

2000

No. 1201-50409
(SFHD - 001344)

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

DONNA MARIE O'QUINN,

APPLICANT

- and -

EDWARD JOSEPH O'QUINN,

RESPONDENT

[Cite as: O'Quinn and O'Quinn, 2001 NSSC 93]

D E C I S I O N

HEARD: Before the Honourable Justice John D. Murphy, Supreme Court of Nova Scotia, at Halifax, Nova Scotia, on May 15, 16, and 17, 2001.

DECISION: May 17, 2001, (Orally)

**RELEASE
OF ORAL
DECISION:** June 18, 2001

COUNSEL: Lola Gilmer, for the Applicant
Walter J. Thompson, Q. C. , for the Respondent

MURPHY, J.

BACKGROUND

[1] This Application was commenced by Donna O'Quinn during September, 1999, seeking variation of the Corollary Relief Judgment granted by Gruchy, J. when the parties were divorced on February 27th, 1998. A further Application to vary that Judgment was made by Edward O'Quinn on November 8th, 1999. It was determined at a Pre-trial Conference April 12th, 2001 that the Applications would be heard together, with Ms. O'Quinn proceeding as the Applicant and Mr. O'Quinn as the Respondent.

[2] The Corollary Relief Judgment ordered that Mr. and Ms. O'Quinn have joint custody of the children of the marriage, Colton, born December 14th, 1990, Joshua, born February 25th, 1992 and Chad, born November 9th, 1993.

[3] That Judgment further provided that Mr. O'Quinn have day to day care and control of the children in his residence for 32 weeks of the year, with his residence being their principal residence, and that Ms. O'Quinn have day to day care and control of the children in her residence for 20 weeks of the year. The Judgment also contained provisions with respect to access, and directed that Mr. O'Quinn pay Ms. O'Quinn \$140.00 per week child support for the 20 weeks of her care and control, based upon his 1997 income of \$32,000.00 and monthly support indicated by the Child Support Guidelines to be \$606.00.

[4] During June of 1998, the Nova Scotia Court of Appeal dismissed an Appeal from Justice Gruchy's decision.

[5] It is apparent from the reasons for judgment which Justice Gruchy provided that he gave substantial consideration to the employment circumstances of the parties. Mr. O'Quinn was and remains employed on vessels operated by Department of Fisheries and Oceans ("DFO"). His employment arrangements provide for large blocks of time which he can spend at home - at the time of Justice Gruchy's Order he spent approximately 4 months per year at sea, all between mid April and mid December, accumulating leave which he used during the winter months; at that time Ms. O'Quinn, who had been a homemaker throughout the marriage, was not employed.

PRESENT APPLICATION and EVIDENCE

[6] Ms. O'Quinn now seeks to vary the Corollary Relief Judgment to have the childrens' primary residence deemed to be with her, and she also seeks a variation in maintenance for the support of the children. Mr. O'Quinn requests that the Judgment be varied to direct that the children, while in school, reside at all times with him,

regardless whether he is at sea, on duty "along side", or on leave. He has also asked, in the alternative, if the Court does not vary the Judgment in the manner he seeks, that its terms remain unchanged, rather than be altered as desired by the Applicant.

[7] Extensive Affidavit evidence was filed by the Applicant and the Respondent, by the Applicant's mother, and by neighbours familiar with the circumstances and activities involving the children when with one or both parents. In April, 2000, the Court directed that a home study be prepared relating to the care and control of the children, and on September 12th, 2000 an Assessment Report was provided by Patricia Dougan, an experienced social worker, pursuant to that Order. Ms. Dougan's report was before the Court, as was a report dated June 28th, 1999 from Dr. Stacey Schwartz, a pediatrician, who had met with one of the children, Joshua, and both parents.

[8] This hearing was held May 15th, 16th, and 17th, 2001, when oral evidence was received from the Applicant and the Respondent, as well as from Ms. Dougan, Mr. O'Quinn's present partner, Annette Russell, and Ms. Deborah MacFarlane.

[9] The evidence reveals the following factual developments affecting the Applicant, the Respondent, and the children since Justice Gruchy's Judgment of February 1998:

- (a) Mr. O'Quinn continues to reside in the former matrimonial home at 5 Carr Street, Dartmouth. Since 1998, his partner, Annette Russell, whom he intends to marry in August 2001, also resides there, as do the children when they are with their father.
- (b) Ms. O'Quinn remains in the same 3 bedroom apartment in which she lived at the time the Judgment was given. Currently, Ms. O'Quinn occupies that residence alone, except when the children are with her.
- (c) Mr. O'Quinn continues to be employed with DFO and is now home more than he was in 1998. According to his Affidavit evidence he expects during 2001 to work a total of 102 days of which 56 will be sea days, with 31 of those sea days being days when the children attend school. He will be home on leave for the remaining approximately 250 days of the year and he is available during that time to be a full time parent. Annette Russell is a full time homemaker and remains at the Carr Street residence when Mr. O'Quinn is at sea.
- (d) Ms. O'Quinn was at home full time until she participated in various training courses during 2000 and 2001, which led to obtaining her present full time employment at Canavan Appraisal Centre in Halifax during March 2001. Ms. O'Quinn works from 8:00 a.m. to 4:30 p.m. Monday to Friday, and transportation arrangements require that she leave home in the morning on those days at approximately 6:30 a.m., returning in the evenings at about 6:00 p.m.

- (e) Where Justice Gruchy granted the Corollary Relief Judgment, the two older children, who had been residing with their mother, attended Ian Forsythe school, near their mother's apartment. At the start of the following school year, in September 1998, when they were living with Mr. O'Quinn, the children moved to Brookhouse School and all three children now attend that school, which is about two blocks from Mr. O'Quinn's Carr Street home.
- (f) When the children are residing with Mr. O'Quinn, they either walk or bike to school, sometimes accompanied by Mr. O'Quinn or Ms. Russell.
- (g) Brookhouse School is too far from Ms. O'Quinn's residence to allow the children to regularly walk to school from there. When the children are with their mother, and since she has been working in Halifax, the children go to school alone by cab in the morning and in the afternoon the youngest child, who is dismissed about a half an hour earlier than the other children, awaits their dismissal at the school, and the three children then return home by cab. The responsibility for arranging the cab in the afternoon was initially taken by the oldest boy, who is now 10, but recently the school has provided assistance contacting the taxi company.
- (h) The children always go to their father's residence for lunch on school days, including when they reside with Ms. O'Quinn and also when Mr. O'Quinn is at sea. Ms. Russell looks after the children at lunch time if Mr. O'Quinn is not there.
- (i) Ms. Russell and Mr. O'Quinn have a long term stable relationship; the evidence indicates that Ms. Russell is actively involved with the children while they are at their father's home, carrying on the traditional homemaker role and also assisting with the children's school and extra curricular activities. Although Ms. Russell has an active role in the children's day to day lives when they are at the Carr Street residence, it is apparent from the evidence, including her evidence and Mr. O'Quinn's testimony, that the children view her as their "stepmother" and unquestionably Ms. O'Quinn stands alone in the role as the children's mother, having a very close bond with each of the children.
- (j) When the children reside with Ms. O'Quinn, a neighbour comes to her residence at approximately 6:30 in the morning when Ms. O'Quinn goes to work, and the neighbour looks after the children until they depart by cab for school. When the children return to their mother's home after school, they are looked after by a neighbour or family friend there until Ms. O'Quinn returns from work.
- (k) Both parents are actively involved in children's school, church, and extra curricular activities including Beavers, Cubs and sports; however, there is very little, if any, overlap in the parents' involvement with these activities, due to the continuing acrimonious relationship which Mr. & Ms. O'Quinn have.

- (l) Both the Applicant and the Respondent have supportive extended families living close to their respective homes; the children have close relationships with their maternal grandparents, and with their paternal grandmother, who is a widow, as well as their paternal uncles, aunts and cousins.

- (m) At the time the Corollary Relief Judgment was granted, Justice Gruchy expressed substantial concern with respect to Ms. O'Quinn's excessive bingo playing, which had seriously undermined the parties financial position. The present evidence is that Ms. O'Quinn has not attended a bingo game for about a year. She has made preliminary contact with the Nova Scotia Drug Dependency Centre with a view to undergoing assessment to determine whether gambling presents a potential difficulty for her - this step was taken a short time prior to the current hearing.

[10] Important aspects of the parties' situation which remain unchanged since Justice Gruchy's decision include:

- (a) Both parties are loving, conscientious and dedicated parents, deeply involved and very concerned with their children. Both have strong parenting skills and a genuine interest in their childrens' well being;

- (b) Bitterness unfortunately continues between the parties, who do not communicate well and who tend to frustrate rather than facilitate access arrangements. This was evident in the tone of the Affidavits and oral evidence before me, where each party, while acknowledging that the other was a good parent, constantly sought to highlight deficiencies in the other's circumstances and attitudes.

[11] Patricia Dougan provided testimony concerning her findings after extensive interviews with the children, the parents, Ms. Russell, and collateral contact with extended family, teachers, school officials and babysitters.

[12] Among the conclusions set out by Ms. Dougan the following stand out:

- (a) The two older children have some emotional difficulties:
She described Colton as a "highly anxious, emotionally burdened child", and stated that Joshua has been "emotionally burdened and saddened by his current living situation".

- (b) Ms. Dougan found:
"...unlike Colton who displays internalized type symptomology, Josh tends to externalize feelings which are difficult for him to manage and hence displays anger and aggression".

- (c) She advised that Chad, now age 6, is adequately managing emotional issues

associated with his parent's divorce.

- (d) Other comments made by Ms. Dougan indicate that the children are not happy, well adjusted or carefree. They were, in her view, "pressured, stressed, anxiety ridden, confused and quite emotionally burdened". Ms. Dougan expressed her opinion that the two older children have difficulties moving back and forth between two homes, with this being less of a problem with Chad. She suggested the children need predictability, consistency, security and stability, and stated on more than one occasion that the source or nature of the conflict between the parents is long standing, entrenched, highly dysfunctional, and detrimental in terms of the children's needs.
- (e) Ms. Dougan found, and the evidence before the court supports her conclusion, that both Mr. and Mrs. O'Quinn "present as committed and loving parents", ... but to their children's detriment they tend to primarily blame each other for the current situation. She stated as follows in her report:

"Perhaps Mr. and Mrs. O'Quinn's highly dysfunctional and unresolved couple issues are most evident in their non-existent and/or hostile communication patterns together with their attribution of blame and responsibility primarily to each other for their children's current emotional and behavioural functioning difficulties. In a joint interview with them on September 6, 2000, this evaluator provided very clear feedback suggesting their children's current difficulties are directly associated with the highly conflictual and protracted nature of their custody/access dispute. These parents were also strongly cautioned that they must take immediate steps to rectify the current situation in efforts to avoid their children's development of further or more serious mental health issues. Continued exposure of these young aged children to significant levels of tension, mistrust and suspiciousness between parents whom they love and need is simply unacceptable and highly counterproductive to healthy child emotional growth and development in particular. Little wonder they currently present as very burdened, confused and torn. Should persistent power struggles and a lack of trust, tolerance and flexibility continue to dominate the parental relationship, then one could predict these parents will face increased control issues with the children especially as they approach adolescence.

[13] Ms. Dougan indicated that at the time of her assessment, the two younger children expressed a wish to live with their mother, while the oldest has not shown a preference for living arrangements. She went on to note that the children's stated wishes may be rooted in the early bonding and care provided by Ms. O'Quinn as a stay

at home mother while their father was working at sea for long periods of time during their early years, and that it would not be uncommon for their identification with their father to increase as they approach adolescence and face gender related issues and challenges which often require the guidance and assistance of a trusted father figure. She noted:

“Different developmental stages may well influence parent/child relationship dynamics and impact a child’s choice of living arrangements.”

[14] Ms. Dougan’s assessment was completed approximately 8 months before the hearing, while Ms. O’Quinn was still a stay at home mother and before the current developments have unfolded concerning Ms. O’Quinn’s employment, the children’s transportation to school, and Mr. O’Quinn’s increased at-home time.

[15] Ms. Dougan’s evidence clearly showed that the uncertainties associated with the children moving from home to home were affecting their performance at school, and their emotional stability generally. Both parents also suggest the children should not be “flipped” back and forth from home to home, although perhaps not unexpectedly, there was no agreement as to where their principal residence should be. This factor is also highlighted by Dr. Stacy Schwartz in her June 28, 1999 report concerning Joshua. She said:

The social situation is very concerning ... the children flip back and forth between mom’s house and dad’s house depending whether dad is at sea or not out to sea. They have been back and forth to court so many times and there are certainly two big sides to this story.

[16] Dr. Schwartz continued:

I think this little boy, [she was referring to Joshua], is severely affected by his difficult and stressful social situation. It certainly would be in this child’s best interest for the social situation to reach a point of greater stability with the children being with one of the parents through the school week and not flipping back and forth from household to household during the school year.

[17] The evidence revealed two continuing parental issues which particularly exacerbate the situation; and prevent the parties from improving communication:

- (a) The children are aware of the conflict between the parents concerning custody. Ms. Dougan suggest that Ms. O'Quinn holds out to the children hope that the Court will solve the problems they now have by ordering that the children live with her, resulting in a return to Ian Forsythe School which may hold some promise of greater happiness for the children. She suggests that this may lead to their indicating a preference for being with her.
- (b) Mr. O'Quinn tends to unduly blame Ms. O'Quinn for causing dissolution of the marriage and disruption of the family.

FINDINGS and APPLICATION OF LEGAL PRINCIPLES

[18] The children are older now, both parents have different amounts of time available to be with the children as a result of different employment situations, the children's school locations have changed and their educational needs have increased. The logistics of attending school, and the dynamics associated with moving from one home to another are changing.

[19] In any variation of the Corollary Relief Judgment, I am restricted to considering changes in the circumstances from those which existed at the time the Order was granted. *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at pp.42-44, paras. 9-13. The sole consideration is the best interests of the children, in the context of changed situations in which they are found.

[20] Joint custody is usually premised on an ability and willingness of the parents to work together to share in their children's upbringing and activities, and in decisions affecting the children. While both the Applicant and Respondent are loyal, loving and devoted parents, unfortunately neither has demonstrated a desire or ability to work well together in the best interests of the children. It is Mr. and Mrs. Quinn's responsibility, for the sake of their children, to resolve the acrimonious situation described by Ms. Dougan.

[21] Joint custody may be a tenuous proposition in such circumstances; however, the situation has not deteriorated since Justice Gruchy's decision to the extent that the parties cannot create an environment with sufficient cooperation to continue a viable joint custody arrangement. Distinct changes of attitude by both parties, and to some extent by their extended families who appear not always to foster communication between the parents, are urgently needed. The Court can try to foster an environment in which the parents can work together, but they must be willing and able to do so.

[22] It is important for the children, during developmental years while attending school, to have a stable consistent environment, without "flipping" residence from one home to another during the school year. The authorities confirm the significance of this factor, particularly this Court's ruling in *Schwenker v. Shepard* (1996), 154 N.S.R. 2d 148 and other decisions referred to in that case.

[23] The circumstances in the present case have not changed so dramatically as to warrant alteration of the principal direction given by Justice Gruchy - that Mr. and Mrs. O'Quinn have joint custody of the children, with Mr. O'Quinn's residence being their principal residence. Changes are, however, needed. This is apparent from the evidence concerning the present domestic and employment arrangements in each household, particularly the difficulties associated with the children's moving back and forth during the school year, both the emotional upheaval of making complete moves from one household to the other during the school year, as well as the daily logistics of getting back and forth to school when at their mother's home. My findings should not be interpreted as an expression of any disapproval in connection with Ms. O'Quinn's accepting employment outside the home. To the contrary I see that as a very positive development for all concerned and I will try to optimize its effect on everyone, particularly the children.

[24] I have considered the children's wishes as revealed by Ms. Dougan, although I recognize the arguments made by the Respondent's counsel concerning the danger of placing too much emphasis on a preference expressed by young children.

[25] The Court should optimize the parties' limited financial resources to achieve the children's best interests. The evidence shows that while the parties are getting by reasonably well on modest incomes, extra money to pay for day care is not available when the children can be well looked after in the home where one parent resides and either that parent or that parent's partner is there. I do not find, as Ms. O'Quinn suggests, that a proper solution is for the children to go with their mother during the school year and attend a different school - it is not appropriate in my view for the children to again change schools, nor is it prudent not to take advantage of the time which their father and Ms. Russell have available during the school week. I therefore direct that the Corollary Relief Judgment be varied in accordance with the following:

- (c) The children shall reside with Mr. O'Quinn at his home during the months of September through June inclusive, subject to the following:
 - (i) Ms. O'Quinn shall have access during the months of September through June every weekend, except for one weekend during each month, when the children will remain with their father. Subject to direction below, the weekend the children remain with their father will be the weekend which includes the third Sunday of each of those months, because that weekend is less likely to be a holiday weekend, and it will also allow for the children to be with their mother on Mother's Day and their father on Father's Day.
 - (ii) Unless there is agreement otherwise concerning pick up and drop-off, Ms. O'Quinn's access shall commence after supper 7:00 p.m. on Friday evening and continue until after supper at 7:00 o'clock on Sunday evening, provided that if the Friday preceding and/or the Monday following the weekend is a holiday, the children's time with their mother shall begin

from 7:00 Thursday and/or continue to 7:00 Monday, as the case may be.

- (iii) When Easter Sunday is the third Sunday of the month, the arrangements shall be modified so that the children spend Easter weekend with their mother and the previous weekend with their father. Otherwise, the children shall be with their mother at Easter.
- (iv) The children's residence in Mr. O'Quinn's home during the school week will not change even if their father is at sea; I am satisfied that Ms. Russell provides a stable environment there and that it is in the best interests of the childrens' school development that they reside in one home at all times while attending school.
- (v) Given the continuing difficulties between the parties, I make the following additional directions, on matters which would normally be left for the parties to resolve:
 - (aa) The Applicant and Respondent must cooperate to be flexible in changing the weekend during the month the children do not spend with their mother, if such a change will result in more time available with Mr. O'Quinn due to his work schedule. If for example, Mr. O'Quinn is at work during the weekend containing the third Sunday of the month, the parties should change weekends that month to enable the children to spend a weekend with their father.
 - (bb) I also direct that the parties cooperate to facilitate transportation. The evidence shows that Mr. O'Quinn presently has more access to a motor vehicle than Ms. O'Quinn, and it would be in everyone's best interest if he would look after transportation of the children to the extent he can do so without major inconvenience.
- (b) With respect to the summer months, both parties have indicated that it would be reasonable for the children to spend approximately one month with each parent. I respect this suggestion and direct that the children spend 4 weeks with Ms. O'Quinn during the months of July and August, the remaining time to be with their father during the school vacation. The parties have indicated a preference that Ms. O'Quinn's time take place in two blocks of two weeks each, and that is reasonable. I do direct, however, that each party accommodate the other in arranging the summer schedule so that the children be with their parents, as much as possible, while parents are on vacation. In particular, Ms. O'Quinn may have limited vacation time during the summer months and the children should spend their time with her, to the extent possible, while she is on vacation. Similarly, the parents should cooperate to determine the best child care arrangements for the children during any summer period when they are with their mother, and their mother is required to work. These arrangements could include the children returning to spend daytime hours with their father, even though they

are residing for a time in their mother's home, or may include spending time with maternal grandparents. Having the children go to a camp when the other parent is available to be with the children during the day time may not be a good option and should not take place without agreement by both parties.

Although Ms. O'Quinn has indicated her willingness to allow the children to go on vacation with Mr. O'Quinn and Ms. Russell during the summer of 2001, while they are being married in Ottawa, because there has not been a great deal of cooperation in the past, I specifically direct that the children be with Mr. O'Quinn for a reasonable period not to exceed 3 continuous weeks in connection with the trip to Ottawa in the summer of 2001. The childrens' 4 weeks with Ms. O'Quinn should be worked around this commitment and I trust that to the extent she has holidays this summer they can be arranged not to coincide with the Ottawa trip.

- (c) I do not change the provision of the Corollary Relief Judgment with respect to Christmas, and it is not necessary to give any further Order with respect to Easter, as it is covered under the provisions for weekends set out earlier.
- (d) With respect to March break, I direct that the children spend alternate years with each parent during the weekdays of the break without affecting the weekend arrangements set out above, unless otherwise agreed between the parents. As the children have been with Mr. O'Quinn the past 2 years, they should spend March break with Ms. O'Quinn in 2002. If it is difficult for Ms. O'Quinn to make arrangements to spend time with the children during the day time in March break because of her work commitments in her alternate year, it may be appropriate for the children to spend the days with their father rather than a sitter, or for the parties to exchange the March break week in that year for an additional week with Ms. O'Quinn during the summer months; I would hope the parties cooperate to make those arrangements.
- (e) Mr. Justice Gruchy provided that both parties facilitate telephone contact between the children and the parent without the children from time to time. This should continue, and given some of the difficulties which have arisen with respect to telephone contact, I go further and order the parties to encourage and provide such contact, as "directing that they facilitate" does not seem to have been sufficient. Each parent shall give the children an opportunity to contact the other parent whenever the children wish, and not less than once each day between 5 and 8:00 p.m. If the children are at Ms. O'Quinn's parents and if her parents continue to deny Mr. O'Quinn access to their telephone number, I direct that Ms. O'Quinn arrange to have the children telephone Mr. O'Quinn from her parent's home if it is convenient at all.

[26] In the context of the variation I have made to the custody and access provisions of the Corollary Relief Judgment, I invite counsel to make a joint proposal concerning child support; if they are unable to do so, I will provide a direction.

[27] Except as outlined above, the provisions of the Corollary Relief Judgment shall be unchanged.

[28] In view of all the circumstances, including the two applications and the divided success, there shall be no costs awarded in this application.

J.