

FAMILY COURT OF NOVA SCOTIA

Citation: *C.W. v. T.B.*, 2020 NSFC 15

Date: 2020-09-10

Docket: FPICPSA-113982

Registry: Pictou

Between:

C.W.

Applicant

v.

T.B.

Respondent

DECISION

**Identifying Information has been removed from
this electronic version of the judgment.**

Judge: The Honourable Judge Timothy G. Daley

Heard March 13, 2020, in Pictou, Nova Scotia

Written
Decision September 10, 2020

Counsel: Roseanne Skoke, for the Applicant
T.B., Respondent, self represented

Introduction

[1] This decision concerns 13-year-old twin sisters, S.L.B. and S.M.B., and what parenting arrangement will serve their best interests. Though they are twins, their circumstances are both intertwined and very different.

[2] Specifically, I must decide whether they should reside in a shared parenting arrangement with approximate equal time with each of their parents, whether they should reside primarily with their mother or whether they should reside in a split parenting arrangement with S.M.B. residing with her mother, C.W., and S.L.B. residing with her father, T.B.

[3] I must then decide the issue of child support, both table amount and contribution to section 7 expenses.

Positions of the Parties

[4] Their mother, C.W., says that she should have sole custody of the children, they should reside primarily with her and have regular parenting time with their father, T.B.

[5] She acknowledges that S.L.B. resists spending time with her and resides primarily with her father but believes that arrangement is not in her best interests. She says the father is not properly addressing her ADHD diagnoses and medication requirements, does not accept her cognitive disability diagnosis and does not address its effects on her. She says the father does not properly discipline S.L.B. or ensure that she attends school and allows S.L.B. to determine when she sees her mother. She says the father is empowering S.L.B. to make those parenting decisions and is damaging their relationship. She says the father should have parenting time with the children, but they should reside primarily with her.

[6] The mother also seeks child support in the table amount as well as contribution to section 7 expenses, including a retainer for S.M.B.

[7] T.B. seeks joint custody and a shared parenting arrangement, having the children move between homes on a week about or two weeks about schedule.

[8] He acknowledges an alcohol addiction but says he has addressed it through programs and medication and does not consume alcohol anymore.

[9] He says the girls want to spend time with him, and S.L.B. wants to live with him, though he encourages them to spend time with their mother. He says he does not believe S.L.B. has a cognitive impairment and she does not need medication for ADHD. He says she attends school regularly now and is doing well.

[10] He asks the court not to order the table amount of child support based on his proposed shared parenting arrangement and says he cannot afford to contribute to section 7 expenses.

Procedural History

[11] An interim order of July 8, 2019 was put in place granting the parents joint custody of the children. The mother was granted primary care and residence of the children and the father was granted parenting time every second weekend from Friday to Sunday and other reasonable times.

[12] Due to concerns regarding the father's alcohol consumption, he was to present himself at the door when picking up the children for the mother to assess his sobriety. If he were intoxicated, parenting time would not take place. He was prohibited from consuming alcohol or other intoxicating substances prior to or during parenting time and ordered to take medication prescribed to him.

[13] The table amount of child support in the amount of \$727.07 per month was ordered, and medication and retainer costs for the children were to be shared in proportion to income with the father being responsible for 82% of those costs on an after-tax basis.

[14] The mother says the father consistently breaches significant terms of that order. In particular, she alleges that the father repeatedly refused to present himself at the door of her home when picking up the children so she could assess his sobriety. She gives evidence of several occasions demonstrating this refusal.

[15] As well, the parenting arrangement changed over time with the girls residing in the shared arrangement followed by them resisting returning to the mother's home. Later S.M.B. refused to go to the mother's home, although this resolved. Around that time, S.L.B. resisted going to the mother's home and that persisted to the hearing.

[16] There were several further appearances before the court prior to trial to discuss proposed changes to child support based on the father being injured. As well, there

were discussions respecting the father's refusal to return the children to the care of the mother under the current order. The father said the children refused to go. The court made it clear that the current order stood until varied.

[17] On September 25, 2019, the court ordered a custody and access assessment but that assessment could not be completed due to a lack of professional assessors to do that work.

[18] The parenting arrangement did eventually resolve temporarily. By October 2019, the girls began going back and forth between the parents' homes. It was described as a split custody arrangement where S.L.B. remained primarily in the care of her father and S.M.B. remained primarily in the care of her mother.

Applicable Provision of the Act

[19] Before reviewing the evidence relevant to the issues in the matter, it is useful to review the applicable law which is always driven by the best interests of the children.

[20] The applicable legislation in this matter is the *Parenting and Support Act* (the *Act*) and the beginning point in any analysis under the *Act* is s.18(5) which directs that:

In any proceeding under this Act concerning custody, parenting arrangements, parenting time, contact time or interaction in relation to a child, the court shall give paramount consideration to the best interests of the child.

[21] Section 18(8) further directs that:

In making an order concerning custody, parenting arrangements or parenting time in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child., the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

[22] In determining what I should consider in assessing what is in these children's best interests, s.18(6) sets out some of the relevant considerations to be considered, though this list is not exhaustive. The relevant considerations under this subsection include the following:

(a) The child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of

development;

(b) each parent's... willingness to support the development and maintenance of the child's relationship with the other parent...;

(c) the history of care for the child having regard to the child's physical, emotional, social and educational needs;

(d) the plans proposed for the child's care and upbringing having regard to the child's physical, emotional, social and educational needs;

...

(g) the nature, strength and stability of the relationship between the child and each parent...;

...

(i) the ability of each parent....to communicate and cooperate on issues affecting the child...

[23] I will briefly acknowledge I did not consider the factors under s.18(6)(e), (f) and (h) as there was no evidence relating to the children's cultural, linguistic, religious, and spiritual upbringing and heritage. Little evidence of the children's views and preferences (other than as demonstrated by their behaviors in either refusing or participating in parenting time) and no evidence of relationships with other family or friends was offered.

Summary of Evidence

[24] I find it useful to consider the evidence in the context of the children's experiences and needs and within the context of the factors set out in s.18 of the *Act*. That approach grounds the evidence in the framework of the children's best interests as mandated.

History of Parenting

[25] The mother gave evidence that, during her relationship with the father, she stayed home to care for the girls and her other child from a previous relationship while the father worked to provide income for the family.

[26] The mother describes a relationship in which the father's drinking began to increase to the point of concern. This concern remained throughout the relationship and after, including her worry that he would be unable to care for the girls when they were with him. This affected their relationship in many ways, including the father's refusal or inability to conduct repairs and maintenance for the home. The mother also says there was one incident where the father was drinking and driving with one of the girls in the vehicle.

[27] The parties separated in October 2018. Unfortunately, the conflict between the parents continued.

[28] The mother says the father cancelled the home and motor vehicle insurance without notice to her, leaving her driving a vehicle without insurance for approximately a year. The father denies this and says the mother was aware of that circumstance and the cancellation.

[29] The mother says that she and the children resided in the family home after separation but lost it to bankruptcy and foreclosure.

[30] She also says the father took out a loan in their joint names without her consent. He later declared bankruptcy. The father says that the mother was aware of the terms of that loan and consented to it. She later declared bankruptcy as well.

[31] The mother provides several examples where she says the father neglected to ensure that S.M.B. was properly cared for when out with friends and when at a fair. The father denies these allegations, saying he knew she was safe.

[32] The father says that he did develop an alcohol addiction, but it never affected his work or his parenting. He attended an inpatient detox program in April 2019 and takes Antabuse daily to assist in recovery. He is under the care of a physician, has attended for therapy with a psychologist in the past, though he cannot currently afford to continue with that service, and has not consumed alcohol since April 2019. He specifically denies allegations of poor parenting while under the influence of alcohol, including dangerous driving with either child.

[33] That said, the father does not dispute much of the history described by the mother. They had a very conflictual and unhealthy relationship which continued after the separation. They appear unable to appropriately communicate with one another and continue to struggle in assigning blame.

[34] The evidence also confirms that the local police became involved shortly after the interim order was granted because of a dispute over where the children should be. The father's evidence is that the officer involved spoke to the children and determined that they did not want to return to the mother's home. The officer then allowed the children to obtain some belongings from the mother's home and return to the father's home. The father was present, but he says there was no "scene" at the mother's home that day and by that time, S.M.B. had been with him for approximately three weeks and S.L.B. for about one week.

[35] These are but a few examples of the conflicts that continued between the parents both during and after separation. The mother admits that from separation to today, they both argued terribly and sent hateful messages to one another.

[36] The evidence respecting the children reflects that each of them has struggled since separation to find their way in their relationships with each of their parents. This is particularly so for S.L.B., who was diagnosed as having ADHD in grade 3 and more recently diagnosed as having a cognitive impairment.

Ability to Communicate

[37] Respecting the parent's ability to communicate on issues affecting the children, the evidence is clear that they have struggled to do so. The father describes any attempts to communicate with the mother as extremely difficult. Her evidence reflects the same challenge. As the mother admits, the parties have sent very hurtful, inappropriate and, at times, hateful comments to one another by text and email. This, of course, does not capture any telephone or in-person conversations they would have had.

[38] This is reinforced by the father's evidence of the mother communicating with him through his work email address in an inappropriate manner which caused his employer to notify her to stop such communication. There are other examples of social media posts by each parent critical of the other and the mother's evidence that the father will rarely speak to her about the children.

[39] The conflicts arise out of three general sources. First, the parents struggle with the changes in the parenting arrangements that have taken place since separation. At the beginning, the father spent little time with the children. This then normalized into a parenting arrangement with the father having the children on the weekends. Shortly after this, the children, sometimes individually or jointly, refused

to return to the mother's care. Then things settled down to a split custody arrangement by the time of trial.

[40] These parents simply could not deal with the issues and communication and cooperation were absent. It was exacerbated by the mother's concern regarding the father's sobriety and the requirement in the interim order that he present himself for checks by the mother. I find that he has consistently refused to do so which has given rise to further conflict between the parents.

[41] Other examples of these issues are reviewed earlier in this decision including the involvement of the police on one occasion.

[42] A further example arose in September 2019 when the court agreed that, to address the failure to comply with the interim order, the children would spend one night with one parent and the next night with the other for approximately two weeks to allow for a transition back into the mother's home. Unfortunately, that did not occur as planned. The transitions and schedules were quite irregular with the father requesting changes from time to time and at least one of the girls asking to come to the mother's home outside the agreed schedule.

[43] Amid this, the parents continued to communicate in a dysfunctional matter, with the father suggesting in a text that the mother may wind up with no parenting time at all. Likewise, there is a text message between the father and S.M.B. in which he expresses his anger at her for remaining at her mother's home contrary to the schedule.

[44] The second source of conflict affecting communication centres around the issue of discipline in each home. The mother describes imposing discipline on each of the girls at different times by, for example, taking away their phones or denying Internet access. The father says that he supports such discipline but does not feel they should have those devices taken away as they are their only means of communication. Their inability to communicate and cooperate on such discipline issues reflects the conflictual nature of their relationship even after separation. They are unable to come up with a common set of rules, disciplines, and approaches for the children which, I find, has contributed to the children taking control of the parenting arrangements.

[45] The third source of conflict affecting communication arises from these parents' different approaches to S.L.B.'s diagnosis of ADHD and cognitive impairment. The mother accepts the diagnosis and the father does not. The mother

believes the child should be medicated and the father does not. The mother believes both children should receive counselling and S.L.B. should participate in DBT sessions and the father does not. Much of this is discussed below; these differences cause constant conflict and affect communication and co-parenting as well.

Willingness to Support Relationships with Other Parent

[46] When considering the willingness of the parents to support the children's relationship with the other, there are also challenges here. As described earlier, the conflicts over parenting arrangements, discipline and medical issues have continued to create an environment where the children seem to be dictating the terms of parenting rather than the adults.

[47] Each of the parents claims that they are encouraging the children to spend time with the other parent. The evidence on this is limited other than the assertions of the parents. The reality is that the children have resisted spending time with their mother. Given the father's views respecting the mother, her parenting, and his wishes for a shared parenting arrangement, I am concerned regarding his willingness to support their relationship with their mother.

[48] On the other hand, the mother is not without fault. I have reviewed the many communication challenges including her inappropriate texts but at least she does admit that her communication has not been ideal.

[49] The mother says the father has told the children that they are of an age that they can decide where they live. If true, this would be a significant issue for any number of reasons. But the father denies this.

[50] The objective evidence is that the children have been deciding where they will live for some time now, despite the court order and the expressed wishes of the mother. I find that this behaviour and history is more consistent with the possibility that the father has indicated to the children that they may make those decisions. This is reinforced by his evidence in cross-examination that he would not make S.L.B. go for parenting time with her mother. I find there is little evidence to support his position that he is encouraging them to return to their mother's care or supporting a relationship with her.

Children's Needs and Plan for Care

[51] When considering the children's physical, emotional, social, and educational needs and considering the proposed plans for the children's care and upbringing, there is certain evidence which is highly relevant to those considerations.

[52] First, there is the question of S.L.B.'s various diagnoses, treatments, and the approach of each parent to those circumstances. Several witnesses, including expert witnesses, gave evidence of assistance to the court.

[53] A psychologist gave evidence respecting a psychoeducational assessment conducted on S.L.B. in September and October 2018. Her evidence was that the testing revealed the child has a significantly lower intellect and has a cognitive disability. It affects her reasoning and thinking skills and she is in the extremely low range of those skills, which affects her thinking, processing, and understanding of consequences.

[54] She said that S.L.B. is not able to comprehend information appropriately and that this is a significant impairment for her. All cognitive areas are affected, including, for example, understanding instructions for the tests that were conducted.

[55] Other areas impacted by this cognitive disability included memory, nonverbal reasoning, oral vocabulary, listening skills, writing skills, and math comprehension.

[56] She confirmed that these assessments are used when children exhibit problems in school, whether academic or behavioural. These reports are reviewed with the parents and the team at the school to create a plan, or IPP, for the child, which was formulated for S.L.B. The IPP includes services required to assist and address adaptive functioning for daily living skills.

[57] The psychologist confirmed that she was aware of the diagnosis of ADHD by the child's pediatrician and was aware of the medication prescribed to the child which formed part of the plan for assists in school.

[58] She confirmed this is a significant cognitive disability which will not improve or disappear over time. S.L.B. will need ongoing support throughout her life.

[59] When asked what it would mean if a parent denied the existence of the cognitive disability, the psychologist expressed her concern and hoped there would be sufficient supports at school to offset any deficiencies at home.

[60] When asked about the importance of parental support, she said that all children do better when supported at home and she recommends home strategies as set out in the report. The information and home strategies were shared with the mother.

[61] In cross-examination, the psychologist confirmed that the test had not been repeated but was valid for up to two years. She confirmed on questioning by the court that it was "very, very unlikely" that the child's cognitive profile would change over time.

[62] The report itself notes that "since her transition to middle school in grade 5, S.L.B. has shown increased difficulty with the school curriculum, reluctance to attend school and participate, and increased defiant behaviours at school." It goes on to say

The current assessment indicated that S.L.B.'s cognitive ability is significantly delayed compared to her same-aged peers. On all of the assessed areas S.L.B. performed in the extremely low range compared to others her age. A performance in this range indicates that a person is likely to learn at a much slower rate, require much more repetition and practice than others her age, and is likely to have difficulty with learning abstract concepts/applications of skills.

...

In addition to her academic and cognitive development, S.L.B. also presents with delays in her adaptive behaviour development (including social, practical and conceptual skills for daily living). S.L.B.'s learning profile shows that she meets criteria for a diagnosis of an intellectual disability in the mild range.

[63] As part of the recommendations, the report suggests various home strategies such as continuing to support S.L.B. in developing extracurricular activities, talking with her about new topics that she is learning in school, assisting her to develop independence in activities such as laundry or cooking, and continuing to encourage her to read and to read to her on a daily basis.

[64] Evidence was also given by the child's pediatrician whose report was also before the court. In the report, he confirms a diagnosis of ADHD and an intellectual disability in the mild range.

[65] As noted, initially S.L.B. was brought to see him by her mother, but he met with the child and her father prior to preparation of his letter. He notes that the father "does not feel that she has a diagnosis of ADHD and does not believe in the

medication. He also felt that she did much better after skipping the medication." He goes on to say "S.L.B.'s mother did feel that she had ADHD and that the medication has helped a great deal in the past." He also confirms that S.L.B. indicates she does not like taking the medication as it makes her feel nauseous and sleepy.

[66] In his report, the pediatrician confirmed that he had seen S.L.B. as a result of the mother's referral and, after review of her history, an examination and the completion of appropriate questionnaires by her teachers and parents, she was diagnosed with ADHD. He went on to confirm that at the time, she was falling behind in school and not performing appropriately. She was also extremely active in class and was disruptive. She was noted to be far more active than her twin sister and needed help with general day-to-day activities such as washing and dressing.

[67] After an initial trial of medication, there were further adjustments and changes to that medication. A new medication seemed to do well for her, but he confirmed that it is longer-acting and needs to be used every day of the week with a few weeks to build up for adequate effect.

[68] He confirmed that, despite the medication and its positive impact on her ADHD condition, the psychoeducational assessment confirmed a cognitive impairment in the mild range. He reported that when he met with the child and her father in September 2019 for a follow-up appointment, S.L.B. was not involved in an IPP at the school but the school was working on the same. The child was a little frustrated at school, having some difficulty with peers and she was complaining of some abdominal discomfort and being sleepy during the day. Overall, it was felt that the medication was working well.

[69] As he notes in his report:

S.L.B. has been diagnosed with two problems which are essentially lifelong. This has impacted her education. She does need ongoing assistance with her education. She does have ADHD, which will also impact her education. The benefit of using medication for ADHD, especially early on, is to try and help her through a time when she gets her basic education including reading, writing, and math. If she does need extra help with an IPP, improving her focusing abilities is also extremely important."

[70] In commenting on the medication being used, he says, in part, "She should be on this seven days a week. If she does skip doses, it certainly would not work as well as one would like."

[71] In his *viva voce* evidence, the pediatrician did confirm that this medication was not life-sustaining for the child, and it was not essential to her health. It was clear, however, that it was his opinion that it was the appropriate medication to assist the child with her ADHD, particularly considering her cognitive impairment and her need for an education.

[72] He confirmed that it was the father who stopped the medication for S.L.B. based on her wish to discontinue it. The father said she was doing well at school and did not need the medication. He also told the doctor that he did not accept the diagnosis of ADHD.

[73] The doctor confirmed he would never force a child to take medication, but that S.L.B. was too young to decide on her own. It was his role to explain the benefits and effects and the impact on the education of the child and to leave it to the parents to decide.

[74] When asked what he would recommend if the child were primarily in the father's home, he replied that he would not recommend the medication, given that the father openly challenged the diagnosis. Though he is the expert in such matters, he tries not to challenge parental decisions, but rather explain things to them. He confirms the child would not come to physical harm for failure to take the medication, but it would impact her education.

[75] In cross-examination, the pediatrician confirmed that the medication was effective and appropriate so long as it had limited side effects. When asked about side effects that seemed to appear well after beginning the medication, he expressed scepticism that it would be due to the medication, explaining it was a long-acting medication and he would expect side effects throughout the day. When asked about the child reporting being tired in the afternoon, he was unsure if that might be due to schoolwork or just her age and stage of development.

[76] When asked about the fact that the medication had been stopped, he recommended that it be tried again and if there were side effects that arose, a new medication could be substituted.

[77] The court also heard evidence from a registered social worker who had met with both parents and S.L.B. in October 2019 for an appointment respecting the Choice program for the child. It was described as an initial appointment to obtain information respecting concerns for the child and to review what services could be provided under the program.

[78] The social worker says that both parents were present with the child, but the session was not completed because the father ended the appointment. The father stated that the child did not want to be there. He then left and took S.L.B. with him. While the father remained polite throughout the appointment, it was not completed. The social worker says the mother said little, but did want services for the child. She said the service was still available.

[79] It was hoped that S.M.B. could join with S.L.B. in the session as well. Unfortunately, the father's decision to end that meeting brought that option to a close when he left with both children.

[80] The social worker confirmed that there was a person from the Women's Centre present as an advocate. She did not know whether this caused the father to leave or not.

[81] There was also evidence from a mental health group therapist who confirmed that she had met S.M.B. and was aware of S.L.B. and the request for assistance for both.

[82] In her evidence, the mental health therapist described the teenage CBT program available to children. It is an eight-week program providing strategies to deal with anxiety and depression. These children were referred to the program by the mother.

[83] The therapist said that the intake appointment occurred in October 2019 with S.M.B. and her mother and she recommended the CBT program for her based on the child's answers to her questions. She said the child revealed that she had felt anxiety for years and it was worse in the last year. She completed two Beck questionnaires to evaluate the range of anxiety experienced and based upon this and the interview, the therapist recommended the program for her.

[84] She confirmed that she never met S.L.B. who had an appointment later that week. She did confirm that S.M.B. wanted S.L.B. to attend for the sessions.

[85] She said that a few days later, the day of her first session in October 2019, S.M.B. wanted S.L.B. to meet the therapist. But that was the day their father left the meeting about the CBT sessions and took both children with him.

[86] In the end, the therapist confirmed that neither child attended in person and she received an email from the mother putting the services on hold. It was clear that the mother wanted the programming for the children.

[87] On cross-examination, she agreed that she was not aware of the interim court order of joint custody which would require both parents to consent.

[88] Turning to S.M.B.'s education, the school records indicate she is doing well though she has been absent for over 12 days in the 2019-2020 school year, often because she reported not feeling well. There are no obvious concerns for her schooling.

[89] As to S.L.B.'s education and experience, the school records make clear that she has struggled with her behaviour at times. She was given an in-school suspension on May 9, 2019 for insubordination. She was disruptive in the classroom and was not taking responsibility for her actions, blaming others.

[90] This was followed by an out-of-school suspension on May 28, 2019 through to and including May 30, 2019, returning on May 31, 2019. Again, the reason was insubordination during a trip to a camp with her class.

[91] Her report card for grade 7 suggest some struggles as well. Most of the indicators are that she "sometimes demonstrates" competence in the courses, "usually demonstrates" competence in others and only occasionally "consistently demonstrates" competence. The same report card confirmed her marks range between 65 and 80.

[92] The attendance report indicates that between November 28, 2019 and February 11, 2020, she arrived late for school over a dozen times. Similarly, the same report confirms that she left early from school on two occasions.

[93] The IPP for S.L.B. sets out the various supports for her. I infer from the use of the IPP for S.L.B. that she has done better than might be expected because of the IPP and this is reflected in her academic performance.

[94] Reviewing S.L.B.'s cumulative record, it indicates that for the academic year 2019-2020, she was absent 11.5 days out of a possible 179 days. In the prior academic year, she was absent 8 1/2 days, and in the 2017-2018 academic year she was absent 27 days. This gives some indication of the pattern of absences and that

they have not been quite as severe as they had been in prior years but are still of concern.

[95] Finally, when reviewing the teachers' individual comments for each of her courses, there is a thread which confirms that she is a good student, generally kind and polite but does have certain behavioural challenges. She tries hard and, with supports, can succeed in her classes. She has at times shown a reluctance to participate but the overall impression is a positive one.

[96] Within this context, the father is clear in his evidence that he does not accept the diagnosis of ADHD or the diagnosis of cognitive impairment for S.L.B. Interestingly, he said in his cross-examination that he accepted that she had a cognitive impairment in grade 5 but not now, suggesting he believed that her cognitive profile had significantly improved over that time. There is no objective medical evidence to support this.

[97] On the other hand, the mother accepts the diagnosis of cognitive impairment and ADHD, would like her daughter to be medicated under the supervision of the pediatrician and feels that both girls should receive therapy with S.L.B. participating in CBT sessions as well. The father rejects all of this. His position is difficult to understand.

[98] S.L.B. has been assessed and diagnosed over several years with two significant challenges, both ADHD and a cognitive impairment. There was no serious challenge to either the credentials of the experts providing those diagnoses or the methodology for same. There was no contrary evidence, expert or otherwise, brought by the father other than his belief as to the rightness of his position.

[99] In essence, he points to the fact that S.L.B. is doing reasonably well in school now, is attending and seems to be coping well as proof that she is neither cognitively impaired or suffering from ADHD. I find, however, that the only reason she can cope well in school is because the diagnoses have been made and the IPP is in place through the school.

[100] Moreover, it is clear to me that if she were properly medicated, which she is not because her father refuses to administer the medication, and she were to participate in DBT sessions, her ability to cope with her emotions and behaviours would be significantly improved. That is the expert evidence which I accept and is consistent with the evidence before me of the pattern of behaviours and challenges for S.L.B..

[101] In making these findings, I acknowledge that the medication is not life-sustaining and she is able to cope reasonably well without the DBT sessions or therapy with her sister to address the various stresses and family history. On the other hand, is clear to me that each of these girls would benefit from assistance which the father has consistently and inexplicably refused to allow.

[102] As for S.M.B., she had expressed to the therapist that she was anxious and stressed, wanted to participate in therapy with her sister and this has never taken place because of the behaviours of the father, while the mother has supported all of it. While S.M.B.'s needs may be different and less severe than her sister's, they are very real.

[103] On review of all of the evidence, I find that much of the behaviour of the sisters, including refusing to spend time with their mother, wanting to change parenting plans, controlling the parenting arrangements and acting out, is not their fault, but largely the result of the dysfunctional parenting environment in which they are being raised. It is unstable and contrary to their best interests. Each of them, particularly S.L.B., require stability and constant support from each of the parents. If that cannot be provided by both parents, one of them must be given that responsibility.

[104] I accept the evidence of the pediatrician that the medication recommended for S.L.B. must be taken every day of the week to be effective. I also accept his evidence that parents should take into account the diagnosis and the benefit of the medication when making such decision.

[105] In assessing the plans of each parent, I will briefly note that I am satisfied that each of them has suitable arrangements for housing and other necessities of life for the children while in their care. Each has expressed some concern about the other, but I find that they can care for the children's basic needs.

[106] It is also relevant to note that in the father's cross-examination, he was asked whether he would obey an order if it placed S.L.B. in the care of her mother. On this issue, he clearly struggled. He admitted he would have no choice but believed it would not last. He said he would tell S.L.B. to go with her mother, but he would not make her go. He then said he would take her but would not do so again and again. He said at some point, the mother could call the police and have him arrested, but he would not force her to go.

[107] Following on this, he was asked about the arrangement when the children were to spend the night in each parent's home as a plan to transition them back into the mother's care. He explained that the children did not want to go from his home to their mother's. He then said he would never make the children do something that they did not want to do. It was the children's decision whether to go or not.

[108] That evidence is significant and of concern to the court. Not only does it indicate that the father would likely avoid following a court order, but makes clear that he would allow the children to make decisions about their parenting arrangements with minimal effort from him encouraging them to obey the order itself. He would simply let them decide, a decision that clearly should not be left to the children, particularly in circumstances of high conflict to which they've been exposed for the last many years.

[109] It is important to consider the nature and relationship between the sisters. There is, again, little evidence of this, but I think it is reasonable to assume that they would miss each other when being separated by a split parenting arrangement. I note that S.M.B. wanted S.L.B. present when she met with the therapist and there were plans to have them both seen for counselling together. While they have different needs, they remain twin sisters and will be important supports for one another throughout their lives.

[110] I must also consider the fact that, at the time of the trial, the children were in a split parenting arrangement with S.L.B. primarily residing with her father and S.M.B. primarily residing with her mother. No doubt any changes made by this court to their parenting arrangements will be met with some resistance.

[111] But the children cannot be permitted to determine what is in their best interests, including dictating parenting arrangements. Moreover, each parent must set an expectation that each of the girls will abide by the order and spend time in the care of each parent as directed. The father can no longer allow the children to make these parenting decisions. He must act as a parent and ensure they move between the homes as smoothly as possible. Anything less will make clear that he is unable to act in the children's best interests.

Decision

[112] Taking into careful consideration all of the evidence before me, and weighing it in the context of the maximum contact principle as set out in the *Act* while noting that this principle is subject to the best interests the children, I find it is in the

children's best interests that they be placed in the sole custody and primary care of their mother. Their father will have regular and meaningful parenting time with them and will be heard on major decisions concerning their health, education and well-being, but it is time to give the mother the responsibility of those major decisions and the responsibility of parenting these children together in her home.

[113] I arrived at this decision for several reasons. First, it is clear to me that the parties cannot effectively communicate on any issues concerning the children. They are both hostile and completely unable to cooperate whenever an issue of significance arises.

[114] The decision regarding sole custody is also supported by my finding that the mother should have primary care of the children. In that context, she must be able to make the major decisions for the children. It is clear that these parents cannot do so together.

[115] It is also clear that the mother is the parent who will exercise the appropriate judgment regarding the medication for S.L.B. If she decides that S.L.B. will be medicated as recommended, the order will require the father to administer the medication to S.L.B. when she is in his care.

[116] I will require that she keep the father informed of any major issues that arise for the children, particularly given the context of S.L.B.'s various diagnoses, IPP's and challenges that will arise respecting her behaviour and education. The father should have input into those issues when they are raised, and he should be able to speak directly with the experts and educators involved in her care.

[117] But I also find it in both children's best interests that, once that input is received, the mother should have the responsibility to make the final decision. Any requirement that the decision be jointly made would simply lead down the same path of chaos, recrimination, stress for the children and stagnation in addressing the major issues for the children, particularly S.L.B.

[118] When ordering primary care for the mother, I consider the history of the parenting and that the mother has had primary responsibility for the upbringing of the children prior to separation. I do consider that the children had been back and forth in an unstable parenting arrangements and separation, notwithstanding the interim orders of the court. That said, I find that it is the mother who has sought stability more than the father. It is his evidence that he will allow the children to make decisions about where they reside. This is not in their best interests.

[119] I also consider the mother's ability to meet the needs of the children. This is particularly apparent when discussing S.L.B.'s diagnosis and treatment. The expert evidence of her diagnosis of ADHD and cognitive impairment are accepted by me. There is simply no contrary evidence to challenge this other than the father stated his belief that they are not accurate diagnoses.

[120] Respecting treatment, it is the mother who accepts that medication will help her daughter, that DBT sessions will assist her, that both girls will benefit from therapy sessions together and that an IPP at the school will assist S.L.B. in her educational goals. The father either rejects or obstructs all these steps and plans, attempting to justify each but essentially revealing that he rejects all of the diagnoses and plans for treatment for the children.

[121] I find the father's behaviour in leaving the intake appointment with the therapist and taking both girls with him to be further evidence of his lack of focus on the best interests of the children.

[122] I find that his approach is not in their best interests and if they are placed with him, whether on a primary care or shared parenting basis, he will continue the chaos and obstruct all of the support available to S.L.B. and her sister to their detriment.

[123] As noted earlier, when he points to the academic success of both children, I find that this is largely informed by the efforts of the mother to obtain the diagnosis for S.L.B. and participation in an IPP for her. That said, there is much more that can be done to assist both children and the father is ill-equipped to do so.

[124] I also consider the issue of the father's sobriety and find that, though the interim order required the father to present himself for sobriety checks at the door of the mother's home prior to his parenting time commencing, I accept his evidence that he has remained sober for some time and is properly medicated for that addiction. There is no evidence from the mother that he is continuing to drink of late and I am satisfied that condition should not be applied to the current order.

[125] I am, however, persuaded by his addictions history to include a provision that he not consume or be under the influence of alcohol or drugs during his parenting time and that he only take medication prescribed to him in the dosage prescribed.

[126] I have considered that the children may not react well to this decision as it will mean change. But that cannot be a reason to set aside what I find is in their best interests. Their parents and the court must decide parenting issues and that includes

where they will reside. The father must resolve to ensure that they understand this and ensure that he abides by the order. Otherwise, further chaos can be expected, which is contrary to their best interests.

[127] I accept that the father loves his children and that they love him. They will benefit by having parenting time with him on a regular and dependable basis including special parenting time over occasions such as Christmas, summer school break, Easter, and March break. All of this time is to their benefit and they clearly enjoy time with their father which should be encouraged and supported.

Child Support

[128] The interim order of the court of July 8, 2019 set child support at \$727.07 per month based on an income from 2018 of \$50,697.84 for the father. At the time he was working full-time for a local company. The mother's income was found to be \$11,139.24 in the same order.

[129] In his evidence, the father said that he suffered an injury which reduced his hours with that company as of January 2019. His evidence by affidavit sworn August 23, 2019 was that he anticipated the total income for that year of approximately \$38,150 and attached as an exhibit was an income summary provided his employer based on his new hours of work and rate of pay.

[130] He also says, because of the financial hardship he experienced resulting from his reduction in income and the order to pay child support, combined with his bankruptcy payments and other costs, he cannot afford to pay the medical expenses requested by the mother as a section 7 contribution. He suggests that the parties save up over time to attempt to put those costs in place.

[131] The section 7 expenses of most concern to the parents is orthodontic work for S.M.B. and a retainer. There is also an outstanding cost for a chipped tooth for S.M.B.

[132] As well, depending on the medication cost for S.L.B. for her ADHD, there will be some out-of-pocket costs for the parents for this.

[133] The orthodontic cost for S.M.B. is somewhat confused as two different estimates were provided. I understand that the parents agree that at least the upper retainer is required as soon as possible, and the mother provided an estimate from the dentist which indicates the total cost of \$1,374 for S.M.B. The mother's

evidence, confirmed by receipt, is that she has contributed \$500 towards these costs. The same receipt indicates there is an insurance contribution of the cost of \$275.52. Thus, the net cost after contribution from insurance is \$1,098.48. It may also be correct that the mother had paid the entire cost herself.

[134] When considering the father's income for purposes of child support, I accept his evidence that he has suffered a reduction in income as of January 2019. He provided records from his employer confirming the reduction in income and there was no challenge to this evidence. I find his income is appropriately set at \$38,150 and he will be required to pay child support to the mother retroactive to January 1, 2019 in the amount of \$563.95 per month.

[135] In considering the issue of retroactivity, I note the mother requested it be made effective as of July 2019. The father says his income reduced as of January 2019. The mother's evidence is that the father has also failed to pay any support to her since the split custody arrangement came into place

[136] In considering the issue of retroactive child support, I have reviewed the decision of the Supreme Court of Canada in *D.B.S. v S.R.G.*, 2006 SCC 37 in which the Court set out the parameters and analysis for retroactive child support claims. It is helpful in reading that decision to note that the Court held:

97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

[137] In that decision, the Court also held that the date for calculation of the retroactive award should be the date of effective notice as explained below:

121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling

[138] In this matter, there is no doubt that each parent was on notice of the possibility of a retroactive child support claim throughout this proceeding. The mother would be aware that the child support granted in the interim order may be reduced at a later time. The father would be aware that his refusal to pay support may be dealt with retroactively as well. Thus I find that I have discretion to make an order retroactive to at least the date the father says he was injured, January 2019.

[139] When considering the factors under *D.B.S., supra*, I find that the father cannot escape responsibility for child support, albeit reduced from the interim order amount. He allowed the spilt custody arrangement to happen by allowing S.L.B. to decide where she would reside, contrary to the order of the court. He cannot now complain that he should not pay support because of this decision.

[140] I also find he has the ability to pay and it will benefit the children. His income is reduced but he will receive credit for amounts paid to date. Any arrears owed may be paid out over time through the Maintenance Enforcement Program to mitigate that burden. But I find there is no good reason not to award retroactive support in this case.

[141] Respecting medical expenses including orthodontics and medication, I consider section 7 (1) of the Provincial Child Support Guidelines as follows:

Special or extraordinary expenses

7 (1) In a child support order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

...

(c) health related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

[142] I note this section allows for estimates to be applied and requires the Court to take into account the necessity of the expense in relation to the child's best interests and reasonableness of the expense in relation to the means of the parents and the pattern of spending prior to separation.

[143] In considering the orthodontic work for S.M.B., I find it to be reasonable and necessary, given both parents believe that she does require this. I likewise find the cost of repairing the chipped tooth of S.L.B. be reasonable and necessary.

[144] Finally, having found that it is reasonable that she be medicated as recommended by her pediatrician, I find it reasonable that both parents contribute to the medication costs for S.L.B. as well.

[145] I find that each parent can reasonably contribute to such costs and will do so in proportion to their incomes. With the reduction in child support the father should have the means to contribute. This is particularly so given that he has been largely relieved of his debts through bankruptcy.

[146] The father will be required to maintain the health insurance available to him through his current or any future employer and the mother, because she has primary care of the children, will incur the first \$100 cost for such expenses. Anything above that will be shared in proportion to the parents' income.

[147] As to apportionment, the father's income is \$38,150 and the mother's income is \$11,139. Thus, the father's contribution will be 77% and the mother's contribution will be 23% for the purpose of the apportionment of the cost of section 7 expenses.

[148] In the case of the retainer for S.M.B., the net cost after insurance is \$1,098.48. The mother will contribute the first \$100 to that cost and the remainder of \$998.48 will be shared in proportion, with the father contributing \$768.46 and the mother contributing \$230.02. Since she has already contributed \$500 to the dentist, and assuming that remains the case today, her contribution is paid. Any excess will be credited to her and she may use this to set off other medical or dental costs such as medication and the chipped tooth of S.B.M.

Order

[149] There will therefore be an order as follows:

[150] The mother shall have sole custody and primary care and residence of the children. She will be responsible for making all final decisions on major issues concerning the children's health, education, and general well-being.

[151] The mother shall inform the father in a timely fashion of all major issues concerning the children's health, education, and general well-being and she shall seek his input on such issues. Once she had given him the opportunity to provide such input, she shall retain final decision-making authority on those issues.

[152] The father shall be entitled to unfettered access to obtain information or documents from any third party service providers for the children including, but not limited to, schools, teachers, hospitals, physicians or therapists or anyone else involved with the children from time to time. The father shall not be permitted to provide any direction or consent with respect to the children to those third-party service providers except in emergency circumstances as set out below.

[153] Each parent will be entitled to authorize emergency medical care for either of the children when the children are in their care. Immediately upon authorizing such emergency medical care, that parent will inform the other of the circumstance and from that point forward, the sole custodial provisions of this order shall apply.

[154] If the mother determines that S.L.B. should take medication as recommended by her physician for ADHD, the father shall ensure that S.L.B. takes the medication as prescribed when he has parenting time with her.

[155] All communication between the parents shall be polite, respectful, business-like and child focused.

[156] Both parents are prohibited from making any negative or derogatory comments about the other parent or anyone in that parent's family any time that they have care of the children, whether the children are present at the time or not. Each parent is also responsible to ensure that no other person makes any such comments, and, if such comments are being made, that parent shall ensure that the comments stop immediately or the other person is removed from the vicinity of the children.

[157] Unless otherwise agreed upon between the parties, the father shall have the following parenting time:

1. Every second weekend from Friday after school until Monday morning when the children attend school.

If, due to a school in-service day or statutory holiday, the children are not in school on either the Friday or Monday or both during the father's

weekend, that parenting time shall be extended to commence on Thursday after school or end on Tuesday morning or both as the case may be.

2. On the Wednesday following the weekend parenting time, from Wednesday after school until Thursday when he returns them to school.

[158] Unless otherwise agreed upon between the parents, the following special parenting time shall apply and override the parenting time set out above as follows:

1. Christmas School Break – During the Christmas school break one parent shall have the children from the last day of school for the Christmas school break until Christmas day at 2:00 p.m. and the other parent shall have the children from Christmas Day at 2:00 pm until the children return to school at the end of the Christmas school break.

In even-numbered years the mother shall have the children for the first period of parenting time and in odd-numbered years the father shall have the children for the first period of parenting time.

2. Easter – For Easter, one parent shall have the children from the end of school on Easter Thursday until Easter Saturday at 2:00 pm and the other parent shall have the children from Easter Saturday at 2:00 pm until the children return to school at the end of the Easter weekend.

In even-numbered years the mother shall have the children for the first period of parenting time and in odd-numbered years the father shall have the children for the first period of parenting time.

3. School Spring Break – There will be no special parenting time for the school spring break.
4. Summer School Break – During the summer school break, the normal parenting time schedule shall apply except that each parent shall be entitled to up to 2 consecutive or non-consecutive weeks of block parenting time for vacation with the children. The parents shall notify each other via text by May 15 each year of their proposed weeks of summer block parenting time and if there are no conflicts in the proposed schedules, those weeks of summer block parenting time shall apply. If there is a conflict in the proposed schedules, the mother shall have priority of schedule in odd-numbered years and the father shall have priority of

schedule in even-numbered years. If a parent fails to provide notice by the date required, that parent shall lose any priority for summer block parenting time in that year.

5. Father's Day and Mother's Day - The father shall have the children with him on Father's Day from 10:00 a.m. to 6:00 p.m. The mother shall have the children with her on Mother's Day from 10:00 a.m. to 6:00 p.m.
6. Children's Birthdays - There shall be no special parenting time provision for the children's birthday and the party who does not have the child on that day will celebrate the birthday on another day.

[159] The father is prohibited from consuming or being under the influence of alcohol or any non-prescription drug when he has care of the children and may only consume medication prescribed to him in the appropriate doses when he has care of the children.

[160] The father shall be responsible for the pick-up and drop-off of the children for all parenting time.

[161] For the purposes of child support, the father, a resident of Nova Scotia, has an annual income of \$38,150. Pursuant to the Provincial Child Support Guidelines and the Nova Scotia Table, the father shall pay child support to the mother in the amount of \$563.95 per month payable at the rate of \$260.28 bi-weekly retroactive to January 1, 2020.

[162] For the purpose of making an order for payment of special or extraordinary expenses, the annual income of the father is \$38,150 for 2019, and the annual income of the mother is \$11,139 for 2019.

[163] The father shall contribute 77% and the mother shall contribute 23% of the cost of all special and extraordinary expenses for the children to which they agree.

[164] In addition, the parents shall contribute to the cost of the retainer and orthodontic work for S.L.B. in proportion to their income. The net cost of the service and device, after deducting insurance contribution and the mother contributing the first \$100, is \$998.48. The father shall contribute \$768.46 to that cost and the mother shall contribute \$230.02 to that cost.

[165] In addition, each parent shall contribute, after insurance contribution is deducted, to the cost of medication for S.L.B. as recommended by her pediatrician for her ADHD diagnosis in proportion to their incomes.

[166] The order will contain the normal disclosure provision respecting the incomes of both parents.

The mother's counsel will draw the order.

Daley, J.