

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *T.J. v. S.R.*, 2023 NSSC 344

Date: 20231110

Docket: SFHPSA-120630

Registry: Halifax

Between:

T.J.

Applicant

v.

S.R.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Samuel Moreau

Heard: June 21 and June 22, 2023, in Halifax, Nova Scotia

Written Decision: November 10, 2023

Subject: Custody, parenting time, access, forensic assessment, sexual assault, risk, credibility

Summary: The father of the child was incarcerated after having pled guilty to sexual offences against another of the mother's children (not a biological child of the father". Now released the father requests supervised parenting time with his biological daughter. The mother opposed the father's request.

Issues: Does the father pose a risk to the child if granted supervised parenting time?

Result: The father's request is denied. The court found that expert evidence relating to the issue of risk since the father's release from prison would be helpful in assessing

this request. The Court also found that professional involvement is required with respect to the father's plan in consideration of the sibling relationship between the subject child and her sister (victim of the father's criminal actions). The Court found that it is in the child's best interests that the father not have supervised parenting time/direct contact at this juncture.

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

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *T.J. v. S. R.*, 2023 NSSC 344

Date: 20231027

Docket: SFHPSA-120630

Registry: Halifax

Between:

T.J.

Applicant

v.

S.R.

Respondent

Judge: The Honourable Justice Samuel Moreau

Heard: June 21 and 22, 2023, in Halifax, Nova Scotia

Released to
The Parties: October 27, 2023

Counsel: Zachary Chisholm for the Applicant
Patrick Eagan for the Respondent

By the Court:

Introduction

[1] This matter commenced on December 24, 2020, with the filing of T.J.'s

Notice of Application. The parties are the parents of the child, I. born in 2015.

[2] T.J.'s application addressed the issues of custody and parenting arrangements, parenting time and costs. The Respondent father, S.R., filed a Response to Application on December 29, 2020, addressing the same issues, including child support.

Historical Information and Proceedings

[3] The parties were in a common law relationship from 2015 to June, 2019. In addition to the subject child, I. the mother has four other children; A. who is now an adult, A.J. born in 2007 and twins, L. and V. born in 2011. The current application and the order which shall flow from this decision pertain solely to I. The father is not a biological parent of the other children.

[4] The parties and the fathers of the other children A.J., L. and V., were the Respondents in an Application brought by the Department of Community Services (herein referred to as D.C.S. or the Agency) early in 2020. In October,

2019, the father had been arrested and charged with the following in relation to the child, A.J.; sexual assault, sexual exploitation, possession of child pornography, sexual interference, invitation to sexual touching, and making, printing, publishing and possessing child pornography.

[5] Subsequently the subject child, I. was placed in the care of her maternal grandparents and A.J. and the twins were placed with their respective fathers. In June, 2020, I. was returned to the mother's care under the supervision of the D.C.S., whose involvement terminated in February, 2021. Presently I. and A. reside with their mother. A.J. and the twins continue to be in the primary care of their respective fathers.

[6] As per the Interim Consent Order issued May 19th, 2021, the mother was granted "sole custody, sole decision making authority and sole residence" of I. The father was not permitted any parenting time and ordered not to have any contact, direct or indirect, with the child unless ordered by the Court. A provision of the order permits the father to provide letters, gifts or cards to the mother for I. The provision also provides the mother with discretionary authority to determine the appropriateness of any of those items received from the father. The mother may provide updates about I., including pictures, to the paternal grandmother, E.R. or the father. Should either party wish to vary or

change the provisions of the Interim Consent Order, D.C.S. must first be notified.

[7] Eventually the father pled guilty to the offences of sexual assault, sexual exploitation and possession of child pornography. In early 2022, he was sentenced to four years in prison. In January, 2023, the father was released on day parole. Currently he resides in a halfway house during the weekdays and with his current partner, T.D., during the weekends, all within the Halifax Regional Municipality (H.R.M.).

[8] The trial before me was heard on June 21st and 22nd, 2023. The Court heard *viva voce* evidence from the following witnesses: M.J., a social worker, employed by D.C.S.; the mother; paternal grandmother, E.R.; the father; Dr. M. St. A-J., qualified as an expert witness in the field of Assessment and Treatment of Forensic Sexual Behaviour by consent of the parties; and N.D., a Correctional Services Officer employed by Correctional Services Canada at the Dorchester Penitentiary. The father sought to have N.D. qualified as an expert witness in the delivery or provision of the Sex offender Moderate Intensity Program. The father completed same program (facilitated by N.D.) while incarcerated.

[9] *Civil Procedure Rule 55.12* reads:

55.12 Court expert

(1) A judge who is satisfied on both of the following may appoint a person to formulate an opinion, and report the opinion to the court:

- (a) the person is qualified to give the opinion;
- (b) the opinion is likely to be admissible

[10] As per *Civil Procedure Rule 55.04(3)* I was not provided with a Curriculum Vitae for N.D. Her *viva voce* evidence as to her qualifications did not satisfy the requirements set out in *Civil Procedure Rule 55.12*. I did not designate N.D. as an expert witness as I was not satisfied she was qualified to give the opinion sought and that the opinion was likely to be admissible. N.D. testified as a lay witness.

Positions of the parties

[11] The mother requests that she maintain primary care, residence and sole decision making authority pertaining to I. She also requests that the father have no parenting time or direct contact with the child pending his completion of “appropriate services and addresses the Agency’s concerns.” The father seeks supervised parenting time with I., to be supervised by the paternal grandmother, E.R.

Issue

[12] The sole issue to be determined is; does the father pose a risk to I. if he is granted supervised contact/parenting time?

The Evidence

Dr. M. St. A.-J.

[13] Dr. St. A.-J. is a Clinical and Forensic Psychologist with the Forensic Sexual Behaviour Program, Nova Scotia Health. She was qualified as an expert in the field of Assessment and Treatment of Forensic Sexual Behaviour by consent.

[14] Prior to the father's sentencing, Dr. St. A.-J. prepared a Comprehensive Forensic Sexual Behaviour Presentence Assessment dated March 12, 2021. The Assessment was ordered by the Provincial Court. Dr. St. A.-J. testified that as part of the preparation of the report, the father underwent a Penile Plethysmography Assessment (P.P.G.). During the P.P.G. assessments the subject is placed in a private room and shown various computer generated images, including adults, pubescent and pre pubescent females and males. Blood flow to the subject's penis is measured when shown the images. The P.P.G. assessment is used to analyze the risk of the subject reoffending.

[15] Dr. St. A.-J. testified that there is a correlation between the measurements generated by the P.P.G. assessment and the risk or tendency to re-offend . Any “response” 20% or higher is considered to be “strong”. The father’s average responses were 41% with respect to adolescent females and 48% for adult females. Dr. St. A.-J. defined an adolescent female (as per the computer generated avatar) as a 15 year old. The report states that the father’s sexual preference is physically mature females, “but has the capacity to become sexually aroused by child-oriented stimuli as well.”

[16] Dr. St. A.-J. could not rule out the father re-offending against a biological relative. She indicated that re-offending rarely derives from a singular factor. The goal of risk management is to recognize destabilizing influences and factors. Passage of time is suggestive of good internal controls. Dr. St. A.-J. also added that the consumption of alcohol compromises judgment and impulse control.

[17] Below is a reprint of Dr. St. A.-J.’s comments found at page 27 of 28 of the report:

Based on a combination of the Static-99R/Stable-2002R and Stabel-2007, Mr. R.’s baseline (actuarially-determined) risk for sexual recidivism falls into Level II to III, meaning that the probability of Mr. R. committing and being charged with crossing legal sexual boundaries again in the future is half to similar that of the “average” adult man convicted of a sexual offence. If Mr. R. were to reoffend,

his history and current assessment results indicate that it would most likely be against an adolescent female who is well-known to Mr. R. and has contact with him in an unsupervised or inadequately supervised setting (in person or online) through which an emotional attachment may form. Recidivism is also more likely if the target of Mr. R's sexual advances is either assenting or passively (or weakly) resistant. In consideration of relevant dynamic risk factors (i.e., those that may be impacted by intervention), treatment targets for Mr. R. include adaptive coping and emotion self-management, assertiveness skills and healthy problem-solving in relationships, and challenging the offence-supportive cognitions referenced above, including examining underlying beliefs about children's emotional and sexual maturity that might extend beyond the specific context in which he committed the index offences.

N.D.

[18] *N.D.* has been employed as a corrections officer with Correctional Services Canada since 2009. She delivers programs to offenders, including those convicted of violence based offences and sex offences. The father participated in the sex offender Moderate Intensity Program facilitated by *N.D.*

[19] The Program Performance Report found at Court Exhibit 5, Tab F, indicates the father demonstrated a good level of commitment toward the program. *N.D.* testified the father attended every session of the program, fully participated and appeared motivated to achieve skills so as not to re-offend.

[20] The father's rating in relation to his overall participation in the program is "needs improving."

M.J. – D.C.S. Social Worker

[21] M.J. is a Social Worker with the D.C.S. Her office received a referral/notice as the parties seek to vary the existing order. The mother and I. currently reside within the jurisdictional responsibility of M.J.'s office. The child protection application brought in early 2020 was handled by a different D.C.S. office.

[22] Court Exhibit 3 contains copies of D.C.S. case recording reports and other related materials disclosed in accordance with the Order for Production issued June 19, 2023. M.J. testified that she was not able to review the records from the office which initiated the 2020 application. She reviewed the files from her office which dates back to October, 2019.

[23] M.J. further testified that subsequent to receipt of the referral/notice she met with the mother and I., who was 7 years old at that time. M.J. interviewed I. Part of her duties was to ascertain the child's views on the father's request for parenting time. The interview lasted approximately 20 minutes. During the interview I. did not identify the father as a family member. I. could not articulate her views on a relationship with the father. I.'s responses are not surprising given her age and stage of development. The last time she had contact with the father was at age 3.

[24] M.J. clarified that D.C.S. is opposed to the father having direct contact with I., including supervised contact. From the Agency's perspective an Assessment conducted by the Forensic Sexual Behaviour Program indicating that the father would pose no risk to a child (in a supervised contact setting) would possibly sway their position.

[25] M.J. identified some of the external factors the father has addressed in his efforts to be stable: he has maintained sobriety, refraining from the consumption of alcohol; he attends counselling; he is employed; and is in a supportive relationship. M.J. says that these external factors are not/have not been long term. The father was released from prison in January, 2023. I infer from her comments that the father would need to demonstrate consistency over a significant period.

[26] To summarize, D.C.S. views I. as "vulnerable to sexual risk from" the father, given his attraction to adolescent females (Psychological Risk Assessment and Forensic Sexual Behaviour Presentence Assessment dated March 12, 2021). D.C.S. does not view the paternal grandmother, E.R., "as an appropriate supervisor" due to a previous investigation which "substantiated concerns that E.R. was allowing contact between the father and I. when directed not to."

E.R. – the paternal grandmother

[27] E.R. has frequent grandparent contact time with I. Approximately, for the past two years I. has been in E.R.'s care every second weekend. E.R. also provides child care if requested by the mother.

[28] The father resided with E.R. until his date of incarceration. She says he did not consume alcohol in her presence when living at her home. During cross examination E.R. confirmed that her access with I. had been suspended by D.C.S. from February to September, 2020. E.R. denies ever allowing the father to have unsupervised contact with I., since he was charged. Additionally, E.R. says I. has not wet the bed when staying at her residence and has asked about the father on many occasions.

[29] E.R. testified that she has seen the father 5 to 8 times since his release and speaks with him on a daily basis. When questioned as to action(s) she would take if the father was granted supervised contact with I. and acted inappropriately, E.R. indicated she would contact the police.

The Mother

[30] The mother resides with I. and her adult son, A. She has court ordered parenting time with the twins every other weekend and two one week blocks during the summer months. She intends to seek shared custody of A.J.

[31] The mother says that after learning of the charges against the father she suffered a “breakdown”. She accessed various services as facilitated by D.C.S. and their involvement with her family.

[32] The mother testified that I. wets her bed “occasionally” when the subject matter of discussion pertains to conversations held at E.R.’s home. Otherwise I. rarely wets the bed.

[33] The mother also testified that the father and I. enjoyed a good relationship prior to him being charged. She recalled the incident which seemingly led to the suspension of E.R.’s access in 2020. I. came home from a visit with E.R. and drew a picture, ostensibly of the father. The mother alleges that during the same time period the father made a social media post/comment which led her to believe he had had contact with I. She immediately contacted D.C.S. which substantiated concerns that E.R. had allowed contact between the father and I. when directed not to do so. The case recordings found at Court Exhibit 3 address this issue.

[34] The mother says I. is currently on a wait list to see a child psychiatrist at the I.W.K. hospital. I am unclear as to the reason(s) I. currently requires this service.

[35] The mother opposes any direct contact between I. and the father, including contact supervised by E.R. If I decide to grant the father's request for supervised contact with I., the mother asks that same be facilitated by a supervised access and contact program and not E.R.

The Father

[36] The father resides primarily at a halfway house. In mid July, 2023, he will begin to reside full time with his partner, T.D. His relationship with T.D. began in July, 2020. T.D. has a male teenage son who spends weekends with her. The other parent of T.D.'s son is aware of T.D.'s relationship with the father and also of his presence in T.D.'s home.

[37] The father is currently employed by the same employer he worked for prior to incarceration. Upon his release from prison the father completed the Community Maintenance Program for sex offenders. Court Exhibit 5, tab G indicates the father successfully completed the program. At page 9 of 10, of the report, the writer indicates that the father's "overall rating on ability and

commitment to address risk factors through skills” is moderate. The father believes he “had” a substance issue related to alcohol, however he currently has no cravings for same. He testified that he attends ongoing counselling sessions with M.R. and is using the skills he was/is taught in relation to problem solving. The counselling sessions with M.R. is the only service he is currently engaged in.

[38] The father says E.R. indicates that I. makes inquiries about him. The father is requesting that he have supervised parenting time with I. to be supervised by E.R.

Best Interest Factors

[39] In any analysis undertaken such as the present one, the best interests of the child is the paramount consideration. This consideration engages section 18(6) of the *Parenting and Support Act*. A review of the relevant factors as per section 18(6) follows:

(a) the child’s physical, emotional, social and educational needs, including the child’s need for stability and safety, taking into account the child’s age and stage of development;

[40] I. is currently 8 years old. She last had contact with her father at age 3.

Given her age and stage of development and accounting for her lack of

familiarity with the father, any reintegration plan should include input from a qualified professional. I consider a professional's involvement to be of utmost importance as the Agency's evidence suggests I. may have been present during some of the father's assaults on A.J.

(b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;

[41] The mother opposes any form of direct contact between the father and I. I. is unable to self protect and the mother views herself as acting in the child's best interest.

(d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;

[42] As addressed above, it is important that any reintegration plan for direct contact between the father and I. include the input of a qualified professional.

(f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

[43] Given I.'s current age and stage of development, it would be atypical (at least by this Court) to order a voice of the child report or child wishes assessment. I assign minimum weight to the result(s) of the interview of I. by social worker, M.J.

[44] As noted the child last had contact with the father at age 3. It is reasonable to conclude that any substantive knowledge I. has of her father, was/is garnered from the significant adults in her life, including their various and/or divergent perspectives.

(g) the nature, strength and stability of the relationship between the child and each parent or guardian;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

[45] I. has a strong and stable relationship with the mother and paternal grandmother, E.R. The evidence also suggests her relationships with her siblings and maternal grandparents are significant. Direct contact between I. and the father may impact the sibling relationship between I. and A.J. A professional may have some helpful suggestions or strategies on this issue.

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child;

[46] The parents do not communicate with each other and have not since 2019.

The totality of the evidence synthesizes this reality. As with the aforementioned factors, the help and input of a qualified professional may offer guidance.

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

(ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[47] The father's actions in relation to A.J. can be construed as acts of violence. I. may have been exposed to some of the offending behaviours. The impact of the father's behaviour is significant. He was incarcerated and lost his relationship with I. and the mother. The harm to I. requires no further inquiry.

Analysis

[48] Since being incarcerated and released, the evidence suggests that the father has made all reasonable efforts to mitigate his circumstances. He participated in sexual offender programming while in prison, was granted parole approximately 1 year into a 4 year sentence, has participated in programming since being released and attends counselling.

[49] The father argues that substantive evidence from a professional with expertise in the relevant field could have been proffered by D.C.S. in regard to I. and the impact of any contact or non contact with him. I do not disagree with the father on this point. Similarly, I submit that expert evidence addressing the father's circumstances since his release from prison could provide valuable insight into the level of risk (if any) posed by him to I.

[50] Dr. St. A.-J.'s report was authored in March, 2021. Since then the father has been incarcerated, participated in programming and continues to attend counselling. The father's Counsellor, M.R., was not called as a witness. The evidence as it relates to M.R. is scant at best. I accept the father has taken the necessary steps to address his external factors; maintaining sobriety, being employed, attending counselling, being in a supportive relationship. Certainly the hope is that the father continues along this positive path.

[51] In my view, also as important and helpful to the Court in formulating a decision on the relevant issue is expert evidence on the father's current circumstances relating to the issue of risk. The expert report currently before the Court was completed pre-incarceration. The programming in which the father participated while incarcerated and after being released was educational and not designed or intended to assess the issue of risk.

[52] After considering the totality of the evidence I am left with a gap as to updated information from a qualified source regarding the current assessment of risk posed by the father should he be granted supervised direct contact with I. In addition I consider the father's re-integration plan to be incomplete. As articulated in the best interests analysis, it is important that the father's

reintegration plan include professional input, especially in consideration of I. and A.J.'s sibling relationship.

[53] Previously the Agency substantiated concerns of inappropriate supervision by E.R. E.R. denies she acted inappropriately. I accept the Agency's apprehension on E.R. acting as a supervisor. As an independent third party, the Agency's mandate is clear; consideration of I.'s best interests. I was not provided with any evidence which would lead me to conclude that any of the Agency's employees (including M.J.) acted in a manner inconsistent with their mandate. The evidence suggests the social workers carried out their duties professionally.

[54] Pertaining to the issue(s) of credibility, I considered the test set out by Justice Forgeron in *Baker-Warren v. Denault*, 2009 NSSC 59 and effectively summarized by Justice Jollimore in *Wells v. King*, 2015 NSSC 232 at paragraph 5:

[5] In *Baker-Warren v. Denault*, 2009 NSSC 59 at paragraph 19, Justice Forgeron identified factors to be balanced when assessing credibility. These factors include: the inconsistencies and weaknesses in the witness' evidence; whether the witness had an interest in the outcome or a motive to deceive; whether the witness had an ability to observe the factual matters that were the subject of her testimony; the witness' power of recollection; whether the witness' testimony was "in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions"; whether there was an internal consistency and logical flow to the

witness' evidence, whether the evidence was provided in a candid and straightforward manner; and whether the witness was capable of making an admission against her interest.

[55] E.R.'s motive and rationalization is evident. She wishes her granddaughter to have a relationship with her son, the father.

Decision on the Father's request

[56] The father was released from prison in January, 2023, approximately 6 months prior to this trial. This constitutes a relatively short time period in which to properly assess the father's request for contact with I. given the subject matter and totality of the evidence present. Should the father continue on his current path and provide a more robust plan (with input from a professional as contemplated in the best interests analysis portion of this decision and an updated assessment on the issue of risk from a qualified professional) the Court would be in a much better position to comprehensively assess his request.

[57] I find it is in I.'s best interests that the father not have direct contact with her (including supervised contact) at this juncture for the reasons outlined.

Conclusion

[58] After carefully considering the Affidavit and viva voce evidence and guided by the relevant legislation and case authorities including the seminal case, *Foley*

v. Foley, 1993 CanLII 3400 (NSSC), I find it is in I.'s best interest that the following provisions form the terms of the Order flowing from this decision:

- The mother shall continue to have primary care and residence of I.
- The mother shall continue to have sole decision making authority.
- The father shall have no direct contact with I.
- The father may forward letters, gifts or cards to the mother for I. The mother will determine if the letters, gifts or cards are appropriate for I., and provide her with same if she concludes it is appropriate to do so.
- The mother may provide updates, including pictures to E.R. and/or the father.
- The appropriate office of the Department of Community Services (child protection) shall be notified of any intended application to vary or change any of the terms of this Order prior to the application being made.
- Enforcement Clauses.

[59] Counsel for the mother shall draft the Order.

[60] The parties may provide written submissions on costs 30 days after the Order has been issued.

Samuel C.G. Moreau, J.