SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hammond v. Nelson, 2012 NSSC 27

Date: 2012 01 20
Docket: HFDMCA-68746
Registry: Halifax

Between:

Patrick Hammond

Applicant

v.

Alexandra Nelson

Respondent

Judge: The Honourable Justice Leslie J. Dellapinna

Heard: January 10 and 11, 2012, in Halifax, Nova Scotia

Counsel: Gordon R. Kelly and Adrienne Bowers counsel for Patrick Hammond
Daniel S. Walker counsel for Alexandra Nelson

By the Court:

BACKGROUND

[1] Patrick Hammond (the Applicant) and Alexandra Nelson (the Respondent) dated for approximately three months in 2008.

[2] As a result of that relationship they now have a daughter, Paige Jessica Hammond Nelson, who was born on May 29, 2009. Paige is now a little over two years and seven months old. The parties never cohabited and they did not marry.

[3] From the time that the Respondent believed that she might be pregnant she included the Applicant in Paige's life. The Applicant welcomed the news of the pending birth of their daughter and has been an involved parent throughout, accompanying the Respondent to most of her medical appointments prior their daughter's birth, attending pre-natal classes with her, being present when Paige was born and enthusiastically sharing in her care subsequent to her birth. Both parties were complimentary of the other person's ability to care for their daughter.

[4] The extended families of both the Applicant and the Respondent have been supportive.

[5] Both the Applicant and the Respondent have gone on to form new relationships. The Applicant resides with his common-law partner, Ms. Samson, and the Respondent resides with her partner, Mr. Carmichael. They plan to marry this coming summer. Both parties spoke well of the other's partner and to the extent that their partners were involved in caring for Paige, all would seem to agree that they have done well in doing so.

[6] Although both parties spoke positively of the other as a parent, there have been difficulties between them from time to time. Their dating relationship did not last beyond three months because, it seems, they both recognized that they had enough differences that their relationship could not be long lasting. They have had many arguments since coming to know each other and continue to have arguments from time to time.

[7] The Respondent said that she had difficulty communicating with the Applicant. She found speaking to him frustrating because, among other things, she

felt that he tried to control their conversations. The Applicant also conceded that their conversations were not effective or productive. They have therefore resorted to communicating through e-mails. The Respondent finds the Applicant's e-mails to be distressing as well because, in her words, they are "frequently laced with criticism" of her as a person and as a parent.

[8] The Applicant said that he has found the Respondent openly hostile to him at times and he believes that the Respondent discourages Paige from spending time with him by her words and through her body language. The Respondent denies any accusation to that effect and said in her affidavit that the Applicant "is hyper-vigilant about how I behave and he does not hesitate to call me on anything".She also said that "[the Applicant's] constant berating of my character does now create the space we need to communicate effectively about Paige. To get through one of his long e-mails is an emotionally taxing event for me." The Applicant does have a tendency to provide the Respondent with long and detailed e-mails but claimed it is his effort to keep the Respondent fully informed of his experiences with Paige and to discuss parenting issues.

THE APPLICATION

[9] In February 2010, when Paige was approximately eight and a half months old, the Applicant initiated this proceeding by way of an Application to the Court for a parenting order and a child maintenance order pursuant to the provisions of the *Maintenance and Custody Act* R.S.N.S. 1989, c. 160. At the same time he made an application for an interim order.

[10] A hearing was scheduled for March 3, 2010 before the Honourable Justice Campbell of this Court. When the hearing date arrived the parties and Justice Campbell agreed to convert the hearing into a binding settlement conference.

[11] Until then Paige had been residing primarily with the Respondent but the Applicant was seeing Paige frequently at times that were agreed upon by the parties.

[12] At the binding settlement conference the parties were able to agree on the terms of an interim order which was issued on April 6, 2010. Among other things that order provided that Paige would continue to reside primarily with the

Respondent and that the Applicant would have parenting time with her each Tuesday from 3:30 p.m. until 6:30 p.m., each Thursday from 3:30 p.m. until 6:30 p.m., each Saturday from 8:00 a.m. to 12:00 p.m. and each Sunday from 10:00 a.m. to 4:00 p.m.. There was also a provision in the order for the payment of child maintenance by the Applicant to the Respondent.

[13] It was also agreed that the arrangement was to continue until the end of August 2010 when it was expected that the Respondent would return to work or school at which time there would be another settlement conference.

[14] There were of course other provisions in the order including a clause that said the Applicant would have the care of Paige overnight beginning in October 2010, subsequent to the second settlement conference.

[15] On September 14, 2010 the second binding settlement conference took place and again the parties were able to reach an agreement. That agreement was put in the form of another interim order which was issued on October 14, 2010. Among other things it provided that Paige would continue to reside primarily with the Respondent and from September until early January 2011 the Applicant would have parenting on with Paige on a two week rotation as follows:

- In week one, beginning September 14, 2010, he was to have her from Tuesday at 3:30 p.m. until the following Wednesday morning when she would be dropped off at daycare and on Saturday at 9:00 a.m. until the following Sunday at 7:00 p.m..

- In week two, commencing September 21, he would have her in his care from Tuesday at 3:30 p.m. until Wednesday morning when she was dropped off at daycare and on Thursday from 3:30 p.m. until Friday morning when she again was dropped on at daycare.

[16] Beginning on January 4, 2011 the rotation would change somewhat so that it was as follows:

- In week one, commencing January 4, 2011, the Applicant was to have Paige with him from Tuesday at 3:30 p.m. until the following Wednesday morning when she went to daycare and on Friday at 3:30 p.m. until Sunday at 3:30 p.m..

- In week two, commencing January 11, 2011, he was to have her in his care from Tuesday at 3:30 p.m. until Wednesday morning when she went to daycare and on Thursday from 3:30 p.m. until Friday when she was dropped off at daycare.

[17] There were also provisions in the order for parenting time by both parties on special events such as Christmas, Easter, Mother's Day, Father's Day and Paige's birthday.

[18] The order confirmed that the parties agreed that they would exert their best efforts to work cooperatively in making plans consistent with Paige's best interests and to resolve disputes amicably, that they could consult on all substantial questions relating to Paige including questions with respect to her education, social environment, non-emergency medical health care and so on, and that neither party would make a major developmental decision regarding Paige without the consent or acquiescence of the other except on an emergency basis. Each was entitled to attend any and all of Paige's activities, participate in her medical appointments, attend meetings scheduled by her daycare (and later by her school), each would have telephone access to Paige at reasonable times when she was in the care of the other and each would make reasonable efforts to share any information they receive regarding Paige with the other parent.

[19] Again, there was a provision for the payment of child maintenance by the Applicant to the Respondent.

[20] At the conclusion of the second settlement conference the parties agreed to have yet another conference with Justice Campbell but on the third occasion it was to be a non-binding settlement conference. That conference was held on May 2, 2011. Unfortunately the parties were not able to reach an agreement. Trial dates were then scheduled.

THE APPLICANT'S POSITION

[21] It was the Applicant's position that a joint custodial and shared parenting arrangement by which Paige would spend an equal amount of time with both

parents would be in her best interest and it is that which he is seeking. He proposed a schedule under which the parties would share the care of Paige on alternating weekends from Friday to Sunday, and from Monday to Thursday the parties would share that time equally by one parent having Paige with him or her on Monday and Tuesday of one week and Wednesday and Thursday of the following week. The other parent would have the care of Paige on the remaining days.

[22] In addition to Paige spending an equal amount of time with both parents, his plan ensured Paige would never be away from either parent for more than three days (except during vacation periods).

[23] His proposed parenting plan also included an equal sharing of holidays and other special event days.

[24] The Applicant also proposed that child maintenance be paid recognizing the shared parenting arrangement which, because of his higher level of income, would result in him payment child maintenance to the Respondent.

THE RESPONDENT'S POSITION

[25] The Respondent was opposed to equal shared parenting for a number of reasons including:

- The parties do not communicate well enough for co-parenting to function in their daughter's best interest;

- The Respondent believes that the Applicant, in spite of what he may have said in his affidavit, does not respect her parenting ability sufficiently for them to co-parent and she referred to the criticisms and tone of his various e-mails;

- Because the Applicant resides in Shad Bay and she lives on the peninsula of Halifax (approximately 30-40 minutes by car from each other) co-parenting would not work; and

- It is the Respondent's view that Paige has not responded well to the parenting schedule that was agreed upon at the second settlement

conference. She says that Paige does not easily adapt to change and in her affidavit beginning at paragraph 28 said the following:

> "28. Before the implementation of the current parenting schedule, in September, 2010, Paige had been spending only one overnight per week with her father. We then jumped to five overnights every two weeks. I now feel that I should not have agreed to such an abrupt change in the parenting schedule, especially since Paige was also just starting daycare that month and we had also moved to London Street.
>
> 29. This transition was really hard on Paige. She was frequently resistant to going with Patrick and when she was in my care she would scream and cry when I left her even to go into the next room. When Patrick would go to pick her up from daycare she would often cry and insist that she did not want to go to his house."

[26] The Respondent also believes that Paige is responding poorly to the "deviations" from the routine that she has in the Respondent's home that are not followed in the Applicant's home.

[27] Although the Respondent has agreed to joint custody of Paige, rather than an expansion of the Applicant's parenting time with Paige, she believes a reduction of the time that he now has with Paige would be in her best interests. She proposed an alteration to the current two week schedule such that the Applicant would have the care of Paige in accordance with the following schedule:

- In week one the Applicant would pick Paige up from daycare (and later from school) each Wednesday afternoon and have her until the subsequent Friday when he would again drop her off at daycare (and later at school) in the morning.

- In week two the Applicant would pick Paige up from daycare (and later school) each Monday afternoon and would have her in his care until Tuesday when he would drop her off at daycare (and later at school) in the morning and he would also have her on Saturday from 9:30 a.m. until Sunday at 3:30 p.m.. This arrangement would alternate every two weeks.

[28] There were also provisions in her proposal for special event days and holidays which were not dramatically different from that which was contained in the Applicant's proposal.

[29] If her parenting arrangement was accepted the Applicant would pay the table amount of child maintenance to her. She also requested an order requiring the Applicant to share her childcare expense and the cost of her medical/dental insurance for Paige.

[30] In addition to the negotiations that have been ongoing through counsel the parties have had their own discussions regarding what would be best for Paige. The Respondent urged the Applicant to agree to Paige being assessed and followed by a child psychologist because of the behaviour the Respondent has witnessed. She said "I am concerned that this early insecurity and instability in her life could have long lasting damaging effects on Paige's emotional and psychological well being". The Applicant didn't see the need for and did not agree to a psychological assessment.

ISSUES

[31] The issues that arise from this case are:

1. What parenting arrangement should be ordered? More specifically, should Paige continue to reside primarily with the Respondent or should the Court order a shared parenting arrangement like that proposed by the Applicant?

2. What is the appropriate child maintenance to be paid taking into account the parenting arrangement that is ordered?

LEGISLATION

[32] The relevant legislation is found in the *Maintenance and Custody Act* (supra). Sections 9 and 10 of the *Act* provide that the Court may make an order for child maintenance and shall do so in accordance with the *Child Maintenance Guidelines*.

[33] Section 18 contains the relevant provisions with respect to custody and whereas that is the more important issue between the parties they are worth repeating here:

> 18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.
>
> (2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order;
>
> > (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
> >
> > (b) respecting access and visiting privileges of a parent or guardian or authorized person.
>
> ...
>
> (4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise
>
> > (a) provided by the Guardianship Act; or
> >
> > (b) ordered by a court of competent jurisdiction.
>
> (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[34] I interpret subsection (4) as meaning that there is no presumption in favour of either the mother or the father at the commencement of any custody proceeding and until the Court determines otherwise each are considered joint guardians of their child and each would be equally entitled to the care and custody of that child.

[35] Further, there is no presumption in favour of any particular child care arrangement such as a shared custody arrangement or an arrangement that would result in the child being placed in the primary care of one parent with specified parenting time to the other.

[36] Each case must be decided on its own merits and in each case the Court must make a decision based on the evidence presented, guided by the principle that the “welfare of the child is the paramount consideration”.

ANALYSIS

[37] In previous cases the Court has used the terms “welfare of the child” and “the child’s best interests” interchangeably. I do so here.

[38] In the course of this hearing I was given numerous affidavits to consider. That affidavit evidence included two affidavits from each of the parties. On behalf of the Applicant I was also given affidavits from his common-law partner, his mother, his father, a friend who also happens to be his common-law partner’s aunt who has known the Applicant for approximately three years, and another friend who has known the Applicant since 1994.

[39] On behalf of the Respondent, I received affidavits from her common-law partner, her mother and a friend who has known her since 2005.

[40] I’ve also considered the parties’ Parenting Statements as well as their financial information. I’ve had the benefit of hearing them testify. I was also aided by the briefs provided by counsel as well as their verbal submissions.

[41] By all accounts Paige is a bright child. Her mother describes her as an intelligent and imaginative child with verbal skills that seem far beyond those of her peers. The Respondent says that Paige understands and uses humour in her interactions with others and has an incredible memory. She believes that Paige will do very well in school.

[42] Other adjectives offered by witnesses on behalf of both parties include “amazing”, “brilliant”, “delightful”, “precocious”, “affectionate” and “musically inclined”.

[43] Although the parties (as well as their families and friends) think of Paige in the most positive of terms, both parties reported certain behaviours by Paige that cause them concern. The Applicant referred to occasions when Paige hit or bit other children at the daycare and other occasions when she seemed to him to be sad when she perceived her mother to be sad.

[44] The Respondent reported that Paige seemed unusually dependent on her when she is in her care and said that she rarely engaged in “solo play” and instead

tried to include her mother in all of her activities. The Respondent believes that there is a connection between Paige's dependence on her and what she perceives as her daughter's difficulty adapting to the current care arrangements.

[45] Counsel drew my attention to a number of cases intended to assist the Court in arriving at an appropriate disposition.

[46] In *Foley v. Foley* (1994), 124 N.S.R. 198 (N.S.S.C.) Goodfellow, J. set out a number of factors to be considered when determining what would be in a child's best interest. They include any statutory direction, the physical environment in which the child would be placed when in the care of her parents, the child's wishes, the kind of role model each parent presents, the time that each parent has available to spend with the child as well as other factors such as discipline, cultural development, the emotional support that each parent provides and the support provided by extended family members. I've considered all of those factors and concluded that both the Applicant and the Respondent are capable parents. They both take their parenting responsibilities seriously. They enjoy the time that they spend with their daughter. They, their partners and their extended family members provide her with the necessary degree of stimulation, education, recreation and entertainment.

[47] Even though both parties may be good parents in their own right that does not necessarily lead to the conclusion that an equal shared parenting arrangement would be in Paige's best interest.

[48] Counsel for the Respondent referred to a number of cases including *Bryden v. Bryden*, 2005 NSSF 9 decided in February 2005. The case involved a couple who separated in January 2001 after five years of marriage and who divorced in January of 2003. They had two sons who, at the time of their divorce, were almost five and almost three years of age. The parties had agreed on a joint custody arrangement at a time when the older of their sons had not yet entered school. Although it is not clear from the decision what the exact arrangements were it was stated that both parents were spending as much time as possible with their sons as their work schedules allowed but when their older son started school the time that their father could spend with them was seriously reduced. Thereafter they resided primarily with their mother. The father applied to vary the parenting arrangements seeking an equal amount of time with the children on a week on week off basis. Justice Coady found the following:

> [9] "I can see that I have before me two very responsible and loving parents as far as their relationship with their children is concerned. There are issues between them surrounding the children but I do not consider them of any consequence to my deliberations. I find that they both will strive to do what is best for their sons who I conclude are thriving at the present time."

[49] Justice Coady appeared to be of the view that the parents shared similar values and similar approaches to parenting and that the boys thought a lot of their father. He said that Mr. Bryden was the only real male role model in their lives and he was a very positive role model. When the parties lived together Justice Coady described them as "equal players" as far as their sons were concerned. Nevertheless he was not prepared to order a week-on week-off, or even an equal, shared custody arrangement. He said at paragraph 14:

> [14] "...shared custody arrangements require greater cooperation and communication than do traditional joint custody arrangements."

[50] And further at paragraph 15:

> [15]...I am of the opinion that it is the rare case, the rare parents and the rare children who can make week-on, week-off work in a way that is in the children's best interests."

[51] And at paragraph 16:

> [16] In *Farnell v. Farnell* [2002] N.S.J. No. 491, I accept the comments [of Goodfellow J.] respecting week-on, week-off arrangements stated at ¶10:
>
> "Shared custody rarely in my experience works and only seems to where there is present an environment where the children thrive when the children are able to fluidly move from one home to another by reason of parents who are mature in circumstances and reside in such close proximity that the children can go back and forth themselves, continue in the same school, continue with extracurricular activities, church or other activities that they would normally engage in. Such a situation is next to impossible to attain and continue when children live at long distances...".

[52] In the following paragraph Justice Coady said that in his view both parents would have to support such an arrangement for it to be in the children's best interests.

> "...The children's activities and schooling must always be constant. Their friendships must be constant. These things will only work if the two homes are in the same community. They will only work if both parents are committed to such an arrangement. I take the view that week-on, week-off requires a parental relationship sufficiently close that one might wonder why they live separate and apart...."(para. 17)

[53] Justice Coady concluded that the parties had made choices that were not consistent to moving to such an arrangement. He ordered joint custody but granted Ms. Bryden primary care of the children and their father parenting time on alternate weekends as well as time each Monday and Thursday from 4:00 p.m. to 7:30 p.m..

[54] In *Mahaney v. Malone*, 2009 NSSC 217, Justice Williams denied an application by the father for equal shared parenting and said at paragraph 43:

> "43. The courts in Nova Scotia have been rather consistent in considering shared parenting arrangements and expressing the view that a greater degree of communication and cooperation is needed for those relationships to work than in more traditional custody arrangements."

[55] Williams, J. was not prepared to grant the shared parenting sought by Mr. Mahaney because in his view the required degree of cooperation was not present.

[56] Counsel for the Applicant referred me to two cases of the Honourable Associate Chief Justice O'Neil. *Murphy v. Hancock*, 2011 NSSC 197 involved an application to vary a previous order relating to the parenting of the parties' two children. They had lived in a common-law relationship for approximately four years, separating in June of 2006. They had two sons who, at the time of the variation hearing were seven and five years of age. The parenting arrangement had changed at different times since the parties separated but at the time of the hearing the parties had fallen into a pattern whereby the mother had primary care and the father had the children with him every second weekend (Friday to Sunday) as well as two additional days (including overnights) each week.

[57] For a period of time the parties had tried a week-on, week-off arrangement but the mother brought that to an end believing that it was not workable.

[58] The mother sought, among other things, to drop the overnights and to change the characterization of the parenting arrangements from "joint custody" to "primary care" with her.

[59] In spite of the opposition expressed by the mother, Associate Chief Justice O'Neil ordered an equal shared parenting arrangement on a week-on, week-off basis. In doing so he identified that it was significant to him that the parties lived in close proximity to each other such that the children were able to continue to maintain their peer relationships in their community and would be in their school district regardless of whether they were with their mother or their father.

[60] It should be noted that although there was a certain level of disharmony between the parties Associate Chief Justice O'Neil found at paragraph 60:

> "60. The parties do communicate at an acceptable level to parent effectively. They have demonstrated that they can do so. They may not enjoy communicating with each other but that is different than being unable to meet their responsibility to do so. Furthermore, the absence of shared parenting will not eliminate the need for the parties to communicate...."

[61] And at paragraph 68 Associate Chief Justice O'Neil said:

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

[62] The second of Associate Chief Justice O'Neil's cases that was referred to me is the case of *Gibney v. Conohan*, 2011 NSSC 268. The written decision of the Court followed an eight day trial spanning four months.

[63] The parties had been married in 2002 and separated in 2009. They had two children aged nine and almost seven years of age. The mother sought primary care and the father sought shared parenting.

[64] The parents worked in the same office and lived near each other. Again, Associate Chief Justice O'Neil considered that to be an important factor because it reduced the risk of the children losing important relationships that they developed at school and in their community. Like in the *Murphy* case the Court concluded that although the parties didn't enjoy communicating with each other they did communicate at "an acceptable level to parent effectively". In this case too Associate Chief Justice O'Neil ordered a week-on, week-off arrangement.

[65] While there are similarities shared by this case and *Murphy* and *Gibney*, there are also differences. In *Murphy* (supra), the couple had cohabited in a common-law relationship for approximately four years before separating. Their children were seven and five years of age as compared to Paige who is only two. For more than two years before the hearing the parents shared the care of the children approximately equally. O'Neil A.C.J's decision for the most part just resulted in fewer transitions. *Gibney* (supra) involved a couple who were married and who had cohabited for a period of approximately six years before separating. Their children were nine and six at the time of the hearing.

[66] I have also considered the decision of the Honourable Justice Stewart in *Rivers v. Rivers*, [1994] 130 N.S.R. (2d) 219. The focus of that case was more joint custody as opposed to shared custody. In paragraph 48 Justice Stewart said:

> "[48] Besides the obvious that there is no mutual agreement to joint custody, does the actual evidence mitigate against joint custody? Do obstacles exist to joint custody? In answering, any number of questions should perhaps first be asked:
>
> (A) A very basic question would be has each parent maintained a meaningful relationship with their children and does each possess parenting capabilities that are adequate to meet their children's needs?
>
> (B) Will the parents be able to make decisions together about the children? Are they able to co-parent despite any conflict on a personal level between themselves? Can they separate feelings for each other to focus upon the children's need for a relationship with both parents? Can they separate their personal relationships from the parent/child relationship?

(C) Will the children be involved in the conflict between the parents in a detrimental manner?

(D) Will the proposed joint custody arrangement cause disruption and discontinuity to the children's developmental needs?

[67] I suggest that the same questions have to be asked when the issue is shared parenting. If the parents are not candidates for joint custody then they can't possibly be candidates for shared parenting.

[68] As a result of reviewing the case law presented and listening to the submissions of counsel, I have attempted to summarize some of the considerations that the Court may consider when asked to decide whether a shared parenting arrangement should be ordered in any given case over the objections of one of the parents. It is not intended to be an exhaustive list. Those considerations include the following:

1. In different circumstances would the Court consider each of the parents to be an appropriate "primary parent"? Equal joint and shared custody essentially places both parties in that position.

2. If a parent resides with a partner the Court must be satisfied that the partner is fully supportive of the parenting plan, that the child and the parent's partner have a good relationship, that the parent's partner is an appropriate secondary support to the parent and is a suitable role model to and influence on the child. Evidence of instability in the relationship between the parent and his/her partner may also be a consideration.

3. Does anyone else reside with the parent, such as other children, room mates, boarders and the like, and if so, what would be the effect of their presence in the same household on the child?

4. Do the parents live in close proximity of each other? A shared parenting arrangement should not be at the expense of the child's ability to maintain relationships with his/her peers. Ideally the residences of the parents should be sufficiently close to each other that the child, when old enough to be outside the home without the direct supervision of her or his parents, should

be able to easily walk from one parent's home to the other and, just as important, should be able to maintain friendships in his/her neighbourhood and to go to and from school as easily from one parent's home as the other. If the parents' homes are not in close proximity then more than likely the child's social network will suffer.

5. The age, maturity and personality of the child and how those factors may impact the child's ability to cope with shared custody. If a child is very young such that they are napping and/or breastfeeding then shared parenting may not be workable. Further, the younger the child the more dependent the child is on the parents for transportation, social activities and the like. Older children tend to be more resilient, independent and more able to go from one parent's home to the other and to connect with their friends. Also, some children may adapt to a shared parenting arrangement more easily than others. Every child is different. While efforts should be made to minimize costs, the opinion of an expert in this area would almost always be helpful to the Court.

6. The wishes of the child if ascertainable. The child's preference is often relevant and the weight to be given to the child's opinion would, as always, depend on, among other things, the age and maturity level of the child.

7. The communication level between the parents and their ability to cooperate with each other and make decisions together. It is easy to say that parents should put aside their differences and do what is necessary to serve the best interests of their children but the Court must recognize human nature for what it is. Many couples are able to set aside their personal differences for the sake of their children and frequently are able to agree upon a shared parenting arrangement that works for them and their children. The Court sees it in agreements that accompany consent orders. However, frequently parents whose relationships have broken down are unable to achieve the necessary degree of cooperation in spite of their best efforts. A shared custody arrangement requires an unusual level of cooperation between the parents on a day in and day out basis. As Justice Coady said in *Bryden* (supra), it is "the rare case, the rare parents and the rare children" who can make shared parenting work.

It is essential that the parties communicate with each other, keep each other informed of matters relating to their child and make decisions together. If the Court is not satisfied that they can then imposing a shared custody arrangement over the objections of one of them may lead to a deterioration of an otherwise good relationship and subject the child to conflict and instability. At the same time, however, the Court must not give a license to litigants to be disagreeable simply to defeat a joint or shared custody determination (see Farnell v. Farnell, 2002 NSSC 246; 209 N.S.R. (2d) 361 (NSSC)). An indicator of whether the Court can reasonably expect the required degree of communication and cooperation may be found by looking at the parents' parenting history. Were both parents active parents prior to the break down of their relationship? Were they able to successfully co-parent at anytime prior to the hearing? If so, there may be reason to believe that arrangement (or something like it) could continue.

8. Ultimately the Court must consider what is in the best interests of the particular child who is the focus of the inquiry. It is difficult to argue against the fairness of shared parenting. If a parent truly loves his/her child and wants and is prepared to parent them, then it would seem completely unjust to them to have to accept anything less than an equal opportunity to do so. The Court's focus however is on the child. The wishes of the parents, although important and require serious consideration, come second to what the Court believes is best for the child.

[69] Applying the above considerations to the circumstances of this case I came to the following conclusions.

[70] Both parties are capable of being primary parents in their own right. Among other things they have proven their parenting skills, they have suitable residences and they shared their time with Paige without too much difficulty even before the Court's involvement.

[71] Both parties have the time to spend with Paige although at the present time the Respondent's work schedule affords her greater time with Paige than does the Applicant's. The Respondent works a typical Monday to Friday schedule from between 8:30 a.m. to 4:30 p.m.. She is able to work more hours some days to create more flexibility and leave work earlier on others. Outside of her work hours, during which Paige is at daycare, she is available to care for her daughter.

[72] The Applicant just recently accepted a new job in downtown Halifax. He works what is called the “back shift” from 11:00 p.m. to 7:30 a.m.. His work week therefore starts at 11:00 p.m. on Sunday and ends at 7:30 a.m. on Friday. In the future he may be able to work the day shift or what is called the night shift (which would end at approximately 11:00 p.m.). Because he is new in his position he said that the back shift works well for him as it allows him to ease into his duties. When he is at work his partner, Ms. Samson, would be home. As of September she plans to return to university. Although there is no evidence of what her hours will be then it is likely that she will still be available during the evenings. The Applicant will be available each weekend.

[73] When the Applicant is at home during the day he has to sleep so that he is able to go to work in the evening. He said that when he comes home from work he usually is able to get to sleep by 9:00 a.m. or 10:00 a.m. depending on whether he has to drive Paige to daycare first. He would, however, be awake and available to spend time with Paige after her return from daycare in the afternoon until she goes to bed at approximately 7:00 or 7:30 in the evening.

[74] In his submissions counsel for the Applicant indicated that should Paige be sick during the evening the Court could expect the Applicant to leave work to be with his daughter. However it is doubtful that would happen if Paige wakes up because of a bad dream or because of some other disturbance (like a passing snowplow). On occasions such as that it would be the Applicant’s partner who would care for her. While there is every reason for the Court to believe that she is a suitable caregiver, it would be preferable for Paige to have the comfort of one of her parents on those occasions. That said, the Applicant’s work schedule alone would not be a bar to shared parenting.

[75] Other than Paige the only other person the Applicant resides with is Ms. Samson. Paige gets along well with her. Ms. Samson and the Applicant have cohabited since September of 2009 (a little over two years). There is no evidence to indicate instability in their relationship.

[76] The Respondent resides with Mr. Carmichael. It appears that Paige gets along well with him as well. While he too appears to be a suitable support person the Respondent made it clear that when it comes to caring for Paige in her

household, she assumes the majority of that responsibility. The Respondent and Mr. Carmichael intend to be married in approximately seven months time.

[77] Both Ms. Samson and Mr. Carmichael are supportive of their partners' respective positions.

[78] Paige is only two. She will be three in approximately four months time. She continues to nap during the day. She is no longer being breastfed. She depends entirely on her parents and other care providers to take her where she needs to go and to arrange her recreational activities. In just a few short years that is likely to change as she becomes more mobile, and more social. She will begin school in two and a half years. Then, if not sooner, she will start to form friendships beyond her family circle. It is important that she be able to develop those relationships.

[79] The parties do not live in close proximity to each other. It takes approximately 30 minutes to drive from the residence of one parent to the residence of the other. The Applicant has said that he is prepared to move if that is a requirement of shared parenting but has not yet moved closer to the Respondent's residence because he didn't know if the Respondent had plans to relocate again. She's only recently moved to her current residence and has indicated that while she likes the neighbourhood, she considers her home to be a starter home and she and her partner will likely be moving again. She and Mr. Carmichael both indicated a desire to stay in their current neighbourhood.

[80] Paige is too young to express an opinion as to her preferred parenting arrangement.

[81] Even before Paige was born the parties attempted to work together to care for their daughter. They do communicate and they communicate often. They do not, however, always tell each other everything that the other would want to know. For example, it was not until the Respondent received the Applicant's affidavits that she learned that at least half of the time when Paige was in the Applicant's care, it was Ms. Samson who would pick up and drop off Paige at her daycare. Similarly she learned only during the course of the proceedings that Paige slept overnight at her paternal grand-parents' home without the Applicant being present. The Applicant also registered Paige for gymnastics without informing the Respondent. The Respondent on the other hand wasn't always open with the

Applicant. For example, she took Paige to doctors' appointments during which Paige received immunizations without the Applicant knowing.

[82] Further, although the parties have agreed to a joint custody arrangement, there is some reason to be concerned that they will not be able to agree on important matters relating to Paige. Examples of past decisions that they could not agree upon include Paige's daycare arrangements during the summer of 2010, whether she should receive the H1N1 vaccine and whether she should see a psychologist. In the first two instances the Respondent unilaterally decided when it was apparent no agreement could be reached. As for sending Paige to a psychologist, the Respondent acquiesced to the Applicant's wishes, perhaps pending the outcome of this proceeding.

[83] Because they have agreed to a joint custody order, they are required to communicate, to cooperate and to make decisions jointly. I believe that they will try but I also believe it will be an effort for them both.

[84] The Applicant made it known since Paige was born (and perhaps before) that he has wanted equal parenting time with his daughter. He apparently has always assumed that equal parenting time would be in Paige's best interests. But he's not objective. He loves his daughter and he wants her as much as possible. He cannot understand why the Respondent is resistant to such an arrangement. The Respondent has tried to accommodate the Applicant as much as she can notwithstanding the fact that they were never a couple. She thinks she may have gone too far.

[85] What parenting arrangement then is in Paige's best interest? After considering all of the evidence, submissions, legislation and case law put before me I am unable to conclude that an equal shared parenting arrangement would be in Paige's best interest at this time in her life.

[86] While there are attractions to the Applicant's plan including that Paige would never be away from either parent for more than three days and nights in a row it also means that Paige is never in one home for more than three days or nights in a row. Some people would say that Paige would then have two homes. The opposing view is that she would have no real home at all.

[87] The fact remains, since her birth approximately two and a half years ago, Paige has lived primarily with her mother. The Applicant has been actively involved in her care and through the settlement conference process has had his parenting time increased. Is Paige coping well with the parenting arrangement? That appears to depend on who you ask.

[88] Given Paige's young age, it is certainly possible that she has had difficulty with the number of transitions from one parent to the other particularly when those transitions are in addition to her daily attendance at daycare during the week, her visits to extended family members and her recreational activities.

[89] The distance between the parties' respective residences presents a problem and to some degree so does the Applicant's work hours (which I appreciate are likely to change in the near future). But, the most significant difficulty is the nature of the relationship between the parties. I do not believe that it is such that equal joint and shared custody will function as it should.

[90] I am of the view that a further significant change in Paige's parenting plan would not be to her benefit or in her best interests. Like any child she needs stability and I believe that it is found by leaving her in the primary care of her mother with the Applicant having generous parenting time with perhaps fewer transitions than is now the case.

[91] The Applicant's desire to have Paige in his care an equal amount of time is understandable but from the evidence presented I believe to impose a shared parenting arrangement over the objections of the Respondent would in time have an adverse effect on their relationship, an adverse effect on Paige and may possibly lead to further litigation.

CONCLUSION

[92] Therefore, drawing from the suggested clauses provided by counsel, I order the following:

1. The Applicant and the Respondent are granted joint custody of their daughter, Paige.

2. The joint custody will be governed by the following terms (which according to counsel's written submissions were for the most part agreed upon);

a. Each parent will continue to have a full and active role in providing a sound moral, social, economic and educational environment for the child;

b. Both parents will exert their best efforts to work cooperatively in making future plans consistent with the child's best interests and to amicably resolve any disputes that arise;

c. The parents will consult on all substantial questions relating to the child, including but no limited to religious upbringing, education, significant changes in social environment and non-emergency healthcare, and neither parent will make a major developmental decision regarding the child without the consent or acquiescence of the other, except on an emergency basis;

d. Each parent specifically will not use his or her custodial rights to frustrate, deny or control the relationship between the other parent and the child;

e. Each parent will exert every effort to foster a feeling of affection between the child and the other parent; and

f. Neither parent will do anything which would estrange the child from the other, injure the child's opinion of either parent or family, or impair the natural development of the child's love and respect for either parent and family.

3. Both the Applicant and the Respondent will be entitled to attend all of the child's activities, and will be entitled to participate in medical appointments and in meetings scheduled by the daycare or school which relate to the child's care or education, for example, parent-teacher conferences. Where possible, the parents will attend such meetings and appointments together.

4. Each parent will have telephone access with the child at reasonable times when the child is in the care of the other parent. The same provisions apply regarding email and on-line communication with the child when age appropriate.

5. Neither parent may take the child outside of Nova Scotia on a vacation without providing the other with a travel itinerary and a telephone number where

the travelling parent can be reached when the child is in his or her care outside of Nova Scotia. In the event that either parent travels outside of Nova Scotia with the child, and requires a Consent Letter for the travel, the non-travelling parent will provide a Consent Letter to the travelling parent.

6. The parents will make reasonable efforts to share any information regarding the child, including information as to health, education, recreational activities and the like and may request and obtain information from third parties regarding the health, education, and general well being of the child, including, but not limited to, access to daycare, school and medical reports, and each parent has the right to obtain copies of all the child's medical, educational, and religious records.

7. The residence of the child will not be changed from the Halifax Regional Municipality without agreement of the parties, evidenced in writing, or an order of a court of competent jurisdiction. The child is habitually resident in Halifax, Province of Nova Scotia, Canada.

8. Each parent will have the right to authorize emergency medical care and treatment for the child.

9. Neither parent will discuss the provisions of this order or other adult issues with the child or in any circumstances where she may overhear a discussion with respect to same. Further, the child will not be involved, directly or indirectly, in the discussion or negotiation of such issues.

10. Paige will reside primarily with the Respondent.

11. Paige will be in the care of the Applicant in accordance with the following schedule which will repeat every two weeks and which will commence on the next week following the last weekend that Paige was in the care of the Respondent:

> **Week one**: from Monday at approximately 3:30 p.m. when the Applicant will pick Paige up from daycare or from school (when applicable) until Tuesday morning when Paige will be dropped off at daycare or at school (when applicable); and
>
> Friday at approximately 3:30 p.m. when the Applicant would pick Paige up from daycare or school (when applicable) until the following Sunday at

approximately 5:00 p.m. when she will be returned to the residence of the Respondent;

Week two: From Wednesday at approximately 3:30 p.m. when Paige will be picked up from daycare or school (when applicable) until the following Friday morning when Paige would be dropped off at daycare or school (when applicable).

12. During holidays and other special occasions referred to herein, the parenting time referred to above will be suspended although the "counting" of the weeks will continue and will recommence following the holiday or special event day referred to herein:

a. **Holiday Mondays** - When a statutory holiday otherwise referred to in this paragraph falls on a Monday following the weekend that Paige is in the care of the Applicant, Paige will remain in his care for that holiday but will be returned to the care of the Respondent no later than 5:00 p.m. on that Monday.

b. **Christmas** - In even numbered years the child will be in the care of the Applicant from December 23 at 9:30 a.m. to December 25 at 3:30 p.m. and in the care of the Respondent from December 25 at 3:30 p.m. to December 28 at 9:30 a.m.. This schedule will be reversed in odd numbered years. Once the child begins school the parents will equally share the child's Christmas break from school such that in even numbered years the child will be in the care of the Applicant for the first half of the Christmas school break to and including Christmas Day at 3:30 p.m. and in the care of the Respondent from Christmas Day at 3:30 p.m. until school resumes in January. This schedule will be reversed in odd numbered years.

c. **Easter** - If Easter falls on a weekend that the child would be in the care of the Applicant, the child will be in the care of the Respondent from 9:30 a.m. on Easter Sunday until 9:30 a.m. on the following Tuesday. If Easter falls on a weekend that the child would be in the care of the Respondent, the child will be in the care of the Applicant from 9:30 a.m. on Easter Sunday to 9:30 a.m. on the following Tuesday.

d. **March Break** - For the purpose of this paragraph the March break will be defined as commencing with the first Monday of the March break and ending with the last Friday of the March break. Once the child begins school, the child will spend the March break in odd numbered years in the care of the Respondent and in even numbered years the child will spend March Break in the care of the Applicant.

e. **Mother's Day** - If Mother's Day falls on a weekend when the child would otherwise be in the care of the Applicant, the Respondent will be entitled to have the child with her from 9:30 a.m. on Mother's Day until the child returns to daycare or school on Monday.

f. **Father's Day** - If Father's Day falls on a weekend when the child would otherwise be in the care of the Respondent, the Applicant will be entitled to have the child with him from 9:30 a.m. on Father's Day until the child returns to daycare or school on Monday.

g. **The child's birthday** - Each parent will be entitled to spend time with the child on her birthday.

h. **Summer vacation** - In 2012 each parent will be entitled to one full week of summer vacation with the child uninterrupted by the regular parenting schedule referred to above. Beginning in 2013 each of the parents will be entitled to two full weeks of summer vacation with the child uninterrupted by the regular parenting schedule referred to above, provided that the two weeks are not consecutive. In 2012 and each even numbered year thereafter the Respondent will advise the Applicant by May 15 of the week or weeks that she will have the child in her care during the summer vacation and the Applicant will advise the Respondent by June 1 of the week or weeks he will have the child in his care. In 2013 and each odd numbered year thereafter the Applicant will advise the Respondent by May 15 of the week or weeks he will have the child in his care and the Respondent will advise the Applicant by June 1 of the week or weeks that she will have the child in her care. In the scheduling of their summer vacation with the child both parents will be mindful of the regular parenting schedule referred to above and will ensure that the child is not out of the other parent's care for any more than seven consecutive days.

[93] With respect to child maintenance, the Respondent's income for child maintenance purposes is $64,000.00 per annum. He will therefore pay child maintenance to the Respondent in the sum of $541.00 per month commencing the 1st day of February, 2012 and continuing on the 1st day of each month thereafter until otherwise ordered.

[94] The Respondent also sought a contribution by the Applicant to her childcare expenses (day care) and also to the cost of her medical/dental insurance premiums which provide coverage for Paige. With respect to the latter, the Applicant also has coverage for Paige through his employment. I find that there is an advantage to the child in both parents having a plan because one would complement the other and, as counsel for the Applicant submitted, the Applicant's plan provides protection in the event that there is ever an interruption in the Respondent's coverage for any reason such as during a change of employment. Therefore each of them will be responsible for the cost of their own plan. Should either of them discontinue their plan for any reason it would be open to the Court to require a sharing of the cost of the remaining plan following a variation application.

[95] The Respondent's childcare costs come to $3,020.00 per year and her income for the purpose of calculating the sharing of special expenses comes to $24,894.00 per annum. After tax savings, the net cost of the day care is $1,442.00. The Applicant is responsible for $71.04%, or $85.00 per month. That too will be paid to the Respondent each month beginning February 1 bringing his total child maintenance obligation to $626.00 per month.

[96] I direct that counsel for the Respondent to prepare the order.

J.