IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bryden v. Bryden, 2005 NSSF 9

Date: 20050114
Docket: 1201-56113 (SFHD-12359)
Registry: Halifax

Between:

John David Bryden

Applicant

v.

Sherrie Lynn Bryden

Respondent

Judge: The Honourable Justice Kevin Coady

Heard: January 14, 2005, in Halifax, Nova Scotia

Written Decision: February 15, 2005

Counsel: Elizabeth Jollimore, for the Applicant
B. Lynn Reierson, for the Respondent

By the Court:

[1] John and Sherrie Bryden separated on January 3, 2001, after five years of marriage. There are two young children of this union, Ben who is now almost seven years old, and Henry who is almost five years old.

[2] John and Sherrie were divorced on January 13, 2003. The Corollary Relief Judgment set out an extensive parenting plan which was built on a joint custody arrangement. The extensive arrangements came about as a result of the settlement pre-trial process. Attached to the Separation Agreement was a Schedule "A" that set forth the time the children would be with each parent. It was based on a bi-weekly schedule. At the time of signing the Separation Agreement in October, 2002, and the Corollary Relief Judgment in January, 2003, Ben was not yet in school. Henry was two years old and still an infant. Both spouses were working in diagnostics at local hospitals and their incomes were quite comparable. Mr. Bryden worked one week from 2:00 p.m. until 10:00 p.m. and he worked the second week doing day shifts. Ms. Bryden was also working shifts at her place of employment. Parenting times revolved around the parents' work schedules. Regardless of the tag one places on this arrangement, both parents were spending as much time as possible with the boys as their work schedules permitted. For times when both parents' work overlapped the boys were being cared for by Sharon Nauss. Ms. Nauss was chosen by both parents and was appreciated by both parents. She was obviously very close to these two boys.

[3] Obviously, the parties to the Separation Agreement realized that the parenting schedule set out in that Agreement would not work once Ben started school and they included paragraph 8(a) of that Agreement that states "commencement of the Children's attendance at school" would be a material change in circumstances.

[4] The start of school by Ben essentially took away the five mornings in week one when the boys would have been with Mr. Bryden. At about the same time Mr. Bryden changed the terms of his employment such that he worked day shifts.

[5] I do not find that the job change to day shifts added anything to the access complications that were basically created by Ben going to school. The only thing

not changing jobs would affect was time spent with Henry and that would only last until pre-school or, at the latest, entry into the public school system.

[6] Mr. Bryden made his application to vary parenting time and child support on September 18, 2003. The case has gone through mediation and finally worked its way to trial rather slowly. For the past eighteen months an arrangement has emerged and it can be described as follows: Ms. Bryden has provided primary residence for the boys. The boys are with their dad every second weekend from Friday afternoon until Monday morning when he drops them off at daycare or school. He has time with the boys on Monday evenings prior to parenting weekends from 4:00 p.m. to 7:30 p.m. and he has time with the boys on Thursday evenings after parenting weekends from 4:00 p.m. to 7:30 p.m. He has all of the other parenting times and rights set out in the couple's Corollary Relief Judgment.

[7] During this eighteen month period, Ms. Bryden was living in north-end Halifax and Mr. Bryden was living at Stillwater Lake, or at least for the majority of that period of time, and, effectively, the boys were spending most of their time in north-end Halifax under the care of Ms. Bryden and Ms. Nauss, their long-time child care provider.

[8] Mr. Bryden cautions me not to consider the eighteen months as the *status quo*. I accept that caution. Mr. Bryden should not be effectively penalized for the delay in the process and the time that was consumed by mediation. Be that as it may, I must always be guided by the best interests of the child; in this case, these two young boys. I can say my decision will not be rooted in this so called *status quo* but rather in the best interests of these boys.

[9] I can see that I have before me two very responsible and loving parents as far as their relationship with their children is concerned. There are issues between them surrounding the children but I do not consider them of any consequence to my deliberations. I find that they both will strive to do what is best for their sons who I conclude are thriving at the present time.

[10] This is an application to vary pursuant to s. 17 of the *Divorce Act*. I do not consider this to be an application to vary custody and there will be no change in the joint custody arrangement. I do not consider this to be an application to vary child support per se. Child support changes will essentially be a consequence of any

variation respecting parenting time. The Corollary Relief Judgment anticipates the starting of school as a material change in circumstances as defined in s. 17.(5) of the *Divorce Act*. There is no question but that Ben starting school amounts to a material change in the parenting arrangements envisioned in the Corollary Relief Judgment. So I find that there is a change sufficient to satisfy the threshold set out in s. 17.(5) of the *Act*.

[11] I am also alerted to s. 17.(9) of the *Divorce Act* that states that I should "give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child." Mr. Bryden wants me to establish a week-on, week-off regime with an exchange on Fridays. Ms. Bryden wants an order for parenting with dad every second weekend. She supports the Thursday and Monday visits as well as the additional times and rights set out in their Corollary Relief Judgment. So, in essence, both parents want a variation of the Corollary Relief Judgment respecting parenting time. Mr. Bryden wants the week-on, week-off arrangement. Ms. Bryden wants a variation that reflects what has been happening on the ground over the past eighteen months.

[12] I want to advance some evidentiary conclusions:

1) I was initially concerned that Ms. Bryden raised so many minor incidents that I considered trivial and mostly from before 2002. I do hear Ms. Reierson's explanation that such was needed to establish that these parents have different values and different approaches to parenting. With respect, I do not completely agree. Her incident evidence is a concern that she is not truly committed to the value of dad's role in the boys' life. The evidence raised concerns that dad could be minimized in this family as a whole. I was also concerned for much the same reason by introducing Ms. Nauss to the litigation process. I raise this because of concerns that Ms. Bryden may not be committed to Mr. Bryden's ongoing role in the boys' lives. The boys think a lot of their dad and that should never be eroded. Hopefully, when this litigation ends, their relationship will mend;
2) I accept that Ms. Bryden has been the primary parent throughout the boys' lives. I view both parents as involved, during cohabitation, as equal players. Since separation, Ms. Bryden has been the principal parent as set out and stated by Justice Roscoe in the *Burns v. Burns* case. The boys woke up at her home for most days of their young lives. For the past eighteen months they have primarily resided with mom. The quote from *Burns v. Burns* at p. 8 of

Ms. Reierson's legal memorandum is very significant. I have given it close consideration in determining that Ms. Bryden has been the primary parent for all of the boys' lives;

3) I find that these young boys have a real connection to the community in which their mother resides. Ben goes to St. Stephen's School. Henry goes to daycare at Veith House and this September will go to St. Stephen's as well. Their caregiver, Ms. Nauss, is part of this community. Their significant friendships are in the Halifax community. Their future activities will grow out of their school and Mr. Bryden is not suggesting they go to school in Stillwater Lake;
4) I do not note any evidence that they have similar connections to Mr. Bryden's community. There is no suggestion from Mr. Bryden's evidence that he would involve them in activities there specifically and he proposes commuting. I find that he recognizes by doing that the value of their roots to this community;
5) The boys are very close to Mr. Bryden and Ms. Murchie and enjoy their time with them. Mr. Bryden is the only real male role model in the boys' lives and he is a very positive role model. Nothing should ever happen in any way to minimize that important role. I expressed my concerns earlier about Ms. Bryden's evidence about the incidents, as I'll call it, and the use of Ms. Nauss as a witness, and I guess it is in this area that my concerns are based;
6) I accept that the boys want to spend more time with their dad, however, I can give that little weight given their present ages.

[13] Further, I must make this decision based on the best interests of these boys and not on my feelings about these parents. This is not about winning or losing the case. It is about doing what is right for the boys. It is not about sympathy for parents or any other such sentiment for parents or anybody else associated with this family. It is all about the boys.

[14] I have reviewed the *Bradley v. Josey* [2003] N.S.J. No. 487 decision advanced by Ms. Reierson and I share the quote she used in her submissions; roughly stated that shared custody arrangements require greater cooperation and communication than do traditional joint custody arrangements.

[15] If I were to accept Mr. Bryden's proposal, it would be effectively shared parenting regardless of the use of the words "joint custody." I am of the opinion that

it is the rare case, the rare parents and the rare children who can make week-on, week-off work in a way that is in the children's best interests. I have also reviewed *Bell v. Cormier* [2003] O.J. No. 3331, a case that affirms that it is a rare case where alternating joint custodial arrangements is an appropriate regime for any child.

[16] In *Farnell v. Farnell* [2002] N.S.J. No. 491, I accept the comments respecting week-on, week-off arrangements stated at ¶ 10:

> "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 another 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 extracurricular activities, church or other activities that they would normally engage in. Such a situation is next to impossible to attain and continue when children live at long distances . . ."

[17] I find that these parents are mature. It is my view that the week-on, week-off parenting must be created by design rather than by trying to transform an existing arrangement into one. It is all about stability. Both parents would have to support such an arrangement for it to be in the children's best interests. The children's activities and schooling must always be constant. Their friendships must be constant. These things will only work if the two homes are in the same community. They will only work if both parents are committed to such an arrangement. I take the view that week-on, week-off requires a parental relationship sufficiently close that one might wonder why they live separate and apart. I believe these parents are not so antagonistic so as to rule out week-on, week-off parenting but they, individually and collectively, have made choices not consistent with moving to such an arrangement.

[18] In conclusion and for the reasons already mentioned, I am not prepared to order week-on, week-off parenting. It is not in the boys' best interests. It would be an obstacle to developing roots to their community, their school and their activities, especially as they get older.

[19] I will vary the Corollary Relief Judgment. It will remain a joint custody arrangement and principal care will be with Ms. Bryden. The boys will be with their

dad every second weekend on the terms and times presently occurring. The Thursday and Monday evenings will continue. All of their other access terms set out under the parenting section in the Corollary Relief Judgment will continue. I will add a clause to the effect “such other parenting time with dad as the parents can agree.” This is in addition to the language in paragraph 5(g) of their Separation Agreement. These children should spend as much time with their dad as possible without uprooting them from the stability of their present community. As I said before, this is all about stability. It is not about who is the best parent. You are both excellent parents. Excellent parents sacrifice their own interests and feelings for the best interests of their children.

[20] In light of my decision, I must visit the issue of child support. My ruling satisfies s. 17(4) of the *Act*. I find Mr. Bryden’s income for child support purposes to be $50,900.00. I find Ms. Bryden’s income for child support purposes to be $46,226.00. Mr. Bryden will pay $691.00 in s. 3 support monthly effective February 1, 2005. Section 7 expenses will be shared proportionately; 52 percent for Mr. Bryden and 48 percent for Ms. Bryden. The amount, on the evidence, seems to vary. I am uncertain as to what the amount is on an annual basis. I will leave it to counsel to work out the language and implementation of the s. 7 expenses but it will be based on a 52/48 percent ratio.

J.