SUPREME COURT OF NOVA SCOTIA
Citation: *Fraser* v *Fraser*, 2011 NSSC 178

Date: 20110519
Docket: 1205-002925
Registry: Pictou

Between:

Darcy Lynn Fraser

Petitioner

-and-

Eric Eugene Fraser

Respondent

BEFORE:	The Honourable Justice Charles Haliburton
HEARD:	February 21 and 22, 2011 at Pictou, Nova Scotia
WRITTEN DECISION:	May 19, 2011
COUNSEL:	**Peggy Power**, counsel for the petitioner **Roseanne M. Skoke**, counsel for the respondent

By the Court:

[1] At the opening of the hearing in this matter, the parties agreed on the record that it is appropriate to divide matrimonial property on an equal basis; that household contents and minor personal property will remain in the possession of the respective parties as it has already been divided. Some items of the husband remain in the garage on the matrimonial property. It was also agreed that the husband will retain the fifth wheel camper trailer, at a value of $4,000.00 together with the Bayliner boat valued at $2,500.00. Both items are matrimonial property and Ms. Fraser will therefore be compensated for her one-half interest. It was also agreed by the parties that the only matrimonial debt is a line of credit where the balance owing of $22,000.00. All of which will be assumed by Ms. Fraser, Mr. Fraser having repaid his share after separation.

[2] **Darcy Lynn Fraser** (hereinafter referred to as "Ms. Fraser") is 40. She was born on March 11, 1970. **Eric Eugene Fraser** (hereinafter referred to as "Mr. Fraser") is 41. He was born on December 30, 1968. The parties were married at New Glasgow, Nova Scotia on August 12, 1995. There are two children born of the marriage, namely: **Zachary Allister Fraser**, born January 22, 1999 (who is currently 12 years old) and **Callie Victoria Fraser**, born June 10, 2003 (now 7 years old).

[3] It seems apparent that a life changing or at least relationship changing event occurred on April 15, 1999, when Mr. Fraser suffered a disabling injury while at work. He was a carpenter. He fell 30 feet when a roof collapsed and was left hanging in his safety harness for some period of time suffering trauma to his shoulder, neck, lower back and groin, also resulting, he said, in post-traumatic stress disorder. He was "smashed up pretty good". Ms. Fraser was at that time on a maternity leave from her job with the Royal Bank of Canada after recently giving birth to their first child.

[4] Mr. Fraser was, prior to his accident, the principal breadwinner in the family; a member of the Carpenters Union. He had, in anticipation of marriage, constructed what has become the matrimonial home. As a result of his injuries, he is now permanently disabled and in receipt of long term workers' compensation benefits and Canada Pension Plan benefits.

[5] Meanwhile, Ms. Fraser has sought job advancement in her employment with the Royal Bank, where she is the Commercial Account Manager in the New Glasgow branch.

[6] Both parties, I conclude, have been frugal or at least thrifty in financial matters. While I conclude that Mr. Fraser has not been any less economical in the spending he has done, full credit should go to Ms. Fraser for her management of their joint and separate financial affairs.

[7] The parties separated on March 12, 2006, when Ms. Fraser asked Mr. Fraser to leave the matrimonial home. She remained in the home with the children while Mr. Fraser moved into his camper trailer. A pattern began of sharing time with the children, the parties making their own

arrangements on an *ad hoc* basis; that is to say, there was no formal separation agreement or any application to court prior to the filing of the Divorce Petition.

[8] The Petition and Answer put all matters in issue. Both parties seek divorce; each of them seeks joint custody, with both of them claiming primary care giving access to the other party; each of them seeks child support; division of matrimonial property; pension division, and costs.

Divorce Granted

[9] On the basis of the evidence I am satisfied that the jurisdiction of the court has been established; the marriage proven; the residence requirements satisfied and that the parties have been living separate apart for a period in excess of one year. An order for divorce will issue and the application of the petitioner is granted to have her name changed to **Darcy Lynn MacDonald.**

Division of Assets

[10] The assets of these parties as disclosed in the evidence consist of the following items:

Real Estate

The Matrimonial Home (presently occupied by **Ms. Fraser** and which she proposes to have sold)	$186,000.00
Mini-home (occupied by **Mr. Fraser**)	31,000.00

Other Assets (not previously divided or disposed of)

Fifth wheel camper trailer (retained by **Mr. Fraser**)	4,000.00
Bayliner boat (retained by **Mr. Fraser**)	2,500.00

Securities and Bank Accounts

Investment Account (****7711)	109,869.00
Guaranteed Investment Certificate (***1097)	105,841.00

RESSOP (****-01)	145,585.00
Direct Investment account (**45)	47,746.00
RRSP (Registered to **Ms. Fraser**) (**77)	36,915.00
RRSP (Registered to **Mr. Fraser**) (not documented in the evidence)	15,000.00
Carpenters Pension (**Mr. Fraser**) (valued at date of separation)	5,966.00
Pension (**Ms. Fraser**'s Employment – RBC) (Value unknown at date of hearing)	

Debt

Line of Credit (Joint) (at time of separation)	22,000.00

Other Assets (Possessed by or under the control of the parties in relationship to which they gave evidence)

[11] There is an RESP account for the two children with a current value of $56,095.00. There is, as well, evidence that Ms. Fraser inherited an interest in a business or company, referred to as AGR Housing. It was apparently a business involving residential rentals, now shared by Ms. Fraser with her mother and, presumably, other members of the family. The value of her interest or of the business itself is unknown.

[12] There is no issue or dispute with respect to most of the items listed. The RESP is the property of the children and is intended to be used for their post-secondary education. The values of the matrimonial home, mini-home, camper trailer, boat, RESSOP, direct investment account the two RRSPs and their respective pensions are to be divided equally by agreement. When the matrimonial value of Ms. Fraser's RBC pension is established, each of the parties will buy out the notional interest of the other's pension, as part of the equalization process.

[13] An appraisal of the matrimonial home in August 2006 valued it at $144,000.00. The parties however at trial agreed on a value of $186,000.00. It was nonetheless Mr. Fraser's position that the house has greater value than that and he estimated a "fair selling price" to be

$200,000.00. In the end, an actual sale will finally determine its value. I think it is safe to say that the market poses risks. The fact that the sale of the house is mandated for the purpose of dividing its value between the parties will certainly not increase its value. It may be that a purchase/sale between the parties would put them in a better position to maximize the proceeds.

[14] Should one or the other decide to acquire the interest of the other, then, I would direct that the agreed value of $186,000.00, less full costs of effecting the transfer, would be the price. Ms. Fraser has already born the cost of the migration of the title and will be reimbursed one-half of that expense in any event.

Insurance Proceeds

[15] The only significant disagreement regarding the division of assets was with respect to the two investments; the mutual fund (***7711) and the GIC (1097) totaling $215,710.00. These two items represent the remainder part of a disability insurance policy payable to Mr. Fraser as a result of his workplace accident and disability. Indicative of this couple's caution in financial matters, and I suspect on Ms. Fraser's initiative, the mortgage on the matrimonial home was insured against death and disability. She had furthermore taken advantage of disability insurance available to her at her place of employment. As a result of having obtained these insurance policies, the balance of the mortgage on the matrimonial home (approximately $7,000.00) was paid out on their behalf and a lump sum disability benefit of $300,000.00 became payable to Mr. Fraser.

[16] The pretrial memorandum filed on behalf of Ms. Fraser sets forth the following, which I find is confirmed by the evidence:

> Ms. Fraser had disability insurance for Mr. Fraser through her employment with the Royal Bank. She paid the premiums of the insurance. When Mr. Fraser suffered the work related injury in 1999, Ms. Fraser initially made the application for the insurance proceeds without legal assistance. The application was denied. The parties hired legal counsel and were successful in obtaining the insurance proceeds. The award was partially used to pay matrimonial debt. The original award was $325,000. The net proceeds of the insurance was $187,000. Ms. Fraser, with Mr. Fraser's consent, invested $100,000 in a GIC and $87,000 in a mutual fund in both parties' names, with the right of survivorship. Ms. Fraser has always been in charge of the investments. She has paid one-half of the taxes on the joint investments and made all of the investment decisions.

[17] The two assets noted as having been acquired with the $187,000.00 remainder are those identified above with a present value totaling $215,710.00. There is no evidence before the Court detailing what became of the other $138,000.00 from the insurance settlement. It is

understood that a substantial legal cost was incurred in gaining the settlement and a line of credit and perhaps other debts were retired. There is evidence that a line of credit in an unknown amount was outstanding, the proceeds of which had been used to initiate the "direct investing" account (3845). My understanding is that at least some of the insurance proceeds found their way into that account.

[18] The parties having separated and claiming a division of matrimonial property, the question arises: What is the appropriate disposal of these two funds invested in their two names, jointly?

[19] The position put forward by the petitioner Ms. Fraser is set forth in the above quotation from the pretrial brief. To recap her position in point form:

- The opportunity to purchase this disability policy resulted from her employment with the bank.

- On her initiative and with the approval of Mr. Fraser, she subscribed for the policy.

- The cost of the premium was deducted from her salary.

- When the insurer denied coverage: "We had to hire a lawyer", she said, and the settlement process took about two years.

- She initiated discussions involving herself, Mr. Fraser and the financial planner, with respect to appropriate investments and "I am entitled to one-half of those investments".

[20] The position of the respondent Mr. Fraser opposes the division of these assets. He testified that he received the $300,000.00 "because I had a disability, and understood it was for future loss of wages and the cost of medications." Some of the interest, he said, was drawn down to assist in the purchase of his mini-home but "the balance is there for my care. This was paid to me for pain and suffering, loss of wages. It was for me down the road." The cheque, he said, was payable to him and he did not realize it had been deposited as a joint asset until "two years ago when I went in to do some banking."

[21] When cross examined on the subject, he agreed that he had signed documents when the money was invested, the investments were made with his knowledge but he said that he had not realized it was a joint investment "it was for me, loss of wages, health and future care." When questioned about the right of survivorship provision, he said "I didn't understand".

[22] A number of cases have been cited by counsel in arguing the pros and cons of identifying these two investments as matrimonial property. The discussion obviously starts with the statute, *The Matrimonial Property*, R.S.N.S. 1989, c. 275, as amended. Section 2 says in this *Act*:

> *Interpretation*
>
> 2 In this Act,
>
> (a) "business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;

[23] Section 4 states:

> 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, **with the exception of**
>
> (a) **gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children**;
>
> (b) **an award or settlement of damages in court in favour of one spouse**;
>
> (c) **money paid or payable to one spouse under an insurance policy**;
>
> (d) reasonable personal effects of one spouse;
>
> (e) **business assets**;
>
> (f) property exempted under a marriage contract or separation agreement;
>
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.
>
> *Damages or insurance proceeds*
>
> (2) Notwithstanding clauses (b) and (c) of subsection (1), an award or settlement of damages in court or money **being paid or payable under an insurance policy is a matrimonial asset to the extent that it is made, paid or payable in respect of a matrimonial asset**. [Emphasis added by the Court]

[24] Section 13 reads:

Factors considered on division

13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

(a) the unreasonable impoverishment by either spouse of the matrimonial assets;

(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;

(c) a marriage contract or separation agreement between the spouses;

(d) the length of time that the spouses have cohabited with each other during their marriage;

(e) **the date and manner of acquisition of the assets**;

(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;

(g) the contribution by one spouse to the education or career potential of the other spouse;

(h) the needs of a child who has not attained the age of majority;

(i) **the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent**;

(j) whether the value of the assets substantially appreciated during the marriage;

(k) **the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse**;

(l) **the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring**;

(m) all taxation consequences of the division of matrimonial assets.

[Emphasis added by the Court]

[25] In advancing Ms. Fraser's claim to an equal division of the money represented in these two investment accounts, her counsel referred to a trio of cases: *Lucas* v *Lucas* (1990), 95 NSR (2d) 45; *Archibald* v *Archibald* (1981), 48 NSR (2d) 361 (TD) and *Lawrence* v *Lawrence* (1981), 25 RFL (2d) 130 (NSCA). Both *Archibald* and *Lawrence* are quoted extensively in the *Lucas* decision.

[26] All three cases reviewed and interpreted the meaning to be applied to Section 4(1)(a), (b) and (e). Section 4 sets out various types of property which may be owned by a spouse but will not be determined a matrimonial asset in the event of separation. Property in the nature of an inheritance by one of the spouses is such property as described in 4(1)(a), but that property is subject to an exception which does not apply to property acquired under paragraph (b) and (e). So, if a spouse should inherit or receive a gift of a summer cottage, securities or cash, it only remains non-matrimonial to the extent that it is not employed or used for the benefit of the family.

[27] That exception does not apply to an award of damages that is contemplated in subsection (b) or to business assets as contemplated in subsection (e). Those types of assets, by statute, remain the exclusive property of the owner unless they are by some process converted to take on the character of matrimonial assets.

[28] No doubt there are a number of characteristics that could be used to exemplify when assets owned by one spouse have effectively been converted to matrimonial or family property. It seems clear from the cases, and indeed from a reading of the statute, that an inherited summer cottage used by the family for their summer vacation becomes matrimonial property. It also seems clear from the cases that once assets have become matrimonial it would difficult, if not possible, to segregate or reclassify that property or the proceeds from its disposal.

[29] A business enterprise carried on by one of the spouses is excluded under subparagraph (e) whether it is owned before marriage or not. The fact that income from the business is used to support the family would not convert that business to a matrimonial asset.

[30] Similarly, it seems to me that investments made by one of the spouses using money that is not matrimonial in character would not become a matrimonial asset, even though the interest or dividends accumulating on those investments is used to support the family. That circumstance would not alter its character from business to matrimonial.

[31] Perhaps my expression of what I understand to be the concept is not as clear as the words of Hallet J. in *Archibald*:

> The fact that business assets (for example, stocks and bonds) may have been acquired by the husband from earnings which would otherwise have been available for family purposes does not make stocks and bonds ‘matrimonial assets’ as stocks and bonds are clearly within the definition of business assets, being *primarily* held for income producing purposes and thus not property encompassed in the definition of matrimonial assets. Likewise, if property not excluded from the definition of matrimonial assets is acquired from funds realized on the sale of a ‘business asset’, that fact, the source of the funds, does not convert property that otherwise would be caught by the definition of matrimonial assets into a business asset. In my opinion, there is nothing in the definition of a

> business asset which indicates any intention of the Legislature that property, irrespective of its nature (for example, a yacht), purchased from funds realized on the sale of a business asset should therefore be classified as a business asset.

[32] These principles are in agreement with those expressed by Hart J.A. (also in 1981) in *Lawrence*, where he is quoted as saying: "Money invested in savings certificates, stocks or bonds would be business, . . ."

[33] To return to the case presently before us, we have a business asset acquired with money received by Mr. Fraser in settlement of his claim for disability benefits. In our case, however, the fund represented by these two accounts does not represent the entire proceeds of that settlement. There are, I think, two issues to be considered in determining the status of these accounts: (1) Is the account, in fact, traceable to its source? (2) What of the fact that the investments were made in the joint names of Mr. and Ms. Fraser?

[34] I find the comments of Roscoe J. in *Lucas* very helpful in terms of the "tracing" issue. In that case, the husband had been the recipient of an insurance settlement resulting from a car accident. His damage award provided the $19,000.00 needed for the down payment on the house that became the matrimonial home. The question raised in the case was: Was he entitled to have that down payment segregated and taken off the top, as his property, when the matrimonial assets were to be divided? Counsel for Mr. Lucas advanced the argument that the proceeds of an injury claim were clearly excepted from matrimonial property under the definitions provided in 4(1) and therefore not subject to division. The damages award, it was argued, was not subject to the exception applicable under 4(1)(a), the distinction being one I attempted to described earlier.

[35] In the process of considering some cases from Western Canada (where the legislation may have differed), Roscoe J considered the impact of being able to trace the fund from its origin to current status. In determining that Mr. Lucas could not segregate or identify the funds from his damage award, she commented:

> . . . in that case [*Tataryn* v *Tataryn* (1984), 30 Sask Rev 292 (SKCA)], the funds from the personal injury award were still intact in a bank account and, of course, in this case, if Mr. Lucas' money was (sic) still held in his bank account, there would be no question that it was not matrimonial property.

[36] The Judge concluded: ". . . Mr. Lucas had, in fact, converted his personal injury award into a home . . ."

[37] However, in reaching that conclusion, she made this comment, relying on the principles established in *Archibald* and *Lawrence*:

> . . . if the award or settlement of damages was being used for the purpose it was made, that is to compensate Mr. Lucas for his pain and suffering or his lost earnings or his cost of future care, then it should be exempted . . .

[38] The fund is traceable – the $215,000.00 is the proceeds of the insurance payable to Mr. Fraser and it is intact. It is a "business asset".

[39] The remaining question then is: Does the fact that his disability award, which was invested in the names of the two parties jointly, actually conveys a one-half interest in this business asset to Ms. Fraser?

[40] I think not.

[41] I can see no reason to disbelieve the evidence of Mr. Fraser that he believed that fund was there for him to access at some "rainy day in the future" when he would require medication, personal care or other assistance because of deterioration in his condition. I accept his evidence that the investments were made on Ms. Fraser's initiative with the advice of an investment counselor, who was her associate at the bank.

[42] I do not, for a moment, suggest that there was any ulterior or improper motive at play. I presume the advisor would have suggested the joint tenancy arrangement as a matter of convenience, as a means of splitting income on the investment returns and as a mechanism to avoid probate. In the circumstances, it is my view that Ms. Fraser's role as a named beneficiary of those funds was as a trustee for Mr. Fraser.

[43] I am not dissuaded from that conclusion, in spite of evidence that Ms. Fraser claimed one-half of that income on her tax return and paid the tax on it. I do find that curious and out of character when there would likely have been a tax saving to this couple had that income been attributed to the lower income earner.

[44] These conclusions apply only to the investment account (****7711), $109,868.56 and the GIC (***1097), $105,840.98, in accordance with the above discussion about the conversion of such funds to matrimonial assets. The evidence is that some limited share of the disability proceeds were used for other purposes and incorporated into investment accounts and other matrimonial property. The two particular assets, however, have remained segregated and identifiable and are traced directly to the disability claim.

Custody and Access

[45] Ms. Fraser seeks to have the court order joint custody of the two children with primary care to her and access to Mr. Fraser. Her plan is to pursue career opportunities in her job with

the bank, requiring her to move to the Halifax Regional Municipality (she specified Enfield, which is in East Hants).

[46] In an Affidavit Ms. Fraser filed in 2010, she expressed the view that there was "too much movement back and forth between the two households and the children do not have enough time to settle into one house before they are moved to the other parent's home." Disputes have arisen between the parents when the exchange takes place and accordingly "the current situation is simply not healthy for the children."

[47] With respect to Ms. Fraser's future plans and career goals, the affidavit goes on to say:

> I have now reached the highest point that I can in the Pictou County market. I have been offered jobs in Halifax, which would greatly increase my standard living and enable me to provide a better life for our children . . . I am requesting that the custody arrangements should be flexible to allow each parent up to two weeks' vacation each year with the children. I am also requesting one week for each parent alone where the other parent agrees to have full responsibility during that time. I also require continued flexibility to accommodate my work schedules as I am out of town a few times per year for work purposes.

[48] The father's desires are diametrically opposed.

[49] I have concluded that the expectations which each of these parents had for the future of their relationship was shattered in 1999 when Mr. Fraser "fell 30 feet through a roof at work and suffered a severe injury." Zachary, their oldest child, was just three months old. Ms. Fraser was on a one-year maternity leave and it became necessary for her to assume virtually all the family and financial responsibilities. One can imagine that the couple found themselves now to be without Mr. Fraser's financial income, facing costs of medicines and treatment for his injuries; and for the resulting anger and depression he experienced. The arrival of Callie in June 2003 apparently did not relieve the stresses that were developing with this couple. In spite of pursuing counseling, their relationship did not survive and Ms. Fraser requested that Mr. Fraser leave the matrimonial home in March 2006.

[50] Notwithstanding the ending of their marriage, Mr. Fraser was recovering from his injuries. As he recovered, he took more responsibilities for household tasks and for child care. He was able to do manual labor around the mini-home which had been acquired; and within a few months of separation, the parties established a shared-parenting arrangement, whereby the children spent three nights a week with their father in the mini-home and four with their mother in the matrimonial home.

[51] Mr. Fraser began coaching little league baseball and minor hockey with Zachary participating in both sports. Callie takes horse riding and music lessons.

[52] The parties live within five minutes of each other and within five minutes of the school which the children attend.

[53] Ms. Frasers' responsibilities at the bank involve a regular work day (8:30 a.m. to 5:30 p.m.), which results in the children, for the greater part of the time, having gone to their father's house after school. They stayed there until picked up by their mother on those nights they were scheduled to be with her.

[54] Both parents are engaged in the extracurricular activities that the children are involved in, with the result that their father was with them at some time, virtually every day. While the evidence is less clear with their mother, there would have been very few days when they would not have spent at least some time with her.

[55] It should be mentioned that the extended families of both parents are in the area and readily accessible to the children. The evidence is that Ms. Fraser's mother and her sister have been regularly involved in assisting during the early childhood of these children as babysitters or caregivers and it is Ms. Fraser's mother who has taken an interest in Callie's musical education.

[56] The parents have now recognized that shared parenting is not an option. They seek an order for "shared custody". Each of them seeks to be the primary care giver. Shared custody appears to be no more viable in this case than shared parenting. There could be no shared parenting if Ms. Fraser should move to the City as she hopes to do. Shared custody, if it is to be meaningful, would require a degree of cooperation and communication between the parents that is not apparent at present. The relationships these parents share with their children are very different, as are their expectations for behavior and the rules that they seek to apply. The portrait I have is of two very different home environments; one of which is child centered, and the other dominated by stress.

[57] Ms. Fraser's career plans are ambitious. She had earlier aspired to become a branch manager in the bank. I think it is common knowledge that at least the Royal Bank is significantly changed in its hierarchy. Branch managers have neither the status nor the responsibility they once had. She has attained the status of "commercial account manager", which is, she says, as far as she can go in Pictou County. Working in a branch in Nova Scotia, all of the important decisions are made in Halifax and her ambition is to become a vice-president within five years, and to work within that environment.

[58] My impression of her is that she will be a happier and more fulfilled person as well as a better role model for her children if she pursues those goals. She has testified that it will require her to return to University or take night courses to gain an MBA degree. One assumes it will require long hours of work and the cultivating of contacts.

[59] It would, I believe, be impossible for her to pursue those dreams while packing school lunches, attending school pageants and going to hockey practice two or three times a week. Such an ambitious process must surely fail in anger and frustration all round.

[60] Mr. Fraser's career goals crashed to an end with his accident in 1999. While it has been determined that he is disabled from gainful employment, he is nonetheless mobile and apparently physically active. He is able to attend skating with his children, coach minor hockey, and enjoy boating and camping.

[61] With workers' compensation and Canada pension benefits, he has an income which, though not large, appears adequate for a modest lifestyle in rural Pictou County. The evidence indicates that he has a keen interest in his children and their activities. He does not have the handicap of work obligations and can devote his full time to the development and interests of the children. He has the great luxury of time to share with children, as he has done in the past, as witnessed by the records he has produced. The children are his primary interest and legacy.

[62] It is appropriate to highlight the evidence which has brought me to these conclusions. I rely on the evidence of Ms. Fraser that she has "come as far as I can" in job advancement unless she moves to either Halifax or Moncton, where, if she acquires an MBA degree, she anticipates gaining a "vice-presidents job in the next five years".

[63] In speaking of her relationship with Zachary, Ms. Fraser expressed the view that he has issues socially, that his behavior is boisterous and impatient and that he does not relate well to other children. He is disrespectful to her and, if he fails to get his own way, he screams, hits and cries. She has arranged psychological counseling for both children and plans biweekly appointments. She says that Zachary is less mature than his age while Callie is more mature than her seven years. She has a quick temper but does well academically; has no social problems and is engaged in piano, horseback riding and gymnastics.

[64] After Mr. Fraser's accident in 1999, Ms. Fraser said, he was physically unable to assist in child care. It was necessary for her to arrange care providers. In 2003 with Callie's birth, she took a full year of maternity leave while Mr. Fraser continued on medications for the depression he was suffering. Notwithstanding some counseling efforts, the couple separated in early 2006. After that, she testified, "he took a more active role", and they developed the shared parenting arrangement I described earlier.

[65] Ms. Fraser described herself as the disciplinarian of the pair, using "time outs" and "discussion". Their different parenting styles have lead to disputes between the parents and their relationship has become "very strained, we do not communicate." In discussing her parenting style, she described herself as: "very organized, imposing time lines on the children."

[66] In cross examination Ms. Fraser conceded that she had slapped Zachary's face causing a "split lip", and had occasion to wash Callie's mouth with soap and water when she "cursed at me". She said, "there have been other instances when I physically "sat" (Zachary) in a chair when he was punching and screaming." She did not deny that Mr. Fraser had threatened to involve authorities in relation to her physical confrontations with the children and she agreed that she had "withheld" Zachary's participation in a hockey game because he was "disrespectful." "I am not going to reward my son for disrespect. He has to have consequences."

[67] Ms. Fraser testified that she has taken courses in relation to custody, access and parenting but that Mr. Fraser did not participate with those. Again, when cross examined and asked about her relationship with another man, Ms. Fraser said that: "Zach does not like it that I have someone."

[68] The shared parenting arrangement suffered a setback when the children returned to school in September 2010. Ms. Fraser, without consultation, decided to fix specific times for access with Mr. Fraser. The children would still be with Mr. Fraser Wednesday, Thursday and Saturday nights but not coming to his home other than at the designated hour and on those nights. The result of this is that Mr. Fraser no longer sees them every day; Zach is in Ms. Fraser's home alone after school and Callie is with daycare.

[69] It is unfortunate that Mr. Fraser's response to this "dictate" was to refuse to take the children into his care at times when it was not his turn.

[70] On the other hand, when Ms. Fraser was (for one reason or another) in need of assistance her evidence was that the reasons for her absences included: attendance at a yoga or exercise class, a social weekend visit to Halifax and trips that were work related. She testified: "I didn't ask him to switch nights because it is an issue."

[71] In Mr. Fraser's view, it will be "devastating" for the children to be removed from their community, family and friends. Ms. Fraser conceded that she has been speaking with the children for the past year about moving to Halifax and that Zachary's attitude is: "I don't want to leave this house" to which her response was "People move – children are very adaptable."

[72] When it was suggested to her in cross examination that Mr. Fraser was concerned about her "passing off her parenting obligations to others" she responded: "he is (miffed) that I made the decision to leave the marriage for my own sake." Asked about the priorities of her career and her present romantic relationship and the proposed move to Halifax, she responded: "My kids come first, whatever follows will follow."

[73] There is no evidence before the Court with respect to the preference of the children but Ms. Fraser accepted that it was likely that Zachary would have told Mr. Fraser that he would "like to live with him".

[74] Mr. Fraser reported that after separation he had the children "most of the time". He produced calendars on which he had noted virtually daily contact with the children throughout 2009 and 2010, but said his access changed in September 2010 when school started: "she said this is what she had decided. . . . she decided on the new arrangement, I never argued because I feared losing more."

[75] After separation, Mr. Fraser wanted the children to stay in the matrimonial home to give them "stability". There was, he said, no suggestion between them of the sale or division of the matrimonial home.

[76] The question of discipline of the children has been contentious. A recent incident that both reported occurred when Ms. Fraser came to take Zach to a psychological counseling session in Truro. The evidence is that this counseling program was initiated by Ms. Fraser without Mr. Fraser's knowledge. He learned of it when told by Zachary, and when one of the appointments happened to fall on his access day. The parents have a very different view of what happened when Ms. Fraser arrived to pick up their son. "Zach wouldn't hear of it. He was worked up. She was hollering; they were both hollering and screaming."

[77] It seems that what started as a dispute between mother and son may have ended up being a dispute between the parents, which was, Mr. Fraser said, resolved when "Zach finally said he would go." It appears both parties contacted the RCMP after this incident.

[78] There had been difficulty over the "slapping" incident three or four years earlier when Mr. Fraser testified: "I told her to take anger management or I would go to the police."

[79] In speaking of his own discipline of the children, Mr. Fraser testified: "They do all right. They fight and argue over TV and toys but they love each other. I feel my parenting is good. I do not condone hitting, or hit the children (myself). This has been a bone of contention. There were times when she wanted me to spank them and I declined. I sit them down and talk to them."

[80] With respect to his routine with the children, Mr. Fraser indicated he likes to get them outdoors as much as possible. He has been coaching Zach's minor hockey team for six years; he volunteers at the school library and otherwise "I don't miss any events that the children are in." When he has the children for a day, he attempts to take them to an event, skating in winter or boating in summer.

[81] Mr. Fraser disapproves of the fact that with the change in visitation, the children are with babysitters more often. While they are "nice girls", their mother should spend more time with them. Nor does he approve of Zachary being at home alone after school when he could still be coming to see his father, who is "always available."

[82] Mr. Fraser testified that "communication is not totally broken (between the parents), every once in a while there is a monkey wrench."

[83] With respect to the children being moved out of the immediate area or even out of the county, he talked about the time they would miss with both his family and their mother's family as his biggest concern. He said: "Any time Darcy is in a pinch, her family helps out", referring, as I recall, to Ms. Fraser's mother and sister, who were mentioned several times as being regularly involved with the children. Mr. Fraser also spoke of time spent in the summer at the summer cottage of his sister, a school principal, with boating and beach activities.

[84] Mr. Fraser spoke of a romantic relationship which he has now established with Bonnie Fitt, a case manager with the Department of Community Services in the New Glasgow office. This relationship, he said, has established a "new constellation of friends for the children" (Ms. Fitt's nieces and nephews with whom they enjoy bonfires, meals and other recreations.)

[85] With respect to the "acting out" behavior reported by Ms. Fraser, Mr. Fraser testified that "he has never witnessed any of these behavior problems . . . never beating on the wall or on a table."

[86] Under cross examination, Mr. Fraser testified that at the time of the separation, the children were seven and three years of age. There was shared parenting with no set schedule for visitation. Previous to this past year, Mr. Fraser said he effectively had Zach five days a week, involving after school and Saturdays, as well as frequent Friday nights. When challenged, he agreed that since September, on sick days or storm days, he takes responsibility only if it falls on Wednesday or Thursday. He agreed that there had been arguments between him and Ms. Fraser in the presence of the children, which he terms undesirable.

[87] Mr. Fraser disagreed that Zachary is aggressive at school. He suggested that they play boy games like "King of the Hill" (I infer that he thought pushing and shoving normal in that context). He agreed that Ms. Fraser had asked him to take some counseling and testified that he is prepared to do that. Mr. Fraser agreed that in September, when the visitation changed, he said words to the effect "You are on your own", explaining that "that was the way she set it up", so he is now available "only on the days she assigned".

[88] When Mr. Fraser was asked, he did not agree that "withholding privileges is an appropriate discipline"; he said he did, in principal "but not hockey, he loves it. It is a social exercise. My idea would be to take away his video games." Asked if he had the same opinion if told that Zachary had thrown a plate of lasagna, his response was that that behavior had "escalated beyond anything I know about."

[89] Mr. Fraser was asked for his view of an embarrassing incident when Zachary had wet himself in school. He expressed the view that "stresses may have played a role in it, including

the fear of moving and missing hockey (Zachary and his mother had had a "fight" the night before)".

[90] The evidence of Mr. Fraser is supported by the evidence of Bonnie Fitt. She said the two of them have a committed, loving and respectful relationship; that they are frequently together when he has his children with him and that they do things together on Saturday nights and Sundays, such as boating, going to the swimming pool, spending time at the cottage or homework.

[91] Ms. Fitt described Zachary as very quiet, internalizing a lot of things but good natured; he and his father get along well. She has not had any bad experiences with him. Callie, she says, is more active, vocal and more fun. She likes attention and likes to bake, talk, play cards. "I take it she enjoys herself."

[92] With respect to Zach, "I have not seen him have a tantrum nor have I seen "acting out" behavior. . . . Zachary idolizes his father." Their attitude to her, she described as "they like me, they are respectful, they say hi when they come in and they thank me for supper." She tries to get to their various activities when she can.

[93] Regarding her contact with Ms. Fraser, she said "I don't feel any animosity between us."

[94] Another witness was Lily Ann DeYoung, who is the principal of the Thornburn School where the children attend. She has been a teacher in that school for 33 years and taught both parents and now has their children at the school. She maintains the school files and has no discipline file with respect to Zachary, for whom a psycho-educational report was obtained some years ago. These reports, she said, are fairly common and would be triggered if a teacher perceived some difficulty which might be in a subject area or otherwise. In this case, she testified it was done because of some "impulsivity" on Zachary's part.

[95] Ms. DeYoung testified that Zachary has some "trouble slowing down, acting without thinking through. Apparently it was perceived he had some difficulty in attentiveness." The report was prepared when he was eight years old and the focus was on difficulty with social skills not with academics. He is, she said, performing at his grade level while Callie "performs well academically, is happy and enthusiastic."

[96] Ms. DeYoung reported that both parents attend all or most of the events at the school, and both have volunteered. Mr. Fraser has been there daily to pick up the children. She has not observed any conflicts between them on those occasions. Zachary, she said, can still exhibit signs of impulsivity and that she has, on occasion, spoken with him to remediate a playground dispute.

[97] In her affidavit filed April 1, 2010, Ms. Fraser proposed, at paragraph 30:

> The children stay four nights a week with me and three nights a week with their father. I believe that arrangement is no longer in the best interests of the children. There is too much movement back and forth between the two households and the children do not have enough time to settle into one house before they moved to the other parent's home.

[98] Continuing at paragraph 35: ". . . The current situation is simply not healthy for the children.

[99] At paragraph 45:

> I am requesting that the custody arrangement should be flexible to allow each parent up to two weeks' vacation each year with the children. I am also requesting that one week for each parent alone, where the other parent agrees to have full responsibility during that time. I also require continued flexibility to accommodate my work schedule as I am out of town a few times per year for work purposes.

[100] At paragraph 43:

> I have now reached the highest point that I can in the Pictou County market. I have been offered jobs in Halifax, which would greatly increase my standard of living and enable me to provide a better life for our children.

[101] Objectively, the situation here should have been as good as it gets where parents divorce. They live in a very small community, both living close to the school attended by the children. The children are still very young and they have two homes, which they can easily access. Moving back and forth is a problem only because of the present animosity between the parents and their conflicting views on child management.

[102] The evidence is clear that Zachary, at least, is unhappy in Ms. Fraser's care, resists her efforts at managing or discipline, objects to her present relationship with another man, wishes to stay in the matrimonial home and is distressed at the prospect of a move away from his father. The evidence is that the children are very attached to each other and would not want to be separated. It is important that they be kept together.

[103] This is a unique situation where the father is the parent who is free from the necessity of going out to work. Mr. Fraser has all day available to devote to the children's interests. He has a friend with whom the children are comfortable and who is apparently able to assist with preparing meals (if Mr. Fraser's talents are limited in that area). The uncontradicted evidence is that the children enjoy their time in that household.

[104] The *Divorce Act* mandates a consideration of the best interests of the children, as well as maximum contact with both parents. Both are seeking an order for joint custody. In that context I am prepared to grant that request, with primary care of the children to their father. Ms. Fraser will have full access to scholastic and health records and hopefully the parents can jointly agree on important decisions relating to health, education and so on. While the present living arrangements continue, the children will spend not less than two nights each week with their mother. Ms. Fraser's vacation time will also be accommodated. The parties should work out the details to best suit their own convenience, and for approval by the court

[105] I believe Ms. Fraser is correct in saying that following her career goals would "greatly increase my standard of living and enable me to provide a better life for our children." Having seen her, and heard what she has said, she should pursue those goals. The stresses of managing the children over the next six to eight years are likely to increase. In the context of past experience with friction and discipline, the future for both her and for the children in her full time care while she pursues an ambitious career begs for heartache and misery. She is an achiever. All members of this family will be happier if they are able to rejoice in her career successes, and share quality time with her when she is not under stress.

[106] My expectation would be that when the children are in their teen years, they will be proud of their mother's determination and success and learn to appreciate her values and her disciplined approach to life.

Costs

[107] I am prepared to hear the parties if there is an issue regarding costs.

J.