

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *JD v. CB*, 2021 NSSC 345

Date: 2021-12-16

Docket: SFHPSA No. 117658

Registry: Halifax

BETWEEN:

J.D.

Applicant

and

C.B.

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: February 25, February 26, July 30, November 29, December 9, 2021 in Halifax Nova Scotia

Oral Decision: December 9, 2021

Written Decision: December 16, 2021

Counsel: J.D., Applicant, self-represented
Jessie Chisholm, counsel for the Respondent, C.B.

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 two children, a daughter who is 15 and a son who is 9 years old. The daughter and the son are the children of JD, the father, and CB, the mother. The parties disagree on two issues - parenting arrangements and child support.

[2] The parenting issue was the more contentious and fluid of the two issues. Initially, the mother wanted to move to Ontario with the children, while providing the father with parenting time, primarily during the summer and holidays. The father did not agree. He wanted the children to live in Nova Scotia with him.

[3] Recently, the mother abandoned her request to move to Ontario. Instead, she seeks primary care of both children in HRM. In contrast, the father seeks primary care of both children in the New Glasgow area where he lives.

[4] At the outset of the proceeding, both children were in the primary care of the mother. At the conclusion of the hearing, however, the daughter was living with the father while the son continued living with the mother.

[5] The parties' separation was difficult. Conflict and tension were elevated. The conflict eventually led to child protection investigations which were concluded without court action. Communication, however, remains poor; each party views the other in a negative light. The conflict and poor parental communication negatively affected the children.

[6] In addition to disputing the appropriate parenting arrangements, the parties also disagreed on child support. The mother seeks prospective and retroactive child support. Further, the mother was frustrated with the father's lack of disclosure and the insufficient amount of child support he paid.

[7] For his part, although the father agrees to pay child support, he states that he is experiencing financial difficulty because he lost his job for a significant period during the Covid shutdown. He also notes that he shouldered all travel related expenses associated with transporting the children between Halifax and the New Glasgow area.

Issues

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

- Who should have primary care and decision-making?
- What is the appropriate parenting arrangement?

- What is the appropriate child support order?

[9] I must decide these issues by applying the law to the evidence properly before me. The inadmissible hearsay and opinion statements are not evidence and are not considered.

Background Information

[10] The parties were involved in a long term common law relationship between 2002 and 2019. Their children were born in 2006 and 2012. Throughout the relationship, the mother was the primary caregiver while the father was the primary wage earner. The father was also an involved and loving parent.

[11] The parties separated in September 2019. The mother remained in the family home with the children. The father temporarily moved in with an extended family member. The father continued to have daily, liberal parenting time with the children.

[12] Daily contact stopped once an EPO issued. Thereafter, the father usually had parenting time every Thursday evening and every second weekend. The paternal grandmother assisted with the parenting transfers while the EPO was effective.

[13] Soon after separation, the family home was sold. The father wanted to get his own place. He could not afford to pay all the bills associated with two properties. The mother and the children therefore moved to a rental property which meant that the children changed school districts. Unfortunately, the mother and the children moved a second time when the home they were renting was sold.

[14] After moving from the family home, the mother began a long distance relationship with another man, Mr. V. The mother and Mr. V wanted to live together. The mother asked to relocate to Ontario so she could live with Mr. V. The mother felt that she could improve her life and the lives of the children by moving.

[15] The father objected to the move and initiated court proceedings in February 2020.

[16] For his part, the father began a relationship with Ms. R who lived in Salt Springs. They decided to move in together after the father lost his job during the Covid shut down in March 2020. Once the father moved to Salt Springs, he was not able to visit the children as often as he previously had.

[17] On July 2, 2020, an interim consent order was reached confirming joint custody, and a shared summer parenting arrangement, together with a child support

payment of \$343 per month given that the father was in receipt of EI. This order issued in September 2020.

[18] A child's wish assessment on behalf of the daughter was conducted by Maya Sloan. The assessment was received on February 3, 2021. Ms. Sloan advised that the daughter wanted to move to Ontario with her mother.

[19] The contested hearing began on February 25, 2021. Evidence was received from the father, Mr. V, the mother, and the mother's friend, AG. Submissions were provided. The court scheduled an oral decision for the next day, February 26, 2021.

[20] The decision was adjourned because the mother's counsel advised that child protection authorities had opened an investigation. I therefore issued an interim order requiring the parties to participate in therapy and with the hope that the Minister of Community Services would assist given the parties' lack of financial resources. The hearing was adjourned until April 15, 2021 to provide sufficient time for the child protection investigation to conclude.

[21] A court conference was held on April 7 because details surrounding the investigation were still unknown. The April 15th trial date was released and Orders of Production granted.

[22] On May 31, 2021, another court conference was held. It was confirmed that both child protection offices in Halifax and Pictou had concluded their investigations and closed their files. The hearing was therefore rescheduled to the next available date, which was July 30, 2021.

[23] On July 30, 2021, both the mother and the father testified. I scheduled the oral decision for my next available date, which was September 9th.

[24] The oral decision was not rendered on September 9th because child protection authorities were conducting another investigation. The hearing was therefore adjourned until November. By this time, the daughter had moved into her father's home in Salt Springs.

[25] A voice of the child report respecting the son was conducted by Wendy Green and received on November 22, 2021. Ms. Green advised that the son wanted to live primarily with his mother.

[26] The hearing resumed on November 29, 2021. In addition to the parties, the father's girl friend Ms. R and another friend, CM, testified. Final submissions were also reviewed.

[27] The oral decision was given on December 9, 2021.

Analysis

[28] Who should have primary care and decision-making?

Position of the Mother

[29] The mother wants to be designated as the children's primary caregiver. She seeks joint decision-making and in the event of disagreement, she wants the parties to follow the recommendations of any relevant professional.

[30] In support of her quest for primary care, the mother relied on many factors, including the following:

- She was the primary care parent before and after separation.
- The children enjoy a closer relationship with her than with the father.
- She has better parenting skills.
- The daughter's educational, emotional, and mental health needs have suffered since she moved in with the father and Ms. R.
- She is better equipped to meet the educational, medical, emotional, and general welfare needs of the children.
- Both children's wish assessments confirm that the children prefer to live with her as their primary care parent.
- The daughter only moved in with the father because of a disagreement over marijuana use.
- She is willing to facilitate a relationship between the father and the children.
- She successfully completed a myriad of courses to help improve the parenting dynamic and ensure she parents in a healthy way.
- The father exposed the children to family violence throughout the parties' relationship. The father's aggressive behaviour negatively affects the children.

Position of the Father

[31] The father seeks primary care of the children and joint decision-making for reasons which include the following:

- He and the children have a loving relationship.

- He will foster a relationship with the mother. He believes that both parents need to be actively involved in the children's lives because the children need their constant love and guidance.
- He is deeply concerned that the mother will not promote his relationship with the children. He states that the mother consistently undermines him; that the mother negatively portrays and vilifies him to the children; and that the mother does not respect him as a parent.
- He states that he is better able to meet the daughter's significant mental health issues while the mother is not.
- The children have an excellent relationship with Ms. R, his family and friends.

My Decision

[32] Each party must prove what is in the children's best interests based on the factors stated in s. 18 of the *Parenting and Support Act*, which factors are akin to the best interests' factors discussed in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 and in *Foley v Foley*, 1993 N.S.J. No. 347.

[33] I must analyze the parties' positions by addressing all facets of the children's lives and from a child-centric lens. My analysis must be comparative and balanced: *D.A.M. v C.J.B.*, 2017 NSCA 91. Credibility issues will be resolved, when necessary, by applying the law and factors outlined in *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Gill v. Hurst*, 2011 NSCA 100.

[34] I will now review relevant best interests factors to determine who should have primary care. Shared parenting is not an option because of the distance between the two homes.

Physical Needs

[35] Although neither party has a lavish home, both are able to meet the physical needs of the children. They can and do ensure a safe and clean home environment.

Mental Health and Emotional Needs

[36] Both parties struggle to meet the daughter's mental health needs. The daughter has experienced significant trauma, such as being exposed to parental conflict, being the target of bullying, and having her sexual integrity violated by a boyfriend and a neighbour. The daughter tried to commit suicide.

[37] I, like her parents, recognize the daughter's fragile mental health. The daughter often feels lonely, unhappy, unwanted, and unloved. She overdosed on medication. She does not always make healthy decisions.

[38] The daughter's complicated and deep seated emotional and mental health issues are serious and troubling. They did not simply emerge when she moved in with her father. They have been present for a long time and will require professional assistance to be resolved.

[39] The father is committed to helping the daughter. He ensured that the daughter connected with a mental health professional. The father is supportive of the daughter's counselling.

[40] In addition, the father acted in a protective fashion by affirming the daughter's concerns and by contacting the proper authorities once he knew that the mother's neighbour acted inappropriately with the daughter.

[41] Further, the father engaged in therapy. When asked about what he learned, the father was able to identify some insights. He understood the importance of personal accountability. He was no longer blaming the mother for his own poor conduct. The father also identified useful strategies to ensure he manages his anger and frustrations in a healthy fashion.

[42] Finally, the father did not condone the daughter's marijuana use. This is apparent in his text message to her.

[43] For her part, the mother encouraged the daughter to get counselling through the school. This appeared to be beneficial for the daughter. Further, the mother also took courses and received a number of certificates. I was not, however, confident that the mother garnered significant insights as a result of the programs. She continued to blame the father and assumed little responsibility for her own conduct.

[44] The mother also negatively involved the children in the parental conflict, especially the daughter, by discussing separation issues so that daughter blamed the father for the financial decisions that were made.

[45] Conversely, the mother did act in a protective fashion once she became aware of her neighbour's inappropriate actions. She readily agreed that the neighbour could no longer visit or be part of the daughter's life.

[46] The son does not appear to have the serious mental health issues and experiences that the daughter has. He nonetheless was negatively affected by the parental conflict.

[47] The parties are encouraged to connect with individual counselling services so that they are better equipped to help their children. Recommended counselling objectives include identifying what constitutes harmful parental conflict; acquiring skills to stop engaging in parental conflict; identifying the harmful impact that parental conflict has on children; learning to recognize the emotional needs of each child; learning how to parent and support teenagers who experienced trauma; and learning skills to manage anger and frustrations in a healthy fashion.

Educational and Social Welfare Needs

[48] The son attends school and appears to complete the educational tasks that are required of him. The mother acts in an appropriate parental fashion to ensure the son's educational needs are met. She likewise meets the son's social welfare needs.

[49] The mother also supervised and supported the daughter's education while the daughter was living with her. The daughter did relatively well in school while she lived with the mother. School absences and grades were not a concern.

[50] The father and Ms. R want the daughter to succeed. The daughter, however, missed school and did not perform well in her studies after moving to Salt Springs. I recognize that the daughter's unresolved mental health issues negatively impact all aspects of her life, including her education. The father is working with the school to help alleviate the educational issues.

Children's Views and Preferences

[51] The son wants to live primarily with his mother and have parenting time with his father. The son's wishes were provided in a thorough child's wish assessment provided by an independent assessor.

[52] The daughter initially stated that she wanted to live with her mother. She expressed an intense dislike for her father and blamed him for much of what was wrong in her life. The daughter's feelings towards her father were adversely influenced by negative comments from the mother. The mother encouraged the daughter to take sides in the parenting conflict. The mother encouraged the daughter's negative feelings for her father. The mother disparaged the father in the daughter's presence. The mother drew the daughter into the parental conflict.

[53] Since the wish assessment was filed, the daughter moved homes. She is now living with her father. I find that the daughter's decision to live with her father represents her current views and preferences. She is 15 years old and so her views are subject to more weight than if she was younger.

Relationships Between Children and Parents

[54] The son appears to have a healthy relationship with both of his parents. He is more resilient than the daughter. He does not experience serious mental health issues. He loves both parents and enjoys spending time with each. He nonetheless was negatively impacted by the parental conflict.

[55] In contrast, the daughter has a challenging relationship with each of her parents. She is suffering from mental health issues associated with trauma. This impacts her ability to form healthy relationships, including those with her parents.

Fostering of Relationship with Other Parent

[56] The parenting conflict inhibits the development and maintenance of stable and healthy parent child relationships. Both parties need to make lasting changes in their presentations. They both must stop involving the children in the parenting dispute.

Violence

[57] There was violence in the relationship. The father did act out by getting angry when frustrated. The father undertook counselling and has incorporated the skills that he learned so that violence is no longer a concern.

Conclusion

[58] I reviewed and balanced the best interests factors outlined in the *PSA*, including the most relevant factors which I highlighted. In reaching my decision, I employed a holistic and child-centric approach.

[59] In the circumstances of this case, I find that it is in the best interests of the daughter to be placed in the primary care of the father. I find that the father is better able to meet the daughter's mental health needs and that he will act as a protective parent. I also find that the father will better support the daughter's relationship with her mother than would the mother support the daughter's relationship with her father. The father does not generally involve the daughter in the parenting conflict while the mother does. Further, I find that given the daughter's age, it is appropriate that her wishes be respected.

[60] Conversely, I find that it is in the son's best interests to be placed in the primary care of the mother because the son is more securely attached to the mother. The mother was the primary caregiver since birth. The son is more resilient than is the daughter and is doing well socially, educationally, and psychologically in the mother's care. Further, the son expressed a desire to continue with the current parenting arrangement.

[61] It is unfortunate that the children will not always be living together because of the split parenting arrangement. The daughter and the son will, however, continue to see each other when they are visiting the other parent and they will otherwise connect virtually. Sibling separation should generally be avoided unless the children's best interests dictate otherwise, as was found in this case.

[62] What decision-making order is in the best interests of the children? The parties agreed to joint decision-making and that arrangement is adopted. Each will consult with the other about important issues affecting the health, education, and general welfare of the children. The parties will consult on a timely basis and in a meaningful fashion. If they are unable to reach agreement, the mother will have final decision-making authority for the son and the father will have final decision-making authority for the daughter.

[63] Each party must also keep the other advised in a timely fashion about important matters affecting the child in their care. Their communication should be child centered and respectful.

[64] The parties will have access to all information about the children by directly contacting professionals involved in the children's care such as teachers, doctors and dentists. Each parent will keep the other advised of contact information respecting the children's school, doctors, and other professionals. Mental health records will only be shared if deemed appropriate by the children's counsellor.

[65] **What is the appropriate parenting arrangement?**

[66] The mother will have reasonable parenting time with the daughter based on the daughter's preferences. The father will encourage the daughter to visit with her mother, including on special occasions and during holidays. The father will drive the daughter to the mother's residence after the mother first e-transfers the father gas money of \$50 each way - \$100 per round trip.

[67] The father will exercise parenting time with the son on every second weekend which can be extended to Monday or Friday if there is no school on the Friday or Monday. The father will also exercise parenting time with the son during holidays such as Christmas and Easter, summer vacation, and during special occasions. The father will be responsible for the transportation.

[68] If the parties want a defined holiday and vacation schedule, they are to submit their proposal for my review within two weeks of my decision.

[69] Each party will have reasonable telephone or electronic communication with the child in the care of the other parent.

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

[71] This matter involves a split parenting arrangement. I therefore must determine the incomes of both parties before I can set the appropriate amount of child support. In so doing, I must reference s. 19 of the *Child Support Guidelines* for two reasons. First, the father did not provide the financial disclosure that he was repeatedly ordered to disclose. Second, the mother is under-employed and the under-employment is not required by either the needs of a child or by the mother's reasonable education or health needs. Further, in reaching my decision, I apply the law that is reviewed in *Standing v. MacInnis*, 2020 NSSC 304.

[72] I find the father's current income to be about **\$56,000** which is the approximate rounded up figure produced by prorating and annualizing the father's income with his current employer since April 2021. The father thus owes the prospective table amount of **\$476** for one child effective September 1, 2021.

[73] I find the mother's income to be **\$25,000** because she is under-employed. There is no admissible evidence to confirm health reasons or any other allowable reason why she is not employed. The mother is capable of earning at least \$25,000 a year. The mother thus owes the father child support of **\$190** for one child effective September 1, 2021.

[74] Therefore, the net prospective payment due from the father to the mother is **\$286** per month as of September 1, 2021 and continuing on the first day of every month thereafter.

[75] The father must also pay retroactive child support because he paid less than stated in the *Guidelines*. The mother sought child support. The father chose not to pay the table amount. The children experienced financial difficulties because the father did not pay the table amount. Although the father will experience some hardship if he is required to pay a retroactive award, the hardship is a product of the father's own making. It is inappropriate for the father to benefit from his failure to pay child support. Further, the father's hardship will be reduced by affixing a repayment schedule such that the father will pay an additional \$150 per month until all retroactive child support is paid in full. He has no ability to pay a lump sum award.

[76] The retroactive amount that is owed is based on the father's income. In **2019**, the father earned \$55,163, less union dues of \$2,117, for a total income for support purposes of \$53,046. The father should have paid **\$757** in child support from October to December 2019 which equates to **\$2,271**.

[77] The father did not produce his **2020** income tax return. I therefore will provide an evidenced based calculation and impute income. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: *Staples v. Callender*, 2010 NSCA 49. I find that the father's combined 2020 income at about \$33,000 which equates to a child support payment of **\$497** or **\$5,964** for the year. The father's annual income is based on three months of employment income and EI income for the balance of the year.

[78] The father did not provide proof of all income earned in 2021. The father started working with his current employer in April 2021 at a rate of about \$56,000 per year. Before that, the father collected EI and was employed with another business. Because disclosure was not provided, I impute income of \$56,000 for the entire year. I am not deducting union dues because I have no evidence that such were paid in 2021. Until September 2021, when the daughter moved in with her father, the father should have paid \$797 per month as child support for two children. This amount was payable for eight months which equates to **\$6,376** in child support.

[79] The father therefore should have paid **\$14,611** in child support to the mother which is based on \$2,271 for 2019; \$5,964 for 2020; and \$6,376 up to and including August 2021.

[80] The mother stated that the father paid **\$1,700** from October 2019 until June 2020; **\$3,681.86** from July 2020 until August 2021; and **\$39.50** until November 2021, for a total of **\$5,421.36**. The father did not dispute this evidence.

[81] The father thus owes **\$9,189.64**, less credit for any additional payments received by MEP after adjusting for child support owed as provided in this decision. The father must pay this retroactive award at a rate of \$150 per month until the award is paid in full.

[82] I did not provide the father with a credit for the access transportation expenses that he exclusively bore in connection with travel between Halifax and Salt Springs because of the father's failure to disclose all income tax information as ordered.

Conclusion

[83] The father is granted primary care of the daughter while the mother is granted primary care of the son. The parties will decide major issues jointly, but in the event of disagreement, the father will have final decision-making on matters affecting the daughter, while the mother will have final decision-making on matters affecting the son.

[84] The parent who does not exercise primary care will have parenting time with the other child. Both parties must encourage and foster a relationship with the other parent. Both parties are encouraged to meaningfully participate in counselling to improve their parenting skills and to better support the children's mental and emotional health.

[85] The father must pay child support to the mother on a prospective and retroactive basis as stated.

[86] Ms. Chisholm is to draft the order.

Forgeron, J.