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CONSENT, COERCION and SHARED PARENTING: *RUFFUDEEN-COUTTS V COUTTS*

Susan B. Boyd*

Over the past couple of decades, social and legal norms have shifted radically in favour of shared parenting as the preferred model for post-separation parenting, whether that be shared decision-making or shared time.¹ Even in jurisdictions such as Canada that have not legislated a preference for shared parenting time, shared arrangements and joint custody awards have steadily increased.² The notion that children may be harmed if they do not maintain generous contact with their fathers is firmly entrenched, despite ongoing critical analysis of the consequences of excessive attention to the need for contact relative to other considerations.³ Even in the face of a strong

* The author thanks The Honourable Donna Martinson for reading an earlier draft, Jennifer Flood (UBC J.D. 2013) for her impeccable editing assistance, and an anonymous reviewer for constructive suggestions.

¹ Helen Rhoades, “The Rise and Rise of Shared Parenting Laws: A Critical Reflection” (2002) 19 Can J Fam L 75.

² For example, Canadian statistics for 2003 indicate that in 44 percent of court-determined custody cases in the divorce context, the outcome is an order for joint custody, which is more than double the number from the mid-1990s and four times the figure when compared to the late 1980s: Statistics Canada, *Women in Canada: A Gender Based Statistical Report*, 5th ed (Ottawa: Target Group Project, 2006) at 103-116. It is reasonable to assume that the percentage of joint custody awards have risen since 2003.

³ The focus tends to be on paternal contact because children still live primarily with their mothers after separation or divorce. Because Canada has conducted less empirical research on the outcomes of custody arrangements, this comment draws mainly on empirical

statement from the Ontario Court of Appeal that joint custody orders should not be made in contested cases without “some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another”,⁴ joint custody is sometimes ordered in fact scenarios that fly in the face of this message.⁵ In some cases, this result occurred because of the ideological convictions of a judge that joint custody is superior to sole custody or due to a failure to take seriously problematic conduct by one of the parents.⁶

Despite the apparent embrace of shared parenting within the legal system, empirical research cautions against any “one size fits all” approach to the wellbeing of children whose parents live apart. For instance, Trinder’s review of empirical studies on shared parenting time (which does not necessarily mean equal time but rather can be as low as 30 percent of time with one parent) shows that while shared residence can be a positive outcome in a climate of parental cooperation and

studies in other jurisdictions such as Australia and England. Critical voices have, however, been raised in Canada against the normative shift toward joint custody and shared parenting. See for example: Susan B. Boyd, “Autonomy for Mothers? Relational Theory and Parenting Apart” (2010) 18:2 *Fem Legal Stud* 137; Elizabeth Hughes, “The Language and Ideology of Shared Parenting in Family Law Reform: A Critical Analysis” (2003) 21 *Can Fam LQ* 1; Martha Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us” (2007) 26 *Can Fam LQ* 286 [Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment”].

⁴ *Kaplanis v Kaplanis* (2005), 249 DLR (4th) 620, 194 OAC 106 (Ont CA) at para 11.

⁵ Martha Shaffer, “Joint Custody Since *Kaplanis* and *Ladisa* – A Review of Recent Ontario Case Law” in Martha Shaffer, ed, *Contemporary Issues in Family Law* (Toronto: Thomson Canada, 2007) 431 at 459-470 [Shaffer, “Joint Custody Since *Kaplanis*”].

⁶ *Ibid.*

where children's needs are prioritized, in higher conflict cases, which typically follow litigation, negative outcomes for children are too often found.⁷ The research shows that children can benefit from regular contact with both parents after separation, but only when they cooperate, communicate, and have low levels of conflict.⁸ Moreover, social science research does not reveal a clear linear relationship between the amount of parenting time and better outcomes for children.⁹

Given this research, it might be thought that an approach that looks to the needs and interests of the individual child at the heart of a dispute would be far preferable to a pro-contact or shared parenting approach. The former approach would be far better suited to the task of preventing unacceptable risk to children. Instead, shared parenting remains rooted as the preferential norm, being the *de facto*, if not the *de jure*, starting point for decision-making both inside and outside the courts. Mothers who raise concerns about contact by the other parent are too often vilified as selfishly promoting their

⁷ Liz Trinder, "Shared Residence: A Review of Recent Research Evidence" (2010) 22:4 *Child & Fam LQ* 475. See also Belinda Fehlberg et al, "Legislating for Shared Time Parenting After Separation: A Research Review" (2011) 25:3 *Int'l JL Pol'y & Fam* 318; Helen Rhoades, "The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform" (2008) 36:3 *Federal L Rev* 279; Belinda Fehlberg, Christine Millward, and Monica Campo, "Shared Post-Separation Parenting in 2009: An Empirical Snapshot" (2009) 23 *Austl J Fam L* 247; and Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment", *supra* note 3.

⁸ See review of the literature in Fehlberg et al, *supra* note 7.

⁹ Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment", *supra* note 3; Bruce Smyth, "A Five Year Retrospective of Post-Separation Shared Care Research in Australia" (2009) 15:1 *J Fam Stud* 36.

own interests or, worse, as engaging in conduct that alienates the other parent.¹⁰

The 2012 decision by the Ontario Court of Appeal in *Ruffudeen-Coutts v Coutts*¹¹ suggests that parents who attempt to resist custody arrangements that embody the hegemony of the pro-contact or pro-shared parenting approach can face an uphill battle. It also illustrates the considerable influence that a judge can have on negotiated consent orders between parents. Parents who are concerned about how they or their children will fare under a shared parenting regime may not be “heard” within negotiations or court proceedings in the same way as those who push for a shared parenting arrangement. Moreover, they may be persuaded, or even coerced, to agree to arrangements that may not be in their children’s best interests.

RUFFUDEEN-COUTTS V COUTTS

The technical issue in *Ruffudeen-Coutts* was whether leave to appeal was required in the case, given that the order was ostensibly a consent order (for joint custody and shared primary residence) that normally requires leave to appeal.¹² The father had brought a motion to quash the mother’s appeal for lack of leave. The first appellate panel found that leave was required because the order was a consent order and dismissed the motion to quash because the proper leave materials had not been prepared. A new panel of the Court of Appeal was then asked to deal with both the leave issue and with the merits of the appeal, should leave be granted. Epstein J.A., for the

¹⁰ Helen Rhoades, “The ‘No Contact Mother’: Reconstructions of Motherhood in the Era of the ‘New Father’” (2002) 16 Int’l JL Pol’y & Fam 71.

¹¹ *Ruffudeen-Coutts v Coutts*, 2012 ONCA 65, 348 DLR (4th) 64 [*Ruffudeen-Coutts*].

¹² *Courts of Justice Act*, RSO 1990, c C.43, s 133(a).

majority, found that the mother's argument that she was under duress at the time she entered the agreement that formed the foundation of the order was not supported by any affidavit evidence.¹³ Furthermore, the majority confirmed that the order was a consent order¹⁴ despite the unusual circumstances, which are explained below. As such, leave to appeal was required before the merits could be considered.

Epstein J.A. noted that jurisprudence reveals resistance to allowing a review of issues that the parties have represented to the court as having been resolved.¹⁵ Where the issue relates to the validity of consent, leave should not be granted unless the evidence demonstrates that there is an arguable case that, at the time the agreement that formed the basis of the consent order was entered into, the moving party could not or did not consent due to factors such as fraud, duress, or undue influence.¹⁶ It was, however, noted that matters involving children fall into a special category, given the court's obligation to give priority to the child's best interests.¹⁷ Before articulating the test for cases involving children, Epstein J.A. made three observations speaking to the desirability of upholding consent orders and the high threshold for obtaining leave even in cases involving children:

- a. In cases involving children, the statutory requirements related to best interests of the child mean that the judge's determination should attract deference.
- b. Finality itself has been recognized as being in the best interests of the child.

¹³ *Ruffudeen-Coutts*, *supra* note 11 at para 48.

¹⁴ *Ibid* at paras 49-56.

¹⁵ *Ibid* at para 59.

¹⁶ *Ibid* at para 64.

¹⁷ *Ibid* at paras 65-66.

- c. Family law practice and procedure encourages parties to come to an agreement on as many issues as possible, and therefore, consent orders are regularly granted. Allowing them to be easily appealed would provide another route to prolonged litigation.¹⁸

As a result, Epstein J.A. found that “leave to appeal consent orders in family law cases involving children should not be granted unless . . . the record demonstrates an arguable case that the order, at the time it was made, was not in the child(ren)’s best interests.”¹⁹ Epstein J.A. could find nothing in the record in the case at hand to support the conclusion that the judge did not honour his statutory obligations to make a determination in the child’s best interests. In fact, she said, “the order in this case was for shared custody, which on its face, is consistent with the maximum contact principle articulated in s. 16(10) of the *Divorce Act*.”²⁰ Like too many judges, Epstein J.A. overlooked the precise wording of section 16(10), which is 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 interests of the child*.”²¹ It is entirely possible that shared custody was not consistent with this child’s best interests, a point to which I return below.

Epstein J.A. went on to look at the law on consent in contracts and to find that there was no evidence to support the duress argument presented by Ms. Ruffudeen-Coutts. Ms. Ruffudeen-Coutts had been represented by counsel and there was no evidence that counsel gave ineffective advice or assistance, nor evidence from counsel about how, if at all, his

¹⁸ *Ibid* at paras 69-71.

¹⁹ *Ibid* at para 73.

²⁰ *Ibid* at para 74.

²¹ *Divorce Act*, RSC 1985, c 3 (2d Supp), s 16(10) [emphasis added].

client was affected by the conduct of the motion judge.²² A strong dissent by Feldman J.A. disagreed on the approach to the consent order and the merits.

THE FACTS

The facts in *Ruffudeen-Coutts*, as presented by Epstein J.A., reveal a short marriage of four years (2006-2010), with one young child, a two-year-old son, and a history of conflict, at least post-separation. The mother applied for divorce along with, *inter alia*, sole custody and only supervised access by the father. The father brought a counter-motion in which he sought shared custody. Seven days after her application for divorce, the mother brought a motion on an urgent basis for a temporary order for sole custody and supervised access by the father, exclusive possession of the home and a restraining order against the father. After negotiations, a temporary agreement was reached whereby the son would reside with the mother and the father would have supervised access. A restraining order was also agreed to. These terms were reflected in a consent order dated the same day, December 22, 2010.

The dissenting justice, Feldman J.A., added more factual texture. The supervised access that had been agreed to was to be by either the father's brother or the mother's brother. The consent order restrained direct communication between the parties, and police assistance was ordered to enforce the order and return the child to the mother after access visits.²³ The mother's affidavit alleged she was the *sole* caregiver to her son, having taken off 14 months from her job following his birth. The mother also alleged that "the father showed little interest in caring for the child, was abusive to her including yelling, swearing and throwing things at her, and that she feared for her

²² *Ruffudeen-Coutts*, *supra* note 11 at para 76.

²³ *Ibid* at para 7.

safety and that of the child.”²⁴ The father denied these allegations and claimed that the mother was keeping the child from him. Clearly there was at least high conflict, and at worst possible abuse, at issue in this case. The child had never spent a night with the father alone.²⁵

THE MOTION JUDGE

In March 2011, the father brought a motion on an urgent basis for a change in access and return of his passport. The mother brought a cross-motion for contempt, alleging that the father was not cooperating with efforts to sell the home. Once again, they negotiated a settlement, dealing with all issues other than the father’s access, certain child care expenses and an expert assessment requested by the father. These outstanding issues came before Hambly J., the motion judge, on May 31, 2011. At this hearing, both parents were represented by counsel.

According to Epstein J.A., the mother’s counsel at some point asked for time to seek instructions from his client with regard to a possible resolution, and after a short break, the parties advised that they had reached an agreement. One key term was that custody and support of the child would be shared and there would be no spousal support. Minutes of Settlement were signed and the motion judge indicated that he would grant an order accordingly. However, on his own initiative, the motion judge wrote reasons “in which he purported to explain his willingness to endorse the consent.”²⁶ As well, he suggested that three terms be added, for example, providing for prohibitions against the parties criticizing each other or allowing others to criticize them in front of their son. The final order dealt with all unresolved matters and added these three

²⁴ *Ibid* at para 8.

²⁵ *Ibid* at para 31.

²⁶ *Ibid* at para 43.

terms characterized by Epstein J.A. as “peripheral to the issues of importance to the parties.”²⁷

Referring in some detail to the transcript of the May 2011 hearing, Feldman J.A. noted that it disclosed “that the motion judge made it clear from the beginning that having read the record, he was upset with the way the mother had carried on the litigation including her allegations against the father and her emergency motion.”²⁸ The motion judge observed that the mother’s conduct in “exaggerating and making extreme unsubstantiated allegations . . . constituted evidence of attempting to alienate the father from his child.”²⁹ Even though neither party was asking at that time that the primary residence of the child be moved from the mother on an interim basis, the judge “suggested to the parties at the lunch break that they each determine what conditions they would seek if the primary residence of the child were changed to be with the father.”³⁰ Over an extended lunch period, the parties and their counsel negotiated. The mother’s counsel requested more time, saying they had made some progress. The judge responded by clarifying that he was the one to make the order, so any resolution was to be only with his approval. When the parties came back, they again needed more time, which was resisted by the motion judge. He gave them only a “little time” and cautioned that he would not approve a police assistance order, “which he felt was inappropriate in a child custody context.” Feldman J.A. stated that the motion judge “made it clear that he believed parents should get along for the sake of the child.”³¹

²⁷ *Ibid.*

²⁸ *Ibid* at para 10.

²⁹ *Ibid* at para 17.

³⁰ *Ibid* at para 10.

³¹ *Ibid* at para 14.

Feldman J.A. added more detail about the order of the motion judge. It was for shared custody, with primary residence being one week with the mother, then one week with the father, plus 12 hours access on the non-residential week. Counsel disagreed on whether that was a “final” or a “trial” order, with the mother’s counsel thinking he had agreed to an order that would be tried out. “The judge said he thought the word written was ‘final’ and he made it final.”³² He concluded by commending the parties for working it out “after listening to me.”³³ His reasons for judgment, released six days later, indicated that he felt that the mother and her counsel had overreached in bringing the original emergency motion and that there was no evidence to support a supervised access order. The husband had earlier consented to this order, approved by another motion judge.

In addition, the motion judge struck an affidavit made by the mother’s brother, in which he expressed negative views about the father’s interactions with the child, from the record. Finally, in paragraph 10 of the reasons of the motion judge, he stated: “I told counsel . . . that the primary residence of the child should be with the father and the issue was whether the wife’s involvement with the child should be supervised in a manner that would ensure that she did not attempt to alienate the child from the father. I also emphasized that the child was entitled to the involvement and support of both parents in his life as he grew up. After receiving my view, counsel asked for time to seek instructions from their clients, which I readily gave them.”³⁴

This more detailed account of what went on prior to agreement being reached by the parents, presented by Feldman

³² *Ibid* at para 15.

³³ *Ibid*.

³⁴ *Ibid* at para 19.

J.A., makes more sense of the mother's key argument: that her consent was given under duress due to the comments made by the motion judge and, as such, did not amount to consent in law. As we have seen, the majority of the Court of Appeal did not accept this argument.

THE DISSENT

Feldman J.A., in dissent, did not deal with the duress issue directly. Instead, she found that part of the order was made on consent, while part was not. As such, she found that leave to appeal was not required. If, however, she were wrong and the order was indeed a consent order requiring leave to appeal, then she "would grant leave on the basis that the motion judge made an error of law by failing to fully consider the best interests of the child, which is always required, including when the order is on consent."³⁵ Feldman J.A. noted that the Court of Appeal decision in *Kaplanis v Kaplanis*³⁶ also involved facts where the parties had trouble communicating. In *Kaplanis*, Weiler J.A. found that where parties have trouble communicating, there must be some evidence that they will be able to effectively communicate before joint custody can be ordered.³⁷ Feldman J.A. found that the record in *Ruffudeen-Coutts* revealed a motion judge who was so focused on his perception that the mother was trying to alienate the child that he did not properly consider the best interests of the child, as required by the relevant statutes. She stated that "the court's obligation to ensure that the agreement reached was in the best interests of the child required at least testing the evidence and possibly expert involvement before making a final order."³⁸

³⁵ *Ibid* at para 23.

³⁶ *Kaplanis v Kaplanis* (2005), 249 DLR (4th) 620, 194 OAC 106 (Ont CA).

³⁷ *Ruffudeen-Coutts*, *supra* note 11 at para 29.

³⁸ *Ibid* at para 34.

She would have set aside the final order and ordered a new hearing regarding interim custody arrangements.³⁹

CONCLUSION

In the end, all justices offered a way for the mother to change the ostensibly consensual order for shared time, especially given the incomplete evidence in the case. Epstein J.A. signaled that she found some comments from the motion judge “troubling”,⁴⁰ and noted that the mother was “not left without an opportunity to address her concerns upon a proper record and in the appropriate forum.”⁴¹ The mother could bring a motion to set aside the order on the ground of facts arising or discovered after the order was made. Epstein J.A. also stated that such a motion, if brought, should be heard by a judge other than the motion judge.

The mother eventually found a remedy via this route. She successfully applied for an order to set aside the four paragraphs of the May 31, 2011 order that had required shared custody on alternating weeks. Madam Justice Leitch found that “it is very clear on the evidence that the comments of the motions judge coerced the settlement” and that he recognized that his expression of his views had a significant impact on the parties.⁴² Although Leitch J. felt that the motions judge had “offered his candid reflections to help the parties”, in the circumstances of the case, “the motions judge did not present as a neutral referee who only expressed preliminary impressions, views or concerns and the resulting pressure

³⁹ *Ibid* at para 35.

⁴⁰ *Ibid* at para 76.

⁴¹ *Ibid* at para 78.

⁴² *Ruffudeen-Coutts v Coutts*, 2012 ONSC 6438 at para 100 [*Ruffudeen-Coutts* 2012].

placed on the Applicant was illegitimate and coerced her will.”⁴³ In place of the paragraphs that were set aside, Leitch J. made a temporary order reflecting what the parties had outlined in the original consent endorsement request placed before the motions judge on May 31, 2011: primary residence with the mother. She also ordered that a case conference be scheduled on an urgent basis.⁴⁴

Ruffudeen-Coutts raises an issue about the extent to which judges should convey to high conflict parties before them quite directive messages about the desired outcome of the dispute. The motion judge in effect did this by suggesting that an order changing primary residence to the father was likely and by implying that “parents should get along for the sake of the child.”⁴⁵ At best, the motion judge was attempting to get the parties to negotiate a settlement, as they had done previously; at worst, he was trying to punish the mother by removing primary residence from her. In the mother’s mind, this pressure from the motion judge would likely have prompted her to consider the “compromise” of shared parenting as the only way for her to retain some custodial rights and protect her child’s interests. The evidence before Leitch J. by the applicant and her lawyer was precisely to that effect.⁴⁶

It is impossible to know whether the motion judge was attempting to prompt a resolution that reflected shared parenting, but that was the outcome. Whether that outcome reflected the child’s best interests is open to question. For one thing, “[t]here is no empirical evidence showing a clear linear relationship between shared time and improving children’s

⁴³ *Ibid* at para 101.

⁴⁴ *Ibid* at para 109.

⁴⁵ *Ruffudeen-Coutts*, *supra* note 11 at para 14.

⁴⁶ *Ruffudeen-Coutts*, *supra* note 42 at paras 43-63.

outcomes.”⁴⁷ While studies show that “it is good for children to maintain continuing and regular contact with both parents when they cooperate and communicate and have low levels of conflict”,⁴⁸ it is equally clear that these features are not typical of the broader separating population and that they are not likely to be present in high conflict separating couples such as the one in *Ruffudeen-Coutts*. Moreover, there is “increasing evidence that shared time arrangements present particular risks for children when mothers express ongoing ‘safety concerns’, where there is high ongoing parental conflict and when children are very young—or some combination of these”,⁴⁹ as there was in *Ruffudeen-Coutts*. It is worth repeating that the *Divorce Act*’s “maximum contact” principle in section 16(10) applies only to the extent that contact is consistent with the best interests of the child.⁵⁰ As well, in Ontario, as Shaffer has emphasized, joint custody (and presumably shared time as well) should not be considered or granted by a court when one parent behaves in ways that are contrary to the child’s best interests.⁵¹

The empirical studies reviewed by Fehlberg et al indicate that “the evidence so far does not suggest that changing the law to encourage shared time leads more families to enter shared time arrangements, let alone ‘workable’ arrangements (ie manageable for parents and appropriate for children’s needs at different points in their childhood).”⁵² Although Fehlberg et al were mainly concerned with efforts to

⁴⁷ Fehlberg et al, *supra* note 7 at 321. See also Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment”, *supra* note 3.

⁴⁸ *Ibid* at 320.

⁴⁹ *Ibid* at 323.

⁵⁰ *Divorce Act*, *supra* note 21.

⁵¹ Shaffer, “Joint Custody since *Kaplanis*”, *supra* note 5 at 464.

⁵² Fehlberg et al, *supra* note 7 at 319.

legislate preferences for shared parenting, this cautionary note should be considered by judges as well, given the power that they can have over parties and their negotiated settlements. Even if the evidence were not clear in *Ruffudeen-Coutts* that duress had influenced the negotiation of the consent order, it seems fairly evident that influence was brought to bear on the negotiations and that the resulting order may not have placed the best interests of the child first.

The desirability of encouraging consent orders and finality of proceedings must surely be secondary to the need to ensure that children's needs and interests are protected. The reasons why some parents find it difficult to come to settlement are complex and researchers in England have concluded as follows:

Acknowledging and dealing with the ethical and emotional conflicts between parents, rather than insisting that they are ignored for the sake of the children, might actually produce a system that will be more attentive to the long-term welfare of children.⁵³

These words of caution should be borne in mind in light of the recent report presented to the Supreme Court of Canada, urging that judges (as well as lawyers and law schools) should embrace a culture of mediation and settlement that would encourage litigants toward an early negotiated settlement.⁵⁴ While no-one would wish to see parents litigate issues that need not be adjudicated, it would also be

⁵³ Carol Smart & Vanessa May, "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes" (2004) 26:4 J Soc Welfare & Fam L 347 at 358.

⁵⁴ Kirk Makin, "Report to Supreme Court chief justice calls for family law overhaul", *The Globe and Mail*, March 27, 2013, online: <<http://www.theglobeandmail.com>>

problematic to see judges err on the other end of the continuum, creating a climate of fear or coercion surrounding dispute resolution, as appears to have been the case in *Ruffideen-Coutts*.