

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Butler v. Butler, 2008 NSSC 336

Date: 20080707

Docket: 1205-002610

Registry: Pictou

Between:

Lisa Elizabeth Butler

Plaintiff

v.

Dallas Martin Gerald Butler

Respondent

DECISION

Judge: The Honourable Justice Douglas L. MacLellan.

Heard: June 23, 24, 26, 2008 and July 7, 2008 in Pictou, Nova Scotia

Written Decision: November 21, 2008

Counsel: Nicole Mahoney, for the plaintiff
Lloyd Berliner, for the respondent

By the Court: (Orally)

[1] This is a divorce hearing. The parties were married on July 20th, 2001 and separated in July of 2004. They had lived together in a common-law relationship which started in 1995. There are two children of the marriage, Dawson Matthew James Butler, born May 17th, 1998 and Hayden Dallas Frances Butler, born May 24th, 2001.

[2] The grounds for divorce have been proven and a divorce judgment will issue. The main issue in dispute before me in this hearing is whether the custody arrangement for the children of the marriage be a shared arrangement where each parent would have the children for an equal period of time or whether the present arrangement is maintained. The present arrangement is based on a Family Court Order made in January of 2006 by Judge Wilson of the Family Court. That order resulted from a settlement conference held by the parties, their counsel and Judge Wilson. It details an arrangement of shared co-parently.

[3] The arrangement provided that the boys would be with Mr. Butler every second weekend from Friday evening to Monday evening at 5:00 p.m. In addition he was to have the boys Wednesday evening and over night to Thursday morning

at 7:30 a.m. He also was entitled to have an evening visit with the children on alternating Mondays from after work until 6:30 p.m.

[4] The order also provided for other times when the children were on vacation and basically gives him half of that vacation time.

[5] The order provided that Mrs. Butler would get the child tax benefit and that Mr. Butler would pay \$100.00 per month less than the amount normally payable under the child support guidelines. That was I understand to reflect the fact that he had the children for a significant period of time.

[6] The evidence before me is that the parties agreed to vary the Wednesday night overnight visit with Mr. Butler to Thursday night, which meant that on the week of his scheduled weekend visits he would have the children from Thursday evening until Monday morning.

[7] In August 2006 Mrs. Butler filed her Petition for Divorce in which she requested that the present custody arrangement, set out in the Family Court Order,

continue but that the court increase the child support payable because of an increase in Mr. Butler's income since the making of the Family Court Order.

[8] Mr. Butler acting as self rep filed an Answer in which he asked that the custody arrangement be changed to one where he had the children for 50% of the time.

[9] The divorce was scheduled for hearing in May 2007 but prior to the hearing counsel for Mrs. Butler and counsel for Mr. Butler filed briefs on the issue of shared custody. Mr. Berliner had come on the file as counsel for Mr. Butler prior to that scheduled hearing.

[10] Justice Tidman after reviewing the materials in the file, prior to the hearing, ordered that an assessment be done by a psychologist to address the issue of shared parently. Because of that the divorce hearing was adjourned.

[11] Ellen Millman was engaged to do the report and it was filed in November 2007. The report recommended a shared custody arrangement with each parent having the children for an equal period of time. Mrs. Butler objected to that

arrangement and the parties agreed to have a hearing which was scheduled before me on June 23rd, 24th and 26th.

[12] I have heard from Ellen Millman and her report has been introduced into evidence. I have also heard from the parties and other witnesses called by them.

[13] Counsel have identified the central issue as being what custody arrangement is in the best interest of the two children.

[14] Mr. Butler suggests that the children would benefit by spending more time with him and points to Section 16 (10) of the **Divorce Act** which mandates that a custody order should provide as much contact with both parents as is in the best interest of the children.

[15] Counsel for Mrs. Butler argues that the present arrangement is working and has been in effect since January 2006. She suggests that Mr. Butler's request for shared custody has a lot to do with a request to allow him to reduce his child support payments based on him having the children for more than 40 % of the time. She also argues that there has not been a material change in circumstances

since the making of the Family Court Order and therefore the court should not change that Order. She also argues that because the parties do not communicate very well a shared parenting arrangement would not work.

[16] Ellen Millman is a psychologist with a masters degree. She has done many custody assessments for the Family and Supreme Court.

[17] In her report she recommended that each parent have equal time with the boys. She found that basically each parent was capable of looking after the children. She pointed out that both had new partners and each had a young child with the new partner. Mr. Butler's partner, Arlene MacDonald also has a son Kaine from a previous relationship. He is nine years old.

[18] Ms. Millman recommended that the parents be awarded joint custody and that each parent have equal time. She indicated that a mediator be engaged to arrange a schedule of that time.

[19] Mrs. Butler testified that she and Mr. Butler were together for eight years prior to their marriage in July 2001 after the birth of Hayden. Dawson was born in

1998. She said that she was the primary care giver to the boys and that Mr. Butler was emotionally abusive to her and that on a couple of occasions he resorted to physical abuse. She said that in her opinion he was very controlling.

[20] She said that they were living in Calgary and that they decided to buy a home there. She said they did in September 2002 but that they had discussed the issue of moving back to Nova Scotia so that Dawson could start school there in the fall of 2003. In April 2003 Mrs. Butler's mother got sick and she decided to come back to Nova Scotia to care for her. Shortly after she came back her mother died in July 2003. Prior to her leaving Calgary they both agreed to list their house for sale. Mr. Butler although, in her words, not thrilled with the arrangement agreed to do that.

[21] Mrs. Butler and the boys stayed in Nova Scotia after April 03. While she was in Nova Scotia she became involved in an affair with another man and when Mr. Butler came to Nova Scotia for a visit in June 2003 she told him that the marriage was over.

[22] The Family Court dealt with the issue of custody and support in December 2004 and granted joint custody to both parents with Mr. Butler having alternate weekends and overnights on Wednesday. He also provided care for Dawson after school during the week and cared for Hayden on Monday, Wednesday and Fridays. At that time Mr. Butler was unemployed.

[23] In January of 2006 the Family Court issued the current Custody Order. It provides in detail the present custody arrange. Mrs. Butler said that after the Order was granted she suggested and they both agreed that the midweek overnight be changed to Thursday night.

[24] Mrs. Butler wants the present arrangement to remain as it is and objects to Mr. Butler having equal time. She feels that the report done by Ms. Millman was not done properly or professionally and that it recommendations should not be followed. She feels that the present arrangement provides more stability for the boys and a shared arrangement would be disruptive to them.

[25] I heard from Arnold Charron, Mrs. Butler's partner. They have a child Elizabeth who is close to two years old. He has lived with Ms. Butler for three years.

[26] Mr. Charron has had a number of run ins with Dallas Butler. He said that Mr. Butler does not respect Lisa Butler and that he had had to step into the situation when Mr. Butler got upset. He has heard him numerous times being rude to her and was in the house when there were confrontations. As a result he and Ms. Butler have told Mr. Butler not to come to their home and the children are dropped off outside when they are returned by him. On one occasion when Mr. Butler made a crude remark to Lisa Mr. Charron went to Mr. Butler's house to confront him about that comment.

[27] Mr. Charron said that at first while he lived with Lisa she would put up with a lot of emotional abuse from Mr. Butler but that as time went by she became stronger and now, in his words, stands on her own feet. Mr. Charron also expressed his opinion about how Ms. Millman did the report. He said she interviewed him at the Tim Hortons and that when he objected they moved out to her car where the interview was completed. He said that she also told him what

she was going to recommend in her report, that would be a shared arrangement with the children. He said he was really surprised about that. Mr. Charron feels that Ms. Butler is a wonderful mother to the boys and his daughter Elizabeth.

[28] Arlene MacDonald is the partner of Mr. Butler. They have lived together since May 2005. She also has a son Kaine who is 9 years old. She and Mr. Butler have a son Landon who is 11 months old. She described their home in Little Harbour and the house which has six bedrooms. She works for the Pictou County Sexual Health Association as its executive director. She said she has done that for 5 years.

[29] Ms. MacDonald knows the Butler boys as they visit with Mr. Butler on weekends. They also go on trips together. She described that when the children come to visit their family that many times Mrs. Butler calls them at the house. She feels that there are too many calls coming from her while they visit their father.

[30] She explained an issue which arose in Ms. Millman's report when Dawson Butler had complained about fights he had with Kaine, her son. She said she was

concerned about that and she and Mr. Butler arranged counselling for Kaine and the whole family including the Butler children.

[31] Ms. MacDonald put forward a plan for shared time involving a set number of days for each parent. That was based on an article she produced as Exhibit R-3

[32] Mr. Butler testified. He said that he is a millwright and works for Nova Forge in Trenton. He has had that job since May 2005. His hourly wage is \$20.42 per hour and he works a 40 hour work week. He gets some overtime. His 2007 income was \$50,568.00.

[33] Mr. Butler said that after he finished high school he took a 2 year industrial mechanic course at community college. He then started an apprenticeship program over the next 5 years leading to getting a certificate as a certified millwright. He said that enables him to work in that trade anywhere in Canada except Quebec. He said he works on large stationary equipment doing maintenance and repairs.

[34] He said that he and Ms. Butler moved to Calgary in 1994. He said he was with one employer there for six years. Dawson was born in May 1998. His job

during that time did involve some time away from home but most of it enabled him to be at home at night. He said his longest time away from home was 21 days.

[35] He said that in 2001 when Hayden was born Ms. Butler came home to Nova Scotia and was here for 2 months. He said they got married in July of that year after Hayden's birth. He said he went back to Calgary and she followed him in the fall. She went back to work in April 2002 in Calgary. In the fall of 2002 he said that they discussed buying a new home. They did so in September of that year. He said their plan was to stay in Calgary for 5 years then sell the house and move back to Nova Scotia. He said that there was a change in plans as they had previously intended to move back to Nova Scotia in the summer of 2003 so that Dawson could start school in Nova Scotia. He said they registered Dawson for school in Calgary for September 2003 but that in April 2003 Mrs. Butler's mother became very ill and she decided to come home to care for her. He said they changed their plans and decided that they would sell the Calgary house and move to Nova Scotia.

[36] He said that he stayed in Calgary to look after the sale of the house while she cared for her mother. The boys left Calgary with her. He denied that Mrs. Butler told him at that time that she was not coming back to Calgary.

[37] He said that in June 2003 he came to Nova Scotia and was there when his wife's mother died in early July. He said he went back to Calgary while she stayed in Nova Scotia to look after her mother's estate. He said he still felt that she would follow him back but by September when Dawson started school in Nova Scotia he accepted the fact that she would not be coming back to Calgary. He still felt that their marriage was O.K. and he made a number of trips back to Nova Scotia. He said he dropped the price on the house in Calgary and it sold in June 2004. He came back to Nova Scotia in July and went on employment insurance. When he came back he lived with Mrs. Butler and the boys at her father's house in Thorburn but 2 weeks after he arrived he discovered that Mrs. Butler had had an affair with another man. He left the house and went to live with his parents. He said he got counselling to deal with the issue of their separation after their 12 year relationship. He said that he and Mrs. Butler agreed to an arrangement for care of the boys.

[38] That arrangement involved him caring for Hayden full time on Monday, Wednesday and Friday of each week and caring for Dawson after school each day until Mrs. Butler got off work.

[39] That arrangement was put in the form of a Family Court Order in December 2004.

[40] Mr. Butler said that he was happy with that arrangement and after the order was taken out he completed a divorce kit which was to be a joint request for a divorce. He said he completed the kit and took it to Mrs. Butler for her to sign. He said that she did not complete it and shortly after he gave it to her he received documents whereby she asked for a new court hearing. He thought these documents was the divorce petition.

[41] In May of 2005 Mr. Butler said he got his current job. Because of that he could not care for the boys as he had been doing. The custody arrangement was changed with him having the boys every second weekend and on Monday night.

[42] In the fall of 2005 Mr. Butler became involved in a settlement conference with his lawyer, Mrs. Butler and her lawyer and Judge Wilson of the Family Court.

[43] During that settlement conference the parties came to an agreement about custody and access. An order was prepared and taken out in January 2006. That order has been in effect since that time. It has already been referred to in this decision.

[44] Mr. Butler asks that the present arrangement he has to access the boys be changed to one where they are with him for 50% of the time. He says they are happy and content while they are with him and he wants them to have more time with their new step brother Landon and Ms. MacDonald's son Kaine.

[45] Mr. Butler feels that Mrs. Butler does not keep him properly informed about things in the boys lives and points to an example where he was not told about a medical appointment Dawson had in Halifax. He found out about it just days before that appointment and therefore could not attend. He says he was not told about a special reading program Hayden was enrolled in at school until he found out from his teacher some months after it had started.

[46] Mr. Butler admitted that he had physically mishandled his wife on one occasion by pulling her hair and had pushed her when he says she was drunk. He said she fell into a closet.

[47] He also agrees that there has been verbal confrontations between them dealing with issues involving the boys.

[48] Mr. Butler suggests that the problems between himself and Mrs. Butler should not prohibit him from having the boys one half of the time.

[49] He thinks that both parties should put their personal differences aside for the sake of the children.

[50] The **Divorce Act** provides the basis upon which a court deals with an Application to Vary a Custody Order.

Section 17 (5) provides:

“Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by the reference to that change.

Sub Section 6 provides:

“In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.”

Section 17 (9) of the **Divorce Act** provides:

“In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.”

[51] A central issue in this case is whether I should consider this case as an Application to Vary the Family Court Order of January 5, 2006 or simply deal with the custody issue in the divorce proceeding as an original Application for Custody.

[52] In **Cameron vs. Cameron**, [2006] N.S.J. No. 247, our Court of Appeal dealt with that issue. There the appeal, to the Court of Appeal, was from a decision on divorce which determined that a Family Court Order made previous to the divorce hearing was an order that had dealt with custody and therefore the court had to determine if there was a material change in circumstances which would warrant a change in the custody order. The trial judge had found that no such change existed and that was an issue on the appeal. In that case Bateman, J.A. of the Court of Appeal said and I quote:

“The judge here found that the mother had not established a change which altered the children’s needs or the ability of the parents to meet those needs. The fact that the children were experiencing some stress from the alternating week care arrangements did not warrant a variation of the joint custody order so as to permit the mother to move with the children. The mother says in this regard he erred.

Here, the custody situation presenting at the time of trial was governed by the Order of White, J.F.C. made under the **Maintenance and Custody Act**, R.S.N.S., c. 160 (the “**MCA**”). The onus was on the mother to establish a material change in circumstances since the time of the preceding order. Both under the **MCA** and the **Divorce Act** the governing test in custody matters is the best interests of the child. The parents each referred to the law as laid down in **Gordon v. Goertz**, *supra*.”

[53] In this case the Family Court made an order based on the consent of the parties. That was done in January 2006. The divorce originally scheduled for May 2007 is now being heard.

[54] Mr. Berliner on behalf of Mr. Butler argues firstly that the Family Court Order dated January 5th, 06 from the Family Court is not a final order in that court because it simply varied a previous Interim Order dated December 8th, 2004.

[55] His argument is that since it is an Interim Order, his client does not have to prove a material change in circumstances and this court should address the issue of custody and access.

[56] He also argues that if a material change is required that it has taken place here.

[57] I reject Mr. Berliner's position in regard to the Family Court Order. While the order issued on January 5, 06 was headed "Consent Varied Order" I conclude it was an order dealing with the situation at that time and was not an interim proceeding pending a full hearing. Clearly it was intended to address the complete issue of custody and access and child support. No subsequent hearings were anticipated when it was consented to by the parties. I consider the Family Court Order a final order dealing with custody.

[58] I conclude that Mr. Butler must therefore show a material change in circumstances since the making of the Family Court Order which change materially effects the children in such a way that warrants the court here reassessing the issue of custody.

[59] The evidence before me has demonstrated that basically since the making of the Family Court Order the parties have been able, with some difficulty, to adhere to the terms of that order. The problems described by the parties in regard to pick ups and to schedules that are not unusual to me. The parties have different versions of how specific matters transpired. There is definite conflict on some issues and other times it turns on the view of the different persons involved.

[60] It is clear to me that there is a clear lack of communication between the parties. The fact that Mr. Butler is forbidden to go the home of Mrs. Butler is evidence of how they are getting along. I find that there is very little empathy by either for the other. Each party sees the problem from their own point of view.

[61] I can not conclude that there has been a material change which affects the lives that would justify this court making a variance in the 2006 order of the Family Court.

[62] Mr. Berliner suggests the addition of the new children for both parties is significant. He suggests that Mr. Butler wants to have the boys with him more often so they can bond with Landon, his new child. I conclude that the new child in Mr. Butlers family does not constitute a material change in circumstance that would justify the court to reassess the situation.

[63] The present situation while not ideal is in fact working. Both parties now have new families and the boys appear to have settled into a routine of going to each home at the appointed time. Clearly a status quo has been established. Hopefully the parties themselves will resolve their personal differences and work towards making the present custody arrangement work.

[64] In the event that I am wrong in deciding that Mr. Butler has to prove a material change before the court should consider a variation I would comment as follows.

[65] Mr. Butler's main contention before me is that I should follow the recommendations of the psychologist Ms. Millman.

[66] I have serious reservations about Ms. Millman's report. It is the first time I have ever had parties seriously criticise how a psychologist goes about preparing such a custody assessment report.

[67] I was surprised that Ms. Millman interviewed Mr. Charron at Tim Hortons. I was surprised she interviewed the children mainly at Mr. Butler's residence and not at both residences.

[68] I was surprised she told Mr. Charron what she had decided before filing the report.

[69] I also find that her report is not instructive as to why a change in the access arrangement should be made. Her report basically sets out a description of the questions she asked the witnesses and their responses. She then proceeds to her recommendation. No where does she attempt to justify her recommendation for

shared custody with equal time. She does not deal with the potential problems of a full shared arrangement because the parties are not getting along. She leaves to someone else the issue of how to split up the time. Her interview with the boys does not disclose a desire by them to change the current arrangement.

[70] Ms. Millman's report is but one factor I must consider in deciding what is in the best interests of the children. While I have doubts about her recommendations I am prepared to acknowledge that it is supportive of Mr. Butler's position.

[71] Mr. Butler asks for more time with the children and suggests that it would not be significantly different than the present arrangement which he suggests is about a 60 / 40 split of time.

[72] I see the issue differently. At present it is clear that with the exception of every second Thursday night the boys are with Ms. Butler at her home during the school week. They go to her home from school back and forth. She has a good arrangement for babysitting so that they join their half sister Elizabeth at the babysitter's home.

[73] To change the arrangement to one where every second week they would go and come home from school to Mr. Butler's house is a significant change. I know how things are going presently. The arrangement here has been in place since May 2005 when Mr. Butler went to work. I do not know how matters would work if I do what Mr. Butler asks. I do not know how disruptive the change from house to house would be for the children.

[74] I do not know if the parties could agree on joint rules especially for school nights.

[75] I also have some serious concerns about Mr. Butler's partner Arlene MacDonald. During the trial on two occasions her sworn evidence was directly contradicted by other witnesses.

[76] Ms. MacDonald testified that on Halloween night 2007 she picked up the boys at school for Mr. Butler at a time when he was scheduled to pick them up at the babysitter's place. She said she went to the school and spoke with a lady who was there with the boys, that was Heidi MacDonald, and asked that she let them go

with her. She said that she then went to Ms. Walsh's place, the babysitters house, and told her that she had the boys.

[77] Both Ms. Walsh, the babysitter, and Heidi MacDonald testified that Arlene MacDonald did not go to Ms. Walsh's home to advise what was happening. I accept the evidence of Ms. Walsh and Heidi MacDonald over that of Arlene MacDonald on that issue.

[78] Arlene MacDonald told the court about a wedding promise ceremony she and Mr. Butler arranged at their church in February 2006. She testified that while meeting with the minister, Reverend Johnson, that Mr. Butler was asked if he was divorced and that he had answered that he was not but that it was in the works.

[79] Reverend Johnson was called on rebuttal and testified that Ms. MacDonald had told her that Mr. Butler was in fact divorced. She said she asked both Mr. Butler and Ms. MacDonald on the night of the rehearsal before the ceremony about the same issue and that they confirmed that he was divorced. She said she was very upset that they were not being truthful to her because she would not have done the ceremony if she knew Mr. Butler was not divorced.

[80] I accept Reverend Johnson's evidence over that of Ms. MacDonald and Mr. Butler in regard to that incident.

[81] While I have reservations about Arlene MacDonald I don't have similar reservations about Ms. Butler's partner Mr. Charron. I found his evidence to be completely creditable and I believe his involvement with the boys is beneficial to them. I believe he would make a good role model for them as they grow up and he assumes the role of a step parent.

[82] The ultimate test here is what is in the best interest of the boys. I conclude that maintaining the present arrangement is more beneficial to them than changing the arrangements so that they spend equal amounts of time with each parent.

[83] As time passes and they get older maybe new arrangements will have to be worked out.

[84] I do conclude that Mr. Butler's involvement with his boys is very important to them. They clearly benefit from having regular extended contact with him and

he is I find completely dedicated to his children. His involvement with their sporting activities is very helpful and let me suggest that if two different rinks are involved while the boys are playing hockey that the parties agree which parent should go to which rink.

[85] These boys I find are very lucky to have four people who are anxious to care for them.

[86] With a little insight for the other persons position I believe both of you can reduce the conflict that presently exists. I believe the fact that both parties have had to sit and listen to the other persons position and concerns over three days in court will be beneficial in the future. I believe it is always good to see issues from the other persons prospective.

[87] I conclude that the present arrangement set out in the Family Court order will continue with the exception of the Wednesday, Thursday overnight visit will be changed to Thursday as agreed to already by the parties.

[88] The parties have asked me to decide the issue of child support and in reviewing my notes and considering this matter I really do believe that I have not properly heard from counsel on the issue of child support and I intend to give counsel an opportunity to address that issue before I decide it.

[89] I believe the parties, as I understand it, on the property issues involved in this divorce as I understand it the property that is jointly held. The suggestion by Mrs. Butler is that property be conveyed to tenants in common and that they both retain their interest and subject to me hearing from Mr. Butler he does not seem to have any objection to that, I would order that that be done.

[90] There also I believe is an issue of an R.E.S.P. and I am not sure if the parties have agreed on that, if not counsel can address the issue.

[91] In dealing with the issue of child support let me say this, that I have not actually figured it out but it seems to me that Mr. Butler is getting, if not has not reached, the cut off part of forty percent of the time with the children and under the child support guidelines, if he in fact reaches that time span, he is entitled to have that considered in deciding the child support amounts and therefore I would like

counsel to address that issue before I decide it. Maybe I will hear from you first Ms. Mahoney. I guess, really if you could indicate whether you feel he has hit that forty percent and if so what your position is.

[92] **Ms. Mahoney**: My Lord, it is our position that he has not quite hit the forty percent mark. While he, while Mr. Butler may come very close to having the children forty percent of the time, by our calculations it is probably closer to somewhere around maybe, thirty five percent of the time. It my, Ms. Butler's position that Mr. Butler should be ordered to pay child support basically in accordance with the child support guidelines, in accordance with the Nova Scotia table. I believe the amount he should be paying based on the \$51,000.00 is about \$715.00 per month.

[93] **The Court**: I think it is \$722.00.

[94] **Ms. Mahoney**: Sorry, \$722.00.

[95] **The Court**: Yes.

[96] **Ms. Mahoney**: And were also asking that Mr. Butler contribute to child care expenses and hockey expenses in proportion to his income, as well. Camp Geddy is Ms. Butlers, something Ms. Butler wants the children to do, she is still willing to pay for the camp herself and with respect to the R.E.S.P. the parties have agreed Mr. Butler did sign the proper forms, which basically takes his name off the R.E.S.P., Ms. Butler will continue to make those contributions on her own, she is not seeking any contribution from Mr. Butler, provided that when the time comes to deal with post secondary expenses, education expenses, she be given credit for the amounts that she has made, payments she has made. We are asking for child support based on the guidelines and that Mr. Butler contribute to child care and hockey expenses in proportion to his income.

[97] **The Court**: But I take it Ms. Mahoney that the parties have come to the consent arrangement with Family Court, they recognized a reduction in child support of \$100.00 per month. That I understand was entered into by consent, in other words, the guideline amount was taken at that time and \$100.00 per month was deducted off to reflect the fact that he had the children a significant period of time.

[98] **Ms. Mahoney**: Why it is my understanding My, My Lord that the incomes were, were pretty similar on that time as well. So that formed part of, Ms. Butler agree to take to handle all the Section 7 expenses, you know, in consideration for Mr. Butler paying child support...

[99] **The Court**: O.K.

[100] **Ms. Mahoney**: ...he did agree that he would pay \$100.00 less a month but the incomes were similar at that time. Mr. Butler's income is increased by about \$15,000.00 since that order was made in February, in January of 06.

[101] **The Court**: O.K., Mr. Berliner.

[102] **Mr. Berliner**: Just on the follow up on the last point. Firstly, there was, other then a question by myself, we do not really know what Ms., on cross examination of Ms. Butler, we do not know what her income is.

[103] **The Court**: I thought we had agreed that it was thirty five.

[104] **Mr. Berliner**: Well she had said that, I mean there is no...

[105] **The Court**: Yes.

[106] **Mr. Berliner**: ...documentation or anything like that. I am accepting her of, for her word and I guess she can certainly file and require that there be an exchange of tax information in the normal course in any event. Whatever his income or her income, I guess I do not really follow the logic act when this consent order, consent variation order, I say interim, you say not. That, what, what factor his income or her income, what her income meant, I mean obviously there was a shared arrangement in place and that was, was agreed to. I would and I have not done the final calculation of that, when one factors in half of the summer, as well as the other times that the court has indicated that are pursuant to here and look into account the weekend, the March Break, the Easter etc. I believe we are close to, if not at, or if not in excess of forty percent. So I think the court should have to take into account that in arriving at an amount of support that is required, it is recognized that, and again this, this vary order, consent variation order indicated that there was, no, an interpretation of it was that he would not have to pay any Section 7 expenses and I think the court is certainly able to deviate showing that

there has been a change there to require him to pay Section 7 expenses and I am assuming that is what the court is prepared to do. Otherwise, were, were, the alternative is if were sticking the same consent order, for an issue of custody and access, should we not be saying, keeping it the same for the issue of support. That is an alternative argument I guess, I guess, our first argument would certainly be there, we are at a forty percent rate or, or an amount of time in which there would be, you know, the normal offset of incomes to determine an amount of support, recognize as well Section 7 expenses would be shared proportionate to their respective incomes. Those our the thoughts I have on child support.

[107] **The Court**: Any comment about the property and the, the R.E.S.P's.

[108] **Mr. Berliner**: The R.E.S.P I think is just Mr., Mr. Butler signed both, kept one he thought it was his and (Inaudible) I will talk to him about (Inaudible). Your order is to have the property, change it to tenants in common...

[109] **The Court**: Tenants in Common.

[110] **Mr. Berliner**: ... and again so long as I understand that is not a difficulty...

[111] **The Court**: Somebody would have to undertake to do that but.

[112] **Mr. Berliner**: Somebody will have to do that, that is correct.

[113] **The Court**: O.K.

[114] **Mr. Berliner**: (Inaudible)

[115] **The Court**: I am, just going to, I am just going to, I want to make sure that I gave everybody an opportunity to speak to the issue of support. I am just going to take a break for ten minutes and consider that issue and come back.

[116] **Court Reporter**: All rise, court is in recess for ten minutes.

[117] **Court Reporter**: Please be seated.

[118] **The Court**: The evidence before me in regard to the issue of child support, I guess to some extent is a bit lacking but based on the information as I understand

it, it is as follows, Mr. Butler's income for 2007 was \$50,568.00 and I understood Ms. Butler's income for 2007 was \$32,500.00.

[119] I have no direct information in regard to the incomes of the respective partners Ms. MacDonald and Mr. Charron, so I am, I am going to assume, for purposes of this that they cancel out. In the circumstances with, based on his income for two children Mr. Butler would normally pay \$722.00 per month child support. The Family Court order referred to in my decision had an arrangement whereby he was giving a, a reduction in the normal amount, suggestion is that, that was made because of Section 7 issue, I am not quite sure if that is the case but it, it did I think attempt to reflect the fact that the children were going to be spending a considerable period of time with him based on, on the arrangement.

[120] Section 9 of the child support guideline provides:

“Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[121] Case law on the issue of shared custody is to the effect that the court should start with the determination of whether the children are with the, what you might call the non custodial parent, for more than forty percent of the time. And it seems to me in this case, for purposes of this determination, I am going to find that in effect they are spending forty percent of the time with Mr. Butler.

[122] That however does not end the issue because that section then mandates that, and the case law I suggest, mandates that the court look firstly at the issue of a simple straight forward set off and a straight forward set off would mean that Mr. Butler would pay \$722.00, Mrs. Butler based on her income would pay \$486.00 for a difference of about \$236.00.

[123] But it seems to me that is not, again the end of it, that the court has to go on and consider these other factors the increased costs of shared custody arrangements and the means of the parties. And it is, it is in regard to the last issue that it would have been helpful it seems to me if I had known the actual income of the partners, to look at the family income, well recognizing on Mr. Butlers part that he has one additional dependant that his family is responsible for. But, so it seems to me that

section gives the court considerable discretion to decide what is, what an appropriate amount of child support should be.

[124] In, in this case there is evidence, I believe from Mr. Butler that, that boys basically have a complete set of clothing at his house and that they have a lot of toys and stuff and things that they use at his house. I think the only thing that they kind of shared back and forth was the hockey gear. So there has to be a recognition of that and considering all of these factors as I hope I have considered them, I think it is appropriate in the circumstances and recognizing that I believe Mr. Butler is currently paying child support of \$404.00 per month, which at that point was agreed to and has been in place for a period of time. That the appropriate amount of child support for Mr. Butler would be the sum of \$400.00 per month, under Section 9.

[125] That however, will reflect the fact that Mrs. Butler will be entitled to, I believe, I think under the income tax act, probably gets the child tax credit, child tax benefit.

[126] And, the Section 7 costs will not be covered completely by her as is the case with the Family Court Order but in fact the Section 7 costs, the legitimate Section 7 costs will be shared on a sixty, forty split.

[127] And, the order will contain, an order in regard to the property being held joint, in tenants in common and the R.E.S.P has all ready been dealt with. Is there any other issues that I have not dealt with?

Mr. Berliner: What was the last point you raised, tenants in common and then was last point.

The Court: Or the R.E.S.P has already been dealt with.

Mr. Berliner: R.E.S.P.

Ms. Mahoney: My Lord, were just, the only other issue I think is the, the transfer of the vehicle registration into Ms. Butler's name. We were hoping that either a deadline could be set or perhaps the parties could make some arrangements today to have that done it has been dragging on for a while. And I...

The Court: I think, was that a problem with, of, of them having to get together at the registry?

Ms. Mahoney: I believe that is the issue.

The Court: Can you just, can you pick a date?

Ms. Mahoney: Maybe, perhaps Mr. Berliner and I can deal with that.

Mr. Berliner: That is no problem, perhaps the (Inaudible) can do that, it is not something that...

The Court: O.K., while lets say, while let me say if it is not done by the end of the month, that, that it should be done by the end of the month, of this month.

Mr. Berliner: By the end of July, that is fair.

The Court: By the end of July and I, I mean, I can, I can set a time but as soon as I do so I am sure somebody will have a conflict with the time.

Mr. Berliner: Should note, that is, you know that summer at the time I under, I know my client is scheduled to go away...

Ms. Mahonley: (Inaudible)

Mr. Berliner: ...and I am assuming...

The Court: Right

Mr. Berliner: ...Ms. Butler is then going to go away after that.

Ms. Mahoney: The end of the month is fine My Lord.

The Court: It might be a good afternoon to do it this afternoon. If...

Ms. Mahoney: In, the only...

The Court: ...they have to go, if their together and if there not out, not working and they can run out to the Registry of Motor Vehicles, it might be good to do just.

Ms. Mahoney: The only other clarification I was, I was seeking My Lord, is, is the order going to read as the Family Court Order does, joint custody with a shared co-parenting schedule...

The Court: Yes.

Ms. Mahoney: ...is either parent going to be...

The Court: Yes.

Ms. Mahoney: ...primary decision maker or primary care giver?

The Court: Well, O.K. what, what are you asking?

Ms. Mahoney: Well I guess, it, it says joint custody with a shared co-parenting schedule...

The Court: Yes.

Ms. Mahoney: ... and with some of the evidence, about the parents being informed and decisions not being made, I am just wondering if either parent is going to be the, the primary parent to be making decisions or if one parent has the final say or if it will continue as is.

The Court: Well, I, I, think that the, I think the divorce should have a clause as per the *Divorce Act* about, by each parent being entitled to get medical, school records, the whole nine yards about that. I, I guess Mrs. Butler has the children sixty percent of the time and I suppose the reality would be, is that, while each parent in, in that kind of an arrangement has a right to have input, somebody has to make the decision. Is that what your asking?

Ms. Mahoney: Yes My Lord, just the formal decision.

The Court: I do not know if you want to write that into the order but I think it might be assumed under the law. What do you say Mr. Berliner?

Mr. Berliner: Well I think that has been a good source of a lot of the conflict that we have heard over, for two and a half days, or, or so. In that, there has to be

recognition that we are dealing with a shared parenting arrangement and if that is going to continue, that she, and if, that he, she is going to find out about the medical, medical appointments two months in advance and only lets him know a day or two before, I mean that is just.

The Court: I have no problem with a clause saying that. That each parent, the parent whose ...

Mr. Berliner: In a timely fashion. Yeah...

The Court: In a timely fashion.

Mr. Berliner: ...I mean and that has always, that has been...

The Court: Yes.

Mr. Berliner: ... I guess, that has been some of the evidence has been.

The Court I, I have no problem with that kind of a clause in, in the divorce.

Mr. Berliner: Just makes sense, that is all.

The Court: Yes, makes sense but I guess the issue is if, if, if it comes to, you know, again I am trying to think what...

Mr. Berliner: Well, I mean I am not sure there...

The Court: ...what a decision would, would have to be made were, where they are in direct conflict. He is saying black and she is saying white and that somebody has to decide I suppose she is going the one that is going to have to decide.

Mr. Berliner: But, there is no way, I, I guess I am trying to think back of what was the evidence that, where one of those decisions were made.

The Court: I did, I have not, had not heard one these...

Mr. Berliner: No neither have I...

Ms. Mahoney: I, I think ...

The Court: No, no.

Mr. Berliner: ... because it was not the disclosure of the information.

Ms. Mahoney: I think one of the, one of Ms. Butler's concerns was the counselling that, it was her feeling that the consent of both parties should have been in place before the children were taken to counselling and that is what some of her concerns are, I guess.

The Court: Well I guess, I guess it seems to me I, I read that issue, that I agree with the concept that the parent should advise the other but I guess if in that circumstance if Mrs. Butler said I disagree with the children going to counselling, you know, that would be a tough decision. You know, I expect parents will, will, will operate reasonably in the circumstances and reasonable requests will be complied with. But I suppose, I do not want to generate work for myself, but if, if people think that something is such a matter of principal that they do not want the other to do something in regard to the children they can always make an application to stop that. So I do not know if I have answered your question or not.

Ms. Mahoney: That is fine My Lord.

The Court: O.K., anything else?

Mr. Berliner: Nothing My Lord.

The Court: Thank you very much. Ms. Mahoney will you prepare the order?

Ms. Mahoney: Yes, My Lord.

The Court: If you will send it to Mr. Berliner for consent to form, only and I would hope that, all, we have not dealt with specifically the terms of the order in regard to Christmas and the, the, the other vacation times but is the wording in the Family Court order acceptable and will it be incorporated into the divorce?

Ms. Mahoney: It is fine from Ms. Butler's point of view My Lord.

The Court: That is the basis for it. Thank you very much.

J.