

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *D.S. v. R.T.S.*, 2017 NSSC 155

**Date:** 2017-05-29

**Docket:** *Sydney* No. 1206-006908

**Registry:** Sydney

**Between:**

DS

Applicant

v.

RTS

Respondent

**Judge:** The Honourable Justice Theresa Forgeron

**Heard:** November 17, 2016; April 13, 2017; May 19 and 29, 2017, in  
Sydney, Nova Scotia

**Oral Decision:** May 29, 2017

**Written Decision:** June 2, 2017

**Counsel:** Alan Stanwick for the Applicant  
RTS on his own behalf

**By the Court:**

**Introduction**

[1] The mother and father are separated spouses and the parents of two boys who are 13 and 11 years old.

[2] The parties were unable to resolve two key issues, the most important of which concerns access. Currently, the boys live with their mother and have supervised access with their father. The mother wants supervised access to continue because of concerns surrounding violence and alcohol abuse. In contrast, the father believes that he should have unsupervised and unrestricted access. He says that he has learned to manage his anger by successfully participating in counselling and anger management classes. He says that he will not drink alcohol if he is granted unsupervised access.

[3] The second unresolved issue concerns the payment of child support. The mother seeks the table amount of child support and an additional amount for childcare expenses and retroactive support. Although the father agrees that he should pay the table amount of child support, he disputes an obligation to contribute to childcare expenses or to pay a retroactive maintenance award.

**Background Information**

*Personal Particulars*

[4] The parties were married on April 26, 2003. Their first son was born about one year later in April 2004 and the second son was born in May 2006.

[5] Throughout the marriage, the father worked for the CBRM in the Public Works Department. He continues to maintain this employment. The mother was also employed during the marriage. She is a seasonal fisher employed by her father. The mother collects EI when she is not fishing.

*Violence and Alcohol Abuse*

[6] Unfortunately, violence was a regular part of this family's life. The violence included physical assaults, such as the father pushing, hitting, slapping and throwing things at the mother when he was angry, frustrated or upset. The violence

also included the father calling the mother crude and humiliating names. The violence was worse when the father was drinking. The violence often occurred when the children were present. Sometimes the children would attempt to protect their mother. Over the years, the father offered many apologies and made many unsuccessful promises of change.

### *Separation*

[7] The mother began to recognize that the father would not likely change. In November 2013, the family was returning from a hockey game. The mother was driving, the father was in the front passenger seat and the boys were sitting in the back. In his anger, the father struck the mother with the back of his fist, in three successive assaults, while she was driving at about 100 km an hour. The father was unconcerned about the impact of his violence; he was unconcerned about the real potential of a car accident.

[8] The mother had enough. She made a decision to end the marriage. She would leave after Christmas. Regrettably this plan changed because the violence escalated. As a result, the mother left on December 21<sup>st</sup>. She returned three days later after the father promised to quit drinking and promised to take an anger management course. These promises, like so many in the past, were short lived. It was not long before the father's violence and alcohol abuse resurfaced. The final separation took place in March 2014. There was no further attempt at reconciliation.

[9] After separation, the mother initially lived with her parents until the end of fishing season. In July 2014, she returned to the matrimonial home. The father stayed in the matrimonial home until July when he moved in with his mother.

[10] In September 2014, the father threatened to kill himself. He accessed mental health services. In addition, the father decided to enroll in an out-of-province, faith based therapy program so he could learn to manage his anger and stop abusing alcohol. The father took an unpaid leave of absence from his employment to attend this program. The program was scheduled for 10 months; the father quit after a month.

### *Post Separation Maintenance and Debt Payments*

[11] The family's ongoing financial struggles were exacerbated after separation. Neither party could afford the matrimonial home and many of the other bills that

had been incurred. The bank eventually foreclosed on the matrimonial home. A vehicle was repossessed. In the end, each party sought protection by filing separate consumer proposals, which were ultimately accepted by their creditors.

[12] After separation, the father paid the table amount of monthly child support except from March to July 2014, when he was living in the matrimonial home and paying the mortgage, and for six weeks in the fall of 2014, when he was on unpaid leave of absence. The father did not, however, contribute to the payment of childcare expenses.

#### *Post Separation Access*

[13] After separation, the children had regular unsupervised and unrestricted access with their father. This all changed in November 2015 when one of the sons texted his mother about the violence that he allegedly observed between the father and his new partner. As a result, both the police and child protection authorities initiated investigations.

[14] For her part, the mother immediately filed an emergency motion because she was concerned for the safety of the children. On November 23, 2015, an *ex parte* interim order issued which permitted only supervised access and which restricted the father's use of alcohol.

[15] On December 22, 2015, an *inter partes* hearing was held and an order issued. This order expanded the list of access supervisors and ordered the father to attend addiction counselling and personal counselling to address ongoing issues with anger, violence and alcohol abuse.

[16] A third interim order issued on March 4, 2016 and flowed from a Date Assignment Conference. During the Conference, the father exploded. He verbally assaulted the mother. Because of the intensity of the violence, and in the best interests of the children, the court on its own motion suspended all interim access until the father obtained a mental health assessment which confirmed that he was stable and not a risk to the children; or until the father filed an interim motion and led evidence that the children would not be at risk if interim supervised access was reinstated.

[17] On August 3, 2016, a fourth interim order issued which reinstated supervised access, but through the YMCA supervised access program. The parties continued

to participate in this program until they later agreed to the paternal grandmother once again resuming her role as access supervisor.

### *Trial Particulars*

[18] The contested access and child support issues were the subject of a divorce trial held on November 17, 2016, and on April 13, May 19 and May 29, 2017. The following people testified at the trial: the mother, a police officer, a child protection supervisor, the babysitter, the paternal grandmother and the father. Oral and written submissions were provided. Further, after submissions were concluded, the mother filed a motion to lead fresh evidence. The motion was denied. The oral decision was rendered on May 29, 2017.

### *Agreements*

[19] The parties were able to settle all other issues arising from their separation. These agreements were read into the record and will form part of the corollary relief order as follows:

- The mother will have sole custody of the children.
- The father will pay the table amount of child support in the monthly amount of \$771 to the mother through the Maintenance Enforcement Program.
- Neither party will pay spousal support to the other party.
- Each party will retain all personal property held in their name or possession without further equalization to the other party.
- There will be an equal source division of the father' employment pension.
- Each party is responsible for meeting their obligations under the provisions of their respective consumer proposals.

[20] In addition, the mother' name change application is granted as is the parties' divorce.

### **Issues**

[21] To resolve the outstanding parenting and maintenance issues, I will answer the following three questions:

- Is it in the best interests of the children to have access supervised?
- Should s.7 childcare expenses be awarded?

- Should retroactive child support be awarded?

### Analysis

#### [22] Is it in the best interests of the children to have access supervised?

##### *Position of the Parties*

[23] The mother seeks supervised access because of the father's abuse. She said that the father is unable to control his anger and was violent in the children's presence. She stated that the father's conduct causes the children to experience emotional harm; the father's conduct also places the children at risk of physical harm. The mother further said that the father's abuse of alcohol interferes with his parenting.

[24] In contrast, the father stated that it is in the children's best interests to be in his unsupervised care. He said that he successfully completed anger management courses and has engaged in counselling. He says that he has learned skills to properly channel his anger and frustration.

[25] The father also stated that supervised access is no longer necessary. He said that supervised access is restrictive. The father said that the children should not be deprived of the benefits flowing from unrestricted access. He particularly lamented the loss of overnight access, although he acknowledged that he could have exercised overnight access if he stayed at his mother's home when visiting with the children.

##### *Law*

[26] The ***Divorce Act*** states that custody and access decisions must be based on the best interests test. In deciding what is in a child's best interests, I must examine competing parenting plans and choose the course that will best provide for the child's healthy development: **K. (K.) v. L. (G.)**, [1985] 1 S.C.R. 87 (S.C.C.). The ***Divorce Act*** also states that I must not consider parental conduct unless the conduct is relevant to the child's best interests. Finally, the ***Divorce Act*** states that I must ensure that a child has as much contact with each parent as is consistent with the child's best interests.

[27] The factors which compose the best interests test are varied and relate to the child's health and to the child's educational, social, cultural, emotional and moral development, as well as to the ability of each parent to meet the needs of the child.

[28] Unlike its provincial counterpart, the *Divorce Act* does not specifically address the issue of family violence. This omission, however, does not mean that violence is not a relevant consideration when assessing best interests. It is. Family violence negatively affects children. Violence erodes confidence and self-esteem. Violence perverts a healthy family life. A child who is exposed to violence learns that violence is an acceptable way to resolve disputes. It is not. A child who is exposed to violence learns that violence is an acceptable way to express love. It is not. In my decision, I considered the issue of family violence and the impact that violence played on the children's development.

[29] In my decision, I also have considered the following legal principles which have emerged from case law, including the decisions of **Young v. Young**, [1993] 4 S.C.R. 3 (S.C.C.); **Abdo v. Abdo** (1993), 126 N.S.R. (2d) 1 (N.S. C.A.); **Bellefontaine v. Slawter**, 2012 NSCA 48 (N.S. C.A.); and **Doncaster v. Field**, 2014 NSCA 39 (N.S.C.A.):

- The burden of proof lies with the party who alleges that access should be denied or restricted, although proof of harm need not be shown.
- Proof of harm is but one factor to consider in the best interests test.
- The right of the child to know and to be exposed to the influence of each parent is subordinate in principle to the child's best interests.
- The best interests test is a positive and flexible legal test which encompasses a wide variety of factors, including the desirability of maximizing contact between the child and each parent, provided such contact is in the child's best interests.
- The court must be slow to extinguish or restrict access. Examples where courts have extinguished access include cases where access would place the child at risk of physical or emotional harm, or where access was found to be contrary to the child's best interests.
- An order for supervised access is seldom seen as an indefinite or long term solution.

- Access is the right of the child; it is not the right of a parent.
- There are no cookie-cutter solutions. Courts must examine the unique needs of each child and craft an order that protects and enhances that child's best interests.

[30] In **Lewis v. Lewis**, 2005 NSSC 256, as approved in **Bellefontaine v. Slawter**, supra, this court reviewed circumstances which may lead to the imposition of supervised access at para 24, which include the following:

- Where the child requires protection from physical, sexual or emotional abuse.
- Where the child is being introduced or reintroduced into the life of a parent after a significant absence.
- Where there are substance abuse issues.
- Where there are clinical issues involving the access parent.
- Supervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent.

### *Decision*

[31] I find that the mother has proven that supervised access is in the best interests of the children for the following reasons:

- Although the father participated in anger management courses and counselling, he continues to lack insight. Insight is often required to make permanent lifestyle changes.
- The father has yet to assume responsibility for his conduct. He continues to blame the mother for his inability to exercise unsupervised access. He believes that the mother is set on bleeding him dry and that she wants to diminish his influence over the children. Examples of this finding are found in the e-mails the father submitted as evidence. In his March 2016 e-mail to his E-Counsellor, the father said that "... *She just wants a paycheck from me and could care less if I live on the streets and never see them. ....*" Later in

that same e-mail, the father noted that “... *but she is just trying to run me into the ground and destroy me. ...*” In another March 2016 e-mail, the father says the following about the mother: “... *she is a poison piece of shit to me with retarded expectations that make no sense whatsoever on any level. ...*”

- The father lacks insight into why access was cancelled during the Date Assignment Conference. In his March 2016 e-mail, the father suggests that he lost access to his children because “... *I lost my cool and asked her did she want me to quit my job and commit suicide???*...” These comments confirm that the father has little insight into the fact that his violent and volatile conduct during the Date Assignment Conference triggered the suspension of access. He did not simply lose his “cool”.
- The father has a short fuse. He is reactive and impulsive. As an example, at the conclusion of his oral submissions in May 2017, and after assuring the court that he had changed, the father called the mother an “*idiot*” and the court process “*pathetic*” and “*a joke*”. This type of impulsive reaction is typical of the father. I infer that if he is unable to act with restraint during a court hearing, his vitriol and abuse will be considerably worse when there is no authority monitoring his actions and conduct.
- The father lashes out and blames the mother when he does not get his own way, or when he seeks to assert dominance and control. His apologies ring hollow given his repetitive conduct.
- Participating in courses does not in and of itself resolve violence. For example, the father stated that he successfully completed anger management courses on three occasions, yet he continued to be violent after he finished the courses.
- The father’s ability to participate in addiction services was hampered because of a lack of service providers.
- The father’s volatility, impulsivity and unpredictable violent outbursts confirm that it is not in the best interests of the children to be in their father’s unsupervised care. The children have been exposed to their father’s physical and emotional violence which is typically directed at the mother. The father

has called the mother crude and humiliating names in the presence of the children. The children will, on the balance of probabilities, be exposed to violence if the father is granted unsupervised access.

- Supervised access will limit the opportunities for violence and will ensure that the children are immediately removed if the father acts out.

[32] Supervised access will be reasonable access, at reasonable times and upon reasonable notice, to include weekly contact, and holiday and special event access.

[33] As noted previously, supervised access is not a long term solution. The father has made some improvements. The father should continue with his therapy and make necessary and permanent life style changes such that he is no longer violent and he no longer addresses the mother in an abusive fashion. Until this occurs, it is not in the best interests of the children to be in their father's unsupervised care. It is not in the children's best interests to be exposed to violence or to hear their mother degraded and devalued by their father.

[34] In addition, given that the father's alcohol use negatively affects his parenting, the father must not consume alcohol during or 24 hours before he exercises access.

[35] The access supervisor will continue to be the paternal grandmother, or such other person as agreed to by the parties, with such agreement to be placed in writing. All access supervisors must file a statutory declaration with the court and the mother in which they confirm that they will be present when the father is exercising access and that they will immediately remove the children if they observe the father being violent or calling the mother derogatory names. Further, the supervisor must report any violence to the mother and any assaults to the police. The supervisor must cancel access if the father is under the influence of alcohol.

**[36] Should s.7 childcare expenses be awarded?**

*Position of the Parties*

[37] The mother seeks s. 7 childcare expenses. She wants the father to pay his proportional after-tax share for 2016 and 2017. The mother states that childcare is necessary during the fishing season. She notes her unusual hours of work.

[38] The father objects for two reasons. First, he says that he has no ability to pay. He says that his discretionary income is limited and that his budget is modest. Second, he says that childcare costs can be avoided or minimized. He suggests that the children could live with him and his partner during all or a portion of the fishing season.

*Law*

[39] Section 7 of the *Child Support Guidelines* provides the court with the discretionary jurisdiction to order the payment of all or a part of childcare expenses incurred because of the custodial parent's employment. Before the noncustodial parent can be ordered to contribute, however, childcare expenses must be found to be both reasonable and necessary. In addition, it is the net after-tax cost of childcare expenses that is shared, usually in proportion to the incomes of each of the parties.

*Decision*

[40] I am ordering the father to pay his proportionate share of the net after-tax costs of the childcare expenses that the mother incurs. In so doing I find that the expense is both reasonable and necessary for the following reasons:

- The mother only incurs childcare when she is fishing. She leaves for work at about three or four in the morning. Childcare therefore includes some overnights. The mother also works on the week-ends.
- The mother and the childcare provider confirmed the amount of the childcare expense. They were both credible. It is a reasonable amount in the circumstances.
- The suggestion that the children should stay with the father so that childcare expenses can be avoided or reduced is not feasible because the father has only supervised access and because the father and the children live in different communities.

[41] The following information was used to determine the quantum of the father's obligation in respect of childcare expenses:

- The mother earns \$33,849 per annum.

- The father earns \$55,933 a year less union dues of \$784
- Childcare expenses are \$4,750 a year.

[42] The Child View program stipulates that the father's annual after-tax contribution to the childcare expense is \$137 monthly. The father owes this amount beginning on January 1, 2016 and continuing every month thereafter until further court order. This is not technically a retroactive award because the father was aware that the mother was seeking s.7 expenses at least at the Date Assignment Conference that was held before the 2016 childcare expenses were incurred. The mother and children should not be penalized because the court was unable to schedule an early date.

[43] I also order that the mother provide the father with notice, in writing, when there is a change in the childcare amount. A copy of her letter should also be sent to the Maintenance Enforcement Program.

**[44] Should retroactive child support be awarded?**

*Position of the Parties*

[45] The mother seeks retroactive child support for the four month period between mid-March to mid-July 2014, and for the six weeks in the fall of 2014 when the father was in New Brunswick attending the faith-based therapy program. The mother further suggests that child support should be based on what the father could have earned had he not taken an unpaid leave of absence. The mother is not seeking retroactive support for s.7 childcare expenses before 2016.

[46] In contrast, the father disputes the retroactive claim. He states that he overpaid the table amount of child support. He says that he faithfully paid child support. He also states that income should not be imputed to him. He took a leave of absence to attend a treatment program in good faith. He finally notes that he has absolutely no ability to pay a retroactive award.

*Law*

[47] The test for a retroactive increase in child support is set out by the Supreme Court of Canada **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37 (S.C.C.). Bastarache J., states that when considering a claim for retroactive support, the court must examine and balance four factors.

[48] The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support, or in the face of an insufficient payment of child support [paras 101 and 104].

[49] The second factor relates to the conduct of the noncustodial parent. If the noncustodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based on objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support [paras 106 and 107].

[50] The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and includes an examination of the child's standard of living [para 111].

[51] The fourth factor requires the court to examine the hardship which may accrue to the noncustodial parent as a result of the noncustodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the noncustodial parent engaged in blameworthy conduct [para 116].

### *Decision*

[52] The mother has not proved that a retroactive award should be granted for the following three reasons:

- Except for a few months, the father faithfully paid the table amount of child support.
- The father acted in good faith when he registered for the faith-based therapy program in New Brunswick. He only missed six weeks of earnings.
- The father has no ability to pay a retroactive award given his obligation to pay the table amount and s.7 childcare expenses from 2016 forward.

**Conclusion**

[53] This is one of the unfortunate cases where unrestricted access is not in the children's best interests. As such, the father is granted supervised access based on the terms and conditions stated. It is hoped that with continued therapy, the father will make the necessary changes in his approach to problem solving and the mother. Once the father is able to properly manage his anger and violent outbursts, he can make application to vary the requirement for supervision.

[54] In addition, the father must continue to pay the mother the table amount of child support in the amount of \$771 per month together with an additional \$137 per month to cover his proportionate share of the net-after tax cost of the childcare expense, for a total monthly obligation of \$908. The father must pay the s. 7 expenses effective January 1, 2016.

[55] Mr. Stanwick is to draft the divorce and corollary relief orders.

Forgeron, J.