IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
**Citation:** *W.B. v. C.C.*, 2006 NSSC 286

**Date:** 20060929
**Docket:** SBW 1302-00576/043837
**Registry:** Bridgewater

**Between:**

W. B.

Petitioner/Respondent

v.

C. C.

Respondent/Applicant

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

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| **Judge:** | The Honourable Justice Walter R.E. Goodfellow |
| **Heard:** | September 25, 2006 in Liverpool, Nova Scotia |
| **Counsel:** | Elizabeth A. Wozniak, for the petitioner/respondent<br>Alan G. Ferrier, for the respondent/applicant |

**By the Court:**

**BACKGROUND:**

[1] W. B., now forty-two and C. C., now thirty-nine were married July 22, 2000 and separated approximately five and one-half years later on January 5, 2006.

[2] Their marriage was blessed with a daughter R. E. B., born August [...], 2001.

[3] The Petition for Divorce was issued January 10, 2006 and an Answer and Counter Petition on June 23, 2006.

[4] An Interim Application to address interim custody and access was heard February 9, 2006 and the order eventually signed March 31, 2006. The substantive portions of that order are as follows:

> 1. IT IS ORDERED THAT the Petitioner, W. B., shall have interim custody and primary care of the child, R. B., born August [...], 2001 (herein "R.").
>
> 2. IT IS FURTHER ORDERED THAT the Respondent, C. C., shall have unsupervised access with R. as follows:

(a) Every Thursday from 3:00 p.m. until Saturday at 6:00 p.m. The Respondent shall pick R. up from her daycare ([...]) on Thursdays at the beginning of access and the Petitioner shall pick R. up at the Tim Horton's in [...] on Saturdays at the end of access.

3. IT IS FURTHER ORDERED THAT both parties shall use their best efforts to ensure R.'s best interests, and in particular her psychological well-being and safety, are given priority throughout the parties' separation and divorce process and specifically during access transitions.

4. IT IS FURTHER ORDERED THAT the Respondent shall undergo anger management therapy and counseling which has been required of her and arranged by Family & Child Services in Bridgewater, Nova Scotia.

4. IT IS FURTHER ORDERED THAT neither party shall take R. outside the Province of Nova Scotia, for any purpose without the written consent of the other party.

5. IT IS FURTHER ORDERED THAT this order is subject to the present no-contact provisions placed on the Respondent by the Provincial Court being varied to allow the above specified unsupervised access.

[5] There is a further Interim Order issued August 29, 2006 which disbursed the net proceeds of the sale of the matrimonial home so that each of the parties' solicitors received in trust the sum of $128,672.86.

**APPLICATIONS:**

**Interim Application of W. B. - April 22, 2006**

[6] Mr. B. filed this application seeking interim child support and Section 7 expenses retroactive to February 9, 2006. In addition the application seeks a custody order assessment with a psychological component. The file contains a consent order which I will sign directing this assessment.

[7] Finally, Mr. B.'s application seeks disbursal of the proceeds of the sale of the matrimonial home which are presently being held in equal amounts by the parties respective solicitors. At the hearing counsel advised the court that they had disbursed the funds in trust so that this is no longer an outstanding issue.

**Interim Application of C. C. -August 16, 2006**

[8] C. C. filed her interim application seeking a variation of the existing custody order with respect to the parenting arrangements for their daughter and confirming that she has the right to make inquiries and be given information as to the health, education and welfare of their daughter. Subject to my determination on the issue of variation of the parenting arrangements from the interim order discussion was held

between the court and counsel at the outset of the hearing wherein the court expressed the view that the suggested clauses dealing with inquiries, etc., set out in the affidavit of C. C. filed August 16, 2006 and in particular in paragraph 40 was far too extensive and more likely to create and cause contentious side issues, I directed counsel to consider a provision clearly reflecting the statutory provision in the *Divorce Act*, s. 16(5) directing the opportunity for the non-custodial parent to make direct inquiries but making it clear that where any particularly body such as a school does not wish to deal with more than one parent than that must be accepted by the non-custodial parent and the custodial parent will remain with the obligation of timely communicating school reports, health situation, etc. of their child.

[9] In addition, C. C. seeks the return of various personal and household items and an order providing for the time sharing of the parties' dog on an equal basis.

[10] At the hearing of these applications the court was advised by counsel that they had had a meeting in late August with the local justice and had resolved most of the outstanding concerns with respect to personal household items. I directed them to confirm what, if anything, is outstanding and if they wish they can address

anything outstanding in writing to me and I will hold a telephone conference to conclude this issue.

[11] With respect to the dog, I was advised by Mr. B.'s counsel at the hearing that he had given up pursing this issue and in his evidence he expressed frustration at trying to deal with his wife on so many issues that although he viewed the dog as a family dog, and important to their daughter, in his view he simply could not continue the fight on so many fronts and has given up on the dog leaving the family pet with the mother.

**ISSUES:**

[12] With respect to the evidence to be considered on an application to vary, guidance was provided by Hart, J. (as he then was) in *Wesson v. Wesson*, (1973), 10 R.F.L., p. 193, at p. 194:

> In my opinion the evidence to be adduced in support of such an application should be limited to the changed circumstances of the parties subsequent to the latest order of the court. This is not to say that cross-examination should be limited to recent events if reference to earlier facts is necessary to determine the credibility of any of the witnesses, but it must be assumed that the order of the court was validly made in accordance with the law if it has not been previously set aside

> Once the evidence of the changed circumstances has been received, however, the court must be guided in making its decision by the well-established principles of law relating to custody applications.

[13] In *Wesson v. Wesson*, supra, there were changes in the circumstances of both parties. Justice Hart described then as considerable. Nevertheless, he maintained the *status quo*.

[14] From the foregoing, as listed in the brief filed on behalf of C. C. the following issues are outstanding:

**Issue 1:** An Interim Variation of the Interim Order issued in the Supreme Court of Nova Scotia on March 31, 2006 with respect to the parenting arrangements for the child, R. E. B., born August[...], 2001.

**Issue 2:** Pursuant to section 15(2) of the *Divorce Act of Canada* for interim child support and section 7 expenses retroactive to February 9, 2006.

**Issue 2: Pursuant to section 15(2) of the *Divorce Act of Canada* for interim child support and section 7 expenses retroactive to February 9, 2006.**

[15] Ms. C. gave evidence with respect to her employment during her marriage. For a fairly lengthy period she was apparently receiving income as a translator on what is described as an “under the table” arrangement. What is most important and for which Ms. C. should be given credit is what she did with the funds from her income. Her evidence is that she has set aside approximately $15,000.00 in a Registered Education Savings Plan for their daughter and has further funds in trust. I will comment further on this area of educational funds in some suggestions to the parents.

[16] Presently, Mr. C. is employed in Halifax and must commute on a daily basis five days of the week. She incurs employment costs for gas and parking. Her gross rate of pay is $12.00 an hour and she estimates her total earnings for 2006 to be in the vicinity of $10,000 - $12,000.

[17] In addition, the parties own a rental property and apparently the gross rent has been retained by Ms. C. and she has paid some expenses such as taxes. The gross rent is $700 a month and she has just now provided $300 to Mr. B. and retains $400 a month.

[18] The information I have with respect to income is not entirely clear or satisfactory. The rental income aspect is more of property determination and certainly any inequity can be adjusted when the determination is made under the *Matrimonial Property Act*. I accept Ms. C. evidence that her income at this stage is of a relatively low annualized which I fix at $11,000 for the purposes of her payment for child support and she should pay the Table amount retroactively from April 1, 2006 onward.

[19] The Order dismissing her application shall also set the *Federal Support Guideline* provision and further contain the standard provision with respect to the production and exchange of full income particulars on an annual basis between the parties.

[20] With respect to the request for a s. 7 contribution, I once again have very little comfort on the financial information available and I do accept that Ms. C. when it was necessary for their daughter to have child care on Fridays that she in fact contributed on a number of occasions to a total of $131. This issue does not

appear likely to be very substantial but, in any event, it can be more appropriately addressed at the time of trial.

**CHANGES IN CIRCUMSTANCES SINCE MARCH 31, 2006 ADVANCED BY C. C.:**

[21] It is not difficult to understand the concern of the mother, C. C., if she does not get a variation of the existing parenting/access arrangement now then she will be confronted with a situation which will have crystalized further by the time this matter goes to trial. The petition for divorce is based upon an allegation of adultery by C. C. with a doctor whom both parties apparently were looking to for counselling to address problems within their marriage. The allegation, which is denied, is that Ms. C. commenced a sexual relationship with the doctor and in his evidence before me, Mr. B. confirmed that his law suit against the doctor is outstanding and continuing. For practical reasons, the divorce in this matter is not likely to be heard until they have the alternate grounds available of one year's separation. Additionally, I have just signed a Consent Order dealing with an assessment of the parties and possible assessment of their daughter and it is projected that this assessment will not likely be completed until sometime in December. While, as I have stated, I fully understand the concern of Ms. C. as to

the possibility of the factual situation with respect to the primary residence and parenting of their daughter by the father, further stabilizing nevertheless, it is in this case, as in most cases, a consequence of the breakdown of a marriage. The parties have disposed of the family home and their daughter since the interim order was granted has now entered school and the residence of the father and daughter is less than 1 km from her school and apparently the mother has acquired a home which is approximately 35 kms from the school.

[22] Ms. C. maintains that the Justice who issued the Interim Order had to concern himself with the fact that Mr. B. had Ms. C. charged with common assault and arising out of conversations with the Department of Social Services, a charge was apparently laid against C. C. relating to their daughter. The change advanced is that Ms. C. has been acquitted on the common assault charge of having assaulted her husband and the charge relative to their daughter has been stayed.

[23] While it is understandable to perceive that the existence of criminal charges was a major determination in the granting of interim custody of their daughter to the father, the reality of what transpired indicates very clearly that Justice Robert

Wright made his determination of interim custody otherwise, and went so far as to indicate he saw no evidence of violence alleged by the husband.

[24] Justice Wright, in his oral decision of February 9, 2006 specifically stated:

> [7] Let me say at the outset that there are a number of things in the evidence that I have heard today that do not establish certain propositions advanced and I speak of three always under the umbrella of my consideration of what's in the best interests of the child based on the information that's before me.
>
> [8] Number one, is that there is no – there is no evidence before this Court that substantiates any allegation of physical abuse by Ms. C. against her daughter.
>
> [9] Now the conclusion that was reached by Ms. Aucoin was that R. was a child in need of protection. Here we have the Children's & Family Services, who you know have done their normal investigation spanning a period of a week of so. They probably know more than I do, but from what I have heard and the evidence before the Court today, is there is no evidence to substantiate an allegation of physical abuse - and I have to remember that when I consider the strength of the plan espoused by Children & Family Services for continued supervised access. And neither has it been - while I'm on the subject - neither has it been demonstrated to this Court today that Ms. C. is unfit as a parent.

[25] And further:

> I have sit here - sat here and watched both the mother and the father testify and while there is obviously a very high degree of tension between them, I have seen or heard or observed nothing that would make me think that either of them is any more fit than the other to be the custodial parent - but because of the degree of tension that exists between them, neither do I think by way of an interim solution - an interim order - that co-parenting would work. There is too much tension, too much animosity, too much exaggeration, too much pointing the finger the other way, lack of communication. All of those things are simply going to get in the way and way and I don't think that it's going to be in the best interests of R. to have a co-parenting arrangement in the short term and so what I fall back on is the *status quo* in part.

[26] The decision of Justice Wright provided for unsupervised access by the mother to the child at her place of residence for either Saturday or Sunday, all day each weekend. Justice Wright went on to suggest that it should progress to more liberal access and the Order taken out March 31st provides the overnight access referred to earlier.

[27] Can an Interim Order be varied? Answer: Yes. Any order that relates to a child can be varied if there is a change in circumstances that requires variation in the best interests and welfare of the child. See, for example, *Foley v. Foley* (1994), 124 N.S.R. (2d) 198, p. 203, paragraphs 27,33:

> [27] Mrs. Foley's removal of the children has also brought about a substantial change in the parenting environment that existed for some time prior to July 6, 1993.
>
> ...
>
> [33] It is imperative for the stability of these children that they return to their home without delay. There is just enough time to get them settled before the commencement of their school year.

[28] *Foley v. Foley*, supra, was approved by our Court of Appeal in *Marshall v. Marshall* (1998), 168, N.S.R. (2d) 48.

**DETERMINATION**:

[29] I have acknowledged the concern of Ms. C. with respect to the reality that their daughter is likely to continue to have as her primary residence that of her father until a trial is held in 2007. However, that is just one of the unfortunate consequences of separation. I do not find her concern in this regard and the conclusions with respect to the criminal charges constitute a change in circumstances, given Justice Wright's decision.

[30] Additionally, Ms. C. was directed to take counselling sessions with respect to anger and there is a report from the South Shore Assessment and Counselling Services of July 31, 2006 that notes specifically her tone of voice and sarcastic comments in a counselling session of July 5, 2006 and improvement since then. The report notes that the assessment was only based upon the information as provided by Ms. C. and there is no information that would indicate that she is not now managing her anger appropriately at this time.

[31] I have now had the opportunity to view both parties in open court and my conclusion is a mirror echo of that stated by Justice Wright in his decision, which is cited above , noting their inability to communicate, the high degree of tension that still exists, etc. The anger and finger pointing may have relented slightly but is still prevalent. Co-parenting or equal sharing of time with their daughter is not now and is not likely to be in the best interest and welfare of their daughter for the foreseeable future.

[32] I am satisfied for the totality of the reasons indicated that the application of C. C. to vary the existing interim order should be dismissed.

**RECOMMENDATION - SUGGESTIONS**:

[33] While I very clearly found there were no changes in the circumstances that warranted now, or in the foreseeable future, a co-parenting or equal sharing of time by the parents with their daughter. There is likely some benefit to their daughter and to a settling of the environment if the mother had greater access to their daughter until trial.

[34] It is my recommendation that for the months of October, November, December and January that every 3rd weekend the existing order be changed to permit their daughter to have access to her mother for Saturday evening as well so that she would then have on that particular weekend their daughter with her for 3 nights.

[35] With respect to Christmas it is fairly standard that block access be granted close to an equal sharing of the Christmas school vacation period. At one time the standard in this regard was set out in *Glavin v. Glavin* (1994), 130 N.S.R. (2d) 161. More frequently now the parties are able to agree on some division of the time on Christmas day, perhaps with the mother having their daughter from 3:00 p.m. onward or some such arrangement. I hasten to add that I have no evidence before me as to the family circumstances, practices, intentions, etc. and these additional comments are merely suggestions which I hope will find favour.

[36] I would stress very strongly that it is not in their interests to go through the emotions of yet another interim application to address Christmas access. When parents are under emotional stress there is no doubt this impacts on the emotional

well being of their daughter and to the extent possible any further interim application between now and trial should, if possible, be avoided.

[37] One further recommendation is that Ms. C. provide full documentation and disclosure of exactly what has been invested in an RESP for their daughter. The father, Mr. B., should consider matching what the mother has done for their daughter. There may well be some measure of a government grant available

[38] Both parties at this time have cash on hand from the sale of the matrimonial home and it is a clear opportune time to provide some level of secured financing for the educational future of their daughter. The issue was not before me, however, I would point out in a similar situation recently when the issue was before me I in fact ordered the father to make an equal level of contributions (see *Rhynold v. Van der Linden;* Goodfellow, J.; 2006 NSSC 260; 1201-00496).

**COSTS:**

[39] Counsel are entitled to be heard on costs if they are pursued and they are unable to reach agreement.

**J.**