SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *K.A. v. O.E.*, 2017 NSSC 332

Date: 2017-05-31
Docket: *Halifax* No. SFHMCA-090505
Registry: Halifax

Between:

K. A.

Applicant

v.

O. E.

Respondent

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	May 23, 24, 25 & 26, 2017, in Halifax, Nova Scotia
Oral Decision:	May 31, 2017
Written Release:	December 21, 2017
Counsel:	Sarah Harris, for the Applicant

BACKGROUND:

[1] P. J. E. was born on November […], 2012. He is four years old. P. is the son of Ms. A. and Mr. E. who were in a common law relationship from 2011 to 2013. A Notice of Application was filed by Ms. E. on Mar 31, 2014. In that application she sought a determination of the issues related to custody, access and child maintenance.

[2] There was an interim hearing before the Honourable Justice Jollimore on September 16, 2014. An Interim Order was issued on October 30, 2014 which placed P. in a joint and shared parenting arrangement which provided that P. spend 6 overnights with his father in a 14 day schedule. For the past thirty one months P. has seen both of his parents on a relatively equal basis.

[3] The matter of P.'s custody and access will be dealt with first. It is the priority for the parties and also the issue of paramount concern to the court. Section 18(5) of the *Maintenance and Custody Act* stated:

> " 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."

[4] It is P.'s best interests that are at the forefront of this decision. The child maintenance will flow from the decision made on custody and access.

[5] The application was heard pursuant to section 18 of the *Maintenance and Custody Act*. Section 18(2) of the *Act* stated:

> "The court may, on the application of a parent or guardian or, with leave or permission of the court, a grandparent, another member of the child's family or another person, make an order that a child shall be in or under the care and custody of the parent or guardian or authorized person."

[6] Pursuant to section 18(2)(a) the court has the power to make an order respecting access and visiting privileges of a parent.

[7] That statutory framework must be interpreted in light of the particular facts and circumstances of P.. There can be guidance found in the principles set out in case law but each case will turn on the particular factors involved. P. has been

described as a very intelligent, engaging and caring child. He enjoys a number of activities and enjoys spending time with both sides of his extended family.

[8] I had the opportunity to hear from a number of witnesses in these proceedings in addition to the parties:

Kristen Veinot from the Dept of Community Services
Jackie Barkeley- custody and access assessor
K. H.- maternal grandmother
S. F.- ex partner of Mr. E.
R. E.- paternal grandmother
A. R.- current partner of Mr. E.

[9] The affidavit evidence of Natasha Dugas was admitted with counsel for Ms. A. waiving cross examination.

[10] A few things became painfully evident from the testimony:

1) This situation is highly conflictual and has involved complaints to the Department of Community Services and the Police on a number of occasions
2) Quite remarkably, P., DESPITE this level of conflict, appears to be doing relatively well. The assessor noted that "P. E.'s behavior with both parents suggests a comfort level and the appropriateness of equal time to be spent with both parents."

CREDIBILITY

[11] In making factual determinations, I have been asked to make findings of credibility. Counsel for Ms. A. has requested that I reject the evidence proferred on behalf of Mr. E. in the event of conflict between his evidence and hers.

[12] There are a myriad of cases which deal with the issue of credibility. The case of *Baker-Warren v. Denault*, 2009 NSSC 59 set out the factors related to credibility assessments. I will review some of the issues of credibility relating to various witnesses.

[13] Evidence provided by K. H. was inconsistent and confusing at times. For example, Ms. H. testified to her calling police and having them attend when Mr. E. was picking P. up at the Sobey's parking lot. She denied that she contacted Ms. F.'s mother who "happened upon the scene." Her explanation that Ms. F. just

happened upon the scene as she went to get gas is not credible. Both Ms. H. and S. F. spoke to the police officer. Ms. H. confirmed that she laid a complaint against the officer. Her denial of the fact that the police referenced both Ms. H. and Ms. F. being on a witch hunt was directly contradicted by her later in cross examination.

[14] Another example of the inconsistencies in Ms. H.' testimony related to an incident between Ms. A. and Mr. E. in November 2013. She referred to Mr. E. as the aggressor in this incident. When this version of events was directly contradicted by the text messages exchanged with Mr. E. at Exhibit A of Exhibit 12, Ms. H. then indicated that she sent those texts to appease Mr. E.. I reject her assertion that she lied in these texts to appease him.

[15] Ms. S. F. also provided testimony in support of Ms. A.. Ms. F.'s testimony was also problematic. Although she indicated that Mr. E. was constantly putting her down, she could not recall a single specific incident.

[16] She did, however, recall an incident involving her step-father and Mr. E. when they were in attendance at a hockey arena. At first, Ms. F. described that she and their child A. had come upon Mr. E. and her stepfather arguing and shouting at one another and she immediately left. Later in cross-examination she indicated that she entered the arena with her step father but was unaware of how the argument began or what was said.

[17] Another incident involved Ms. F. testifying about a difficulty in A. returning from a 10 day trip to […] with Mr. E.. Ms. F. indicated that she contacted the police to assist in the return of A. because she was not sure if Mr. E. was returning A.. The difficulty with this assertion, however, is that Mr. E. had texted messages during the return trip from […] to advise that he would be 20 minutes late.

[18] The acrimony and toxic relationship between Ms. F. and Mr. E. was palpable. The lack of communication, and involvement of police and Department of Community Services was evident. Ms. F. has become a central support person for Ms. A.. It is difficult to imagine that this support will be beneficial for P., and the concern is that the level of acrimony and negativity as between Mr. E. and Ms. A. will increase.

[19] There were also minor inconsistencies in the evidence provided by the parties themselves.

1. Mr. E. provided contradictory testimony related to his assertion that he always provided appropriate car seats to transport P..

2. Ms. A. testified that Mr. E. was following her to a medical clinic with P. which led to some concern on the part of the assessor as to Mr. E.'s motivation. This, however, appears to be an exaggeration at best, and distortion of the facts at worst.

Overall, however, the majority of the evidence provided by the parties was credible.

CUSTODY- Shared, Primary Care, Parallel

[20] I need to evaluate this evidence in the context of determining P.'s best interests. Both parents have requested that I reject the recommendation of Ms. Barkley wherein she recommends that shared parenting continue. Both Ms. A. and Mr. E. have requested that they have primary care of P. and both have requested final decision making authority on major developmental decisions related to P..

[21] What makes this situation even more complicated is the decision of Ms. A., despite the shared parenting arrangement, to secure housing at such a distance from where the parties had previously resided in […]. For the majority of the shared parenting arrangement, the parties lived in relatively close proximity. In fact, the evidence is clear that Ms. A. spent the majority of her life in […]and that her mother resided on the same street as the parties at one point.

[22] In the fall of 2016, with court dates pending, Ms. A. decided to relocate from […] to […]. Although Ms. A. is free to relocate where she chooses, it makes the decision related to parenting time for P. (who will soon be school age) extremely difficult.

[23] I have been referred to decisions on behalf of counsel for Ms. A. in relation to shared parenting: *Dorey v. MacNutt*, 2013 NSSC 267, C.(J.R.) v C.(S.J.), 2010 NSSC 85, *Hustins v Hustins*, 2014 NSSC 185, and the multitude of cases referred to therein. I am well acquainted with the case law which suggests that a conflictual history between the parents may make a shared parenting arrangement unworkable.

[24] The court must make a sound and reasoned decision in the best interests of P.. Best interests was described by Judge Daley in the case of *Roberts v Roberts*, 2000 Carswell NS 372 (Fam. Ct.), where he stated:

> "These interests include basic physical needs such as food, clothing and shelter, emotional, psychological and educational development, stable and positive role

> modelling, all of which are expected to lead to a mature, responsible adult living in the community..."

[25] The custodial options that the court may consider were aptly described in the case of *V.K. v. T.S.* 2011, ONSC 4305, at paragraph 68:

> "68 The term "custody" refers to parental decision-making and authority respecting a child. As the Supreme Court of Canada stated in Young v. Young, "the custodial parent is responsible for the care and upbringing of the child, including decisions concerning the education, religion, health and well-being of the child." Traditionally, the options respecting custody which the courts have considered have been sole custody or joint custody, which accords both parents full equal parental control over and responsibility for all aspects the care, upbringing and education of the child. In more recent years, a third option has evolved, referred to as "parallel parenting…"

[26] I have considered the totality of the evidence before me and have concluded that a parallel parenting arrangement will be in P.'s best interests. Parallel parenting was defined in the *V.K.* case, *supra*, at paragraph 77:

> "77 As noted previously, in recent years, the concept of "parallel parenting" has developed in Family Law practice and in the case-law. This phrase has been used to describe various types of parenting arrangements, and in fact there is some dispute in the academic literature about the precise definition of parallel parenting. In some circumstances, parties and the courts have used the phrase "parallel parenting" to describe what is essentially a joint custody regime with additional, more specific terms to address particular areas of decision-making. In other cases, parallel parenting is described as a "sub-category of joint custody" which involves granting each party separate, defined areas of parental decision-making authority independent of each other. For ease of reference, I will refer to this latter concept as "divided parallel parenting."
>
> Parallel parenting as defined in the social science literature is not a manifestation of joint legal custody in the sense of the parents making major decisions jointly, but rather; parallel parenting involves each parent making the final decision about a different domain. In other words, each parent has sole custody, only over a different domain of decision-making."

[27] A number of cases in Nova Scotia have adopted the reasoning in *V.K. v. T.S., supra,* and have imposed a parallel parenting regime in appropriate circumstances. In this regard I refer to the cases of *Cooke v. Cooke*, 2012 NSSC 73, *Denninger v. Ross* 2013 NSSC 237, and *MacDonald v. Ross,* 2013 NSSC 117.

[28] In the present case, I am referring to divided parallel parenting in relation to major developmental decisions. I am also satisfied that a continuation of the relatively equal sharing of P.'s time is in his best interests. Although the assessor has recommended a week on/ week off arrangement, I do not accept this schedule to be in P.'s best interests. He is about to commence primary and for such a young child, the commute necessitated by Ms. A.'s relocation would be too onerous fifty percent of his schooldays.

[29] A number of factors are to be considered in determining whether parallel parenting with an equal sharing of time is appropriate:

1) The significant involvement of both parents in the child's life. The involvement of the parent must not only be temporal involvement (i.e. significant time) but must also include involvement in all aspects of the child's upbringing: including issues of childcare, education, and social upbringing.
2) Both parents have a close and loving attachment to the child.
3) Both parents have their own relative strengths and weaknesses. The child can benefit from each party's strengths and should have the best each of the parents have to offer. The relative weaknesses of each parent and the impact on the child can be minimized if the parallel parenting arrangement is appropriately structured
4) The ability of the parent to independently make decisions that are in the child's best interests. Such situations are often marked by the complete inability for the parents to communicate and cooperate, but if working independent of one another, each has the capacity to make decisions that are child focused and well reasoned.
5) The extensive conflict between the parties is a product of the parties' interactions and both parents are responsible to some extent for the level of conflict. A parallel parenting arrangement will ensure that the child is the focus of the decision being made, not the reaction of the other parent or the effect on the other parent. By removing the defensive reactions of each parent, both are better able to focus on the needs of the child.
6) To provide either parent with joint custody with final decision making may well empower one parent to minimize and significantly impact the role of the other parent in the child's life. Separate and distinct from the myriad of cases where there are allegations of "parental alienation", this factor seeks to address a far more subtle form of marginalization of the other parent's role in the child's life.

7) A highly structured parallel parenting plan will reduce the necessity for communication and thereby reduce the opportunities for ongoing parental conflict.

[30] As stated in the case of *Denninger v. Ross, supra*, at paragraph 47:

> "47 While the parties are no longer able to parent jointly, the solution to their conflict and lack of communication will not be found in arbitrarily putting one parent solely in charge of the children, but instead in making each parent responsible for separate areas of decision-making."

[31] P.'s schedule has seen enough changes in the recent past. As a result, P. will continue to attend his current daycare until the end of August subject to the following:

1) The parties will have a week on/ week off arrangement during the months of July and August. The transition day will be Friday at the conclusion of daycare.
2) There will be no restrictions on either parent's time with P.. Other than international travel, which would require the written consent of the other parent, each parent is free to travel with P. as they see fit during their parenting time. Should P. be accompanying a parent on travel outside of Nova Scotia, the travelling parent must provide the other parent with an itinerary of where P. will be as well as complete contact information for the duration of the trip.
3) As a result of this schedule, there is no necessity to arrange for further block summer parenting time given P.'s age. The parties can each opt to take P. for two consecutive weeks in the summer commencing in the summer of 2019 (when P. is six). Arrangements for block summer access must be made no later than April 1st so that appropriate child care (including summer camps) can be arranged.
4) The week on/ week off arrangement will continue until the last week of August in each year. Ms. A. will have P. in her care commencing Friday, June 2nd and every second week thereafter. This year, 2017, her summer week on/ week off schedule concludes with the week ending on Friday, September 1, 2017.
5) Thereafter there will be a four week rotating schedule as follows:

a. Three weeks of the four week cycle, Mr. E. will have P. in his care overnight on Monday through Thursday. P. will be enrolled in […] and on school days will be enrolled in before and after school care in […]. Ms. A. will have P. in her care from Friday to Monday during those weeks. In order for both parents to have weekend parenting time in each four week cycle, Mr. E. will have one week (to include a weekend) and Ms. A. will have one week as well (to include a weekend). The parenting schedule is set out in the schedule distributed to the parties and appended hereto.
b. Specifically, commencing September 1, 2017 to September 8, 2017, Mr. E. will have a full week with P. (in referring to the parenting schedule chart this would be week 3).
c. Ms. A. will have P. from September 8, at the conclusion of school until Monday morning September 11 when she brings him to school.
d. Mr. E. will have P. in his care from Monday morning Sept. 11, until Friday morning Sept. 15 when he brings him to school.
e. Ms. A. will have P. from Friday Sept. 15 until Monday morning Sept. 18.
f. Mr. E. will have P. from Monday Sept. 18 until Friday Sept. 22
g. Ms. A. will then have P. in her care for one week (until Sept. 29.
h. Mr. A. will then have P. for one week and the schedule starts again.
i. Mr. E. will drop P. off on Fridays and Ms. A. will drop P. off on Monday mornings.
j. This will result in Mr. E. having 15 overnights in a 28 day cycle and minimize transitions on weekdays. One week in four P. will need to travel from […] to […] to go to school. This cuts down considerably on weekday travel time for P. rather than the week on/ week off schedule proposed by the assessor. Should Ms. A. relocate to the […] area, the schedule shall become a week on/ week off arrangement.

[32] The parties were able to reach agreement on special occasions as follows:

1. *Christmas*: The period Dec. 24 to Dec. 26 will be considered the Christmas holiday period. Ms. A. will have P. in her care from Dec. 24th to Dec. 25th in even numbered years and Mr. E. will have P. in his care from Dec. 25th to Dec. 26th. The transition time is 2 pm each day. The schedule will alternate in odd numbered years.

2. *Easter*: Easter will be defined as Good Friday to Tuesday morning return to school. Mr. E. will have P. in his care from Good Friday to

Easter Sunday in odd numbered years. Ms. A. will have P. in his care from Sunday to a return on Tuesday morning to school. The transition time at Easter will be 2:30 pm on Friday and Sunday.

3. *Thanksgiving*: Thanksgiving each year, Ms. A. will have P. from Sunday at 10 am to Monday at 10 am. Mr. E. will have P. in his care from Monday at 10 am until his return to school Tuesday morning.

4. H*alloween*: Halloween the parties have agreed on a transition time at 6 pm. However, in reviewing the recording of the parties' agreement read onto the record, which parent had the earlier time frame on Hallowe'en and which parent had the time commencing at 6 pm was not specified. In the absence of agreement between the parties I reserve the right to provide further particulars.

DECISION MAKING

[33] Having specified the parenting schedule as noted above, I will now deal with the division of responsibility related to major developmental decisions. Mr. E. will have the decision making responsibility related to education and child care. Ms. A. will have decision making responsibility related to medical decisions, including medical care, dental care and optical care.

[34] Both parties must provide all pertinent information on a timely basis to the other parent related to their sphere of responsibility. The parties will be authorized to receive information from third party care providers but that does not negate the responsibility of the parents to provide the information to each other.

[35] The parties will communicate in writing via email unless there is an emergency. Because of the level of conflict, written communication is best.

ACTIVITIES/ EVENTS

[36] In relation to extra-curricular activities during the school year, Mr. E. will be able to enroll P. in one activity. Ms. A. will be able to enroll P. in one activity during the summer months. Should the parties be able to agree on any additional activities after discussion, then P. may be enrolled. In the event of disagreement, however, P. will be limited to one activity at a time. It is hoped that the parties ability to communicate may increase such that additional activities for P. can be agreed upon.

[37] Both parties will be able to attend P.'s school concerts and events as well as attending extra-curricular activities. Until the conflict lessens between the parties, the communication will be cordial and child focused but kept to a minimum. P. is not to feel the brunt of the anxiety and tension as between the parents.

[38] Both parties will be able to attend medical appointments for P.. Again, communication between them in the presence of P. will remain cordial and kept to a minimum to ensure that P. is not exposed to conflict.

[39] At the time of registration or enrolment, all contact information for both parties will be provided and each parent shall be listed as the emergency contact for P.. This applies to any registration (be it school, child care, medical care, etc.)

CHILD SUPPORT

[40] The parenting arrangement qualifies as a shared parenting arrangement such that each parent has P. in his or her care in excess of 40% of the time. As such, I must consider the financial means needs and circumstances of each of the parties. Each of the parties will be entitled to receive the child tax benefit six months of the year.

[41] Ms. A. earns an annual income of $36,192. Mr. E. is currently awaiting a return to his unionized employment. He has declared his income at nil. During periods of unemployment in the past, Mr. E. has qualified for employment insurance benefits. When he last worked his average income was $943 per week. Ms. Harris has requested that I impute income to Mr. E. of $40,000.

[42] Mr. E.'s income is set at $40,000. Utilizing Mr. E.'s average income of $973 for 40 weeks per year his income would be $38,920. Even though he has seasonal layoffs, this allows for 12 weeks per year in layoffs. In addition, Mr. E. would be entitled to receive EI benefits which he has received in the past. His income, therefore, is imputed to be $40,000.

[43] Mr. E. has the benefit of sharing expenses with his current partner, Ms. R.. Mr. E. also has responsibility to pay child support for his son, A. to Ms. F.. Ms. R. and Mr. E. also have another child to support.

[44] As a result of the financial circumstances of the parties, there will be no payment of child support by either party. The net childcare costs are to be shared equally between the parties. Costs of activities are also to be shared equally.

Chiasson, J.