

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Einsfeld v. Anthony*, 2019 NSSC 227

Date: 20190718

Docket: SFHPSA-107175

Registry: Halifax

Between:

Mario Antonio Einsfeld

Applicant

v.

Krista Joyce Anthony

Respondent

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: March 28 & 29, 2019, in Halifax, Nova Scotia

Counsel: Terrance G. Sheppard for the Applicant
Diana M. Musgrave for the Respondent

By the Court:

[1] Mario Einsfeld and Krista Anthony married on January 3, 2006. They have a daughter, Emma Einsfeld, born September [...], 2011. Emma is now 7 years old. The parties separated in the spring of 2014 and were divorced in April 2015. In October 2017, Mr. Einsfeld started the present application requesting the court address the issues of parenting arrangements and child support.

ISSUES:

- 1) What is the appropriate parenting arrangement for Emma?
- 2) What is the appropriate quantum of child support:
 - a. retroactive and prospective; and
 - b. section 7 expenses

BACKGROUND

[2] At the time of separation, the parties were residing in Ottawa. Mr. Einsfeld was a member of the Canadian Forces when the parties met. Ms. Anthony was a licensed dental hygienist and joined the forces in 2014. In March 2014 Ms. Anthony left the matrimonial home in Ottawa and attended basic training in Quebec.

[3] Ms. Anthony completed her basic training in Petawawa in August 2014. Between March and August 2014 Mr. Einsfeld had primary care of Emma. At the time she was approximately 2 ½ years old. Ms. Anthony was posted to Montreal following her basic training.

[4] From September 2014 to the spring of 2015 the parties had a week on/ week off shared parenting arrangement. The parties would make the 2 ½ hour commute between Montreal and Ottawa to facilitate the shared parenting arrangement. Ms. Anthony remarried in March 2015. Her spouse, James Anthony, is also in the military.

[5] Two events happened which changed the shared parenting arrangement:

- 1) Emma was due to start school in September 2015 or 2016 and shared parenting with the parents living in separate cities could not continue; and

2) Ms. Anthony advised Mr. Einsfeld in May, 2015 that she was moving to Nova Scotia for a posting in Halifax.

[6] As a result of the foregoing, the parties retained an assessor, Karen Poole. Ms. Poole's report was referenced by both parties in their evidence. Ms. Poole was not a witness in the proceeding but both parties relied on various findings in her report.

[7] Ms. Poole's report at p. 13 contained the following statement:

“Both of these parents appear to be capable of providing good and loving care for Emma and of meeting her needs. In an ideal world, they may continue to do so. However, they are members of the military and as such are both subject to postings, albeit that Mr. Einsfeld is unlikely to be posted in the next couple of years.”

[8] Ms. Poole recommended that Emma be in the primary care of Ms. Anthony and relocate to Nova Scotia. In July 2015 Ms. Anthony moved to Halifax with her spouse and Emma. The parties followed the recommendations of Ms. Poole in relation to Mr. Einsfeld's parenting time.

[9] In 2016, Mr. Einsfeld was also able to secure a posting in Halifax. He had been trying to move to Nova Scotia since 2015 when Ms. Anthony advised of her relocation. In June 2016 the parties entered into a temporary parenting arrangement incorporated into a Minutes of Settlement (the “agreement”).

[10] Although the parties were divorced in 2015, there was no Corollary Relief Order issued by the court in Ontario. Instead, the parties reached a temporary agreement on parenting issues. The document from the Superior Court of Justice, Family Court is entitled Minutes of Settlement. The first paragraph provides: “The following parenting provisions are agreed on a temporary basis...” In part, the agreement stipulated that Emma would be in the care of Mr. Einsfeld 3 out of 4 weekends per month. It provided further particulars in relation to holiday time.

[11] The latter portion of the agreement indicates that: “The remaining provisions of these Minutes of Settlement are agreed on a final basis.” There was a clear distinction between the temporary nature of the parenting arrangements and the final basis for the remaining provisions. It is interesting to note that the agreement provides for terminating events as they relate to child support which may not accord with the principles set out in the *Divorce Act*, R.S.C. 1985, C.3 (2nd Suppl),

as amended. The final portion of the agreement also deals with property division, and insurance provisions.

[12] The parties have been operating under the schedule set out in the agreement since 2016. Mr. Einsfeld commenced the within application in October 2017 seeking to increase his parenting time. Ms. Anthony filed a response application and is also seeking to change the schedule.

LAW & ANALYSIS

[13] Although the parties were divorced in 2015, there was no Corollary Relief Order issued. This is an anomaly which does not occur in this jurisdiction as a Corollary Relief Order always accompanies a Divorce Order. Nevertheless, the court order issued out of Ontario indicates that the parenting arrangements in 2016 were temporary.

[14] There is no final order in relation to parenting. There is no necessity to prove a material change in circumstances. Section 17 of the *Divorce Act*, supra does not apply as this is not a variation of a final order.

[15] Section 16(1) of the *Divorce Act* states:

“A court of competent jurisdiction may, on application by either or both spouse or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.”

[16] Section 16(8) provides that the only consideration before the court in making such orders is the best interests of the child “as determined by reference to the condition, means, needs and other circumstances of the child.”

[17] Both parties raised various concerns related to the other party’s ability to parent Emma. The situation was not unlike the situation of Ms. Poole when preparing the assessment report. Ms. Poole stated at p. 12 of her report:

“It is abundantly clear that both Ms. Crawley and Mr. Einsfeld adore Emma and as such wish to have her in their primary care. In their mission to seek this occurring, both have raised concerns about the other.”

[18] Ms. Anthony has the following concerns related to Mr. Einsfeld’s parenting:

- 1) Anger management issues

- 2) Mr. Einsfeld involving Emma in adult conversations
- 3) Mr. Einsfeld's lack of communication with Ms. Anthony
- 4) Mr. Einsfeld's inability to set boundaries for Emma
- 5) Mr. Einsfeld delegating his parenting role to his mother

[19] She led evidence to support the validity of her concerns. Ms. Anthony indicated that Mr. Einsfeld was abusive of her prior to separation. She provided no further detail in her affidavit of the abuse. In her affidavit filed March 7, 2019, she recounted an incident wherein she took Emma to the washroom during a football game, September 8, 2018. Mr. Einsfeld waited 20 steps away from her at the washroom and was "staring" at her and Emma as they went into the washroom. I am uncertain how this can be seen to be physically or verbally abusive. Mr. Einsfeld's affidavit indicates that he was the one to take Emma to the bathroom and that Ms. Anthony took over when they got to the washroom.

[20] Mr. Einsfeld confirms that he was convicted of assaulting Ms. Anthony. The complaint was made by Ms. Anthony in June 2009 (more than two years prior to Emma's birth). Mr. Einsfeld readily admitted that he regretted his actions and that it only happened once. Following the complaint, Mr. Einsfeld moved out of their home. He moved back into the house in December 2009 and plead guilty to the charge in March 2010.

[21] The parties continued in their relationship thereafter. Ms. Anthony became pregnant and they had Emma in September 2011. The parties participated in couples counselling following this incident.

[22] Mr. Einsfeld also attended anger management courses and domestic violence programs following the charge. He had individual counselling which continues to the present time. There is no other evidence of further domestic violence.

[23] Ms. Anthony alleges that Mr. Einsfeld involves Emma in adult conversations. She provided the example that Mr. Einsfeld would tell Emma that he would be picking her up on Thursday of that week as Friday was a PD day and that was his time. Ms. Anthony indicates that he should not be telling Emma such things as these should be discussions between the adults.

[24] The difficulty with this assertion is that it was not a conversation the adults needed to have. PD days are clearly spelled out in the agreement as Mr. Einsfeld's time. Therefore confirming that he was picking Emma up as per the agreement did not in any way require further adult discussion.

[25] It is interesting to note that Ms. Anthony was concerned about Mr. Einsfeld's engagement of Emma in adult conversations and was completely unaware of her own behaviour. Ms. Anthony and her current spouse saw no issue in having discussions with Emma about what happened when she was with Mr. Einsfeld. The affidavit of Mr. Anthony discloses the following at paragraph 35 of his affidavit:

“We have had lengthy discussions with Emma asking how life is at her father's house in order to better understand why there are issues.”

[26] Clearly these lengthy discussions with Emma are exactly the sort of adult discussions that should be taking place with Mr. Einsfeld. Placing Emma in a position of inquisition about her father places her squarely in the middle of potential conflict.

[27] Ms. Anthony also indicated a concern about Mr. Einsfeld's lack of communication with her. She testified to an incident whereby Mr. Einsfeld signed a permission slip for Emma to attend a school event and did not advise her. Mr. Einsfeld should have communicated this to Ms. Anthony as the school event was to take place on Ms. Anthony's parenting time.

[28] She also advised of an incident wherein the police stopped Mr. Einsfeld when Emma was in his care and he did not contact Ms. Anthony. Although the incident involving the police was relatively minor (i.e. did not have his license and registration when pulled over), he should have contacted Ms. Anthony. Emma was with him and had to be picked up by Mr. Einsfeld's brother so that he could attend the police station. The absence of information would only serve to compound the worry of Ms. Anthony when advised of this incident by Emma.

[29] Ms. Anthony also asserts that Mr. Einsfeld does not set appropriate boundaries for Emma. She indicates that Emma is able to eat what she pleases, and has no limits placed on her behaviour by Mr. Einsfeld. Mr. Einsfeld testified that he believes the rules for Emma are fairly consistent between the two households. He indicated that Emma enjoys eating out on occasion. He also

indicated that the bedtimes do not differ between the two households and the only time she is allowed to stay up slightly later is on weekend nights (i.e. 8:30 pm).

[30] Ms. Anthony believed that Mr. Einsfeld's mother was doing the majority of the parenting on his time. Mr. Einsfeld vehemently objected to the assertion and indicated that they usually visit with his mother one time per month. Ms. Anthony also objected to Emma having sleepovers with her grandmother and sleeping in the same bed. Mr. Einsfeld indicated that Emma has only had two sleepovers with his mother in the years since they've been in Nova Scotia. The evidence does not support that Mr. Einsfeld has in any way delegated his parental role to his mother.

[31] Mr. Einsfeld has the following concerns related to Ms. Anthony's parenting:

- 1) Ms. Anthony's attempts to minimize his role as Emma's father
- 2) Ms. Anthony's controlling behaviour
- 3) Lack of communication from Ms. Anthony

[32] Mr. Einsfeld testified to an incident which occurred on January 12, 2018. Mr. Einsfeld attended at the school to pick Emma up at the end of the school day as he had finished work early. When he arrived the teacher refused to allow Emma to go with Mr. Einsfeld until she had received approval from Ms. Anthony. Ms. Anthony indicated that as "primary parent" she needed to authorize Mr. Einsfeld to pick Emma up from school.

[33] On cross-examination, Ms. Anthony confirmed that she had provided the school with a copy of the Minutes of Settlement (ref. Exhibit 5, exhibit A). I note the following in relation to Mr. Einsfeld's parenting time as set out in the Minutes:

1. On the "first, second and fourth weekends of each month, **from Friday after school** (or 4:00 p.m. when Emma is not in school) to Monday morning..." (ref para 1(a)); and
2. Commencing in September 2016, Emma shall additionally be in the care of her father as on "Wednesdays each week, **from after school** (or 4:00 p.m. when Emma is not in school) to 7:30 pm..." (ref para 2(e)).

[34] The school therefore needed no authorization from Ms. Anthony for Mr. Einsfeld to pick Emma up at the end of the school day. According to the Minutes

of Settlement, Mr. Einsfeld had care of Emma from the end of the school day on Wednesdays after school three of four Fridays after school preceding his weekend time. The issue and the confusion arose as a result of communication difficulties between the parties. If Mr. Einsfeld has legal care of Emma at the times noted in the preceding paragraph, then he has the responsibility to communicate directly with the school in advance to advise when Emma should not be put on the bus (as she would be picked up by him). It is not for Ms. Anthony to assume responsibility for communicating with the school.

[35] Emma broke her arm in March 2018. Mr. Einsfeld testified that he asked Ms. Anthony for particulars on follow up appointments and that she did not provide them to him. Ms. Anthony advised that she did tell Mr. Einsfeld about the follow up appointments.

[36] On cross examination, Ms. Anthony confirmed that Mr. Einsfeld asked to attend the next appointment. She advised him that he was unable to attend that appointment as she had already made plans for “mom and daughter day”. Ms. Anthony indicated that Mr. Einsfeld did not specifically ask to attend the other appointments, a point denied by Mr. Einsfeld.

[37] I do not accept that Mr. Einsfeld only wanted to attend the one follow up medical appointment for Emma’s broken arm. Mr. Einsfeld has indicated repeatedly his request to be involved in Emma’s medical care only to be advised by Ms. Anthony as to when he is “permitted” to attend. Mr. Einsfeld has accommodated Ms. Anthony’s discomfort with his presence, but this must be evaluated in the context of what is best for Emma.

[38] Ms. Anthony has minimized any potential assistance Mr. Einsfeld can provide to Emma in her French immersion education. She has indicated that he does not complete necessary homework - a point which has been denied by Mr. Einsfeld. She indicates that Mr. Einsfeld may be limited in being able to provide assistance to Emma with her French language studies. This fails to recognize that French is the second language for **both** parents- not just Mr. Einsfeld.

[39] Mr. Einsfeld’s second concern relates to the degree of control Ms. Anthony exerts over his parenting of Emma. Ms. Anthony attempts to control the dialogue as between Emma and Mr. Einsfeld. Something as innocent as reminding Emma of when she will see him next (in accordance with the court order) is seen as involving Emma in adult conversations.

[40] Ms. Anthony was concerned about the degree of care provided by Emma's paternal grandmother, and clearly wanted more control over the time spent with her. Despite having little to no first hand knowledge, Ms. Anthony wants to control the interaction as between Emma and her grandmother- how many sleepovers there are, where Emma sleeps, who prepares the meals when her grandmother visits, etc..

[41] Mr. Einsfeld testified that Emma has had two sleepovers with her paternal grandmother. He indicates that his mother will visit approximately once per month. Mr. Einsfeld's evidence is that the relationship between his mother and Emma is very positive and loving. The degree of control that Ms. Anthony wishes to have over the loving relationship between Emma and her grandmother appears to be unnecessary and contrary to Emma's best interests.

[42] The third concern of Mr. Einsfeld relates to the lack of communication from Ms. Anthony. Ms. Anthony indicated that Emma was having night terrors, wets the bed and is hitting herself. These incidents are referred to in her affidavit of March 8, 2018. Mr. Einsfeld testified that the first time he was aware of these statements was at the time of reading the affidavit in March 2018.

[43] Mr. Einsfeld indicated that he did not observe any of these behaviours at his home. If the behaviours were present while Emma was in the care of Ms. Anthony, it is extremely troublesome that she did not see fit to mention these to Mr. Einsfeld at the time they were occurring. Perhaps these concerns formed the basis for her request for Emma to see a counsellor, but the concerns are so significant that it is inconceivable that Ms. Anthony would not have a discussion with Mr. Einsfeld about them.

[44] Another example of poor communication is in relation to Emma's counselling. Mr. Einsfeld testified that the first time he heard about counselling for Emma was during a parent/ teacher meeting in December 2017. Unbeknownst to Mr. Einsfeld at the time, Emma had already been in counselling since October 2017.

[45] Ms. Anthony went through her EAP program and booked Emma for counselling with Lisa Mader in October 2017. Her affidavit sworn on March 8, 2018 states at paragraph 71 and 72:

“Emma saw Lisa for the first time in late October. I did not tell Mario initially, as he has refused to consider counselling in the past, despite the fact that at this time I understand he still attends counselling himself.

72. Emma has now seen Lisa a couple of times, and I told Mario in early December that I was taking Emma to a counsellor and provided him all of the details.”

[46] Ms. Anthony blames Mr. Einsfeld for not agreeing to counselling without providing him the relevant information. The alleged behaviours of Emma in the home of Ms. Anthony may well have been relevant to the decision for counselling and yet Ms. Anthony withheld that information from Mr. Einsfeld. A parent with joint custody of a child should not be learning critical information about a child by reading a court document.

RELIEF SOUGHT

[47] What is not in dispute between these parties is that Mr. Einsfeld spends the majority of Emma’s free time with her. Over the course of a year, he spends approximately 38% of his time with Emma.

[48] Ms. Anthony wishes to revise the schedule such that Mr. Einsfeld has Emma in his care every second week and additional time every 2nd Wednesday evening when he does not have weekend time.

[49] Mr. Einsfeld is seeking a shared parenting arrangement.

[50] Each case turns on the specific and unique facts before the court. I have considered the statutory framework and have reviewed the relevant case law. Case law has often discussed the level of communication and cooperation required to have a successful shared parenting arrangement.

[51] Counsel for Ms. Anthony stresses the fact that communication and tension between the parties would render this type of arrangement unworkable. In this regard, counsel has referred the court to the cases of *McNeil v. Peach*, 2012 NSSC 135. In *McNeil*, supra, the court cited with approval the case of *Hammond v. Nelson* 2012 NSSC 27. Justice Dellapinna in the *Hammond* decision, supra, indicated that it is essential that the parties communicate with each other, keep each other informed of matters relating to their child and make decisions together.

[52] Communication is at the heart of many custodial disagreements. Each party may lay the fault for the poor communication at the feet of the other party. Rarely

is there overwhelming objective evidence that it is the fault of one parent. Given the fact that there will be poor communication at various times caused by one or both parents throughout their separation, what is the court to do?

[53] The court must undertake a fact specific exercise to determine whether:

1. the impediments to good communication are within the control of one or both parties (a fault based analysis);
2. whether the incidents of poor communication are statistically significant given the parenting history;
3. to what extent the poor communication between the parties affects the child; and
4. what, if anything, the parties have done to improve or foster their communication, and what they are prepared to do.

[54] The absence of good communication is not necessarily a bar to a shared parenting arrangement. It is a factor to be considered within the context of the means, needs and circumstances of the child. As more families come to court with a higher degree of engagement by both parents, the courts will routinely be grappling with the issue of poor communication between the parents.

[55] Case law has considered poor communication as one factor to examine. The cases of *Clarke-Boudreau v Boudreau*, 2013 NSSC 173 (NSSC), *Gibney v Conohan*, 2011 NSSC 268 (NSSC), and *Parsons v Parsons*, 2011 NSSC 347, are but three such cases. In each case, communication was an issue between the parents. Despite this, the court ordered an equal sharing of time as between the parents (by way of shared or parallel parenting arrangements).

[56] The vast majority of the communication between these parties has been respectful and child focussed. Often Mr. Einsfeld has deferred to the requests of Ms. Anthony in relation to Emma's care. They have discussed and been flexible in relation to holiday schedules in order to accommodate Emma's best interests. They have both been active and engaged parents to Emma participating in all aspects of her life.

[57] That is not to say that there are no issues in relation to communication. As noted herein, Ms. Anthony has not always provided timely and fulsome information to Mr. Einsfeld. Mr. Einsfeld has indicated that he has not received information from Ms. Anthony at different times, when the evidence proves

otherwise. These parents are not perfect in their communication- that is unattainable for most. That does not, however, mean that with insight and a more mindful predisposition to communication that it cannot improve.

[58] I find it to be in Emma's best interests that she be in a shared parenting arrangement with her parents on a week on/ week off arrangement. The current parenting arrangement is on the cusp of a shared parenting arrangement. The current difficulties stem primarily from some communication problems and the mantle of "primary care" parent to Ms. Anthony.

[59] Both parents are loving, attentive and extremely engaged in Emma's care. Both are capable of providing appropriate care to Emma although in different ways. Differences in parenting need not result in conflict- they can lead to flexibility and strength in their child by exposure to different ways of seeing the world.

[60] Shared parenting is in Emma's best interests for a myriad of reasons including:

1. The ability of both parents to meet Emma's day to day needs;
2. The proximity of the homes to Emma's school;
3. A consistent and stable schedule which will allow both parents an equal opportunity to have both free time (i.e. weekend time) and the more harried weekday schedule rife with activities, schedules and responsibilities;
4. The level of engagement of both parents historically in Emma's care;
5. The lessening of transitions between the two homes; and
6. The ability to schedule and to participate in both weekday and weekend activities with Emma with both parents.

[61] The holiday schedule as set out in the Minutes of Settlement will continue by agreement of the parties. The change to week on/ week off will occur at the conclusion of the summer schedule which provides for a two week alternating schedule. The current schedule of parenting will remain in place until the summer schedule commences.

[62] At the hearing of this matter the court noted the parties had not conducted a *Contino* analysis should a shared or parallel parenting arrangement be ordered. As

is often the case, the parties have limited resources and virtually all evidence led related to the appropriate parenting time. Nevertheless, our Court of Appeal has indicated in the case of *Woodford v MacDonald*, 2014 NSCA 31, that the lack of a full *Contino* analysis may result in a successful appeal.

[63] The parties will have two weeks from the date of this decision to provide their submissions in relation to the *Contino* analysis. The decision in relation to the appropriate level of child support will be provided thereafter.

Chiasson, J.