SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Ross-Johnson v. Johnson, 2010 NSSC 262

Date: Decision Date 20100712
Docket: 1201-59476
Registry: Halifax

Between:

Heidi Ross-Johnson

Applicant

v.

Christopher Johnson

Respondent

Judge:	The Honourable Justice Moira C. Legere Sers
Heard:	June 14, 15 and 16, 2010
Written Decision:	July 12, 2010
Counsel:	Sheena McCarthy for the Applicant Brian Bailey for the Respondent

By the Court:

[1] By decision dated July 3, 2009 custody of the child, J. J. born April 2, 2000, was granted to the father. The child was to reside with his father in Arkansas, United States of America ("US").

The July 2, 2009 Variation Order

[2] The terms of the variation order need not be repeated except to emphasize the provisions that facilitate communications between mother and child in person in the United States and Canada, by way of a web cam, phone calls and such other opportunities as are reasonably possible.

[3] The mother was entitled to block access with the child initially in the father's hometown and thereafter in Nova Scotia at Christmas, March Break and block summer access commencing the summer of 2010.

[4] Any telephone and web cam contact between the child and the mother was to be supervised for the first four months of transition to ensure the conversations were healthy and appropriate so as not to interrupt his transition into the father's home and disturb the integrity of his new residence. Any emotionally-charged content was to be monitored and prevented.

[5] The father was given the authority to terminate the supervision earlier than the four months should he determine continued supervision unnecessary.

[6] The Supreme Court of Nova Scotia (Family Division) retained jurisdiction over the child for the purposes of a **review hearing** on November 16, 2009. At that time the father was to provide an affidavit detailing the transition and a report from the child's counsellor. The mother was to provide a reply affidavit.

[7] This Decision was appealed and affirmed by Nova Scotia Court of Appeal decision dated December 11, 2009 (*Ross-Johnson v. Johnson,* 2009 NSCA 128).

Review

[8] The parties appeared with their counsel on November 16, 2009 for the review.

[9] As directed, the father filed a report provided by Mr. Stephen Seward, the counsellor working with the child in Arkansas.

Supervision of Calls

[10] An issue arose over the tenor and content of the telephone access between the mother and the child. The father began to monitor the calls between the mother and the child and terminated the calls, as directed by court order, when the mother's conduct became abusive and inappropriate. This supervision became problematic.

[11] The Court directed the father's counsel to inquire whether the child's therapist, Mr. Seward, could supervise or whether an alternate supervisor could be put in place. The Court directed that the father and his wife were not to supervise the calls.

[12] The Court directed counsel to arrange a telephone conference to advise the Court of these supervised telephone arrangements. The mother's then counsel, Mr. Grant, was present during the initial arrangements. Mr. Grant advised his client wished to file an application to vary. Trial dates were set for June 14, 15, and 16, 2010. The review was set for January 28, 2010.

[13] The January 28, 2010 review was set up to assist the Court by having Mr. Seward in Arkansas speak via video conference to the issue arising as a result of the telephone calls between the mother and the child.

[14] The mother advised the court office on January 22, 2010 that she was no longer represented by counsel. On January 26, 2010 it became apparent that the mother would not have counsel in time for the access hearing. Consequently, the review hearing was converted into a pre-trial conference.

[15] On January 28, 2010, a pre-trial conference was held and the matter was set over with consent of the parties to have Mr. Seward appear by way of video conference from Arkansas. The scheduled video conference was delayed until the mother successfully retained or had counsel appointed on her behalf.

[16] Counsel addressed the problematic phone calls with the court in Halifax on January 28, 2010. Mr. Bailey, counsel for the father, and Ms. Ross-Johnson, now unrepresented, were present in court. Arrangements were made to facilitate independent monitoring through Mr. Seward to remove the father from the process and to attempt to reduce the mother's level of agitation. The timing of the calls was also discussed and modified. This direction, set out below, is taken from a transcript of the administrative pretrial:

> **THE COURT:** Mr. Bailey is going to talk to Mr. Seward to see if he will change the times. If Mr. Seward confirms that he will send you a letter in writing telling you the times and the conditions. You initiate the call - this is the time - it will be monitored - Mr. Seward will be there - it will be 40 minutes - and that means you and the two children can have a chance. If the conversation -
>
> **MS. ROSS-JOHNSON:** 11 minutes?
>
> **THE COURT:** 40 minutes.

[17] Mr. Seward agreed to monitor these twice-weekly 40 minute calls on Sundays and Wednesdays at a time arranged to suit the mother's schedule. The mother was to initiate the calls and Mr. Seward would bridge into the son. While the son had the option of calling the mother at any time from home, his therapist indicated he refrains from calling to avoid stress associated with the calls. Both parties indicated that the calls were being taped.

[18] In late January 2010, Mr. Seward contacted the mother to begin the course of monitoring the telephone calls. The mother refused to cooperate with the monitoring. She advised the therapist that her sister had been appointed to monitor the calls. She refused to adhere to the plan and continued to call J. directly. The therapist recommended the father avoid taking calls at home in order to encourage the mother to abide by the court direction.

[19] After a month of this approach, recognizing the child’s need to stay in touch with the mother, both the father and the therapist gave up on moving the calls through Mr. Seward and reinstated the father monitoring the calls. When the child expressed a desire to speak to his mother but reluctance to place the calls, the therapist recommended the father insist on and arrange weekly calls.

[20] On March 30, 2010, the mother insisted that the Court directed her to call J. directly and not through anyone else. This is clearly **not** what is reflected in the January 28, 2010 court appearance.

[21] The Court also reminded the mother that the June hearing dates were set at her former counsel's request on the understanding she would be filing a variation application with supporting affidavit. At the administrative pretrial this variation application had not been filed.

[22] The mother obtained a lawyer and filed her application on April 8, 2010 pursuant to Section 17 of the *Divorce Act* to vary custody and access issues. The time delay between the review date of November 2009 and April 2010 is largely due to the mother's wish to wait until she was appointed another counsel.

[23] A further pre-trial conference was held on April 16, 2010. Counsel discussed and consented to making available at trial two counsellors in Arkansas via video technology: Stephen Seward and Kay Pantier.

Summer Access Arrangements

[24] Arranging summer access became problematic.

[25] On May 12, 2010, at a further pre-trial conference, the mother's summer access was discussed. The court-ordered transportation arrangements were reversed because the father was coming to Nova Scotia for the hearing. The father would cover the cost of transportation to bring the child with him to Nova Scotia before the trial date and the child would be returned by the mother on or before July 5, 2010. The mother was to cover the cost of the child's return to the US. Counsel were advised to exchange details of the transportation arrangements (flight details) to and from Arkansas by May 14, 2010.

[26] By June 8, 2010, the flight details were not confirmed by the mother. The father indicated he would be arriving by car on the weekend of June 13, 2010. Absent confirmation from the mother regarding the arrangements, the father would be required to make return arrangements with the child. For the child's safety, he must be accompanied by an adult.

[27] The mother advised the Court that she would be driving to Arkansas, aided by a relative from Ontario. No specifics were given.

[28] The Court ordered the mother to provide an itemized itinerary as to her departure date, her arrival in Ontario, departure from Ontario together with the telephone numbers and addresses of the overnight locations and the date and approximate arrival time in Arkansas. The mother was to make available a telephone number and ensure she reports by phone and allows the father to speak to the child by telephone each night of their stop until their arrival in Arkansas. The mother was to also provide to the father the name and telephone number of the brother-in-law who has committed to drive with her to Arkansas after the visitation and before July 5, 2010.

[29] If the mother was unable to confirm her plans in accordance with these instructions, the father would book the child's return to Arkansas for the same time as his own.

[30] The week before the child's anticipated arrival in June 2010, the mother confirmed her family purchased an airline ticket for the child's return.

Transition

[31] In the process of moving the child from the mother to the father's care, the mother told the child that he was going to visit his father for four weeks after which he would return to Halifax. Throughout early telephone conversations with the child once he transferred, she repeatedly tells him he is returning to Halifax to live with her in November 2009. The mother advises him in her telephone calls of all the efforts she has made to keep his connection to school and extracurricular activities. She advised the Court he did not want to stay with his father in Arkansas.

[32] In the April 7, 2010 affidavit the mother testifies that in the beginning her telephone access was going well and her calls to the child were allowed and answered on time. There were multiple daily calls. She admitted that the child had free rein to call her when he wanted to.

[33] By April 2010 the mother advised that her telephone calls were becoming more infrequent and inconsistent.

[34] The mother testified that from January 28, 2010 to March 17, 2010 not one of her calls to the child had been answered. She advises that on the child's birthday, his grandparents telephoned to wish him a Happy Birthday and their calls were not answered or returned. She and her daughter called on Easter morning and she advises that neither of the calls was returned.

[35] The mother acknowledges in her May 14, 2010 affidavit that her calls have been reinstated and she has been permitted to speak to the child. She believes the approaching court date has been the motivating factor.

[36] The mother acknowledged that the father allowed the child to get a Facebook account for the purposes of communicating with her. This is not method of communication she embraces, although she is familiar with it and uses it herself. She alleges that despite this, her messages to the child go unanswered. She advises she has not been provided any information about his school or doctors.

[37] The mother advises that the child has said to her on a number of occasions that he would like to speak to her more. This has been verified by the father and Mr. Seward and arose out of the temporary diversion of calls through the therapist and the mother's refusal to contact the child through the therapist.

[38] The mother contends she is not able to open email attachments that the father sent regarding the school. However, she has blocked the father's and his wife's email address and she has advised him not to send her emails.

[39] The father did provide the mother a link for the school to assist the mother obtain information about their child's school, calender and activities. He also provided a link for their child's after school care.

[40] On April 26, 2010 the father sent the mother a free version of Adobe Reader so that she could open PDF files. He asked her to refrain from calling him at 5:00 in the morning.

[41] The father confirmed that he sent the information about the doctor, dentist, school and after school care by email and reminded the mother that she had direct access to these third-party service providers. She does not have to go through him.

Mr. Seward

[42] At paragraph 136 of the Decision dated July 3, 2009 the father was directed to obtain professional counselling to assist the child's transition from Halifax, Nova Scotia to Rogers, Arkansas.

[43] Stephen Seward was qualified to give evidence as a counsellor of adult and young adolescents with emphasis on the treatment of depression and anxiety, inter and intra personal issues.

[44] Mr. Seward, a senior counsellor, was licensed to practice as a professional counsellor in the State of Arkansas on October 22, 1991 and as a marriage and family therapist on September 3, 1998. Along with various memberships, he is licenced to supervise counsellors.

[45] Mr. Seward was provided the decisions of the Supreme Court of Nova Scotia (Family Division) and the Nova Scotia Court of Appeal, as well as Mr. Donaldson's report.

[46] The transition to the father's care was scheduled to take place on or before July 15, 2009. The father contacted Mr. Seward on July 16, 2009. Along with his wife, the father first met with Mr. Seward on August 13, 2009. The child was not present.

[47] The first therapy meeting with the child was August 21, 2009. The child was told that Mr. Seward would be contacting the mother as well as speaking to the father. He met with the child again on August 27, September 3, 17 and 22, 2009.

[48] Mr. Seward has filed two reports. Both he and Ms. Pantier, the child's counsellors, appeared via video from Arkansas for the hearing. They were examined and cross-examined.

[49] Their involvement with J. was helpful and appropriate. The child, his father and wife have been well-assisted by their instructive and supportive advice. His testimony was thoughtful and clearly child-focussed. I am satisfied he took his obligations of assisting J.’s transition to his new environment seriously. When confronted with the mother's allegations that the child may be suffering physical abuse, Mr. Seward set in process a protocol aimed at identifying what, if any, risk existed within J.'s circle of influence.

[50] The counsellor noted that the child looked very relaxed, engaging with both the father and the father's wife, smiled frequently and showed no inappropriate signs of anxiety or duress. The child gave and received physical affection with the father and the nonverbal communication with the father's wife seemed very relaxed.

[51] The counsellor advised that J. shared with him his desire to continue to live with the father for the next couple of years at least.

[52] The mother had provided this counsellor with her concerns that the father's better financial situation would result in effectively buying the child's affection. The counsellor addressed this with the father, his wife and the child and satisfied himself that there was no sign that this was in fact the case.

[53] As the counsellor listened to the recordings between the mother and the child, he concluded that:

> . . . Mrs. Ross-Johnson continues to ignore appropriate verbal/emotional boundaries with her son and continues to exhibit the types of behavior reported in Mr. Donaldson's report to the court. ... There seems to be a consistent pattern of incorrect communication and behavior by Mrs. Ross-Johnson that concerns me deeply regarding her own mental health and suitability as a custodial parent.

[54] Mr. Seward set an appointment in order to communicate directly with the mother, with the father present, on October 17, 2009.

[55] Mr. Seward's conversation with the mother on that date contained the allegations made by the mother that the child had used a secret code word indicating he was being abused. He said as follows:

> ... a secret word that he used indicating physical abuse was occurring. She refused to tell me this code word, when it occurred, and gave me a vague story as to why she had not contacted anyone until now regarding these allegations. The entire conversation with her was an hour and a quarter in length, she was very evasive, rude, interrupted me, and was not pleasant or adult-like in manner. . . . This conversation was very similar to recorded conversations I had heard between J., Chris and herself. . . . (Page 3, 2nd paragraph)

[56] The mother told the Court in her affidavit and Mr. Seward in his conversation that in the past the father had hit the son. She reported her belief that the father was doing so currently.

[57] In court the mother denied that she had a code word or that she had spoken to Mr. Seward and alleged physical abuse, despite her affidavit to the contrary.

[58] As a result of these allegations, Mr. Seward immediately set in motion the appropriate investigative intervention and contacted the father and directed him to bring the child in for an interview. As well, he directed the father to contact the Children's Advocacy Center to begin their own independent investigation.

[59] The child denied all assertions made by his mother regarding a conversation about creating a code word, that he had used a code word, or that anyone had abused him.

[60] The Children's Advocacy Center advised they would have to contact the Arkansas State Police. Mr. Seward contacted the Child Abuse Hotline and reported the allegations of abuse coming from the mother and background information. They refused to open a file due to the lack of specific information regarding any actual abuse.

[61] Dealing with the disturbing phone calls and assisting the family to protect and minimize the impact of the mother's calls began to take up much of the family counselling sessions. In addition to the allegations of abuse when the mother began to question the counsellor's professionalism, Mr. Seward transferred J. to a therapist with the Children's Advocacy Center and J. began twice monthly sessions with Kay Pantier, a senior advocate with the Children's Advocacy Center. Mr. Seward's goal was to avoid a conflict in his function and to ensure continued access to therapy for the child. He continued in weekly contact with this therapist.

[62] The counsellor arranged for the child to see a child therapist at the Children's Advocacy Centre:

> . . . If for any reason there are indications of current abuse by the (father's new family) or past abuse suffered by J. by anyone in Canada this information will be immediately relayed to the court unless otherwise directed by the current court. I will continue to inform (the mother) as well.

[63] The counsellor discussed with the mother the need to report her allegations to child protection in the resident state. He was told by her that she was unable to contact child protective services or make a hotline call for suspected abuse because the toll-free numbers do not work in Canada. The counsellor obtained and gave to the mother the direct numbers for these agencies. She also advised the counsellor she had a friend on the State Police. The counsellor advised her to contact him. She did not do so.

[64] The assessor described the child as follows:

> J. has consistently been a cheerful, observant young boy not afraid to ask questions and engage in discussion. His interactions with Mr. and Mrs. Johnson have been observed to be positive, friendly, and thoughtful (of the father's family).

[65] Mr. Seward described J. as relaxed, engaging with both parents, smiling frequently and showing no signs of anxiety or duress. He gave and received physical affection with the father and seemed very relaxed with the father's wife. Mr. Seward concluded that J. talks to him about a variety of issues and speaks freely.

[66] Mr. Seward observed that J. interacted with the father and wife in a positive, friendly and thoughtful manner.

[67] Mr. Seward advised that J. has asked him to convey to the Court that he wants to see both his parents. At one point he advised that he wished to speak more often to the mother by telephone and visit her in Canada. He was certain about his wish to continue to live with the father.

[68] In addition, Mr. Seward spoke positively of the father and his wife. He saw no concerns for the safety of J. at this time:

> In addition, I find them both to be very reasonable, patient and loving with J. in their parenting styles and techniques. J. seems to be responding well to them both. Already J. has formed a strong attachment to both. *If I have any concern it is only around their understandable frustration in dealing with Heidi Ross-Johnson and how to deal with her without communicating anger inappropriately.* I am not saying that they are intentionally communicating with either J. or Heidi. It takes a lot of direction from me, which they follow, in knowing how to respond to and cope with Heidi's actions and the impact Heidi's actions have on all their lives. I find that most

> people, no matter how mature they are, do not know how to respond in a constructive manner to these behaviors and their reactions are certainly well within the range of emotional expression that I have experienced in past cases. They do attempt to restrain themselves, yet even J. is made very uncomfortable by his mother's behaviors. I am confident that the Johnsons will improve in this area with a little direction from me. It is plan that their desire is to do well in this area. (Emphasis added)

[69] After listening to the terminated calls, the Court came to the same conclusion with respect to the frustration the father and his wife experienced and with respect to their need to have constant assistance and intervention available, in order to coach them to respond appropriately to the emotionally abusive phone calls.

[70] I also conclude that the father's wife's written response to the mother was not an appropriate response. This approach only exacerbates the anger and misunderstanding and encourages further angry and hurtful exchanges.

[71] In listening to some of the telephone exchanges, it is clear that while the father exercises considerable restraint with the escalation of the allegations and the screaming and hollering, he does on occasion succumb to yelling over the top of the mother's voice, attempting to get a word in edgewise. This is obviously an entirely ineffective way of dealing with this escalating conflict and ought to be severely discouraged by both.

[72] Mr. Seward made a series of recommendations found on pages 5 and 6 of his report. One of the recommendations suggested that during visitation with the mother the child have a therapist in Canada, even for a one-week visit, and that the visitation in Canada be supervised (reference paragraph 8, page 6).

Ms. Pantier

[73] Kay Pantier was also qualified as a counsellor of young adults and adults with emphasis on treating depression and anxiety in inter personal and intra personal relationships.

[74] Ms. Pantier has 24 years of experience as an educator in the State of Texas, serving as an elementary teacher, an assistant principal and principal. She is licenced

in the State of Arkansas as a marriage and family counsellor. She works out of the Children's Advocacy Center with children who experience abuse.

[75] Ms. Pantier was not provided with much background information. She was permitted to explore issues with objectivity absent any possible bias to preserve her independence.

[76] Ms. Pantier began therapy with J. in November 2009 and saw him for eight sessions from November to May and an additional two sessions prior to the court date.

[77] Ms. Pantier described J. as a happy, bright, delightful young man, very engaging, articulate and a fun ten-year-old who engaged in the counselling process. She and the father confirmed J. enjoys and looks forward to their sessions together:

> We have good conversations. He disclosed that he is close to his father and mother. He denied any physical discipline from his mother or father. He reported being very happy to be living in Arkansas living with his father. (Emphasis added)

[78] Ms. Pantier observed that "their closeness and joy for one another was evident in their interaction."

[79] Ms. Pantier confirmed to the Court that she sees no evidence the child is suffering abuse in the father's household.

[80] Among the many comments included in the therapist's report available to both parents, this child acknowledges he wants to visit the mother and live for now with the father. He expressed fear to Ms. Pantier and to the father independently that he would be prohibited from returning to live with the father after the summer visit.

[81] This child clearly loves both parents, wants the yelling and screaming to stop, wants to have normal peaceful conversation with the mother frequently and wants these conversations to be about his life in Canada and in Arkansas. I have reviewed the "terminated messages" and during one of these messages the mother has asked him not to talk about life at his father’s home. This is unfortunate.

[82] This child does not want to be drawn into the conflict between the mother and the father and does not want to be a part of conversations where the mother is using the contact to continue to denigrate the father and his physical surroundings. The child observed to the therapist the father does not do this. The child indicated the father talks in a nice way about the mother.

[83] J. gave Ms. Pantier permission to tell the Court he wanted to visit the mother in Canada and see his siblings "but I do not want to live there."

[84] Both counsellors are concerned about the need to reduce the loyalty bind, the constant tug of war within which this child lives. They believe long term this is likely to produce anger and confusion about J.'s sense of belonging. They recommend continuing counselling to assist him in managing the stress and anger as he navigates his relationship between households.

Evidence Supporting the Most Recent Variation Application

The Mother

[85] The mother supports her application on two grounds: (a) a denial of access and (b) her improved circumstances resulting from her counselling.

[86] The mother has a series of complaints with respect to her frustration with access. Due to what she considers a denial of access with the child, she wishes the Court to reverse the July 2009 decision. She accuses the father of lying. She acknowledges her own anger in these calls, e-mails and voice messages and believes it is justified and caused by the father.

[87] The mother contends that the results of her counselling are proof of a change in her circumstances justifying a reversal of the court order. In addition, she alleges that the evidence supports a denial of access between her and the child sufficient to justify a change in the custody back to her. She promises to facilitate contact between the child and the father.

[88] The mother contends that she has financial limitations and cannot work with the access schedule. She alleges she has little to no positive telephone contact, that her calls are terminated. She advised the child is not allowed to talk honestly and openly

with her. She alleges she has not been informed of the child's counsellor or medical information. She believes the child wants to come home; she misses him.

[89] At paragraph 33 of her November 2009 affidavit, the mother alleged that the child was being struck as a matter of discipline. She reported these allegations to the child's therapist, Mr. Seward and, as noted, he then made the mandatory report to child protection authorities, directed the father to bring the child in to see him for an interview and transferred therapeutic intervention for the child to the office of the Child Advocate.

[90] In court the mother testified that she did not allege physical abuse. Her oral testimony does not accord with her affidavit or the testimony of Mr. Seward. I do not accept her evidence on this point.

[91] The evidence tendered by the mother in support of her application for a variation in custody and access comes from herself by way of her parenting statement and her five affidavits, as well as her sister D.C. and her mother M.E.

[92] Her parenting statement is dated April 6, 2010.

[93] The mother asked to have the child returned to her permanent care. She would agree to specify four weeks of block access in the summer for the father upon four weeks' prior written notice, access to be exercised within Nova Scotia. She promised unrestricted telephone access between the child and the father. The mother states she is more prepared to encourage the child to spend time with the father.

[94] The mother alleges that the father has failed to comply with the existing court order and she is afraid the father would not return the child to the jurisdiction.

[95] She repeats her request to have the father's contact with the child restricted to the province of Nova Scotia. This request was denied previously when she requested this relief, in her emergency application to vary the original Corollary Relief Judgment on August 5, 2008. She seeks to have this relief imposed in this application.

[96] Nothing appears to have changed about her insight and willingness to facilitate contact between the child and his father.

Historical findings: The First Assessment

[97] At page 5, paragraph 24 of the Decision dated July 3, 2009 the assessor Michael Donaldson stated as follows:

> 24. Notably the assessor indicated that "Heidi's anger towards Chris and her jealousy regarding Chris' relationship with his new partner is palpable." He found she had a need to punish the father for his refusal to reconcile with her. He found that J's best interests rarely took precedent in regard to his relationship with his father. He found that from the mother's perspective the father's involvement with the child was intrusive and disruptive.

[98] The assessor experienced the mother's rage. He noted as follows:

> Her rant which lasted approximately 10 minutes, including her berating the assessor as well as Chris for "going against my wishes", as well as name calling. This was all done in front of a crushed J. whose excitement at seeing his father was overwhelmed by his mother's anger. It was not until she left that they recovered from the onslaught and focused on one another. Chris indicated that had the assessor not been present, the language would have been abhorrent (she acknowledged that she cursed and swore when they interacted and Chris did not), access denied and J. having been exposed to all of it. A more sensitive parent would have sent the child into the house while the adults discussed the matter. These concerns permeate the interaction between Heidi, Chris and J. via telephone and in personal interaction. There has also been what can only be described as "taunting" him by inviting him to Halifax and after his plans were made and tickets purchased, calling and saying "if you show up here there will be hell to pay". It my opinion Heidi has limited capacity to grasp perspective other than her own. (Emphasis added)

Conclusions in July 2009 Decision

[99] At page 14, paragraph 75:

> 75. Far more troubling is the contents of a taped telephone call during which the mother took the phone from her son and in his presence ranted at the father in an uncontrollable rage demeaning him in the son's presence, encouraging the son to relive his feelings of abandonment and anger at his father, and enforcing how this exemplified the father's lack of concern for him. This sense of abandonment was

> created by the mother's version of events and do not reflect the father's serious efforts to maintain contact with his son.

[100] And paragraph 76:

> 76. The mother vilified the father, reducing the child to tears. It was one of many truly manipulative and abusive conversations between the mother and father. As the assessor noted, the mother does not isolate her child from her anger. In fact, the evidence supports the fact that she actively engages the child in her anger.

[101] At paragraph 80:

> 80. She [the mother] showed no insight into her behaviour either with the assessor or when confronted in court with her rages during the telephone contact. She expressed that she felt her anger was justified and was not inappropriate or adverse to the child's interests.

[102] Page 16, paragraphs 93 and 94 of the decision speaks to the voice mails that both parents knew were being taped:

> 93. There was no objection to the admission of these voice mails. There was no suggestion by the mother that these conversations did not take place or that the voice was not her own. She does advise that there were many more voice mails that would present her in a far more calm manner and that these do not reflect the vast majority of the discussions.
>
> 94. It is difficult to believe the intensity and the content of the discussions were it simply his testimony against hers. One has to listen to the subject matter to believe and observe how an innocent conversation with his son can escalate into a blind barrage of verbal abuse involving both the father and the son. One has to experience the nature and extent of the mother's emotional abuse to believe it happens as the father indicates.

Current Evidence

Maternal Grandmother

[103] The maternal grandmother testified that the family misses J. She supports her daughter's bid to have him back in her custody. She advises that her daughter has changed since J. went to live in the US. She is more in control of herself.

[104] The father does not have any difficulty facilitating calls to J. from the maternal grandmother. The maternal grandmother has called J. in the father's home on special occasions, sent J. email birthday cards on special occasions. She acknowledged that while J. did not return her emails, if she called and J. was not home, the father would call her back and let her speak to J.

[105] I am satisfied that the maternal grandmother is appropriate and child-focussed in her conversations with J.

Maternal Aunt

[106] D.C. wishes to support her sister. She acknowledges that her sister is high strung and excitable.

[107] D.C. has been close to J. and has been his babysitter in the past. In the past she allowed the father to stay at her place in order to exercise access in Nova Scotia. She maintains contact with J. in the US. It is not frequent contact nor does she believe the communications are as comfortable as they once were. She finds that some of his conversations with her now are most stilted.

[108] D.C. has managed to be very appropriate in her conversations with J. and understands the importance of keeping him out of the conflict. She takes a wise and appropriate approach to her phone conversations. She does lament that he does not call her back.

[109] D.C. is able to speak to the father in a civil way and has acted on at least one occasion as a go-between to reestablish contact after the mother's call was terminated after a very emotive message.

The Mother's Counselling

[110] Ms. Tracey is the counsellor currently addressing Ms. Ross-Johnson's difficulties. Commencing August 2009 she worked with her addressing depression, anxiety and relationship work. She has also addressed anger management issues, what

is triggering her response and is attempting to assist her in implementing methods to calm herself and her physical and emotional response.

[111] Her measurement of the success of the counselling she admits is largely self-report and how the mother is able to articulate getting underneath the angry expressions.

[112] Ms. Tracey was qualified by consent to testify in the same manner as the two other counsellors.

[113] As of November 9, 2009, the mother attended nine sessions. The counsellor believes the mother was better able to cope with her anger toward the father. In the reporting letter of November 2009, the counsellor indicated that the mother appeared to gain insight into her defensive behaviour as follows:

> Thus far, she appears to have gained insight into her defensive behaviour and is currently working toward more effective ways of expressing herself. She is learning techniques to reduce her overall anxiety and to refrain from reacting negatively when feeling misunderstood or misrepresented.

[114] The mother's counsellor noted in her second reporting letter on May 10, 2010 that the mother continued to attend counselling, primarily focussed on anxiety and depression. The counsellor noted that the mother is continuing to experience anxiety symptoms and worry about the loss of her relationship with her son.

[115] While it is clear that the mother is addressing these issues in counselling, in her testimony the mother has not admitted to having depression or anger management issues.

[116] Ms. Tracey indicates that if her client (the mother) would be granted custody, she believes a comprehensive assessment may alleviate the Court's concern for the mother's emotional stability. If the custody is granted to the mother, Ms. Tracey would recommend the mother and the child engage in parent-child therapy in order to ensure that their re-connection is successful.

[117] Ms. Tracey acknowledges that her counselling role is limited by self-reporting information provided by her client.

[118] The counsellor listened to two telephone calls. She noted that of what she saw, there were some inappropriate comments made to the child in the two tapes that she was privy to.

[119] She was not fully aware of the findings of fact in the Decision nor of the history of the matter including the level of hostility that existed when the child was in the custody of the mother. She also advised that she was not involved in testing the veracity of the information she was receiving, did not contact and was not required to contact collaterals to assess the accuracy of the self-reporting, did not speak with the father or the child or any of the family members.

[120] The mother testified that she now uses a strategy she learned in counselling to deal with the difficult calls between herself and the father. These include hanging up on him, putting the phone away from her ear so she cannot hear him and other techniques that have not been clearly defined. Her counsellor advised she did not recommend these techniques to the mother.

[121] The mother advises that as a result of her counselling she is in a better position to understand her anger toward the father. In her court testimony she denies that she is angry.

[122] The counsellor noted the difficult childhood circumstances of the mother in understanding her response to conflict and noted that this particular aggressive, combative and sometimes belligerent response entertained by the mother does not appear to be happening in other aspects of her life. She noted this, admitting she did not have any significant awareness of the historical and very similar pattern of behaviour exhibited by the mother when she was in the position of power over the father.

[123] I cannot accept the counsellor's view that this manner of behaviour is related solely to the difficult relationship issues between the father and the mother absent evidence that her knowledge of the historical circumstances comes from sources other than her client.

[124] The counsellor went on to indicate that she felt there was sufficient progress, that there would no contr-indication to the child returning to the mother. That opinion was outside the scope of the counsellors expertise in this case. There was no

foundation for establishing this opinion, given the limitations on the counsellor with respect to no knowledge of the surrounding circumstances or the child's needs. She displayed very little knowledge about what actually takes place in these discussions and in the negotiation for access. I place no weight on that recommendation.

[125] This counsellor did not have discussions with other therapists involved to get another view. I accept her conclusions as they relate to the progress she saw in her sessions with the mother as indicative that she was able to make some progress with the mother. That progress has not been noted or is not evidenced in the other relationships that are necessary in order to address the child's global best interests.

[126] The counsellor was also unaware that the supervision of the mother's calls was a decision reached in part as a result of the mother questioning the feasibility of having the father supervise her calls and as a result of in-court discussions with the mother and the father's counsel about a better way to have the calls monitored. Mr. Seward was the monitor directed by the court. The mother knew this in court and was advised of this by a letter from counsel and subsequently by an email from Mr. Seward.

[127] Certainly the counselling available to the mother is positive in that there appears to be a relationship established that allows the mother to work through some of her issues with this counsellor against whom she does not feel antagonistic. This is a step in the right direction.

Post Decision contact between mother and child

[128] The mother's financial circumstances are apparently limited to a survivor's pension from her first husband. She has two teenage children to support. She is not required to pay child support for J.

[129] The mother was permitted to have block contact in Arkansas during the summer of transition and in Canada in her home for Christmas (commencing December 26th to his return to school in January), March Break and block access to the child in the summer of 2010.

[130] The mother did not visit J. in the summer of 2009 or make Christmas arrangements. She blamed the father for failing to keep her informed of the school

break. The child had not seen the mother since he moved to the father's residence in July 2009.

[131] However, I know nothing of her capacity or ability to find employment to facilitate access. Therefore, I am unable to draw any conclusions as to her financial ability or inability to arrange and execute access in the US or Canada. I do know that in May 2010 she drove to Florida with her two children to attend her nephew's graduation. She made no arrangements or requests of the father to facilitate access with her son and I have heard no evidence as to how difficult this would be to achieve.

[132] The mother testified she was not able to visit the child in the US in the summer of 2009 and did not have adequate notice of his March Break to arrange block access. Thus, since July 2009 up to the arranged summer visit of 2010, she has not had in-person contact with the child other than by telephone.

[133] The mother advised that she could not afford the cost of these trips for Christmas, failing to advise in advance of her intent not to exercise Christmas access.

[134] The mother accused the father of failure to inform her of the March Break dates in a timely fashion. The facts support a conclusion that when the child was moved to the father's care, the father provided the mother with a list of cell phone and contact numbers to ensure telephone access. He provided her with email and telephone numbers of the school and doctor as directed. She was emailed care giver information, the child's report cards and test scores.

[135] In November 2009 the mother advised she had no information regarding the child's school progress except for the information contained in the counsellor's report that he was doing well in school.

[136] The mother is firmly of the belief that the child wants to come home on a permanent basis and that he misses her.

The Telephone Calls and Email Communication

[137] The father has made J. available to the mother, grandmother, aunt and his siblings through telephone calls and setting up a monitored Facebook account. J. is able to place any calls to his home in Canada. The father was and remains prepared

to set up web cam communication. The mother resists this form of communication although uses it to send the child material, some of which the father finds offensive.

[138] The child's aunt (the mother's sister) and maternal grandmother have confirmed that the father has gotten back to them when they call and facilitated the contact between J. and his maternal relatives.

[139] The father provided the mother with email attachments and information from a free site to assist her in downloading the information. She insists on regular mail. His historical knowledge of her computer ability would suggest she is and had used this as a communication tool very early on in their life together.

[140] J. is attending a school ranked 5th out of 451 elementary schools in the US. His school has received a 10 out of 10 rating in the National Great Schools Rating Program.

[141] The mother gave evidence she was in direct contact with the school and had an email address for the school website, complete with school calender and other information. She has contacted the school asking that the child be pulled from class to speak with her. They have refused.

[142] The mother has blocked the father's entry into her email account, insisting he mail any school information.

[143] The mother had the opportunity to speak to J. frequently, sometimes four to five times daily, initially from July 2009 to February 2010. The calls were interrupted from February to March to encourage her to move the monitored calls through Mr. Seward. Upon her repeated refusal to participate in these calls, the direct contact as monitored by the father was reinstated. She has forwarded emails to J. including some that have been screened out for inappropriate content.

[144] While there are many calls that have been permitted (see paragraph 32 the father's May 25, 2010 affidavit) and acknowledged to be positive, there are some the father says are less appropriate that are allowed to continue in order to maintain contact between the child and the mother.

[145] There are examples of 15 terminated calls exemplifying the same manner of escalating abusive dialogue as was evident in the original proceeding, observed in person by Mr. Donaldson and now experienced by Mr. Seward.

[146] There are many examples of conduct continuing the denigration of the father with the child. The mother invites the child to compare his life in Canada with his life in Arkansas. She suggests he is returning to live with her, that he is lonesome, that he is unhappy and fearful. These calls support the counsellor's recommendation that for a period of three months the calls continue to be monitored.

[147] The difference between what occurred following the divorce and what is occurring now is remarkable.

[148] While living with the mother, J. was unable to maintain a relationship with the father. He was torn and engaged directly by the mother in conversations that were hurtful and harmful, leading him to believe the father did not care about him.

[149] Within the first year after the transition, he has frequent connection with his mother, providing her conversations are positive and healthy. They are terminated only when her conversation deteriorates. The father has exhibited an intention to include the mother in the child's life, despite significant conflict, and to seek and follow professional advice and to provide contact with the mother and her family.

[150] During the years following the divorce despite the repeated efforts made by the father to maintain an connection, his contact was reduced and obstructed by the mother.

[151] J. is currently spending summer block time with the mother until his July 5th return to Arkansas. Despite the continued hostility directed at the father, he continues to facilitate contact between the child and his mother.

Conclusion

Application to Vary

[152] Section 17(1),(5),(6) and (9) of the *Divorce Act* sets out the relevant legislative considerations for the Court.

[153] There is a two-stage inquiry in custody variation cases: (1) the reviewing judge must determine **whether there has been a change in the condition, means, needs or other circumstances of the children - the party seeking to vary the order bears the onus of proof**; and (2) if a material change is proven, the court must decide whether the change requires a variation of the custody order based upon the child's best interest. If a change of custody is ordered without the required proof of changed circumstances, the variation should be overturned: *Talbot v. Henry,* 25 R.F.L. (3d) 415, [1990] 5 W.W.R. 251 (Sask. C.A.).

[154] This two-staged process was endorsed by the Supreme Court of Canada in *Gordon v. Goertz,* 1996 Carswell Sask.199. The threshold issue is whether there has been a material change in the circumstances of the child since the last custody order was made (*Divorce Act*, s. 17(5)). **If a material change is demonstrated**, the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances (*Gordon v. Goertz, supra*, para. 9).

[155] I am satisfied on the totality of the evidence before me that there is no substantial or material change in circumstances of the child from July 3, 2009 to the date of the hearing that would justify moving into the second stage of the analysis. The change proposed relates to difficulties exercising access. The evidence does not support the mother's contention that the difficulties are principally caused by the father.

[156] I am further satisfied that the weight of the evidence supports the continuation of the child's current residence with the father in Arkansas. The child's best interests are addressed by the current court order. The move of this child from the mother to the father was supported by the evidence in the initial application and identified as necessary to address his best interests.

[157] Subsequent to that decision, other than the access difficulties, there is positive evidence that this child lives in a supportive, nurturing environment and has access to therapeutic intervention. This environment has the possibility of preserving his connection to both of the parents. The only negative aspect is the loss of contact with the mother which could be improved considerably if the mother would and could address her personal perspective and embark on behavioural changes that would foster and promote harmonious contact. It is the mother who has terminated email contact

with the father, continued the difficult exchanges and failed to exercise her visitation opportunities.

[158] Both the mother and the father, and father's wife, should not misunderstand or minimize the desirability of preserving and nurturing this child's contact with the mother and extended family in an appropriate fashion.

[159] I am satisfied that the mother's counselling is supportive of her and it is desirable that she continue. However, the counselling has not resulted in an abatement of the abusive phone calls and inappropriate content of emails and phone calls involving the child in the conflict between the mother and the father.

[160] I am satisfied that the child is functioning well, is happy and healthy in the father's care.

[161] I am satisfied the child wishes and needs to have ongoing, healthy contact with the mother.

[162] I am very satisfied with the nature and extent of the therapeutic support services made available to the child throughout this transition. Given the significance of the move into the father's care, the geographical distance between jurisdictions and the intense and problematic nature and content of the communications between households, it was critical to an evaluation of the child's progress to make these counsellors available to the mother and the Court to hear and test their evidence.

[163] The opportunity afforded to hear and see the counsellors testify and the opportunity available to the mother's counsel to test their evidence resulted in the mother and the Court being more fully and accurately informed of the child's circumstances.

[164] I am satisfied that there is evidence that J. is closely connected to the mother and has been afforded a significant block of his formative years in the mother's care. The mother has not been prepared to provide him with access to the father and has frustrated significant efforts by the father to be an important participant in the child's life, despite her acknowledgment that the child needed and wanted the father in his life.

[165] I am further satisfied that the father continues to have insight into and exhibits and understandings of the importance of facilitating contact between the child and the

mother. The father has expressed his intention to continue to follow the advice of the therapists regarding the nature and extent of this contact.

[166] I am satisfied that the current principal cause of the mother's difficulties in exercising telephone and email contact is her problematic behaviour, anger and lack of insight into the effects of her conduct. I am also satisfied that the father's supervision of the calls has been problematic. It is difficult for an involved parent to manage the level of hostility.

[167] The mother has shown no insight into the effect of her hostile communications on J. or the effect of her conversations. Part of the problem in understanding court direction and understanding the directions of the counsellor is that she is emotionally charged, yelling during conversations with the father and counsellor. This makes a two-way conversation virtually impossible, thereby interfering with her ability to listen and hear something other than what she believes is correct.

[168] I cannot draw any conclusions about her ability to travel or afford access or her ability or lack thereof to obtain employment to facilitate travel.

[169] I am satisfied that the best evidence of the need to manage the hostile telephone contact comes from the two counsellors. There is a need in the immediate future to continue monitoring these calls.

[170] The father and his wife have been coached to assist them in intervening to manage the countless emails and telephone calls well outside reasonable times during the day and night.

[171] The father is better able to avoid escalating the exchange between the mother and himself. Interchange between the mother and the father's wife should be kept to a minimum. It should be positive, non-confrontational and support and facilitate healthy connections between the mother and the child.

[172] The father has made significant efforts to peacefully negotiate the hostile communications. As noted in Mr. Seward's report, page 6, recommendation #10:

> E-mail conversation with (the father) would be the best way to communicate parental concerns and information for the reasons mentioned above. In addition it is in this area alone that I have seen any negative emotions communicated by the (father and

> his wife). It is very common for untrained individuals to not have the communication skills needed to communicate with someone such as J.'s mother and I am not surprised by their successful and unsuccessful attempts to deal with her inappropriate communication with J. and with them.

[173] In relation to this comment underlined, I have seen evidence of the father's wife's attempt to respond in writing to the mother. The response is in itself problematic and unhelpful. I have also reviewed calls where the father was unsuccessful in de-escalating the conversation and became inappropriately involved.

[174] Mr. Seward gave a list of 12 recommendations to the Court. Included is the continued counselling regime for the father and his wife and J. in accordance with recommendations #1 and #3. This should continue until the therapist and the father determine it is no longer necessary or productive.

[175] Recommendation #2: that J. continue in his current location until at least the end of the primary school would represent a speculative determination beyond the scope of this hearing. There is no evidence before me that would support a variation of the current order and a move back to the mother's primary care.

[176] The counsellor recommended continuation of the twice weekly schedule of telephone calls between mother and child, initiated by the mother and monitored for another three months. Mr. Seward has thus far agreed to provide this service and the mother has been advised the only cost to her is the actual cost of the call to Mr. Seward and not his fees. He has, however, advised her if she wishes any further involvement with his service by way of information or explanation, she shall be responsible for paying his hourly rate.

[177] The child shall have unlimited phone contact with his siblings, mother and maternal family from his home. The father would do well to encourage these connections.

[178] Since July 2009, the father has accepted and returned calls from the maternal grandmother and aunt. He has not determined it necessary to monitor these calls. I am satisfied that the aunt and grandmother appreciate the need to avoid engaging in inappropriate conversation with J.. They have demonstrated insight and should be

encouraged to continue to contact J. to maintain his connection to his maternal extended family. I see no need to monitor these calls.

[179] The father has also allowed contact with J.'s siblings and that should be encouraged. While the mother has used these calls to connect briefly to the child, the nature of the connection has been so limited and has not been so inappropriate so as to terminate the connection between the siblings.

[180] Rather than terminate these calls, the child should be assisted through coaching by therapists to handle these calls and, if and when they became problematic, he has exhibited the ability to deliver the telephone to the father to terminate the calls.

[181] The child has exhibited some ability to navigate these troubled waters and this skill set should be supported.

[182] The therapist also recommended that the child have access to a therapist in Halifax, Nova Scotia while block visitation is ongoing to ensure there is an appropriate avenue for addressing any difficulties that may arise during this access. I am and continue to be concerned about the effect of one-month block visitation without therapeutic intervention given the mother's lack of insight and the content of her conversations with the child.

[183] The father will have to determine after this summer access whether that is affordable for him and appropriate depending on the emotional state of J. on his return.

[184] The therapist recommended email communication between the father and the mother to avoid many of the difficult telephone exchanges. The mother shall unblock her email to allow the father to keep her informed, as in the order of July 2009. In addition to regular quarterly email updates and additional updates on the happening of important medical and developmental events, the father shall, at the beginning of each school year, send by regular mail a calendar of school events and information regarding the new school year and any additional extracurricular activities.

[185] The father should use as a guide in deciding what information should be passed on to the mother all that information he would wish to have about the child if the roles were reversed.

[186] Further information flow shall be by email unless agreed upon by the parties or varied by court order.

[187] With respect to the remaining recommendations, it is up to the custodial parent to make decisions regarding other therapeutic intervention. *Gordon v. Goertz, supra*, specifically recognizes the court's limited capacity to manage the day-to-day child-rearing decisions or indeed the efficacy of maintaining a watching brief on the family's day-to-day living.

> As Goldstein, Freud and Solnit stress, an important function of the law on divorce or separation is to reinforce the remainder of the family unit so that children may get on with their lives with as little disruption as possible. *Courts are not in a position, nor do they presume to be able, to make the necessary day-to-day decisions which affect the best interests of the child. That task must rest with the custodial parent, as he or she is the person best placed to assess the needs of the child in all its dimensions.*
>
> . . .
>
> *Once a court has determined who is the appropriate custodial parent, it must indeed it can do no more than, presume that that parent will act in the best interests of the child*. [Emphasis added]
>
> It follows that where, as here, a decision of the custodial parent is challenged by the non-custodial parent on the basis that it is not in the child's best interests,
>
> > [t]he emphasis should be . . . on deferring to the decision-making responsibilities of the custodial parent, unless there is *substantial* evidence that those decisions impair the child's, not the access parent's, long-term well-being. (*MacGyver v. Richards, supra*, at p. 445 (*per* Abella J.A.); emphasis added)
>
> It must be remembered, as Twaddle J.A. points out in *Lapointe v. Lapointe, supra,* at p. 620:
>
> > In all but unusual cases, the custodial parent is in a better position than a judge to decide what is in the child's best interests. A judge can scrutinize the decision, ensure that it is reasonable and even say, when clearly shown, that the custodial parent's decision is in fact not in the child's best interests, but initially it is the person entrusted with the responsibility of bringing up the child who probably knows best.

[188] Likewise, it is up to the mother to continue in a therapeutic relationship to assist her in management of her anger and problematic communication strategy. This, if effective, can only help her in engaging on a regular consistent basis with the child and promote strong and healthy future ties.

[189] I recommend that the mother's counsellor have access to the child's therapist, or Mr. Seward, to assist the mother's counsellor in addressing with the mother modification of her problematic behaviour to support the development of frequent appropriate communication with the child.

The Scope of the Review

[190] In the Decision dated July 3, 2009 at page 26, paragraph #25, I ordered as follows:

> THAT this matter shall be set down for a review to be held on **Monday, November 16, 2009, from 9:30 to 9:45 am** at the Supreme Court of Nova Scotia, Family Division, 1815 Upper Water Street, Halifax, Nova Scotia. The father shall provide an affidavit detailing the transition and a report from the child's counselor three (3) weeks in advance of the hearing. The mother shall provide an affidavit in reply one (1) week in advance of the hearing.

[191] The Supreme Court of Nova Scotia retained jurisdiction over this child. The transition to the father's custody represented a significant change in this young child's life. The purpose of conducting a review was to manage and observe the transition to ensure compliance with the court order, to ensure connection was possible between the mother and the child and to facilitate and manage any difficulties obstructing a healthy and smooth transition while the court retained jurisdiction.

[192] The Court wished to ensure the father complied with the direction to immediately provide a supportive, therapeutic environment and provide a report to the Court about the child's circumstances.

[193] Maintaining peaceful connections with the mother was an important element of the order.

[194] The Supreme Court of Canada has discussed the use of reviews in *Leskun v. Leskun,* 2006 Carswell BC1492. They have encouraged a limited use of reviews as a judicial tool in order to discourage open-ended use of reviews which avoid the threshold tests set out in an application to vary under Section 17 of *the Divorce Act*.

[195] I am aware that these cases deal with reviews of spousal support orders. However, the principles discussed appear equally applicable to custody and access situations where serious uncertainty may arise and require case management of transitions for limited purposes. Reviews can be helpful to allow for modification and reporting on specific issues for logistic purposes.

[196] The decision of July 2009 was a significant transition for this child. The Court will likely lose jurisdiction over this child once residency in the US is confirmed. Before that occurred the Court required reporting on the child's transition to ensure both the mother and the child had available access to the Court to establish communication between the two.

[197] In *Leskun v. Leskun, supra,* the Supreme Court of Canada states as follows:

> 36 Review orders under s. 15.2 have a useful but very limited role. As the amicus pointed out, one or both parties at the time of trial may not, as yet, have the economic wherewithal even to commence recovering from the disadvantages arising from the marriage and its breakdown. Common examples are the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment. In such circumstances, judges may be tempted to attach to s. 15.2 orders a condition pursuant to s. 15.2(3) of the *Divorce Act*, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order. This will properly occur when the judge does not think it appropriate that at the subsequent hearing one or other of the parties need show that a change in the condition, means, needs or other circumstances of either former spouse has occurred, as required by s. 17(4.1) of the *Divorce Act*.
>
> 37 Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances: *Choquette v. Choquette* (1998), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the amicus fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no change in circumstances. The test for variation is a strict one: *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), at pp. 688-690.

> 38 Here the review order was justified by serious doubt at the time of trial as to the true financial situation and prospects of the wife and what level of support would actually be needed. See *Schmidt v. Schmidt* (1999), 71 B.C.L.R. (3d) 113 (B.C. C.A.), at para. 9:
>
> > [Review orders] are considered particularly useful in circumstances where there is some doubt as to whether spousal maintenance should be continued and, if so, in what amount. Rather than force the parties to go through a variation proceeding with its strict threshold test of change in circumstances, the court provides that maintenance shall be reviewed.
>
> At the date of the trial before Collver J., there were outstanding issues which the trial judge anticipated would be resolved in a relatively short time.
>
> 39 *Willick* and *Choquette* establish that a trial court should resist making temporary orders (or orders subject to "review") under s. 15.2. See also: *Keller v. Black*, [2000] O.J. No. 79 (Ont. S.C.J.). Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances. Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case. That is what happened here. The more precise condition stated in the reasons of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings.

[198] This review was intended to be limited in scope and can be concluded by logistical modification of the court order as set out below.

[199] Save and except for paragraph 23 of the Order of July 3, 2009 and the other modifications noted herein, all other provisions of that Order remain in force and effect.

[200] There is no longer any need to preserve the jurisdiction of the Court for the effective enforcement of these orders. Further litigation is not warranted at this time.

[201] Mr. Bailey shall draft the amending Order.

Legere Sers, J.

Halifax, Nova Scotia
July 12, 2010