IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Lockhart* v. *Lockhart*, 2008 NSSC 271

Date: 20080916
Docket: 1204-004666
SKD-055825
Registry: Kentville

Between:

Eloise Gerene Lockhart

Petitioner

- and-

Anthony William Lockhart

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	August 25, 2008 in Kentville, Nova Scotia. Oral decision on August 28, 2008
Written Release:	September 16, 2008
Counsel:	Jean Dewolfe, Q.C., Solicitor for the Petitioner Christina Lazier, Solicitor for the Respondent

BY THE COURT:

A. Introduction

[1.] Eloise and Tony Lockhart are blessed with three children - age 10, age 7, and age 6. With no history of discord or notice, Mr. Lockhart left the home in October 2007. Ms. Lockhart had, for at least six years, been the stay-at-home care giver, and Mr. Lockhart a full-time teacher. Both are loving, capable and involved parents.

[2.] This decision is in respect of three interim applications: (1) Ms. Lockhart's application of February 4, 2008, for interim custody, child and spousal support, heard on March 5 and resulting in an interim parenting and support order, and an order for a custody assessment report with a return date of June 3; (2) Ms. Lockhart's application of March 31 for permission to relocate with the children to her parents' home near Oxford, Nova Scotia; and (3) Mr. Lockhart's application of May 13 for primary care of the children.

[3.] The Court ordered parenting assessment was received on July 31st. The June 3rd chambers date was rescheduled to August 13th chambers docket. The August 13th hearing was adjourned to August 25th to provide a full day for the hearing. I have considered the parenting assessment report, all affidavits filed, Counsels' opening submissions, the extensive cross-examination on the report and those affidavits on Monday, and the written submissions received last night and this morning. Monday's hearing went late into the evening. Because this decision was just completed, I reserve the opportunity to correct grammatical errors, and clean up inarticulate statements, without changing the reasons and result.

[4.] Specifically, the evidence consists of:

a) the Court ordered custody assessment prepared by Neil Kennedy, upon which he was cross-examined by both counsel;

b) the Affidavit of Kevin Mason (a social worker who has provided weekly counseling to Ms. Lockhart and the children from January 2008). Mr. Lockhart's counsel objected to admission of opinion evidence from Mr. Mason because of its late filing contrary to CPR 31.08. I agreed and edited his affidavit to delete opinions and recommendations. He was cross-examined on the balance of the affidavit;

c) Ms. Lockhart's father's affidavit upon which he was cross-examined;

d) three Affidavits of Ms. Lockhart, her Statement of Financial Information, Statement of Property and current financial information, upon which she was extensively cross-examined; and

e) three Affidavits of Mr. Lockhart, his Statement of Financial Information, Statement of Property and current financial information, supplemented by direct oral evidence and followed by cross-examination.

[5.] This decision is divided into three parts: first, an outline of the law; second, my overview of the evidence; and, third, application of the evidence to the law.

B. The Law

[6.] The legal principles begin with Section 16 and 17 of the *Divorce Act*. The analytical framework for any decision involving parenting in which one of the parties proposes to move begins with the Supreme Court of Canada's 1996 decision in ***Gordon* v. *Goertz***, [1996] 2 S.C.R. 27.

[7.] Section 16 of the *Divorce Act* authorizes courts to make orders respecting parenting. Four subsections are relevant.

[8.] First, subsection 8 provides that in making a parenting order, the Court shall take into consideration only the best interests of the children as determined by reference to the condition, means, needs and other circumstances of the children.

[9.] Subsection 9 provides that 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.

[10.] Subsection 10 contains the only explicit principle of assistance in determining what is meant by the best interests of children. The subsection is headed "Maximum Contact" and reads:

> "in making an order, 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."

[11.] Subsection 7 states the Court may include in an order a term requiring any person who has custody and who intends to change the place of residence of the child to notify, at least 30 days before the change or within such other period as the Court may specify, any person who is granted access of the proposed time of the change and new place of residence.

[12.] Section 17 of the *Divorce Act* deals with applications to vary, rescind or suspend orders, including custody and support orders.

[13.] In Paragraph 9 of ***Gordon* v. *Goertz***, Justice McLaughlin, (now Chief Justice) writes that

the principles that govern applications to vary apply to mobility or relocation applications. The *Act* directs a two-stage inquiry: first, the Court must be satisfied that a change in circumstances has occurred since the last order. If the Court is so satisfied, the Court must then enter into consideration of the merits of the application and make the order that best reflects the interests of the children in the new circumstances.

[14.] With regards to the first stage of the inquiry - the so-called "threshold test" of whether there has been a material change in circumstances, Justice McLaughlin wrote:

> "What suffices to establish a material change in circumstances of the child? Change alone is not enough; the change must have altered the child's needs and [the] ability of the parents to meet those needs in a fundamental way. Moreover, the change should represent a distinct departure from what the Court could reasonably have anticipated in making the previous order."

[15.] And at Paragraph 13 she wrote:

> "It follows that before entering on the merits of an application to vary a custody order, the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or of the ability of the parents to meet the needs of the child; (2) which materially affects the child; and, (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."

[16.] Assuming the Court is satisfied there has been a material change in circumstances, a judge must embark upon a fresh inquiry as to what is in the best interests of the children, having regard to all of the relevant circumstances relating to the children's needs and the ability of the respective parents to satisfy them.

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

[18.] The inquiry does not begin with a legal presumption in favor of the custodial parent. The Supreme Court rejected any legal presumption in favor of the custodial parent and substituted instead a principle of great respect and the most serious consideration for the view of the custodial parent - a principle which is something lesser than a presumption, but more than the equal footing parents share in non-mobility cases.

[19.] Each case turns on its own unique facts. The only principle is the best interests of the children in the particular circumstances of the case and consideration of a non-exclusive list of enumerated factors.

[20.] The focus is on the best interests of the children and not the interests or rights of the

parents.

[21.] The enumerated factors that a judge should consider include:

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

b) the existing access arrangement and the relationship between the children and the access parent;

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

d) the views of the children, when appropriate;

e) the custodial parent's reasons for moving, but only in exceptional cases where it is relevant to that parent's ability to meet the needs of the children;

f) the disruption to the children by a change in custody; and,

g) disruption to the children consequent on removal from family, schools and the community.

[22.] With respect to these principles, some Courts of Appeal and academics have made the following observations.

[23.] If there is a residence restriction in the Order to be varied, Courts of Appeal are divided on whether this places a burden of proof on the custodial parent to prove that the move is in the child's best interests. In my view the existence of such a restriction is a factor, but only in the context of whether the proposed change is in the best interests of the children. It does not create a special burden.

[24.] Most Courts of Appeal differentiate between situations in which one of the parents is a primary care giver from those circumstances where both parents have a shared parenting arrangement. In this case, the difference is important. More than one of my colleagues has attempted to define the difference. Some Courts do not bother distinguishing between shared and joint custody and focus on the substance of the parenting arrangement rather than the form. Shared custody involves a more equal division of physical care as well as decision making. Shared custody really only works if the parents can communicate, cooperate and share similar lifestyles as well as similar parenting philosophies. Otherwise, the disruption in a child's routine from the different living environments will likely affect the child adversely.

[25.] In this case, Mr. Lockhart states that, during cross-examination, Ms Lockhart agreed that

prior to separation they had co-parented. The word "co-parenting" was not defined in the question or the answer. Co-parenting is not synonymous with shared custody. A review of the case law shows that the word means different things to different people - lay persons, lawyers and judges. A quick review of the text **Child Custody Law and Practice** by James McLeod, chapter 8, shows that it is used to describe arrangements classified as joint, parallel and shared custody. For examples, see ***Celotti*** 2007 CarswellOnt 4137, where it is used in reference to a joint custody arrangement; ***Baerken* v. *Cahuzac*** 2006 NSSC 286, where it is used in reference to an interim joint custody application; ***Ursic*** 2007 CarswellOnt 694, where it is used in reference to a parallel parenting arrangement; and, ***Armstrong* v. *Bojin*** 2006 CarswellOnt 4378, where it is used in relation to a shared custody arrangement.

[26.] I accept that it would not describe a sole custody arrangement, but I stop short of describing it as meaning only equal parenting or excluding arrangements where time, duties, and roles are not equal. Specifically, the word's meaning does not preclude circumstances where one parent is a primary care giver.

[27.] Most Courts of Appeal recognize the positive effect on children of being cared for by a well functioning, happy custodial parent.

[28.] Despite comments in ***Gordon* v. *Goertz*** to the effect that the custodial parent's reasons for moving are only relevant in exceptional circumstances, it is clear that, because of the *Divorce Act* and the Supreme Court's direction that courts balance the wishes of the custodial parent with the principle of "maximum contact", courts are obliged, as part of the balancing analysis, to determine whether the wishes of the custodial parent are reasonable in the totality of the circumstances. This is not to say that custodial parents are not entitled to lead their life after separation in whatever way they choose to promote their own interests. Nor does it mean that a custodial parent should be prevented from moving to accommodate the needs of children, or that the non-custodial parent should be compelled to move (see ***Burns v. Burns*** 2000 NSCA 1).

[29.] Some commentators have suggested that case law provides little guidance because of the broad discretion given to trial judges to determine issues on the unique facts of each case, subject only to the "nebulous" test of "best interests". While one can find a decision which will justify almost any result, mobility decisions would not be improved by rigid guidelines or rules stymieing a court's ability to assess each case on its own unique facts. Mobility cases are unlike child support cases.

[30.] The current (2007) edition of **Annual Review of Family Law** by James MacLeod and Alfred Mamo, makes the following observations respecting mobility cases:

> 1. In deciding whether to approve or deny a proposed move, the Court should balance the benefits and detriments of allowing the move against the benefits and detriments of refusing the move.
>
> 2. Most parenting assessors appear inclined to the view that it is in the best interests

of children for parents to live in close proximity to each other unless it is not possible in the circumstances.

3. The fact that parties share joint custody does not prevent a primary care giver from moving.

4. The existence of an agreement or court order which restricts freedom to move or provides for notice before moving does not establish a presumptive rule against moving.

5. The effect of children's wishes to move or stay depends largely on the children's age and maturity.

6. A short distance move usually has insufficient effect on children's relationship with the stay behind parent to induce a Court to prevent the move.

7. The children's interests usually have little to do with a proposed move. Most parents want to move for personal, career or employment reasons and, not unnaturally, want to take their children along. The Court's task is to balance a parent's right to move ahead with his or her life against the other parent's right to continue his or her relationship with the children. Most mobility cases, by necessity, involve a comparison of the benefits of the proposed move with the extent of the disruption in access. Regardless of the reasons for the move, the decision to allow or deny relocation must be focused on the pros and cons to the children, not by reference to the interests of the parents.

8. The Court is unlikely to approve a proposed move if it is satisfied that the parent proposing the move will use the opportunity to frustrate or deny access to the other parent.

9. The Court is inclined to deny a proposed move if a parent seeks permission to move prematurely or with a poorly thought out plan.

10. Courts allow moves that are proposed in good faith and not intended to frustrate access so long as the primary care giver parent is prepared to accommodate the interests of the children and the access parent by restructuring access and, where appropriate, the increased cost of access.

[31.] Some courts have addressed the issue of whether it is appropriate or relevant to ask the question of whether the custodial parent will move without the child. Professor Rollie Thompson, in **Ten Years After Gordon: No Law, No Where** (2007) 35 RFL (6th) 307, wrote the following under the subheading "The Irrelevant Question: Will You Move Without Your Child?":

"In the recent *Spencer* appeal, [2005 ABCA 262] the Alberta Court of Appeal broached

an important issue, the perennial question asked of the moving parent: "will you move without your child?" For the court, Paperny J.A. pointed out the problems with this question:

> "In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with [the] children, he or she raises the prospect of being regarded as self interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children", the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents."

In the result the Alberta Court of Appeal allowed the move and the mother was permitted to move from Calgary to Victoria.

The Quebec Court of Appeal has gone further and described this question as "irrelevant" in ***F.H.* v. *V.J.*** [2003 JQ 671]. The mother there had given the typical response that she would not go back to France without her child and the trial judge had then rejected the move, as it was better for the child to remain in Quebec with two parents. The appeal was allowed and the move permitted.

> . . . .
>
> Few custodial parents can face the prospect of life without their children, especially a primary caregiver, and thus we know the answer that will usually by given. By not asking the question, we do not lose information and there is less unfairness to the custodial parent."

[32.] The following general principles regarding parenting are relevant to mobility cases:

> 1. While access is the right of the child and turns on the child's interests and not on the parent's interests, there should be regular and frequent access unless a parent has forfeited the right by misconduct or by conduct that poses a risk to the child. Access arrangements should be structured to take into account both the parents' and the children's schedules.
>
> 2. As a general rule it is in the best interests of a child to develop and maintain a

relationship with both parents. Access disputes often focus on why a Court should not maximize contact between children and the non-custodial parents.

3. Access arrangements are never static. Children's needs and tolerances evolve over time and access should evolve to reflect those changes.

4. Access may be denied or limited if there is no apparent benefit to the child, or if a child cannot handle continued contact with a parent, or if a child can handle only limited contact. Access should reflect a particular child's tolerances given their age and circumstances.

C. The Evidence

Neil Kennedy

[33.] Neil Kennedy is a social worker appointed by the Court in March 2008 to make a Custody and Access Assessment. His report is the result of his attendances and interviews with the parents, the children in each parent's home, and collateral sources.

[34.] I begin with an explanation of the purpose of Custody and Access Assessments. Not all assessments have the same purpose.

[35.] Some assessments are ordered to deal with specific clinical issues, often of an emotional or psychological nature, or with allegations for which specialized expert opinion is necessary.

[36.] Others are ordered so as to provide the Court with impartial empirical observations and analysis, of a more in-depth nature than can be obtained by viva voce evidence in a courtroom, as to the condition, means, needs and other circumstances of the children and the capacity of the parents to fulfill the children's needs. This second or latter purpose has many additional benefits: it sometimes assists parents in resolving issues before Court; it keeps children out of Court; it often reduces the necessity for evidence that would otherwise be presented in Court in an adversarial manner; it saves time; and it reduces the necessity and impact of credibility assessments that arise from "he said-she said" testimony.

[37.] The pure adversarial approach to the resolution of family issues, particularly issues of parenting, is not constructive. The adversarial approach is less likely to result in the fairest solution, and is more likely to create the atmosphere of animosity that interferes with the ability of the parents to co-operate in their joint ongoing involvement in the lives of their children.

[38.] Sometimes custody assessment reports contain recommendations. Some

recommendations are obvious from the observations reported. Some reports contain recommendations that do not include all of the factual circumstances or legal considerations that judges are required by law to consider. While sometimes helpful, recommendations are not always necessary. None of these limitations detracts from the value and importance of the assessors' investigations and observations.

[39.] In the case at bar, there is no record as to why Justice Moir ordered an assessment, or whether it was his independent determination, or at the request of counsel. There is no evidence in the file or in the report, of any specific clinical issue that would require an assessment by a specialist. The Order for the assessment was made before Ms. Lockhart's application to relocate the children to Oxford. It is apparent from the report and cross-examination that, when he carried out his investigation, Mr. Kennedy was aware of Ms. Lockhart's desire to move, even though he was not aware of her application.

[40.] Of concern in considering the weight to put on the"recommendations" part of the report, is the fact that, in his assessment as evidenced in his report and highlighted on cross-examination, Mr. Kennedy did not consider all the relevant legal principles mandated by ***Gordon* v. *Goertz*** - in particular, the "great respect" to be given to the custodial parent's view and needs. Nor did he consider the economic factors that motivated the application to relocate. This concern does not detract from the value of his impartial and professional conclusions respecting the family history and dynamics, Mr. Lockhart's concerns about Ms. Lockhart's parenting, and the interaction and state of mind of both the parents and the children, observed in more natural settings than this courtroom.

[41.] In this case, Mr. Kennedy acknowledges that, while he was aware that Ms. Lockhart was in some crisis with respect to finances, until he heard the opening oral statements of counsel, he did not consider, and was not qualified to consider, the nature and magnitude of those financial issues and how they might or should impact on the court's decision.

[42.] It is his observation that both Ms. Lockhart and Mr. Lockhart are excellent parents. He was impressed with both. He confirmed that Ms. Lockhart has been the primary care giver for the children, ages 6 to 10, for at least six years, and has done her job well, and that Mr. Lockhart has been actively involved in the lives of the children.

[43.] He was advised by Mr. Lockhart of the many concerns Mr. Lockhart had about Ms. Lockhart's parenting, including issues related to her mental health, "bad mouthing" him, interfering with his access, denigrating or maligning him in front of the children, and her inability to effectively manage the children. Mr. Kennedy found nothing to support any of these concerns.

[44.] Mr. Kennedy noted that initially Ms. Lockhart appeared to have been shocked and stressed by the separation that had not been foreseen by her. He states that "this was not a couple at odds before the separation". Mr. Lockhart's leaving of the matrimonial home, to move in with a fellow teacher and her two young children, was a "loss" to the children of their Dad.

[45.] Mr. Kennedy outlined the effect on Ms. Lockhart and the children. He noted that Ms. Lockhart appropriately entered into counseling for herself and the children. He concluded that the counseling had benefitted Ms. Lockhart and the children, and that they were now well-adjusted to the separation. He found no evidence in his dealings with the children, with whom he thought he spent sufficient time to make his assessment, to indicate the Ms. Lockhart had denigrated Mr. Lockhart in front of the children or interfered with the children's desire to exercise access with Mr. Lockhart. This observation is important to the analysis of the mobility issue.

[46.] Mr. Kennedy was aware that Mr. Lockhart had not participated in the counseling with Mr. Mason and that Mr. Lockhart appeared to have a bad view of Mr. Mason, but Mr. Kennedy spoke to Mr. Mason and appeared to agree, from his own assessment, with most of Mr. Mason's observations.

[47.] Mr. Kennedy's report concluded that the children should have maximum contact with both parents, a principle enunciated in the *Divorce Act*, and, since both parents were excellent parents, a shared custody arrangement with Ms. Lockhart physically parenting 60 percent of the time and Mr. Lockhart parenting 40 percent of the time would be in the best interests of the children. On cross-examination he acknowledged that this recommendation was reached without information and analysis as to the financial viability of Ms. Lockhart remaining in Hants County or living in the matrimonial home that was listed for sale at the request of Mr. Lockhart and could be sold on short notice at any time.

[48.] When asked if it was not possible for Ms. Lockhart to remain in Hants County for reasons related to finances and the proposed sale of the matrimonial home, and that the only practical alternative was to move in with her parents in Oxford, he was clear in his opinion that the children should be in the primary care of their mother as opposed to remaining in Hants County and moving in with their father.

[49.] On cross-examination by Mr. Lockhart's counsel, he resolutely maintained this opinion. While acknowledging that moving from Hants County and having less contact with Dad would be a change for the children, this did not equate to the effect of the loss the children would feel if they did not remain in the primary care of their mother. He, of course, hoped that any move would be for as short a period as possible, and hoped that through the Court process, the finances could be arranged in a way that Ms. Lockhart could financially afford return to Hants County.

Kevin Mason

[50.] As noted, Kevin Mason's affidavit was edited by the Court to delete the opinion evidence. He was cross-examined on his involvement as a counselor to the children and to Ms. Lockhart. He met with them on an average of once per week (31 times since January 2, 2008). He described Ms. Lockhart and the children as having adjusted to the separation.

[51.] Mr. Mason confirmed that in February 2008 Mr. Lockhart had visited him. Mr. Mason

had discussed in positive terms how the counseling was going and the children were adjusting. He had only declined to disclose information that he was restricted from disclosing for confidentiality reasons.

[52.] Mr. Mason confirmed that Mr. Lockhart did not ask to join in the counseling and it was not his place to solicit his services to Mr. Lockhart.

[53.] Mr. Mason was asked by Mr. Lockhart and agreed to provide Mr. Lockhart with a report on the counseling. There was a difference in the evidence between him and Mr. Lockhart as to the arrangement for Mr. Lockhart to receive this report. Having observed the demeanor of both under cross-examination, I accept the evidence of Mr. Mason in preference to that of Mr. Lockhart on this issue.

[54.] I accept that Mr. Lockhart did not contact him again to arrange to pick up the report until he left phone messages in late July at Mr. Mason's place of day-time employment when Mr. Mason was away on vacation, and that upon return from vacation in August Mr. Mason attempted to contact Mr. Lockhart without success.

[55.] Mr. Mason is a registered social worker with both a bachelor and masters degree in social work. He has worked extensively in child welfare and family violence disciplines, and for the last ten years have performed clinical work in hospitals. He has a private practice two nights a week; this was the basis upon which he counseled Ms. Lockhart and the children.

[56.] Mr. Kennedy indicated that he relied to some degree on the information he received from Mr. Mason, but made his own assessment that Ms. Lockhart had acted appropriately in the circumstances of the separation, and had no outstanding adjustment issues.

Levi Lloy

[57.] Ms. Lockhart's father's affidavit basically stated that he and his wife were retired school teachers who owned a farm near Oxford, Nova Scotia, on which they have lived for 20 years.

[58.] The property was described. It can accommodate and would provide an excellent living environment for Ms. Lockhart and the three children.

[59.] Mr. Lloy's evidence was to the effect that his daughter could not survive financially in Hants County and that he had provided her with $7,000.00 or $8,000.00 so that she could survive there during the last ten months.

[60.] His daughter (Ms. Lockhart) had commenced attendance at Acadia University to upgrade her education to qualify for pharmacy and he supported her desire to obtain professional qualifications. To assist her in that regard, and aware of her financial circumstances, he and his wife had agreed to permit her to reside in their house with her children for so long as she needed to complete her education. She would be expected to contribute to the groceries, and they (Mr.

And Ms. Lloy) would provide child care at no cost while Ms. Lockhart commuted daily to classes at the Agricultural College in Truro or at Mount Allison University in Sackville.

[61.] On cross-examination, Mr. Lockhart's counsel questioned whether he would continue to financially support Ms. Lockhart and the children if they remained in Hants County. He replied that he would do what he could, but did not have ability to continue as before.

Eloise Lockhart

[62.] Mr. and Ms. Lockhart knew each other from an early age. They married in 1996 when she was 20 and he was 22. They have three children.

[63.] When married, Mr. Lockhart had just graduated from Acadia University with a business degree and was working in his father's business. He was unable to obtain his degree as he owed the University $3,500.00. Ms. Lockhart paid this from her student loan and it was repaid with family income. She had attended Nova Scotia Community College and obtained a certificate in human services management after a one-year course.

[64.] Ms. Lockhart apparently obtained employment as a graphic designer at about $10.00 per hour with B&B Paper Plus, a job for which I understand she was not properly qualified, but where she worked first part-time then full-time from approximately 1997 until approximately 2003 with the exception of three one-year maternity leaves. The last maternity leave of one year following the birth of the youngest child in August 2002.

[65.] Subsequent to the maternity leave that commenced August of 2002; that is, for the last five years before the separation, she did not work outside the home. She was a full-time parent, but for a home business - soap making - which was started five years ago and which, in the last two years, has started to make a profit, earning her about $4,000.00 last year.

[66.] In or about 2000, Mr. Lockhart ceased employment with his father's company and returned to Acadia University as a full-time student studying toward a Bachelor of Education degree. He graduated after two years and commenced teaching in September 2002. He commenced teaching when, by agreement, Ms. Lockhart became a full-time care giver for their three children. She has remained their primary care giver since. In cross-examination, Ms. Lockhart acknowledged that they had co-parented. The word was not defined. I do not find that she acknowledged or that it was a fact that Mr. Lockhart's time, duties and roles with the children equaled that of Ms. Lockhart before the separation. This is an important factor in my analysis.

[67.] At some point before the separation Mr. Lockhart decided to improve his teaching qualifications. He participated in evening courses through the Mount Allison University Distance Education Program and recently completed the degree requirements and obtained his Masters of Education degree.

[68.] I accept that this will increase his current annual teaching income from approximately $51,600.00 to somewhere between $54,000.00 and $55,000.00.

[69.] The parties lived in a rural area of Hants County and owned only one vehicle. While it appears that a neighbor's vehicle was available to them, I accept Ms. Lockhart's evidence that because of the limited transportation they were not active in the community and the children were not involved in extracurricular activities and that most of their activities were as a family; that is, that she and the children were always together and that when Mr. Lockhart was not teaching or in night school, they spent their time together at their home as a family. They also spent considerable time during holidays at Ms. Lockhart's parents' farm in Oxford.

[70.] Prior to the separation there was no sign of discord. In October 2007 Mr. Lockhart left the matrimonial home. He moved in immediately with a fellow teacher and her two children. This event appears to have come out of the blue and caused considerable stress to Ms. Lockhart and upset to the children.

[71.] In November 2007, the Lockharts and their then lawyers met and worked out a temporary arrangement. I do not say that they reached an enforceable agreement. That led to the application of February 4, heard on March 5, 2008.

[72.] Commencing in November 2007 it appears that the parenting arrangement was as follows:

a) the parents had joint custody of their children;

b) their primary residence was with Mom;

c) Dad had access on alternate weekends;

d) Dad paid child support of about $900.00 and spousal support of about $100.00;

e) Mom remained in the matrimonial home and Dad paid the mortgage, mortgage insurance and property taxes; and

f) Mom had the use of the family vehicle.

[73.] Following the November meeting, Mom decided that she had to upgrade her education in order to obtain a profession and become self-sufficient as soon as possible.

[74.] In January 2008 she enrolled in Acadia University in qualifying courses for a pharmacy or nursing degree. She successfully completed the first four credits in the spring term and testified that she believed she required two more full credits, I believe chemistry and biology, and three other half-credits, to qualify for pharmacy. There is no guarantee she will be admitted. These courses also will enable her to enter nursing. She wishes to continue full-time to get the

remaining credits this year.

[75.] She can return to Acadia University in the Fall, and has also registered at the Agricultural College in Truro about 40 minutes from her parents' home in Oxford where she can get the similar courses for half the tuition cost, while living at and commuting from her parents' home.

[76.] She has applied for student loans, bursaries and other assistance from Government agencies to pay for her tuition and living expenses. These are available if she is a full-time student.

[77.] At the same time she started attending Acadia University, she commenced the counseling program with Mr. Mason for herself and her children to adjust to the separation and the stresses surrounding it. As previously noted, the children and she have attended weekly since.

[78.] When she finished the Spring term at Acadia University, she became active in her home business (soap making), soliciting sales at trade shows and from customers and producing the product.

[79.] Because the child support paid by Mr. Lockhart covers only the household grocery bill and Mr. Lockhart's payment of the mortgage, insurance and taxes do not assist in any of the other living expenses, she has not had sufficient funds, even with the child tax benefit, to continue residing in the matrimonial home.

[80.] She has had to borrow about $7,000.00 from her father and $1,800.00 from her sister to get by. Her father cannot continue to assist her financially to this extent.

[81.] It is relevant that, at Mr. Lockhart's request, the house has been listed for sale. Ms. Lockhart agreed to his request.

[82.] In June two separate offers were made for the house and both were accepted. Both fell through. Before they fell through Ms. Lockhart had made arrangements with friends, who offered to assist her in moving out and storing her things without any cost to her. Apparently Mr. Lockhart's possessions had already been removed from the home.

[83.] When the deals fell through, she determined that she would still move for free, as arranged, and she placed the furnishings that were in the home in storage locally in Hants County, and she took her nicknacks and personal effects, and those of the children, to her parents' home.

[84.] Ms. Lockhart says she did not abandon the matrimonial home and Mr. Lockhart says that she did. The Court heard considerable evidence on this issue. Both parties are making more of this issue than this Court makes of it. I am satisfied that Ms. Lockhart's finances had reached the desperate stage and that by the end of July she had to take up her parent's offer for the rest of the summer.

[85.] The March interim order provided for access by Dad to the children every second weekend and alternative Thursday's overnight. It did not provide for summer access.

[86.] When the hearing intended for June 3 had to be postponed to August 13, Mr. Lockhart, through counsel, sought equal summer access to the children. He proposed alternating weeks with each parent. Ms. Lockhart agreed to share the summer, but on a two weeks alternating schedule. After negotiations, Ms. Lockhart agreed to Mr. Lockhart's request. The children were used to spending periods of their vacation time at the Oxford farm.

[87.] During Ms. Lockhart's weeks with the children, they basically lived at her parents' farm in Oxford - a not unusual occurrence in any event, and during Mr. Lockhart's weeks with the children, she was living between her parents' house and the matrimonial house in rather frugal circumstances. The soap making equipment, used in her home business, was located in the matrimonial home; she stayed there when she worked at the business.

[88.] It was about July 31 that she moved the furnishings into storage in Hants County and the other personal property to Oxford. At that time this application was scheduled for hearing on August 13. The matrimonial home is listed for sale, and the parties were actively seeking to sell it.

[89.] It is not reasonable to expect that the living accommodations for the children would be uprooted at any time; that is, when the house sold, nor is it unreasonable for Ms. Lockhart to plan a move to more reasonable housing accommodations during her own schedule, as opposed to on short notice at an inconvenient time.

[90.] Mr. Lockhart complains that Ms. Lockhart breached the March Order by relocating without a variation of that Order. She applied on March 31 to relocate with a hearing scheduled for June 3. She was out of money and living on charity with three children. To the extent that moving the children to Oxford for the summer, and putting the furniture in storage in Hants County, is construed as a relocation out of Hants County, she did what she had to. I accept she did not relocate but kept her options open. If the court determined, as a result of this hearing, that she had to stay in Hants County, she could get an apartment in Hants County, gets the furniture out of storage, and the kids' summer vacation would end. If the court said she could relocate, they would stay on the farm.

[91.] Ms. Lockhart has also actively sought employment in the Windsor/Hants County area in the event that the Court does not approve her application to relocate. In cross-examination she testified as to many of the applications she had made. It was her position that she will abandon her education plan, at least on a full-time basis, if she must remain in Hants County by reason of the Court not approving the relocation.

[92.] In cross-examination she maintained her prior position that while Mr. Lockhart is a very good father to the children, and that she has no concerns when the children are with him, she has been and is the primary care giver for the children and that it is in the best interests of the children

to remain in her primary care.

[93.] In addition to the counseling, and exploring her education and employment opportunities in Hants County in the event she could not pursue her education options by this decision, Ms. Lockhart also investigated the cost for her and the children to live: first, in the matrimonial home (if it was not sold); or in an apartment in Hants County; or in an apartment in Wolfville; as opposed to living with her parents in Oxford. One of these options was verbally answered on cross-examination. It is apparent that the cost of accommodation in Wolfville is more expensive than any of the other locations. Three of the options were described in her second affidavit.

[94.] I find the detailed estimates of expenses set out in her affidavit to be underestimated or quite conservative, but that her income estimates, assuming she continues to pursue her education, to be reasonable.

[95.] The budget summaries show that if she were to live in the matrimonial home her deficit, exclusive of child care expenses and post-secondary education costs, would easily exceed $2,000.00 per month, I believe her estimate was $2,061.00. Her estimate of the deficit, if she was living in a rented apartment in Hants County, again exclusive of child care and post-secondary education costs, would be at least $1,500.00 per month, I believe her estimate was $1,438.00. The third option of living with her parents in Oxford, and accepting that her parents would provide child care expenses while she was in school and on the assumption she could commute to school daily, shows no deficit.

[96.] As noted, these budgets do not include her education costs which she proposes to finance through loans and bursaries, nor do they include childcare expenses.

[97.] Ms. Lockhart testified that it was in the best interests of the children for her to complete her education as soon as possible so that she can become self-sufficient sooner and contribute financially to the children's well-being.

[98.] Ms. Lockhart says she cannot afford to continue to live in Hants County without substantial spousal support, which Mr. Lockhart cannot afford to pay and does not propose to pay. In his post-hearing brief Mr. Lockhart proposes to pay, subject to a comprehensive series of conditions and only after the house is sold, $500.00 a month for a fixed term. This is not enough to solve the problem, even if it is within the range of the Spousal Support Advisory Guidelines.

[99.] Ms. Lockhart states that, even if she put her education plans on hold and worked at jobs at or near the minimum wage - and I note that her attempts to find suitable employment in the Windsor area to date have been unsuccessful, she could not cover her deficit, when child care expenses are included.

[100.] Ms. Lockhart was cross-examined for about three hours. The longer she testified the more I was convinced that despite the manner in which the separation occurred, she has adjusted well to the separation and, as Mr. Kennedy observed, has moved on with a positive attitude about the

future.

[101.] Ms. Lockhart displays none of the concerns raised by Mr. Lockhart to Mr. Kennedy and to this Court about interfering with Mr. Lockhart's access or bad mouthing or maligning or acting in any way that would suggest that she carries a grudge with regards to the manner of the separation so as to interfere with his access to the children.

[102.] There are many tools for assessing credibility. First is the ability to consider inconsistencies and weaknesses in the witness's evidence, including internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses. Second is the ability to review independent evidence that confirms or contradicts the witness' testimony. Third is the ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in 1949 in ***Faryna* v. *Chorny*** 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. Fourth, it is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it too should be done with caution. Fifth is a special consideration that 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.

[103.] I have applied these general guidelines in my assessment of the lengthy cross-examination of Ms. Lockhart on her Affidavits. Ms. Lockhart answered vigorous cross-examination in a straightforward way with almost instant answers for questions which were internally consistent and consistent with the evidence of Mr. Kennedy and Mr. Mason. Her demeanor was open and I readily accept after three hours that her evidence was honestly given.

[104.] If she had any bitterness at the time of separation, which would, in the circumstances, have been a normal and expected reaction, she has satisfied me that she has moved on.

[105.] The only occasion in which she expressed hesitancy was when she was cross-examined as to why the children would not do well in the primary care of Mr. Lockhart. She was asked, in effect, whether she could say anything negative about Mr. Lockhart's circumstances or about him as a parent. She stated he was a very good parent but she hesitated before going on to comment that Mr. Lockhart had been living with Ms. Fraser for only ten months in a house partly owned (she believed) by Ms. Fraser's estranged husband. She either stated, or implied, that she had concern that their relationship had not yet been proven to be stable. In no other respect did Ms. Lockhart say anything negative about Mr. Lockhart. That did not change her view that as she was the primary care giver for the children, it was in the best interests of the children to remain in her primary care even if she could not, for financial reasons, continue to live in Hants County.

Anthony Lockhart

[106.] Mr. Lockhart's evidence included the Affidavits sworn February 29, May 9 and August

18, direct evidence and cross-examination.

[107.] The substance of his three affidavits was a lengthy list of complaints about the conduct of Ms. Lockhart since their separation. The balance of the affidavits consisted of an outlining of his income, expenses and debts; an explanation of his inability to pay any spousal support so as to support Ms. Lockhart in Hants County; his understanding of Ms. Lockhart's income and her ability to earn income; and, his explanation as to why she should put her education plans on hold and go back to work, even if such work was at or near the minimum wage level.

[108.] Virtually all of the complaints with regards to Ms. Lockhart's conduct, including the switching of counselors, the numerous incidents when he says Ms. Lockhart interfered with his relationship with the children, or caused the children to miss school inappropriately, were brought to the attention of Neil Kennedy, investigated by him and discussed by him in his evidence.

[109.] Mr. Kennedy supported none of the complaints and came to the conclusion that there was no basis to suggest that Ms. Lockhart had acted inappropriately with respect to the children or in respect of their relationship with Mr. Lockhart. These observations are consistent with my observations of Ms. Lockhart in a thorough cross-examination.

[110.] With respect to Mr. Lockhart's evidence as to his income as teacher, I found it to be not straightforward in several respects. It was obvious from his financial disclosure that since August 2007 his teacher's income was over $51,000.00 but it appears that in the November 2007 meeting between the parties he arranged for child support to be reduced on the basis that his income was $47,000.00 on his tax returns, and estimated at that time by him to be at the annual rate of $49,000.00.

[111.] In cross-examination with respect to his expectations for income as a result of completing his Masters of Education degree, he was evasive, unhelpful and in my view not forthright. I accept that one of the reasons he took the Master's program was to advance his qualifications and income, and that his income will likely exceed $54,000.00 when he chooses to complete the process.

[112.] Mr. Lockhart's evidence was unlike that of Ms. Lockhart. She was straight forward, cross-examined with vigor, but clearly demonstrated, as is reflected in the children's attitude toward Mr. Lockhart, that she makes great efforts to encourage and facilitate access. The sum of Mr. Lockhart's affidavits is that she interferes with his access and is not co-operative. I reject his evidence in favor of that of Ms. Lockhart, supported not only by its internal consistency and her demeanor, but by the evidence of Mr. Kennedy and Mr. Mason.

D. Application of the *Gordon v. Goertz* Analysis

Stage One - Material Change in Circumstances

[113.] I find that Ms. Lockhart's financial circumstances deteriorated to the point that she could not, other than relying upon the charity of her parents and her sister, continue to reside in Hants County.

[114.] The family debt and Mr. Lockhart's finances prevent him from paying significant spousal support to enable Ms. Lockhart to eliminate the large deficit in her household budget.

[115.] If Ms. Lockhart gave up her education plan, her ability to get employment near the minimum wage level, combined with the additional child care expenses, would not, based on my review of the evidence, close the gap and permit her to survive living in Hants County.

[116.] I find this financial crisis to be a material change in circumstances, as described by Justice MacLaughlin in ***Gordon* v. *Goertz*,** sufficient to trigger the second step of the analysis.

[117.] An additional consideration with respect to material change of circumstances is the fact that Ms. Lockhart has been living in the matrimonial home. The home is listed for sale. Mr. Lockhart insisted on its sale in order to reduce the family debt, a reasonable proposal, and Ms. Lockhart agreed. It is only a matter of a short time and it will be sold and Ms. Lockhart will have to move. This is a factor that may soon become a reality. That move should be planned, it should not be a event contingent on a sale on short notice.

Stage Two - Benefits and Detriments

[118.] This is my analysis and conclusions respecting the seven factors enumerated in Paragraph 49 of ***Gordon* v. *Goertz***.

A) Existing custody arrangement and relationship between the children and the custodial parent

[119.] Ms. Lockhart has always been the primary care giver for the children. Between 1997 and 2003 she worked outside the home. Two of those years were full-time. The last year she was on maternity leave. Effectively, she has been the full time stay at a home care giver since the birth of the youngest child in August 2002. That coincides with Mr. Lockhart's completion of his education degree and starting full-time employment as a teacher.

[120.] While the evidence is clear that Mr. Lockhart has always been an involved parent, he has always worked outside the home, or attended University, on a full-time basis from the time of the birth of the first child until the present.

[121.] Since separation Mom continues to be the primary care giver.

[122.] At present the relationship between the children and their custodial parent is excellent. It appears that the children have not been active outside the home and live in a rural area and their lives have centered around home. Mom has been there the most.

[123.] Mr. Lockhart has expressed concerns and complaints about Ms. Lockhart's mental health. These have not been substantiated and the Court relies upon the evidence of Mr. Kennedy, Mr. Mason and Ms. Lockhart herself. My observations of Ms. Lockhart, tested during lengthy cross-examination, are contraindicative of any such concerns.

[124.] Mr. Lockhart proposes to change the primary care to himself. That would constitute a significant change in the children's lives. In my view the proposed change does not meet any of the criteria described by Judge Daley in ***Webber* v. *Webber*** (1989) 90 N.S.R. (2d) 55, or by Justice Goodfellow in ***Foley* v. *Foley*** (1993) 124 N.S.R. (2d) 198.

B) The existing access arrangement and the relationship between the children and the access parent

[125.] Mr. Lockhart has been, by all of the evidence, an involved parent. He has not been an absentee father. It cannot, however, be said that he has nearly the involvement with the children as Ms. Lockhart. He has always worked or studied on a full-time basis.

[126.] Since the separation he has had access every second weekend and since the order in March, maybe before, every alternate Thursday during the school year. By agreement, holidays are shared equally.

[127.] On an annualized basis, it appears to the Court that the access schedule works out to about 80 weekend nights during the school year (two per weekend), and about six weeks out of the twelve weeks of summer, Christmas and March break. This constitutes approximately 33 percent of all days in the year and approximately 50 percent of all non-school days.

[128.] Neither Mr. Kennedy nor Ms. Lockhart testified, by their affidavits or orally, as to any concerns with respect to the relationship between the children and Mr. Lockhart; however, Mr. Lockhart's affidavits are substantially complaints about Ms. Lockhart's interference with his relationship with his children and the impact upon that relationship.

[129.] Mr. Kennedy was aware of the complaints during his investigation and found nothing to indicate that they were valid. Mr. Mason was aware of some concerns between the children and Mr. Lockhart which he says were resolved through the counseling process. It appears that much of the initial problem between Mr. Lockhart and the children was the fact of his sudden departure from the matrimonial home and involvement with Ms. Fraser, a situation into with the children was introduced, I believe Mr. Kennedy said, too quickly.

[130.] It would be normal to expect that if one spouse leaves the other, out of the blue and without prior discord, for another partner, there would be emotional upset and some disruption in relations, not only between the spouses but involving the children. It is likely that such an occurrence would generate a reaction that, in the calm of hindsight, might be regretted. It could well be that Ms. Lockhart said something without thinking of the consequences at the time of separation. We expect humans to be human. Often the reactions from a jilted spouse are far

worse than anything alleged by Mr. Lockhart in this case.

[131.] While I accept that some things might have been said, or messages inadvertently conveyed to the children, I accept the evidence of Mr. Kennedy, Mr. Mason and Ms. Lockhart to the effect that Ms. Lockhart has handled the predicament she found herself in an admirable way, that she is not depressed, that she is forward looking and positive, and that she has moved on with her life, and is genuinely encouraging the relationship between the children and Mr. Lockhart.

[132.] Ms. Lockhart undertook the counseling and it was a productive process. She formulated a plan to upgrade her education so as to become self-sufficient and in a better position to financial support herself and her children. She has been flexible in changing Dad's access to suit his wishes, in particular, I refer to the week on - weeks off summer access arrangement.

[133.] Mr. Lockhart's complaints about the oldest child's sleep over in New Minas detracted from him as a child focused parent. His complaints about interference with phone calls are negated by Ms. Lockhart's reply that she only interferes when the phone calls are made late and interfere with meals or other planned activities, which reply is accepted by me.

[134.] It appears that she is sufficiently self-assured and confident in her relationship with the children, unlike Mr. Lockhart, that she does not see the need to call them daily when they are with their Dad.

[135.] I share Ms. Lockhart's counsel's observations in the last two paragraphs of Page 2 of her Post-hearing memorandum to the effect that Ms. Lockhart appears to accept Mr. Lockhart as a good parent but Mr. Lockhart still does not accept Ms. Lockhart as a good parent.

C) The desirability of maximizing contact between the children and both parents

[136.] Section 16(10) of the *Divorce Act* does not specifically say maximum contact, it says as much contact with each spouse as is consistent with the best interests of the children.

[137.] I am satisfied, after listening to the cross-examination of Mr. Kennedy and Ms. Lockhart, that Ms. Lockhart will accommodate and facilitate access with Mr. Lockhart and will be flexible. This does not mean that she will accommodate any and all wishes for access by Mr. Lockhart, but I accept that she generally believes Mr. Lockhart is an excellent parent and she is not insecure in her relationship with the children.

[138.] Mr. Lockhart has not been in a position to demonstrate whether he would be flexible and reasonable in maximizing contact between the children and Ms. Lockhart. His unfounded complaints about Ms. Lockhart's qualities as a parent and complaints about interference with his access cause me some concern with how he would act if he were in her position. His lack of trust in Ms. Lockhart's parenting skills is in contrast to Ms. Lockhart's trust in his skills.

D) Views of the children

[139.] Neither party advocates that the views of the children should be a factor in this analysis. They are very young and, in my view, this is not a factor other than to acknowledge and agree with Mr. Kennedy's conclusion that if the ideal shared parenting is not practical in this case, the children would view any change in primary care from Mom to Dad as a significant loss and would not view relocation with Mom to Oxford as such a significant loss of Dad.

E) Custodial parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.

[140.] Most often when Courts deny permission to relocate based on this factor, it is based on a finding that: the custodial's parent's intention involved a desire to frustrate the access parent's contact with the children, or the decision to move was made prematurely or was poorly thought out.

[141.] With respect to the first reason I have no reservations in finding that Ms. Lockhart is comfortable with Mr. Lockhart exercising generous access and there is not now, nor is there likely to be, any interference with Dad's access to the children if she moves. I saw no hidden agenda during the thorough cross-examination of Ms. Lockhart. I do not believe she intends to move for the purpose of frustrating access.

[142.] With respect to whether the relocation is premature, I have considered the fact that upon separation Ms. Lockhart remained in the matrimonial home with the children. At Mr. Lockhart's request the house was put up for sale. This is clearly to reduce and eliminate family debt for which Mr. Lockhart, as the sole "breadwinner" at the present time, has to date been responsible. Signed agreements for the sale of the house made in June fell through but clearly are a sign that on short notice Ms. Lockhart could be required to vacate and would have been required to vacate if she had not taken advantage of the free help to move the furnishings out of the home and into storage in the area at the end of July. The uncertainty and "not knowing" when, on short notice, one will have to move would normally cause stress to anyone, let alone a single parent without income and with primary care of three children.

[143.] It would have been irresponsible for Ms. Lockhart not to plan and it is reasonable for her to have planned on the fact that she would have to vacate the matrimonial home on short notice and that such a move should not be done during the school year when it would be even more disruptive to the children.

[144.] I find that her proposed relocation is not premature.

[145.] The final frequently-cited consideration is whether the move is poorly planned. Whether or not Ms. Lockhart's plan to obtain a better education and professional qualifications is reasonable - and I accept that in light of her first term at Acadia they appear to be reasonable, she considered all of the options open to her. She will be left with a deficit by any of the scenarios except for relocation to her parents' home.

[146.] She specifically explored living in the home, the most expensive and the most uncertain in the light of the listing of the house for sale. This option was no more than an interim emergency plan in light of the family debts. She explored getting a rental in Wolfville area and continuing her post-secondary education next year in Wolfville. She explored getting a rental in Hants County and commuting to Wolfville. She explored job opportunities in and near the Hants County for which she may be qualified. Such jobs are at or near the minimum wage level.

[147.] With child care expenses, and without significant spousal support, none of these three options is fiscally responsible or manageable. They all leave her with a deficit and a need to rely upon the charity of others.

[148.] I accept the evidence with respect to Ms. Lockhart's budget scenarios. I find that the only fiscally responsible and feasible plan for her is to move in with her parents.

[149.] I recognize that her deficit would likely be less than the scenarios produced for the Court if she worked a minimum wage job and put off her education plan until the children were no longer dependents but there would still be a deficit. It is not appropriate or reasonable to submit that her parents should make up the deficit, even if there is evidence that they may be able to do so on a short term basis.

[150.] While it is not strictly necessary for the determination of this issue, it is my view that Ms. Lockhart's education plan is reasonable and in the best interests of the children. The reason is simple: it is in the children's best interests that Ms. Lockhart become financially self-sufficient by attaining a professional status within her capacities, and endure three to five years of marginal financial viability, in exchange for a bigger dividend of a higher income thereafter. This is a far more preferable route to working at minimum wage until the children are old enough to leave home ten or more years down the road.

[151.] The argument put forward by Mr. Lockhart that Ms. Lockhart should defer her education plans is hypocritical, in light of the fact that during their 11-year marriage Ms. Lockhart, and indirectly the children, has supported his change in careers, his full-time attendance in University and the upgrading of his education so as to ensure his financial future. The argument detracted from Mr. Lockhart's image as a child- focused, as opposed to a self-centered, individual.

F) Disruption to children by a change in custody

[152.] At present, and for at least the last six years, the children have been in the primary care of their mother.

[153.] It is the observation of Mr. Kennedy, supported by the totality of the evidence, that a change in primary care to Dad would cause a severe sense of loss in the children. It is clear this is not in the best interests of the children. Even Mr. Kennedy's "ideal" proposal of shared parenting would leave Mom with 60 percent of the time and Dad with 40 percent. This recommendation was made without consideration of the economics of family life.

[154.] On the other hand, Mr. Lockhart has access, partly by Order and partly by the agreement of Ms. Lockhart, that constitutes approximately 33 percent of the total nights of the year, 50 percent of the total non-school nights.

[155.] A relocation by Mom to Oxford with the children would not, in my view, interfere with Dad's ability to maintain a quality of access that approximates that which he now has.

[156.] I state that it is more the quality, and not the quantity of time, that is important, so long as the quantity meets a minimum threshold and is fairly spaced. All of that is easily doable if Ms. Lockhart's relocation plan is approved.

[157.] The distance between Dad's residence and Oxford measures less than 200 kilometers or two hours on very good highways and would not, in my view, disrupts reasonable access.

G) Disruption to the children consequent on removal from family, schools and community

[158.] I will deal with each separately.

[159.] There is no evidence of the involvement of the family, let alone the children, in the local community. They have lived in the country, owned one vehicle, and had some access to another vehicle. The evidence is that their life was centered around their immediate family.

[160.] There was no evidence of the involvement of any extended family member in the Windsor area that would be disrupted by the move. I assume Mr. Lockhart's parents live in the Windsor area. The Court accepts evidence to the effect that, before the separation, the children spent many holidays, including Christmas and March break, at Ms. Lockhart's parents' farm in Oxford. I find no disruption of the children in respect of relationships with extended family by reason of the proposed relocation.

[161.] Relocation would require the children to change schools. Their present school has an excellent reputation. I had understood, before receiving Mr. Lockhart's post-hearing memorandum, that he intended to keep the children in the same school if granted primary care. It appears from his post-hearing memorandum that he intends to move the children, subject to Court Order, from Newport Station School, the one they presently are in, to Falmouth School. Obviously Ms. Lockhart's plan would involve a change in schools.

[162.] Even if I accept that Mr. Lockhart intended to keep the children in the same school, the extent of the disruption was not the subject of any evidence before the Court. The ages of the children suggest to the Court that they are likely to adapt to a new school easier than children who have an extended network of friends, for example, in high school. It is in the teen years that children rely less on their family and more on their friends. In addition, there is no evidence before the Court of any significant clinical issue with respect to any of the children, such as special needs or an inability to adapt, that would suggest the move would be disruptive.

E. Findings

Custody and Access

[163.] It should be obvious from my analysis of the factors as applied to the evidence that in my view the relocation by Ms. Lockhart with the three children, in the present circumstances, is easily in the best interests of the children and that it will not cause any significant disruption to Dad's access.

[164.] I make no condition that the relocation be time limited. I do not see, for example, that in the next year, if Ms. Lockhart pursues her pre-pharmacy education upgrading at the Agricultural College and commutes daily to her parents that there is any significant benefit in requiring her to return to Hants County.

[165.] Obviously, if she completes that program as planned and enters pharmacy or nursing school, she will have to relocate again. That likely would constitute a material change in circumstances. Custody and parenting, as I said at the beginning, are never static. This decision is based on the present circumstances.

[166.] The parties made various representations with regards to access. Ms. Lockhart at one time offered Mr. Lockhart three weekends out of four during the school year and an equal sharing of holiday periods. She offered to commit to transport the children from Oxford to Stewiake where he could pick them up. Without knowing the exact milage, this appears to me to be a reasonable access plan in the present circumstances. If the parties cannot finalize such a plan, the Court will do it for them.

[167.] With regards to telephone and internet access, the Court has concerns with regards to the daily phone calls from Dad to the children which appear to have been a source of some contention by Mr. Lockhart to which Ms. Lockhart responds that she only interferes sometimes when the late phone calls interfere with supper or activities. I do not see a need for daily phone calls. I see a benefit to periodic phone calls of a short duration by Dad to the children or by the children to Dad whenever the children wish. If the parties cannot work out a reasonable arrangement, the Court will impose those terms. In a way, this request by me is a test.

Child Support

[168.] One of the Court's concerns with respect to the credibility of Mr. Lockhart centered around his unsatisfactory answers as to his income. I am satisfied that his teacher's income is fixed usually August 1st for the succeeding 12 months. I am satisfied that in November 2007 it was more than disclosed at the meeting and resulted in a child support order that was low. I was completely unsatisfied in the way he responded to the likely change in his income that will result from his recent completion of his Masters of Education degree. I would hope that he does not

delay in filing the necessary paperwork with the Department to obtain the raise.

[169.] Based on a present income of $51,600.00 less Teachers' Dues, rounded to $51,000.00 for the purposes of determining child support, I direct him pay whatever the table amount is for $51,000.00 effective September 1st.

[170.] I direct that he diligently pursues with the Department of Education recognition of his Master's Degree and, forthwith upon receipt of any pay increase, he advise Ms. Lockhart and adjust child support in accordance with that pay rate (likely in the range of $55,000.00).

[171.] I make the usual order with regards to disclosure of income.

Spousal Support

[172.] Based on the representations by counsel for Ms. Lockhart that no spousal support would be requested or required if the relocation plan was approved, I make no spousal support order at this time. In doing so I make no determination at this time as to the entitlement of Ms. Lockhart to spousal support on compensatory, non-compensatory or contractual basis. That is reserved for another day.

Matrimonial Home

[173.] I am satisfied that Mr. Lockhart has a more urgent need to complete successfully the sale of the home. He is the one who is paying the bills. It is pulling everyone under. I grant him exclusive possession of the matrimonial home on the basis that he will maintain, up to date, the mortgage, the property insurance, the property taxes and any other expenses until the closing. I give Ms. Lockhart a reasonable time to remove the remaining items she has from the property. By reasonable, I mean a short time but not tomorrow; I trust it can be done forthwith. If they cannot agree, I will fix a time.

[174.] Mr. Lockhart's post-hearing memorandum dealt with the issue of whether, if it did not sell, he could rent it. By rent it, I presume he means to someone else for fair market value, and that he will apply the rent to the matrimonial debts.

[175.] I make no comment on the comprehensive proposed resolution of all the property division issues and support issues. These issues should be reserved for a divorce hearing, not an interim application. Because I only had time for a quick perusal of it, I give no opinion on its fairness. That is for another day. I do understand the urgency for dealing with the matrimonial home. Based on this decision, there is no requirement for Mom to continue to have, once she gets her "goodies" out, access to the home.

Vehicles

[176.] To the extent not covered by the prior Order, I grant Ms. Lockhart continued possession

and use of the Grand Prix until a divorce hearing or further order of the Court.

Medical

[177.] The responses of Mr. Lockhart did cause me some concern. At least until the divorce and, possibly later, Ms. Lockhart should continue to benefit by the health/medical/dental plans that Mr. Lockhart has through his employment.

[178.] I accept her evidence that she should have a Letter of Direction. I direct Mr. Lockhart to forthwith execute the appropriate Letter of Direction that would authorize Ms. Lockhart to submit the medical, counseling and dental bills relevant to her and the children both past and prospective, until a further order of the Court, so that she can submit those bills and receive the reimbursement directly.

[179.] I ran out of time to dictate a complete decision, and there may still be loose ends. If there are any further ancillary issues that cannot be resolved, I am prepared to come back and hear counsel in order to clean up those loose ends.

JEAN DEWOLFE, Q.C.: My Lord, the issue of costs. I would not raise it normally except we were here for twelve hours, which is an extremely expensive undertaking for my client on Monday. I cross-examined for one hour of that, I believe, and I think, in the circumstances -

. . .

COURT: Here is the problem with regards to costs, and I am going to hear Ms. Lazier before I make any final determination. . . . My inclination before hearing from Ms. Lazier would be to defer it, even though I don't like deferring cost orders, until the end of the day. I am not saying that the Court will not make an order for costs with regards to the application but I am saying that I think it should be deferred to see whether the parties can work out a resolution [of their disputes], and it should be a factor in the resolution of costs.

. . .

THE COURT: And I am not foreclosing an order for costs. I am trying to see how the adversarial process works. I am trying to give incentives for people to sit down and resolve the issues.

CHRISTINA LAZIER: My Lord, if I may ask a question, clarification, with respect to the costs. Would it, is your Lordship saying that presuming we can work things out without further litigation there will be no costs awarded, I'm not sure, or whether, if we were seeking costs, we must make a new application?

THE COURT: No, I am saying there has to be a new application. What I think I am trying to do is to hold a carrot, or an incentive, for people to resolve and not fight. If there are

contests and the approach to the resolution of the issues is the same as in these applications, then I probably will order costs. But I am reserving on that, I will hear full submissions at a future day if either of the parties determines they want to raise it. But, when I do, I will take into consideration how it progressed from here.

CHRISTINA LAZIER: Thank you, my Lord

JEAN DEWOLFE, Q.C.: Thank you, my Lord.

J.