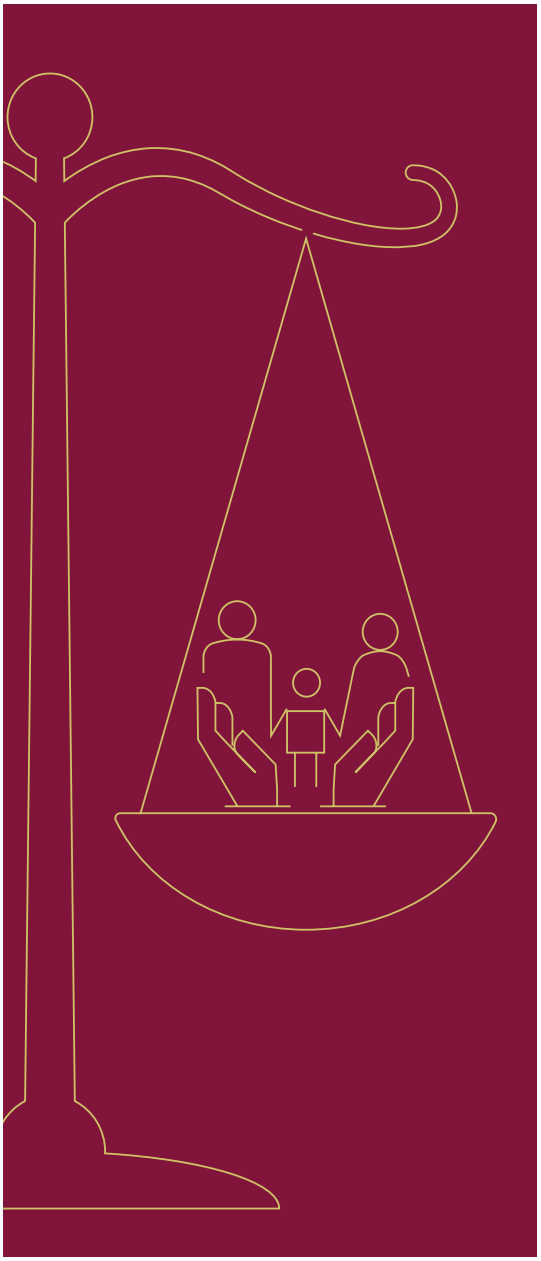
LEGAL BULLETIN

Parenting Orders and Decision-Making in Cases of Family Violence : NM v SM, 2022 ONCJ 482



Overview

The family court is often tasked with allocating decision-making responsibilities ("DMR") for children when parents separate, for example,[1] whether one or both parents should have decision-making responsibility. As with all matters related to parenting plans, the primary consideration in allocating DMR is the best interests of the child test.[2] The court's assessment of a child's best interests will consider family violence because this impacts the parents' ability to make decisions for a child together (as would be case for shared or joint decision making responsibility). The court is often tasked with creating a parenting schedule alongside deciding who should have DMR.

The recent case of *NM v SM* is a helpful example of how the court applies the best interests test and considers family violence when making parenting orders.

Background Facts

The trial, heard by Justice Sherr, was about the parenting of the parties two boys, aged 6 and 2. The mother sought primary residence and sole DMR. Sole DMR would allow the mother to make major decisions about the children on her own, including decisions on topics of education, extracurriculars, religion and spirituality, and health.

The mother's position on parenting was based on two primary grounds. First, because of the parenting history. The mother argued she had always been the boys'

[1] For more information about decision-making orders, see CREVAWC's past bulletin on LB v PE

[2] *NM v SM*, 2022 ONCJ 482 at paras 136, 145. This is consistent with the requirements set out in the legislation.

primary caregiver. Second, the mother pointed to the father's violence towards her, which had taken place in front of the children.[3] The father denied the allegations of family violence and sought joint DMR and equal parenting time.[4]

The parties cohabitated (and were not married) from May 2016 until February 2020, when the relationship ended. The mother worked a steady 9 a.m. to 5 p.m. job as a purchaser. The father worked as a professional mixed martial arts ("MMA") fighter and operated an MMA training gym.

The mother testified that she had always been the children's primary caregiver and usually made decisions about the children. The mother had positive things to say about the father and acknowledged that the children have a close bond with him.[5] However, the mother expressed concerns about the parties' ability to co-parent due to family violence during and since the separation.[6] This was the basis for her claim for sole DMR.

Making a Parenting Order

a) Decision-Making Responsibility and Family Violence

As noted in a previous bulletin, joint decision-making orders, which empower parents to make major decisions about the child together, are only appropriate in certain cases. The court must consider principles from the case *Kaplanis v Kaplanis*, which assesses the abilities of the parties to communicate about the child(ren) effectively.[7]

There is also legislation that governs how the court should make these decisions.[8] The *Children's Law Reform Act* (the "CLRA") applies to parenting disputes between unmarried parents, such as *NM v SM*. The CLRA sets out the best interest of the child factors in section 24(3).[9] The best interest factors are a non-exhaustive list of criteria a judge must consider when making a parenting order, including about DMR, and must be the paramount consideration in these cases.[10] In 2021, the CLRA was amended to include an assessment of family violence under section 24(4), requiring the court to contemplate the effects of family violence on a potential parenting order.

b) Parenting Time and Family Violence

In determining how much time a child should spend with each parent, the primary consideration is the best interests test as set out above, including the subsection about family violence.[11] Based on section 24(6) of the CLRA, the court should make an order that gives the child(ren) as much time with each parent as is consistent with their best interests. However, Justice Sherr noted that recent caselaw from the Court of Appeal for Ontario states that this does not mean *equal* parenting time is in every child's best interests.[12]

Notably, an equal parenting time plan requires a high level of communication and coordination. Justice Sherr held that a joint regime should not be ordered where "the evidence indicates that implementing such a plan, given the dynamics between the parties, would be an invitation to conflict and chaos, and would be destabilizing for the child."[13]

[3] *Ibid* at para 116.

[4] Ibid at para 80.

[5] *Ibid* at para 34.

[6] *Ibid* at para 39.

[7] *Ibid* at para 128.

[8] The *Divorce Act* applies to parties that had been married, while the Children's Law Reform Act applies to unmarried parents. The *Divorce Act* provisions regarding parenting orders are almost identical to those in the *Children's Law Reform Act*.

[9] The best interest factors under section 24 of the CLRA can be found here.

[10] *NM v SM*, supra note 2 at para 145.

[11] *Ibid* at para 145.

[12] Justice Sherr references *Knapp v Knapp*, 2021 ONCA 555 at para 34.

[13] *Ibid* at para 151.

Parenting Orders Where there is Family Violence

a) Decision-Making Responsibility in *NM v SM*

The mother provided detailed evidence about the family violence.[14] The father was quick to anger and "demanding and persistent until he gets what he wants."[15] The mother described a pattern of coercion and control that arose between the parties when making decisions about the children. The father was unwilling to compromise and threatened the mother with violence if she did not agree with him. The mother said she felt powerless so she agreed with him, which he then offered as evidence that they made the decision jointly.[16]

In cases of family violence, it is "crucial that the court considers whether a co-operative parenting arrangement is appropriate" because:

"**A victim of family violence might be unable to co-parent due to the trauma they have experienced or ongoing fear of the perpetrator. In addition, co-operative arrangements may lead to opportunities for further family violence.**"[17]

In this case, the Court noted that family violence may be "insidious" and difficult to prove because it often takes place in private. Justice Sherr recognized that abusers are often "skilled manipulators" and may be charming, convincing liars, and persuasive.[18]

The Court accepted the mother's evidence and made a finding of family violence, noting the strong power imbalance between the parties.[19] This finding was based on several instances of control by the father: overholding the children, withholding their health cards, withholding child support, manipulating the children, and putting the mother "in impossible situations."[20] Moreover, Justice Sherr found that the father conducted the litigation in a controlling and manipulative way.[21]

In applying the law to the parties' circumstances, Justice Sherr held that the mother should have sole DMR. Justice Sherr listed the factors that supported the order, including poor communication between the parties; the father's family violence; the father's continued pattern of control and lack of respect for the mother; and the father's use of the children as pawns to manipulate decisions.[22] Further, Justice Sherr noted that a joint DMR order would "likely be used by the father as a mechanism to control the mother."[23] Accordingly, it was not in the best interests of the children to order joint DMR.

b) Parenting Time in *NM v SM*

The mother sought an order that would keep primary residence of the children with her and allocate every-other weekend to the father, while the father sought equal parenting time.[24]

In making the order, Justice Sherr stressed that both parties have strengths and weaknesses but that the level of communication between the parties, coupled with the family violence concerns, indicated it was not in the best interests of the children to have equal parenting time. Instead, the Court set out an every-other weekend schedule with two mid-week visits for the father.[25]

Justice Sherr highlighted the need to reduce the children's exposure to adult conflict. Notably, the Court stated that:

"**It is also in [the children's] best interests to protect the mother from the father's controlling and coercive conduct**."[26]

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[14] *NM v SM*, *supra* note 2 at paras 40-41.

[15] *Ibid* at para 40.

[16] *Ibid* at para 41.

[17] *Ibid* at para 110.

[18] *Ibid* at para 111.

[19] *Ibid* at paras 116-17.

[20] *Ibid* at paras 116-125.

[21] *Ibid* at para 126.

[22] *Ibid* at para 137.

[23] *Ibid.*

[24] *Ibid* at paras 152-53.

[25] *Ibid* at paras 158, 163.

[26] *Ibid* at para 159.

The best way to protect the mother was to award her primary residence and sole DMR to minimize her interactions with the father. The Court recognized that if the mother continued to be exposed to the father's conduct, it could impede on her ability to parent the children. Accordingly, Justice Sherr stated that the court must establish clear boundaries that will reduce how often the mother must consult or interact with the father.[27]

Implications

This case stands for the proposition that family violence can impede the parties' ability to co-parent and that parenting orders that require parties to make joint decisions may lead to further abuse. Moreover, the judgment accurately describes the effect family violence has on survivors: they may struggle to prove family violence and find it difficult to disagree with their abuser. In terms of parenting time, the judgment acknowledges the need for the court to set very clear boundaries to protect against ongoing family violence concerns.

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[27] *Ibid.*

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