SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Cole v. Dixon, 2014 NSSC 348

Date: 20140919
Docket: 1201-064590
Registry: Halifax

Between:

Kimberlie Heather Cole

Applicant

and

William John Dixon

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: August 20 and September 4, 2014

Counsel: Kimberlie Cole, Self Represented
Terrance Sheppard, counsel for Mr. Dixon

By the Court:

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Introduction/Issues

[1] This is a decision in the matter of Kimberlie Heather Cole, Applicant and William John Dixon, Respondent. Ms. Cole would like the Court's permission to relocate to Southern Ontario with the parties' children. She says that she is optimistic that she will gain employment there in the technology sector. She would like to relocate with the two children from her first family with Mr. Dixon and with her current husband and the two children she has with him.

[2] Ms. Cole and Mr. Dixon married in 1998, separated in 2009 and divorced in February 2012 following binding arbitration, which occurred in September 2011.

[3] The parties have two children, a daughter born October 24, 2001 and a daughter born December 19, 2005.

[4] The issue for the Court's determination is whether it is in the best interests of the children to relocate to Southern Ontario with their mother.

[5] A secondary issue is a determination of the child support obligations of each party.

Governing Legal Principles

[6] The law on the issue of mobility is frequently reviewed.

[7] In the case of *Fedortchouk v. Boubnov*, 2013 NSSC 277, I outlined the principles that will guide a Court's decision when relocation of a child is proposed:

> [153] When relocation of a child is proposed by either parent, the analysis requires a consideration of the principles enunciated by the Supreme Court of Canada beginning with Gordon v. Goertz [1996] S.C.J. 52:
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> > 49. The law can be summarized as follows:
> >
> > > 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

(a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

> [154] As stated, a parenting order has been in place since registration of the separation agreement on May 6, 2011. That order essentially provided for shared parenting of the parties' two middle children and for primary care of the youngest by Dr. Fedortchouk and primary care of the oldest by Mr. Boubnov.
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> [155] The parties do not contest that a change of circumstances exists and the parenting arrangement must be revisited.
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> [156] The Supreme Court of Canada in Gordon v. Goertz supra at paragraph 17 stated:
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> > 17. The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement: Francis v. Francis (1972), 8 R.F.L. 209 (Sask. C.A.), at p. 217. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time. (Willick v. Willick, supra, at p. 688, per Sopinka J.) The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances (Wesson v. Wesson, supra, at p. 194) to decide what custody arrangement now accords with the best interests of the child. The threshold of material change met, it is error for the judge on a variation application simply to defer to the views of the judge who made the earlier order. The judge on the variation application must consider the matter anew, in the circumstances that presently exist.
>
> [157] An assessment of the child's best interests will determine the Court's ruling on the application to permit the children to relocate for the coming academic year. I am mandated to consider inter alia the existing custody arrangement and the children's relationship with both parents and his wishes.

[8] An assessment of what is in a child's best interest results in consideration of a wide range of factors. This was also discussed in *Fedortchouk v. Boubnov, supra* and more recently in *Myer v. Lyle*, 2014 NSSC 233. I will repeat the language I frequently use to summarize those factors. At paragraph 18 in *Myer v. Lyle supra*, I summarized the governing legal principles:

> [18] The parenting issue I must decide is to be disposed of after a determination of what is in the best interests of the parties' child. The principles that govern this determination were commented upon in Dorey v. MacNutt, 2013 NSSC 267. I stated the following at paragraphs 6 through 13; this is the law that will guide my decision making herein:

[6] The Divorce Act, RSC 1985, c 3 (2nd Supp)at s.16(1), (2) and (8), (9) and (10) provides:

> Order for custody
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> 16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> Interim order for custody
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> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).
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> . . . . .
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> Factors
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> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
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> Past conduct
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> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> Maximum contact
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> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[7] Justice Goodfellow, in his often quoted decision Foley v. Foley [1993] N.S.J. No. 347, outlined factors generally relevant to an assessment of what parenting arrangement is in a child's best interest. At paras. 16-20, he wrote:

16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment;

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child:

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to

> parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);
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> 15. The interim and long range plan for the welfare of the children;
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> 16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
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> 17. Any other relevant factors.
>
> 17. The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question. With whom would the best interest and welfare of the child be most likely achieved?
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> 18. The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.
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> 19. Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.
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> 20. On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[8] Recent amendments (2012) to the Maintenance and Custody Act, R.S.N.S. 1989, c.160 (‘MCA') give us statutory guidance on how the best interests of a child are to be determined. The following in s.18(6) of the ‘MCA' is of persuasive value when interpreting s.16(8) of the Divorce Act supra:

> s.18(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including

(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 or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;

(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;

(e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

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

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

> (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
>
> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

> [9] Clearly there is significant overlap in the 'MCA' when compared to the checklist developed by Justice Goodfellow two decades ago.

Overview of the Evidence

[9] Ms. Cole offered the evidence of David Eisenhauer, her husband; Colleen Cole, her mother and her evidence in support of the application.

[10] There was some additional direct examination of Colleen Cole and cross examination of the Applicant, Kimberlie Cole. Mr. David Eisenhauer was not required for cross examination, however.

[11] Mr. Dixon offered his evidence on his behalf. He also offered the evidence of Stacy Arseneault, his supervisor with SunLife Financial. He is the Financial Centre Manager. Mr. Arseneault was subject to some cross examination by Ms. Cole. In addition, Mr. Dixon offered the direct evidence of his parents, Helen Elizabeth Dixon and Frederick John Dixon; and Marie Norwood, his sister in law; and David Giles. None of these persons were required for cross examination and their evidence was presented in affidavit form.

[12] Colleen Cole is the mother of the Applicant, Kimberlie Cole. Colleen Cole confirmed that she has a close relationship with the subject children and has been "very involved" in their lives since their birth. Colleen Cole lives in the Halifax area. She supported her daughter's claim that her daughter has always been the more involved parent. She supports her daughter's plan to move "if necessary so that Kim, as the primary breadwinner, can obtain employment in her field of expertise".

[13] Mr. Frederick Dixon, the Respondent's father also filed an affidavit. He described himself as having been actively involved in the lives of the subject children including babysitting them; having them for sleep overs; family dinners; attending church; going to movies; and watching TV. He also described how the children spent time at his cottage and engaged in various activities while there.

[14] He described Ms. Cole, the Applicant, as having an aggressive personality.

[15] Ms. Helen Dixon, the Respondent's mother, also offered evidence of her involvement with the grandchildren.

[16] Ms. Cole's brother, Pastor Jason Cole, was called by the Respondent to testify. He confirmed the involvement of the Respondent in the lives of the children in a very positive way. He was positive with respect to his sister as well. He did, however, describe her as having a strong personality. Although his evidence was politely stated, the inference I draw is that Ms. Cole can be a difficult person to deal with as far as he is concerned.

[17] Mr. Stacy Arsenault, the Respondent's supervisor, confirmed the high priority the Respondent places in meeting his parenting responsibilities, a priority Mr. Arsenault supports. He said the Respondent has total flexibility to manage his time in his new advisory position with SunLife Financial. The Respondent was formerly a Career Sales Force Manager with SunLife.

[18] Ms. Norwood, the Respondent's sister confirmed her close relationship with the Respondent's children. Ms. Norwood has three children under five years of age and they are known to the subject children and have a relationship with them. She confirmed that Mr. Dixon's extended family are involved in the lives of the parties' children in an active and loving way.

[19] Ms. Norwood described Ms. Cole as controlling and confrontational.

[20] Ms. Cole told the Court she has two younger children with Mr. Eisenhauer. Ms. Cole is currently on maternity leave, which ends in December 2014. Ms. Cole remains employed in the IT sector in Halifax with New Net Communications which, in 2014, purchased NewPace Technologies, her former employer. Ms. Cole explained that in January 2014 she received a termination notice from NewPace Technologies. Her employment was to end in the spring of 2014. Her employment has continued with the new owner of NewPace Technologies and the termination letter was withdrawn prior to the takeover by New Net Communications.

[21] Ms. Cole nevertheless believes her employment in Halifax is not secure and she has therefore been seeking other employment opportunities. She has had continuous employment in the technology sector in Halifax for fifteen years.

[22] The evidence reveals that initially Ms. Cole proposed a move to Seattle, Washington to be employed by Microsoft. She testified that she abandoned that proposed move because of the distance and travelling logistics to and from Washington State from Nova Scotia. She says she is currently in negotiations with Blackberry.

[23] Ms. Cole was unclear as to the terms or conditions that would be associated with employment with Blackberry. This is understandable since Blackberry have not offered her a job or identified a job description for positions for which she says she is being considered. She referred to the potential Blackberry employment opportunity as being in Toronto but after questioning, confirmed that the employment would be in Waterloo, Ontario. However, she anticipated being able to work from her proposed home in Mississauga for part of the time but was unclear what that arrangement would be.

[24] The Court concludes that there is significant uncertainty as to whether the employment opportunity actually exists or will exist with Blackberry and if so, the terms of that employment.

[25] Ms. Cole argues that she must make a move to firm up her future economic prospects. Currently her best employment prospects appear to be in Halifax.

[26] Mr. Dixon argues that the two children he and Ms. Cole parent should remain in Halifax because this is their most stable environment. He points to his involvement in their lives as significant. He says the children have well established community relationships and valuable relationships with members of both extended families.

[27] Mr. Dixon is concerned that Ms. Cole's living arrangement will be unstable. Mr. Dixon points to the children having attended three schools over the past four years as a result of Ms. Cole's moves within the Halifax Regional Municipality. He says a move to the Toronto area over the fall of 2014 would result in the children attending a fourth school in 4 ½ years.

[28] Both parties agree that their relationship, since separation, has been high conflict. The police have had regular involvement in the lives of the parties,

particularly when issues arise around the parenting of the children. Uniformed policemen and marked police cars have been at the homes of both parents and their presence has been known to the children.

[29] Mr. Dixon alleges that Ms. Cole moves to a new neighbourhood when he moves to the same school district as the children. He is suspicious that Ms. Cole's proposed move to southern Ontario is but another step in her effort to separate him from his children.

[30] Mr. Dixon impressed the Court as fair minded, patient, non confrontational and compromise seeking. I am satisfied that he is.

[31] This couple are what is described as high conflict. Little can be resolved between them and this is unlikely to change.

[32] Unfortunately, they can not avoid dealing with each other - given that they must parent two children.

[33] Ms. Cole has filed multiple variation applications since the parties separated in 2009.

[34] It was clear from her demeanour, approach and the determination demonstrated in the courtroom when she testified that she is structured to the point of inflexibility and values control and may need to be in control. She places a high value on being 'right', not fully appreciating that view is subjective.

[35] Mr. David Giles' evidence is corroborative of the Court's impression.

[36] The police have been involved in the parenting conflict unnecessarily. Paragraph 58-61 of Mr. Dixon's affidavit (Exhibit 4, tab 1) describes one such incident:

> 58. With respect to her paragraphs 98 and 99, on March 7, 2014 I did pick the children up early from school as we had plans for Spring Break and their school day was light. The Applicant has a Protection of Property Order ("PPO") against me so picking the children up from school causes less stress for them.
>
> 59. On June 30, 2014 I picked the children up from school for the same reason, to avoid any potential conflict between the Applicant and me. This was the last day

> of school and they only had to attend for an hour or so to receive their report cards.
>
> 60. The afternoon of June 30, 2014 I received a telephone call from Officer Baxter from the Tantallon RCMP asking me about the events of the morning. I explained the details and my reasoning and he was satisfied.
>
> 61. It is incredible to me that the Applicant cannot see how involving the police is such a petty parenting time disputes has such a negative effect on our children. I am just glad that the police phoned on this occasion rather than showing up.

[37] Further at paragraphs 108-109 of the same affidavit, Mr. Dixon described another incident when police were called by or on behalf of Ms. Cole by her husband:

> 108. This is another example of the Applicant picking petty disputes with the children's parenting time. There was no rhyme or reason to the Applicant's insistence that I pick the children up at 7 pm. The Corollary Relief Order that has just been issued on February 13, 2012 clearly said their time with me started after school. Even if I was dead wrong, allowing them the extra few hours would surely have gone a long way to substantiating her claim to be supportive of the children's relationship with me.
>
> 109. Instead, the Applicant removes the children from school early, unbeknownst to me, and then when I show up at the door wondering where the children are, David called 911. Four RCMP officers arrived. The issue was resolved and the Applicant advised that she would get the children ready and have them delivered to my sister's home down the street. The children were not delivered to my sister's home until 7 pm.

[38] The older child related the events of June 30, 2014 in the course of her interview with the child wishes assessor. The summary of the report is as follows (see Exhibit 2, third page):

> "She also spoke of a situation the last day of school when her mother requested a change in schedule to be able to pick the girls up from school. Her father did not agree to this change and her mother told them if he took them from the school she would call the police. Rachael said she worried about this day before because she knew what would happen."

[39] Ms. Cole testified that she did in fact call the police when she learned Mr. Dixon had picked Rachael up.

[40] Mr. Dixon explains Ms. Cole's three moves with the children over the past four years as a response to his having communicated his plan to move to the children's school district. He sees the proposed move out of Nova Scotia as a response to his having disclosed a plan to move to the children's current school district in Hammond's Plains.

[41] The Respondent offers Exhibit 4, tab 1 as proof of this. Paragraphs 23 and 57 of the Respondent's affidavit, sworn July 25, 2014 read:

> 23. On February 21, 2014 I had advised the Applicant that I would be moving into the children's school area as soon as feasibly possible. On March 19, 2014 I emailed the Applicant asking her to confirm that she had no intentions to move from her current location and her response on April 6, 2014 was "Do not move into my neighbourhood. If you move anywhere from the Bedford Highway Mill Cove Plaza up the Hammonds Plains Road, I will move" attached hereto as Exhibit "C" is a copy of the email exchange.
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> . . . . .
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> 57. Attached hereto as Exhibit "G" is a copy of a text message conversation between the Applicant and Rachael. In this message string, the Applicant's husband is referred to as daddy. Rachael makes a comment "if he buys we are ruined Bedford". The Applicant tells Rachael to tell me I shouldn't move at all. Rachael replies "I can't he wants a new home anyway and we both know that you'll win at court and go to Seattle anyway so it don't matter." The Applicant's responds "if he moves over here I'm moving for sure".

[42] Rebecca is the parties' eight (8) year old daughter.

Conclusions

[43] Ms. Cole's plan to work in the Toronto area is nebulous. Notwithstanding the confidence she expressed about finding employment in Southern Ontario, she did not offer any convincing evidence of job offers received by her or even evidence of serious interest by prospective employers.

[44] Her testimony is the only evidence on this point. However, it must be carefully weighed given the absence of details of prospective employment. Her current request of the Court is that she be given permission to move to Southern Ontario. She can not tell the Court or Mr. Dixon where she will move to; where she will be working; her hours of work or responsibilities or her pay.

[45] It is not quite as chicken and egg as Ms. Cole suggests.

[46] A parent seeking to move two children, one age 8 and one age 13, to another region of the country with all of the disruption associated with such a move needs to present more of a plan than she offers.

[47] Her current case for a move to Toronto can not be considered without regard to her April 2014 proposed move to Seattle. In her April 16, 2014 letter to Mr. Dixon (Exhibit 3, tab 1c), she made the same argument in favour of a move to Seattle as she is now making to support a move to Southern Ontario. In her April 9, 2014 letter (Exhibit 3, tab 1b), she identified July 2014 as the date of the proposed move. Her letter of termination was withdrawn in the Spring of 2014.

[48] She testified that by June 2014 she realized Seattle was too far for the children to travel when they were to see their father in Nova Scotia. That explanation is not satisfactory. The distance to and from Seattle was well understood before then.

[49] Ms. Cole filed her application to move to Seattle with the Court on May 1, 2014 as an emergency application.

[50] A child's wishes assessment (Exhibit 2) was prepared to reflect the wishes of the older child as far as clarifying the wishes of the older child with respect to her living arrangement; primary residence and schedule of contact with both parents. One is forced to ask, after hearing and reading the evidence and hearing from the parties, whether Rachael's interest in moving to Toronto is viewed by her as a means of reducing parental conflict and getting relief from it. The Child Wishes Assessment suggests this. In all of the circumstances, I put little weight in the child wishes assessment as far as the desire to move is concerned.

[51] I am satisfied that Ms. Cole is incapable of fostering a positive relationship with Mr. Dixon or supporting the same between him and the children. Her need to be in control of all parenting issues is an obstacle to reaching that objective. For whatever reasons, beyond the scope of this proceeding, she is unable to parent in the 'grey' zone. She seems unable to respond to the uncertainties of daily life and absent strict adherence to a schedule or routine has difficulty co-parenting. Her

responses to disagreements with Mr. Dixon are extreme and as pointed out, do result in her involving the police in petty matters. The children are not shielded from this behaviour as has been pointed out.

[52] Susan Grant-Robertson, who completed the Child Wishes Assessment recommended that:

> 1. Rachael be permitted additional time with her father.
>
> 2. That Rachael be given the option to move with her mother, provided Ms. Cole support Rachael's relationship with her father.

[53] I am satisfied, given what I consider to be compelling evidence, that Ms. Cole will not support the children having a satisfying and healthy relationship with their biological father.

[54] She has communicated her displeasure in response to Mr. Dixon's plans from time to time to be living near the children and by extension, more present with them. She does not offer a satisfactory explanation for that view.

[55] In *Gibney v. Conohan*, 2011 NSSC 268 I observed that the absence of shared parenting can create a perceived and actual power imbalance in one or both parents and result in an abuse of one's parenting position. It is clear that Ms. Cole is empowered by her conclusion, after calculating parenting time; that she has more than 60% of the parenting time. She believes she is the primary care parent and her views are always paramount. She does not distinguish between the allocation of parenting time and decision making. These are different aspects of custody and need not lay on top of each other.

[56] In the context of the modern family, the analysis and differentiation of parenting roles is not so arbitrary as Ms. Cole believes. Parenting involves many roles and responsibilities. It is not an all or nothing proposition with 40% of the parenting time being a necessary threshold below which a non primary care parent necessarily plays a significantly lesser role in a child's life and is less involved in decision making. Ms. Cole believes Mr. Dixon has 39% of the parenting time available.

[57] On the evidence before the Court, Mr. Dixon is, in fact, an involved, active committed parent. He is making an invaluable contribution to the lives of his children and meeting many of their needs. His contribution can not simply be minimized out of hand because he cares for his children less than 40% of the time. A qualitative assessment of the non-primary care parent's role must be undertaken. He should have a meaningful role in decision making relevant to the child. This is in the best interests of both children.

[58] The decision of the Supreme Court of Canada in *Gordon v. Goertz, supra* contemplated such an analysis. The structure of families in 1996 when that decision was released was evolving and the evolution continues. More and more non primary care parents are nevertheless heavily involved in parenting and have more parenting time with their children. They are also more involved in decision making relative to the children. The law directs that parenting plans maximize the child's time with each parent because such an outcome is presumptively viewed as in a child's best interests.

[59] Ms. Cole argues that the Court does not have authority to increase Mr. Dixon's parenting time because that change was not pleaded by him.

[60] Ms. Cole has not been surprised by Mr. Dixon's request for primary care whether Ms. Cole moves or not. She is the one who asked the Court to assess the best interests of the children in terms of parenting. That, in fact, is now the Court's responsibility.

[61] Such an assessment is part of this Court's inherent jurisdiction; its *parens patriae* jurisdiction. Parties are not free to limit the Court's jurisdiction to decide upon a child's best interests having asked the Court to decide it.

[62] The Court does have a duty to ensure each party has an opportunity to respond to parenting scenarios that are before the Court. Mr. Dixon's desire for more parenting time and in fact, for primary care, has been known to Ms. Cole throughout.

[63] Our Court of Appeal in *Slawter v. Bellefontaine*, 2012 NSCA 48 discussed the responsibilities of trial Judges when pleadings are deficient and procedural fairness is a concern. This is not such a situation. Ms. Cole responded to the issue

of shared parenting as a live one. She argued the Court could not give more parenting time to Mr. Dixon because the pleadings were deficient.

[64] Paragraph 53 and 54 in *Slawter v. Bellefontaine supra* reads:

> [53] There is some authority that granting access in excess of the specified access requested is a jurisdictional error. In A.L.M. v. K.H., 2004 BCSC 1420 (CanLII), 2004 BCSC 1420, a Master ordered interim joint custody but granted access to the father in excess of the specified access sought in the notice of motion. The mother appealed, arguing that the Master had exceeded his jurisdiction. The respondent father suggested that he had sought overnight access and that access is decided on the basis of the best interests of the child, it is not an excess of jurisdiction to go beyond what one of the parties sought. To say otherwise would be a severe restriction on the discretion of the court to act in the best interests of a child. C. Lynn Smith J. concluded that the appellant was prejudiced in her opportunity to consider her position, and provide material bearing on the issue of pre-trial overnight access, and that the Master should have given her the opportunity to provide further evidence and submissions on this question. Failure to do so amounted to an excess of jurisdiction. She wrote:
>
> > 38. I recognize that orders may be made that go beyond the specifics set out in a Notice of Motion. In Chambers, the interaction between counsel and the court may lead to an order beyond that sought in the Notice of Motion, but the appropriate practice is to ensure that the parties have had adequate opportunity to provide evidence and make submissions on the matter, and to adjourn if necessary to provide that opportunity.
>
> [54] I am not convinced that it is necessarily correct to label an order that deals with specifics of custody and access in a manner different than what the parties specifically requested as jurisdictional error (see Brundrett v. Brundrett, supra, and Greenough v. Greenough, [2003] O.J. No. 4415 (Sup. Ct.)). The courts enjoy a broad statutory, and if necessary, inherent jurisdiction to act in the best interests of children, and should not feel constrained in their goal to fashion specific terms in an order that strive to achieve that goal, subject to ensuring procedural fairness.

[65] The child assessor recommended more time for Mr. Dixon should the children remain in Nova Scotia. She also recommended professional help to assist the parties with communication.

[66] I am satisfied that the children should be in a fifty/fifty parenting arrangement with the transition to occur Sunday evening at a neutral location. When the children are being picked up by Mr. Dixon, the transition shall occur at the McDonald's restaurant closest to Ms. Cole's home and when returned, they shall be met at the McDonald's closest to Mr. Dixon's home by Ms. Cole. In both

cases, each party may designate someone to meet the children or drop them off as the case may be.

[67] I have ruled in favour of an equal parenting arrangement to ensure the children can gain the additional benefit from having more time with their father. Fewer transitions will result in less opportunity for each parent to monitor the activities in the other home and less opportunity to involve the children in that activity.

[68] I have considered Mr. Dixon's case for primary care. However, maintaining a healthy relationship between the children, Ms. Cole and her new family remains an important goal in the children's best interests.

[69] As stated, allowing Ms. Cole to remove Mr. Dixon from the children's lives would be detrimental to their best interests. That decision would also result in the loss of an enriching life with extended family members in the Halifax region. It is a cost that the children do not need to pay.

[70] In contrast, I am satisfied that should Ms. Cole leave the region for work, Mr. Dixon will facilitate the children's involvement in her life and that of Ms. Cole's extended family in Nova Scotia.

[71] Should Ms. Cole leave Nova Scotia, the children will be in Mr. Dixon's primary care and the parenting time for Ms. Cole will be as proposed by her for Mr. Dixon, should the children have been permitted to move.

[72] Child support, effective September 1, 2014, will reflect the shared parenting arrangement and will be governed by s.9 of the Child Support Guidelines, P.C., 1997-469:

> Shared custody
>
> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and

> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[73] Should the parties be unable to agree on the application of this section, I will accept written submissions and rule on the issue. In addition, I retain jurisdiction to decide upon other details of parenting should that be necessary.

ACJ