

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Conrad v. Cado, 2010 NSSC 327

Date: 20100816

Docket: SFHMCA-036529

Registry: Halifax

Between:

Dusanka Conrad

Applicant

v.

Dragan Cado

Respondent

Judge: The Honourable Assoc. Chief Justice Robert F. Ferguson

Heard: July 30, 2010 in Halifax, Nova Scotia

Written Decision: August 16, 2010

Counsel: Dusanka Conrad, self-represented
Dragan Cado, self-represented

By the Court:

[1] Dragan Cado and Dusanka Cado, now Conrad, had three children, Sara, born November 11, 1988, Lazar, born August 26, 1996 and Anastasija, born August 4, 1988 in their care when they separated in late December 2004.

[2] Currently both parents wish to be designated, by Court Order, as custodial parent of the two youngest children, Lazar and Anastasija. Ms. Conrad further seeks children support from Mr. Cado. Mr. Cado does not seek child support.

HISTORY/BACKGROUND

[3] The separation occurred around December 19th of 2004 with Ms. Conrad leaving the family home with the three children and moving into Byrony House.

[4] On December 22, 2004 Mr. Cado made an application pursuant to the *Maintenance and Custody Act* seeking custody of his three children. On the same date, he made an interim application seeking the same relief.

[5] On December 30, 2004 a hearing was convened. Both parties appeared without counsel. By agreement, the hearing did not proceed. It was also agreed the children would be with Mr. Cado from 2:00 p.m. that day to 2:00 p.m. the following day. Further, that the parents would work out parenting times. It was stated that every effort would be made to keep the children in their school placement.

[6] On January 19, 2005 Ms. Conrad filed a reply to Mr. Cado's interim application seeking custody of the three children and child and spousal support. January 20, 2005 Ms. Conrad further made a counter-application seeking custody of the three children, both child and spousal support and exclusive occupation of the matrimonial home.

[7] On February 1, 2005 an interim hearing was held. Mr. Cado was self-represented. Ms. Conrad had counsel. A Serbian translator also participated. As previously noted Mr. Cado sought custody. Ms. Conrad sought custody, child and spousal support and possession of the matrimonial home. Both parties testified. An oral decision was delivered and an Order issued on March 8th of 2005. The Order stated in part:

AND UPON IT APPEARING that Dragan Cado has an annual net income of approximately \$35,000 and the Respondent Dusanka Cado, has an annual net income of approximately \$22,800, for the purpose of determining the table amount of child support;

AND UPON there being three children of the relationship namely, Sara Cado, born November 11, 1988; Lazar Cado, born August 26, 1996; and Anastasija Cado, born August 4, 1998;

NOW UPON MOTION:

THE FOLLOWING RELIEF UNDER THE MAINTENANCE AND CUSTODY ACT IS HEREBY ORDERED:

1. Dragan Cado and Dusanka Cado shall have joint care and custody of Sara Cado.
2. Sara Cado shall have significant input into where she lives.
3. Dusanka Cado shall have the care of Lazar Cado and Anastasija Cado and shall be responsible for the day to day decision making regarding them.
4. Both parties shall have reasonable access with the children not in their care.

5. Whereas Dusanka Cado would be entitled to child support for the care of two children from Dragan Cado in the amount of \$494 based on his approximate net annual income of \$35,000; and whereas Dragan Cado would be entitled to child support for the care of one child from Susanka Cado in the amount of \$188 based on her approximate net annual income of \$22,800:
 - (a) Dragan Cado shall pay to Dusanka Cado the set off amount of child support in the amount of \$306 per month, commencing the last day of February 2005, and paid on the last day of each month thereafter, until further Order of the Court.
6. Neither Dragan Cado nor Dusanka Cado shall remove any of the children from the Province of Nova Scotia, without permission from the other, or without an Order from a Court of competent jurisdiction.
7. Dragan Cado shall not pay spousal support at this time.
8. Neither party shall make any changes to the medical, dental nor any other benefit plans in existence through his/her employment.
9.
 - (a) This Interim Order shall remain in effect until reviewed by a court of competent jurisdiction.
 - (b) This matter is set for an organizational pre-trial before the Honourable Justice Mona Lynch of the Supreme Court, Family Division, on March 14, 2005, at 3pm.

[8] As this was an Interim Hearing with a resulting Interim Order, an organizational pre-trial was set for March of 2005. On the same day, a second Order requiring a Custody and Access Assessment was also issued.

[9] On March 14, 2005, at the pre-trial conference, Mr. Cado was self-represented. Ms. Conrad had counsel. Both parties were unable to agree as to the “reasonable access” provision in the recently issued Order. Counsel for Ms. Conrad indicated she would be making a further interim application as to this issue. There was an indication that the issue as to the possession of the family home could be resolved. The parties agreed to a settlement conference on a date after the Court ordered Assessment was made available.

[10] On June 6, 2005, the Custody and Access Assessment was completed and made available.

[11] On June 13, 2005, at the settlement conference, no agreement was reached. Both parties agreed to participate in another such conference. On June 20, 2005, at a continuation of the settlement conference, no agreement reached and it was acknowledged that the matter should proceed to trial.

[12] On November 23, 2005, a Separation Agreement dated November 10th 2005 with Mr. Daco and Ms. Conrad as parties was registered in the Supreme Court of

Nova Scotia and assumed the status of a Court Order. The document is quite detailed, having 37 paragraphs. It states in part:

PARENTING PLAN:

3. The parties shall have joint custody of the three children of the relationship, namely Sara, Lazar and Anastasija.
4. The principle residence of Sara shall be with Dragan and he shall have primary care and custody of Sara.
5. The principle residence of Lazar and Anastasija shall be with Dusanka and she will have primary care and custody of those children, and be responsible for the day to day decision making regarding them.
6. The access with respect to the three children would continue to be the same as it has been:
 - (i) Sara and Dusanka shall decide the access between them.
 - (ii) Dragan shall access with Lazar and Anastasija and shall pick them up from their home on Tuesday evenings at 8 pm and return them directly to their school on Friday at 9 am, or to the care of Dusanka if Dragan is not able to return them directly to their school.
 - (iii) Any other access that is mutually agreed upon by the parties.
7. Neither parent shall remove the children from the jurisdiction of the Province of Nova Scotia without the written consent of the other parent,

which consent for purposes of vacations shall not be unreasonably withheld, or an Order of a Court of competent jurisdiction.

8. Each parent acknowledges the importance of the other parent to the children and agrees to facilitate and foster a good and positive relationship between the children and the other parent. Each parent acknowledges the fitness of the other as a parent.
9. Each parent shall be entitled to access to all medical, educational and other records relating to the children and shall freely share with the other parent all information relevant to the children's health, education and general welfare.

GUARDIANSHIP:

10. Each parent acknowledges that the other parent shall be guardian of the children in the event of the death of that parent.

MAINTENANCE AND SUPPORT FOR CHILDREN:

11. Insofar as the children are eligible, Dragan shall continue the medical, dental, and drug plan coverage for the children, available through his present employer, or any substitute or replacement employment as the case may be. If Dragan obtains new employment that permits the children to be covered under a medical, dental or drug plan, he shall be responsible for enrolling the children in that insurance plan.
12. Neither party shall pay the other child support commencing November 1, 2005. This arrangement may not be in keeping with the Provincial Child Support Guidelines; however, the parties agree that it is in the best interests of the children to not pay support to the other at this time.

13. The parties shall share equally in the costs of daycare and the lunch program for Lazar and Anastasija, commencing November 1, 2005.

[13] Around December of 2007, Ms. Conrad who was previously residing in Halifax re-located and began a new relationship in Dartmouth and the children moved with her.

[14] In August of 2008, Mr. Cado filed an variation application pursuant to the *Maintenance and Custody Act*. In reality, it was really a request for the Court to enforce the provisions of the existing Separation Agreement/Court Order.

[15] On August 8th 2008, at the Interim Hearing, Mr. Cado represented himself. Ms. Conrad had counsel. An oral decision was rendered on the day of the Hearing which resulted in an Order which was issued on February 27, 2009 which stated in part:

1. **THAT** paragraphs 3 through to and including 10 noted as “PARENTING PLAN” AND “GUARDIANSHIP” in a Separation Agreement between the Applicant and the Respondent dated November 10, 2005, and registered with the Court on November 23, 2005, remain in effect, with particular emphasis on the following portions:

- “3. The parties shall have joint care and custody of the three children of the relationship, namely, Sara, Lazar and Anastasija.

5. The principle residence of Lazar and Anastasija shall be with Dusanka and she will have primary care and custody of those children, and be responsible for the day to day decision making regarding them.

6. The access with respect to the three children would continue to be the same as it has been:

...
 - (ii) Dragan shall access with Lazar and Anastasija and shall pick them up from their home on Tuesday evenings at 8 pm and return them directly to their school on Friday at 9 am, or to the care of Dusanka if Dragan is not able to return them directly to their school

 - (iii) Any other access that is mutually agreed upon by the parties.”

[16] The Order did not contain a provision that the children return to the school they were attending when the Separation Agreement was signed.

[17] On March 17, 2009, Ms. Conrad made two applications to the Court pursuant to the *Maintenance and Custody Act*. In one she seeks relief as to the custody, access, child maintenance and the registration of the Agreement. The second was an interim application seeking relief as to custody, access, child support and what would appear to be payments towards Section 7 expenses as

pursuant to the Nova Scotia Child Support Guidelines. The Court running file indicates that neither of these applications were considered an emergency. The Court running file indicates that the parties were to proceed through Conciliation and the issue was narrowed to deal with the summer or non school parenting time. Two conciliators were assigned to the task and met with the parties on May 11th and June 9th 2009. The issue of summer access was not resolved. A hearing was scheduled.

[18] On June 26, 2009, a hearing took place with regard to summer access. Both parties appeared without counsel. An interpreter was in attendance. A consent was reached and an Interim Order issued which stated in part:

IT IS ORDERED THAT the children, Lazar Cado, born August 26, 1996 and Anastasija Cado born August 4, 1998 shall be in the care of the Applicant, Dragan Cado, from Fridays at 4:00 p.m. until Mondays at 8:30 a.m. Pick-up of the children on Fridays shall be by Mr. Cado; pick-up at Mr. Cado's home on Mondays shall be by the Respondent, Dusanka Conrad;

IT IS FURTHER ORDERED that the parties' daughter, Sarah, shall contact Ms. Conrad every Friday evening at 10:00 p.m. to confirm she is at Mr. Cado's home with the said children;

IT IS FURTHER ORDERED that between July 25, 2009 - August 3, 2009 Mr. Cado shall not have any access with the said children; Ms. Conrad shall provide

to Mr. Cado one week prior to July 25, 2009 an itinerary of how the children may be reached and where the children will be;

IT IS FURTHER ORDERED that Mr. Cado shall have the children in his care for a two-week period in July 2009; Mr. Cado shall provide to Ms. Conrad one week prior to this period an itinerary of how the children may be reached and where they will be;

IT IS FURTHER ORDERED that while the children are in the care of one parent, they may have telephone contact with the other parent;

IT IS FURTHER ORDERED that this matter shall be and is hereby adjourned for settlement pre-trial on August 28, 2009 at 2:30 p.m.;

[19] The Order contains a provision for the matter to be adjourned to a further settlement conference in August of 2009.

[20] On August 28, 2009, a settlement conference was held with no agreement being reached.

[21] On October 13, 2009 a pre-trial conference was held which confirmed that Justice Lynch's Order was only to deal with summer access.

[22] On October 23, 2009, was the date set for a two hour trial. A conclusion was reached that the two hours allotted to these issues was insufficient and the matter was adjourned for a further pre-trial and trial.

[23] On June 18, 2010, at the pre-trial, both parties appeared unrepresented and an interpreter was present. It was concluded that two days were necessary to hear the outstanding issues and the trial was set for March 29th and 30th of 2010. A further pre-trial was scheduled for February 4, 2010 to finalize the number of witnesses that would be required.

[24] On February 17, 2010, the pre-trial originally scheduled for February 14th was held.

[25] On March 29, 2010, the trial began. Both parties were unrepresented. An interpreter was present. Six witnesses were called. On March 30, 2010, the trial continued with one further witness being called and an oral decision was given that day resulting in an Interim Order issued on July 6, 2010 which stated in part:

NOW UPON MOTION:

IT IS HEREBY ORDERED THAT:

1. The children, Lazar Cado, born August 26, 1996 and Anastasija Cado, born August 4, 1998 shall remain in their current school;
2. The Respondent, Dragan Cado, shall have access with the children every second weekend from Friday after school until Monday morning when the children return to school, regardless of the children's schedules. There will be no exceptions to this access schedule. If Monday is an in-service day for the children access will continue until 2:30 p.m. on that Monday. If Friday is an in-service day access will commence at 10:00 a.m. on that Friday. The Respondent, Dragan Cado, will be responsible for transporting the children to and from any appointments and/or activities they may have scheduled during weekend access.
3. The Respondent, Dragan Cado, shall have access every Tuesday from after school until 9:00 p.m.
4. Summer access will be shared between the Applicant and the Respondent on a two week rotation schedule while the children are out of school. The terms of this access to be agreed upon by the parties.
5. Apart from the foregoing, the terms of the Separation Agreement registered with the court on November 23, 2005, remain in effect.

[26] On July 15, 2010, an Order for Assessment known as a Child's Wish Assessment was issued.

[27] On July 21, 2010, the Wishes of Children Assessment Report was made available to the Court and to the parties.

[28] On July 28, 29 and 30, 2010, both parties appeared without counsel. An interpreter was present. Seventeen people, including the evaluator who prepared the Assessment Report, testified.

ISSUES

[29] In November of 2005, the parties registered with the Supreme Court of Nova Scotia a Separation Agreement thus providing it with the same force and effect of a Court Order.

[30] Since that time, as chronicled, there have been numerous Court interventions and Orders of an interim or temporary nature. Both parties seek to vary the terms of the Separation Agreement not on an interim or temporary basis. Mr. Cado seeks

to have the primary care of their two children, Lazar and Anastasija and for them to attend school in his area. He does not seek child support. Ms. Conrad seeks to continue as primary caregiver for the children and for the children to attend school where she is living and for child support on a retroactive and ongoing basis. Both parties if and on being designated the primary caregiver, believe the other parent should exercise access with these children primarily on every second week-end.

SUBMISSIONS

MS. CONRAD

[31] Ms. Conrad submits that while residing with Mr. Cado she has been forced to live in an abusive relationship. Mr. Cado is both domineering and threatening. During the times they lived together she provided the primary care for the children, especially the two that are the subject of this hearing. Her relationship with Mr. Cado had reached a state in December of 2004 when it was impossible to remain under the same roof with him. Her moving and residing in Byrony House for about two months was less than an ideal situation, but the only option available to her at that time. She took the then three children with her to remove them from

the same intolerable and oppressive situation that she was facing. Mr. Cado in the past has treated his children, especially the older ones, in a similar fashion, occasionally expelling them from the family home. During the time Ms. Conrad resided on Barrington Street in an apartment with three and then two of the children, she was the prime provider. She did most of the travelling, getting the children to and from the school that was very close to Mr. Cado's residence. She provided for their needs with little, if any, financial assistance from Mr. Cado.

[32] Meeting Mr. Conrad, her current husband, provided her with an opportunity for a better life for both she and the two youngest children. His home in the Dartmouth area provided improved living conditions for she and the children. Moving to Dartmouth made it impossible for her to keep the children in the school in Mr. Cado's area. She approached Mr. Cado on having the children reside in Dartmouth. Mr. Cado was not open to the children changing schools. She continued to approach him on the subject and he eventually refused to comment. She took his eventual silence as acceptance and in June made arrangements for the children to attend school that fall in Dartmouth. The children have flourished in the Dartmouth area. They are doing well in school and in their extracurricular activities. Mr. Conrad has been kind and respectful of her and has been a positive

factor in the children's lives. Their living accommodations exceed what she was able to offer on Barrington Street and what Mr. Cado can provide in the family residence. She provides more structure to the children. The children would not be as clean or prepared for school if residing in Mr. Cado's home. The Children Wishes Assessment admittedly does suggest the children desire to spend more time with, if not reside with, their father. However, the children are too young to make such a decision and further, in all probability, their views have been influenced by their father.

[33] In effect, the children should remain in her primary care with Mr. Cado having access on every second week-end and he should provide child support.

MR. CADO

[34] Mr. Cado submits that during the time he and Ms. Conrad resided together she had a history of seeking and exploring relationships outside their union. Further, she is not well psychologically. Ms. Conrad's removal of the children from his home and their school in December of 2004, even for a brief period of time, indicates her lack of interest in the children's best interest. The initial

Assessment Report indicated the children should be in his care. Armed with this favourable Assessment Report, he still entered into a Separation Agreement that provided Ms. Conrad with primary care of Lazar and Anastasija believing it was in their best interest at that time, a belief that he no longer holds. The reason that he was not required to provide child support, as per the Agreement, was that he assumed all of the family debt as a result of their separation. Ms. Conrad's removal of the children to Dartmouth and from their established schools, was contrary to their best interest and done solely to aid her new relationship with Mr. Conrad. Ms. Conrad was well aware of his opposition to such a move. Her unilaterally greatly diminishing the time he had with the two younger children was not only contrary to their best interest, but against their wishes. The move, in effect, took the children away from their school, their neighbourhood and their friends. The Children Wishes Assessment clearly indicates the children desire to reside with him and to attend school in his area. The children should be returned to his area to reside and complete their education.

LEGISLATION

[35] The most relevant portions of the *Maintenance and Custody Act* are as follows:

9. Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child.

10.(1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the *Guidelines*.

(2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.

(3) A court may award an amount that is different from the amount that would be determined in accordance with the *Guidelines* if the court is satisfied that

(a) special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses or common-law partners, or the division or transfer of their property, directly or indirectly benefit a child, or special provisions have otherwise been made for the benefit of a child; and

(b) the application of the *Guidelines* would result in an amount of child maintenance that is inequitable given those special provisions.

(4) Where the court awards, pursuant to subsection (3), an amount that is different from the amount that would be determined in accordance with the *Guidelines*, the court shall record its reasons for doing so.

(5) Notwithstanding subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the *Guidelines* on the consent of both spouses or common-law partners or parents if satisfied that reasonable arrangements have been made for the maintenance of the child to whom the order relates.

(6) For the purpose of subsection (5), in determining whether reasonable arrangements have been made for the maintenance of a child, the court shall have regard to the *Guidelines*, but the court shall not consider the arrangements to be unreasonable solely because the amount of maintenance agreed to is not the same as the amount that would otherwise have been determined in accordance with the *Guidelines*.

...

18. (1) In this Section and Section 19, “parent” includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

(4) Subject to this *Act*, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the *Guardianship Act*; or

(b) ordered by a court of competent jurisdiction.

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.
(Emphasis added)

37(1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

CASE LAW

[36] In **Gordon vs. Goertz**, [1996] S.C.J. No. 52 MacLachlin, J. (As she then was) said, beginning at paragraph 49:

49. The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;

 - (b) the existing access arrangement and the relationship between the child and the access parent;

 - (c) the desirability of maximizing contact between the child and both parents;

 - (d) the views of the child;

 - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

 - (f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new.

[37] I am satisfied that the threshold requirement of demonstrating the material change of circumstances has been met. Since the registration of the Separation Agreement the children have moved with their mother from Halifax to Dartmouth, changed schools, and the parenting time they had with their father has been considerably reduced. These were changes that have affected the children.

[38] There is no legal presumption in favour of either parent. The Court must consider the appropriateness of maximizing the contact between both children and their parents.

[39] The ultimate decision is dealing with the best interests of the children.

[40] In **Young v. Young**, [1993] 4 S.C.R. 3, the Supreme Court of Canada while discussing section 16 of the **Divorce Act** elaborated on the “best interests” test. At paragraph 17, the Court stated:

“...the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather it has been left to the judge to decide what is in the “best interests of the child”, by reference to the “condition, means, needs and other circumstances” of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the “best interests” test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, view objectively. There is no room for the judge’s personal predilections and prejudices. The judge’s duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.”

[41] While **Young** (*supra*) was considering the best interests test in the context of the **Divorce Act**, the same test can be applied to the **Maintenance and Custody Act**.

[42] In **Foley v. Foley**, [1993] N.S.J. 347 Goodfellow, J. enumerated a number of considerations to be considered when trying to determine the children’s best interests.

ANALYSIS

[43] In determining what parenting arrangement would be in the best interests of children I have considered the principles in **Gordon v. Goertz** (*supra*) and the factors listed in **Foley** (*supra*). I have considered the comments of Joan Newman made in her Assessment Report dated June 6, 2005. I have considered the comments of Michael Donaldson in his Assessment Report dated July 21, 2010. I have considered the Wishes of the Children as reflected in the Report of Mr. Donaldson. I have reviewed the evidence presented by the parties and their submissions.

[44] I find both parents love and are concerned for their children.

[45] I find both parents are capable of meeting their children's needs and providing for them. The parents themselves signed a Separation Agreement which stated:

PARENTING PLAN:

8. Each parent acknowledges the importance of the other parent to the children and agrees to facilitate and foster a good and positive relationship

between the children and the other parent. Each parent acknowledges the fitness of the other as a parent.

GUARDIANSHIP:

10. Each parent acknowledges that the other parent shall be guardian of the children in the event of the death of that parent.

[46] The Custody Assessment Report of Ms. Newman of 2005 stated:

As both these parents are capable of the day-to-day care of their children, Anastasija, Lazar and Sara Cado that they be granted a joint custody arrangement.

[47] In the Assessment prepared by Mr. Donaldson the children express a desire to spend considerable time in the care of both parents.

[48] Ms. Conrad's plan to have the children reside primarily with her in Dartmouth in a home comprised of she and Mr. Conrad would provide acceptable care. I find Mr. Conrad to be a positive factor in this plan.

[49] Mr. Cado's plan to have the children reside primarily with him in the former family home comprised of him, his new partner and daughter, Sara, would provide acceptable care. I find the presence of the older sister to be a positive factor.

Further, the children appear to be accepting of the presence of Mr. Cado's new partner.

[50] After their final separation in late December of 2004, the couple entered into an agreement as to their parenting time with Lazar and Anastasija. The children each week spent three nights with one parent and four nights with the other. The three nights they spent with Mr. Cado were during the week as he was required to work week-ends. Although the children spent the majority of time with their mother they attended school very close to their father's home and some distance from Ms. Conrad's Halifax apartment. They were enrolled in French Immersion. The parents were acknowledged as joint custodians with Ms. Conrad indicated as the primary caregiver. This is a somewhat unusual parenting arrangement. Yet it apparently had worked to the parents, and more importantly the children's, satisfaction for three years.

[51] There were some assertions but no real evidence that Lazar and Anastasija did not prosper socially or scholastically during this time. There is no evidence that the children were not happy with the routine or the amount of time they were in the care of each parent.

[52] One is left with the impression that if the children continued going to school in their father's area and being in his care every Tuesday evening until Friday morning this matter would not currently be before the Court.

[53] In July 2008, Ms. Conrad sent the following message to Mr. Cado:

As I now live her in Dart, the children will go to school here, I know we have already been talking about this, but you disagree. You know well that I have been driving children there last three years even this half a year and with all my wish to make it easier for the children, now I will not be able any more, unfortunately that's how it is, it is painful and hard to them, but that's how it is. As regarding their coming to you on your days off that also changes, they will not be able to come to you during the work week from Mondays to Fridays, for a number of reasons. Some of them are directly connected with their studying. During these years we have had a lot of unpleasant situations where something was left either at your place or at my place and all in all confusion for the two of them. Their getting up on time and going to bed on time, sleeping in bedrooms, and not in front of the TV in the living room, regular hygiene and changing their clothes...there are so many things, and if you would just insist, I would sit down again and write down every single one. I know that you as well take care, that is normal, but if you really wish the children well, do not make their adjustment to the new environment harder, both this here at home and at school.

As regarding the children's coming to you, they can come every other weekend, Friday after your work 8.30 till Sunday 11.30. Why every other weekend? The answer is that they now here have a yard and can play and not be in the apartment as earlier, secondly, I as well want to have days with them when we have fun not only study and work. I thank thee... Dusa

[54] Ms. Conrad unilaterally removed the children from their regular schooling and normal interaction with their father. According to her proposal their time with him would be reduced from 12 nights a month to four. I am satisfied Ms. Conrad knew she was acting contrary to their Agreement/Court Order and Mr. Cado's wishes. She had no justification given their relationship to believe his refusing to continue discussions on this type of change amounted to his agreement. Further, given the legal involvement from their separation to the signing of the Separation Agreement, she had every reason to believe she would have to have made a Court application to vary their existing Agreement.

[55] It would appear the only reason Ms. Conrad had to unilaterally move the children from their established school system and drastically reduce their time with their father, was to accommodate her new relationship.

[56] That being said, Ms. Conrad had every right and reason to begin a relationship with Mr. Conrad. She had every right and reason to begin it in the home of Mr. Conrad. She has since moving to the Dartmouth area provided appropriately for the children. They are continuing in French Immersion. Their physical accommodation would appear to be superior to that available to them in

Ms. Conrad's former apartment or Mr. Cado's family home. She has provided for them to remain involved in extracurricular activities. She has borne nearly the total cost of providing for the children since residing in Dartmouth.

[57] It would have been extremely difficult for the children to reside primarily in Dartmouth and attend school in Mr. Cado's area. It would not have been quite as difficult for them to have continued their established time with their father while living in Dartmouth.

[58] Ms. Conrad's proposal, as illustrated in her letter to Mr. Cado, destroyed a working parent and child relationship. She owed it to the children to have attempted to resolve her appropriate move in another manner. Having said that, Mr. Cado should have recognized Ms. Conrad entering into a new relationship and re-locating in the Halifax Regional Municipality area was to be expected. He could have recognized she had and was providing for the children in the circumstances. He could have sought a solution given the change in circumstances.

[59] Instead, they both took entrenched opposite positions, suggesting minimizing of the other parent's involvement which was contrary to the evidence presented and the expressed wishes of the children.

[60] Both parents suggest they are acting in their children's best interest. However, viewing this conflict from 2005 to date, it would appear the main concern is who shall win this contest, a contest that does not contain the children as participants.

[61] Mr. Cado's main thrust has been emphasizing Ms. Conrad's wrongfully taking of the children from his life and in fact keeping them away from him and their rightful home to this day. I understand why he would think that way, but I have very little reliable evidence to indicate that Ms. Conrad is not a caring mother and capable parent.

[62] Ms. Conrad suggests Mr. Cado is threatening, domineering and of a bullying nature. That he is not open to the views of other people. Having observed him in Court, I understand why she is of that belief, but I have very little reliable evidence that Mr. Cado is not a caring father and capable parent.

[63] The Wishes of Children's Assessment Report favours Mr. Cado. Ms. Conrad, as previously noted, cautions me in considering this document and its contents. She suggests the children could have been influenced by their father. However, it must be noted that during the preparation of this Report and concluding and gathering the views of the children, that they were predominantly in their mother's care. Further, that when Lazar let his views be known, he was within one month of being 16 years of age. I have, as previously noted, taken into account Mr. Donaldson's Report.

[64] I have concluded that it is in the children's best interest to have a considerable amount of time with both parents. It has not proven detrimental to them in the past and they prefer it to continue in the future. The difficulty is in the precise arrangements as to this parental arrangement. Neither parent given their, at least, initial views that the other parent should have marginal parenting time, have been of much help in this regard.

CONCLUSION

[65] The current Agreement/Order is varied to reflect the following: Mr. Cado and Ms. Conrad will continue as joint custodians.

[66] Beginning in September of 2010, the children are to attend school in the school district where Mr. Cado resides. This Decision is subject to Mr. Cado having the ability, as he indicated to the Court he had, to have these children re-enrolled in French Immersion in his school district.

[67] Parenting time shall operate on a four week rotation. Ms. Conrad's parenting time will be as follows: week one - Friday after school, and if there is no school, at 3:30 p.m. to Monday when the children are returned to their school or to the home of Mr. Cado if there is no school; week two - her parenting time is similar to week one; week three - Thursday after school to Friday morning when the children are to return to their school; week four - her parenting time is the same as in week one and two. This rotation will begin Friday September 2, 2010.

[68] The remainder of the time the children shall reside with Mr. Cado.

[69] Summer vacation, July and August, this time shall be shared equally between the parents, each having two weeks in each month, such periods of time not to be consecutive. Beginning in the month of February of 2011 Ms. Conrad will inform Mr. Cado of the periods of time she is selecting for the summer months. The following year Mr. Cado shall have the opportunity during the month of February to pick his blocks of time and it shall continue to rotate in that fashion. In addition, the parties shall share the Christmas vacation time equally as well as the March break. It is hoped that they will be able to make their own arrangements in this regard. It is open to the parents, upon agreement, to make different arrangements as to parenting time. The children shall remain involved in their current basketball program and Anastasija in her music program.

[70] Neither party shall make any major development decisions which could significantly affect the children's education, religious upbringing, health or medical care, without first consulting the other party. In the event they are unable to agree, they will probably, as in the past, seek the Court's direction.

[71] Paragraphs 7, 8, 9 and 10 of the Separation Agreement/Order remain in effect.

[72] No child support shall be payable at this time. Mr. Cado shall assume responsibility for providing financially for the children. This has primarily been Ms. Conrad's burden in the past and it is time for Mr. Cado to step forward, which he indicated in the Court proceedings he was quite willing to do. Given that it is going to be Mr. Cado's financial responsibility to provide for Lazar and Anastasija, I will not be granting Ms. Conrad's request for retroactive child support. An Order will be forthcoming.

J.

