

FAMILY COURT OF NOVA SCOTIA

Citation: Robar v. Warner, 2010 NSFC 28

Date: 2010 11 09

Docket: FLBMCA-061871

Registry: Bridgewater

Between:

Jacqueline E. Robar

Applicant

v.

Jeffrey W. Warner

Respondent

Judge:

The Honourable Judge William J. Dyer

Heard:

June 17, 2010, in Bridgewater, Nova Scotia

Counsel:

Timothy Reid, for the Applicant

Tabitha Veinot, for the Respondent

By the Court:

[1] Jaqueline Robar (Robar) and Jeffrey Warner (Warner) submitted cross-applications to address parenting and child support issues.

Background

[2] In early March, 2009 Robar and Warner entered into a consent order by which Robar was awarded day to day care and control of their two year old daughter and Warner was provided with parenting time. At first, Warner was to exercise his parenting time from 9:00 a.m. Saturdays until 5:30 the same day, to alternate with Sundays from 9:00 a.m. until 5:30 p.m. in subsequent weeks.

[3] Starting in early June, 2009 Warner was to have his daughter with him from Saturday at 9:00 a.m. until the next day (Sunday) at 5:30 p.m. This arrangement was to continue each and every second weekend thereafter.

[4] The parties also agreed that they would make their best efforts to provide parenting time to Warner on special occasions when Warner's parenting time would be exercised in the latter part of the afternoon and early evening. The order also provided that Warner should not be under the influence of alcohol or non-prescription drugs while exercising his parenting time.

Present Issues

[5] In early December, 2009, Robar made an application to vary the consent order on the basis that Warner had little or no contact with their daughter (largely related to his incarceration for offences against her), that he was on a Probation Order which included a prohibition of his contact with Robar, and that it was not in the child's interests to continue the last-ordered parenting regime. Specifically, she asked for a variation which would effectively remove the provisions for overnight alternate weekend parenting time. And, she asked for sole custody of the child and for supervision of Warner's parenting.

[6] Under the **Maintenance and Custody Act (MCA)** and **Child Maintenance Guidelines (CMG)**, Warner wanted to vary his child support. With the help of their counsel, the parties managed to reach a settlement on retroactive and current

child support. An order was submitted and approved. The matter continued to hearing regarding the parenting arrangements.

Provincial Court History

[7] An accurate picture of Warner's involvement with the criminal justice system is essential if one is to understand the parties' current positions. With respect, this aspect of the case was not well-presented in court. This led to needless confusion - by the parties and by their counsel.

[8] I observe that most of the criminal charges against Warner pre-date the consent order I mentioned at the outset, although they were not concluded by court process until August, 2009. My recapitulation follows.

[9] An Undertaking was given by Warner to a Peace Officer on May 12, 2008. This followed an incident on that date which resulted in an assault charge against Warner under section 266 of the Criminal Code. Robar was the complainant. Its terms included prohibition from communication with Robar; and prohibitions from going to specified local addresses. Communication "through legal counsel" was excepted. There was also a requirement that Warner abstain from alcohol and drug consumption, except for medical prescriptions.

[10] Multiple charges were dealt with on August 19, 2009. Most of the incidents occurred after Warner's assault of Robar in May, 2008. The global outcome was a sentence of 5 months imprisonment, to be followed by one year probation. As mentioned, Robar started her present application around the time of Robar's release. More precisely, the Probation Order covered the following:

- s. 266 C.C. – assault. Offence date May 12, 2008
- s.145 C.C. - breach of undertaking. Offence date July 1 – Dec. 21, 2008
- s.145 C.C. - breach of undertaking. Offence date July 22nd, 2008
- s.372 (3) C.C. - harassing phone calls. Offence date July 22, 2008
- s.145 C.C. - breach of undertaking. Offence date February 22, 2009
- s.145 C.C. - breach of undertaking. Offence date April 24, 2009

[11] The Probation Order's terms included no contact with Robar, direct or indirect, and prohibition against being at her places of residence or places of employment. Other terms included attending as directed by his probation officer

for the following: substance abuse assessment and counseling, anger management assessment and counseling, spousal/partner violence intervention and prevention program.

[12] A Conditional Sentence Order was imposed February 5, 2010. This was also connected to the incident which occurred April 24, 2009 and specified a single charge under s. 145 C.C. - breach of undertaking. For this offence, Warner's sentence included 30 days in custody, to be served in the community. In this most recent order, there was a provision that Warner not contact or attempt to contact Robar at any time, for any reason, whether directly or indirectly unless specifically authorized in writing by the court, and to remain away from her residence and place of employment. However, there were no conditions regarding assessment, counseling, treatment, etcetera. – perhaps because a Probation Order was already in place dealing with these matters.

[13] A new Probation Order was endorsed simultaneously on February 5, 2010. It too related to the events on April 24, 2009 and a charge under s.145 C.C. - breach of undertaking. This Order was intended to follow the 30 day sentence imposed under the Conditional Sentence Order. It is for one year and obviously will not expire until early in 2011. It specifies that Warner not contact or attempt to contact Robar at any time for any reason, whether directly or indirectly, unless specifically authorized in writing by the court and required him to remain away from her residence and place of employment. There were no other terms and conditions. So far, this Probation Order has not been varied to reflect the possibility of contact between the parties incidental to his parenting times.

[14] (In passing, and with respect, I was unable to reconcile the charging references under s. 145 C.C. in connection with the events on April 24, 2009 in two distinct sentencing orders - in August 2009 and again in February 2010. Neither party introduced copies of any of the Informations which were before the court at the various appearances. This might have resolved the conundrum.)

Warner's Evidence

[15] Warner resides at Western Shore, Lunenburg County. He is employed locally as a labourer. Warner wrote that he and Robar separated in or about May of 2008 and he conceded that Robar has had the day to day care of the child since then.

[16] He acknowledged the five month custodial sentence mentioned above. It started on August 19, 2009; he was released on November 27, 2009. He confirmed that he continues to be under a prohibition regarding contact with Robar and that similar prohibitions have been in place since mid-May, 2008. He complained that as a result of the no contact provisions, from time to time, it has been very difficult for him to arrange parenting times with his child. Efforts to resolve things after he retained counsel proved unsuccessful.

[17] Referring to the March 2, 2009 (Family Court) consent order, Warner emphasized that the alcohol and non-prescription drug terms and conditions only related to his parenting times.

[18] In his version of what happened on or about April 24, 2009, he was not scheduled to have parenting time that day. Admittedly, he was out with friends and drinking alcoholic beverages. He insisted that he went to Robar's residence based on a telephone or text message from her. He claimed that Robar asked that he pick up an item for the child and deliver it to her residence as soon as possible. His evidence was that he told Robar that he was out drinking at the time, but that she insisted that he accomplish the delivery. He did so. More to the point, he claimed he thought the "no contact" prohibition had expired by then and therefore there would be no problems if he acceded to her request. He reasserted that Robar knew he had been drinking when she contacted him; and that there was no need for him to underline that fact when he arrived. However, he said that when she "discovered" that he was under the influence of alcohol, she immediately called the police and events unraveled from there.

[19] Despite the parents' conflict, Warner said he was able to exercise some overnight parenting time, although he was vague and confusing about the frequency and duration of contact. I took his references to be for the period between the initial charges against him and his convictions. He claimed that more than once Robar offered to let him stay overnight; and that he did so. And, he gave some examples of the activities that he engaged in while he had the child under his wing. When pressed, he insisted that he stayed at Robar's residence "quite a few times" while parenting his daughter. Warner stated there were witnesses who could corroborate this - but none of those individuals submitted affidavits or testified. I doubt his version of the events is accurate.

[20] Asked about the transition arrangements for parenting after the parties' initial separation, Warner said the arrangements were quite informal and that he often just "texted" Robar. However, he said that access stopped completely when he went to jail, for obvious reasons. But, he asserted that he resumed texting Robar about parenting after his release from custody. (This was in the face of a prohibition against direct and indirect contact with her imposed by a Provincial Court Judge.) After his release, he said he was denied access because of Robar's belief that the child would be unfamiliar with him. As a result, and not without irony, he went to the police to seek enforcement of the earlier consent order. However, the police declined to get involved.

[21] Warner opposes Robar's application for sole custody; he seeks joint custody. He also opposes her request for supervision of his contact with the child. He stated he is aware of the need to rebuild his relationship with the child given the infrequency of his contact. He seeks parenting times during every second weekend with day visits on both Saturday and Sunday. He asks that the court authorize overnight access in the longer term.

[22] Asked to elaborate about his proposal, he suggested something in the range of two to three months to re-familiarize himself with the child. He softened his position by indicating that he was comfortable with a couple of suggestions by Robar as to who might assist with transportation and initial supervision arrangements.

[23] Warner said that he wants joint custody because he believes the parties can communicate once the criminal court no-contact provisions have ended. He is convinced that a joint custody arrangement will support his rights as a parent should something happen to Robar.

[24] Regarding his current consumption of alcoholic beverages, Warner claimed that he is drinking significantly less - but, he has not stopped and expressed no intention to do so. He has not engaged in formal assessment or counseling for alcohol dependency. He said that his probation officer has directed counseling for anger management and that this was occurring two to three times weekly. However, no reports to support this were submitted. He claimed that some parenting skills advice was being given - incidental to anger management counseling.

[25] When pressed about his current lifestyle, Warner admitted that he has never self-referred himself to Addiction Services and that he is still drinking. He also said that he has made no self-referrals for spousal abuse counselling. He has not attended any courses specifically geared toward improvement of parenting skills. Warner rationalized his inaction by saying that he had not been directed to engage in such by his probation officer. His probation officer did not testify.

[26] Asked directly what he feels he has to offer to advance the child's best interests, he was unable to clearly articulate an answer. He simply said that he "was always there for her" and exemplified various household items and personal items which he had provided in the past for her benefit.

[27] In testimony Warner confirmed that he last saw his daughter in mid August, 2009 and he agreed that she may not even recognize him at this point in time.

[28] Robar asked that the court impose a condition that the child have no contact with Warner's brother, Shawn. Warner did not oppose this term and condition.

Robar's Evidence

[29] Robar acknowledged that a lawyer on her behalf wrote to the Public Prosecution Service in late January, 2009. That letter stated that Robar would like to vary the terms of Warner's undertaking so that she and Warner could have contact incidental to making arrangements for Warner's parenting time. When that letter was written, it was known and understood that Warner would be appearing for a trial in late February, 2009 in regard to a number of outstanding charges. The lawyer's letter concludes with the following words: "My client would like to get the undertaking varied sooner rather than later".

[30] Robar also conceded that regardless of the formal prohibitions in place that she and Warner had "off and on contact". According to her, this was done after she consulted with the police who reportedly condoned the contact despite the lack of court approval. In one of her affidavits, Robar included copies of her diary entries regarding Warner's contact with the child up until April 24, 2009. (Warner did not challenge the contents.)

[31] Leaving aside Warner's encounters with criminal court processes, Robar wrote that one of her main difficulties was that she and he have never been able to

communicate civilly about access arrangements. According to her, problems would usually arise “due to his attitude towards me or a manner of speaking and he would end the call by hanging up”. By contrast, she says that she personally has no problems in communicating with him - provided that the conversation is about parenting and the child and not other issues between the adults, and provided he is sober.

[32] In another affidavit, Robar wrote that on April 24, 2009 she permitted Warner into her apartment to exercise access to their child. According to her, he showed signs of alcohol use and his loud voice scared the child. He refused to leave when asked to do so. As a result, she called the police for assistance in removing Warner. According to her, Warner had almost tripped while carrying the child and he smelled of alcohol. As discussed elsewhere, charges followed. Nonetheless, there must have been some communication and cooperation between the parents afterward. For example, Robar recalled that in July, 2009 she accompanied Warner and their daughter to the local Exhibition. And, she recalled that she and her current boyfriend helped Warner move to the Western Shore area.

[33] Robar referred to the last consent order which envisaged day access evolving into overnight access. However, according to her, overnight access did not occur. She claimed that Warner showed no interest in picking up a crib that had been purchased for him to use during access. And, she wrote that her two year old daughter really does not know who Warner is at this stage. She wrote that she believes that he knows very little about her needs or how to care for her properly.

[34] Robar included in her evidence a copy of a newspaper article published in late August, 2009. The article was entered without objection. The story disclosed the sentencing of Warner to five months in jail starting August 19, 2009. Robar confirmed that she was the unnamed victim mentioned by the reporter. The story said that Warner had a lengthy criminal record and had additional charges of assault, breaching an undertaking and making harassing phone calls to her. The article referred to the difficulties which started in May, 2008 when she called the police for assistance in removing him from her residence. As also alleged by Robar, the story went on to say that Warner had been arrested and released on an undertaking to have no contact with her and to stay sober. The news report said that Robar repeatedly ignored those orders between July of 2008 and April, 2009. The story said that he telephoned her twelve times and sent 50 text messages despite court prohibitions in place. After Robar contacted the police she received

ten more calls from Warner while officers were at her home. The article concludes by noting that the presiding judge said that Warner had had lots of opportunities to get help over the years but has never done a thing about his alcoholism.

[35] Robar wrote that Warner asked to stay overnight at her apartment but she reiterated that she did not recall any instances where he actually did stay. She recalled that he contacted her in November, 2009 to see if he could stay at her apartment when he was released from jail - but she stated she refused this request. Robar also acknowledged that before Warner was last incarcerated he asked to see his daughter. The evening before he went to jail, Robar permitted access at her apartment for a few hours. The visit was uneventful.

[36] Robar said that Warner called her a few times while incarcerated. She confirmed that she agreed that he could have some contact with his daughter upon release from custody. She said she agreed to this on the understanding that the parents would confine their discussions to access only and that there would be no discussion of past events and other adult issues. However, by early December, 2009 Robar said she was determined to prevent access by Warner – ostensibly based on his lack of interest in parenting, his disregard to the last order regarding alcohol use while parenting, his lack of interest in picking up and using a crib for overnight access, and his general lack of knowledge or interest about the child's needs and routines. In testimony, Robar also reiterated underlying concerns about Warner's parenting skills and knowledge and his past history of disregard for Family Court and Provincial Court orders.

[37] In testimony, Robar described her daughter as a typical two year old. Reportedly, her daughter is energetic and independent. The child has some health issues related to milk and wheat ingestion. Accordingly, the child ingests mostly soy milk and the concerns are controlled largely by diet upon medical advice. Robar said that she is somewhat timid of most males. She said she is her daughter's primary caregiver at this time but her mother and step-father assist, as need be. Robar is not employed outside the home; she parents her daughter full-time. Looking to the future, Robar was asked what sort of access, if any, she envisaged for Warner. She stated that access could occur at her residence provided that it is monitored by her mother or her step-father or her current boyfriend or if it is exercised in her presence. If Warner is to have contact with his daughter away from her residence, she would still like to personally supervise or to have one of her parents supervise those arrangements. Robar insisted that access not be under

the supervision of Warner's brother, Shawn Warner. She did agree, however, that Warner's brother, Ricky, and his common-law spouse, Ruth, would be suitable candidates to supervise.

[38] Robar insisted that a joint custody regime would not work because of the well documented history of the parties' failure to communicate and cooperate in regard to parenting. In her words, "He cannot make the right decisions for himself, let alone for the child". In cross-examination, Robar said that she would be agreeable to a provision for reasonable access, for reasonable periods of time, subject to supervision but insisted that there be no overnight access. In terms of communication, she suggested that arrangements be made through her parents or through Ricky and Ruth Warner. All of these individuals reside in the local area. In the same vein, she said that the supervisors could facilitate transportation as all have motor vehicles and Warner is not licensed. Asked to clarify her concerns about Warner's brother, Shawn, she said the brothers are living together at the same residence at this time, that the brother has similar drinking problems, and that the brother assaulted her in the past. She did not elaborate.

[39] Before the case concluded, counsel stipulated that there had been communications between counsel in aid of settlement of the parenting issues. This was to allay any suggestion that Warner had not been proactive during the proceedings to gain satisfactory (to him) parenting times.

Discussion/Decision

[40] According to the **MCA**, the father and the mother of a child are joint guardians and are equally entitled to the care and custody of their child unless otherwise provided by statute or ordered by a court of competent jurisdiction. Regarding the care and custody, or access and visiting privileges in relation to a child, the court must apply the principles that the welfare of the child is the paramount consideration.

[41] When the parties appeared before the court in early March, 2009, they sidestepped adjudication on whether the parties would enjoy joint custody of the child or whether sole custody would be vested in one of them. They did so by simply agreeing that Robar would have day to day care and control of the child and that Warner would have specified parenting times.

[42] Review of the file discloses that when the last order was taken out there was no mention that Warner was facing multiple criminal charges for incidents occurring between mid- May, 2008 and late February, 2009. (As mentioned elsewhere, those charges were not resolved until August, 2009.)

[43] I am satisfied that Warner's commitment of additional offences in late April, 2009, his incarceration for several months in late 2009, and the sentence in early February, 2010 - considered as a whole - constitute a material change in circumstances sufficient to warrant review of the whole parenting scheme and consideration of Robar's request for variation. Further, the fact that neither parent previously sought adjudication on the issue of sole versus joint custody, in my opinion, has left the door open for decision at this time.

[44] I agree with the proposition that the essence of most joint custody arrangements is shared decision-making and in that sense may be distinguished from the care and living arrangements. Although joint custody in combination with fully "shared" care and parenting are not unusual, more often than not, joint custody is tethered to an understanding that a child will live primarily with one parent while the other parent has liberal or specified contact or access.

[45] Importantly for our purposes, parents in those situations usually affirm that the "non-custodial" parent will be consulted and have input into the most important decisions which are made. Examples include schooling, daycare, religious faith, non-emergency medical care, etc. Viable joint custody (ie., joint decision-making) schemes presuppose a level of communication and cooperation that mimic, as near as practical, what would occur if the parents and child(ren) were functioning as a single family unit under the same roof. Locally, many court orders include clauses which purport to define the legal jargon and exemplify the expectations.

[46] Most parents, to their credit, choose to put aside personal animosity and differences in order to make joint custody work. However, not everyone is able or willing to do so. In some cases, the conflict is so intense between the parents and the ability to communicate and cooperate is so fractured and dysfunctional, that joint-decision making is not viable. Frequently, children observe or get embroiled in the conflict and may suffer as a result. Regrettably, maybe predictably, the present case has disintegrated into this category.

[47] Leaving aside the parties' motivations and intentions when they entered into the last order, I am satisfied on the evidence that they are currently unable to cooperate and communicate effectively, without conflict, in the best interests of their young daughter.

[48] In real-life terms, Robar has been the child's primary care-giver since birth. She has been the main decision-maker, thus far. I find that Robar's continuation in that role is best for the child. In my opinion, there is a high likelihood that mandatory input by, or consultation with, Warner will lead to renewed conflict - unless and until he comes to grips with his alcohol addiction.

[49] Robar has been repeatedly victimized by Warner whose episodic alcohol abuse all too often has led to domestic violence and other criminal conduct. For much of the time since early 2008, by Provincial Court orders, Warner has been constrained from contacting Robar. Yet, he has persisted in attempts to make contact; and he seems oblivious to the legal consequences or the real-life impact on Robar and his daughter. That Robar may have sent mixed signals about her wish to restore contact and communication for her daughter's benefit does not detract from my assessment of Warner's responsibility and accountability.

[50] I am satisfied, as was at least one Provincial Court judge, that most (if not all) of Warner's inappropriate conduct over the last two years can be linked to an alcohol addiction which he has been unable or unwilling to acknowledge or treat. His recent criminal record speaks volumes about this.

[51] I conclude that decision-making should be vested in Robar in the child's best interests and I order that she shall have sole legal custody. In all of the circumstances, I find that Robar's proposals will best advance the child's interests as Warner attempts to build up some trust between the adults and reestablish a relationship with her.

[52] Robar offered, in good faith, to permit Warner to have the care of their daughter away from her residence if his parenting is supervised. I am prepared to authorize this. I am mindful that supervised access or contact should only be imposed when it is necessary to protect a child's safety and security or for other good cause. Without hesitation, I find that Warner's unpredictable excessive use of alcohol, and unpredictable behaviour while under the influence of alcohol, warrant supervision or monitoring of his parenting - at least until he has taken

concrete steps to have his addiction assessed and treated. It would be naive to accept the proposition that he can micro-manage his drinking to the point that he can guarantee sobriety when parenting. At her age and stage, his daughter cannot protect herself from potential harm should he be under the influence of alcohol; and she is too young to disclose risky conduct by her father to others.

[53] Accordingly, while I conclude that Warner should not be forbidden from having parenting time, I order that it shall occur only at Warner's residence (in her absence), or at such other places as Robar may approve, provided that it is monitored by the maternal grandmother or maternal step-father, or by Robar's current partner, or by Warner's brother, Ricky Warner and his common-law spouse (Ruth), or by Robar personally. I recommend that the latter scenario be a last resort; and it shall be conditional on Provincial Court approval and Robar's consent, to any needed variations of court orders which preclude contact between the parents for this purpose. Robar shall designate the supervisor(s) for each occasion.

[54] Picking up on Robar's testimony, I order that Warner shall have parenting time, of reasonable duration and frequency, subject to supervision as aforesaid. (Parenting times during alternate weekends seems likely). However, at this time, there shall be no overnight access. Communications preparatory or incidental to parenting times by Warner shall be made through the parenting supervisors, as designated by Robar. Transportation arrangements for access shall also be made through and carried out by the access supervisors on each occasion.

[55] Warner shall not be under the influence of alcoholic beverages immediately before or during his parenting times with the child. And, Shawn Warner shall not be present during the child's times with her father.

[56] Robar shall provide to Warner timely information and reports (when available) about their daughter's health, religion, education and welfare. Pending a review, this information shall be provided *via* the supervisors.

[57] The foregoing regime should give Warner a chance to reestablish his relationship with his daughter given the infrequency of contact over the last months. Keeping in mind that Warner seeks generous or expanded contact and that he would like overnight access in the longer term, I will order that the matter be

reviewed in approximately six months time. Counsel may secure a mutually convenient docket appearance from one of the Family Court Officers.

[58] Mr. Reid shall submit an Order, with consent as to form, as soon as convenient.

Dyer, J.F.C.