SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: D.L.P. v. S.J., 2010 NSSC 107

Date: 20100317
Docket: SFHMCA-028963
Registry: Halifax

Between:

D.L.P.

Petitioner

v.

S.J.

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	March 15 and 16, 2010, in Halifax, Nova Scotia (oral decision: March 17, 2010)
Written Decision:	March 25, 2010
Counsel:	Krista Forbes, for D.L.P. G. Douglas Sealy, Q.C., for S.J.

By the Court:

Introduction

[1] This application began as the father's application for primary care of his daughter, S. He filed his application in January 2009 and withdrew it on March 12, 2010 when his counsel communicated to the mother's counsel that he was not going to pursue his claim to become S's primary residential parent. After the father filed his application, the mother responded in August 2009, seeking retroactive and prospective child maintenance and costs. All applications proceed under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

[2] As a result of the withdrawal of his initial claim, S shall have her primary residence with her mother. Withdrawing this claim left me to deal with the issues of:

a. the child's custodial designation;

b. the child's access to her father;

c. the mother's claim for retroactive child maintenance;

d. the mother's claim for prospective child maintenance pursuant to sections 3 and 7 of the *Child Maintenance Guidelines*, N.S. Reg. 53/98; and

e. the mother's claim for costs.

[3] Through the course of the father's cross-examination some matters were resolved and, based on his consent, I direct that the final order state that the father may request and obtain information regarding the health, education and general well-being of S, including daycare, school and medical reports, and medical, educational and religious records directly from the school, hospital or other institution or person. Where the father is unable to obtain information, the mother shall provide it to him. The order shall also state that neither parent shall make disparaging comments about the other or discuss adult issues in the presence of the child.

The child's custodial designation

[4] The mother has not contested that there's been a material change in circumstances since the last order was granted in July 2004. According to Justice McLachlin, as she then was, in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) at paragraph 13, my task is to make a fresh inquiry into the child's best interests, having regard to all relevant circumstances relating to her needs and her parents' abilities to satisfy them.

[5] S is seven and one-half years old. She is newly a big sister to a half-brother born to her mother and her mother's husband, and to a half-sister born to her father and his wife. Neither her

mother nor her step-mother is currently at work. Her mother is usually employed and S attends an after school program when her mom is working. S is active in dance and soccer.

[6] S is in Grade Two and has a good attendance (evidencing her good health) and her report card shows that she's progressing successfully though Grade Two. Standardized testing done throughout the province shows she is competent, if not proficient, in the areas tested. By times, she has experienced difficulty in adapting to new circumstances, according to her father. There are no adverse comments on her report card about her social interactions. The affidavit of a daycare provider who has known S for four years, describes her as "bright, happy and well-behaved" and "full of life". The social skills she demonstrates at daycare indicate that she has empathy for other children - including them in activities and considering their feelings. As a seven year old, she's just learning to write, to spell and to punctuate. I mention this specifically because the distance at which she lives from her father makes this relevant to email communications.

[7] There's no evidence S has particular health, emotional, educational or other needs. Her father suggested S needed counselling to assist her in dealing with a multiplicity of "father figures" in her life, but he did not pursue that suggestion in argument and I am not persuaded that S has any requirement for counselling. In the six years since separation, S's mother has been involved in two significant relationships. The second of those two relationships is her current marriage. The father's concerns about S's dental health have not persisted.

[8] Custodial decisions relevant for S are the garden variety of decisions that arise for every child: which school, which daycare, what religious upbringing, what discipline. S does not experience conflict as a positive aspect of her life. I have the mother's evidence that S has been exposed to conflict between her parents. Particularly, conflict between the parents about the father's phone calls with S meant that she went without phone contact with her father for nine months. During the same time, there was no face to face contact between S and her father. Parental conflict has had negative consequences for S.

[9] S's father asks to be joint custodian, saying he feels "powerless" and "uninvolved". He wants equality of participation in S's life.

[10] A parent's feelings are not relevant in determining parenting arrangements. The only consideration I am to have in determining parenting arrangements is S's best interests. At paragraph 16 of the Supreme Court of Canada's decision in *Young,* [1993] 4 S.C.R. 3, then Justice McLachlin said:

> 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.**

The emphasis added to that quotation is mine. *Young* is a decision under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, which I believe is equally applicable to cases under the *Maintenance and Custody Act*. Section 18(5) of the *Maintenance and Custody Act*, which governs this application, states that the welfare of the child is the paramount consideration, a variation on the language of best interests.

[11] When asked how joint custody would work "on the ground", the father said he would participate in making decisions, such as choosing child care providers or extra-curricular activities, by looking at the internet and the mother would let him know what's closer, what has the better teachers and this would allow them to work together. There is scant evidence of the parents "working together" and far more examples of dissonance, failure to appreciate the other parent's viewpoint and conflict.

[12] The mother opposes the request for joint custody, saying she is the primary care-giver and has been for most of S's life, the father has been in British Columbia for approximately three years, she knows the local circumstances and she is in the best place to make the right decisions for S.

[13] The father doesn't offer any evidence of what his participation in decision-making would offer S, only that it would be more emotionally satisfying for him. The evidence I have is that the mother is better positioned, by proximity and historic involvement, to make the most appropriate decisions for S. This arrangement will also avoid the conflict that has been so detrimental for S. Accordingly, I order that the mother shall have sole custody, care and control of S.

[14] There was discussion about consultation with regard to decisions. Ultimately, sole custody means that the sole custodian exercises final decision-making authority, regardless of whether there is notification or consultation. With regard to exercising her custodial authority, the final order should state that the decisions where the mother shall have sole authority are decisions relating to health care, religious upbringing, education, discipline, significant changes in the child's social environment and making changes to the child's appearance (which includes tattoos, piercings and haircuts). If emergency health care is required while S is with her father, he shall authorize that treatment and immediately notify the mother.

[15] Day-to-day decisions regarding S's care shall be made by the parent who is with S at the time. If any decision that is within the mother's sole authority is required while S is with her father, he shall immediately notify the mother and she shall make the necessary decision.

The child's contact with her father

[16] The father has asked for access if and when he is in Nova Scotia. He suggested that if he happens to be in Nova Scotia, that S would divide her time equally between her parents. This suggestion was without context - whether the father would regularly come to Nova Scotia, when

he would come to Nova Scotia, how long he would stay, where he would stay. Without this context it is difficult to assess how this proposal would work for S.

[17] The mother has proposed there be an opportunity for access if the father, his wife or his mother, is in Nova Scotia. The father hasn't objected to the terms of access in Nova Scotia as outlined by the mother, with one exception. The exception related to whether the father was personally required to transport S to and from her mother's home during visits in Nova Scotia. I accept his concern in this regard and agree with his suggestion that he need not personally be the chauffeur for visits, but he should be responsible for providing appropriate transportation for S from and to her mother's home at the beginning and end of visits, unless the parents have agreed to another location. To put that in context, "appropriate transportation" means that S's transportation is provided by someone she knows.

[18] The terms of access in Nova Scotia suggested by the mother and accepted by the father shall be incorporated into the final order. Specifically, the child shall use an appropriate booster seat during the visits, the father shall provide thirty minutes notice to the mother if he is unable to visit and visits which are missed (whether because of the father's inability to attend, the child's illness or inclement weather) shall be forfeit. In no case shall access be exercised where it might be detrimental to the health or physical safety of the child. The father shall give the mother his local address and telephone number and identify locations where access is intended to be exercised during his visits.

[19] There is the matter of access between S and her father in British Columbia. S has not visited British Columbia since 2008. She did not see her father in 2009. While the mother would have allowed contact in Nova Scotia, she neither offered this nor did the father request it. Since S was last in British Columbia, her father has moved into a new home in a new community where he, his wife and their child live with his wife's extended family. While this house is large, there was no evidence how many people live there, who they are, and how familiar they are to S. The father says he and his wife live in a basement suite in his mother-in-law's home. He described this as "Over 1,000 square feet. I store my tools in the garage. It has two bedrooms - one for parents, one for kids. It's nicely set up. There's a place for play, it's very safe."

[20] While described as a suite, the father's description made no reference to bathroom or kitchen facilities, so I am left uncertain whether S would be living in community with the family upstairs or in a self-contained home in the basement. I return to my questions of how many people live there, who they are, and how familiar they are to S.

[21] The mother asks that I phase in access in British Columbia, starting with two weeks in each of 2010 and 2011, three weeks in each of 2012 and 2013, and four weeks in 2014 and beyond. S will be twelve at the end of the summer of 2014 and I'm told that is the age at which an airline will allow her to travel on her own. Because she is being required to travel from Halifax to Vancouver for her time with her father, I do order that her travel be accompanied until she is twelve.

[22] To allow S to adjust to time with her father before she travels to British Columbia, I make the following order in terms of S's access with her father during the summer months:

a. This summer (2010) - S shall spend two weeks with her father in Nova Scotia, followed immediately by two weeks in British Columbia;

b. Summer of 2011 - S shall spend ten days with her father in Nova Scotia, followed immediately by three weeks with him in British Columbia;

c. Summer of 2012 - S shall have one week with her father in Nova Scotia, followed immediately by four weeks with him in British Columbia;

d. Summer of 2013 and beyond - S shall have four days with her father in Nova Scotia, followed immediately by four weeks with him in British Columbia.

The father says that S has demonstrated behavioural problems during her visits in British Columbia. This time of adjustment with her father will ensure she is comfortable with him before she travels so far from home.

[23] In every year I've provided for an adjustment period for S with her father in Nova Scotia. This may include her step-mother and paternal grandmother: it must involve her father. While he describes a large extended family in British Columbia, the father is the person with whom S has her primary relationship. He is the reason she is going to British Columbia and, especially once he realizes his plan to return to work, he may not be present every day. It is important that this adjustment period involve meaningful time for S to be with her father to establish or re-establish the bond with him as the person primarily responsible for meeting her daily needs, before she is swept into the busy family environment in British Columbia.

[24] The mother made a proposal for arranging summer access which I accept. By March 15 of each year (except this year, since that date has already passed, when the deadline will be March 25), the mother will email the father with any information she has about S's summer schedule. Otherwise, the father shall provide the mother with his intended summer access dates by April 1 each year. If the parents are not able to agree on specific summer dates, access shall commence on August 1. The father shall be responsible for all costs associated with summer access. Access is conditional upon return airfare purchased before S leaves Nova Scotia, proof of purchase and an itinerary to be provided to the mother seven days before the commencement of the access. I make this order to address concerns which have arisen in the past when the child was not returned to Nova Scotia as the parties anticipated, if not agreed. The father shall be responsible for accompanying the child during her travel, unless the parents agree on an appropriate accompanying chaperone. During S's time with her father (in Nova Scotia and in British Columbia), she shall have brief telephone calls with her mother. These calls won't exceed ten minutes. The calls will occur three times each week and be scheduled when access dates are fixed. The father shall ensure the calls are made as scheduled.

[25] S must be returned to Nova Scotia at least 72 hours before school starts so her mother has time to prepare her for the return to school. The parents must appreciate that S is returning from a distance of four time zones and she will need to adjust her schedule before school starts. This must be kept in mind by the father in scheduling his access. If the parents have not agreed on access and it starts on August 1, access may be curtailed by the requirement that S return to Nova Scotia at least 72 hours before school starts.

[26] The father has not asked for any information about S. Regardless, I am ordering that certain information be provided by the mother to him. The mother shall:

1. Provide the father by March 31, 2010 with the name, address, telephone and fax number and any email address for S's doctor and dentist in Nova Scotia;

2. Provide the father by March 31, 2010 with the name, address, telephone and fax number and website address for S's school and her daycare (if this is known, recognizing that the mother is currently on maternity leave). Any time this information changes, the father is to be informed within seven days of the change;

3. Provide the father, within seven days of any registration, with copies of any registration documents completed to register S for school, activities, with a doctor or dentist. S's surname must be registered using the maiden name of the mother and the father's surname;

4. Provide the father, by email on the last Friday of every month, starting on March 26, 2010, with an update email about what has happened with S during the preceding month. This email will address issues of education, health, recreation, religion, childcare, social, behaviour and development. This will assist in keeping the father informed about S's circumstances. It supplements the information the father has directly available. It does not replace his obligation to inform himself;

5. The father shall be notified at least 48 hours in advance of any parent teacher meetings, so he can make arrangements to participate in them by telephone;

6. S and the father shall have contact with each other by email. At her age, I don't anticipate this will be frequent or lengthy: once or twice each week a message would be exchanged. An exchange means that a message is received and a response is sent. This may be initiated by the father or by S. The mother is expected to monitor this to ensure communications are age appropriate. At her literacy level, I anticipate that S may need help reading or composing messages; and

7. The father may send letters, cards and packages to S. Again, the mother is expected to monitor this.

[27] The obligation on the mother to inform the father of events in Nova Scotia does not remove the obligation from the father to inform himself. He's being given contact information so that he can use it. Since the mother is to provide updates only once a month, it will be for the father to keep himself up to date on a more frequent basis.

[28] The mother wanted additional conditions on S's access: notification if S is staying overnight at some address other than her father's and provision of a contact number and notification (with a requirement of her consent) if S is removed from Nova Scotia or British Columbia during her visits with her father. Here, in particular, the father makes his argument about parental equality. The mother explains her desire for notification of alternate address access by referring to an incident between S and her cousin, where the cousin tried to persuade S to participate in sex play. The father advances no reason, related to S, for seeking reciprocal treatment. His goal is equality of treatment for himself.

[29] It is appropriate that the father notify the mother where S will be, if she is staying overnight at some home other than the father's during S's time with him. Similarly, if S is spending time with her father, his wife or his mother in Nova Scotia or with her father in British Columbia, and she is taken outside of the province, the mother shall be notified and she shall provide prior written consent for her removal from that province. Her consent shall not be unreasonably withheld. When either parent takes S out of the province, the other parent shall be provided with notice, an itinerary and a contact number where S can be reached. Both parents should know where S is when she is travelling.

[30] The parents have agreed that the father will have access to S via Skype and they have agreed on the terms of this contact. There was discussion about scheduling phone access. The father wants S's schedule, so he can try his luck at speaking with her, calling at different times. The mother wants a schedule so that the calls come at predictable times. There is a four hour time difference between S's home and that of her father.

[31] Approaching this from the perspective of the child's best interests, it is in S's best interests that she has regular contact with her father. The father has raised the issue of S's "self-image". A fundamental building block of a child's sense of self-worth is the attention of a parent, for what does it mean if our parents don't love us? For a child, a parent's dependable presence is a demonstration of that love.

[32] I have found that conflict is not in S's best interests. It is a notable feature of this case that conflict has arisen over phone calls. Conflict between the parents deprived S of phone contact with her father for approximately nine months. The best way to ensure dependable contact and to avoid conflict (both goals serve S's best interests) is scheduling phone calls as suggested by the mother: the father shall have telephone access with S once per week. This shall occur on Wednesday at 7 p.m. AST. The Wednesday call may be moved to Tuesday or Thursday in the future, depending on S's extracurricular schedule, with notice to the father. The call shall last approximately fifteen minutes, with the father responsible to time and end the call.

Both parents shall demonstrate some flexibility with regard to scheduling missed phone calls: the goal shall be to have phone calls occur as scheduled.

Retroactive child maintenance

[33] Retroactive maintenance is governed by the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37. A "retroactive" award is one which addresses a historic period when there was no prior agreement or order or which varies the terms of a prior agreement or order after the fact, rather than on a prospective basis.

[34] According to paragraph 99 of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, when determining whether it is appropriate to make an award retroactively, I am to consider: the reason for the recipient's delay in making the claim, the payor's conduct; the child's past and present circumstances; and whether an award made retroactively would result in hardship. All of these factors must be considered and none is dispositive on its own.

[35] The July 2004 order required the father to pay the mother $200.00 each month as child maintenance and a contribution to child care costs. That amount was to be reviewed in September 2004. There is no subsequent order for maintenance.

[36] The parties gave evidence of subsequent discussions about maintenance. The mother says that in September 2004, the parents agreed the father would pay $250.00 each month and, when S's child care costs increased in 2007, they further agreed he'd pay $350.00 each month. The father says he was paying $250.00 per month in 2005 and that he told the mother in 2007 that he'd "pay no less than $250.00 per month and aim for $350.00 per month". Payment of the greater amount, he was clear, would depend on his financial circumstances. Both versions are somewhat consistent with the payments the father made to the mother in 2007, as documented in her June 2009 affidavit. There is no documentation or other corroboration to support either parent's version to the exclusion of the other's. To the extent that they have no shared understanding, there was no agreement.

[37] The mother's affidavit filed on June 1, 2009, first mentions her retroactive maintenance claim, seeking a retroactive award for 2007, 2008 and 2009. In this affidavit, she details payments owing from 2007, when she says the father paid about thirty percent of the maintenance he owed. In 2008, it is her evidence that he paid less than thirty percent of the maintenance he owed. These calculations are based on amounts the mother says the father owed. The mother received no maintenance payments from the father after July 2, 2008. She did not take any steps to pursue this money until the father sought to change the child's primary residence. The mother filed her application to address retroactive maintenance in August 2009. I find she was prompted to do this by the father's application to change the child's primary residence as her application comes only in response to his.

[38] Neither in her affidavit nor in her testimony did the mother explain her delay in bringing her claim for retroactive child maintenance. She has offered no evidence that the child, in her past or present circumstances, has suffered from her father's failure to pay or experienced any sort of impact from it. Finally, there is no evidence from the mother that there would be any hardship from a failure to order the father to pay a retroactive award.

[39] The father has offered no evidence with regard to his conduct and whether it was blameworthy. He says "I am not in any position to pay arrears in child support if they are sought by the Respondent nor do I think they are appropriate". His comments are a conclusion, they are not evidence. Whether the father is in the position to pay a retroactive amount and whether it is appropriate that he do so are conclusions for me to reach based on evidence, not on the father's conclusion offered in lieu of evidence.

[40] I have none of the evidence I need to exercise the discretion to award retroactive maintenance. While I have the father's tax returns from 2007, 2008 and 2009, they alone don't dictate that there should be a retroactive payment of child maintenance. The determination that there should be a retroactive award of maintenance is made after considering the four factors identified by the Supreme Court of Canada in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* and I have no evidence about those. Accordingly, I cannot exercise that discretion as I should and I dismiss this claim.

[41] I do note that this is a frequent problem. Very often I see applications for retroactive support or maintenance where I am simply provided with historic income materials or tax returns and asked to make a retroactive award. Historic disclosure is not all that is needed to justify making a retroactive maintenance award. The Supreme Court of Canada dictates how I am to exercise my discretion in making a retroactive award and I cannot make such an award in the absence of the requisite evidence. The Supreme Court of Canada directs me to balance the competing principles (certainty and flexibility) while respecting the core principles of child support. This can only be done where the parties introduce the relevant evidence.

Prospective child maintenance - section 3

[42] In argument, the mother asked that I impute annual income of $59,496.00 to the father and require him to pay $555.76 per month in maintenance, pursuant to section 3 of the *Child Maintenance Guidelines*, as applied to a payor living in British Columbia. This is the amount the father earned in his most profitable year. From the father, I have his testimony that he has no current earnings. While his tax returns show him as "single" (only his most recent return notes his new relationship) and claim the GST credit, he has not disclosed the income he receives or anticipates receiving from that benefit.

[43] The father was involved in a car accident in November 2008. He says he has a herniated, slipped disc in his lower back and a lot of muscle tear in his upper back and neck. He says his back is very sore and that he can hardly bend without pain. He claims he can hardly sleep at night. He says his legs go numb and he has a hard time functioning in his daily routine. After

his accident he was immediately told that he should do no heavy lifting, bending or stretching. Six months later, he had a CT scan which showed tear and impingement on nerve root. The father says his sleep patterns are off and that he sleeps on the floor or a chair or wherever he can be comfortable. He said he cannot sit through an entire day.

[44] The father has attached three letters as exhibits to his affidavit. These are not expert reports and their authors were not available for cross-examination. The letters are consistent in saying that the father could not work as a concrete finisher (in October 2009) or do substantial work as a concrete finisher (in January 2010). The mother points out that the letters do not say the father cannot work at all or even that he cannot work to some degree as a concrete finisher. The most recent letter says that the father cannot do substantial work as a concrete finisher which suggests the father is capable of some work as a concrete finisher.

[45] The father has acted in sports commercials in the past. He attempted auditions since the accident but says they fell through because he was too out of shape. Other than that, he gave evidence of no other efforts to find work. He has not pursued any sort of financial compensation for his injury or the loss of income resulting from it. He says his focus is on returning to health. This focus appears to be undisturbed by financial concerns. He has not given evidence that he is in any debt. He is provided with a home by his wife's family, a vehicle by his own family and the $5,000.00 expense associated with this trip was provided to him by an unnamed benefactor.

[46] My authority to impute income comes from section 19 of the *Child Maintenance Guidelines* which provides, in part:

> 19 (1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the parent is **intentionally under-employed or unemployed**, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or **health needs of the parent**;
>
> (f) the parent has **failed to provide income information** when under a legal obligation to do so;
>
> (g) the parent **unreasonably deducts expenses** from income;
>
> Reasonableness of expenses
>
> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

[47] I have emphasized those portions of the section to which the mother referred. Her main argument related to s. 19(1)(a). She did note that the father failed to provide his financial

disclosure until less than two months before the application was heard, though it was apparent his information was required as soon as Justice O'Neil rendered his decision in a related application: *Pitts v. Noble*, 2009 NSSC 325. The father is self-employed and note was also made, though not pursued through cross-examination, that the father may have deducted expenses unreasonably in his self-employment.

[48] There was no evidence that the father is disabled from all employment. He has only sought employment in one field. He has restricted his employment search to seeking work in commercials. There is no evidence that he has sought any employment for which he might be otherwise suited.

[49] In imputing income to the father, I need some basis on which to fix an alternate amount of income. In her brief, the mother argued that I should impute the amount of $30,000.00, but she did not suggest a basis for this amount. In 2008 the father worked for ten months prior to his accident. His earnings for that ten month period were $22,600.00. The father suggests I extrapolate this amount to twelve months and fix that as his income for the purpose of child maintenance. Extrapolated to twelve months of earnings, his 2008 income equals annual earnings of $27,120.00. Alternately, the father suggests I use the average of his earnings in 2006, 2007 and 2008. This amount is $28,537.66.

[50] Of the two suggestions, the latter approach, which recognizes a very good earnings year and a year of negative earnings, is a more accurate reflection of the father's earnings experience. Based on the father's intentional unemployment, ss 19(1)(a) and (f) of the *Child Maintenance Guidelines*, I impute an annual income of $28,537.66 to the father and I order child maintenance based on that amount. This amount should be reflected in the recitals to the final order. Using the simplified tables for British Columbia, his monthly payment of child maintenance will be $266.00, beginning the first day of January 2010. Payments will continue on the first day of each month thereafter. If the father commences any claim for compensation arising from his injury, the child support I have ordered shall be payable from compensation owed to him.

Prospective child maintenance - section 7

[51] The mother makes a claim for a contribution to S's child care expenses. Such a claim is governed by section 7 of the *Child Maintenance Guidelines*. The preamble to this section states that in an application for child maintenance I may provide for some contribution to a special expense "taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation". In determining whether the father should contribute, I first want to know the extent of the expense.

[52] Calculating the expense means considering any subsidies, benefits, income tax deductions or credits relating to the expense, according to s. 7(3) of the *Child Maintenance Guidelines*. Those *Guidelines* also state, in s. 7(2), that the guiding principle in determining the

amount of an expense is that the expense is shared by the parents in proportion to their respective incomes.

[53] I estimate the pre-tax daycare expense for S this year will be approximately $1,700.00. She will spend one month in daycare this summer (after her mother returns to work and before her time with her father) at a cost of approximately $600.00 and four months in after-school care at a cost of $275.00 per month. By virtue of her age, a maximum expense of $4,000.00 may be deducted from the mother's income. Without having any specific evidence, I assume the mother's income is less than her husband's, so the *Income Tax Act*, R.S.C. (5th Supp.), c. 1, requires she deduct this expense. This year, the mother's income is approximately $30,000.00 based on her maternity leave Employment Insurance benefits, the date she intends to return to work and her salary. Her marginal tax rate will be approximately twenty-four percent. Accordingly, this year the child care expense deduction will save her approximately $408.00, meaning the after-tax cost of child care will be $1,292.00.

[54] I have imputed income of $28,537.00 to the father. The mother will have income of $30,000.00 this year from Employment Insurance benefits and her earnings. If the after-tax cost of child care was proportionately divided between the parents for 2010, the father would be required to pay 49% of the after-tax child care cost. This calculates to an annual payment of $633.08 or monthly payments of $52.75.

[55] According to s. 7(1) of the *Child Maintenance Guidelines*, it is in my discretion whether to order the father contribute to this and any other s. 7 expense. In determining whether he should, I am to consider the reasonableness of the expense in relation to the means of the parents. I have ordered the father finance all costs associated with S's access. I am not willing to add the additional burden of contributing to S's child care cost. It is a necessary expense and one which the mother has afforded, largely without financial assistance from the father. I prefer the father dedicate his means to access with the child.

Costs

[56] There is no order pursuant to Rule 5.17 of the *Nova Scotia Civil Procedure Rules* (1972) exempting the father from an award for costs. So, costs are considered as they would in the normal course. Justice MacDonald outlined the general principles applicable to costs awards in *Fermin v. Yang*, 2009 NSSC 222, at paragraph 3:

1. Costs are in the discretion of the Court.

2. A successful party is generally entitled to a cost award.

3. A decision not to award costs must be for a "very good reason" and be based on principle.

4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to an otherwise successful party or to reduce a cost award.

5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".

6. The ability of a party to pay a cost award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q. v. P.L.T.*, 2005 NSFC 27 (CanLII), 2005 NSFC 27:

> Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65 (CanLII), 2004 BCSC 65].

7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

8. In the first analysis the "amount involved" required for the application of the tariffs and for the general consideration of quantum is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".

9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000 in order to determine the "amount involved".

10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the 'amount involved', but rather, to award a lump sum". However, departure from the tariff should be infrequent.

11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the

> offer compared to the parties' position at trial and the ultimate decision of the court.

[57] Here, the father withdrew his application on the most significant claim (his claim that S be transferred to his primary care), he was partially successful in his application with regard to prospective child maintenance, in that he does not make a contribution to special expenses, but he does pay child maintenance pursuant to s. 3 of the *Child Maintenance Guidelines* and he pays S's travel costs. The mother was successful in having her child maintenance claim heard in Nova Scotia with the parenting claim. Justice O'Neil ordered that costs be in the cause with regard to that application. As well, the mother was successful in most of the relief she sought with regard to access and in obtaining ongoing child maintenance. The mother failed in her retroactive maintenance claim.

[58] Success is more the mother's than the father's and, if the father had not withdrawn his primary care application last week, there would be no question that the mother was decidedly the successful party.

[59] The Court has discretion to award or withhold costs and the discretion to withhold costs can be exercised where based on principled reasons. The father advances two principled reasons for dismissing the mother's claim for costs. The first reason is this is a custody case. The second reason is that an award would result in financial hardship.

[60] I'll deal first with the principled reason that costs should be withheld in custody cases because a child's best interests are at issue. The fear of a costs award might deter a parent from pursuing matters that are relevant to a child's best interests. Money should not overshadow child's best interests. The father argues that this was a legitimate application and deserving of that protection. To assess this argument, I need to consider the application.

[61] S was born in 2002. She is seven and one-half. She has always lived with her mother. While her parents cohabited, she also lived with her father. Her parents separated in 2003 when she was one year old. The father moved to British Columbia in 2006, when S was three. Prior to this, there had been infrequent overnight contact between S and her father. The infrequency of overnight visits was not by the father's choice. It was during and after the spring of 2007 that S began to spend significant periods of time, including overnight visits, with her father. By virtue of her father's relocation, S's contact with him has been difficult: travel is time-consuming and expensive, contact by telephone is confounded by multiple time zones, S's young age (which obviated email and made long calls challenging) and the schedules of both S and her father.

[62] The father's application to become S's primary custodial parent was based on his observations of her behaviour, her comments to him and what he was able to overhear as occurring in S's household during his phone calls with S. These circumstances occur in 2008, since, as his wife says in her affidavit, S's behaviour in 2008 was "vastly different" from her behaviour during her visit in 2007. According to the evidence on behalf of the father, S, who was just turning six, is to have said: her step-father yells at her and spanks her and drops her on

the floor; she was told it was ok to call her step-father "dad"; she watched sex with her mommy; her mommy always talks about sex; her mommy's friend knows all about sex; and she always stays in her bedroom and reads, unless her step-sister is visiting.

[63] The father says he observed that S was whiny, she was extremely aggressive and violent, she "gave up" or threw temper tantrums rather than try new things, she stole and she simulated sex acts with her dolls. He also says that S had a junk food diet which contributed to her eight cavities.

[64] I specifically outline this evidence on behalf of the father to draw attention to the fact that his application had a very frail basis. In some regards, it was based on the uncorroborated, unverified statements from a child who was just turning six years old. In other regards, it was based on his observations of her behaviour. His observations do not appear to take into account that he was observing S during an extended visit from Nova Scotia to British Columbia where S found herself in a strange community, surrounded, mostly, by strangers. She was in a place she had been only once before and was with people who, for the most part, she'd seen only once before. She was in a place where she'd be required to stay for quite a long time without the comforting presence of her mother, who had been her primary care-giver for all her life. It is understandable and even predictable that a young child in these circumstances would behave in questionable ways.

[65] The father testified that S told him about her step-father's physical abuse when she was explaining why she was aggressive with other children. It seems not to have occurred to the father that this might be a situation where his daughter was passing the blame to someone else - a person her father viewed with antipathy - so her father would be receptive to her explanation and she wouldn't be in trouble.

[66] I make these comments to highlight the frail basis on which the father sought to change his daughter's primary care. In terms of the legitimacy of the father's claim for primary care, there are four other significant pieces of information.

1. When the father returned S at the end of her 2008 visit, he did not raise his concerns with the mother in a meaningful way. He delivered S and immediately returned to British Columbia. While he may have believed the mother wouldn't be receptive to his comments, he didn't take this chance while he was in Nova Scotia to contact local authorities.

2. The father did raise these concerns by phoning the Department of Community Services, but it was in mid-February 2009, five and one-half months after returning S to Nova Scotia.

3. The father did raise these concerns by phoning the Halifax Regional Police Services to request a well-being check on S, but it was in mid-February 2009, five and one-half months after returning S to Nova Scotia.

4. The father began his court action to change S's primary residence in January 2009. He was in a car accident in November, 2008 which would have delayed him after that point, but no action was filed upon hearing S's complaints.

[67] The complaints which formed the basis of the application were suspect and the father's own actions show that he did not treat them with the seriousness I would expect from a parent who believed his child was being physically abused and who was on the other side of the country, unable to monitor the situation personally or promptly.

[68] The father arrived in Nova Scotia prior to the beginning of this application and spent time with S. He saw her for approximately three hours on each of March 9 and March 10, 2010. Shortly before his third visit on March 12, 2010 the mother's counsel was advised that there was no longer any contest with regard to S's primary care. The father's concerns were resolved with minimal opportunity to observe S or investigate her circumstances. The mother's counsel was notified the application was not being pursued on Friday afternoon. The application was scheduled to begin the following Monday morning.

[69] On balance, I find that the father's claim for S's primary care was not a meritorious claim which should be protected by denying the mother costs. While I do not want the prospect of a costs order to dissuade a parent from litigating so important an issue, I do not want parents to pursue unreasonable applications or to squander court time. Here, the application put the mother to significant expense in defending the claim, while she is the child's sole financial support.

[70] By the time he abandoned his primary custody claim, the mother had filed three affidavits of her own, one from her husband and two from other witnesses. Orders for Production had been granted for files from the Department of Community Services and the Halifax Regional Police Services. The mother had initiated an application to deal with the admissibility of a Family Report which was mysteriously prepared in British Columbia. I describe the preparation of the report as "mysterious" because no one is aware how it came about being prepared, there was no evidence how it was funded and there was no indication who initiated its preparation.

[71] In response to the father's application, the mother sought child maintenance. It was her evidence that the father hadn't paid any maintenance since mid-2008. The father opposed dealing with the maintenance application as part of this hearing, arguing that the mother was required to take the route of the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 despite his presence in Nova Scotia for the hearing of his application. Justice O'Neil heard that application on September 15, 2009 and ordered the applications be heard together with costs to be in the cause.

[72] The parties could not avail themselves of the court's settlement conference option because they did not agree on what was to be discussed: the mother was not prepared to negotiate parenting without negotiating child maintenance and the father was not prepared to negotiate child maintenance.

[73] Ultimately, this hearing took two of the three days assigned to it. Earlier notice of the withdrawal of the primary claim might have meant it took less time.

[74] According to her counsel, the mother's total legal bill will be $33,000.00. This amount includes fees, disbursements and HST. It is pre-tax. I am told that between twenty-five and fifty percent of the fees relate to the claim for child maintenance. These fees will be deductible from the mother's income in the year in which they are paid. This means that the mother will be able to deduct between $8,434.25 and $16,868.50 of her expense. Assuming payment of her fees in last year (when the application began), this year and next, her marginal tax rate will be between twenty-four and thirty percent, based on her earnings and the reduced income she's been receiving while on maternity leave. At best, her after tax cost will be $28,000.00 and, more likely, it's in the range of $29,000.00 to $30,000.00, since most of her legal bills will be paid in this year or last year when she is on maternity leave and, as a result of her lower income, she has a lower marginal tax rate.

[75] I have no information about offers exchanged.

[76] A second principled reason for withholding costs is typically described as "impecuniosity". The father argues that his financial circumstances militate against an award of costs. The case law is more nuanced.

[77] Justice Gass explained this consideration in *Connelly*, 2005 NSSC 203. Mr. Connolly faced significant access costs and had been ordered to pay substantial arrears of child support. He argued that an award of costs would cause him considerable financial hardship and impair both his ability to exercise access to his children and to meet his child support obligation. At paragraph 9, Justice Gass wrote, "Any order of costs should not have an adverse impact on the children's emotional or material well being. Access with their father is important for their emotional well being and the child support obligations are critical to their material well-being." Justice Gass declined to award costs against Mr. Connelly.

[78] In considering S's emotional and material well-being, I am mindful that she is in the primary care of her mother, who is primarily responsible for meeting her emotional and material needs. The child's welfare is not harmed by an award of costs against her father. Without any income, he has been able to make a trip to Nova Scotia for a few weeks. He estimates the cost of this trip at $5,000.00. Without any income, he is able to provide for his family in British Columbia. This reason for withholding costs is not applicable to the mother's claim for costs. There is no evidence that an award of costs against the father will adversely affect S.

[79] This was a two day hearing. The preliminary application to deal with the *Interjurisdictional Support Orders Act* was heard in a half day. Using the rule of thumb that each day in court should be assigned $20,000.00 as the amount involved, the amount involved in this matter is $50,000.00. The basic scale for a proceeding where the amount involved is $50,000.00 is $7,250.00. For each additional day, another $2,000.00 is to be added. This brings the total award to $10,250.00. I order the father to pay the mother costs of $10,250.00 forthwith.

_____

J.S.C. (F.D.)

Halifax, Nova Scotia