

In the interests of Children:
An Examination of Custodial Judicial Practices in Nova Scotia

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An Honours Thesis submitted in partial fulfillment of the requirements
for the degree of Bachelor of Arts (Honours Criminology)

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April 17th, 2018
Saint Mary's University
Halifax, Nova Scotia
Canada

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Abstract

When Supreme and Family Court Judges in Nova Scotia are tasked with deciding custody arrangements for divorced parents and their children, the children's wellbeing should be put first. This leaves however, several questions unanswered: exactly how child focused are these decisions, what factors are at play in judicial decision making, and what roles do allegations of abuse play in effecting a child's life? The answers to these questions were explored through a qualitative examination of academic sources, as well as from selected Nova Scotian Court cases from 2003-2017. It shows that although the child's voice is largely considered, it is given equal weight against other evidence and testimony. Judges are mandated to examine both the legal precedents and existing evidence of each case no matter how substantial. Furthermore, the extent to which allegations of abuse effect decisions depends entirely on the volume and legitimacy of evidence that the victim provides. The limitations of this research may lead into an examination of victim support services. In particular services that are not only child centered but provide legitimacy to allegations wherein there is no physical evidence present. An investigation of this nature could create a pathway in which new and more effective methods of victim support may be established.

Dedication:
To the true inspiration behind this research:
the woman who went through hell to get me here.
Thank you, Mom, I owe you everything!

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Introduction

Decision making in child protection cases has been described as “requiring the skill of Machiavelli, the wisdom of Solomon, the compassion of Augustine and the hide of a tax inspector” (Cleaver, Freeman, 1995 pg. 19). For the judges who single handedly make such important decisions as these, this statement is none-the-less true. Choosing with whom a child’s best interest lies could determine that child’s future health and safety. This thesis therefore focuses first and foremost on decisions made by Canadian, and more specifically, Nova Scotian family courts, pertaining to cases of child custody, some of which often involve domestic violence.

Furthermore, this thesis examines under what circumstances Family and Supreme Court Judges in Nova Scotia make decisions of child custody. They say that it takes a village to raise a child, and although this may be true, in some cases of child custody it is up to the children to raise their own voices concerning their best interest. We don’t often realize just how much of an effect these custody decisions have on the children to whom they concern. In Nova Scotia alone it is quite clear that Justices take making such a complex decision very seriously. In most cases they require extensive evidence against one party in order to assign sole custody as opposed to joint custody parenting in any given case.

What arguably makes this a highly complex and important contemporary issue is illustrated in stories like mine. It began in 2005, with my parents’ divorce from an abusive marriage, leaving myself and my younger brother in the crosshairs of what turned out to be a ten-year grudge match between parties. To this day, the effects of the decisions that were made during that time are still relevant to the

directions that my life and that of my brother have gone. Perhaps the most blatant example of the effects of these decisions is the original decision that was filed, ordering sole custody of both children to my mother. Initially, my father got supervised access to my brother, whereas I was not forced into any such agreement because my voice was heard.

Unfortunately for my younger brother, his life turned out very differently from my own, in that his has included illegal drug use, abusive tendencies, and young parenting. All things considered, I take the position that his behavior is most likely the result of the custody decisions made by the Court. Nova Scotia Family and Supreme Court Justices need to make sure they make decisions of custody that are truly in the best interest of the child. The consequences of an ill-informed decision can put a child at risk of danger, depending on the environment in which they live. Examples of such danger include but are not limited to emotional/physical abuse. In any case, it is in the best interest of the child that the right choice be thoughtfully and successfully made.

The purpose of this paper therefore is to examine the decisions that are made by Supreme Court Justices regarding child custody. This essay begins with a review of academic literature to explore a number of secondary scholarly source articles regarding not only the voice of the child, but justifications for judge's decisions in terms of custody arrangements that are in the best interest of the child. In addition, this paper will look at (in the form of a critical content analysis) 6 custody decisions in Nova Scotia; 2 involving abuse, 2 that went against the child's voice, and 2 that not only considered the child's voice, but also accepted and agreed with it. All cases

are accessed via the Canadian Legal Information Institute's online database (www.canlii.org). Lastly, in order to round out the arguments highlighted in this essay, and to acknowledge that this essay concerns one small fish in a sea of others, some consideration of further directions to carry the findings of this essay forward is also provided.

As for the well-being of the children involved in Nova Scotian cases of custody, it is clearly imperative to continue this topic of great importance. This essay opens the discussion of current thinking with respect to what constitutes the welfare and security of a child when it comes to the role that judicial officials play in making such crucial decisions.

Literature Review

Introduction

To a person who has a limited knowledge of the ways in which Nova Scotian Supreme Court Justices make decisions regarding child custody and access, their decisions might seem simplistic. You just pick the right parent for the child. However, in most cases, making that choice comes with a lot of complicated opinions and issues. In order to establish the argument for the following discussion, this section will focus on a review of academic sources selected to represent the following themes: the best interest of the child, the role of the judge as caregiver, and lastly, how allegations of abuse effect who gets custody of the child.

In keeping with the range of data collected for critical analysis, most of the articles selected have been written here in Canada from 2003 to present, so both the

articles and the cases themselves will (for the most part) maintain the similar and current, legal information. In order to understand what other scholars and academics have had to say about the topic of child custody, the discussion begins with a thematic analysis of what is considered to be in keeping with the child's best interests from a scholarly standpoint. Then, the degree to which Justices in Canada implement these laws when tasked with cases of child custody will be discussed, especially when allegations of abuse are considered. In doing so, it is reasonable to assume a better understanding of the circumstances under which judges of the Nova Scotian Supreme Court make decisions concerning custody of a child.

Child's Best interest

Until recently, when marriages broke down and children were involved, it was typically seen fit to presume it was only the adults who suffered the brunt of the proverbial mudslinging inside and outside the courtroom, particularly in cases where domestic violence was a factor. Fortheringham, Dunbar & Hensley (2013, pg. 312) argue that "Children once thought to be silent, unaffected observers and passive bystanders in situations of domestic violence are also significantly impacted both as witnesses to parental violence and as direct victims of abuse or neglect". If this is the case, why, in most cases do only adults carry the burden of evidential proof in the courtroom? Children are a valuable resource for the evidence required in making custody decisions and if anyone should have a say in their best interest, it's them (provided they are able mentally and physically). Fortunately, R. Brian Howe, a professor from Cape Breton University argues:

International interest in promoting the rights and voices of children has grown significantly in recent decades. An important reflection of this has been the adoption of the Convention on the Rights of the Child (CRC) by the United Nations in 1989 and the subsequent ratification of the CRC by all countries of the world except Somalia and the United States” (Howe. 2009. pg.19).

The CRC has since made great strides in establishing the child’s place in the court-centered conversation, either directly or through the adopting of specific agencies, which are being developed for children to access via their parents in order to broadcast the children’s wishes, opinions etc.

It seems that although the focus may not primarily be on the child just yet, and aside from the idea that some individuals still worry about protecting their child from court proceedings, there is increasing interest in agencies that advocate for and listen to what the child wants. Howe theorizes that “with the growing interest in children’s rights has been growing interest in the establishment of special agencies – children’s ombudsmen, children’s commissioners, child advocacy offices - to champion and advance the rights of the children” (Howe, 2009. Pg.19). One of those child advocacy programs is the Canadian Speaking for Themselves document, which combined the efforts of lawyers and social workers in a child centered process. This program truly promotes the best interests of the child, whilst simultaneously keeping them from the stresses of appearing in court. It essentially allowed the counselors to work directly with the child, and the lawyers within the law to advocate for the child’s best interest, rights, and well being almost as a separate entity from each parent. Although this program reduced the stress for the children,

as they do not have to appear in court, “Consent was required from both parents, and no court order was required for a child to be accepted into the program” (Fotheringham et. al 2013. Pg.316). According to the source, this programs biggest limitation was that it required unanimous consent from all parties (the child included) to proceed.

For many reasons, allowing the child to have their voice heard in proceedings is still considered potentially dangerous. As Birnbaum, Bala & Cyr (2011; pg. 399) discovered: “In part this absence is the result of the perceptions and assumptions of professionals and professionals about children and the effect of parental separation on children...children will be harmed if they are involved in any way in the decision-making process following parental separation”. Now this harm could potentially come from several sources, the most apparent of them being the amount of stress involved in appearing in court, as well as having to give testimony regarding which parent they wish to take custody of them. One of the institutions being developed by the CRC, specifically in Canada, is the Integrated Domestic Violence Court whose focus is, as its name stipulates, on marital domestic violence issues. While drawing legal attention to such issues could in theory, do no harm but good, it ultimately diverts attention from whether the children and their opinions are involved or not. According to Birnbaum et al, “it could be argued...that domestic violence concerns are still not being addressed by the IDVC and the focus remains on parents rather than children” (2017. pg.629).

So what is the meaning behind this themes narrative? Well, one could argue that there has certainly been a shift in focus in the Supreme Court. When examining

family custody, the legal system seems to be creating a space in which children are able to safely express their opinions regarding who they want to parent them. Furthermore, based on what each of the sources suggests, there appears to be various routes by which this may happen. So, if any of them are correctly applied, it appears as though there will be more of a likelihood for a well-informed custody decision, as justices will have more information at their disposal, and as a result, the child will have their best interests represented.

Judges as Legal Parents

In order for a child to end up in the best possible situation after a custody dispute, a properly informed decision needs to be made. If the child's parents/guardians cannot first agree on an appropriate arrangement that is in the best interest of everyone, but most importantly, the child, then the decision in most cases falls to a Canadian Supreme Court Justice, which often proves to be problematic. Although judges in most cases are given discretion by law in terms of how to operate and make decisions, according to Martinson and Jackson, "The Family Law Act gives judges a number of important legal responsibilities that focus on the best interests of children and that require the judge, by the use of the word "must" to examine the particular circumstances of the child or children at issue, using a specific legal framework" (Martinson and Jackson, 2017, pg.17). By working within this framework, judges are able to make better-informed decisions, combining the evidence presented in cases with the precedence set out by the law.

In addition to the regulations set out by law in Canada, it appears as though judges have standards outside of said regulations. In most instances, Canadian Supreme Court Justices prefer to have children maintain a good relationship with both parents. Unless absolutely necessary, sole custody is not assigned without evidence of neglect, abuse or degradation towards the child themselves. Wallace and Koerner found that “many judges expressed belief about the importance of maintaining the child’s relationship with both parents” (Wallace and Koerner, 2003. pg. 183). In order to increase a child’s chances of a proper upbringing, whilst maintaining their wellbeing after their parents separate, it seems crucial according to the Wallace and Koerner, that the parents create a parenting plan (regardless of whether or not it is drafted inside or out of the court room) which establishes a functioning routine and creates for the child a sense of normality in their lives. In a perfect world, judges prefer that parenting plans only come across their desk if there is no way for both parties (each parent) to work in a co-operative manner in order to make arrangements for their offspring. Unfortunately, regardless of this desire for co-operation, there are still a large number of custody cases piling up on the desks of Canadian judges because parents in the process of separation can’t seem to get along.

According to Cheryl Regehr, “One of the factors that has repeatedly added to a family’s distress and alienation from one another during the period of divorce is the adversarial judicial process through which custody disputes are decided” (Regehr, 1994. pg.361). Although this may be true, and although it is clear that the use of the judicial system should only be a last resort, this does not diminish the importance of

the judge's ability to adjudicate in such tense situations. There are a number of crucial details that help a judge determine what custody decision is in the best interests of the child(ren). The most important indicator of a custody decision indicated by Regehr was revealed to be the age and developmental status of the children involved in these cases. As Wallace and Koerner (2003) point out, indications from their study on the influence of child and family factors on judicial decision making suggest:

"In addition to age, the following factors were identified by the clear majority of judges as impacting their decision making: the child's wishes as to the custody arrangement; the child's stability (i.e. consistency in the child's life); parental fitness and more specifically, factors indicating parental unfitness; the history of the parent-child relationship; consideration of which parent has been the primary care-giver; each parent's willingness to foster the parent's relationship with the other parent and extended family" (Wallace and Koerner, 2003. pg. 183).

If one thing at all is clear from this review of the literature it is the detailed amount of time and care that Canadian Supreme Court Justices give to family court cases, and more specifically cases of child custody. When the life of a child is in question, the judges in charge of deciding their future put themselves to work examining by law which custodial orientation is best suited to ensure the child's wellbeing.

After reviewing the literature, it is apparent that taking family custody cases into the Supreme Court of Canada is meant to be a last resort when families are figuring out what to do with their child after a divorce. Like in most things, when judges are tasked with determining decisions of custody, there are rules mandated

by law that they are obligated to follow, although there is an element of discretion for judges to be able to work around the complex and individual nature of each case. All this being said, issues of custody and access are not to be taken lightly, at least not by those in charge of deciding how to proceed in these cases.

Based on the academic sources highlighted in thus far, it is clear that judges take great time and care when discerning what is best for a child. Following the policy set out by Canadian law: they must listen to every explicit detail of a case (including the child's testimony), and research similar cases in order to apply precedence. Thus justices in Canada are able to make better, more informed decisions, and are able to infer onto the child, as well as their divided family, the course of action that is in the child's best interest.

Allegations of Abuse

This final theme evident in the scholarly literature demonstrates the ways in which allegations of abuse effect judicial decisions of child custody. Whether the target is the parent, the child or both, judges take these allegations very seriously across the board. Children in these cases are always the victim without question, as instances of spousal abuse can effect a child's development and can drastically change who the child chooses to parent them when they are given the chance to have their voice heard. Calleen Varcoe and Lori Irwin in their article "If I Killed You, I'd Get the Kids"; Women's Survival and Protection with Child Custody and Access in the Context of Woman Abuse, found that their "central finding was that child custody and access processes provide opportunities for abusive partners to exert

power and control over their partners and children, and that these opportunities were often supported by policies and practices of service providers” (Irwin, Varcoe, 2004. pg. 85). One of those providers just so happens to be the justices of the Canadian Supreme Court and if a child is given the chance to have their voice directly heard by the court, it can be particularly difficult if the child must make their statement in front of their abusive parent. Doing so often causes a child to relive the trauma instilled by the abuser. The Canadian Justice System (courts included) has been working tirelessly to reduce exposing the child to their abusers; however, there is still much work to be done. For example, in Ontario, the provincial government adjusted its Family Services Act to ensure “more emphasis being placed on investigating children exposed to domestic violence (DV)...As a result of most provinces across Canada recognizing exposure to DV as a form of child abuse, it has become clear that exposure of children to DV occurs with alarming frequency” (Alaggia Et al. 2007. pg. 2). Essentially, if more cases of domestic violence and abuse are reported, then it is less likely that children will have to appear and relive their trauma in or outside of the courtroom.

Slightly less centered on children is the issue of the accuser (i.e. the one alleging the abuse against them) being responsible for the burden of proof. More often than not having to report acts of abuse against your partner or ex-partner are extremely difficult acts. One must consistently attempt to justify their claims as believable. Most often, the accuser is a woman, and who without sufficient evidence will have her statement written off as a false claim. Aleggia, Reghr & Rishchynski (2007, pg. 2) assert that “Among the factors that may inhibit women’s choices about

dealing with violence are economic barriers, emotional dependence, cultural and religious prohibitions regarding separation and divorce, problematic custody and access orders and the dangers of increased lethality involved in leaving” (2007, pg. 2). Besides leaving their abusive partner, these individuals are under extreme pressure from the court and need to find the time to recover and process their trauma in order to heal. This would be enough to drive any person to the brink. If this is any indication as to what it is like to experience dealing with and reporting an abusive trauma, then for a child to go through the same process must be magnified to an extreme degree. The Report on Federal-Provincial and Territorial Consultations by the Canadian Department of Justice determined:

Family law legislation should contain three points about family violence: a statement that the best interests of children are the first priority; a clear definition of violence (in particular, the scope of the definition; and an allocation of the burden of proof (in particular, whether this should rest with the alleged victim or with the alleged perpetrator, and what should be done in the meantime to protect children) (Department of Justice Canada, 2001 pg. iv).

This report suggests that first of all, any children involved in an abusive marriage breakdown should be the center of the issue, in regards to how their welfare and best interests are being maintained during this trying time. Secondly, it appears that respondents to this study were receptive to the concept of the burden of proof not being placed entirely (if at all) on the “alleged victim” and that the offender should be held accountable. A report such as this is encouraging as it appears as though there is hope for victims of domestic violence (the abused and their children) to be received, and more importantly believed by justices in Canada,

however, there is validity in these judges making sure there is enough evidence to support claims of abuse as there have been cases of alleged abuse that were fabricated by parties in order to indemnify the responding party.

It is interesting to see that throughout each of the three themes recorded in this review, one thing stands tall: the need to protect and preserve the child's life. Included in this theme however, was an additional need for protection of the abused spouse as well. It is also clear that the victims of abuse play a key role in child custody cases involving domestic violence, as said victims are sometimes children. Additionally, whether the abused spouses' allegations of abuse are believed can effect which parent's care the child will ultimately be placed. If the wrong choice is made because of a false testimony or not enough evidence, then the child's well being could be in danger with no escape. The burden of proof is one of the most important aspects, as the amount of evidence provided to support abuse allegations, as well as the way it is presented, can be traumatizing for a child.

Conclusion

What is becoming increasingly clear from this discussion concerns the details with which Canadian Supreme Court judges make decisions of child custody, even with added elements of abuse thrown into the mix. The majority of articles under the child's best interest theme seem to agree that the child's voice needs to be heard, directly or indirectly, in order for a more detailed decision to be made, as the theme suggests, in the best interest of the child.

The divergence however, is whether or not it is beneficial for children to testify for themselves in court or if instead they should work with social workers and lawyers to testify for them.

The role of the judge seems to indicate that most judiciary officials' work within the mandated laws as well as within the details of the case (child's opinion included) to form the most accurate decision which the details of each case will allow. Most academics argue that judges in Canada find it hard to assign sole custody, as in most instances, it is beneficial for the child to maintain a positive relationship with both of their parents, post divorce.

The last theme for consideration relates to abuse cases and how they effect custodial decisions. All of the articles address the seriousness of abuse allegations and are quite clear in regards to the implications for most individuals (children included) in reporting these incidences, let alone legitimizing them in court. What is up for debate is the notion of whether or not the burden of proof should continue to fall on the accuser, rather than the abuser, to solidify factuality.

It is clear in any case that the well being of the child is paramount in decision making, regardless of the specific details in each case. Their testimony is essential regardless of whether it is presented directly or indirectly via their lawyer. It is encouraging to see that the general public seems to be in favor of shifting the burden of proof in abusive situations away from the victim; instead, it should fall evenly between the two parties to judge whether the allegations are fact or fiction.

Methods

To explore under what circumstances judges make decisions of child custody in Nova Scotia, this project qualitatively analyzes six Nova Scotian Supreme Court decisions between 2003 and 2017. These cases are collected from the Canadian Legal Information Institute's online database. These cases were selected to represent three sub-categories, with two cases per category. Two cases contained elements of abuse (sexual, physical or emotional), two suggested the child's voice was listened to and a decision was made in their favor. Lastly, two cases were chosen in which the judges ultimately decided, due to a number of complications, to reject the opinion of the child in favor of other sizable evidence. These two cases resulted in a decision that was in direct opposition to the child's voice. To analyze these cases, the themes collected in the literature review were then applied directly in order of relevance to each case. Taken together, the analysis shows under what circumstances the judges of the six chosen cases made their decisions.

Unsurprisingly, it was impossible to stay entirely un-biased in this research given my personal history in a case that was to some degree, similar to those that were examined. That being said it was this bias of opinion that fueled my interest in undertaking this research in the first place. Lastly it is important to note that owing to its qualitative design, findings from this research are not generalizable to the general population.

Content Analysis

Based on the information revealed in the literature review, the amount of time, evidence, and attention to detail it takes for Nova Scotian Supreme and Family

Court justices to make decisions of custody in the best interest of children is at the very least expansive. None the less, every day justices work within the law to positively effect the living conditions and over all well being of children to the very best of their ability. However, upon completion of the literature review, what is now needed is an application of the three themes that were found, particularly in relation (where applicable) to the six cases associated with this paper. This will encourage more substantial details in regard to under what circumstances justices in Nova Scotia make such crucial decisions. Based upon the literature review each of the six cases will be analyzed incorporating existing knowledge with actual court documents to respond to the research question. Each of the themes generated will open a gateway to sub themes, according to the relevance of each case.

Following this section will be a summary of findings which will hopefully provide a way forward in terms of best practises for the betterment of judicial decisions of child custody in Nova Scotia. What is important to remember in this process is no matter the circumstances, if a child is involved in proceedings, their best interest must always be a focal point.

Child's Best interest

Wishes of the Children: While the child is always meant to be a central point in any custody and access decision, their opinion in court proceedings is just one of the many factors a judge must consider. Incidentally, three of the six sample cases (Cole

v Dixon, Hustins v Hustins, and Jessome v Jessome) all cite in their sections on case law the following excerpt from Foley v Foley:

Wishes of the children – if, at the time of the hearing such are ascertainable and to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in other. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been more indication or, expression by the child of a preference (Foley v Foley, NSSC. 1993).

What can be pulled from this is that sometimes a child's voice is considered less significant when compared to other evidence given by peers or adults. This does not mean that the child's wishes do not hold significance, but instead that justices consider all the evidence in front of them, and do not simply rely on the testimony or evidence of a child. Although to some extent this could seem to be in contrast to the supposed child centred practise, it shows how much judiciary officials in Nova Scotia are concerned with the well being of the children in the cases they are assigned.

Additionally, when a member of the court, a parent or a guardian etc. requests a Wishes of the Child assessment, there is nothing to guarantee that such an assessment will ever be heard or recognized. For example, Justice Chiasson in the Nobles v. Pitts case found that such an assessment proved to be inconclusive for the following reasons: "The matter of a potential assessment of Shaydan (the child in question) was addressed with Mr. Pitts in pre-trial hearings of this matter.... Mr.

Pitts did not return Shaydon. Nor did Mr. Pitts request either of the alternatives of a report or assessment. Instead, he sought to introduce hearsay statements of Shaydan” (Nobles v. Pitts, 2016 NSSC 86). In cases such as this, justices often throw out “hearsay” statements as they, for the most part, are subject to manipulation by a third party (typically the plaintiff or defendant) and are thus falsified. The problem with this case however, is that Mr. Pitts was found to have influenced his daughter’s statements as the judge ultimately determined “The statements are contradictory and do not meet the threshold of reliability” (Noble v Pitts, 2016 NSSC 86). Assumedly in this case, because the child’s comments seemed to contradict each other, the judge made a decision that did not align with the wishes of the child, as they were considered.

Whether or not a judge has all the accurate information they need for deciding a case will make a big difference in the well-being of a child’s life going forward. This is something that will come up in later themes. However, unless there is significant evidence to suggest that a Wishes of the Child Assessment should not be presented to the court (if requested) a child’s opinion has the potential to positively effect a custodial assignment, depending on the circumstances of the case. Even though this assessment, as well as the children’s testimonies, are not the only factor involved in such complex decision-making, they should be considered some of the more beneficial contributors, considering that their life is on the line. Children should (unless otherwise proven) have a say in the proceedings, even in a limited capacity.

Joint or Soul Custody: In most of the sampled cases, one of the most interesting findings is a notion that is consistent with the literature. Judges will not assign sole custody to one parent without granting, at minimum, supervised access to the other parent, unless clearly unwarranted. In *Jessome v Jessome*. Justice McAdam cited the following, as part of the case law under the divorce act, where custody of a child is involved:

In making an order under this section, the court shall give effect to the principle that a child of marriage should have as much contact with each spouse as is consistent with the best interest of the child and for that purpose shall take into consideration the willingness of a person for whom custody is sought to facilitate such contact (Jessome v Jessome, NSSC, 2014)

This was apparent in almost all six cases as it is clear that little to no access for a child to their parent is considered to be damaging to said child. In only one of the sample cases was access to the child restricted. The father, in this instance, was uncontrollably abusive and irresponsible. Justice Forgeron concluded that “The termination of access is a remedy of last resort. Rarely should such a remedy be granted. Because of the exceptional nature of this case, it is in the best interest of Jonathan to terminate all access to his father” (*Roach v Roach*, 2008 NSSC 384) Rightly so, the judge in this case decided that the child was better off having no contact with an abusive parent, rather than suffering under the weight of such a burden!

On an alternate note, *Jessome v Jessome* is a case which highlights a father who does not wish to have any access to his children because he didn’t want to risk jail

time for an additional altercation much like one he instigated with his ex-wife, prior to their appearance before the judge. Justice McAdam however, wrote this reasoning off as an excuse, but proceeded parallel to the wishes of Mr. Jessome, removing all access and custody of his children. The judge stated in the case document “In my view it would not be in the best interest of the children to award access to a parent who doesn’t want it” (Jessome v Jessome, 2014, NSSC 285). In the majority of the sample cases, however, access decisions resulted in joint custody or sole custody with supervised access given to the non-custodial parent.

So, what this initially clarifies is that Justices typically refrain from placing a child in the care of just one parent/guardian. If the child can have a relationship with both parents, without their well being brought into question, then it should be done. As Judge Forgeron stated in *Roach v Roach* “There is no absolute right to access, although the best interest of a child is generally promoted when a child has meaningful contact with both parents” (*Roach v Roach*, 2008, NSSC, 384). Having said that, Justice Forgeron cited *Abdo v. Abdo*, 1993 CarswellNS 52 (C.A) “The court must be slow to extinguish access unless the evidence dictates that it is in the best interest of the child to do so” (*Abdo v. Abdo*, 1993 CarswellNS 52 (C.A)). Although this would seem to be contradictory to some extent, what it makes crystal clear is that most Nova Scotian judges in their practice, will for the most part, restrain from assigning sole custody of a child to one parent without access given to the other. What these cases do not highlight is what happens if the wrong decision is made due to a lack of evidence and the child is subject to continuous violence and abuse.

Judges as Legal Parents

Judges and the Law: If the parents of a child who are divorcing cannot agree on what arrangement is best for their child, then they must ask the court to decide for them. This decision, although it is in no way simple, is detrimental to the wellbeing of the children involved. Nova Scotian Supreme and Family Court Justices are mandated to work within the law to figure out what custody arrangement is in the best interest of the children involved. Thankfully, based on the sample cases that were examined, it appears this has effectively been done. Based on the collective sample cases, it appears that each judge decided to employ precedence (i.e. examining decisions from similar cases) seeking wisdom from their peers who presided over similar cases previously. For example, Justice O’Neil in *Cole v. Dixon* as well and Justice Forgeron both cited *Gorden v Goertz* [1996] to decide whether or not the parents in their individual cases should be allowed to move their children away from their ex-spouse. “The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child” (*Cole v. Dixon*, 2014 NSSC 348). This quotation is an example of the legislation and precedence requirements needed for a justice to move towards a substantial and effective decision, but that is not all that is required.

In each of the sample cases, the presiding justices are relatively consistent in their efforts to fully understand the Canadian government’s mandated guidelines for custodial and access decision making before concluding the cases they are assigned. In *Sidney v. Sidney*, part of the dispute was over who would take ownership of the

marital home and subsequently the child, as they would need to be able to provide and look after both. The Justice observed that “At some point B (the child) is going to need a stable and safe environment in which to live...Now the court has jurisdiction to grant an order for the interim exclusive possession of the matrimonial home by ss. 11 (1) (a) of the Matrimonial Property Act” (Sidney v. Sidney). The justice rightly included this segment in the court document as a way of signifying they had done proper research on the applicable case law. Arguably the Divorce Act (which is mentioned repeatedly in a majority of the sample cases) is the most applicable in situations of child custody and marital separation as it “permits the court to “make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage: s.16 (1) (Jessome v. Jessome, 2014 NSSC 285). Essentially, this act in its entirety provides proper legislation by which judges can make better, more informed decisions.

Without this legislation those who oversee such complex decisions would be left with little more than the evidence given by the parties involved in each case. There would be no ethical guidelines put in place and these decisions would be made that much more complicated. At the very least, when judges examine case law, and government legislation it provides a rational, legal and critical element, which acts as the foundation for a stable home to be constructed around the child. All that is left are the details associated with the case to determine what walls should be built to protect the best interest of the child.

Judges and The Evidence: Evidence, just like case law (i.e. The Divorce and Marital Homes Acts) helps a judge in deciding what is a suitable custody arrangement for any given child. In all six of the cases that were sampled there appears to be a significant amount of evidence (in the form of witnesses, child and parental testimony) to support both sides. However, whether that evidence is legitimate has proven to be the hardest point of discernment. In *Lewis v. Lewis*, justice Forgeron denied Ms. Lewis's the part of her affidavit, which suggested that her husband had sexually assaulted her and had taken sexually explicit photos of her in the process. The judge stated:

I find that the parties engaged in joint, sexual activities and that such activities did not at any time impact on the children. Too much time and evidence was devoted to this topic. This evidence was not considered relevant to the issue of the best interests of the children, and in any event was joint and consensual (Lewis v. Lewis, 2005 NSCC 256).

The judge in this case indicated that consenting sexual activity is not considered relevant to cases involving child custody and access because neither children nor any evidence of abuse was found to be involved. Therefore, Justice Forgeron dismissed these allegations and the mother's evidence became insignificant.

In *Sidney v. Sidney*, the judge sided with Mr. Sidney as he appeared to be the competent and financially stable parent who would be in the best interest of the couple's offspring. Interestingly, the court made such a decision because it appeared Mr. Sidney had his child's best interest in mind and was "able to buy out Ms. Sidney's interest in the home" (*Sidney v. Sidney*, 2017 NSSC 252). In contrast, Ms. Sidney's evidence appeared simply as a personal attack against Mr. Sidney. Examples

included such statements as “Mr. Sidney gambles, abuses substances and does not pay his bills” (Sidney v. Sidney, 2017 NSSC 252). Also “She gets along with the neighbors, while Mr. Sidney does not.” (Sidney v. Sidney, 2017 NSSC 252). Ms. Sidney provided no evidence to support these statements, which ironically resulted in Justice Forgeron giving permission for custody of B (the child) to remain with Mr. Sidney as it appeared he was her best chance for a healthy, successful life.

What is clear in this section, above anything else, is how seriously Nova Scotia Supreme Court and Family Court justices consider all the given evidence and relevant case law when determining the outcome of a case they are given. In all six sample cases, justices exemplify the most important of both these elements whilst discarding or proving the insignificance of that which doesn't quite fit. Although this, at times, appeared to be a lengthy process, the persistence exemplified by the justices in these cases alone proves just how seriously the Nova Scotian Supreme and Family Court take the decisions that are thrust upon them. However, if there is a lack of available evidence, or if such evidence is in any way questionable, there is an increased risk for justices to make incorrect arrangements, which are not in the best interest of the child, forcing them into parental situations that are potentially damaging to their well-being (i.e. abuse).

Allegations of Abuse

Physical and Emotional Abuse: Of the 6 sample cases that were looked at for the purposes of the research, only 2 of them possessed significant allegations of abuse. Although both cases deal with abuse factors, they are entirely different in

circumstance. *Roach v. Roach*, which has been examined earlier in this report, revokes custody of a child from a father who was found to be violent as well as physically abusive, and non-responsive to a parental assessment. Justice Forgeron reported a statement from Mrs. Roach that “Jonathan has been negatively affected by the supervised access which was ordered in the Corollary Relief Judgment. Jonathan was consistently upset immediately before and after the experience of supervised access” (*Roach v. Roach*, 2008 NSSC 384). In this case, the judge appears to be concerned that if contact with his father continues, then the amount of emotional trauma and pain Jonathan will no doubt feel will increase. The judge also feels as though it would be best for this change in parental custody to be permanent:

Mr. Roach has no understanding of the harm that flows from his abusive conduct and the ongoing denigration of Ms. Roach in the presence of the children; and I find that the relationship and attachment between Jonathan and his father is a negative one. I am unable to find any positives in the relationship as it presently exists (*Roach v. Roach*, 2008 NSSC 384).

Often in cases of abuse, judges will assign sole custody to one parent with access to the child for the other. In this case, however, it is clear that contact with Mr. Roach would negatively affect Jonathan, with a possible increase to physical trauma (if of course that was not already happening!) Because of his abusive and disruptive nature, the justice was quite clear about the character of such a violent individual; “I find that Mr. Roach has little ability to self-monitor and self control. He is reactive and impulsive...His conduct causes his children to experience shame, hurt and guilt.” (*Roach v. Roach*, 2008 NSSC 384).

It is remarkable to see that in cases like these, Nova Scotia Supreme and Family Court judges will remove children from violent influences. Doing so will allow for the child to find better male role models for their life and begin to move away from the emotional tendencies learned from their abusers. What is surprising is that the judge in this case was willing remove one parent from the equation, as that is typically frowned upon unless needed, which in this case, it was. What could be argued is that this is, in fact, a more drastically extreme example and that further information is required to determine what the minimum threshold is when questioning when to remove a child from a potentially dangerous situation. Clearly there is a distinction needed to be made between what can be classified as abuse and what is classified as negligence.

Negligence: *Jessome v. Jessome*, unlike the previous case exemplified a different form of abuse, one that was significantly less direct but nonetheless integral to the growth and well being of the children involved. Justice MacAdam reported that Mr. Jessome “Has not exercised access or otherwise maintained contact (such as by communication at holidays or birthdays) as contemplated by the other” (*Jessome v. Jessome*, 2014, NSSC 285). Most disturbingly, this shows how much the father in this instance truly cares about his children, which is not much. It is clear that he would rather look out for himself than the well being of his children. Regardless of his intentions, or prior altercations wherein the police were involved, this is not a justification for why someone would voluntarily forfeit their rights to their children. Justice MacAdam saw through Mr. Jessome’s claims and indicated, “such an explanation is simply an excuse and not an acceptable justification for

effectively abandoning his children. Justice Bourgeois' order provided him with specific rights of access. He chose not to exercise his rights" (Jessome v. Jessome, 2014 NSSC 285). What Mr. Jessome seems to be overlooking is the most important thing, his children's best interest. While he claims that participating in his child's life will cause more harm than good, what he appears to be forgetting is the extent to which his children need his presence in their lives.

This man has proven that he is not abusive towards his ex-wife (other than the average marital argument) or his children and poses no threat to those around him. So the question remains, there must be some other reason as to why he chooses not to be an active member of his children's life other than the negative altercations with his ex-partner. Such minimal circumstances do not in any way justify abandonment of innocent children. It is certainly not in the best interest of a child to be without either parent, nor is it the judge's intention therefore; removing contact from either parent in this case proves to be unnecessarily unproductive.

If anything is to be learned about the ways in which Judges of the Supreme Court in Nova Scotia make decisions of custody in the best interest of the child, it's that a lot of effort, time and evidence is needed as well as applying the necessary legal and ethical information to make a well-informed decision in which the child's well-being and safety are guaranteed. As this essay draws to a close, what remains to be uncovered is two-fold: firstly, what amount of evidence is needed for victims of domestic abuse (children included) to be believed? Secondly, is it possible for judges to make a decision, with the proper amount of evidence and applicable legal stature that is 100% in the best interest of the children involved? Even though a number of

components involved in how judges in Nova Scotia make decisions of custody that are beneficial for the children have been uncovered, what has yet to be examined are possible ways forward in terms improving the chances that the right custodial decision will be made.

Discussion

When my parents were getting divorced, I was unaware just how much time and consideration was needed, not to mention how much my opinion actually mattered. I also had no idea how much detailed evidence was required for Justices of the Nova Scotia Supreme and Family Courts to make a decision in our best interest. How could I? I was only twelve years old. Examining this process eleven years later has highlighted for me, the following questions: To what extent are decisions of child custody child centered, what are the components required for justices to make these decisions (evidence and legal stature), and lastly in what ways do allegations of abuse effect decisions of best interest in child custody cases? This framework, which upon completion, and if applied properly, should present substantial improvements for best practices in custodial decision making by justices for the betterment of a child's life. However, before this is completed, a discussion must take place regarding the findings in the research, so one can fully comprehend the gravity of the need for such improvements.

The custodial aspect of divorce is meant to be child centered and, in most cases it is. My voice (as the child in question) was quite clearly heard. I did not want my father to have access to me; therefore he was not given it. Although that

situation was a little more complex, the fact remains that my voice was heard and applied in this decision. Birnbaum, et al (2011, pg. 401) theorize:

At the broadest level, children's participation in decision making related to parental separation can be varied as having an opportunity to be involved directly or indirectly when parents are making arrangements without any professional assistance, having input into services that are being provided to them upon separation, having a role in mediation or court-based dispute resolution, or participating in discussions about broader policy and law reform issues relating to parental separation.

One of the most important reasons a child's voice is considered when parenting arrangements are being assigned, is for the judge to be able to hear from the child directly, especially if the parents are at odds with one another. However, that is essentially the reason for the Nova Scotia Supreme Court's input to begin with.

Hearing a child's opinion could reveal evidence that is detrimental to a case not to mention a child's wellbeing, especially when abuse allegations are at play.

Unfortunately, along with all other evidence in a case, the child's statement is given equal weight.

Judges are mandated in custody cases to grant access based on the information (the child's voice included) and legal precedence related to each case.

The decision is usually in the child's best interest, but that doesn't necessarily mean it was the only right decision. Typically in Nova Scotian cases of child custody and access, Judges put themselves to work to figure out a parent-child access arrangement that is in the best interest of the child. This decision, as informed as it may be, will not please everybody and is sometimes not in the child's best interest, leaving him or her vulnerable to abuse. Martinson and Jackson suggest that Justices

typically:

...operated within what can be called the traditional adversary system. In it, judges made decisions based only on the evidence and legal arguments presented, almost always by lawyers. They were not involved in assisting people to settle their cases, so did not have to make recommendations about what a fair outcome would be in that context

(Martinson and Jackson, 2017, pg. 14).

Instability in decision-making is the result of a lack of evidence, leading the judge to make a decision that is potentially harmful to the child. The fact remains that vulnerable children should not be subjected to abuse based purely on a lack of evidence to support a truthful claim of harassment and/or abuse.

This research revealed the extent to which proper consideration of evidence is needed in these highly complex decisions. For example, when someone files allegations of abuse against their ex-partner, although their claim may be legitimate, it is their responsibility to present the evidence to support their claim; basically “you’ve been abused? Your child is at risk? Great, prove it”. This highly contentious attitude towards physical, emotional, and sexual abuse has proven to be fundamentally ineffective. Most victims have a hard-enough time dealing with the effects of the abuse that was thrust upon them, and it can re-traumatize the victim (adult or child) to have to re-hash their experiences in court as well as in front of the offender (parent/partner). A study done by Varcoe and Irwin (2004, pg. 85) has found “that child custody and access processes provided opportunities for abusive partners to exert power and control over their partners and children, and that these opportunities were often supported by policies and practices of service providers”.

The offender's attempts to physically or mentally harm their victim, as well as the victim's inability to cope or produce evidence could act as both a lack of evidence and yet becomes evidences itself. Sometimes the evidence of abuse is a result of emotional rather than physical violence. Fortunately, in the cases that were sampled, most justices sided with the victims, because there was significant evidence to support the victims as well as their children who were not safe in the hands their of abusers. In the case where the judge chose not to believe the plaintiff (Lewis v. Lewis, 2005 NSCC 156) the judge deemed the incident merely an unconventional form of consensual sexual activity rather than sexual abuse and found no harm had come to the children as a result. Unfortunately, outside of the sample cases, these allegations of abuse that are truthful sometimes go either unrecognized or get dismissed due to a lack of evidence or a cunning, manipulative, abuser.

My brother and I both were at risk in the beginning of our case, as there was a chance we would end up in the hands of an alcoholic verbal abuser who harassed our mother during, and after their marriage. Although I ended up not having a relationship with this man, my younger brother was not so lucky. His age and relationship with his father may have subjected him to continuous strain and contention. The judge who assigned sole custody of both siblings to my mother and granted supervised access of my brother every second weekend to the other party, did not want to give our father access as they legitimized the claims of abuse and violence presented by my mother and her lawyer. Normally, Judges do not want to assign anything except joint custody but for an entirely different reason. Section 16

(10) of the Divorce act states that “the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interest of the child” (Lewis v. Lewis, 2005 NSCC 256). In any case, the evidence of abuse was substantial, and the judge made a decision that was in the best interest of the relationship between both parent and child...but mostly child.

Directions for Further Study

So, it appears the writing is on the wall: Nova Scotia Supreme and Family Court Judges stick primarily to the legislation and evidence (or a lack there of) when it comes to decisions of custody and access. The level of consistency and commitment to the children in each case was fascinating. Initially, I had thought there might be a few discrepancies in what judges do, but, in fact, there were none. The limitations existed in the evidence.

As crucial as it may be, the evidence is not always legitimized. Judges can only make decisions of custody and access in the best interest of children when they have the proper amount of evidence (i.e. witness testimony, wishes of the children, parental evidence etc.) to back it up. Not having this evidence leaves room, not only for an improper and potentially harmful decision to be made, but it also puts the child at risk of continuous harm by the parent with whom they were improperly placed.

Perhaps the evidence is where emphasis on further research should lie. Justices in Nova Scotia are likely to make more accurate and beneficial decisions in the best interest of the children if proper evidence is both presented and legitimized. The next step could be to identify what services need to be put in place,

and what supports could be added to support existing services. For example, the recently established Integrated Domestic Violence Court, was established to support victims and their children when claiming allegations of abuse. Establishing these services would provide substantial grounds for claims to be believed by a judge, and institute a protectorate wherein the judge would not be cautious in assigning sole custody to one parent without access to the other. Perhaps if these services were available and properly implemented for my family, we wouldn't have ended up as divided as we are today.

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