

**IN THE FAMILY COURT OF NOVA SCOTIA**

**Citation:** *K.S. v. D.B.*, 2008 NSFC 33

**Date:** 20080917

**Docket:** FLBMCA-021472

**Registry:** Bridgewater

**Between:**

K. S.

Applicant

v.

D. B.

Respondent

**Revised Decision:** The text of the decision has been revised to protect the identity of certain parties. This revised version is released on February 16, 2009.

**Judge:** The Honourable Judge William J. Dyer

**Heard:** July 3, 2008, in Lunenburg, Nova Scotia

**Counsel:** Barry F. Whynot, for the Applicant  
Jennifer L. Schofield, for the Respondent

**By the Court:**

[1] Under the **Maintenance and Custody Act (MCA)**, K.S. commenced proceedings against D.B. for joint custody of the parties' children, B. (now 12 years old) and C. (now 9 years old), and for primary care of both children, subject to reasonable access by their father. There are also claims for child support under the **Child Maintenance Guidelines (CMG)** and for spousal support.

[2] An interim “without prejudice” order endorsed a joint custody regime on the understanding that C. was living primarily with her mother and that B. was primarily with his father. Mutual reasonable access was also affirmed. Interim child support of \$264 was to be paid by D.B. to K.S. starting March 1, 2008. Spousal support was not ordered.

[3] The main outstanding issues are the parenting arrangements and spousal support. Child support is dependent on the parenting scheme.

[4] (K.S. was anxious for a hearing so that the “status quo” would not be prolonged. However, her lawyer was away due to illness at one stage. The delay was not a factor in the final outcome.)

### **Legal History**

[5] In 2002, the parties were involved in a Family Court case which resulted in a written decision [2004 NFC 33] touching on the same issues with the exception of

primary care of both children which was then vested in K.S., by agreement. The parties reconciled in early 2004, but separated again in early 2008.

### **The Case for D.B.**

#### **B.B., paternal grandmother**

[6] B.B. is D.B.'s 76 year-old mother who resides in a rural community which is just a few minutes by car from K.S.'s residence. B.B. has a two-bedroom house with a finished basement which was converted into a room for B. She said B. and his father moved into her residence when the parties separated in February, 2008.

[7] B.B. confirmed that her son works weekdays and that he leaves the home at 5:30 a.m. During the school year, she gets B. up around 7:15 a.m. and they have breakfast together. She ensures that her grandson is ready for school and for his bus which arrives at 8:00 a.m. B. returns around 4:15 p.m. B.B. is home upon B.'s return; and D.B. usually arrives home around the same time. B.B. prepares supper for all three of them and D.B. makes B.'s lunch each evening for the next school day.

[8] She described her relationship with her son and grandson as close; and said that both her son and grandson are welcome to stay with her as long as they wish. Also, she said that C. is welcome in her home and testified that her granddaughter has been visiting more frequently since early April, 2008.

[9] Reportedly, B. has adjusted well to her home. B.B. stated that B. brings friends to the home to play and that he and his friends have also enjoyed visits to her camp at a local lake. She said that B. is free to see his mother whenever he wishes.

[10] B.B. admitted that she has had a number of health problems. She underwent triple bypass heart surgery in 2007. She had a so-called mini stroke in her eyes, which she said has not affected her eyesight. She has high blood pressure which she treats with medication. She has diabetes which is also treated with medication. She has routine checkups with her doctor twice yearly. Although she also has some arthritis, she claims that she is still generally active within and without the home, and she described herself as being in generally good health. She is not engaged in any active physiotherapy or chiropractic treatments.

[11] B.B. raised seven children. She describes B. as a normally active child. She is aware that he has been diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD) but claims that he is not particularly hyperactive. She seems to attribute this to medication which he is supposed to take daily at breakfast.

[12] B.B. said that C. has had some overnight visits at her home with the approval of the mother. When she visits, she sleeps with her grandmother.

[13] The grandmother denied that there have been any serious problems coordinating professional medical appointments for B., but admitted there may have been unintentional confusion if there were occasions when she was simply unaware of appointments from either B. or his father.

[14] As far as schooling is concerned, B.B. said that she helps her grandson at home. She has a grade nine education. She claimed that B. is doing well in school “for his ability”. (This is disputed by K.S.; and even the father is not really pleased with his son’s school performance.) She believes that B. must receive a good education and that “he has no choice” in this regard.

[15] Asked about the success of her own children in school, she said that her daughters graduated from high school but her sons left before graduation to join the workforce.

**M.R., paternal aunt**

[16] D.B.'s sister M.R. resides directly behind their mother's home. She has a motor vehicle and valid driver's licence. She works night shifts and is at home during the day. She said that she is "only a phone call away if my mother, D.B., or B. should ever need me". She described their family as close and that they help one another whenever they can.

[17] M.R. said that both B. and C. are welcome in her home. She said that C. likes to visit and play in her yard.

[18] M.R. said she is concerned about K.S.'s behaviour towards her brother and how this might be impacting on her niece and nephew. She exemplified by exhibiting an unflattering posting from K.S.'s Facebook profile which she claims B.

could have accessed if he wished. The sample posting included a sarcastic comment ostensibly written by T.M. (who testified as a witness on behalf of K.S.).

**D.B.**

Parenting

[19] According to D.B., B. wanted to come and live with him when the parties separated, and C. wanted to remain with her mother. D.B. has no objection to the latter and stated that he respects her wishes.

[20] D.B. said that the children are “free to come and go between our respective homes”. According to him, the arrangement has been working well for both children. He said the distance between their residences is only about two or three minutes by car and he noted that the parents live in the same school district. He said he rarely works weekends, so they can be devoted to B., in particular.

[21] D.B. reported that immediately after the separation B. was not regularly visiting his mother and C. was not regularly visiting him. More recently, he claimed

that C. had started coming and has stayed occasionally overnight on weekends.

However, he admitted that B. has still not been seeing his mother regularly and only stayed overnight a few times.

[22] D.B. mentioned his mother's camp on a local lake which is only about three miles away from his mother's residence. He said that he and B. have been spending weekends there and that sometimes B. brings friends. In the same vein, he said that C. spent an entire weekend in mid-April with them at the camp and he claimed that it was enjoyable for all concerned.

[23] D.B.'s evidence was that he has been trying to maintain as best he can the routine that was in place before the separation. He exemplified a typical day for himself and B. The description is similar to that provided by the paternal grandmother.

[24] D.B. stated that he took B. to his hockey games last winter and reports that his son really enjoys the sport. He said he paid for the cost of some hockey gear and noted that registration fees have been waived for the upcoming season.



[25] D.B. stated that B. often brings friends around to their residence and that he appears to be adjusting well to his new home environment. Since B. has been living under his roof, he says they have developed a closer bond and are much closer than they were before the separation.

[26] In his testimony, D.B. insisted that he encourages B. to visit his mother. He said that B. can go when he wants, including overnight visits. However, there was disagreement over whether B.'s admitted reluctance to visit his mother was connected to the father's refusal to permit the family dog to go with him. According to D.B., B. never mentioned the dog. But, he agreed that it routinely sleeps in B.'s room. D.B. begrudgingly conceded that he had refused to let the dog go to K.S.'s residence ostensibly because she kept the dog over his protests in the past. That the dog may now travel with B. to his mother's was admitted to be a very recent development. Apparently, there is still a dispute over who owns the dog.

[27] D.B. insisted that he is not simply giving his son the final decision as to whether he does or does not visit his mother and denied that he has abdicated a big part of his role as a parent. This is hard to reconcile with his other testimony: "I tell him, if he wants to go, he should go to his mom's"; and "I don't say 'no' to him".

D.B. added that B. tells him that he does not feel comfortable at his mother's home. And he finally conceded that he has never told B. that he must or should go and stay. He again deflected his own responsibility by saying that K.S. could tell B., "You have to stay".

### B.'s Schooling

[28] D.B. said that he tries to get B. to do some homework each evening and noted that his mother has a computer that B. can use. Both he and his mother sit down with B.. However, D.B. also denied that his son is "on line" after 10:00 p.m. at night and underlined this by saying that his mother routinely turns off the computer before she goes to bed.

[29] D.B. said that he has spoken to B.'s teacher and attended at least one parent teacher meeting. Regarding a meeting with the school principal, D.B. conceded that he did not discuss this meeting with the mother beforehand and agreed that she would have learned about this after the fact. With hindsight, he agrees he should have discussed this with her.

[30] He said that tutoring or some other form of one-on-one help is needed. According to him, some assistance was put in place after March and when this happened B. made some improvements - for example, in mathematics. D.B. said he has also spoken to the school principal about one incident of acting out and that the issue was satisfactorily resolved.

[31] D.B. got B.'s final report card just before the hearing. He said that he was disappointed. He said that he would impose consequences on B. including taking a computer toy away from him temporarily. But, he agreed that in the result he did not take the toy away or follow through with any consequences.

[32] D.B. said "B. needs more help". He then said that "they" can help him during the next school year and that B.'s teacher says this will occur.

[33] D.B. completed grade 9. He has no other formal education or training.

### B.'s Health

[34] D.B. acknowledged B.'s medical condition (ADHD). He said that B. takes one pill daily. In response to allegations that B. was not receiving adequate or timely medication, he explained the circumstances under which he ran out of pills at one stage and encountered difficulties in renewing a prescription because K.S. had retained some of the already prescribed pills at her home.

[35] D.B. admitted that he has relied on his mother to administer the daily dose and he has assumed that his directions were being carried out. He did not elaborate on what checks, if any, he conducts to verify compliance.

#### Other Issues

[36] Regarding B.'s interaction with his contemporaries, D.B. said that there are friends within a short distance of their residence although he sometimes must be driven to visit other friends. He said that B. is always home by 8:00 p.m.

[37] As far as conflict over medical appointments is concerned, D.B. complained that K.S. made appointments without consulting with him and refused to disclose, for example, that she had taken B. to a mental health facility. According to D.B., his

son still does not understand why there was a referral and he protested K.S. has not adequately explained the situation to him either. Regarding a missed dental appointment in May, D.B. said he simply did not know anything about a scheduled appointment from K.S. and only learned about it via his son.

[38] D.B. alleged that there was an incident in early May witnessed by B. when his grandmother was returning him to K.S.'s house. The gist of this story is that K.S. had allegedly tossed his clothes and tools onto the road in front of the house.

[39] Regarding alternate weekend parenting of both children by the mother (as proposed by K.S.), D.B. apparently has no objection to this even though it will cut into his own weekend parenting time.

[40] Regarding the allegation that he called B. "stupid", D.B. candidly admitted that he did so but he said it only happened once. Since then, he said that he and B. have grown closer and explained his unfortunate conduct as arising out of some frustration at the time.

[41] Regarding complaints that he was supplying energy drinks or other inappropriate eating or drinking substances, D.B. said that most of the items that the mother has complained about were obtained through friends and he insisted that B.'s consumption should no longer be a problem.

[42] D.B. flatly denied assertions by K.S. that he attempted or threatened suicide. Allowing that things may have been said and done in anger, he said until the final breakup he did not want the relationship to end.

#### Child support history

[43] D.B. wrote that he left the family residence in February, 2008 because there was too much arguing between him and K.S. in the presence of the children. He said he moved in with his mother as it was the most affordable place for him to live until the parties sort out the division of their matrimonial assets and support issues.

[44] In testimony, D.B. stated that he had been married before and has two other daughters who are 22 and 18 years old respectively. D.B. was under a court order to

pay child support for one of them. Support arrears had accumulated and were collected by garnishee until the end of April, 2008.

[45] D.B. said that with regular employment deductions and the garnishee, his net pay at one stage was less than \$355 weekly for a 40 hour work week. According to him, this was the reason he was late in paying child support to K.S. for C.'s benefit. He submitted a pay-stub showing the garnishees which he mentioned. Little was said about the reasons arrears had accumulated in the first place.

[46] When the arrears were finally extinguished, D.B.'s current payments to his former partner (\$444 monthly) plus \$264 monthly to K.S. for C.'s benefit got back on track. Support payments under the other order ended in June, 2008; so did the garnishee. Accordingly, his only potential obligations are to K.S. and their children.

### Finances

[47] D.B. did not introduce a true copy of the 2007 personal tax return which he filed with the Canada Revenue Agency. He said that he "owes money" but was not precise. He admitted that his 2007 T4 slip demonstrates a total income from his

current employer of about \$53,865. He worked full-time in 2007 and therefore had no Employment Insurance Benefits. He added that he has no other income from any other source. He admitted that he received a raise in May, 2008. He agreed with the proposition that his likely 2008 income will be in the in \$60,000 range.

[48] As far as his current living expenses are concerned, he said that he pays \$400 monthly to his mother and pays for his own food which he estimates at another \$400 monthly. His mother covers the basic cable service to the residence and he tops up that expense for additional services. D.B. added that payments on his vehicle are in arrears.

[49] D.B. admitted that he has enjoyed a monthly surplus of income over expenses of about \$830, after paying support for C. and before adjustment of his over-stated Canada Pension Plan and Employment Insurance deductions.

[50] Despite the earlier decision, it is clear that D.B. does not understand why he should pay any spousal support. He seemed to be aware that spousal support, if paid, would be tax deductible but was apparently unaware that once things settle out that he could ask for adjustments in tax deducted at source by his employer.



[51] Regarding the mortgage on the family residence, D.B. said that he made one payment after February, 2008 but stopped because he did not have enough money to make payments while the garnishee was in place. He did not seem to be terribly concerned about this and implied that K.S. should be taking care of it because she was “making money off her mother”. The latter was an apparent reference to rent to be paid by mother to daughter under their current living arrangements. He gave no assurance that he is prepared to help out in any way.

[52] Exhibit 10 is a Statement of Financial Information in which D.B. first demonstrated a monthly salary of slightly in excess of \$4,800 against significant expenses resulting in a budget deficit. Exhibit 12 is his Amended Statement of Financial Information disclosing income of slightly over \$5,000 monthly against expenses of close to \$4,200 leaving a monthly budget surplus. His current expense budget has very few discretionary items.

[53] Exhibit 11 is a Statement of Property. D.B. sets out a number of assets including the jointly owned residence, jointly owned vehicles, and other items. Although he admitted that he has the benefit of a company pension, he did not

identify the current value. However, he did note that he has a small RRSP deposit. On the liability side, D.B. mentioned the mortgage, some bank loans, and a credit card. The total amount of those debts appears to exceed \$141,000 but the responsibility for those debts has yet to be determined.

### **The Case for K.S.**

#### **T.M., friend**

[54] T.M. is a friend of K.S.'s who is married and resides with her husband and their seven year-old daughter and four year-old son in Lunenburg County. She is employed locally at a grocery store as a part-time cashier.

[55] T.M. said that she visits K.S.'s home about once a week and that they have daily telephone contact. She said that B. played minor hockey last year and that she attended some of his hockey games where she saw both parents supporting him. According to her, it was usually the K.S. who was responsible for transportation to and from games before the couple separated in early February.

[56] According to T.M., K.S. attended all of the children's parent-teacher meetings, but she never saw the father there at any of the functions she attended. (She admitted that she did not attend school meetings in March, 2008 and could not speak to the father's attendance at that time.)

[57] According to T.M., K.S. disciplines her children by using the so-called time-out technique. She claims that she has never seen D.B. discipline the children but she said that about a year ago, on one occasion, she observed the father yelling at B. and calling him "stupid". Based on that observation, she claims that D.B. has a very low frustration threshold when dealing with the children.

[58] T.M. and K.S. volunteer at the local schools where their respective children attend. D.B. is not similarly involved with such programs.

[59] T.M. also stated that she occasionally babysits for K.S. when K.S. is at work.

[60] T.M. is aware that B. has been diagnosed with ADHD. She asserts that she has seen the child when he is on his medication and when he has not been. When not taking his medication, she claims B. can get out of control and become overly active.

According to her, she has seen B. behaving in a manner consistent with not being on his medication on a couple of occasions when he was with his father, after the parents have separated. However, she has never seen such behaviour when the child has been in the company of his mother. The implication is that B. may not be taking his medication as needed when with his father.

[61] While the couple was still living together, T.M. claims that B. and his father had “very limited interaction” and that it appeared as if father and son did not get along. She claimed that if B. needed any emotional support because he had hurt himself or something was wrong, he would always go to his mother for support.

[62] With regard to D.B.’s work schedule, she said that K.S. would try to arrange her own work schedule so that she could be around most of the time when the children needed her. She added that K.S., to her observation, was the primary caregiver for both children since birth until the time of separation when, according to her, B. has “probably spent four days a week living with his dad and his grandmother”.

[63] T.M. wrote that she is able to continue to support both children by providing child care for them when their mother has to go to work and the maternal grandmother or maternal aunt are unavailable to assist.

**L.S., maternal grandmother**

[64] L.S. is the 55 year old mother of K.S. and the children's maternal grandmother. She works locally as a cook and has done so for almost 15 years. Her shifts are either from 6:00 a.m to 2:00 p.m. or from 10:00 a.m. to 6:00 p.m. She also works alternate weekends. During the weekends, her shifts run from 12:00 p.m. to 6:00 p.m. or from 6:00 a.m. to 2:00 p.m. In practice, she said that she has provided child care a couple of times weekly at K.S.'s request.

[65] L.S.'s other daughter, K., used to reside in a downstairs, self-contained apartment unit of her daughter, K.S.'s, home. However, K. recently bought a mobile home directly across from K.S.'s home and relocated there in early May, 2008. After K.'s departure, L.S. moved into the basement apartment unit and has agreed to pay monthly rent of \$300. As a result of her relocation, the grandmother says that she will see the children much more frequently.

[66] L.S. described her health as “extremely good” and said that she has lots of energy to assist her daughter in looking after the grandchildren. She said that she is aware of B.’s medical circumstances and has observed that he is very lively if he does not take his prescribed medication. When B. visited her at Easter time, she described him as “somewhat sad” but allowed that he is a very quiet boy and does not usually talk very much, in any event.

[67] L.S. also said that B. is a relatively small boy physically and that he is “not a great communicator”. She said that he wants to have friends around him and, at least when at his mother’s home, he usually has a friend involved with him whether in play or whether engaged in other activities away from the home. L.S. said that she will support her daughter and the grandchildren by helping to provide child care when K.S. is at work. She said she is also available to provide emotional support to the family.

[68] L.S. updated her circumstances in testimony by saying that she now sees C. daily and that she sees B. often, even though he is living primarily with his father at this time. She said that she has mainly cared for C. while K.S. is at work but she said

she has also cared for B., by agreement. She claims that she gets along with both children and made no disparaging remarks about D.B. or his family.

[69] L.S. presented as a straight-forward witness who holds a realistic view of the family's situation.

**K., maternal aunt**

[70] K. is K.S.'s 37 year old sister who is single. She has no dependents. She lives directly across the road from K.S. She works at a nearby bank, generally from 8:30 a.m. to 4:30 p.m., Monday to Friday.

[71] K. had been living with K.S. for about seven and a half years. The residence was described as an older two story house which was built by their father. She said that K.S. and D.B. bought the residence in 1996 and renovated the basement and lived there before renovating the upstairs. In 2000, she said the couple moved upstairs and she moved into the self-contained downstairs unit. She said that she used to spend part of her day upstairs almost daily visiting both parents and her niece and

nephew. According to her, she could overhear conversations in the upstairs while she was living downstairs.

[72] She confirmed the uncontradicted evidence that D.B. leaves home early in the morning and returns home in late afternoon. According to her, her sister always got the children up for school in the morning and she packed their lunches. She said that K.S. also looked after the children's homework and that she was home most days after school to meet the children at the bus and to otherwise care for them. She acknowledged that the father would care for the children during the weekends particularly when K.S. was at work.

[73] K. said she helped out with the children and occasionally if K.S. had to work an early shift she would sometimes attend to the children's early morning routine and needs.

[74] K. confirmed that she bought a mobile home very close-by and that she will continue to assist her sister in looking after the children in the mornings when K.S. is working an early shift and said that she will also be able to care for the children on weekends if need be.



[75] Since the separation of her parents, K. said that C. has appeared somewhat sad. She said that B. is very immature emotionally and socially for his age. She strongly asserted that he is not a good student and that she sometimes tried to help him with his homework. She is aware of B.'s medical circumstances and claims that he seems to be able to focus better when he has been taking his medication. When he is not taking his medication, she said he is "very hyper and inattentive".

[76] K. said that she has seen B. taking his medication each morning and, indeed, she has assisted with this. Her belief is that B. has been taking medications for ADHD for about two or three years.

[77] K. claimed that she sometimes heard D.B. yelling at the children while the couple were still living together. She also stated that she heard the father call B. "stupid" on a couple of occasions about a year ago. She said that if she heard yelling or other things being said which were inappropriate in the upstairs residence, she would go upstairs, intervene, and try to calm the situation down.

[78] In terms of B.'s activities, she said that B. likes to have friends at his residence regularly. She said he likes to draw and that he spends a fair amount of time on the computer. She said that B. and his friends also like to play street hockey.

[79] K. said that she has seen both parents telling the children to go to their room for so-called time-outs when discipline has been required.

[80] She believes that the children are "extremely close" and she said that she has observed C. crying because she reportedly misses her brother and the family dog.

[81] K. also wrote that she has observed C. crying because she misses her father who, she says, had not been visiting C. regularly since the separation. She claims to have seen D.B. visiting a friend directly across the street, apparently on more than one occasion, when he did not even acknowledge the presence of C. when she was playing outside nearby.

[82] In relation to an earlier separation in 2003/2004, K. said that at the time K.S. had the day-to-day care of both children and that D.B. had very little contact whatsoever with either. Her personal opinion is that during the recent separation,

D.B.'s main interest is B. She said that she has never heard D.B. tell either of the children that he loves them but she has heard K.S. tell both children that she does so.

[83] According to K., B. played minor hockey last year and she observed that D.B. would sometimes take C. to the rink with them but claims that he has not done so since the separation. In her opinion, D.B. is essentially ignoring C. and that this is extremely upsetting to the child.

[84] K. claims to have tried to encourage D.B. to improve his relationship with his daughter but that he seems disinterested in making any serious effort.

[85] K. said that she will continue to provide child care for both children as need be and indicated that she is prepared to help both with their homework and in other activities. With respect to her own education, she completed high school and then a secretarial course at a local community college campus.

[86] In testimony, she clarified that her help with child care is mainly confined to pre-school involvement (not after school). She also volunteered that she is aware of

B.'s reportedly poor school performance and she suggested that he may require some individual tutoring.

**K.S.**

Parenting

[87] K.S. is 34 years old. She confirmed the parties lived in a common-law relationship from October 31<sup>st</sup>, 1994 until February 6, 2008; and that the parties also lived separately from July, 2003 until March or April of 2004 during which time there were Family Court Orders generated, the last of which followed a contested hearing and a written decision.

[88] D.B. moved back into the parties' home in or about April, 2004, shortly after the release of the last decision. The parties continued to live together until D.B. left. B. went to live with his father at that stage. C. remained with K.S. and B. has continued to have contact with his mother.

[89] K.S. characterized herself as the primary caregiver of both children since their birth. In previous Family Court Orders, she was recognized as retaining the day-to-day care and control and primary residence for both B. and C.. In Exhibit 2, K.S. reiterated that she has been the primary parent throughout the children's lives and that she has either worked part-time or been at home with the children since their birth. She said that she has had the advantage of full-time work outside the home for only a brief period of time. She again stressed that she has always been responsible for taking the children to their appointments, and has been the one primarily responsible for dealing with B.'s ADHD. K.S. also asserted that she has transported the children whenever they are involved in activities such as rock climbing, summer vacation swimming lessons, baseball, etc. and that she has also generally been responsible for taking the children to their friends' birthday parties and other activities.

[90] She listed her responsibilities within and without the household. They have included taking the children to all of their appointments, caring for them at home if they become ill, packing their school lunches, ensuring that they get to school on time, etc., when she is not working. She is also involved at the children's school as a volunteer and participates in various school trips and meetings. She said her son's

ADHD has to be carefully monitored and that she has had the responsibility for ensuring monthly appointments are made and kept with the family physician.

[91] As expressed in Exhibit 1, K.S.'s proposal is that the parties have joint custody of both children on the understanding that she will have the day-to-day care and control of both children. She suggested that D.B. should have contact or parenting times during the evenings and weekends on a reasonable basis provided that reasonable notice is given to her.

[92] Echoing what D.B. said, K.S. said that B. "comes and goes". However, as at the hearing, there had been no overnight stays with her since early May. She reiterated her position that B. would more likely stay overnight and visit more often generally if he was able to have the dog with him.

[93] Regarding her employment history and education, K.S. said that she did not work throughout the relationship and that she actually looked after the children much of the time when they were younger. Indeed, she said that D.B. told her at one point that she did not have to work outside the home.

[94] In testimony, K.S. repeatedly stated that she approved of a joint custody arrangement but believed both children should live primarily with her and that B. in particular could spend generous amounts of time with his father, but she would like to see a set parenting schedule which could include provisions for additional visits or substituted time, etc., if needed in order to give the arrangements some flexibility. K.S. believes quite firmly that B. should not be dictating the parenting schedules for his parents. However, when pressed by her own lawyer, she had difficulty providing specifics of frequency and duration. Although she is well aware that B. has many friends and would like to be engaged in activities, she said that he also needs to make time for his family in priority to some of those activities. She seemed to suggest that it would be sufficient if B. spent every second weekend with his father or at times when she is working and D.B. is not.

#### Concerns about de facto care by the paternal grandmother

[95] K.S. expressed concern about the age and general state of health of D.B.'s mother. As noted elsewhere, the paternal grandmother had triple bypass surgery about a year and a half ago and has a number of other health concerns. According to

K.S., it would be difficult for the grandmother to look after one or both the children for extended periods of time - particularly given that B. has ADHD.

[96] K.S. said that she tries to telephone B. daily but is often told that he is not at the (grandmother's) house. Her understanding is that B. is spending a lot of time with his friends and may not be spending as much time under D.B.'s supervision as was suggested. K.S. conceded that B. will sometimes come over to her home for suppers.

[97] K.S. also ominously declared that C. was upset on one occasion after returning from the paternal grandmother's camp. However, she provided no specifics and simply indicated she would be speaking to D.B..

#### Education and employment

[98] K.S. is employed outside the home as a dietary aid and relief cook at a local residential facility. She received her grade 12 equivalency through the GED Program offered at a local High School in 2000. Her employment history is reviewed starting at paragraph 32 of Exhibit 1. She has been at her current job since early 2005.



[99] K.S. said that in early 2006, she took it upon herself to attempt to get financial help that would permit B. to get into a minor hockey program. She was successful in this regard and as a result B.'s hockey skills reportedly improved considerably and she supports his involvement in this activity.

[100] K.S. recounted that on one occasion when B. was misbehaving that his father threatened that he would lose his hockey activity if his son's attitude did not change.

#### B.'s schooling

[101] K.S. is concerned about D.B.'s capacity to assist his son and daughter with schooling. With a limited education and somewhat limited comprehension himself, she said that D.B. has traditionally been unable to assist the children with their homework. K.S. indicated that by late June she had learned that B. was failing his grade six but would be given a so-called "social pass" into grade seven.

[102] K.S. expressed dissatisfaction with B.'s final report. She said that she has discussed her thoughts with D.B. but is not satisfied that D.B. has done and will do

everything that needs to be done to improve B.'s progress at school. K.S.'s belief is that only she can bring to the situation the kind of structure that B. needs at this time for education purposes, everything else aside.

### Discipline and parenting styles

[103] Unlike D.B., K.S. said that she attended parenting classes to learn how to improve her discipline techniques. She explained this in some detail. However, she complained that D.B. will not follow through and support her so that the approach has met with limited success. She also suggested that D.B. has been more physical in his discipline than she. And, she asserted that D.B. is far too liberal when it comes to setting bedtimes for the children. (On the other hand, she also characterized him as being a "very strict and inflexible parent".)

[104] K.S. chastised D.B. for letting her son stay up too late - often on a computer. K.S. also recounted that there were several occasions when the father told his son that he was "stupid" or "an idiot" which she said was very hard on B.'s self esteem.

[105] K.S. said that as far as scheduling of activities and appointments is concerned that she generally speaks to B., not to his father.

[106] K.S. then made a broad allegation that her son is “running the roads” and that he simply comes and goes as he pleases. She is concerned about this because she sees him as an immature 12 year old.

#### Impact of family separation

[107] K.S.’s stated plan is to keep the family home which has four bedrooms and the usual outdoor amenities. The home is within walking distance of a school bus stop and a number of other community amenities.

[108] K.S. wrote that since the separation, C. has become extremely upset and that she misses her brother and the family dog which D.B. took with him. She said that C. often cries because she misses her father and is concerned that he has really made no serious effort to see her since the separation, at least until recently.

[109] K.S. claims that B.'s behaviour has deteriorated since the separation. She discussed his staying up late as well as drinking so-called energy drinks which are full of caffeine and which she feels are not appropriate for him to be drinking since he has ADHD. She also has observed inappropriate language and considerable disorganization for a child who needs a strict daily routine.

[110] K.S. also stressed that C. is very upset at living separately from her brother. She said that C. would like B. to be under their roof. K.S. also said that C. missed her father at the outset and that she still promotes C.'s contact with him. However, she does not think that D.B. is reciprocating by promoting maximum contact by B. with her.

### Routines and schedules

[111] In May, K.S. wrote that when she works an early shift that she has the children's lunches and their bookbags packed and ready to go in the mornings. At that point, she said her sister got the children up and took them to the bus stop. When working the early shift, she was usually home by the time C. got off her bus at 2:10 p.m. If she is not at home, C. normally walked with a friend and her children to the

friend's house where C. is babysat by the friend until K.S. gets home. B.'s bus stop normally would drop him off right beside the house at 4:00 p.m. She is usually home unless working a late shift in which case B. would go to a friend's house until she gets home at 7:00 or her sister gets home after work. When working a late shift, K.S. wrote that her sister, K., usually picks up C. at the babysitter's and brings her home.

[112] K.S. said that she regularly provided D.B. with copies of her shift schedules so that he could pick up C. at the babysitter's to decrease the cost of child care. K.S. wrote that D.B. neglected to pick up C. when he should have on several occasions and as a consequence she decided not to provide him with any further copies of her schedules and simply made her own arrangements with her sister, K.

[113] In her testimony, K.S. gave an elaborate explanation as to her current shifts at work. Her earliest may include 5:30 a.m. to 1:30 p.m.; 5:30 a.m. to 1:00 p.m.; 6:00 a.m. to 2:00 p.m.; 10:00 a.m. to 6:00 p.m.; or 10:45 a.m. to 6:45 p.m. She said she gets her schedule every two weeks but actual changes usually occur on a six-week rotation. However, there can be changes because of vacations, appointments, illness,

etc. She usually gets three shifts one week and four the next. Additional shifts can be tacked on. She works two weekends; and then gets the third one off.

[114] During the school year, when she is not home and C. gets off her bus (at 2:10 p.m.). she walks with her friend C.H. to her house where Ms. H. babysits until K.S. gets home. Ms. H. has no contact with B..

[115] K.S. reiterated since the respective moves of her sister and her mother, that both of those family members still babysit for her as needed having regard to her employment schedule.

#### Other issues

[116] K.S. recounted an incident before the separation (in late January, 2008) when she said the respondent came home heavily drunk and may have consumed medications. She said that he said things at the time that led her to believe that he may be suicidal.

[117] Just before the final separation, K.S. said she asked D.B. not to say negative things about her in front of the children but, according to her, he persisted in doing so and also discussed inappropriate matters in front of them.

[118] K.S. also wrote in mid-April that she was making arrangements for the children to speak to counsellors at the local mental health unit so that they could discuss issues that are concerning to them regarding the breakdown of the family.

[119] Exhibit 3 was largely devoted to the push/pull between the parents, literally and figuratively. This aspect of the evidence does not merit a lot of attention except to note K.S.'s allegation that part of B.'s reported reluctance to stay with her for any significant period of time is related to D.B.'s refusal to allow the dog to accompany him and stay at K.S.'s residence.

[120] She also wrote that one mental health appointment for B. was missed and had to be rescheduled because D.B. did not cooperate. (Elsewhere he wrote that he was unaware of the appointment).

[121] For the summer months of 2008, the only formal activities planned for C. were summer soccer and some day-camps. As far as B. is concerned, K.S. had nothing planned for him. (In fairness, the D.B.'s plans are similarly vague; and the paternal grandmother's intentions for the long summer recess were left unstated.)

[122] Regarding the evidence of M.R., K.S. admitted that she is responsible for the Facebook posting but said that she posted it in anger and that it was intended for her friends only. She admitted that B. did have access to her account and that he may have seen the posting. She said it was removed after a week or so and it's unlikely that there is any permanent harm.

[123] At the hearing, K.S. updated her evidence by indicating that C. has had more frequent contact with her father which she has encouraged and which she thinks is very important.

[124] Regarding the mental health appointments for C. and B., from her testimony it appears that she did not consult the father before making the arrangements and as noted elsewhere chose to discuss appointments with B. rather than his father.



[125] Regarding her own health, K.S. said that she is taking an antidepressant to reduce anxiety. She said she has had no anxiety attacks since C.'s birth and that the current medication is a low dose maintenance regime. K.S. admittedly has some issues surrounding control of her anger and frustration with D.B.. She said that she is trying to learn not to let people "push her buttons" and claims that she is now aware of the possible impact of any inappropriate behaviour by her on the children. On those occasions when she recognized that she may have acted inappropriately in the presence of a child, she said that she has tried to explain her conduct and apologized.

### B.'s Health

[126] As far as B.'s ADHD is concerned, K.S. said that B. is really good when he is on his medication but can get "out of control" when he is not. She gave some examples.

[127] K.S. believes that B. needs more structure and discipline and says that he has missed appointments because he would prefer to be at or with his friends as a good example of how B. is running the show, so to speak.

[128] On the debate over whether B. has or has not been taking his medication, K.S. said that she had been buying all of the medications at one stage and admitted that she withheld some pills on one occasion. She gave her rationale for this. There apparently has been some conflict over payment for the medication including responsibility for any uninsured portions.

### Finances

[129] K.S. is looking for the basic table amount of support for both children and is looking for spousal support at the rate of \$500 monthly, for an indefinite time period.

[130] K.S. would also like medical and dental coverages to continue through D.B.'s employment. She has her own group benefits through her employment but indicated she would prefer to be on his plan because apparently it has more benefits. K.S. discussed the potential interaction of her and his group plans and how they play out in real life. However, she agreed that there were no direct discussions with D.B. about what might be viable. As noted above, coverage for the children will be ordered.

Because of the uncertainty about eligibility, coverage for her is not ordered at this time.

[131] K.S.'s amended Statement of Financial Information demonstrates gross monthly income of just over \$2,800 inclusive of employment earnings, National Child Tax Benefit, interim child support, and rental income. The expense side of her budget contemplates her payment of the mortgage against the home property which she currently occupies. Additionally, she shows that she is taking care of the property taxes and insurance. In many ways, the budget is not extraordinary, after correction of some minor errors.

[132] In arriving at a monthly deficit of almost \$600, it is significant that K.S.'s combined entertainment, alcohol, and tobacco budget is \$650. And, another \$140 monthly is allowed for holidays and gifts. With respect, she should not expect D.B. to subsidize all of those lifestyle choices.

[133] Because of the current parenting arrangements, there are no demonstrated expenses for babysitters or daycare.

[134] K.S.'s Statement of Property was completed with more precision than D.B.'s. She puts a figure of \$150,000 as the current market value of the residence and she calculates the combined value of the parties' other assets, whether solely or jointly owned, at approximately \$23,500. The assets and debts have not been finally divided by agreement or court decision.

[135] She determined that as of mid-April, 2008 the mortgage balance was about \$126,000. She said that after the separation D.B. refused to pay the mortgage on the family home and also did not make the fire insurance payments. As a result, the fire insurance was cancelled by the carrier. She was also contacted by the lien holder for one of the vehicles and informed that D.B. had not been making those payments either. The truck's debt holder threatened to commence legal action against her since they were jointly and severally liable for the loan.

[136] In mid-March, 2008 a lawyer for the residential mortgage holder threatened foreclosure unless the accumulated arrears, some legal costs, etc., were paid and fire insurance reinstated. When she confronted D.B. about the threatened foreclosure and her worry that she and the children might be forced out of the family home, she

said that D.B. appeared to be disinterested and indicated that there was nothing he could do since his wages were being garnisheed for child support.

[137] K.S. had to obtain a personal loan to forestall the foreclosure proceedings and found enough money to reinstated the fire insurance on the home. Throughout this time, D.B. paid no child support even though he was living with minimum expenses at mother's.

[138] On cross-examination, K.S. said that her mother's \$300 monthly rent is all inclusive. She admitted that the going rate in the area was probably closer to \$600 monthly but she is charging a reduced rate because of the child care services being provided and because she is dealing with her own mother.

[139] K.S. indicated that she is currently working 30 hours per week on average. She said that she gets more hours in the summer months and is able to tap into more hours because her mother is now available to assist with child care. She said that full-time work is rare and is assigned by seniority.

## **Analysis**

[140] Under section 18(4) of the **MCA** the father and the mother of a child are joint guardians and equally entitled to the care and custody of a child unless otherwise ordered. In any proceedings regarding care and custody or access and visiting privileges, the court must apply the principle that the welfare of the child is the paramount consideration.

[141] The weight of the evidence is that K.S. was primarily responsible for the care of both children until the most recent separation. When the parties were temporarily separated in 2003, K.S.'s primary responsibilities for the children and their primary residence were recognized in court orders. In my prior written decision, I determined that the parties had agreed at one stage that K.S. need not work outside the home and that she would assume the role of homemaker and full time parent. Pursuant to that understanding, I found that K.S. remained at home for much of the relationship (of nine years duration by 2003). To her credit, K.S. commenced employment outside the home. She acknowledged (last time) that D.B. helped care for the children when he was not working. In the meantime, D.B.'s work schedule and awayness has not changed markedly over the past five years. He is precluded

from being of much assistance as far as personal care and supervision is concerned, except after work and on weekends.

[142] As K.S. gradually increased the amount of time she works outside the home, it was inevitable that there would be more delegation of the care of the children to others. She, like D.B., is essentially living under the same roof with her own mother. She, like D.B., has the benefit of other family members who are very close by and who are quite supportive.

[143] B. went to live with his father and C. stayed with her mother, ostensibly based on their wishes at the final separation in February. There is no independent, reliable evidence to confirm the wishes or preferences of either child, then or now, or how deeply or shallowly they are entrenched. However, I am satisfied C. has expressed more concern than her brother about “sibling separation” and also that separation from her father is taking a toll on her. K.S.’s strong preference is that both children live primarily with her, but this is opposed by D.B. By contrast, he only seeks primary care of his son. A necessary corollary of his position is that the children can and should continue to live primarily at different locations. The wishes of the

children, and their parents, are factors to be considered but they are not determinative.

[144] The physical environments of both competing residences are adequate, but K.S.'s current residence arguably has some advantage inasmuch as it can easily accommodate two children, full-time. The paternal grandmother's residence is more cramped, although suitable for C.'s visits. (D.B. does not seek primary care of both children, in any event.) With respect, given the paternal grandmother's admitted medical history, I receive with caution her unqualified statements that she has no problems whatsoever in caring for and properly supervising B. when his father is not around.

[145] One cloud on the horizon is whether K.S. will continue to occupy her present residence after a final division of assets or if expenses overwhelm her before then. Neither party gave any indication as to when they expect the financial issues to be resolved.

[146] There was no evidence that community, cultural or religious factors have any special importance to the family. The parents live very close to each other.



Whatever the outcome, the place of each child's schooling will apparently not be affected.

[147] K.S. perceives herself as the more consistent and structured disciplinarian and the most helpful and involved as far as B.'s education is concerned. There is evidence to support this proposition, although no expert opinion evidence or reports were introduced regarding ADHD in general or B.'s particular circumstances. But, on a balance of probabilities, B. likely benefits from routine and close supervision, particularly when he is not in school or in other structured activities.

[148] I find that all of B.'s current challenges at school cannot be laid solely at his father's doorstep nor attributed to ADHD. However, of the two parents, I find K.S. is more attuned to B.'s special needs. This may be a function of being better educated than the father. Of the two parents, she has also been in much closer touch with school officials and school programs. These involvements are long-standing and have been consistent. Although D.B. said he understands B.'s education needs, I find he not does fully appreciate that his son likely needs intense help at home, not just at school, and that the task cannot simply be left to B.'s teachers. Both he and his

mother minimized the significance of the ADHD diagnosis and seemed to lack understanding and insight regarding the condition and implications.

[149] I am mindful that both parents participated in the care and upbringing of B. and C. for the three years immediately preceding the separation, even if K.S. did the lion's share. Both parents work outside their homes and are frequently gone before the children are up in the morning. Both parents have turned to extended family members for child care in their own absence. Both parents profess willingness to facilitate contact by the children with the other parent; but both steadfastly adhere to their legal positions on primary care and primary residence.

[150] Most recently, despite lip-service to the concept of joint custody (which was agreed to), I find that the underlying issue here is one of "control" - each parent firmly believing that if she/he loses "primary" care and residence of a child that she/he has lost control of the child's upbringing, forever. Given the detailed paragraphs in the last order about what joint custody encompasses, one is left wondering about their level of understanding and, perhaps, sincerity. Unfortunately, since the separation, both parents have been guilty of making appointments or

attending meetings without any apparent concern for the desirability or involvement of the other.

[151] I find that the father has been the least willing to facilitate maximum parent/child contacts. His refusal, until the hearing, to even allow the family dog to accompany his son to the mother's residence - knowing that B. would then be more likely to stay longer - speaks volumes about his attitude. I also find that D.B. has too readily left visitation scheduling to his son's whims, with the predictable result that the child is largely dictating the frequency and duration of contact. He also seems to be more focused on his son, rather than focused on both children and what is best for both of them. By contrast, K.S. has encouraged and fostered contact with C., despite the father's early reticence; and proposes to encourage a relationship by both children with him by supporting generous parenting times.

[152] The notion that Courts should be reluctant to separate siblings upon family breakdown has been recognized in the past by some courts. It is grounded in an assumption that the impact of breakdown will be lessened if children remain together. I have directed myself to proceed cautiously in this area especially because there is no social science evidence before the court to support the general

proposition. There is evidence that the children interacted and functioned well when they were together. Certainly, there is no evidence of dysfunction. A reasonable inference is that they will derive some benefit if reunited as a family unit. There is also demonstrable disadvantage in sibling separation, as evidenced by the impact on C. As the youngest, in age and stage of life, she is the clearly the most vulnerable. As it happens, this is not offset by a viable plan from D.B. demonstrating he is ready, willing and able to assume primary care of both, under the same roof; or that he can or would facilitate shared parenting (e.g., week-about; month-about etc) of both.

[153] Looking at the evidence as a whole, I conclude that the interests of the children at this time would be best served with the agreed joint custody regime but with a return to parenting arrangements similar to that in place at the time of the last separation, namely, that K.S. shall have primary care of both children and that they shall reside primarily with her. D.B. shall have generous parenting times, upon reasonable notice which shall include but not be limited to those weekends when K.S. is working. This is premised on her testimony that her schedule currently includes two consecutive weekends “on”, then one “off” with the result that D.B. will have care of the children for two consecutive weekends out of every three. D.B.’s weekend parenting times shall start Friday afternoons upon his return from work and conclude

an hour before the youngest's bedtime on Sunday evening. Additionally, upon request, D.B. may have parenting times two evenings each week from the time of his arrival home until an hour before bedtime, as above.

[154] Neither parent devoted much attention to holidays, special occasions, vacations etc. In principle, they should be shared equally. Unless otherwise agreed, occasions such as Labour Day, Thanksgiving, Natal Day, Remembrance Day, Canada Day, etc. should alternate annually between the homes. Parenting shall be divided equally, each year, for the longer holidays such as Easter weekend, Christmas/New Year's holidays, Spring school break etc. Annual vacations from work were not specified. However, D.B. shall have the children under his primary care, upon request, during his vacation provided he gives K.S. at least one month's advance notice on the understanding such care will be for at least two weeks each year and that the weeks need not be exercised consecutively. Annual vacation times are in addition to all other prescribed times. Should D.B. experience seasonal or other reductions in his work hours such that he is at his residence during the work-week, he shall notify K.S. who shall offer him the first opportunity to care for the children when she is at work.

[155] The parties may increase, contract, and substitute parenting times by agreement.

[156] If the parties are unable to agree on specifics sufficient to implement this decision, further directions may be sought upon notice.

[157] K.S. suggested that any order be flexible because of the unique work schedules and commitments of the parents but also because of the proximity of the residences. That was a good idea. I have left transition times, for example, imprecise. We will see if it works.

[158] The recitals in the interim order reinforcing the underlying joint custody arrangements should be incorporated in the final order.

### **Child Maintenance**

[159] I considered the **MCA** (sections 8, 9, and 10), and the **CMG**, sections 3, 6, and 16, in particular. (D.B. did not seek any Schedule III adjustments to income for travel or other expenses; K.S. advanced no section 7 claims.)

[160] Based on his amended Financial Statement and testimony, I determine D.B.'s annual income to be about \$60,000. I find K.S.'s Line 150 annual income to be about \$27,000. The Table amount of basic support for two children is \$851 monthly.

[161] D.B. shall pay for the children's benefit to K.S. \$851 monthly, on the first day of each month, starting effective October 1, 2008. The first three payments shall be made directly to K.S.. Thereafter, they shall be paid through the MEP. There shall be mutual, annual disclosure of personal income tax returns and assessment notices by June 1<sup>st</sup>, starting in 2009.

[162] D.B. also undertook to maintain both of his children on his group medical plan at his place of employment although he expressed uncertainty as to whether he would be allowed to keep K.S. on it. She has her own group coverages, in any event. Accordingly, I will order that he provide coverage for the children only, at this stage

### **Spousal support**

[163] I wrote about the legal framework previously:

Under the **MCA**, priority must be given to child maintenance [section 3A (1)]. .

... There are a host of factors that must be considered in deciding entitlement and quantum [section 4]; and spouses have an obligation to assume responsibility for their own support [section 5]. In some circumstances, support may be reduced or forfeited [section 6]. And, it is generally recognized that the principles stated in **Bracklow v. Bracklow** (1999), 44 R.F.L. (4th), (S.C.C.) apply to spousal support issues under both federal and provincial legislation.

In **Bracklow**, the Supreme Court of Canada recognized that there are three types of support, namely, compensatory (to address any economic disadvantages and advantages resulting from the marriage or the roles of the spouses), non-compensatory dependency-based support (to address any disparities in needs and means), and contractual support (to reflect any agreement regarding financial responsibilities). I find the first two arguably pertain to the parties here.



In the present case, by their conduct, the parties evidenced an understanding that D.B. would be the primary income earner who would secondarily assist with the upbringing of his children and with the upkeep of the household. K.S. assumed the role of full-time parent and housekeeper on the understanding she would help with the household finances with part-time work if and when she could. Although the evidence is limited, they appear to have pooled their money and jointly incurred significant debts against modest family income. Unfortunately, neither party devoted much (if any) attention in their evidence to their expectations and hopes as they entered their relationship, or as it evolved, or to what they thought might happen if the relationship floundered, as it did....

Complicating matters is the fact that there has not been a final division of the parties' assets and debts. Final decisions regarding spousal support are often best left until the final capital positions of the parties are known. In the present case, there was no clear evidence as to what is likely to happen with the parties' most valuable asset, their home, which appears to have little equity and which is attracting significant costs.

To his credit, D.B. has assumed responsibility for the bulk of those residency costs for his family. K.S. and the children thereby derive considerable benefit. And, in many ways, their lifestyle has not changed markedly from what it was before the separation. As each mortgage payment is made, a small dent is made in the mortgage balance. D.B. receives no credit for so-called “occupation rent” related to his legal interest in the property, nor does he receive any income tax relief. D.B. is now subject to a \$600 monthly, basic child support order for the children of this relationship; and a \$260 monthly award for the benefit of the children of his former marriage (both without any tax relief). He has not raised any suggestion of “undue hardship” under section 10 of the **CMG**.

Allowing that he now shares accommodations with another individual, I find he has necessarily contracted his lifestyle. His income has increased in recent years, but he travels long distances and works long days to achieve that income.

While I would stop short of characterizing K.S. as a malingerer, from her testimony I found K.S. to be less than keen and enthusiastic about gainful employment or occupational training so as to upgrade her

skills and improve her job prospects. I was left with the impression she would prefer to “cross her bridges as they come” and that she is not prepared to seriously commit to self-improvement or self-support until her benefits are all but exhausted. She may harbour the thought that a job will surface, but it would be unwise to count on that. But, in the final analysis, she did not put forward any clear plan for her future or how she proposes to meet her obligations under section 5 of the **MCA**. Without a plan, it is difficult for the court or D.B. to grasp her true financial needs and prospects, or those of the children. With a plan, she could at least present D.B. with some concrete proposals to consider regarding child care. Finally, she must also realize that both parents have a legal child support obligation, not just D.B.. [Section 8 **MCA**.]

That said, against the background of a reasonably long relationship, her role within the relationship, the tacit understandings as to her financial responsibilities before separation and the prevailing custody arrangements, I am satisfied that K.S. has met the threshold for spousal support entitlement. Given the fluid state of her work prospects and the unresolved issues surrounding the home and the other assets/debts of the parties, I am not prepared to make a terminal order.

I agree with the submissions by D.B.'s counsel that an obvious source of income (that would require no work) is to increase the apartment rental to \$350 monthly or more. D.B. apparently has no objection to rental funds flowing directly from K.S.'s sister (or another tenant) to K.S.. A realistic rent bearing some relation to the local market should be instated immediately. That step alone would effectively eliminate K.S.'s budget deficit.

I am mindful that awards are not constrained to a simple assessment of immediate need and ability to pay. [See **Bracklow** above.] However, I agree with the submission on behalf of D.B. that if an award of spousal support is to be made at this stage, it should not be at the upper end of the scale. Indeed, I find it cannot be anything but a modest award, given the financial circumstances.

I am aware that there will be income tax consequences to each spouse as a result of any award. Unfortunately, detailed calculations based on the final evidence were not presented by the parties. As a consequence, there is an element of "rough justice" here. It is not for the court to conjure up a variety of factual scenarios (for example, that the wife pay the mortgage etc. from a higher award so as to potentially

give the husband more tax relief) where there is little or no evidence of the net, after-tax implications to each spouse.

K.S. continues to have the main responsibility for the children's care and upbringing. This is no small task. By the same token, her reluctance to face the new financial realities should not be rewarded with a spousal support award that leaves little or no incentive for change on her part and which could become a disincentive for the payer.

Keeping in mind D.B.'s contributions to his family by way of the mortgage and related expenses since the separation, and the child maintenance award now in place, I find a fair and just result will be achieved by ordering him to pay to K.S. the monthly sum of \$200 as periodic spousal support, commencing effective January 1, 2004. The amount is conditional on him continuing to pay the mortgage (principal and interest), municipal taxes, fire/home insurance pending further order of a court of competent jurisdiction or written agreement of the parties. D.B. may wish to instruct his employer to adjust his payroll deductions for income tax to more closely reflect his likely tax liability in 2004.

[164] Since that was written, there was a reconciliation and the final separation. However, the basic underpinnings for entitlement by K.S. have not changed or disappeared; and I am satisfied the legal threshold has again been met.

[165] As before, there has not been a final division of assets and no clear evidence as to what is likely to happen to their jointly-owned residence, or when. This will have to be done as a prerequisite to any final support order.

[166] Unlike before, D.B. is not obliged to contribute to the support of his other children. Since June, he has enjoyed a comfortable budget surplus from which he has steadfastly refused to lend any assistance, directly or indirectly, for spousal support. Unlike before, he has not assumed responsibility for any of the significant costs associated with the residence. That it has not been lost to foreclosure is remarkable. Equally remarkable is his apparent indifference to K.S.'s plight.

[167] D.B., until now, has had the care of his son and paid some support (for his daughter's benefit). And, like before, he has contracted his lifestyle somewhat by residing with his mother. He travels a long distance to earn a living with the result that his vehicle and related travel costs are high.

[168] Since last time, K.S. has ramped up her employment income. The rent she receives from her mother for the downstairs apartment is likely less than the “open market rate”. I am satisfied that this is offset to a considerable extent by the value of child care services being provided by the grandmother.

[169] By my calculation, D.B.’s expenses before support and employment deductions will be in the \$2,200 monthly range against gross income of around \$5,000 monthly. As mentioned, he overstated source deductions for CPP and EI by not capping them with the annualized maximums. He also made no calculations regarding the income tax consequences of spousal support, if paid; and he did not seem to know or remember that he can request recalculation of deductions by his employer.

[170] In looking at the total picture, I agree with the submission by Ms. Schofield that spousal support must necessarily be modest at this time. The final version of the **Spousal Support Advisory Guidelines (SSAG)** was recently released. Postulating a slightly lower income for D.B. (i.e., \$58,000), a thirteen year relationship, and primary care of both children to K.S., Mr. Whynot conceded that application of the

**SSAG** would result in monthly spousal support of less than \$200 monthly. The **Guidelines** were never intended to be binding, but have frequently been used as a “litmus test” or framework within to assess potential outcomes. [See Annual Review of Family Law (2007), James G. McLeod, Alfred A. Mamo, pages 316 - 319] Mr. Whynot’s calculations of D.B.’s net monthly cash flow, after child support using ChildView software is around \$2,200 monthly, before living expenses. I have calculated those expenses to be in the range of \$2,000 or higher which leaves very little for spousal support. Whether one uses ChildView, or engages in a **SSAG** analysis, or resorts to a traditional needs versus ability to pay approach, I conclude that K.S.’s \$500 monthly demand is unrealistic and cannot be sustained in the circumstances. Spousal support - parenting issues aside - should have been flowing before now. He selfishly and arbitrarily decided he was not going to help with the mortgage, insurance and other expenses for a property he co-owns. Pending the final division of assets and debts, and keeping in mind that D.B.’s income and child support are now slightly higher than the calculation models, I order that he pay \$150 monthly on the first day of each month, starting effective June 1, 2008, with no termination date at this time.

[171] There were no requests for court costs. None are awarded.



[172] Mr. Whynot shall submit an order.

**Dyer, J.F.C.**