

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Chisholm v. Chisholm*, 2017 NSSC 45

Date: 20170217

Docket: SFPAMCA 051661

Registry: Port Hawkesbury

Between:

Rodney Charles Chisholm

Applicant

v.

Maxine Denise Chisholm

Respondent

Judge:

The Honourable Justice Darryl Wilson

Heard:

November 16 and 17, 2016

Oral Decision:

December 15, 2016

Written Decision:

February 17, 2017

Counsel:

M. Louise Campbell, QC - Counsel for Applicant

Meghan MacGillivray Case - Counsel for Respondent

By the Court:

[1] The Applicant, Father, filed a Notice of Variation Application on August 28, 2015, seeking a variation of the current Custody and Access Order from joint custody with primary care and control with the Respondent, Mother, and specific access to the Father, to joint custody with primary care and control with the Father and specific access to the Mother.

[2] The Parties have a son, now 10 years of age. They separated when the child was 4 months old. The Mother has been the child's primary care provider since separation.

[3] At the time the Father filed a Notice of Variation Application, he also filed a Notice of Motion seeking a quick hearing to address the issues of the Mother denying him access and enrolling the child in a school in Whycomagh, instead of Port Hawkesbury, which would be closer to the Father's residence.

[4] A hearing scheduled for November 2015 was cancelled when the Parties agreed to enter into settlement discussions. A judicial settlement conference was held on December 3, 2015, and the Parties entered into a temporary parenting arrangement with a review scheduled for August 2016. While the Father was satisfied with the terms of the access provisions of the settlement conference Order, he was convinced the Mother would continue to interfere with his access. He did not wish to participate in the settlement conference review in August 2016. The settlement conference Order contained a provision that if the Parties could not reach an agreement/settlement on August 24, 2016, then trial dates would be set and the Parties would revert to the previous custody and access Order.

[5] The Mother reverted to the previous Order, which upset the Father. At a pretrial conference in October 2016, the chambers judge, without hearing from the Parties, restored the access terms of the settlement conference Order.

ISSUES

[6] The issue for the court to determine is whether the Father should be the child's primary care provider, and if so, what access the Mother should have, or should the current custody and access Order be varied to reflect the change in needs and circumstances of the child and the Parties.

BACKGROUND

[7] In order to put the current proceeding in its proper prospective, it is helpful to review the history of the Parties' relationship and court proceedings concerning custody and access issues.

[8] An initial Order dated April 17, 2008, provided for joint custody; primary care and control to the Mother and specific access to the Father – 3 hours on Wednesday and one overnight every weekend; conditions were imposed that the Father abstain from alcohol consumption, attend AA meetings and meet with an addiction counsellor; transportation to and from visits were to be done by the Mother to observe the Father's sobriety. The Father states he has maintained sobriety for 8 years.

[9] From that initial Order until the start of these proceedings there have been 12 court appearances - mostly review hearings, but also pretrial conferences and chambers appearances to deal with interlocutory matters.

[10] A custody and access assessment was ordered in September 2011.

[11] A Variation Order was issued January 4, 2012, pursuant to a hearing in November 2011, which confirmed primary care and custody to the Mother, varied the Father's weekend access to every second weekend from Friday evening to Sunday evening and added Christmas time for 2011. Additional conditions were added to the prior court orders, including the child not be removed from Port Hawkesbury during the Father's scheduled access without his permission or until makeup access is provided; neither party to seek self-health remedies, which interfere with the other parent's parenting time, unless the health or life of the child is in danger; the provision for each parent to make one phone call at the child's bedtime when the child is in the other parent's care; no planning of activities or suggestion to the child of activities which would impact the parenting time of the other parent; neither party to speak negatively of the other party or to speak about court proceedings in the presence of the child, and cooperation with the preparation of a Custody and Access Assessment.

[12] A second Variation Order was issued August 30, 2012, pursuant to a hearing in May 2012, which removed restrictions on contact between the child and the paternal Grandfather; directed the Parties to meet with Dr. Patricia Gerrior, for assistance in dealing with custody and access issues; provided directions for transportation of the child to and from visits; confirmed that the custody and access

assessment was to proceed and provided for the imposition of costs if there was a denial of access by the Mother.

[13] The Parties met with Dr. Gerrior, who provided advice and suggestions on how to deal with the child's needs in the face of parental disagreement over visits.

[14] The custody and access assessment was not completed until 2013. The assessment recommended that the Mother have primary care and control of the child; the Father would have access every second weekend from Friday night to Sunday night and every Wednesday overnight, returning the child to school on Thursday mornings and shared holidays. It also recommended the parties continue to attend co-parenting sessions with Dr. Gerrior, both parents attend individual therapy to address personality characteristics that contribute to ongoing difficulties with the Father's therapy focusing on helping him accept the loss of his relationship with the Mother, the Father attend a parent education program for guidance with making appropriate decisions on food choices, activities and stability in the child's routine. This assessment was referenced but not tendered as an exhibit in this proceeding.

[15] In December 2013, the Father required surgery for a brain tumor. He was hospitalized for 20 days, and did not return to work for a year. He occasionally has nose bleeds, but states that is not a concern and his health is good.

[16] During the Father's illness, the Mother would take the child to his residence for visits. The Parties disagreed with the Father's ability to drive. According to the Father, the Mother would not accept the doctor's opinion that he was capable of driving. The Father was requesting more access as his health improved. According to the Father, the Mother denied his request for additional access.

[17] He initiated court proceedings and access per the last order resumed.

[18] The court heard from each of the Parties. They provided detailed affidavits and were cross-examined on their affidavits. This is not a contempt hearing for the denial of access, nor a hearing requesting an Order for costs for denial of access, but a hearing to determine the appropriate parenting arrangements for the child going forward.

FATHER'S EVIDENCE

[19] The Father said that prior to this application the Mother controlled when visits took place, the length of the visit, and the amount of time he could be alone with the child. When he and the child were alone, the Mother insisted the child call her if anything untoward happened. If the child did not call her, she would get upset, which in turn upset the child.

[20] The Father stated changing primary care would permit him to look after the child's needs when he is in his care without interference from the Mother, and confirm that he is equally capable of looking after the child's needs.

[21] The Father stated the Mother's interference is preventing the child from developing a meaningful and beneficial relationship with him. His affidavit is a record of journal entries from September 2015 to September 2016, which detailed communication between the Parties, as well as the Mother's conduct surrounding the child's access with him. Attached to his affidavit were copies of various text messages between the Parties.

[22] I do not intend to summarize each of the interactions referred to in the Father's affidavit. I have reviewed them. A summary of the Father's evidence as it relates to the Mother not promoting meaningful parenting time between the child and the Father includes:

1. On many occasions the Mother has unreasonably refused his requests to change access time or to make up lost access time. He is more than willing to allow the child to attend functions with the Mother during his access time, and has accommodated her requests on many occasions.
2. The Mother does not consult with him about the child attending birthday parties, sleepovers or visiting friends during his access time. The Mother tells the child of her plans during the time the child is with the Father, including planned visits to her family in Antigonish. This upsets the child who feels he is missing out on these activities. The Father does not want to upset the child and often loses access time, which is not made up.
3. The Mother does not cooperate in parenting the child when the child is in the Father's care. She refused to provide pictures to help them complete a heritage fair project for the school, she did not inform the

Father of the date of the heritage fair; she wants to reduce the child's access time with him because she believes it is interfering with the child's school performance and attendance; she did not inform the Father the child was in swimming lessons until they were almost completed and did not inform him of a Monday night soccer game; she accused him of not properly caring for the child; she did not provide the school with the settlement conference Order (which was not issued until June 2016); she planned her 2006 Summer vacation to limit his access; she frequently texts and telephones the child while he is in the Father's care, causing stress for the child.

4. The Father recognized additional overnight access was a change for his son who sometimes wondered about it. They talk about the importance of access and according to the Father, his son is okay with the overnight visit on Sunday.
5. The Father states that he has lost meaningful access time over Halloween 2015, Father's Day, Christmas 2015, due to the Mother's actions.

MOTHER'S EVIDENCE

[23] The Mother said that prior to this application the Parties had agreed to an access schedule that reflected access time ordered by the court but varied week to week to suit the Father's schedule.

[24] The access schedule was designed with the help of Dr. Gerrior to respect the child's wishes and his development needs at the time.

[25] The Father did not initiate requests for additional access. It was left to the child to contact the Father to set up visits.

[26] The Mother states she has supported and facilitated access by complying with Dr. Gerrior's recommendations; encouraging their child to attend visits, including overnight visits; supporting the Father during his surgery and subsequent lengthy recover by taking the child to visit him; and assisting the Father with personal needs.

[27] The child had difficulty in adjusting to the access schedule set out in the settlement conference Order, which included additional overnights. His focus in school was affected because overnight stays at the Father's residence on Wednesday and every second Sunday meant early wakeup times, so the Father

could drive him to school. According to the Mother, the son has left school early several times since the last Order was put in place.

[28] The child has difficulty communicating with the Father when he does not want to go along with the Father's plans or wishes and asks the Mother to do the communicating.

[29] The child makes his own plans with his friends, that sometimes interfere with the Father's access. She does not try to sabotage the Father's access, nor encourage the child to attend family functions during the Father's access time.

[30] The child has a phone and the Father can speak to him at any time. There is little communication between them by telephone.

[31] The Father should be responsible for informing himself of the child's activities at school. The Father's affidavit contains many misrepresentations of communications and events which she addressed in more detail in her affidavit. For example, the text messages do not represent a complete record of their communications on a topic; Summer vacation in 2016 was scheduled in advance, communicated through counsel and exercised according to the Order. It was not scheduled at the last minute. A soccer game on Monday night, which only happened once, was known by the Father.

[32] The Father is often late to pick up the child for visits and does not give her notice if he is going to be more than 15 minutes late. The pickup times set out in the Order are not realistic and should be adjusted to 4:30 pm during the week and on Fridays.

[33] The Mother has concerns about the Father's ability to be a primary care parent.

1. The Father does not take her concerns seriously when she raises issues such as the child's cavities, and the Father sending him to school with marks all over his arms.
2. The Father's health issues, such as tiredness and shortness of breath, impact his physical ability to parent and limit his abilities to parent more than the time set out in the access schedule.
3. The Father's access is not always focused as he takes the child with him to do mechanical work for cash.

4. The custody and access assessment of Heather Power recommended the Parties attend therapy. The Mother met with her therapist, but has not received any indication that the Father has followed through with all the recommendations made in relation to his parenting. The Father met with a parent education advisor, but did not meet with a therapist as recommended in the custody and access assessment.

LAW

[34] This proceeding is taken pursuant to the **Maintenance and Custody Act**, RSNS 1989, c. 160. The Applicant must demonstrate there has been a material change in circumstance sufficient to vary the existing court orders. Neither counsel addressed the issue of material change in circumstances. Their focus was on what parenting arrangement was in the best interest of the child.

[35] I find the following material changes in circumstances have occurred since the last order – the Mother’s enrollment of the child in school in Whycocomagh, the Father’s health issues and disruption in prior access schedules, the child’s age – he is 10 now verses 5 at the time of the prior order, the opinion of both parties that the prior orders were not working in the child’s best interest, and the completion of a Parental Capacity Assessment with recommendations.

[36] The burden of proof is on the party seeking to change the parenting arrangement. Any change in the custody and access arrangement for the child must be found on balance to be in the best interest of the child. In making this determination I have considered s. 18 of the **Maintenance and Custody Act**. The statute sets out factors for the court to consider in determining the best interest of the child. All relevant factors must be considered, even if not listed. Section 18 also directs the court to give effect to the principle that the child should have as much contact with each parent as is consistent with the best interest of the child, including the consideration of impact of any family violence, abuse or intimidation.

SUBMISSIONS

[37] The Father’s final submission was that the court should order either shared parenting or the provisions set out in the settlement conference order. The father’s submission that the Mother interferes with his access is supported by the inclusive of conditions in prior court orders, such as directions not to make plans for the

child during his parenting time, the imposition of costs if access denied, and provisions for make up access. Shared parenting would mean less chance of interference by the Mother. The Father's health issues are behind him and he has the ability to care for the child on a full-time basis.

[38] If the court does not order shared parenting, the Father submits that it is in the child's best interest to reinstate the provisions on the settlement conference order. He submits there is no evidence from the school that the child is struggling, and a return to prior orders would reduce his parenting time. The Father also wants the order to include provisions for consultation on future school changes, as well as directions that schools and/or daycare be given copies of court orders so he is contacted during his access time.

[39] The Mother's submission is that share parenting is not appropriate as the parties are not able to communicate in the best interest of the child. The distance between their residences would make schooling difficult for the child. She agreed to a custody and access assessment because of the Father's allegations of interference. She supports the recommendations of the Custody and Access Assessment, agrees to joint custody and to share special occasions and holidays, and will consult on future education choices. She is also agreeable to working with Dr. Gerrior to help the parties overcome continuing difficulties in their communications about custody and access issues.

[40] She is opposed to changing primary care and control since she has always been the child's primary care provider and he has done well in her care. She acknowledges the issue of activities that the child wants to attend during the Father's access time is a source of irritation between them. However, it is her submission that it is up to the Father and son to deal with these issues. The Father should not expect her to cancel social activities or invitations the child receives, which impact the Father's parenting time.

CONCLUSION

[41] The Father has not satisfied the court with clear, convincing and cogent evidence that it is in the child's best interest that he be the child's primary care parent or to order shared parenting.

[42] The Mother has been the child's main parent for his entire life. She provided him with stability and ensured that all his physical, emotional, social and

educational needs were met to date. She is attentive and interested. He is doing well in her primary care.

[43] The Father has not established himself in a consistent parenting role. While he may be capable of meeting the child's basic physical, emotional, social and educational needs, the Father acknowledged attending parent education classes to become better informed about making choices with respect to the child's nutrition, activities and stability of a routine.

[44] The nature, strength and stability of the child's relationship with the Mother and her family is on a more solid footing than the relationship between the child and the Father's family. No doubt this is attributable in part to the Mother being the child's primary care parent over the years and the Father's limited involvement in the child's life while dealing with addiction and medical issues. The Father acknowledges the child seems sad when he is not able to attend visits to his Mother's family during the Father's parenting time.

[45] The Parties are not able to work together as co-parents. They have not demonstrated the ability to cooperate or communicate on parenting issues in a respectful and understanding manner. After 10 years of separation, multiple court hearings and the help of professionals, their relationship is still marked by distrust and suspicion in dealing with parenting issues. The result has been conflict and not cooperation. A change of primary care or shared parenting is not likely to change this dynamic.

[46] The distance between the parties' residences is not conducive to the child maintaining a structured school routine and therefore, shared parenting is not appropriate in this circumstance.

[47] Any change in custody will be a significant change in the child's life and what has been his day to day routine for a long time. It would be a major adjustment for the child. The Father's plan for the child's care is lacking in sufficient detail for the court to determine if the child would be able to deal with this adjustment. The court only heard from the Parties, who obviously have a self-interest in the proceeding. It would have been helpful to have heard from third parties, such as counsellors, assessors, school officials, and medical professionals for the court to make a more informed assessment of the impact on the child of a change in primary care.

[48] It appears to the court that the main basis for the Father's application is his belief that the Mother is intentionally limiting the opportunity for the child to develop a meaningful and beneficial relationship with him. While some of the Mother's behaviours impact the Father's parenting time, it is not as bad or pervasive as portrayed by the Father. There is not parenting alienation. Some of the Father's complaints are without merit, while others can be attributed to initiatives taken by his son, who is at an age when he is beginning to separate from his parents and spend more time with friends. The Father should realize these non-family interests will impact his parenting time. The Parties need to be flexible when this occurs.

[49] The Father does have some legitimate concerns when the Mother does not contact him in a timely manner to speak about changes to the fixed access schedule when the child wants to go with her to events during the Father's parenting time, nor does she seem to appreciate the impact on the Father's parenting time. If the child wishes to be elsewhere, she could be more supportive of the child spending time with the Father during these periods.

[50] At the same time, the Father does not appreciate the Mother's concerns for their son's well-being and is too quick to dismiss her concerns for interfering with his parenting time.

[51] On balance, a change in primary care in favor of the Father or shared parenting, is not in the child's best interest having regard to all the child's needs and circumstances.

[52] The court should promote and foster as much contact as possible between the Father and son that is in the son's best interest. In arriving at a parenting plan that I believe is in the child's best interest, in addition to statutory factors, I have taken into account the importance of the child spending time with the Father on a weekly basis, the child's advancing age and need to spend time with school friends, the Mother's concern about the impact of longer visits between the child and Father during the school year, the Father's work schedule, their inability to cooperate and communicate effectively, and the distance between their residences.

[53] I find the parenting plan to be in the child's best interest to be as follows:

1. The Child, Duncan Chisholm, born [...], shall be in the joint custody of his Mother, Maxine Denise Chisholm, and his Father, Rodney Charles Chisholm.
2. The Child, Duncan Chisholm, shall be in the primary care and control of the Mother, Maxine Denise Chisholm, and her residence shall be the Child's primary residence.
3. The Father, Rodney Charles Chisholm, shall have parenting time as follows:
 - a. Commencing Friday, January 6, 2016, for two consecutive weekends of every three weekends, from Friday at 6:00 pm until Sunday, at 6:00 pm for the first weekend, and from either Friday at 6:00 pm until Saturday at 6:00 pm or Saturday at 6:00 pm to Sunday at 6:00 pm for the second of three weekends and continuing on that rotation. The Parties are to agree on the weekend where parenting time is split. If they fail to agree on the parenting time for the split weekend, then the Father shall choose during the months of January, March, May, September and October and the Mother shall choose during the months February, April, June, November and December.
 - b. If the Father's full weekend access falls on a long weekend due to school holiday or in-service, the Father shall have the Child in his care from Thursday at 6:00 pm until Sunday at 6:00 pm, if the holiday or in-service falls on a Thursday; or from Friday at 6:00 pm until Monday at 6:00 pm, if the holiday or in-service falls on a Monday, provided the Father is not working on the holiday or in-service day.
 - c. During the school year, every Wednesday commencing at 4:00 pm until 8:00 pm, except the Wednesday of the week the Father does not have weekend access, when parenting time shall commence at 5:00 pm, returning the child to school or the Mother's care on Thursday morning.

- d. Commencing with Christmas 2016, the Child shall be with his Father from 2:00 pm on Christmas Eve, to and including 2:00 pm on Christmas Day.
- e. The Parties shall share equally the Christmas school break between them and will alternate Christmas Eve and Christmas Day such that in 2017 the Child shall be with his Mother from 2:00 pm on December 24th to 2:00 pm on December 25th. The Father shall have the Child in his care on Christmas Eve and Christmas Day in even numbered years and the Mother shall have the Child in her care on Christmas Eve and Christmas Day in odd numbered years.
- f. The Parties shall equally share the March break between them, beginning with the first day of the school break, whether it is on a weekend or not and concluding with the last day of the school break, whether it is on a weekend or not. If the Father is unable to take days off during the March break, the regular access schedule will continue through March break. In the event the Mother is planning a vacation trip during the March break, then the Father's parenting time will be suspended and made up at another time within 2 months from the missed parenting time.
- g. The Parties shall equally share the Easter holiday. The Father shall have parenting time Easter Saturday at 6:00 pm until 6:00 pm on Easter Monday in the even numbered years, and in odd numbered years, the Father shall have parenting time on Easter weekend from after school on Thursday to Easter Saturday at 6:00 pm. The Mother shall have parenting time Easter Saturday at 6:00 pm until 6:00 pm on Easter Monday in the odd numbered years, and from after school on Thursday to Easter Saturday at 6:00 pm in the even numbered years.
- h. The Mother shall have a period of blocked time not to exceed two weeks during the Summer school break. The Mother shall provide the Father with notice of the timing of the blocked access as soon as her vacation time is approved. The parties

shall alternate on a weekly basis the balance of the Summer school break (7 weeks) with the Father having the child 4 weeks and the Mother 3 weeks. The Mother's 3 weeks shall not include the week before or after her 2 week block vacation time.

- i. Regardless of the parenting schedule the Child shall be with the Father from 6:00 pm on Saturday and 6:00 pm on Father's Day. Likewise, regardless of the parenting schedule, the Child shall be with his Mother from 6:00 pm on Saturday to 6:00 pm on Sunday on Mother's Day.
- j. The Father shall have parenting time with the Child on the Father's Birthday, December 28th, and that parenting time shall include an overnight. The Mother shall have parenting time with the Child on her birthday, June 21st, and that parenting time shall include an overnight. The Parties shall notify each other in advance as to which night they select, being either the night before their birthday or the night of their birthday. In the event the Mother's birthday and Father's Day fall on the same day, the Father gets to choose the overnight in the even numbered years and the Mother gets to choose the overnight in the odd numbered years.
- k. The Parent not having care of the Child on the Child's birthday shall have a minimum of 2 hours with the Child on that day.
- l. The Father may contact the Child at reasonable times by telephone, text or email. The Mother may contact the Child at reasonable times by telephone, text or email. The Child may contact the Mother or Father at reasonable times by telephone, text or email.
- m. The Father shall have such other parenting time as the Parties can agree.

- n. In the event the Father's parenting time is missed due to events attributable to the Mother, it shall be rescheduled within 30 days at a time of the Father's choosing. In the event the Father's parenting time is missed due to cancellations by the Father, it shall only be rescheduled with the Mother's consent.

[54] Both Parents may request and obtain information regarding the health, education and general well-being of the Child, including but not limited to school and medical reports and the right to obtain copies of all medical, educational and religious records pertaining to the Child, directly from third parties. Each Party shall immediately inform the other by text or otherwise, of any medical appointments scheduled for the Child and both parties shall have the right to attend those medical appointments.

[55] For purposes of interpreting the above order, time assigned for specific holidays or events shall override regular access after which the regular access rotation shall resume by commencing the rotation at the point where it had been interrupted.

[56] The Father's access shall be subject to the following conditions:

1. The Father is to completely abstain from the use of alcohol or non-prescriptive drugs.
2. There should be no individual under the influence of alcohol or non-prescriptive drugs present during access visits.
3. The Parties shall consult on all major decisions in the Child's life, including decisions regarding the child's health, education and welfare.

Wilson, J.