SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: LeBlanc v. LeBlanc, 2009 NSSC 228

Date: 20090724
Docket: 1201-057505 (SFHD-22893)
Registry: Halifax

Between:

Lena LeBlanc

Applicant

v.

Glen LeBlanc

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	July 13,14,15,16,17, 2009 in Halifax, Nova Scotia
Counsel:	Lynn Reierson, Q.C., counsel for Lena Urquhart (LeBlanc) Kim Johnson, counsel for Glen LeBlanc

By the Court:

[1] This case results from an application by Lena Urquhart ("the Applicant") to vary the custody and access provisions of the parties' Corollary Relief Judgement in order to permit her to relocate with the parties' two children to Arichat, Nova Scotia where her husband, Mr. Joseph Martell ("J.M.") now resides.

BACKGROUND

[2] Both the Applicant and Glen LeBlanc ("the Respondent") were raised in Cape Breton but both chose Halifax as their home prior to their marriage.

[3] When they first began dating the Applicant lived in Halifax and the Respondent was still living and working in Sydney. The Respondent left his job in Sydney in order to move to Halifax to be with the Applicant. They began living together in September 1993 and were married on September 23, 1995.

[4] The parties have two children namely, Madison Leigh LeBlanc born June 2, 1998 (now 11 years of age) and Brett Michael LeBlanc born May 29, 2001 (now 8 years of age).

[5] The Applicant and the Respondent separated on or about October 23, 2002 when the children were four years and seventeen months old respectively.

[6] In 2003 the Applicant advised the Respondent of her wish to move to Kingston, Ontario to reside with a gentleman with whom she had been in a long distance relationship for several months. By October 2003 she changed her mind about that move and decided to remain in Bedford, Nova Scotia (where the parties lived at the time of their separation).

[7] The Applicant began her relationship with J.M. at approximately the same time that she ended her relationship with the gentleman in Ontario.

[8] By August 2004 the parties negotiated and signed a Separation Agreement.

[9] J.M. testified that while the Applicant was negotiating the terms of the Agreement she discussed its terms with him including that it would provide for the sharing of joint legal custody of the children with the Respondent, the Respondent

would have access to the children on alternate weekends as well as weeknight access and neither party would move the children from the Halifax area without the consent of the other party.

[10] The actual wording of the parenting arrangements contained in the Separation Agreement is as follows:

SCHEDULE "A"

PARENTING PLAN

JOINT CUSTODY

The parents shall have joint legal custody of the children of the marriage who are: Madison Leigh LeBlanc, born June 2, 1998; and Brett Michael LeBlanc, born May 29, 2001.

Intent of Joint Custody

1. The parents each acknowledge the importance of the other parent to the children. In agreeing to joint custody, the parents intend that:

(a) each parent shall exert best efforts to work cooperatively in making future plans consistent with the best interest of the children and to resolve amicably any disputes that arise;

(b) the parents shall consult on all substantial questions relating to the children, including, but not limited to, religious upbringing, education, significant changes in social environment, a move from the metro area, regular child-care and non-emergency health care. Decisions will be made with the consent of both parents and neither parent shall unreasonably withhold consent;

(c) each parent specifically agrees not to use his or her custodial right to frustrate, deny or control the relationship between the other parent and the children. Each parent shall exert every effort to foster a feeling of affection between the children and the other parent. Neither parent shall do anything which would estrange the children from the other, injure the opinion of the children or either parent or impair the natural development of the children's love and respect for either parent.

Administration of Joint Custody

2. The following conditions shall apply to the administration of the joint custody:

(a) The children shall reside primarily with the Mother.

(b) While the children are with the Mother, she shall have *de facto* responsibility for the care of the children with respect to the day to day care, upbringing and discipline, provided that the Father is to be consulted on all major decisions affecting the children, as set out in section 1 above.

(c) While the children are with the Father, he shall have *de facto* responsibility for the care of the children with respect to the day to day care, upbringing and discipline, provided that the Mother is to be consulted on all major decisions affecting the children, as set out in section 1 above.

(d) The children shall be with Father as set out at paragraph 6 below.

(e) The parents shall share any information regarding the children including information as to health, education, child-care, recreational activities and the like.

(f) The children shall have telephone access to the parents at reasonable times when the children are with the other parent.

Emergency Medical Care

3. Each parent has the right to authorize emergency medical care and treatment for the children provided that the other parent is notified as soon as reasonably possible.

Right to Information and Participation

4. Each parent may request and obtain information regarding the health, education and general well-being of the children, including but not limited to, access to daycare, school and health reports, and the right to obtain copies of all medical, educational and religious records pertaining to the children directly from third parties.

5. Each parent may participate in and attend the children's extra-curricular, educational and religious activities and attend the children's health care appointments.

Access Defined

6. In recognition of the benefit to the children of maintaining an ongoing relationship with the Father and of the parents' desire to maintain a close relationship between the children and the Father and to ensure there is meaningful involvement by the Father into the lives of the children, the children shall have the following access with the Father:

(a) alternate weekends from Friday after work (i.e., directly from day care) until Sunday at 6:00 p.m., beginning on the weekend of May 21, 2004;

(b) where a statutory holidays (sic), school holiday or professional development day falls on a Friday or a Monday, the children's alternate weekend access with the Father will be extended to include the additional time, by beginning the access on Thursday after work (i.e. directly from day care) or Monday at 6:00 p.m., as appropriate, and this provision (sic);

(c) each Monday evening from between 5:30 p.m. and 6:30 p.m. until 8 p.m.;

(d) each Thursday evening after work (i.e. directly from day care) until Friday morning (unless the weekend is a long weekend during the children's time with the Mother's (sic), when the Thursday overnight access shall be replaced with the Father's choice of the previous Tuesday or Wednesday overnight;

(e) the children shall alternate March school breaks, with the Father during March break in 2004 and even-numbered years thereafter and the Mother during the March school break in 2005 and odd-numbered years thereafter;

(f) the parties shall alternate the block of time beginning at 6:30 p.m. on December 22 and continuing until December 25 at 7:00 p.m. with the Mother having the children with her for this block in 2004 and even-numbered years thereafter, and the Father having the children with him for this block in 2005 and odd-numbered years thereafter. The balance of the children's school Christmas holidays shall be divided equally between the parties on the understanding that, generally, the Mother is required to work before Christmas, so the Father will take his share of the Christmas holidays with the children prior to Christmas and the Mother will take her share of the Christmas holiday after Christmas. Both parties recognize that there will be some co-operation required to ensure that the children enjoy Christmas holidays with each parent during the parents' non-working time. The Wife shall provide her work schedule for the holiday period to the Father on or before December 1 of each year so that the issue is resolved before December 10 of each year;

(g) the children shall spend a total of four weeks with each parent during July and August. The children shall be with each parent for no more than two consecutive weeks. In even-numbered years, the Father has first choice of the first two weeks of summer vacation time, provided he gives written notice to the Mother of his proposed two-week vacation period on or before May 1. The Mother shall then notify the Father, in writing, of her choice of two weeks of vacation on or before May 15. The Father shall notify the Mother of his choice for any further summer vacation access which he wishes to exercise on or before June 1 and the Mother shall provide similar notice on or before June 1. This shall be reversed in odd-numbered years. If the parent who is entitled first choice fails to give written notice, the other parent is entitled to choose their vacation period and the parent who failed to give notice shall accommodate the scheduled vacation of the other parent.

(h) the children may spend part of Mother's Day with the Mother and part of Father's Day with the Father, notwithstanding that it may fall on their scheduled time with the other parent;

(I) the children shall have reasonable telephone access with the parents at reasonable times;

(j) notwithstanding the specific access outlined in this schedule, the parents acknowledge that flexibility is required in order to provide for the Father and Mother to meet their professional responsibilities, take vacations, allow for illness of a parent or a child, and so forth, and the

parents may therefore change this agreement from time to time by mutual consent.

7. Each parent shall provide the other with a current address and telephone number where the children can be reached while the children are with that parent. If either parent takes the children out of Halifax Regional Municipality for two days or more, they shall provide the other parent with an itinerary for the trip and telephone numbers were the children can be reached.

Passports

8. Neither parent will apply to obtain a passport for any child without the written consent of the other, such consent not to be unreasonably withheld.

Change of Names

9. Neither parent shall change the name of either child either by common use or by application under any existing or future legislation in any jurisdiction without the prior written consent of the other parent.

Guardianship

10. Each parent acknowledges that the other parent shall be the guardian of the children in the event of death of one parent and any will executed by either parent shall so provide.

Religion

11. The parents agree that the children of the marriage are of the Catholic faith and shall be raised in that faith.

[11] The parties were divorced on February 10, 2005. The Corollary Relief Judgement was granted on the same day and it incorporated the terms of the Separation Agreement. No effort was made by either party to change the terms of the Agreement.

[12] In October 2004 the Respondent met his current wife, Julie LeBlanc ("J.L."). They began to live together in February 2006, built their current home in Bedford in 2007 and were married in September 2007. J.L. has been a significant part of the children's lives since at least 2006. In J.L.'s affidavit she said, after meeting

the children for the first time in December 2004; "I immediately took to the kids and was relieved when [they] responded very positively to me". She also said:

> "I developed a strong relationship with the children early on and it continues today. I have never tried to be a replacement for the children's mother. I have been a friend to the children but do take on a co-parenting role with [the Respondent] when the children are with us."

[13] In paragraph 124 of the Applicant's affidavit sworn August 25, 2008 she said:

> "[J.L.] is very good to the children and I am supportive of their relationship with her."

[14] In paragraph 136 of her affidavit sworn June 1, 2009 she said:

> "I have always been of the view that the children benefit from [the Respondent] being in a relationship with [J.L.]. She is good to the kids and I have supported the children's relationship with [J.L.] since her relationship [the Respondent] began and I continue to support that relationship."

[15] Subsequent to the parties' divorce the Applicant rented a condominium in the same general area of Bedford as the former matrimonial home which enabled Madison (who was then entering grade 1) to continue to go to the same school. The home built by the Respondent is in Glen Arbour, a drive of approximately ten minutes from the Applicant's condominium.

[16] The Applicant and J.M. dated from 2003, became engaged in July 2008 and were married on January 2, 2009. From the time they started dating the Applicant drove from Halifax to Cape Breton most weekends and holidays. On those weekends when the children were with the Applicant they accompanied her. During the past five years the children have spent a portion of their Christmas holidays in Cape Breton with their mother and J.M., four to five weeks each summer and nearly every second weekend and most holidays. Very occasionally J.M. came to Halifax but the majority of the time the Applicant (and the children during their time with her) went to Cape Breton.

[17] The Applicant testified in paragraph 62 of her affidavit sworn August 25, 2008 that the children think of J.M. "as their friend" and said that they have never

been pressured by either the Applicant or J.M. to see him as anything more than that. In paragraph 8 of J.M.'s affidavit sworn June 1, 2009 he said:

> "The best way to describe my role in [the children's] lives is to say I am another of their extended family members, like a grandparent or an uncle. It is my role and responsibility to support their parents and help the children meet the expectations they would like to follow and reach. I spend very little time alone with the children, [the Applicant] is with us most of the time and we do things together. Thus it is easy to know what her parenting style is and I follow her lead.

[18] In March 2008 the Applicant advised the Respondent of her intention to relocate to Cape Breton and she formally applied to vary the Corollary Relief Judgement on the 27th of August 2008. It was her evidence that although she and J.M. had been dating for approximately a year when the Separation Agreement was signed and a year and a half when the custody order was granted she did not make the decision to move until well after the Corollary Relief Judgement was issued.

[19] The Respondent opposes any relocation of the children and filed a Response by which he seeks, preferably, shared custody of the children.

[20] Madison has just finished grade 5 and Brett grade 3. Both are good students. Both have many friends in the area of their homes including what the Applicant refers to as their "best friends".

[21] Outside of school the children are involved in many extracurricular activities. Madison, for example, has been involved in Sparks and Brownies and takes music lessons and is involved in dance. Brett has been involved with skating lessons, lacrosse and more recently hockey which he has played the last two years. In both of those years the Respondent has been his team's coach.

[22] The parties keep the children involved in outside activities. The Applicant, for example, takes them for walks, takes them swimming, plays mini-golf with them and as well does crafts with them both. The Respondent has taught Brett to swim, both children to skate and both to ride their bicycles. He plays golf with them on a junior golf course near his home in Glen Arbour where they also have both taken golf lessons.

[23] Both children frequently have friends over to play whether they are living with the Applicant or the Respondent.

ISSUE

[24] Should the Applicant be permitted to relocate the children to Arichat, Nova Scotia?

THE APPLICANT'S POSITION

[25] The Applicant seeks an order that will enable her to relocate with the children to Arichat, Nova Scotia where J.M. has his home. Her primary reason for wanting to move to Arichat is to be with J.M..

[26] The move is not motivated by a need or desire to improve her economic circumstances. She is an esthetician and has been so employed at a spa in Dartmouth for the past 19 years. She earns between $35,000.00 and $37,000.00 a year and, in addition, since her father passed away in January 2008 she has been receiving another $2,000.00 a month from his pension plan. The Respondent also pays her child support, presently in the sum of just over $9,100.00 a month, tax free.

[27] According to the Applicant's Statement of Expenses she saves approximately $6,000.00 a month in addition to $10,000.00 a year in a RRSP.

[28] If this application is granted it is her intention to leave her employment and to stay at home at least for the next year. After that she says she is contemplating furthering her education or perhaps starting a home-based business.

[29] J.M. is a self-employed accountant. His office is in Arichat as is his home. He has no children of his own or other dependants.

[30] The Applicant acknowledges that moving the children to Cape Breton will be "upsetting" to them and will cause them some disruption but believes that they will adapt. She says that they have already met new friends in Cape Breton and both she and the Respondent have extended family members living there.

[31] She also acknowledges that her plan requires a change to the current parenting time that the Respondent enjoys with the children. However, she believes that her plan will provide the Respondent with almost the same amount of time with the children as does the current parenting arrangement but his access will have to be structured in a different way. She proposes that the Respondent's access during the children's March break from school, the children's Christmas holidays and their summer vacation remain unchanged. During the remainder of the year she proposes that the Respondent have the children every long weekend, every Easter weekend and, as is now the case, every second weekend from Friday after school until Sunday evening. She is prepared to drive the children from Arichat to Halifax in order to facilitate that access. She also proposes reducing the child support that she currently receives from the Respondent by approximately $3,000.00 a month in order to enable the Respondent to purchase a second accommodation in Cape Breton, near J.M.'s residence, so that he can exercise access to the children in Cape Breton for extended weekends which would not be possible if his access was exercised in Halifax.

[32] Counsel for the Applicant suggested that if the Respondent's weekend access was exercised in Halifax the children, because of their relatively young ages, could possibly miss some time from school on Friday afternoons and/or Monday mornings in order to maximize their time with their father on his weekend. In addition, she proposed that perhaps one weekend each month the Respondent could exercise extended weekends in Cape Breton (for example from Thursday through to Monday) but she acknowledged that to do that he most likely have to take two half days off from work for travel purposes on Thursday and Monday.

[33] The Court was advised both at a pre-trial conference three months prior to the commencement of the trial and in one of the Applicant's affidavits, that she will not move to Cape Breton unless she has the Court's permission to take the children with her.

THE RESPONDENT'S POSITION

[34] It is the Respondent's position that a relocation to Cape Breton would not be in the children's best interests. Although the parties originally came from Cape

Breton, Halifax(Bedford) has been the only home the children have known and relocating them to Arichat would be an unnecessary disruption in their lives. Moving to Cape Breton would require the children to leave their homes, their neighbourhoods (and neighbours), their friends and classmates and all of the activities in which they take part in Halifax. More importantly they would lose the ability to spend the same amount and quality of time with their father and J.L. that they have been used to.

[35] The Respondent is the Chief Financial Officer of a large regional communication provider with operations in several Canadian provinces including, in particular, New Brunswick and Nova Scotia. His position is second only to the President of the company. His job is demanding and requires a significant time commitment including the need to travel from time to time. Nevertheless, because of his seniority in the company he can, for the most part, manage his schedule around his parenting time with the children. In paragraph 6(j) of their Separation Agreement the parties recognized that their professional responsibilities would require flexibility to the parenting schedule. Even so, it has been a rare occasion when the Respondent has missed his time with the children.

[36] The Respondent has asked the Court not to allow the Applicant to move the children to Cape Breton. He believes that it is important for them to have maximum contact with both of their parents and he believes that can best be accomplished by both parents and the children residing in Halifax. He also proposes that the Court order a shared custody arrangement on an alternating week basis in order to reduce the children's transitions between their parents and therefore, hopefully, the conflict between the parties. Failing that he would like to see the current access arrangements varied so that on his weekends with the children he be permitted to keep the children overnight on Sunday and also each Monday overnight to Tuesday morning.

[37] The Respondent testified that if the Applicant is permitted to move the children to Cape Breton he will use whatever flexibility his superiors will allow him in order to maximize the time he can spend with the children but moving to Cape Breton is not something his company's President or Board of Directors would likely tolerate.

[38] It is also the Respondent's position that whether the Applicant's application is granted or denied it is not in the children's best interests to have to endure seven

to eight hours on the highway every two weeks in order to go to Cape Breton or to see their father in Halifax.

THE LAW

[39] The applicable legislation is found in section 17 of the *Divorce Act*, R.S.C., 1985, c. 3. The relevant provisions are as follows:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> ...
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> ...
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, **the court shall take into consideration only the best interests of the child as determined by reference to that change.**
>
> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.
>
> ...

> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact. (emphasis added)

[40] The leading case with respect to the mobility of children is found in the Supreme Court of Canada decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27 where McLachlin, J. (as she then was) summarized the law at paragraphs 49 and 50 as follows:

> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
>
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
>
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> 7. More particularly the judge should consider, inter alia:
>
> > (a) the existing custody arrangement and relationship between the child and the custodial parent;
> >
> > (b) the existing access arrangement and the relationship between the child and the access parent;

> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[41] The *Divorce Act* therefore directs a two-stage inquiry. The first stage requires the party seeking the variation to demonstrate that there has been a material change in the circumstances of the children since the making of the original custody order and, if the Court is satisfied that such a change has occurred, the second stage requires the Court to consider the merits of the case and make an order that best reflects the interests of the children in the new circumstances (*Gordon*, *supra*, paragraph 9).

ANALYSIS

Stage 1:

A. Has there been a material change in the circumstances of the child since the making of the previous order?

[42] Subsection 17 (5) provides that the Court shall not vary a custody order unless there has been a change in the “condition, means, needs or other circumstances of the child”. Not just any change will suffice. Change of some kind is inevitable. The change must be a material change in the circumstances of the child.

> 12. What suffices to establish a material change in the circumstances of the child? **Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way**: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 **(P.E.I.S.C.).** Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
>
> 13. It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
>
> 14. These are the principles which determine whether a move by the custodial parent is a material change in the "condition, means, needs or other circumstances of the child". **Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them. A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way. Similarly, if the child lacks a positive relationship with the access parent or extended family in the area, a move might not affect the child sufficiently to constitute a material change in its situation. Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child.**
>
> 15. The third branch of the threshold requirement of material change requires that the relocation of the custodial parent not have been within the reasonable contemplation of the judge who issued the previous order: *Messier v. Delage*,

> [1983] 2 S.C.R. 401. If a future move by the custodial parent was considered and not disallowed by the order sought to be varied, the access parent may be barred from bringing an application for variation on that ground alone. The same reasoning applies to a court-sanctioned separation agreement which contemplates a future move. In such cases, the application for variation amounts to an appeal of the original order.
>
> 16. Conversely, an order which specifies precise terms of access may lead to an inference that a move which would "effectively destroy that right of access" constitutes a material change in circumstances justifying a variation application. (See *Wickham v. Wickham* (1983), 35 R.F.L. (2d) 448 (Ont. C.A.), at p. 453; *Wright v. Wright* (1973), 40 D.L.R. (3d) 321 (Ont. C.A.), at p. 324; and see generally on this point *Wainwright v. Wainwright* (1987), 10 R.F.L. (3d) 387 (N.S.S.C.); *Korpesho v. Korpesho* (1982), 31 R.F.L. (2d) 449 (Man. C.A.), rev'g (1982), 31 R.F.L. (2d) 140 (Man. Q.B.).) **Where, as here, the custody order stipulates terms of access on the assumption that the child's principal residence will remain near the access parent, the third branch of the threshold requirement of a material change in circumstance is met.** (Emphasis added) (*Gordon, supra*, paragraphs 12-16)

[43] It could be argued that whereas the Applicant has not yet moved there has not yet been a material change and therefore the prerequisite to any further action by the Court as required by ss. 17(5) of the *Divorce Act* does not exist. A literal interpretation of ss. 17(5) would lead one to that conclusion. However if that is the way the *Act* is to be interpreted a parent in the position of the Applicant would have to first move the children before bringing an application and in so doing may find herself in contempt of the existing court order. A more pragmatic approach would be to consider a proposed plan to move as a change in circumstance. If the Court considered the move to be a material change in the circumstances of the children it may then make an order that would take effect upon the move taking place. Such an approach avoids the risk of the Applicant placing herself in contempt and it also allows her the opportunity to change her mind about the proposed move depending on the court's decision. It would also be an approach that procedurally better serves the interests of the children.

[44] I am satisfied there has been a material change in the circumstances of the parties' children as a consequence of the Applicant's remarriage and plan to move to Arichat. Although Arichat is only a three and a half to four hour drive from Halifax, much of the Respondent's parenting time that he now enjoys would not be possible if the children lived in Cape Breton.

[45] While the Respondent's block parenting time during the summer, March break and Christmas could go on unaltered, his frequent weekday access as well as his weekend access would have to be changed and reduced in order to accommodate such a move.

STAGE 2:

The best interests of the children.

[46] Once satisfied that there has been a material change in the circumstances of the children the court is to embark on a "fresh inquiry" as to what is in the children's best interests. The court should not default to the existing arrangement *(Gordon*, *supra,* paragraph 17) and the court is not to begin with a legal presumption in favour of either of the parties. "The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time. (*Willick v. Willick,* [1994] 3 S.C.R. 670, at p. 688, *per* Sopinka, J.) (*Gordon*, *supra*, at paragraph 17).

[47] Because the *Divorce Act* contemplates individual justice (*Gordon*, *supra*, paragraph 38) each case must be decided on its own facts.

[48] The *Divorce Act* itself is of only limited assistance in guiding the court on how to determine what is in a child's best interest. In *Young v. Young*, [1993] 4 S.C.R. 3, McLachlin, J. (as she then was), in the context of section 16 of the *Divorce Act*, wrote the following beginning at paragraph 15:

> 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. To the extent that contact conflicts with the best interests of the child, it may be restricted. 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. It 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.

> 20. I would summarize the effect of the provisions of the Divorce Act on matters of access as follows. The ultimate test in all cases is the best interest of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child.

[49] After referencing *Young* in *Gordon, supra*, McLachlin, J. wrote at paragraph 25:

> 25. The reduction of beneficial contact between the child and the access parent does not always dictate a change of custody or an order which restricts moving the child. If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move. This said, the reviewing judge must bear in mind that Parliament has indicated that maximum contact with both parents is generally in the best interests of the child.

[50] In determining what is in the children's best interests I find the comments of Osborne, J.A. in his dissent in *Woodhouse v. Woodhouse* (1996), 29 O.R. (3d) 417 at paragraph 89 (and which was referred to favourably by Roscoe, J.A. in *Burns v. Burns*, 2000 N.S.C.A. 1 at paragraph 45) to be helpful:

> "Just as according a presumptive deference to the custodial parent's decision to move may be said to tilt the inquiry too much in favour of the custodial parent, similarly asking the singular question whether it is in the children's best interests that access be decreased tilts the inquiry too much in favour of the non-custodial parent. Framing the inquiry in that way tends to limit the required balancing of relevant factors. The better approach is to determine whether there is a valid reason to decrease access when *all* of the relevant factors (including the custodial parent's decision to move, which is entitled to "great respect") are taken into account. That is to say that both the benefits and detriments of the proposed move must be considered and balanced."

[51] So, what is in the best interests of the parties' two children? I know of no exhaustive list of factors that the court is to consider when trying to determine what is in a child's best interest. Arguably the best attempt to summarize a list of

considerations is found in *Foley vs. Foley* (1994), 124 N.S.R. (2d) 198 where Justice Goodfellow wrote, beginning at paragraph 15:

...

> In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.
>
> 16. Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
>
> 1. Statutory direction Divorce Act, ss. 16(8) and 16(9), 17(5) and 17(6);
>
> 2. Physical environment:
>
> 3. Discipline;
>
> 4. Role model;
>
> 5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;
>
> 6.Religious and spiritual guidance;
>
> 7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;
>
> 8. Time availability of a parent for a child;
>
> 9. The cultural development of a child:
>
> 10. The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13.The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

17. The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question:

With whom would the best interest and welfare of the child be most likely achieved?

18. The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

19. Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any

> real appreciation of such until long after the maturity of the child makes the question of custody mute.
>
> 20. On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[52] The parties' separation in October 2002 resulted from the Applicant's decision to leave the Respondent. Among other things the Applicant felt isolated because the Respondent was too involved in his work and was not taking enough time to spend with her and their two young children.

[53] The Respondent acknowledged his part in the breakdown of the marriage and largely blamed himself. He told a number of family members that he felt that he was a poor husband and father. It seems, though, that he took the separation as a wake-up call and among other things continued with counselling which he began shortly before the parties separated. In addition to seeking help to cope with the anxiety that he was feeling as a consequence of the marriage breakdown, the Respondent also sought help finding a balance between his work and time with his family.

[54] It is probable that had the Court been asked to decide on custody in October 2002, custody would have been granted to the Applicant. She was at that time shouldering the majority share of the parenting responsibilities.

[55] By August 2004 the Respondent had apparently developed enough as a parent that the Applicant signed the Separation Agreement which has governed the care of the parties' children for the past five years.

[56] Among other things the Separation Agreement provides:

> The parties each acknowledge the importance of the other parent to the children;
>
> They are to consult on all substantial questions relating to the children including moves from the Halifax area. Decisions with respect to the children are

to be made with the consent of both parties and neither party is to unreasonably withhold that consent;

Neither party is to do anything that would estrange the children from the other;

The children are to reside primarily with the Applicant and both of the parties have the responsibility for the care, upbringing and disciplining of the children while the children are with him or her;

It is considered a benefit to the children to maintain an ongoing relationship with their father and the parties both expressed a desire to maintain a close relationship between the children and the Respondent; and

The Respondent's access is intended to maintain a meaningful involvement by the Respondent in the lives of the children.

[57] The current parenting schedule enables the Respondent to have the children all or part of eight days out of every fourteen plus block times during the summer, Christmas and other special events.

[58] The Respondent has demonstrated that he takes his role as a joint custodial parent seriously. He keeps himself informed of how the children are doing in school. He has gone to all but one of their Christmas concerts. He and J.L. spend time with the children when they're doing their homework. He has enrolled both children in extracurricular activities and has followed through by taking them to those activities. He coaches his son's hockey team.

[59] There is no question that the Respondent has developed as a parent since 2002.

[60] The Applicant considers herself to be the children's "primary caregiver". She believes that she, more so than the Respondent, ensures that the children's homework is complete. She testified that she attends all of their curriculum and parent-teacher meetings. She says, too, that she arranges all of the children's after school child-care and attends to all of their medical and dental appointments. The Respondent, on the other hand, complains that she does not keep him informed of those appointments.

[61] Since the Separation Agreement was signed in August 2004 both parties have taken an active role in the lives of their children and jointly provided for their care, nurturing and education.

[62] To refer to the Applicant now as the "custodial parent" would be misleading as it would fail to give the Respondent sufficient credit for the kind of parent he has become. It is true that the children are with their mother more days or part days than they are with their father and it is also true that she has been responsible for more of the mundane affairs of the children as described in *Burns, supra*. To that extent it would be accurate to consider her as the primary caregiver to the children and in that role her view with respect to the relocation of the children is entitled to great respect. Nevertheless, having considered the factors listed in *Foley, supra* and all the evidence presented I find that both the Applicant and the Respondent are equally capable of parenting the children.

[63] Both parents are able to meet the physical and other needs of the children and the children are extremely close emotionally to both their mother and their father. I believe they also have a strong attachment to J.L. and may over time become more than just friends with J.M..

[64] The current custody arrangement allows the children to frequently see both of their parents. Except for block time during the summer, Christmas or March break they rarely go more than a couple of days with one parent before seeing the other. Second perhaps only to a shared custody arrangement such as that proposed by the Respondent, few arrangements would do more to maximize the children's contact with both of their parents.

[65] The existing custody agreement has worked well for the children. They have thrived under it.

[66] The views of the children are one of the factors to be considered by the Court. It remains, however, for the Court to decide on the parenting arrangements - not the children. See *Poole v. Poole*, 2005 N.S.S.F. 7.

[67] Both parties presented affidavit evidence from witnesses supporting their positions. Those witnesses included family members, friends, fellow employees, colleagues and caregivers. Many of those affidavits, as well as the affidavits of the

parties themselves, included statements and reactions attributed to the children. Such evidence presented by the Applicant's witnesses was generally contradicted by the evidence of the Respondent's witnesses. I found all such evidence to be unreliable and have given it no weight.

[68] During the course of these proceedings Ms. Marika Lathem, B.S.W., M.S.W. was retained by the Respondent to prepare a custody and access assessment. Her report included a reference to the children's wishes. According to Ms. Lathem the children did not want to move to Cape Breton and also "had significant anxiety and worry about the move". She said "the children repeatedly expressed a strong connection to the community they lived in, the friends they have and the activities they engage in." Further, she said, "most profoundly they spoke of deep attachment to/love of their father and an affective bond with [J.L.]." Ms. Lathem also concluded that both parents are equally competent and able to parent the children and strongly urged that the wishes of the children not to move to Cape Breton be supported by the Court.

[69] Counsel for the Applicant expressed numerous objections to the methods used by Ms. Lathem including her decision to interview both children at the same time, reminding the children what they said when they were interviewed at the home of their father before allowing them to express their views when interviewed at the home of their mother and the timing of her interviews relative to when the Applicant informed the children of her desire to move to Cape Breton.

[70] While I do not agree with all of the objections raised I do have some concerns. The children were interviewed very soon after the Applicant informed them of her proposed move (through no fault of Ms. Lathem) and there is at least the possibility that the children's reaction was an emotional response that may become more moderate over time.

[71] Also, while I understand Ms. Lathem's decision to interview the children together (it was their wish to remain together and Ms. Lathem wanted to maximize their comfort level) there is some reason to believe that both of the children may have been influenced by the answers given by the other.

[72] I am also concerned about the young age of the children (11 and 8).

[73] I choose to give little weight to the evidence of the children's wishes as contained in Ms. Lathem's report but I accept they have a strong attachment to their father.

[74] The Supreme Court has directed that the custodial parent's reason for moving is to be considered only in the exceptional case where it is relevant to the parent's ability to meet the needs of the children.

[75] The Applicant's plan to move to Cape Breton was not made because it would enhance her ability to meet the needs of the children. She wants to move to Arichat to live with her husband. Her motive is understandable.

[76] The Applicant said that after taking a year off she may take some courses but again, that is not her reason for moving.

[77] There will be no economic benefit to the children as a result of a move.

[78] The Applicant said that she wanted to return to Cape Breton where her mother, grandmother and siblings live. I'm sure she enjoys being closer to her family but I am not convinced that family ties has anything to do with her plan to move to Cape Breton. She has lived in the Halifax area for approximately 19 years and it was not until she dated J.M. for a number of years that she decided that she wanted to return to that area of the province. Before that (in 2003) she wanted to move to Ontario.

[79] The Applicant emphasized the time the children will get to spend with the many family members that both she and the Respondent have in Cape Breton. The Applicant's mother, grandmother and brother live in Dundee and her sister lives in Port Hawkesbury. The Respondent's parents live in Sydney. The children might get to spend more time with extended family if they lived in Cape Breton - at least with members of the Applicant's family. It is less likely that the children will see much more of their paternal grandparents given the distance between Sydney and Arichat. Both of their paternal grandparents have health problems and the children's contact with them would likely to take place during the Respondent's time with the children.

[80] The Respondent gave evidence that the children are extremely close to his brother who lives in Sackville (just a few minutes from the Respondent's home in Bedford).

[81] Regardless of the advantages offered by living in Cape Breton, moving there would be disruptive to the children. The weekday access that they now enjoy with their father as well as any spontaneous access that now occurs because of the close proximity of their parents' homes would not be possible.

[82] Their time with their father on alternate weekends would likely be eroded due to his or their travel time between Halifax and Cape Breton which can only be mitigated in part by the Respondent taking additional time off work. The children routinely missing time from school is not a realistic solution.

[83] The children's move to Cape Breton would eliminate any possibility of the Respondent continuing to coach his son's hockey team and would reduce the occasions when he can attend the children's other extracurricular activities.

[84] The children have many friends that they have met at school and in the neighbourhoods of their mother and father. Moving to Arichat will mean losing contact with many if not most of those friends in spite of their parents' best efforts to maintain those relationships.

[85] One should also not forget that in just a few short years the social circles of the children are likely to expand and it would be normal for the children to place more importance on the time they spend with their friends and less on the time they spend with family. It is reasonable to assume that one or both of the children may grow resentful of the time they spend travelling between Cape Breton and Halifax and may want to forego access to spend more time with their friends. Should that happen the children's relationship with their father will suffer. That would be less of an issue if the parties continue to live in the same general area.

CONCLUSION

[86] Realistically there are four possible outcomes resulting from the parties' applications. The Court could grant the Applicant's application and allow her to relocate with the children to Cape Breton and order a restructuring of the

Respondent's access. The Court could reject the Applicant's application to relocate the children and grant primary care to the Respondent. This option is not seriously pursued by the Respondent and the Applicant has made it clear that if she is not allowed to move the children to Cape Breton then she has no intention of moving.

[87] The third possible outcome would be to deny the Applicant's request to move the children but order a shared custody arrangement as sought by the Respondent.

[88] The final option is to dismiss both applications in favour of the current joint custody arrangement.

[89] I have concluded that moving the children to Cape Breton would not be in their best interests. Halifax is the children's home.

[90] The Applicant loves the children and she's demonstrated her ability to parent them. If the children *had* to move to Cape Breton with their mother they would probably learn to adapt. Cape Breton offers schools comparable to those found in Halifax as well as recreational facilities that the children could use. There is also the benefit of having other family members nearby. However, none of that outweighs the importance of their relationship with their father at this time of their lives.

[91] The Court is charged with the responsibility of determining what is in the children's best interests. This is not a contest between Halifax and Cape Breton. My decision would be the same if the parties and their children lived in Cape Breton and the proposal was to move the children to Halifax.

[92] What is best for the children is the parenting arrangement that currently exists.

[93] The Respondent's proposed shared custody arrangement was suggested as a means of reducing the interaction between the parties and therefore their conflict. I believe that much of the conflict that currently exists is as a result of the parties' Court applications. With those behind them the situation will likely improve. Further, the shared custody arrangement proposed by the Respondent is not required as a consequence of the change in circumstance referred to earlier. It would also likely only increase the animosity between the parties because of the Applicant's opposition to it. It would work best only if the parties both agreed to it.

[94] I cannot conclude this decision without commenting further on Ms. Lathem's custody and access assessment.

[95] Ms. Lathem recommended that the Applicant's request to move the children to Cape Breton not be granted. She also recommended that the parties share the parenting of the children equally.

[96] Mr. Martin Whitzman testified on behalf of the Applicant. He gave evidence of how custody and access assessments should be performed. He also addressed the issue of children's wishes assessments but acknowledged that he was not an expert in that field. At the risk of oversimplifying Mr. Whitzman's evidence he testified that there was no universal set of guidelines for the conducting of custody and access assessments but there were "best practice standards" that should be followed. He expressed his opinion as to what he considered to be the best method to follow when performing a custody/access assessment, a practice which he has developed over years of experience. He acknowledged that other assessors may have methods that are different from his which may nevertheless be equally supportable.

[97] Interestingly, during his cross-examination he said that when he met with the parties last year he was hired to try to facilitate an agreement between them and to offer his advice. He was unable to get them to agree. After emphasizing that he did not conduct a custody and access assessment he said it was his advice to the Applicant that she not move the children. He said it seemed to him that the children were doing well and he recommended against doing anything that might not work as well unless there was a very good reason for doing so.

[98] Using the foundation laid by Mr. Whitzman's evidence counsel for the Applicant raised a number of objections to Ms. Lathem's report and implored the Court to assess the merits of her client's application without regard to Ms. Lathem's opinion. I do not share all of the concerns raised by counsel and although I found Ms. Lathem's report to be of some assistance, my conclusion as to what is in the children's best interests would have been the same had that report not been included in the evidence. The same applies to Mr. Whitzman's evidence of his advice to the Applicant last year.

[99] The advantages to the children that result from them remaining in Halifax including having frequent contact with both of their parents far surpass the

importance of them remaining in the primary care of the Applicant should she move to Cape Breton. The terms of the parties' Agreement signed in 2004 apply as much today as they did five years ago.

[100] The Applicant's plan to move to Cape Breton does not put the needs of the children first. Instead it addresses the wishes of the Applicant and J.M.. The children and the Respondent are expected to adapt.

[101] If I have any concerns about the Applicant's parenting it is that she does not seem to place nearly as much importance on the Respondent's relationship with the children as she should or as much as she said she did in the Separation Agreement. That was demonstrated by her plan to move to Ontario in 2003, her apparent unwillingness to drop the children off at the Respondent's residence (he has lived in his current home approximately two years and the Applicant has yet to drop off the children at his house and in fact does not know which house in Glen Arbour belongs to the him) and her proposed move to Cape Breton which was made, in my view, without the Applicant and/or J.M. considering all other possible options first. According to the evidence the Applicant never asked J.M. if he would move to Halifax and he never offered. It was J.M.'s evidence that he would not consider moving to Halifax even if it meant that the children did not have to move. I would have thought that they would have at least considered other possibilities before putting the children and the Respondent through this ordeal.

[102] For all the reasons stated the applications of both parties to vary the custody and access provisions of the Corollary Relief Judgement are dismissed. I assume as a consequence of this decision the Applicant will not be relocating to Cape Breton but if she does then primary care of the children will then be given to the Respondent. I would then be prepared to hear further evidence and submissions with respect to the Applicant's access.

[103] At the present time the Applicant is taking the children to Cape Breton approximately every two weeks which requires them to be on the highway a total of seven to eight hours each round trip. The frequency of those trips is not in the children's best interests. It requires them to travel too often and forces them to miss organized extracurricular activities and takes away from the time that they are able to spend with the Respondent because of his involvement in some of those activities.

[104] I do not intend to include in my order at this time a specific provision stating when or how often the Applicant can take the children to Cape Breton but I am prepared to include in my order a provision that will permit the Respondent to have the travel issue reviewed by me before the end of January, 2010 should the same travel pattern continue. A restriction could possibly be ordered as a "term and condition" of custody. It is the Court's hope that the parties will be able to reach their own agreement on the frequency of the children's trips to Cape Breton.

[105] The parties are reminded too that their Separation Agreement requires that they "share any information regarding the children including information as to health, education, child-care, recreational activities and the like". With that provision in mind both parties should be advising the other of any upcoming medical and dental appointments and any scheduled recreational activities in which the children take part including lessons, concerts and hockey games.

[106] I direct that counsel for the Respondent prepare the required order. Unless the parties are able to agree I am prepared to hear further submissions on the issue of costs on a date to be scheduled.

J.