

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *TM v. CV*, 2021 NSSC 82

Date: 2021-03-09

Docket: SFH No. 1201-071808

Registry: Halifax

Between:

TM

Petitioner

v.

CV

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: November 27, 2020, in Halifax, Nova Scotia

**Written
Submissions:** December 8, 9 and 15, 2020, and February 9 and 10, 2021.

Counsel: Peter Crowther, counsel for the Petitioner, TM
Meaghan Johnston, counsel for the Respondent, CV

By the Court:

Introduction

[1] This high conflict divorce involves the wife, TM, and the husband CV, together with their three children who are between the ages of eight and 15. Despite the intensity of the conflict, the parties ultimately reached agreement on all but four issues - communication, transportation during parenting exchanges, children's medical insurance, and the mortgage penalty.

[2] For her part, the wife states that she is afraid of the husband because he was violent. Because he was violent, and to facilitate joint custody consultation, the wife proposes that the husband retain a lawyer to communicate with her on his behalf. In addition, she wants the husband to pay for a professional service to transport the children when the parenting exchanges do not occur at school.

[3] In relation to the monetary issues, the wife wants the husband to be solely responsible for the cost of the children's health coverage on his medical plan. She also wants the husband to pay the mortgage penalty fee.

[4] In contrast, the husband denies being violent. He states that the wife's allegations are strategically made to boost her litigation demands. He states that they should communicate through a Parenting App and that he should not be required to hire a professional service to transport the children when exchanges occur other than at school.

[5] In respect of the monetary issues, the husband states that he contributes to the cost of the wife's health plan as part of the s.7 expense payment. He does not want to add the children to his plan because there is no direct billing. He wants to avoid nonessential communication with the wife because of her propensity to have him charged. In addition, he wants the wife to assume any fees associated with a mortgage penalty given the sizable unequal division of assets in her favour.

Issues

[6] The four issues which I am to decide are as follows:

- Should the husband be required to communicate through counsel on all parenting-related matters?

- Should the husband be required to arrange and pay for a mutually agreed upon professional to transport the children for parenting exchanges that do not occur at the school?
- Should the husband, at his own expense, be required to name the children on his employment health plan?
- Who should pay the cost of any mortgage penalty that arises when the home is refinanced?

Background

[7] The parties were married on September 29, 2002. For the most part, the husband was employed in the accounting field while the wife was a stay-at-home mother. The parties' children were born in 2005, 2007, and 2012.

[8] The marriage was not a happy one; separation took place in 2018. Initially, the children lived primarily with the wife until the summer of 2020 when the oldest child began to live with both parties in a shared parenting arrangement.

[9] The oldest child is diagnosed with serious neurodevelopment disorders. These disorders affect the child's communication, anger management, and mental health. The child experienced significant difficulties both at home and at school. At times, the wife called the police for protection against the child. In addition, the child has been hospitalized. The child accesses treatment through the IWK. Parental involvement is critical to the child's successful treatment.

[10] The divorce action was started by the wife filing a Petition for Divorce on March 29, 2019. The husband filed an Answer on June 18, 2019. On May 31, 2019, the wife filed a motion seeking interim custody, child support, spousal support, exclusive possession of the home, and an order preventing the children from being removed outside HRM. The motion was resolved by a consent order dated July 9, 2019.

[11] Currently, both the wife and the husband live in Dartmouth, about a five minute drive from each other. The wife continues to live in the matrimonial home. The husband continues to be employed as an accountant. The wife now teaches writing at an educational facility.

[12] Settlement negotiations were not fruitful. Therefore, a trial was scheduled for three days on November 25, 26, and 27, 2020. Subsequently, the parties

advised that settlement was reached on all but four issues. Counsel were confident that the remaining issues could be determined with a half day appearance.

[13] The divorce trial was held on the morning of November 27, 2020 with each of the parties testifying. No other witnesses were called. Because the matter was not concluded within the allotted time, it was agreed that final submissions would be written.

[14] The written submissions were filed on December 8 and 9, 2020. In addition, each party sought to provide additional evidence and further submissions for my consideration on December 15, 2020 and February 9 and 10, 2021. As there were no motions filed and no consent, I will not consider any additional facts conveyed through counsel's post-trial correspondence.

Analysis

[15] **Should the husband be required to communicate through counsel on all parenting-related matters?**

Position of the Wife

[16] The wife states that during the marriage, the husband was violent towards her. She says that the intimate partner violence included physical, sexual, and emotional violence as well as coercive controlling behavior. She says that the husband continues to intimidate and control; he is unpredictable and impulsive. The wife states that she fears the husband.

[17] Additionally, the wife notes that there are two criminal matters before the Provincial Court. She states that there is one Peace Bond and two Undertakings prohibiting direct or indirect contact. Communication is permitted only through counsel.

[18] The wife wants to continue to use a Parenting App to communicate with the husband. However, she wants the husband to continue to use his lawyer to communicate with her. She submits that parenting communication was successfully facilitated using this practice since March 5, 2020.

Position of the Husband

[19] Except for an incident in 2016 when he had a mental health break-down, the husband denies that he was ever violent to the wife either physically, emotionally,

or sexually. He denies coercive controlling behaviour. The husband states that the only incident of violence was in 2016 when he grabbed the wife by the shirt after which he was hospitalized for three weeks for much needed mental health treatment. He notes that the police did not charge him in 2016 even though they investigated at the time.

[20] The husband states that the wife's complaints to the police are all strategic. He offers the following in support:

- On March 1, 2020, he changed the structure of the mortgage payment so he could ensure that the mortgage was paid. On March 4, 2020, the wife applied for an EPO based on an allegation of harassment and assault. On March 5, he was charged with assault arising from the 2016 mental health incident.
- On June 5, 2020, the wife reported to Victim Services that he was in breach because he asked one of the children where the wife worked. The husband was not charged.
- On June 12, 2020, he entered into a peace bond. The husband said he agreed to a peace bond because he did not want to spend the time and resources on a trial about an incident that happened four years earlier when he experienced a mental health breakdown. The husband states that the peace bond permits incidental contact in relation to the children.
- The wife tried to have him charged with breach of the peace bond on July 29 and August 1, 2020. No charges were laid.
- On September 13, 2020, the husband was charged with breach of the peace bond because he attended the IWK for his son's appointment on August 11, 2020. The husband states that he did not communicate with the wife during the appointment. This charge remains outstanding.
- On October 9, 2020, the parties reached agreement in principle on all contested divorce issues, including joint custody.
- On October 28, 2020, the husband was charged with sexual assault and assault against the wife which the wife alleges to have occurred in 2018. The husband understands that the wife now states that the husband sexually assaulted her over 800 times during the marriage. The husband vehemently denies the charges.

[21] The husband does not want to hire a lawyer to communicate with the wife on his behalf. He states that such a proposition is not practical for two reasons. First, he will have to pay a lawyer. Second, the lawyer may not always be available.

[22] Although the husband is deeply concerned about false allegations, he recognizes that some communication is necessary, especially given their oldest child's medical conditions. The husband believes that the Parenting App is the appropriate means of communication provided that the communication is child-focused and respectful.

Decision on Communication Issue

[23] In any parenting decision, I am mandated to focus on the children's best interests. Family violence is a significant consideration when assessing best interests. Many cases specifically address the impact of family violence when parenting arrangements are being determined, such as: *Doncaster v. Field*, 2014 NSCA 39; *Werner v. Werner*, 2013 NSCA 6; *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S. C.A.); *SLJ v KB*, 2019 NSSC 268; *NK v RE*, 2021 NSSC 13; *DS v RTS*, 2017 NSSC 155; *Desrosiers v Pastuck*, 2016 NSSC 308; and *Peters v Reginato*, 2016 NSSC 345. Often when violence is found, parenting restrictions are ordered, such as sole decision-making, supervised access, or access suspension.

[24] Is violence a relevant issue in this case? Two points are notable. First, despite the serious allegations, the parties consented to an order of joint custody. The parties, who are represented by capable and experienced counsel, agreed that they would consult one another about major decisions affecting the children's lives and that they would share decision-making. Joint custody was not court imposed.

[25] Second, the parties were assigned three days to have this matter heard and determined. Without prompting, both parties asked to relinquish all but a half day of trial time. The parties opted to have the matter heard in two hours. It is impossible for me to determine credibility based on the limited evidence. The parties' direct evidence was presented through affidavits drafted by their counsel. Cross-examination was minimal.

[26] I am unable to conclude whether the husband was violent with the wife other than in 2016 when he experienced a mental health crisis for which he was hospitalized for three weeks. I am not satisfied on a balance of probabilities that other violence occurred. I do not know what occurred.

[27] Despite the allegations of violence, the parties must nevertheless have a means to communicate about the children. They agreed it was in the children's best interests to do so. I concur given the children's needs, especially given the oldest child's complex medical and social challenges.

[28] A reasonable communication plan must be ordered. I find that it is not reasonable to require the husband to retain a lawyer to communicate with the wife. Not only is such a requirement costly, but it would prevent communication during times when the husband's lawyer was not available, such as when she was in court, assisting other clients, ill, on vacation, or attending to her own life.

[29] The Parenting App is the reasonable solution. I therefore order that the parties communicate in a respectful and child-focused manner about the children via a Parenting App as coordinated through counsel. Obviously, nothing in my decision impacts any other order that has or may issue through the Provincial Court or any other court of competent jurisdiction.

[30] Should the husband be required to arrange and pay for a mutually agreed upon professional to transport the children for parenting exchanges that do not occur at the school?

Position of the Parties

[31] The wife wants the husband to retain a professional service for the following reasons:

- She is afraid of the husband because he is violent and impulsive.
- There are Provincial Court orders restricting contact.
- She does not feel comfortable having strangers transport the children.
- She is concerned that the husband will move out of HRM and she will be responsible for costly travel expenses for the children.
- In the past, the husband used the children to coordinate transportation which is neither safe nor appropriate.
- The husband's criminal conduct caused the restrictions; he should be responsible for any additional costs arising from his actions.
- The husband has a greater financial ability to pay for a professional transport service than does she.

[32] In contrast, the husband states that the parties agreed that each parent will have day-to-day decision-making when the children are in their care. Each parent is thus tasked with ensuring appropriate transportation when the parenting exchanges do not occur at school.

Decision

[33] I must determine what transportation requirements are in the children's best interests given their needs and circumstances, the parties' circumstances, and the provisions of the consent CRO. In this case, the parties consented to a joint custody order which authorizes each parent to make day-to-day decisions for the children who are in their care.

[34] I find that in the event parenting exchanges do not occur at school, the husband will be responsible for arranging transportation of the children to the wife's care at the conclusion of his parenting time while the wife will be responsible for arranging transportation of the children to the husband's care at the beginning of the husband's parenting time. Each parent will be responsible for making appropriate arrangements. Each parent must acquire their own booster seats for the children in keeping with provincial transportation laws.

[35] A professional transportation service is not ordered, although there is nothing preventing either party from doing so. Further, nothing in my order impacts any other order that has or may issue through the Provincial Court or any other court of competent jurisdiction.

[36] Finally, this order is based on both parents living in HRM. Should either party move, this provision is subject to variation based on a material change in the circumstances.

[37] **Should the husband, at his own expense, be required to name the children on his employment health plan?**

Position of the Parties

[38] The wife wants each party to name the children, at their own expense, on any employment health insurance that is available to them through their employment. She says health coverage is important given the children's needs. She notes that one of the children will soon likely require braces.

[39] The husband states that the issue of s.7 expenses was resolved when the wife accepted his offer. The wife agreed that the husband would pay \$270 each month for s.7 expenses. In the wife's Statement of Special Extraordinary Expenses, she provided an estimate of the cost of health insurance for the children. This cost was therefore anticipated and accepted as part of the husband's contribution to the s.7 extraordinary expenses.

[40] In addition, the husband wants to avoid the potential for more conflict and false allegations. He states that his health plan does not allow for direct billing. After incurring the expense, the wife would have to forward the receipt to the husband who in turn would forward it to the plan administrator. The plan administrator would reimburse the husband who would then have to communicate with the wife. The husband wants to avoid unnecessary contact with the wife.

Decision

[41] Each party should list the children on their respective medical plans. Pursuant to s. 7, the parties must prorate the cost that each party incurs by including the children on their medical plan.

[42] The husband will not be required to forward particulars of the health plan or reimbursement of expenses to the wife unless he is permitted to do so by any existing Provincial Court order.

[43] **Who should pay the cost of any mortgage penalty that arises when refinancing the home?**

Position of the Parties

[44] The wife wants the husband to pay for any penalty that she incurs in having the home transferred into her name for the following reasons:

- After separation, and without consulting her, the husband renewed the mortgage on June 23, 2020. The husband had a legal obligation to consult with her pursuant to clause 4 of the mortgage renewal agreement. He blatantly ignored this provision. Instead, the husband unilaterally selected a 60-month adjustable rate which includes a penalty. There was no penalty under the previous mortgage.
- The husband earns significantly more than she does and can better afford to pay the penalty.

[45] The husband disagrees. He states that the wife received a sizeable unequal division of property in her favour. Not only did the husband agree that the wife could retain the equity in the home, but he also agreed to transfer his entire LIRA to her without equalization. At the end of the day, the husband has over \$55,000 in matrimonial debt while the wife has over \$39,000 in net matrimonial assets. The estimated cost of the mortgage penalty is \$1,175. This is a debt which the wife should pay given the division of assets.

Decision

[46] The *Matrimonial Property Act*, R.S.N.S., c. 275, does not define matrimonial or family debt. Section 13(b) the *Act* authorizes the court to consider "the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred" as part of an unequal division claim. Despite the lack of statutory clarity, courts routinely consider debt when equalizing the division of matrimonial property. To include a post separation debt, the court must be satisfied that the debt was incurred to either meet basic living expenses or to preserve a matrimonial asset. The overall consideration is reasonableness.

[47] I find that the penalty was incurred to preserve the matrimonial home because the mortgage needed to be renewed. The husband should have consulted with the wife. He did not. The wife, however, received an unequal division of the assets in her favour. In these circumstances, I order that the penalty be equally divided between the parties.

Conclusion

[48] In addition to the granting of the parties' divorce, and approval of the settlement reached, the following orders are confirmed:

- The husband does not have to retain a lawyer to communicate with the wife on his behalf. Rather, communication will be through a Parenting App. Communication must be respectful and child focused.
- In the event parenting exchanges do not occur at the school, the husband is to make arrangements to transport the children to the wife's care at the conclusion of his parenting time, while the wife is to make arrangements to transport the children to the husband's care at the commencement of his parenting time. Professional service providers are not required.

- The parties will prorate the cost that each incurs by having the children included as a beneficiary of any employment medical plan that is available to them. The husband is not obligated to forward particulars of the health plan or reimbursement of expenses to the wife unless he is not prevented from doing so by court order.
- The parties will equally share in the cost of the mortgage penalty that is incurred when the wife refinances to have the husband removed from the mortgage.

[49] If the parties wish to make costs submissions, they should do so within two weeks.

Forgeron, J.