

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Hi v. Hi, 2014 NSSC 253

Date: 2014-07-07

Docket: Sydney No. 79534

Registry: Sydney

Between:

B HI

Applicant

v.

V HI

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: June 12, 2014, in Sydney, Nova Scotia

Oral Decision: July 7, 2014

Written Release: July 8, 2014

Counsel: V Hi, on her own behalf
B Hi, on his own behalf

By the Court:

[1] **Introduction**

[2] Seven year old El and five year old Em are the children of B Hi. El and Em are special needs children. Their mother died a number of years ago. V Hi is the paternal grandmother, and custodial care giver of the children. The parties cannot agree on the terms of interim access.

[3] **Issues**

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

- What general principles apply to interim parenting decisions?
- Has there been a material change in the circumstances?
- What interim access provisions are in the best interests of the children?
- Should Mr. Hi's current common law spouse be designated as a supervisor of overnight access?

[5] Before addressing these issues, I will provide a brief overview of the relevant background information.

[6] **Background Information**

[7] In 2009, child protection authorities became involved in the lives of Em and El as a result of a referral indicating that the children's mother was terminally ill and their father, Mr. Hi, had sexually abused his sister when he was an adolescent.

[8] Following this referral, the agency conducted an investigation. Protection concerns were confirmed. The children were taken into care by the agency. Mr. Hi participated in services to address the protection risks. Services included an assessment by Dr. Connors who confirmed that Mr. Hi was not at risk to sexually abuse his own children. The children were therefore returned to Mr. Hi.

[9] The children remained in Mr. Hi's care for a short time before they were re-apprehended. Mr. Hi was not supervising the children properly. In addition, drugs and drug paraphernalia were found in Mr. Hi's home.

[10] The agency next sought a parental capacity assessment of Mr. Hi. Mr. Hi co-operated. A number of recommendations flowed from the assessment. These recommendations were not diligently pursued by Mr. Hi. The agency therefore sought an order for permanent care.

[11] Before the permanent care hearing took place, Mrs. Hi put forth her plan of care. After conducting an investigation, the agency decided to support Mrs. Hi's plan. They terminated their involvement once the *Maintenance and Custody Act* order issued in March 2012.

[12] The *MCA* order vested custody in Mrs. Hi. Mr. Hi was granted reasonable access. The order also stipulated that Mr. Hi was not to have unsupervised overnight access. Further, the parties were mandated to contact child protection authorities should any changes in custody or access occur.

[13] Approximately one year later, Mr. Hi sought to vary the provisions of the 2012 court order. He commenced a variation application on July 22, 2013. Mrs. Hi filed a response on February 24, 2014. The variation hearing is scheduled for January 19 and 20, 2015.

[14] In addition, Mr. Hi also filed a motion seeking to vary the access provisions, on an interim basis. He seeks to specify the times of access and to name his current common law spouse as the supervisor for overnight access. Mr. Hi wants to take the children on an extended summer holiday.

[15] Mr. Hi is currently employed. He anticipates having every Wednesday and Saturday off. He also anticipates a summer vacation in August.

[16] Mr. Hi has formed a new relationship. He is living with his partner, Ms. Ri. They have a new baby. Ms. Ri has two other children from a previous union. She is willing to supervise overnight access.

[17] For her part, Mrs. Hi seeks written confirmation from the child protection authority that the agency approves of the changes sought by Mr. Hi. No such authorization was provided.

[18] Child protection authorities were notified of the application and interim motion by the court. The agency is in the process of investigating the family's circumstances.

[19] The interim hearing was held on June 12, 2014. The parties, Ms. Ri, and SJ testified. Submissions were given and the matter adjourned for decision until today's date.

[20] **Analysis**

[21] **What general principles apply to interim parenting decisions?**

[22] The court is mandated to apply the best interests' principle in all parenting decisions as noted in s. 18 of the *Maintenance and Custody Act*, which states as follows:

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.

[23] The best interests principle has been described as one which has an inherent indeterminacy and elasticity: **MacGyver v. Richards** (1995), 22 O.R. (3d) 481 (Ont. C.A.), paras 27 to 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.

[24] During interim proceedings, the status quo gains pre-eminence. The court is focussed on what interim, parenting arrangement will be the least disruptive, and most supportive of the child: **Pye v. Pye**, [1992] N.S.J. No. 133 (N.S. T.D.); **Stubson v. Stubson**, [1991] N.S.J. No. 210 (N.S. T.D.); **Foley v. Foley**, [1993] N.S.J. No. 347 (N.S. S.C.); **M. (A.) v. Y. (A.)**, [2012] N.S.J. No. 33 (N.S. S.C.); and **Horton v. Marsh**, 2008 NSSC 224 (N.S. S.C.).

[25] The status quo which ordinarily must be maintained is the status quo which existed, without reference to the unilateral conduct of one parent, unless the best interests of the child dictate otherwise: **Kimpton v. Kimpton**, [2002] O.J. No. 5367 (Ont. S.C.J.). The status quo, however, is not the only factor to be considered when fashioning an interim parenting arrangement. In **Foley v. Foley**, *supra*,

Goodfellow, J. provided a series of factors for courts to consider and balance when determining the best interests of a child, in the context of an interim motion. The *Maintenance and Custody Act* also lists relevant factors.

[26] I have reviewed the law, the evidence, and the submissions. I have based this court's parenting decision on what is in the best interests of Em and El.

[27] **Has there been a material change in the circumstances?**

[28] I am required to find a material change in circumstances before I can vary the provisions of the last court order as noted in s. 37 of the *Maintenance and Custody Act*.

[29] An application to vary is not an appeal of an original order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the date the order was made. The existing order can only be varied if a party proves that a material change in the circumstances exists, and as a result of that change, the current order no longer meets the child's best interests: **Gordon v. Goertz**, [1996] 2 S.C.R. 27 (S.C.C.).

[30] A material change is one which has not been foreseen or could not have been reasonably contemplated by the judge who made the original order: **Gordon v. Goertz, supra**. A material change must be more than a temporary or minor change. The change must be a substantial, continuing one which impacts the child and the ability of the care givers to meet the needs of the child.

[31] Although **Gordon v. Goertz, supra**, involved proceedings pursuant to the *Divorce Act*, the same legal principles apply to an application made pursuant to the *Maintenance and Custody Act*: **Rafuse v. Handspiker**, 2001 NSCA 1 (N.S. C.A.).

[32] I find that a material change in the circumstances has occurred since the last order issued because the flexible access contained in the wording that permits "reasonable access at reasonable time" was a source of chronic confusion and conflict between the parties. Conflict and confusion in access scheduling is never in the best interests of children.

[33] What interim access provisions are in the best interests of the children?

[34] It is in the best interests of the children to have specified access. The following access schedule will be in place pending the 2015 variation hearing and decision:

- Mr. Hi will exercise access to the children every Wednesday and Saturday from 2:30 pm until 6:30 pm when school is in session, and from 9:00 am until 6:30 pm when school is not in session.
- Specified access will be suspended on December 25, Easter Sunday, Victoria Day, Canada Day, Natal Day, Labour Day, Thanksgiving Monday, and for 10 consecutive days in the summer should Mrs. Hi choose to take the children away from the area for vacation.
- Mr. Hi will have access to the children at such other times as is consented to by Mrs. Hi, to include between 1:30 and 6:30 pm. on December 25, Easter Sunday, Victoria Day, Canada Day, Natal Day, Labour Day, and Thanksgiving Monday, provided Mr. Hi is not working during these specified times.
- Mr. Hi must take the children to any scheduled activity or to any birthday party or special function to which the children are invited during his scheduled access. In the event Mr. Hi is not willing to do so, the children will remain with Mrs. Hi and make-up access will be provided at an alternative time within the week.
- Only persons holding a valid license are permitted to transport the children in a vehicle which is safety inspected and which is equipped with proper child restraints.
- Mr. Hi will only enroll the children in organized activities if he first obtains the consent of Mrs. Hi.
- Mr. Hi will have reasonable telephone access to the children at reasonable times.
- Mrs. Hi is to keep Mr. Hi advised on a timely basis of important matters affecting the health, education, and general welfare of the children.

- Mrs. Hi is to keep Mr. Hi advised, on a timely basis, of school concerts and organized special activity performances in which the children are participating so that Mr. Hi may attend such concerts or performances.
- Mr. Hi may only attend medical appointments with the consent of Mrs. Hi and the professionals overseeing the appointments. Mrs. Hi will advise Mr. Hi of the outcome of all medical appointments that Mr. Hi does not attend.

[35] Should Mr. Hi's current common law spouse be designated as a supervisor of overnight access?

[36] Clause 2 (c) of the current court order states that Mr. Hi "shall not have unsupervised overnight access with the children." Mr. Hi seeks to have his current partner, Ms. Ri, supervise the overnight access. Mrs. Hi disagrees.

[37] I deny Mr. Hi's claim for the following reasons:

- This is an interim proceeding. Insufficient evidence was adduced to prove that it is in the best interests of Em and El to allow Ms. Ri to supervise overnight access. The burden is upon Mr. Hi to prove his suggestion. He did not lead clear, convincing, and cogent evidence to support his proposition.
- Mr. Hi did not prove that he engaged and completed the services as recommended in the parental capacity assessment.
- Ms. Ri is not an independent or unbiased individual. She is engaged in a romantic relationship with Mr. Hi. They have a child together. Ms. Ri's ability to provide supervised care is compromised.
- The evidence surrounding the method of supervision was limited. The court was not provided with evidence as to how Ms. Ri would be able to provide supervision during the overnights. No evidence was led on how Ms. Ri could supervise if she was asleep, attending to her own personal needs, or addressing the needs of her other three children.
- The agency has only recently begun its investigation.

- Em and El are vulnerable special needs children.
- The status quo favours the denial of overnight visits supervised by Ms. Ri in that no such overnight visits have occurred.
- The children's best interests are maintained by a denial of overnight visits supervised by Ms. Ri. Such an outcome is most supportive and the least disruptive to the children.

[38] **Conclusion**

[39] Mr. Hi's motion to specify the terms and conditions of interim access, pending the January 2015 hearing, is granted based upon the provisions previously reviewed. Mr. Hi's motion to have Ms. Ri act as supervisor for overnight visits is denied.

[40] The court will draft and circulate the interim variation order.

Forgeron, J.