

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: S.D. v. J. D., 2010 NSSC 145

Date: 20100419
Docket: 1201-062700
Registry: Halifax

Between:

S. D.

Petitioner

v.

J. D.

Respondent

Editorial Notice

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

Judge: The Honourable Justice Moira C. Legere Sers

Heard: March 22 and 23, 2010

Counsel: Damian Penny, counsel for S. D.
Jane Lenehan, counsel for J. D.

By the Court:

[1] The petitioner and respondent married on August *, 1999 and separated on May 15, 2008 at a time when both were residents in the province of Nova Scotia, having been resident here since May 24, 2007.

[2] The petitioner commenced a Divorce Petition on June 3, 2008. The Answer and Counter Petition was issued on June 13, 2008. Both parties are represented by counsel.

[3] The petitioner is 33 years old; the respondent is 34 years old.

[4] There are two children of the marriage: one born August *, 2000, currently attending grade 4 and the second, a preschooler, born October *, 2005.

Couple relationship

[5] The parties met in 1994 while both undergraduate students. They began living together in June 1996. They moved to * together in 1998 to allow the petitioner to continue in her field of education.

[6] I have reviewed the history of the relationship as set out in the decision of November 2008. In reviewing the affidavits filed, I note that both of these parents were young and immature when they met. Their affidavits describe the usual moves associated with their search for employment.

[7] The mother notes that when she pursued graduate studies in *, the cause of the first move, she and the father were essentially for the first time independent of their parents.

[8] The mother acknowledged she began to suffer stress and anxiety after 1998 as a result of a number of factors including the relationship, the moves required by seeking employment to sustain them, the move away from her family of origin .

[9] Otherwise, there was nothing noteworthy about the various difficulties they encountered.

[10] The mother believes that she was encouraged by the father to separate herself from her parents. That removed from her a strong source of support. She began to feel isolated. She attended counselling for a period of time in * to assist her balancing her relationship with her husband and her separation from her parents. They were a significant source of support for her.

[11] The father gained a * in 1998, a * diploma in 2002, and earned many * certifications.

[12] He was employed in 1999 then lost his job in 2001. He was unemployed for approximately a year during which period of time he retrained. The family was required to move around in * until he accepted a position. During that period of time the mother worked filling in the gaps.

[13] The father's search to find and maintain stable work required that he work long hours. He first worked in the spring of 1995 with a *, moving to * work with a company. In 2001 he lost his job with this *company and took an EI retraining grant to take * courses in *. He worked in a few short-terms jobs during that period of time, while the mother remained at home. He finished his course in 2001 and he moved to * for better job prospects. When he could not find work immediately, the mother took part-time work.

[14] This search for stable employment resulted in a number of school moves as well. As such, the move from school to school appeared to be necessary in the search for stable employment. The moves did not arise out of a lack of stability in either parent's lifestyle. This must, I assume, be the foundation of the recommendation by Justice O'Neil to keep the child in one school for as long as possible.

[15] Thankfully, the father's parents assisted them financially as the couple struggled to become independent and stable. It took the father a year to find work and when he finally found work, the mother also looked for part time work for fear that his employment would not be permanent.

[16] It was in 2002 both parents were out of the home trying to find work. Both parties decided in late 2003 that the mother would stay home and manage the children. That became her primary role. The father pursued employment. The mother took on the role of homemaker, preparing meals for the family, organizing the children's

activities, and generally became the primary household caretaker. She engaged the father as much as possible in these activities when he was not working.

[17] Understandably it was difficult. The father worked long hours; the mother was largely responsible for the home and for the care associated with the children. As the oldest child started school, the mother continued with her involvement in addressing their needs, both at home and at school.

[18] During the fall of 2006, the mother noted that often the father would have to work late and would be two to three hours late getting home. She did not fault him for this; it meant that his days were long and that he required time to unwind when he came home. He confirmed that many times he would come home to assist in getting the oldest child to bed and recommence working three or four hours to midnight or later and be up again in the morning to go to work.

[19] The father finally accepted a job in Halifax and moved in May of 2007. Initially he worked from 7:00 am to 7:00 pm or 11:00 am to 11:00 pm, three or four days per week, putting him outside of the home for considerable periods of time. His work shifts ultimately changed, allowing for some more family time.

[20] The father required more quiet time, more down time than the mother, and admits, although reluctantly, that he spent approximately three hours per day on the computer aside from his work. He believes this started as the relationship deteriorated and he ultimately withdrew.

[21] The mother indicates this pattern of being absorbed in the computer evolved throughout as the father needed to have wind down time.

[22] Both parties are serious about retaining employment. Both parties have experienced difficulties in the past in settling with one particular field of activity and finding satisfactory and more permanent work. Both parties have retrained.

[23] The parents separated finally as a result of an incident on May 23, 2008. The mother moved in with her parents and the father remained in the matrimonial home. His parents came from * to reside with him and assist him during the course of the separation and his transition into more hands-on parenting.

[24] I am satisfied that all jurisdictional elements of the Petition for Divorce have been proven. The parties have remained separate and apart for at least one year preceding this divorce petition. I grant the divorce on that basis.

[25] The parties submitted a consent order resolving all matters in dispute relating to the division of property. This consent order, once signed and issued, shall be incorporated into and form part of the Corollary Relief Judgment as agreed upon between the parties.

[26] The issues remaining before the court include the parenting arrangement between the two parties, child support and spousal support.

Parenting Arrangement per Interim Hearing

[27] The parties appeared before Justice O'Neil on November 12 and 13, 2008 to resolve interim parenting issues and child support. A decision was issued on November 28, 2008. I shall not repeat the contents of the decision other than to note that the information relating to their background relationship and the history of the proceedings to November 28, 2008 are contained therein and shall not be repeated for the purposes of this decision.

[28] At the time of the decision, the mother was in a two-year program of studies at the *. She has since graduated and is currently scheduled to commence work.

[29] The evidence supports a conclusion that historically the mother has been the primary care giver for the children while the family lived in * and in Nova Scotia. Historically, the respondent has been the primary financial provider for the family.

[30] The parties agreed on June 30, 2008 to an interim order for the summer of 2008. This order was effected after the oldest child was kept from the mother for a two-week period as the parties attempted to iron out their differences. At this point, one child remained with the mother and one with the father until resolution was reached.

[31] The parenting schedule they agreed upon is as follows:

1. The children will reside with the petitioner when they are not residing with the respondent.

2. The respondent shall have parenting time as follows:
 - a. Every second weekend commencing the weekend of Friday, June 27, 2008 from Friday at 6:00 pm until Sunday at 6:00 pm.
 - b. Two overnights each week, commencing at 6:00 pm and continuing until the next morning at 8:00 am, being Tuesday/Wednesday and Thursday/Friday in the week following his weekend with the children and Monday/Tuesday and Wednesday/Thursday in the week before his weekend with the children.
3. The respondent shall pay child support to the petitioner in the amount \$786.00 for the support of the children, being the Nova Scotia table amount for two children, payable on the first day of the month, for the months of July 2008 and August 2008.

[32] A second interim application was filed on October 9, 2008. The parenting schedule was the issue. Both parents and ultimately the court found that the parenting schedule provided too many transitions for the children, resulting in frequent exchanges. This created stress for the parents and the children.

[33] There was a significant amount of travel to effect delivery of the children to the other care giver, the elementary school and child care providers. The court agreed travel obligations placed a burden on the parents and the children.

[34] As a result of numerous factors, including a concern about the mother's anxiety and the father's use of pornography, the court ordered the following:

1. That the parties undergo a parental capacity assessment, with a psychological component.
2. That the parties cooperate to obtain a report from [the oldest child's] counsellor.
3. Subject to 4 below, neither party possess, purchase, view or create pornographic material or material that might be considered pornographic in the broad sense of that word, whether that material be in electronic, digital, print or photographic form.
4. That with respect to pornographic material possessed by either party, it is to be placed in a container and sealed in a secure fashion and stored in a manner

satisfactory to both parties and in the event that the parties cannot agree on the form of that storage, they may seek direction from the court.

5. The parties shall have joint custody of their children.
6. The interim consent order shall continue with some modification. The court varied and specified the father's overnight access to order the children to be with the father on Wednesday and Friday, the Friday overnight access ending at 10:00 am on Saturday. The children would also be with the father from Saturday morning to Sunday at 4:00 pm every other Saturday and Sunday.
7. The court ordered the child to continue at her current school, to be enrolled in the Excel Program for before and after school when a position becomes available.
8. The father was to be responsible for transportation of the child to and from school, given it was his position that the child should remain in his current school close to the matrimonial home where the father lived. The mother had proposed a move closer to her own residence.
9. The court gave the father the option to arrange alternate child care if the child could not get in to the Excel Program.
10. The younger child in day care was to remain in proximity to the mother's current home and be cared for by her parents or another suitable care provider arranged by her. She was to be responsible for all that child's transportation to and from day care and to the father's home on Wednesday and Friday.

[35] The court emphasized a number of issues on the interim level:

1. That the stability of the oldest's child's elementary school was important. The court endorsed the child continuing in this school if at all possible, given the moves that the parents had made within * to Nova Scotia and given that the child's parents were in the process of a divorce. This stability would enhance the child's ability to settle.
2. The court sought to reduce the transitions and weekday disruptions and to maintain the degree of involvement each parent had in the lives of the children.
3. The court endorsed the involvement of the four grandparents as they continued to assist the parents in the parenting strategy. He recognized how difficult it was for the father's parents to come to Nova Scotia from * during the father's parenting time.

4. The court endorsed for the youngest child an opportunity to be cared for near his maternal grandparents should it be possible to put that in place to reduce the need for him to travel and maximize the opportunity for him to be cared for by his mother and other extended family members on days they were free to do so.
5. Summer block access was limited to two-week block periods unless otherwise agreed upon and the March breaks were divided.
6. The court left in each parents' hand the obligation to resolve child care issues that arose during their parenting periods as they deemed appropriate.
7. The father was ordered to pay child support in accordance with the child support Guidelines.

[36] At the interim level the test to be applied as recognized by the Learned Trial judge was one that promoted the status quo (**Marshall v. Marshall**, [1998] NSJ No. 172, para. 25 adopting the test applied by Justice Kelly in **Pye v. Pye** (1992), 112 NSR (2d) 109 at paragraph 5).

[37] It is clear that the Learned Trial Judge also put his mind to the list of considerations as outlined in **Foley v. Foley**, [1993] NSJ No. 347 and in particular, he emphasized the availability of both maternal and paternal grandparents to assist in parenting the children as a significant positive feature of this case.

[38] The assessment as ordered by Justice O'Neil was completed by report dated August 19, 2009. The clinicians involved in the assessment included a social worker who was the primary investigator collecting evidence and interviewing individuals. She was assisted by a psychologist. In addition there was a psychiatric consult, which was an hour and a half psychiatric assessment, completed on each of the parties.

The Assessment

[39] All three of the team of assessors testified.

[40] Johneen Kelly was qualified by consent as a social worker able to give expert evidence in the area of performing assessments of parents and children with respect to parenting capacity and custody and access.

[41] Ms. Kelly was the principal clinician. She has been employed as a member of the IWK Parent Child Assessment team from 2007 to the present. Prior to that for four years she was a Child Protection Social Worker with the Long Term Protection Unit of the Department of Community Services. For eight years prior to that she was employed as a clinical therapist with the Choices Adolescent Treatment Program (formerly Drug Dependency Services). Ms. Kelly considered it her role to determine the best plan for the children regarding custody and access.

[42] The clinician had six meetings with the father, five scheduled and one unscheduled and six meetings of three hours each with the mother. Home visits lasted one and half hours and she interviewed the collaterals.

[43] Ms. Kelly confirmed both were pro-social parents with healthy role modeling. She advised the mother had a good understanding of the oldest's temperament and strengths and acknowledged that both of the parents could provide the basics.

[44] She described the mother as intellectual, interesting, deeply spiritual, loves children, yet struggles with her anxiety. According to the social worker, the mother does not have any insight into the extent of her anxiety and its potential effect on the children.

[45] Ms. Kelly observed that the father presents as cool and aloof, although when interacting with the children he connected well. He intellectualized but when he became more comfortable with Ms. Kelly, she observed he became more relaxed.

[46] Ms. Kelly acknowledged that the father presented voluminous material he had compiled for her reading, which included emails from the mother from the beginning of their relationship forward to support his views regarding the mother.

[47] She confirmed that both parents were eccentric.

[48] The assessor noted that the stress of the interview produced in the mother a number of unusual physical presentations including rigid posture, closing her eyes tightly, shaking her head slightly. The mother was "highly anxious and intense"

during her interviews. The assessor noted the mother made serious gulping motions prior to answering questions. The social worker commented that the mother was "the most anxious person she had interviewed." She observed her anxiety as quite palpable.

[49] The assessor also noted the mother had difficulty discussing the sexuality issues and her difficulties with her husband. The assessor noted, however, that when the topics concerning her were education, artistic and literary pursuits and the children, the mother spoke with confidence and composure and appeared comfortable.

[50] Because Ms. Kelly was concerned about causing the mother further distress, she did not move into an assessment of what actually happened between the couple in order to assess the extent of the differences between the two and the corresponding affect this aspect of their relationship had on each of the parties. Neither parent spoke about this either.

[51] This leaves the court with little information about the nature and extent of the sexual incompatibility and unable to assess the effect of this incompatibility on the mother.

[52] Ms. Kelly could not pinpoint the cause of the mother's anxiety; she could not conclude whether it was situational or long term. Her example of the effect of the anxiety on the children was exemplified in her view of the way the mother intervened on the home visit to take the children from the activity and ensure that the child attended the bathroom. Other than the anxiety caused to the children by both parents, this appears to be the one time when there is a tangible comment regarding the effect of the mother's anxiety on the child.

[53] As a result of her concerns regarding the mother's level of anxiety, the social worker referred her for psychiatric assessment.

[54] However, the long-term view and the history, as described by both parents and third-party service providers, does not provide proof that historically the children have experienced the effects of the mother's anxiety.

[55] On the evidence provided, it would be truly difficult to identify how much of the children's anxiety arises from the parents' inability to resolve the issues without

conflict and differentiate that aspect of their concerns with their concerns regarding the mother's anxiety.

[56] The assessor concluded based on her view of the parties that the father was in a better position because of his employment and life circumstances to be the primary care giver. Because the parties could not agree, she concluded there should be a sole decision-maker and that role she recommended to the father.

[57] Ms. Kelly clarified that she and the assessment team did not adopt the father's wish to have sole custody for a long period of time. Their recommendation was limited to two years with a review to determine whether the mother's anxiety had improved. Their long-term goal was to move from joint custody with the mother as primary care giver to the father as sole parent and back to a joint custody situation in two years; a move toward equal time when the mother demonstrated progress in managing her anxiety.

[58] Sole custody was apparently recommended in part to eradicate the possibility of dissent in decision-making given the father was employed in a stable position and the mother's anxiety was not yet treated to their satisfaction.

[59] It was clear to me that this sole custody recommendation was not intended to be permanent. It was designed to encourage the mother into counselling in order to regain equality in her status as a parental figure.

[60] Heather Cake was qualified by consent to give expert evidence as a psychologist with expertise in the area of developmental psychology, able to give expert opinion in regard to the assessment of parental capacity and its influence on the development of children. A psychologist for 19 years, she was employed for 17 years with perinatal follow up and had a significant focus on newborns and very young children, as well as an interest in the impact of genetics on children.

[61] Her role was limited. Ms. Cake completed a piece of the assessment relating to the youngest child. She advised that she did not attend home visits and was not the primary clinician.

[62] Ms. Cake advised there was nothing in the testing results that would cause concern regarding the parents' ability to parent. She admitted that she did not have

enough of the history to pinpoint the cause of the mother's anxiety and was concerned about whether the mother's anxiety would affect the children.

[63] The psychologist did not have historical information that would support a prospective view that the mother's anxiety would in fact interfere with the children. She was concerned about the possibility of it arising.

[64] She indicated that the mother appeared fragile to her. She did not know whether the mother was engaged or disengaged. She confirmed that the mother had an appropriate level of knowledge regarding child development and acknowledged that she only observed her briefly.

[65] Ms. Cake described the father as somewhat self-righteous, authoritative and indicated that if challenged, he could feel wronged and would have difficulty to compromise. Her concern regarding the mother was whether she was able to be emotionally available to the children because of her own anxiety level if she has not sought therapy.

[66] Ms. Cake acknowledged that the children were doing relatively okay at the time of the report and acknowledged that she does not know about the potential for change.

[67] Historically, it would appear that the mother has been emotionally available to the children.

[68] Dr. Khalil Ahmad was qualified by consent as a psychiatrist able to give expert opinion evidence in the diagnosis of mental disorders and advise regarding treatment of mental disorders and, in particular, how certain mental disorders can impact upon the ability to parent.

[69] Dr. Ahmad was clear to remind us on a number of occasions that his diagnosis comes solely from a one and a half hour interview with a person at a specific time (June 30, 2009). To determine how the mother or father are coping now as a result of intervention as well as the resolution of the issues, they would have to be referred again for an appropriate assessment.

[70] Dr. Ahmad concluded that the mother suffered from generalized anxiety disorder and under Axis II diagnosed her with dependent personality traits. In court

he corrected his report indicating that the Axis II diagnosis at that time should have said dependent personality disorder.

[71] He advised that the current situation, i.e., the divorce and custody battle between her and her husband, has resulted in making her quite anxious and tense. She is experiencing a lot of stress. He advised that the anxiety disorder could be related to her present situation. He concluded she needed help to cope with this anxiety.

[72] He advised that while she had seen her doctor and been prescribed anti-anxiety medication, he suggested it could be looked at again by a referral to a mental health clinic.

[73] He also indicated there was a physical problem which would be unrelated to parenting that could be addressed by a health professional as well.

[74] He determined the mother was very intense and anxious during the interview; however she advised she usually sleeps well and her appetite at times has fluctuated. Dr. Ahmad suggested that with assistance, this should be able to settle within a two-year period. He notes it would be a concern if this anxiety goes untreated. It could affect the children.

[75] His diagnosis of dependent personality disorder means that she needs the support of other people. This disorder would affect her more so than have an effect on others.

[76] He noted that the generalized anxiety disorder in Axis I is acute in the sense that it ought to be treated now and the Axis II may or may not affect the person for life.

[77] Dr. Ahmad relied on the information in the assessments and from his colleagues as well as his own observation. He recommended psychotherapy and medications as and if advised by her attending physician or psychiatrist. The goal of treatment is to assist her avoid having her own anxieties affect the children.

[78] Dr. Ahmad indicated that he concluded that the father had narcissistic traits because he fit the personality type of one who appeared to have a high opinion of himself, feels he does no wrong, and does not see a need to change. He noted that the personality diagnosis can be difficult to change and it can affect the couple's relationship. In this case, it obviously did so.

[79] To change, he advised one has to obtain insight and then assistance in understanding how to make an adjustment.

[80] Dr. Ahmad noted there could be difficulty in addressing any deficiencies because the father's personality type would fit into a category of persons who would be of the belief he was a perfect husband and not see other person's points of view.

[81] Dr. Ahmad was not involved in assessing the children or the children with the parents. He simply assessed the individuals and made his recommendations. He did not indicate that the mother was unable to parent.

[82] The assessment recommended:

1. That primary care of the children be given to their father including sole decision-making authority with respect to all aspects of the children's care.
2. That the mother commit to and consistently engage in a course of personal therapy designed to ameliorate her emotional functioning with a focus on addressing her anxiety.
3. That the father continue with his current therapist.
4. That the mother have parenting time with the children every second weekend and one evening through the week.
5. That the oldest child be periodically seen by her counsellor.
6. That serious consideration be given to providing a copy of this report to any mental health practitioners working with members of this family.
7. That a referral be made to a community-based pediatrician on behalf of the children to discuss and explore their respective issues with inattentiveness and distractability.
8. That the children would benefit from being seen by a single medical practitioner.

[83] These recommendations significantly alter the current parenting structure as arrived at initially in June 2008 by the parents by consent and as ordered after an interim hearing by the court in November 2008.

[84] The recommendations fundamentally alter the historic parenting structure adopted by the parents and the strategy the parents have been living with since the separation. They significantly reduce the mother's parenting time with the children, removing from her any authority or responsibility for decision-making.

[85] After considering the totality of the evidence, I am rejecting the recommendations in part as it relates to changing sole custody to the father.

[86] I accept as helpful the cautious opinion of Dr. Ahmad regarding the personality difficulties these parents experience and the recommendations for treatment.

[87] Also helpful was the clarification regarding the youngest child's status in light of the parent's concern.

[88] In addition, it was helpful for the court to have the team review the extent of the father's interest in sex and pornography and the impact, if any, that has on his ability to parent. The clinician had contact with the father's therapist (the court did not have any direct evidence from his therapist) to formulate a therapeutic opinion as to the father's ability to isolate this interest from his children.

[89] The father will need to be continually vigilant in separating out his opinion as to what addresses his needs and interests from what addresses his children's needs in accordance with their ages and stage of development.

[90] The father will need advice external to himself when addressing sexuality issues for his children and he will need to be inclusive of other opinions including but not limited to the mother's opinion as to what is appropriate.

[91] As it relates to the parenting strategy, I conclude that the court has the benefit of examining the totality of tested evidence and is in a position to determine a parenting strategy that best suits the children and accords with the jurisprudence and the proven facts.

[92] The concept of a parenting strategy that substantially alters the existing strategy, that has produced good results for the children, to persuade the mother, in this case and in these circumstances, to address her anxiety does not fit well into our current understanding of the law in private custody matters. It is more likely to fit a child protection proceeding where the state has authoritatively met the threshold test of proving risk of such a nature that protective services are warranted.

The Law

[93] In reviewing the totality of the evidence, I have considered the factors enumerated in **Foley v. Foley**, 1993 Can LII 3400 (NSSC) and **Young v. Young**, [1993] 4 SCR 3.

[94] Of the 17 factors enumerated in **Foley**, I specifically note as relevant the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);
2. Physical environment;
- ...
4. Role model;
- ...
8. Time availability of a parent for a child;
- ...
11. The emotional support to assist in a child developing self esteem and confidence;
- ...
13. The support of extended family, uncles, aunts, grandparents, etcetera;
14. The willingness of the other parent to facilitate contact with the other parent. ...
15. The interim and long range plan for the welfare of the children.
- ...

[95] In reflecting on **Young**, a consideration in this particular case is the history of the children's lives established by the consent and decision-making process of both parents, a strategy they adopted and an assumption of roles they chose that worked well for the children.

[96] I have carefully reviewed the discussion of best interests and the contribution of the Supreme Court of Canada towards our understanding of the principle of "best interests". This was addressed by the Supreme Court of Canada in **Young**.

[97] L'Heureux-Dubé J. said:

Expert evidence should not be routinely required to establish the best interests of the child. Expert testimony, while helpful in some circumstances, is often inconclusive and contradictory because such assessments are both speculative and may be affected by the professional values and biases of the assessors themselves. Experts are not always better placed than parents to assess the needs of the child. ... The custodial parent, therefore, will often provide the most reliable and complete source of information to the judge on the needs and interests of that child (pg. 11).

.....

One of the most significant factors in many cases will be the relationship that the child entertains with his or her parents (pg. 9).

.....

The most common presumption now governing the best interests test is the primary caregiver presumption. It explicitly restores the values of commitment and demonstrated ability to nurture the child and recognizes the obligations and supports the authority of the parent engaged in the day to day tasks of child rearing (pg. 9).

[98] The best evidence (certainly not the only evidence) is evidence of the child's state of being, their daily performance either at home, in public or in school.

[99] For the benefit of warring parents, it helps to understand the view of the court when making a decision to move out of a *de facto* joint custody situation after separation or divorce. L'Heureux-Dubé J. said at page 6:

The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

Child placement decisions should safeguard the child's need for continuity of relationships, reflect the child's (not the adult's) sense of time, and **take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.** This need for continuity generally

requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent. A custody award is a matter of whose decisions to prefer, as opposed to which decision to prefer. (My emphasis added)

...

The right to access is **limited in scope** and is conditioned and governed by the best interests of the child. ... **The role of the access parent is that of a very interested observer, giving love and support to the child in the background.** He or she has the right to know **but not the right to be consulted.** Access rights recognize that the best interests of the child normally require that the relationship developed with both parents prior to the divorce or separation be continued and fostered. (My emphasis added)

[100] Having said that, L'Heureux-Dubé continued:

Decisions are made according to the best interests of the child without the benefit of a presumption in favour of either parent. The *Act* envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the children.

[101] And cautioned:

Maximum contact, however, is not an unbridled objective and must be curtailed where ever the welfare of the child requires it. (My emphasis added)

[102] This caution serves to aid parents and lawyers when discussing the statutory direction in the *Divorce Act* that identifies maximum contact as a desirable objective. It roots this consideration of which parent is best positioned to appropriately facilitate contact so as to inject some common sense and moderation on maximum contact. It confirms that the focus is on the best interests of the children.

[103] Best interests as understood by Sopinka, J. is also helpful to us. He said at page 18-19:

The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the *Divorce Act*. ... This policy, he said, is not displaced

unless there is a substantial risk of harm to the child. (My comment- This latter statement is included not because I rely on it for this decision, rather for accuracy.)

The best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. The "rights" must be distributed between the custodial and the access parent so as to encourage such a relationship. The traditional notion of guardianship giving to the custodial parent the absolute right to exercise full control over the child, even when the other parent is exercising his or her right of access, is at odds with this concept.

[104] Indeed, Sopinka, J. speaks to our current state of knowledge regarding the importance of preserving the rights and responsibilities of both parental figures. When a court is asked to intervene in a private custody matter, the court's interest is in preserving for the children the best of both parental figures that can be preserved, limiting or as L'Heureux-Dubé, J. said "minimizing the adverse effects" of separation and divorce (pg.11).

[105] If we start from the perspective that it is the child's interests that is the priority, we then look to the evidence surrounding the historical parenting strategy adopted by the parents. The evidence helps us identify their strengths and minimize the effect of their weaknesses; oft time defining roles between parents to lessen conflict and preserve for the child all that they have, protect them from adverse effects of one or the other parents weaknesses **before** we consider minimizing the role of one of their parents to the role of an observer.

[106] Moving to a sole custody relationship is a more intrusive parenting strategy that would require evidence confirming that this shift in parenting strategy is necessary to address the child's best interests. This move to sole custody ought to be approached with caution as it could result in a *de facto* reduction of the role of the parent that was addressing the best interests of the children.

[107] When considering the father's proposal on the mother's access or parenting time, I noted the comments of the Supreme Court of Canada regarding imposition of limits by one parent on the other.

[108] McLachlin, J. spoke on the issue of limiting access or, in today's terminology, limiting "parenting time". She said: the custodial parent has no "right" to determine limits on access. The custodial parent must consider the best interests of the child.

[109] In determining whether an activity poses harm (such as the practice of religion in **Young** or here, the mother's level of anxiety or the father's use of pornography), one must ask: Does this pose a risk to the child?

[110] Sopinka, J. talked about the presence of conflict. Conflict between parents "is not uncommon" (pg19). Conflict "in itself cannot be assumed to be harmful unless it produces a prolonged acrimonious atmosphere".

[111] If a parent persists in keeping the children engaged in the conflict such that a court concludes that harm, whether it is psychological, emotional or physical, is possible or perhaps even likely, then a shift in the parenting strategy may be considered. Harm itself need not be shown to restrict a parents access. Harm is not the test. Best interests is the test as described by L'Heureux-Dubé, J.

History

[112] The parties met in 1994 when they were both undergraduate students. The mother was likely around 17 years old if they met during the academic session. The father was possibly 18 years old. The father transferred to the mother's university and they began to live together as students.

[113] Upon the mother's graduation, they moved to * in 1998 where the mother began a Master's program. They married in August of 1999. The father was unemployed. He retrained and became employed in the * industry. Their first child was born when the mother was 24 years old and the father 25. Their second child was born when the mother was 29 and the father 30.

[114] The most notable period of time during which this child experienced and expressed difficulties was the incident that occurred on May 23, 2008. As a result of the separation, there was a tug of war involving the children and the parents and the police became involved and intervened. It was the final crisis in the family and notably it caused the family some pain.

[115] At page 2 of the assessment, the social worker identifies two meetings, one meeting with each child and one observation of the children with the mother and the father separately. The mother brought the oldest child to the social worker for her visit. The child was noted to respond to questioning in a matter of fact tone, neither

depressed nor sad. The social worker noted that the child did have, at the end of the interview, difficulty maintaining her focus and while easily distracted at times, was also responsive to redirection.

[116] The oldest daughter expressed her desire to have equal time with her parents.

[117] The oldest child described her parents in equally positive terms. At the time, there was some dispute about where she would go to school and that caused her some anxiety. The school described her as "beautifully behaved," "extremely creative child" who excels at activities which allow her a creative outlet. She is described as a "good kid" who is pleasant, seems happy, does not exhibit any unusual emotional outbursts and does not present as anxious or angry. The only school-based concern was the occasional lack of focus - she's a daydreamer.

[118] The parents attend parent teacher meetings together and share common concerns to the teachers with respect to their daughter.

[119] This child was referred to a therapist who described her as very bright and normal, albeit slightly parentified due to spending a lot of time with adults, and a little overly worried about her parents, particularly her mother.

[120] Initially the therapist indicated that the child had become involved in the parental dispute but this has ceased toward the end of the therapy. The therapist indicated that the child is bonded with both of her parents and focussed on things between them being fair. She does not want to lose touch with her father.

[121] The therapist recommended that the mother gain insight into the possibility that her anxiety could negatively impact her children inadvertently. The therapist wants the mother to learn to communicate with the child in such a way as the child is not worried about her mother.

[122] The oldest child's therapist concluded that each of the parents expressed a genuine desire to put the children's needs ahead of their own and noted that with direction they could be successful.

[123] She acknowledged that each parent had a level of anger toward each other and a desire to make disparaging remarks about the other to the therapist privately. While

the child was not in their presence, it was clear to the therapist that the child was aware of this activity.

[124] The therapist concluded that the parents would benefit from continuing to work on a cooperative, co-parenting strategy with a therapist to make sure that the parenting strategy meets the child's needs.

[125] The mother has described her eight-year-old in very positive, enthusiastic terms. Her explanation is not contradicted by other evidence.

[126] The youngest child was not interviewed by the primary assessor social worker; however, Ms. Cake conducted a developmental assessment of this child. Both of his parents were concerned about possible delays in his speech development. The psychologist identified no areas of concern. She advised he be referred to a pediatrician to obtain a more comprehensive assessment of his high activity and irregularities in daily bodily functioning.

[127] Ms. Kelly's observations of the youngest child relates solely to her attendance at their home for observations with both mother and father separately.

[128] The assessor described his demeanor as appropriate and despite some difficulty in speech, his pattern of speech was clear and comprehensible.

[129] In the father's home he was observed to be quiet, calm, relaxed and happy. He was "focused on an activity for a notable period of time" and sought minimal assistance from his father, although he sat in close proximity to him and was physically affectionate with him.

[130] The child's mood with his mother was different. He was tearful and whiny. The social worker concluded the mother was intrusive in her approach to the child. She removed him from an activity to take him to the washroom to use the toilet and he was tearful during this interaction. The mother was apparently in the process of toilet training and the child was none too happy about it. The assessor observed that he was not uncomfortable in his mother's presence, but toward the end of the visit he was clingy and verbally seeking out affection from her by repeatedly asking her for a hug.

[131] It should be noted that the visit to the father's premises occurred on the weekend and the visit to the mother's after a full day of daycare.

[132] The daycare described the youngest child as age appropriate, not aggressive, without difficulty in transitions. He was described as happy go lucky, smiling a lot, of giving hugs. He too was easily distracted, requiring reminders and monitoring. The daycare noted that both parents were aware and watching what they considered his attention challenges.

[133] The child's doctor noted nothing unusual with respect to the child. The child was also seen by various members of that physician's practice. It is not uncommon in this day and age to see various members of a practice attend to a patient when a physician is unavailable or not on call.

[134] Again, the mother described her son as vigorous and energetic and in very positive terms, identifying specifically his strengths and his weaknesses. There is no evidence to contradict the mother's description and in particular, it accords with the description of third-party service providers.

[135] In conclusion, these two children have experienced transition from * to Nova Scotia. This has not been terribly upsetting to them. Their most significant trauma has been separation and divorce of their parents and their involvement in the resolution of the issues by the parents.

[136] There are very positive third-party observations confirmed by the parents and the maternal grandparents respecting the children.

[137] It would be fair to conclude, based on the history of these parents, that the mother has spent a considerable period of time parenting the children. That was her primary role prior to the separation. At one point she home-schooled the oldest child. The description of her involvement and role with the children as contained in her affidavits was not contradicted by the father.

[138] It would also be fair to conclude that the father was not as significantly involved in the day to day care of the children prior to separation. With the help of his parents and subsequently on his own, his role with the children has changed significantly and he has become more adept at parenting on his own.

[139] It appears that since the separation, the method of resolving issues has settled considerably and the children are experiencing the benefit of remaining connected with both parents.

Pornography

[140] A significant barrier to the success of this relationship was the lack of commonality and lack of sexual compatibility. The respondent is described as having a strong interest in pornography and sexual fantasy and introduced these to the petitioner very early on in their relationship.

[141] In reviewing the decision of Justice O'Neil, I note that he rejected the mother's explanation that this pornographic material was imposed upon her by Mr. D.. He also rejected the father's explanation as to why he spent many hours alone in a room at home while using the computer.

[142] Based on the evidence that he had, Justice O'Neil was satisfied that the parties shared an interest in pornography for most of their years together. He acknowledged that it was outside the scope of the court's competence at that time to determine whether the significance of the interests was relevant to the parties' suitability as parents. It is for that reason, partially, that he appeared to recommend the assessment. He did note that neither party suggested that the possession of pornography per se rendered the other a less suitable parent. That position continues to the date of this final hearing.

[143] Subsequent to the separation, the father attended therapy to help him deal with the end of the relationship and to address the issues related to pornography. The assessment notes the comment of his therapist, a professor of human sexuality, that the father's interest is outside the norm with respect to his focus on sex, acknowledging that he did not have a disorder nor does his interest impair his functioning. She described him as having a strong academic interest in sex and a corresponding strong sex drive. She agreed that he would benefit from continuing in therapy.

[144] The psychiatric assessment notes that this father has some narcissistic traits, obsessive traits toward sexual fantasies which he describes as some obsessive interests in adult pornographic literature. He advises the father does not, however, suffer from a psychiatric illness. The psychiatrist recommended that he continue to see a

psychologist regarding his sexual interests. If they continue and are unresolved, they may affect his future relationship with women. They have certainly affected his current relationship.

[145] The father testified he continues in therapy. He abided by Justice O'Neil's order to destroy any and all pornographic material in his home completely.

[146] The father is emphatic that he is able to maintain appropriate boundaries and to ensure that the children are not exposed in any way, shape or form to pornography while under his care or in his household.

[147] The removal of this material and absence from the home or in any environment in which the children reside is a condition of this order.

[148] In fact and in retrospect, while it is correct as stated by Justice O'Neil that the court is not a censor nor moralistic in its assessment of this evidence, it becomes relevant when assessing the father's ability to enter into adult relationships and sustain those relationships and his ability to parent.

[149] Currently, the professionals indicate that the father is able to place his children's interests as a priority. The assessment concludes that if he addresses this issue, it is not a boundary to parenting.

[150] It must be acknowledged, however, that this pornography and his sexual interests and the lack of compatibility with the petitioner's sexual perspective, are essentially a significant part of (certainly not the entire cause of) the reason the parents' relationship ended. The father must develop some insight into the potential this interest, if unchecked, has to destroy relationships and to create difficulties.

[151] Each parent played a part in the breakdown of the marriage. The sexual incompatibility is evidenced in the breakdown of the relationship, the dissolution of the marriage and the resultant instability of the children's life.

[152] It is clear that the views of the father are fundamentally different than the views of the mother, the mother coming from what is described by the social worker as a more shame-based view of sexuality.

[153] The issue of introducing the children to appropriate sexual information will be an issue that is difficult for these parents. The father's view as expressed through the mother in her affidavit of October 31, 2008 at page 42 would not, I suggest, accord with currently held notions of appropriate educative sexual material. It certainly does not accord with the mother's views.

[154] The parents will be required to agree on who and how to introduce the idea of sexuality to the children and since their views are so polarized, it would be appropriate that they would find a medical practitioner with whom they both agree and, through discussions with this medical practitioner, develop a strategy to convey appropriate sexual educative information to the children at the appropriate times. The parents are both intelligent individuals and have access to professionals and can achieve this with little struggle.

[155] I am also concerned that while the mother maintains that this was not of interest to her, she has exhibited poor judgment in taking the child shopping to adult stores to display to the child a different view of sexuality that addresses her historical problem. It certainly does not address the child's needs, age or stage of development.

[156] The mother, likewise, shall be prohibited from exposing the child to pornographic materials or adult shops containing the same.

Respondent

[157] The respondent's affidavit evidence confirms many uncontentious historical facts. He also confirmed that after separation his parents took a leave of absence from their jobs in another province to stay with him to provide him emotional and transitional support as he took on a greater role in the parenting of his children.

[158] The respondent does not disagree with the historical roles that the parties played. He confirmed that his parents assisted him in the transition and testified that he is able and willing to be the sole parent to these children and to provide access time to the mother.

[159] His parents stayed with him for this transition obviously subject to short returns to their province for various items until the end of December 2009. In January, he notes at paragraph 26 of his October 2008 affidavit, they would be returning to their ordinary work and residence.

[160] This is noteworthy because the father raised as a concern the fact that the mother requires the continued assistance of her parents as she continues to live and gain support from them while she attended school. This implied that he was better able independently to address the issues of transition, separation and divorce and provide a stable environment.

[161] In fact, both parents required and obtained the strong emotional and financial assistance that each of their parents offered to them for a considerable period of time, perhaps for different reasons and perhaps to address the different needs of the respective parents. Both parents and the children enjoyed the benefit of this extended family support.

[162] In the first affidavit in October 2008, the father was recommending a two-week rotation, with the children spending five days with each parent and then two days with each parent. Thus, during week one, the mother would have parenting time from Wednesday until Monday to make five overnights and the father would have from Monday to Wednesday. During week two, the mother would have them from Wednesday until Friday and the father from Friday until Wednesday.

[163] The respondent's focus was, at that time, on making sure the children were with them an equal amount of time.

[164] The father proposed, and the mother agreed, to rotate Christmas morning to allow the children to be in the care of one parent from Christmas Eve through to 12:00 o'clock noon on Christmas Day and with the other parent from 12:00 o'clock noon on Christmas Day until Boxing Day, rotating year to year. Commencing in even years, the children will be with the mother on Christmas Eve and morning and on alternate years with the father.

[165] The father has included two additional special days besides Christmas, birthdays, Canada Day, Natal Day and New Year's Eve to include equinox and solstice, proposing that in even numbered years the mother would have the children and in odd numbered years he would have the children.

[166] In even-numbered years, he would have the children for March Break, Easter Eve from 6:00 pm until Easter Sunday at 6:00 pm, Thanksgiving and Halloween and the mother would have them on odd-numbered years.

[167] The children would be with the mother on her birthday and Mother's Day and with the father on his birthday and Father's Day. He proposed four weeks for each during the summer, with the mother having first choice.

[168] The bulk of his proposal focuses on ensuring a clinical division of time between parents with little view as to what the schedule would do for the children.

[169] The father did, however, propose that since they had moved frequently in * that the schooling should be more permanent location. This location coincided with proximity to the matrimonial home where the oldest child was registered for school. It is the home within which he continues to reside.

[170] At separation, when the mother left the husband, she enrolled the child in school closer to her parents' home; the father took the child back to her ordinary school and it took the intervention of the principals and discussions between the parents to arrive at an interim concession which was subsequently endorsed by the court.

[171] After separation, the parents disagreed on after school daycare. The mother did not want the oldest child involved in preschool and after school daycare or Excel functions. She preferred family supervision rather than Excel.

[172] The father recognized that if he wanted to have the children remain in their current school and he was not permitted to enrol them in an after school program, it created very difficult circumstances for him in getting himself to work and back on time.

[173] The interim resolution by Justice O'Neil allowed the older child to attend the Excel before and after school program, but recommended that the younger child be cared for by the parents or in the maternal grandparents' home or with such other suitable childcare provider chosen by the mother.

[174] Clearly, with respect to the second child, the court was trying to "maximize the opportunity for him to be cared for his mother or extended family members on days that they were free to do so" (Paragraph 45, Decision dated November 28, 2008).

[175] The father was concerned about the difficulty the mother has had in finding an educational course acceptable to herself. While she has obtained a job, her history would indicate an absence of any long-term employment. This is true in part because of the agreed upon role she assumed as a stay-at-home parent and partially because she took the time upon her return to Nova Scotia to retrain. She enrolled and completed a two-year course which resulted in her current job. The father does not have high hopes for her long-term employment stability.

[176] A review of the respondent's affidavit indicates that essentially he was the financial provider throughout and the mother was the primary parent. From the father's perspective, the mother's desire to change her course of studies frequently, her desire to return to Nova Scotia and her lack of a driver's license contributed to placing additional stress on him as the primary financial provider and only person with a driver's license.

[177] However, a look at the total evidence shows that the father was in the job market for a certain period of time in * and likewise, had to move and retrain to obtain more reliable employment.

[178] The father is also concerned about their lack of ability to communicate. Certainly, there are grounds to be concerned about the failure of both parents to resolve ordinary and everyday issues. The incident arising on May 23, 2008 which resulted literally in the children being pulled from one parent to the other was no doubt horrific for the children and a vivid example of the lack of knowledge the parents displayed in assessing how they could resolve their issues without drawing the children into the conflict.

Conflict/ Decision Making

[179] The assessment concluded on August 19, 2009. The assessor highlighted the difficulties the parents experienced on separation: the manner in which both families became involved in the dispute, the difficulty the parties had in determining a parenting schedule without court intervention, and the difficulty they had in deciding, as a result of the separation, where the oldest child would go to school. These are the usual issues that need resolution. The fact that they were resolved in a hostile manner is unfortunate but not uncommon.

[180] Prior to their engagement in the parent information course and with their various respective counsellors, these two individuals continued their habit of approaching new situations with little knowledge as to how to conduct themselves.

[181] Many parents approach these issues under a great deal of stress, with a considerable amount of fear that the court's involvement will result in a loss of their parenting opportunities.

[182] However, it is clear after much time has passed that they understand, through parent education and through their counsellors, a more appropriate way to remove the children from the conflict.

[183] I am satisfied that while the litigation is ongoing, resolving issues is extremely problematic. Both parties are invested in a different view of how this should resolve.

[184] Regardless of the problems associated by the dissolution of the marriage, the two children have been described by all their third-party service providers in very positive tones and the oldest child is showing a very positive school report.

[185] Both parents have been able to agree on a number of other issues. The assessment noted that both "place value on education, social consciousness, supporting the development of respectful behaviour, and the importance of nurturing of innate interests and talents."

[186] Neither of the parents consumes unreasonable amounts of alcohol. Non-prescription drugs are not an issue nor is there any evidence of a criminal past.

[187] Physically, they are both healthy as are the children. Notably, the assessor contacted the mother's current physician and former physician from * and reported that neither had any concerns regarding her physical health. Her family physician confirmed that he had seen her regarding stress-related issues following the separation. The mother was provided a prescription but did not take them because of her fear of psychotropic medications.

[188] Her family doctor noted that the mother experienced a mood improvement as a result of taking the prescription; however, he has not prescribed it since June 2008 and the mother has indicated her reluctance to do so.

[189] Likewise, the father has been reported to be in good physical health, although he has not undergone a physical examination for the past couple of years. The assessor contacted the current family physician as well as his former physician in * and was advised that neither expressed any concern regarding the father's physical nor emotional health.

[190] The evidence supports a conclusion that the actual history of the children and their performance is positive. This evidence would be a contraindication to a suggestion that the mother's anxiety cannot be curtailed.

[191] Dr. Ahmad testified he was not suggesting there was a probability that the anxiety would adversely affect the children; he was suggesting that there was a possibility and that difference of probability versus potential is an important distinction.

[192] Courts become involved in this private custody matter when the parents or guardians cannot resolve difficulties. It is important to respect individual parents' rights to parent, balancing that with the children's right to live in a healthy, conflict-free environment. Each parent brings to the child unique to that parent certain skills and abilities.

[193] To create a parenting strategy that favours one parent over the other, there has to be evidence that removing from one parent their rights and responsibilities is merited to better address the best interests of the children. There ought to be evidence that the best interests of the children requires a definition of roles that places more responsibility on one parent than the other.

[194] In the private sector, the court does not act as big brother or big sister to oversee ordinary parental activity. The court is involved in resolving the dispute between the parties, focussing on the best interests and at the same time focussing on preserving for the children the best of each of these parents. The least intervention is the best option, barring risk.

[195] Requiring this couple to engage in another court review, after counselling is achieved, would prolong the litigation unnecessarily. This case is not a situation where the court must or even can assume a role of supervision as in a child protection process.

[196] The parents have been unable to agree on a parenting strategy. There is nothing to suggest that in two years' time they will voluntarily adjust the parenting strategy to reinstate the mother's equal status as recommended by the assessment simply because the mother has successfully completed a course of therapy. Such an order may simply promote further litigation.

[197] This is not a child protection matter in which there have been findings of risk which mandate government involvement in the lives of private citizens. In that situation, clearly the level of risk assessed reaches a point where it is important to ensure the parents attend to the issues of concern before moving into the more intrusive involvement through court action and mandatory involvement in medical intervention.

[198] Removing from a primary parent, in this case the mother, the ordinary rights and responsibilities as a joint parent and moving to a sole custodial situation with the father would require far more evidence that this change is necessary to achieve the best interests of the children.

[199] A parent generally stands equal in the eyes of the court. The court must look to the historical relationship between the parents and the child to assess parental strengths and weaknesses and to craft a strategy of parenting that will emphasize the strengths each parent has to offer their children.

[200] The parenting strategy should incorporate each parent according to their individual strengths and protect the children as much as possible from weaknesses that interfere with each parent's ability to parent effectively.

[201] The burden is on the parent proposing such a radical shift to deprive a parent of their rights and responsibilities to show that the best interests of the children require a diminution in the rights and responsibilities of the other parent.

[202] The parenting situation would have to have deteriorated further than it has in this situation to affect such a radical shift in parenting strategy.

[203] Here we are dealing with a family that can address all of the basic needs of their children and more.

[204] The children also have the life-enriching experience of having both grandparents available to assist the parents and to act as support and to root their children in their history.

[205] There are no concerns about alcohol or drug abuse; both parents are intelligent and competent.

[206] The historic evidence support that the mother certainly has been able to address the basic needs of her children and more during the course of the early history of development and the father has more lately learned to be a primary parent as a result of the separation.

[207] The level of the dysfunction identified in the assessment report ought not to be pathologized as has been done in the father's testimony. He has taken the expert's report to new and unsustainable levels.

[208] His evidence causes me grave concerns about his own ability to be cooperative, communicative, and to treat the mother as an equal parent worthy of consultation.

[209] I am concerned that a sole custody order would be premature and would result in a creation of a status quo which would become irreversible within the two years suggested by the assessment.

[210] A sole custody order might gives the father a false sense of his own strengths without regard to his own weaknesses. A sole custody order fails to account for the positive results, the positive evidence, the very physical evidence of the children's well-being that exists currently while residing with the mother and her parents which has been essentially a continuation of the pre-separation situation.

[211] Such a change at this stage would not acknowledge the strengths of the mother; it would exacerbate the weaknesses. It would result in taking away from the children a part of their parental influence.

[212] Despite the recommendation that it be limited, it would be difficult to alter. It could potentially negatively impact the children diminishing her role and the influence that come with her including her extended family.

[213] It ought to be remembered that this parental capacity assessment is not a risk assessment as is usually the case in child protection. The mother's counsel provided the court an article written by Timothy T. Daley, *Canadian Family Law Quarterly*, Volume 17, 1999, at page 2.

[214] The author identified that the parental capacity assessment is intended to identify the strengths, weaknesses, ability and skills of the parents as caretakers of the child . . . "It looks at a parent's track record as parent." Page seven, subparagraph (vi) of this report deals with the focus of assessment. The author indicates:

There are two main questions that the PCA [parental capacity assessment] is to address. Is the quality of parenting by the parents under scrutiny compatible with normal development within the culture and community where they reside? If the answer is 'no', then the second question asks whether the quality of parenting is capable of changing with intervention. And, of course, what intervention?

[215] Based on the totality of the evidence, I conclude that the quality of parenting by the parents under scrutiny is in fact compatible with normal development within the culture and community where they reside.

[216] With respect to the issues identified relating to both the mother and father's functioning, it is clear that the question remaining is can these aspects of these parenting be capable of changing with intervention. The assessors are recommending intervention although changing personality issues are likely to be more difficult to achieve according to Dr. Ahmad. This would include the father's issues as well as the mother's.

[217] Both parents have indicated they are prepared to continue with intervention to address the personality characteristics of the father (Axis II) and more specifically the diagnosis of generalized anxiety disorder relating to the mother.

[218] The mother has historically sought out counselling in the past for various issues.

[219] To conclude that there might be an effect on the children relating to her anxiety is speculative. While it may be a good therapeutical guess, there is no historical

information to suggest, other than situational anxiety relating to the separation, that the mother's anxiety has adversely affected the children.

[220] While both parents were criticized by various assessors and therapeutic advisors of their tendency to speak badly about the other parent, to provide information about their faults, the mother managed in her testimony, in a very stressful environment, to refrain from bad mouthing the father to identifying his skills and to reinforce her wish for primary care without denigrating the father.

[221] She was reluctant to discuss the details of their personal relationship with her therapists and with the assessors. Some concern was expressed by the therapist about her anxiety level increasing when this subject matter was raised.

[222] Viewed from another perspective, the parental capacity assessment undertaken for the purposes of child protection proceeding completely exposes all personal detail and minutia regarding a person's life. This mother has a desire to maintain some privacy over the amount of personal content open for public viewing. Her reluctance ought not to be dismissed as a negative reflection on her.

[223] On the contrary, the father testified and with every opportunity expressed his concern for the mother managing to identify her weaknesses. He was clearly still involved in attempting to put before the court his own grief, his own difficulty enduring the separation and his serious concern about her mental state. In assessing his testimony, it is clear that he has pathologized this situation to support his sole custody bid.

[224] In conclusion, it is premature to direct a sole custody situation either to the mother or to the father. I am not satisfied on the evidence this is an appropriate solution that would adequately address the best interests of the children.

[225] It is premature to reduce either parents' ability, right and responsibility to consult and make appropriate and educative decisions about the physical, spiritual, emotional and day to day health of their children.

[226] They are both intelligent and can access the necessary resources that will facilitate their understanding of their role in the conflict and how to keep their children out of the middle. Both could use some assistance with respect to this.

[227] I order joint custody of the children to continue.

[228] The children are to remain in the mother's primary day-to-day care.

[229] The oldest child will remain in her current school of * and be enrolled in the Excel Program as currently exists for as long as it is appropriate. The father shall be responsible for transportation of the child to and from school and the Excel Program.

[230] The mother shall be responsible in accordance with the order of the court for the younger child's attendance in a child care facility or in her home by her parents or other suitable child care provider until he is school aged and she shall be responsible for the transportation requirements to and from day care for this child.

[231] The youngest child starts school in September 2010. It makes perfect sense for that child to go to the same school as his sister.

[232] This does not mean that the children have to remain in the same area for their full elementary and secondary education. What it does mean is that their selection of school ought to be stabilized for a period of time and in the event one or the other parents have to move for employment purposes, serious discussions be undertaken to determine whether it is appropriate to move the children's school or not. The mother may want to reflect on her proximity to the children's school to facilitate transportation issues when the youngest child begins school.

[233] Neither parent shall remove the child from their school without consent or court order. They shall first engage in discussion between the two of them and shall then attempt to mediate or negotiate a solution should the need arise to relocate.

[234] The mother will have to be flexible about negotiating by e-mail. The benefit of email is that in the event it is used for purposes other than appropriately resolving issues relating to the children, they can be printed and shown to a third party who can determine by the tone and content which parent has the problem discussing the children's issues.

[235] The father suggestion to copy the other parent when there are discussions with third-party service providers is a good idea as it keeps both parents informed and up to date.

[236] The email shall be used only for ensuring that appropriate medical educational religious information concerning the children and their activities is discussed between the parents. Hopefully, the parents will work on their ability to speak to one another about children issues.

[237] At least one parent indicated they were prepared to continue with Mr. Whitzman to create a strategy of communication so that as issues evolve they can discuss them without third party intervention. The mother will have to engage with the father and he with her to move to resolve these issues.

[238] The failure of either parent to move beyond their differences will no doubt be a significant consideration should the court have to be involved again.

[239] Should either party be required to bring this matter back to court, they are reminded that the court is directed under section 16(10) and section 17(9) as follows:

Maximum contact

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

[240] I note that the father proposed, should he have custody as a result of this hearing, parenting time for the mother which was in fact less than the parenting time he has now.

[241] The schedule designed by Justice O'Neil addressed the youth and stage of development of both children in that it did not provide for lengthy periods of time when the children would be out of either one or the other parent's supervision.

[242] There was some videotaping of the transfers in the past. There is no need to continue that practice. The transitions shall be peaceful. Any contentious issues shall not be discussed or resolved during transfers.

[243] The Wednesday night overnight for the father gives the children an opportunity to connect with their father midweek during a school day to allow the father to become involved in school activity.

[244] The every Friday night also keeps the children in contact with their father resulting in three overnights every second week and two overnights during the remaining weeks in the month.

[245] I agree that summer block access shall be limited to two week block periods unless otherwise agreed by the parties. While the child is with one parent for a block period of time that child shall have unlimited telephone access to the other parent.

[246] The father shall have the child in his care for March break on even-numbered years, the mother on odd-numbered years unless the parties agree in writing in advance to share March break each year or to negotiate another agreement with respect to March break.

[247] The parties may agree in writing in advance on expanding or altering this parenting structure. This strategy is really a work in progress and changes will be necessary as the children mature. The parents are encouraged to be flexible with one another as they focus on the children's best interest.

[248] Both parents will continue with therapy as directed. They need to learn to develop a method of communication that would keep their children out of the conflict.

[249] I am directing that the mother commit to a course of personal therapy, provide the assessment report to her therapist and continue as recommended in this therapy in accordance with the therapeutic opinion of her psychologist. This course of therapy shall address the issues raised in the report relating to her anxiety, simply to ensure that she is assisted in developing the necessary tools to address her generalized anxiety as diagnosed to ensure that she develop a strategy that lifts any and all burden from the children relating to her own personal issues.

[250] I am further requiring the father to continue as directed with his therapist to address the issues related to sexuality and building healthy relationships. This referral seeks to ensure that the therapist addresses with him the appropriate protective measures to ensure his children are never exposed to any pornographic materials or

any issues relating to his issues around sexuality that caused a problem in the parental relationship as addressed in the parental capacity assessment.

[251] The oldest child's counsellor ended her sessions with the child because she thought the child was doing well and was concerned that continued attendance at therapy may create an impression that something is wrong with her. The counsellor wanted to prevent pathologizing the child and her situation. The counsellor indicated that once the family situation stabilizes and should there be a need, future counselling can be restarted. I endorse that point of view. If the need arises, these parents will ensure the child attend therapy in the future.

[252] I direct that the parents provide the assessment report and this decision to their therapists. I am deleting the recommendation in the assessment that would include dissemination of the report to include a broader reference to any mental health practitioners working with members of this family. For the purposes of these issues and the transition issues, their current therapists should have a copy of this decision and the assessment report.

[253] Further dissemination of the assessment at this time without consent is an unwarranted violation of the rights of privacy to their health information for the parents and their children, and is a fairly intrusive measure that is not justified based on the evidence before me.

[254] The parents are further recommended to discuss any issues that arise with respect to their children, including inattentiveness and distractability. There is nothing with respect to these parents that would suggest that they would not address these issues should they arise.

[255] The parents will agree on a family physician able to provide consistent services to the children. In this environment, it is recognized that family physicians are not always available and that some walk-in clinics will be necessary to treat more urgent matters. It is appropriate that the parents agree on a physician and that their agreed-upon physician has the information from other physicians who have had of necessity to treat the children. This provides the benefit of having their own family physician as informed as possible of any issue arising with respect to the children.

[256] The court makes no comment as to whether the mother should be living independently or with her parents. Clearly with her parents currently, it has been a

supportive environment for the children. The court further makes no comment positive or negatively on the living arrangements there. It may be that while the mother starts her employment history, the support of her parents would be of assistance. I leave that to her to decide.

[257] It goes without saying that each parent shall provide appropriate sleeping accommodations for the children and that shall include their own beds as opposed to sleeping with either parent.

[258] The father will ensure when the children are with him that they are properly supervised. He is not to delegate that supervision to others; rather, he is to assume that ultimately if the children are with him, he is responsible for their safety and well-being. I have reviewed the circumstances surrounding the two incidents raised by the mother regarding the father's insight into supervising his children while they are in his care. These situations reflect his lack of knowledge and experience about the need to assume full responsibility for their supervision while they are in his care rather than assuming someone else is watching them. It is something that can be addressed by the father appropriately as long as he understands that while the children are in his care, he is solely responsible for their well-being.

[259] Neither parent shall have, possess, purchase, view or create pornographic material or material that might be considered pornographic in the broad sense of the word, whether that material be in electronic, digital print or photographic form in their home or in any way in proximity to the children while the children are in their care.

[260] The children shall not be involved directly or indirectly in the parents' negotiations regarding contact.

[261] Each parent shall have access to third-party service providers to obtain information from those providers regarding the children.

[262] Each party shall ensure that the other parent has details of any doctor's visits while the child is in their care.

[263] In an emergency, the emergency with respect to the child shall be addressed immediately and the other parent shall be contacted forthwith in order to ensure their attendance at the hospital or medical care provider.

[264] With regard to summer contact, the mother shall have first choice in odd-numbered years by providing to the father no later than May 15th in writing her first choice. In the event she fails to do so, that choice reverts to the father. This does not detract from the father's right to have first choice in even-numbered years and likewise, should he fail to do so, the choice reverts to the mother for that year.

[265] The parties shall rotate Christmas mornings such that the children are in the care of one parent from 3:00 pm on Christmas Eve through to 12:00 noon on Christmas Day and with the other parent from 12:00 noon on Christmas Day through to 3:00 pm on Boxing Day, rotating year to year.

[266] On even-numbered years, the children shall be with the mother on Christmas Eve and morning and with the father on odd-numbered years.

[267] In even-numbered years, the mother shall have the children in her care on the children's birthday, Canada Day, including fireworks, Natal Day and New Year's Eve, and the children shall be in the care of the father for those times in odd-numbered years.

[268] In even-numbered years, the father shall have the children in his care Easter Sunday Eve from 6:00 pm until Easter Sunday at 6:00 pm. On Thanksgiving and Halloween, they shall be in the care of the mother for those times in odd-numbered years.

[269] The children shall be with the mother on her birthday and on Mother's Day and with the father on his birthday and on Father's Day.

[270] Neither party shall remove the child from the jurisdiction of Nova Scotia or from their current geographical location without written consent of the other party or court order. In the event the children are to be removed for a vacation, the parties shall be advised of the location of the vacation, the time of departure and arrival, and the place where the children can be contacted.

[271] Neither party shall discuss with the children any aspect of these proceedings or express to the children unfavourable views of the other parent.

[272] The parties shall cooperate to ensure that both parents have the ability to be kept informed regarding the children's educational activities, concerts, and homework

requirements. The school shall be informed of the phone numbers and emergency contact numbers for both parents.

[273] Until both children are school age, the father shall bear responsibility for the oldest child's after school program. He chose that method rather than the mother's option. The mother shall be responsible for her youngest son's child care costs up to the start of school. When both children are in school, the parties shall pay their proportionate share of childcare expenses.

Child Support

[274] The father annual income for the 2009 year is \$55,460.82. He shall pay to the mother child support in accordance with the Guidelines in the amount of \$788.00 per month commencing April 1, 2010 and continuing every month thereafter until further order of the court.

[275] The parties shall exchange on an annual basis on or before May 15th of each year a full and complete copy of their income tax returns, notices of assessment and/or reassessment immediately upon receipt.

[276] The father shall continue to include the children in any medical benefit plan he has with his employment. He shall provide the mother with sufficient information to allow for immediate access to the plan for the purposes of addressing the children's needs.

Spousal Support

[277] The mother has asked for spousal support. She was adequately trained in one field before and during the marriage and subsequently post separation has re-engaged in further training. That training is complete.

[278] She graduated with a * in 1998 and a diploma in * in 2003. She now has a diploma in *. She is employed as of April 10, 2010.

[279] Reviewing the relevant sections of *Divorce Act*, it is clear that she was supported during the marriage. She has had the opportunity to retrain post separation

while the father has borne the bulk of the financial responsibility pre and post separation.

[280] She is able to support herself and has reached an appropriate level of self sufficiency. Spousal support was asked for at a time when the mother was in school and, while counsel included this relief in his final submissions, not much evidence was tendered regarding her entitlement and need. In fact, the thrust of her testimony supported her independence and ability to provide for herself and the children.

[281] I order no spousal support.

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

Legere Sers, Moira C.

April 19, 2010
Halifax, Nova Scotia