

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bachmann v Bachmann, 2011 NSSC 394

Date: 20110613
Docket: 1206-5978
Registry: Sydney

Between:

Sean Bachmann

Applicant

v.

Mary Arlene Bachmann

Respondent

Judge: The Honourable Justice M. C. MacLellan

Heard: March 29, 2011 and June 3, 2011

Oral Decision: June 13, 2011

Written Decision: October 25, 2011

Counsel: Ms. Lisa Fraser Hill, counsel for Applicant
Hugh MacLeod, counsel for the Respondent

By the Court:

OUTLINE

[1] In order of importance we all agree that the main issue is whether or not the father, Sean Bachmann, should have access on school nights with his daughter MacKenzie (born October 14, 2002). All other provisions of access are contained in a lengthy, detailed consent order that resulted from a Settlement Conference.

[2] I am also to consider the issues of spousal support and retroactive spousal support. The spousal support issues are:

1. Where or not Arlene Flemming is entitled to spousal support and if so how much, in what form; and
2. Is retroactive spousal support appropriate?

[3] Most of the issues were settled by the parties. The parties are to be commended for progress made without Court intervention. The terms of agreement and dispute are contained in the current Order of March 22, 2011:

Joint Custody

1. Custody of the following child is granted to Sean Bachmann, Mary Arlene Bachmann, and Angela Flemming jointly:

Name of Child	Date of Birth
MacKenzie Dawn Bachmann	October 14 th , 2002

Terms for Joint Custody

2. Angela Flemming has primary are and residence for the child, MacKenzie Dawn Bachmann, and Sean Bachmann and Mary Arlene Bachmann have liberal access with the child, according to the following terms:

Mary Arlene Bachmann

- 1) Liberal parenting time on a regular, weekly basis;

Sean Bachmann

2) Access according to his work schedule whereby he has the child in his care for the last three days of his four days off. Overnight access during weeknight has not been agreed to and shall be determined at the hearing scheduled for March 29th, 2011;

3) Sean Bachmann shall pick the child up at the school bus stop on his first day of access. In the event that Sean Bachmann's access commences on a day when the child is not in school, he shall pick her up at 9:00 o'clock in the morning to commence his three days of access;

4) In the event Sean Bachmann's days off work fall on a weekend, he shall have the child in his care overnight on Fridays and Saturdays and shall return her on Sunday at 6:30 p.m.;

5) During the months of July and August every year, commencing July, 2011, Sean Bachmann shall have the child on each of his three days off for three full days and three nights whether they occur on a weeknight or weekends. Sean Bachmann shall use his discretion and may return the child for several hours or for an overnight with Angela Flemming during his three days and nights of visitation. This shall be at Mr. Bachmann's option and he shall contact Angela Flemming and provide her with prior notification if the child is going to be temporarily returned to her residence.

6) Sean Bachmann shall provide Mary Arlene Bachmann and Angela Flemming with a copy of his work schedule showing each of his four days off for the balance of the year;

7) Sean Bachmann and Mary Arlene Bachmann shall each be entitled to two consecutive weeks of access during the summer vacation each year. Sean Bachmann shall have first choice of vacation dates during all even numbered years and Mary Arlene Bachmann shall have first choice of vacation dates during all odd numbered years. The party with the first choice must provide the vacation schedule by

April 1st and the party with the second choice by April 15th each year;

8) Christmas Eve to December 25th at 3:00 p.m. the child shall be with Mary Arlene Bachmann and Angela Flemming;

9) Christmas Day on December 25th from 3:00 p.m. to December 27th at 9:00 a.m. the child shall be with Sean Bachmann;

10) Easter vacation shall be shared equally between Mary Arlene Bachmann and Sean Bachmann each year;

11) March Break shall be shared equally between Mary Arlene Bachmann and Sean Bachmann each year;

12) Sean Bachmann shall have access on Father's Day each year;

13) Mary Arlene Bachmann shall have access on Mother's Day each year;

14) Sean Bachmann and Mary Arlene Bachmann shall have reasonable telephone access and access over the internet;

15) Sean Bachmann, Mary Arlene Bachmann, and Angela Flemming shall participate in family counselling with a child psychologist, in accordance with the recommendations of the psychologist, in order to obtain assistance with the resolution of parenting issues and concerns;

16) Angela Flemming shall consult with Sean Bachmann and Mary Arlene Bachmann on all major decisions affecting the health, education, religion, recreational activities, and general welfare of the child. In the event of an impasse after meaningful consultation by all three parties, Angela Flemming shall have final decision making authority;

17) Each of the parties shall have the right to contact schools and professionals involved with the child, including medical, educational, and social professionals in

order to obtain all information, documentation, and communication regarding the child without the prior approval of any other party;

18) Each of the parties can attend all school functions and extracurricular and recreational activities of the child;

19) Angela Flemming shall provide Sean Bachmann and Mary Arlene Bachmann with timely notification of all medical appointments, parent teacher meetings, sporting and extracurricular activities of the child by providing advance notice by way of a phone call and e-mail within 24 hours of becoming informed of any such activities.

Child maintenance payments

3 Sean Bachman must pay child maintenance to Angela Flemming in the amount of \$648.00 each month, based on the applicable table amount of the *Child Maintenance Guidelines*.

When child maintenance payments are due

4 Child maintenance payments are due on the first day of each month starting on February 1st, 2011.

Child maintenance payments shall be automatically adjusted based on the payer's annual income for the previous taxation year on March 1st of each year.

Child maintenance through health plan

5 Sean Bachmann must continue medical, dental and drug plan coverage for the child available through his present or subsequent employer and Sean Bachmann must see that the other party is reimbursed without delay after a receipt is delivered by the other party for submission to the insurer.

[4] The custody of MacKenzie Dawn Bachmann, born October 14, 2002 was granted to Sean Bachmann (the father), Mary Arlene Bachmann (the mother) and Angela Flemming (the maternal aunt), jointly. Angela Flemming has the primary care and residence of the child, and Sean Bachmann and Arlene Flemming were granted liberal access, according to the terms set out above.

The remainder of the consent order deals with matters are not relevant to this hearing.

- [5] The statutory provision that governs this matter are sections 16 (1) and 16 (10) of the *Divorce Act*. Section 16 (1) reads:

16(1) A court of competent jurisdiction may, on application made by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and the access to, any or all children of the marriage.

Section 16(10) reads:

16(10) In making an order under this section, the court shall 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.

- [6] The facts of this case are unusual. The facts are unusual in that neither parent has physical custody of MacKenzie. There is no parental fault and no intervening circumstances why this is so. That is the one major fact that must be kept in mind, there is no one parent that is in a recovery program or who has abandoned or deserted MacKenzie. It is circumstance that has happened, a situation has occurred under unusual circumstances. This is also the custody arrangement to which the parents consented.
- [7] There are facts agreed to between the parties. These facts are contained in Mr. MacLeod's pretrial brief, paragraphs 2, 3 and 4 (the only amendment is the date of marriage). Mr. MacLeod's brief dated March 18, 2011 contains the following agreements:

2. Sean Bachmann is 35 years of age and earns \$75,000.00 per year. He is a resident in Halifax and has a new partner who he lives with;

3. Arlene Bachmann is 32 years of age and commence living in a common law relationship with Mr. Bachmann in January, 2002. They married August 26, 2006, they separated in January 2009;

4. Arlene's Bachmann's employment history. In 2002 to 2005, Arlene Bachmann did not work, she was a stay at home mom. In 2006, 2007, 2008 she worked at Protocase and earned in the range of \$25,000.00 to \$30,000.00 a year. In 2009 she was laid off and live on EI earnings under \$15,000.00 and declared bankruptcy. At that time Sean Bachmann declared bankruptcy and the family home was sold. In 2010 she continued to live on EI and had several jobs totalling \$27,139.44 with an employment income of \$14,343.44. She continues to work at United Farmers Co-op three days per week where she expects to earn \$12,000.00 for 2011.

- [8] Also it was agreed by the parties during this hearing, that Mr. Bachmann works four days on and four days off. All parties agreed that he has been consistent to coming to Cape Breton on his days off for access with MacKenzie. Both parties will be discharged from bankruptcy by July, 2010 (at the latest). Payments to the Trustee of Bankruptcy are no longer required. Neither party has real or personal property that is relevant to this proceeding.
- [9] Since August 2004 MacKenzie lived with her mother Arlene at the home of Angela Flemming and the maternal grandparents (referred to as the Flemmings) at the Flemming farm in North Sydney. In the fall of 2005 the parties found an apartment in North Sydney where they planned to live together with MacKenzie. From August 2004 to present Mr. Bachmann commuted between Halifax and North Sydney.
- [10] MacKenzie had her own room in the parties new apartment in North Sydney, however, she has continued to reside primarily at the Flemming Farm with her aunt Angela and the maternal grandparents.
- [11] A brief chronology of the relevant history is as follows:

1. The common-law union commenced in January, 2002.
2. The date of the marriage was August 26, 2006.
3. The date of MacKenzie's birth was October 14, 2002.
4. The date the family effectively moved back to Cape Breton to live on the Flemming Farm in August 2004.
5. The date that the parties to this matter obtained their own apartment was the fall of 2005.
6. The date of separation was approximately January 14, 2009.
7. The date of the Petition was February 1, 2010.
8. The date of the Conciliation Report was June 22, 2010.
9. The date of the Respondent's Application was May 13, 2010.
10. The date of the Respondent's Answer & Counter-Petition was June 22, 2010.
11. The date of the first Pretrial was January 11, 2011.
12. The date of the consent order that the parties achieved through the assistance of Settlement Conference was March 22, 2011.
13. The date of trial was March 29, 2011.
14. The date of Post-Trial Submissions were due and were received on April 15, 2011.
15. Date of the oral decision was June 3, 2011.

[12] I accept Sean Bachmann made approximately two trips a month to Cape Breton to visit his daughter, MacKenzie, commencing in January of 2009 to present. He has maintained an apartment near the Flemmings for purpose of exercising visitation with MacKenzie since the date of separation, January of 2009. He has paid all expenses to maintain this apartment.

[13] I had to consider whether or not his internet bundling was a legitimate consideration, but I have concluded that it is a valid expense. The apartment rent costs him \$300.00 a month, gas is receipted at \$130.00 a month, the cable, phone, internet is \$155.00 a month, which totals \$585.00, somewhat less than his counsel put forward. I find that Mr. Bachmann paid and continues to and does pay \$585.00 a month for access costs, as well as ongoing child support in the amount of \$648.00 per month.

[14] Mr. Bachmann has consistently sought overnight access with MacKenzie. I accept his evidence on this point. Originally he was not assertive in his

claim because he wanted MacKenzie to settle after the separation of the parties. Also, he recognized the difficulties MacKenzie experienced in grade primary. His efforts for overnight access became more consistent in the fall of 2010 onward.

- [15] Prior to separation Mr. Bachmann commuted to Cape Breton twice a month. During this time from August 2004 to separation in January 2009 Mr. Bachmann attempted to have MacKenzie remain with he and his former partner in their North Sydney apartment. I accept that he attempted to start a normal routine for toilet training MacKenzie, and to have her sleep in her own bed. I accept his efforts in both areas were unsuccessful, in part because he was not in the residence full time. Secondly, these efforts were unsuccessful because Arlene Bachmann was not supportive. Once Mr. Bachmann returned to Halifax, efforts to train MacKenzie ceased and MacKenzie reverted back to her earlier practices. When Mr. Bachmann was at work in Halifax, Arlene, MacKenzie and Aunt Angela slept in the matrimonial apartment some nights, or MacKenzie slept most nights with her maternal grandparents and Aunt Angela at the Flemming Farm.
- [16] In her oral evidence, Arlene Bachmann agreed that when Sean Bachmann returned to work in Halifax MacKenzie was allowed to return to her grandparents' home to overnight at the Flemming Farm.
- [17] Since separation (January 2009 to March 2011), Sean Bachmann had approximately ten overnights with his daughter.
- [18] Mr. Bachmann retained the services of Dr. Reginald Landry to discuss particular problems relating to MacKenzie, such as her prolonged use of a baby bottle, and her habit of not sleeping in her own bed. Also Mr. Bachmann questioned the doctor as to what was best for MacKenzie as a result of the separation, and whether or not MacKenzie should be able to choose where she stays, should she be on a set schedule, and generally what was best for MacKenzie.
- [19] Mr. Bachmann wanted to have overnight with MacKenzie so that he could be part of her routine, including child-rearing chores, such as homework. Even though he has extensive daytime access during the week, he was

required to return MacKenzie back to the Flemming Farm at night. He was not permitted to help with her homework.

- [20] I accept Mr. Bachmann's evidence that from separation onward, he always protested his limited role as a father. Mr. Bachmann has not accepted the restrictive role he has been given by Arlene, the mother and Angela Flemming. He believes that the Flemmings and Arlene Bachmann, see him in the role of MacKenzie's friend. Arlene Bachmann sees herself, or believes that MacKenzie sees her as an "older sister". Both parents consider Angela Flemming as the principal caregiver, and she is pursuant to the consent order. This is the situation which Mr. Bachmann reluctantly accepts, however, it is the position both parents accepted when the consent order was granted. While Mr. Bachmann reluctantly accepts this reality; Ms. Arlene Bachmann endorses the arrangement.
- [21] Ms. Arlene Bachmann does not reside at the Flemming Farm, she maintains a separate residence nearby with her partner.
- [22] Mr. Bachmann questions several specific child rearing practises. Up until last year, at age seven, MacKenzie was allowed to take her baby bottle to bed with her to sleep. She was allowed, if she wished, to sleep with her Aunt Angela, as opposed to sleeping in her own bed and in her own room.
- [23] MacKenzie still uses Pull-Ups, or Underjams at night. According to her mother Arlene, this need is due to nervousness attributed to the father's pending visit, or post visit. Angela, who is the principal caregiver, attributes the needs for Pull-Ups to MacKenzie's lazy bowel syndrome.
- [24] Mr. Bachmann would have liked to find out whether or not Pull-Ups, or Underjams, are necessary at this stage, and if so, why. He has generally been unsuccessful in securing information to date. No medical evidence was tendered.
- [25] While I accept and find as a fact that the relationship between Arlene Bachmann and Sean Bachmann is strained, Ms. Bachmann gave evidence that Sean Bachmann expressed his concerns to her in relation to MacKenzie having a baby bottle, and sleeping with her Aunt Angela. Arlene Bachmann

gave the opinion during the viva voce evidence that she did not find his concerns to be “unrealistic”.

- [26] I find as a fact that there is no proven nexus given in evidence to relate MacKenzie’s night time bladder accidents to her father’s visits. My finding is corroborated by Angela Flemming’s evidence that such problems do not manifest as a result of the father’s visits.
- [27] All parties agree that MacKenzie is able to make choices, which she does. She decides where she sleeps, as she has since a very early age, until present. Her mother and aunt advise MacKenzie’s decisions are followed to secure MacKenzie’s happiness; and that her happiness is the paramount consideration. There is no evidence that MacKenzie is ever unhappy with her father. Only on one of the ten nights that Mr. Bachmann had overnight access did MacKenzie wish to go back with her aunt and grandmother, and on that occasion she was exercising access in Halifax.
- [28] All parties agree that MacKenzie did have a difficult second term in grade primary, from April 2009 onward. She missed a fair amount of time from April to June 2009, (exhibit # 2, tab 4).
- [29] She manifested her unhappiness in school by crying or lying on the floor and on occasion she vomited. Her aunt and mother attributed this difficult time she was going through to the parties’ separation in January of 2009. Mr. Bachmann has no opinion as to what caused this difficulty.
- [30] MacKenzie’s report cards were provided by Mr. MacLeod, (exhibit #2, tab #4) from grade primary up to the beginning of grade 2. Her current report card for grade two indicates that MacKenzie is doing very well. Her report cards from grade primary onward comment generally on positive progress in all aspects.
- [31] All parties agree that MacKenzie is getting along very well now in all areas. Her aunt and mother describe her day-to-day life in great detail. They have established a routine which is followed to the letter. MacKenzie’s life on the Flemming Farm with the farm animals and horseback riding sounds like a lovely version of “Rebecca of Sunnybrook Farm”. However, I find the strict

adherence to the schedule to the degree that it excludes the meaningful involvement of Sean Bachmann has not, on a balance of probabilities, been proven to be in MacKenzie's best interest.

[32] Arlene Bachman does not visit with MacKenzie on Monday, Tuesday, and Wednesday, as the Ms. Bachmann works. MacKenzie never overnights with her mother. Her mother does not go to watch MacKenzie's horseback riding lessons, as she views this to be MacKenzie's time with her grandfather. It is the maternal grandfather's responsibility to read MacKenzie a bedtime story. It is the Aunt Angela's responsibility to provide MacKenzie's medicine to her before bed. One person from the Flemming family is to drop MacKenzie off at school, another is to pick her up. This routine is established to the tiniest detail. It is noted the schedule has been strictly followed. Mr. Bachmann has not, for the last two years, been able to help MacKenzie with her homework, even when it is on an evening that he has access. His daytime access ends at six-thirty on school nights when he is required to return MacKenzie to Angela and her grandparents so that MacKenzie could do her homework, have her bath, her medicine, and her storybook. There are all chores that the father could perform if given the opportunity. In the past Mr. Bachmann has on occasion, given MacKenzie her medicine. The "medicine" consists of powder in apple sauce, which I conclude cannot be a difficult procedure. He could, if permitted, read her a bedtime story. He could, if permitted, help her with her homework after school. These are all parental tasks which Sean Bachmann has been willing to do from the date of separation. He has been prevented from performing these tasks by the regime put in place by Arlene Bachmann, Angela Flemming, and supported by the maternal grandparents.

[33] I accept Sean Bachmann was, and remains in a difficult position. The family moved home in August of 2004, as Arlene Bachmann wished to return to Cape Breton. Ms. Bachmann was not working at the time. Mr. Bachmann, is and has been employed in Halifax. He continues his commute back and forth from Halifax to North Sydney, in 2004, to be with his family, and after separation in 2009, to be with his daughter. Mr. Bachmann has no extended family in Cape Breton. I have accepted on the balance that he sought employment in Cape Breton without success. His employment involves aircraft maintenance. However, I find that Mr. Bachmann has been

reasonable and consistent in his wish to be a meaningful figure in his daughter's life. I am satisfied that without this Court's intervention, he will be cast in a role he fears, as expressed in his testimony. He will be cast and remain solely a friend to MacKenzie.

- [34] I am not satisfied MacKenzie's problems in grade primary can be completely attributed to the parents' separation three months prior. This suggestion has not been proven, however it may well have been a factor contributing to her difficulty from April to June in grade primary. Whatever the cause, I am satisfied that these problems did not manifest in grade one, and have not been manifested in grade 2. The comments from the teachers in the report cards exhibited indicate that the contrary is true. At present MacKenzie appears to be thriving in school.
- [35] I am satisfied that MacKenzie is a happy, contented eight year old. No doubt her current positive state is due in part to her caregivers, primarily her aunt Angela. The fact remains, MacKenzie is an eight year old with no special needs, except what her aunt classifies as lazy bowel syndrome. No medical evidence was provided by anyone that MacKenzie's occasional night time accidents are relevant in assessing overnight access with her father.
- [36] I note that her aunt, Angela, did not support that MacKenzie manifests negatively after her father visits. I note that the mother, Arlene Bachmann, attributes MacKenzie's accidents to having to calm MacKenzie down after one of her father's visits. I find that the mother's evidence is inconsistent with the facts. Arlene Bachmann does not see MacKenzie on Monday, Tuesday, and Wednesday because she is working on those days. Therefore she would be unable to see a negative manifestation from the child on a Monday following a weekend access with the father.
- [37] I find that her concern as expressed in that regard is totally unsubstantiated even by her own evidence, and is contradicted by her sister's evidence, who is the principal caregiver.
- [38] I am impressed that Sean Bachmann had concerns with his daughter not sleeping in her own bed, and using a baby bottle, and Pull-Ups at night at age seven. These are valid concerns. He raised these problems with Arlene

Bachmann and Angela Flemming, and he sought professional help. Apart from Angela taking MacKenzie to a pediatrician, Mr. Bachmann is the only parent or caregiver who went farther to find out whether his concerns were valid.

- [39] I accept that schedules and routines are necessary to proper child-rearing. Maybe more so for some children than others. I do not accept, and wholly disagree, that such schedules and routines ought to be followed slavishly, and to the degree that these schedules preclude a very committed father from playing a meaningful role in his daughter's life.
- [40] MacKenzie's mother may see herself, or believe MacKenzie sees her as an older sister; but Mr. Bachmann has manifested that he has never seen himself as anything other than MacKenzie's father. Sean Bachmann impresses me as a father who is committed to his role. It is in MacKenzie's best interests that she knows her father in that role.
- [41] I am satisfied on balance of probabilities that it is in MacKenzie's best interest to know her father as a father. It is in this child's best interests to have as much contact with her father as possible as provided in section 16(10) of the Divorce Act. I grant the father, for that reason, overnight access on weekdays, including school days. Given MacKenzie's schedule to date, I find this should be a gradual integration. I found Angela Flemming to be reasonable in her presentation, and more generous in her view of Sean Bachmann's role than Angela Bachmann, and I suggest that she and Sean Bachmann work through a plan to integrate overnight access on school nights.
- [42] If they are not able to work through this schedule gradually, failing an agreement, then I will order school overnights to commence in the fall term of 2011, with overnights three out of four nights. The overnight change will be mitigated by the father's summer access. I believe Angela Flemming will encourage MacKenzie to adopt to this change in overnight access. For clarity, access for the father during the summer is to be as set out to in the consent order, clause 2(5) and 2(7). Clause 2(5) states:

5) During the months of July and August every year, commencing July, 2011, Sean Bachmann shall have the child on each of his

three days off for three full days and three nights whether they occur on a weeknight or weekends. Sean Bachmann shall use his discretion and may return the child for several hours or for an overnight with Angela Flemming during his three days and nights of visitation. This shall be at Mr. Bachmann's option and he shall contact Angela Flemming and provide her with prior notification if the child is going to be temporarily returned to her residence.

Clause 2(7) states:

7) Sean Bachmann and Mary Arlene Bachmann shall each be entitled to two consecutive weeks of access during the summer vacation each year. Sean Bachmann shall have first choice of vacation dates during all even numbered years and Mary Arlene Bachmann shall have first choice of vacation dates during all odd numbered years. The party with the first choice must provide the vacation schedule by April 1st and the party with the second choice by April 15th each year.

- [43] I am also satisfied that Sean Bachmann, if on some evening in the future that MacKenzie is needy or overtired, and may find greater comfort by going back with her aunt for that night, that Mr. Bachmann will be receptive to this situation.
- [44] I am satisfied that once MacKenzie develops a comfort zone by staying at her father's, that overnighing with her aunt and grandparents, and the need for her to dictate her own overnight schedule will cease.
- [45] Also, I find it is important for any child to know that it is not for her to specify where she goes, and with whom she spends time. This is the course that has been followed for MacKenzie from age three to age eight and a half, it is certainly not a course that should be continued as she enters her teenage years. She has to learn to take direction, and her current caregivers have to learn to be flexible, and MacKenzie herself has to learn to be more flexible.
- [46] While she may not particularly care for this ruling, I am satisfied that Angela Flemming will support and will respect this decision. I have found her to be very committed to MacKenzie. She is also very committed to the rigid schedule that the Flemmings have put together. I am satisfied from her vive

voce evidence, from her demeanor, and from my review of the transcripts in entirety, that she has MacKenzie's best interests at heart.

- [47] I expect, and I hope that she will learn to be more flexible as to what best interests means when it relates to MacKenzie, as an eight and a half year old who is surrounded by people who care for her, and who has a father that really wants to be a part of her life. Mr. Bachmann has positive traits to add to her daily life, and to her routine. It should, if she acquires some flexibility and respect for Sean Bachmann, not be difficult to include Sean Bachmann in the routines that have been established for MacKenzie.
- [48] I think Mr. Bachmann will undertake his expanded role willing, and between Angela and Mr. Bachmann I am quite certain they can instruct MacKenzie. The initial commencement of this procedure may not be easy, and there may be difficult times, but MacKenzie is, surrounded by people who love her, and that circle includes her father. If he is made part of the solution I am sure with proper encouragement, the concern of overnights on school nights will diminish, and MacKenzie will be as comfortable in her father's apartment as she is at the Flemming Farm.
- [49] I do have some concerns about Arlene Bachmann. Based on her evidence, she may not be open to these changes. I received conflicting messages from Arlene Bachmann during her evidence, and I recommend that she commence counselling or avail herself on the available parenting literature. She is close to her family. She knows the value of closeness to family. She has opted for a course where her family do the larger part of the child-rearing. That was her choice, the wisdom of which is beyond the scope of this decision. However, it is important because of the decision she has made for herself, that she not preclude Mr. Bachmann from fulfilling his role as MacKenzie's father.
- [50] Arlene Bachmann has an easier time with access than Mr. Bachmann. She sees MacKenzie when she needs to, and to quote her, she sees her "whenever I have five minutes here or ten minutes there, whenever I can squeeze the time in".
- [51] I note as well that Arlene Bachmann gave evidence that if Sean Bachmann does have any concerns in relation to MacKenzie, he ought to bring them to

Angela for discussion. I accept that she is correct on this issue. If there is any difficulty in the gradual increase of overnight access for the father, then I think that mature and meaningful conversation can take place between Angela Flemming and Mr. Bachmann, and I recommend that they follow that course.

[52] Mr. Bachmann stated, and I accept that if all parties are willing to extended access, it will work, and I accept that he is willing to work with the Flemmings and engage in counselling, if necessary, in order to give full effect to his role as a father.

[53] If Arlene Bachmann finds that she cannot work towards extended meaningful access to the father, then I would recommend that she not be part of the negotiation, and that any arrangements to be made for fine-tuning of this Order be between Angela Flemming and Mr. Bachmann only. With the exception of this addition to the consent order (clause2(2)); all other terms remain as consented by the parties in March 2011.

[54] The second issue is spousal support which is governed by 15.2(1), 15.2(4) and 15.2(6) of the *Divorce Act*, which states:

Spousal Support Order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Factors

15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

These sections set out the factors and parameters for a Judge to weigh before deciding whether or not spousal support should be paid and, if so, in what amount and in what form.

[55] As well counsel are referred to the 2011 text by MacLeod and Wilton, the *Divorce Act* annotated, page 199, where they paraphrase concisely the ruling in *Moge and Moge*:

The principles embodied in the current *Divorce Act* engage the courts in a different type of analysis than that which was required under the 1970 *Divorce Act* when considering the question of support. The most significant change is a shift away from “means and needs” as the exclusive test to a set of objectives which require the courts to accommodate a much wider spectrum of considerations. This change recognizes that the economic

variables of marriage breakdown do not lend themselves to the application of only one objective. “All four of the objectives defined in the Act must be taken into account when spousal support is claimed or an Order for spousal support is sought to be varied. No single objective is paramount.”

[56] The considerations involved in awarding or refusing spousal support are paraphrased by MacLeod in the Annual Review of 2010 (p. 446):

In *Bracklow v Bracklow* the Supreme Court of Canada held there are three types of support.

1. Compensatory support, both specific, capable, and non-specific, to address the economic advantages and disadvantages to the spouses flowing from the marriage, or the roles adopted in marriage.
2. Non-compensatory dependency based support to address the disparity between the parties needs and means from the marriage breakdown.
3. Contractual support to reflect and express or implied agreement between the parties concerning the parties’ financial obligations to one another.

[57] Justice McLachlin in *Bracklow v. Bracklow* (1999) 1 S.C.R. 420 at para. 49 held:

Marriage, as this Court held in *Moge* (at P. 870), is a ‘joint endeavour’, a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a

vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support. (emphasis added)

Issue:

- [58] Is Arlene Bachmann entitled to spousal support and if so for what time period? If she is entitled, what form of spousal support is appropriate; lump sum or periodic?

Findings:

- [59] The following findings are made on a balance of probabilities based on the evidence.
- [60] Sean Bachmann's income is \$75,000.00, and he shares expenses in Halifax with his current partner who earns \$32,000.00. Arlene Bachmann's current income is approximately \$12,000.00 per annum according to her vive voce evidence.
- [61] Ms. Bachmann first sought spousal support in her application to the Court in May 2010. Mr. Bachmann maintains Ms. Bachmann did not that she does not want any spousal support when it was discussed at the time of separation in January 2009. Mr. Bachmann maintains he cannot afford to pay spousal support but if required to do so he requests the quantum not exceed \$200 per month.
- [62] Ms. Bachmann's education is Grade 12, one year in Business College where she earned a Business Computer Application Diploma; two years at Mount St. Vincent where she studied accounting. She advised she did not complete the degree because the employer who was financially assisting her education laid her off. Also, she did not wish to proceed with her degree as she was anxious not to incur any further student loans.
- [63] During the marriage she agreed that both her employer and her husband encouraged her to complete a university degree. She maintains this was never done, because it simply wasn't financially feasible.

- [64] Ms. Bachmann's work history is not in dispute. She worked in Halifax as a bookkeeper before MacKenzie was born. Arlene Bachmann was laid off early in her pregnancy, for reasons unrelated to the pregnancy. MacKenzie was born in October, 2002. Ms. Bachmann wished to return to Cape Breton. She and MacKenzie returned to Cape Breton in August of 2004, and Mr. Bachmann began to commute between Halifax and Cape Breton. This commute was necessary for him to continue his employment in Halifax. Ms. Bachmann did not work from early 2002 to 2006. She was able to work from August 2004 when she returned to Cape Breton because her family assumed many child rearing responsibilities.
- [65] During her evidence Ms. Bachmann agreed that she was not precluded from seeking employment due to any child rearing responsibilities since November 2005. Ms. Bachmann worked in Cape Breton from 2006 to 2009, and earned in the range of \$25,000.00 to \$30,000.00 per year as agreed by counsel. In 2010 (exhibit 2, tab 2) Ms. Bachmann's income was \$27,129. Her income was supplemented by employment insurance. She and her former employer parted ways in January of 2009, for reasons not disclosed. It was disclosed that these reasons did not relate to child care obligations.
- [66] Ms. Bachmann advised that she works part-time and has since the separation. Ms. Bachmann's pretrial brief outlines her 2009 income as \$15,000. Ms. Bachmann's (exhibit #3), Statement of Income from May 13, 2010, indicated that in 2009 she earned \$24,434. and \$28,553 in 2010, which is a variance with Mr. MacLeod's figure in his brief. The variation between her 2009 income in exhibit #3 and the brief; both filed on behalf of the Respondent, do not impact greatly to my conclusion on spousal support. I have concluded for the purposes of this decision to accept her vive voce evidence that she earned \$15,000.00 in 2009, despite the variation between her own exhibited materials. Ms. Bachmann currently shares her expenses with her common-law partner, who earns approximately \$23,000.00 per year according to her evidence.
- [67] Ms. Bachmann indicates that currently she works three days a week, Monday, Tuesday and Wednesday. It was left unclear whether or not her employment was seasonal, but I have concluded she works part time for the full year. I have concluded that she does not receive any employment

insurance benefits at the present time, and that she remains working with the Farmers Co-op.

- [68] In her vive voce evidence on direct Ms. Bachmann maintained that she currently earned \$12,000.00 per year. She did not advise whether this income is net or gross, and perhaps this is where the confusion arises. However, this is the same figure accepted by Ms. Fraser-Hill on behalf of Mr. Bachmann in her post-trial calculations on the spousal support guidelines. I accept after careful review that her 2011 income is \$12,000, non-seasonal and part time.
- [69] Counsel agree the spousal support guidelines provide a range between \$487 to \$582.
- [70] Arlene Bachmann agrees that she did not avail herself on any programs or courses of retraining or study since the separation, and did not consider any retraining sponsored by Employment Insurance while she was in receipt of Employment Insurance in 2010.
- [71] In seeking employment Ms. Bachmann advises that she visits weekly with Ms. Ings. I understand Ms. Ings may be a person who works at the Employment Insurance Office. Ms. Bachmann also tendered fifteen cover fax letters. These are not cover letters for employment; rather, the fax sheet that it would normally introduce a cover letter seeking employment and a Resume. She indicated that she sent out her resume to fifteen different employers, together with an appropriate cover letter and Resume. The cover letters and Resume were not tendered, however the fifteen fax sheets were tendered. The cover sheets that Ms. Bachmann has tendered, (exhibit #2, tab #5), extend from the month January, 2009 to June 2010. The average is one job seeking letter per month over the 18 month time period from January, 2009 to June, 2010. She advised that she also sent out other job seeking letters, but did not retain these copies. She recalls she contacted other potential employers but could not recall their names. Her job searches are narrowed to the area of bookkeeping. She has not examined any alternative employment or retraining through employment insurance programs, or upgrading. Ms. Bachmann has not contacted any call centres to see if she could find full-time employment with these centres. I acknowledge and accept she had weekly contact with the EI Office. It is unclear if these contacts were by phone or in person.

- [72] Mr. Bachmann pays child maintenance of \$648.00 per month since separation, and \$585.00 in access costs, for a combined monthly contribution of \$1,233.00. Mr. Bachmann also maintains MacKenzie on his health plan. When I review Ms. Bachmann's exhibits, she also has a health plan. However, it was not clarified whether or not MacKenzie was covered under her health plan.
- [73] By July of 2010, if not earlier, both parties will be or are discharged from the bankruptcy proceedings which commenced at the date of separation. The losses included the matrimonial home.
- [74] Ms. Bachmann voluntarily moved to Cape Breton from Halifax. She knew or ought to have known Cape Breton is an economically challenged island where employment potential is less than the Halifax Regional Municipality. Secondly, Ms. Bachmann's employment pursuits are insufficient to promote her self sufficiency as required by the Act. I find her employment search to be insufficient.
- [75] Ms. Bachmann's current needs were altered from her two exhibited statement of expenses prepared May 13, 2010 (exhibit # 4) to reflect current changes in her expenses and in her income. She was unable to provide the Court with an accurate accounting of her current government deductions which are not included in this exhibit (exhibit # 4) but were located upon review of the file as an attachment to her pretrial brief. Ms. Bachmann advised she co-shares expenses with her partner.
- [76] Her expenses are an approximation only as her evidence was vague on some points in relation to the changes over her tendered budget (exhibit # 4) versus the budget she wished the Court to accept. I have reconstructed her budget as follows:

Rent:	\$150.00 per month
Heat:	\$100.00
Electricity:	\$ 38.00
Phone:	\$ 60.00
Food for herself only:	\$350.00
Toiletries:	\$ 25.00
Clothing:	\$100.00

Her care:	\$223.00
Gas:	\$100.00
License and insurance:	\$ 50.00
Parking:	\$ 50.00
Health costs related to the child:	\$ 30.00
School costs:	\$ 40.00
School supplies:	\$ 20.00
Hair and grooming:	\$ 40.00
Drugs:	\$ 10.00
Gifts:	\$100.00
Cigarettes:	\$200.00

- [77] I calculate her total needs to be \$1,686.00 per month. As indicated, that is as exact a figure as I can achieve after transcribing her evidence and integrating her changes with the existing exhibited budget.
- [78] Ms. Bachmann advised that she pays \$90.00 per month for MacKenzie's school supplies, lunches and medical needs. In March 2011 she commenced paying \$65.00 child support for MacKenzie. I assume Angela Flemming receives the child support as she is the primary care giver.
- [79] In reviewing Ms. Bachmann's financial circumstance it is important to remember she has bookkeeping training and she has worked in that capacity for a number of years. Yet, she was unable to pinpoint to the Court, an area of need that required her to receive spousal support. She has no debts, and her monthly deficit was difficult to ascertain. She is a discharged bankrupt and is no longer paying the Trustee. When asked by the Court how Ms. Bachmann saw herself utilizing spouse support, the exchange was as follows:

THE COURT: If Mr. Bachmann was to pay you spousal support for a couple of years, how would your situation be any different than it is now? How would you be more independent?

A. I would be able to do a little bit more, I would be able to go out once in a while to maybe a movie or do a little bit more with my daughter. I don't have a whole lot of

money to do things with her right now so I would definitely take her on vacations and that. She and I really enjoy camping together.

- [80] Ms. Bachmann has not been able to show how she experienced any hardship resulting from the marriage, resulting from child rearing, or resulting from the breakup of the marriage.
- [81] I find she had opportunity, clearly, during the marriage to complete her degree, I find she did not examine any possibility for retraining, or upgrading, post separation, when there were programs that may have been available to her, she did not look into the possibilities. She has not been rejected by any programs, she has simply not examined any training programs. She had provided no evidence to support any restrictive family obligations from the fall of 2004; or at the later date when she and Mr. Bachmann obtained their own apartment in 2005, and left the child rearing responsibilities to Ms. Bachmann's extended family. I find she has no family responsibilities restricting her from seeking full time employment and / or restraining her from 2005 onward. There is no disability preventing Ms. Bachmann from working full time.
- [82] I find that Ms. Bachmann may well have need for money in addition to her salary whether or not it is as low as the \$12,000.00, however, she still does not fit within any of the provisions of s.15 Divorce Act, based on the evidence provided.
- [83] Ms. Bachmann may have chosen a lifestyle below which she may have enjoyed with Mr. Bachmann. However, there is absolutely no evidence as to the lifestyle these parties enjoyed while together. Their separation terminated contemporaneously with both parties going through a bankruptcy proceeding.
- [84] As noted by Justice Moira Legere-Sers, in the case of *MacPhee v Brown* [2010] N.S.J. No. 94:

“It is likely that the Respondent is underemployed and that the conditions of her employment do not relate directly to the marriage, she has clearly chosen a lifestyle

that does not currently produce the economic advantages her former employment would yield.”.

She held further:

“ Her spousal entitlement would relate more to a disruption cost by the separation and the inevitable costs of reassociating herself, the fact that she remains in the community is her personal choice as is her lack of pursuit of professional development in her historic profession of teaching”.

- [85] In that particular case it was established that the Respondent did have costs associated with relocating or re-establishing herself, yet Justice Legere-Sers still examined the requirements of the payee to make wise choices professionally before spousal support can be ordered.
- [86] In the case before me, there is no proof of the costs to Ms. Bachmann for reestablishing herself. She has provided no evidence as to her reduction of lifestyle. As I have indicated both parties have recently been discharged from a bankruptcy proceeding and should have little or no debt. If there are relevant and existing debts, credit cards, debt of any nature for Ms. Bachmann, these have not been provided.
- [87] I note as well that this is a short term marriage, including the cohabitation from 2002 to 2009. I consider as well Mr. Sean Bachmann’s child support paid regularly as well as the high access costs he has incurred over the past two years and three months. I find the costs incurred by Mr. Bachmann for access are reasonable.
- [88] Ms. Bachmann is not parenting MacKenzie. She only has an obligation to herself to become self sufficient. However, if these facts as proven were examined from another angle, and I have not been asked to do so but I have done so in any event. That is, if she were examined in the position of payor for child support for MacKenzie, the Court would examine whether or not she is fully employed so that she could provide meaningful support for

MacKenzie. This has not been argued before me, however, it is true that if child support was sought from Ms. Bachmann she would be examined as to whether or not she was using her employable hours and her skills appropriately.

- [89] I note that if I accept all the Respondent's claimed expenses for MacKenzie, she has recently started paying \$155.00 per month as child support. Prior to March, 2011 she paid \$90.00 (exhibit # 4 items: 16(c) health; 16(d) school; 17 school supplies). The additional \$65.00 was as a result of a settlement conference held in March 2011. Ironically, this figure is less than what she spends on cigarettes a month. However, Ms. Bachmann at the same time indicates she doesn't have any money to go out or to take her daughter to functions.
- [90] I find her wish to retrain is non-existent and her employment search has been limited to the point of being unproductive. Her obligation to become self-sufficient under Section 15.2 (6) has not been met. She has not been able to obtain full-time employment and has not been able to explain why. She has not been able to point to losses caused to her as a break-up of the marriage or even a change of lifestyle. Ms. Bachmann may well have a deficit each month but this need is in no way related to the marriage, the marriage breakdown or child rearing.
- [91] Ms. Bachmann's limited and recent child support (\$65.00) is a valid expense. Her payment of \$30.00 per month health care for MacKenzie coupled with the existence of a health plan was never clarified. However, I do accept Ms. Bachmann as of March 2011 pays towards MacKenzie's maintenance in the amount of \$155 per month. I note that I could have considered the vagueness of her expenses as outlined in exhibit No. 4 as well as, the delay in applying for spousal support. Delay can be fatal in certain circumstances as noted by Justice Duncan in the decision of *Miller v. Miller* 2009 NSSC 294:

“Delay in seeking spousal support may disqualify a recipient from an entitlement to support for a period during which support was not sought as the payor is taken to have structured their affairs according to known obligations so that it would be unfair to impose an

additional retroactive burden. This does not appear to be a hard fast rule however and will be subject to the particular circumstances.”

- [92] However, given the circumstances of this case I have put very little weight on the vagueness of her expenses and I am satisfied that I have reached a reasonable approximation of her monthly expense from all information before the Court. As well, I have put little weight on the fact that she has delayed sometime before making the application for spousal support.
- [93] Arlene Bachmann’s claim does not fit with any of the three *Bracklow* categories. As recommended in *Bracklow* (supra at paras. 34-36) I examined the issue of spousal support by weighing the factors in 15.2(4) against the background of the four objectives in 15.2(6)
- [94] Ms. Bachmann is not entitled to spousal support. She was required to prove relevant facts. She was certainly given an opportunity to prove entitlement and need as a result of the effect of the marriage, the breakdown of the marriage or child rearing responsibilities or relocating herself. Ms. Bachmann has clearly been unable to prove she is entitled to spousal support in any form, lump sum or periodic.
- [95] I have reviewed the spousal support guidelines as provided by counsel. However, given my findings on entitlement, the calculations are not relevant to the conclusion of this matter. I find that Ms. Bachmann is not entitled to spousal support under the contractual, compensatory or non compensatory models. One could assume that the disparity between incomes of \$75,000.00 and \$12,000.00 may in of itself require spousal support. However, in this case negating factors clearly support a finding that a spousal support award is inappropriate.

M. Clare MacLellan
J.

