IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. K. H., 2009 NSSC 71

Date: 2009 03 10
Docket:SFHCFSA-055303
1201-56166 (SFHD-012607)
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

K. H., S. J. and G. G.

Respondents

AND

G. J. G.

Petitioner

v.

K. E. H.

Respondent

Restriction on Publication: Publishers of this case please take note that s. 94(1) of the ***Children and Family Services Act*** applies and may require editing of this judgment or its heading before publication. Section 94(1) provides:

> "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child."

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Revised decision: The name of one of the counsel was omitted. This decision replaces the previously distributed decision.

Judge: The Honourable Justice Leslie J. Dellapinna

Heard: January 19, 20, 21, 22, 2009, in Halifax, Nova Scotia

Counsel: John Underhill counsel for the Agency
Jennifer Schofield counsel for G. G.
Tanya Jones counsel for K. H.
S. J., Self-represented
Peter Katsihtis counsel for S. W., g.a.l.

By the Court:

[1] This decision addresses the disposition of two proceedings which, at a Pre-trial Conference, the parties agreed would be heard at the same time. One proceeding involves a review application pursuant to subsection 46(1) of the ***Children and Family Services Act,*** R.S.N.S. 1990, c.5 by which the Minister of Community Services ("the Agency") seeks an order under subsection 46 (5)(a) terminating a Supervision Order obtained earlier by the Agency with respect to the children of Mr. G. G. and Ms. K. H. and bringing an end to the Agency's involvement with their family. In addition to the Agency and the children's parents, Ms. H.'s partner with whom she now resides, Mr. S. J., is a named party. The second proceeding is the divorce between Mr. G. and Ms. H. or, more accurately, the corollary relief proceeding flowing from their divorce. The main outstanding issue between Mr. G. and Ms. H. is the custodial arrangements with respect to their two children.

BACKGROUND

[2] Mr. G. and Ms. H. were married on December *, 1992. They have two children, B. born June *, 1996 (now 12) and L. born March *, 1999 (soon 10).

[3] The parties separated in February 2001. It was then that they began to sleep in separate rooms and live separate lives although they both continued to reside under the same roof.

[4] The divorce proceedings were initiated by Mr. G. in September of 2001. Around the same time he moved from the matrimonial home.

[5] In the same month Mr. G. applied for an order seeking, among other things, interim custody of the children and interim exclusive possession of the matrimonial home. Before a hearing took place the parties and their counsel reached an agreement which was put in the form of an Interim Order. They agreed they would share interim joint and shared custody of the children such that each would have physical custody of the children on alternating weeks and Ms. H. would have interim exclusive possession of the matrimonial home.

[6] The relationship between the parties since their separation has been one of constant acrimony and bitterness which has had the unfortunate effect of spilling over onto all those with whom the parties have had relationships over the past eight years including Mr. G.'s former fiancé and Mr. J.. It has also adversely affected the two people most important in their lives, their children.

[7] Although neither Mr. G. nor Ms. H. took active steps to conclude the divorce proceedings between 2001 and 2007 the circumstances between the parties were far from tranquil. The minutes of a risk management conference held by the Agency on October 9, 2007 included the following entry which gives an indication of the nature of the parties' relationship after their separation:

> "There has been extensive child protection involvement with this family, beginning in July 2001 regarding concerns of domestic violence which were substantiated when Ms. H. assaulted Mr. G.. From October 2001 through March 2006, the Agency received several referrals including unsuitable associations, sexual abuse, parental alcohol abuse, custody/access issues, all of which were not substantiated or not investigated."

[8] In May 2007 Mr. G. contacted the Agency to report concerns that he had with respect with Ms. H.'s mental health, alcohol consumption and the nature of her relationship with Mr. J.. As a result of Mr. G.'s phone call the Agency conducted an investigation and quickly confirmed the nature of the relationship

between Mr. G. and Ms. H. but the Agency also had concerns for the relationship between Ms. H. and Mr. J.. There was at that time evidence of domestic violence between them. A file was opened for on-going child protection services and Ms. H. and Mr. J. were referred to couples counselling. Counselling was also provided to the child B..

[9] In October 2007 Ms. H. said that she was no longer prepared to accept the Agency's services. Because of a perceived risk of physical and emotional harm to the children the Agency filed a Protection Application with the Court on October 17, 2007 with the first hearing taking place on October 24, 2007.

[10] The Interim Hearing under the ***Children and Family Services Act*** was completed before me on November 16, 2007. I concluded at that time that there were reasonable and probable grounds to believe that the children were in need of protective services and with the consent of the parties ordered that the children remain in the care of their parents subject to the supervision of the Agency. Mr. G. and Ms. H. continued to share custody of the children on the alternating week schedule.

[11] I also ordered Ms. H. and Mr. J. to continue to participate in couples counselling, that Mr. J. abstain absolutely from the use of alcohol and not be under the influence of alcohol while in the presence of the children, that Mr. J. go to Capital Region Addiction Prevention Treatment and Services for a substance abuse assessment and to cooperate and participate in such therapy and/or counselling as may be recommended as a result of that assessment, that counselling continue to be made available for the child B. and that her parents cooperate with that service.

[12] At a hearing on January 14, 2008 I concluded that the children were in need of protective services (also with the consent of the parties). By that time a divorce trial was scheduled for March 2008 as well as a Settlement Conference to take place prior to that trial. Those hearing dates were later postponed to give the parties the opportunity to take part in mediation services. Neither the Settlement Conference nor mediation brought the parties any closer to a resolution.

[13] The Disposition Hearing under the ***Children and Family Services Act*** took place on March 17, 2008 at which time a Supervision Order was granted. In addition to the services that were previously in place therapy services were also

ordered to be provided for L.. Reviews of the Disposition Order took place on June 2 and September 4, 2008.

[14] In addition to couples counselling for Ms. H. and Mr. J. and therapy for both of the children, the Agency also funded an individual therapist for Ms. H.. A custody and access assessment was also conducted by Mr. Neil Kennedy.

THE AGENCY'S POSITION

[15] The Agency seeks to terminate the protection proceedings and takes no position with respect to the outcome of the custody proceedings between Mr. G. and Ms. H.. Counsel for the Agency has made it clear that notwithstanding its request for a Termination Order the Agency is not abandoning the parties and will continue to offer services to the parties on a voluntary basis including counselling for Ms. H. for at least another three months.

POSITION OF MR. G.

[16] Mr. G. proposes that the parties continue to share joint custody of the children but asks that they be placed in his primary day to day care and control. He also wants to be given the final decision making authority with respect to the children. He is prepared to discuss with his wife any significant decisions that might affect the children (either by phone, or should that not be workable, by e-mail) but if they are unable to reach an agreement he wants to have the "final say".

[17] His affidavit contained a proposal for access by Ms. H. including alternate weekends from Friday after school until Monday morning to be extended an extra day should the children not have to go to school on a Friday or Monday, an overnight during the week and additional time during the Christmas Holidays, summer break, the children's March Break as well as other times during special event days during the year.

[18] In the even that Mr. G. is given primary care he has asked the Court to order Ms. H. to pay to him the table amount of child support. Under the ***Matrimonial Property Act,*** R.S.N.S. 1989, c. 275 he seeks an order confirming that the parties will each retain any personal property that they might now have. Also, he has a

locked-in retirement account and his wife has an employment pension entitlement both of which were acquired during the marriage. He seeks to have those two assets divided equally between them.

THE POSITION OF MS. H. (AND MR. J.)

[19] Ms. H. believes that it is in the children's best interests that they be in her primary care and she too wants the final decision making authority with respect to the children. Her access proposal for Mr. G. is very similar to what he proposed for her should he be given primary care.

[20] Ms. H. also seeks child support including an order retroactive to April, 2006 and she asked that her name be added to an RESP account that was previously opened by Mr. G. for the children so that she too can contribute to that account. She opposes any division of her pension benefits.

THE CHILDREN AND FAMILY SERVICES ACT PROCEEDINGS

[21] The Agency's application to terminate the protection proceedings is granted.

THE DIVORCE

[22] I am satisfied that all jurisdictional issues have been addressed. I am satisfied too that there has been a permanent breakdown of the marriage between Mr. G. and Ms. H. and there is no possibility of reconciliation. A Divorce Judgement will therefore be issued.

CUSTODY

[23] The children B. and L. are at the centre of their parents' conflict. B. was described as mature for her age, a very capable student, bright, athletic, well adjusted, well behaved and social. L. is also a good student, is well behaved, and enjoys playing computer games as well as organized sports, particularly soccer.

[24] The children are feeling the effects of the conflict between their parents. There is ample evidence of that in the Agency's recordings and also in the reports

filed with the Court. Ms. Dianne Wheeler, a Clinical Social Worker who provided therapy to B., said in her report dated February 5, 2008:

> "Initially in therapy B. presented as being stressed and feeling very confused as a result of the on-going conflict between her parents and the more recent involvement of the agency.
>
> ...
>
> It appears that B. has been negatively impacted by living in an environment where her parents' needs and anger at each other have been the primary focus of their family relationships. This has created a lot of stress for B. as she constantly feels caught in the middle of that relationship and she can never make the right choices without someone being angry at her. Hopefully there can be some positive resolution for this family at this time considering the effect of the family conflict on this young girl to date. In addition, B. is beginning the pre-adolescent stage of her development and she needs emotional and psychological stability as she embarks on this stage of her development."

[25] In the same report Ms. Wheeler said that Ms. H. shared with B. "some adult centered information" in the form of documentation generated by the protection proceedings which included the Agency's social worker's notes and information that Ms. Wheeler had given to the Agency. Ms. Wheeler wrote:

> "This was information that B. believed had been shared in confidence and it was very disturbing to her to see it written out in file notes and presented in court. This has changed the therapeutic alliance with B.. Since that time B. has not been open about her worries and fears or willing to discuss any family information except on a very superficial level....
>
> I remain concerned about the apparent disruption in the therapeutic relationship and would strongly recommend that B. not be exposed to further information sharing regarding any adult focused concerns and information about custody issues and arrangements."

[26] B. continued to see Ms. Wheeler from September 2007 through to June 2008. In Ms. Wheeler's report of June 30, 2008 she said:

> "B. appears to be more stable at this point in her life and is able to acknowledge that she has really worked on removing herself from her parent's (sic) conflicts.

> We know this remains a difficult task for any young child to sustain given their emotional attachments and needs within the parent/child relationship. Given the past history of the highly conflictual relationship between Mr. G. and Ms. H., it will likely remain a challenge for this family to keep their children out of the middle of their conflicts and make B. feel as if she has to choose sides in regards to her parents' disputes....
>
> Given her present stability I am recommending closing this case at this time with the view that further therapy may be necessary if family relationships become as highly stressful as they have previously been."

[27] Ms. Wendy Green, a Social Worker with many years experience, provided therapy for L. between January and May 2008. In her report dated February 11, 2008 she described him as a shy, quiet eight year old (as he then was) who needed time and support to be able to express himself. She also said "He appears genuinely upset by his parent's (sic) conflict."

[28] In her May 16, 2008 report Ms. Green wrote:

> "L. is not expressing individual issues of concern at this time. He appears to feel pressured and uncomfortable when discussing his family situation. L. appears to be coping well within school and within social situations. According to his most recent report card, he is exhibiting above-average social and work habits at school....
>
> It is likely that he understands that even if he was to discuss issues of concern he has with his relationships and experiences with family members, that his parents would not be able to work together and resolve these issues in his best interest. He is sullen, quiet and at times passively resistant when discussing his family. He is however, vibrant and interested when performing other tasks.

[29] Although by May 2008 Ms. Green felt that L. did not require further therapy she said L. was still expressing "upset and sadness" about the conflict between his parents and concluded her report by saying:

> "It is strongly recommended to L.'s parents that they attempt to mediate a viable solution to their co-parenting problems. As L. ages he will need flexibility and problem solving from both of his parents."

[30] Mr. G. is a 50 year old self-employed * . He cooperated with and was generally courteous to the Agency's workers even though he admitted that after having them involved in his life for the past year and a half he viewed the Agency as an inconvenience and wanted their involvement to come to an end.

[31] He has been active in the raising of his children. He enjoys his time with them, he plays with them and cooks for them. He has coached his son's soccer team.

[32] He assigns the children chores and he says that the children both have friends in the neighbourhood of his apartment and their friends are welcome in their home.

[33] For a period of time he was engaged to be married but apparently his relationship with his former fiancé has come to an end.

[34] Although employed on a full-time basis his employment is flexible enough that he can leave his office to attend to the needs of the children during the day should the need arise.

[35] According to the evidence neither of the children have expressed any serious complaints about Mr. G.'s parenting but both did say that on occasion he has raised his voice to them (although he denied yelling at them) and both children find his "louder than usual" voice to be intimidating. Mr. G. acknowledged that his voice is loud and understands how it can on occasion upset the children. He expressed a willingness to try to be conscious of that when speaking with them.

[36] Mr. G. has strong opinions regarding Ms. H.. He has told a number of people that he believes she has mental health problems and abuses alcohol. He said that he has tried in the past to communicate with Ms. H. but without success. He accuses her of leaving telephone messages at his home "uttering profanities and speaking in a threatening and hysterical tone." He also said that Mr. J. has threatened him with physical harm.

[37] Mr. J. was once a friend of Mr. G.. That is no longer the case. He began dating Ms. H. in the Summer of 2006 and soon after they began cohabiting. Rather than distance himself from the conflict between Mr. G. and Ms. H., he has taken an active role.

[38] He has a 14 year old son from a previous relationship with whom he has access every second weekend during the school year and every second week in the Summer.

[39] The relationship between Ms. H. and Mr. J. has been unstable. They have separated on a number of occasions - sometimes for only a day or two and at other times for longer periods of time.

[40] Over the course of the past couple of years they have had a number of serious disagreements which on at least one occasion degenerated into a physical altercation. In March 2007, after both Ms. H. and Mr. J. had been drinking, Ms. H. poured an alcoholic drink over Mr. J. while he was in bed. An argument ensued which led to both assaulting the other. Ms. H. called the police. Mr. J. was charged with assault but was later acquitted. Ms. H.'s testimony at his trial differed from the statements as recorded by the investigating police officers on the night of the incident.

[41] On April 21, 2007 the police were again called to the residence of Ms. H. and Mr. J.. According to the Agency recordings Ms. H. left the residence and would not talk to the police. No charges were laid.

[42] In June 2008 Ms. H. left the home of Mr. J. after a prolonged period of drinking by Mr. J. and went to live for a period of time with a friend. They separated again in October of 2008. It would appear from comments made by Ms. H. to an Agency worker that she contemplated leaving Mr. J. again as recently as December 2008.

[43] Although alcohol has played a role in many of their disagreements Mr. J. would not acknowledge that alcohol was a factor in their relationship and he said that he had no problem with alcohol. I am satisfied however that Mr. J. does have a problem with alcohol abuse.

[44] The Agency identified his alcohol use as a potential child protection concern prior to the Disposition Hearing. Mr. Kennedy in his report of February 18, 2008 recommended that Mr. J. "self refer to Drug Dependency Services of Capital Health for a suitable outpatient's program to deal with alcohol abuse". Yet, Mr. J. said that he wasn't aware that he was expected to take any further steps to deal

with his alcohol use. He viewed the Agency Plan of Care dated March 5, 2008, which listed the Agency's expectations of each of the parties including that Mr. J. "participate in an outpatient program to address issues around alcohol abuse", as just a "wish list". Only after a case conference at the Agency's offices in November 2008 did Mr. J. finally agree to actively seek treatment. As of the week of the trial he had yet to enter a treatment program but said he was scheduled to commence such a program in a few weeks time.

[45] As for Mr. J.'s allegation that he had threatened Mr. G. with physical harm, Mr. J. did not specifically deny threatening Mr. G. but said:

> "Mr. G. has called the police on me twice saying I threatened to kill him and the police came to visit me twice and I was not charged with anything."

[46] Mr. J. was not an impressive witness. He was evasive, non-responsive and at times not credible. He contradicted himself on numerous occasions. It was difficult to believe his testimony unless it was supported by other corroborating evidence. He is, however, more than just marginally involved with the children. According to Ms. H. he's been in a "child rearing role to both children" for the past two and a half years and he and Ms. H. intend to be married after Ms. H.'s divorce is finalized.

[47] Ms. H. is 45 years of age. She is presently employed part-time as a *. She works out of her home when the children are at school. Whereas she only works 15 hours a week her schedule is flexible and she is generally available for the children after school and on weekends.

[48] I saw no evidence that Ms. H. suffers from any mental health issues (as alleged by Mr. G.) but she does tend to be more emotional than her husband.

[49] She admitted showing B. the Agency's recordings and said that it was a poor decision on her part.

[50] Ms. H. did not always cooperate with the Agency and at times was rude, disrespectful and even verbally abusive to the Agency social workers. She told Ms. Dutch, the worker primarily responsible for the Agency's file, that she told the children "everything" [concerning the proceedings involving Mr. G.]. During

her cross-examination Ms. H. said she told Ms. Dutch that out of frustration but it wasn't true.

[51] She said she encouraged the children to have a good relationship with their father and that she has "never interfered with this". The Agency recordings, however, show that on at least one occasion when speaking with Ms. Dutch she was openly critical of Mr. G. while the children were present.

[52] Ms. H. minimized the conflicts that she has had with Mr. J.. She said she did not believe that Mr. J. has an addiction to alcohol but acknowledged she "probably" told the Agency that he did and she acknowledged too that she was the first person to suggest to the Agency that Mr. J. should be assessed for alcohol abuse.

[53] Mr. Martin Whitzman provided Ms. H. and Mr. J. with couples counselling. In his report dated October 9, 2007 he said:

> "I have indicated to both that the combination of high stress with the use of alcohol is a lethal combination and must stop. I constantly hear and agree that the stress that is being caused by K. ex-husband (sic) may have created a very difficult situation for this couple. I have instructed them on the use of anger management strategies but also suggested that the strategies are totally ineffective if alcohol is being consumed. S. has indicated that he has the alcohol problem under control!...They are indicating that their relationship continues to work well with no outstanding issues. I have not scheduled another session but have left it open for them to call if future issues develop. I do not believe there is anything further that I can offer this couple without some acknowledgement that clear issues do exist."

[54] In his January 21, 2008 report Mr. Whitzman said:

> "K. and S. continued to meet and discuss the issues that were contributing to the stress in their lives. S. completed the alcohol assessment and indicated that the results were somewhat elevated. He has recognized the need to stop drinking and reported a three month period where he has abstained from alcohol. S. and K. both stated that their relationship has improved since S. has stopped drinking. In particular, their ability to deal with stress and conflict has resulted in a much better outcome."

[55] Subsequent to Mr. Whitzman's report both Mr. J. and Ms. H. continued to drink alcoholic beverages although neither would acknowledge it was a problem.

[56] Mr. Whitzman concluded his report by stating:

> "... the couple counseling has served a purpose in explaining their dynamics and how the alcohol was clearly creating added stress. They deny any further issues that would require my services and it was felt that the counseling should be terminated at this point. They are indicating that their relationship is much stronger and closer with no outstanding issues."

In spite of what they may have told Mr. Whitzman there were clear indications of problems in their relationship after January 2008.

[57] In December 2008 Mr. Sam West was appointed *Guardian ad Litem* for B. pursuant to subsection 37 (3) of the ***Children and Family Services Act***. He asked B. what she wanted in terms of her primary residence and in his report he said:

> "B. has remained very strong and consistent in her directions to me that she wants to live with her mother full time."

[58] Her reasons for wanting to live with her mother included that she found her father strict, that he wanted to know all the details of her life and that there was more room at her mother's home. She also said she had a closer relationship with her mother and that she found discussing personal issues with her father to be awkward.

[59] Mr. West was in favour of B. being placed in the primary care of her mother but said in his report:

> "I have a concern for the lack of follow through by Mother and S. meeting the Agency's concerns, however it currently appears that they are sincere in addressing those problems i.e. Mother's counseling and S.'s alcohol issues."

[60] And further:

> "it appears that B. has a greater likelihood of success if she were to live with her mother and S. **providing that they follow through with the current services put in place by the Agency."[Emphasis added]**

[61] Mr. Neil Kennedy, who prepared a Custody and Access Assessment Report for the Court (which report was prepared 10 months before Mr. West's report), favoured maintaining the shared week on, week off shared custody arrangement. He said:

> "I do not believe that there is any justification to alter the existing parenting arrangement period. There is no reason to believe that such a move would enhance the children's lives or stop the dysfunction between the parents.
>
> If the children were living with either parent as primary residence this would only exacerbate the situation and probably place the children deeper into the middle of the dispute. The arguments would not end. In addition, there are no indications that the children's emotional well being is being affected ie., no behavioural problems, academic difficulties. They would, of course, be better off with parents who could put aside their differences. The parent with primary care would want to make all the decisions as to activities, etc., and this would result in more problems.
>
> I believe that there needs to be a intervention to address the issues of family violence especially with S.'s drinking. S. states that in the past year he has made positive changes. He also has been involved in two serious incidents where alcohol has been involved in the past year. The Drug Assessment refers to substantial to severe, high probability of having a substance abuse disorder and S. needs to be careful.
>
> **In essence, S. needs to move beyond the assessment stage and enter into treatment. If S. is not prepared to take the step then a placement with Mr. G. should be considered."[Emphasis added]**

[62] During cross-examination Mr. Kennedy said that he wasn't surprised with what B. told Mr. West and given her age he was now prepared to recommend that primary care of B. be given to her mother. He qualified that statement (as he did in his report) by saying that if Mr. J. did not follow-through with an alcohol treatment program than in his view the Court should still consider granting primary care to Mr. G..

[63] The recommendations of Mr. West and Mr. Kennedy both assume that Mr. J. and Ms. H. take the Agency's concerns seriously and will address them through counselling and substance abuse treatment. They also both gave a great deal of weight to the wishes expressed by B..

[64] I am not convinced that Mr. J. or Ms. H. genuinely accept that Mr. J. has an alcohol problem or that alcohol has had an effect on their relationship. Until November 2008 neither of them seemed to accept the Agency's child protection concerns regarding their relationship and both resisted the Agency's involvement. After the November 2008 case conference both claimed to have a change of heart. No explanation was given for why, after the passage of so much time, they suddenly were prepared to follow the Agency's recommendations.

[65] As for B.'s preferred parenting arrangement, given her age and stated level of maturity her wishes should be considered but they are not determinative. They are but one of many factors that the Court is to consider when deciding what is in her best interests. It is for the Court to decide on the parenting arrangements - not the child. As said by Associate Chief Justice Smith in *Poole v Poole,* 2005 NSSF 7; 2005 CarswellNS 92 (S.C.) at paragraph 36:

> "While a child's wishes must be given due weight (particularly when the child reaches the teenage years) such wishes must not be confused with the child's best interests which must be determined by the Court after considering the evidence as a whole".

[66] Regardless of her wishes, custody should not be awarded to a parent if in the Court's view it is not in her best interests.

[67] Section 16 of the ***Divorce Act,*** R.S.C. 1985, c.3 provides as follows:

> 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.
>
> ...
>
> (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.
>
> (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.
>
> ...

> (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.
>
> (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.
>
> (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.

[68] In *Young v. Young*,[1993] 4 S.C.R. 3, McLachlin, J. (as she then was), writing for the majority, said the following with respect to section 16 (beginning at paragraph 15 of her decision):

> "15 Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
>
> 16 First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
>
> 17 Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.

> 18 Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the "best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. But *only* to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access: Michael Rutter, *Maternal Deprivation Reassessed* (1981), Benians, "Preserving Parental Contact", in *Fostering Parental Contact* (1982).
>
> 19 Wood J.A., in the Court of Appeal, put the matter as follows at p. 93:
>
> It seems to me that at the very least, by enacting this subsection [s.16(10 of the *Divorce Act*], Parliament intended to facilitate a meaningful, as well as a continuing, post-divorce relationship between the children of the marriage and the access parent.
>
> Without limiting the generality of the adjective "meaningful", such a relationship would surely include the opportunity on the part of the child to know that parent well and to enjoy the benefit of those attributes of parenthood which such person has to share. In most cases that would clearly be in the best interests of the child, and the best interests of the child, not parental rights, are the focus of the whole of s. 16 of the *Act*."

[69] The children appear to have a bond with both of their parents and both parents have demonstrated an ability to care for their children. If it were not for the conflict that exists between the parents and the impact that it is having on the children emotionally and perhaps even psychologically I would be tempted to order the continuation of the current shared custody arrangement. For the sake of the children though the parenting arrangement needs to be changed.

[70] I recognize granting primary care of the children to either of the parents is not likely to help their relationship with each other but the Court's focus is not on them - it is on the children.

[71] Ms. H. and Mr. J. have an unpredictable relationship. It has been marked by arguments, separations and even one episode of domestic violence. Their arguments have been fuelled by alcohol consumption primarily by Mr. J. but occasionally by Ms. H.. On two occasions (May 2007 and June 2008) Mr. J. demonstrated his distrust of Ms. H. by changing the locks to the home after she left and insisting that she bring the police with her before allowing her to collect any of her belongings because he thought that without the police she would damage his property.

[72] Although Ms. H. gave serious thought to leaving Mr. J. (again) in the months immediately preceding this trial, she testified that she viewed Mr. J. as an emotional support. Even though it appears that Ms. H. and Mr. J. have taken pains not to drink around the children, if primary care was granted to Ms. H. I would be very concerned about the stability of the children's living arrangements and the possibility that they may be exposed to alcohol abuse and perhaps even domestic violence. I am concerned too about the message Ms. H. is conveying to the children by staying in such a relationship.

[73] Ms. H. loves her children but she has shown a tendency to expose them to adult issues, has been openly critical of their father around them and seems to be putting her relationship with Mr. J. before the interests of the children.

[74] If the children are placed primarily in the care of Mr. G. I am more confident that he will provide them with a stable and safe environment. There is no evidence of him putting his relationship with others before his relationship with the children. Alcohol abuse is not a factor in his household and while Mr. G. can be stern he has been fair and consistent in his parenting and his expectations for B. and L..

[75] Mr. G.'s work schedule is flexible enough to accommodate the needs of the children. I believe too that in spite of the poor relationship that exists between the parties, Mr. G. has sufficient respect for the authority of the Court that he will honour the Court's directions regarding access and Ms. H.'s role in parenting the children.

[76] I therefore find that it is in the children's best interests that their parents continue to share joint custody but that they be placed in the primary care of their father. Ms. H. will continue to play an important role in the lives of the children and my order will provide for generous access which, among other things, will provide B. with ample opportunity to spend time with her mother and discuss with her those

things which she may feel less comfortable discussing with her father. I therefore order the following:

1. Mr. G. and Ms. H. (the "parents") will continue to share joint custody and Mr. G. will have the primary day-to-day care and control of the children.

2. The parents will cooperate with each other as much as it is reasonably possible to ensure the most appropriate care, upbringing and education of the children.

3. Mr. G. will not make any significant decision that impacts on the children's health, education, religious upbringing or general welfare without first consulting in good faith with Ms. H. in the hope that they might be able to arrive at a mutual decision. If the parties are unable to agree Mr. G. will have the final decision making authority. In making any decision Mr. G. is to consider the input of Ms. H. and the desirability of maintaining a healthy relationship between the children and both of their parents and any such decision made by Mr. G. is to be immediately communicated to Ms. H..

4. Until such time as the parents are able to communicate constructively face-to-face or over the telephone their communications (other than communications relating to emergency medical decisions for the children) are to be by way of e-mail.

5. Both parents will have the authority to make emergency medical decisions relating to the children when they are in his/her care provided he/she notifies the other parent as soon as possible of the nature of the emergency.

6. Both parents will be entitled to receive information relating to the children such as school report cards, medical reports, information regarding their recreational activities and the like.

7. Both parents will share with each other any information they receive regarding the children's health, education, recreational activities and the like and will make reasonable efforts to keep the other parent informed of matters relating to the children. Both parents will pass on to the other parent as soon as reasonably possible invitations, notices, report cards and other information which he or she receives relating to the children.

8. The parents will share, on an alternating basis, the responsibility for taking the children to their non-emergency medical and dental appointments. It is my intention that both parents will have an equal opportunity to take the children to these appointments. Mr. G. will be responsible for scheduling the children's medical and dental appointments and will immediately advise Ms. H. of the date and time of such appointments (regardless of who is taking the children on that occasion). When it is Ms. H.'s turn to take the child/children to the appointment she will reply to Mr. G.'s e-mail within 72 hours to advise whether she is available to take the children to and attend the appointment.

9. Both parents may attend the children's parent-teacher meetings at their school (s) and both parents may attend any extra-curricular activities involving the children.

10. The parent who has the children in his/her care during a scheduled extra-curricular activity will be responsible for transporting the children to and from the activity unless otherwise agreed between the parents in advance.

11. The parents will inform each other of any changes in his or her home address, home phone number, work address, work phone number, e-mail or any other means of contact.

12. Ms. H. will have the care of the children as follows:

I) Every second weekend from Thursday after school until the following Monday morning when she will deliver the children to school. If the Monday following her weekend with the children is a holiday (other than Christmas Day, Boxing Day or New Year's Day which holidays are addressed in (III) below) or a professional development day which does not require the children's attendance at school, Ms. H.'s time with the children will be extended an extra day such that she will have the children until she returns them to school Tuesday morning.

II) During the week preceding Mr. G.'s weekend with the children, Ms. H. will have the care of the children one additional overnight (from after school until she delivers the children to school the following morning) which evening shall not be Monday evening or Friday evening unless agreed to by Mr. G..

III) The parents' time with the children during the Christmas holidays will be divided equally. In odd numbered years Ms. H. will have the children commencing the last day of school until 3:00 p.m. on Boxing Day by which time she will transport the children to the home of Mr. G. and he will have the children in his care from 3:00 p.m. Boxing Day until the children's first day back to school in the New Year. In even numbered years Mr. G. will have the children from the last day of school until 3:00 p.m. on Boxing Day by which time he will transport the children to the residence of Ms. H. who will then have the children from 3:00 p.m. on Boxing Day until the children's first day back at school in the New Year.

IV) The parents will equally divide the care of the children during their summer vacation from school such that each parent will have the children on an alternating two-week schedule.

V) The children will spend Mother's Day with their mother and Father's Day with their father.

VI) Each parent will have the opportunity to spend time with the children on the children's birthdays such that the parent who does not ordinarily have the care of the children on that day will have at least three hours with the child on that day.

VII) As suggested by both parents, the care of the children during the children's March Break from school will be divided equally between the parents.

VIII) As suggested by both parents, the children will spend Easter with the parent who happens to have the care of the children on that particular weekend in the normal course of events.

IX) Both parents will have reasonable telephone access to the children when they are in the care of the other parent and the children may have unlimited contact with both parents by way of e-mail and instant messaging.

13. Neither parent will schedule any new activities for the children to take place during the other parent's time with the children without that parent's consent.

14. The parent who has the care of the children will be responsible for transporting the children to and from any activity in which the children are enrolled and which takes place while in the care of that parent.

15. Neither parent will remove the children from the province of Nova Scotia with the intention of relocation without the express written consent of the other parent or the consent of a Court of competent jurisdiction in this province and neither parent will remove the children from the province of Nova Scotia for any other purpose, such as vacations, without giving to the other parent at least two weeks advance written notice.

FINANCIAL ISSUES

[77] Ms. H. requested that the Court order that Mr. G. allow Ms. H. to add her name as a holder of the Registered Educational Savings Plan account that he established for the children so that she can contribute to that fund. Given the state of their relationship, that would not likely be workable. Ms. H. can set up her own RESP account for the children and can make her contributions to that account. Her request is therefore denied.

[78] Ms. H. proposed that she retain sole ownership of her employment pension (from her previous employment) and Mr. G. retain his locked-in retirement account. Section 12 of the ***Matrimonial Property Act***, presumes an equal division of matrimonial assets unless an equal division would be unfair and unconscionable taking into account the factors listed in section 13. The Court wasn't given a clear picture of how their various assets and debts were distributed between them subsequent to their separation. There was a matrimonial home which was secured by a mortgage and there was a separate consolidation loan. Both had RRSP loans. Sometime after their separation Ms. H. filed for bankruptcy and received nothing from the house equity. Mr. G. testified that he too received nothing from the house proceeds because of the loan payments that fell to him to pay. I cannot conclude with the limited evidence provided that it would be unfair or unconscionable to divide the remaining matrimonial assets equally and therefore it is ordered that both Ms. H.'s employment pension and Mr. G.'s locked-in retirement account will be divided equally between them.

[79] Ms. H. seeks an order for child support having effect retroactive to April 2006. Again, scant evidence was presented to convince me why a retroactive order would be appropriate. There is no evidence of Ms. H. making demands upon Mr. G. for child support prior to this trial and no interim application had been made.

[80] While there was a discrepancy in their incomes in 2006 their 2007 incomes were virtually identical. However, Ms. H. said during cross-examination that there was no reason why she couldn't work full-time hours. Given those circumstances there may be good reason to impute income to Ms. H. before making an award for retroactive child support.

[81] Considering all of the circumstances of this case I am not prepared to make an order for child support with retroactive effect. On a prospective basis however I find that Ms. H. has an actual employment income of $11,718.00 per annum and based on that and given that I was not asked to impute further income to her I order her to pay the table amount of child support to Mr. G. for the support of the two children in the sum of $91.00 per month commencing the 1st of April, 2009 and continuing on the first day of each month thereafter until otherwise ordered. The Corollary Relief Judgement will contain the usual provision requiring Ms. H. to provide Mr. G. with a copy of her tax return and income information slips (whether or not filed with Canada Revenue Agency) each year as well as a copy of her Notice of Assessment or Re-assessment as the case may be received from Canada Revenue Agency, which documentation will be delivered to Mr. G. no later than June 1 of each year beginning with Ms. H.'s 2008 tax return information which will be given to him no later than June 1, 2009.

[82] Mr. G. made no claim for a contribution toward any section 7 expenses. It is my understanding that the parties already share some expenses that would otherwise fall under section 7 of the *Guidelines* and it is hoped that they will continue to do that in the future.

[83] I direct counsel for the Agency to prepare the Termination Order under the ***Children and Family Services Act*** and counsel for Mr. G. to prepare the Divorce and Corollary Relief Judgements.

J.