

SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. KM*, 2020 NSSC 318

Date: 2020-11-17

Docket: SFHCFSA No. 113966

SFH No. 1201-062352

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

KM and SH

Respondents

v.

EH (by Guardian *ad litem*, Susan Sly)

Third Party

v.

BH (by Guardian *ad litem*, Beth Archibald)

Third Party

And Between:

SFH No. 1201-062352

KM

Applicant

v.

SH

Respondent

LIBRARY HEADING

Restriction on Publication: Restriction on Publication

Pursuant to subsection 94(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, there is a ban on disclosing information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Judge: The Honourable Justice Theresa Forgeron

Heard: September 1, 2, and 22, 2020 in Halifax, Nova Scotia

Decision: November 17, 2020

Subject: Child protection, best interests of the child, children’s wishes, risk of emotional abuse, material change in circumstances, restrictions on father’s parenting time; parenting time at discretion of the children

Legislation: *Children and Family Services Act*, S.N.S. 1990, c. 5
Divorce Act, R.S.C. 1995, c.3

Summary: The parties’ Corollary Relief Order following their 2009 divorce provided for joint decision-making, primary care with the mother, and specified parenting time for the father. Subsequent court orders altered some of the provisions of the original CRO, while other orders resolved contempt, disclosure, and assessment motions. In 2019, the mother applied for sole decision-making and a reduction in the father’s parenting time.

Shortly after the mother’s application, the Minister filed a protection application. The children were found in need of protection based on a substantial risk of emotional abuse. At the disposition hearing, remedial services were ordered to be undertaken by the mother, father, and children. Litigation guardians were also appointed for the children. The parties and the children participated in remedial services, although the father did not fully engage or complete therapy.

Ultimately, the final protection review and parenting variation application were heard together in September 2020.

Issues: Material change in circumstances; limitations on the father’s parenting time; decision-making; termination of the child protection proceeding.

Result: The court found that the mother had proven a material change in circumstances because of child protection concerns and their impact on the children’s emotional security, neither of which were known nor contemplated at the time of the last order.

The court rejected the father’s contention that the protection proceeding was a farce brought about by inexperienced and biased social workers who were supported by biased and unethical service providers. The court rejected the father’s contention that female protection workers and female service providers were biased because of their gender. The court rejected the father’s contention that his estranged relationship was a result of the mother’s alienating conduct.

The court found that the mother proved that parenting restrictions were in the children's best interests because the father did not resolve the protection concerns and because the children expressed their wish to limit contact with the father. The father's world view and personality caused the father to be resistant to change. The father externalized the process by blaming others; he refused to acknowledge his negative conduct and its impact on the children. The father's lack of insight was problematic. Further, the children were mature, insightful, and intelligent. Their wishes were to be respected. The father's parenting time was ordered to be at the discretion of the children.

The court found that the mother proved that it was in the best interests of the children that she be granted sole decision-making on all matters affecting the children, including international travel. Joint custody was not workable in the face of the parental conflict and the father's abusive communication.

Because the mother successfully addressed the protection concerns, the court terminated the child protection proceeding given the protective measures adopted by the court in the variation application.

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FAMILY DIVISION

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Judge: The Honourable Justice Theresa Forgeron
Heard: September 1, 2 and 22, 2020 in Halifax, Nova Scotia
Decision: November 17, 2020
Counsel: Peter McVey, Q.C., counsel for the Minister of Community
Services
Margo Fulmer, counsel for the mother, KM
SH, the father, appearing self-represented
Kelsey Hudson, counsel for the *Guardian ad litem*, Susan Sly for
the child, EH
Hannah Rubenstein, counsel for the *Guardian ad litem*, Beth
Archibald for the child, BH

By the Court:

Introduction

[1] The father, SH, and the mother, KM, are the parents of two children. The son, EH, will soon be 15 years old while the daughter, BH, will be 13. For many years, the mother and father were enmeshed in an escalating parenting conflict which showed no signs of abatement. Not unexpectedly, the children suffered.

[2] Because of the high conflict parenting dynamic, the Department of Community Services intervened. The Minister was concerned about the emotional well-being of the children. The Minister's protection concerns were proven; a detailed plan of care implemented. The Minister states that the children and the mother fully co-operated with the service providers, while the father was not as engaged. The Minister states that the protection application can now be terminated based on the mother's progress and her proposed parenting plan.

[3] For her part, the mother states that the current joint custody order should be varied in the children's best interests. She seeks sole decision-making and primary care of the children. In addition, she wants the father's parenting time to take place in the presence of other people and to be based on the children's wishes.

[4] The children were represented by their litigation guardians. Both litigation guardians support the position of the Minister and mother. The children want to determine all details of their father's contact with them.

[5] The father strongly disagrees. The father states that the mother alienated the children against him. The father states that the children are at a substantial risk of abuse in the care of the mother. The father states that the current joint custody order must be enforced or the children placed in his care to ensure that his fractured relationship with the children is repaired.

[6] Further, the father states that the child protection proceeding should be terminated because it was nothing but a farce since its inception. The father states that the Minister conducted a faulty investigation by failing to examine his documented concerns surrounding the mother's mental health and her physical abuse of him. The father also states that the Minister erroneously relied on the mother's version of events, even though the mother lied. In addition, the father states that the Minister is biased against him and relied on professionals who never

saw him interact with his children. He is convinced that the service providers supported the Minister because they are financially connected with the Department of Community Services.

[7] Ordinarily, a child protection proceeding is determined before a variation application. Because the Minister's position is premised on the success of the mother's parenting plan, I will not do so in this case. Instead, I will examine the legal positions of the parties, next the merits of the mother's variation application, and finally the termination of the child protection application.

Issues

[8] In this decision, I will answer the following questions:

- What is the position of each of the parties?
- Did the mother prove a material change in circumstances?
- Did the mother prove that restrictions should be placed on the father's parenting time?
- Did the mother prove that she should have sole decision-making authority?
- Should the child protection proceeding be terminated?

[9] Before addressing these issues, I will provide background information to provide context.

Background Information

[10] The father and mother married in July 2005. Their son was born about four months later in November 2005 and their daughter two years later in November 2007. The parental relationship was unstable. The father and mother separated in 2006 and divorced on August 12, 2009.

[11] The 2009 Corollary Relief Order delineated the parenting plan. It was based on joint decision-making, with the mother having primary care and the father specified parenting time. The CRO was short-lived. Since that time, the following court orders issued in the divorce proceeding:

- A 2010 order which varied several provisions, including granting the mother final decision-making on matters involving health and school choice.

- A 2011 order denying the father's contempt motion and granting costs to the mother.
- A 2014 order and an amended order which varied child support.
- A 2016 order mandating a custody/access assessment with a psychological component.
- A 2017 order denying the production of the mother's medical records with Dr. Hudec or any other psychiatrist with whom the mother consulted.
- A 2017 order specifying Christmas parenting time.
- A 2017 order which clarified the father's parenting time while maintaining the mother's primary care status.
- A 2018 contempt order against the mother for wrongfully denying the father parenting time. The mother was also ordered to pay costs to the father. The father was ordered to attend an IWK parenting program; the children were ordered to attend counselling. Both parties were directed to provide their consent to enable the children to attend counselling.
- A 2019 contempt order against the father for communicating negative or derogatory comments about the mother. The father was also ordered to pay costs to the mother.
- A 2019 order for the commission of a Voice of the Child Report.

[12] In January 2019, the mother filed an application to vary the parenting provisions of the 2017 court order. The mother was seeking sole decision-making and a reduction in the father's parenting time. On May 29, 2020, the mother filed an amended variation application to address travel and child support issues.

[13] In April 2019, the Minister filed a protection application. Throughout the protection proceedings, the children remained in the care of the mother, but subject to the supervision of the Minister. The father's parenting time was based on terms and conditions approved by the Minister, and typically occurred in the presence of a case aide or family member.

[14] Interim protection orders were granted on April 15, 2019 and May 8, 2019.

[15] On June 20, 2019, the children were found in need of protection with the usual reservation of rights respecting evidence and grounds. The protection

finding was based on a substantial risk of emotional abuse as found in s. 22(2)(g) of the *Children and Family Services Act*, SNS 1990, c. 5. The protection finding was not contested. The protection finding was not appealed. The protection finding was entered by O'Neil, ACJ.

[16] The disposition hearing was contested. Evidence was led on September 10 and 11, 2019. My oral decision was rendered on October 10, 2019. The oral decision was later reduced to writing and is reported at *Nova Scotia (Community Services) v. KM*, 2019 NSSC 312. The disposition order mandated a number of remedial services to be undertaken by the mother, father, and children. The disposition order was not appealed.

[17] Orders appointing litigation guardians also issued. The first order was granted after a contested hearing. The father objected to the appointment of Susan Sly as the son's litigation guardian based on alleged gender bias and because of Ms. Sly's past association with the agency. By written endorsement, *Nova Scotia (Community Services) v. KM*, 2019 NSSC 152, and subsequent order dated May 15, 2019, I confirmed Ms. Sly's appointment as *guardian ad litem*. Further, on January 30, 2020, Beth Archibald was appointed to be the daughter's *guardian ad litem*.

[18] Uncontested review hearings were held on December 6, 2019, March 4, 2020, April 24, 2020, and July 17, 2020.

[19] The protection proceeding was nearing the end of its legislative timeline. Unfortunately, the parties did not agree on the terms of a final order. A contested hearing was once again scheduled. The final review was heard in conjunction with the *Divorce Act*, R.S.C. 1995, c. 3, variation application under the sequence provisions of *Rule 37.03*. Consolidation was not appropriate because the Minister did not seek party status in the variation application. Further, the portion of the variation application dealing with maintenance was severed and assigned another court date.

[20] The final protection review and the parenting variation application were heard on September 1, 2, and 22, 2020. Thirteen witnesses testified: social worker Alyson Boyce; counsellor Nick Cardone; counsellor Danielle Trottier; counsellor Natalie Hache; psychiatrist Dr. Risk Kronfli; counsellor Wayne Hollett; social worker Nicole Slaunwhite; *guardian ad litem* Beth Archibald; *guardian ad litem* Susan Sly; the mother, case aide Michael Buchan; the father, and the paternal

grandfather. At the conclusion of the hearing, each of the parties provided their submissions.

Analysis

[21] **What is the position of each of the parties?**

The Minister's Position

[22] The Minister notes that at this stage the only remedies available are to terminate the proceedings or to place the children into the Minister's permanent care: *N.J.H. v. Nova Scotia (Minister of Community Services)*, 2006 NSCA 20, para 20. As there is insufficient evidence to justify a permanent care order, the Minister asks that the protection application be terminated in favour of a parenting order that will place the children in the primary care of the mother with parenting time to the father based on the children's wishes. The Minister states that child protection concerns were successfully addressed by the mother.

[23] The Minister's position is based on factors which include the following:

- The Minister offered services to the parents and children as set out in the disposition order. Ms. Boyce and Ms. Slaunwhite were the protection workers who coordinated services and met with the parties.
- The mother successfully completed services through the Family Support Program and with her counsellor Danielle Trottier. The mother made significant gains and insight into the presenting protection concerns.
- The father successfully completed the Family Support Program. The father did not complete required individual therapy. The father was initially resistant to therapy. Because of his resistance and other circumstances, the Minister obtained an order to have the father assessed by psychiatrist, Dr. Kronfli. Although concluding that the father does not have a personality disorder, Dr. Kronfli nevertheless confirmed that the father presented with dysfunctional personality traits and may benefit from cognitive behavioral therapy.
- The Minister found a counsellor, Wayne Hollett, who was compatible with the father. It was hoped that the father would learn skills to be less reactive and to respond to others without agitation, irritation, anger, and

hostility. It was hoped that the father would gain insight and assume ownership of his role in the protection concerns. The therapy was not concluded by the time of trial. The father did not successfully address the protection concerns.

- The son worked with his counsellor, Nick Cardone, who confirmed that counselling was no longer necessary. Nick Cardone described the son's disconnectedness from the father and provided insight into the son's capacity to make decisions about ongoing access with the father.
- The daughter successfully worked with her counsellor, Natalie Hache, to process her experiences and recognize their impact on her social and emotional development. Ms. Hache offered insight into the daughter's experience, her perceptions, her growing resilience and sense of self-worth, and her concerns about an ongoing relationship with the father.
- The children's litigation guardian each recommended that the father's parenting time should be based on the children's wishes.

The Mother's Position

[24] The mother states that it is in the children's best interests to remain in her primary care with the children deciding the parameters of the father's parenting time. The mother relies on the following to support her position:

- She successfully completed therapy and the Family Support Program as directed. The father did not. The father's progress, if any, was limited and insufficient to address child protection concerns.
- The court found that the children were in need of protection because of a substantial risk of emotional abuse. The court found that the father was so consumed by the conflict that he was unable to parent in a healthy fashion and was unable to focus on the children's needs. The court found that the father acted in an inappropriate and damaging fashion by negatively portraying the mother, belittling and taunting the son, withholding affection, and yelling at the children. The court found that the children were directly impacted and unable to cope with the father's negative parenting and criticisms.

- The father lacks insight. His views of the child protection concerns and issues relating to the children are simplistic and external to himself. He did not assume responsibility for his actions.
- The children consistently express their wish to limit their interaction with the father because of the father's conduct. The father's conduct caused the children to experience fear and anxiety. The children do not want to be alone with the father. The children are mature and were not influenced. Their wishes should be respected.
- The risk of emotional harm outweighs the benefits of forcing the children to have contact with their father against their wishes.

The Father's Position

[25] Although supporting the termination of the child protection proceeding, the father strenuously objects to the mother's variation application. He states that the mother did not prove a material change in circumstances. The father asked that either the current order be enforced or that the children be placed in his care. The father urged the court to adopt the following statements:

- The mother is not credible.
- There is a substantial risk that the mother will physically abuse the son because the son resembles the father, the son is no longer "cute and cuddly", and the mother has untreated mental health disorders. The mother will no longer draw on her "maternal instincts". The son is in danger from the mother.
- The mother physically abused the father during their relationship.
- The mother is responsible for the children's alienation.
- The mother reported false allegations about his parenting to protection authorities because she was not succeeding in her efforts to vary the parenting provisions of the court order. The mother was also found in contempt. The mother was beginning to run out of options and therefore launched a different strategy with the Minister of Community Services.
- The mother's false allegations were generally investigated and dismissed until inexperienced and biased social workers became involved. These social workers inappropriately targeted him.

- The false allegations do not support a protection finding. For example, the father's decision not to allow the children to eat chocolate bars and drink pop between meals can hardly constitute emotional abuse. Yet inexperienced and overweight social workers mischaracterized his parenting as such.
- He did not appreciate the significance of the protection finding. Further, the court was wrong when it rendered its decision at the conclusion of the contested disposition hearing. The children were not and are not in need of protection in his care.
- The service providers are biased in favour of the Minister because the majority of their professional earnings is derived from the Department of Community Services. Further, some of the service providers show gender bias.
- The mother's false narrative was re-enforced by the children's counsellors. The father's conduct was taken out of context and discussed in a negative light, thus increasing the children's fears and anxiety and further diminishing his parental relationship.
- His relationship will improve once the child protection proceeding is dismissed and the current order is enforced. Once the children have unrestricted parenting time, the parent child relationship will be repaired.

The Son's Position

[26] The son, through his litigation guardian Susan Sly, supports the position of the Minister and mother. Ms. Sly states that the son is a calm, mature, responsible, intelligent, and thoughtful teenager. His wishes and preferences were consistent and clear. The son does not want to visit his father without another adult present. The son does not want to attend overnight visits. The son wants visits to occur based on his wishes. The son plans to continue to attend Sunday dinners at the paternal grandparents where his father also attends. Provided he consents, the son may attend other activities with the father if other adults are present, such as golfing with his father and grandfather.

[27] The son engaged in a significant period of counselling. The son gained insight and tools to process the trauma that he experienced. The son no longer wishes to participate in counselling. Rather, the son wants to enjoy his life as an ordinary teenager would.

[28] Further, the litigation guardian does not recommend joint counselling with the father without the son's consent.

The Daughter's Position

[29] The daughter, through her litigation guardian Beth Archibald, supports the position of the mother and the Minister. Ms. Archibald described the daughter as intelligent, mature, sensitive, and caring. She states that the daughter's stress and anxiety decreased after participating in counselling and after her wishes were respected.

[30] The litigation guardian wants the father's parenting time to be subject to the daughter's wishes. The daughter does not want to visit the father without another adult present. The daughter does not want to have overnight visits. The daughter wants to continue to visit the father at the Sunday dinners held at the paternal grandparents.

[31] Further, the litigation guardian does not support joint counselling with the father unless the daughter consents.

[32] **Did the mother prove a material change in circumstances?**

Position of the Parties

[33] The mother offers the following factors in support of a material change:

- The deterioration in the stability of the relationship and attachment between the children and their father.
- The *de facto* reduction in the parenting time being exercised by the father.
- The children's wishes.
- The involvement of the Minister of Community Services.
- The court finding that the children were in need of protection.

[34] The father states that the mother did not prove a material change in circumstances. The father states that the mother used the child protection system to gain a tactical advantage and to thwart the current parenting order.

Legislation and Case Law

[35] Section 17 of the *Divorce Act* provides authority to vary parenting orders if a material change in circumstance is proven. The Supreme Court of Canada discussed the test to apply in two cases. In *Willick v. Willick*, [1994] 3 S.C.R. 670, para 20, the court held that a material change is one that "... if known at the time, would likely have resulted in different terms."

[36] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the court described the material change test at paras. 12 and 13 as follows:

- 12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
- 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

Decision on Material Change

[37] The mother proved a material change in circumstances as mandated in s.17(5) of the *Divorce Act* for four reasons. First, the high conflict parenting dispute that existed at the time of the last order increased in intensity. So much so, that the state intervened, and a protection finding was entered which held that the children were at a substantial risk of emotional abuse. The protection finding confirmed that the father's ability to meet the children's needs was seriously eroded. The protection finding also recognized that the children's needs drastically changed since the last court order.

[38] Second, the protection finding confirmed that the children were materially and negatively affected by the existing parenting arrangement. The children experienced clinical issues. The daughter and son both exhibited signs of distress, worry, and anxiety. The daughter and son were ordered to participate in therapy.

The daughter continues to participate in therapy. The daughter was more sensitive and less resilient than the brother.

[39] Third, the children consistently express their wish to limit contact with the father because of the stress, anxiety and difficulties they encountered when they visited their father, especially when these visits were conducted outside the presence of another adult. The son and daughter are bright, articulate, and sensitive. Their wishes were provided in a thoughtful fashion free from influence or manipulation. The children's wish to restrict contact with the father was not made impulsively. Their wish was based on a need to limit their exposure to the father's negative comments and conduct.

[40] Fourth, the initiation of child protection proceedings was not foreseen nor was it reasonably contemplated at the time of the last court order. Had the protection finding been known, a different court order would have issued.

Rejection of Father's Claims

[41] In finding a material change in circumstances, I specifically reject the father's claims for the following six reasons. First, the Minister's investigation and conclusions were not erroneous because some of the social workers had limited employment history with the agency or because of gender bias. The court ultimately reached the same conclusion as did the Minister during the 2019 contested disposition hearing as reported at para. 29 of *Nova Scotia (Community Services) v. KM, supra*, wherein I stated that the Minister proved a substantial risk of emotional abuse. Salient findings from para 29 of my decision are reproduced as follows:

- The father and the mother are embroiled in a high conflict, polarizing and protracted parenting dispute. The father is convinced that the mother is alienating the children from him. The father is convinced that the mother is trying to sabotage his relationship with the children.
- The father is consumed by the conflict. He views all that occurs from this lens. The father is so consumed by the conflict that he is unable to parent in an objective and healthy fashion. He is unable to focus on the needs of the children. The children's best interests have fallen victim to the demands of the parental conflict.
- The father's disconcerting text messages to the son are emblematic of his inability to prioritize his children's interest. These texts were a brutal assault against the children's mother. There was no apology. There was no remorse. These texts are examples of how poorly the father is functioning as a parent. He is often angry,

anxious and stressed because of the parenting dispute. These emotions significantly cloud his judgement.

- The father feels betrayed by the children, the courts and the protection workers. The father perseverates on the mother's conduct. The father is angry, upset and frustrated. The father is blind to the children's needs. The father believes that holding the mother in contempt is the solution to resolve the serious issues confronting the children.
- Because of his beliefs, the father acted in an inappropriate and damaging fashion. He attempted to draw the children into the dispute by negatively portraying the mother. He belittled and taunted the son. The father is frequently angry and upset. He withholds affection. He yells at the children. The children were often anxious, stressed and upset in the father's care. The children did not know how to cope. In making these findings, I accept the statements of the children as relayed to Mr. Gillis, Ms. Blaikie, Ms. Boyce and Ms. Sly.
- The father's conduct, viewed objectively, confirms that there is a substantial risk that the children will suffer emotional abuse. The father's conduct will likely seriously interfere with the children's healthy development, emotional functioning and attachment to others.
- There is a substantial risk that by calling the son demeaning names, and by making unsettling, pejorative and cruel comments to the children about their mother, that the children will feel rejected, isolated, deprived of affection, humiliated and hurt. The children's self-esteem was negatively affected, eroded and undermined by the father's inappropriate parenting and by his angry presentation.
- Subjectively, the evidence confirms that the children are not able to cope with their father's negative parenting and his criticisms. They feel rejected. Their attachment to their father is negatively impaired. The children's experience of their father's parenting in the face of growing hostilities proves that they are at a substantial risk of emotional abuse because their healthy development and emotional functioning are being negatively affected and their attachment to their father, a key figure in their life, is in jeopardy of being destroyed.

[42] Second, the father was wrong when he suggested that the Minister's investigation was faulty because the Minister did not obtain disclosure from a psychiatrist who the mother saw before the birth of the son – about 15 years ago. That dated information was not relevant. Indeed, the father was previously unsuccessful in his bid to obtain disclosure of those records. In 2017, Beaton, J., as she then was, refused to grant the requested disclosure order. Justice Beaton's decision was not appealed.

[43] Third, the father was wrong when he suggested that the Minister's investigation and involvement were solely based on the mother's referrals. To the contrary, the Minister reviewed the father's e-mails which contained aggressive

and abusive language. Social workers and counsellors interviewed the children to learn their perspective. Social workers also interacted with the father and observed his emotional deregulation, his anger, and his inability to assume responsibility for any of the serious protection and parenting concerns.

[44] Fourth, service providers were not biased because they are women. The suggestion that women are incapable of acting professionally, ethically, and competently because they are female has no foundation in law or fact.

[45] Fifth, service providers were not biased because the providers receive referrals from and are paid through the Department of Community Services. There is no credible evidence to suggest that these specialists intentionally or unintentionally disregard their professional and ethical responsibilities by misrepresenting or distorting the facts.

[46] Sixth, there is no risk, substantial or otherwise, that the mother will physically or emotionally abuse either child. The suggestion that the mother will abuse the son because the son is no longer “cute or cuddly” or because he looks like the father is based on speculation not grounded in the evidence.

Summary

[47] The mother proved a material change in the circumstances. The children were found to be in need of protection because of a substantial risk of emotional abuse. This risk was not contemplated at the time of the last court order. The protection risk negatively impacts the children and the father’s ability to meet the needs of the children.

[48] **Did the mother prove that restrictions should be placed on the father’s parenting time?**

Position of the Parties

[49] The mother wants the father’s parenting time to be in the presence of another adult and to be at the discretion of the children. The mother notes that the father did not successfully complete therapy as previously ordered in the child protection proceeding. Because the protection concerns have not been successfully addressed, the mother states that it is in the children’s best interests to restrict the father’s parenting.

[50] In contrast, the father states that his parenting time should not be restricted or determined by the children. The father objects to all suggested restrictions. The father invokes the maximum contact principle.

Law

[51] Courts are directed to apply specific principles when determining whether parenting time restrictions should be imposed as follows:

- The best interests test is the only test; parental preferences and rights play no role: *Young v. Young*, [1993] 4 S.C.R. 3, para. 202.
- The mandatory, maximum contact principle is premised on the fact that contact with each parent is ordinarily seen as valuable. This principle, however, is modified by the best interests test. The goal of maximum contact is therefore not absolute: *Young v. Young*, *supra*, para. 204.
- Risk of harm to the child is not a condition precedent for limitations on access; the ultimate determination is the child's best interests, although risk of harm may be a relevant factor: *Young v. Young*, *supra*, para. 209.
- Where suggested restrictions affect the quality of access, the court should consider whether the offending conduct poses a risk of harm to the child that outweighs the benefits of a free and open relationship: *Young v. Young*, *supra*, para. 210.
- Courts are hesitant to deny all access. Parental contact is seen as desirable. A complete denial of access is ordered infrequently, where parental conduct is extreme, and where access would place the child at risk of emotional or physical harm or where access is not in the child's best interests: *Doncaster v. Field*, 2014 NSCA 39, para. 55.
- The burden is on the parent seeking access restrictions to prove that the restrictions are in the child's best interests: *Slawter v. Bellefontaine*, 2012 NSCA 48, para. 20.
- Supervised access is seldom seen as an indefinite order or long-term solution, although in rare circumstances it may be appropriate: *Slawter v. Bellefontaine*, *supra*, paras. 44 – 48.

[52] In *Slawter v. Bellefontaine*, *supra*, at para. 47, Beveridge, J.A, reviewed some of the circumstances during which supervised access is an appropriate solution, and these include the following:

- Where the child requires protection from physical, sexual, or emotional abuse.
- Where the child is being introduced/reintroduced after a significant absence.
- Where there are substance abuse issues.
- Where there are clinical issues involving the access parent.

Decision

[53] I find that it is in the children's best interests to place restrictions on the father's parenting time essentially for two reasons. First, the father did not resolve the protection concerns. As a result, the children remain at substantial risk of emotional abuse in the unsupervised care of the father. Second, the children continue to express their wish to control the contact that they have with their father. I will now comprehensively examine each of these reasons.

Unresolved Protection Concerns

[54] At the time of disposition, the father was given an oral and written decision which highlighted the protection concerns and the remedial services required of him. Throughout the decision, the father's lack of insight was identified as an underlying factor in the father's resistance to change. At para 29 of *Nova Scotia (Community Services) v. KM, supra*, I stated in part as follows:

The father has not consented to participate in services for his parenting deficits because he does not yet recognize that his parenting is placing his children at risk. Hopefully, this decision will provide him with an opportunity for insight. With insight, services can be put into place to remedy the protection concerns and to foster a healthy father/child relationship.

[55] Unfortunately, the father did not take advantage of the time and services offered. The father's insight did not improve with time. The father stagnated. The father continued to externalize the cause of the protection concerns by steadfastly blaming the mother, the Minister, social workers, and service providers. The father refused to assume responsibility for his conduct. As a result, the father did not make the necessary changes to ameliorate the protection concerns. Examples to support this conclusion, include the following:

- The father belittling agency lawyers, social workers, and service providers as being unintelligent¹, biased, and unethical.
- The father's unrelenting focus on the perceived mental health issues of the mother arising from the mother's contact with a psychiatrist about 15 years ago before the son was born.
- The father's inability to appreciate the emotional turmoil that the children experienced because of his conduct.
- The father minimizing the protection issues as being his refusal to allow the children to consume junk food.

[56] The father's lack of insight is a product of his unbending world view and personality. I agree with Dr. Kronfli's assessment² when he summarized his psychiatric opinion as including the following:

- The father "presents as a self-righteous individual who routinely discounts the validity of the opinions of the professionals, who have been consulted by the Agency, especially when the reports contain any negative information."
- The father's "volatile actions have demonstrated that he is highly reactive to external circumstances."
- The father presents as "a cynical individual that views himself as a critical person" and who "perceives his environment in a black and white way."
- Although the father does not have a psychiatric illness, there is a "clear disconnect between how he feels and how he is perceived by others."
- Individuals who have the father's personality traits "may have difficulty controlling their emotions and display seemingly irrational behaviors including passive-aggressive tendencies, and their dysfunctional interactions often cause relationship problems."

¹ Even going so far as attaching a website article citing unnamed "university data experts" ranking various university majors for intelligence as found in exhibit 7.

² Exhibit 1, Tab 18, Psychiatric Assessment.

[57] Given his world view and personality, the father did not meaningfully participate in services. Although the father completed programming with the Family Support Worker, he did not successfully participate in individual therapy with the following stated objectives as found in para 40 of *Nova Scotia (Community Services) v. KM, supra*:

[40] Further, the father must participate in intensive therapy, preferably with a psychologist, with the following stated goals:

- To acquire skills to manage anger, resentment and frustration in a healthy fashion.
- To acquire skills to improve communication with the children.
- To acquire knowledge on child development in preteens and teenagers.
- To gain insight into the direct and indirect harm that children experience when exposed to parental conflict.
- To acquire skills to protect the children from the parental conflict.
- To acquire knowledge about attachment, self-care and nutrition.
- To acquire skills related to positive and appropriate discipline.
- To acquire skills to better understand the children's feelings and emotions.

[58] In June 2020, the father began his work with clinician Wayne Hollett. The father did not disdain this particular social worker. Therapy began in a somewhat positive fashion and appeared to be moving forward until the father was confronted with an access issue that was not resolved to his liking. Mr. Hollett concisely and correctly framed the dilemma in his report as follows:

While [the father] has seemingly gained further insights and understanding into how his reactions and verbalization affect his children and his relationships with them, and while [the father] has taken a number of initiatives to establish a more favourable and respectful paternal milieu; the reality is that it is extremely difficult to quickly modify entrenched emotional reactions and behavioural responses involving a propensity to react and respond to personal threat with agitation, irritation, anger, and hostile verbalization. And while his daughter [B] reportedly has recently noted what is perceived to be a positive change in her father, a recent access incident in a restaurant appears to confirm the hypothesis that regressions are to be expected in the challenging journey toward perceptual, emotional and behavioural personality change.

[59] Although the father loves the children, and is highly motivated to enjoy a positive and healthy relationship with them, the father did not make the permanent changes required to address the protection concerns. I therefore find that the father will continue to respond in an entrenched, reactive, volatile, and defensive manner when he feels threatened. As a result, a substantial risk of emotional abuse continues to be a pressing and troubling protection risk when the children are in the care of their father.

Children's Wishes

[60] The children's wishes were communicated through the professional voices of their therapists and litigation guardians. As reviewed in my earlier decision, particularly at para 29, the children were deeply impacted by the father's negative parenting. As a result, the children were ordered to participate in therapy. The son's therapist was Nick Cardone; the daughter's therapist is Natalie Hache. The son's therapy is concluded³, while the daughter's therapy is ongoing.

[61] In addition, the children were each appointed litigation guardians. Susan Sly was the son's litigation guardian; Beth Archibald was the daughter's litigation guardian. The litigation guardians met with the children over a series of months to establish rapport and to obtain their independent views.

[62] I accept the evidence of Mr. Cardone, Ms. Hache, Ms. Sly, and Ms. Archibald. Based on the evidence, I find that the son is a mature, thoughtful, insightful, and capable teenager. He is not belligerent. He does not engage in antisocial behavior. He is measured. The son's decision was not made impulsively or reactively. The son's decision was not reached because of alienation or manipulation. Rather, the son's decision was reached in response to the prolonged negative parenting of the father.

[63] Similarly, I also find the daughter to be mature, thoughtful and insightful, although she is less resilient and less confident than the son. The daughter is more vulnerable than the son. The daughter is neither belligerent nor engaged in antisocial behaviour. Further, the daughter did not make her decision impulsively or reactively. The daughter's decision was reached in response to the father's negative parenting. It is a protective decision.

³ Although Mr. Cardone stated that further therapy would eventually help the son process issues arising from the estrangement, Mr. Cardone acknowledged that it was not, at present, the appropriate time to do so.

Summary on Parenting Restrictions

[64] In summary, the mother proved that restrictions should be placed on the father's parenting time with the children. The father did not resolve the protection concerns. As a result, the children remain at substantial risk of emotional abuse in the unsupervised care of the father. Further, the children's wishes should be respected. Each of the children expressed a wish to limit contact with the father so that they are not alone with him, do not spend overnights with him, and have control over the terms of the contact. The children are thoughtful, mature, and insightful.

[65] In the circumstances, I order that the father's parenting time be at the discretion of each of the children. The impact of the father's negative parenting outweighs the benefits of a free and open relationship. The children do not want to be alone with the father. Parenting time will thus be in the presence of another adult. Typically, the father does not react negatively while in the presence of other adults, such as the grandparents. Giving the children discretion is in their best interests because it allows for contact with the father in a manner that shields the children from their father's damaging conduct.

[66] I also accept that joint counselling between the father and each of the children must be contingent on their agreement to participate. At present, joint counselling would not be effective because of the father's lack of insight. If at some future point, the father achieves insight and joint counselling is recommended, then the children will participate if they consent.

[67] **Did the mother prove that she should have sole decision-making authority?**

[68] The mother seeks sole decision-making, including on matters related to travel within Canada and internationally and without the consent of the father. The mother is concerned that the father misuses the joint custody provisions of the court order to create conflict and to attempt to control her and the children.

[69] The father disagrees. He believes that the children benefit from his involvement. He states that as a parent, he should be able to participate in all decisions concerning the children. He does not trust the mother's judgement.

[70] Where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that such a situation will change,

joint custody is ordinarily not appropriate: *Roy v. Roy*, [2006] CarswellOnt 2898 (Ont. C.A.). This lack of effective communication, however, must be balanced against the realistic expectation, based on the evidence, that communication between the parties will improve once the litigation concludes. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: *Godfrey-Smith v. Godfrey-Smith* (1997), 165 N.S.R. (2d) 245 (N.S.S.C.).

[71] The parties are embroiled in a long standing parenting dispute that negatively impacts the children. The parties do not communicate in a healthy and child-focused fashion. There is little chance that communication will improve. I therefore find that it is in the best interests of the children for the mother to have sole decision-making authority on all matters involving the children, for the following reasons:

- The father does not communicate respectfully. He degraded the mother and was verbally abusive to her in his written communication.
- The parties cannot communicate effectively. As an example, there was considerable delay and conflict surrounding international travel for the children in conjunction with the extracurricular activities.
- The mother is child focused and can be entrusted to make decisions in the best interests of the children. The father is not. The father uses the joint custody provisions of the current order to further the conflict and to seek control.

[72] It is in the best interests of the children to de-escalate the conflict and to have decision-making that is child-focused. The mother is granted sole decision-making authority. The mother is also required to provide the father with monthly updates confirming important matters affecting the children's health, education, travel, and general welfare. Such communication will be by email and is contingent on the father providing his email address and communicating respectfully to the mother. If the father is not respectful, the mother's obligation to provide updates is vacated.

[73] In addition, the father is entitled to communicate respectfully with and seek information from the professionals involved with the children, including educators,

doctors, mental health professionals, and coaches without the further authorization of the mother.

[74] Finally, the mother may apply for the children's passports and the children may travel, including internationally, without the consent of the father.

[75] **Should the child protection proceeding be terminated?**

[76] The legislative time lines in the child protection proceeding are concluded. I must either grant a permanent care order or terminate the proceedings. There is no middle ground.

[77] The mother, as primary care parent, successfully addressed the protection concerns. The father did not. Given the protective measures reached in this decision concerning the father's parenting time, the child protection proceeding is, however, appropriately terminated.

Conclusion

[78] The mother's application to vary is granted. The mother proved a material change in the circumstances because of the identified protection concerns and their impact on the children's emotional security.

[79] Further, the mother proved that parenting restrictions were in the children's best interests because the father did not successfully reduce the protection concerns and because the children, who are mature, thoughtful and insightful, consistently express their wish to limit contact with the father. The parenting restrictions will not prevent contact between the father and the children, but rather, the restrictions will shield the children from the damaging effects of the father's negative parenting. The father's parenting will be at the discretion of the children, who will continue to attend the Sunday dinners at the home of the paternal grandparents.

[80] Finally, the mother proved that it was in the best interests of the children to grant her sole decision-making on all matters affecting the children, including those associated with their health, education, general welfare and travel. The mother's obligation to keep the father informed of important matters is contingent on the father communicating in a respectful manner.

[81] The child protection proceeding will terminate given the protective measures adopted by this decision.

[82] Ms. Fulmer will draft the variation and travel orders. Mr. McVey will draft the termination order.

[83] Requests for costs, if any, are to be filed by November 30, 2020 and responses filed by December 15, 2020.

Forgeron, J.