SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *K.S.E. v. S.F.W.*, 2015 NSSC 66

Date: 20150304
Docket: *Halifax* No. SFHMCA-090537
Registry: Halifax

Between:

K.S.E.

Applicant

v.

S.F.W.

Respondent

Judge:	The Honourable Justice Beryl A. MacDonald
Heard:	December 15 and 16, 2014, in Halifax, Nova Scotia
Counsel:	Jennifer Reid for the Applicant S.F.W., Self-Represented

By the Court:

BACKGROUND

[1] On April 2, 2014 the Mother filed a Notice of Application pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s.9 (as amended). She requested sole custody of the two children born of her relationship with the Father, reasonable access to the Father, child maintenance prospective and retroactive to August, 2013, spousal maintenance and costs if the matter was contested.

[2] On August 21, 2014 the Father filed a Response to Application in which he requested the court order into effect the terms of a document which he called "Proposed Consent Control Relief Order". He attached that document to his Response to Application. In it he requested joint and shared custody of the children implemented in a week on/week off arrangement transitioning at 6:00 p.m. on Monday. There were other suggested terms for birthday and holiday access. Neither party was to pay the other child maintenance. There were suggested terms in respect to extracurricular activities, mobility and the sharing of child tax benefits. The Mother did not agree to consent to this "Order".

[3] The parties had been in a common-law relationship from approximately October 2007 until May 8, 2013. The children are now six and five years old. Prior to the parties' separation the Mother was a stay-at-home mother. After the parties' separation she had no employment and this continues. She receives social assistance.

[4] The Father had previously been employed until the fall of 2013 with RIM. In that employment he earned approximately $50,000.00 per year. His skills are in information technology and he is qualified to teach IT Infrastructure Library. He did take parental leave after the birth of each of the parties' children for the full 12 months but the Mother was also at home at that time.

CUSTODY/PARENTING PLAN

[5] The Mother has requested custody and primary care. Custody refers to the authority to make decisions for the child. Primary care refers to a parenting arrangement in which one parent provides care for significantly more time than the other.

[6] Joint custody requires both parents to agree about decisions that have significant or long lasting implications for the child or that impose responsibilities on a parent - for

example, decisions about physical or mental health, dental care, counseling, education, and enrollment in recreational activities, choice of child care provider and in some cases religious instruction and choice of school.

[7] When a court is asked to decide who is to have authority to make decisions for children and the parenting plan under which they will live, the court is directed to decide what is in the best interest of the child.

Best Interest

[8] Many have attempted to describe what is meant by the term "best interest". Judge Daley in *Roberts v. Roberts*, 2000 CarswellNS 372 paragraph 1, said:

> ...These interests include basic physical needs such as food, clothing and shelter, emotional, psychological and educational development, stable and positive role modeling, all of which are expected to lead to a mature, responsible adult living in the community...

[9] In *Dixon v. Hinsley* (2001) 22 R.F.L. (5th) 55 (ONT. C.J), at para. 46 the following appears:

> The "best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual, and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development...

[10] Several cases have attempted to provide guidance to the court in applying the best interest principle: See for instance *Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C); *Abdo v. Abdo* (1993) 126 N.S.R. (2d) 1 (N.S.C.A).

[11] In section 18 of the *Maintenance and Custody Act*, R.S.N.S.1989 c.160, as amended, the legislature has summarized what should be considered by a court when it is asked to determine what arrangements are in a child's best interest. I will only reproduce those I consider relevant to this case:

> (6) (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 parents' or guardians' 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 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 or guardian;…
>
> (i) The ability of each parent, guardian or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child;
>
> (8) in making an order concerning care and custody or access and visiting privileges 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 interest of the child,…

[12] Paragraph 8 does not suggest there is to be a presumption it is in the best interest of children to be parented by both parents in a joint custodial equal time sharing arrangement, although many strive to suggest this is so. The question is - what arrangement is in the best interest of children given their ages, stages of development, personalities, educational and other needs in the context of the ability of each parent to carry out his or her parental responsibilities and obligations?

[13] Because shared parenting provides significant contact between a child and both parents, many consider this to be the best parenting arrangement for every child. There are often many practical reasons why shared parenting is not in a child's best interest, geographical distance for example. In addition there are many parenting deficiencies, unresolvable conflict, for example, that may result in a finding that shared parenting is not in the child's best interest.

Shared Parenting

[14] In *Farnell v. Farnell*, 2002 NSSC 246 (N.S.S.C.), one of the early decisions that provided guidance about the factors to consider when applying the best interest principle to a request for shared parenting, Justice Goodfellow commented:

> [10] ...Shared custody rarely in my experience works and only seems to where there is present an environment where the children thrive when the children are able to fluidly move from one home to another by reason of parents who are

> mature in circumstances and reside in such close proximity that the children can go back and forth themselves, continue in the same school, continue with extracurricular activities, church or other activities that they would normally engage in. Such a situation is next to impossible to attain and continue when children live at long distances …

[15] Recent decisions, *Baker-Warren v. Denault*, 2009 NSSC 59 (N.S.S.C.), *Murphy v. Hancock*, 2011 NSSC 197 (N.S.S.C.) for example, suggest consideration of the following factors:

- impact of two residences upon the child's presently established relationships with a school, a day care facility or non-parental caregiver, friends, extended family and recreational activities. Will they be maintained or diminished? How will the parent help the child adjust to the changes required?

- whether there are significant differences in the residences and the lifestyle of the child when living with either parent;

- impact of transitions between residences upon the child and the parents. Will these have negative consequences for the child? How will the parents help the child adjust? Will these cause conflict between the parents? How can that be avoided? Can these transitions be accommodated within each parent's work schedule?

- availability of each parent, step parent (if there is step parent), or extended family members to personally care for the child and availability and willingness to provide care when the parent, in whose care a child is to be according to the schedule, is unavailable;

- whether there are significant differences in discipline technique, daily routines, value transmission, support for required medical, dental and educational interventions, and support for recreational activities;

- whether there has been conflict, including domestic violence, in the parents' relationship and its impact and potential impact upon the child;

- whether both parents' "parenting style" provides a "good fit" for development of the child's personality and interests;

To these I would add:

- What does the parent know about child development and is there evidence indicating what is suggested to be "known" has been or will be put into practice?

- Can the parent set boundaries for the child and does the child accept those restrictions without the need for the parent to resort to harsh discipline?

- Does the child respond to the parent's attempts to comfort or guide the child when the child is unhappy, hurt, lonely, anxious, or afraid? How does that parent give comfort and guidance to the child?

- Is the parent emphatic toward the child? Does the parent enjoy and understand the child as an individual or is the parent primarily seeking gratification of his or her own personal needs through the child?

- Can the parent examine the proposed parenting plan through the child's eyes and reflect what aspects of that plan may cause problems for, or be resisted by, the child?

- Has the parent made changes in his or her life or behaviour to meet the child's needs, or is he or she prepared to do so for the welfare of the child?

[16] Parents in a shared parenting arrangement must exhibit an ability to cooperate and jointly plan for their children. They must be able to do so on a continuous basis, far more frequently than is expected from parents who have other parenting arrangements. Conflict and the potential for conflict must be at a minimum. Each parent must respect the other and their value systems. Methods of discipline should not be substantially dissimilar. Parents must be able to communicate face to face. They must respond quickly to inquiries from the other parent about issues involving the child, focusing on the child's need not on the parent's issues. Routines in each household should be similar to ensure the child is not confused by or encouraged to become oppositional because of different standards and expectations in each home.

Conflict

[17] Conflict between parents does not necessarily mean they cannot be awarded joint custody or shared parenting. If there is sufficient indication of their ability to place the needs of the child before personal needs and to cooperate on issues of vital importance to the child these parenting arrangements may be appropriate. (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S.S.C.); *Rivers v. Rivers* (1994), 130 N.S.R. (2d) 219 (N.S.S.C.)

[18] It has been suggested that parents who have joint custody and shared parenting may be less likely to consider their parenting role to have been diminished and therefore these parents are less likely to withdraw from meaningful contact with their children. Continuing to respect the role and responsibility both parents have in fulfilling parental obligations may encourage parents to overcome existing conflict between them. These are suggestions found in reported decisions. However, joint custody and shared parenting must not be granted as a form of wishful thinking. The nature and extent of the conflict between the parties must be analysed to determine if joint custody and the requested parenting plan is in a child's best interest.

Credibility

[19] When witnesses have different recollection of events the court must assess the credibility of their statements. I adopt the outline for assessing credibility set out in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37:

> [36] There are many tools for assessing credibility:
>
> a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
>
> b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
>
> c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in ***Faryna v. Chorny***, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in

> those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
>
> d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution ***R. v. Mah***, 2002 NSCA 99 at paragraphs 70-75).
>
> e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. ***R. v. J.H.*** [2005] O.J. No.39 (OCA) at paragraphs 51-56).
>
> [37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See ***R. v. D.R.*** [1966] 2 S.C.R. 291 at paragraph 93 and ***R. v. J.H.*** *supra*).

[20] I may never know the truth about what happened. All I can do is apply the legal principles developed by our courts to assess "credibility". The action imbedded in this word is a direction to sort out reliable from unreliable information. What information is most persuasive?

[21] In preparing this decision I will not recite all of the testimony I have read or heard. I will refer to testimony that I believe best assists an understanding about why I have made this decision.

Factual Analysis

[22] After the parties separation the Father had regular access with the children including overnight access. The access was to occur in response to a schedule provided by the Father to the Mother but often, without notice, he did not pick up the children as expected.

[23] Early in July 2013 the Mother suggested they parent the children in a week on/week off shared parenting arrangement. I reproduce below the series of e-mails exchanged on July 30, 2013 that followed this request, editing out irrelevant material. These e-mails are attached to the Mother's affidavit Exhibit 2 and the Father's affidavit Exhibit 7. It is difficult to put them in exact order since many would have crossed in time. However, the basic messages are clear.

Father to Mother:

> Throughout June and July, (the children) were seeing me practically every day with very few exceptions. They would have supper with me every day, and spend every weekend with me. This practice was in the best interest of (the children) as it allowed them to maintain a relationship with me. Your arbitrary decision that my access to (the children) would be one week on and one week off has resulted in them not being able to see me at all. You are well aware I work full-time days, and that in order for me to take (the children) for a seven-day period would require childcare in my home from 6:15 a.m. to 4:15 p.m. for five of those seven days…… One week of child care would be $400. This is not affordable or practical, and it is not in the best interest of (the children) to have them in the care of a stranger for 50 hours a week…… By demanding week on and week off access you have denied (the children) a relationship with their father….. I am willing and able to continue the access schedule of picking them up every day after work for supper, and dropping them back to you in the evening, and having them stay with me every weekend….. In the event you are unwilling to revert to our previous schedule and continue to insist on week on week off access I will make an application to Family Court for an emergency custody hearing, as you have arbitrarily denied (the children) a relationship with their father……

Mother to Father:

> If you have plans on the weekend when you are supposed to have them, be responsible and get a sitter. Stop ignoring my text. If it is your time to have them, stop assuming they will stay with me. I'm trying to have a life too. This entire access schedule is for your convenience only. You don't pay me support. Come 7 PM, you can do whatever… you want….., Without having to get a sitter etc. All of these "no-shows" when in fact you're supposed to be picking up the kids, and totally ignoring my texts wondering if you're getting them or not, is disgraceful, wrote disrespectful and unacceptable. And needs to stop. When you don't like what I have to say, this is your reaction, I don't care if you have plans, gig or date. They are your kids too. You take them when it's your time. I had to cancel my plans because you failed to let me know you have plans. Not anymore. I am not planning my life around you. You will help me put them to bed three times a week too. (or I can leave). I need more help with them. And you get more time. Regardless of what you think, you are still required to pay maintenance.

Father to Mother:

> You did not answer my question:

Please advise if you are willing to revert to the previously enjoyed and practiced access schedule.

Mother to Father:

I will return to your schedule for now, only if you agree to stop avoiding my texts regarding our kids, take them even if you have plans (stop assuming I will keep them), "no-shows" have to end, three nights help with putting them to bed. I am involved with a lawyer, and access and maintenance will be reviewed and revised accordingly.

Father to Mother:

As you have indicated: "I'm involved with a lawyer, and access and maintenance will be reviewed and revised accordingly".
As such, I will not request any access to (the children) until a custody agreement offer has been put forth by your lawyer.
Until such time as there is written and signed a custody agreement, you can have 100% custody of "the children"…..
I will await communication from your lawyer and a signed custody agreement before I have any more access or visitation with (the children).
If you want support or maintenance, file for it in court. You are the one that decided to leave this relationship, you figure out how to deal with the consequences of your choice… Please advise your lawyer to move swiftly in this regard, as until such time as a custody agreement is made (the children) will not have access to me.

Mother to Father:

I went to a lawyer to get advice and know my rights. My intentions was and is not to go to court. Conciliation or mediation. No lawyers involved. I simply want a written agreement….. I want our children to be involved with you as much as possible…. I want what's best for them.

What about if we sit down and write up our own agreement for access. Have it witnessed and signed. Leave maintenance out of it. This is hurting the kids and us. I know for a fact that what you said about never seeing her kids again is untrue. I know how much you love them. And adore them. And they love you more. I cannot imagine you never seeing them again. Growing up without you. That would break all of our hearts.

Father to Mother:

> I am prepared to sever all ties with you and them. Too late to stop court. You went to legal aid, they will force court. You did this. Your choices your actions…. The kids are young enough that they will forget me in a year or two.

Mother to Father:

> This is YOUR choice to not see our kids for a couple of months. Your choice. I am not denying access. You are. Your refusing to see them. I'm with legal aid. It will be a slow process. This is out of my hands. You are punishing our kids. I agreed to Your schedule until things are formalized.

Father to Mother:

> You did this by getting a lawyer. I told you that I would work with YOU to negotiate custody etc., but I did not want this to go before the courts or lawyers. By engaging a legal aid lawyer you have forced us to go before the courts. As I told you before, if you place the custody and support issue before the courts, I will not request any access or visitation with (the children), and that you can have 100% custody.
> My only involvement with them as father if you go to court over this will be to sign a check once a month. The choice is yours. Go to court, and the only thing the kids will ever see from me is a check. Keep this out of court and the kids will have a relationship with me. The choice is yours, but neither you nor the courts can force me to have a relationship with (the children).
> All that can be forced on me is to pay for them.… If you force that through the courts, then that is all they will get, and they will never have a relationship with me, ever….. Your choice. You knew of the consequence when you engaged a lawyer. I will await your lawyer's contact.

[24] The Father did not see the children, nor did he ask to, until September 2013 on the date of the oldest child's birthday when he was invited by the Mother to spend time with both children which he did. He made no request to continue to have access.

[25] In March 2014 the Father sent the Mother an e-mail requesting "split" custody of the children. The Mother sent a proposal for access through her lawyer on March 28, 2014 (relevant portions of the letter are copied):

> ….. With respect to your request for immediate access, as you have not seen and have not asked to see the children since September 2013, it is important that there

> be a transitional period in re-establishing access to ensure that the children are comfortable.
>
> (The Mother) proposes that, on an interim without prejudice basis, you have access with the children every Saturday or Sunday from 12:00 p.m. to 4:00 p.m. with pickups and drop off to be arranged by yourself to and from (the Mother's) home. The first visit could take place this Sunday, March 30, 2014.
>
> The access will be conditional on your agreement that neither yourself nor any other adult present will use non-prescription medications, or abuse alcohol or prescription medications prior to or during your access with the children…

[26] This letter was sent to the Father at his e-mail address. His testimony is that the proposal was received late on Friday afternoon and so he could not respond to accept the suggestion he have access time with the children that Sunday. In his affidavit he comments upon his interpretation of the proposal (Exhibit 5, paragraph 28):

> "…. This strategy of sending me the offer of access late on a Friday afternoon, for me to have a lawyer review, and then reply, before end of business, to accommodate access that weekend, was an impossible task, and one that (the Mother) was aware would cause me to refuse her offer of access….."

[27] The Father did not recognize that the proposal could have been accepted commencing at a different date. The Father did not accept this proposal.

[28] The Mother heard nothing more from the Father until she went to pick up her children after school on a day in June 2014. At that time she was informed by one of the children's teachers that the Father was in the classroom reading a book to one of the children. The Mother had never been informed of the Father's intention to attend at the children's school. The Mother requested the Father to stop attending at the school because she had been advised and believed that his attendance was causing discomfort for the teachers in the school and confusion for the children. The Father ignored her request.

[29] On July 12, 2014 counsel for the Mother wrote to the Father asking that he not attend at the children's school. The proposal for access suggested in the March 2014 correspondence was again offered. The Father wrote back suggesting the parties sign a "Joint and Shared Custody Agreement" that he prepared. He suggested a week on/week off schedule with Wednesday as the transition day. He

included provisions for holiday parenting, mobility, extracurricular activities etc. and proposed neither party pay child support to the other. This proposal is similar to the parenting plan he has asked this court to put into effect. His proposal was rejected. Although the Mother at one time suggested a similar schedule she now rejected this parenting plan. The Father had not exercised significant parenting time with the children since August 2013 and the Mother was not confident he was in a position to parent them on a weekly basis.

[30] As interim access, until a court could decide what was in the best interest of the children, the Mother proposed access on Wednesday from 3:00 to 6:00 p.m. and access on Saturday and Sundays from 12:00 p.m. until 4:00 p.m. conditional upon the same terms as were requested in the previous proposals. The Father rejected this because he did not accept the need for the requested conditions nor did he accept that the children needed to be slowly reintroduced to his care. He proposed a schedule for August that would have placed the children in his care from 9:00 a.m. until 3:00 p.m. on August 8, 12,14,19,21, until 6:00 p.m. on August 9,10,16,17, on August 23 until August 24 at 6:00 p.m. and on August 26 until August 28 at 6:00 p.m. Not surprisingly the Mother rejected that suggestion.

[31] At an interim hearing set for this matter on August 29, 2014 the Mother proposed access between the Father and the children from 3:00 p.m. until 6:00 p.m. on Wednesday and every Sunday from 12:00 p.m. until 4:00 p.m. to provide reintroduction of the children to their Father who they had not seen for some time. The Father had failed to provide his affidavit to opposing counsel and as a result I did not continue the hearing to determine interim access. An adjournment was required. I told the Father I would order the access the Mother was prepared to provide so he could begin to have contact with his children. He refused. He informed me his new job, one he had just been interviewed for, would require him to work Wednesdays and most if not all Saturday and Sundays. He could not tell me when he could parent the children yet it was still his request the parties share week on/week off parenting. The affidavit he did file on August 21, 2014 provided no information about how he would parent the children. It did not describe his residence and where the children would sleep. It said nothing about the personalities of the children and how he would meet their needs. It said nothing about who would care for the children when he had to work. He had no alternate interim arrangements that he would accept to begin regularizing his contact with the children. He preferred to have no contact at all.

[32] The Father did provide information that his meeting with the children at their school could be accommodated by the school. However, he stopped meeting them there perhaps because I had cautioned him this may not be acceptable to the court. I cautioned him the court may draw a negative conclusion if he continued to refuse regularized contact and insist, in preference to the Mother's suggestion for contact, that he continue to meet the children at their school.

[33] In his affidavit filed as Exhibit 5 paragraph 26 the Father says:

> …(The Mother) was aware that due to my variable work schedule, including overnight shifts, that this type of arrangement (week on/week off) would not be possible for me. (The Mother) was unemployed at the time, and to the best of my knowledge is still so. There was no reason for (the Mother) not to co-operate with me and work on finding a custody schedule that worked with my work schedule. …

[34] Parents who have children must make arrangements to care for their children even when they work. The Mother is not required to organize her life, and the life of the children, around the Father's work schedule. If he was not going to commit to a consistent schedule this would affect her ability to access educational opportunities and personal services. She was not required to accept this uncertainty in order to ensure the children had opportunities to be parented by their Father.

[35] The Father did have 90 minutes of contact with the children in November and he has since agreed to several opportunities to have the children in his care. The Mother now proposes that the Father care for the children every second weekend from Friday after school (or when his work day ends presuming it ends early evening) until Sunday at 6:30 p.m. He has a new partner who may be sharing his residence with her two children. The Father's evidence about whether she lives full time in his residence was questionable given he also stated she has kept her own apartment. She is the person the Father suggests will care for the children when he is working. Because of the Father's previous description of his work schedule I question how much parenting the children will receive from their Father.

[36] The Father has not provided the court with his plan for the care of the children if they were to reside with him every second week. He has not described his residence or the community in which he lives other than to say he lives in a

three bedroom duplex. He does not indicate how the children will get to school or to any recreational events they are to attend. He has told me nothing about his present partner other than her apparent willingness to parent the children when he is working. She was not a witness in this proceeding. As a result I would be placing the children, for a considerable period of time, with a stranger to this court. I do know the children are now familiar with her and her children. Five people would be living in the Father's household when the children are present.

[37] Because the Father has not provided significant parenting to his children since August 2013, because his present relationship is relatively recent and because the court knows nothing about the Father's new partner, I do not accept she should be given, as a result of a court order, the responsibility she will have to parent these children every second week.

[38] The Mother did not provide details about her parenting plan and residence. However, she has been caring for the children since separation. She is on social assistance. I know her residence is small but adequate. It is the Father who had the burden of proof to convince me his shared parenting plan will work. He was content to leave the children to be parented by their Mother without contact with him for a significant period of time. He cannot now complain about her living conditions. Had he complained it would be his burden to explain why her living conditions are now inadequate. He has not done so.

The parties attempted to reach an agreement at a settlement conference but once the draft order was prepared it appeared the Father did not agree with much of the wording. His disagreements undermine his suggested consent to that agreement and as a result I am not bound by that agreement whatever its terms might have been. After reviewed the situation between the parties I am not satisfied all of the terms as drafted are in the children's best interest.

[39] The Father has filed three affidavits to which he has attached some relevant and some irrelevant material. I do not intend to take the time to categorize each of the attachments nor do I intend to remark on each of the paragraphs in his affidavits to explain to him why much of the material he has provided is irrelevant, is inadmissible opinion, is speculation, or is hearsay. I will however provide some examples that may be useful to his understanding.

[40] In Exhibit 5 paragraph 2 he complains that the Mother incorrectly completed the "Statement of Contact Information and Circumstances" in respect to his portion of that document and he highlighted the errors. These documents are just to assist the court in communicating with the parties and it is not unusual for errors to occur which later need to be corrected. The existence of those errors does not undermine a party's creditability or affect the court's determination about an appropriate parenting plan, child or spousal maintenance and thus this information is irrelevant.

[41] The Father takes issue with many of the statements the Mother made in her affidavit and claims they are inaccurate. However, most of this relates to the breakdown of the parties relationship, who lived where on what dates, and when the common law relationship commenced, none of which are relevant to the decisions I must make in this proceeding. These differences are not substantial and they do not challenge the Mother's credibility about issues that are of relevance in this proceeding.

[42] There are statements in the Father's affidavit that call into question his credibility and as one example I refer to paragraph 9 of Exhibit 5. The Father complains about the Mother's comment in her Parenting Statement that, "the Respondent was having regular access which ceased after July 19, 2013, as he had advised that he wished to sever all ties because I had sought legal advice." He says in paragraph 9 "this statement is not accurate and is solely the opinion of (the Mother). I request that this statement be revised to read as follows: "the Respondent was having regular access which ceased after July 19, 2013, due to irreconcilable differences." Courts do not revise statements parties make at the request of other parties. In addition the interpretation the Mother reached about the exchanged e-mails was correct. The Father was refusing to see his children because the Mother would not go along with his plan for their care and had sought legal advice. This what his e-mail stated. He cannot now seek to revise the interpretation understood by the Mother - an interpretation that would be accepted as accurate by any reasonable person reading his e-mail.

[43] In paragraph 5 of Exhibit 6 the Father states "I attended the school every schoolday during the month of June 2014 to see my children for a few minutes at their dismissal time. This became the only way for me to see my children as all attempts to negotiate with (the Mother) for access were unsuccessful." This is not an accurate statement about what happened between the parties. In fact the Father

made no efforts to negotiate. He told Mother what he wanted and would accept nothing less. The Mother made various suggestions about times when he could have access with the children on an interim basis until this hearing could be completed. The Father would accept nothing less than what he proposed in his plans. The price for his rigidity was he did not have contact with his children. He put his own need to have the parenting plan of his design ahead of the children's need to have a continuing consistent relationship with him. He tried to use his contact with the children as a "bargaining chip" to secure the Mother's consent to his plans. This decision was against the children's best interest and strongly suggests the Father does not know how to forgo his own wants, needs and desires to do what is best for his children.

[44] After the Interim Hearing the Father did accept some suggested parenting time perhaps as a result of my discussion with him at that Interim Hearing.

[45] Were it not for the Mother's conviction that it is important for these children to have contact with him and to be parented by him, I would have been persuaded there is little the Father can offer them as a parent. He was selfish enough to refuse to see the children at times suggested by the Mother because he could not see them when he wanted to. These children lost regular contact with their Father for a significant period of time as a result of his choices. I do not accept that he can now set aside his own needs in favor of those of his children. The Father is rigid and authoritarian in his view and the prediction for joint custody and shared parenting under such circumstances would be continual conflict. Joint custody and shared parenting is not in the best interest of these children.

[46] I accept the Mother's perspective that it is important for these children to develop their relationship with their Father even though the court is skeptical about his commitment to them. To develop that relationship, given their ages, I have decided they must be in his care somewhat more often than every second weekend and so I have provided for week day overnight access every week. If the Father does not exercise this opportunity when he could make arrangements to do so, this may be a further indication of his inability to organize his own life to have contact with his children.

Custody/Parenting Plan

[47] The Mother is to have custody and primary care of the children with access to the Father as described in the Parenting Plan attached as Schedule "A" to this decision. The terms and conditions that apply to the Plan are also contained in Schedule "A". I have insufficient evidence to conclude that either party has abused or will abuse alcohol or non-prescription drugs and as a result I have not included any terms referencing this topic in the parenting plan.

[48] In the Plan I have provided specific dates for access to commence knowing many of these dates will have gone by when the parties receive this decision. I have used specific dates so they will have a set commencement date from which to calculate the access schedule.

Child Maintenance

Father's Income

[49] The Father has IT skills that have, in some years, provided him with yearly income considerably above minimum wage. His income since 2008 is:

2008 - $38,873	2009 - $37,992	2010 - $19,415
2011 - $50,167	2012 - $49,366	2013 - $55,546

[50] The information the Father has provided for 2014 indicates from February 9, 2014 until August 2014 he was in receipt of EI. He did not provide information about the gross income he received from EI. He provided a statement showing the net amounts he received and they total $11,053.00. The EI program provides income assistance based upon insurable earnings. There is a ceiling on those earnings set at $49,500.00 At this level the maximum weekly gross income provided is $524.00 Total gross yearly income based on this amount would be $27,248.00 The Father did not receive EI in January and early February because of a severance payout he received from RIM. That severance is included in his 2013 income. Deducting $524.00 from the total gross yearly income for 5 weeks he could have received on EI reduces that income to $24,623.00. The Father worked with Randstad Canada from September 8, 2014. He provided a letter stating, "He works and average of 28 hours per week at a rate of $22 per hour. The end date of his contract is December 19, 2014. The Father did not produce any pay stubs

confirming what he did earn to the date of the hearing. Total gross income for the period of employment (15 weeks) for 28 hours per week at $22.00 per hour would have provided $9,240.00. Deducting the same 15 weeks at $524.00 per week from the potential EI claim and adding the earned income of $9,240.00 results in a 2014 gross total income of $26,003.00

[51] Section 19 of the Federal Child Support Guidelines permits the court to impute income to a person who is "unemployed or underemployed". This provision requires a court to consider the amount of income a parent could earn if he or she was working to capacity. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as the availability of work, the ability to relocate and other obligations

[52] Courts in Nova Scotia and some other provinces have concluded that this section of the guidelines is not confined to circumstances where a parent deliberately seeks to evade his or her child support obligations or recklessly disregards his or her children's financial needs while pursuing his or her personal choice of employment or lifestyle. It also applies to those who have not taken reasonable steps to secure or maintain employment commensurate with his or her age, health, education, skills and work history.

[53] The discretionary authority to impute income must be exercised judicially in accordance with the rules of reason and justice. It is not to be exercised arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income. The burden of proof rests with the person seeking to impute income.

[54] I am not satisfied the Father was as active in pursuit of employment as he could and should have been. His historic pattern of income suggests he has the ability to earn considerable more than the $26,000 it appears he received in 2014. He has been underemployed. I impute 2014 and 2015 total annual income in the amount of $35,000.00 per year recognizing that steady employment may be more difficult to find than it had been and his work may be primarily contractual with periodic unemployment.

Prospective Table Guideline Child Support

[55] The Father has provided material indicating he cannot afford to pay child maintenance. He has a new partner but it is unclear whether she is presently living in his residence or only does so periodically. What is clear is that neither she nor her children are his "legal dependents". He has not filed an application for undue hardship. As a result the child maintenance guidelines are clear – table guideline child maintenance is to be based upon the Father's total (gross) annual income. Absent a finding of undue hardship "inability to pay" is not a consideration.

[56] The Father's total annual income is $35,000.00. The Father must pay the Mother $505.00 per month for table guideline child maintenance commencing March 1, 2015.

Retroactive Table Guideline Child Maintenance

[57] The Mother has requested child maintenance commencing August 1, 2013 continuing until February28, 2015. This includes a period before the commencement of her application. Although the Supreme Court of Canada decision in *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra,* 2006 SCC 37 (*DBS*) dealt with a *Divorce Act* variation application requesting retroactive child support, not an originating application, as is the case here, the factors it posed for consideration are often referenced in originating *Divorce and Maintenance and Custody Act* proceedings .

[58] The majority in *DBS* confirmed that the decision to grant a retroactive award is discretionary. Justice Bastarache, writing for the majority, described various issues and factors to be considered prior to making a retroactive award. Those are:

1) whether there is or is not an existing court order or agreement
2) status of the child/children
3) delay by the recipient in seeking the award
4) conduct of the payor parent
5) financial circumstances of the child/children
6) hardship imposed by a retroactive award

[59] The rationale for the Supreme Court's decision to confirm the court's discretion when considering a retroactive award is described in paragraph 95:

> [95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child-support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a freestanding obligation to support one's children must be recognized, it will not always be appropriate for court to enforce this obligation once the relevant time period has passed.

Court Order

[60] In this proceeding there was no existing court order until the Interim Order was granted.

Status of the Child

[61] The children, who are the subject of these proceedings, are "dependent children" as that term has been defined in the *Maintenance and Custody Act* and they are therefore entitled to child maintenance.

Delay

[62] In his discussion about delay Justice Bastarache said in *DBS:*

> [101] Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont. Gen. Div.), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.

[63] As a result of the exchange of the previously referenced e-mail on July 30, 2013, the Father knew or should have known that the Mother wanted him to pay child maintenance. The Mother's application was filed August 2014. Given the parties separated in the spring of 2013 there was no unreasonable, or indeed any, delay by the Mother in requesting child maintenance from the Father.

Conduct of the Payor

[64] In *DBS* the Supreme Court confirmed that blameworthy conduct by a payor is a factor to consider in an application for a retroactive award. In paragraph 106 of *DBS* blameworthy conduct is described as "anything that privileges the payor parents' own interests over his/her children's right to an appropriate amount of support". It encompasses such actions as:

- hiding income
- intimidating the recipient parent for the purpose of preventing her/him from bringing an application
- misleading the recipient into believing support obligations are being met when he or she knows that they are not
- consciously choosing to ignore support obligations

[65] The Father has known since July 30, 2013 that the Mother was requesting that he pay child maintenance. In his July 30, 2013 e-mail he told her "If you want support or maintenance, file for it in court." This was a clear indication that he did not intend to provide child maintenance until he was ordered to do so. He also wrote in his e-mail:

> "As I told you before, if you place the custody and support issue before the courts, I will not request any access or visitation with (the children), and that you can have 100% custody. My only involvement with them as a father if you go to court over this will be to sign a cheque once a month."

This was clearly his attempt to intimidate the Mother. The Father's conduct is blameworthy.

Financial Circumstances of the Children

[66] The requirement to examine the children's financial circumstances was reviewed by Justice Bastarache in *DBS* and he said:

> [110] A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavor to ensure that their children receive the support they deserve when they need it most. But because this will not

> always be the case with a retroactive award, courts should consider the present circumstances of the child — as well as the past circumstances of the child — in deciding whether such an award is justified.
>
> [111] A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate…
>
> [113] Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her: see *S. (L.)*. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

[67] I do not consider the direction to examine the financial circumstances of the children to suggest there must be evidence they have "gone without" because appropriate child maintenance has not been paid. However, in this case, given the financial circumstances of the Mother there can be little doubt about the children's need for financial support from their Father.

Hardship

[68] In *DBS* the court directed that "a broad consideration of hardship" is appropriate. One essential question is whether there is a capacity to pay the retroactive award taking into account the ongoing child maintenance payments and

the payor's legitimate requirement for sufficient financial means to support himself and those to whom he owes a legal duty of financial support. A payor also should have the financial means to exercise the parenting considered appropriate in a parenting plan. This requires, among other expenditures, those for housing, food and transportation that may not be required in similar amounts by a single person who has no financial dependents.

[69] The status of the Father's relationship with his present "girlfriend" is unclear. He testified she maintains her own residence but he expects her to look after the children when he cannot. This suggests they will be living in a common household. Nevertheless this relationship is relatively recent and he has no legal obligation to provide financial support to her or to her children.

[70] The Father's expenses can exceed his present income but I have imputed income to him because I expect he can be more frequently employed than he has been. While he may not be able to immediately pay a retroactive award it can be structured to be paid over time.

[71] Hardship is not a reason to deny an award in this case.

[72] In *DBS* the majority decided that if a retroactive award is justified there are three possible commencement dates:

1. The date when the payor was given "effective" notice that child support or a change in child support was being requested. Effective notice "does not require the recipient parent to take any legal action; all that is required is that the topic be broached."

2. If there is delay and the matter has not been adjudicated upon, even where effective notice has been given, "it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent."

3. However, the presence of "blameworthy" conduct by the payor will "move the presumptive date of retroactivity back to the time when circumstances changed materially.". As a result, the date when the total income of the payor increased may be an appropriate date for the beginning of the retroactive order.

[73] The Supreme Court addressed the quantum to be awarded retroactively and agreed that the quantum must fit the circumstances. "Blind adherence to the amounts set out in the applicable Tables is not required ---- nor is it recommended" (para.128). The presence of undue hardship can yield a lesser award.

[74] By July 30, 2013 the Father had effective notice that the Mother requested his payment of child maintenance. She now asks the payments begin as of August 1, 2013. The Father had income in 2013 from which he could have paid child maintenance. Based upon his 2013 total annual income the required payment would be $776.00 per month for a yearly total from August to December of $3,880.00. In 2014 his total annual income has been imputed at $35,000.00 requiring a monthly payment of $505.00 for a total yearly amount of $6,060.00. For January and February in 2015 he will owe $1,010.00. As a result the total amount that will be categorized as retroactive child maintenance is $ 10,950.00. This is to be paid in installments of $200.00 per month until paid in full. When this amount is added to his ongoing child maintenance he will be required to pay $705.00 per month.

[75] No later than June 1st of each year, the Father must provide the Mother a copy of his income tax return, completed with all attachments, even if the return is not filed with the Canada Revenue Agency, and also provide all notices of assessment prepared by the Canada Revenue Agency for that return, immediately after the notice is received.

[76] The payment of maintenance is to be enforced through the Maintenance Enforcement Program.

Spousal Maintenance

[77] The Mother requests spousal maintenance. The evidence does not provide enough information to permit a careful analysis of the basis for her entitlement. I know nothing about her level of education, skills training or work history prior to her relationship with the Father. I know she has a child from a previous relationship for whom she receives no child maintenance. Certainly during her relationship with the Father she was completely financially dependent upon him. This would form the basis of a non-compensatory entitlement to spousal maintenance.

[78] Although a spouse may be entitled to receive spousal maintenance, the ability of the payor to pay the amount requested, or any amount, is to be considered. In this case counsel did provide a range of quantum suggested by the Spousal Support Advisory Guidelines. However, that calculation did not use the income I imputed to the Father. I have not calculated new numbers based upon the Father's imputed income because the numbers generated by the Spousal Support Advisory Guidelines do not mean the Father can afford to pay the suggested amounts.

[79] I have required the Father to pay significant retroactive child maintenance. This will take up any financial surplus he can generate at this time. As a result he does not have the ability to also pay spousal support.

_____

Beryl A. MacDonald, J.

Attached: Schedule "A"

Schedule "A"

PARENTING PLAN

Custody

1. The Mother shall have custody of the children meaning the Mother has sole authority to make decisions that have significant or long lasting implications for the children or that will impose responsibilities on a parent - for example, decisions about physical or mental health, dental care; counseling; child care; education and, subject to paragraph 23, recreational activities.

Primary Care/Access

2. The Mother shall have primary care of the children.

Access/Parenting Time

General Terms

3. When access ends the children are to be returned to their Mother's residence or to their school or child care provider whichever is appropriate depending upon whether the children are in school or are to receive child care from a child care provider.

4. It is expected the Father will pick up the children from the Mother's residence. If the Father can pick up the children at the end of the school day, from their child care provider or earlier than the pick-up time described in this plan he may do so provided he has notified the Mother of this change no later than 12:00 p.m. on the day before his access is to begin.

5. Holiday and other special time arrangements for both parents shall cause the regular schedule to be suspended. If the holiday or special time falls on the Father's Wednesday access his access will resume the following Wednesday. If the holiday or special time falls on the Father's weekend access time and places the children in the Mother's care, the regular schedule is to resume with the children to be in his care on the weekend after the holiday or special occasion.

6. The Mother is not required to rearrange the access/parenting time schedule because the Father is unable for any reason to comply with the schedule. She may consent to a change of schedule should she wish to do so.

Regular Access

7. Commencing March 4, 2015 the Father shall have access every Wednesday from 4:00 p.m. until 8:45 a.m. Thursday.

8. Commencing March 6, 2015 the Father shall have access every second weekend from Friday at 4:00 p.m. until Sunday at 6:30 p.m.

Long Weekends with a Monday Holiday

9. If because of the regular access schedule the children are in the Father's care on a long weekend with a Monday holiday the children shall continue in his care until 6:30 p.m. of that Monday.

Mother's/Father's Day

10. Regardless of the regular access schedule the children shall be in the care of the Father on Father's day from 9:00 a.m. until 6:30 p.m. and in the Mother's care on Mother's day from 9:00 a.m. and if the children are in the Father's care because of the regular access provisions the children will not be returned to the Father's care that Sunday.

Easter Holiday

11. Commencing 2015 and in all odd numbered years the Father shall have access with the children from 4:00 p.m. on Thursday at the beginning of the Easter school break until Tuesday morning at 8:45 a.m.

12. Commencing 2016 and in all even numbered years the Mother shall have the children in her care for the Easter school break.

Christmas Holiday

13. Commencing 2015 and in all odd numbered years the Mother shall have the children in her care from the beginning of the Christmas school break until December 26 at 12:00 p.m. when they are to be in the care of the Father until 6:30 p.m. January 1.

14. Commencing 2016 and in all even numbered years the Father shall have the children in his care from the beginning of the Christmas school break until December 26

at 12:00 p.m. when they are to be in the care of the Mother until the resumption of the regular schedule after January 1.

March School Break

15. Commencing 2015 and in all odd numbered years the Mother shall have the children in her care for the week days of the March School Break. The regular access schedule continues to apply to the weekends before and after the Break.

16. Commencing 2016 and in all even numbered years the Father shall have the children in her care for the week days of the March School Break. The regular access schedule continues to apply to the weekends before and after the Break.

Summer School Break

17. Each parent is to have the children in his or her care for two weeks, consecutive or non-consecutive during the summer school break.

18. In odd numbered years the Mother is to have first choice of that two week period and in even numbered years the Father is to have first choice.

19. The parent with first choice must notify the other parent of his or her choice, including the time when the child will be picked up and returned, on or before April 30 of each year and the other parent must provide notice of his or her choice on or before May 15th of that same year.

Children's Birthdays

20. The parent who is not caring for the child on that child's birthday is to have parenting time with that child from 4:00 p.m. until 6:30 p.m. on that day.

21. If the Mother is not caring for the child on that child's birthday she shall provide the transportation to have the parenting time provided to her on the child's birthday.

Additional Access/Parenting Time/Changes

22. Additions, deletions, and changes to this parenting plan may be made upon agreement of the parties in writing and an exchange of e-mail confirming clear acceptance of the proposed change is an "agreement in writing" for this purpose.

TERMS and CONDITIONS

Recreational and Other Activities

23. The Mother shall not schedule an activity for a child/children (such as but not limited to, organized sports, lessons, recreational activities, or social activities such as birthday parties or sleepovers) during the time that child/children is/are scheduled to be in the care of the Father without his consent, which shall not be unreasonably withheld. The Mother shall consult with the Father in advance of scheduling these activities before indicating to the child/children whether or not he/she/they is/are attending that activity.

24. The Father is not required to contribute financially to any recreational activity in which a child is enrolled unless he agrees to contribute but his agreement to contribute shall not be unreasonably withheld.

25. When the Father has the children in his care he must ensure they attend all recreational activities he has agreed they are to attend.

Day to Day Decisions

26. With respect to daily decisions, not those involving significant or long lasting implications for the children, and including non-emergency medical care, the parent who has care of the children according to the parenting plan is to be the decision-maker with the other parent being advised about non-emergency medical care decisions made.

Emergency Decisions

27. With respect to emergency decisions, the parent who has care of the children according to the parenting plan is to be the decision-maker with the other parent being advised as soon as possible about the emergency and the decision made.

Right to be Informed

28. The Mother must inform the Father about any significant changes, problems or recommendations relating to the children's physical and mental health, dental care, physical and social development, and education including the responsibility to send a copy of the child's school progress reports, and all written reports received from service providers about changes, problems or recommendations.

Contact Information About Service Providers

29. The Mother must provide the Father with the name, address, telephone number, and other contact information for the persons or institutions providing services to the children - for example, the child's physician, dentist, therapist, teacher, and child care and recreational provider and she must update him if there are any changes.

Transportation

30. Unless the parenting plan states differently, the Father is to provide all transportation (picking up and returning children) required to comply with the details of the parenting plan.

Parties' Addresses/ Contact Information

31. The parents must provide each other, and continue to provide each other, current addresses, telephone numbers, and e-mail addresses and all other contact information.