

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *J.M.P. v. A.F.*, 2018 NSSC 64

**Date:** 2018-03-19

**Docket:** *SFSNMCA* No. 97945

**Registry:** Sydney

**Between:**

J.M.P.

Applicant

v.

A.F. and B.K. (Deceased)

Respondents

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: January 23 and 24, 2018 in Sydney, Nova Scotia

Written Release: March 19, 2018

Counsel: Charys Payne for the Applicant J.M.P.  
Susanne Dixon for the Respondent, A.F.

## By the Court:

### Facts

[1] This is a case involving a grandparent seeking access to his grandson.

[2] A.F. and B.K. are the parents of B.A.F., born \* 2014. Their relationship ended when B.K. was killed. J.M.P. is B.A.F.'s paternal grandfather. He was absent for long stretches during B.K.'s childhood, but re-established a relationship with B.K. before he died. He was in prison when B.A.F. was born, but after his release, he saw him occasionally at A.F.'s home and at family gatherings.

[3] J.M.P. sought access with B.A.F. after B.K.'s death. A.F. opposes this. A hearing was held on January 23 and 24, 2018 during which time the court heard from the parties and Ms. C., the late B.K.'s mother. She supports A.F.'s position. The court also heard from J.M.P.'s probation officers and J.M.P.'s sister.

[4] The hearing proceeded by way of cross-examination on affidavits. Correctional service (probation) records were tendered by consent, along with notes from J.M.P.'s visits with B.A.F. through the Y.M.C.A. supervised access program.

### Law

[5] J.M.P.'s application was initiated pursuant to the **Maintenance and Custody Act**, R.S.N.S. 1989, c. 160, as amended. Section 18 of the **Act** states as follows:

18 (2A) The court may, on the application of a parent, grandparent or guardian or, with leave or permission of the court, another member of the child's family or another person, make an order respecting access and visiting privileges of a parent, grandparent, guardian or authorized person.

...

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.

(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including

- (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
  - (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
  - (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
  - (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
  - (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
  - (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
  - (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
  - (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
  - (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
  - (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
    - (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
    - (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.
- (6A) In determining the best interests of the child on an application for access and visiting privileges by a grandparent, the court shall also consider
- (a) when appropriate, the willingness of each parent or guardian to facilitate access by and visiting with the grandparent; and
  - (b) the necessity of making an order to facilitate access and visiting between the child and the grandparent.

[6] The burden of proof lies with J.M.P. to demonstrate that access with B.A.F. is in the best interests of the child, considering all of the factors laid out in the legislation.

[7] Many Nova Scotia courts have commented on the principles which apply in these cases. Most recently Justice Cormier in **Spence v. Stillwell**, 2017 NSSC 152 (paragraph 115) summarized them as follows:

- a. The paramount consideration in determining whether to grant grandparent access is the best interests of the child.<sup>1</sup>
- b. Parental decisions and views are entitled to a level of deference. However, the level of deference depends on the context. *Simmons v. Simmons*, 2016 NSCA 86.
- c. There is no preferred judicial approach to determining whether grandparent access is in the best interests of the child, which approach is appropriate depends on context. *MacLeod v. Theriault*, (2008), 2008 NSCA 16 (Can LII), 262.
- d. Under the Act the onus is on the applicant grandparent to prove that access is in the child's best interest. *M.O v. S.O.*, 2015 NSFC 12, *B. v. R.*, 2015 PESC 20 (CanLII).

## Decision

[8] For the reasons which follow, I find that it is not in the best interest of the child to have access with J.M.P. at this time.

[9] Firstly, and most importantly, access is for the benefit of the child. It is not for the benefit of the party who seeks access. J.M.P. is of the view that access with the child B.A.F. will help him cope with his son's death. He states: "The opportunity to see him once per week was very helpful to my grieving process". That is not the purpose of access.

[10] B.A.F. is three years old. There is no evidence that he has special needs. He is a young child who is unable to self-protect, so his comfort and safety must be ensured by the adults in his life. He is clearly attached to his mother, for whom he cried at length during several Y.M.C.A. visits.

[11] A.F. strongly opposes contact between J.M.P. and her son. She is the sole caregiver for B.A.F. Her wishes deserve careful consideration.

[12] J.M.P.'s history, which includes violence, drug and alcohol abuse, and illegal activity, concerns A.F. He served a four year sentence in federal prison for possession of drugs for the purpose of trafficking (2 counts) and breach of conditions. He has a lengthy criminal record spanning forty years, including violent offences. A.F. fears that people he has crossed could retaliate against him

while B.A.F. is present, that he may be unable to control his anger around B.A.F., and that he will revert to his old lifestyle. Her fears are not unreasonable.

[13] J.M.P. acknowledges that he has a problem with alcohol and a history of drug use. He says those issues are behind him now, but he has said that before, according to his probation records. In fact, he was charged with breach of probation in February, 2017. He was under conditions at the time to refrain from the purchase, possession and consumption of alcohol, but he bought an alcoholic beverage in full view of his probation officer at a local bar. At the time of the incident, his vehicle was fitted with an interlock machine arising from impaired driving convictions in Ontario.

[14] While J.M.P. says he's learned from his mistakes, A.F. argues that a breach of probation while this court case was pending makes the risk J.M.P. poses to her son all the more real. She consented to supervised access at the Y.M.C.A. before J.M.P. breached his probation order.

[15] J.M.P. strongly denies having involved his son B.K. in the drug trade, but I accept the evidence that he did use B.K. as a runner, and that he used drugs in B.K.'s presence. It's likely B.K. was abusing drugs before he reconnected with his father, but their renewed relationship led to B.K.'s deeper involvement in the drug trade.

[16] J.M.P.'s probation officer notes in her March, 2017 report that J.M.P. is described by those closest to him as "manipulative, impulsive and lacking in problem solving skills". She also notes that he had a tendency to "minimize and justify his issues" and that he needs to be "well liked, have money, and impress people". Those observations are consistent with J.M.P.'s evidence, the probation officer's evidence, and my observations during the hearing.

[17] In his affidavit, J.M.P. minimized his breach of probation, calling it a "minor breach". His characterization is concerning given that he has a history of breaching court orders.

[18] J.M.P. also tried to minimize his drug use. In his first affidavit filed March 31, 2016 he states that "I have not consumed any drugs in approximately eight years". However, in his third affidavit filed January 17, 2018, he admits that A.F. saw him "consume cocaine on one occasion at a party...". Clearly this was less than eight years ago, because A.F. and B.K. only started dating in 2013.

[19] Also concerning is J.M.P.'s testimony that he doesn't feel the need to attend A.A. meetings regularly. Yet he still drinks socially, he wants to continue his business which sets up in liquor establishments, and relapse was a concern for his probation officer.

[20] J.M.P. also minimized his criminal past. He states in his affidavit that he "committed a crime" but he conceded that he's committed more than one crime. He also states that he has "a conviction for driving under the influence of alcohol dating back to 2008" but the evidence is clear that it wasn't just one conviction for D.U.I. He was also evasive when questioned about his history of trafficking and of domestic violence, even though he went to jail for assault and his probation records confirm that he has a history of selling drugs.

[21] The probation officer questioned J.M.P.'s ability to change his lifestyle in 2015, but later wrote that J.M.P. was coping with the loss of his mother and son appropriately. It is noted that he has strong family support, including his sister S.M.N., with whom he grew close after his release from prison. S.M.N. has agreed to supervise access for J.M.P. if the court grants his application.

[22] S.M.N. only saw B.A.F. on a few occasions before his father's death. She says that B.A.F. has had no contact with his father's family since B.K.'s death, but acknowledges that her great-grandson spends time with B.A.F., and that her late mother saw B.A.F. before her death. B.A.F. also sees Ms. C (B.K.'s mother) regularly.

[23] Communication between A.F. and J.M.P. would be difficult if access were ordered. A.F. blames J.M.P. for his role in B.K.'s death. She does not trust that he has changed his ways. She is not willing to facilitate access, and ordering her to do so would only compound her grief, which in turn would impact the child.

[24] A final consideration is the nature of the relationship between J.M.P. and B.A.F. J.M.P. was not part of the child's life while in prison, and he had intermittent contact after his release. I do not accept his evidence that he was a daily visitor before B.K.'s death.

[25] J.M.P. wants to be "a positive role model" in B.A.F.'s life and "to share good memories" of his father with B.A.F. as he grows. These are laudable goals, but they are not the test for whether access should be ordered. Only time will tell whether he is able to maintain a non-antisocial lifestyle.

[26] J.M.P. has exercised supervised access through the Y.M.C.A. in the past year. However, he only had 11 visits, some of which were cut short because B.A.F. cried inconsolably for his mother. On at least one occasion, J.M.P. had to be told to respect B.A.F. boundaries, because B.A.F. resisted too much contact. It's clear that J.M.P. cherished the access time with his grandson and that he had some good visits with positive interaction with B.A.F., but there is no relationship to preserve at this point.

[27] Further, the YMCA access order was granted on an interim basis, without prejudice. I therefore see no need to apply the principals for termination of access in making my decision.

[28] I recognize the tension between A.F.'s position towards access for J.M.P. and her tolerance of drug use in her relationship with B.K., especially after B.A.F. was born. It might seem contradictory, but her evidence was still credible. The question isn't whether she made good choices then, but whether access with J.M.P. now is in the child's best interests. I am not satisfied that it is.

[29] I have taken into account Ms. C.'s evidence. She is clearly angry and grief-stricken, and she blames J.M.P. for her son's death. I accept her evidence that her relationship with J.M.P. was violent and unhealthy. Not surprisingly, she opposes access with B.A.F.. Her views are entitled to much less deference than the mother's views, but her evidence still deserves some weight.

[30] I reject J.M.P.'s suggestion that access could be supervised at his sister's home as a way of balancing A.F.'s concerns. The point of access is for the child to maintain a beneficial relationship with a grandparent. If there is no relationship or it's not of benefit to the child, then supervised access does not achieve any goal.

[31] Further, J.M.P. breached his terms of probation while still involved with supervised access at the Y.M.C.A. This is no reflection on S.M.N., who offered to supervise access in her home. It's instead a reflection of J.M.P.'s inability or unwillingness to follow a court order and change his lifestyle to become a good role model for his grandson.

[32] The application is dismissed. Each party shall bear their own costs.