**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** Clark v. Saberi, 2012 NSSC 310

**Date:** 20120822
**Docket:** 1201-062662, SFHD-058718
**Registry:** Halifax

**Between:**

Robert Alan Clark

Applicant/Petitioner

v.

Mojdeh Amanda Saberi

Respondent

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| **Judge:** | The Honourable Justice Beryl MacDonald |
| **Heard:** | June 28, and July 19, 2012, in Halifax, Nova Scotia |
| **Oral Decision** | July 20, 2012 |
| **Written Decision:** | August 22, 2012 |
| **Counsel:** | Robert Alan Clark, the Applicant/Petitioner, self-represented<br>Sheree L. Conlon, counsel, for the Respondent |

**By the Court:**

[1] This is a relocation case. The Mother, who has primary care of the three children of the parties marriage, intends to marry and wants to move with the children to Phoenix, Arizona where her intended partner lives and works. The Father does not want the children to move. The parties have been separated since October, 2007. They have been divorced since August 11, 2010. The children are 15, 13, and 11. The oldest child is a daughter.

[2] Because of the nature of this proceeding I informed the parties of my decision at the conclusion of the hearing and that my written reasons would follow.

**PRELIMINARY MATTERS**

[3] The Father is self- represented. He has filed several affidavits containing much repetitive information. At the beginning of the hearing counsel for the Mother objected to many of the statements made in the Father's affidavits. However, counsel recognized there was insufficient time to review and adjudicate upon each of the offending paragraphs or portions of paragraphs. This issue had to be resolved before the children were to begin a new school year. Counsel requested that I ignore those portions of the information provided by the Father that I determined to be inadmissible or irrelevant without further submissions from her or the Father. I attempted to explain this request to the Father and indicated he could decide not to oppose Counsel's suggestion or he could require an examination of each sentence the Mother alleged to be inadmissible or irrelevant. If this was his request I informed him I would hear submissions from the Mother's counsel and I would then hear his submissions. I would then make my decision. The Father chose not to contest Counsel's suggestion.

[4] If, in this decision, I commented upon each and every statement contained in the Father's affidavits to explain why I consider the statement or portions of the statement to be inadmissible or irrelevant because, for example:

- it is commentary,
- it is privileged information,
- it is hearsay,
- it is opinion,
- it is a submission,
- it is a plea,
- it is a speculation,
- it is innuendo,
- it is argument,

I would still be writing this decision next year. I do believe it is important to help those who file affidavits to understand why many of the statements they make cannot be considered by the court in its decision-making. However that requirement must be balanced against the appropriate

utilization of judicial time and resources and the importance of providing timely decisions when the best interest of children is involved. Even when parties who appear before us do not raise objections to statements contained in affidavits judges regularly give no weight to statements that are inadmissable and irrelevant in respect to the issue for which the statement has been offered as "proof".

[5] Any reading of a text book on the Law of Evidence will remind the reader of the complexity of this subject. There is a distinction between evidence that is admissible and evidence that is not relevant. Often it is said irrelevant evidence is inadmissible. However, evidence may not be relevant in proof of one proposition but relevant in proof of another. So there are cases that suggest certain evidence is inadmissible for one purpose but admissible for another. This may not be correct terminology but the important point is that some information may have no relevance to any point in issue, and therefore is to be completely excluded as a consideration in the decision making process; other evidence may be inadmissible even if it may appear relevant. Heresy, for example, is often inadmissible. Statements in affidavits may not be relevant to prove the deponent's allegations but may be relevant in proof of the opposing party's allegations. Therefore use of this "evidence" and the direction to the court about use must be carefully considered. It may not be of benefit to strike paragraphs in an opponent's affidavit that may be useful in proving one's case.

[6] I have carefully reviewed all of the statements contained in the affidavits of each party. I have completely ignored statements or portions of statements that I consider irrelevant in respect to any proposition put forward by either party. Below are some examples of my analysis of some of the statements by way of example.

[7] From the Fathers affidavit filed February 6, 2012 (attached to Exhibit 1):

> 54 The stability in the lives of the Children is replaced by loss of everyone they know, living with strangers, no friends and no help to get any, and elements of risk and turmoil of integrating into a new home, such as whether (the Mother's) marriage will survive, or whether the Children can coexist with strangers in their new house.
>
> This is a submission and a speculation. It is not relevant for any purpose.
>
> 61 Even if the Boys continue playing competitive basketball, they may become disappointed from setbacks in their competitive basketball since the reputation they spent a lifetime cultivating is gone, and they need to spend years of game time with teammates to earn it the "ball" again.

This is an opinion. It could also be considered speculation. It is not relevant for any purpose.

[8] From the Fathers affidavit filed March 22, 2012 (Exhibit 3)

> 31 Items 15 to 20-With my current spouse, we maintain a life and is scheduled distinct from the frenzy and panic of short notice that is (the Mother's) life. We support the Children as much as is possible however we also maintain our own plans which cannot react quickly to (the Mother's) scheduling whim or lack of notice for school events -things which (the Mother) is expected to safely supply as per the Parenting Plan, but never usually delivers.

This statement contains innuendo and could be considered scandalous. One of the Father's allegations is that the Mother breached the Parenting Plan. Appropriate "facts" to support this allegation would describe in detail the circumstances of the breach including what happened and when it happened. Statements like those made in paragraph 31, while not relevant in support of the Father's allegation about breach of the Parenting Plan, may be relevant to the Mother's allegation that the Father is dismissive of her requests for parenting assistance. Cooperation in parenting is a relevant parenting issue. This type of statement may undermine the case the Father wished to present.

[9] From the Father's affidavit filed June 26, 2012 (Exhibit 4)

> 24, 36, 37 These paragraphs refer to positions taken and statements made during settlement negotiations.

These are inadmissable. They are privileged communications.

> 35 In practice, most women relax their expectations of a suitable mate at this time in their lives so they have a number of interested men to properly date. This is effective risk mitigation. Alternatively, (the Mother) seems to have not relaxed her expectations and has therefore only identified one man in the whole continent. However, by this choice she precludes the techniques most other women employed to confirm they got what has been advertised. (The Mother) is assuming large risks for herself and the children by the very fact that she is not relaxed her expectations.

I have not printed the statements made immediately before paragraph 35. Many portions of those statements are not relevant but their essence is an allegation that the Mother does not know, and has made no effort to know, whether the person she wishes to marry is as he appears. He may be a "con artist" and she is a 45-year-old "single love-struck woman". Presumably this information is provided to "prove" the Mother exercises poor judgement. One's ability to exercise good judgement is a parenting issue.

[10] The content of paragraph 35 is not relevant to "prove" the Mother's poor judgement. It is a combination of opinion, speculation, and commentary. It can also be considered scandalous.

However, once again, this statement may say more about the Father and his attitude toward the Mother than it does about whether she has exercised appropriate judgment in choosing her partner. As a result it may have relevance in respect to a proposition the Mother wishes to put forward.

**CREDIBILITY**

[11] The testimony, both orally and in affidavits, given by the Father differs materially from that given by the Mother. When parties 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*).

[12] I cannot presume to know the truth about what happened between these parties and their children. I was not present to witness anything that 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?

[13] I do not intend to recite in detail all of the contradictory information provided by each of the parties. I have carefully read the affidavits each has presented and the other documents filed. I have listened to oral testimony. I have decided the information provided by the Mother that is of relevance in this proceeding is credible and when it differs from the information given by the Father, I have accepted the Mother's version of events. The examples I use in this decision to explain a point I have made are often not the only example I could have used.

[14] The Father is manipulative. He will make statements he knows have little or no truth to them in order to achieve his goal. Below is an example of this process at work.

[15] On January 25, 2012 the Mother informed the Father she was getting married and considering a move to Ottawa or Phoenix. She wanted to talk to the Father about this so there would be a smooth transition for the children. It is true this message assumed the children should move with the Mother. But given the fact (which will be discussed later in this decision) that the Mother was the primary care parent it is not surprising she did not contemplate the children remaining in Halifax in the Father's primary care. He could have discussed this with her at the meeting she requested. Instead he immediately commenced a legal proceeding framed as an urgent matter. In his affidavit filed on February 6, 2012 (attached to Exhibit 1) he said:

> 36 I recently had a short email dialogue of unexpected importance with (the Mother) (Exhibit A) where she stated her intentions to marry and move the Children out of Nova Scotia. This imminent threat to the Children's Best Interest, my continued access, and possible kidnapping is the reason for this application.
> .....
>
> 39 I consider this an urgent matter as I have been tricked by (the Mother) in the past with important effects, and she is likely misleading me again now as to when she will move with the Children out of Nova Scotia and her ultimate destination.
> .....
>
> 41 (The Mother) might very well move to Iran or the USA with the children during the Children's March break, or even earlier, for example.
>
> 42 Exhibit A of (the Mother) indicates her approach and likely intent (refer to para 74) is to kidnap the Children as defined within the Hague Convention since Para

> 24 of the Parenting Agreement states the country of Residency as Canada these purposes. (Father's actual words - not decision typing error )

[16] The Father provided no facts from which it could be concluded that he had been "tricked" by the Mother in the past. He provided no facts to support his allegation she would "kidnap" the children and take them to Iran or to the USA other than the fact that her intended partner lived in the USA and she had family in Iran she had visited in the past. However, the mere suggestion of kidnapping does result in an expedited court process. The Mother was prepared to consent to an order preventing a change in the children's residence so that more time could be made available than was provided for the Father's emergency hearing. During this hearing the Father acknowledged he did not believe the Mother would kidnap the children. I am satisfied he knew this at the time he filed his application. This was a blatant attempt to mislead the court.

**FACTORS TO CONSIDER IN A RELOCATION CASE**

[17] In the decision *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the Supreme Court of Canada provided guidance about the approach to be used and the factors to be considered when deciding whether a parent can move to another residential location with a child. The inquiry has two steps. First the Court must decide whether there has been a material change in circumstances. In every case when a parent has indicated an intent to move a child's residence a significant geographic distance away from a previous residence this threshold requirement has been fulfilled unless there is evidence to satisfy a court that the move was contemplated at the time the original order was made. In this case the intended move does constitute a material change in circumstances.

[18] The second step in a relocation proceeding, as contemplated by *Gordon v. Goertz ,* is a fresh inquiry to determine what parenting arrangement in which residential location is in the best interest of the child having regard to all of the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy those needs. The Supreme Court directed (and I summerize):

> 1. The inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
>
> 2. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's decision to live and work where she or her chooses is entitled to great respect and consideration.
>
> 3. The past conduct of a parent is not to be taken into consideration unless the conduct is relevant to the parent's ability to act as a parent of a child.
>
> 4. The parent's reasons for the move are irrelevant absent a connection to parenting ability, as may be the case of a move the sole purpose of which will be to frustrate or interfere with access.

5. The focus is on the best interests of the child or children and not the interests or rights of the parents.

[19] More particularly the judge should consider, amongst other factors:

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

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

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

(d) the views of the child;

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

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

[20] As the Supreme Court has said in *Gordon v. Goertz* :

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

An analysis of the case law on relocation provides detail to the factors to be considered that assist in the determination of the child's best interest and those are:

- the number of years the parents cohabited with each other and with child;
- the quality and the quantity of parenting time;
- the age, maturity, and special needs of the child;
- The advantages of the move to the moving parent in respect to that parents ability to better meet the child's needs;
- The time it will take the child to travel between residences and the cost of that travel;
- The feasibility of a parallel move by the parent who is objecting to the move;
- The feasibility of a move by the moving parent's new partner;

- The willingness of the moving parent to ensure access will occur between the child and the other parent;
- The nature and content of any agreements between the parents about relocations;
- The likelihood of a move by the parent who objects to the relocation;
- The financial resources of each family unit;
- The expected permanence of the new custodial environment;
- The continuation of the child's cultural and religious heritage;
- The ability of the moving parent to foster the child's relationship with the other parent over long distances;

[21] Some courts also recognize the positive effect on children of being cared for by a well functioning, happy custodial parent. If this is a factor to be taken into consideration it must be balanced against all the other factors. In addition, it must be reality tested because there may be many ways a parent can seek happiness and security that do not involve moving away and which may require some reasonable personal sacrifice, or consideration of other plans, for the best interest of the child.

[22] The comment by the Supreme Court that, "the parent's reasons for the move are irrelevant absent a connection to parenting ability, as may be the case of a move the sole purpose of which will be to frustrate or interfere with access" has been troubling. What reasons for a move can be considered to have a connection to parenting ability? Since the decision in *Gordon v. Goertz* there appears to be a societal narrative that custodial parents ,who have been living with children for some time in one location, should not move to locations that will impede or complicate children's relationships with the other parent, extended family, friends, and attendance at a familiar school. There is no such narrative in respect to the non custodial parent. He or she can move at will and no court ordered permission is required. The implication of this narrative is that there must be some very good reason for such a move by the custodial parent. However the Supreme Court indicated the relevant reasons to be examined are those "connected to parenting ability". The only example given was " a move the sole purpose of which will be to frustrate or interfere with access".

[23] There are circumstances that may lead to a finding that a move is solely for the purpose of frustrating access, for example:

- A move to seek alternative employment with no definite job offer in place;
- A move to follow a partner who has made no commitment to the moving parent;
- A move to follow a partner who would be able to join the parent in the present location.

[24] As a result, while the reasons for a move may ultimately be irrelevant to the decision to be made, evidence about those reasons must be provided, as will evidence about job opportunities for the custodial parent and, if a partner or intended partner is involved, whether that person can move to the custodial parent's present location.

[25] Of course the reasons for a move may also require analysis when the court is attempting to balance the benefits of a move against the detriments. In order to understand the benefits the court must understand whether a parent will, in the new location, have the ability to provide financial security for the children, provide a home situation which will be nurturing and free from conflicts with other persons, whether there will be persons living in the new community who can provide financial, personal and emotional support to the parents and the children. The answers to these questions often involve understanding why a parent is relocating. No doubt for these and other reasons parents do provide the court with information about why they intend to move.

[26] Once a court has decided the reasons for the move should not result in a finding that the move is solely for the purpose of frustrating access it must then analyze two situations. The first is the situation of the children living with the custodial parent in the new location and the second is the children living with the non custodial parent in the former location. It is not for the court to analyze these requests based upon what the custodial parent's situation would be if he or she did not move. Courts have considered it inappropriate to ask the moving parent whether he or she would remain at the previous location if the children are not permitted to move with them. 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.
>
> The Quebec Court of Appeal has gone further and described this question as "irrelevant" in ***F.H.* v. *V.J.*** [2003 JQ 671]. . . . .

It is just as inappropriate to consider what the parent's situation would likely be if he or she remained at the previous residence. The parent is asking the court to analyze the situation based on an intended move. If the court decides the best interest of the children is to remain in their previous residential location in the care of the non custodial parent it will be up to the moving parent to decide whether he or she will in fact move as originally intended.

**Who Is The Custodial Parent?**

[27] Who in this case is the custodial parent whose decision is to be given great respect? In *Burns v. Burns* 2000 NSCA 1 the Appeal Court chose not to limit the concept of "custodial" parent to a person having sole custody pursuant to an order, which was the case in *Gordon v. Gertz* but extended this designation to whoever was the primary care parent. There is no question that by Interim Order and later by Corollary Relief Judgement the Mother was and is the primary care parent. The Father rarely cares for the children at times other than for the specific parenting time (access) set out in the Parenting Plan. He has never applied to be granted more time. He cannot now suggest the Mother is not the primary care parent.

**Is The Move Requested Solely to Frustrate or Interfere with the Father's Access?**

[28] The Father has complained about the Mother's plan. He suggests she has not fully investigated her intended partner's credentials. He suggests he may not be as committed to the relationship as she believes. The Mother has no job awaiting her in Phoenix. She has no extended family living there.

[29] The Mother has known her intended partner for approximately two years. He has visited with her in Halifax and he has cultivated a relationship with the children. She and the children have visited him in Phoenix. They have met his family. The Mother has provided detailed information about her intended partner's employment, income, personal interests, family, and the community in which he lives. The Mother and the children will live in his home. She does not intend to work initially but eventually will either do so as an employee or as a self-employed person in a business she and her intended partner may develop. Her education and training appear to make her as employable in Phoenix as she is in Halifax. Her intended partner works in a very specialized area and his mobility is limited as a result. He is a member of the Baha'i faith, as are the Mother and the children. He is Persian as is the Mother and he is active in the Baha'i Faith and in the Persian American community. The Mother and the children have been very involved with friends and family in Halifax as participants in this Persian culture. That involvement, and their participation in the Baha'i Faith, is important to the Mother and to the children. The Father, was initially supportive of their involvement; he became a member of the Baha'i Faith himself for a period of time. Now he says he was shunned and excluded by those in the faith and of the Persian culture, including the Mother's extended family. I have determined this was his overaction to the reality facing him. He did not speak the language of many of those he would meet at Baha'i and Persian cultural events. I am not satisfied there was a conscious effort by those of the faith and culture to ignore him.

[30] The Father generally refuses to transport the children to attend Baha'i Holy Days and Feasts and Persian Celebrations if these events occur when they are to be in his care. He either requests a rescheduling of access or requires the children be returned to his care at the end of the event. He has refused to permit the children to attend these events if they occur during his "block access" time.

[31] The Mother's reasons for her move have nothing to do with any desire on her part to frustrate or interfere with the Father's access. She is moving so that she might share her life with a supportive, kind, nurturing spouse who shares her faith and culture. I have no reason to believe her intended partner is not such a person. The Father has no "evidence" to the contrary.

**PREVIOUS ORDERS**

[32] The Interim Consent Order dated July 21, 2008 confirms the children were to be in the primary care of their Mother. The Father was to have access every second weekend from Friday evening until Sunday evening and one evening per week. The Order also provided:

> 2.(c) Such other access as can be agreed upon between the parties. The parties shall be flexible with making arrangements for the children to accommodate their schedules and activities. Reasonable requests of the parties shall not be refused unreasonably.
>
> 7. Regardless of the access schedule, the children shall continue to attend the Baha'i events, activities and services, and (the Mother) will pick up the children and take them to the events, activities and services and return them to (the Father) if they are in his care at the time. The ( Father) shall be entitled to additional access in lieu of their time spent at Baha'i activities in the event it falls during his scheduled access time.

[33] The parties had significant difficulties reaching a resolution in respect to the appropriate final parenting plan. They did eventually consent to the parenting plan which was attached as Schedule "A" to the Corollary Relief Judgment dated August 11, 2010. Pursuant to that plan the Mother continued to have primary care of the children. The Father had access with the children every second weekend from Friday at 6 PM until Sunday at 6 PM and every Wednesday night from 6 PM until Thursday morning at 8:30 AM. There was to be "such additional access as can be reasonably agreed upon between the parties". Specific provision was made requiring the Mother to contact the Father and provide him with the opportunity to parent the children if she was to be away for periods exceeding 24 hours. The notice she was to give him about this opportunity was to be "as soon as practicable in the circumstances". There were provisions for vacation and holiday access. Special provisions were made to ensure the children would attend Baha'i Holy Days and Feasts and Persian Celebrations. If the event was on a day when the Father was to have access the access was to be rescheduled at his request or he could take the children to

the event. This provision was to apply even during his "block access" times. He has for some time refused to comply with this provision when block access occurs.

[34] The Parenting Plan provided that the children were to be in the joint custody of their parents. The parents were required to share and exchange information each received but both were entitled to complete information, right of consultation, and duplicate reports from all of the individuals involved in the children's lives. The underlying implied term of the Parenting Plan was that if a parent was dissatisfied with the information that was provided by the other parent he or she would have the right to contact the service provider directly so as to ensure the free flow of information relevant to the children.

**Father's Complaints**

[35] The Father has complained about the Mother's failure to provide him with information about the children as is required by the Parenting Plan. He has similar complaints about the Mother's failure to abide by the access provisions of the Parenting Plan and he accuses her of interfering with and impeding the time he was to spend with the children. He also blames the Mother for his 2 ½ year estrangement from his daughter. Because he was self- represented there was no clear presentation explaining the relevancy of this information in respect to the relocation request. This information may be relevant to establish the following:

1. A flaw in parenting suggesting the children should not be in the primary care of that parent.
2. A failure to follow court orders suggesting a likelihood arrangements to be made by court order would not be obeyed for the return of children for visitation should they be permitted to move.
3. An unwillingness to respect and nurture the relationship between the children and the other parent.

[36] In this case the evidence of the Father's complaints, if accepted, may indicate a flaw in parenting but given that his first preference is for the Mother to continue living in Halifax with the children under the terms of the present order, whatever these flaws may be he does not suggest the children should be in his primary care as long as their Mother is living in Halifax. In fact he has presented no plan about how he would provide care to the children if he was the primary care parent. I know very little about his present wife. I do not know whether she is prepared to parent these three children. I do know she supported the Father in respect to his view about what the daughter would need to do to be in the presence of the Father and in her presence. As a result she has had very little to do with parenting the daughter.

[37] Has the Mother failed to follow the Parenting Plan leading to the conclusion that she will not obey an order requiring the children to return to Halifax so their Father may have access with them? What are the failures alleged by the Father? He asserts she did not:

- provide him with information about the children
- abide by the strict terms of the access arrangement
- ensure that their daughter had access with him as required by the parenting plan

[38] I am satisfied the Mother provided and attempted to provide the Father with information about the children. There was a special e-mail account set up for this purpose but he admitted in testimony he did not access that account. He also admitted he did not ask the children's schools to place him on their e-mail list so he would get the dates and times of school events, parent teacher meetings etc. He complained about not being involved in decisions about his daughter's treatment at the Shriner's Hospital in Boston, USA but he knew their plan from the start was to follow the recommendations of the physicians treating her. He did not contact them for reports although he was entitled to do so. In short he expected the Mother to provide him with everything. He was not prepared to do anything himself to become better informed about the lives of his children. He preferred to berate the Mother for her failures to inform. He showed no acceptance when given a reasonable explanation about why he had not received a child's report card, or been involved in medical decisions about her treatment, and in doing so cast himself as a victim of the Mother's plotting to demote him in his daughter's eyes. (the Father's affidavit, Exhibit 4, Tab F).

[39] I am satisfied the Mother followed the Parenting Plan. The plan was not meant to be a rigid, fixed in stone, document. It contemplated changes from time to time as are required to meet the children's needs. Parents who no longer live together are often continuously juggling who will transport children to their activities and appointments, assisting the other with parenting when job obligations require a parent to be away during his or her usual parenting time, and rearranging personal events and schedules to attend to their children's needs. Because of the Father's intransigence the Mother, for the most part, shouldered these responsibilities alone. The Parenting Plan provided each parent with an opportunity to provide care for the children when the other parent expected to be unavailable. The Father was offered these opportunities but frequently refused to care for the children. He had other plans. It was inconvenient for him. One might expect this to happen occasionally but the evidence convinces me it was a regular occurrence. The Father did not want to care for the children except according to the regular schedule nor did he want to make any accommodation that might make the Mother's life easer. The most egregious example of this is contained in an e-mail exchange attached as Tab B to Exhibit 5 of the Mother's affidavit filed June 15, 2012. In this exchange the Father refused to care for the children if school was cancelled due to weather (even though he had them in his care) and refused to drop them off at the Mother's home because the Order said he was to drop them off at school. He insisted on dropping them off at the Mother's office, not at her home, even though he was advised she would be out of town.

[40] The Mother did not enrol the children in recreational activities to interfere with or thwart the Father's access. She enrolled them in activities they enjoyed. She wanted their lives to go on as they had in the past even though the parties were separated. The children had skill and their participation required their attendance at games and practice sessions at times when they were to

be in the Father's care. He was very dismissive about their wish to be involved in these activities. His children should not engage in such activities especially when he may have to provide transportation and be prevented from doing whatever it is he wanted to do at that time. From the Mother's affidavit filed June 15, 2012, (Exhibit 5):

> 46. Attached hereto and marked Exhibit "I" is a true copy of my email to (the Father) dated April 28, 2010, with the complete list of soccer times and places. (The Father) would not agree to them playing, stating it "intrudes on his visitation unnecessarily". He told me to "skip (their son's ) tryouts and convince them not to be excited about teams superior to house league", even though they had played in the competitive league previously.

[41] The Father held the Mother responsible for the lack of contact he had with his daughter for a period of almost 2 ½ years. The Father attached to his affidavit filed June 15, 2012 a "Log of Notable Circumstances" (Exhibit 5, Tab W). This is a typed document prepared by the Father. This is a document he sent to his daughter by attaching it to his e-mail sent to her on December 31, 201. (paragraph h. of Exhibit 4 and Tab JJ of Exhibit 5) It is obvious from its content that it was not created shortly after the recorded events. The Father referred to many of these events in his affidavit and tendered the "Log" presumably to bolster that evidence and possibly as proof of the contents not specifically mentioned in his affidavit. The Mother takes objection to this use of the material. I recognize this is very suspect material. The "Log" is not evidence providing assistance to the Father's case but it does contain admissions helpful to the Mother. I will start with the Father's own words in his entry in the "Log" dated October 15, 2007:

> I had taken to sleeping in the van four times in attempts to have (the Mother) begin addressing our marital problems. This was not working, as she simply ignored it and would sleep comfortably while I froze. On Oct 15, 2007 (para 33 of (the Mother's) July 4, affidavit Ex 201-P), I finally realized this approach was not working, so I finally came home and attempted to take the bed from her (replace her in bed with myself). I bodily removed her from the bed by dragging her out of it by her arms - there was no other physicality. I only demanded she vacate the bedroom, not the house as she claimed. She used this opportunity to overreact, feign terror to the children, and beg they call 911 for the police. Ultimately, I was escorted out of the house for the night, with all kids witnessing.

[42] The parties daughter was 10 when this event occurred. She witnessed her father pull her mother out of bed late at night when her mother was sleeping. This would have been terrifying. It is not unreasonable the daughter would have been frightened of her father and fearful about what he may do to her mother or to her. Overtime she did become disrespectful of him but I believe she had reason to do so. I accept the Mother's information about the demands the Father put upon his daughter and how these led to her physically kicking him on at least one occasion, and spitting at him on another. His mature parental response was to kick her back and spit at her. Their daughter was taken to a counsellor to attempt to repair their relationship but the Father

refused to co-operate. The counselling was not going to do what he thought was required. He refused to recognize his daughter may have had good reason to disrespect him. Parents cannot merely demand respect, they too must earn it. Instead this Father delivered his 10 year old daughter an ultimatum. From the Mother's affidavit filed June 15, 2012 (Exhibit 5):

> 86 On June 11, 2009, the Father wrote to (the daughter) and advised her that, among other things, she was a public embarrassment to him, she would have to prove herself "worthy" to be in his company and she would be unable to exercise access with him until she provided him with an acceptable 500 word handwritten apology for her behaviour, which he called her "tickets for visitation".

He blames the Mother for not requiring the daughter to write that apology. The Father refused to have any contact with his daughter after this notwithstanding the Mother's many requests, and his daughter's requests, that he do so. He continued to demand the apology. He gave his daughter no Christmas or Birthday gifts. He would not call her, or take calls from her, to offer support when she had her skin graft surgeries.

[43] In January 2011 the daughter once again expressed an interest in meeting with her father. The Mother attempted to arrange this but the Father would not do so without an apology. On February 4, 2011 at 1:15 a.m. the Father sent this e-mail to his then 14 year old daughter and he copied it to the Mother:

> A friend can only wait so long for an apology before the friendship is permanently broken. So too with us. Please show me something before the end of this February, otherwise it will be too late, and I won't be reading it.

The daughter wrote an apology. It is attached as Tab EE to Exhibit 5. It should have been enough. It was not.

[44] The Father meet with the daughter once at Tim Horton's in May, 2011. Obviously he was in no hurry to have this meeting.

[45] On June 27, 2011 the Father e-mailed his daughter and copied to the Mother an "Attestation" that was to be sighed by Mother and daughter as a condition of the Father seeing his daughter. The contents are too disturbing to repeat in this decision. They can be found at Tab HH of Exhibit 5 filed in this proceeding. That a Father would write this malicious diatribe to his daughter is shocking. It makes clear his total inability to be understanding, compassionate, loving, nurturing and kind. He is a narcissist. He is completely unable to recognize or identify with the feelings and needs of others. He lacks empathy. These are necessary parenting skills. He does not have them. The fact that he appears to have a good relationship with his sons only means they are careful to obey, unlike their sister, and they know what happened to their sister. What happens if they do rebel at some time while in their Father's care? Will he refuse them

entry into his home or send them back to the Mother demanding she make them apologize for whatever expectation of his they have not met? The fact that his daughter, in spite of this e-mail, still wants to have a relationship with her father only speaks to the desperate need for children to have a relationship with a parent, no matter how poorly they may have been treated by that parent.

[46] This Father does not have the necessary parenting skills to be the primary care parent. While my primary example is his treatment of his daughter, his lack of skill for the reasons I have identified can eventually negatively affect his sons. In addition there are examples of inappropriate treatment of his sons. He had them read the affidavit he attached to Exhibit 1 in this proceeding. This is the document in which he suggests their Mother would kidnap them and take them to Iran. He has not been supportive of their athletic preferences. It is not in the children's best interest to be in his primary care. Therefore they cannot remain in Halifax if their Mother moves no matter how much this may be their preference, and each has expressed some preference to remain here. The diminished contact with extended family, friends, and with their Father are insufficient reasons in this case to order that they continue to reside here in the primary care of their Father. These factors would only take on importance if the parent with whom they were to reside, if they stayed, had the parental capacity to provide for, not just shelter, clothing, and nutrition, but also healthy psychological and emotional development. To do so a parent requires patience, compassion, empathy, flexibility, and occasionally must make some personal sacrifice. The Father does not have these skills nor is he willing to make any personal adjustment for the benefit of his children.

**Parenting Plan**

[47] These children are to accompany their Mother when she moves to Arizona. They are to be in her custody. The geographic distance does not permit meaningful joint decision making. The Mother shall keep the husband informed about the children's educational progress, recreational activities, health and dental care, social development and about anything that significantly impacts their physical, intellectual, physiological, and social development. She is to send the Father copies of reports she has received about the child in reference to any of these issues.

[48] I have significant concerns about the relationship between the Father and his daughter and as a result I will treat the Father's access with her somewhat differently than I will his access with her brothers. Parents cannot be forced to care for their children at dates and times provided to them. However, consequences can be ordered if an access parent refuses to care for a child when he or she has the opportunity to do so and the child is a willing participant. Custodial parents cannot suddenly decide not to care for their children (think of the single parent situation). Why should parents with an opportunity for access pick and choose when and with which children he or she will exercise this opportunity? This is a possibility in this case and as a result the Father will have access opportunities with all three children and there will be a consequence if he does not want to have access with his daughter when she wants to participate. The Mother has been encouraging contact between daughter and Father and I accept she will continue to do

so. However, she will be the decision maker in respect to whether the daughter will participate in the access with her Father. The Father is not to discuss this with his daughter. Whether she will be included or not in any particular visit will be information provided by the Mother to the Father. If he is informed that she does want to be included in the access, and the Father refuses to care for her during the time provided, he is to pay the total cost of the return ticket for visitation with his sons.

[49] The Father is to have access with the children every summer for 4 consecutive weeks. No later than May 31 in every year the Father is to inform the Mother in writing with the dates during which he intends to exercise his summer access. He is to purchase the return tickets for their travel and, if requested to do so by the Mother on or before June 7 of each year, the date of departure and/or return are to include time to permit the children to be in Nova Scotia before and/or after their consecutive four week access with the Father. This is to permit them an opportunity to visit with maternal extended family in Nova Scotia.

[50] On or before June 30 in every year he is to purchase return tickets for the children to travel by airplane flight to Halifax and he is to have these tickets delivered to the Mother by Fed Ex or other secure delivery. Upon receipt of confirmatory information from the Father about the cost of the return tickets and for the delivery of those tickets to the Mother she shall reimburse him ½ the disclosed amount within three weeks of her receipt of that information. The Mother shall provide the children's passports and she shall have prepared and sign any consents required to permit their travel. These arrangements for travel and reimbursement for the cost of travel are to apply to all access travel required.

[51] The holiday the children will have over the Christmas season is difficult to divide when children are to fly the distance that will be involved as a result of this relocation. The only practical solution is for the children to remain with one parent for their entire school break alternating between parents' homes each year. If the Mother moves to Arizona before December 2012, the Mother is to have the children in her care for their Christmas School Break in 2012, and in every even year thereafter. The Father is to have the children in his care for the 2013 Christmas School Break and in every odd year thereafter.

[52] If the Mother moves to Arizona after December 2012, the children are to be in the Mother's care for the 2013 Christmas School Break and in every odd year thereafter. The Father is to have the children in his care for the 2014 Christmas School Break and in every even year thereafter.

[53] For any year when the children are not to be in the Father's care for their Christmas School Break they are to be in his care for their entire Spring School Break.

[54] The Mother is to inform the Father of the date for the children's Spring School Break on or before October 31 in the year prior to that Spring School Break.

[55] It does not appear practical or affordable to have the children travel at times other than those that I have ordered. The Order is to state the parents may make arrangements for such further parenting time for the Father either in Nova Scotia or Arizona as can be agreed upon in writing and this will also necessitate their agreement about who will pay or contribute to the children's transportation cost if they are to travel. E-mail communication will be recognized as a communication in writing provided that the entire string of e-mails leading to the agreement and the agreement itself is kept and provided by the parties should there be any subsequent dispute.

[56] The Mother shall have a home computer that has installed a program such as "Our Family Wizard " or Skype with an e-mail program that will permit a "virtual visitation" and communication with the Father and between the Father and the children. Our Family Wizard is a program that also allows for scheduling but if the Father does not wish to purchase this program I would expect the parties to use Skype and an e-mail program. I do not know what the children's schedules will be in Arizona. There is a significant time change between that State and Nova Scotia. Therefore I cannot micro manage these parents to give specific times each week for "virtual visitation" to occur. All I can say is that the children are to contact their father no less than twice every week for a virtual visit to be arranged by the Mother. She is to inform the Father the week before every visit with the date and time when the children will be contacting him and he is to confirm whether he will be available. If he will not be available and an alternate time cannot be found in any week the time lost will not be made up. This does not prevent more virtual visits it just sets out the minimum that must be arranged. The Order should provide that the Mother is not to prevent the children from contacting their Father at any time they may choose to do so.

[57] The parenting plan incorporated into the Corollary Relief Judgment issued August 11, 2012 remains in effect until the Mother relocates to Arizona. Upon her move with the children the provisions of the Order issued as a result of this decision shall apply.

**Child Support**

[58] There is to be no deduction in the amount of table guideline child support to be paid by the Father to the Mother pursuant to the Corollary Relief Judgment issued August 11, 2011. I have required the Mother to share the cost of transportation so the Father may have access time with the children. Once the children move to Arizona he will not be required to pay the current special and extraordinary expenses. The Mother will be required to make a fresh application for contribution to any of these expenses she is required to pay in support of the children after they move. I have reviewed the financial information the Father has provided in his affidavits. The Father's income disclosed in the Corollary Relief Judgment was $103,170.00. The Children's Preferences Assessment Order issued in March 2012 recorded the Father's income to be $107,170.00. The Father's wife is working and earns, according to the Father's testimony, "less than $40,000.00" but he was not able to say how much less. He and his wife have traveled to China to visit her family. I am satisfied the Father has the ability to pay for his share of the children's transportation cost.

**Other**

[59] The Mother is to have the Order issued in this proceeding filed or registered for enforcement purposes pursuant to *The Uniform Child Custody Jurisdiction and Enforcement Act*, or other similar legislation in force in the state of Arizona. She must provide confirmation to the Father that she has done so. If *The Uniform Child Custody Jurisdiction and Enforcement Act* or similar legislation is not in force in Arizona, the Mother shall pay for and provide to the Father an opinion from a Lawyer in Arizona practicing family law explaining how he may enforce the provisions of this Order in that state.

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Beryl MacDonald, J.S.C.