

SUPREME COURT OF NOVA SCOTIA

FAMILY DIVISION

Citation: *LL v. KS*, 2021 NSSC 84

Date: 2021-03-04

Docket: SFHPSA No. 112768

Registry: Halifax

Between:

LL

Applicant

v.

KS

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: February 22, 23 and 24, 2021 and March 4, 2021, in Halifax,
Nova Scotia

Oral Decision: March 4, 2021

Written Decision: March 11, 2021

Counsel: Ashley Dutcher, counsel for the Applicant, LL
Danika Beaulieu, counsel for the Respondent, KS

By the Court:

Introduction

[1] This decision will resolve parenting and child support issues involving 10-year-old E and seven-year-old J who are the much-loved children of the mother, LL and the father, KS. Although both parties support a joint custody order, the mother wants to be a primary care parent while the father seeks a shared parenting arrangement. The mother also seeks retroactive and prospective child support; the father suggests that he pay the set-off amount.

[2] The mother does not believe that a shared parenting arrangement is in the children's best interests for three reasons. First, she says that the children have flourished in her primary care and will continue to do so. The mother thinks that the *status quo* is in the children's best interests. Second, she says that she and the father do not communicate well; there is conflict in their communication. She states that the conflict is exacerbated because she was emotionally abused by the father. Shared parenting will aggravate the communication conflict. Third, she notes that the father's proposed changes will not result in him having additional quality time with the children. Instead, the mother wants the father to continue to parent the children according to the current schedule. The mother states that there is no principled reason to alter the current parenting schedule which has worked well.

[3] The mother also seeks retroactive and prospective child support. The mother believes that her request for child support led the father to apply for a shared parenting regime. She is concerned about the sincerity of the father's motivation. She believes that the father's request is an attempt to avoid paying the table amount of child support.

[4] In contrast, the father seeks a shared parenting arrangement. His position is primarily grounded on three factors. First, he relies on the parental capacity assessment of psychologist, Olga Komissarova who recommended a joint and shared parenting arrangement. Second, he relies on the wishes of the children. E and J want to spend more time with him. Third, he believes that the children will prosper in the joint and shared custody of both of their parents.

[5] In addition, the father denies an improper motive. He states that he initially agreed to a primary care model of parenting because the children were young and because he was involved in a toxic relationship. He notes that the children's needs

changed over time and that his toxic relationship ended. Further, the father confirmed that he attended counselling; he believes he is in a better position personally to share parenting of the children.

[6] Finally, although recognizing an obligation to pay some retroactive child support, the father states that he lacks an ability to pay the amount sought by the mother. Prospectively, he proposes a set-off payment.

Issues

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

- Is it in the best interests of the children to be placed in the primary care of the mother or in the shared parenting of both parents?
- What parenting plan is in the best interests of the children?
- What is the appropriate child support order?

Background Information

[8] The parties dated in high school and later reconnected. They were in an on-and-off relationship between 2009 until March 2014. Two children were born during their relationship – a daughter, E in 2010 and a son, J in 2013.

[9] After separation, the children lived primarily with the mother while the father had regular parenting time. Usually, the father exercised parenting time on every second weekend and every Tuesday and every Friday evening. The parties made additional arrangements during the holidays and for vacations and special occasions when the father requested extra time with the children.

[10] Although this parenting schedule was consistent for years, there was no written agreement or court order confirming the schedule. The parties were flexible and seemingly content with the *de facto* parenting arrangement and schedule. Neither party applied to the court to obtain an order.

[11] After separation, the parties moved on with their personal lives. The mother started dating and then cohabiting with her partner, NB and her children - seven-year-old twins L and E.

[12] For his part, the father formed a relationship with CC. Their almost four year relationship was not healthy. They eventually separated in the spring of 2018.

[13] Following their separation, the father sought counselling. He engaged in counselling from May 2018 until October 2019 during which time various topics were addressed including anger management; communication; boundaries and limit-setting; the reduction of the impact of unhelpful thoughts; identification and use of core values as a guide for behaviour; self-esteem; and supportive counselling for difficult experiences.

[14] In the spring of 2019, the father began a relationship with his current girlfriend, TC, although they do not live together. The father advises this relationship is healthy and happy. TC has two daughter, K who is 15 years old and Ka who is 12 years old.

[15] The mother and her partner live in their home in Dartmouth while the father lives in his home, near extended family, in Head of Chezzetcook. Depending on traffic, it is a 30 minute drive between the parties' homes.

[16] The children attend school in Dartmouth. Both parties want the children to continue to attend this school. Both parties are pleased with the quality of the education at the children's school.

[17] The mother currently works from home and earns about \$41,700 per year. The father works at a municipal utility and earns about \$59,600 per year.

[18] On December 21, 2018, the mother applied for a parenting and child support order. On May 1, 2019, the father filed a Response. The matter proceeded to trial after settlement efforts failed.

[19] A trial was held before me on February 22, 23 and 24, 2021. At the outset of the hearing, I confirmed that I would not consider the inadmissible hearsay statements that were in the filed affidavits. During the trial, I had the benefit of hearing from each party, psychologist Olga Komissarova, CC, Anna Webster, AP, NB, KC, and DS. I also had the benefit of reviewing the oral and extensive written submissions filed by counsel on behalf of the parties.

[20] The decision was adjourned to Thursday, March 4, 2021.

Analysis

[21] **Is it in the best interests of the children to be placed in the primary care of the mother or in the shared parenting of both parents?**

Position of the Mother

[22] The mother submits that it is in the best interests of the children to remain in her primary care. She is adamant that a shared parenting regime is contrary to the children's best interests. The mother relies on various reasons to support her position, including the following:

- The *status quo* should be respected because it worked. The children have excelled in her primary care and will continue to do so. She is the parent who traditionally and skillfully cared for the children's basic needs, including most of the children's educational, medical, social, and day-to-day needs. This is not the time to experiment with the children's welfare. The children should continue in her primary care.
- The father's proposed parenting plan will not result in him having more quality time with the children. The father proposes two more overnights per week on Tuesdays and Fridays. Given the children's bedtime, there is no meaningful benefit in extending the evenings to overnights. To the contrary, the children will simply be rushed the next morning.
- The father has not acted as a primary care parent and is not capable of ensuring that the children's routine, sleep patterns, homework, and morning schedule are accomplished. The father is not a morning person and barely gets himself ready for work in the morning. The mother states that the father is not a competent parent.
- The father lives a significant distance from her home and the children's school. The children will not benefit from the added morning rush to arrive at school punctually.
- The father does not always assign priority to the children's needs. At times, the children were exposed to violence in the father's care. At times, the father is unable to understand the children's emotional needs. At times, the father lacks patience and yells at the children, especially J. At times, the father is oblivious to the children's needs. The mother says the evidence confirms these statements. For example, the father was angry with J because J was incontinent. The father does not always change J's clothing after having accidents. Further, the father forgets J's medication and he must be reminded of appointments.
- The children, especially J, require structure and routine. Transitions can be difficult. A change in the parenting schedule will likely cause stress and anxiety in J.

- The parties lack the ability to communicate in a respectful and co-operative fashion. Conflict exists between the parties. The mother states that the father was emotionally and verbally abusive to her in the past. Further, she states that the father does not always respond to her texts, or provides a delayed response, or provides a defensive and vague response.
- The father's motivation for seeking a shared parenting arrangement is financial. Simply put, the father does not want to pay the table amount of child support. His shared parenting application was not filed until after the mother applied for child support.

[23] In addition, the mother disputes the recommendations of the parental capacity assessor. The mother notes many inaccuracies within the report which she says speaks to poor quality preparation and outcome. The mother states that given these errors, the report lacks a proper analytical framework. It cannot be relied upon.

[24] The mother further notes that Ms. Komissarova's reports were not followed in other cases such as *Doncaster v. Field*, 2013 NSSC 85; *Nova Scotia (Minister of Community Services) v SM*, 2016 NSFC 3; and *Nova Scotia (Minister of Community Services) v DB*, 2016 NSFC 4.

[25] In summary, the mother states that it is in the children's best interests to continue in her primary care.

Position of the Father

[26] The father states that it is in the children's best interests to be placed in the joint and shared custody of both parents for reasons which include the following:

- A shared parenting arrangement allows the children to maximize the amount of time that they spend with each parent. The children will benefit from the love, attention, and nurture of both parents.
- A shared parenting arrangement will lessen transitions which the child J finds stressful.
- Both parents are capable parents. Both parents can and do meet the needs of the children.
- The parental capacity assessment recommends a joint and shared parenting arrangement.
- The children want to spend more time with him.

- His employer will allow adjustment to his work schedule so that he can transport the children to school in the morning and attend to their needs during his parenting time.
- He is attuned to the needs of the children. For example, when they were young, he recognized that the children should be in their mother's primary care. The needs of the children have changed over time. They are no longer babies. Shared parenting is in their best interests.
- He believes that shared parenting is best for the children. He is not seeking a shared parenting arrangement because he wants to pay less child support.

[27] Although the father disputes the allegations raised by CC, he recognizes that this relationship was toxic and unhealthy. This relationship ended about three years ago. Since then, the father says he sought out counselling to gain insight and to ensure such a relationship is not repeated.

[28] The father also denies the abuse allegations raised by the mother and her partner. He states that communication has improved significantly since he undertook counselling.

[29] The father states that a joint and shared parenting arrangement is in the children's best interests.

Legislation and Law

[30] All parenting decisions are based on the best interests test as noted in s.18(5) of the *Parenting and Support Act*, 2015, c. 44, s. 2. Abella, JA, as she then was, held that the best interests principle is one which has an inherent indeterminacy and elasticity: *MacGyver v Richards*, (1995) 22 O.R. (3d) 481 (CA) at paras 27 to 29. Factors composing the best interests test are stated in s. 18 (6) of the *Act*, many of which were referenced in the evidence and submissions.

[31] When applying the best interests factors, I must examine the competing parenting plans. In this case, both parties endorsed joint custody as their preferred arrangement. Joint custody refers to decision-making. Children typically benefit from the contributions and perspectives of two motivated and loving parents. Joint custody generally involves co-operation and consultation in the decision-making process. Joint custody generally requires a high level of communication: *Roy v. Roy*, [2006] O.J. No. 1872 (C.A.) and *Godfrey-Smith v. Godfrey-Smith*, (1997) 165 N.S.R. (2d) 245 (S.C.).

[32] In this case, although agreeing on joint custody, the parties disagree as to the parenting schedule. The mother seeks primary care while the father seeks shared parenting. To decide the issue, I must analyze the legislative best interests factors using a balanced and comparative approach: *D.A.M. v. C.J.B.*, 2017 NSCA 91. I will frame my comparative analysis around the factors highlighted by the parties, as follows:

- History of Care
- Parental Communication
- Violence
- Children's Relationship with Parents
- Children's Relationship with Other Family
- Maximum Contact
- Children's Physical Needs
- Children's Emotional Needs
- Children's Medical Needs
- Children's Educational and Social Needs

Decision on Best Interests

[33] I will now review these factors in light of the evidence, law, and submissions before deciding the parenting arrangement that is in the children's best interests.

History of Care

[34] It is undisputed that the mother was the *de facto* primary care parent since the parties separated in 2014. The mother was dedicated and diligent in the exercise of her parental duties. She is an organized, structured, and protective mother.

[35] Although the father was not the primary care parent, he was nonetheless a substantially involved parent who had a consistent and loving relationship with the children. He too provided excellent care to the children. He too was involved in their health, education, and daily lives. He too provided the children with love, attention, and nurture.

[36] The father does not parent in the same manner as the mother. This leads the mother to dismiss the father's parenting abilities. I do not agree with the mother's conclusions. Rather, I agree with the opinion of the assessor, Ms. Komissarova when she stated that the parties are both competent parents and that their parenting differences are complementary.

[37] The children benefit from both styles of parenting. I accept Ms. Komissarova's description of the children's happiness with the father as well as the mother. The children need balance in their life. The mother would benefit from less structure; the father would benefit from more structure. The children benefit from both parental approaches. Both approaches are essential to the children's healthy development.

Parental Communication

[38] The mother expressed concerns about communication while the father did not. The mother says communication is poor. The father disagrees. Ms. Komissarova attributes their divergent views to be a result of expectations. I agree with Ms. Komissarova.

[39] The mother does not want to have a shared parenting arrangement because she believes the *status quo* should be adopted. As a result, the mother is quick to interpret events in a negative light, is quick to exaggerate and to draw negative conclusions that affirm her primary care paradigm. Her partner reinforces the mother's perceptions.

[40] In contrast, the father does not view communication as an issue. He wants a shared parenting regime. As a result, he interprets communication issues in a positive light. He perceives communication to be effective. He did not appreciate the extent of the mother's concerns.

[41] The parties' communication is compromised by several factors including litigation strategy and the perceptions of each of the parties. The current communication issue does not, however, resolve whether the children should be placed in the primary care of the mother or in the shared parenting of both parties for four reasons, as follows:

- The parties chose a joint custody designation thus indicating an intention to consult and co-operate in decision-making.
- Communication is an important but not sole factor that I must consider when assessing best interests.
- The parties love their children and are motivated to ensuring their health and happiness. Both can improve communication expectations and boundaries through counselling. The children deserve no less.

- Shared parenting can also exist where there are communication issues, such as through parallel parenting regimes: *Baker-Warren v. Denault*, 2009 NSSC 59.

Violence

[42] The mother expressed legitimate concerns about violence. The father acknowledged this concern as well.

[43] The *PSA* correctly identifies violence as an important best interests factor that influences the type of parenting arrangement that is adopted. My findings on this issue are as follows:

- The father and the mother had a troubled relationship which ended over six years ago. There was no physical violence, although aggressive words were exchanged at times.
- There was violence in the relationship between the father and CC. This violence produced a toxic environment which was not healthy for either the children or the adults. CC was the aggressor at times. The father was the aggressor at other times. CC's evidence was not completely credible.
- The father eventually recognized the unsuitability of the relationship. The relationship ended.
- The father took steps to ensure that he would not be involved in such a relationship again. He voluntarily engaged in lengthy counselling. He was not compelled to do so by any court.
- The father made permanent lifestyle changes that ensures violence is no longer a factor.

[44] I have no concerns that the children will be exposed to violence in either the home of the mother or in the home of the father.

Children's Relationship with Each Parent

[45] The children have excellent, stable, and loving relationships with each of their parents. Both parents are competent and capable parents. Both parents meet the developmental and emotional needs of the children. Both children have strong attachments to each of their parents. Both children reach out to each of their parents in times of hurt or in times of happiness. Neither party has a negative relationship with the children.

Children's Relationship with Other Family

[46] The children have solid relationships with the extended family of each of the parties. They have loving and supportive relationship with their stepmother and her children. They have loving and supportive relationships with the father's extended family, their cousins, and the father's girlfriend and her daughters.

[47] The children are indeed fortunate to be surrounded by so many people who encourage and support them; who accept and love them; and who provide them with a sense of family. All such relationships are in the children's best interests.

Maximum Contact

[48] The *PSA* references the maximum contact principle in s.18(8). Maximum contact is not absolute but is qualified by the children's best interests. When assessing the benefits of maximum contact, I must assume a holistic and child centric approach to ensure the focus remains on the children and not on the wishes of the parents.

[49] As part of the maximum contact analysis, I will consider the wishes of the children. In this case, the wishes of the children were presented through the neutral and objective lens of the assessor, Ms. Komissarova. Through discussions with the children and by observation, I accept Ms. Komissarova's opinion that the children want to spend more time with their father and that this wish is in the children's best interests.

Children's Physical Needs

[50] Both parents can meet the physical needs of the children. The father lives in Head of Chezzetcook while the mother lives in Dartmouth. The children are safely situated in both homes. The children benefit from both an urban lifestyle with their mother and a rural lifestyle with their father. The children love living in the country where there is more freedom of activity, lots of animals, and family nearby.

[51] In addition, both parties know how to cook, clean, and maintain a healthy and safe environment to ensure that the physical needs of the children are met. They will both adopt a similar parenting routine with morning and night rituals. They will ensure that the children maintain healthy hygiene and sleep practices. The children are properly clothed and cared for in both homes.

[52] I recognize that the father lives about a 30-minute drive from the mother. However, the father works in Dartmouth and can easily drop the children off to school or to their bus stop en route to work. In this case, the distance between homes will not negatively impact the physical needs of the children.

Children's Emotional Needs

[53] The children have healthy emotional attachments to both parents. The children feel comfortable discussing problems with both their mother and father. The children seek comfort and direction from both their mother and father. In addition, the children disclosed similarities about rules, expectations, and discipline in both homes. All descriptions were appropriate and child-focused.

[54] Both parties will continue to meet the emotional needs of the children.

Children's Medical Needs

[55] Although both parties were involved with the children's medical needs, the mother generally assumed the greater role. The father, however, did and can ensure that the children's needs are met. Both parents can and will participate in medical appointments and will follow the reasonable recommendations of the treating professionals.

[56] Despite these comments, I have two concerns. First, the father must take a more proactive approach with J's medication. Second, the mother must be more accepting of the father's involvement. It is troubling that the mother arranged for J to see a psychologist without notifying or consulting the father. The children's best interests are enhanced when both parents are involved.

Children's Educational and Social Needs

[57] Although both parents were active in meeting the children's educational and social needs, the mother assumed a greater role because she was the primary care parent. The father, however, was and is an involved and active parent. Before Covid, he picked the children up on Tuesdays after work, and oversaw the completion of homework at his home. The mother supervised homework on the other days. Since Covid, the children return to the mother's home after school and complete their schoolwork before visiting their father for the evening. Further, the mother, as primary care parent had more hands-on involvement with the school.

[58] Both parents have the children participate in social activities while the children are in their respective care. The mother values organized and structured

activities while the father prefers spontaneous play, outdoor activities, and visiting family and friends. The children benefit from both types of social engagement.

[59] When planning future organized activities for the children, the parties will have to balance the children's interests and educational demands. Further, structured activities must not interfere with a balanced life. The number and type of structured activities must be based on the children's circumstances including the fact that they have two homes, and including their need for unstructured play and relaxation while in the care of both parents.

Conclusion of Parenting Arrangement

[60] I have considered the legislation, case law principles, the evidence, and the extensive written and oral submissions of the parties. After applying a holistic and child-centered focus in keeping with the best interests factors, I find that it is in the best interests of the children to be in the shared parenting of the mother and father.

[61] In summary, both parents are engaged, competent, loving, and nurturing parents who connect emotionally with their children. The children adore their parents. The children have healthy attachments to both parents. The children want to spend more time with their father. Both parents can meet the children's needs. The children are no longer infants. The children's needs changed over the past six years. The children's current needs are best met in a shared parenting arrangement. Primary care is no longer in the children's best interests.

[62] In so finding, I also reject the suggestion that the father applied for shared parenting to evade or reduce his child support responsibilities. Shared parenting is expensive because both parents must acquire and maintain a home, food, clothing, toys, furniture, and supplies for the children. Shared parenting will inevitably cost the father more than the table amount of child support.

What parenting plan is in the best interests of the children?

[63] The following parenting plan is in the best interests of E and J:

Joint Custody: The mother and the father will share joint custody of E born April *, 2010 and J born June *, 2013.

Routine Decisions: Each party will have routine, day-to-day decision-making authority when the children are in their care. Each party will notify the other by email of the following routine decisions made while the children are in their care: particulars of minor illnesses and any medication

that was administered; particulars of assignments for homework, projects, and tests; and particulars relating to significant social welfare matters.

Emergency Decisions: In the event of a medical emergency, the party having physical care of the children will make decisions necessary to alleviate the emergency, and will notify the other party as soon as possible as to the nature of the emergency and emergency treatment.

Significant Decisions: The parties will consult in a meaningful and timely manner about important matters that impact the children's health, education, and general welfare. The parties will strive to reach a consensus on all such decisions and where there is an impasse, then the parties will seek advice from any involved professional, such as a doctor, dentist, teacher, or social worker to assist them in reaching a child-focused consensus.

Communication: The parties will communicate in a respectful and child-focused manner about the children. The parties will acquire a Parenting Communication App to communicate about the children. Except in the case of an urgent situation or an emergency, the Parenting App will be used as the communication tool between the parties.

Counselling: The mother and the father must participate in individual counselling to acquire skills which will aid in effective parenting communication which is child-focused and productive.

Access To Professionals: The mother and the father may communicate with all professionals involved with the children, and to obtain information and documentation about the children from all medical professionals, educators, and all social welfare professionals without the prior consent of the other party.

[64] I must now address the parenting schedule. When crafting the shared parenting schedule, I have considered J's transitional issues. For this reason, I reject the father's shared parenting schedule, although I appreciate why his proposal was put forth. The shared parenting schedule is as follows:

Regular Shared Parenting Schedule: The children will be in the care of the father from 4:15 pm every Wednesday until 4:15 pm every Saturday. The children will be in the care of the mother from 4:15 pm every Saturday until 4:15 pm every Wednesday. The father will arrange transportation for the children on Wednesdays and the mother will arrange transportation for the children on Saturdays. The father is responsible for the care of the children during his parenting time, including arranging childcare for after school or

when the children are ill or when there is no school. The mother is responsible for the care of the children during her parenting time, including arranging childcare for after school or when the children are ill or when there is no school.

Special Occasions and Holidays: The regular schedule will be suspended for special occasions and holidays. I adopt the parties' agreement for holidays, vacations, and special occasions.

Activities: The parties will reach agreement before an organized activity is scheduled during the parenting time of the other party. Both parties must ensure that the children attend birthday parties, school events, and other social events that are scheduled during their respective parenting times.

Flexibility: The parties will be flexible in making *ad hoc* changes to the parenting schedule to accommodate special family functions or other events that are occasionally scheduled during the parenting time of the other and in the best interests of the children.

[65] **What is the appropriate child support order?**

[66] The mother seeks retroactive and prospective child support. The father states that he cannot afford to pay the amount sought.

[67] I find that the father must pay retroactive child support to the mother in the lump sum amount of \$17,862 for the following reasons:

- I accept the calculations provided by the father's counsel as accurate.
- The mother sought support in the table amount.
- The father opted not to pay her the table amount.
- The children needed the child support.
- Although the father will likely experience hardship, the hardship was self-induced. A repayment schedule is appropriate to address hardship issues.

[68] Prospectively, I am only able to issue an interim order because the parties did not provide the evidence that I am required to analyze before calculating child support in a shared parenting arrangement. As such, I order the payment of the set-off amount commencing March 2021.

[69] In addition, I order that the parties proportionally share in the net expense, after deducting for insurance reimbursement or income tax benefit, of any of the

children's medical and dental expenses, employment related childcare expenses, or agreed upon activity expenses.

[70] Finally, the father must pay \$200 per month towards the retroactive maintenance award until it is paid in full.

Conclusion

[71] An order will issue confirming the following:

- A joint and shared parenting arrangement with the children being in the care of the mother from Saturday at 4:15 pm until Wednesday at 4:15 pm, and with the father from Wednesday at 4:15 pm until Saturday at 4:15 pm, together with special provisions for holiday, vacation, and special occasions.
- The interim payment of the set-off amount for child support commencing March 2021 and continuing monthly thereafter until the parties file the necessary evidence to enable a *Cantino* analysis.
- The interim payment of s. 7 expenses based on a prorated distribution.
- The retroactive payment of \$17, 682 due to the mother from the father payable at a rate of \$200 per month commencing March 2021.

[72] Although I will entertain costs submissions, and subject to any settlement offers, it appears that there was mixed success, and this may indeed be a case where the parties should bear their own costs.

[73] Ms. Beaulieu can prepare and circulate the order.

Forgeron, J.