IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

**CITATION: *Lewis v. Lewis,* 2005 NSCC 256**

**Date:**20050823
**Docket:** 1206-004620
**Registry:** Sydney

**Between:**

Alison Lewis

Applicant/Respondent

v.

Gordon Lewis

Respondent/Applicant

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|---|---|
| **Judge:** | Justice Theresa Marie Forgeron,<br>Justice of the Supreme Court of Nova Scotia<br>(Family Division) |
| **Written Decision:** | September 16, 2005 |
| **Counsel:** | Christopher Conohan, counsel for the Applicant<br><br>Tony Mozvik, counsel for the Respondent |
| ***Note:*** | ***This decision is to be reproduced in its entirety. Editing of names is not appropriate.*** |

**By the Court:**

## Introduction

**[1]** The matters before the court for decision concern the interim parenting of the two children of the marriage and a request for a parental capacity assessment.

**[2]** A decision respecting custody and access is one of the most important determinations to be made by the court as such decisions reach more deeply into the lives of the children and of the parties than any other decision a court will render. Great care must be taken to ensure that the best interests of the children is met in conformity with the relevant legislation, case law and evidence.

## Background

**[3]** The parties married on August 28, 1999 after living in a common law relationship for approximately one year. They separated for the final time on November 7, 2002. They have two children, namely: Brydon Daniel Lewis born March 2, 1995 and Emily Taylor Lewis born April 20, 2000.

**[4]** Ms. Lewis is employed at a local private school, operated by her sister, on a full time basis. She has been the primary care giver of the children since their birth as Mr. Lewis has spent significant portions of the year away from the area for employment purposes. The primary care giving status of Ms. Lewis was not challenged during the course of these proceedings.

**[5]** The divorce petition issued on April 20, 2004. An interim hearing had been scheduled, but did not proceed as the parties negotiated an interim resolution of the issues in December 2004. This agreement resolved, on an interim basis, issues of custody, access, maintenance, exclusive possession of the matrimonial home, and the payment of the mortgage and loan. The parenting arrangement was one of joint custody with primary care to Ms. Lewis as well as final decision making authority in the event of a disagreement on any major decision. Access between Mr. Lewis and the children was broadly stated to be reasonable access at reasonable times upon reasonable notice. The order incorporating the terms of this agreement issued on January 17, 2005.

**Present Proceedings**

**[6]** Both parties have filed applications stemming from the January interim consent order. Mr. Lewis filed an application to enforce the access provisions on January 13,

2005. Ms. Lewis filed a variation application on May 27, 2005 seeking supervised access.

**[7]** While awaiting a hearing date to determine the merits of the competing applications, a temporary, interim consent order was reached on May 30, 2005 and issued on June 15, 2005. This order was to govern the parties until the interim hearing was held on August 18, 2005. The order provided Mr. Lewis with supervised access through the YMCA supervised access & exchange program.

**[8]** At a pre-hearing conference, the parties were able to agree to strike out several portions of the Affidavits on file so as to conform with Rule 70.13 (8).

**[9]** The following witnesses testified at the interim hearing: Ms. Ali MacDougall, Mr. Gordon Lewis, Mrs. Mary Lewis, Ms. Carolyn Lewis, Ms. Alison Lewis and Constable Mary Beth Gibbons.

**Law**

**[10]** Interim custody orders are designed to meet the best interests of the children for a relatively brief period of time. As such, emphasis is placed upon the preservation of the status quo. Interim orders are not binding upon the trial judge and no change in circumstance is necessary to be proven at the time of trial.

**[11]** The jurisdiction to make an interim order is found in **Section 16 (2)** of the **Divorce Act** which reads:

> (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.

**[12]** The factors to be considered in making an interim consent order are set out in **Section 16 (8)** of the **Act**:

> (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.

**[13]** Past conduct of a parent is not to be considered unless that conduct is relevant to the ability to parent a child at **Section 16(9)** of the **Act** which states**:**

> (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.

**[14]** The other principle which the court is mandated to consider is stated in **Section 16 (10)** of the **Act** which provides:

> (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.

**[15]** Variation of interim orders is not the norm, however such is recognized as appropriate in special circumstances. In **Marshall v. Marshall** (1998) 168 N.S.R.(2d) 48 (C.A.), the Nova Scotia Court of Appeal commented on the scope of interim proceedings in comparison to final hearings and the authority to vary an interim order. Roscoe J.A. states at paragraph 26:

> ¶ 26 The focus is on the status quo and the short-term living arrangements for the child. Although in this case the parties had been separated for a few years, and had consented to the first order, the test that should have been applied was the same: if there is no reason to change the existing situation, that situation should continue until the trial. There is authority for variation of interim orders: see Foley v. Foley (1993), 124 N.S.R.(2d) 198 (S.C.).

**[16]** In **Foley v. Foley**, 1993 Carswell NS 328 (S.C.) Goodfellow J. varied an interim order given the substantial changes in circumstance brought about by the wife's unilateral variation of the status quo. The wife had moved from the matrimonial home with the children without the consent of the husband. The variation order was granted to preserve the status quo while awaiting the divorce hearing. Goodfellow J. states at

paragraphs 28 and 30, which state in part:

> ¶ 28 Mrs. Foley's removal of the children has also brought about a substantial change in the parenting environment that existed for some time prior to July 6, 1993.
> ...
> ¶ 30 The frequent acceptance of the status quo as a decisive reason for granting a parent interim custody is often no more than deference by the court to what has been put in place by the parties as parents.

**[17]** Because this matter involves a variation application, ordinarily a material change in circumstance would have to be proven. However, although framed as a variation application, Ms. Lewis is in reality attempting to vacate the first order as she alleges that she was under duress when she consented to the order. She states that she was controlled by Mr. Lewis and consented to the order out of fear. Ms. Lewis states that the first order does not represent what is in the best interests of the children. For the purposes of my decision I will determine the application of Ms. Lewis without reference to the change in circumstances test.

**[18]** In **Pye v. Pye** (1992) 112 N.S.R. (2d) 109 (T.D.) Kelly J. reviewed the law applicable to interim applications and noted that the status quo of the child must be maintained as closely as possible pending the final hearing. The children should be

placed in the environment with which they are most familiar . Kelly J. states at paragraph 5, which in part reads:

> [5] I concur with Grant, J. in **Stubson v. Stubson** (1991), 105 N.S.R. (2d) 155; 284 A.P.R. 155 (N.S.S.C.,T.D.) that the test in such an application was properly set out in **Webber v. Webber** (1989), 90 N.S.R. (2d) 55; 230 A.P.R.. 55 (F.C.), by Daley, F.C.J. at p. 57:
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> > Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible. ...

**[19]** Although **Foley** and **Pye,** supra, dealt with interim custody matters, and not access issues, the principles enunciated are nonetheless applicable to all interim parenting arrangements.

**[20]** The status quo which is to be maintained is the status quo which existed without reference to the unilateral variation of one spouse, unless the best interests of the children dictate otherwise. In **Kimpton v. Kimpton** 2002 CarswellOnt. 5030 (S.C.J.), J.Wright J. defined status quo in paragraph 1, which reads as follows:

> 1 There is a golden rule which implacably governs motions for interim custody: stability is a primary need for children caught in the throes of matrimonial dispute and the *de facto* custody of children ought not to be disturbed *pendente lite*, unless there is some ***compelling*** reason why in the interests of the children, the parent having *de facto* custody should be deprived thereof. On this consideration hangs all other considerations. On
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> motions for interim custody the most important factor in considering the best interests of the child has traditionally been the maintenance of the legal *status quo*. This golden rule was enunciated by Senior Master Roger in Dyment v. Dyment [1969] 2 O.R. 631 (Ont. Master), (aff'd by Laskin J.A. at p. 748)

> [[1969] 2 O.R. 748 (Ont. C.A.)] , by Laskin J.A. again in *Papp v. Papp* (1969), [1970] 1 O.R. 331 (Ont. C.A.), at pp. 344-5 and by the Nova Scotia Court of Appeal in *Lancaster v. Lancaster* (1992), 38 R.F.L. (3d) 373 (N.S. C.A.). By status quo is meant the primary or legal status quo, not a short lived status quo created to gain tactical advantage. See on this issue *Irwin v. Irwin* (1986), 3 R.F.L. (3d) 403 (Ont. H.C.) and the annotation of J.G. McLeod to Moggey v. Moggey (1990), 28 R.F.L. (3d) 416 (Sask. Q.B.).

**[21]** This principle is more firmly reviewed in the annotation of James McLeod in the decision of **Moggey v. Moggey** 1990 Carswell Sask 72 (Q.B) wherein James MacLeod states in part:

> "*Status quo*" is not just the short-term living arrangement. It is the way of life that existed before the current issue of custody or access arose. On a variation application the court should continue the legal custody order in the absence of clear evidence that the welfare of the child requires another disposition.
>
> ...
>
> The same analysis would suggest that one person cannot unilaterally remove a child from the family home without a custody order and claim that the "*status quo*" should be maintained pending the hearing. As Vogelsang Prov. J. Held in *Lisanti v. Lisanti* (1990), 24 R.F.L. (3d) 174 (Ont. Prov. Ct.,), the removal violates the custody rights of the other parent. The bottom line is that self-help should be discouraged. ...

**[22]** Ms. Lewis seeks to change the status quo of the children from that which existed prior to January 2005 during which time Mr. Lewis, and his family, were very much involved in the lives of the children. After January 2005, access was refused and then

proceeded on a supervised basis only. Ms. Lewis seeks ongoing, interim supervised access.

**[23]** Supervised access is an exceptional remedy. A child is entitled to share in the daily life of his/her parents unless such is not in the child's best interests to do so. Access is the right of the child and not the right of the parent. There is no presumption that contact with both parents is in the best interests of the child, although such contact generally is: **Young v. Young** (1993) 160 N.R. 1 (S.C.C.) and **Abdo v. Abdo** (1993) 126 N.S.R. (2d) 1 (C.A.).

**[24]** Supervised access is appropriate in specific situations, some of which include the following:

[a] where the child requires protection from physical, sexual or emotional abuse;
[b] where the child is being introduced or reintroduced into the life of a parent after a significant absence;
[c] where there are substance abuse issues; or
[d] where there are clinical issues involving the access parent.

**[25]** Supervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent. Access is for the benefit of the child and each application is to be determined on its own merits.

**[26]** In rendering my decision I have reviewed the case law presented on behalf of Ms. Lewis, in addition to the law stated in my decision. The facts stated in the cases referenced by Ms. Lewis are not similar to the facts found in the case at bar. I have also applied the proper legal onus in respect of the competing applications. Each party bears the burden of proof in respect of his/her respective application. The burden of proof is the civil burden which is proof on the balance of probabilities.

**Evidence**

**Ali MacDougall**

**[27]** Mrs. Ali MacDougall testified on behalf of Mr. Lewis. Mrs. MacDougall is the mother of Aubrey Gordon Stone who is the oldest child of Mr. Lewis. Mrs. MacDougall indicated that Mr. Lewis is a good father to Aubrey and that he and Aubrey have a good relationship. Mrs. MacDougall testified that she did not observe violence in the relationship between Mr. Lewis and Aubrey, and that no violence existed between she and Mr. Lewis. She was not concerned about Mr. Lewis engaging in risky behaviour with her son.

**Gordon Lewis**

**[28]** Mr. Lewis testified that he was a good father who was caring, loving and attentive. He readily agreed that there were significant periods of time when he was forced to leave the area for employment purposes. He stated that he was very involved with the children when he returned home.

**[29]** In response to the many allegations raised against his character, Mr. Lewis denied the same. He confirmed that he was found not guilty of uttering threats to Ms. Lewis after a contested criminal proceeding. Mr. Lewis also testified that he was found not guilty of sexually assaulting his sister. He acknowledged that the criminal matter was adjourned and eventually dismissed as his sister did not attend the criminal court proceedings. Mr. Lewis stated that he and his wife both watched pornographic movies, engaged in "phone sex", and that Ms. Lewis was a willing participant in having sexually explicit photographs taken. Mr. Lewis indicated that the children were not in any way involved in these adult sexual matters. Mr. Lewis further stated that the alleged breach charges were dismissed and dealt with by way of a peace bond.

**[30]** In addressing the negative parenting allegations, Mr. Lewis stated that he had not used corporeal punishment, but rather employed time out as a discipline strategy. He acknowledged that he did not always have the children wear a helmet when they were

driving on the ATV around the home. He stated that he uses a puffer for allergies and has on the appropriate occasions ensured that Brydon uses a puffer. He indicated that no cigarettes are smoked in the presence of the children and that his children have never seen him smoke. Mr. Lewis said that Brydon is not exposed to animals, other than when he used to visit with Ms. Lewis' sister who had a cat.

**[31]** In discussing his position on access, Mr. Lewis indicated that supervised visits at the YMCA were unnecessary and such visits were not conducive to an ongoing parent child relationship. He stated that Brydon was bored at the YMCA.

**Mary Lewis**

**[32]** Mrs. Mary Lewis testified next. She is the mother of Mr. Lewis. She stated that she did not use corporeal punishment on the children, and, if anything, that she spoiled her grandchildren. She missed not seeing her grandchildren as it had been some time since she had any meaningful contact with them.

**Alison Lewis**

**[33]** Ms. Alison Lewis filed two Affidavits. She stated that she felt coerced and threatened and as a result consented to the parenting arrangements which were placed in the January court order. She feels that the parenting provisions of the order do not represent

the best interests of the children. She expressed several concerns regarding the parenting of Mr. Lewis.

**[34]** Ms. Lewis stated that Mr. Lewis sexually assaulted his sister, has watched pornography and participated in pornographic telephone calls. She indicated that Mr. Lewis coerced her into having sexually compromising photographs taken and that Mr. Lewis refuses to return the photographs despite her requests. Ms. Lewis is convinced that Mr. Lewis broke into her home and stole personal items after the first court order was reached.

**[35]** Ms. Lewis indicated that the relationship between she and Mr. Lewis was abusive and that Mr. Lewis continues to threaten her.

**[36]** Ms. Lewis expressed concerns regarding Mr. Lewis' parenting including his use of corporeal punishment, Mr. Lewis' minimization of Brydon's medical condition and his lack of dispensing appropriate medication. Various safety concerns were likewise raised by Ms. Lewis. She stated that Mr. Lewis did not have the children wear helmets when driving on the ATV and that Mr. Lewis sometimes drove a vehicle after consuming alcohol.

**[37]** Ms. Lewis also expressed concerns about Mr. Lewis' noninvolvement in the lives of the children. Ms. Lewis stated that Mr. Lewis threatened to kidnap the children and move them to the United States.

**[38]** Given these various concerns, Ms. Lewis sought continued supervised access and a parental capacity assessment.

**Carolyn Lewis**

**[39]** Ms. Carolyn Lewis was called as a witness by Ms. Lewis. A warrant was necessary to ensure Ms. Carolyn Lewis' attendance. During her direct examination, Ms. Lewis was confronted with, and cross examined on, a prior inconsistent statement. Ms. Lewis was declared an adverse witness. Ms. Lewis acknowledged that she gave a statement to the police respecting alleged sexual abuse involving her brother, Mr. Gordon Lewis. Ms. Lewis confirmed that she tried to have the charges dropped, and was unsuccessful in so doing. Ms. Lewis stated that she did not appear in court to advance the criminal proceedings. She indicated that when she made the complaint to the police that she was suffering from serious mental health difficulties and was unable to distinguish dreams from reality. She asserted that she had made many untrue allegations at the time and that her memory was quite poor. Ms. Lewis stated that she allows her three children to be alone with Mr. Lewis and that she trusts Mr. Lewis with her children.

**Constable Gibbons**

**[40]** Constable Gibbons was the last witness to testify. She discussed the circumstances surrounding the charges laid against Mr. Lewis. She stated that Ms. Carolyn Lewis sought to withdraw the sexual abuse complaint against Mr. Lewis within hours of having given the statement to the police because of family pressure.

**Assessment and Findings**

**[41]** In making the findings that I have, I have assessed the evidence presented by the witnesses during their *viva voce* evidence as well as reviewing the Affidavits presented.

**[42]** I accept the evidence of Mrs. Ali MacDougall. She has no vested interest in the proceedings as she is no longer in a relationship with Mr. Lewis. I find Mrs. MacDougall to be a truthful and credible witness. The court accepts the evidence of Mrs. MacDougall and where it conflicts with the evidence of Ms. Alison Lewis, the evidence of Mrs. MacDougall is preferred. I find that there was no physical violence or spitting of the nature described by Ms. Alison Lewis during the access exchanges as alleged.

**[43]** I accept the evidence of Mrs. Mary Lewis. She too was a credible witness who clearly loves her grandchildren and would do them no harm. Indeed prior to separation,

there was significant involvement from the paternal grandmother in the lives of the children inclusive of the provision of child care. This pattern continued for a substantial period of time after separation. There is absolutely no reason why the children have been denied contact with Mrs. Mary Lewis, a grandparent who has much to offer in terms of love and nurture. I further find that Mrs. Lewis does not engage in corporeal punishment of any kind with Brydon or Emily.

**[44]** I find on a balance of probabilities that Ms. Carolyn Lewis was not sexually abused by her brother Mr. Gordon Lewis. Any evidence to that effect is without merit. Ms. Carolyn Lewis stated that she was suffering from significant mental health difficulties at the time the complaint was laid and she was unable to discern truth from fiction. Her evidence was not credible in relation to the alleged assault as outlined in the statement produced. Mr. Lewis was found not guilty of the charges. Further, and most importantly, Ms. Lewis was aware of the sexual abuse complaint when it was made in 2003, yet continued to allow unsupervised access between Mr. Lewis and the children until January 2005.

**[45]** I prefer the evidence of Mr. Lewis over that of Ms. Lewis where there was a conflict in the evidence. This was for several reasons, including:

> (a) Mr. Lewis was more direct and straight forward when presenting his evidence. He was candid and consistent. Ms. Lewis was not.

(b) Ms. Lewis was evasive at times. She attempted to make further allegations against Mr. Lewis during cross examination and when questioned by the court. An example of this is found in Ms. Lewis' description of Emily being touched sexually by another child while in the care of Mr. Lewis. This serious allegation is noticeably absent from Ms. Lewis' two affidavits.

(c) Ms. Lewis did not contest unsupervised access between Mr. Lewis and the children until January 2005. If she was as concerned as she says she was, Ms. Lewis would have and could have acted much sooner.

(d) There is absolutely no credible evidence that the children suffered in any respect during the period of unsupervised access. This lack of evidence supports the position of Mr. Lewis, and not that of Ms. Lewis.

(e) Ms. Lewis' allegations of threats and blackmail do not ring true. The parties had reached agreement on all issues in December 2004, and without court hearing. Ms. Lewis received interim possession of the home, maintenance, and an order as to the payment of certain debts which was beneficial to her. She also was awarded primary care of the children and final decision making authority in the event of a dispute. In effect, the relief provided to Ms. Lewis appears to be fair and appropriate. Mr. Lewis did not "win" anything by virtue of any alleged threats or blackmail.

(f) Ms. Lewis had no difficulty accessing services when she felt that Mr. Lewis had broken into her home. To the contrary, Ms. Lewis has moved quite quickly. Ms. Lewis' actions confirm that she can act independently and forcibly when she feels that her safety or that of the children is in jeopardy.

(g) Ms. Lewis was incorrect when she alleged that Mr. Lewis personally threatened her in the spring of 2004 as Mr. Lewis was physically working in Alberta at the time Ms. Lewis alleged that he was in Cape Breton.

**[46]** I do not accept the allegation that Ms. Lewis has been a pawn controlled by Mr. Lewis since the separation in 2002 and indeed since the relationship began. Ms. Lewis is an articulate, intelligent lady who has accessed a lawyer and court services without difficulty. She loves her children and would not have placed their safety at risk because she

felt controlled and/or threatened by her estranged husband who was out of province for many months of the year for employment purposes. Ms. Lewis would not have compromised the safety of her children in such a fashion.

**[47]** I find that the parties engaged in joint, sexual, adult activities and that such activities did not at any time impact on the children. Too much time and evidence was devoted to this topic. This evidence was not considered relevant to the issue of the best interests of the children, and in any event was joint and consensual.

**[48]** I find that Mr. Lewis did inappropriately allow the children to ride on the A.T.V. without the mandatory safety helmets.

**[49]** I find that Mr. Lewis did not abuse the children. I find that corporeal punishment was not utilized as a method of discipline by either party.

**[50]** I find that there are no health risks associated with the children, and in particular Brydon, being in the unsupervised care of Mr. Lewis.

**[51]** I find that the parties had verbal arguments during their relationship, but that there was no physical abuse between them.

**[52]** I find that Mr. Lewis did not break into the residence of Ms. Lewis and further that he did not steal anything from her. It was this mistaken belief, that resulted in Ms. Lewis denying access contrary to a then existing custody order.

**[53]** I find that the parties are unable to communicate with each other on issues respecting the children at this juncture in time.

**Decision**

**[54]** Applying these findings to the best interests of the children, and in conformity with the legislation and case law, I make the following interim order:

**Custody**

**[55]** Ms. Lewis shall have custody of the children as the evidence is clear that the parties cannot communicate to the extent necessary for a joint custody order to operate effectively. It is not in the best interests of the children to be placed in parental conflict as a result of court imposed and forced communication. Further Mr. Lewis may have avoided much of the ill will by simply returning the photographs. No good reason was provided to the court as to why Mr. Lewis is still retaining the compromising photographs in light of the lasting separation and the desire of Ms. Lewis to have the photographs returned.

**Regular Schedule**

**[56]** Mr. Lewis shall have unsupervised access to the children according to the following two week schedule:

> (a) **On week one**, Mr. Lewis shall have the children from Friday at 3:30 p.m. until Sunday at 3:30 p.m. unless Monday is a holiday or the children are not in school in which case access shall be extended until 3:30 p.m. on the Monday. This access shall commence Friday September 2nd, 2005 and every second week thereafter.
>
> (b) **On week two**, Mr. Lewis shall have the children on Tuesdays and Thursdays. When the children are not scheduled to be in school, such access shall be from 10:00 a.m. until 6:00 p.m. When the children are in school, the access shall be from 3:30 p.m. until 6:00 pm. This access will commence on August 23, 2005 and continue biweekly thereafter.

**Christmas 2005**

**[57]** The children shall be in the care of Ms. Lewis from December 24th at 3:30 p.m. until December 25th at 3:30 p.m. The children shall be in the care of Mr. Lewis on December 25th at 3:30 p.m. until December 26th at 3:30 p.m. This schedule shall apply unless the parties agree in writing to another schedule in its stead.

**Transportation**

**[58]** Mr. Lewis shall have a third party attend the home of Ms. Lewis to transport the children at the commencement of access. Ms. Lewis shall ensure that the children are prepared and available for access and she shall take the children out to the vehicle for access.

**[59]** Ms. Lewis shall have a third party attend the home of Mr. Lewis to transport the

children at the conclusion of access. Mr. Lewis shall ensure that the children are prepared and available to go home and he shall take the children out to the vehicle at the conclusion of access.

**Other Holiday Access**

**[60]** No Easter access or March break access is determined as the divorce hearing should be scheduled prior to that time.

**Communication**

**[61]** The parties shall have no direct communication with each other except to the extent stated in this decision. All information respecting the children shall be conveyed by email which shall be sent in a format that can be saved. The parties are urged to save all such communication with the understanding that such communication may be used in future court proceedings. Only issues surrounding the children's health, education and social welfare shall be the subject of the communication. In the event the parties do not have access to email, a written notebook shall be purchased for communication purposes. This notebook shall be provided to the third party who transports the children at the commencement and conclusion of each access visit.

**[62]** The communication which will be stated in the notebook or email shall include any

educational information such as details surrounding parent teacher meetings, report cards, concerts, tests and project results; medical information regarding any illnesses which the children have contracted and/or information concerning the dispensation of any medication, and/or health instructions relating to the care of the children or their progress. Further all other relevant social welfare information regarding the children shall be communicated in this fashion. All such information shall be provided on a timely basis i.e. one party does not tell the other party about an important event two weeks after it has been concluded.

**Access to Information**

**[63]** Both parties have the right to access medical, health, educational and social welfare information and documentation directly from the professionals involved in the care of the children without the further consent of the other party.

**Miscellaneous**

**[64]** The children shall not drive on the ATV during the interim period. Serious injuries can and do occur unless all safety precautions are utilized at all times.

**[65]** Neither party shall operate a motor vehicle while having consumed any alcohol whatsoever and neither party shall consume alcohol to excess while the children are in his/her respective care.

**[66]** No smoking shall be permitted in the presence of the children.

**[67]** The permanent residence of the children shall not be changed from the area unless the parties reach written agreement to the contrary or a court of competent jurisdiction otherwise so orders.

**[68]** Neither party shall remove the children from the province of Nova Scotia during the interim unless the parties reach a written agreement to the contrary or a court of competent jurisdiction so orders. I am not concerned that Mr. Lewis is going to kidnap the children however this provision is necessary to provide some comfort to Ms. Lewis during the interim.

**Parental Capacity Assessment**

**[69]** Ms. Lewis makes application to have a parental capacity assessment of Mr. Lewis pursuant to section 32F (1)of the **Judicature Act** R.S.N.S. 1989, c.240 which provides:

> **32F** (1) Upon application or on the judge's own motion, a judge of the Supreme Court (Family Division) may direct a family counsellor, social worker, probation officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.
>
> (2) A person directed to make a report pursuant to subsection (1) shall file a written report with the Supreme Court (Family Division) together with a copy

> of the report for each party to the proceeding and for the judge.
>
> (3) The contents of a report filed pursuant to subsection (2) may be received in evidence in the proceeding.
>
> (4) A person filing a report pursuant to subsection (2) is a competent and compellable witness.
>
> (5) Any party, including the party calling the person as a witness, may cross-examine the person referred to in subsection (4).
>
> (6) No action lies or shall be instituted against a person who prepares a report pursuant to subsection (1) for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done by that person in the carrying out or supposed carrying out of that duty.
>
> (7) A judge may, subject to the regulations, specify in an order made pursuant to subsection (1) the amount of any charge for the report that each party is required to pay. 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

**[70]** I deny the application sought by Ms. Lewis. Ms. Lewis has failed to prove that a parental capacity assessment is necessary or in the best interests of the children. Such an assessment should not be ordered as a matter of course. An assessment should not be used as a fishing expedition. An assessment is appropriate where clinical information would not otherwise be available to the court on a germane issue. I refer counsel to the law stated by Edwards J. in **Farmakoulas v. McInnis** (1996) 152 NSR (2d) 52 (SC). The annotation of James MacLeod in the decision of **Sheikh v, Sheikh** 2004 Carswell Ont 4395 is likewise instructive.

**[71]** In this present application, I have grave concerns that an assessment would be used as an attempt to admit highly prejudicial, sexual abuse allegations which would not otherwise be admissible as evidence. Determinations relating to the best interests of the children must not be based on speculation. I find that a trial judge will be well equipped to make a custody/access determination in this case without the necessity of a parental capacity assessment.

**[72]** In addition, I have denied the application for an assessment as I am concerned with the costs and delay associated with an assessment. This case should be processed to final hearing as quickly as possible.

**[73]** Finally I have denied the application as parental capacity assessments are intrusive upon the lives of the children who are required to participate in a direct way.

**Unilateral Determination to Ignore Court Order**

**[74]** I was also requested to provide direction respecting the self help measures undertaken by Ms. Lewis in January 2005 when she chose to act unilaterally in the face of a

court order. The court does not look favourably upon such conduct and behaviour. A court order must be respected and followed by the parties. If an emergency occurs, then access to the courts on an expedited basis is provided for in the Rules if the threshold burden is met.

**[75]** I ask counsel for Mr. Lewis to prepare the order.

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THERESA M. FORGERON, J.