

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *DB v. EJ*, 2023 NSSC 346

Date: 20231030
Docket: 110889
Registry: Sydney

Between:

DB

Applicant

v.

EJ

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Pamela Marche

Heard: August 24, 25, 28 & 29, 2023, in Sydney, Nova Scotia

Final Written Submissions: October 6, 2023

Written Decision: October 30, 2023

Subject: Parenting Arrangements; Best Interest Test considerations, Relocation considerations;

Summary: The parents of a seven-year-old child with leukemia could not agree on parenting arrangements, including with whom and where the child should primarily reside.

Issues:

(1) Has there been a change in circumstances?

(2) What parenting arrangement is in the best interests of the child? How do relocation considerations apply in this case?

Result: Substantial non-compliance with the order sought to be varied constituted a material change in circumstance given the facts of

this case. Other changes included the diagnosis of the child's medical condition and the mother's multiple moves.

The Court analyzed all relevant best interest factors as per s. 18(6) and 18H(4) of the *Parenting and Support Act* and determined it was in the child's best interests to be placed in the primary care of the father in a First Nation community in Cape Breton (referred to as X to protect the anonymity of the parties) for a number of reasons including:

- The mother failed to prove the father did not properly attend to the child's medical and educational needs.
- The mother's concerns about the father's parenting skills, in general, were largely without merit.
- The mother demonstrated pattern of instability in terms of housing and interpersonal relationships.
- The mother's unilateral decision to abruptly place the child in the father's care in 2020 and to take the child out of the father's care in a similar fashion in 2022, while the child was undergoing chemotherapy, created further insecurity for the child and called into question the mother's judgement.
- The mother's claim that she was denied parenting time and not told of the child's medical condition in a timely manner was not substantiated.
- The father's plan to reside in community X better connected the child to his Aboriginal heritage.
- The father's parenting plan was more fully supported and enriched by extended family residing in X.

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated November 7, 2023.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

**By the Court:
Overview**

[1] Seven-year-old E has been a very sick little boy. In the spring of 2020, he was diagnosed with leukemia and underwent intensive chemotherapy. He is now in the maintenance phase of treatment which is expected to last until 2025. His health remains a significant concern.

[2] E's father, EJ, lives in a First Nation community in Cape Breton which I will refer to as X to promote the anonymity of the parties. E's mother, DB, lives in Dartmouth. Each parent believes E should reside in their primary care. I must decide what parenting arrangement is in E's best interest and in what community E should reside.

Background and Procedural History

[3] In September 2019, a Consent Order was issued that set out a joint custody arrangement with E being in the primary care of DB. DB had final decision-making authority after consultation with EJ. EJ had reasonable parenting time upon reasonable notice. The parties agreed to wait until E was thirteen to see if he would follow a specific religion and this choice would be subject to E's wishes. The parties further agreed that EJ would be permitted to teach E about Mi'kmaq traditions and culture in recognition of his First Nation heritage.

[4] At the time the Consent Order was issued, E was living with DB in Glace Bay and EJ was living in X. Soon thereafter, DB relocated with E to Dartmouth.

[5] By April 2020, DB's living arrangements had become precarious. She sent E to live in X in the home of DJ, EJ's father, where EJ was also residing. DB says she intended for E to be cared for by DJ, but she acknowledges that it was EJ who did so. E was in the primary care of EJ from April 2020 until July 2022, and, during this time, they lived in X.

[6] In April 2022, E was diagnosed with leukemia. He received treatment at the IWK Children's Hospital in Halifax. EJ stayed in a nearby hotel so he could attend to E's medical needs.

- [7] In July 2022, following a parenting visit with E, DB told EJ she would not be returning E to his care. She claimed she feared for E's health and safety and was acting as a protective parent by keeping E solely in her care.
- [8] In August 2022, EJ responded by filing a Variation Application seeking primary care of E and putting the issue of relocation before the Court. At the same time, EJ filed an Interim Motion to have E returned to his primary care.
- [9] In September 2022, an Interim Order was issued by agreement that placed E in the care of both parties, on a week about basis. Clauses were included to reflect the fact that both parents were to be actively involved in E's medical care and to promote positive, child-focused communication between the parties. This Order was made on a without prejudice basis. In December 2022, a further Interim Consent Order was issued that modified the shared parenting arrangement, again on a without prejudice basis, to a two week about rotation.
- [10] To their great credit, the parties were able to reach these interim arrangements, in part, because of their ability to focus on E's medical needs as opposed to their legal issues. E's illness necessitated a comprehensive treatment strategy that included significant parental involvement and cooperation outside the hospital setting. E's parents needed to follow a detailed medical plan including the administration of a variety of medications and the constant monitoring of E's health status. Even though they did not agree on where and with whom E should ultimately reside, the parties were able to cooperate in terms of attending to E's medical needs and coordinating a shared parenting schedule.
- [11] Interim hearing dates scheduled for February 2023 were adjourned by consent due to a personal matter involving counsel. The parties agreed the hearing rescheduled for August 2023 would result in a final parenting order.
- [12] A four-day hearing was held in August 2023. The parties agreed to focus on parenting issues and address child support later. The following evidence was considered:
- EJ testified as did his father, DJ and his mother, CD. All filed affidavits.
 - DB testified as did her mother, CW and her partner, TB. All filed affidavits.

- The affidavit evidence of DB's sister, RB, was tendered by consent, not subject to cross examination.
- By consent, the business records of hospitals, schools, police, and Mi'kmaw Family Children Services (MFCS) were tendered.
- By consent, correspondence from DB's therapist was tendered as factual evidence but not for opinion.
- E's therapist, Brandy Gryshik, testified and her counselling records were considered.
- Dr. Kellock, a pediatrician with an advanced level of oncology care who has treated E, and April Connolly, a Family Care Coordinator in the Oncology Department at the IWK, each testified at the request of both parties.
- EJ's brother, WJ, was called as a rebuttal witness.

[13] The deadline for filing written final submissions was extended several times because of E's illness. Closing submissions were received from DB on September 29, 2023, and EJ on October 6, 2023.

Positions of the Parties

[14] Both parties agreed E has access to equivalent medical treatment in Cape Breton as he does in Dartmouth. DB confirmed she would offer no argument that her residence was a better placement for E given its closer proximity to the IWK Children's Hospital.

Position of EJ

[15] EJ believes E should be in his primary care in X. EJ works for his father's construction company. He says his work schedule is flexible so his need for childcare is minimal. His plan is to continue to reside in the home of his father, DJ, and to keep E enrolled in school in X. EJ says he can get E to the Cape Breton

Regional Hospital within the recommended hour of E displaying any symptom of illness, as per E's treatment plan.

[16] EJ says his parenting plan includes the strong support of his father, mother, siblings, and extended family, many of whom live nearby. He believes E can be best connected to his Aboriginal heritage by living with him in X. EJ believes E wants to live with him where he can be closer to his friends and family.

[17] EJ argues he has been the parent primarily responsible for E's care from April 2020 to July 2022. EJ denies there was an agreement that E would be returned to DB's care once she obtained stable living arrangements. EJ says DB made little effort to visit E during the time E was his primary care. He denies that DB was refused parenting time with E.

[18] EJ refutes DB's claims that he has not properly attended to E's needs in terms of health, education, or any other aspect of care. He says it was his attention to E's medical issues that led to E's diagnosis in the first place. EJ says he fully understands E's needs and has demonstrated an ability to address them appropriately.

[19] EJ claims DB's unilateral and abrupt decision to drop E off into his primary care in 2020, and then pull E out of his primary care in 2022 in a similar fashion, created significant instability and upheaval for E. EJ denies DB's assertion that it was necessary for her to remove E from his care for health and safety reasons.

[20] EJ says DB has a history of instability in terms of housing and interpersonal relationships. He also says DB has limited access to family or cultural support.

Position of DB

[21] DB argues she is the parent most capable of caring for E. Her parenting plan involves E residing with her in the apartment she shares with her partner, TB, and TB's brother. In addition, DB's younger son, EH, is with her approximately half the time. Parenting arrangements for EH are currently being contested.

[22] DB claims her parenting plan has the support of her partner, TB, her mother, CW and her sister, RB. She believes having E in her primary care will permit E to develop a closer bond with her other son, EH, E's younger half-brother.

[23] DB works in the construction industry but is currently on a leave related to E's medical condition. She hopes to limit her need for childcare by working alternate shifts with her partner, TB, who also works in construction.

[24] If E is placed in DB's primary care, he will continue to be enrolled in school in Dartmouth and DB will make efforts to keep E connected to his Aboriginal heritage through the Mi'kmaw Native Friendship Centre.

[25] DB claims she is concerned about EJ's parenting skills. She says EJ allows E to spend too much time playing video games, some of which are inappropriate given E's age. She says EJ allows E to eat too much junk food and he does not promote enough outdoor, physical activity for E. DB claims EJ's father, DJ, shares her concerns to such an extent that he made a child protection referral about EJ's parenting.

[26] DB argues it was her concern about E's well-being that caused her to remove E from EJ's care in July of 2022 and that she was acting as the protective parent in doing so. DB claims the hotel room in which EJ and E were staying while E underwent cancer treatment was filthy and unhygienic. She claims there was very little healthy food available for E and that EJ rarely took E out of the hotel room where they spent most of their time playing video games.

[27] DB claims EJ is inattentive to E's complex medical needs. She says he was neglectful in completing medical logs, has forgotten to administer E's medication and is often unsure of how and when to dispense E's medicine. She claims EJ has been non-compliant with medical protocols as reflected by his refusal to wear gloves while handling E's bodily fluids and his failure to always have a thermometer on hand to monitor E's temperature. DB believes she is better capable of attending to E's health.

[28] DB argues EJ has been lax in overseeing E's education. She claims EJ failed to ensure E attended school regularly and, as a result, E is not being promoted to the next grade in the school he attends in X. She says E attends school more regularly while in her care and is being promoted to the next grade in the school he attends in Dartmouth.

[29] DB says she has ensured E's emotional needs are being met by arranging for E to attend therapy. She claims EJ has not shown any interest in participating in E's therapy and allowing E to reside in X will disrupt E's established therapeutic relationship.

[30] DB claims she never intended for E to remain in X and there was an agreement that E would be returned to her care, once her living situation stabilized. She claims she was denied parenting time with E while his was in his father's care. She further argues EJ refused to return E to her primary care once she had established herself in Dartmouth.

[31] DB argues EJ breached the existing court order by allowing E to be exposed to Christianity.

[32] DB believes EJ could and should be working and has chosen not to do so.

Issues

- 1. Has there been a change in circumstances?**
- 2. What parenting arrangement is in the best interests of the child? How do relocation considerations apply in this case?**

Issue One: Has there been a change in circumstance?

Legislation

[33] The applicable legislation is the *Parenting and Support Act*, 1989 RSNS c. 160, (the *Act*). Pursuant to s. 37(1) of the *Act*, I may make an order varying, rescinding, or suspending an order where there has been a material change in circumstances.

Findings and Decision

[34] There has been a material change in circumstances since the 2019 Consent Order was ordered:

1. There was a substantial lack of compliance with the order sought to be varied. Although lack of compliance with a court order will not always amount to a change in circumstance, in this case it does. The parenting arrangement outlined in the order has not been the *de facto* parenting arrangement for many years. The operational thrust of the order, now the subject of the variation, has not reflected reality for quite some time.

2. There are several other material changes in the circumstances that affect E's best interests including E's serious medical condition and multiple changes in DB's place of residence.

[35] I am satisfied that circumstances have changed sufficiently such that parenting arrangements must be re-examined. I move then to weighing the advantages and disadvantages of the parenting plans proposed by EJ and DB.

Issue Two: What parenting arrangement is in the best interests of the child? How do relocation considerations apply in this case?

Legislation and Case Law

[36] The paramount consideration in any decision about parenting is an analysis of which parenting plan is in best interest of the child (s. 18(5) of the *Act*). Section 18(6) of the *Act* outlines factors to be considered when assessing what parenting arrangement is in the child's best interests.

[37] The list of best interest factors is non-exhaustive. The weight to be attached to any factor varies from case to case, depending on the circumstances. In determining what is in the 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.

[38] I must also give effect to the principle that a child should have as much contact with each parent, as is consistent with the child's best interests (s. 18(8) of the *Act*). There is no presumption in favour of shared parenting: **Barendregt v. Grebliunas**, 2022 SCC 22.

Relocation

[39] Section 18H of the *Act* directs how relocation issues must be addressed and s. 18H(1) provides that the best interest of the child is the paramount consideration when assessing relocation. Section 18H(4) sets out additional best interest factors to consider when relocation is at issue.

[40] Relocation is defined as a "change in the place of residence of a child that can reasonably be expected to impact the child's relationship with a parent who has an order for contact time with the child" (s. 18E(1)(b)).

[41] Section 18H(1A) sets out who is responsible for proving the relocation is, or is not, in the best interest of the child. The burden of proof is dependent upon the care-giving arrangement in place and whether there has been substantial compliance with a court order or agreement.

[42] The Supreme Court of Canada in **Barendregt**, *supra*, held that the best interest test is highly contextual and parenting issues, including those involving relocation, must be analyzed through the perspective of the child. I must balance the relocation plans put forth by each parent when assessing the best interest of a child: **Titus v. Kynock**, *supra*. The order in which issues in a relocation application are addressed is not critical. The analysis is driven by the circumstances of each case: **Weagle v. Kendall**, 2023, NSCA 47.

Findings and Decision

[43] Although I have not specifically addressed each factor set out in s. 18(6) and s. 18H(4) of the *Act*, I have considered all elements relevant to this case. When assessing credibility, I have considered the factors set out in **Baker-Warren v. Denault**, 2009 NSSC 59, and confirmed in **Hurst v. Gill**, 2011 NSCA 100.

History of Care – A Timeline for Context

[44] DB was born in 1997 and lived in the United States until she was approximately 15 years old. DB had been experiencing mental health issues and living arrangements with her mother had become untenable. It was determined that DB should live with paternal family in Cape Breton.

[45] DB and EJ began dating in March 2014. DB's placement with family members broke down and DB had no where to live so, in the fall of 2015, DB moved into the home of CD, EJ's mother, where EJ was also residing. E was born in February 2016. At that time DB and EJ were 19 and 20, respectively. They resided for some time with CD, and then later with EJ's father, DJ.

[46] On December 26, 2016, DB and EJ ended their relationship. E had not yet turned one year old. After the parties broke up, DB was permitted to continue to reside in DJ's home in X, having no where else to live, and EJ returned to the home of his mother, CD, in a different First Nation community.

[47] DB continued to reside with DJ until February 2017, when she and E moved in with SD, who she described as her "new spouse". They lived together with E,

moving to Glace Bay and then Sydney. They had a son together, EH, who was born 2018. DB claims, and I accept, that EJ had very little contact with E during this period. The Consent Order that provided primary care of E to DB was issued in September 2019. Later in 2019, DB moved with SD, her two children, E and EH, to Dartmouth for work.

[48] In April 2020, DB's relationship with SD ended and she again had no where to live with her children. As a result, DB placed E in the care of DJ in X. EJ assumed primary care of E who had just recently turned four years old.

[49] During cross examination, DB admitted to moving at least 10 times in the seven years since the parties separated. The end of DB's relationship with SD marked a period of significant housing insecurity for DB. After April 2020, DB living arrangements were largely transient and she moved seven times between April 2020 and January 2022.

[50] In October 2021, DB overdosed on a combination of prescription drugs and alcohol. DB reports blacking out from alcohol consumption and not remembering taking the drugs.

[51] In January 2022, DB moved into an apartment being rented by two brothers. By February 2022, DB and one of the brothers, TB, were a couple. DB's plan to move with TB to a new home in the spring of 2023 did not happen.

[52] After April 2020, E settled into his father's primary care in X. In September of 2020, he was enrolled in pre-primary school in X. He spent time with his extended family members and made friends in school and in the community. DB had little contact with E during this time.

[53] In April 2022, E was diagnosed with leukemia. From April 2022 to July 2022, E spent a great deal of time at the IWK or in hotels nearby in EJ's primary care. DB actively attended at the hospital and the hotel to assist with E's care.

[54] In July 2022, following a parenting visit with E, DB advised EJ she was keeping E in her care. EJ filed an emergency motion to have E returned to his care and the parties eventually agreed, on a without prejudice basis, to a two week about shared parenting arrangement. This which was workable as E was spending a great deal of time at the IWK Children's Hospital, or hotels nearby, for medical reasons. When E was not attending at the IWK, parenting time exchanges were facilitated by the parties meeting at a halfway point.

Relocation and Burden of Proof

[55] EJ lives in X and DB lives in Dartmouth and I must determine who will have primary care of E. Part of this analysis, given the facts of this case, necessitates the weighing of the benefits of E residing in X, where his father lives, or Dartmouth, where his mother lives. The decision I must make about where and with whom E will reside, will significantly impact parenting time, which means I must take into consideration s. 18H of the *Act*.

[56] EJ put the issue of relocation before the court when he applied to vary the 2019 Consent Order. The parties agreed at the onset of the hearing that each party has the burden of showing what is in E's best interest. I agree:

- The current Interim Order, in place in some form since September 2022, provides that E will spend substantially equal time in the care of both parties. Both parties have complied with the Interim Orders. However, the Interim Orders were made on a without prejudice basis and are not determinative of the issue on a final basis. Section 18H(1A)(a) does not apply.
- The Consent Order of September 2019, which is the subject of EJ's current variation application, provides DB with primary care of DB. However, DB has not substantially complied with this order, having voluntarily placed E in the primary care of EJ in April 2020, where he remained until July 2022. When there is a lack of substantial compliance with the order, s. 18H(1)(e) applies.

Best Interest Test Analysis – s. 18(6)

Medical Needs

[57] I do not accept DB's argument that EJ has not been able to properly attend to E's medical needs. In making this finding, I place considerable weight on the testimony of both Dr. Kellock, E's pediatrician at the Cape Breton Regional Hospital, and April Connolly, a Family Care Coordinator in the Oncology Department of the IWK Hospital. These independent professionals, who have been directly involved in E's medical treatment, offered credible and unbiased testimony.

[58] I find that it was EJ's attention to E's health and well-being that led to the discovery of E's leukemia in the first place. E was in EJ's primary care in the months preceding the discovery of E's medical condition. EJ properly sought medication attention for E which ultimately resulted in E's diagnosis.

[59] I find that EJ has not perfectly managed E's medical treatment plan:

- EJ failed, on at least one occasion, to administer medication to E (as did DB).
- On several occasions, EJ did not give E his vitamin D drops, or calcium supplements as directed.
- There was one weekend when EJ was not in possession of a working thermometer, necessary to assess whether E had a temperature, a critical component of monitoring E's well-being.

[60] However, I also find E appropriately sought medical advice on how to best address his error in dispensing E's medication. Furthermore, none of these oversights brought harm to E, as confirmed by the testimony of April Connelly and Dr. Kellock. Given the intensity of the medical treatment plan and the stress of the situation, I find it not unreasonable to expect that such issues would arise.

[61] I agree with DB's assertion that EJ did not always follow medical protocol. He was not as compliant with completing medical logs as he should have been. He did not always use gloves when handling E's bodily waste. On one occasion, he took E to St. Martha's Hospital as opposed to the Cape Breton Regional Hospital, contrary to the recommendation of medical professionals. However, overall, I find the evidence demonstrates that EJ is and has been fully committed to attending to E's health. EJ's best efforts, while not perfect, have fully met E's medical needs.

[62] My findings in this regard are supported by the testimony of Dr. Kellock who described EJ as being appropriate and attentive in attending to E's medical condition. She had no concerns about EJ following medical protocol. Ms. Connelly generally shared the assessment of Dr. Kellock in this regard.

[63] I am not convinced, as suggested by DB, that EJ's frequent questioning of DB in relation to the administration of E's medication (timing and dosage) are indicative of his inability to manage E's medication condition. Dr. Kellock

testified that E's prescribed medication and treatment plan was constantly subject to adjustment. Queries such as those made by EJ would be a natural response to that situation and it would be appropriate for EJ to discuss this issue with DB, the person with whom he was sharing responsibility for administering E's treatment plan.

[64] Overall, I find the conduct of EJ and DB, both young parents, admirable in terms of their commitment and capability to oversee E's medical care. They should each be commended.

Educational Needs

[65] I do not accept DB's argument that EJ has not been able to properly attend to E's educational needs. I do accept that DB has been more proactive in ensuring E attended school regularly and completed homework consistently.

[66] E has been enrolled in two schools: one in Dartmouth and one in X. I accept that he has attended school more regularly in Dartmouth, while in DB's care, than he has attended school in X, while in EJ's care. E will progress to grade two if he continues in the Dartmouth school but will have to repeat grade one if he continues school in X.

[67] EJ testified that E missed a lot of school in X because school administration there would send E home if he presented with a fever, nausea, or any other indicator of illness. This happened with enough regularity that EJ began not to send E to school if he showed signs of being unwell. I accept this to be a reasonable response given the circumstances. I also accept that DB has been more apt to exercise her discretion to send E to school under similar circumstances.

[68] I find EJ's oversight of E's school attendance has been appropriate given the severity of E's illness. This finding is supported by the testimony of Dr. Kellock who confirmed E should not be sent to school with a fever and could reasonably be kept home from school, at the parent's discretion, if showing other symptoms of illness. EJ's decision to prioritize E's health over his grade one curriculum was not unreasonable.

Emotional Needs

[69] I do not accept DB's argument that she has better attended to E's emotional needs. DB says she ensured E received therapy and EJ has played little to no role in this therapeutic intervention. I accept EJ has not been overly involved in E's counselling. However, part of the goal of E's therapy, in addition to coping with his medical condition, was to address the abuse E experienced from DB's former partner while in DB's primary care. It makes sense, then, that DB would be more directly involved in E's therapy in this regard.

[70] Moreover, E's therapist, Ms. Gryshik, testified that being abruptly moved from the primary care of one parent to another parent could be traumatic for a young child. She confirmed DB did not tell her this had happened to E, not once, but twice. The fact that DB did not tell Ms. Gryshik about this demonstrates either a lack of insight about the impact of her actions or an unwillingness to be completely candid. Neither scenario is conducive to supporting E's emotional well-being.

[71] I find it is important for E to continue with therapy. Given Ms. Gryshik's maternity leave, there has been a break in her therapeutic relationship with E at any rate. Furthermore, Ms. Gryshik has indicated a willingness to continue therapy with E remotely, if necessary, or connect E with a local therapist, if he is permitted to reside in X. Given EJ's demonstrated commitment to attend to E's physical health needs, I am confident that he would ensure E's therapeutic needs are met, if E is placed in his primary care.

Parenting Skills and Protective Parenting

[72] DB's early concerns about EJ spending too much time gaming and not enough time actively parenting E were warranted. These concerns were shared by EJ's father, DJ, who made a child protection referral accordingly. To EJ's credit, however, he demonstrated that he was willing to accept this criticism and do something about it. EJ voluntarily participated in two rounds of programming offered by MFCS to better himself as a parent. Ultimately, the MFCS case notes reflect no concerns about EJ's ability to parent.

[73] EJ continues to spend time playing video games with E. DB acknowledged that she plays video games with E as well. I do not believe DB is truly concerned about the age-appropriateness of the games EJ plays with E, given her admission that she, too, plays games with E of a similar nature.

[74] DB was concerned EJ was spending too much time with E video-gaming while they were staying in the hotel room near the IWK. I accept EJ's evidence that he and E spent a lot of time gaming while staying in the hotel but that they also drew, colored, and watched movies. EJ explained the activities he and E could do were limited given the E's illness and their living conditions. I find EJ's approach to be reasonable given the circumstances.

[75] I do not accept DB assertions that EJ's failed to ensure proper hygiene for E. E has an allergy to medical adhesive. I accept E's skin rash, cited by DB as evidence that EJ failed to ensure E was properly showered, was more likely a mild allergic reaction to E's bandage.

[76] I do not accept that E was pale, lethargic, and short of breath because EJ failed to ensure E got enough exercise and outdoor exposure. I find E's presentation was more likely a result of his medical condition and treatment than poor parenting by EJ.

[77] I further find that EJ's reluctance to spend much time with E outside the hotel room was reasonable given the fear of exposure to Covid-19 and E's compromised immune system. I do not accept that E's appetite issues were a result of EJ's poor food choices. I find it more likely that E's struggles around eating were a result of his illness.

[78] My findings in relation to E's general health (skin rash, paleness, listlessness, appetite etc.) are supported by the testimony of medical professionals who confirmed that many of the concerns cited by DB as being indicative of poor parenting from EJ could very well be a result of E's medication condition and treatment.

[79] I do accept the hotel room in which EJ and E were residing while E was receiving treatment at the IWK was very messy and dirty. EJ's father testified that EJ is not as tidy as he wished he would be. I find EJ to be somewhat lax in terms of housekeeping. There was a period when EJ had Covid-19 and he appropriately did not allow cleaning staff in the room. EJ let the cleanliness of the space get away from him, but I find this to be understandable given his own illness and the fact that he was managing very serious health concerns for E.

[80] My findings in relation to the condition of the hotel room are supported by the MFCS case notes. Upon investigation, MFCS did not share DB's concerns about EJ's parenting or the condition of his hotel accommodations.

[81] DB cited all the above as reasons why she needed to act as a “protective parent” and remove E from EJ’s care. I find that DB’s intervention was unwarranted. DB had no cause to act in the way she did. She had no reasonable basis to believe E was unsafe. DB’s actions demonstrated a willingness to put her own wants above the needs of E. Forcing such an abrupt and major change upon E, during a time of medical crisis, raises very serious concerns about DB’s judgement.

Willingness to Facilitate Parenting Time / Denial of Parenting Time

[82] I accept EJ’s assertion that DB did not often make efforts to exercise parenting time with E from April 2020 to July 2022. I do not accept DB’s claim that EJ denied her parenting time with E. Further, I do not accept that DB’s difficulties with E’s extended family members reasonably prevented her from spending time with E.

[83] As discussed previously, the period between April 2020 to January 2022 was a tumultuous time for DB. She was ending an abusive relationship, struggling over parenting issues related to her younger son, and experiencing housing instability. She did not have a driver’s license. Covid-19 restrictions limited travel and the management of social bubbles presented logical difficulties. I find these are barriers that would have limited DB’s ability to exercise parenting time with E.

[84] DB, however, blames EJ and his family, for her lack of parenting time with E. She claims she could not exercise parenting with E in Cape Breton because EJ’s father had harassed her and the home of EJ’s mother was unsafe due to mold.

[85] For context, DB’s relationship with both EJ’s mother, CD, and father, DJ, is strained. DB and CD frequently disagreed about the care DB provided to E while they were living in CD’s home. DB and CD strongly diverge on religious beliefs. Conflict between DB and DJ escalated to the point that she accused DJ of harassment and lodged a complaint about DJ with his employer.

[86] I found both CD and DB to be credible witnesses who expressed a genuine concern for their grandson and presented a balanced assessment of the situation. Even though there have been interpersonal difficulties, I accept the testimony of both CD and DJ that they are each willing to facilitate DB’s parenting time with E.

[87] DB was invited to spend time with E in the home of CD while E was in EJ's primary care. DB refused, saying the home contained mold and was unsafe. I find CD's openness to having DB in her home was gracious, particularly under the circumstances, and DB's unwillingness to accept assurances that the home was safe was not reasonable.

[88] DB's allegations of harassment by DJ were not substantiated (criminal charges were not laid and the complaint to DJ's employer was dismissed). The situation was partly of DB's own making and not a reason that prevented her from spending time with E.

[89] I do not accept that DB sought and was denied the return of E to her primary care in 2021. First, DB submitted an abundance of text messages as evidence, but she could provide no written confirmation of making any such request in 2021. Also, DB has demonstrated she is keenly aware of how to utilize police, child protection agencies and court services to advance a parenting claim. There is no evidence of her doing so in 2021. Finally, even if DB had requested the return of E to her primary care, it would have been appropriate for EJ to object to such a request given DB's ongoing instability at that time.

[90] I agree with DB that EJ was often late for parenting exchanges between Dartmouth and X. EJ cited construction, challenges associated with traveling with a young child and the need to rely on extended family members for transportation as reasons for his occasional tardiness. I accept EJ should have provided DB with more notice when he was going to be late. However, my assessment of EJ's testimony was that he, too, was frustrated by the circumstances that caused his delay. I do not find that EJ's occasional lateness amounts to a deliberate attempt to frustrate DB's parenting time.

[91] Part of the willingness to facilitate parenting time, is the willingness to communicate important information in a timely manner. DB claims that EJ delayed telling her that E had cancer. This is not true. I find that immediately upon being told of E's diagnosis, while still on the phone with the IWK, EJ directed his brother, WJ, to inform DB of the situation. While EJ displayed some uncertainty about the date upon which this happened, there was no uncertainty from either EJ or WJ about the sequence of events. I am satisfied that DB was immediately advised of E's diagnosis.

[92] I do accept the assurances of each party that they would be willing to facilitate parenting time for the other, should E be placed in their primary care.

Financial Capacity, Employment and Childcare

[93] I accept DB's assertion that EJ has had opportunity to work and has chosen not to. EJ admits that work has not been his priority and he has not actively sought employment. He has chosen to spend all his available time providing care for E. Given E's medical condition, I do not fault EJ for this.

[94] EJ's father, DJ, runs a construction company. EJ can work with his father and there is flexibility in terms of EJ's work schedule such that EJ is able to provide care for E as needed. EJ has presented a viable plan in terms of employment, financial capacity, and childcare availability.

[95] DB also works in construction in the Dartmouth area. Her job site can vary. Her partner, TB, works in construction as well. Part of DB's plan involves her and TB working opposite shifts, to increase their availability for E. DB's plan also involves a commitment she says her employer has made to be flexible about deployment. Although I did not hear directly from DB's employer, I accept DB's evidence that her employer has indicated a willingness to accommodate her, where possible.

[96] I am less satisfied, however, about DB's plan for childcare. In the past, DB used the services of a 13 year old to babysit E. Both medical professionals and child protection workers expressed apprehension about the appropriateness of such a young person looking after a child with such serious medical needs. DB was dismissive of this concern, saying the 13- year-old's mother was always present. This was not, in fact, always the case. DB's approach to childcare in the past, and the uncertainty of her plan for childcare in the future, is concerning.

Cultural Connections

[97] If E is permitted to live primarily in X, he will attend * Primary School. DB acknowledged this school offers a more substantive curriculum grounded in Mi'kmaw culture than does the school E would attend if he was living primarily in Dartmouth.

[98] I accept DB's evidence that she has made efforts to keep E connected to his cultural heritage through the Mi'kmaw Native Friendship Centre. I am satisfied, however, that E's Aboriginal upbringing and heritage will be more keenly fostered if he is directly immersed in the traditional teachings and practices of his

paternal extended family who are living in X and another nearby First Nation community.

Relationships between the Child and Siblings, Grandparents, and other Family Members

[99] DB argues E should be placed in her care so that he can benefit from living with his brother, EH. The difficulty with this is that EH only resides with DB approximately half the time. Parenting arrangements for EH are contentious and have not been fully resolved. Placing E in the primary care of DB does not necessarily mean E will be living primary with EH. Furthermore, I do not accept that placing E in the primary care of EJ will prevent E from having a meaningful relationship with his brother, EH.

[100] Further, DB claims to have the support of her mother, CW, and her sister, RB. I have little doubt that DB's extended family love E very much. The reality is, however, that both these individuals live outside Canada and have had very limited physical contact with E. Their connection to E is primarily supported by phone and Facetime. Their ability to provide support is limited.

[101] EJ has a large extended family on his father's side. Both DJ and CD present as engaged grandparents committed to doing all that is necessary to support the care of E. If E were placed in EJ's care, he would grow up with his grandparents, aunts, uncles, and cousins. He would be part of a much larger and more firmly connected family circle. I do not share DB's concerns that EJ relies too heavily upon his family for support.

Compliance with Court Orders

[102] DB argues that EJ failed to comply with the 2019 Consent Order because he allowed E to be exposed to his family's practice of Catholicism. I accept that E was witness to his grandmother praying and he attended with his extended family on a pilgrimage to Holy Mountain. I agree with DB that EJ allowed this to happen although the parties agreed E could chose what religion he would practice once he turned 13. I have difficulty faulting EJ for this, however, because DB herself was not in compliance with the Court Order. She, too, admitted to exposing E to spiritual practices and beliefs related to Wicca.

Impact of Violence, Abuse, or Intimidation

[103] DB says EJ was manipulative and controlling during their relationship. Some of the comments she attributed to EJ were so outlandish, no reasonable person could believe them to be true. I find the comments were more likely reflective of a dramatic teenage relationship based as much upon fantasy as reality. I am confident DB would not have allowed E to remain in EJ's primary care if she was truly concerned about EJ's capacity to cause harm.

[104] DB says both she and E were victims of violence in DB's relationship with SD. This is obviously concerning. DB acted appropriately in leaving that relationship and seeking therapy for E accordingly. E's exposure to violence, however, occurred while in the care of DB not EJ.

Ability to Communicate and Cooperate

[105] Despite all their differences and the tremendous amount of stress associated with E's illness, I was impressed by the ability of DB and EJ to communicate and cooperate. I saw two young parents, each with limited resources, doing their level best to met E's needs together. For the most part, they made a shared parenting arrangement work, under very difficult circumstances. The communication exchanges which I observed were respectful and child focused. Both parents are to be commended in this regard.

Best Interest Test Analysis – s. 18H(4) – Relocation

Compliance with Notice Provisions/ Mobility Restrictions

[106] No notice of change of residence or intention to relocate was ever provided by DB. There was no restriction on mobility contained in the 2019 Consent Order.

Reasons for Relocation

[107] DB is not intending to relocate. She already has. She moved to Dartmouth in 2109 for work purposes.

Effect on the Child and the Parent as a Result of the Relocation

[108] E has been through an incredible amount of upheaval in the last two years. He has undergone intensive chemotherapy treatment. He has split his time on a two-

week rotation between Dartmouth and X. He has spent a significant amount of time in hospitals. He hasn't always been able to attend school regularly.

[109] E has now entered the maintenance phase of his medical treatment. He is getting older, and school is becoming more important. The interim shared parenting arrangement is no longer feasible.

[110] A decision about which parent will have primary care, in what community, will significantly reduce the amount of time E will be able to spend with the parent who is not providing primary care. The distance between X and Dartmouth is * km. Neither DB nor EJ has a driver's license or a car. Both will need to continue to rely on the favor of others or public transportation to effect parenting exchanges.

[111] That said, given the facts of this case, resolving the issue of where E will primarily reside will bring much needed stability to E's life. He will be able to settle into one school and establish deeper roots within in a single community. His time with family and friends will no longer be subject to continuous jostling.

What I Did Not Consider

[112] I did not consider the views and preferences attributed to E based on comments he made to child protection workers. I could not assess reliability.

[113] I did not consider the dating practices or sexual proclivities of either party because I heard no evidence of any discernable impact upon E associated with the parties' personal choices in this regard. Whether either party participated in polyamorous relationships or "friends with benefits" situations did not factor into this decision.

[114] During her testimony, DB's mother, CW, unexpectedly disclosed personal information related to DB's youth which was understandably upsetting to DB. None of that information factored into this decision.

[115] I was not influenced by either party having spiritual practices that fall outside mainstream religious beliefs.

Stability and Security

[116] DB raised many concerns about EJ's parenting. I have found these concerns to be largely unfounded. However, the fact that I believe EJ to be a very capable parent does not diminish DB's capacity to parent. DB has also demonstrated a willingness and capacity to parent. Neither parent is perfect. Both clearly love E and are committed to his care.

[117] Ultimately, I have determined that EJ is more able to provide stability and security to E in X. EJ has been a constant in E's life since April 2020. EJ has stable housing and a more robust and tightly knit security net of extended family and community. Placing E in EJ's primary care will more firmly anchor E in his Aboriginal culture and heritage. DB's decision to abruptly move E twice in his young life disrupted E's security. Placing E in EJ's primary care will protect against such future instability. I am satisfied that EJ and his extended family will continue in their commitment to ensure E maintains a meaningful relationship with his mother and brother.

Decision on Parenting

[118] I have carefully considered the legislation, case law and evidence. I have determined it is E's best interest to order the following:

- E will be placed in the primary care of EJ and E will reside, therefore, in X.
- EJ will consult with DB on major issues related to E and will consult on all issues related to E's health. In the event the parties are unable to agree on major decision affecting E, EJ will have final decision-making authority, including the authority to make decisions regarding E's religious practices.
- DB will have parenting time with E every second weekend in Dartmouth. Each party is responsible for travelling part way to effect parenting time exchanges that will occur in New Glasgow.
- DB will have such other reasonable parenting time as the parties may agree upon.
- DB will have liberal parenting time with E when E is required to attend at the IWK Hospital. DB may attend all medical

appointments for E and EJ must keep DB apprised of such appointments.

- DB will have six weeks of block parenting time with E during the summer months.
- EJ and DB will share E's Christmas break from school. DB will have E in her care from the beginning of the school break until 2 pm on Boxing Day commencing 2023 and continuing every odd year. DB will have E in her care from 2pm on Boxing Day until the day before school resumed from Christmas break commencing in the year 2024 and continuing every even year thereafter.
- DB will have E in her care every March break.
- EJ will have E in his care every Easter.
- DB can make inquiries and receive information from E's educators, care providers and physicians.
- DB may each receive E's school report cards, medical reports, dental reports, specialist reports, and information regarding E's recreational activities.
- DB and EJ will each allow the other daily contact with E, through Facetime, phone calls or other reasonable means, while E is in the care of the other parent.

Child Support

[119] The parties agreed at the outset of the hearing to deal first with parenting arrangements and later with outstanding issues of prospective and retroactive child support.

[120] DB has not made financial disclosure as directed. The matter of child support will be referred to the conciliation service to address outstanding disclosure and to canvass the possibility of resolving child support issues by consent. If the parties cannot agree on child support, the matter will be put back before me.

Conclusion

[121] Counsel for EJ will draft the Order. Any party wishing to be heard on costs must file written submissions on the issue on or before November 20, 2023.

Pamela A. Marche, J.

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *DB v EJ*, 2023 NSSC 346

Date: 20231030

Docket: No. 110889

Registry: Sydney

Between:

DB

Applicant

v.

EJ

Respondent

ERRATUM

Judge: The Honourable Justice Pamela A. Marche

Heard: August 24, 25, 28, & 29, 2023, in Port Hawkesbury, Nova Scotia

Written Release: October 30, 2023

Erratum Date: November 7, 2023

Counsel: Kent McNally, Counsel for the Respondent, EJ
DB, Self-Represented Applicant

Erratum details: At page 24, paragraph 118, the seventh bullet point should read as follows:

- EJ and DB will share E's Christmas break from school. DB will have E in her care from the beginning of the school break until 2 pm on Boxing Day commencing 2023 and continuing every odd year. DB will have E in her care from 2 pm on Boxing Day until the day before school resumed from Christmas break commencing in the year 2024 and continuing every even year thereafter.