SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Pretty v. Pretty, 2011 NSSC 296

Date: 20110708
Docket: 1206-5188
Registry: Sydney, N.S.

Between:

Gary James Pretty

Applicant/Respondent

v.

Kathleen Joyce Pretty

Respondent/Applicant

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	April 5, 2011 in Port Hawkesbury, Nova Scotia; and June 6, 2011, in Sydney, Nova Scotia
Oral Decision:	July 8, 2011
Written Decision:	July 18, 2011
Counsel:	Gary James Pretty, Self-Represented Gus Postlewaite, for Kathleen Joyce Pretty

By the Court:

[1] Introduction

[2] Sixteen year old Crawford and 12 year old Saxon are the children of Mr. and Ms. Pretty. Crawford lives with his father, while Saxon lives with her mother. Crawford now wants to live with his mother. Mr. Pretty does not support this request. Mr. Pretty is concerned that Ms. Pretty will not be able to meet Crawford's special needs. Crawford has an autistic spectrum disorder known as Aspergers syndrome.

[3] A contested hearing was scheduled to determine this parenting issue, in addition to the maintenance issue, which had been previously scheduled for review. The application was heard on April 5 and June 6, 2011. In addition to the evidence of the parties, the court heard from Brenda Lavandier, Chrissi Lynch, Sharon MacCuspic, Evelyn Cameron, and Dr. Andrew Lynk. The matter was adjourned for oral decision.

[4] Issues

[5] The following issues will be determined in this decision:

a. What material changes in circumstances have occurred since the issuance of the last court order?

b. Is it in Crawford's best interests to live with his mother or father?

c. What access provisions are in the best interests of Crawford?

d. Should income be imputed to Mr. Pretty?

e. Should an undue hardship finding be made?

f. What is the appropriate child support order?

g. Should maintenance be varied on a retroactive basis?

[6] **Background**

[7] The historical data respecting this family was detailed in the court's reported divorce decision found at **2010 NSSC 54.** This decision confirms that during the parties' eight year marriage, Ms. Pretty was the primary care parent, while Mr. Pretty was the primary wage earner. The family lived in Ontario where Mr. Pretty was employed with the Coast Guard. A desired life style change led the parties to move to Cape Breton in 1996.

[8] Mr. Pretty retired from the Coast Guard in 1998. He secured a teaching position with the Nautical Institute in Port Hawkesbury in 1999. Mr. Pretty also worked for the Princess Cruise Line in 2001 and 2002 and held various other nautical related jobs on an ad hoc basis.

[9] Mr. and Ms. Pretty separated in 2002. Initially, Crawford and Saxon lived with their mother, while Mr. Pretty exercised access. This changed in April 2008 when Crawford attacked Ms. Pretty with a knife in an unfortunate incident. Crawford has been living with Mr. Pretty ever since.

[10] The parties were divorced in February 2010. According to the Corollary Relief Judgement, the parties share joint custody of their children. Crawford's primary residence was with his father in Arichat; Saxon's primary residence was with her mother in the CBRM. Crawford visited his mother and sister regularly.

[11] The visitation schedule was altered in September 2010 because Ms. Pretty and Saxon moved to Dartmouth. Ms. Pretty was in receipt of social assistance after separation. She returned to school, and graduated as a

continuing care assistant in 2010. Upon graduation, Ms. Pretty found employment in Dartmouth.

[12] Access was restricted after Ms. Pretty and Saxon moved to Dartmouth for the following three reasons:

a. It takes about four hours to drive the distance between Arichat and Dartmouth. Only Mr. Pretty has a vehicle.

b. Both parties have limited financial resources. Ms. Pretty is barely able to meet her legitimate household expenses. Mr. Pretty's financial circumstances are also constrained. Mr. Pretty lost his job at the Nautical Institute in June 2009. His EI claim ran out. Mr. Pretty is now working as a janitor.

c. The parties have a deeply embedded dislike and distrust of each other. They are incapable of communicating respectfully and thoughtfully with each other, even on parenting issues.

[13] Since September 2010, Crawford only had physical access to his mother and sister during the Christmas, March, and Easter breaks. Crawford did, however, speak regularly to his mother and sister by telephone and computer.

[14] At the time of the divorce hearing, Crawford was managing well socially and academically in the care of his father. This abruptly changed in January 2011. Crawford literally shut down after the conclusion of the Christmas visit. His friendly, kind, happy disposition was no more. Crawford became withdrawn, isolated, and noncompliant. He experienced a dramatic weight loss, and complained of fatigue.

[15] Crawford's teachers were extremely concerned and worried. The Vice Principal urged Mr. Pretty to arrange an appointment between Crawford

and his pediatrician. The Vice Principal also sought help from trained professionals employed with the school board. Although Crawford's behaviors have improved since the intervention, he is no longer the happy adolescent that he was previously.

[16] Commencing in January 2011, Crawford has consistently expressed a desire to move to Dartmouth so that he can live with his mother. Ms. Pretty supports Crawford's request to return to her care.

[17] **Analysis**

[18] **What material changes in circumstances have occurred since the issuance of the last court order?**

[19] In the Corollary Relief Judgment, the court scheduled a review of the child and spousal support provisions for November 2010. This date was adjourned, at the request of the parties, to April 2011 to deal with the maintenance and parenting issues affecting Crawford. The court was not asked to determine the access arrangements affecting Saxon. The past access arrangement remains in tact.

[20] Before the court can vary a custody or maintenance order, a change in circumstances is required as set out in section 17 of the *Divorce Act*.

[21] In **Gordon v. Goertz** [1996] 2 S.C.R. 27, the Supreme Court of Canada discussed the meaning of a material change in circumstances. A material change must affect the child, or the ability of the parents to meet the best interests of the child. A material change occurs when a judge would likely have crafted a different order, had the new facts existed at the time the original order was made. The new facts could not have been reasonably contemplated or foreseen at the time the original order was made.

[22] The following material changes have occurred since the issuance of the last court order:

a. Ms. Pretty graduated from the Nova Scotia Community College with a diploma in continuing care. She found employment in Dartmouth and relocated there as a result.

b. Access has been limited since Ms. Pretty moved to Dartmouth.

c. Sixteen year old Crawford has expressed a consistent wish to return to live with his mother and sister.

d. Crawford has experienced significant personality changes since January 2011.

e. Mr. Pretty has not returned to work at the Nautical Institute as anticipated, and has found employment as a janitor.

[23] The parenting and maintenance issues are thus properly before the court for consideration.

[24] **Is it in Crawford's best interests to live with his mother or father?**

[25] *Position of Ms. Pretty*

[26] Ms. Pretty states that it is in Crawford's best interests to return to her primary care, for a number of reasons, including the following:

a. She was the primary care parent for the vast majority of Crawford's life. She is thus better equipped to ensure that Crawford's emotional and developmental needs are met.

b. Crawford's wishes have been repeatedly and consistently expressed. They should be respected.

c. The children should be reunited under one roof. They have a loving and supportive relationship.

d. Crawford's emotional health is in jeopardy while living with his father.

e. Ms. Pretty will ensure that Crawford has opportunities available to him so that he can become independent. More opportunities exist for Crawford in Dartmouth than in Arichat. Mr. Pretty does very little with Crawford, and this is hampering Crawford's chance to become independent.

f. Ms. Pretty and Crawford have a loving and supportive relationship. There are no concerns about physical safety because Crawford has matured. Further, Ms. Pretty and Crawford have both learned skills to prevent a dangerous situation from developing in the future.

[27] *Position of Mr. Pretty*

[28] Mr. Pretty states that it is in Crawford's best interests to remain in his primary care for a number of reasons, including the following:

a. Crawford has done extremely well in his care, until January 2011.

b. Crawford would likely experience significant adjustment problems if he were to transfer into a new school and community. SAERC is a small school. Crawford knows all of the teachers and students. The school is supportive and interested

in Crawford. The Dartmouth school is a much larger facility; Crawford knows noone who will be attending the school.

c. Ms. Pretty lacks appropriate child care arrangements for Crawford.

d. Crawford has a good relationship with Mr. Pretty, his new partner, and their children. All of Crawford's needs are being met in his current situation.

e. Ms. Pretty has not learned any new skills that show she is now better equipped to prevent another physical altercation with Crawford.

[29] *Decision of the Court*

[30] In making my decision, I am cognizant of the burden of proof and credibility factors. In **C. (R.) v. McDougall,** 2008 SCC 53, Rothstein J. confirmed that there is only one standard of proof in civil cases - proof on a balance of probabilities. The evidence must be clear, convincing, and cogent to satisfy the balance of probability's test. Testimony must not be considered in isolation, but rather examined based upon its totality.

[31] Credibility plays a significant role when assessing the burden of proof. The court considers a number of factors when making credibility determinations. These were reviewed in **Baker-Warren v. Denault**, 2009 NSSC 59, at paras 18-20, and have been considered by me in this decision.

[32] In all parenting decisions, I must apply the best interests of the child test. The best interests of the child test has been described as one which has an inherent indeterminacy and elasticity: **MacGyver v. Richards** (1995), 11 R.F.L. (4th) 432 (Ont. C.A.). The factors which compose the best

interests of the child are varied and are dependent upon the unique circumstances of each case. In **Foley v. Foley**, [1993] N.S.J. No. 347 (S.C.), Goodfellow, J. lists a number of helpful factors which courts typically examine when determining a contested custody dispute. In **Burgoyne v. Kenny**, 2009 NSCA 34, Bateman J.A. confirms that the court must examine all relevant circumstances relating to the child's needs and the ability of the parents to satisfy them. The interests and rights of the parties are not important.

[33] I have examined the plans of both parties in the context of Crawford's best interests. I have determined that it is in Crawford's best interests to continue to have his primary residence with his father for several reasons.

[34] *Child Care Arrangements*

[35] Mr. Pretty has superior child care arrangements in place for Crawford. Crawford does not have extensive time alone while in the care of Mr. Pretty. Mr. Pretty works from 6:00 pm until midnight every Monday to Friday. He is home each night after work and during the week ends. Further, his common law spouse is also home, except when she teaches night classes. Mr. Pretty's step children are also at home at night.

[36] In contrast, Ms. Pretty has not made satisfactory child care arrangements for Crawford. Ms. Pretty lives in a three story building that houses six apartment units. Ms. Pretty's apartment occupies a portion of the second and third floors of the building. The neighbor who provides child care lives in a portion of the first floor of the building.

[37] Ms. Pretty works 12 hour shifts. Half of these shifts are at night, from 7:00 pm until 7:00 am. During this time, Crawford and Saxon spend about two to three hours in the company of the neighbor who lives on the first floor of the building. Between 9:00 pm and 10:00 pm, the children return to their own apartment to go to sleep. The neighbor remains in her own

apartment. The neighbor is available should the children contact her. The neighbor, however, does not directly supervise the children after 10:00 pm.

[38] Ms. Pretty's child care arrangements are not in Crawford's best interests. Dr. Lynk stated that Crawford's ability to reason, to weigh consequences, and to make sound judgements were significantly impaired, likely at the level of a seven or eight year old. As a result, Crawford would not be capable of responding appropriately should an emergency arise. Saxon is also too young to care for Crawford, nor should she be expected to assume such a burden at her young age. The lack of direct, adult supervision from 10:00 pm until 7:30 am when Ms. Pretty works nights creates a substantial risk of harm for Crawford. It is not appropriate.

[39] *Educational Needs*

[40] Mr. Pretty's educational plans for Crawford are superior to those proposed by Ms. Pretty. Mr. Pretty plans to have Crawford continue his education at SAERC.

[41] The court concurs with Mr. Pretty and Dr. Lynk about the high quality of care that the SAERC staff have provided to Crawford. The staff have not only been professional, they have been genuinely concerned about Crawford. This is supported in the evidence of Ms. Cameron, Crawford's English teacher, and Ms. MacCuspic, the Vice Principal. The court was impressed by all that they have done on Crawford's behalf. While attending SAERC, Crawford received an excellent educational experience that was tied to his needs, abilities, and talents.

[42] Further, Crawford has been accepted by the students who attend SAERC. The evidence of Ms. MacCuspic and Ms. Cameron confirms that Crawford has not experienced bullying, and has made friends at the school. The atmosphere at SAERC is one of acceptance.

[43] I conclude that the majority of the staff and students at SAERC view Crawford as an important and unique individual. Crawford is not viewed as a burden, nor as a problem to be solved. This is a benefit that cannot be understated.

[44] I have virtually no evidence about the school where Ms. Pretty proposes to enroll Crawford. Ms. Pretty did not supply any information to the court, other than the school is quite large and in her neighborhood.

[45] In the absence of evidence, I am unable to conclude that any positive benefit will flow to Crawford by being transferred. To the contrary, I have significant concerns that Crawford will likely experience transitional difficulties transferring from a small, rural school to a large, city school.

[46] *Health Issues*

[47] Dr. Lynk stated that Crawford was not experiencing depression, nor any other mental health disorder at this time. He noted that Crawford had improved considerably between his last two visits which were held on March 21 and May 24, 2011. Dr. Lynk stated that Crawford's personality changes were likely attributed to the fact that Crawford, like many autistic children, perseverates on a topic, which in this case was the desire to move to Dartmouth. Nonetheless, Dr. Lynk noted that Crawford should be consistently monitored for any changes to the status of his health.

[48] I find that both parties will ensure that Crawford obtains the medical help that he requires. I am, however, concerned that neither party has been sufficiently attentive to Crawford's emotional needs as he progresses into adulthood.

[49] Mr. and Ms. Pretty have each drawn Crawford into their disputes, blind to the problems this will create. Further, neither party adduced any evidence about how they were addressing Crawford's changing emotional

needs. For example, in December, Crawford asked a girl to the Christmas dance and was refused. Soon thereafter, Crawford stated that he had no friends and that noone liked him. Crawford also expressed concerns about certain household rules that bother him. Although these household rules are valid, they are nonetheless quite troubling from Crawford's perspective. Crawford is also dissatisfied with the size of his bedroom and computer desk. When Mr. Pretty moved in with Ms. Lavandier, Crawford was given his own bedroom, but it is much smaller than the bedroom Crawford had in the apartment he shared with his father.

[50] These concerns are quite troubling to Crawford. He has not been able to accept the need for the new rules, nor does he appreciate why adjustments have to be made when a new family unit is formed. Crawford is also likely experiencing challenges with romance and rejection.

[51] These issues and concerns need to be addressed from Crawford's perspective. This is not currently happening, and Crawford is experiencing distress as a result. I, therefore, order Mr. Pretty, and Ms. Pretty to the extent that her work and finances permit, to participate in counseling/therapy with Crawford for the purpose of addressing Crawford's emotional needs and concerns. The professional chosen must be knowledgeable and trained in the field of autistic spectrum disorders. If Ms. Pretty cannot attend the sessions, she will be provided with information and documentation about the sessions so that she can implement the strategies which have been discussed. Hopefully, the parties will learn new skills which will help Crawford adjust to life's challenges, while reducing the anxiety and stress that he is experiencing.

[52] In addition, each party will participate in individual counseling to acquire information about the negative impact that arises when parents involve children in family conflicts, and to acquire skills to better communicate with each other about their children. Mr. and Ms. Pretty must stop involving Crawford in their conflict.

[53] *Relationship with Each Parent*

[54] Crawford has a good relationship with each parent. Although Ms. Pretty has more experience as the primary care parent, Mr. Pretty has assumed this role for the last three years. Until January 2011, Crawford excelled under his care.

[55] Mr. Pretty continues to be an appropriate primary care parent, notwithstanding the emotional difficulties that Crawford has exhibited since January, 2011. Crawford's difficulties and challenges are not directly related to Mr. Pretty, any more than they can be directly assigned to Ms. Pretty. I find that Crawford's problems have likely developed for a number of reasons, including the following:

a. Both parents involving Crawford in their conflict, through direct and indirect means.

b. Crawford not seeing his mother and sister as frequently as he did in the past after their move to Dartmouth.

c. Crawford not seeing his father as frequently as he did in the past because Mr. Pretty is now working evening shifts every Monday to Friday.

d. Crawford experiencing adjustment difficulties arising from new household rules and a new home environment. These rules, such as wearing a robe after a shower and wearing T Shirts because there are three females in the home, are appropriate. However, Crawford needs to learn to process and accept these rules in a way that is comfortable for him, given his particular sensory needs.

e. Crawford experiencing normal challenges of many teenagers, including romantic crushes and rejection.

[56] *Reunification of Siblings*

[57] While it is usually beneficial to have siblings reside together, where possible, this cannot be the sole factor determining the best interests of Crawford. Saxon and Crawford can continue to speak on the phone, through the computer, and in person during access.

[58] *Available Services*

[59] Ms. Pretty's argument that there are more services available in HRM than in Arichat was not borne out in the evidence. Ms. Pretty did not present any significant evidence of special services available in HRM other than the local recreational center, library and malls. In the absence of such evidence, I cannot conclude that there are more services available in HRM than in Arichat that would benefit Crawford's special needs.

[60] *Violence between Crawford and Ms. Pretty*

[61] I am not concerned that Crawford will be violent with Ms. Pretty in the future. Crawford was violent once in April 2008. There has never been another episode, despite the many over night access visits which Crawford has enjoyed while in the care of his mother since April 2008. Further, Crawford engaged in therapy after the 2008 incident. In such circumstances, I find the potential of violence reoccurring to be low.

[62] *Wishes of Crawford*

[63] Crawford's wishes are an important consideration, although not the sole factor in determining his best interests. This is one factor, among many,

that must be balanced and weighed by me to reach an order in Crawford's best interests.

[64] Mr. Pretty, Ms. Pretty, Ms. MacCuspic, and Dr. Lynk testified that Crawford has consistently stated that he wanted to live with his mother. However, I do not find this wish to be in Crawford's best interests for the reasons previously stated.

[65] In addition, I also accept Dr. Lynk's evidence that Crawford's ability to reason, weigh consequences, and make sound judgements was on par with those of an eight year old. Further, Dr. Lynk was unsuccessful in having Crawford expand on why he wanted to move, other than he would have a bigger bedroom and TV at his mother's home. This confirms Crawford's lack of insight into the level of analysis that should accompany any major life decision.

[66] Therefore, while I have considered Crawford's stated wishes, and have grappled with the challenges Crawford may experience because of my decision, I am unable to conclude that it is in Crawford's best interests to move to Dartmouth.

[67] **What access provisions are in the best interests of Crawford?**

[68] It is in Crawford's best interests to have frequent visits with his mother and sister, which are to occur when Ms. Pretty is not scheduled to work night shifts, to include at least one week end a month and during holidays. Extended summer holidays are also appropriate, when Ms. Pretty is on vacation, or has proper child care. The week end visits will be a four day visit and should maximize, where possible, days when students are not required to attend school.

[69] Dr. Lynk stated that the shuttle bus would be an appropriate and safe form of transportation for Crawford, provided the shuttle bus driver was

familiar with Crawford, and Crawford is informed of the specific rules of travel. Both parties appear open to utilizing the shuttle bus. Mr. Pretty will pay the cost of the shuttle bus to take Crawford to visit Ms. Pretty. Ms. Pretty will pay the cost of the shuttle bus to return Crawford at the conclusion of access.

[70] **Should income be imputed to Mr. Pretty?**

[71] Ms. Pretty asks the court to impute income to Mr. Pretty because he is under-employed pursuant to section 19(1)(a) of the *Guidelines*. Mr. Pretty disputes this request. He states that he has diligently looked for work. He asks that child support be based upon his current income as a janitor.

[72] Section 19 of the *Guidelines* provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from the case law:

a. The discretionary authority found in s. 19 must be exercised judicially, and in accordance with rules of reasons and justice - not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic**, 2005 NSSC 291.

b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.

c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income is less than in prior years, or if ill health, or the needs of a child are advanced to justify the unemployment or under-employment: **MacDonald**

v. MacDonald, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.

d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court should look to what is reasonable and fair in the circumstances: **Van Gool v. Van Gool**, [1998], 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.

e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income. A party cannot be relieved of support obligations to further an unrealistic or unproductive career: **Marshall v. Marshall**, 2008 NSSC 11; and **Duffy v. Duffy**, supra.

[73] I accept that Mr. Pretty's decision not to work at sea is reasonable given Crawford's special needs. Crawford is in the primary care of Mr. Pretty. This restricts Mr. Pretty's ability to work away from home for long periods of time. Despite this recognition, I nonetheless find that Mr. Pretty is under-employed and that income must be imputed to him. Mr. Pretty has an income earning capacity that is greater than what is represented by his current wage as a janitor. I make this finding for the following reasons:

a. Mr. Pretty is a healthy, educated, intelligent, and talented man. He has many skills. He is currently not using these tangible assets in a way that maximizes his income earning capacity.

b. Mr. Pretty has done very little to find remunerative employment. He appears to have devoted much of his efforts at returning to teach at the Nautical Institute. This appears to be an unrealistic goal. Having decided that a sea faring job is no longer feasible, Mr. Pretty must expand his employment searches and opportunities.

c. Mr. Pretty may have to take lesser skilled jobs that are currently available until such time that he finds more suitable employment.

[74] I find that Mr. Pretty has an income earning capacity of approximately $35,000 in all of the circumstances of this case.

[75] **Should an undue hardship finding be made?**

[76] Mr. Pretty seeks a finding of undue hardship because of access costs, the loss of his job at the Nautical Institute, and his financial obligation to pay the debt related to the Framboise property, which was a former matrimonial home property. Ms. Pretty also claims undue hardship. She notes her dire financial circumstances, the payment of debt, and high access costs as factors for the court to consider.

[77] Section 10 of the *Guidelines* provides this court with the discretionary authority to veer from the table amount if certain conditions have been met. First, the court must find that undue hardship has been created by the circumstances. Second, if circumstances of undue hardship have been found, the court must compare the standards of living of each household. If the payor has a lower standard of living after the payment of child support, then the court may reduce the table amount of child support. However, the court can also refuse to reduce child support, even when there is a finding of undue hardship and a lower household standard of living: **Hanmore v. Hanmore**, 2000 ABCA 57 para. 9, leave to appeal to the Supreme Court of Canada refused at [2000] S.C.C. No. 182.

[78] The following legal principles are applicable to this case:

a. A narrow definition of "undue hardship" must be adopted to ensure that the objectives of the *Guidelines* will not be defeated. Only exceptional circumstances will justify a reduction in child support: **Hanmore v. Hanmore**, supra, at para 10;

b. The burden of proof is on the person claiming the relief: **Hanmore v. Hanmore**, supra, at para 11;

c. "Hardship" is defined as "difficult, painful suffering", and "undue" is defined as "excessive, disproportionate." To succeed, one must prove that the hardship is exceptional, excessive, or disproportionate in the circumstances. This produces a "very steep barrier" to a successful claim: **Hanmore v. Hanmore,** supra, at paras 11 and 17, and quoting from **Barrie v. Barrie** (1998), 230 A.R. 379 (Q.B.);

d. A departure from the *Guidelines* for undue hardship should be the "exception and not the norm": **Hanmore v. Hanmore**, supra, at para. 13, and quoting from **Hansvall v. Hansvall**, [1998] 4 W.W.R. 202 (Sask. Q.B.);

e. Parents are expected to exhaust all efforts to increase their incomes and decrease discretionary expenses before consideration can be given to reduce a child support obligation: **McPhee v. Thomas** 2010 NSSC 367.

f. Parents usually expend money exercising access. When a child lives in a different community, additional travel expenses may be incurred. However, such expenses will not justify an undue hardship finding unless they are unusually high and excessive:

Poirier v. Poirier 2004 NSSC 23; and **Unser v. Yourex** 2010 NSSC 421.

[79] Neither party succeeds in their respective claims for undue hardship. Mr. Pretty is not actually paying the Framboise property debt, and therefore such is not an appropriate consideration. The cost of access will now be shared. This is no longer a consideration. Further, neither party has produced evidence sufficient to meet the high threshold necessary to advance an undue hardship claim.

[80] **What is the appropriate child support order?**

[81] The parties have implemented a split parenting regime. They each have the capacity to earn similar incomes. Therefore, there will be no child support payable by either party, subject only to two, section 7 expenses.

[82] The first section 7 expense to be shared relates to the joint, professional therapy/counseling ordered for Crawford. Any uninsured costs associated with this counseling will be shared equally between the parties.

[83] The second section 7 expense to be shared relates to the child care expense that Ms. Pretty incurs while she works, in the amount of $140 per month. There is no evidence that this is tax deductible. Mr. Pretty will pay Ms. Pretty $70 per month, on the 1st of each month, as his share of the child care expense. Ms. Pretty will notify Mr. Pretty, in writing, if this expense changes.

[84] The parties have advanced other section 7 expenses. These expenses are either similar, or do not fall within the meaning of s. 7. Further, although Mr. Pretty has incurred travel costs to take Crawford to school, other arrangements could have been pursued. In addition, Mr. Pretty has more disposal income available to him, than does Ms. Pretty. Mr. Pretty shares expenses with his partner. Ms. Pretty does not reside with another adult.

Ms. Pretty cannot afford to pay the transportation costs associated with Crawford attending SAERC.

[85] Finally, each party will name both children on all medical, dental, and drug plans available to them from all current and subsequent employers, and each will provide the other with the details of his/her plan. Each must see that the other is reimbursed without delay after a receipt is delivered by the other party for submission to the insurer. Both parties will use any available heath plan benefits to assist with the payment of the joint and individual counseling/therapy which have been ordered.

[86] **Should maintenance be varied on a retroactive basis?**

[87] Mr. Pretty is in arrears of spousal and child support. He seeks a retroactive variation to forgive such arrears. Ms. Pretty disputes this claim.

[88] I grant the variation effective October 1, 2010. Ms. Pretty was employed by this time. Mr. Pretty had the capacity to be earning the same income as Ms. Pretty by October 2010. Indeed, the Corollary Relief Judgement contemplated a review of the support provisions in November 2010 in the absence of agreement. Therefore the child support obligation stated in clause 3.1 of the Corollary Relief Judgement is vacated as of October 1, 2010. Mr. Pretty's obligation to pay his share of the monthly child care expenses will not be effective until August 1, 2011 because Mr. Pretty has borne all of the access expenses to date. All other lump sum spousal support and child support arrears, however, arising from previous court orders are to be collected through the Maintenance Enforcement Program.

[89] **Conclusion**

[90] The following relief is hereby granted:

a. Ms. Pretty's claim to vary the primary residence of Crawford is refused. Crawford will remain in the primary care of Mr. Pretty, with access to his mother as specified in this decision. Access expenses will be equally shared between the parties. The parties will participate in the court ordered therapy.

b. Income is imputed to Mr. Pretty. He has the capacity to earn an income similar to that earned by Ms. Pretty.

c. The undue hardship claims of both parties are dismissed because the evidence does not meet the legislative threshold required to displace the *Guidelines*.

d. Because of the split custody regime, and the equal income earning capacities, neither party will pay child support to the other effective October 1, 2010, subject to two section 7 expenses.

e. The parties will equally share the uninsured, joint counseling/therapy ordered in respect of Crawford.

f. Mr. Pretty will pay Ms. Pretty $70 per month for his share of the child care expenses incurred by Ms. Pretty commencing August 1, 2011 and continuing on the 1st day of every month thereafter.

g. The retroactive forgiveness of spousal and child support other than as stated herein is refused.

h. Each party will name both children on all medical, dental, and drug plans available to them from all current and subsequent employers, and each will provide the other with the details of his/her plan. Each must see that the other is reimbursed without

delay after a receipt is delivered by the other party for submission to the insurer.

Dated at Sydney, Nova Scotia this 18th day of July, 2011

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Forgeron, J.