SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *NK v. RE*, 2021 NSSC 13

Date: 2021-01-15
Docket: SFHPSA No. 114042
Registry: Halifax

Between:

NK

Applicant

v.

RE

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	January 14, 2021, in Halifax, Nova Scotia
Oral Decision:	January 15, 2021
Written Release:	January 18, 2021
Counsel:	Catherine Torraville, counsel for the Applicant, NK RE, appearing self-represented

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.

By the Court:

Introduction

[1] This decision concerns four-year-old R, a vulnerable and impressionable young child. RE is the child's father; NK is the child's mother. Although both parents love the child, they cannot agree on what parenting arrangements are in his best interests. The mother is worried about the impact of family violence. In contrast, the father says violence is not a relevant issue.

[2] In addition, the parties cannot agree on the amount of child support that the father should pay. The father says that he lost his licence and job and therefore has no ability to pay support. For her part, the mother wants income imputed to the father.

[3] Yesterday, I heard evidence from both parents, the maternal grandfather, and the long-term protection worker employed with the Department of Community Services. After hearing the evidence and the parties' submissions, I adjourned until today to give my decision.

Issues

[4] In my decision, I will answer the following four questions:

- Does violence remain an outstanding obstacle?
- Should the father's parenting time be supervised?
- What is the appropriate decision-making order?
- What is the appropriate child support order?

Analysis

[5] Does violence remain an outstanding obstacle?

Position of the Parties

[6] The father states that violence is no longer a relevant issue for the following reasons:

- It is wrong to concentrate on the past. He wants to look to the future.

- He was not violent towards the mother, except on one occasion, the details of which were taken out of context and were greatly exaggerated by the mother.
- He is now able to regulate his emotions. He no longer becomes uncontrollably angry. The father attributes his former emotional dysregulation to his loss of relationship with the mother, his job loss, his drinking, and his thyroid imbalance. He states that he is no longer angry with the mother; he has moved on. He is no longer upset about losing his job. His drinking is under control as he attends AA. His thyroid condition is managed with medication. And finally, he said that he completed the New Start program. As a result, the father says that he no longer experiences anger or emotional dysregulation.

[7] Further, the father noted that his positive behavioural changes were evident during the hearing. He did not escalate when he did not agree with what was being said. He also noted that that even the mother stated that their last written communication was civil.

[8] In contrast, the mother does not share the father's account or optimism. She is concerned about the father's lack of insight and progress, together with his failure to provide proof of program attendance or successful completion. The mother is concerned about the impact of violence on the child. She wants to protect the child from the father's violence and emotional dysregulation.

Legislation and Law

[9] Violence is a significant factor when determining parenting issues under the *Parenting and Support Act* as confirmed by the following:

- Section 2(da) provides an expansive definition of violence, which includes abuse or intimidation, physical or sexual abuse, forced confinement, coercive and controlling behaviour, intimidation, harassment, threats, stalking, and damaging property.
- Section 18(6)(j) directs the court to consider the impact family violence has on the ability of the violent parent to meet their child's needs and on the ability of parents to co-operate.
- Section 18(7) requires the court to consider the nature, recency, and frequency of the violence; the harm caused to the child; and the steps undertaken to prevent future violence.

- Section 18(8) requires the court to consider family violence when creating parenting plans in the child's best interests.

[10] Even before this legislation was enacted, appeal and trial courts recognized the link between violence and parenting. For example, in ***Doncaster v. Field***, 2014 NSCA 39, the Court of Appeal affirmed the trial decision to deny access where access would place children at risk of emotional or physical harm, or where access was otherwise not in the children's best interests. The evidence confirmed that the father caused physical and emotional harm to the children when he reacted in a violent and unpredictable fashion. The father lacked insight.

[11] Further, in ***Werner v. Werner***, 2013 NSCA 6, the Court of Appeal refused to disturb a trial judge's decision to deny access because the father violently assaulted his wife and engaged in psychologically abusive and controlling behavior. The court also noted that the denial could be reviewed after the father completed an assessment and counselling.

[12] Similarly, in ***M.A. v. A.A.***, 1993 NSCA 205, the Court of Appeal restored the Family Court's decision terminating the father's access where the father was found to be a domineering, selfish, argumentative, and cruel man, who was both unpredictable and uncontrollable. His lifestyle was at odds with his parental responsibilities.

[13] Other examples of decisions in which violence impacted parenting decisions include, ***S.L.J. v. K.B***., 2019 NSSC 268; ***K.M. v. K.M.G.,*** 2018 NSSC 159; ***D.S. v. R.T.S***., 2017 NSSC 155, ***Peters v. Reginato***, 2016 NSSC 345, and ***Vaculik v. Vaculik***, 2015 NSSC 202.

[14] In addition, I disagree with the father when he suggests that past conduct is not relevant. I am permitted to examine past conduct. In ***D.(S.A.) v. Nova Scotia (Minister of Community Services)***, 2014 NSCA 77, para. 82, a child protection case, Fichaud, JA held that although "[t]here is no legal principle that history is destiny", past conduct is relevant as it may signal "the expectation of future risk".

Decision on Violence

[15] I find that violence is a significant issue in the father's life. The father was consistently physically, emotionally, and verbally abusive to and harassing of the mother. He hit her. He pushed her. He confined her. He yelled, cursed, and called her vulgar and humiliating names. He destroyed the mother's property. He harassed and stalked her. In so finding, I accept the evidence of the mother,

grandfather, and social worker. I do not accept the evidence of the father; he was not a credible witness.

[16] I further find that the father was verbally abusive and harassing to employees of the Department of Community Services. He regularly yelled and used profanity when they attempted to engage him in a case plan. He harassed them. He attempted to intimidate them.

[17] Past violence, though relevant, does not necessarily determine current status. Most people have the capacity to effect positive and permanent lifestyle changes, even in the face of significant historical deficits. I must therefore examine the evidence to determine if, on a balance of probabilities, the father incorporated permanent lifestyle changes to ensure that violence is no longer an issue.

[18] I find that violence continues to be a pressing issue which impacts the father's parenting for the following reasons:

- The father lacks insight into the extent of his problem. He consistently minimized his criminal conduct and blamed the mother for exaggerating and focusing on the past.
- The father neither recognizes the negative impact that his conduct has on his ability to parent nor the risks to the child. The father is seemingly oblivious to these obvious concerns.
- The father shows little genuine remorse for his past conduct.
- The father provided no credible evidence that he undertook and successfully completed anger management training, addiction treatment, and ADHD services as directed in the October 2019 interim order.
- The father did not successfully resolve his addiction issues. At one point he stated that he stopped drinking. At another point, he stated that he reduced his alcohol intake. The father should not drink alcohol because his violent tendencies increase when he uses alcohol.

[19] In summary, violence was and remains a critical concern. The father quickly escalates without warning and with no apparent triggers. He is volatile and unpredictable. He is physically, verbally, and emotionally abusive. He regularly curses and uses profanity. He attempts to intimidate and control. He destroys property. He lacks insight and remorse. Violence impacts the parenting plan that is in the child's best interests.

[20] Should the father's parenting time be supervised?

Position of the Parties

[21] The mother seeks restrictions on the father's parenting time because of issues related to violence and substance abuse. The mother also notes that the Department of Community Services will file a child protection application in the event she allows the father to exercise unsupervised parenting with the child.

[22] The father disagrees with the mother's submissions. He states that there is no valid reason to impose supervision. He further states that he will never participate in the Veith House supervised access program.

Legislation and Law

[23] Courts are directed to apply specific principles when deciding whether restrictions should be imposed. The legislative principles that I considered were previously reviewed. In addition, the following caselaw principles also apply:

- The burden is on the parent seeking restrictions to prove that restrictions are in the child's best interests: ***Slawter v. Bellefontaine***, 2021 NSCA 48, para. 20.
- The best interests test is the only test; parental preferences and rights play no role: ***Young v. Young***, [1993] S.C.J. No. 112, para. 202.
- The maximum contact principle is modified by the child's best interests. 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; the ultimate determination is the child's best interests, although risk of harm maybe 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.
- A complete denial of access is ordered infrequently, such as where parental conduct is extreme, and where contact would place the child at risk of emotional or physical harm or where contact is not in the child's best interests: ***Doncaster v. Field,*** *supra*, para. 55.

- Supervised contact is seldom seen as an indefinite or long-term solution, although in rare circumstances it may be appropriate: ***Slawter v. Bellefontaine***, *supra*, paras. 44 – 48.
- Circumstances where supervision is appropriate include where the child requires protection from physical, sexual or emotional abuse; where the child is being introduced/reintroduced after a significant absence; and where there are substance abuse or clinical issues: ***Slawter v. Bellefontaine***, *supra*, at para. 47.

Decision on Supervision

[24] I find it is in the child's best interests to place restrictions on the father's parenting time for the following reasons:

- The father has a lengthy history of emotional dysregulation and violence. The father is volatile, unpredictable, and violent.
- The father lacks insight into his problems. He assumes little responsibility for his conduct.
- The father does not respect court orders. Despite the interim order forbidding unsupervised contact, the father regularly sought, at times successfully, to have unsupervised access with his son.
- The father did not make permanent lifestyle changes to address his violent approach and criminal lifestyle.
- The father failed to meaningfully engage in services.
- The father has not successfully managed his addiction issues. He recently was jailed for about a month for an alcohol related offence, which he blamed on the police.

[25] These findings confirm that the father's conduct poses a substantial risk of physical and emotional harm that outweighs any potential benefit arising from a free and open relationship. The father's lifestyle is not what is expected of a loving and nurturing father.

[26] In such circumstances, the following restrictions are in the child's best interests:

- All contact between the father and the child must be supervised either through a professional program such as Veith House or by a person

approved by the mother. The father must not be under the influence of alcohol or drugs before or during access.

- The terms and conditions of the father's parenting time will be as stated by the mother.
- The paternal grandmother is not permitted to supervise because she did not follow the interim order. She permitted unsupervised contact. She did not notify the mother of the unsupervised contact.
- The father must participate and successfully complete an intensive individual program on family violence, with a trained therapist or counsellor. The father must gain insight into what violence entails and how violence negatively affects his son. The father must assume responsibility for his own conduct. The father must learn skills to develop healthy relationships and to manage his anger in a nonviolent fashion.

[27] Before making an application to vary these parenting restrictions, the father must show that he effected permanent lifestyle changes by completing the programming and by not engaging in any further criminal activity.

What is the appropriate decision-making order?

[28] I must now determine issues surrounding decision-making recognizing that the child is placed in the mother's primary care and residence because of violence, and because the mother meets the child's health, educational and social welfare needs.

[29] The mother seeks sole decision-making. The mother does not want to communicate with the father.

[30] The father seeks joint decision-making and joint communication. He states that the mother doesn't always recognize her children's needs. He states that his input is in the child's best interests.

[31] I grant the mother sole decision-making authority in all matters impacting on the child including the child's residence, health, education, and general welfare. The mother is not required to consult with the father about any decisions that she makes.

[32] The mother is not required to communicate with the father about the child. The father is, however, authorized to communicate with professionals involved

with the child, such as teachers and medical professionals. Other important information about the child can be conveyed between the paternal grandmother and the maternal grandfather if they consent.

[33] Further, the mother is permitted to apply for the child's passport, and any renewal, without the father's consent or authorization. The mother is permitted to travel for vacation with the child within Canada or internationally without the consent or authorization of the father.

[34] This ruling is granted for two reasons. The first reason is based on violence. Given the nature, recency, and extent of the violence, it is not safe to force communication between the parties. The second reason concerns parenting capacity. The mother has the capacity to parent and make child-focused decisions. The father does not yet possess these skills.

What is the appropriate child support order?

[35] During the course of the hearing, it was learned that the father lost his drivers licence and thus his job as a trucker. The father says no child support should be ordered because he has no income. In contrast, the mother seeks to impute income to the father.

[36] Section 19 (1) (a) of the *Federal Child Support Guidelines* provides me with the discretionary authority to impute income if the payor is under-employed provided the under-employment does not arise because of the needs of a child or the payor's reasonable educational or health needs. In conducting my analysis, I applied the law as reviewed in **Smith v. Helppi**, 2011 NSCA 65 and ***Parsons v. Parsons***, 2012 NSSC 239. In Nova Scotia, the test to be applied when determining whether a person is intentionally under-employed is reasonableness, which does not require proof of a specific intention to undermine or avoid a support obligation.

[37] My analysis follows a three-part format. First, I must determine if the father is underemployed. I find that the mother proved that he was. The father worked in the past. In 2018, the only year for which disclosure was provided, the father earned $38,342. The father says that he currently has no income. He is thus under-employed.

[38] Second, I must determine if the father's under-employment arises because of the needs of a child or because of the father's reasonable educational or health needs. The father's unemployment does not arise because of the needs of a child or because of his reasonable health or educational needs. Indeed, the father

proffered no evidence to suggest any of these reasons were associated with his unemployment. The father is not working because he lost his licence, and he is not looking for work.

[39] Finally, I must determine the quantum of income to be imputed based on rational and logical reasons. A party cannot avoid support obligations by a self-induced reduction in income or a refusal to look for work. The father has a legal duty to support his young son.

[40] In the circumstances, the mother proved that an annual income of $25,000 should be imputed, considering the realty of the father's loss of his driver's license. The father is capable of earning an income in at least a minimum wage job. Such a finding is in keeping with the evidence and the principles espoused in case law.

[41] Child support is due according to the terms of the interim order until December 2020. As of December 1, 2020, child support is payable at a rate of $190 per month and continuing on the first day of every month thereafter. The usual MEP and disclosure provisions will continue to apply. The mother's request to register the order with the Recalculation Program is granted, subject to the caveat that child support will be based on the father's actual income or $25,000, whichever is the greater.

Conclusion

[42] Because of concerns surrounding the father's emotional dysregulation, volatile temper, unpredictability, and violence, the mother is granted sole decision-making and primary care of the child. The father's parenting time must be supervised until he successfully completes programming and effects permanent lifestyle changes. Further, income is imputed to the father based on $25,0000 per annum for child support purposes.

[43] Ms. Torraville is to draft and circulate the order.

Forgeron, J.