IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Gallant v. Gallant, 2008 NSSC 347

Date: 2008/09/30
Docket:1206-5246
Registry: Sydney

Between:

DARRELL GALLANT

Petitioner

v.

LUCILLE GALLANT

Judge:	The Honourable Justice M. Clare MacLellan
Heard:	May 1, 2008 and May 2, 2008
Oral Decision:	September 30, 2008
Written Decision	November 5, 2008
Counsel:	Ralph Ripley, Counsel for the Petitioner Candee McCarthy Counsel for the Respondent

[1] I will commence by apologizing for the length of time waiting for the decision. It was the result of my own ill health together with a competing Court docket where there was little time to devote to review of evidence and decision.

[2] l must start by saying that the pre and post trial submissions were very well done and the Exhibit Book was among one of the better ones I have seen. Your counsel have done well for you. On to the business at hand and I'm sure it's been a stressful time for both of the parties.

[3] The divorce is granted, as I said the last day, and Ms. Gallant's name has been changed to Doucet. I notice on the marriage certificate, she has a different spelling so whatever spelling she finds to be appropriate will be the appropriate spelling.

[4] The issues that we were to work on were contained in the running file on the March 25th pre-trial and it reads as follows: Primary issues as it relates to the child would appear the amount of time the child spends with the respective parents in the primary residence is the main issue. Flowing from that issue will be maintenance for the child; division of assets, real and personal, including investments, including R.R.S.P.'s, spousal support, retro spousal support, retro child support. The Applicant

is not seeking any contents but wishes to have the values included in the equalization and division of debts. At that point in the pre trial it was agreed that joint custody and exclusive possession of the home to Mr. Gallant was agreed.

[5] The parties were married on December 27, 1997 and separated in September, 2006. They agreed to joint custody of Devon, who is 4. I understand he will be 5 January. 2009. He was born January 18, 2004. The relevant sections to be examined are the **Divorce Act,** Sections 15 and 16 and I will go into those in greater detail when it is necessary to refer specifically on the issues of spousal and child support and primary residence. These Sections provide:

> Child support order
>
> 15.1 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.
>
> Interim order
>
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to pay for the support of any or all children of the marriage, pending the determination of the application under subsection (1).
>
> Guidelines apply

(3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

Terms and conditions

(4) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.

Court may take agreement, etc., into account

(5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons

(6) Where the court awards, pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

Consent orders

(7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Reasonable arrangements

(8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.
1997, c. 1, s. 2.

Spousal Support Orders

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

1997, c. 1, s. 2.

Priority

Priority to child support

15.3 (1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

Reasons

(2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

Consequences of reduction or termination of child support order

(3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.
1997, c. 1, s. 2.

Custody Orders

Order for custody

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Interim order for custody

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

Application by other person

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

Joint custody or access

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

Access

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

Order respecting change of residence

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Past conduct

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[6] The case law on custody is set out in **King v Lowe** {1985} 1 S.C.R. 87

which although it is a 1985 decision, it is the Supreme Court of Canada and it is still

topical law as to what a judge is to look for and look at in weighing the best interests of a child. I quote Justice MacIntyre:

> I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious considerations in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

[7] It has been my practice to use what I refer to as the useful checklist prepared by Justice Goodfellow in **Foley v Foley** in 1993 (124 N.S.R. (2d), 198) and it is still topical. This checklist provides for a substantive analysis. It's an aide memoire to providing a substantive analysis of the pertinent issues and upon the completion of the analysis, it enables the judge to examine which of these features are relevant to this particular child. So it allows tailor making in the examination of best interests. Some children, the physical comfort will be the primary consideration. For other

children, the emotional comfort will be the primary consideration. So although the checklist is there, the sixteen (16) factors, some of them are relevant, some of them are not. Some of them are relevant to Devon, some are not; some would be relevant for other children that wouldn't be the same for Devon. So this list allows one to remember the number of items the judge ought to look at and then it is for the judge to select item by item and weigh on a balance of probabilities which items are relevant to this child. I will be going through them one by one in relation to Devon, together with the statutory sections of the **Divorce Act**, section 16(8), 16(9), 16(10), which I referred to earlier. The issues are: the physical environment, discipline, role model, wishes of the child, religion and spiritual guidance, assistance of experts, time availability of the parent for the child, cultural development of the child, the physical and character development of the child by such things as participation in sports, the emotional support to assist the child in developing self esteem and confidence, the financial contribution to the welfare of the child, the support of extended family, aunts, uncles and grandparents, and the willingness of parents to facilitate contact with the other parent, the interim and long range plans for the welfare of the child and the financial consequences of the child, and any other relevant factors.

[8] On other issues, there were agreements prior to Court that the house would be occupied by Mr. Gallant. It is my understanding that he is to purchase Ms. Gallant's interest. If that is changed, I'll hear from counsel at the end of my decision.

[9] There was an agreement also to joint custody. After the trial, counsel agreed on most property issues. There was some confusion on that point and so the Court contacted counsel. Despite their joint Exhibit Book, different names were used for different investments which made analysis unclear. I could pretty well guess from the amounts but it was less than clear. I asked for clarification from counsel, which I received from Ms. McCarthy on September 16, 2008 with confirmation from Mr. Ripley on September 16, 2008, which would be considered the date that the pleadings closed and I read this correspondence into the record as to what Ms. McCarthy has related to the Court:

> Further to your correspondence of September 11, 2008, I have reviewed the court transcript (beginning at 16:00) and both parties' post-trial submissions, and clarify the following;
>
> > Both parties agree to the sum of $10,895.00 in RRSPs should be rolled over to Ms. Gallant to equalize the RRSPs that existed at the date of separation.
> >
> > Mr. Ripley calculates a $21,864.01 equalization payment is owing to Ms. Gallant and I calculate $22,780.00

> equalization payment is owing to Ms. Gallant. The difference of $915.99 represents the parties' only differing valuation figure, which is the real estate commission reduction on the matrimonial home.
>
> Both parties have set the appraised value of the home at $235,000.00. Both parties reduced the value by $1,500.00 for legal fees and migration and $336.30 for the cost of the appraisal. Mr. Ripley reduces the figure by $15,993.00 for real estate commission and I reduce it by $14,100.00 for real estate commission.
>
> The figure for real estate commission varies between Mr. Ripley's commission and mine as I expect Mr. Ripley added 13% GST to the 6% reduction for the real estate commission. It was agreed on the record there would be a reduction of 6% to represent real estate fees. There was no agreement to further reduce this figure by 13%. In her pre-trial brief, Ms. Gallant suggested an appropriate real estate commission would be 5%. I submit that the concession of 6% at the conclusion of trial was considered to be all in. The transcript does not indicate it is an all-in figure, nor does it indicate there should be a further reduction for GST. It is silent on this issue. I submit that absent specific language that GST be included, the plain language of the submission was that the reduction would be 6% only. The submission on what was agreed upon with respect to the valuation of the home is at 16:06:11 of the CD transcript.

[10] I am asked to decide whether it should be $21,864.00 or whether it should be $22,780.00. As well, there's a table outlining the debts and assets as of the date of separation contained in Ms. McCarthy's letter.

[11] The wife's position that the quantum is $22,780.00; the husband's position is that it is $21,864.00. I was at a loss to understand counsel, was it reduction in real estate commission, I could find nothing in my notes to relate to that. Where did that fit in? Ms. McCarthy says there was an agreement as to a reduction in real estate commission.

CANDEE McCARTHY: At the end of the hearing my Lady when we made summations with respect to what we could put on the record as agreed, Mr. Ripley had raised that the valuation of the home be reduced for what Mr. Gallant would incur for real estate and we agreed on the record that it would be reduced, but there was no...the agreement....what it says on the record is we agreed to reduce it by 6%. I guess the disagreement is whether that should be further reduced to represent gst.

THE COURT: So that's the only issue, because your figure and his are different, and you say in your second paragraph that that represents the party's only differing valuation figure, which is the real estate commission reduction. Your letter doesn't say gst reduction

CANDEE McCARTHY: No, that's the only component, it's the gst component of the real estate commission reduction.

THE COURT: O.K. so that should read just its only gst that you (counsel) are arguing about?

CANDEE McCARTHY: Yes.

THE COURT: O.K. in that situation I agree with Mr. Ripley and his letter that the case law provides that the gst reduction be provided. The thinking on that is that even though it (gst) will not be immediately incurred if Mr. Gallant buys the house, it will be ultimately incurred if Mr. Gallant sells the house and that's why the case law requires it to be included. So we would go with Mr. Ripley's comments which are contained in his letter of September 16th. I'm not going to read it but he refers to case law that he has provided and it will form part of the record as will your letter and your calculations which are all at the date of separation as I understand, is that correct?

CANDEE McCARTHY: Yes my Lady.

THE COURT: To determine the best interests of Devon, which is the main reason that we are here, to find the principal residence, I have utilized, as I have already indicated, the **Foley** checklist and superimposed on each item the evidence and my conclusion on the evidence.

[12] **Physical environment**. I'll deal with the divorce sections later, but in item #2 of **Foley**, the physical environment, my review of the evidence shows that both homes are adequate to meet Devon's needs. Both counsel agree on this point. However, Devon has lived longer in the father's house but a great deal of time included living in that home with his mother also living in that home. So the house and the structure he is more familiar with, the makeup of the parties within the house, not so. The father requested that Ms. Gallant move out and she complied. They then began this week about rotation with Devon, who also was attending the same pre-school as he did when the parties were together. He attends pre-school as both parents work full time. I find that both homes meet Devon's physical needs. He is more familiar with the father's home, which is probably the only home he can remember prior to separation. In this case, I find that physical residence is not a major concern given: (a) Devon's more significant needs; and (b) the house has changed in its complexion due to the absence of his mother and the presence of Mr. Gallant's current friend, who I do not have a last name for, so I sound as if I know her, but her name is Natalia, but no one has given me a last name. What is her last name?

RALPH RIPLEY: I'll have to spell it because it.....

THE COURT: O.K. if she doesn't mind, we just keep calling her by that, yes o.k.

RALPH RIPLEY: She's present. Would it be alright with my Lady if she just indicated to you what the spelling of it is.

THE COURT: o.k. sure.

NATALIA SAVIOLIDIS: S-A-V-I-O-L-I-D-I-S.

THE COURT: S-A-V-I-O-L-I-D-I-S., o.k. I'm just probably going to call you Natalia, is that o.k.? I find that the houses as physical structures are more or less equal. The father has an edge over the mother's home. In my view, I guess it's because I'm from the country because it is rural and therefore would have a greater play area, but also due to Devon's familiarity with the father's home. However, as I have indicated, this is not a major consideration for Devon as he has more important features which I must consider in determining his best interests.

[13] In relation to discipline, the parents have very different discipline styles although both use time out and the time out chair. Neither agrees with the other. Ms. Gallant believes that Mr. Gallant's use of correction is too extensive, i.e. lengthy time out and lengthy removal of privileges. Mr. Gallant believes that Ms. Gallant practises the squeaky wheel. If Devon complains badly enough, mother will give in and not effect correction methods. However, Ms. Gallant indicates that she has

read the book, ‘One Two Three Magic’, and follows imposing age appropriate time out for Devon. The need for discipline or proper discipline or discipline that both parties agree to became particularly acute after the parties separated and shortly after Mr. Gallant’s friend moved into the matrimonial home. Mr. Gallant has given evidence that he believes Devon’s misbehaviour commenced in the fall of 2006. Ms. Gallant believes that misbehaviour started in January, 2007. The day care staff had complained to both parents in the winter of 2007. Day care staff indicated that Devon’s behaviour was such that he required a one on one worker at day care and he was aggressive, had temper tantrums and required constant correction on some days.

[14] Mr. Gallant relies historically, separate and apart from Devon’s behaviour now, on the evidence of two (2) incidents where Ms. Gallant was needlessly rough with Devon when he was an infant. It appears from my calculation, and I may be somewhat off on this, that Devon was eight months, nine months, around that age, but less than a year old when these events took place. Ms. Gallant maintains that her conduct was not extreme, as extreme as put forward by Mr. Gallant. She maintains that when Devon was about nine months she shook him twice and not three times and she said nothing to Devon. Mr. Gallant indicates that she did shake Devon three

times and that he had to step in, correct her, hold Devon, as Devon was hysterical, and help him settle. Mr. Gallant indicates this happened in June, 2004, with another incident happening in October, 2004. Ms. Gallant indicates that this happened on one occasion and that she did shake Devon once or twice in June, 2004. He would be about six months at that time. The second occasion, she said she took a crying Devon out of the crib and placed him firmly in her lap. Mr. Gallant says that is not accurate and that she once again shook the child. Ms. Gallant denies that there was any second occasion of shaking. She did say she took him firmly out of the crib and placed him in her lap. After this second episode, which appears to have taken place in October, 2004, whatever the event was, the parties attended with psychologist, Mr. Bryson, and Ms. Gallant saw a doctor for medication. As Mr. Bryson advised, Devon was placed in day care for two days per week to give Ms. Gallant respite.

[15] Both parties, Mr. & Ms. Gallant, agree that Ms. Gallant was depressed at these times. She was, I find as a fact, caring for a colicky child practically full time as her husband was working long hours and belonged to a hockey group. In the night time he was helpful with her in dividing the chores once he did get home. Ms. Gallant describes herself during this first year of Devon's life as alone, weepy and

exhausted. She maintains that during this time she believed herself to have had a breakdown, particularly at the time of the first episode. Ms. Gallant advised that she was the one or the impetus who sought help from Mr. Bryson. Mr. Gallant advises and agrees that he was reluctant to go to Mr. Bryson, but he did attend.

[16] Ms. Gallant, in questioning by the Court, denied the second shaking incident, but agrees that both episodes were examples of inappropriate parenting and that there never was another incident. She describes herself as loving and nurturing. She sought medical help and followed the medical direction and life essentially went on for the couple.

[17] I note that Mr. Gallant went back to work the next day after the first episode. However, he took a three (3) week leave of absence and stayed at home after the first incident. He then returned to work and Ms. Gallant remained the principal caregiver until she returned to work part time in April, 2006 and full time in October, 2006. From October, 2004 until October, 2006, she was the principal caregiver for Devon, with assistance from Mr. Gallant along with the assistance of day care. So probably a better calculation would be from Devon's birth up to her return to part time work, which was April, 2006.

[18] I have presented this evidence at length although it relates to a time when Devon was less than one year old, because it is a major issue for Mr. Gallant. Mr. Gallant believes that his wife still poses a risk to Devon and indicates that he stayed with Ms. Gallant until Devon could talk. I took that to mean that Devon would then be involved in his own protection. However, I find as a fact, based on both parents' evidence, that from Devon's birth in January, 2004 until Ms. Gallant's return to part time work in April, 2006, she was the principal caregiver alone. I can attach no significance to Mr. Gallant staying until the child could talk because the mother was there the majority of the time and Devon's ability to speak would not in any way affect his safety, in my view, because the years that she was principal caregiver, he could not communicate at a level sufficient to relate fear from parental conduct.

[19] Ms. Gallant maintains that she is a loving and nurturing parent; that she knows how to discipline; that there has never been another incident; and that Devon is bonded to her; and that she uses time out with appropriate lengths of time according to age. Ms. Gallant indicated, as I have already said, that she read the book, "One Two Three Magic" and she follows that text. Mr. Gallant maintains that he is a better and firmer disciplinarian and that he will remove privileges if Devon is acting

up, but Ms. Gallant will not. Evidence was provided that Mr. Gallant will impose the removal of privileges for Devon for a number of days and if Ms. Gallant's time with Devon interrupts that time period, Mr. Gallant will resume the punishment the next time Devon is returned to his care.

[20] Ms. Gallant alleges that Mr. Gallant will punish Devon even if the day care has already done so. That is her evidence and we have not heard anything to the contrary. Mr. Gallant maintains that Devon needs a strong hand, I mean that in a figurative sense, and that the punishments must be consistent. Mr. Gallant also uses the time out chair with success.

[21] Day care workers advised that staff simply have to tell Devon that his father will be coming if his behaviour does not improve and then Devon's behaviour will improve. Day care staff member, Ms. MacLean, has never seen any problems existing between Ms. Gallant and Devon or Mr. Gallant and Devon. For example if Devon doesn't want to come in after a play session, staff will advise him that if he does not comply his father will come. The father had to come on one or two occasions and on one occasion had to remove Devon and take him home because he was acting out. The day care worker indicated that, in her view, and I didn't have

her qualifications, she wasn't speaking as an opinion witness; however, it is common sense that she maintains that punishment must occur right after the infraction for a child of Devon's age and not later. Simply put, as I understood from that, a child does not understand punishment instituted a period of time after the infraction. They (young children) are simply not mature enough to understand postponed correction.

[22] Devon had to see Dr. Landry (psychologist) in the summer of 2007 due to his behaviours. The parents attended these sessions I understand.. A report was issued to the parents but not to the Court.

[23] I find the parents have very different parenting approaches although they used the same text and the same methods. They have a different philosophy. I accept that the problems with Ms. Gallant, when Devon was under one year old, were based medically and this is according to both parents. I find that once Ms. Gallant received help and support, she was able for the subsequent years to care for Devon in an age appropriate manner. Day care staff confirm that Devon will conform if threatened that his father will come to day care and his behaviours will be curbed. I am unsure if such a practice for an already disturbed 4 year old is sound. I know that to postpone punishment on a 4 year old is not a sound practice. I note as well that

when Devon is upset and seeks comfort from a parent, the day care staff indicate that he cries for his mother and not his father.

[24] The parents have very different views on discipline. This is something that we have to fix. I can't give a recipe card on how we do that, but it is essential that where they are separated that their views on discipline must be on the same page. Ms. Gallant stated that Mr. Gallant does not listen to her views and does not respect her as a parent. Mr. Gallant maintains that Ms. Gallant poses a risk to Devon and that on the discipline issue, she gives in too easily to him.

[25] These varying discipline practices between the two homes is clearly not in Devon's best interests. He is simply too young to grasp that mom and dad have different views and it will be years, years before he will ever understand that, if he ever does. I find as a fact that the behavioural problems for Devon started after the parties separated and became marked in January, February, 2007, which is contemporaneous with the movement of Mr. Gallant's new friend into the home, which occurred less than two months after the mother moved out. The child would have seen his mother in the home up until November and then would have seen

Natalia Saviolidis in the home on Christmas Eve, which was the first time he met her. She moved into the home the next month.

[26] The next issue to examine is Item 3, which is as important as discipline is important. It is one of the issues that I was looking for in Devon. The next one which is important to him is role model. I find that both of the parents are well educated and articulate. They certainly appear to be hard working and responsible on the day to day issue that they must see to. However, Mr. Gallant, I find as a fact, has shown a shortfall in his ability to place Devon's concerns first and to show Devon it is proper and expected that he respect his mother and his father. Mr. Gallant has shown a distressing lack of respect and understanding with regards to moving his new friend into the home shortly after Ms. Gallant moved out. There is so much literature written on how to blend a family so that it is appropriate for the child to accept the new person. This, in almost every case, requires a gradual introduction. Mr. Gallant indicated that he had done some reading on the point. If he had done some reading, in fact, and I have no indication to the contrary, he would certainly have grasped the fact that if mother moved out in November, 2006 and Dad is having a friend in for a sleep over on Christmas Eve, 2006, that is simply

inappropriate. It shows that Mr. Gallant placed his own wishes ahead of those of Devon.

[27] A 4 year old on Christmas Eve, he would be 3 at that time, he should be dealing with the wonders of Christmas, the wonder of Santa coming and not wonder who is this woman and why is she in the place where Mom was.

[28] Mr. Gallant told the day care staff that his girlfriend could pick Devon up, but he did not tell Ms. Gallant this, which resulted in an incident at day care. It is unclear what Devon heard of this incident, but it is another example of the absence of respect that Mr. Gallant has shown consistently for Ms. Gallant in her role as mother.

[29] Under section 16(9) of the **Divorce Act**, past conduct is not to be referred to by a Court unless relevant to parenting ability. I find as a fact that respect for parents, one for the other, and especially in front of the children is a critical consideration in the determination of best interests. Dad's conduct in all aspects with his girlfriend, Natalia Saviolidis, her introduction, showed a failure to think of Devon first. Mr. Gallant's conduct showed an absence of sensitivity. I notice as

well that his girlfriend is an educated woman and it would have been prudent if she had cautioned Mr. Gallant that they must proceed at a very slow pace because Devon's wishes are much more important than their own particular wishes to be together. This is so particularly when one looks at Exhibit #8 (access schedule set up after separation), when they had ample time to be alone together without Devon and time to prepare to be a blended family.

[30] Other examples of the absence of support of Ms. Gallant, as mother; not Ms. Gallant as partner because they have decided not to be partners, but Mr. Gallant failed to support Ms. Gallant financially. It was understood that she could not afford to maintain the matrimonial home. He wished to maintain the home and he was left uninterrupted in the occupation of the home. He spearheaded the division of the furniture, but I find that for the first three months after separation, it was difficult for Ms. Gallant, on her income at that time, which was approximately $20,000.00 for that year. She had worked part time and only commenced working full time in October, one month before she vacated the matrimonial home. It would be very difficult for her to set up housekeeping for her and Devon without any financial support and to provide a nice Christmas for Devon. Ms. Gallant indicated that she had no funds to make a nice Christmas for Devon and that Mr. Gallant, who had

been giving her $500.00 a month, ceased to do so in October or November. When she sought the money out, he indicated that it would have been made available to her if she would sign off from his business. I do note however there was a small sum of money in the joint account during this time, which she could have accessed. According to the evidence, when together she allowed all money matters to be dealt with by Mr. Gallant. However, there were funds in the joint account that she did not access during this difficult time. It wasn't much but it was something that she could have drawn on. However, the money is secondary to the absence of respect as a parent which I find to be very important in my analysis.

[31] Furthermore, on another point, based on the letters tendered by Ms. McCarthy, Exhibits #12, #13 and #14, Mr. Gallant failed to facilitate the car transfer, which should have been a simple matter, a simple matter of him going down (to Access Nova Scotia) and signing the documents. There was no need for them to go down together. However, it affected Ms. Gallant's ability to get around with Devon and caused stress. Ms. Gallant had to borrow a car from a friend. It was one more feature which must have made the departure from her home, from her husband, a new practice with her son, and starting a full time job, and she doesn't have a car. The failure to answer these questions regarding transferring the car in a timely

manner to Ms. Gallant resulted in her not having a car. The removal of her from the car insurance, which was done quickly by Mr. Gallant, is also inexplicable.

[32] The failure to answer the letter that Ms. Gallant had written, or her counsel had written, to ask for the background of Mr. Gallant's girlfriend, who was living in the home with Mr. Gallant and Devon was not answered. This was the time to sit down with Ms. Gallant and say, 'this is my new friend, she's a nurse, she has no criminal record, she's a fine person, etc.' That could have been done without Devon there and it could have been done and should have been done.

[33] Mr. Gallant's lack of concern shows a rigidity and absence of sensitivity that one would not want a child to emulate. Similar observations on a smaller scale are seen in the way Mr. Gallant managed Devon's glasses, haircuts, and who was the major person at his birthday party, the renting of the same cottage with his girlfriend and Devon as rented when the family was intact; all of these actions indicate an absence of awareness of what this little fellow may be thinking. Because he was young did not mean he was not aware. Ms. Gallant showed a willingness to consult Mr. Gallant on the smaller issues, re glasses, but Mr. Gallant exhibited an absence of sensitivity and a rigidity in his approach. He was the boss and he was going to

make decisions such as putting down his new girlfriend as a person authorized to pick up the child at day care without consulting the mother.

[34] As a role model overall, Ms. Gallant appears to be more aware and more sensitive to Devon's needs and this is a major consideration in the determination of best interests.

[35] Regarding wishes, Devon appears to care for both of his parents and both of his parents want to spend ample time with him. Ms. MacLean at day care noted that if he cries for a parent, he does cry for his mother. However, he is young and he does manifest some disturbing behaviours, in my view, especially at day care. It is noted as well, as I have already indicated, that the mother was principal caregiver from birth until she commenced part time work in April, 2006. So it is not unusual that he would be seeking out his mother and so little can be drawn from his wishes based on the fact that he would be more familiar with his mother and that he is so young. While this factor would be a major factor in a 10 or 11 year old, it is not particularly relevant in relation to Devon.

[36] Number 6 - **Religious and Spiritual Guidance**. There is no evidence called on these features.

[37] Number 7 - **Experts**. Devon has seen Dr. Landry and prior to that his parents had sessions with Mr. Bryson. However, The Bryson sessions could have been for other matters besides Devon. It could have been some form of marriage counselling because the parties don't agree on why they saw Mr. Bryson so I am unclear on that point. However, it is clear there was day care recommendations and the referral to an M.D. for Ms. Gallant which took place as a result of the Bryson sessions when Devon was just a year old. Devon was seen by Dr. Landry in 2007. Considering that I find Devon's behaviours to be in close proximity to the family breakup, it is hoped that sessions with Dr. Landry will continue. When Devon turns 5 he will be better able to verbalise and there are certain ways to deal with children at that age to get to the root of what it is that is bothering him. Is it the breakup of the family, is it the presence of a step mother, is it something else, is it based on some medical condition? All we know is that his acting up is contemporaneous to the breakup of the family and the insertion of a new person in the family home.

[38] However, it is clear from all the evidence and from reading the day care notes that there has to be substantial change if Devon is to become a healthy, happy, well adjusted 5 year old achieving his full potential as the Supreme Court of Canada required in **King v. Lowe**.

[39] **Time Availability** is Number 8. Both parents work full time. Mr. Gallant has longer hours but seems to have some flex time when it is necessary for him to go to day care. Ms. Gallant has a little flex time at work and can leave half an hour early if necessary. It appears that Ms. Gallant was available to day care staff as well, but from the evidence, they felt that to call Mr. Gallant was more effective, although they classified Ms. Gallant as willing to work with them. However on the issue of time availability, it appears that both parties can make themselves available to Devon. Even though Mr. Gallant works longer hours, he seems to have a certain flexibility in those hours.

[40] It is my conclusion, based on all the features which I will go into further, that the current access schedule, Exhibit #8, which Mr. Gallant drew up based on work schedules, that there is difficulty with this schedule. Mr. Gallant maintains that the parents agreed to the schedule and that the schedule works. Ms. Gallant stated she

never agreed to the schedule voluntarily but felt she had to follow the schedule. She believes the schedule does not work. She maintained that she followed the schedule (Exhibit #8) because she was "brain washed". She stated Exhibit #8 confuses Devon with its back and forth and she believes the shifting between homes contributes to Devon's behaviour. Exhibit #8 provides basically the following: Week 1 - Mrs. Gallant 2 days; Mr. Gallant 2 days; Mrs. Gallant 3 days. Week 2 - Mr. Gallant 2 days; Mrs. Gallant 2 days; Mr. Gallant 3 days and so on. I find as a fact, based on all the evidence, that the current schedule is not in Devon's best interests. There is simply too much back and forth given his emotional state at this time plus the parents both have manifested an immaturity in dealing with special events and holidays. This is particularly seen in their e-mails, which were exhibited re Easter and the birthday party that Devon did not get to attend because of an absence of communication by Ms. Gallant. A more predictable format must be worked out on a weekly basis and particularly for special occasion events which seem to be difficult for both parents. The format must suit Devon's current needs. Devon does not appear, from my review of the day care notes and from listening to both parents, to be a child which one would classify as a tough and tumble type who could roll with the punches (figuratively). He is exhibiting behaviours that show that there is some underlying suffering, underlying discontent, underlying

uncertainty, I'm not sure which but I am sure, on the balance of probabilities, on a strong balance of probabilities, that a new format must be drawn up that suits his needs and this format must contain predictability, tranquillity and respect.

[41] Number 9 and 10 - **Cultural Development, Physical Character**. There is very little evidence on this factor here as Devon is so young. Mr. Gallant did remove one gym class as Devon was acting out and that may have been appropriate. Ms. Gallant criticizes this but I cannot draw any conclusion from the evidence as I have no evidence as to the time of the removal of this privilege. It may have been that he acted out shortly before gym class and removal of gym class would be appropriate. It may have been that he acted out two days before gym class and the removal of gym class would not be appropriate. However, I do not have any evidence on this point. I do not have much evidence on what cultural development he is experiencing, but possibly that's because he is 4 and he is young. However that will be something that happens soon and I have not heard the parents' views on the need for cultural development so #9 and #10 are not issues that I have to consider in relation to my determination of best interests, principal residence and time allocation between parent.

[42] Number 11 is **Emotional Support to Assist in Self Esteem and Confidence**. I find again, as I have indicated, that Mr. Gallant has displayed a rigidity in his practices with Devon that may become a problem in the future. Mr. Gallant, in his movement of his girlfriend into the home and the timing that he did, shows an inability to priorize which I find to be essential in child rearing, as I have already indicated. I draw a negative inference from Mr. Gallant's refusal to allow Ms. Gallant to attend the hospital when Devon was having ear tubes inserted. He should have known her presence would have been a comfort to his son. I acknowledge he did allow Ms. Gallant to attend the home at a later time, I think maybe even that same day, but it is natural for both parents to want to be at the hospital, even for a routine procedure.

[43] Number 12 - **Financial.** Mr. Gallant is more financially secure than Ms. Gallant. However, I find that it is difficult to understand why Mr. Gallant paid no maintenance over the past twenty-two months. Ms. Gallant had just commenced full time employment and had to set up housekeeping. She had Devon with her one half of the time on a much more restricted salary. In 2006 she was working part time and then full time and earned approximately $20,000.00. I believe at that same time Mr. Gallant was in the home with a new partner who earned $60,000.00 and he was

earning $90,000.00 during that year. Devon was with his mother one half the time so Mr. Gallant should have had concerns as to whether Devon's needs were being financially met That was not the case.

[44] Number 13 - **Contact With Extended Family**. Both parents' families are in Margaree and there were just superficial comments in relation to visiting back and forth with grandparents. I assume that this is an even consideration for both parents. I have not heard any complaint regarding grandparents and have very little evidence on this point.

[45] Number 14 - **Willingness to Facilitate Contact With Each Parent.** Both parents here have a need for improvement on this point. The e-mails and evidence of last Easter exhibit an immaturity. However, Mr. Gallant has more incidents of failure to facilitate than Ms. Gallant on the evidence; the hospital session in particular. As well when Ms. Gallant was away on course for five days, she had difficulty securing a visit with Devon. She ultimately did but this should have been a given. This is part of the back and forth if the parties wanted something like Exhibit #8 (access schedule) to work.

[46] Ms. Gallant believes that Mr. Gallant wants to control the whole custody process and he has no respect for her or her input as a parent. Ms. Gallant's conduct in relation to Easter was immature in relation to her dealings with the birthday party invitation for Devon. She indicated that the parents didn't want Mr. Gallant at the birthday party. Mr. Gallant indicates that he would have fitted in at the party. I accept his evidence on that fact. So whatever her thinking was in relation to the birthday party, this was one time when she did not priorize Devon's needs. He wanted to go to the birthday party as it was one of his friends and he was likely going to find out about the party.

[47] I note in relation to both parents that section 16(10) of the **Divorce Act**, statutorily makes willingness to facilitate contact with parents and the child to be a statutory obligation. So it is not only in case law and case law is persuasive and binding, it is also a statutory obligation of both parents to facilitate. So if mother is away on course for five days, father should say: 'sure you can take him, take him overnight even if it's not my day'. Mother at Easter time should say: ' o.k. you want to see him at Easter, I'm not going to go to Margaree, I'm going to have Easter here so that you can have part of Easter here'. Similarly with the birthday. If Miranda's parents said: 'we don't want Mr. Gallant there", then it's her job to say,

'well why not, he's the father', or, 'I'll take Devon.' However to place the invitation on top of the fridge or on the fridge and think that Devon was not going to find out about the party shows absence of forethought on her part in relation to that event.

[48] Perhaps the greatest example of the need for improvement with both of these parents is the e-mails that went back and forth regarding Easter. Mr. Gallant starts out quite polite although insistent and the e-mails go down hill from there. No one has told me whether or not this couple can even talk to each other. They seem to communicate through e-mails and if they believe for a minute that Devon doesn't pick up on that, they are wrong.

[49] Number 15 - **Interim and Long Range Plan for Child's Welfare**. The parents have started a fund and Mr. Gallant continues to finance an educational fund for Devon. I find that both parents can meet Devon's short and long term needs in the physical sense. Both have attended day care meetings and sessions with Doctor Landry. Both have legitimate concerns with Devon's emotional misbehaviour and the evidence indicates that Mr. Gallant is more closely involved with the day care where Devon's behaviour remains a problem.

[50] Number 16 - **Financial Consequences of Custody**. Both parents appear to be able to meet this feature although Ms. Gallant makes less money than Mr. Gallant. However, the financial consequences of actually caring for Devon were not presented in evidence.

[51] The parties have agreed to joint custody. This is not binding on the Court. I am bound to make a determination of best interests so it is open to this Court not to sanction the parties' agreement on joint custody. After a review of the evidence and I must indicate considerable time spent on re-reading the evidence. I think it's the only time I reviewed the evidence four times, re-reading the evidence and considering whether or not joint custody is ever going to be workable, I have to decide whether or not to sanction this agreement by the parents. As observed by the current Chief Justice of the Appeal Division, J. Michael MacDonald, when he was Associate Chief Justice of the Trial Division in **Godfrey v. Smith** {1997}, 164 N.S.R., 247, there is a large difference between the parents' ability to work together versus the parents willingness to work together. The (then) Associate Chief Justice held at paragraph 13 as follows

> The parties agree that the children should remain in the day to day care of their mother. They also agree that Mr. Godfrey Smith shall

continue to have liberal access. I have been asked to make some adjustments in this regard and I do so later in this judgment.

There remains however one very contentious issue. It involves the struggle over control of all major decisions affecting the children. The parties have become very entrenched in their respective positions in this regard.

For her most part, Ms. Godfrey Smith seeks to secure sole custody. While acknowledging an obligation to consult, she wishes to have final say in the event of a deadlock. Ms. Godfrey Smith states historically that she's always been primary caregiver and as such she has made such decisions. She views her husband's attempt to deny her sole custody as an unwarranted interference designed solely to control her life and meddle with her privacy. She feels that they have had little or no ability to co-operate. As such, she feels any attempt at joint custody would be futile.

For his part Mr. Godfrey Smith states he is motivated solely by his love and concern for his children. He wants an equal say on all issues involving the children. He feels that his wife is totally obstinate on this issue because of her acknowledged lack of co-operation. He wants joint custody which would force the parties to negotiate on equal footing. "Deadlock" he feels, should be resolved on a case-by-case basis whether by him (as he views himself as being the more reasonable of the two) or alternatively by the Court. To award Ms. Godfrey Smith sole custody, he feels, would only perpetuate the conflict.

Here is one of the most relevant comments Associate Chief Justice

MacDonald makes:

It is painfully obvious to me that these parties in recent months have demonstrated a depressing lack of co-operation. This has resulted in the vitiation of virtually any direct communication between them. They do not meet face to face. They do not talk on the phone, their e-mails are curt at best. They use the children as messengers and then wonder why things are lost in the translation.

> The situation has been very stressful not only to the parties but certainly upon the children. It has reached a point now that their unwillingness to communicate has overshadowed all other issues in this trial. In fact, had these parties only communicated, I am convinced the matter would never have come to Court. It is sad to see two such intelligent, capable and loving parents become so caught up in their own discord. Ironically all this may appear to support Ms. Godfrey Smith's submission for sole custody with co-operation being seen as a necessary ingredient of joint custody. .

[52] Associate Chief Justice concluded that the pivotal feature to examine in making an award is whether or not the parties are able to work through custodial arrangements. Again I specify that he indicates there is a great difference between unwilling or unable. The late Doctor Steinhauer, 1993 in The Least Detrimental Alternative, a text which in family law is the equivalent to the **Criminal Code** in criminal law. I take judicial notice of this fact. However, Dr. Steinhauer was writing in a different area somewhat, a child is need of protective services. However, he does indicate when one is examining risk and best interests for children that one of the best indicators of how people will parent in the future is how they parented in the past unless they are willing to be self critical and make concerted efforts to change. He is one of the foremost authorities on risk in children.

[53] Other Judges have held otherwise in relation to the issue of joint custody and I refer particularly to the decision of **Ellsworth v. Ellsworth** (2002), 208, N.S.R. (2d), p. 1 where Justice LeBlanc held, in summary, that joint custody can have the effect of encouraging the parties to put their rivalry aside and to utilize their energies to promote the child's well being.

[54] The conclusion of whether or not joint custody is workable in this case is, as in every case, is case specific. After lengthy reflection, I have concluded that joint custody is, at this time, in Devon's best interests. Whether or not it remains in his best interests is really up to the parties and their ability to act appropriately as parents. This is particularly so for Mr. Gallant. Mr. Gallant has to learn to reflect on his own rigidity and particularly his lack of respect for Ms. Gallant as a mother. Also he must examine his inability to prioritise Devon's needs in a sensitive manner.

[55] Ms. Gallant must learn to be more flexible and less territorial re: her day versus his day. Of the features examined in **Foley v Foley**, which is a substantial list and allows a thorough analysis of best interests, I find the features dealing with emotion are more important for Devon at this time. He is acting out and he has since approximately Christmas, 2006, January, 2007, February, 2007, depending on what

date one accepts from the parties; but basically since this family ended and he became aware that it was at an end. It must have been quite a difference for him to see Dad with someone else and Mom in a different house in the city. It must have been different for him to go to the same cottage that he went to with Mom one summer, only now he's with a step mother in the same cottage the next summer. It must have been different for him to be in the hospital with only one parent. So there is a substantial amount of change imposed on Devon. I find it was imposed without an awareness that it would have an effect. Whether there was the view that, 'oh he's so young, he won't be aware'; but we see the manifestation of his misbehaviour in day care and, to a lesser degree, at home and this has to mean something. I believe that both parents have the ability to put Devon first but this has to be consistent. I have not seen this in relation to Mr. Gallant although I believe Mr. Gallant truly believes that he has done so. It is clear that these parties are no longer a couple; it is clear that they do not even like each other, but they are partners and they are partners in the business of raising Devon as he deserves to be raised and there is no way they can get out of this partnership, so they have to make it work.

[56] I accept Ms. Gallant's evidence that the current schedule of back and forth is simply not working given Devon's emotional state. She finds that he is confused

and that he is manifesting that confusion and I agree with her. On a balance of probabilities, I find that Ms. Gallant is better able to meet Devon's emotional needs. I accept the current back and forth is not working for Devon at this time. Perhaps if the breakup had been done in a different manner and the introduction of stepmother was done in a different manner, he would not be negatively manifesting and a back and forth custody schedule would have worked. I have seen it work with other children but that is when the parents put the back and forth and the child's needs first and monitor these needs and communicate with each other.

[57] I find as a fact that Devon needs a fixed and structured environment at this time and therefore I find it is in his best interests if his primary residence is with his mother who has demonstrated a greater ability to address his needs ahead of other interests.

[58] I believe I must set up a visitation schedule for Mr. Gallant, although I'm sorry that I have to do so. This is something the parties should have been able to work through themselves, but the schedule (Exhibit 8) is not working for Devon and that is clear based on the evidence and based on Devon's conduct. I would have been very interested to find out what Doctor Landry had to say about that but I do

not have a report. I would have been interested in his professional input. The father is to have every second weekend with Devon and if it is a long weekend he shall have that day as well. This will start Thanksgiving weekend. Mr. Gallant will have Devon every Wednesday evening, depending on when he gets off work. If he gets off work at noon that day, he can have Devon from noon until 8:00 p.m., when he will be returned to Ms. Gallant's residence. If he doesn't get off until 3:00 p.m. or 5:00 p.m., then his Wednesday access will commence at that time. Mr. Gallant shall have Devon Christmas Eve from 5:00 p.m. to 8:00 p.m.; Christmas Day from 2:00 p.m. on December 25th until December 27th at 8:00 p.m. Mr. Gallant shall have Devon two (2) weeks in the summer, giving notice by May 1st and that will increase to four (4) weeks in the summer of 2010 (corrected), to be allotted two (2) weeks with Mr. Gallant; back with Ms. Gallant for two (2) weeks; and then back with Mr. Gallant. As Devon matures the four (4) weeks can be consecutive. This will be one issue that the parties can examine and discuss with Doctor Landry when the four (4) consecutive weeks should start and if Devon settles down it can start very shortly.

[59] Mr. Gallant shall also have Devon every Father's Day from 10:00 a.m. until 8:00 p.m. whether or not it is his weekend. Mr. Gallant shall have Devon on Mr. Gallant's birthday from 10:00 a.m. to 8:00 p.m., whether or not it is a week day or

whether or not it is his weekend. If it is a week day and he cannot have the time off, then he can have Devon from the time he completes his day's work until 8:00 p.m. when he is to return Devon to his residence.

[60] Mr. Gallant shall have Devon for four (4) hours on Devon's birthday, not to conflict with any party plans. Mr. Gallant shall be entitled to attend Devon's birthday party if one is held and he and Ms. Gallant shall be the primary presenters at this birthday party and the stepmother shall have a retiring role, not the role she had on his last birthday party.

[61] Mr. Gallant shall have Devon on every Easter Saturday from 10:00 a.m. to 8:00 p.m. and every Easter Sunday from 2:00 p.m. until Easter Monday at 8:00 p.m.

[62] Mr. Gallant shall have every second March break for the entire March break starting March, 2009.

[63] Mr. Gallant shall have telephone access every day. Telephone access is to be appropriate and there are to be no calls after 7:00 p.m.

[64] Mr. Gallant shall have any other visitation as the parties can agree upon and hopefully Ms. Gallant can be generous in the access if Devon appears to have settled down somewhat.

[65] Mr. Gallant shall be informed about all medical, educational and social events and he shall be advised of these events in advance so he can attend. He can attend any doctor or medical appointment, dentist appointment, parent/teacher meetings, Christmas concerts, anything of that nature.

[66] Ms. Gallant shall consult with Mr. Gallant on all major decisions that affect Devon's well being. In the event of impasse, Ms. Gallant will have final decision making authority.

[67] It is recommended that Mr. and Ms. Gallant attend counselling, preferably jointly but that may be something that has to happen down the road. They may need individual counselling to improve their communication for their benefit but more importantly for Devon's benefit. There is nothing worse than going to a high school graduation, I've seen it, we've probably all have seen it, where Mom is one side of

the room glaring at Dad on the other side of the room. There is a book written that I strongly recommend to you, if I haven't already, Voices of Children of Divorce, an American text. If anyone wishes the citation I will give it to you. It's a book of interviews with grown up adults, they are all grown up but their parents divorced when they were a child and during the time when Mom and Dad are divorcing and communicating only through e-mail and putting their own interests first, these children effectively have a black out of events. They have no recollection of things that ought to be wonderful, like Santa coming or the trophies they won in highschool. Because they are busy coping, they are busy surviving and that's not what the Gallants want for Devon. They are getting that but they don't want this and they may need professional help to get past this impasse. Now Ms. Gallant may say: 'he was mean to me and I was brainwashed'. Mr. Gallant may say: 'well she was rough with the child and I'm the better person'. You might be entitled to keep that view for the rest of your life, but you still have to learn to communicate with each other and have one parenting practise or you will, not you may, have a damaged child, a damaged adolescent, a damaged young adult. The texts are written. It's not a maybe, a could be, you will have a damaged child and the damage is shown in the following negative features. The child will either have a drug or alcohol problem, have antisocial tendencies or even worse gravitate away from both

parents and not be able to make relationships with other people. Think what a lonely life that would be, to never ever have a relationship that means something to you, but that's what happens when children are raised in a chaotic, hostile environment.

[68] I'm now moving on to the issue of spousal support. Spousal support was applied for in the documents. However s. 15 of the **Divorce Act,** which I incorporated into this decision requires that there be an examination of entitlement and factors so we need to know the length of the marriage, the functions performed and whether or not there is any order or agreements and that's all in Section 15.2(4) which I have paraphrased. In Section. 15.2(6), one has to examine the economic disadvantages arising from the marriage or its breakdown, apportion between the spouses any financial consequences arising from the care of the child over and above any obligation for support of the child and to relieve economic hardship of the spouse arising from the breakdown of the marriage and insofar as practical promote economic self sufficiency of the spouse within a reasonable period of time. Entitlement was not pleaded or proven on **viva voce** evidence, no financial material was tendered in the Exhibits. I note there is financial material for Ms. Gallant in the file, but it was not tendered and is therefore not evidence properly before the Court.

[69] There was no direct examination or cross examination on spousal support. I note that both parties have provided me with post trial submission views on spousal support and that there was an analysis of the spousal support guidelines provided as well. I note as well that Ms. Gallant's counsel indicated that she is not looking for substantive spousal support but just $1.00, I don't know if it's a month or a year. However, I find that this issue has to be pleaded on the merits. It just did not happen. I did not hear facts that would enable me to make a firm conclusion on a balance of probabilities. I find it would be inequitable given the way this matter has unravelled to bar Ms. Gallant from proceeding with an application at a later date. I find that Mr. Gallant is not at a disadvantage because I am making no order for spousal support simply because I have no evidence. It was as if the whole thrust of this case with the time available was put on Devon's well being, which I believe is proper. However, the spousal support application is not judged because of an absence of evidence. Spousal support remains a viable issue but will not be dealt with in this decision.

[70] **Personal Property.** There is some comment that Mr. Gallant wished to have the materials evaluation but as the trial progressed I certainly got the impression that the parties had done their own division. I heard almost nothing on property except

in Exhibit 4, relating to the list of items received by the parties. Therefore I find that the **de facto** division of property was made between the parties which settles that issue. I set the value of the car, pursuant to Exhibit #3, tab 23, at $5,500.00. Mr. Gallant has kept the car so he will owe the mean value to Ms. Gallant. The Educational Fund is to remain as is. If Devon does not go to university, which I hope is not the case, then the fund is to be divided on a fifty-fifty basis up until the date of separation, September 5, 2006. Any contributions after that date and any interest accruing on the contributions after that date shall be the sole property of Mr. Gallant. In the event that there is any matrimonial property that has not been specifically included in my comments today and in the letters of Mrs. McCarthy and Mr. Ripley, then those assets shall be divided on a fifty-fifty basis with the exception of Mr. Gallant's business, to which Ms. Gallant has no interest or equity. It is already calculated in the figures that the monies taken from the family funds to start a business by Mr. Gallant in the amount of $20,000.00 shall be divided as in the calculations of Ms. McCarthy. In her first paragraph she does a lump sum and so for the purposes of clarity, that money is to be made available for division.

[71] In relation to retroactive child support, the parties had shared custody for approximately two (2) years, more likely twenty-two (22) months. Section 9 of the shared custody provision of the Guidelines provides:

> Where a spouse exercises a right to access to or has physical custody of a child for no less than forty (40%) percent of the time over the course of the year, the amount of child support ordered must be determined by taking into account:
>
> (a) the amount set out in the applicable table for each spouse;
>
> (b) the increased cost of shared custody; and
>
> (c) the condition, means, needs, and other circumstances of each spouse and of any child for whom support is sought.

[72] The Supreme Court of Canada in 2005 has determined the role of these three sections and how these differ from section 3 of the Guidelines in the decision of **Contino v. Contino {2005}, 3 S.C.R. 217**. The case concludes that no one feature is paramount. Judicial discretion is to be exercised fairly and with flexibility so that it is reflective of the economic reality of the parties. Based on section 9(a), Mr. Gallant would owe $5,975.00. I have checked Mrs. McCarthy's calculations and with the addition of adding the last three months, I find that her calculations in the post trial brief are accurate and accepted.

[73] Mrs. McCarthy does the calculations from the date of separation up to June, 2008, but since the submissions were only filed in June, 2008 and the decision is given in September, 2008, I have added three (3) months at her calculation per month and the final figure is $5,975.00. That is according to section 9(a).

[74] The calculations accepted are from date of actual separation, November 11, 2006, to date of oral decision, September 30, 2008. They are as follows:

> 2006
> Ms. Gallant's annual income: $20,610.42 for a table amount of $167.00
> Mr. Gallant's annual income: $90.087.00 for a table amount of $764.00.
>
> Difference of $597.00 x l.5 months = $895.50
>
> 2007
> Ms. Gallant's annual income: $43,409.00 for a table amount of $377.00
> Mr. Gallant's annual income: $79,187.70 for a table amount of $681.00
>
> Difference of $304. X 12 months = $3,648.00
>
> 2008
> Ms. Gallant's annual income: $43,409.00 for a table amount of $377.00
>
> January to February 8, 2008:
> Mr. Gallant's annual income: $79,187.70 for a table amount of $681.00
>
> Difference of $304 x 1 month = $304.00
>
> February 8 - March 19
> No support payable
>
> April - September 30, 2008

Mr. Gallant's annual income: $65,000.00 for a table amount of $565.00
Mrs. Gallant's annual income: $43,409 for a table amount of $377

Difference of $188 per month x 6 months = $1,128.00

Total retroactive base child support owing: $5,975.00

[75] Section 9(b), an increased cost in shared custody arrangements. I assume there are increased costs; however, I have heard no evidence on this issue.

[76] Section 9(c), condition, means, needs and other circumstances of each spouse and of any child for whom support is sought. Section 9(c) is broad to allow discretionary examination of the pluses and minuses of what occurred post separation. I have heard the evidence that Mr. Gallant's partner earns approximately $60,000.00 a year and that she pays for groceries. Mr. Gallant currently, without any bonus' is earning $65,000.00. That would indicate that there is $125,000.00 available versus the $43,000.00 in Ms. Gallant's household. Obviously it is not Mr. Gallant's girlfriend's responsibility to support Devon but it is her responsibility to co-share expenses so I acknowledge that Mr. Gallant's expenses are shared or ought to be shared as a result of his new partner. However, I have examined as well that for almost two (2) years Mr. Gallant has serviced the debts that the parties had at the date of separation. Ms. Gallant indicated she might have received a call or two from

creditors, but basically she has been left without having to deal with that responsibility. I examined as well the fact that she has the Child Tax Credit for the last two (2) years and that she claimed the total child care costs for the taxation year 2006. With these factors under consideration, the debt servicing, the Child Tax Credit and the claiming in 2006 of all of the child care costs, I reduce the amount of retroactive child maintenance to $4,000.00 to be paid by Mr. Gallant within thirty (30) days.

[77] Mr. Gallant is to purchase the house, if he wishes to do so, with the calculations already referred to at the commencement of this decision and in the amount of the appraisal. If it is not clear from counsels' letters, he is also to receive one-half of the value of appraisal from Ms. Gallant.

[78] Further child support for Devon shall be based on the Guideline amount of $65,000.00 at Mr. Gallant's current job and it is to be adjusted at the end of the year should he receive an increase or bonus of any kind this year. Mr. Gallant indicates that the company is reasonably new or he is reasonable new to the company, I'm not sure which and he does not expect an increment this year and maybe not next year. If he is wrong and he does receive an increment or bonus of any nature or kind as

a result of his employment, then the figures may be adjusted upward. I did not average out his income over the years, the past three years, to set the maintenance amount. I felt it was more equitable and I am entitled to decide his maintenance based on his current income. However, it is his obligation to notify Ms. Gallant should his situation improve.

[79] In relation to s. 7 day care expenses, Mr. Ripley is correct. It is the net day cost to be shared in proportion to the parties actual incomes. So it is the actual day care costs to be shared in proportion to the actual income from all sources.

[80] Completed Tax Returns and Notice(s) of Assessment are to be exchanged. Ms. Gallant or Ms. Donovan to Mr. Gallant; Mr. Gallant to Ms. Donovan by June 30, 2009 and the last day of June each year for so long as Devon remains a child of the marriage. This does not mean that one can say: 'I gave my papers to my accountant and I don't know what he did with them.' These documents are to be filed by the end of April so if the parties have an accountant who doesn't have the tax returns completed by the end of June, then the parties may have a problem as this is a Court Order to have returns exchanged by June 30th. I spend a lot of time on non compliance in other cases with this term and therefore in all cases where I

have been ordering the exchange of documentation; if one party fails to do so and the other party incurs a loss, either legal fees and/or must resort to the courts, that the Court will process costs that may be substantial. It is clear these documents have to be exchanged and the proportionate responsibility on net day care costs are to be shared. Hopefully in the future if Devon has other needs such as braces, this will be the formula.

[81] In relation to costs, costs are discretionary and it is difficult to use the schedules, given that there is not really a monetary amount to be fixed on this case. I do find that Ms. Gallant was successful on most issues. No time was spent on spousal support since it wasn't really pleaded. Time was spent on the cashed in family savings for the business. That $20,000.00 should have been agreed from the onset. A fair amount of time was spent on that issue. Therefore I order costs to be awarded to Ms. Gallant in the amount of $3,000.00 for the two days in Court.

[82] Counsel are to draw up a completed valuation table and sign off as to the agreed to items contained in the letter and Mrs. McCarthy is to have the Court Order of all matters prepared within ten (10) working days.

_____

MacLellan, J.

Note: Counsels' letters attached.