

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Kelly v. Benoit*, 2017 NSSC 212

Date: 20170905

Docket: SFHMCA-103921

Registry: Halifax

Between:

Michael Joseph Kelly

Applicant

v.

Stephanie Leigh Benoit

Respondent

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Judge: Justice Beryl Mac Donald

Heard: July 10 and July 11, 2017

Keywords: Family, Relocation, Credibility, Family Abuse, Parenting Plan

Legislation: *Parenting and Support Act*, R.S.N.S. 1989, c.160 s. 2(da)

Parenting and Support Act, R.S.N.S. 1989, c.160 s. 17A

Parenting and Support Act, R.S.N.S. 1989, c.160 s. 18

Parenting and Support Act, R.S.N.S. 1989, c.160 s. 18D

Parenting and Support Act, R.S.N.S. 1989, c.160 s. 18G

Summary: Mother fled Nova Scotia with the child to leave a relationship in which there was family abuse. The relocation presumptions were applied. It was in the child's best interest to relocate with the Mother. The Father lacked insight into his drug addictions. His family had not supported the Mother's concerns about those addictions and ignored the effect they had on his relationship with the Mother and the Father's parenting ability.

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Counsel:

Michael Kelly with counsel, Stacey O'Neil and Michelle Axworthy

Stephanie Leigh Benoit with counsel, Peter Crowther

By the Court:

[1] In March 2017, the Mother left Halifax Nova Scotia to fly to Saskatchewan. In doing so she had the assistance of police, Child Protection workers and staff at Barry House. It appears she informed them she was in an abusive relationship and was fearful for her safety.

[2] In this proceeding she repeats these allegations and adds her concern about the Fathers addictions and mental health issues. She requests their daughter remain in her care in Saskatchewan.

[3] The Father denies he was ever abusive toward the Mother and he is requesting their child be returned to Nova Scotia.

Evidentiary Issues

[4] The Father had several witnesses appearing on his behalf. The Mother had only herself and those professionals who have provided services to the Father.

[5] There were several evidentiary issues that required attention. They involved whether the court could rely upon material contained in the records provided by the

Police and the Nova Scotia Health Authority and the extent to which the court could admit and rely upon a child's statements.

[6] While counsel did not provide extensive submissions in respect to these issues I consider it important for the parties to understand how I have assessed this information.

[7] The records were admitted as "business records". This means I can accept that the persons who recorded the statements in those business records accurately reported what he or she saw or heard when speaking with the parties. I have not relied on or considered any opinions contained within those records.

[8] The child involved in this proceeding is now six years old. Some of the statements attributed to her were made recently but some were made when she was younger. Given the level of conflict in this family, the reliability of those statements is questionable, even if they could properly be admitted as evidence of the child's state of mind. Although, as will be outlined in the balance of this decision, I have found the Mother's evidence more credible than that given by the Father and his family members, I recognize she also had a reason to elicit statements from the child favorable to her position.

Credibility

[9] In this proceeding much of the information provided by the Father and his witnesses differs from the information given by the Mother. This difference is, unfortunately, not an unusual situation in these matters. I will never know the “truth” about what happened. All I can do is apply the legal principles developed by our courts to assess “credibility”. The action imbedded in this word requires that I distinguish reliable from unreliable information and assess what information is most persuasive on a balance of probabilities.

[10] In assessing credibility, I have considered Justice Warner’s decision in *Novak Estate, Re*, 2008 NSSC 283 and in particular his comment that it requires “The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CarswellBC 133, is ‘in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions’”. I also recognize that I am “not to rely on false or frail assumptions about human behavior”.

[11] Also, “In assessing credibility there is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part of, or all a witness's evidence, and may attach different weight to different parts of a witness's evidence”. (ibid para. 37)

[12] The Father and his witnesses attempted to persuade me that the Mother:

- is neglectful of the child
- abuses the child
- is untruthful about the Father’s verbal aggression and abuse of her

[13] The information provided by the Mother is persuasive. The Father’s testimony and those of his witnesses is not. I will provide some examples about why I have reached this conclusion.

[14] In her affidavit contained in Exhibit #1, Tab 3, the Father’s sister states that when the child was “four or five we were at a family gathering at my home. The child was having a temper tantrum and the Mother grabbed the child roughly and whipped the child around her waist. The child’s head just missed the doorframe. The child was screaming and crying that she was hurting her ‘mommy you’re hurting me’. While this was happening, the Mother was screaming, ‘I can’t stand

this fucking kid'. I watched the Mother throw the child into the Father's truck until her tantrum stopped while the Mother stood outside of the truck had a smoke."

This information is not credible because I cannot accept this witness would merely have watched this event occur without intervening to protect the child, but, according to her testimony, she merely stood by and allowed the Mother to continue the abuse.

[15] The Mother described an event that occurred Christmas 2016 when she called the Father's mother because he was yelling and throwing things around the house. She was asking for help to get the Father out of the house. The mother did ask to speak with the Father but he refused to talk with her. He left the house with the child but his mother asked the Mother not to call the police because she believed he would calm down. In response on cross examination, the Father's mother recalled the conversation but indicated she had been informed the Father and the Mother had a fight "over a jacket". She testified there was no indication he was throwing things around. I do not accept the Mother would have called the Father's mother because of a mere fight over a jacket. A jacket was involved but the call was a plea for help to calm the Father who was out of control.

[16] The Father has called the Mother a “slob and a lazy human”. He has testified that he and his mother “bicker”. I find it extremely unlikely the Father does not call his mother names as well. She denies this but admits the Father was “verbally aggressive” as a child. She states he is no longer “verbally aggressive”. I do not believe her. The Father’s aggressive tendencies have not disappeared. The evidence indicates he becomes very frustrated when his expectations are not met. His visible agitation leads to concerns that he may escalate into anger and violently erupt. While this eruption is verbal, "Words have energy and power with the ability to help, to heal, to hinder, to hurt, to harm, to humiliate, and to humble." (Yehuda Berg- author). The Father used words to hinder, to hurt, to humiliate and to humble.

[17] The Father wanted a “quick fix” to his anxiety and chronic pain issues and was not satisfied with the services offered to him through the efforts of his family doctor and by professionals to whom he had been referred. As a result, aside from the drug treatment prescribed by his family physician, he remains untreated for anxiety and chronic pain. He also appears to suffer from obsessive-compulsive traits that have made him hypercritical of the Mother. He criticized her housekeeping standards, childcare abilities and, knowing about her learning

disability, he belittled her efforts to improve her education. I do not accept his testimony that he was supportive of her desire to become a Licensed Practical Nurse.

[18] The Father suggests he did not attempt to isolate the Mother. However, I accept her evidence that the only phone that could open the door into their apartment was his cell phone. The Mother has produced records in proof of the fact that she had a cell phone at the time the Father made this change although both the Father and his mother testified the Mother had no cell phone at that time.

[19] When the Mother worked at the Stanfield International Airport, she was unable to use the Father's vehicle and was primarily driven to her employment by the Father's family members. He suggests this was because he needed the vehicle but during this time his employment was sketchy and he may not have been working at all. I have not taken the time to carefully trace the various timelines but even if this was the case the parties have not been truthful about the reason why the Mother was driven to and from her workplace by the Father's family members. They suggested the Mother refused to take the shuttle. No shuttle was available during her hours of work.

[20] In his testimony, contained in Exhibit 2 at paragraph 75, the Father makes reference to hand written records he kept from May 4 to June 4, 2015. In Exhibit 12 at paragraphs 61 to 69 the Mother provides credible information that convinces me the Father did not make those records at the time the events allegedly occurred nor do those records contain an accurate account about what took place on those days. The Father is prepared to, and has, fabricated evidence.

[21] Much of the evidence from the Father's witnesses is repetitive. It repeats or confirms statements already made either by the Father or other witnesses called on his behalf. Repetition of incredible evidence does not change its character. In addition, some of the evidence could only have come from the Father or his mother to others and is not their firsthand knowledge.

[22] I have no doubt the Father's interaction with the child can be perceived by others as warm, loving, encouraging and appropriate. However, I have concerns about the nature of that relationship and will return to that topic later in this decision.

[23] My decision that the information provided by the Mother is, on a balance of probabilities, credible when compared to the information provided by the Father

and his witnesses, does not mean I have decided all the information provided by the Mother is credible. What it does mean is that the preponderance of the evidence has satisfied me the Mother was emotionally and verbally abused by the Father. He was derogatory of her as was his family, including his mother.

[24] I can understand the Father's family may wish to support him in his attempt to reform himself and deal with his chronic pain without the use of drug therapy. But the facts are clear, he abused opiates in the past and there is a considerable risk he may abuse opiates in the future. He is a regular user of marijuana which, if consumed in too great a quantity, can impair an individual's parenting ability. The Father would not discuss any of these issues with the Mother and was dismissive of her concerns when they were raised.

[25] The Mother alleged the Father was selling drugs. She has not proven this allegation but I am satisfied she was afraid of the Father and was concerned that he was abusing and selling drugs. She wanted him to deal with what she perceived to be his addictions and with what eventually has been called his anxiety disorder. He made some efforts to do so, not because of the Mothers prompting, but because he did have enough insight to recognize his anxiety was interfering with his daily life functioning. However, he was not satisfied with the information he received. The

options presented to him were to continue with drug therapies; combine drug therapy with counseling; or try counselling without drug therapy. The second option was the option recommended, but the Father did not pursue that option because the prescribed medication was not medication he wanted to take.

[26] The Father's family physician, who is a practitioner skilled in dealing with addiction issues, as well as in the management of chronic pain, is continuing to provide him with drug therapies and presently is attempting to reduce his dosage of morphine. The recommended services for the Father involves counseling with a psychologist but he has chosen not to pursue this option although it was offered to him in what I consider to be a timely manner. He did meet with a therapist and decided not to continue with the counseling option because:

- He did not feel the counselor to whom he was referred to be a "good match" because that counselor was not "sympathetic, personal or sensitive".
- He was uncomfortable if his surroundings were not "clean" and the counselor's office was "untidy".
- He did not want to do the "homework" prescribed by the counselor but only wanted someone to "listen to" him.
- The counseling services were not offered in the location of his choice.

[27] The Father is very much focused on himself. He shows very little empathy. He criticized the Mother about her poor housekeeping standards and her tiredness

without acknowledging she had little time to attend to everyday tasks because she was working and attempting to upgrade her education. At the end of the day her energy levels were depleted. In addition, he often was unemployed and there was no reason why he should have expected the Mother to do the housework when he could do so.

[28] The Father's freedom from full-time regular work permitted him to take the child to her recreational activities. The Mother was not so fortunate but she is criticized by the Father and his family because she rarely attended these activities. This lack of empathy can interfere with positive parenting if the child is viewed through the prism of the parents wants and needs and not seen as an independent person whose wants and needs may be separate from that of the parent. This child may be the center of this Father's universe but as she gets older, and more independent, she may not meet his expectations. If this happens she may become subject to his verbal assaults, as did her Mother.

[29] Eventually the Mother decided she could no longer live with the Father. She had no friends or family in Nova Scotia to whom she could turn for support. Given the lack of emotional support she received from the Father's family she could not realistically be expected to have elicited their assistance. When she asked for their

help they had dismissed her concerns. She had employment but it would be very difficult for her to support herself and the child on her income. She would receive little, or possibly no child support from the Father given the low income he earns when working.

[30] I accept the Mother's evidence that she does have a good relationship with both her mother and father. She and the child are presently living with her father in Saskatchewan.

[31] The Mother knew, if she told the Father she wanted to move with the child to Saskatchewan, he would do everything he could to prevent her from leaving. She could not continue to live with him while this issue was resolved and she had nowhere to live in the meantime except possibly in a shelter such as Barry House. In this proceeding the Mother has repeated her allegations about the Father's statements that he would kill her and others. There is no independent verification that the Father has made these statements and the Father alleges the Mother merely has made these up for the purpose of these proceedings.

[32] I make no findings in respect to the Father's alleged statements. I do accept the Mother was afraid of the Father's behaviors and was concerned they may eventually erupt into physical violence against her.

[33] The Mother also expressed concern about the child's sexualized behaviours. These may exist but a cause has not been established.

Legal Analysis

[34] There is no pre-existing order in respect to the parties and this child. The application has been commenced under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 which has been amended and is now called the *Parenting and Support Act*. Although the application was commenced under the previously named legislation the provisions contained in the amendments are to be applied. The amendments do not contain any transitional provisions. As noted in *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) authored by Ruth Sullivan:

There is no presumption against the immediate application of legislation to an ongoing factual situation, that is, one that is not yet complete when the legislation comes into force. [Sullivan, page 761]

[35] However, because the amendments came into effect by proclamation on May 26, 2017 the notice provisions contained in section 18 E do not apply to this move because it occurred in March before the changes to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 were proclaimed. At that time, the Mother was not required to give notice of this move.

[36] The amendments to the *Maintenance and Custody Act*, changed the name of the Act to the *Parenting and Support Act* and requires a court to consider several described factors when it makes a “best interest of the child” determination. In addition, it has created rebuttable presumptions to consider when there is an application to relocate a child’s residence. These provisions are in effect and I must consider them.

[37] The rebuttable presumptions are contained in section 18 H (1):

When a proposed relocation of a child is before the court, the court shall be guided by the following in making an order:

- (a) that the relocation of the child is in the best interests of the child if the primary caregiver requests the order and any person opposing the relocation is not substantially involved in the care of the child, unless the person opposing the relocation can show that the relocation would not be in the best interests of the child;

(b) that the relocation of the child is not in the best interests of the child if the person requesting the order and any person opposing the relocation have a substantially shared parenting arrangement, unless the person seeking to relocate can show that the relocation would be in the best interests of the child;

(c) for situations other than those set out in clauses (a) and (b), all parties to the application have the burden of showing what is in the best interests of the child.....

(3) In applying this Section, the court shall determine the parenting arrangements in place at the time the application is heard by examining

(a) the actual time the parent or guardian spends with the child;

(b) the day-to-day care-giving responsibilities for the child; and

(c) the ordinary decision-making responsibilities for the child.

(4) In determining the best interests of the child under this Section, the court shall consider all relevant circumstances, including

(a) the circumstances listed in subsection 18(6);

(b) the reasons for the relocation;

(c) the effect on the child of changed parenting time and contact time due to the relocation;

(d) the effect on the child of the child's removal from family, school and community due to the relocation;

(e) the appropriateness of changing the parenting arrangements;

- (f) compliance with previous court orders and agreements by the parties to the application;
- (g) any restrictions placed on relocation in previous court orders and agreements;
- (h) any additional expenses that may be incurred by the parties due to the relocation;
- (i) the transportation options available to reach the new location; and
- (j) whether the person planning to relocate has given notice as required under this Act and has proposed new parenting time and contact time schedules, as applicable, for the child following relocation.

[38] The relocation provisions in the *Parenting and Support Act* direct that the “court shall determine the parenting arrangements in place at the time the application is heard”. The parents had been living together immediately prior to the Mother’s relocation to Saskatchewan. Parents who live together do not receive labels such as “primary care parent” nor do we refer to such parents as having a “shared parenting arrangement”. As a result, I have decided this situation attracts the rebuttable presumption in section 18 H (1) (c). Both parties have the burden of showing what is in the best interests of this child.

[39] Several cases have attempted to provide guidance to the court in applying the best interest principle: See for instance *Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C); *Abdo v. Abdo* (1993) 126 N.S.R. (2d) 1 (N.S.C.A).

[40] The factors applied in these cases have been repeated in section 18(6) of the *Parenting and Support Act*. However, the process of determining a child's best interest involves more than just reviewing a list of factors. In *Dixon v. Hinsley* (2001) 22 R.F.L. (5th) 55 (ONT. C.J), at para. 46 the following appears:

The "best interests" of the child is regarded as an all-embracing concept. It encompasses the physical, emotional, intellectual, and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer-term growth and development...

[41] All cases involving relocation are difficult but this one is especially so. Neither the Mother, nor the Father, nor their families have significant financial resources. It would be naïve to expect this child to be able to fly between Saskatchewan and Nova Scotia more than once, possibly twice, a year. Neither parent has anyone in the other parent's community with whom he or she could reside while exercising parenting time with the child.

[42] A superficial analysis would suggest the child will suffer fewer losses if she remains in Nova Scotia. The Father is here, his extended family is here, the child's friends are here and the child will continue to be enrolled in the school she attended last year. The only person the child knows in any intimate way in Saskatchewan is her mother. However, while family and community are important, the question is whether they overwhelm the Father's parenting deficiencies which are:

- his self-centeredness
- his lack of empathy
- his lack of insight into his mental illness that has caused him to reject counseling therapy
- his propensity to distort events to suit his own purpose which generally is to place blame on others without any introspective examination of his contribution to what has happened
- his use of name-calling and degradation to express his frustration

[43] Because the Father's family have paid no attention to these aspects of his personality I have no confidence their involvement in the care of this child will overcome those deficiencies. They may begin to blame the child for her behaviors rather than look for causes within the parenting she is receiving from her Father. This is what they have effectively done in respect to their analysis of the Father's relationship with the Mother.

[44] Demeaning and degrading insults can destroy a person's self esteem and can contribute to feelings of uselessness, worthlessness and self blame. This can lead to depression, anxiety, and physical illness. As a result, a parent's caregiving ability may be undermined. Children who know or become aware of one parent's propensity to demean, belittle, dominate and control the other parent are placed in an unhealthy situation and this can undermine the child's respect for the demeaned parent.

[45] Children learn how to behave from watching how their parents and others behave. When children see violence, anger or threats used to resolve conflict or to make another person obey, or to make the person using the verbal assault feel stronger or more important, they will likely make use of, or respond to conflict in the same way.

[46] I have decided it is in the best interest of this child to relocate with her Mother to Saskatchewan. I have made this decision even though the evidence indicates the Mother is not likely to be cooperative with the Father in respect to his parenting time with the child and recognizing her failure to appropriately carry out her responsibilities in arranging face time contact with him. I have attempted to

craft a parenting plan that will provide her with specific direction but I cannot mend broken relationships nor recreate trust once it is lost.

[47] The parenting plan is attached as Schedule “A” to this decision.

[48] The Mother has not requested child support in this proceeding. If she is seeking costs she is to file her written submissions within 10 days from her receipt of this decision. The Father’s response is to be filed within 5 days from his receipt of the Mother’s submissions.

B. MacDonald, J.

Schedule “A”

PARENTING PLAN

Custody/Sole Custody

1. The Mother must have custody of the child meaning she has the responsibility and authority for the care and upbringing of the child and for the making of decisions regarding the care, supervision and development of the child.

Right to be Informed

2. The Mother must inform the Father about any significant changes, problems or recommendations relating to the child’s physical and mental health, dental care, physical and social development, and education, and must provide copies of all written reports received from service providers about these changes, problems or recommendations.

Communication

3. Until the parents are ready to communicate in telephone conversations, regular communication is to be by e-mail or text message except in the case of an emergency, or an event that requires communication on short notice, when a telephone conversation will be appropriate.

4. All communication between the parties must be respectful, to the point and as brief as possible. Reply is to be within 24 hours of receipt of the message with an explanation if a later reply is made.

Parties’ Addresses/ Contact Information

5. The parents must provide each other, and continue to provide each other, current addresses, telephone numbers, e-mail addresses and all other contact information.

Parenting Schedule

Face to Face Contact

6. The child must be in the Father's care in Nova Scotia, if he has the financial means to transport her from her residence to his and back to her residence:
 - for three weeks every summer commencing the summer of 2018
 - for her spring school break
 - for her Christmas school break in every even year commencing 2018
7. The Mother must inform the Father about the dates for the child's spring and Christmas school break no later than 3 days after she is informed about those dates by the child's school.
8. The Father must inform the Mother about whether and when he will have parenting time during the summer no later than May 15 in every year.
9. The Father must inform the Mother about whether and when he will have parenting time with the child during her spring break no later than 6 weeks before the beginning of that school break.
10. The Father must inform the Mother about whether and when he will have parenting time at Christmas no later than 6 weeks before the beginning of the child's Christmas school break.
11. No later than 2 weeks prior to the commencement of his parenting time the Father must provide the Mother with information about how and when the child will be transported including a copy of all tickets purchased for her travel. He is to inform the Mother about where the child will be residing while in his care and about the drugs that have been prescribed to treat his chronic pain and anxiety.
12. The Father must not be under the influence of any non-prescription drug or alcohol while he is parenting the child.

13. The Father may have parenting time with the child if he can travel to her residence but the date and time for that parenting time must be arranged with, and agreed upon by the Mother.

Telephone and Other Contact

14. The Mother must provide the Father with a schedule when the child will be available on two occasions every week to receive a call from the Father taking into account when the Father will be available to participate in that communication. She must make the child available to receive a call from the Father according to the schedule. The call may be by telephone, facetime, or skype depending upon the technology available to the parties. The Mother must permit the Father to interact with the child without her presence and to accommodate this, once contact is made, she is to leave the child alone in a room with the receiver (telephone, iPhone, iPad, notebook or computer) to permit this private conversation time.

15. The Father must initiate the contact by telephone, facetime or skype and he must pay for any cost associated with this communication.

16. When the child is in the care of the Father, the Mother must have the same opportunity for contact with the child on the same days and time as is provided to the Father pursuant to paragraph 14 and the Mother must initiate that contact and pay for any associated cost.

Changes

17. The parties may agree to change the provisions of this parenting plan but that agreement must be in writing and an exchange of an e-mail communication confirming the changes will be considered an agreement in writing for this purpose.

18. The Mother must inform the Father if the child will not be available to participate in the contact provided in paragraph 14, explaining why this will occur and providing an alternate time for this contact.

19. The Father must inform the Mother if the child will not be available to participate in the contact provided in paragraph 16, explaining why this will occur and providing an alternate time for this contact.