

SUPREME COURT OF NOVA SCOTIA

Citation: *Duffy v. Poirier*, 2014 NSSC 297

Date: 2014/09/05

Docket: *Halifax*, No. SFHMCA-074383

Registry: Halifax

Between:

Frank George Duffy

Applicant

v.

Natasha Gail Poirier

Respondent

Judge: The Honourable Justice Moira Legere Sers

Heard: March 7, July 9th 2013; June 9th, 2014, in Halifax, Nova Scotia

Counsel: Michele J. Cleary, for the Applicant
Bryen Mooney and Peter Crowther, for the Respondent

By the Court

[1] On March 2nd, 2011 Mr. Duffy filed an application for custody of his child Frankie, born October 9th, 2008.

[2] The mother, Natasha Poirier, filed a Notice of Interim Motion on September 13th, 2011 seeking interim custody.

Brief introduction to the Parties

[3] Frank Duffy was born May 18th, 1967 and is 47 years of age; the mother, Natasha Poirier, was born January 28th, 1979 and is 35.

[4] The parties were a couple for six years, living common law between April 2007 and December 2010.

[5] The relationship ended in May 2010. The father moved out to his camper for the summer. He returned to live with the mother after the summer until December 2010 when he was able to obtain his own lodgings.

[6] The father's parenting statement confirmed that this child lived with both parents.

[7] The father is unemployed and continues to be in receipt of disability insurance. The mother was and continues throughout to be employed as a legal assistant.

[8] The mother testified that subsequent to their separation her schedule of parenting time was imposed on her by the father.

[9] The child lived with her Tuesdays, Thursdays, Saturdays and some Sundays. The child lived with the father Mondays, Wednesdays, Fridays and some Sundays.

[10] When the child was with the father the mother visited him most nights and assisted in his care, bathed him and put him to bed.

Interim hearing October 18th, 2011 / Order January 10th, 2012

[11] The child was three years old at the time of the interim hearing. He is now five years old.

[12] The father has been represented by four lawyers at separate times throughout these proceedings. He has released three of these during the proceedings.

[13] The mother was unrepresented at the interim hearing. Subsequent to the interim hearing she retained counsel.

[14] The interim hearing was set for ½ hour.

[15] Both parents sought an order for interim custody.

[16] The mother filed her own affidavit and parenting statement; and an affidavit from the father's previous partner Katherine Brodie sworn October 11th, 2011. The father filed his affidavit and parenting statement.

[17] The Court informed the parents there was insufficient time to hear evidence or consider the affidavits other than in a cursory manner.

[18] The father represented that the status quo was that he was the primary parent.

[19] The mother was unable to present her evidence given the short time available. Although advised that this was an interim proceeding only and not intended to be a final result, the mother under considerable pressure, unable to articulate her submissions, reluctantly agreed to what was presented as a "consent order."

[20] I have listened to the tape of the proceedings. Time was extremely limited. There was in fact no hearing on the merits or an opportunity to challenge the evidence.

[21] The process resulted simply in a discussion rather than a hearing.

[22] The mother did not have an opportunity to articulate her position.

- [23] Unfortunately, what emerged could not legitimately be called a consent order. It is clear the mother was under considerable duress, without counsel, and had little choice but to agree to an interim arrangement.
- [24] The mother consented to a status quo order that did not represent their previous parental roles.
- [25] The order granted joint custody to the parents; ordered the child to remain in the primary custody of the father with reasonable access to the mother at reasonable times upon reasonable notice. It designed parenting time as Tuesday between 5:30 p.m. to Wednesday at 7:00 a.m.; Thursday 5:30 p.m. to Friday at 7:00 a.m.; and Saturday at 11:00 a.m. to Sunday at 6:00 p.m.
- [26] Given the dynamics of the parties involved this order effectively removed from the mother any power or authority to negotiate decision making respecting the child.
- [27] The rationale for this interim order was that the father was disabled and able to stay at home during the weekday and be available for the child while (a) the mother was gainfully employed or (b) during those times he required day care.
- [28] The Court accepted that the status quo was reflected in the father's assertions that the child was in fact in the primary care of the father.
- [29] The mother maintained that while she had to leave the home she visited the child every night.
- [30] The parenting statements would suggest that the mother's contact was more significant than described by the father.
- [31] The father subsequently acted as if a decision had been made on the merits. He assumed an authoritarian role with the mother .
- [32] His interpretation is a serious misapprehension of what happened and what was intended at the interim hearing.
- [33] He erroneously suggests he has had interim custody of Frankie since separation. The Order of Joint Custody does not reflect that.

[34] The father said:

“the fact that I am at home on disability and looking after Frankie meant , to Justice MacDonald , that I had the time and the opportunity to tend to all “Frankie’s needs.”

[35] This is a distortion of the reality that occurred at that interim appearance considering there was no hearing on the merits.

[36] The interim order continued until the present hearing.

[37] After the interim order at least three other judges have had the parents before them for procedural motions. I have presided over this case since January 2013.

High Conflict

[38] This continues to be a high conflict family.

Process Delay

[39] Subsequent to the October 18th, 2011 appearance and order; on November 21st, 2011, the Court was advised there was a breakdown of the relationship between the father and his counsel.

[40] New counsel appeared on his behalf on January 10th, 2012. The mother was then represented by counsel. The matter was adjourned for a settlement conference on April 10th, 2012 and a hearing in June of 2012.

[41] The settlement conference was unsuccessful.

[42] Having discharged his second lawyer, the father appeared before another Justice on July 20th, 2012 without counsel.

[43] On September 26th, 2012 he appeared before the Court with counsel.

[44] His newly retained counsel filed a motion for an adjournment. The mother also presented a motion for disclosure of police records.

[45] On September 26th the adjournment was granted to allow the father to obtain new counsel.

[46] On March 5th, 2013, by way of teleconference, his then current counsel advised that he needed further time to prepare.

[47] The March 7th starting date was used to hear the evidence of Christine Brittain, an assessor working out of New Brunswick. She travelled from New Brunswick to give her testimony.

[48] Ms. Brittain had prepared a Voice of the Children report in an earlier case concerning this father and his two older daughters.

[49] The trial was further adjourned to July 2013.

[50] On July 9th, 2013 the Court heard the evidence of the father and his former partner. On July 10th, 2013, the mother testified.

[51] The hearing was scheduled to continue on October 29th, 2013.

[52] On October 24th, 2013, with the continuation of the hearing approaching, the Court was informed that the solicitor client relationship between the father and his then current counsel broke down.

[53] On October 29th, 2013, the father's counsel arrived to advise the Court of a breakdown in the relationship between himself and the father.

[54] The mother's counsel continued to oppose these repetitive requests for adjournment.

[55] The father wanted the assessor present for cross-examination. He pleaded with the Court to adjourn to allow him time to obtain counsel. He insisted he was disadvantaged and unable to adequately cross-examine the assessor, the only remaining witness. Again an adjournment was reluctantly granted on December 11th, 2013.

[56] The father subsequently advised the Court he was unable to obtain a lawyer.

[57] Information was disclosed at this appearance that the child disclosed he wanted to die.

[58] With the consent of the parties the Court made a referral to Child Protection authorities requesting an update in the assessment and a wider consultation with collaterals.

[59] To await the investigation results and allow the father time to obtain counsel the matter was again adjourned.

[60] The result of the court referral produced recommendations that the father and the son receive separate counselling. The June 2nd, 2014, updated assessment suggested the father was seen by a psychologist, Mr. Russell, although the nature and extent of this consultation is unknown.

[61] The child had three counselling sessions through the IWK.

[62] Having obtained new counsel on February 27th, 2014, his counsel appeared and requested an adjournment to prepare for cross-examination of the assessor.

[63] On the final appearance in June 2014 the father's counsel asked for another adjournment. This was denied.

[64] The matter proceeded without the assessor present. The Court was informed by his counsel that the father did not require the assessor to be present for the purpose of cross-examination after all.

[65] The father's conduct has unreasonably prolonged the process. Whether he is unable to work effectively with his various lawyers or he simply wanted to delay the proceedings, he benefited from the adjournments. By firing his lawyers and requesting adjournments the status quo order continued.

[66] This delay has effectively created a status quo that has not been shown to be in the best interest of the child.

The Mother's evidence

[67] The Respondent asserted from the outset she was the primary caregiver. She put the child to bed each night and cared for him daily. She purchased all his food, paid for day care and medical expenses as required.

[68] In her affidavit the mother speaks to the father's prior criminal involvement.

[69] Attached to her affidavit is a decision of the New Brunswick Court relating to five individuals charged with conspiracy to traffic crack. Mr. Duffy is not one of the individuals charged. His name is used in the decision as someone who was having a conversation with one of the accused.

[70] The mother tenders this as evidence of the father's involvement in drug trafficking in the past. The decision she attached cannot be used to draw any conclusions about the father's involvement in that particular transaction.

[71] The father does not deny his past criminal involvement.

[72] He maintains that his criminal behavior is in the distant past, (12 years previous), and he is no longer involved in criminal activity. There is no evidence to the contrary.

[73] The mother advises that when she was involved with the father he changed his name to Reynolds to distance himself from the name Duffy and to dissociate himself from a previous life of drugs and alcohol. At the time Frankie was born the father was going by the name Reynolds.

[74] The mother claims that the father drank every day during their relationship. This affected his behavior and his behavior worsened after the birth of their child.

[75] The mother testified as follows:

"I have continuously, since we discontinued our relationship, had difficulty with the Applicant. The Applicant has called in a harassing manner both at work and home and has often arrived at my residence announced, uttering threats and accusations. ...on more than one occasion I have been forced to contact them, (the police), and have them involved."

[76] The police were called by a third party in August 2011 while witnessing an altercation between the parents. ..." The Applicant was refusing to return Frankie to my care on that particular weekend and has

Frankie locked in the car while yelling at me in the driveway. Throughout the confrontation, Frankie was crying out the window for me.”

[77] The mother testified that after an unsuccessful settlement conference the father threatened to blow up her car.

History of child care

[78] The Respondent returned to work after maternity leave in September 2009. The father stayed at home to care for Frankie from Monday to Friday 8:00 a.m. - 5:30 p.m. The mother would provide care for the child from Monday evenings, weekends and holidays.

[79] During September 2009 and October 2010 the father was required to attend medical appointments three times per week. The Respondent testified that the father would wake up in pain each morning.

[80] When not in the care of the mother due to her employment, the child was put in the care of a caregiver close to their home.

[81] She would leave for work around 8:00 a.m. and return after work.

[82] They would prepare meals together and later, when their child could eat solid foods, the father would prepare meals. The mother would clean up, do the housework, laundry and remove the trash. They would shop for groceries together and share the cost.

[83] The mother received the child tax credit and bought and paid for their child's mediation, childcare, milk, clothes etc...

[84] She took their child to the doctor, play dates etc... The father has also done so.

[85] When the parents separated in May 2010, the mother purchased a home in Lower Sackville. The father wished to reside in his camper in the summer in Hammonds Plains.

[86] During the summer of 2010 the father lived in his camper at Woodhaven. He would care for Frankie while the mother worked during the day. The child would return to her care in the evenings.

- [87] The father would pick the child up in the morning from the mother's home and she would pick him up after work at the father's home.
- [88] They would sometimes eat together at the mother's home.
- [89] During the evenings and weekends the mother was the primary caregiver for the entire family. During this period of time the child was with the mother five nights a week.
- [90] As winter approached the father moved back in with the mother in Sackville.
- [91] The father moved into his own apartment in December 2010 settling in more permanently in January 2011.
- [92] The entire family spent Christmas 2010 at the mother's home with all three children.
- [93] From late 2010 to early 2012 the father would have the child four days a week, the day care one day and the mother during the evenings.
- [94] The mother continued to do the father's laundry, his housework and helped him with legal matters during this period of time.
- [95] Mid February 2011 the child was with the father Monday, Wednesday and Friday until Saturday, the mother would visit the child every Monday, Wednesday and Friday night at the father's house and stay until she put the child to bed (except for Mondays when she left by 7:15 p.m.). This was the schedule she said was imposed upon her by the father.
- [96] The remainder of the time the child would be with the mother.
- [97] About mid-February the father stopped asking the mother to do his housework. He asked her to stop putting the child to bed while she visited in his home.
- [98] From April 18th, 2011 to May 16th, 2011 the child was in the care of the mother. The parents and child spent time together during this time.
- [99] The father moved to Nine Mile River, Nova Scotia in May 2011.

[100] During the summer the father asked the mother to do his laundry in her home, he used her shower and stayed at her home when the weather was not good.

[101] In July - August 2011 the mother put a stop to this behavior. The mother terminated the relationship entirely.

[102] Thereafter, for one to two days per week, while the mother was at work the child was placed with a child care giver and the remainder of the week with his father.

[103] The rest of the time during the evenings he was with the mother and on her days as designated.

[104] Once the mother terminated intimacy between she and the father, his behavior towards her became very difficult. He began to impose rules on her, refuse contact, calling her, visiting her and coming to her home unannounced.

[105] He imposed a schedule on the mother. He constantly blamed the mother in the presence of the child.

[106] The mother did her best to keep the peace and comply with the father's imposed rules just to ensure she had access to her child without interruption.

[107] The mother advised the Court she was being harassed by the father by phone and email.

[108] The father sent emails about her relationships real or imagined. He told the mother he had people watching her home and following her.

[109] The mother's testimony has been validated by the collaterals involved in the assessment process.

The father

[110] The father had been injured at work in 2007 . In 2008 he was re-injured in a motor vehicle accident.

[111] As a result of his injuries he receives a disability allowance, has a medical marijuana permit and is on prescribed pain killers. According to the evidence of his daughters and two partners , in the past he mixed his medication regime with alcohol.

[112] The father has three daughters from previous relationships; the oldest from a previous relationship was 26 at the time. He had two daughters living with their mother in New Brunswick. He has one son from a relationship with the Respondent herein.

[113] Respecting his relationship with Ms. Poirier, the father alleged that after they separated she kept their child from him for short periods of time.

[114] He asserted he was the primary caretaker since birth.

[115] I conclude that while he did play a significant role as did the mother his belief is not in keeping with all of the evidence.

[116] He admits that he and the mother split the cost of groceries and she paid the babysitter. He admits she would come home from work and she would feed and bathe the baby.

[117] The father is unable, with any clarity, to see or articulate the mother's true role and value. He speaks with third parties to diminish her role as if her significant support and caregiving diminishes his relationship with his son.

[118] He accused her of coming into his home and stealing his medication. He would deliberately count his medication in front of her.

[119] He considers her abusive and threatening.

[120] There is no evidence before the Court from any witness or assessor that supports his assessment.

[121] The father suggests that when Frankie was in his care Ms. Poirier would not assist him with their child. He said she would leave his home at 7:30 p.m.

[122] It was Mr. Duffy who changed the long standing routine established between the parents during which time the mother assisted him in getting their child to bed. It was he who insisted she leave his home.

[123] The father admits he is unable to work due to chronic pain. As noted he uses prescribed marijuana and other prescription pain medication. The father admits that at times he could not bath their child.

[124] Notably and exceptionally, in his March 1st, 2013 affidavit he speaks clearly and concisely to the issues of shared parenting, without excessive blaming, derogatory accusations and insinuations against the mother.

[125] In his affidavit of May 28th, 2013, he speaks about the shared parenting arrangement and admits that the mother and he equally share the tasks and responsibilities associated with their child.

[126] However, he regresses to his usual presentation of painting the mother in a critical light, blaming her for his circumstances and insisting he is the primary parent and more responsible guardian for this child.

[127] There is no end to his attempts to try to convince the Court of the mother's bad character. There are fleeting glimpses of insight when he admits she is a good mother and his son needs to be connected to her.

[128] While the father is unable to positively articulate the mother's role he does admit she helped out, and assisted while in the home with him.

[129] He admits the mother did more of the laundry and he cleaned dishes while she bathed the baby. He admits it is her health plan that covers the child and that she occasionally buys diapers for him.

[130] The father engages in a constant repetition of his history of conflict.

[131] Reading the mother's affidavit and emails does not produce the same toxicity.

[132] The father equates the mother's wish to separate from him with a suggestion she wanted to separate from her child.

[133] The evidence does not support any suggestion that the mother intended or did withdraw from her parenting responsibilities for the child.

[134] In his affidavits in March and May 2013 the father acknowledges that he has no contact with all three of his daughters.

Assessments

[135] There were two assessments completed and tendered in evidence in this proceeding. There is a third prepared for another proceeding.

1. The first Voice of the Child assessment was undertaken in the matter between the father and his previous partner concerning his access to his two children in St. John, New Brunswick. The assessor, Christine L. Brittain, completed this assessment report dated July 2012. His two children, ages 15 and 11, refused to visit with him in Nova Scotia.

Ms. Brittain confirmed that the children provided compelling reasons why they wished to terminate contact with their father.

2. The second assessment in time is the first assessment of the family before me (father, mother and child).

In her February 2013 report the assessor recommended a joint parenting arrangement. The assessor advised that it would be in the best interests of this child if the plan could reduce the transitions between the parents. She recommended the parties seek professional help for resolving the conflict.

She recommended that the child be enrolled in the school district where the father resided because he was available during the day.

She recommended that the father have the child during the weekday from 5:30 a.m. until 5:30 p.m. and the mother have all after schools and overnights Monday through Thursday. She thought the parents could share weekends.

She recommended the matter be assessed again after one year.

[136] The parents were not prepared to adopt the recommendations of the assessor. After this assessment they agreed to an interim 2-2-3 day split custody scheme.

[137] The second assessment of this family and in particular this child occurred due to the disclosures made by the child. The assessor was directed to broaden her scope to provide information as to how the child

was doing in school and to speak to third party service providers to get a more accurate picture of the child's emotional health.

[138] The order for assessment was not presented for signature until April 7th, 2014.

[139] The matter was finally adjourned to June 9th, 2014.

[140] In her updated assessment Ms. Simms recommended:

1. A 50/50 arrangement with clear instructions to the parents to cease all discussion except that which is necessary for relaying necessary information about the child;
2. She focused on the communication of the father to the mother and other third parties. She recommended co-parenting mediation and a program for families in high conflict, (Strong Families IWK);
3. She recommended **no tolerance** for further emotional abuse and harassment by the father against the mother with serious consequences if the father does not change his communication behavior; and,
4. She recommended a 5-2 split and alternate weeks with alternate weekends.

[141] On June 9th after the updated assessment was filed the parties were invited to address the recommendations of the updated assessment and speak to the schedule proposed by the assessor. Neither party agreed to adopt the recommended changes in schedule.

[142] In her first assessment Ms. Simms noted;

“It is the unhealthy relation and lack of boundaries between these parents that need to be addressed; shifting the relationship from one of fault finding inquisition and defense to one of respect for the autonomy and choices of the other parents ...”

[143] She recommended individual counselling to address communication skills to grow in support and respect for each other.

[144] In retrospect, after considerable weighing of all the evidence and the level of conflict in this family, I have concluded that the assessors first

proposed schedule was one which best utilized the skills of each parent and allowed for separate parenting. Considering the circumstances of this family the proposed schedule maximized parental availability yet provided a degree of overnight stability to the child.

[145] The proposed schedule allowed for a parent, (the father), to be available should the child need a parent during schooltime hours. It did not require him to care for the child all day . Considering his own evidence as to his level of pain and disability this was achievable. The proposal also allowed for considerable involvement of the father in shared vacations and holidays.

[146] It allowed the child to be with the mother after work hours and weekday overnights. This would have provided a consistent and predictable schedule allowing the child to be in the care of the mother overnights during the week. The evidence suggested the mother was better able to provide for her child during these evening and overnight hours.

[147] The father's chronic need for pain medication, his physical condition and the effect of both on his ability to parent during the night made putting the child with the mother during the night an ideal plan which maximized and optimized the child's access to the best of both parents when they had the best to offer him.

[148] Unfortunately neither parent agreed with the schedule and did not adopt it on a voluntary basis.

[149] Through all the barrage of detail about the conflict between the two parents, third part observations by the assessor conclude that both parents are significantly involved with their child. Third party observations indicate each parent is appropriate.

[150] Despite saying he wanted to kill himself, the assessor concluded the child was independently well looked after *but the debilitating conflict between the parents created a toxic environment from which he could not escape.*

[151] It was with some concern about the effect of this ongoing conflict and the consequences on the child that the Court ordered a closer look at the child's emotional health.

[152] Each parent was notified in advance of the assessor's impending visit to their home.

[153] The assessor found the father's apartment clean and suitable for children.

[154] The child's bedroom was described as comfortable and well stocked with books. The assessor found Frankie quiet, comfortable and natural in his home and with his interactions with his father. The father demonstrated pride and was supportive of his son.

[155] Likewise the assessor found the mother's apartment clean and comfortable. The child's room was equally well stocked with books and toys. The child presented as comfortable and natural in his interactions with his mother.

[156] The assessor found the mother forthright, yet overwhelmed by the stress resulting from the conflict between herself and the father.

[157] She found the father assertive, stressed and focused on his role as father.

[158] She concluded that the parents care for their child, want what is best for him, want to have the other parent in his life, have had to rely on one another to maintain their schedule of parenting and have made compromises for their son to make the co-parenting successful.

[159] She commended the mother for maintaining a responsible career to model stability and structure and the father for providing while disabled.

[160] The assessor recommended a joint parenting arrangement.

[161] The most compelling problem she concluded was the negativity and reactivity in the relationship between the parents. The mother presented feelings of despair, defeat, worry and victimization in keeping with her childhood and the continuing trauma of conflict in her life.

[162] The father was anxious and one-sided in his perspective, inhibiting his ability to see events from anyone else's perspective.

[163] The conflict continued and the child, by expressing his wish to die, symbolized the damage and destruction the parents continue to inflict on him by their ongoing conflict.

The second family assessment – an update

[164] The second assessment was the result of wider consultation with professionals and third party service providers.

[165] The assessor agrees that each parent-child relationship is necessary.

[166] While the report must be read in its' entirety, the professional advice is consistent with the totality of the evidence: Ms. Denise Sullivan saw this child in January after court referral.

1. "The level of negativity and hostility in five year old Frankie Duffy Poirier's life has caused, (and is the cause of), stress for the whole family; putting the child at serious risk for clinical anxiety and depression.";
2. She concluded that the child's main stressor was not due to the relationship between the child and either of his parents individually, but rather to his exposure to conflict and negativity, primarily precipitated by the father;
3. Ms. Sherry Slaunwhite of Community Mental Health's Choice Assessment program said as follows:
 - (a) Frankie's distress is a direct result of conflict between the parents. She continued "Frank's, (Mr. Duffy's), display of hostility was more overt and accusatory in comparison with Natasha's disposition which was more defensive but ...tried to stay focused";
4. The main proponent of this negativity is the father. His behavior must change;
5. The mother is making efforts to respond to the father's hostility appropriately; and,
6. If the father does not immediately make efforts to deal with his negativity and harassment of the mother, clear consequences must be set out and followed.

[167] In describing the father's behavior the psychologist providing counselling for Frankie commented that while she confirmed that the father loves his son she found it;

"...extremely difficult to impose a structure for effective communication and keep the focus on the child. Dad compulsively made disparaging remarks about Mom in front of Frankie. I tried many times to have him stop but he couldn't. Mom was defensive."

[168] Due to this negative environment being so damaging to Frankie she asked each parent to take Frankie to the waiting area, speaking to each individually:

"Dad was extremely frustrated but tried to be cooperative. He seems to have cognitive processing difficulties. He couldn't focus and often misunderstood and got anxious and reactive. I had to correct his meaning of his misunderstanding many times. He seemed to understand but would misinterpret again.

He got stuck and could not move off his negative focus against Natasha. He would accuse her, saying he tried for years to get them professional help but Natasha wouldn't agree."

[169] She also noted:

"...there is no evidence he initiated professional services and he couldn't answer with whom or when."

[170] The investigating worker with Child Protection, Ms. Sullivan, confirmed that the conflict between the parents made the child sad. He is a child caught in the middle.

[171] She found:

"Frank focused on Natasha, blaming her for Frankie's distress. He dragged out the past with Natasha, with serious accusations, yet did not necessarily want to restrict the 50-50 arrangement.

He was offensive and accusatory forcing Natasha on the defensive. He victimized himself and blamed her for everything. This approach made it impossible to facilitate a conversation between the parents about minimizing stress for the child."

[172] Ms. Sullivan found Natasha, although at times reactive...to be more level-headed and more stable.

[173] Ms. Slaunwhite of Choices Program observed the child to be somewhat disassociated emotionally. This comment is consistent with observations made by one of his teachers.

[174] Ms. Slaunwhite described the dynamic between the parents as so dysfunctional that it was difficult to assess anything else.

“...the verbal conflict was to the point it was an impairment to communication. Frank has a constant expose of arbitrary accusations against Natasha who was constantly on the defensive. She found Frank to be very angry and...invested in his story...which she found to be a distorted reality. She observed the mother less invested in the story and trying to stay focussed.”

[175] The child was found less to be depressed and more to be suffering from living in a war zone of conflict.

[176] The end result was to recommend reduction of transitions between the parents, make recommendations to each parent regarding counselling and attendance at an IWK program specific to this family's needs, follow-up with a review and if change was not made, provide clear consequences to alleviate the child's level of stress.

Voice of the Child Assessment

[177] A copy of the Voice of the Children Assessment regarding the New Brunswick daughters was tendered in spite of the father's objection.

[178] The assessment described the father's conduct as the reasons underlying the recommendation to terminate the visits between the father and his two daughters.

[179] I considered the first Voice of the Child Assessment only to the extent it spoke to the father's distorted perception of events and pattern of accusations against the mother in this proceeding.

[180] The father advised he had regular contact with his two older daughters. He blames Ms. Poirier's bad behavior as the reason his daughter's did not want to come back and visit him in Nova Scotia.

[181] The Voice of the Children's report tendered in this proceeding does not support the father's assertions.

[182] Neither does the evidence of mother of these two children.

[183] During the first two years of the relationship between Mr. Duffy and Ms. Poirier the father did not see his two dependant daughters. This consequence was triggered when he refused to return them to their mother in New Brunswick after a visit in Nova Scotia.

[184] The police were involved and the children were returned to their mother.

[185] Ms. Poirier assisted Mr. Duffy obtain access to his daughters. He eventually obtained supervised access and ultimately was allowed to bring them to Nova Scotia unsupervised.

[186] Ms. Milberry, (Katherine Brodie), the mother to the Applicant's two daughters in New Brunswick), testified before me that she was prepared to allow her daughters to visit with their father in Nova Scotia because she was confident they would be safe in the presence of the Ms. Poirier, the Respondent herein.

[187] After the Applicant and Respondent separated the children continued to visit with Ms. Poirier and their half-brother Frankie while he was in the care of the Respondent.

[188] Mr. Duffy's daughters expressed their comfort with Ms. Poirier and their visits with her and their continued contact with their half-brother Frankie despite the separation.

[189] The children refused to continue any contact with their father.

[190] The father admitted that Ms. Poirier assisted him to get his visitation with his daughters.

[191] The daughters began to resist contact and refused to spend time with him due to what they believed was his alcohol consumption.

[192] The daughters were subject to demeaning comments about their mother and her partner and they feared for the safety of their mother due to the father's comments.

[193] As to Ms. Milberry's comments or opinions regarding any comparison between the two situations or her opinion as to the outcome of this case I have not relied on them as appropriate or relevant to this enquiry.

[194] Ms. Milberry provided a second affidavit later in July 2013. In that affidavit she outlined her relationship which was burdened by the father's drug use.

[195] Mixed with alcohol his usage provided a very difficult living environment.

[196] The father was subsequently charged and convicted of drug possession along with other charges for which he was sentenced to house arrest for one year.

[197] The same inter-personal behavior described by the mother in this proceeding existed in his previous relationship.

[198] The daughters reported that their father spoke badly about their mother, made allegations about her in their daughters' presence, smoked marijuana in their presence and made the visits a very negative experience such that they refused to continue with the visits.

[199] Despite the father's abysmal relationship with his former partner Ms. Milberry, his current conflictual relationship with Ms. Poirier, and his failed relationship with his three daughters he has a good relationship with his son. This was as observed by the assessor.

[200] He genuinely wants the best for his son and provides for him to the best of his financial and emotional ability.

[201] Using the strength of his position as primary parent the father has continued his harassment of the mother with no regard for the effects on his child.

[202] His behavior, although much more controlled and muted in court, is consistent with the presentation in animated form as described by the assessors.

[203] I am conscious of the father's value to the child in spite of his behavior. I am conscious of the consistent recommendations of the assessor.

[204] I am also conscious that the father has been able to display appropriate conduct towards the child when in the presence of unrelated individuals who have spoken positively of his care and nurturing of his son.

[205] I am conscious of the need to put an end to the conflict in which this child lives and reduce the litigation which has, I conclude, prolonged and exacerbated the conflict. It is a costly burden emotionally for all parties and financially for the mother.

[206] The mother has made progress and can provide a healthy environment for this child.

[207] Against all odds and most particularly the emotional abuse the father has directed her way she has displayed an enormous dedication to this child even when she determined her voice was not heard.

[208] The Maintenance and Custody Act governs this proceeding. Section 18 provides as follows:

Powers of court

18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or, with leave of the court, a grandparent, other member of the child's family or another person make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

(4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(b) ordered by a court of competent jurisdiction.

(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.

(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including

(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.

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

- (a) the nature of the family violence, abuse or intimidation;
- (b) how recently the family violence, abuse or intimidation occurred;
- (c) the frequency of the family violence, abuse or intimidation;
- (d) the harm caused to the child by the family violence, abuse or intimidation;
- (e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and
- (f) all other matters the court considers relevant.

(8) In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6) (j). R.S., c. 160, s. 18; 1990, c. 5, s. 107; 2012, c. 7, s. 2; 2012, c. 25, s. 2.

[209] To this statutory directive I consider the following:

1. Role model;
2. Assistance of experts;
3. Time availability of a parent for a child;
4. Physical and character development of a child by such things as participation in sports;
5. Emotional support to assist in a child's development, self-esteem and confidence;
6. Financial contribution to the welfare of the child; and,
7. Interim and long range planning.

[210] The Supreme Court of Canada has confirmed that a rights based approach is not the proper approach to assess issues of best interests in custody matters.

[211] We know that there is no legal presumption in favour of a custodial parent. The best interests of the child is the primary focus.

[212] There are a number of legislated and case law factors referred to which, for obvious reasons, are not relevant or pertinent in this situation. For example, we do not have access to a reliable method of determining the children's wishes.

[213] It is an understatement to say that both parents came through considerable adversity in their lives.

[214] The father presents as a negative role model with the constant emotional abuse he directs towards the mother.

[215] Yet, he also provides a nurturing aspect and is seen to show affection for his son and a desire to care for his son.

[216] The mother presents as a more moderate role model with a strong work ethic and desire to provide financially and take care of her son. She earns an income and is able to look after her son.

[217] The father's finances are not as strong as the mother's. He lives on disability income yet he manages to provide the necessities of life for his son.

[218] He has daytime availability due to his disability.

[219] The mother is the stronger and more stable emotional influence.

[220] This child has been living in and experiencing the effects of chronic conflict between his parents in large part initiated by the father's need to establish himself as the parent with control and authority over his custody.

[221] The father continues to battle to protect his position with the child. Perhaps this is based on his past experience of being alienated from his children. However, the evidence suggests strongly this is largely as a

consequence of his own conduct. His strategy, (perhaps unconscious), has been a constant attack on the competing parent.

- [222] Alone he has been described as an appropriate caring parent but in situations where he is called upon to be a co-parent he is constantly in conflict with and berating the mother.
- [223] The father has not learned to share parenting responsibility without disparaging the mother. The effect of this constant battle of words is to root the child in conflict.
- [224] The assessor and other professionals have identified a possible reason for the father's mistaken belief that he is under fire; i.e. His need for pain medication, his physical state, the mixture of marijuana and pain medication, as well as the possibility that there is a cognitive impairment.
- [225] I am unable to make any reasonable conclusions with certainty as to what if any extent the father currently mixes alcohol with his pain medication regime.
- [226] The father acts as if he is under siege. He misunderstands or misinterprets the motivation of others.
- [227] This adversely affects the child's and mother's emotional health and stability. It places the child at risk of depression and sadness.
- [228] The mother is far more willing to facilitate and support the presence of the father in the child's life than the father is the mother. The mother's ability to continue to put herself in the presence of this emotional degradation just to stay close to her child is evidence of this.
- [229] The father has little ability to cooperate with the mother; the mother however, has evidenced an ability to keep the child connected to the father.
- [230] The history of care of this child is however, that he has a significant connection to both of his parents. If he could enjoy this without conflict he could potentially flourish.
- [231] The father's plan is one-sided as primary caregiver. He has not shown flexibility or generosity about the mother's involvement. He has not used

his defacto authority cooperatively or wisely in a manner which reduces conflict between the father and mother.

[232] The mother's request for sole custody is a method she has adopted to stop the conflict by putting decision making in her hands.

[233] I have no evidence of the child's views although I have some sense that he wants to spend more time with his mother even if he is hesitant to speak to this. He already has significant contact with his father.

[234] There is an observable strong attachment between the child and each of his parents as noted by the assessor. It is the conflict between the parents that is debilitating.

[235] I have little evidence of this child's connections to extended family.

[236] This is a situation where emotional abuse continues. The father's constant harassment and accusations against the mother are a form of violence.

[237] Although he is the cause of this abuse he is also seen as able to care for his son.

[238] What long term effect this has on the son aside from the obvious has yet to be determined. As a role model this behavior is not a positive influence.

[239] This environment is harmful which is why the assessors recommend fewer transitions where the child has to experience the father's anger with the mother.

[240] Clearly the weight of evidence supports a primary care arrangement with the mother.

[241] The assessors recommend shared parenting in spite of the father's behavior.

[242] I do not see this as a contradiction. There are many versions of shared parenting as a parenting strategy.

[243] In assessing this I am not using shared parenting as it is used in the child support guidelines. Rather I use this term as it refers to a sharing of the parental responsibilities day to day and with regard to major decisions.

[244] This child has become accustomed to a close-to-shared parenting arrangement. The reports are that he is comfortable with both parents individually.

[245] I am aware that while the father creates this negative environment around the mother the assessor has noted that in spite of their differences each parent has made and is capable of making compromises to ensure their child's needs are met.

[246] I acknowledge that for many reasons including systemic delays this first hearing on the merits comes far too late in the day.

[247] I attribute a good portion of the fault for this to the father and his constant requests for adjournments, his hiring and discharging of lawyers.

[248] I will design a parenting schedule that will keep both parents in his life according to the evidence of their strengths and frailties and provide options to reduce the transitions for this child.

[249] I intend to give the father **a final opportunity** to change his behavior in an effort to preserve for the child that which is good in his life.

Conclusion

[250] I will continue **a joint legal custodial arrangement** that will preserve for both parents the rights and responsibilities for the day to day care and nurturing of their child in accordance with their skills and availability.

[251] The parents shall continue to share the right and responsibility for major decisions. These decisions will be made after consultation and consent or court order.

[252] It is critical to reduce the conflict in this child's life.

[253] To address the father's lack of flexibility, his inability to co-parent consistently and without conflict, his ongoing misuse of his perceived authority and his contribution to the excessive level of conflict in which this

child is mired and has been since the parties terminated their relationship, I place the child in **the primary care of the mother.**

- [254] The mother has already shown an ability to put her child's interest ahead of her own.
- [255] The father has been, thus far, unable to set aside his own needs and focus on the child's right to maintain a connection with both parents.
- [256] The first assessor recommended the child be at the mothers place after school each night and returned to school by her to avoid the child being in the presence of both parties.
- [257] **The child shall be with the mother from after her work (at the hour she determines and communicates to the father) each Monday to Thursday night inclusive on those weeks which end in the father's weekend and through to each Monday when the week ends with her weekend.**
- [258] **The mother shall arrange to deliver the child to school each morning. The father shall arrange to pick up the child after school until the mother's work ends.**
- [259] **The father shall transport the child to the mother's home after her work** He is able to drive and manage the transportation.
- [260] **The mother is to designate the usually time she is able to be home after her work . She shall communicate that time to the father and he shall deliver the child to her at that time .** It is intended that the child shall have supper times in the mother's home
- [261] **The father and mother are not to engage in any conflict or discussion around any issue during this transition of the child between them other than as is necessary for the safe transition of the child from the father's care to the mother's care.**
- [262] Each parent shall **alternate weekends** from Friday after school to Monday return to school.

- [263] **Should the mother's employment schedule permit her to transport the child to school at an appropriate time, she shall deliver him to school each day.**
- [264] **Should the parents be able to agree without conflict that the child can be brought to the father's place before school to assist the mother continue her employment without disruption, they may consent in writing in advance to this arrangement. Without such consent in writing, she shall arrange to have the child delivered to school with appropriate supervision.**
- [265] **Should the parents enter into an arrangement that the mother first delivers the child to the father before school and he is responsible for bringing the child to school and should the conflict escalates, the mother shall advise the father in writing and immediately resume responsibility for delivering the child to school**
- [266] **No major decision shall take place with respect to school, health, residence or otherwise without consultation by email and agreement or court order.**
- [267] **The parents shall consult on extra-curricular activities. The mother shall have the final say on any activities taking place during the school week nights.**
- [268] **The parents shall not enroll the child in an activity on the weekends requiring the other parent to participate without that parent's consent.**
- [269] **The parents shall, as much as possible, keep Frankie with the same doctor or doctors who are familiar with him.**
- [270] **Should there be a need to obtain medical or other services with another medical service provider they will email the other parent about what took place and what, if any, treatment is prescribed.**
- [271] **Each parent shall keep themselves up-to-date on his school work and school activities.**
- [272] **Christmas vacation shall be divided such that for even numbered years the child shall be with his mother from noon on the 24th to noon on**

the 26th and with the father from noon on the 26th to noon on the 28th.
Thereafter the parents shall divide the vacation period equally.

[273] In **odd numbered years** at Christmas the child shall be with the father on the noon of the 24th to noon on the 26th and thereafter with the mother from noon on the 26th to noon on the 28th with the balance of the vacation divided.

[274] **March break shall be divided** each year in accordance with the ordinary schedule.

[275] **Summer vacation shall as well be divided equally.** The parties may address the appropriateness of the 2014 summer schedule at the review to effect necessary or appropriate changes depending on the child's needs and emotional health.

Additional Rules

[276] The residence of the child shall not be moved farther from the mother's residence without order of the Court or the mother's written consent.

[277] The child's school shall not be changed without agreement of the parties or court order. Should there be a need for change this can be presented at the review.

[278] While the child is in the care of each parent they shall make **minor** day to day decisions. During the day the father may make minor decisions and during the evening hours the mother.

[279] If there is an educational issue to be resolved the mother shall be consulted and agree prior to any change in the educational plan.

[280] Each parent shall keep themselves independently informed of their son's school events and progress.

[281] Each parent has the right to consult with and receive information about their son from all third party services providers including educators and medical personnel.

- [282] If a medical, educational or emotional emergency arises the other parent will be alerted by the fastest method possible.
- [283] If the emergency is medical the parent in whom the child resides at the time of the emergency will take immediate appropriate measures to address the emergency by taking the child to a doctor or hospital and thereafter, as soon as practicable, alert the other parent by email or phone, (only in an emergency).
- [284] The parents shall seek a referral through their family doctor and attend the IWK Strong Families Program.
- [285] **Each parent must undertake and continue counselling, refer themselves and their family as recommended to the IWK program and co-mediation** should they be able to engage.
- [286] Each parent shall ensure their counsellor has the two Simms reports, and this decision and will continue to pursue counselling so that their own individual communication skills and coping strategies are addressed in the course of counselling.
- [287] If there is no cooperation between the two such that they receive the recommended counselling as parents **each is expected to independently seek this counselling as recommended and will be required to provide proof of attendance, frequency and duration as well as a report from the service providers.**
- [288] Each parent shall agree, with the assistance of their counsel, to select an affordable co-parenting mediation counselling. If neither can afford this or it is financially unavailable they shall take this to their individual counselor and seek the assistance to pursue this.
- [289] **The father must stop pointing the finger at the mother, harassing her and blaming her. He must turn his attention to addressing his own personality deficits that mires him in his own distorted perceptions.**
- [290] There is a suggestion that the father may have some impairment of cognitive functioning. He is also suffering pain and medicating with pain killers and marijuana.

[291] He must consult with his doctor and counsellor to find out the extent to which this influences his personality and perceptions and to assist him in addressing his medical and emotional needs.

[292] The father is to constructively, (respectfully and positively ,without blaming), communicate with the mother regarding practical matters relating to their son. He shall not attempt to address any other matters related to her personal or professional life with her.

[293] The father is to immediately stop all negative comments about the mother publically or in private, verbally or via email.

[294] The father is to refrain from any negative comments regarding the mother in the presence of his son.

[295] If he believes there is evidence that the son is at risk he is to contact the child protection agency to allow them to conduct an independent investigation.

[296] The totality of the evidence causes me to conclude that the father is largely responsible for continuing the high level of conflict creating a toxic environment for this child as he tries to move back and forth between parents. Neither parent is to ever speak in a negative manner about the other parent in the presence of their son.

[297] The order will be staged to monitor the father's progress. Initially, I will keep both parents significantly involved to allow the child the time and space to be nurtured by both parents.

Review

[298] The summer schedule was ordered at the end of the court hearing. I order a review of this and the summer schedule provided earlier to assess how the child has adapted.

[299] Before the review the Court will want to see an update by the assessor Simms and if unavailable, another suitable assessor.

[300] Each parent shall provide a short affidavit to the Court and each other two weeks in advance of the review date to indicate how the child is adjusting to the summer schedule.

- [301] The Court will be looking for proof that the child's conditions have improved with the parents' efforts to remove him from the conflict.
- [302] I will hear from both parties to address the status of the conflict and draw conclusions on their evidence in accordance with proper procedure.
- [303] The success of each parent will relate solely to their own ability and diligence in addressing the cause of conflict and making the necessary changes
- [304] Should there be no progress, should the father continue with his abusive, accusatory manner towards the mother, the order may be varied and reviewed to further remove the child from situations of conflict.
- [305] At the review there must be evidence of a demonstrable change in the father's behavior and a significant reduction in the conflict in which this child exists.
- [306] The level of contact with the father will reflect the child's best interests and be focused on removing the child from as much conflict as possible.
- [307] While not intending to restrict the Court in that review stage it must be clear that if the father's participation in conflict is not reduced sufficiently a second stage order could remove the joint decision making and consultation process to a sole custody order in favour of the mother.
- [308] At this stage the highest priority must be put to preserving what is good in this child's life including and honouring his attachments to his parents yet removing him from the conflict for as long as is necessary to address his emotional needs.
- [309] The first proposed schedule was a schedule which I think put the child in school with access to his father during the father's better times, (i.e. daytime), and put him with his mother at night consistently Monday through Friday on her weekends.
- [310] It does result in at least one, if not two, transitions between parents.
- [311] Should the child's emotional health deteriorate either parent may apply for a variation of the order.

Child Support

- [312] The father is on disability and able to maintain himself.
- [313] The mother is earning \$37,532 in the 2012 year resulting in a payment of \$315.47. I do not have updated information but this income is consistent with the past years income.
- [314] The father has income from disability pension and social assistance resulting in a minimum payment of \$41.48.
- [315] The Court must also consider the circumstances of the parents.
- [316] In his 2012 income statement the father also received Workman's Compensation. I am unaware whether this continues to date.
- [317] The father has had access to a lawyer through Legal Aid.
- [318] The mother did not fare well when she attended the interim hearing without counsel.
- [319] Due to the difficult nature and high conflict in these proceedings she would have been unable to navigate without counsel. She has paid the price of repeated adjournments and a lengthy process requiring no doubt significant costs.
- [320] In addition, the interim order allowed the father to register the child in school outside the city.
- [321] The mother is operating in a deficit position, in part due to legal fees to put her legitimate case before the Court.
- [322] I decline, without more evidence as to their respective circumstances, to order child support. This may be better assessed later.
- [323] That may change with this arrangement or the parties may consider an agreement.
- [324] When this matter returns for review the parties shall provide updated financial information and evidence concerning the receipt of the tax credits.
- [325] I will also require evidence of their indebtedness and legal costs.

[326] The review as contemplated by this order shall be set by the Devonshire schedulers in accordance with the availability of the parties and their counsel on or before December 15th 2014 .

[327] Counsel for the mother shall draft the order.

Legere Sers, J.