IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Murphy v. Hancock, 2011 NSSC 197

Date: 20110525
Docket: SFHMCA 055370
Registry: Halifax

Between:

Lindsay Jamie Murphy

Applicant

v.

Dion Ray Hancock

Respondent

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Heard: February 14, 15 and 21, 2011, in Halifax, Nova Scotia

Written Decision: May 25, 2011

Counsel: Tanya Jones, for the Applicant
Peter D. Crowther, for the Respondent

By the Court:

Introduction

[1] The parties commenced a common-law relationship in September of 2002. They separated in June 2006. They were never married. They have two children: two sons, born November 21, 2003, and September 28, 2005.

[2] For the period of approximately two years following the parties' separation, Mr. Hancock travelled outside the Province for work as an aircraft mechanic. Consequently, his parenting time with the children was somewhat unstructured and consisted of block periods when he was in Nova Scotia. Ms. Murphy is employed by the Capital Health Authority in Halifax, Mr. Hancock is a self-employed contractor now working as an aircraft mechanic locally. In 2010 they earned in the range of $32,000.00 and $49,000.00 respectively. They care for their two sons for roughly the same amount of time over a two-week period.

[3] Both parties cohabit with new partners.

Issues

1. Should the consent order dated December 17, 2008, be varied? If so, how? Is this a proper case for a shared parenting arrangement structured on the basis of alternating weeks?

2. Should the child support obligation of Mr. Hancock be recalculated effective July 1, 2010? If so, what is the result?

3. How should the parties share special expenses for the children?

The Evidence

[4] The applicant's mother, Cynthia Murphy testified. She is clearly supportive of her daughter's legal position and unfriendly to Mr. Hancock. She is an involved grandparent and committed to the welfare of her grandchildren. She complained about Mr. Hancock's reliability when he had responsibility to pick up the children. Her evidence was not of much significance on the issue of the parenting arrangement to be put in place. She is currently less involved in the family because her daughter has been living independently of her since 2009.

[5] Mr. Sean Murphy, the applicant's father also testified. He lives with his wife, Cynthia Murphy. He limited his contact with Mr. Hancock after the 2008 consent order. He said Mr. Hancock and his daughter have different parenting styles; his daughter's being superior. He last spoke to Mr. Hancock in 2006, with the exception of those times he answered the telephone in his home when Mr. Hancock was calling. Mr. Murphy's assessment of Mr. Hancock's parenting style is tainted by an intense dislike of Mr. Hancock. He too is a committed grandparent and will support a parenting arrangement decided upon by the court. He will do that for his grandchildren and his daughter. He has had limited opportunity to observe Mr. Hancock with his children over the past couple of years.

[6] Ms. Murphy's husband, Mr. Guitard, testified. He is a valuable role model for the children and a positive influence on the relationship between Ms. Murphy and Mr. Hancock. He impressed the court as mature, balanced and fair minded. He described his role as that of a step parent, to contribute to the growth and nurturing of the children in cooperation with the extended family.

[7] The applicant, Ms. Murphy is a committed, loving parent who places a high priority on being available for the children. She has made adjustments to her employment schedule so that she will be more available for the children. She complained that Mr. Hancock frequently changed plans, leaving her with child care responsibilities. Many of her specific complaints pertain to a period more than a year ago. The 2009 variation application herein was made necessary by Mr. Hancock's work schedule, which frequently had him travelling outside of Nova Scotia.

[8] When cross examined she agreed that she would prefer to share decision making pertaining to the children with Mr. Hancock but she has found this difficult to accomplish. She did concede that in recent months there have been a number of matters resolved cooperatively. These include the sharing of the children's toys and clothing and arrangements for summer travel to Labrador in 2010. She also agreed that in recent months no problems have arisen between the parties with respect to the daycare service or the children's attendance at school. She also agreed that her disappointment upon learning that the children would be registered with a family doctor, who employs Mr. Hancock's partner in her home, must be balanced with the fact that the children were without a doctor for a year and the parties were having difficulty locating an available family doctor.

[9] Ms. Murphy agreed that Seth's birthday celebration went well. It was at a local bowling alley and involved both families. Communication and cooperation between the parties was required to make this event a success and it was.

[10] Ms. Murphy described herself as a more listening parent than Mr. Hancock and agreed with the suggestion that he is more of a 'teaser' with the boys. She disapproved of Mr. Hancock involving the children in the use of sling shots for hunting birds. She seemed to accept this activity as reflective of Mr. Hancock having been raised in Labrador where this outdoor activity is more common. She described their difference of opinion on this issue as cultural. Notwithstanding her criticisms of Mr. Hancock's parenting approach, she conceded on cross examination that she has had very little opportunity to observe him in that role.

[11] She agreed that there is little or no evidence that Mr. Hancock's current work responsibilities impedes his availability as a parent.

[12] Mr. Hancock's partner, Ms. Vorstermans testified. She has one biological child born in 2003. The child lives with her. She testified that the January parenting schedule consisting of alternating weeks was more fluid for the children and resulted in a better parenting opportunity by both families. She is a child care provider; has a flexible schedule and can bring the children to her place of employment.

[13] On cross examination, she said she will commence studies at Mount Saint Vincent University in September and will be less available than is currently the case. I am satisfied that she is a positive influence on the relationship between the parties and will enhance communication between them.

[14] Mr. Hancock responded to a number of concerns raised by Ms. Murphy and identified by her as examples of poor communication. He testified in glowing terms about the positive experience the alternating week schedule was for the parties during the month of January 2011. In his view a continuous week of parenting time permitted him and his partner to establish a consistent regime in their household for the children. The schedule of alternating weeks resulted in less disruption for the children and a more enriching experience between him, his partner, his partner's son and the boys.

[15] On cross examination, Mr. Hancock disputed the allegation that he was not diligent in ensuring the children were prepared for school after being with him. He explained that he is self employed locally and has flexibility at work, which flexibility permits him to leave work to pick up the children at school. Mr. Hancock explained that he arranged the phonetics class only after concluding Ms. Murphy would not be responding to his inquiries on the subject. Similarly he explained that he enrolled one of the children in Tae Kwon Do only after he did not get a response from Ms. Murphy and he became concerned that the class would be filled before he had a response. He denied that he chose to ignore her opportunity to have input.

[16] On the decision to enroll the children with the family doctor who employed his partner, he testified that the children had been without a family doctor for a long time and that he had offered to find another doctor if the situation made Ms. Murphy uncomfortable. Finally he denied that he takes Ms. Murphy's silence as acceptance of his position.

History of Parenting

[17] As stated, the parties separated in June 2006 and for the next two years, Mr. Hancock's parenting time was unstructured because he travelled outside the Province for work and he would spend block periods with the children when in Nova Scotia. In November 2008 he began to focus on work in Nova Scotia.

[18] Ms. Murphy commenced an action on October 16, 2007. A consent order dated November 25, 2008, followed. It provided for the following parenting arrangement:

. . . . .

2. The children shall reside in the primary day to day care of the Applicant Lindsay Murphy and have parenting time with the Respondent Dion Hancock every second weekend from Friday after school/daycare to Sunday at 7:00 p.m. and two overnights during the week.

. . . . .

4. The Respondent shall have such other additional parenting time as agreed to between the parties.

5. Holiday access shall be as arranged between the parties.

[19] The November 2008 order obliged Mr. Hancock to pay child support of $851.00 per month, reflecting an income of $60,000.00.

[20] By December 2008 the foregoing parenting arrangement had evolved into the following two week overnight parenting schedule (Exhibit 16):

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Week One	Dad	Dad	Mom	Mom	Dad	Dad	Dad
Week Two	Mom	Mom	Dad	Dad	Mom	Mom	Mom

The parties propose to equally share the summer time and holiday periods with the children.

[21] On November 6, 2009, Ms. Murphy filed a variation application. She sought to vary the 2008 order by (1) eliminating the two overnights per week during the school year, and by (2) having the Sunday night exchange every other week and changed to a drop off at school Monday morning, instead of the evening before at her home. (Although not in the 2008 order, as a matter of practice the Sunday evening return had become a drop off Monday morning at school)

[22] Ms. Murphy also sought (3) to change the characterization of the parenting arrangement from “joint custody” to “primary custody” with her and she sought (4) a proportional sharing of special expenses not a 50/50 sharing as ordered in 2008. Finally, (5) she sought a recalculation of Mr. Hancock’s child support obligation effective July 1, 2010, to reflect what she asserts was Mr. Hancock’s actual 2009 income.

[23] At a settlement conference in December 2010 the parties agreed to parent on an alternating week basis for the month of January 2011. They did so. They have since resumed the schedule provided for in the 2008 order as varied by practice. Ms. Murphy testified that the January 2011 arrangement was not workable for the children. Consequently, she is not agreeable to continuing with it.

[24] In the pre-hearing argument, on behalf of Mr. Hancock, his counsel argued that the current arrangement results in Mr. Hancock having the children in his care seven out of fourteen days.

Overview of the Parties' Positions

[25] At paragraphs 12-13; 167-176 and 184-185 of her affidavit filed January 24, 2011 (Exhibit 1), Ms. Murphy gives the reasons she wants to change the parenting schedule. Paragraphs 12-13 capture the essence of her complaints:

> ... The table amount for an income of $92,600.00 is $1258.00 per month but Mr. Hancock has continued to pay $851.00 per month based on an income of $60,000.00.
>
> 12. While I filed my Variation Application to eliminate the overnights one year and three months before the trial this February 2011 the reasons I would like to change the schedule remain the same; including that Mr. Hancock and I do not communicate well, that Mr. Hancock does not have a consistent schedule despite being in the local area more often, Mr. Hancock does not appear willing to make sure he and I follow the same routines with the children. Mr. Hancock and I have very different parenting styles and Mr. Hancock has told me that when he has the children what he does is his business and I have no right to know anything. In addition when the children return from Mr. Hancock's they are upset, hungry and tired and it takes me two to three days to get them back on track.
>
> 13. I agreed to try shared custody for the month of January 2011 and it has not eliminated these factors.

[26] In an earlier affidavit (exhibit 'E" to exhibit 9), filed in support of her November 2009 variation application, she detailed circumstances she believed were examples of how shared parenting would be unworkable.

[27] Mr. Hancock wishes to have the parenting arrangement changed to a shared parenting plan that follows a week-on, week-off schedule.

[28] Mr. Hancock states that any communication issues and differences of opinion on parenting that exist are relatively minor. He submits that, in fact, intact families exhibit similar differences of opinion and parenting styles. He argues further that the e-mails between the parties – copies of which are shown as Exhibit

15A and 15B – confirm that the parties do, in fact, resolve their differences and that communication does occur and does work. In his pre-hearing brief he submits that he "is not seeking to change the amount of time he spends with the children, he simply seeks to re-arrange the allotment of parenting time" ,emphasis added.

[29] The parties do agree that the current arrangement is too disruptive for the children and both wish to eliminate the mid-week overnights.

Legal Principles

[30] This proceeding is governed by the *Maintenance and Custody Act*, R.S.N.S. 1989 c.160 (hereinafter referred to as the "*Act*"). Section 37(1) provides:

> 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.

[31] The parties agree that there has been a change of circumstances and the necessary pre-condition to varying the 2008 order exists. Mr. Hancock identifies his decision in December 2009 to not travel for work as a change of circumstances and Ms. Murphy asserts that the parenting arrangement is not working and this is a change in circumstances. I am satisfied a change of circumstances has occurred.

[32] The court's power, when dealing with custody and access issues, is governed by the directions contained in Section 18(4) and (5) of the *"Act"*:

> 18(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. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

[33] These directions are consistent with those of the *Divorce Act* S.C. 1985 c. 3 (2nd Supp.) at sections 16(8) and (10). When making a custody order under that statute, the court shall only take into consideration the best interests of the child as determined by reference to the condition, means, needs and other circumstances of

the child. A divorce order must also give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, "for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

[34] When courts talk of the "welfare of the child" and the "best interests of the child", the phrases are typically applied interchangeably. In this decision, they will be.

Best Interests Criteria

[35] In the following I will repeat and expand upon many of the comments in J.A. V. J.R. [2010] N.S.J. 597, when called upon to consider a plan for shared parenting. Many of the principles and observations discussed made have application herein.

[36] Justice Goodfellow, in his often quoted decision *Foley v. Foley* [1993] N.S.J. No. 347, outlined factors generally relevant to an assessment of what parenting arrangement is in a child's best interest. At paras. 16-20, he wrote:

> 16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
>
> 1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);
>
> 2. Physical environment:
>
> 3. Discipline;
>
> 4. Role model;
>
> 5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;
>
> 6. Religious and spiritual guidance;
>
> 7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child:

10. The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

17. The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question. With whom would the best interest and welfare of the child be most likely achieved?

18 The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

19. Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.

> 20. On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[37] Turning to an application of these criteria to the evidence, I am satisfied that the physical environment, approach to discipline and the availability of positive role models is comparable in the homes of both parties. Each parent is available to the children. Mr. Hancock purchased a home in Middle Sackville, so he could be closer to the children who reside in Lower Sackville.

[38] I am satisfied that both parents will support the involvement of the children in recreational activities. Both will support the children financially and involve both extended families as required and they will involve each other.

[39] After considering the factors enumerated by Justice Goodfellow, it is apparent that each parent has a strong plan to care for the children.

[40] Justice Forgeron, in *MacKeigan v. Reddick* [2007] N.S.J. No. 425, also discussed a number of factors relevant to determining which parent should be designated the primary caregiver. At paragraph 45 she wrote:

> 45 Each party seeks to be the primary care giver of Brady. Each party states that Brady's best interests would be served if Brady was placed in his/her respective care. The most significant factors which have been espoused by the parties in support of their positions, and which were examined by me, are as follows:
>
> a) Status quo,
>
> b) Poor decision-making,
>
> c) Nutrition and hygiene,
>
> d) Willingness to facilitate maximum contact,
>
> e) Family attachments,
>
> f) Home environment,
>
> g) Time availability and parenting style, and
>
> h) Cultural and moral development.

Justice Forgeron found shared parenting unworkable in that case.

[41] I wish to consider these factors by reference to the evidence before me. Neither parent herein has demonstrated poor decision making that involves the children. The other factors enumerated I have already commented upon.

[42] In a more recent "mobility" decision, Justice Forgeron ordered that a parallel parenting arrangement be established, notwithstanding a conflicted situation. In *Baker-Warren v. Denault* 2009 NSSC 59, at paragraph 42, she wrote:

> 42 In addition, the factors set out in the second part of the test in Gordon v. Goertz [1996] 2 S.C.R. 27 must likewise be addressed in any parenting dispute. These factors are noted at para. 23 of Burgoyne v. Kenny, 2009 NSCA 34, wherein Bateman J.A. states as follows:
>
> > In para. 49 of Gordon v. Goertz, supra McLachlin J., as she then was, for the majority, summarized the applicable principles. An original custody determination is informed by the following considerations:
> >
> > 1. The judge must embark on an inquiry into what is in the best interest 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.
> >
> > 2. 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.
> >
> > 3. The focus is on the best interests of the child, not the interests and rights of the parents.
> >
> > 4. The judge should consider, inter alia:
> >
> > a) the desirability of maximizing contact between the child and both parents;
> >
> > b) the views of the child, if appropriate;
> >
> > c) the applicant parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
> >
> > d) the disruption to the child consequent on removal from family, schools and the community he has come to know.

[43] Justice Forgeron went on and analysed the child's best interests by reference to a number of factors (1) the allegation of parental misconduct:

violence; (2) the allegation of parental misconduct : substance abuse; (3) the allegation of child alienation; (4) the maximum contact principle; (5) the impact of a possible move by a parent; (6) the state of the parent-child relationship; (7) the physical environment and financial circumstances of the child; (8) the child's educational, cultural, spiritual and general welfare needs; (9) the parent's approach to discipline; (10) the child's health needs; (11) the availability of family support; (12) each parent's time availability; and (13) the child's views, if ascertainable.

[44] Finally, Justice Forgeron concluded as follows:

> 120. It is in Kyra's best interests to have healthy relationships with both parents. Currently, this is compromised by Ms. Baker-Warren's manipulation and alienation, and by Mr. Denault's impulsive and reactive personality. Both flaws pose risks to Kyra.
>
> 121 Despite these significant limitations, the court must, nonetheless, determine the type of parenting plan in Kyra's best interests. Ms. Baker-Warren has been the primary care parent. Mr. Denault does not have the parenting experience that Ms. Baker-Warren has. It is, therefore, in Kyra's best interests to be placed in the shared and parallel parenting of the parties, but in the primary care of Ms. Baker-Warren. This finding is contingent on the parties fully cooperating with the therapies and making the necessary changes in his/her conduct. If the parties refuse or are unable to make the necessary changes, then this parenting plan will likely have to be revisited.
>
> 122 The shared parenting plan is necessary so that Kyra benefits from both of her parents. The parallel parenting regime will permit the establishment of a meaningful and balanced relationship between Kyra and each of her parents. The shared parenting plan will ensure that Kyra's material, emotional, educational, and social welfare needs are met.
>
> 123. The plan will be tailored to meet the needs of Kyra - not the needs of Ms. Baker-Warren or Mr. Denault. Kyra will spend significant block time with each party. Weekly transitions between households will be reduced. The plan will also decrease conflict by providing the parties with few opportunities to make independent scheduling choices.
>
> 124. The parallel parenting regime does not follow Dr. Landry's recommendations on a verbatim basis. Dr. Landry's expert opinion was exceedingly helpful, albeit dated by the time the trial concluded. I have veered from the recommendations based upon the totality of the evidence and to ensure the best interests of Kyra are met. The court cannot

> delegate its judicial role and responsibilities to health care professionals in any event.

[45] Justice Forgeron then directed a two-week rotation of the parenting time which she described as sharing custody in a parallel parenting regime. Justice Forgeron also outlined very detailed guidelines to govern the parenting arrangement. She authorized the child's move to Gatineau, P.Q.

Shared Parenting

[46] Notwithstanding complaints the parents, herein, have about each other's parenting choices from time-to-time, they agree that the other is capable of parenting their children to a level within the range of appropriate parenting. They also agree that the children should be with the other parent for a significant amount of time each month. Since late 2009 the allocation of parenting time permits the characterization of their parenting regime as shared.

[47] Shared custody is defined by the Federal Child Support Guidelines at s. 9 SOR / 97-175 as amended and by s. 9 of the Nova Scotia Child Maintenance Guidelines, N.S. Reg. 53/98 as amended. It is defined by the amount of time a spouse/parent exercises a right of access to, or has physical custody of a child. When that reaches forty percent a shared custody situation exists. The arrangement implies a greater role for the parents in the management of the child (ren) and may impact on the child support obligations of the parents. The leading case on the latter issues is Contino v. Leonelli-Contino, [2005] S.C.J. No. 65; 2005 SCC 63. Although the word custody denotes decision making authority there is no statutory direction on how decision making authority associated with shared custody (parenting) is to be allocated.

[48] The 'Act' at s. 18(4) directs that "the father and mother of a child are joint guardians..of the child" unless otherwise ordered. A wide range of descriptions of the decision making authority are possible in a shared parenting arrangement. All decisions need not result from an agreement reached by the parties. Day to day decisions affecting a child are typically made by the parent exercising "access to, or having physical custody " of the child. Other decisions require a consensus to be effective but this is not always the case. The current state of the law is that in most cases, regardless of the parenting arrangement, joint custody is ordered.

Most parents accept the obligation and need to consult each other and to keep each other informed on all issues affecting their child(ren).

[49] Jurisprudence on the issue of whether shared parenting should be ordered is very fact specific. I agree with the comments of Justice Wright in *Hackett v. Hackett* [2009] N.S.J. 178, at paragraph 13:

> 13. It is all well and good to look at other cases to see how these principles have been applied, but the outcome in other cases is really of little guidance. Every case must be decided on a fact specific basis and nowhere is this to be more emphasized than in custody/access/parenting plan cases. To state the obvious, no two family situations are ever the same.

[50] Within the assessment of the best interests of a child when shared parenting is proposed a number of factors frequently prove important. They are refinements to the best interests analysis discussed earlier. The factors are the following:

1. The proximity of the two proposed homes to each other is an important factor to consider. This is relevant to assessing how shared parenting will impact on all aspects of a child's life, including what school the child will attend, what recreational or social relationships will be disrupted or preserved and how available each parent will be to the other should shared parenting be ordered;

2. The availability of each parent to the child on a daily basis and the availability of step-parents is an important consideration. A court should also consider the availability of members of the respective extended families and whether a shared parenting arrangement impacts negatively or positively on a child's relationship with the extended family;

3. The motivation and capability of each parent to realize their parenting opportunity for the best interests of the child;

4. Whether a reduction in transitions between households can be achieved by a shared parenting arrangement. This is particularly important when transitions frequently give rise to conflict between the parents;

5. Whether mid-week parenting time or contact with the other parent can be structured without disrupting the child. This contact might be after school or after supper time, for example, the objective being the elimination of extended periods without contact between the child (ren) and a parent;

6. The opportunity, if any, that shared parenting provides for each parent to be involved in decisions pertaining to the health, educational and recreational needs of the child; the level of interest each parent has in participating in decision making in these areas is relevant to this assessment;

7. The responsibility that shared parenting imposes on each parent to share the parenting burden and to be involved in decisions pertaining to the health, educational and recreational activities of the child and an assessment of each parent's willingness to assume their share of that responsibility after entrusted with it;

8. The employment and career benefits that may accrue to each parent as a result of a shared parenting arrangement and a more equal sharing of the parental responsibilities;

9. Whether improvements in the standard of living in either or both households may accrue as a consequence of a shared parenting arrangement;

10. The willingness and availability of parents to access professional advice on the issue of successful shared parenting;

11. The extent to which primary care by a parent and more limited access time by the other parent will give rise to conflict in the parenting arrangement. The "elephant in the room" in many custody disputes has three aspects (a) the child support consequences that flow from a shared parenting arrangement or the alternative and (b) the manner in which a primary care parent can use his/her position to have power and control of parenting and (c)whether a parent will abuse the parenting opportunity by doing so. Shared parenting is often not ordered because the parties are too conflictual, notwithstanding that

the conflict may result from a power imbalance in the parents' relationship flowing from the parenting arrangement in place. Courts must be cognizant of this dynamic;

12. An assessment of the parenting styles. That assessment should address/answer the questions posed by Justice MacDonald in *C.(J.R.) V. C.(S.J.)* 2010 NSSC 85, at paragraph 12:

> -- What does the parent know about child development and is there evidence indicating what is suggested to be "known" has been or will be put into practice?
>
> -- Is there a good temperamental match between the child and the parent? A freewheeling, risk taking child may not thrive well in the primary care of a fearful, restrictive parent.
>
> -- Can the parent set boundaries for the child and does the child accept those restrictions without the need for the parent to resort to harsh discipline?
>
> -- Does the child respond to the parent's attempts to comfort or guide the child when the child is unhappy, hurt, lonely, anxious, or afraid? How does that parent give comfort and guidance to the child?
>
> -- Is the parent emphatic [empathetic ?] toward the child? Does the parent enjoy and understand the child as an individual or is the parent primarily seeking gratification of his or her own personal needs through the child?
>
> -- Can the parent examine the proposed parenting plan through the child's eyes and reflect what aspects of that plan may cause problems for, or be resisted by, the child?
>
> -- Has the parent made changes in his or her life or behaviour to meet the child's needs, or is he or she prepared to do so for the welfare of the child?

I must now consider what the evidence allows me to conclude when these twelve criteria are applied.

[51] These parents are, for all practical purposes, in the same community. This eliminates the risk of the children losing important relationships at school, at church or through recreational activities. The extended family in the area can easily be involved in the children's activities, as spectators at sporting events, for example, regardless of which home they are residing in a given week.

[52] I am satisfied each parent will maximize the parenting opportunity afforded to them. Each has already made important decisions to be more available to them.

[53] The number of transitions may be reduced. Had I ordered every other week end and access for either parent I would also have ordered access in between those weekends. Mid-week access when a child is settled for seven days is less disruptive for them. I am satisfied each parent will be involved in decisions affecting the children.

[54] These parents will meet the parenting challenges flowing from a shared parenting regime. They will also benefit from having a break from meeting that responsibility each day. Both parents have important and responsible jobs that undoubtedly require their energy. The freedom to more aggressively pursue professional objectives may improve the earnings of these parents.

[55] I am satisfied that these parents will access resources to assist them as parents if the need to do so arises. They impressed the court.

[56] I cannot conclude that either party is motivated by financial concerns or a need to control the parenting of the children. This factor is neutral on these facts. It is my conclusion that they accept the position of the other as taken in good faith.

[57] Similarly, I do not draw any negative conclusions as a result of evidence of the parenting style of these parents. They impressed the court as genuine parents interested in what is good for the children. I do not believe their parenting styles are much different, in reality.

Conclusion

[58] The court has been asked to determine what parenting arrangement is in the best interests of the two subject children, and in particular whether a shared parenting arrangement based on alternating weeks is in the children's best interests. I am satisfied that such an arrangement is in the best interests of the children. In January of 2011, it existed and in my view, that experience demonstrates that it can be successful. Notwithstanding the expressed concerns Ms. Murphy has about Mr. Hancock's parenting she proposes they equally share the summer parenting time. In addition the children have been in a shared

parenting arrangement for some time. There is no evidence that the amount of time the children have had with Mr. Hancock has in any way negatively impacted on them. In fact the reduction in parenting time proposed for Mr. Hancock would be a significant change for these children.

[59] I wish to address the concerns raised by the parties and apply the governing legal principles.

[60] The parties do communicate at an acceptable level to parent effectively. They have demonstrated that they can do so. They may not enjoy communicating with each other but that is different than being unable to meet their responsibility to do so. Furthermore, the absence of shared parenting will not eliminate the need for the parties to communicate. Both parents will be entitled to information that may first come to the attention of the other. That information may pertain to the health, educational or recreational needs of the child. If both parents are to be very involved in the children's lives, and they agree they will be, regardless of the outcome of this hearing, frequent communication between the parents will still be required.

[61] In addition, the exchange of the children will still need to be coordinated. Perhaps more frequently than would be the case if shared parenting were not ordered on an alternating week basis.

[62] Mr. Hancock is promising to have a consistent routine for the children. During his parenting time, that is his responsibility. The routines the parents implement need not be identical. There is value for a child to learn the different approaches available to parents. I do not share the concern that such an experience is presumptively disruptive or stressful for a child. Within an intact family, children often learn that their parents have different attitudes when dealing with the same subject. It would be unusual for children to not have that experience. Of course, evidence that a parent's approach is not in the best interests of a child, raises a different issue. In such a circumstance, it is the routine of the parent, not its inconsistency with the routine the child is exposed to in the other household, which is problematic.

[63] The children herein, will be exposed to the routines and parental styles as a result of the parenting plan espoused by both parties. A decision to deny shared

parenting will not significantly impact this concern, should the court find it should be a concern. I do not.

[64] Justice Sopinka, in *Young v. Young* [1993] 4 S.C.R. 3 at page 84 stated:

> . . . . . The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the Divorce Act. This means allowing each parent to engage in those activities which contribute to identify the parent for what he or she really is. The access parent is not expected to act out a part or assume a phony lifestyle during access periods. The policy favouring activities that promote a meaningful relationship is not displaced unless there is a substantial risk of harm to the child.
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> 179 In this regard, I agree with Wood J.A. in the Court of Appeal (1990), 50 B.C.L.R. (2d) 1. In his reasons he states, at p. 96:
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> > I believe the whole of s. 16 of the Divorce Act of 1985, when properly construed, reflects the modern view that the best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. That construction in turn requires that the distribution of "rights", between the custodial and the access parent, be such as to encourage such a relationship. And such a construction is inconsistent with the full-blooded traditional notion of guardianship which would give the custodial parent the absolute right to exercise full control over the child even when the other parent is exercising his or her right of access.

[65] *Supra* at paragraph 50, I identified a number of factors that are frequently relevant to assessing whether a shared parenting arrangement is in the best interests of these children.

[66] I am satisfied that the children will maintain a continuity of peer relationships in a shared parenting situation. The parents live near each other. The children will be remaining in the same school district and within range of their established peer groups. Each parent, by virtue of their proximity of the homes, will also be “available” to assist the other parent and the children when the need arises.

[67] A shared parenting arrangement will continue the availability of members of both extended families to the children and will also enhance the availability of

their step parents. This is an important positive outcome for those children in the shared parenting arrangement proposed.

[68] Significant conflict arises between parents when a parenting arrangement establishes a status quo that one parent interprets as a power position, confirming superior authority on that parent. In such circumstances, the other parent often interprets the parenting arrangement as victimizing. To the extent that a parenting arrangement can be concluded, and result in a lessening of this dynamic, it must be considered. Of course, the result must be one that is in a child's best interest. I am satisfied that a shared parenting arrangement will result in less conflict for these parents.

[69] Herein, a shared parenting arrangement structured on an alternating basis, will reduce the number of transitions. There will be fewer times the child needs "to pack" and for the parents to exchange the children. Exchange can be emotionally laden contexts for all involved.

[70] I am satisfied that each parent can spend mid week time with the child with minimal concern for conflict. The alternative, which is the separation of the children from "the other parent" for a week is not necessary. A strong rationale should exist to support such an outcome. The children will be living near each parent. It is in their best interests that their opportunity to share the experiences of the week with both parents be timely. Mid week access is an enhanced opportunity for the children to receive the love of the other parent and for the children to love that parent back. That is an experience for children that must be highly valued.

[71] Herein, both parents want to be informed on all aspects of their children's lives. Shared parenting permits this. I am satisfied that these parents are capable of assisting each other and are willing to do so. They are asking to share the parenting responsibility.

[72] Fulfilling the parenting responsibility is difficult on many days for many parents. It is important that these parents share that responsibility. There is growth as a parent when a parent is required to do so. By accepting the challenges of parenting, each parent is realizing an opportunity to have the child know them and to be cared for by both in a wide range of circumstances. The daily and

weekly school routine of a child is an important experience that the child should have the opportunity to share with each parent.

[73] The children herein will have a similar standard of living in each household.

[74] I am satisfied that the parties will access advice on shared parenting if required to do so. They have each made important decisions about their lifestyles to enhance their opportunity to parent.

[75] I am satisfied that a shared parenting arrangement is workable herein, and in the children's best interests.

[76] Finally, I am satisfied that the parenting styles of the parties do not give rise to concerns that the children will be confused. I have addressed this issue in more depth supra at paragraph 62. This is not a concern.

[77] The following is, therefore, ordered:

Parenting

1. On the Friday following the last day of school in June 2011, the shared parenting arrangement, structured on an alternating week basis shall begin. This start date is chosen in recognition of the fact that the children were to follow that schedule over the summer;

2. The children are to have a period of 3-4 hours with the "other"parent each Wednesday. During the school year, it is ordered that the period end no later than 7:00 p.m.;

3. The parties are to identify a period of two weeks over the summer when the children will be available to each parent for travel or vacation. Obviously, mid-week access would be suspended during this period;

4. The parties shall exchange all information pertaining to the health, educational and recreational needs of the children. They shall do so in a timely fashion; they shall consult each other on issues pertaining to the care of the children; however on the issue of schooling Ms. Murphy shall have the final decision should a disagreement develop;

5. The parties shall give the first opportunity to care for the children to the other parent in the event he/she will be away over night during her/his parenting period;

6. The parties shall develop a budget itemizing the anticipated non-routine costs for the children. These expenses would include those associated with recreational activities; more costly clothing items such as winter jackets, school travel, the “return to school” expenses; special event expenses such as birthday parties for families or friends and for travel. These are but a few examples. There may also be health related expenses such as dental care to be budgeted;

7. The parties are encouraged to propose other terms in an order to be submitted by the applicant. The foregoing is not meant to be exhaustive;

8. Should either party plan to move outside the current school district, notice of the proposed move shall be given to the other at least ninety (90) days in advance. Such notice shall be deemed a change of circumstances permitting either party to seek to vary this order.

Special Expenses

9. The sharing of special expenses on a proportionate basis is ordered; adjusted on July 1 of each year and by reference to the preceding years’ income;

Ongoing Child Support

10. The parties are ordered to pay offsetting child support, based on the tables; adjusted on July 1 of each year and by reference to the preceding years’ income;

Retroactive Child Support

11. The court will be issuing a separate ruling on the calculation/reassessment of the past child support obligations of the parties.

ACJ