IN THE FAMILY COURT OF NOVA SCOTIA
Citation: T.D. v. E.D., 2005 NSFC 32

Date: 20050301
Docket: FLBMCA-015514
Registry: Bridgewater

Between:

T.D.

Applicant

v.

E.D. Respondent

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on May 7, 2009.

Judge: The Honourable Judge William J. Dyer

Heard: December 15, 2004, in Bridgewater, Nova Scotia

Counsel: A. Franceen Romney, for the Applicant
James C. Reddy, for the Respondent

Dyer, J.F.C.:

[1] Under the **Maintenance and Custody Act** (**MCA**), T.D. and E.D. have been unable to resolve parenting and child support issues surrounding their son, W., born June 27, 1996.

[2] The formal legal history goes back to early 2002 when E.D. commenced proceedings in the Family Court – seeking joint custody, generous specified access and child support. Court records disclose the parties were then represented by legal counsel; and that some progress was being made toward settlement, ostensibly with the help of a mediator. By late July, 2002 there was an indication that a Separation Agreement might be forthcoming and, upon request, the matter was adjourned "without date". There were no further developments until T.D. filed a new application in late May, 2004. By then the parties were represented by new lawyers.

[3] As will appear, considerable attention was devoted to the circumstances prevailing in 2002, the developments since, and the current situation. Arguably, what happened about three years ago may be of limited assistance now. But, a summary is given to assist with understanding the current positions of the parties.

T.D.'s Case

[4] From T.D.'s affidavits and testimony the following emerged. Exhibit 1 recounts the circumstances to mid-May 2004, from T.D.'s perspective. According to him, the parties were in a common-law relationship for three years before their marriage on June 19, 1990. Their son, W., was born in late June, 1996. The parties separated November 1, 2001. Divorce proceedings have not been started.

[5] T.D. is employed near the Halifax International Airport site. He generally works Monday through Friday, 8:00 a.m. until 4:30 p.m., exclusive of return travel time; and, occasionally, he works overtime.

[6] At the "initial period of separation", T.D. said the parties agreed that E.D. would care for their son during the week; and he would do so on the weekend. At the time, she was working shifts locally as a cook. If both were working at the same time, family members (of both) would assist with care. As a consequence, no money was spent on day care.

[7] T.D. said that after December, 2001 E.D. started a relationship with one S.P. T.D. said S.P. had a criminal record and allegedly harassed him and routinely confronted him. T.D. alleged that by January, 2002 S.P. had been thrice convicted of impaired driving.

[8] During Easter evening (late March 2002), there was a physical altercation resulting in police intervention at E.D.'s residence and criminal charges against S.P. and E.D.. Subsequently, all three adults were placed on Peace Bonds and directed to have no contact with each other. (Copies of the documents were not produced at the current hearing.)

[9] In April, 2002 T.D. believed his son had been assaulted by S.P.; so he made a referral to the local child protection agency which apparently found no grounds for intervention. (As I observed at the conclusion of the hearing by the court, the referral undermined efforts at keeping the parents' lines of communication and cooperation open.)

[10] T.D. said S.P. and E.D. were cohabiting by July, 2002 at Blockhouse, Lunenburg County. His evidence was that around then S.P. was charged with breaching his Peace Bond by initiating telephone contact with T.D.. T.D. alleged that S.P. faced additional impaired driving charges in July and August 2002.

[11] In August, 2002 T.D. also made another referral to the child protection agency based on disclosures purported to have been made by W. about S.P.. Again, the agency did not intervene. (And, not surprisingly, any remaining trust between the parents further deteriorated.)

[12] According to T.D., E.D. faced eviction in September, 2002 and moved to her parents' home. S.P. went elsewhere. Alleged contact by S.P. with W. in October was again identified as a concern by T.D.. He learned E.D.'s relationship with S.P. may have ended by December, 2002 and that S.P. had been charged and convicted of assaulting E.D..

[13] T.D. learned in March, 2003 from E.D.'s parents that S.P. was allegedly harassing her and that E.D. had relocated to an apartment at Bridgewater.

[14] T.D. alleged there was an incident in May, 2003 during which W. was left unattended at his school bus stop for about 20 minutes.

[15] By August, 2003 T.D. believed E.D. and W. were back with her parents. Somewhere in this time frame, there was parental concern that W. may have Attention Deficit Hyperactivity Disorder (ADHD). T.D. thought diet may have been influencing his son's behaviours while E.D. was inclined to the view of some professionals that ADHD was presenting.

[16] By September, E.D. had left her parents home and, by agreement, W. started to reside with T.D.. The effective date of this change is in dispute.

[17] T.D. arranged for allergy tests. (No reports were filed with the court.) Some advice on diet was received.

[18] W. stayed with T.D. until January, 2004. During this time, E.D. had regular contact with her son. School performance and conduct reportedly was improving. S.P. was in jail by March, 2004. T.D. came to believe E.D.'s circumstances had stabilized. T.D.'s weekend access schedule had resumed with no reported problems.

[19] According to T.D., E.D. had become involved with R.W. in early March, 2004 who was believed to have a criminal record. At the time, E.D. did not have telephone service and disclosed that S.P. was still making efforts to contact her. She expressed concern about S.P.'s pending release from jail, but did not ask T.D. to assume custody of W. E.D. stayed temporarily with R.W. T.D. started receiving reports from school about W.'s deteriorating work and conduct.

[20] W. spent about a week with his father in mid-April, by agreement, when E.D. said she was working and could not arrange child care. T.D. alleged she misrepresented her work situation. T.D. made another referral to the child

protection agency based on some disclosures by W. regarding R.W.'s conduct. T.D. also alleged E.D. baulked at meeting with school officials regarding their son's school situation.

[21] T.D. further alleged that E.D. assaulted and threatened his female companion, J.F., on April 15, 2004, at a local establishment. Upon contacting the local police, T.D. said he coincidentally learned that R.W. was being charged with impaired driving and also alleged E.D. had (prohibited) contact with S.P..

[22] T.D. said E.D. refused to engage in mediation to resolve his ongoing concerns about R.W. and S.P., and W.'s schooling. He then decided to start proceedings. As of mid-May, 2004 T.D. was reporting regular weekend access but a lack of information regarding his son's whereabouts during the week.

[23] T.D.'s mid-December affidavit (Exhibit 2) refers to a renewed dispute between the parties about whether they would or would not engage in mediation and coverage of the incidental expenses.

[24] T.D. proposes that the parties "co-parent W. on a week on/week off arrangement" on the understanding the child would continue to travel to and attend a satellite school of the Acadian School Board . He explained the school is not a French Immersion School, as such; rather it is available "only to children of French heritage".

[25] When T.D. put forward his final proposal, he was aware that E.D. had secured an apartment in Bridgewater and that she was unemployed. He has not recently seen or had any contact with S.P.. He is aware that R.W. is E.D.'s current partner.

[26] In testimony, T.D. acknowledged his proposal would effectively change the prevailing care regime. His week-on/week-off proposal envisages weekend care necessarily being divided.

[27] As at the hearing, T.D. was still residing in Chester. His proposed routine contemplates dropping W. off at the paternal grandparents' home by 6:45 a.m. so he can get to work by 8:00 a.m. His parents would be responsible for ensuring W. has a proper breakfast (and perhaps some early studies) and that W. gets to school in Blockhouse by 8:00 a.m. T.D. said he is normally back in the area by about 5:30 p.m. He would pick up W. at his parents' and then go home for supper, school work, evening activities, and then bed by 8:00 p.m. or so. Transportation to and from school would be by bus, by (subsidized) taxi, or by his parents.

[28] In cross-examination, T.D. agreed that during the work-week he is away from the local area for 11 - 12 hours, daily, on average. He agreed W.'s schooling consumes about seven hours daily. And, he agreed there is a need for someone to provide care and supervision for W. in his absence.

[29] T.D.' objections to the current care arrangements by E.D. include the potential for W. to be left under R.W.'s temporary care should E.D. be away for any reason when W. is at home. On this point, counsel for T.D. stated at page 3 of her written submissions: "Mr. D.'s concerns are limited to W. being left alone in Mr. R.W.'s care and obviously <u>if Ms. D. is present with Mr. W. then there is no issue</u>." [<u>Emphasis added</u>.] Nonetheless, T.D. clearly considers R.W. a poor, if not unsavoury, adult influence. And, he articulated specific concern that R.W. has

potentially more contact with W. than he does; and reiterated concerns about R.W. as detailed in his affidavits.

[30] T.D. admitted he has a female companion who lives with her three children in Dartmouth; and that he “stays there” several times weekly. If his proposal is approved, T.D. stated his stays would necessarily be altered and he would be at his own home to give effect to his proposed arrangements.

[31] Regarding Christmas and other significant holidays and occasions, T.D. testified the parties have been able to cooperate and agree upon mutually satisfactory scheduling. He did not elaborate.

[32] T.D. admitted his proposal also assumes that E.D. will be returning to her former employment by April. Should that occur, he suggested that (everything else aside) he should always be given the “first option” to care for W. when she is at work; and, conversely, he would do the same.

[33] With respect to cultural heritage and language, T.D. is not bilingual and, admittedly, he does not converse easily in the French language. Nor does his own father. His mother is the person through whom French heritage is claimed. He did not profess to have any more to offer than E.D. insofar as use of the French language in the home is concerned.

[34] The paternal grandparents did not testify on T.D.’ behalf. Nor was there testimony from anyone else familiar with T.D.’ employment or living circumstances. He introduced no testimony or reports from education officials or from any other professionals who may have contact with W.. His girlfriend did not testify.

E.D.'s Case

[35] E.D. testified on her own behalf. No affidavits were filed. She currently lives in a home in Bridgewater with W. and R.W.. She has been unemployed since mid-November, 2004 but has lived at her present address since July. R.W. is also unemployed. He last worked for a local fishing company; he hopes to soon return to work, according to E.D..

[36] In her direct testimony, E.D. reviewed her present daily routine for W. Following breakfast, W. walks a short distance to his school bus stop. If the bus is missed for any reason, E.D. drives her son to school which she said starts around 8:35 a.m.

[37] According to E.D., W. is quite bright and does well at school although he reportedly does have "some concentration problems". She said he is well-liked, within and without the school. E.D. stated that he is good at mathematics and very good in French language studies. She characterized him as a good reader who is attentive to assigned homework.

[38] Asked to elaborate about W.'s schooling, E.D. said W. has attended the school since grade primary. She acknowledged that the school provides her son's education entirely in the French language and that W.'s eligibility for enrolment is related to T.D.' "French heritage". E.D. admittedly is not fluent in French, although she has friends and acquaintances who are. She acknowledged that the paternal grandmother is fluent in French; and she agreed this is beneficial to W.

[39] When the parents meet with teachers, E.D. said the conversations are in English. Before the parties separated, she said there was no French spoken in their home. She agreed, as noted, that none of her family members speak French. She said the paternal grandfather speaks very little French.

[40] W.'s after-school routine includes a brief walk home if he returns by bus. Otherwise, E.D. picks him up around 3:15 p.m. He often plays with friends or watches television before supper. Homework is done after supper, following which there may be time for reading or television before his bedtime preparations. W. has his own room.

[41] At one stage, W. joined a local karate organization. According to E.D., this was T.D.' s idea. She said W. did not like the activity. The parents disputed involvement. W. ultimately abandoned the activity. However, he reportedly does enjoy and participate in organized soccer during the summer. No other organized involvements were identified.

[42] Most of E.D.'s employment history and circumstances were elicited on cross-examination. She completed grade 12 and attended a local community college for a couple of years. Her studies apparently included accounting and related subjects. She has worked in retail businesses. For the last several years she has primarily worked as a cook at a café in Lunenburg; and she has also worked for a local pub.

[43] According to E.D., she does not want to continue with her current occupation. She has worked seasonally, in the past. Her schedule has included shift work.

[44] In direct testimony, E.D. stated she “doesn’t know what she wants to do”, but “she will keep looking”. In cross-examination, she made vague reference to perhaps enrolling in a nursing course. When pressed, she admitted she has really done nothing concrete toward firming up any education or training plans, so far. Although she expressed a strong preference not to return to her customary job, she conceded that such “was not out of the question”.

[45] Regarding work at the café, E.D. said she usually knew her shifts two weeks ahead. However, she could be called in upon short notice. She stated she worked some evenings, but usually worked during the day. She testified that the café closes between 9:00 and 10:00 p.m. and she agreed that on those occasions when she works a late shift, W. is normally asleep by the time she returns home.

[46] When challenged about her work ethic and intentions, E.D. countered that T.D.’s present job is the first steady job he has had in years.

[47] Asked about T.D. assuming responsibility for W.’s care if and when she worked evenings, E.D. stated she was aware that T.D. had expressed interest but quickly volunteered she did not want her son then being taken to Dartmouth during the week, especially when school is in session. And, she returned to the theme of T.D. having a “home base”, regardless of her own work schedule. Home base, in this context, is seen by E.D. as including overnights at her residence, except for scheduled weekend or other extended access. She also noted that T.D. has been unwilling to come to her home to be with their son in her absence, or to simply visit and take W. out shopping or for other local activities.

[48] Regarding S.P., E.D.'s testimony was that her last contact with him was in mid-April, 2004 when there was a brief incident triggered by S.P. E.D. said she wants no contact with S.P. She readily admitted she exercised poor judgment in entering, and not sooner ending, that relationship.

[49] Regarding R.W., E.D. admitted that he had been "caught for drinking and driving" in mid-April, 2004 but she stated this occurred on a different occasion than her last contact with S.P. She said this was R.W.'s first drinking-and-driving offence. A guilty plea was entered in June, 2004. R.W. was fined and lost his driving license for one year.

[50] E.D. characterized her relationship with R.W. as "common-law". R.W. is separated from his spouse, but not divorced. She described R.W. as her "life partner".

[51] Asked about R.W.'s role in relation to W., she stated that he is a friend and babysitter, if need be. She said that T.D. is W.'s father-figure. E.D. reported that R.W. does not correct or discipline her son and that, by agreement, those duties are tasked to her. She asserted that R.W. has never physically disciplined or otherwise hurt her son. She believes W. would disclose to her any harm or threats occasioned by R.W. but does not believe R.W. would ever harm W. in any way. She is aware that T.D. thinks otherwise.

[52] E.D. stated that R.W. has provided occasional care and supervision in her absence at her request. However, her mother and T.D. are the main alternate caregivers. She said that R.W. rarely spends any time alone with W., now that she is home full-time. On cross-examination, she admitted that between May

and November (before her work ceased) she left her son alone with R.W. “a few times”. Now that she is not working, E.D. said W. is never alone with R.W.

[53] In cross-examination, E.D. admitted that R.W.’s criminal record includes two convictions for assaults of two former girlfriends. She does not believe that history will repeat itself insofar as her own safety is concerned. She minimized T.D.’s expressed concerns by stating that he does not fully understand or appreciate her relationship with R.W. or their living circumstances. In an emotional outburst, E.D. claimed T.D. “doesn’t want W. around any [other] males!”

[54] In cross-examination, E.D. admitted many of the factual assertions surrounding S.P. found in Exhibit 1, notably paragraphs 13, 14, 15, 16 and 17, and 20. However, she denied co-habiting with S.P. at any stage. She also denied T.D. offered to temporarily care for W. (paragraph 43) and asserted he said, “You got yourself into this mess; you get yourself out”, or words to that effect. She did not seriously dispute problems at the school at that time (paragraph 44).

[55] E.D. became aware of the local child protection agency’s interest in August, 2002 (Exhibit 1, paragraph 21). She was also aware of T.D.’s concerns. As a consequence, she said she engaged a babysitter while she worked; but she agreed she continued her relationship with S.P. despite T.D.’s objections.

[56] E.D. admitted eviction from an apartment because she could not afford the rent, not for the reasons asserted by T.D. (Exhibit 1, paragraph 23). She admitted the allegation at paragraph 24 of Exhibit 1, but said it occurred only once, when she

was briefly ill. She also admitted the assertions found in paragraphs 26, 27, and 29. And she conceded that she has lived at ten different residences since 2001.

[57] Characterizing her past lifestyle as “bee-bopping around”, she testified she is currently settled and stable, and that she does not want her son to experience any more instability. She said she is happy and that she has “done a 180° turn with her life”. She “does not want to chance any more changes”, not even a trial period of shared custody.

[58] Regarding ADHD, E.D. testified she had a doctor’s advice that W. may have the condition and that T.D. would not accept that opinion. It was later learned, she said, that W. had some severe allergies which affected behaviour and which were addressed with dietary changes. She confirmed that ADHD had never been formally diagnosed. Insisting she too was already actively involved, E.D. did not dispute Exhibit 1, paragraph 38.

[59] Regarding Exhibit 1, paragraph 34, E.D. did not dispute the assertions but said W.’s stay with T.D. continued only for about two months after which she and her parents resolved their differences. She agreed that T.D. provided adequate care at the time, but added she had frequent contact and care during this relatively short time.

[60] Regarding T.D.’s assertions found in Exhibit 1, paragraph 45, E.D. testified she had expected to work two jobs (for two employees) that week but ultimately did not. She agreed she asked for T.D.’s help and that she had no concerns regarding the quality of his parenting.

[61] E.D. was unaware of the mid-April referral by T.D. to the agency (Exhibit 1, paragraph 46). She attributed the problems mentioned in paragraph 47 to a mix-up by school officials.

[62] Regarding failed mediation, E.D. did not challenge T.D.'s version of events as summarized in Exhibit 1, paragraph 54 and Exhibit 2, paragraph 7. On the other hand, she said T.D. rejected suggestions she made for an alternate mediator even though she offered to help with the expense. Apparently in exasperation, she approached the mediator originally proposed by T.D., but by then T.D. was no longer interested, she said.

[63] Regarding current access, E.D. testified it usually occurs every weekend from Friday evening until Sunday evening. She said this was the original agreement which she is prepared to honour. Summer access (ie. during T.D.'s vacation) is not seen as problematic; nor is telephone access.

[64] E.D. opposes T.D.'s proposal for shared custody. She believes W. should have one "home base" and not be shunted back and forth, in alternate weeks, thereby having two. According to E.D., W. is settled at her residence and access by T.D. is regular and going well for father and son. She sees no need to upset the current arrangements; and suggested that a wholesale upheaval now would be unfair to the child.

[65] E.D. mentioned that W. currently spends a lot of time in Dartmouth with T.D. at the residence of his girlfriend and her three children. She has not opposed this. Her only concern would be school-night travel to Metro.

[66] E.D. said W. enjoys contact with the extended maternal family in the Bridgewater area. The maternal grandparents live only a few minutes away and have provided care when needed. However, she testified that T.D. objected in the past to her parents providing care for their son.

[67] There was considerable confusion surrounding school transportation should shared custody be awarded. E.D. suggested it would be unavailable at the father's home and, in any case, that the current busing arrangements were adequate. T.D. insisted there would continue to be entitlement and that if there are insufficient seats on the bus, officials must provide taxi service to and from school for all eligible students. (Neither he nor E.D. filed anything in writing from the Board.)

[68] When re-called, T.D. insisted that W. was under his care "24/7" from the day after the September, 2003 Hurricane Juan until January, 2004 when school resumed after the holiday break when he agreed with E.D. that their son should return to her residence. During that time, she said subsidized taxis were used for W.'s school transportation.

[69] T.D. also testified that weekend access most recently has often, but not always, extended until Monday morning. Regarding "counselling", he said his employee will cover expense, but coverage is unavailable for "mediation".

Discussion/Decision

[70] The court's authority to make orders regarding W.'s care and custody is found in **MCA** section 18(2). The child's welfare is paramount.

[71] Both parents have proposed a “joint custody” regime but neither devoted any testimony to or explained what the expression means to them or for W. Neither party submitted a written proposal or draft order as to what their joint custody order might encompass. Both parties cited **Rivers v. Rivers** (1994), 130 N.S.R. (2d) 221 (S.C.). Presumably, they agree they can and will jointly communicate and cooperate in making decisions surrounding major issues such as schooling, religion and health.

[72] In my experience, most joint custody cases still present in this fashion: the child lives primarily with one parent who has “day-to-day care and control”; the other parent has liberal or generous contact with the child, and a right of consultation and input into major decisions affecting the child’s upbringing. Most orders now exemplify how the parties will give effect to their expressed intentions (eg., by guaranteeing information access and sharing, by ongoing exchanges of schedules, addresses, and phone numbers, etc.). In conflicted cases, it is usually wise to vest final decision-making in one of the parents for emergencies or stalemates. Importantly, joint custody normally entails shared decision-making, regardless of who has primary care; it does not confer a right to make unilateral decisions unless the court imposes a “tie breaker”.

[73] Since **Rivers**, the concept of joint custody has become more expansive and commonplace despite periodic criticism that it has become too relaxed and confusing. [See **Lefebvre v. Lefebvre**, 2002 Carswell Ont 4325 (C.A.); **Polan v. Fawns,** 2003 Carswell Ont 53 (S.C.J.).]

[74] That said, and given the submissions of the parties on the subject, I am prepared to authorize a joint custody order. Unless counsel request otherwise, they shall craft the details of that portion of the final order.

[75] Arguably, the line between joint and shared custody has become blurred because of vague or imprecise agreements and consent orders; and because some courts have abandoned the field and tried to focus on the substance of the parenting arrangements rather than on attaching labels. [**Arlt v. Arlt** 2003 SKQB 466]

[76] Shared custody is not defined in the **MCA** but it is employed in the **Child Maintenance Guidelines (CMG)** [Section 9]. When agreed upon, it normally includes declarations of joint decision-making, and an equal (or close to equal) division of physical or day-to-day care. Most orders I have seen include or contemplate agreement on a well thought-out schedule which has the child(ren) moving between the respective parents' homes.

[77] Also, in my local experience, the regime (in its various forms) is still relatively uncommon. So far, success (as measured by return to court for enforcement or variation) seems least likely in high-conflict cases, especially if court-imposed over the objections of one parent. Not surprisingly, the best prospects for success are in low or no-conflict cases, if the plan is understood and embraced by both parents for the child(ren)'s benefit. Anecdotally, there may be more opportunity for successful plans in areas where the parents can and do live

close to each other, if schooling and extra-curricular activities also happen to be nearby, and if public transportation is readily available.

[78] In the present case, the parents have drawn a clear line in terms of the proposed outcomes. Here, shared custody is taken to mean the "week-about" proposal by T.D. for W.'s care, as compared to the "primary care" arrangement proposed by E.D.

[79] There certainly are cases where there is a common desire to minimize non-parent care, to minimize paid day-care expenses, or to simply mesh care with work schedules. [**Turner v. Turner** 2003 Carswell Ont 3829 (S.C.J.)] But, in the present case, there has been resistance by both parents to being flexible and cooperative during the normal work week. (E.D.'s concession has been to encourage regular weekend and other access.)

[80] In most cases, the opinions, wishes and preferences of children, and the impact of often very complex plans conceived by parents for their children, do not receive a lot of attention in court unless a Custody/Access Assessment or report is ordered or agreed upon. I do not have the benefit of an expert's recommendations that other courts have had. [See, for example, **Rutherford v. Rutherford**, 2004 NSSC 148.] Nor have the parties had any experience with this kind of arrangement. [See, for example, **Hollett v. Vessey**, 2004 NSSF 66.] In passing, I also observe that most locally contested cases on the subject have involved pre-school or early-school age children which may suggest that the

wishes of older children are usually known and, in most cases, weighed by parents before advancing a shared custody plan.

[81] In common with the notion of joint custody, conventional wisdom is that successful shared custody arrangements must be rooted in cooperation and communication intended to advance the child's interests. The care arrangements must be practical; they must be workable. Indeed, the ideal would be if the parents' lifestyles, routines, and philosophies were very similar. Transition issues need to be kept at a minimum. This is not surprising since shared parenting necessarily involves two distinct home environments which will be entered and left, in rotation. Particularly with younger children, different expectations and demands by the parents, or other adults who reside in the home, may be confusing and difficult to understand or accept.

[82] Allowing that " week-about" or "month-about" transitions may be less disruptive and easier to manage than rarely seen "day-about" routines, the reality for most families is that the child and his/her clothing, school and activity supplies, and other required items must be constantly shunted back and forth. The present case is no exception. Some duplication in cost is inevitable even with the best of efforts to reduce such inconvenience. Nor should one lose sight of the implications for extracurricular activities and friendships.

[83] There are cases which suggest that alternate-week residency is not in the interests of many children and that a single, primary residence with day-to-day care and control vested in one parent is preferable; and that during the school year, unless the parents are quite near to each other, imposing shared parenting

may be unrealistic. [See, for example, **Cormier v. Bell** (2003), 43 R.F.L. (5th) 307 (Ont. C.A.); **Cook v. Ross** 2003 ABQB 801; **Cook v. Cook** 2003 BCSC 1539; **Goldstein v. Goldstein** 2004 SKQB 171.] Regardless of the outcome, it is safe to say that most of the reported decisions are factually intense with trial judges paying close attention not only to the concepts but to the real-life implications.

[84] Occasionally, there is evidence that a shared custody demand is thinly masking a parent's true motive. Increasingly sophisticated parties are aware that some relief from the payment of basic child support under the **CMG** might be achieved if there is an award which results in their children being under their care in excess of the 40% threshold contemplated by **CMG** section 9, whether that comes by way of frequency and/or length of access, or by shared care. [**Lake v. Lake** (2004), 50 R.F.L. (5th) 91 (N.B.Q.B)] I cannot say that is the case here.

[85] But, on the evidence, there is every indication that "control" (or its flip-side, "loss of control") of W. and his living situation is at the heart of the matter --- notwithstanding agreed joint custody and the cloaking of each position with the magic words "best interests of the child". I find the parties are still engaged in what amounts to psychological warfare as to who is the best (or worst) parent. And, they have chosen W.'s care as the final battleground.

[86] Intense disrespect, distrust, anger and hostility between the parties bubbled up frequently in the course of testimony and, if there was any doubt, their courtroom demeanour underscored their inability or unwillingness to put aside their personal

differences in favour of what might be best for W.'s care. Neither parent could stick to the "high road" of focussing on W. and the best parenting arrangements for him; neither could resist the temptation to malign the other. I find this to be an unhealthy and unsuitable backdrop against which to sanction a shared care regime; and it raises serious questions as to how long joint custody will remain viable. I do not perceive any prospect for change in the near-term.

[87] On the evidence, W. is well-settled at his current residence where he has already established neighbourhood friendships and where he is close to a school bus stop. A routine for school travel and schoolwork and activities is firmly in place. The midway point for the academic year has come and gone. There is no suggestion that E.D.'s home is physically inadequate or otherwise unsuitable. E.D.'s residency and relationship with her current partner are outwardly stable at this time.

[88] For now, and despite skepticism by T.D., E.D. is unemployed with an expressed disinterest in returning to her former job. Accordingly, she is ready, willing and able to parent full time, as need be, but particularly after school and during school week evenings. Currently, there is no need to leave W. unattended in the home or under R.W.'s supervision. W. is at the age and stage where any inappropriate conduct by E.D. or her partner can be disclosed and reported although I would caution that unfounded accusations will likely only serve to further widen the gap in trust and communication, and dash any hope of meaningful co-parenting, regardless of what label is attached to the legal arrangements.

[89] As far as culture and language are concerned, I find there is no advantage to one residence over the other. There was no evidence touching on religion. Each parent has extended family in the area; but there was no cogent evidence that the relatives of one have more to offer than the other. At least for now, given T.D.' s work schedule and the distances involved, T.D. is and will likely continue to be more dependent than E.D. on others for pre-school and after-school care and supervision.

[90] Many parents are relegated to alternate weekend access and limited access at other times. This is not the case here. Every-weekend access is supported and encouraged by the mother. She does not oppose contact during the school week for reasonable times, provided there is reasonable notice; and provided that overnight access is confined to the weekends, holidays and vacations, or other times when school is not in session. To their credit, the parties have been able to sort out arrangements for special occasions, major holidays and the like.

[91] Except for the power struggle I referred to earlier, the prevailing arrangements have proved to be practical and workable. In the absence of independent or collateral evidence that this is not so, I am not persuaded that the changes T.D.'s proposes will advance W.'s interests. I am concerned that wholesale upheaval of the *status quo* and the prevailing regime at mid-year may have an adverse effect on the child, sufficiently so that I find the risk is not warranted. That such a major change might have some advantages is not the test; rather, it falls to the applicant to establish on a balance of probabilities that the changes will advance the child's interests. Allowing that E.D.'s past lifestyle choices have been less

than sterling (which she acknowledges), the court's role is not to pass moral judgment but to assess what is best for W. at this time.

[92] In the result, I order that E.D. shall have primary care and that T.D. shall have reasonable access at reasonable times upon reasonable notice which shall include, but not be limited to, weekend access as currently in place, reasonable telephone access, and access on holidays, special occasions, school breaks and during summer vacation as apparently agreed upon. Unless there is prior consultation and agreement with T.D., E.D. shall not permit R.W. to have unsupervised care or supervision of W.. The order should contain the usual provisions for consultation and information exchange between the parents regarding health, education, and extra-curricular activities and events. Further direction may be sought, if need be.

[93] Should E.D. return to full or part-time employment or education or training, I order that she shall immediately give T.D. notice, including particulars of her schedule(s); and T.D. shall be given the first opportunity to care for W. in her absence provided that there shall be no overnight stays without the agreement of both parents, provided that care and supervision in such circumstances shall be provided by T.D. personally and not delegated to others, and provided that T.D. shall be responsible for transportation, unless otherwise agreed. If counsel are unable to reduce this to writing, the matter may be brought back before me.

[94] Child support has been left in abeyance. If no agreement is forthcoming, an opportunity for further evidence and submissions may be sought.

[95] Ms. Romney has asked that the question of court costs be left open pending the outcome and a chance for submission, if need be. I will await word from counsel.

[96] In the meantime, I direct Mr. Reddy to submit an order capturing the results of this decision.

Dyer, J.F.C.