

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Farrell-Wadden v. Mombourquette, 2023 NSSC 164

Date: 20230526
Docket: 107475
Registry: Sydney

Between:

Leona Farrell-Wadden

Applicant

v.

Jordan Mombourquette and Andrea Wadden

Respondents

LIBRARY HEADING

Judge: The Honourable Justice Pamela Marche

Heard: April 13 and 14, 2023 in Sydney, Nova Scotia

Final Written Submissions: May 16, 2023

Written Decision: May 26, 2023

Summary: Pursuant to interim consent orders, a nine-year-old child has been living primarily with his grandmother with the father having substantial parenting time. Recently the child has been resisting visitation with his father. The father claims the grandmother has alienated the child from him and, as a result, the child should be placed in his primary care. The grandmother denies alienation. She argues the child should remain in her primary care and be able to decide whether to spend time with his father.

Issues:

- (1) Is it necessary to demonstrate a material change in circumstance before issuing a final order?
- (2) Is the child being alienated from his father?

(3) What parenting arrangement is in the best interest of the child?

Result:

It is not necessary to demonstrate a change in circumstance. The father did not prove alienation. It is in the child's best interest to remain in the primary care of the grandmother. It is not in the child's best interest to bear the burden of managing the terms of his relationship with his father. Specified parenting time for the father will continue and will not be at the discretion of the child.

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Counsel: Alan Stanwick, for Leona Farrell-Wadden
Pavel Boubnov, for Jordan Mombourquette
Jennifer Anderson, for Andrea Wadden

By the Court:

Overview

[1] This matter involves a nine-year-old boy named Cole. Cole has been living primarily with his maternal grandmother for the past six years. He had been spending every second weekend and three evenings every week with his father. In the fall of 2022, Cole's visits with his father essentially stopped. Cole's father believes Cole was alienated from him and, as a result, Cole should be placed in his primary care. Cole's grandmother denies this allegation. She argues that Cole should remain in her primary care and should be able to decide whether he wishes to spend time with his father. The Court must determine what parenting arrangement is in Cole's best interest.

Background

[2] Jordan Mombourquette and Andrea Wadden are the parents of Cole. A Consent Order was issued in May 2017 that placed Cole in their joint custody, with Ms. Wadden having primary care and final decision-making authority for Cole. Within the terms of that Consent Order, the parties also agreed that Ms. Wadden would be permitted to relocate with Cole for education or employment purposes.

[3] Ms. Wadden did not relocate with Cole in the spring of 2017. Instead, struggling with addiction issues, she voluntarily placed Cole with her mother, Leona Farrell-Wadden.

[4] In October 2017, Ms. Farrell-Wadden applied for sole custody of Cole and filed an emergency motion for interim custody, citing fear that Ms. Wadden would act upon her threat to leave Nova Scotia with Cole. Ms. Farrell-Wadden claimed this posed a danger to Cole, given her daughter's issues with substance abuse.

[5] The interim motion was heard in November 2017. At that time, Mr. Mombourquette consented to Ms. Farrell-Wadden having primary care and final decision-making authority for Cole. He further agreed that his parenting time with Cole would be at Ms. Farrell-Wadden's discretion and would be supervised by either his parents or Ms. Farrell-Wadden. Ms. Wadden was not present. Her parenting time with Cole was ordered to be within her mother's discretion. At a

review held in December 2017, both Mr. Mombourquette and Ms. Farrell-Wadden agreed the terms of the existing Interim Consent Order would continue and the matter was adjourned without date.

[6] In May 2019, Mr. Mombourquette applied to vary the Interim Consent Order so he would have sole custody of Cole. At a settlement conference held in January 2020 the parties (by then including Ms. Wadden) agreed that Ms. Farrell-Wadden would have primary care of Cole and that Mr. Mombourquette would have specified unsupervised evening parenting time, twice weekly and every third weekend. The Consent Order also provided Mr. Mombourquette with access to third party information relating to Cole, as well as the right to attend at Cole's extracurricular events and medical and educational appointments. Ms. Wadden's parenting time with Cole remained at her mother's discretion.

[7] A second settlement conference was held in April 2020. The terms of the existing Interim Consent Order continued with the parties further agreeing that Mr. Mombourquette would have an additional evening of parenting time each week (Wednesday, Thursday, and Friday from 2:10 pm until 7 pm) and weekend access would increase to every second weekend (from Friday at 2:10 pm until Sunday at 7:00 pm). No final order was ever issued.

[8] In September 2020, Mr. Mombourquette's parenting time with Cole became sporadic. The parties agree that Cole began resisting parenting time with Mr. Mombourquette around that time but disagree as to why.

[9] A contested hearing was held April 13 and 14, 2023. Mr. Mombourquette testified, as did his mother and partner. Ms. Wadden gave evidence and the court also heard from her sobriety sponsor. Ms. Farrell-Wadden testified as did Cole's school principal and therapist.

Position of the Parties

Jordan Mombourquette

[10] Mr. Mombourquette believes that Ms. Farrell-Wadden is alienating Cole from him. He does not dispute that Cole has been resistant to spending time with him or that Cole has been experiencing stress and anxiety, particularly when transitioning between homes. However, Mr. Mombourquette argues that Cole did not exhibit such behaviour prior to the fall of 2022, before which Cole had always enjoyed spending time with him, his parents, his new partner, and their children.

[11] Mr. Mombourquette believes Ms. Farrell-Wadden must have said something about him to Cole to cause this reaction. He also claims Cole's resistance to spending time with him coincides with Ms. Wadden's re-entry into Cole's life.

[12] Mr. Mombourquette argues the denial of his parenting time constitutes a material change in circumstance. He believes it is in Cole's best interest to be placed in his primary care with Ms. Farrell-Wadden and Ms. Wadden having liberal contact time and parenting time.

Leona Farrell-Wadden

[13] Ms. Farrell-Wadden denies Mr. Mombourquette's allegation of parental alienation. She says she is supportive of Cole spending time with both of his parents. She claims her commitment in this regard is demonstrated by the many years of facilitating access for Mr. Mombourquette, despite experiencing what she describes as bullying and verbal abuse from him.

[14] Ms. Farrell-Wadden argues that Cole should remain in her primary care, as he has been for the past six years. She says she, alone, has been financially responsible for Cole. She claims she is the parental figure who has been principally responsible for attending to Cole's educational, medical, and emotional needs. She argues that Mr. Mombourquette has the right to attend appointments and obtain third party information about Cole, but has consistently chosen not to do so, relying instead upon her to fulfill these duties.

[15] Ms. Farrell-Wadden argues that Mr. Mombourquette has not always taken his parental responsibilities seriously. She reports that he often leaves Cole in the care of his partner, Ms. Sullivan, with whom, she claims, Cole does not feel comfortable. She says Mr. Mombourquette is not always reliable, citing one occasion when he failed to pick up Cole, without notice to her, choosing instead to attend a car race outside Nova Scotia.

[16] Ms. Farrell-Wadden says Cole has been experiencing stress and anxiety which causes him to act out and resist spending time with his father. She claims Mr. Mombourquette was not participatory in the counselling she arranged for Cole to address these issues. Ms. Farrell-Wadden believes Cole deserves to have a say in whether he should spend time with his father.

[17] Ms. Farrell-Wadden suggests that Mr. Mombourquette have reasonable parenting time with Cole in accordance with Cole's wishes. She suggests that Ms. Wadden have parenting time with Cole as may be reasonably arranged.

Andrea Wadden

[18] Ms. Wadden acknowledges Cole has experienced periods of instability in his relationship with her, given her struggles with addiction, but argues she is now recovered. Ms. Wadden says she is currently exercising parenting time with Cole on a regular basis, as often as five times a week. Ms. Wadden supports her mother's position.

Ms. Wadden did not file a Response. She did indicate, in her submissions, the possibility of pursuing primary care of Cole in the future. The potential of such a plan does not factor into my analysis of the issues.

Issues

- 1. Is it necessary for Mr. Mombourquette to demonstrate a material change in circumstance before issuing a final order?**
- 2. Did Mr. Mombourquette prove that Cole is being alienated from him?**
- 3. What parenting arrangement is in Cole's best interests?**

Issue One: Is it necessary for Mr. Mombourquette to demonstrate a material change in circumstance before issuing a final order?

[19] No, it is not necessary for Mr. Mombourquette to demonstrate a material change in circumstances to advance his claim for primary care of Cole. No final order was issued in relation to Ms. Farrell-Wadden's application filed in October 2017 and all parties are seeking a final order, not another interim order.

[20] The Court is not bound by the terms of an interim order. Interim Orders are meant to stabilize matters until a final order can be issued. Even though these parties have lived within the parameters of the Interim Consent Order for several years, and although history of care is a relevant factor when considering what parenting arrangement is in a child's best interest, the Court is not limited to continuing the terms of an interim order until a change in circumstance is proven.

[21] It was not necessary for Mr. Mombourquette to file a Variation Application in May of 2019 to advance his claim for primary care. At any rate, I have consolidated both proceedings and I do not interpret Mr. Mombourquette's form of pleading to introduce the need to demonstrate a change in circumstance before issuing a final order. That said, if I were required to find a change in circumstance after the most recent Interim Order was issued, I would be satisfied to do so given Cole's acknowledged change in emotional and mental well-being and Mr. Mombourquette's interrupted parenting time.

Issue Two: Did Mr. Mombourquette prove that Cole is being alienated from him?

[22] No. Mr. Mombourquette did not prove, on a balance of probabilities, that Cole is being alienated from him.

[23] First, I accept the description of parental alienation adopted by Chiasson, J. in **Williams v. Power**, 2022 NSSC 156. To simplify a complex concept, parental alienation is a process where one parent's role is systematically eroded over time through a variety of maneuvers by the other parent. The person alleging alienation bears the burden of proving it occurred.

[24] Second, I approach Mr. Mombourquette's evidence with caution because there are issues with his credibility. In making this assessment, I have considered the factors set out in **Baker-Warren v. Denault**, 2009 NSSC 59, and confirmed in **Hurst v. Gill**, 2011 NSCA 100.

[25] Mr. Mombourquette's testimony was clearly impeached on three separate occasions during cross examination. Mr. Mombourquette denied: (1) texting Ms. Wadden about his new partner; (2) attending a car race instead of picking up Cole; and (3) threatening to involve the police for the purpose of achieving a strategic litigation advantage. Upon each denial, Mr. Mombourquette was presented with text message exchanges, acknowledged by him to be authentic, that clearly contradicted his testimony and prompted him to make admissions he was not previously prepared to make.

[26] Furthermore, at times, Mr. Mombourquette displayed difficulties with recall. For example, he was reluctant to acknowledge that previous parenting orders had been made with his consent. Also, he was not entirely forthcoming about his work schedule until pressed for detail on cross examination.

[27] Third, Mr. Mombourquette's allegation of alienation is grounded in causation logic that I am not prepared to accept. Mr. Mombourquette testified that visits had been going well and, then suddenly visits were not going well and, therefore, Cole must have been alienated from him. Child refusal or resistance to visitation is not a *prima facie* indication of alienation.

[28] Fourth, Mr. Mombourquette offered no evidence to support his allegations. When pressed to identify what proof there was of the alienation, Mr. Mombourquette responded with "I don't know." When questioned about Ms. Farrell-Wadden's motive to alienate Cole from him, Mr. Mombourquette's response was "I'm not sure."

[29] Finally, Mr. Mombourquette acknowledged several examples of Ms. Farrell-Wadden including, as opposed to excluding, him in parenting responsibilities. Mr. Mombourquette agreed that Ms. Farrell-Wadden kept him aware of Cole's educational and medical appointments (which he admitted to generally not attending). Mr. Mombourquette acknowledged that Ms. Farrell-Wadden provided him with a copy of Cole's report card and consulted with him in terms of scheduling parenting time over the summer months. Mr. Mombourquette agreed, albeit reluctantly, that Ms. Farrell-Wadden arranged for him to be included in Cole's therapy session.

[30] To summarize, there are many reasons why a child may resist or refuse visitation. The court will not assume alienation when there are difficulties with parenting time. Mr. Mombourquette failed to offer proof of any indices of alienation. Furthermore, Mr. Mombourquette acknowledged several examples of Ms. Farrell-Wadden behaving in a manner that was counter-indicative of alienation. Mr. Mombourquette did not meet the burden of proving alienation.

Issue Three: What parenting arrangement is in Cole's best interests?

[31] Section 18(5) of the *Parenting and Support Act*, 1989 RSNS c. 160, (the *Act*) says an analysis of the child's best interest is the paramount consideration in any parenting issue. Section 18(6) of the *Act* states the Court shall consider all relevant circumstances when determining the best interests of the child and provides a list of best interest factors. This list is non-exhaustive and the weight to be attached to any factor varies from case to case, depending on the circumstances.

[32] In determining what is in a child's best interests, I must compare and balance the advantages and disadvantages of each proposed parenting scenario: **D.A.M. v. C.J.B.**, 2017 NSCA 91; **Titus v. Kynock**, 2022 NSCA 35. When competing parenting plans are put forth by a grandparent and a biological parent, there is no presumption in favour of the child being placed in the care of the biological parent: **B.J.T. v. J.D.**, 2022 SCC 24.

[33] I will now address the best interest factors I feel are particularly relevant to Cole's situation.

Physical, Emotional, Social and Educational Needs, including the need for Safety and Security; History of Care and Plan of Care

[34] I find that Cole has been in the primary care of Ms. Farrell-Wadden for the last six years. That said, Mr. Mombourquette has been seeking to have Cole placed in his primary care since 2019. Interim orders have been in place since early 2020 which provide Mr. Mombourquette with substantial parenting time. The fact that Cole spends time with Mr. Mombourquette's parents, new partner, and their children, when Mr. Mombourquette is working for example, does not detract from the significance of Mr. Mombourquette's parenting role. I agree with Mr. Mombourquette's assertion that it is important for Cole to maintain a close and positive relationship with his half-siblings and paternal grandparents.

[35] Each party acknowledges that Cole has been experiencing some emotional dysregulation related to stress and anxiety. The Court has insufficient evidence to ascertain why but must take this reality into consideration when assessing what parenting arrangement is in Cole's best interest. The Court must also consider the fact that Cole has an Individual Program Plan (IPP) at school and is being assessed for Attention-Deficit/Hyperactivity Disorder (ADHD) due to his behavioural and learning challenges.

[36] Recently, Cole has been attending counselling to address some of his behavioural issues. Cole's therapist testified and her counselling notes were submitted by consent. I am not, however, prepared to place a significant amount of weight on the evidence offered by the therapist. She was not confident in her testimony. She often struggled to answer questions and, when she was able to respond, her answers were hesitant and limited. I do not question the therapist's credibility, but I am disinclined to rely too heavily on her evidence.

[37] I do, however, accept the therapist's assessment that Ms. Farrell-Wadden is an important source of security for Cole. This characterization aligns with my finding that Ms. Farrell-Wadden has been primarily responsible for attending to Cole's developmental needs for most of his life. Ms. Farrell-Wadden has been an advocate for Cole in pursuing assessments and interventions that ensure his specific medical and educational needs are being met. She is the person who attends parent-teacher conferences and supports Cole's participation in the Reading Recovery program. She is the parental figure who takes Cole to medical appointments, including a psychologist and a paediatrician for specialized treatment. Mr. Mombourquette's assertion that Ms. Farrell-Wadden arranged counselling for Cole only at the suggestion of the Court does not detract from the fact that Ms. Farrell-Wadden ardently pursued therapy for Cole. I find that Ms. Farrell-Wadden has played a critical role in ensuring that Cole's developmental needs have consistently been met.

[38] Furthermore, I find that Mr. Mombourquette has not been significantly involved with attending to Cole's medical and educational needs. When questioned, Mr. Mombourquette could not name Cole's teacher. He could not explain why Cole needs an Individual Program Plan (IPP) in school. He could not name Cole's paediatrician. Also, while Mr. Mombourquette is clearly concerned with Cole's behavioural issues, I find he did not play an active role in Cole's therapy. The therapist's assessment that Mr. Mombourquette was disengaged during therapy is corroborated by Mr. Mombourquette's testimony when he questioned the validity and effectiveness of the counselling.

Child's Views and Preferences, where they can Reasonably be Obtained

[39] Ms. Farrell-Wadden and Ms. Wadden submit the Court should accept, based on counselling notes reflecting what Cole told his therapist, that Cole would like to spend time with his father but only if his father does more stuff with him, is nicer to him and comes around more.

[40] I give very little weight to the counselling notes in this regard. I have already addressed the limitations of the therapist's testimony. To be clear, I do not question the veracity of the therapist's notes. Further, I do not accept Mr. Mombourquette's assertion that Cole was coached in his reports to the therapist. I am simply reluctant to put a significant amount of weight on the views of a nine-year-old child expressed within the context of therapy sessions meant to address his behavioural issues.

Willingness to Support the Development and Maintenance of the Child's Relationship with the other Parent

[41] I have found that Ms. Farrell-Wadden has not excluded Mr. Mombourquette from his parenting role. Further, I accept the assertion from both Ms. Farrell-Wadden and Mr. Mombourquette that they would each support Cole in maintaining his relationship with other party.

[42] The crux of the issue, then, is what willingness to support looks like in the face of child resistance. Ms. Farrell-Wadden testified that this is where she “draws the line.” She says she will not force Cole to see his father if she does not feel it is Cole’s best interest to do so. Her plan is to let Cole decide.

[43] With respect, Ms. Farrell-Wadden’s position in this regard is not only contrary to court order, but it is also unresponsive to Cole’s challenges and counter-indicative of a willingness to support Cole’s relationship with his father.

[44] Cole is very fortunate to have a grandmother who has attended so well to his needs thus far. I find no evidence of any malintent or malice from Ms. Farrell-Wadden. However, Cole now needs help navigating his relationship with father. The adults in Cole’s live need to stop blaming each other for Cole’s difficulties in this regard and start collaborating on an appropriate therapeutic response to that issue.

[45] I am being asked to provide a legal response to the problem. Mr. Mombourquette argues I should place Cole in his primary care. Ms. Farrell-Wadden and Ms. Wadden argue I should order that Cole may decide whether he wishes to spend time with his father. Having fully considered Cole’s best interests, I am prepared to do neither.

[46] I am satisfied that Cole should remain in the primary care of Ms. Farrell-Wadden. She has been a critical source of stability for Cole, and she is best placed to continue to attend to Cole’s unique medical, emotional, and educational needs. To move Cole out of Ms. Farrell-Wadden’s primary care now would be a disruption not in Cole’s best interest.

[47] I am also satisfied that it is in Cole’s best interest to have a positive and healthy relationship with this father. Unfortunately, a court cannot order that a parent-child relationship be positive and healthy. Families need to do this work

themselves, or their children will suffer. I can only order terms and conditions I believe will support this goal.

[48] I am not prepared to assign to a nine-year-old child the responsibility of managing the terms of a parental relationship. I have no evidence that this would be an effective response to Cole's challenges. I heard no evidence that satisfies me that Cole would be able to navigate such a complex matter. It is not in Cole's best interest to carry the weight of parenting issues.

[49] I am not prepared to reduce or limit Mr. Mombourquette's parenting time. He will continue to have parenting time with Cole each week on Wednesday, Thursday, and Friday from 2:10 pm until 7 pm and every second weekend from Friday at 2:10 pm until Sunday at 7:00 pm. Mr. Mombourquette's parenting time will not be at Cole's discretion.

[50] Ms. Wadden's parenting time will remain within the discretion of her mother, Ms. Farrell-Wadden. However, Ms. Wadden's parenting time with Cole will not occur during the times when Cole is scheduled to be with Mr. Mombourquette, unless Mr. Mombourquette expressly agrees.

[51] I would direct that Mr. Mombourquette and Ms. Farrell-Wadden continue to engage with Cole in therapeutic responses that are grounded in the explicit goal of addressing child resistance to parenting time.

Conclusion

[52] I have carefully considered the legislation, case law and evidence. There has been no parental alienation. Comparing and balancing all the relevant considerations, I find that it is Cole's best interest to remain in the primary care of Ms. Farrell-Wadden. Mr. Mombourquette will continue to have parenting time as outlined in the Interim Consent Order issued in July 2020. Ms. Wadden will continue to have parenting time with Cole at Ms. Farrell-Wadden's discretion, but such parenting time will not occur during the times when Cole is meant to be with his father pursuant to court order, regardless of whether Cole is with his father during those times. The parties will continue to access therapy and counselling to proactively address any issue of child resistance.

[53] I ask that counsel for Ms. Farrell-Wadden kindly prepare an Order that reflects the terms and conditions of this decision. I would characterize this finding as

mixed success between the parties. However, if the parties wish to speak to costs, they must file written submissions on the issue on or before June 16, 2023.

Pamela A. Marche, J.