IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Bradley v. Josey*, 2003 NSSF 53

Date: 20031218
Docket: SFHF 006363
Registry: Halifax

Between:

Ruth Bradley

Applicant

v.

Michael Josey

Respondent

Editorial Notice: Personal identifying information has been removed from the electronic version of this decision.

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: November 20, 2003, in Halifax, Nova Scotia

Counsel: Graydon Lally, for the Applicant
Ronald Pizzo, for the Respondent

By the Court:

[1] Mr. Michael Josey and Ms. Ruth Bradley lived in a common-law relationship until July 1998. They have a daughter, Sarah Michele Josey, who was born [….], 1996.

[2] Mr. Josey is a plumber and works as a general contractor. He is able to choose his hours of work. By virtue of his occupation, he is able to be at home a great deal of the time when Sarah is in his care.

[3] Ms. Bradley works outside the home.

[4] Mr. Josey has established a new relationship with Ms. Krissinda MacIsaac who is a registered nurse and a certified nurse practitioner. She has a five-year old daughter, Kaleigh, from a previous relationship. Mr. Josey's relationship with Ms. MacIsaac had been ongoing for three years at the time of this application. Since February 2003 they have been residing together at […], Cole Harbor, Nova Scotia.

[5] Ms. Bradley also lives in Cole Harbor, where she rents an apartment. Since separating from Mr. Josey she has lived in various locations, improving her living standards as her finances permit. She has not established any other relationship and Sarah is her only child.

[6] Currently, there are two Family Division orders relative to Sarah's care arrangements and schooling. As a result of an order granted by Justice Williams, a schedule has been established determining which parent Sarah spends time during the course of any week. Based on representation from counsel, it is apparent that Sarah spends 53% of her week with her father Mr. Josey and the remaining 47%

with Ms. Bradley. This order also provided that Mr. Josey was entitled to make substantial decisions concerning health and dental care, as well as other major decisions.

[7] A further order granted by Justice Smith settled the issue of which school Sarah would attend. Each parent wanted to have Sarah attend the school in the neighborhood in which they were residing. Justice Smith agreed with the proposal advanced by Mr. Josey. Currently, Sarah attends […] School.

[8] Mr. Josey seeks a number of variations to the current schedule, including having Sarah spend less time with Ms. Bradley, and establishing schedules for Christmas holidays, March vacation and summer vacation. In addition, Mr. Josey wishes to make the major decisions in Sarah's life and also have Ms. Bradley return the child to his home after visits to Ms. Bradley's home.

[9] Ms. Bradley asks the court to order shared parenting, and also to vary the pickup time on Wednesdays from 6:30 p.m. to after school or after Sarah’s gym classes, whichever is earlier. As a result, Ms. Bradley would be able to pick up the child at school rather than at Mr. Josey's residence. Ms. Bradley also wishes to make decisions affecting Sarah when she is in her care, such as placing her in extracurricular activities and making arrangements for her to be seen by a physician or dentist when necessary. The basis for this request is that Ms. Bradley wants little

or no contact with Mr. Josey, claiming that he verbally abuses her or subjects her to verbal harassment. She also seeks an order for parallel parenting or shared parenting, so that she could make decisions for the child when she has her in her care, similar to Mr. Josey placing Sarah in Sparks without consulting or advising her.

[10] The basis for Mr. Josey's variation application is that he and Ms. MacIsaac are establishing a family and wish Sarah to be a part of it. Ms. Bradley claims that this is not pertinent as she wishes to have major contact with her child and she views Mr. Josey's attempts to change the Christmas holiday schedule and formalize March vacation and summer holidays as a further attempt to isolate her from her child. She does not want to see her current time with Sarah reduced.

[11] Mr. Josey opposes shared parenting because he claims he is unable to communicate with Ms. Bradley on a regular basis. He says that she does not have a landline telephone and when she does not have her cellular phone switched on, it is not possible for him to contact her and discuss the events that affect Sarah. He leaves messages on her voice mail but she is unwilling to contact him. He claims that Ms. Bradley is unwilling to agree to a schedule with sufficient notice to permit him to make appropriate plans. It is this lack of schedule that particularly perturbs Mr. Josey, as he says it prevents him from making appropriate plans with Ms. MacIsaac

and her daughter and also in certain instances denies him the opportunity of visiting his parents while they are vacationing in Florida.

[12] Ms. Bradley maintains that she is rather easy to get along with and does not pose much difficulty to Mr. Josey. She maintains that, as Sarah's mother, she is capable of making major decisions affecting Sarah to the same extent as Mr. Josey. She maintains that she does not want to have any close contact, or much contact at all, with Mr. Josey because he is verbally abusive. She referred to a particular telephone call he made to her telephone number where he accused her of not having any moral fibre. According to Mr. Josey, this type of discussion does not occur frequently and did not occur in the past. He was rather unwilling to admit that he would consider such a telephone message to be verbally abusive and attributed it to his frustration with her not having committed to a vacation schedule.

[13] Mr. Josey informed the Court that he had allowed Sarah to accompany Kaleigh to Sunday school without advising Ms. Bradley and made a decision against placing her in a French immersion program without consulting Ms. Bradley. Ms. Bradley opposes such lack of consultation and would want to make decisions affecting her child respecting school, health, dental care and religion to the same extent as does Mr. Josey.

[14] Another reason advanced by Ms. Bradley for opposing any reduction in time spent with Sarah is that Sarah is her mother's only grandchild and often visits her grandmother. Therefore, any reduction in hours would mean less contact with Ms. Bradley's side of the family.

[15] Mr. Josey claims that there is too much friction between the two parents to permit the Court to make an order of shared parenting. He wishes to make the major decisions affecting Sarah's upbringing, schooling, religion and extracurricular activities.

[16] Mr. Josey also claims that been given Sarah's age it would be preferable for her to spend more time with her friend Kaleigh than with Ms. Bradley. That is the basis for Mr. Josey claiming that Sarah should attend gym with Kaleigh, return home on Wednesdays, sleep at Mr. Josey's residence on Wednesday evening and meet her mother after school on Thursday. He says this would be positive for Sarah as well as less disruptive for her. As Mr. Josey's counsel offered, at this age, children such as Sarah gain a lot of insight from associating with children of their own age or slightly younger. And furthermore, an additional night at Mr. Josey's residence would be less disruptive for the child as she prepares for the following day of school classes.

[17] Although there appears to be a dispute between the parties as to Mr. Josey wishing to dictate who should be caring for Sarah when she is in her mother's care and her mother is at work, it appears that Mr. Josey's concern has more to do with Sarah joining either Ms. MacIsaac or him during lunch rather than participating in the school lunch program offered at the school.

[18] As was suggested by associate Chief Justice Ferguson, the court is being asked to fine tune the care of the child and the time allotment of the child to each parent and to formalize the schedule of Christmas holidays, March holidays and summer holidays.

[19] The issues:

1. Should the Court vary the terms of care, custody and access from the current schedule?
2. Should the Court establish a schedule whereby there will be a more organized arrangement?
3. Should the court agree to shared parenting or to joint custody?

The Law

[20] Section 18 of the *Maintenance and Custody Act* provides as follows:

18(1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

….

(**4)** Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the *Guardianship Act*; or

(b) ordered by a court of competent jurisdiction.

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107 [emphasis added]

[21] Unlike the *Divorce Act*, the *Maintenance and Custody Act* provides that the father and the mother of a child are joint guardians and equally entitled to the care and custody of the child. However, this presumption can be displaced where the best interest of the child make such continued joint care and custody inappropriate.

[22] Given the school schedule, it is not appropriate to make a change in the current time that Sarah is picked up by her mother, with the exception that she can be picked up at the gymnasium after classes end on Wednesdays. I am unwilling to change the pickup time to occur any earlier in the day. If there are no gymnasium classes during the week in question, or should the gymnasium classes move to a different day of the week, other than a day in which Ms. Bradley has Sarah in her care, on those days Ms. Bradley will be entitled to call for Sarah at her residence in accordance with the current schedule.

[23] Mr. Josey is asking the court to change the Christmas schedule so that Sarah can spend Christmas Eve and Christmas Day until 2 p.m. with Mr. Josey, Ms. MacIsaac and Kaleigh. This particular change is being requested because Ms. MacIsaac and Kaleigh share the Christmas holiday with Kaleigh 's father and Ms. MacIsaac has Kaleigh in her care on Christmas Eve and Christmas Day until 2 p.m. Therefore, the purpose of this change is to have Mr. Josey's schedule coincide with Ms. MacIsaac’s schedule so that both parents will have their children together as

they celebrate Christmas Eve and Christmas Day. Mr. Josey did not provide any evidence that this is in the best interest of the child, Sarah. Admittedly, it is in Mr. Josey's interest, and maybe Ms. MacIsaac's, but not necessarily Sarah's best interests. Mr. Josey claims that it would be appropriate for the children, Sarah and Kaleigh, to celebrate Christmas together as they spend a great deal of time during the year together. Furthermore, Mr. Josey admits that the following year Sarah would be able to spend Christmas Eve and Christmas Day with her mother, as Kaleigh will be spending this time with her father. This would represent a change from previous years, as this Christmas Eve and Christmas Day was scheduled to be spent with her mother.

[24] Ms. Bradley does not want to schedule the Christmas holidays at all, because she is unsure whether she will be working during this busy time of the year and she is anxious to maximize her income by working extra hours. Therefore, she is anxious to leave her schedule without a court ordered allocation. In the event that she does work extra hours she will make arrangements with Mr. Josey for him to care for Sarah. However, she will not know until shortly before Christmas. Consequently it is extremely difficult to plan.

[25] There has been no evidence advanced that would satisfy me that changing the Christmas schedule would be of benefit to Sarah. It may be of benefit to Mr. Josey,

and perhaps to Ms. MacIsaac and Kaleigh but I doubt that it would be of benefit to her not to spend Christmas Eve and Christmas Day with her mother. Mr Josey wants to be in a position similar to that of Ms. MacIsaac, arguing that, as Ms. MacIsaac has custody of her child on Christmas and Christmas Day, he should have Sarah at the same time. It may be of convenience to him but it does not advance the best interests of the child. As a result, I am unwilling to make a change in the Christmas Eve and Christmas Day schedule.

[26] With reference to fixing a schedule for March vacation, so called, or school break during the month of either February or March, I believe that it is in Sarah's best interests to have an opportunity, if one presents itself, to vacation in Florida with her grandparents accompanied by Mr. Josey. As Mr. Josey mentioned in Court, these occasions are not an annual event, but on occasion he and Sarah would be invited. Other children have the same opportunity to travel and explore and return to school and compare their holidays with classmates. Although this will be during Ms. Bradley's weekly access to Sarah, I believe that is in and Sarah's best interests that she permitted to attend this visit if the opportunity arises. This would mean that she would be with her father for the entire week, thereby depriving Ms. Bradley of having Sarah in her care. This is a minimal inconvenience as compared to the benefit to the child of having an opportunity to travel and explore and also being able to

share in her trip and experiences with all the children as well as her mother. Should Ms. Bradley have the opportunity of having an entire week off work during the same time period during the 2005 winter holidays, I would be disposed to Sarah being with her for that entire week for the purpose of holidays. I am not making an order beyond the holidays occurring in February- March 2004.

[27] As to summer holidays, I am directing that each parent provide notice to the other not later than May 15th of each year, commencing May 15, 2004. Ms. Bradley will provide notice to Mr. Josey and she will also have first choice to designate her one-week summer vacation with Sarah in even numbered years. In 2005 and every odd year thereafter, Mr. Josey shall provide notice to Ms. Bradley by May 15 as to his one-week vacation with Sarah. If either party fails to notify the other by May 15 of each year, then the other party will provide notice and state that he or she wishes to have Sarah with him or her during a specified week in that particular year.

[28] Mr. Josey has raised the issue of the meeting point when Sarah is returned from her time with her mother. Currently, Ms. Bradley returns the child to her father by dropping her off at the Canadian Tire parking lot. Mr. Josey has offered to pick up the child at Ms. Bradley's residence but Ms. Bradley has declined this offer. She prefers to drop Sarah off at the shopping center parking lot. There is no basis to

change this drop-off point at the present time. I accept Ms. Bradley's evidence that she does not endanger the child when she is being returned to Mr. Josey's care.

[29] On the issue of whether there should made parallel parenting, shared parenting or joint custody, I listened carefully to the arguments and I have reviewed the affidavits of both parties, as well as the affidavit of Ms. MacIsaac.

[30] On behalf of Ms. Bradley I am urged to overlook several decisions of the Nova Scotia Supreme Court and to apply decisions of the Ontario Superior Court of Justice where, in a number of cases, shared parenting or parallel parenting was ordered.

[31] The Nova Scotia Supreme Court on at least two occasions refused to award parallel parenting or shared parenting where there was evidence of difficulty in communication between the parents. In *Farnell v. Farnell* (2002) 209 N.S.R. (2d) 361 (S.C.) Goodfellow J. stated at para. 10:

> Despite the court's reservations, I think the tremendous love each parent has for these children, plus hopefully the possible easing of the emotional stress that should take place by having the outstanding issues of custody and access determined, will permit a joint custody designation to function in the best interest of the children. I am, however, totally convinced that a shared joint custody arrangement, as suggested by the father, would be not only unworkable but at this juncture probably harmful to the children because it would likely encourage fostering of conflict in the children as to where their home existed. Shared custody rarely in my experience works and only seems to where there is present an environment where the children thrive when the children are able to fluidly move from one home to the other by reason of parents who are mature in circumstances and reside in such close proximity that the children can go back and forth themselves, continue in the same school, continue with whatever extracurricular activities, church or other activities that they would normally engage in.

[32] Goodfellow J. ordered joint custody for the children and provided very substantial and liberal access to the father with the mother having day to day care of the children, provided that the mother would make reasonable effort to consider the suggestions and views of the father on parenting. The mother had the right to make final determinations on all aspects of parenting, including residence, school, discipline, health, extracurricular activities, etc. Goodfellow J. also required the mother to keep the father informed of all activities including discipline health and extracurricular activities and in a timely fashion.

[33] Mr. Josey also cites a number of texts dealing with the issue off equal parenting or parallel parenting. McLeod and Manno, in the *Annual Review of Family Law* (Carswell, 2002), states, at p. 8:

> Shared custody arrangements require greater cooperation and communication between the parents than do joint custody arrangements. The parents must not only work to ensure a child has meaningful, regular, and frequent contact with both parents, they must also provide a constant value system for the child. Parents must have sufficient resources to provide a child with two homes. It is not practical to move clothes and toys or other day-to-day items back and forth. Unless parents live near each other, practical problems may arise around schooling, extra-curricular activities and friends: *Andrew-Reed v. Reed*, 2002 CarswellBC 817, 2002 BSCS 513(in Chambers) (children should not have to tote belongings back and forth)

[34] In supporting joint custody arrangements claiming that these are preferable with structured visitation, and the author adds the following:

> If the relationship between the parents has deteriorated to the point where a custodial parent will not keep the other parent informed about a child's problems or progress nor foster the parent- child relationship, a court should consider awarding joint custody to ensure that both parents continue to be involved in a child's life…

[35] I also refer to decision in *Richardson v. Richardson* [2001] N.S.J. 581 (S.C.) at para. 5 where Hood, J. quoted the principles set out by Stewart, J. in *Rivers v. Rivers* (1994), 130 N.S.R. (2d) 219 (S.C.) regarding the basic criteria to be addressed when making a decision on one form of custody or another:

> (a) very basic question would be has each parent maintained a meaningful relationship with their children and does each possess parenting capabilities that are adequate to meet their children's needs?
>
> (b) Will the parents be able to make decisions together about the children? Are they able to co-parent despite any conflict on a personal level between themselves? Can they separate feelings for each other to focus upon the children's need for a relationship with both parents? Can they separate their personal relationship from their parent/child relationship?
>
> (c) Will the children be involved in the conflict between the parents in a detrimental manner?
>
> (d) With the proposed joint custody arrangement cause disruption and discontinuity and to the children's development needs?

[36] Ms. Bradley claims that the court should order parallel or shared parenting even though there is a high degree of discord between the parents. In support of this position counsel for Ms. Bradley referred to several decisions of the Ontario Court of Justice, General Division and the Ontario Superior Court of Justice. In *T.J.M. v. P.G.M.*, [2002] O.T.C. Uned 78 (S.C.) Aston, J. stated at paragraph 20:

> The evolution of the case law on joint custody orders in Ontario, starting with the foundation case of *Baker and Baker* (1979) 23 O. R. (2d) 391 (C.A.) decided more than 20 years ago by our Court of Appeal is nicely summarized by Bellamy J. in *Dagg v. Pereira* (2000), 12 R.F.L. (5th) 325 (S.C.J.) at paras. 39-45. She identifies *Moll v. Moll*, [1997] O.J No. 4060 (S.C.J.) as a significant turning point. In [Moll], Kruzick J.. reviewed a substantial number of cases from across Canada to conclude that "joint custody" can be appropriate disposition even in cases where parents are openly hostile and uncooperative if crafted as "parallel parenting" instead of

> "cooperative parenting". Consequently, "parallel parenting" orders have become a form of joint custody, a sub-category if you will, which does not depend upon co-operative working relationships or even good communication between the parents. The concept (consistent with subsection 20(1) of the Children's Law Reform Act) is that the parents have equal status but exercise the rights and responsibilities associated with "custody" independent of one another. Section 20(7) of the Children's Law Reform Act provides clear authority for the court to deal separately and specifically with "incidents of custody". The form of a "parallel parenting" order addresses specific incidents of custody beyond a mere residential schedule for where children will reside on a day-to- basis. For example in *South v. Tichelaar*, [2001] O.J. No. 2823 (SC.J.) the court granted "joint custody" but then went on to give the father sole decision-making authority over the children's sporting activities and the mother sole decision-making authority over the dental health of the children.

[37] See also *Cox v. Down*, [2002] O.T.C. 499 (S.C.) at para. 66.

[38] In *T.J.M.* Aston, J. said at para.19:

> [C]ounsel for the mother argues that to impose joint custody on these particular acrimonious parents will only increase the conflict to which the children are exposed. I fail to see why and that is necessarily so. A critical factual issue in any case is whether a joint custody order will expose a child to parental conflict and negatively affect the child. The focus in any particular case is not the parental hostility is a vacuum, but rather the consequence for the child ... [T]he Court of Appeal in *Wreggit v. Belanger* (unreported, docket C34897, December 10, 2001) confirmed that worsening conflict between the parents found to be a source of stress for the children precluded continuation of a three year old joint custody order and justified a sole custody order in favor of the mother. In this case, the evidence does not reveal any adverse effect on any of the three children from the parental conflict. The M. children are thriving, notwithstanding the fact the parents do not communicate or cooperate very well.

[39] At para. 21 Aston, J. said:

> The words "custody" and "joint custody" are often used as shorthand descriptors. However, I am convinced that many custody and access trials could be avoided if parents had to first describe, without using the words "custody" or "joint custody", what specific rights and responsibilities they wish to have, or are willing to share with the other parent. The phrase "joint custody" is emotionally charged. The parent who does not have the child on a day-to-day basis, still typically the father, pursues the Holy Grail of joint custody to avoid being reduced to the status of a

> mere visitor to the child. This case is typical. Inevitably, the issue is framed as a question of parental rights rather than an allocation of parental responsibilities.

[40] Ms. Bradley refers to a number of other cases supporting the position that I should order shared parenting, that is, where the parents make independent decisions in the best interests of the children while they are with them. Ms. Bradley acknowledges that there is a difference in the wording between the Ontario *Children's Law Reform Act* and the *Maintenance and Custody Act* in Nova Scotia

[41] In argument, Ms. Bradley's counsel argued that she should be entitled, when the child is with her, to make all of the decisions relative to the child's school, extracurricular activities, dental health and other needs. This is a different approach than I derive from the Ontario decisions, namely that each parent is entitled to make decisions within certain ambits or spheres of responsibility.

[42] I am of the view that this is not a proper case for each parent to make decisions alone when Sarah is in their care. To allow both parents to make concurrent decisions concerning extracurricular activities, dental and medical treatment, school, church and gymnastics, would be to subject Sarah to two distinct sets of values. I prefer an approach where each parent would be entitled to make decisions in certain areas of responsibility or activities; for example, with Mr. Josey being responsible fact for all extracurricular and school activities, including gymnasium classes, while Ms. Bradley would be responsible to arrange for doctor visits and

dental appointments. However, that position is not being advanced by any of the parties.

[43] I am also concerned that that there are no Nova Scotia cases other than the cases cited by Mr. Josey. The doctrine of *stare decisis* obliges me to follow previous decisions of our court. Ms. Bradley has not been able to point to any difference between the provisions of the *Divorce Act* and those of the *Maintenance and Custody Act*, insofar as the need to give priority to the best interests of the child. See *R. v. Williams*, [2002] S.J. No. 375 and also *Disability Plan v. Flemming* (1992), 152 N.S.R. (2d) 167, at para. 12.

[44] Therefore, the parties shall have joint custody of Sarah. She will reside with her mother 47% of the time and with her father 53% of the time, or any other time she is not residing with her mother, except that the pickup time is changed to after gymnastics classes on Wednesday of each week.

[45] I have modified orders issued by Justice Williams and Justice Smith to the extent necessary. Mr. Josey will make the final decision concerning extracurricular activities, school, dental and health care as well as any religious training, but must consult with Ms. Bradley prior to making any decision or initiating any treatment. Failure to consult with Ms. Bradley on these issues will entitle her to initiate a review of this disposition. The order should provide that Ms. Bradley will be

notified in 10 days before the meeting at a parent-teacher meeting so that she can attend the meeting and meet with the teachers and the same time Mr. Josey is meeting with the teachers if she is otherwise available.

[46] On Thursdays and Fridays of each week, Sarah is in Ms. Bradley's care. During that time, while Ms. Bradley is working and Sarah is attending school, Mr. Josey is requesting the Court to make an Order that Sarah spends her lunch period and after school period with Mr. Josey at his residence. I have decided against making such an order as I believe it is more appropriate for Ms. Bradley to choose where Sarah spends her lunch and after school period. If Ms. Bradley wishes, she may agree to have Sarah spend those periods with Mr. Josey.

[47] I hasten to add that Mr. Josey is to refrain from making any belittling or derogatory remarks with reference to Ms. Bradley, as I believe that these prevent good communication. I am aware that Ms. Bradley is rather stoic and is not necessarily an easy communicator, but this may be on account of how she has been dealt with by Mr. Josey. From the evidence and from Mr. Josey's demeanor I am satisfied that a large part of the communication problem is due to the manner in which Mr. Josey views Ms. Bradley. I do not want it to appear to Mr. Josey that Ms. Bradley is a hindrance to his development of a new family with Ms. MacIsaac, but he must always remember that Ms. Bradley is Sarah's mother and he ought to be

mindful she ought not to be replaced by Ms. MacIsaac, despite the fact that Ms. Bradley does not have any concerns about Ms. MacIsaac.

[48] I am requesting that Mr. Josey's solicitor prepare a composite order including the dispositions of the previous orders as modified by this decision.

[49] As the results are mixed, I am not awarding costs.

J.