

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacLean v. MacLean, 2013 NSSC 92

Date: 20130328

Docket: 1217-000704

Registry: Port Hawkesbury

Between:

Kelly Elizabeth MacLean

Applicant

v.

Daniel Travis MacLean

Respondent

Editorial Notice

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

Judge: The Honourable Justice Moira C. Legere Sers

Heard: February 19, 2013, in Port Hawkesbury, Nova Scotia

Counsel: Wayne MacMillan, for the applicant
Adam Rodgers, for the respondent

By the Court:

[1] A Petition for Divorce was filed on the 22nd day of October, 2009.

[2] The matter of custody and access was brought before the Court for interim resolution.

Relief Requested

[3] The applicant mother is seeking sole custody of E. MacLean, born July [...], 2006 and B. MacLean, born September [...], 2008; supervised access between the father and the children; child support; section 7 expenses and a division of property.

[4] The oldest child was 2 ½ and the youngest six months when the parties separated. E. is now over six years of age and the youngest child, B., 4 ½.

[5] The respondent father's Answer, filed on October 6th, 2010 indicates he is contesting the mother's request for sole custody and supervised access.

[6] The respondent is seeking a joint custody arrangement with primary care to the applicant and unsupervised contact with his children. He is employed in Alberta for a portion of the year. He is requesting block overnight unsupervised access when he is in Nova Scotia.

History

[7] The parties were married on December 31st, 2003 and separated February 23rd, 2009. Both were born and have lived in C.B., N.S.

[8] At the time of the marriage the mother was 21 and the father was 24 years old.

[9] The mother resides in P.H., Nova Scotia; the father in C., Ontario.

[10] The father had not attended the Parent Information Program and was directed to do so by the Court.

[11] To date he has still not attended.

[12] This Interim Hearing was held on February 19th to deal with custody and parenting issues including contact between the father and the children and the payment of special expenses.

[13] By Pretrial Conference Memorandum on August 27th, 2012, the parties were given directions as to when to file their affidavit evidence.

[14] Both parties were represented by counsel at this Interim Hearing.

Issue

[15] The crux of the problem with respect to parenting contact largely relates to the youngest son B.. In the original Application dated October 22nd, 2009, the mother advised in her Parenting Statement that the youngest child, at just over one year of age, had recently visited the I.W.K. Hospital and was diagnosed as having severe allergies, reflux and eczema.

[16] He was diagnosed with life-threatening food allergies to milk, eggs, peanuts and legumes. This is confirmed by Dr. Rex of the Halifax Allergy and Asthma Associates Clinic on June 14th, 2011.

[17] The mother has added to this list other sensitivities including strong scents, air fresheners and horses, although the reaction to horses did not come back positive.

[18] He was to be brought back into the allergy clinic on July 28th, 2011 for assessment of possible allergy to shellfish as well as possible environmental inhalant allergy (horse and cat).

[19] The recommendation of Dr. Rex was to avoid environments with horses and cats until that investigation was complete.

[20] The family doctor confirmed by letter dated March 12th, 2012 that the result of the testing indicated that the child had a newly diagnosed allergy to cats.

[21] Her recommendation was that the home in which he lives or visits has to be completely free of cats and completely cleaned of any residual cat hair.

[22] B. reacts to various allergens with a varying degree of severity. His response to other allergens has included rashes, swelling, itchiness, mood changes and eczema.

[23] These responses cause him extreme discomfort and interfere with his sleep pattern.

[24] The mother also maintains the child on a regime of allergy medicine after an episode. She describes his lethargic behaviour lasting for days and sometimes weeks after the initial outbreak.

[25] I have no medical evidence to allow me to evaluate this description or to determine how much of this is a natural consequence resulting from the initial exposure to the allergens and how much relates to the medication she administers.

[26] B. also had a milk challenge test on December 14th, 2012 and Dr. Rex suggested introducing milk and dairy products to B.; however, the mother felt that B. responded with sharp pains in his stomach, blood in his stool and trouble sleeping after being introduced to this after a period of two weeks.

[27] His family physician or clinic has requested that he be taken off all milk and dairy products and that he be reassessed by the allergist.

Contact Restricted

[28] The respondent has attempted to visit his children three to five times per week since the May 2010 separation.

[29] The applicant initially only permitted visitation in her home when she, her mother or sister are present.

[30] The family doctor recommended a transitional introduction every third day, for two to three hours at a time visiting in the father's home after it was cleaned.

[31] If the child remained free of any significant allergic reactions, they could increase that time.

[32] The father agreed to supervised access as it was the only way he would get to see the children.

Denial of Access (examples)

[33] The father advises that he has offered to take E. for overnight trips on hockey tournaments and is not allowed to take him.

[34] In January 2012 there was a Timbit Tournament in Sydney. The father booked his room and drove up with his girlfriend. The mother did not show up and would not allow him to take his son, E.. She advised that E. had to take antibiotics and, thus, she cancelled the trip.

[35] He advises that when she drops off the boys there is always a scene. He is seeking for a third party to be involved in the pick ups.

[36] He advises that he has requested access on a number of times when he was in Nova Scotia; for instance on November 10th for the remainder of that trip home as well as the 2011 Christmas break.

[37] On December 22nd, 2011 the mother told him that he could not have B. for Christmas because he was going to be sick. When she was challenged on this, she hung up the phone.

[38] On Christmas Eve he called to see if he could have the boys for Christmas, she advised that he could only have E. and after hanging up on him she did agree to let him take B. for a drive for an hour.

[39] On Christmas Day he picked up E. at noon and took B. with him for the hour so that they could open their gifts from Santa. He was advised that B. had a major reaction the night before although the father could see no evidence of this.

[40] On January 26th, 2012 he called the mother to ask when he could pick up E. and B. for the start of his visits when he was home again. He was told he could only take E. and if he needed an explanation he should talk to her lawyer.

[41] On January 27th the mother called to ask what his plans were with the children. He told her he wanted to take both for the day; she denied him access to B. and said that she would not give him a reason and told him to talk to her lawyer.

[42] She advised if he continued to bring up the question of having E. stay overnight, he would not get to see E. at all.

[43] On January 28th, 2012 although the father was supposed to have E. for the day, she called to say he was too tired and had a headache.

[44] On January 29th while he had E. for the afternoon, he was only allowed to take B. for a car ride.

[45] On January 30th she allowed him to take B. for a fifteen minute car ride.

[46] On January 31st he was supposed to take E. to practice but the mother did not send his hockey gear with him. She told the father that she did not want him going because she did not want him to "relapse". He had been ill the week before.

[47] The father did not observe him to be terribly sick that night; quite the contrary, he was filled with energy, eating well and in good cheer.

[48] On February 2nd, 2012 the father was allowed to pick up E. after school. He noted that B. was very upset upon seeing E. leave with him because his mother would not let B. go with him. He stayed with B. and played with him while at his mother's home.

[49] After an initial court appearance and a direction to the father to meet with the allergist, the father made an attempt to attend two medical appointments in Halifax to better acquaint him with the issues with B. present.

[50] The mother cancelled both appointments. She considered she had legitimate reasons to do so. On October 12th the child had been put under anaesthetic to have three teeth removed and placed on antibiotics. The mother suggested and the doctor agreed that the allergy clinic examination be postponed.

[51] Before the second scheduled visit the child had been administered antihistamines. These would have interfered with the testing.

[52] The secondary benefit of that appointment with the father would have been to better inform the father. It would have provided the father an opportunity to talk with the doctor who is the primary specialist responsible for advising with respect to B.. It is unfortunate that the second appointment was cancelled.

[53] The father's view of the cancellations differed. He indicates that when he called the mother to confirm the appointment with Dr. Rex there was no issue regarding the child's attendance until he mentioned that he would be taking his girlfriend with him and once the mother heard that she said "I will cancel the whole thing".

[54] He confirmed that this was the second time she cancelled an appointment for him to see Dr. Rex in spite of the fact that the Court had directed him to make an appointment with Dr. Rex.

Mother's Objections

[55] The mother suggests that the father does not take the allergies seriously although in her *viva voce* testimony she appears to have modified her stance in that regard.

[56] The mother accuses the father of having "almost passed B. a Wonder bar", a chocolate bar filled with peanut butter.

[57] Again, the father's version differed. The father did buy the oldest child such a bar when the two children were visiting him. The father advises that he did not give a Wonder bar to B. as indicated in the first affidavit. He had the children pick out treats at a convenience store.

[58] He passed the bar to the mother at the door saying it was the older child E.'s bar.

[59] In her supplementary affidavit at paragraph 17 the applicant states:

"the mere act of buying the Wonder bar as well as passing it to me would put B.'s safety at risk. As this bar contains peanut butter it would contaminate whatever it touched and could cause B. to have an allergic reaction".

[60] The mother also accuses the father of taking B. to a race track on several occasions. This was risky as they were unsure of the extent of his allergies to animals.

[61] The mother initially refused to allow access or contact if the father's girlfriend is present.

[62] The mother was concerned that the girlfriend's residence while in Nova Scotia was an "old trailer and contains a musty smell of mold and mildew". She advises that the trailer used to have cats in it.

[63] The mother also complains about the father's mother's residence, alleging that the maternal grandmother had cats and horses in the backyard.

[64] She acknowledges in her Supplementary Affidavit that the respondent's parents do not technically own cats but there are cats around the barn and the home.

[65] While the paternal grandmother does not have cats, apparently a cat had been rescued by the father and his son, kept in the porch all night and died very shortly thereafter.

[66] The mother's position is that the father can have full daytime access for both children.

[67] She draws on her physician's instructions that access be limited in that she advised that access should be every third day for a few hours in designated, neutral areas to avoid further health complications for B. and to give him immune system a chance to recuperate.

[68] The doctor's letter could be interpreted differently. The family doctor suggested a gradual introduction to determine whether any of the environmental allergens are present in the father's or paternal grandmother's home in order to determine whether he should be taken back to that location.

[69] While the oldest child is not subject to these allergies, the mother would prefer that the children visit together. She advises that the youngest child feels left out if the older child goes out with his father.

[70] With respect to the older child being able to stay overnight, the mother indicates that the child is very attached to her and not able to stay overnight with the respondent; however, she advises that the child is working hard to get comfortable to be able to stay there.

[71] The mother has also refused to allow the father to take the children to a family wedding because she knew there would be alcohol present and she is concerned about the father's ability to look after the children when consuming alcohol.

[72] One gets the flavour of the mother's understanding or lack thereof in relation to the importance of father-child contact in the mother's affidavit (paragraph 65). She states:

“the respondent does not take the children's health issues seriously. When the children are sick, they should not be pushed to go out and spend time with their father. They need time to rest”.

[73] The mother wants to pre-approve toys, particularly where there are second hand toys such as teddy bears which could be hazardous to her child's health.

Place of Contact

[74] The mother is concerned about the father having his visits with the children in his mother's home. She would prefer that he visit at a playground, in the arena or in a public place.

[75] The children are enrolled in sporting activities. This requires their attendance in a public facility.

[76] There is an incongruity with respect to the mother's concern about the exposure of the child when with the father and yet not concerned in a public place such as is suggested by her as a 'designated safe environment' (i.e. the boardwalk, the playground, the arena and the mother's residence)

[77] There are so many possibilities for contamination in a public place as compared with an environment the father and his family can control.

The Maternal Grandmother and Maternal Aunt

[78] In support of her position, the mother called her mother and her sister to testify on her behalf.

[79] Her mother lives in a home purchased by her sister. The sister works with the Canadian Coast Guard. The mother, her sister and her own mother all live in the same house.

[80] The mother left Ontario where she lived with the respondent and moved directly into her sister's home and has continued to live there since.

[81] They have created a home environment that they believe to be safe for B..

[82] They met with one of the child's specialists (Dr. Morley) and obtained advice on what to do with their home and they followed that advice.

[83] The maternal grandmother and her daughter support the applicant and essentially have become default parents to both children.

[84] However, they rely on the mother to make decisions about when to take the child to the emergency room, when to administer medication, etcetera.

[85] They support the mother in identifying their concerns that perhaps the father has not recognized the serious nature of the allergies and they cite the same examples used by the mother; ie. giving the child Halloween treats that needed to

be vetted and passing a bar containing nuts to the mother for the older son to eat, forgetting the EpiPen.

[86] They have witnessed the conflict between the parents.

The Father's Sister

[87] The father's older sister testified on his behalf, supporting him in his attempts to be a father to his children.

[88] She expresses the family's sadness at being shut out of the children's lives.

[89] She has witnessed the effect of this alienation on the children at Christmas in 2011 when E. became very upset that he was not allowed to stay at his father's overnight.

[90] The sister observed her bother intervene to ensure that E. did not use his disappointment to blame the mother. He spoke to his son in such a manner so as not to escalate the conflict so that the child was able to handle the disappointment.

[91] The sister confirmed that there were no cats at her parents' home.

[92] She has attempted to contact the mother to talk to her to see if she can accommodate the relationship between the father and the children and she has been shut out by the mother.

[93] She advises that her family takes B.'s allergies seriously. The whole family has taken instruction on how to use an EpiPen in case of an emergency. They have advised the mother that they have done that.

The Father's Girlfriend

[94] The father's girlfriend also testified.

[95] She has been acquainted with the father for three years.

[96] She moved to Nova Scotia in 2002. She describes the relationship with the mother as extremely difficult.

[97] Ms. MacNeil spoke highly of her boyfriend and the attempts he has made to contact his children and visit them.

[98] She confirmed that he was initially only allowed to see the children at the mother's residence, including going to her residence for two Christmases to open gifts that had to be pre-approved by the mother before giving them to the boys.

[99] She confirms that despite his efforts, the father has been allowed limited contact with the children, a few hours at a time, when a visit is allowed at all.

[100] Ms. MacNeil confirms that she and the father took a first aid course together and have taken instructions on how to use an EpiPen. Ms. MacNeil herself is in college in Ontario, working toward nurses' training.

[101] She and the father both sat down with Dr. Rex, B.s' allergist, to discuss his allergies. They had difficulty setting up this meeting. They were informed by Dr. Rex that he had the impression that the mother had sole custody and that lead to difficulties setting up the initial meeting.

[102] Ms. MacNeil has been present when the father gets in touch with Dr. Rex and attempts to stay updated with B.'s allergy status.

[103] Ms. MacNeil confirms that although they have been dating for two years she had to leave her home during the visitation hours because the mother would not allow the father access visits if she was present.

[104] She acknowledged that in December 2011 the mother's attitude toward her changed. She contacted Ms. MacNeil wanting to meet without the father present.

[105] They met, went over B.'s allergies and from December of 2011 to May of 2012, a brief period, they actually became friends.

[106] Ms. MacNeil asked to shop for groceries with the mother in order to know how to read food labels correctly for B.. They went grocery shopping together.

[107] She confirmed that when she sees the father with his children, if he is unsure of any food substance, he will not give it to B. unless he contacts the mother first to make sure the food is safe.

[108] Subsequent to that and abruptly, the mother terminated the relationship and said she did not want her children interacting with Ms. MacNeil.

[109] Tired of the conflict that was occurring, Ms. MacNeil removed herself from Nova Scotia and returned to study in Ontario.

The Father's Testimony

[110] The father confirmed that the mother would not let him take his boys with him to be on his own until late 2012.

[111] For the first two and half years after separation he had to visit his sons at the mother's residence under supervision.

[112] He confirms his desire to be a father to his children and his frustration about having to abide by rules imposed by the mother, should he wish to have contact.

[113] He confirms that he made a specialist appointment with Dr. Rex and that he attended Shoppers Drug Mart in Fort McMurray to learn how to use an EpiPen and took a First Aid course with his girlfriend, Amber.

[114] He has asked the mother to call him when B. is reacting to something so he can come down to observe what to expect.

[115] On a occasion that his son was having a reaction (according to the mother) and he was in the area, he asked to come to see B.. She refused him access, indicating that B. was "too tired".

[116] He confirmed that at one point in time he had two cats and when B. was with him he never had a reaction to them. Subsequently, apparently, B. has had reactions to cats.

[117] He confirms that both of the mother's brothers have cats and that B. has been in both of these residences and the brothers visit regularly at Kelly's residence where the family lives.

[118] He confirmed that his mother and father do not own cats.

[119] He also confirms that he has not witnessed a reaction in his own environment and he indicated that "it is only after I drop the boys off and several hours pass that a phone call comes from Kelly saying that something is wrong with one of the boys".

[120] He confirms that while B. has been with him he has never seen any symptoms. He continued to ask for photos of the symptoms and those photos were only supplied on the day of the trial.

[121] When he asked for photos of the last allergic reaction that B. had (the mother had indicated it was after a visit with the father) she said that her lawyer had them and she would not show them to him

[122] He confirmed that he had B. on the following day after the pictures were taken and there was no evidence of a breakout.

[123] He advises that any kind of treats that he buys for B. are pre-approved by the mother herself.

[124] Both parents confirm that B. has never taken a reaction while in the father's care.

[125] The father noted and the mother confirmed that B. ate a handful of the maternal grandmother's pills and was rushed to the hospital on one occasion.

[126] The evidence is consistent that he has had most of his severe reactions to allergens while in the mother's care, visiting her brothers or as a result of contact with an allergen in his own home.

[127] He has also spent most of his life in his mother's care increasing the possibility of contamination as they learn how to cope with his allergies.

The Mother's Testimony

[128] She advises the child had three major incidences, two in respect to exposure to peanuts and one when he was baking with his maternal grandmother in his own home and he touched an egg and transferred the raw egg to his face causing a reaction. He has had a reaction in her brother's home to cats and nuts.

[129] The mother eventually confirmed in her evidence that none of the serious reactions took place while the child was with the father.

[130] The mother has described the symptoms with varying degrees depending on the allergens. For milk she advises she has seen blood in the stool and he has experienced severe abdominal pain.

[131] When the oldest child went to school, the youngest child got into the brother's lunch and ate a cookie that contained substances to which he was allergic.

[132] He also came into contact with a peanut butter jar at the mother's home, thus they discovered he has allergies.

[133] With respect to the exposure to the horses, the father advises that he spoke with Dr. Rex and he did not state in his list of allergies that B. was allergic to horses. Despite that, he agrees to keep B. away from horses.

[134] He advises he's not comfortable treating the boys differently but he is not allowed to have the same access to B. as E..

[135] The mother in return criticizes the father for showing favouritism toward the oldest son.

The Mother's Proposal

[136] The affidavit of the father attaches as Exhibit "B" the proposal put forward by Ms. MacLean for contact, which she hopes the Court will incorporate. It included the following stipulations:

A. Travis may take the boys for **ONE HOUR UNSUPERVISED PER WEEK ON SUNDAYS MORNING FROM 10:00 AM TO 11:00 AM.** After the month of June I will be open to idea of longer visits, however I feel since E. and B. have never been alone with their dad an hour is sufficient time for Travis to begin to form a relationship with both boys while allowing them to slowly get used to being away from me periodically. I chose Sunday mornings because Travis fishes every other day of the week and I felt that visiting the boys on his only day off would be the most convenient for him. 10:00 am to 11:00 am is the best time for B. as well as he is in between feeding periods and nap times.

B. While Travis has E. and B. in his custody during these visits for the month of June, he is **NOT TO TAKE THEM OUTSIDE OF P. H.** If B. has a reaction, he needs to be close by so I can get to him as soon as possible. Once Travis has gleaned enough experience with his reactions, we can discuss the possibility of going beyond P.H.

C. Travis is **not to expose B. to any environment/places (eg restaurants, stores, race tracks, private homes, etc.) that I have not approved.** B. is very susceptible to strong smells and will react to even the slightly odor of perfume, strong deodorant, cleaning supplies, etc. I have seen him break out on one particular occasion after being picked up by my brother who happened to be wearing a powerful deodorant. B. must not come in contact with anyone who is wearing perfume, body spray, hair spray, aftershave, cologne. Some possible "safe" environments to take the boys would be the playground and/or the basketball court at B. School, the beach (to collect rocks, shells, anything the boys find, etc.) the P.H. arena or clan ranald road where they can play road hockey.

...

G. **Under no circumstances is Travis to leave the boys in anyone's else care while they are supposed to be visiting with him,** due to the fact that B. could have a reaction at any time, creating a dangerous situation that few would be quick to handle properly. Also, these visits are for Travis and his children to bond, there is no reason why they should be left with anyone else.

[137] There are numerous other conditions attached to her proposal for access. Some of them focus on the child's needs and the mother's worries; others raise red flags as to the mother's motivation.

[138] For his own protection and to reduce the conflicts in transfers, the father is asking for third party connections. He is also asking for communication to be

email or text messages until the mother can speak to him in an appropriate manner outside the presence of the boys.

Conclusions

[139] These children were born of a brief relationship. The mother took the children from their marital home in Ontario and resettled in C.B, in her sisters home.

[140] Both parents have family in the local area.

[141] The mother has lived there with her sister and mother and they have become the de facto parenting figures for these two children.

[142] For many reasons, the father has been prevented from exercising appropriate parenting time with his children.

[143] These reasons include geography, the fact that the mother left the relationship while in Ontario and returned to Nova Scotia, the father's travel requirements for work in the North and other sites and the fact that the mother has denied him reasonable parenting time with his sons.

[144] The mother claims that she denies parenting time to the father due to her concerns about her youngest child's serious allergies.

[145] The mother, her sister and the maternal grandmother are now well acquainted with his needs and have through trial and error witnessed diverse reactions from rashes, hives, itching, swelling to more serious reactions.

[146] The child has had many opportunities to display various greater and lesser reactions.

[147] The evidence is not clear on exactly the number or extent of the most serious or possible anaphylactic reactions. The maternal grandmother and sister suggested a much larger number than the mother. The mother suggest there were three very serious reactions.

[148] On each occasion the mother and her family have quickly and successfully transported the child to the hospital for successful medical intervention.

[149] B. has had many less serious manifestations of reactions to allergens according to the mother. The mother administers medication and advises the Court his reactions to the allergen and medication to combat the allergen can last up to 2 weeks.

[150] I am unable to draw any conclusions on this information.

[151] The most serious encounters (with peanuts and eggs) occurred when he was exposed to allergens unintentionally at her brother's home or in her own home.

[152] This was the place they discovered his nut allergy, and his egg allergy was discovered as he baked with his maternal grandmother. He also managed to get into his older brother's lunch bag and was exposed to cookies containing nuts.

[153] While the mother has severely restricted the father's contact because of her concerns, there is credible evidence to suggest that B. has never encountered a serious risk in his father's care.

[154] He has been exposed to cats in his father's care prior to being assessed for an allergy.

[155] He has also had less urgent reactions that led to the discovery of his cat allergy.

Analysis

[156] One can readily understand the fear a parent must have when first discovering the extent of one's child's allergies and the seriousness of the consequences if they are not sufficiently vigilant.

[157] One can understand how a parent and family might attempt to control every threatening aspect of the child's environment.

[158] One can understand how a parent might become hyper vigilant and how a child in these circumstances might become medicalized.

[159] Finding the balance that ensures as much as possible the child's safety and normalizing that child's life and that of his sibling is a truly complex and arduous task.

[160] For this reason the Court cannot diminish or under emphasize the absolute necessity for both parents and family members to obtain the proper training and continue to educate themselves on the subject of these allergens as changes occur in the child's age and stage of development and in medical knowledge.

[161] B.'s safety must in all circumstances and without exception be the absolute priority for both parents and any family members who are in a position to care for B. .

[162] There is really no room for error.

[163] Having established this first priority, given the mother's concerns and the father's testimony, I start with the presumption that it is in his best interests of the children and right to have a healthy relationship with both parents.

[164] The question here is whether or not the father is capable of creating a safe environment for the child.

[165] The father is accused of minimizing the seriousness of B.' allergies. On one occasion he forgot the EpiPen and had to return it at the mother's insistence.

[166] He took the small child on a very short boat ride in his family's fishing boat and left the EpiPen in the child's bag on the wharf. That was an oversight that cannot happen again.

[167] On one occasion he handed the child a Halloween treat bag containing treats that may or may not have been problematic. Certainly, I have no evidence that

they were, but they could have been. Education, information and diligence will avoid this from happening again. The entire family needs to be better informed.

[168] On one occasion he allowed the children to pick out their treats (and he advises he verifies with the mother if they are permissible for B.) yet the oldest son choose a nut bar and that packaged and unopened bar was passed by the father at the end of the day to the mother to distribute to the children.

[169] The mother was concerned that this was an unnecessary risk.

[170] The father, his family and girl friend have all been educated on how to administer the EpiPen. The EpiPen buys a short period of time to get to the hospital for more significant intervention, if necessary.

[171] The father has visited the specialist to obtain information and learn.

[172] He and his girlfriend have taken a First Aid course. His girlfriend is currently studying to become a nurse.

[173] The father has asked the mother to call him when she observes a reaction so he can have first hand knowledge of the child's reaction. The mother has refused this even though for two years she has restricted his access to her home.

[174] The burden of proof justifying a restriction on access is the mother's. (**S.M.S. v. R.G.C.**, 2006 NSFC 44)

[175] There is nothing in the evidence that causes me to conclude that the father is incapable of learning how to care safely for his son.

[176] There is no evidence to support that he is unable to care for his older son.

[177] There is no evidence to support a conclusion that his mother and his family are unable or unwilling to work towards providing a safe environment for B..

[178] There is evidence that they are willing and able to provide support for the father and eager to have a relationship with the children.

[179] The father has lost some valuable time and experiences with his children in part because it has taken him a considerable period of time to put the application forward, his work has interfered, and negotiations have failed between the two.

[180] While the parties separated in February 2009 the father only began to actively pursue court ordered relief to resolve his difficulties obtaining access to his children in September 2011.

[181] Other factors have aggravated this situation.

[182] The mother has refused to allow the father's girlfriend of three years to participate in access; has limited the father's visitation with his children to her home; imposed unreasonable restrictions; refused to allow the father to visit when the child(ren) is sick or unable to visit his father; severely and unreasonably restricted his contact to one or two hours; and denied access on some of his trips to Nova Scotia when he was willing and able to take the children to his mother's home.

[183] This has significantly delayed the children's participation in their father's life and that of his extended family.

[184] Left on her own, the mother has shown no intent to allow for a more nurturing role for the father.

[185] It is my conclusion that there are two principle underlying reasons why the mother has restricted the children's contact with their father.

[186] The first is her fear that outside her control the child will be exposed to risk and she will not be there to assist him. This is an understandable fear.

[187] The second reasons is that the mother has not always been motivated by the best interests of her children. I suspect some of her most resistant behaviour is motivated by resentment towards the father.

[188] Her behaviour appears to purposefully control the father's contact with the children. This has the effect of relegating him to a lesser role and delaying his own development as a father as well as rejecting the involvement of his family.

[189] While the father may have been tardy in recognizing the importance of becoming informed of his child's special needs, the mother appears without insight into the importance of the father-son relationship and the effect that the father's absence will have on the growth and development of his children.

[190] The complicating factor is that the mother is taking advice from a number of health care professionals to address her son's issues.

[191] This includes at least one principle family doctor and, at times, others in the community in her absence and at least two allergy specialists.

[192] In one case, the family doctor appears to be suggesting a gradual introduction to the child in the paternal grandmother's home. The suggested approach appears to be related to a desire to determine whether there will be a reaction to the environment.

[193] The mother has adopted this advice regarding a gradual introduction as a statement that the child is not safe in the father's environment and that the father's role is not an essential component of the child's development.

[194] If the latter is the case, certainly that advice would be well outside the physician's expertise.

[195] I am inclined to believe the advice was meant to test the waters for potential allergic reactions rather than a condemnation against more extensive involvement by the father in his son's life.

[196] It would be helpful to the parents and their families to consolidate the advice they has been given and to develop a common understanding from the specialists and family doctor to address the real and reasonable concerns about caring for B..

[197] It might be helpful for the specialist to be informed of the mother's level of concern and response to B.'s needs. They would benefit from clear advice regarding the reasonable care including how many baths are necessary; how frequent to administer the many different products; and how necessary are all

these products so that both parents may be assured of the reasonableness of the parental approach.

[198] To that end, the father may wish to make a list of the products the mother has insisted be provided and speak directly to the specialist to obtain their advice.

[199] They both would benefit from this advice and if they could do this together it might be more beneficial than having this discussion with the specialist separately.

[200] He may want to ask how to properly treat eczema so as not to further aggravate the condition. He should be seeking answers **on his own** and continuing to update his information in event he is looking forward, as he is, to expanded parenting in the future.

[201] In the past, he has relied heavily on the mother to inform him. He needs to be open to her advice and also to take the initiative to keep himself informed.

[202] For the sake of these children, open and frequent two way communication between the parents is essential.

Interim Order

[203] The father shall attend or provide proof of attendance at a Parent Information Program provided by the Family Division or an equivalent program in Alberta or Ontario before the schedule of contact is commenced.

Transportation, Pick up and Return of the Children

[204] The father may name one or more of his family members (and unless agreed upon by the mother, not his girlfriend) to assist him with the pick up and drop off of the children for the first three months of this transition schedule set out below. That person must be familiar with B.'s needs.

[205] I do not see this as a long term solution, rather an important interim step to lessen the conflict between the father and mother and her family and to make communication of critical issues respecting the children possible.

[206] The following terms are to be incorporated into the order:

Interim Custody

1. Joint Legal Custody of the following children is granted to Kelly Elizabeth MacLean and Daniel Travis MacLean with primary day to day care to the Applicant, Kelly Elizabeth MacLean:

B. D. MacLean Date of Birth - September [...], 2008

E. L.T. MacLean Date of Birth - July [...], 2006

2. The parents shall keep each other advised and informed on a timely basis regarding all major issues respecting their children's medical, emotional, spiritual, educational, and physical well being.

3. Except for emergencies when the most immediate method of communication is to be used, the parents shall communicate by email where possible.

4. The parents shall consult on major developmental issues respecting the above and shall agree on major changes and decisions respecting their children's well being.

Third Party Service Providers

5. Each parent shall be entitled to consult with, attend, and receive information from third party service providers including, but not limited to, medical and educational service providers.

6. The mother has the right to make the day to day decision respecting the children and to obtain medical treatment for the children. She must keep the father informed of the children's health care status.

Emergency

7. In the event of an emergency and after addressing the emergency, each parent shall immediately inform the other parent of the emergency as soon as practicable.

8. The father is to develop a safety plan to ensure that he is able to respond to emergencies when the children are in his care. He is to take responsibility for following that plan.

9. In the event of an emergency, the father shall address the emergency and see that the child has access to medical help. He shall as soon as practicable contact the mother so that she is informed and can attend.

10. If the emergency is during the father's parenting time, the mother shall not be entitled to terminate the visit unless agreed to by the father.

Fathers Contact while Out of Province

11. While the father is working outside the Province the mother shall facilitate such liberal contact between the children and their father as is practicable including contact by way of Skype, text, telephone, etcetera.

Restrictions

12. The mother shall not impose restriction on the father's contact related to the presence of his partner or his family without further order of the court.

Medical Appointments

13. Each of the parents shall be entitled to attend medical appointments with the children. If one parent is unable to be present then the other parent may take the child(ren) to the medical appointment whether it be for informational purposes or for illness.

14. If the mother is not present for an appointment, the father may attend such third party service providers with his partner or a member of his family.

Transition

15. The father is directed to make an appointment directly with the child's allergist specialist(s) and to attend an appointment to update himself on the child's medical status

16. For the purposes of normalizing contact between the father, his family and B., the father may bring his mother and his partner to medical appointments should they choose to attend.

17. This is intended to better inform the father and his family of the child's special needs and to assist him in evaluating the different levels of risk relating to the child's medical condition including his nut and egg allergies, his sensitivities and skin care, etcetera.

18. At this appointment the father shall discuss with and seek to be fully informed about this child's special needs including his allergies, his sensitivities, his skin issues and how often to bath him, detailed information about their recommendations regarding his day to day care including bathing regime, administration of medication, including creams, etcetera.

19. The father shall consult with the specialists fully informing them about the paternal grandparents home, including carpeting, etcetera and seek their advice on what changes they need to make to accommodate his child.

20. These changes shall be in effect not only for the period of time the child is in the home, they are permanent as long as the paternal grandmother's home or any other home is intended to be used as a place to facilitate contact between the father and the child while the father is in Nova Scotia. That is to say that the home shall remain nut free and animal free. That is not to say the occupants in the home cannot use eggs during the children's absence.

21. In the event they are able to accommodate the youngest child, the father's parenting time may be exercised in the paternal grandparents home.
22. In the event the recommendations of the specialist cannot be accommodated in the paternal grandparents home, the father shall make suitable provisions for his parenting time with his sons to ensure the home environment is suitable and safe for both children.
23. The home environment in which the child stays with the father shall be nut and animal free. The father shall ensure the child is not exposed to eggs directly or in baked products.
24. No cats or other animals shall be permitted within the home environment **at any time** unless prior approval has been obtained by the child's specialist or family doctor in consultation with the mother.
25. The father shall have the right to attend as well with the child on his own to the family doctor to be better informed about the child's needs.
26. The father shall **always carry** the child's EpiPen when the child is with him and under his care.
27. The father is to ensure that he has a spare and current EpiPen purchased by himself.
28. The mother will provide the child's EpiPen on each occasion that the child is visiting the father. The father shall be responsible for returning the child's EpiPen and personal health care products to the mother at the end of his parenting time.

List of Foods, Treats and Snacks

29. Within two weeks of the date of this order, the mother shall provide the father with a list of the children's foods, treats, and snacks that they can safely ingest.

30. The mother is to provide the father with a list of what she believes are sensitivities in order to better inform the father.
31. Given that the father has less experience at this stage than the mother, the father shall not introduce any treats or snacks that the youngest child may access unless they are on the list, approved by the mother or the allergist.
32. The father shall not give to either of the children any treats or snacks that the youngest child may access unless they are on the list, approved by the mother or the allergist.
33. The mother shall also provide to the father a list of restaurants that she considers safe for the child and the menu items their child can order.
34. While B. is in his care, the father shall assume full responsibility for speaking with the restaurant staff to assure himself, in advance, that the foods he orders for this child are safe.

Schedule

35. This schedule is intended to be a transition schedule to move the children into a more consistent unsupervised parenting schedule that will;
 - a. acclimatize the boys to their father's household ;
 - b. address E.'s reluctance to stay overnight by being with his brother;
 - c. test, in a controlled manner, B.'s exposure to the father's living environment at the same time.
36. Because the boys are at different ages and at different stages of their development and have different needs, the schedule need not be the same initially for both boys.
37. The father's first priority shall be focussed on getting reacquainted with his sons in a consistent and predictable manner.

38. While the father may wish to divide his time between O. and C. B, in the interim this will take away from the reintegration of the children into his parenting care.

39. It is also intended that this parenting schedule increase as the age and stage of development of his children increases.

40. The father shall immediately, and in the future, in a timely fashion in advance provide the mother with his at home schedule.

41. The father shall advise the mother when he will be in C. B.

42. Each parent shall advise the other, in advance, of any changes in address or telephone numbers.

Mobility

43. Should the mother intend to relocate with the children she shall give the father 90 days advance written notice. Failing consent, the matter may come before the Court on application by either party.

Schedule

44. The father current schedule is either a 3/3 (weeks) or 4/2 (weeks) rotation. In either case while he is in C. B. he shall have the following parenting time:

B.

45. *After having addressed the suitability of the paternal grandmother's home with the specialist and taken the Parent Information Program or it's equivalent :*

First Week in the 3 Week Cycle

a. For the first Monday and Wednesday from 10:00 a.m. to noon and on Thursday from 10:00 a.m. to 2:00 p.m.(or such other three days of the first week as the parties may agree upon) the father shall have B. with him (while E. is in school

) in his home (which shall include the father's mother's home should that be determined by the specialist (in consultation with other attending physicians) as "allergy friendly" for B. .

b. The Monday, Wednesday and Thursday days are the default days absent written agreement.

c. That schedule shall continue for the second week and each week thereafter that the father is in C. B.

d. The parents may agree on combining the visits both boys have with their father.

E.

46. The father shall have the right to have E. with him 3 days after school for the first week he is home (i.e. Monday, Wednesday, and Thursday from after school to 6:00 p.m. when E. shall be returned home).

47. Should E. have home work the father will assist him to complete that home work.

Weekend parenting time

48. For the first month following the decision on a 3/3 week schedule, the first week the father shall have the right to have both boys with him from Saturday at 10:00 a.m. to 6:00 p.m. and Sunday from 10:00 a.m. to 6:00 p.m.

For the Second Weekend

49. When the father is home he shall be entitled to have E. with him for the second weekend from Friday after school overnight to Sunday at 5:00 p.m.

50. As it is the second week and a transitional period, should he have completed his enquiries with the specialist, than he shall be entitled to have B. overnight Friday to Saturday night and return B. to his mother's home on Saturday at 6:00 p.m.

51. The third weekend of his three weeks home shall be the mother's weekend.

52. The father is permitted to shorten the duration of an overnight weekend or to transition into weekend access in a gradual manner as he determines better meets the children's best interests and enhances a future positive development of his relationship with his children

53. This is to address the fact that the father is out side Nova Scotia for 3 out of 6 weeks or 4 out of 8 weeks. If that should change and the parties cannot agree to modify this agreement, they are entitled to apply for a variation.

Future weekend parenting time

54. After the first cycle of 3 weeks, providing he has exercised access as set out above, on the father's return he shall be entitled to have E. with him on two out of the first three from Friday after school to Sunday at 5:00 p.m. continuing until further order of the Court.

55. The father shall always keep the mother informed of his whereabouts for the weekend and provide his working cell number to the mother.

56. The father shall visit the local medical authorities should there be any reaction needing medical attention.

57. During the father's three weeks home (or two weeks if a 4/2 rotation) the father shall have the right to have his children with him for at least three afternoons or evenings during the week (in accordance with the schedule set out in the first schedule starting at paragraph 45) with pick up for E. after school extending to supper and return to the mother's home before 7:00 p.m.

58. Supper and homework is to be completed before the child is returned to the mother's home.

Overnight Weekday Parenting Time

59. If access has been exercised on a consistent basis, (with the exception for emergencies only), in September 2013 it is intended to extend one of E.'s two school night times with his father to an overnight with return to school the next morning.

60. The father shall ensure the child's homework is completed and that the child has all he needs to attend school including his lunch, his school books, and proper attire.

61. Should E. or B. have extracurricular activities when with their father than he shall have the exclusive right during his parenting time to take E. or B. to these activities

62. To avoid placing the children in the middle of the high conflict that exists when their parents are together until further agreement of the parties or Court order the mother shall not be in attendance at the extra curricular activity without the prior agreement of the parties. That may change on agreement of the parties or on a review.

March Break

63. The father shall have the right to have the children with him for half of the March break and for a week at Christmas.

Summer

64. This summer access shall not be exercised if the father has not continued to visit the children during his time off at least for the times set out here in for one week of every month from March 2013 to July 2013.

65. Each parent shall have the right to one week uninterrupted vacation time with their children subject to the above condition.

Suspension of Ordinary Parenting Time

66. During summer, Christmas (December 24th, 25th and 26th) and March Break the ordinary parenting schedule shall be suspended to allow for the special holiday access arranged with the consent of the parties, or failing consent, court order.

67. Except for emergencies the children shall have reasonable telephone contact with their mother and father at reasonable times (twice per week before 6:00 p.m.) during the week of access.

68. The mother and father shall provide an exact location and telephone number to allow the other parent telephone access during special holiday times noted above.

Liberal Telephone Contact

69. The children shall be entitled to have liberal telephone contact with the father, whether he is out of province or in Nova Scotia.

70. The father shall also have the same right with his younger son, however, due to the need to be better informed and to have the child transition into extended times with his father, full contact as explained in this order shall graduate from weekly contact as described below and if followed full and equal access in a similar manner for both sons.

Weekday Parenting Time

71. The father shall immediately arrange appointments with the specialists and family doctor and fully inform himself of the child's needs and how to respond to the different levels of reactions.

72. After three overnight visits are completed with E., the father shall be entitled to one overnight with B. each week that he is home in addition to the 10:00 a.m. to 6:00 p.m. on Saturday and Sunday to be extended in July from Friday at 4:00 p.m. to Sunday at 4:00 p.m.

Out of Province Parenting Time

73. This shall be deferred until B. has experience with a consistent schedule of one year of this parenting strategy unless otherwise agreed upon by the parties.

74. E. may travel with his father (sooner than B.) in the Summer of 2013 for an out of province visit or vacation.

75. Should the parents agree in writing in advance, B. may be included in this one week out of province vacation.

76. Should the parents fail to agree in advance in writing the matter will have to be resolved by Court order.

Other Parenting Time

77. **Christmas access** shall be agreed upon between the parties or the matter may be set down for a review at which time the Court will determine the Christmas schedule.

78. The parents may agree to such other parenting time providing the agreement is in advance and in writing.

Enforcement

79. The sheriff must do such things as are necessary to enforce this order and, to do so, may exercise any power of a sheriff permitted in a recovery order or an execution order.

80. All constables and peace officers are to do all such acts as may be necessary to enforce the terms of this order and they have full power and authority to enter upon any lands and premises to enforce this order.

[207] This is an interim order and may be set down for a review or variation by either party.

Employment

[208] The father obtained work in Fort McMurray starting in September of 2010. He anticipates being able to come to Nova Scotia often. He assists his father in summer with lobster fishing.

[209] Up to the date of trial or close to it, the mother was a full time student at Nova Scotia Community College, taking a two year [...] Program. Sometime before the Hearing, she left the program to attend full time to getting her child into school.

[210] She is therefore without employment income.

[211] The father's 2007 Notice of Assessment, while living in C.B., shows income of \$7,021.

[212] In 2008, the Assessment filed in the same province he has a line 150 income of \$29,112.56.

[213] For the 2009 taxation year, the Income Tax Return filed in Ontario has a line 150 income inclusive of employment income and Employment Insurance and other benefits in the amount of \$34,252.

[214] In 2010 his income from all sources was \$27,164.89.

[215] His 2011 tax summary shows income of \$77,915.37.

[216] The mother's income information for 2010 was \$3706. and for 2011 was \$9,240.

[217] The parties did not provide to the Court during the hearing their 2012 income information.

[218] I understand there was a prior agreement between the parties and the father was paying \$572 per month.

[219] With his current income he should be paying \$1,074 per month payable on the first of each month commencing April 1st, 2013 forward until further order of the Court.

[220] Should there be a change in his income, the parties may alter the child support amount to reflect the guidelines and failing consent, have the Court resolve the matter.

[221] Counsel will include the usual reporting clauses.

Health and Other Expenses

[222] The father shall keep the children insured on his employment health plan for as long as he is able .

[223] The mother has identified health related expenses in the July 13th, 2009 Statement of Expenses in the amount of \$1,392.

[224] The drug records show that between February 10th, 2009 and December 28th, 2012, E.'s drug costs(I assume uninsured) were **\$358.71** and between February 10th, 2009 to September 25th, 2012, B.'s drug costs (again I presume uninsured) were **\$283.79**.

[225] This is an extraordinary expense. The father shall pay these uninsured costs specific to this evidence.

[226] He shall continue to pay the uninsured costs pending further order of the Court.

[227] The mother shall provide proof of payments for these prescription medications and the father shall reimburse her within 30 days of receipt of proof of purchase.

[228] The mother also submits claims allegedly expended since the separation (page 6 of 8 in the Brief) totalling \$24,505.04. This includes child care; special milk; creams; clothes; hotels; travel; swimming; and hockey. These have not been proven to the satisfaction of the Court. I defer on these to a later date.

[229] She apparently bathes the child many times a day and applies the creams on each occasion.

[230] The special milk, Alimentum coasts \$40 per week; medical alert bracelet; monthly prescriptions, including Prevacid at \$50 per week; child care; numerous trips to the I.W.K Hospital of approximately \$120 for gas, meals and hotels; trips to outpatients for both children; doctors' appointments for ear specialists; \$600 for prescription glasses; dietician; gastrointerologist and plastic surgeon.

[231] Not all of these have been detailed with sufficient specificity to know frequency and the associated cost.

[232] The milk cost she is claiming is now \$8,200. Without more I am unable to address these kinds of expenditures.

[233] The shareable expense, providing it is necessary (the proof of which will rest with the mother), will be the difference between what one would ordinarily buy and the cost of the special purchase as verified.

[234] The mother has submitted usages of these creams, sun screens, etcetera that appear to be beyond what one would reasonably expect necessary or affordable.

[235] I direct the father to bring the list of special creams, etcetera with him to the doctor's office to obtain advice on them and to see if there are less costly alternatives.

[236] He is also to consult a pharmacist, preferably a pharmacy in the child's town or village.

[237] The mother should also either attend with the father, if that can be accomplished without conflict, or attend independently so that each receive advice about these extensive extras.

[238] I have unreliable evidence as to the costs of these extra over the counter medications.

[239] The mother is to provide verification by the doctor that the creams and non prescriptions are necessary (by the doctor). She shall submit this verification to the father. A future hearing may address this issue more concretely.

[240] Therefore, should she be required to use these, the dosage or recommended dosage must be verified and determined as extraordinary and necessary.

Child Care

[241] Child care is currently not necessary as the mother has ceased attending her courses.

[242] I have insufficient details of retroactive child care needs to assess this claim in accordance with the law.

[243] In the final divorce hearing retroactive costs of special expenses may be claimed.

Hockey and Swimming

[244] The mother has further special expenses for E.'s hockey including overnight stays for tournaments, gas and also two hockey camps at \$95 each.

[245] Both children take swimming lessons in the summer which is \$40 per child.

[246] These activities are no doubt very positive influences for the children. However, they are not necessarily extraordinary. I suggest the parents decide what they want for their children; agree on what they can afford and consider sharing the expense as they are able.

[247] The mother wishes to be compensated for the expenses associated with visits to the hospital and doctors' appointments.

[248] Extra curricular activities shall be agreed upon in advance between the parents. If they agree that these are important activities for their children to attend, they shall either agree on a sharing or have the matter determined in the final Divorce hearing.

Compensation for Travel for Medical Reasons

[249] There is confirmation in 2008 of one visit with Halifax pediatric associates; five visits in 2009; two visits in 2010; four visits in 2011 and three visits in 2012.

[250] He has been seen through the period of time from February 1st, 2009 to January 7th, 2013; 22 times in the Emergency Department; four times in ambulatory care; once in day surgery; and once in the laboratory.

[251] E., between February 1st, 2009 to January 7th, 2013, has had 12 Emergency Department visits.

[252] The mandatory extra medical supplies are to be verified by the specialist and that letter is to be taken to the family physician. In a family of limited means surely the medical authorities and the pharmacist are able to come up with less costly solutions.

Glasses

[253] There is a receipt for glasses for one of the children in the amount of \$74. The father shall reimburse the mother for that expense.

Medical Trips to Halifax

[254] There are 12 visits to Halifax since the separation. I have insufficient proof of the cost of these visits to address them at this stage. This may be addressed at a future date with sufficient proof.

[255] Counsel for the mother shall draft the order.

Moira C. Legere Sers