

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Godbout v. McInnis, 2013 NSSC 274

Date: 20130912

Docket: SFHMCA-35537

Registry: Sydney

Between:

Danny Godbout

Applicant

v.

Heather McInnis

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: June 3, 2013, in Sydney, Nova Scotia

Written Decision: September 12, 2013

Counsel: Danny Godbout, Applicant on his own behalf
Heather McInnis, Respondent on her own behalf

By the Court:

[1] Danny Godbout and Heather McInnis cannot agree on the parenting arrangements that will meet the needs of their children - 12 year old Drake and 11 year old Jayde. The most recent variation order placed the children in the primary care of Mr. Godbout, while Ms. McInnis was granted access every second weekend, together with special occasion, holiday and vacation access. The parenting arrangement is one of joint custody. The current order contemplated a review hearing in June, 2013, at which time the parties consented to re-evaluate their living arrangements based upon the best interests of the children, inclusive of the children's stated wishes.

[2] The review hearing proceeded on June 3, 2013. Each party filed an affidavit and also provided *viva voce* evidence, with the permission of the court. Neither party was represented by legal counsel. The affidavits contained hearsay evidence which the court did not consider. The court was left in the unfortunate position of having no independent evidence as to the wishes of the children. Following the evidence of the parties, submissions were tendered, and the court adjourned for decision.

[3] **Issues**

[4] The following issues will be addressed in this decision.

- Who should have primary care of Drake and Jayde?
- What parenting schedule is in the best interests of Drake and Jayde?
- What child support provisions are applicable to the parenting arrangement?

[5] **Analysis**

[6] **Who should have primary care of Drake and Jayde?**

[7] *Position of the Parties*

[8] Mr. Godbout seeks to continue as primary caregiver of Drake and Jayde. He indicates that he can provide the love, stability, nurture, and direction that the children require. He is concerned about the lack of contact between Ms. McInnis

and the children and notes that Ms. McInnis has not spoken to Jayde since Christmas, and had limited communication with Drake through Drake's playstation. Mr. Godbout indicates that the children are safe and happy with him. He argues for the continuation of the status quo.

[9] In contrast, Ms. McInnis asks that the children be returned to her primary care. She notes that although the children have lived with their father for the past year, she had been the primary care provider for the majority of the children's lives. She indicates that she misses Drake and Jayde terribly. Ms. McInnis feels confident that she can provide the children with the love and care that they require.

[10] *Law*

[11] All decisions involving children must be based upon their best interests. In assessing the evidence related to best interests, this court must have regard to the standard of proof and make credibility determinations. In **F.H. v. MacDougall**, 2008 SCC 53, Rothstein, J. confirmed that there is only one standard of proof in civil cases - that is proof on a balance of probabilities. In every civil case, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must not be considered in isolation, but must be based upon its totality. The evidence must always be clear, convincing and cogent to satisfy the balance the probabilities test.

[12] Parenting decisions made pursuant to the *Maintenance and Custody Act* must be based on the best interests of children. The best interest principle has been described as one with an inherent indeterminacy and elasticity: **MacGyver v. Richards**, [1995] 22 O.R. (3d) 481 (Ont.C.A.), paras 27 - 29. The test is a fluid concept that encompasses all aspects of a child, including the child's physical, emotional, intellectual and social well-being.

[13] I am concerned not only with the day to day needs of Drake and Jayde, but also as to the ability of each parent to ensure that the children mature, develop and grow into confident, healthy and well-adjusted young adults. The Supreme Court of Canada in **King v. Low**, [1985] SCJ No. 7, directs the courts to review the plans of rival claimants and choose the course which will best provide for the healthy development of the children. In **Foley v. Foley**, [1993] 124 NSR (2d) 198,

Goodfellow, J. provided a series of factors for courts to consider and balance when determining the best interests of children.

[14] **Foley-like** factors have also been outlined in the provisions of the *Maintenance and Custody Act* for the courts review. Section 18(6) of the *Maintenance and Custody Act* directs the court to consider all relevant circumstances when crafting a parenting order, including the following:

- (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;
- (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;
- (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
- (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
- (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- (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;
- (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;
- (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
- (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.

[15] The parties did not address all of the factors outlined in Section 18(6) of the *Act* in their evidence or submissions. My decision is thus based upon the evidence which was before me, in keeping with the best interests of the children.

[16] *Physical Environment*

[17] Mr. Godbout resides with his common-law spouse, Ms. Tanner, in a single detached home which Mr. Godbout owns. It is a four bedroom home, over two levels, and contains a large back yard that is situate on approximately one-half acres. The home is located in Westville in a residential area. The middle school, for grades 7 and 8, is located nearby. There are one and a half bathrooms in the home. Mr. Godbout's two other children, ages seven and three, reside in the home as well. The boys share a room and the girls share a room, each having their own beds.

[18] Ms. McInnis resides in a four bedroom duplex which she rents from the Cape Breton Island Housing Authority. The home is also two levels, with one bathroom and a large front yard which she shares with a neighbour. The home is located in a residential area, where there are many children and families. Ms. McInnis currently lives in this home with her three other children, ages four, five and seven.

[19] Both parties' homes meet the needs of Drake and Jayde. Neither parties' plan is superior in respect of this factor.

[20] *Emotional and Safety Needs*

[21] I find that Mr. Godbout is best equipped to meet the emotional needs of the children including their need for stability and safety. Mr. Godbout and his partner promote the stability and safety of the children by engaging the children in a regular routine where there is structure and commitment. There is no evidence to suggest that either Mr. Godbout or his partner currently experience any challenges or mental health difficulties which impede their ability to meet the needs of the children. To the contrary, the evidence confirms that Mr. Godbout's household

operates in a manner that ensures that the children have regular family meals, attend school, are properly clothed, and participate in recreational and social activities.

[22] In contrast, Ms. McInnis indicates that she is currently facing challenges which impede her ability to meet the needs of the children. In particular, although Ms. McInnis indicates that she has not been officially diagnosed with any illness, she is exhibiting depression-like symptoms. Ms. McInnis noted that she cries constantly, that she lacks motivation, and that she is experiencing significant weight loss. She further confirmed that she is engaged in voluntary services and is being referred for a mental health assessment. The symptoms have negatively impacted Ms. McInnis' ability to meet the needs of the children and, in particular, have contributed to Ms. McInnis having no communication with Jayde since Christmas and limited communication with Drake. Ms. McInnis stated that she spends much of her day in bed because she is sad and not motivated.

[23] Because Ms. McInnis continues to experience significant depression-like symptoms, the court is not confident that she has the ability, at this stage, to meet the emotional needs of the children. Mr. Godbout's plan is superior to Ms. McInnis' plan in relation to this factor.

[24] *Social and Recreational Needs*

[25] Mr. Godbout indicates that both children have improved their socialization skills since they started to live with him approximately one year ago. In particular, Mr. Godbout notes that Drake has made friends and regularly enjoys sleep overs, and is engaged and happy. Drake is involved in bicycling, roller blading, playing video games, as well as attending family outings to the local park and fields. In addition, Drake is scheduled to attend a summer camp.

[26] Jayde has also improved since she moved in with her father. Previously, she had a confrontational attitude and was introverted. Since that time, Jayde's attitude has improved substantially. She is polite and helpful. She will also be attending the Tim Horton's camp in the summer. Jayde is making friends.

[27] Ms. McInnis advised that when the children resided with her they were not involved in formal activities, but enjoyed playing outside. Ms. McInnis further

noted that Jayde had socialization issues and liked to play with younger children as they were less confrontational. Both parties agreed that Ms. McInnis' former partner was violent. Violence negatively impacted the children, and in particular Jayde.

[28] Mr. Godbout's plan in relation to the social and recreational needs of the children is superior to the plan presented by Ms. McInnis. Mr. Godbout had greater insight into the importance of meeting the social and recreational needs of the children than did Ms. McInnis, at this time. Mr. Godbout has the capacity and ability to provide emotional and physical security to the children as he is focussed on their needs and he is not impaired for reasons related to untreated mental health challenges.

[29] *Educational Needs*

[30] Both parties presented similar plans in relation to the educational needs of the children. Neither plan was superior to the other, although Mr. Godbout provided more details.

[31] *Willingness to Foster Relationship with Other Parent*

[32] Mr. Godbout understands the importance of the children maintaining a relationship with Ms. McInnis.

[33] Ms. McInnis did not have recent contact with the children because of mental health symptoms and financial stressors. Ms. McInnis is confident that her new boyfriend will be able to assist in transportation so she can exercise access on a more regular basis. The court encourages access and also Ms. McInnis' plan to obtain mental health support.

[34] Ms. McInnis will also foster a relationship between the children and their father. Neither party presented a superior plan on this factor.

[35] *Status Quo and History of Childcare*

[36] As this is a review hearing, a material change in circumstances need not be found. Both parties have experience as primary care parents. Currently, because

of Mr. Godbout's insights and commitment, he is best able to meet the needs of both children. Mr. Godbout can meet the physical, emotional, social and educational needs of Drake and Jayde, and has done so since they have been in his full-time care during the last year.

[37] In contrast, the McInnis' household lacks the structure, routine and commitment to the children that is required. Ms. McInnis has had limited communication with either child in excess of six months. This has negatively impacted on the children.

[38] *Children's Views and Preferences*

[39] The court has no independent knowledge of the children's views and preferences in respect of the parenting arrangement. Despite their age, this factor has thus not been considered by the court.

[40] *Relationship of Children with Each Parent and Extended Family*

[41] I find that Mr. Godbout's plan is superior to Ms. McInnis' plan in relation to this factor. Drake and Jayde have a strong relationship with Mr. Godbout. He has been a consistent and stabilizing force in their life. The children enjoy structure and routine in an environment that is free from violence.

[42] The children's relationship with Ms. McInnis has been negatively affected for two reasons. First, when the children were residing with Ms. McInnis, they were exposed to domestic violence from her ex-partner. The violence exposed the children to dysfunctional relationships and emotional instability. Second, Ms. McInnis has had no communication with Jayde since Christmas and limited communication with Drake. Ms. McInnis showed little insight as to the consequences that this lack of contact had on her relationship with Drake and Jayde.

[43] Drake and Jayde are fortunate to have a number of siblings in both households. Two of these siblings reside in the Godbout household and three of these siblings reside in the McInnis household. It is important that Jayde and Drake have quality time with all of their siblings as children generally benefit from supportive family relationships. Further, the evidence indicates that the children

have a good relationship with Mr. Godbout's common law spouse. Ms. McInnis' current boyfriend also enjoys the children. All such relationships should be maintained, provided they are supportive, safe and protective of the children.

[44] *Summary*

[45] A review of the factors and evidence confirms that it is in the best interests of the children to continue in the primary care of Mr. Godbout. The relationship which Drake and Jayde enjoy with Mr. Godbout is strong, stable, consistent, loving and nurturing. The home is safe and secure. The children have been able to engage in family, educational and social activities in keeping with their needs and best interests.

[46] The court acknowledges Ms. McInnis' love for her children. It is important that Ms. McInnis immediately seek the mental health support that she requires to address the symptoms which are impairing her ability to appropriately interact with the children and which prevent Ms. McInnis from enjoying a healthy and productive life style.

[47] **What parenting schedule is in the best interests of Drake and Jayde?**

[48] The parenting arrangement is as follows:

- Heather McInnis shall have specified access to the children every second weekend from Friday at 6:00 p.m. until Sunday at 2:00 p.m., unless Monday is a holiday or a non school day, in which case access will be extended until Monday at 2:00 p.m. If Ms. McInnis is unable to exercise access, she will provide Mr. Godbout with 48 hours notice.
- Heather McInnis shall have reasonable access during holidays and summer vacation at reasonable times to be scheduled by the parties.
- Heather McInnis and Danny Godbout will equally share in the transportation of the children for access by meeting at a mutually acceptable location that is approximately half way between the two residences of the parties.

- Heather McInnis shall have telephone and internet access with the children at reasonable times. Each party will keep the other party advised to their residential and email addresses, and telephone numbers, and any changes thereto.
- Danny Godbout shall consult with Heather McInnis on all important issues affecting the children. In the event of an impasse, after meaningful consultation, Danny Godbout shall have final decision making authority.
- Danny Godbout shall keep Heather McInnis informed, on a timely basis, of all important matters affecting the health, education and social welfare of the children, including providing Heather McInnis with a copy of all report cards of their children.

[49] What child support provisions are applicable to the parenting arrangement?

[50] Mr. Godbout is not seeking child support from Ms. McInnis. Ms. McInnis' income is below the threshold requirement for the payment of child support pursuant to the provincial *Child Support Guidelines*.

[51] Conclusion

[52] The parties will continue to share joint custody of the children according to the terms of the prior orders. Mr. Godbout will continue to provide primary care and custody, with access to Ms. McInnis to include vacation and holiday access. No child support will be payable from Ms. McInnis to Mr. Godbout. The court will draft the order.

Forgeron, J.