

2000

SFH # 008548

**IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)**

[cite as: Warman v. Durant, 2002 NSSF 12]

BETWEEN: COLIN HERBERT WARMAN - APPLICANT
- and -
TRACY NICOLE DURANT - RESPONDENT

ORAL DECISION

HEARD BEFORE: The Honourable Justice Deborah Gass
Justice of the Supreme Court (Family Division)

PLACE HEARD: Supreme Court (Family Division)
P.O.Box 8988, Station "A"
3380 Devonshire Avenue
Halifax, NS B3K 5M6

HEARING DATES: December 13, 17, 18 and 20, 2001

DECISION (orally): January 4, 2002

COUNSEL: Helen Foote, counsel for Colin Warman
Deborah Conrad, counsel for Tracy Durant

This decision is with respect to the issue of custody of the child born to Tracy Nicole Durant and Colin Herbert Warman being Nicholas Warman, born [...], 1998.

The Court heard extensive evidence in this matter and had considerable documentary evidence to consider in coming to what is a most difficult decision as all of these are when we are dealing with little children who are the product of relationships that have not been able to be maintained and how best to provide for the long-term parenting of children in these unfortunate circumstances.

Nicole Durant and Colin Warman met and began a relationship in 1995 while they were both in the employ of the Canadian Navy. They began living together in the early summer of 1997 and their son, Nicholas, was born [...], 1998. They never married and separated on July 1, 2000. Nicholas is now three and one half nearly four years of age.

Following Nicholas' birth and immediately after Mom's maternity leave, she was posted to sea for six weeks notwithstanding the fact that she was on a shore posting. While the mother was at sea, her mother, Una, came to her home in Dartmouth during the day and looked after the child while the father was at work. Very soon after the mother completed the six weeks of sea duty she was again posted to NATO for approximately three months, again while she was on a shore posting and that was in early 1999.

It is clear from the evidence that the parties were both unhappy with the mother's sea postings and efforts were made to have her remuster, with consideration being given to her leaving the military in order to remain on shore. Applications for remuster or for early release with benefits were rejected. It does appear also from the evidence that a shore posting brings no guarantees of remaining ashore. In fact, the chances are very great that lengthy sea duty has been and can be imposed.

In reviewing the mother's options within the military, the option of transferring to

Ottawa as a flight steward for V.I.P. flights was presented to her. This would give her the assurance that for a three to five-year period she would not be required to go to sea and that her time away on flights would be minimal, perhaps one to three nights a month with rare long-term stays away from home, although it is very clear from all of the evidence that nothing is guaranteed. Flight schedules are posted on a board at her headquarters in Ottawa in advance of the flights.

As a result of this, the mother brought an application for custody and permission to move the child's primary residence to Ottawa effective July 2001. The father made a cross application for custody so the child would remain here in Nova Scotia with him.

Since the parties' separation, they had been operating under a shared parenting arrangement with a schedule that enabled the child to spend roughly equal time with each parent, although the child was in receipt of child care during periods of time. It was a schedule, it was agreed, that took its emotional toll on the child, although there was some contradictory evidence about that. It certainly appeared that at the end of the day the parties did recognize that the schedule was such that it was hard on the child.

Following the interim hearing in May of 2001 the mother then had to go to sea for three weeks and Nicholas stayed with his father until May 21 when Dad went to England for training where he stayed until about August the 4th. Until mother got back from sea, Nicholas stayed with his maternal grandparents. The mother took Nicholas to Ottawa for a week in June and then she did almost another three weeks at sea again at the end of June and July. She relocated with Nicholas to Ottawa on July 20, 2001.

Pursuant to the directions of Justice Legere at the interim hearing, both parents were to make inquiries about employment options that would enable the child to spend maximum time with both parents. There is considerable evidence with respect to the efforts that each parent made and I am satisfied on the evidence that both parents made

reasonable inquiries in that regard. Some issue was taken with the fact that the mother attended at a manpower office in Windsor, Nova Scotia but I am satisfied that the manpower centres have the resources to advise on career opportunities and the data bases for employment information across the country are available. These are federal offices not municipal offices. As a result of the inquiries made, it would appear that the options outside the military for the mother by either retraining or other employment would not have provided her with the security and benefits that she has during her employ with the Department of National Defence.

It would also appear that the options with DND in Nova Scotia leave the mother vulnerable to further lengthy sea postings, perhaps more so since September 11, and to leave the forces at this time would be financially precipitous and not a move that would ensure long-term security for herself or her son. Likewise for Dad, a move to Ottawa if it could happen, (and there was some question about whether or not it could happen because of issues such as bilingualism) but even if it could, it would not be a good career move for him at this time. He has already made significant career compromises for the benefit of his family. The reality for these parents is that they have careers in which mobility is an inherent issue, one with which they would have to struggle at some point during their relationship.

The Court took into consideration all of the difficulties that both of these parents face as a result of the careers they have and the fact that mobility is an inherent issue for them. The Court is also satisfied this is a situation where there are two very loving and two very capable parents who are involved in the life of this child. The Court was also deeply impressed by the extent to which the extended family plays a role in the life of this child. I can tell the parties that one of the most moving sights for the Court was seeing the two grandmothers here in Court greeting each other and sitting together during what is a very difficult and distressing experience for both of them as much as it is for the parents themselves. Nicholas is a very fortunate little boy to have such a loving and nurturing

extended family and that is something that will continue regardless of any decision that the Court imposes on the parents with respect to how Nicholas is going to be parented. If any gift can be given to his child by both of the parents it is the assurance that a positive relationship will continue with all of the extended family members he is so lucky to have in his life.

One of the issues that came before the Court in terms of parenting were some issues with respect to the quality of care that was given. There was some reference to the burns that Nicholas suffered as a result of the pulling over the crock pot and that sort of thing. Frankly when I look at all of those pieces of evidence, I do not conclude that any of those bits of evidence are sufficient for me to conclude that any one parent is any better than or worse than the other. These are both very competent, capable and loving parents and accidents happen. Accidents happen in the care of each of the parents. There was the incident with the grandmother with the oven cleaner. Those sorts of things happen in a child's life and it does not play a significant role in the Court making the difficult decision it has here.

One of the issues that the Court was asked to consider is the community that each parent is offering the child. The mother has moved onto the base. She lives in a residential area where there are a lot of children and there is plenty of play space. It is near church and schools. Dad has remained in the family home in the neighbourhood in which he spent his childhood. It is a pleasant, older residential area again near church and schools. While there may not be as many children in the community, it appears to be a very stable and perhaps a less transient community than that which exists on the base.

Frankly on the basis of the evidence that I have heard, I am satisfied that both communities offer a reasonable environment for this child.

With regard to the parenting as I have indicated, there is nothing in all of the

evidence to suggest that either parent is anything but a good parent to this child, capable of meeting the physical and emotional needs of Nicholas. I will elaborate a little more on that later. Both parents are committed to providing him with a spiritual and moral upbringing and both parties have the benefit of extended family. It is abundantly clear from the evidence that the significant members of this child's extended family are here in Nova Scotia. The grandmothers both have been significant in the lives of this family and the mother's relationship with the paternal grandmother has been a very positive one, both during and after the separation. The maternal grandmother has been extremely active in providing child care when the parents were working. In essence then when one looks at all of the objective factors, the Court concludes that we have two very confident parents here. The question then is in which environment is the child likely to thrive. Frankly the Court would conclude that in both environments the child is likely to thrive.

The Court is then left with the question of which parent is most likely to foster a relationship with the other parent. When all things are equal and here I find that both parents are good and capable parents, I must then turn to the issue of fostering healthy relationships with both parents. This is when the Court heard evidence with respect to some of the issues that raised some concern with the Court, particularly when there was reference to the incident of last Christmas when the mother attempted to have the gifts for the father to be given to Dad and Dad was not in an emotional state at that point in time to accept those gifts and they were refused. There was the issue with respect to the pictures and the efforts to provide Dad gifts from Nicholas which appears not to have been reciprocated in any way.

There was also the incident when Nicholas wanted his mother to go into the house at Christmas and see what was happening there and she was not invited into the house at that particular time.

The evidence before me would tend to indicate that the mother has encouraged

communication between Nicholas and his father, and well she should because she is the one who has removed him from the immediate vicinity of the father. She has encouraged communication between Nicholas and the father and has also attempted to foster communication between herself and Nicholas' father.

From the evidence I have heard, it does appear that Dad is intensely angry and hurt about what has happened and very mistrustful of the mother. The evidence would tend to lead me to conclude as well that he has focused substantially on his own feelings, not just in the context of this custody battle which the parties have been undergoing, but even in the comments made prior to their separation about Mom going out to sea and leaving the two of them alone, something that the mother testified that she hated to do and she felt guilty about doing. As well there was reference to the comments to the son about the game soon being over. The Court is left with the concern about whether or not these issues are appropriate and it does leave the Court wondering about Dad's ability to put his son's needs for a meaningful and positive relationship over and above his own feelings and mistrust toward the child's mother. This anger and bitterness are something that while the Court certainly understands it and the manner in which this relationship has dissolved and the child has been moved about, the Court has to be concerned about what impact that has on the child either directly or indirectly.

One of the issues that was raised in this hearing that the Court noted was Dad's reaction to staying in Ms. Durant's house in Ottawa while she was away and how it was an absolutely abhorrent thought for the father to do that. The reality is that there are a lot of situations where a child stays in the residence and the parents move in and out and it is not uncommon for parents to do this so that a child does not have to be disrupted. It is something that has been done on an innovative basis by parents who have been mindful of the fact that the child is comfortable in a particular place and the parents have actually enabled one parent to live in the house or spend a weekend in the house while the other person vacates so that they can enjoy their time together.

I am also inclined as a result of that and some of the evidence that I have heard to conclude that the mother is more in tune with some of the more important emotional aspects of the child's life and the importance of fostering a happy and positive relationship with the other parent. One of the issues that was raised on a number of occasions was the importance of the elephant to the child and the assurance that that is something that he has with him. While that is something that will diminish with time, it is something that has been recognized as being extremely important and something that the mother has been very much in tune with and while the father is certainly aware of it and its importance, it did on occasion seem to not be as significant, especially with the child going back and forth and his need to have the security of those kinds of familiar things travelling with him.

It does appear, and even though Dad was very suspicious of the mother's motives, that the mother was more intent on fostering a happy and positive relationship between Nicholas and his father such as preparing the picnic, sending the pictures, encouraging communication and her open communication with the paternal grandmother, all of which Dad is very suspicious and certainly he has his reasons for feeling that way. At some point in time, the Court has to draw the line between what is considered to be suspicious in terms of motive and what is in the best interests of the children and all of those actions the Court concludes focus on the child. Thus I concluded that Mom's evidence was more child focused than Dad's evidence and that she is intent on ensuring appropriate communication between the mother and the father about the child as well as between the child and the father.

It also appeared the father was quite content, if he had primary care of the child, to have an open access arrangement with no specific provisions. It does appear that the mother's access proposals were more generous than the father's in that they would be very specific with the ability to have liberal and generous and other access as may be agreed upon. A roughly open-access proposal does create difficulties in that there is no certainty and what can be considered reasonable from time to time may not in reality be reasonable,

particularly where there are concerns about anger, bitterness, mistrust and poor communication. It seems to me that although the mother's access proposal falls far short of what would be appropriate in this situation, it does appear to be more realistic, more generous, and less prone to uncertainty than what Dad was proposing.

Having said all of this, it is very important to note that children of this age do feel the stress of separation from either parent for lengthy periods of time and the distance between the mother and father do make that a reality. But the reality is that if the mother stayed in Nova Scotia, she would be separated from her son because of sea duty and that would be for significant periods of time. When that happens though, he would have the benefit of his father and his grandmothers nearby. Now if Mom is away for any length of time, which does not appear to be what is going to happen, but the Court is very mindful that there are no guarantees and there may be periods of time when she will be away, he does have a great-aunt and uncle with whom he has developed an attachment, albeit a very recent attachment, but not the other parent to be available to him.

Because of the difficult career choices facing both of these parents, there will be no optimal arrangement for this child unless the mother stays in the Halifax Regional Municipality or the father is in Ottawa. If the mother is forced to return to Nova Scotia, she will be in a position where she will be financially compromised and the benefits for the child will therefore be compromised. There will be the financial and emotional difficulties that arise from that which would in turn create further financial strain on the father who would be required to provide spousal support. If the Dad were required to go to Ottawa, there is the question of whether or not he would be able to remain in his employment and again there would be considerable financial difficulties for them.

Because of the relatively young age of Nicholas, I am not as concerned at this point about his own attachments to his community and there has been a lot of talk about the respective communities. It is my view that at this stage in his life his attachment to his

community is secondary to his relationship with his parents and his extended family. Therefore the Court must consider what to do in the situation for the benefit of this child and his relationship with his parents and his extended family. Before he begins school there is an opportunity for him to have maximum contact with both his parents in a way which will be impossible after he starts school.

There is nothing in the parenting style of each parent to suggest that he will not benefit for prolonged periods of time in each household particularly for the next year. I am mindful as well of the fact that there will be trips to Halifax by the mother and perhaps some long trade mission trips which can be accounted for in working out parenting time.

I have to indicate that on the whole however it is my conclusion that in terms of the primary care situation that the best interests of the child are best met with the parties sharing custody but with primary care being with the mother.

From the period of January to June of 2002, the child will be in the primary care of the mother. The mother will forthwith advise the father of any trips away for more than three days, that is for more than two overnights so that he can arrange to go to Ontario to care for Nicholas in her home or bring him to Nova Scotia at his expense.

Every March Break the child will spend with his father and the mother will be responsible for his transportation to and from his dad's residence.

There will be the one week each Christmas with the parties alternating Christmas Eve and Christmas Day as is the pattern that they appear to have already established and for this year, 2002, the parties will share the cost of that.

There will be one month in each summer at the father's choosing by May 31st and the cost will be shared in 2002.

For this year only, the year 2002, the child will remain with his father from the first of September through to Christmas with the provision for the child to be with the mother in Ontario for one week in late October or early November. The mother will be responsible for the cost of that access. There will be access at any other time by the mother in Halifax if she is on a trip to Halifax.

The child would return to the care of the mother in January of 2003 with the provision for him to be with his dad for March Break of 2003, for a week in April, being mid April around his birthday week, and a provision for him to spend a week with his father in May, which would include the long weekend and further the month in the summer.

Commencing in September of 2003, the child will remain in the primary care of the mother and by then if my math is correct, he will be starting school. The mother will advise the father of any trips away of more than three days where upon the father can make arrangements if he is able to come to Ontario to care for him in the mother's home while she is away.

The father will continue to have the child every March Break and the mother will be responsible for the transportation of the child for the March Break.

The child will have one month in the summer with dad and the mother will be responsible for the transportation of the child for that one month in the summer. Again that one month will be designated by May 31st by the father.

The father will continue to have one week at Christmas, again alternating and the mother will be responsible for the transportation.

There will be one long weekend either in the spring or fall at the mother's expense.

The father will have one long weekend in the spring or the fall at his expense and such other weekend access as arranged by the father on a minimum of seven days' notice to the mother. The father will be responsible for the transportation of the child or for visiting the child in Ottawa.

This order and this regime of parenting is based on the premise that the mother is stationed in Ottawa for approximately five years. The evidence would suggest that it is somewhere in the vicinity of three to five years in any event. At the end of that tenure, the mother would be returning to the Halifax area and the parenting arrangement would be reworked to take into consideration the proximity of the parents with each other. In the event that the mother is not posted back to Halifax, that would constitute a change in circumstances that would warrant a full custody review.

Deborah Gass, J.

DG/ng