SUPREME COURT OF NOVA SCOTIA
Citation: Yonis v. Garado, 2011 NSSC 454

Date: 20110803
Docket: SFHMCA 072415
Registry: Halifax

Between:

Jamal Abdosh Yonis

Applicant

and

Ekram Garado

Respondent

Judge:	Justice Carole A. Beaton
Date of Hearing:	July 26, 27 and 28, 2011
Date of Oral Decision:	August 3, 2011
Written Release of Oral Decision:	December 8, 2011
Counsel:	Susan Young, Counsel for Jamal Yonis, with Senior Law Student, Ryan Greer Krista Forbes, Counsel for Ekram Garado

By the Court:

Introduction

[1] The Applicant, Jamal Yonis and the Respondent Ekram Garado came to Canada in May of 2008 as a United Nations High Commissioner Refugees, in search of a life away from the torture and persecution they experienced in Ethiopia

and away from the limited comforts available in a refugee community in Kenya, which was their previous home.

[2] They settled in Halifax with their two young daughters, Amana, not quite six years of age at that time and Aisha, just two years of age. In 2009, the parties welcomed a son, Khalid, born on August 19th of that year.

[3] The parties concur in their evidence that once they were settled in Halifax they received a monthly income from the Federal Government Refugee Assistance Program and Mr. Yonis began studies at community college with the emotional support of his wife.

[4] Initially Mr. Yonis worked 40 hours per week while a student - clearly a man interested in improving the situation of his family. In June, 2009 the Federal funding ended and Mr. Yonis left his schooling some three months short of completion of the program. He sought out social assistance but was refused as he was considered a student.

[5] He was working briefly with two distinct employers during some period in 2010 as evidenced by Exhibit #11 before the Court, but the evidence is not entirely clear on the details of the timing of the employment. In June 2010 Mr. Yonis began working for Casino Taxi where he is still employed.

[6] When the parties lived as a family, Ms. Garado took English language classes at the Metropolitan Immigrant Settlement Association (herein after refereed to as “MISA”) where the parties daughter Aisha attended daycare. Amana attended grades primary through two at Burton Ettinger Elementary School.

[7] The parties were welcomed to the city by, and were involved with the Oromo community, Oromo being Mr. Yonis’ tribal ethnic background. The children attended extracurricular programs at the YMCA and MISA and the family spoke Oromo in the home, although Ms. Garado’s native tongue is Harari.

Background to the Application

[8] In late June 2010, Ms. Garado and the children left for Edmonton, Alberta. Ms. Garado testified they were travelling there in search of new opportunities, to see if Edmonton would offer the family more than living in Halifax had provided.

[9] Mr. Yonis maintained in his evidence that the sole purpose of the trip was for Ms. Garado to have a vacation to visit her brother who had recently arrived in Edmonton. When Ms. Garado failed to return to Nova Scotia by mid July 2010, Mr. Yonis commenced the process that ultimately led to this hearing on the question of interim custody.

[10] There was much discussion in cross examination of both parties as to how the trip to Edmonton came about and was funded. Mr. Yonis was challenged as to why there would be a purchase of only one way tickets if the trip was intended to be merely a vacation. Ms. Garado was challenged as to why she would leave with the children and without her husband if the trip was to be a permanent move.

[11] On the whole of the evidence, I am more than satisfied that the trip to Edmonton was intended to be temporary in nature. If in fact Ms. Garado was merely scouting for better opportunities for the family, I did not hear in her evidence any details as to how a fruitful search might unfold in terms of having Mr. Yonis relocate to Edmonton. Nothing in the evidence assisted me in understanding that there was any level of planning that one would expect to be commensurate with an intended relocation.

[12] On the whole, I am not convinced that when Mr. Yonis drove his family to the airport in June 2010 he understood there was any possibility that they would not return to Halifax. It might well be that Ms. Garado in her mind had decided her relationship with Mr. Yonis was over and/or that her move was a permanent one. However, I am satisfied on a balance of probabilities that Mr. Yonis had no such understanding, insofar as it related to his children being permanently uprooted from Halifax. Indeed in her affidavit evidence, Ms. Garado described that after two weeks in Edmonton she tried unsuccessfully to convince her husband to come to Edmonton to “see the city and consider settling there” and that “ultimately I decided it was better for me and our children not to return to Halifax”.

[13] Owing to the intervening legal issues that have created a delay in the time between Mr. Yonis' first application to NS Legal Aid last summer and the hearing on the question of custody last week, occasioned by reasons I need not review here, the children have now lived in the city of Edmonton with their mother for some 13 months. They have not seen their father from the time of their departure from Halifax in late June 2010 until they arrived in Nova Scotia with their mother week before last. In the intervening period Mr. Yonis did have phone access but the parties disagree as to the frequency of the contact and Mr. Yonis maintains all such calls are monitored. Furthermore, he maintains that the children's capacity to speak with him in the Oromo language, which was the language spoken in their Halifax home, has significantly diminished.

Positions of the Parties

[14] Jamal Yonis now seeks Halifax-based custody of and child support for Amana, Aisha and Khalid and asks the Court to award generous block access to Ekram Garado, contingent upon said access taking place in Halifax. Mr. Yonis says he no longer trusts the Respondent, which I have inferred to mean he no longer trusts that she would return the children to their father in Nova Scotia after an access period in Edmonton where Ms. Garado now resides.

[15] Ekram Garado seeks Edmonton-based custody of the children with generous telephone access and block access for Jamal Yonis in Nova Scotia during those periods when the children are not in school and otherwise in Edmonton, should Mr. Yonis choose to visit the children there.

[16] Ms. Garado was cross examined as to what she would do in terms of her residency if the Court were to require the children to return to Nova Scotia. She testified that she can not live without her children and she would have to return to Halifax to be with them, but cautioned that she would not live happily, that she would suffer and her children would suffer also.

[17] Mr. Yonis resides in a three bedroom apartment in the Fairview area and is employed full time as a taxi driver. His plan for the children is to have them reside with him there, along with his two older children, age 15 and 17, who came to live with him in November 2010 - (I add here, parenthetically, that in her evidence, Ms. Garado corroborated Mr. Yonis' evidence that the efforts made to have his older children join the family in Canada was a joint decision between the parties).

[18] Mr. Yonis plans to re-enroll Amana at Burton Ettinger Elementary School and have Aisha attend there as well. Both girls would attend after school programs while Khalid would attend the YMCA daycare or at a nearby private daycare.

[19] Mr. Yonis plans to adjust his work schedule to 8:30 a.m. to 4:30 p.m., Monday to Friday and 5:00 p.m. - 9:00 p.m. on Friday and Saturday evenings. He reports he will have the support of named friends who have offered to help him with child care and other assistance if needed. He would also intend to take unpaid vacation for the month of August 2011 in order to spend time with the children and re-acquaint them with Halifax.

[20] Ms. Garado lives in Edmonton in a two bedroom townhouse with a backyard. The three children and her brother, who works nights, reside in the home with her. She supports her family through social assistance benefits and the Federal Child Tax benefit. Her plan is to continue residing with the children in Edmonton. The children are engaged in weekend programs in the Harari and broader Ethiopian communities, including Koran school on Saturdays for the girls and a twice per week early learning program for Khalid.

[21] Ms. Garado and the children participate in a parenting and literacy program. Ms. Garado takes English classes. The children have also been involved in city recreation programs such as skating and swimming.

[22] Ms. Garado's evidence repeatedly emphasized the cultural benefits she and the children have realized since joining the proportionately larger Ethiopian community that a city the size of Edmonton offers. Ms. Garado described in her evidence the difference in her life between the feelings of unhappiness, isolation and depression she experienced in Halifax and the stability and happiness she and in turn, her children have enjoyed as part of their exposure to a larger Ethiopian community, including her cousins and her brother in Edmonton.

[23] Ms. Garado maintained that it was important for the children to have a relationship with their father, but she wanted the children to "have an opportunity for a healthier childhood with more supports", which she believes is better achieved in Edmonton. She claimed she wished for the Applicant to "be a part of our lives here in Edmonton, but he has declined to do so". Given that statement by the Respondent in her evidence, it is unclear to the Court whether Ms. Garado

means that she would reconcile with her husband if he was to move to Edmonton. However, ultimately the Court need only concern itself with the relationship of the parties to the extent that it impacts on the children.

[24] The Court passes no judgment on whether Ms. Garado and Mr. Yonis choose to live apart. The Court's only concern is: what is in the best interests of the children?

The Law

[25] Mr. Yonis' application for custody and child support is before the Court pursuant to Sections 18 and 9 respectively of the *Maintenance and Custody Act*. An analysis of the issues before me can be conducted with the assistance of the guidelines provided in the often cited decision of the Supreme Court of Canada in *Gordon v. Goertz* [1996] S.C.J. No. 52, to which counsel for each of the parties have referred the Court. As Dellapinna, J. of this Court noted at paragraph 36 of *Tamlyn v. Wilcox*, 2010 N.S.J. No. 374:

> [36] *Gordon v. Goertz*, *(supra)*, involved an application to vary custody pursuant to the *Divorce Act*. Nevertheless the authority still applies to proceedings under the *Maintenance and Custody Act* (see *Handspiker v. Rafuse* 2001 N.S.C.A. 1).

[26] There is only a limited history of orders as between these two parties. None of the orders have dealt with the question of custody, either interim or permanent. The December 14th, 2010 consent order made pursuant to the *Maintenance and Custody Act* was limited to the matter of a prohibition against Ms. Garado removing the children from Canada. The March 2011 decision of Justice Jollimore reported as *Yonis v. Garado*, 2011 NSSC 110 addressed the question of jurisdiction as reflected in the subsequent order issued in June 2011 identifying this Court as having capacity to, and claiming jurisdiction over the matter and continuing the prohibition contained in the December 2010 order. As there have been no previous orders addressing custody and/or access, I need not concern myself with the preliminary question as to whether there has been a change in circumstances that will justify varying any current order.

[27] As noted by Justice Hamilton of the Nova Scotia Court of Appeal in the recent case of *MacRae v. Hubley*, 2011 N.S.J. 104:

> [14] I am not satisfied the judge relied on the provisions of the interim order as creating a presumption that the mother should have primary care. The judge specifically stated otherwise:
>
> > [43] *Gordon v. Goertz (supra)*, contemplated an application to vary an existing custody order. There is no previous order (other than the interim order) in this case and therefore it is not necessary for either of the parties to demonstrate a material change in circumstance. The Court is to determine what is in the best interests of the children having regard to the existing relevant circumstances. There is no legal presumption in favour of either parent. (Emphasis added.)
>
> [15] Nor am I satisfied that the interim order created the status quo of the children being in the primary care of the mother.

[28] In this case, there has been no interim order, much less any status quo, in the specific legal context in which I use that phrase, which this Court must then be bound to consider. This Court can focus on the question of what is in the best interests of the children, as s.18 of the *Maintenance and Custody Act* direct me to do, without considering any presumption in favour of either parent. To that end, I agree with the observations of Jollimore, J. in *Taylor v. Wanless*, 2009 NSJ 404 wherein she stated at paragraph 5 of that decision:

> [5] The current parenting order is an interim order. As Justice Bateman pointed out in *Burgoyne v. Kenny*, 2009 NSCA 34 (CanLII), 2009 NSCA 34, an interim decision does not bestow "custodial status". As a result, neither parent's views are entitled to the "great respect" that a custodial parent's views are to be accorded by virtue of *Gordon v. Goertz*. Ms. Taylor has had the children in her care more than Mr. Wanless during the interim period. Even if Ms. Taylor was the custodial parent, as was noted in paragraph 49 of *Gordon v. Goertz*, there is no legal presumption in favour of a custodial parent's plan: "Each case turns on its own unique circumstances." The fact is - the only issue which concerns me is the best interests of these three children in the current circumstances. My focus is not on the interests and rights of Ms. Taylor or Mr. Wanless, but on the best interests of their children: six year old Sam, four year old Joshua and two year old Autumn.

[29] Likewise, in this case, my focus is not on the interests and rights of Mr. Yonis or Ms. Garado, but on the best interests of their children: nine year old Amana, five year old Aisha and almost-two year old Khalid.

[30] What does it mean to refer to a child's "best interests"? The concept of best interests was discussed at length by the Supreme Court of Canada in *Young v. Young*, 1993 4 SCR 31. I am mindful of the discussion of the best interests test

therein and also of a caution provided therein as reiterated by Justice Dellapinna, J. in *Tamlyn v. Wilcox (supra)* at paragraph 37:

> [37] In *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, the Supreme Court elaborated on the "best interests" test. At paragraph 17 the Court stated:
>
> > "...the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful....Like all legal tests, [the "best interests" test] is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do."

[31] In *Burgoyne v. Kenny* 2009 N.S.C.A. 34, Bateman, J. considered *Gordon v. Goertz (supra)*, and the often cited case in this province in *Foley v. Foley*, 124 NSR (2d) 198. At paragraph 25 of *Burgoyne v. Kenny (supra)*, Justice Bateman said this about the list of 17 factors enumerated in *Foley (supra)*:

> [25] The list does not purport to be exhaustive nor will all factors be relevant in every case. Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent on a generic list of factors. As Abella J.A., as she then was, astutely observed in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.):
>
> > 27 Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.
> >
> > 28 . . . the only time courts scrutinize whether parental conduct is conducive to a child's best interests is when the parents are involved in the kind of fractious situation that is probably, in the inevitability of its stress and pain and ambiguity, least conducive to the child's or anyone else's best interests.

> 29 Deciding what is best for a child is uniquely delicate. The judge in a custody case is called upon to prognosticate about a child's future, and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence, on the understanding that deciding what is best for a child is a judgment the accuracy of which may be unknowable until later events prove -- or disprove -- its wisdom.

[32] I am mindful that I must reach a conclusion about what is collectively in the best interests of the three children of these parties as the children move forward, based upon what I have learned about the circumstances of their lives to date and yet without the benefit of any "crystal ball" that might permit me to understand how their respective futures will unfold.

[33] I turn now to a consideration of the factors that must be applied to the matter before me, as articulated by the Supreme Court of Canada in *Gordon v. Goertz (supra)*. To assess what is in the best interests of the three children, I am guided by the "menu" of factors enumerated in the head-note:

> (a) the existing custody arrangement and relationship between the child and the custodial parent; (b) the existing access arrangement and the relationship between the child and the access parent; (c) the desirability of maximizing contact between the child and both parents; (d) the views of the child; (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; (f) disruption to the child of a change in custody; and (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know. The "maximum contact" principle mentioned in ss. 16(10) and 17(9) of the *Divorce Act* is mandatory but not absolute and the judge is only obliged to respect it to the extent that such contact is consistent with the child's best interests. As set out in s. 16(9) of the *Act*, parental conduct does not enter the analysis unless it relates to the ability of the parent to meet the needs of the child. In the end, the importance of the child's remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community.

The Evidence

[34] Neither party to this matter suggests that the other parent is incapable of parenting the children or that the children might befall some sort of harm, neglect or detriment if placed in the care of the other party. Counsel for the Ms. Garado urged the Court to question the credibility of Mr. Yonis given his evidence, for one example, that he denied knowing well the witness Fatima Said, despite Ms. Said's

evidence, and that of Ms. Garado also to the contrary, that the two families shared a close connection and bond when Ms. Garado and the children lived in Halifax. It was not difficult for the Court to surmise from the evidence that Ms. Said- if I may put it this way - is not Mr. Yonis' favourite person, but his unwillingness to confirm a previously close friendship and his evidence to the effect that it was Ms. Said who is now cool toward him is not evidence of a nature or kind that leaves me unwilling to accept that Mr. Yonis is overall not a credible witness. In the same vein, I found it very difficult to accept, for example, that Ms. Garado had no knowledge of the significance of the document entered as Exhibit 12 in the hearing, which on its face appears to be a bank account held in her name. Either Ms. Garado genuinely did not know anything about that account - which would then call into question her understanding of the family's finances when they lived as a family unit in Halifax - or she was not prepared, for whatever reason, to acknowledge to the Court the existence of a bank account in her name alone. Again, this is not reason to conclude that all of her evidence is suspect.

[35] On the whole of the evidence before me, I am satisfied that both parties love their children, that both parties want their children to be with them, that both parties are capable providing day-to-day care to the children going forward, just as they have each taken on the care of the children when living as a family unit in the past, and that both are conscious of the need to raise the children in an environment that allows them to have ongoing culturally appropriate exposure to their Ethiopian heritage within the context and backdrop of life in Canada. The parties corroborated one another in their evidence that their parenting styles differ somewhat, with Mr. Yonis being more "relaxed" and Ms. Garado being more "traditional". Ms. Garado was critical of certain aspects of Mr. Yonis' parenting style - for example, his lack of restrictions on computer use by the children. Mr. Yonis was critical of Ms. Garado's parenting regarding, for example, the use of physical punishment with Amana. In a similar vein, each party ultimately blames the other for the breakdown of the family unit. However, as I stated earlier, the erosion of the parties' relationship concerns me only to the limited extent that it is relevant to their respective parenting capacities, as that relates to the best interests of the children.

[36] Undoubtedly, the parties have different views about child rearing - indeed each said, somewhat to the amazement of the Court given the sort of evidence about relationships that it often hears - that they have only argued three times in the history of their marriage. Yet their evidence fundamentally illustrates that they do

not hold the same views about various aspects of daily life with and for the children, despite their agreement on broad principles such as education and cultural sensitivity as I referred to it a few moments ago. That they share differing views about matters such as appropriate bedtimes or the amount of exposure the children should have to the computer does not make either an unsuitable parent. That they differ in their versions of the evidence about who communicated with the school or took the children to doctors appointments does not ultimately require this Court to entirely accept or reject the evidence of either of the parties. There can be little doubt that at this point in their lives, Mr. Yonis has a greater command of the English language than does Ms. Garado, but I am not persuaded Ms. Garado is so limited in her facility in English that it places the children in harm's way or leaves them uncared or under-cared for in her hands.

[37] The fact of the matter is that for the Yonis-Garado children, just as for thousands of other children in Canadian society today, living in a family dynamic where the parents are in separate households will expose the children to differing parenting styles in each household, which I note is not necessarily any different than the reality in our society of differing parenting styles within the *same* household, within family units that are otherwise intact and not under scrutiny by the Court.

The Best Interests of the Children

[38] My concern is the application of the factors set out in *Gordon v. Goertz (supra)*, to the situation of the parties' children to arrive at a determination of what is in their best interests. I do so assuming that there is no presumption in favour of either parent, that there is on the whole of the evidence nothing to persuade me that either parent cannot or should not parent. Although the children have been in the de facto care of their mother in Edmonton for the past 13 months, there is no room for the suggestion that this has created a status quo which the Court must consider. To the contrary, the Court has, for lack of a better description, pushed a national "pause button" such that the fact the children have apparently transitioned nicely to life in Edmonton cannot be pointed to as a reason to exclude the possibility of their return to Halifax. To do so would be to unfairly prejudice Mr. Yonis due to procedural or institutional delays not within his control or making, and to unfairly advantage Ms. Garado by permitting her to maximize that delay to solidify her position.

[39] Frankly, I see little that is different about the children's life in Edmonton versus their life in Halifax, other than the very important exception of the absence of their father in their lives other than by, to date, telephone access of disputed frequency. Clearly, the children had the presence of both parents in their lives until they left for Edmonton last June. A secondary exception would be that the relative size of the Ethiopian cultural community in Edmonton is much larger than that in Halifax. In the end, I am of the view that this is largely a distinction without a difference. The Court can of course have only the most basic understanding of or appreciation for the unique cultural characteristics as brought forth in the evidence of the parties. Absent a fulsome understanding, with nuances, of either the Oromo or Harari cultures, nonetheless the evidence satisfies me that both parties have made and will continue to make efforts to connect the children to their heritage. Indeed, both parents also spoke of their own reliance on the community connections they have made as Ethiopians living in Canada and the ongoing support they intend to draw upon from those connections.

[40] On the whole, the only difference the Court can point to as between life for the children in Edmonton and life for the children in Halifax, other than the relative size of the Ethiopian community in each city, is that in Edmonton the children have exposure to both the Oromo culture which is their father's heritage and the Harari culture which is their mother's heritage, whereas in Halifax they have exposure only to the former and not the latter as there is, according to the evidence, no Harari community in Halifax.

[41] Is this lack of a Harari community in Halifax sufficient reason for the Court to favour the Edmonton location over the Halifax location, and thereby (a) endorse Ms. Garado's unilateral decision to relocate the children, and (b) reduce the contact the children have with their father? I am not persuaded that the evidence before me would permit me to conclude that the answer to that question is yes.

[42] The evidence clearly establishes that there is a Harari community in Edmonton which Ms. Garado, and therefore the children, have integrated with and benefit from as they go about their daily lives. However, I cannot accept that the absence of a Harari community in Halifax should outweigh the desirability of maximizing contact between the children and their father. There is no evidence whatsoever before me to suggest, much less persuade me, that the absence of a Harari community in Halifax is of such significant detriment to the children that it mandates a change in their residency to the exclusion of meaningful contact with

their father. This would seem particularly so given the evidence of both the Applicant and the Respondent that until the move to Edmonton, the children were, as is custom, being raised in Oromo, the background of their father.

[43] The effect of the move to Edmonton has been that the children have not seen their father for over a year, and it would seem that all the culturally rich Harari events that Edmonton has to offer cannot possibly compete with the recognition that these three children have a right to the greatest amount of contact they can possibly enjoy with their father, and for that matter, with their mother as well. I have great difficulty with the evidence I have heard about the lack of contact between Mr. Yonis and the children.

[44] For example, even if I accept the evidence of Ms. Garado that during late 2010 her phone service was disconnected for only two weeks, and not the six week period during which Mr. Yonis testified he had no way to speak to the children, nonetheless it was Ms. Garado's evidence which establishes that during the relevant period she took no steps whatsoever to notify Mr. Yonis of the problem, much less make alternate arrangements for a method of contact between him and the children, which surely would have been rather easily accomplished by several obvious methods. In addition, Ms. Garado did not deny Mr. Yonis' assertion, and yet offered no explanation as to why, once the children arrived in Halifax the week before last, they were barely an hour or two in the company of their father, whom they had not seen in over a year, when Ms. Garado was demanding they be returned to her. Frankly, these types of incidents leave the Court unconvinced that Ms. Garado, if the children were to return to Edmonton with her, would rise to the level of assertiveness and conscientiousness the Court would be looking for in terms of doing everything possible to ensure the children would have meaningful access to and frequent long distance communication with their father.

[45] These children are quite young, and in the same way they were able to transition well to the relocation to Edmonton, so too I am confident they will be able to transition to a return to life in Halifax. Again, the price to be paid in terms of a lack of contact with their father over time must surely far exceed the short term costs to the children of settling for the second time in almost 14 months in different surroundings, although this time the surroundings in Halifax will not be new to them.

[46] This is not a situation where the relocation of the children to Edmonton by their mother was motivated, for example, by an opportunity to improve the economic circumstances of the mother and therefore of the children as well. To the contrary, Ms. Garado has had to obtain social assistance benefits in Edmonton during a period in which Mr. Yonis has apparently been able to increase his monthly income by acquiring his own vehicle rather than renting from the cab company.

[47] The evidence of Ms. Garado has left the Court to conclude that she went to Edmonton for a visit, was comfortable in a setting with her family members, and decided that she would be happier living in Edmonton regardless of whether her husband joined her, and therefore her children would have to remain with her in that new setting. Naturally, having a happy or happier parent is going to assist in raising happy or happier children, but the unhappiness I can appreciate Ms. Garado will undoubtedly feel if her children are not able to remain in Edmonton is, in my view, unfortunate for the children but not as contrary to their best interests as a sporadic, limited, and long distance relationship with their father, with whom, up until the trip to Edmonton in June 2010, they had enjoyed daily contact their entire lives. I do not mean to suggest, and it would obviously be contrary to law, to determine that a parent can never relocate children to a location any distance from their former home because it would have the effect of reducing the child's or children's time with the other parent. To do so would be to place emphasis on the concept of maximizing time with both parents to the exclusion of all other factors discussed in *Gordon v. Goertz (supra)*. However, in summary, the move of these children from Halifax to Edmonton is, in my view, not in their best interests based on the following considerations:

(a) They had lived with both parents prior to the move.

(b) Ms. Garado's decision to relocate was made unilaterally and her failure to return from the trip to Edmonton cannot be relied upon by her as having now created an "improved" life for her children. In other words, as discussed in *Gordon v. Goertz (supra)*, I am not prepared to recognize that the method which Ms. Garado employed to remove the children from Halifax, and the resultant 13 months gap in time between creating new circumstances for the children and the hearing of this matter, should permit Ms. Garado to encourage the Court to place a

greater emphasis on the circumstances the children currently enjoy in Edmonton.

(c) Ms. Garado's decision to relocate was not motivated, at least primarily and initially, by the needs of the children but rather by her own happiness.

(d) Ms. Garado's decision to relocate did not bring about any tangible meaningful financial, emotional or educational advantages for the children.

(e) Ms. Garado's decision to relocate introduced the children to greater opportunities to engage in the cultural community of which their mother was a native, which was the effect or by-product of Ms. Garado's decision to remove the children of the cultural community in which they had been raised in Halifax.

(f) Even an absence of the benefits to the children of cultural connections to the Harari community, which they have now enjoyed for approximately 13 months, cannot in my view, equate to the importance of maintaining a meaningful relationship with their father, one which I am not persuaded Ms. Garado would adequately promote on a long distance basis. This is not a case where the children will be bereft of opportunities for connectedness to their Ethiopian heritage, regardless of whether they are in Edmonton or Halifax, and regardless of which parent they live with, and yet it is the factor that the Respondent returned to repeatedly in her evidence and through the able submissions of her counsel as being critical to determination of the best interests of the children. With respect, I cannot agree.

Conclusion

[48] Accordingly, for all of these reasons, I have concluded that it is in the best interests of the children that they be returned to the home of their father, which is Halifax. I am satisfied that it is in the children's best interests to be in the community where they have spent the majority of their lives, and have the opportunity to have greater contact with their father than they currently enjoy. To put it another way, I am not persuaded on the whole of the evidence that the children's move to Edmonton has benefited them to a degree that or enhanced their

lives to the extent that it could be said that it is quantitatively or qualitatively more in their best interests to live in Edmonton over Halifax. In the end, one location is no better than the other, save that Dad lives in Halifax, where the children always lived, prior to Mom's unilateral decision to remain in Edmonton.

[49] The viva voce evidence of Ms. Garado last week was, as identified earlier this morning, that she cannot live without her children and if the Court decides the children must return to Halifax, then so will she, albeit unwillingly. This is really all I know about Ms. Garado's plan. I have no understanding, nor was there any evidence, as to how Ms. Garado might make allowances for the contingency which will now become a reality - the return of the parties' children to this jurisdiction. There was no evidence before me as to where Ms. Garado might plan to live, or how she might see arrangements for the care of the children unfolding on a day-to-day basis if she were to reside in the same city as Mr. Yonis. Her expressed intention to return to Halifax is merely that, and while I do not question the sincerity of it, it is a statement without the solidity or structure of an actual plan.

[50] Clearly, Ms. Garado will need an opportunity to adjust to the reality of the decision this morning, and I do not wish to see her unfairly prejudiced by her current lack of a plan. I trust it has been clear from my remarks that I do not question her overall capacity as a day-to-day caregiver to her children. The reality of my decision today is that Mr. Yonis must be assigned as the custodial parent for the time being as he is the person with residence in the jurisdiction to which the children are being required to return. Having said that, it is in my view appropriate, particularly in view of *Foley v. Foley (supra)* as to the question of a child's best interests when assessing the question of custody, that Ms. Garado be given an opportunity to return to Court within a relatively short time period, once she has had an opportunity to decide what, if any, changes she will make in her own living arrangements and what level of involvement she wishes to pursue in her children's lives.

[51] Based on the evidence before me in this hearing, if it was a situation where both parents were living in the same city as a result of the Court's decision today, then I would expect I would be inclined to look to some type of joint custody and shared parenting arrangement as being best for the children and being also a reflection of both parties' respective abilities to act in that capacity. Not knowing with certainty if or when Ms. Garado might choose to relocate to Halifax, I obviously cannot make such a determination today, but I do not want today's

decision to be interpreted as preventing Ms. Garado from seeking an adjustment to the parenting arrangements in today's order, upon a review as to her circumstances.

[52] If Ms. Garado wishes to return to Court in approximately 8-10 weeks and demonstrate to the Court's satisfaction that she herself has relocated to Halifax to parent the children and is prepared to share that task with Mr. Yonis, regardless of where each of them might choose to individually reside, then I would reserve the right to make any adjustments to today's order as the Court might see fit at that time, based on new evidence as to the circumstances of Ms. Garado, and/or the children and/or Mr. Yonis, as it might relate to the issue of giving each party a more equal role in parenting the children.

[53] In the meantime, I order as follows:

1. Mr. Yonis shall have custody of the children in Halifax.

2. Ms. Garado shall have the right to exercise access to the children, while she has a fixed place of residence in Edmonton, or any other location outside Nova Scotia, in her place of residence as follows:

    (i) Block access of one month in the summer, with 90 days notice to Mr. Yonis of the intended dates, two weeks during the Christmas season school holiday with 60 days notice to Mr. Yonis of the intended dates and two weeks during the spring school holiday with 60 days notice to Mr. Yonis of the intended dates. Ms. Garado shall have the children with her, when she chooses to exercise access in Halifax, for a period of 10 days in any 30 day period, provided that she provides Mr. Yonis with 30 days notice of her intention to do so and the dates of said access. It is intended that such access would not unduly or unreasonably interfere with the children's school schedule.

    (ii) Prior to returning to Edmonton, which the Court anticipates Ms. Garado will do very soon after today, at least for an initial period, she shall have generous and liberal access to the children, including overnight access, until the date of her departure.

3. Neither party shall remove the children from the province of Nova Scotia without the express permission of the other party, which permission shall be reduced to writing and identify the approximate term or duration of any such absence. Nothing in this clause shall be construed to conflict with the provisions for access as set out elsewhere herein.

4. The parties will make their very best efforts to cooperate in facilitating the transition of and relocation to Halifax of the children.

[54] As to child support, Ms. Garado will need to determine her circumstances, which are uncertain in light of my decision this morning. She should commence payment of child support in favour of Mr. Yonis in view of his new role as custodial parent, although it is not difficult to anticipate that her current sources of income (social assistance and Child Tax benefit) might be adjusted in view of my decision. Further, the matter of the cost associated with access visits, either through having Ms. Garado or the children travel, will have to be calculated into any consideration of quantum of child support. Therefore, the matter of the quantum of child support shall be adjourned to the review hearing date to permit Ms. Garado to provide updated financial information on the issue, which information, along with any proposed parenting plan, shall be filed with the Court and Mr. Yonis no later than 10 days prior to the review date.

J.