

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Cooke v. Cooke, 2012 NSSC 73

**Date:** 20120201

**Docket:** 1206-006173

**Registry:** Sydney, Nova Scotia

**Between:**

**William Cooke**

Petitioner

v.

**Tracey Cooke**

Respondent

**Judge:** The Honourable Justice Theresa M. Forgeron

**Heard:** April 26, October 3, 5, 7, and December 2, 2011  
in Sydney, Nova Scotia

**Oral Decision:** February 1, 2012

**Written Decision:** February 16, 2012

**Counsel:** Darlene MacRury, for the applicant  
Candee McCarthy, for the respondent

**By the Court:**

[1] **INTRODUCTION**

[2] Glen and Tracey Cooke separated over four years ago. Despite the passage of time, their parental relationship is marked with high levels of distrust, hostility, and conflict. Not surprisingly, their son, nine year old Ryan, has been negatively affected. Ryan's life became particularly difficult in 2010. Ryan experienced serious emotional problems, and displayed oppositional and defiant behaviours at times. When the situation became critical, Ryan and his parents obtained professional help.

[3] Despite the professional intervention, the parties were unable to resolve parenting and child support issues. Mr. Cooke seeks joint and shared custody, based upon an alternating week schedule, and no child support. Ms. Cooke seeks a sole custody order, with specified access. She also seeks the table amount of child support, together with contribution for extraordinary section 7 expenses.

[4] **ISSUES**

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

- a) What impact does the separation agreement have on the determination of the parenting issue?
- b) What principles apply to the parenting determination?
- c) What custodial designation is in the best interests of Ryan?
- d) Should a primary care parent be designated?
- e) What parenting schedule is in the best interests of Ryan?
- f) What child support order, if any, should issue?

[6] **BACKGROUND**

[7] Following a long term common law relationship, Mr. and Ms. Cooke married on June 17, 2006. They separated in October 2007. Ryan was born in March 2002. After the parties separated, they, with the assistance of counsel, executed a separation agreement. The agreement divided their assets and debts, and also provided Ms. Cooke with sole custody, with specified access to Mr. Cooke. Mr. Cooke paid monthly child support of \$335 based upon an annual income of \$38,406. The separation agreement was registered as an order pursuant to the provisions of the *Maintenance and Custody Act* in October 2009.

[8] Although some conflicts began to emerge, the parenting and child support arrangements were followed. Ryan appeared happy and content. Changes, however, began to emerge.

[9] In July 2009, the plant, where Mr. Cooke worked, closed. Mr. Cooke was laid off and given a severance which lasted until December 2009. He then collected EI until March 2011, and also completed courses funded through the EI program.

[10] In addition, Mr. and Ms. Cooke both formed romantic relationships with other people. By the summer of 2010, Ms. Cooke and her friend were spending considerable time together, including overnight visits in her home. Mr. Cooke also began to spend considerable time with his friend, including overnight visits. Further, Mr. Cooke, and his new partner, were having a baby. The baby was born in late June 2011.

[11] Mr. Cooke filed an application to decrease child support because of the changes in his circumstances. The terms of a revised consent order were reached in September 2010, although the order did not issue until December 7, 2010. Child support was reduced to \$197 per month, based upon Mr. Cooke's income of \$23,300.

[12] Soon after the consent variation agreement was reached, Ryan began to spend more time with Mr. Cooke to the exclusion of Ms. Cooke. Ryan made accusations against Ms. Cooke of inappropriate parental conduct, and also threatened suicide. As a result of the allegations, the police and the Children's Aid Society conducted investigations. Their investigations did not lead to any further

involvement. There were no protection concerns, although clearly Ryan was experiencing emotional problems.

[13] Mr. Cooke filed an emergency application in the Supreme Court. This application was refused. An order for a parental capacity assessment was granted which was conducted by Dr. Landry, child psychologist. The assessment was completed in March 2011. Dr. Landry's recommendations included a shared parenting arrangement, and therapeutic support for Ryan, given his refusal to spend time with Ms. Cooke, as well psychotherapy for Mr. and Ms. Cooke.

[14] The trial was held on April 26; October 3, 5, 7; and December 2, 2011. The following witnesses testified during the trial: Ms. Eyking, the school's guidance counsellor; Ms. White, one of Ryan's teachers; Dr. Landry; Vivian Cooke, paternal grandmother; Margaret Rudderham, new partner of Mr. Cooke; Glenn Cooke, and Tracey Cooke.

[15] By the time the trial concluded, Ryan was spending an equal amount of time with both parties. Many of the emotional problems that he had experienced had resolved. The matter was adjourned for decision until today.

[16] **ANALYSIS**

[17] **What impact does the separation agreement play in the determination of the parenting issue?**

[18] The parties suggest that the court ought to apply variation principles to the parenting determination because the separation agreement vests Ms. Cooke with sole custody.

[19] I disagree. A material change is not required in these circumstances. There is no corollary relief order as to custody. Therefore, sec. 16 of the *Divorce Act* must be accessed to determine issues of parenting. The factors which I am obligated to consider are reviewed in secs. 16(8), (9), (10), which direct me to apply the best interests test, the maximum contact principle, and to examine past conduct, where it relates to the ability to parent.

[20] In **Jay v. Jay**, 2003 PESCAD 19, Webber, J.A., held that the chambers judge erred in stating that a material change in circumstances must be found when

conducting a sec. 16 analysis based on the existence of a separation agreement. Webber, J.A., states as follows at para. 4:

4 However, it was an error in law for the Chambers Judge to take the position that his jurisdiction was limited as a result of the terms of the separation agreement. Irrespective of the terms of any agreement between the parties, the court has the jurisdiction in a motion for corollary relief in connection with divorce proceedings to hear and deal with all issues of custody and child support. An agreement between the parties is only one factor to be taken into consideration when deciding upon the best interests of the child. While such an agreement provides strong evidence of what the parties accepted at the time as meeting the best interests of the child, it does not relieve the court of its responsibility under s. 16 of the Divorce Act to make an independent assessment of the best interests of the child. (See: Willick v. Willick, [1994] 3 S.C.R. 670).

[21] Therefore, it is not necessary for either party to lead evidence as to a material change in circumstance. The prior separation agreement is, but one factor, which I must consider when crafting a parenting order that reflects the best interests of Ryan. In the end, if the court determines that the provisions of the separation agreement do not mirror the best interests of Ryan, they will not be followed.

[22] **What principles apply to the parenting determination?**

[23] In making parenting decisions, I must ensure that Ryan's best interests are met. The best interests principle has been described as one with an inherent indeterminacy and elasticity: **MacGyver v. Richards**, 22 O.R. (3d) 481, paras. 27-29. The test is a fluid concept that encompasses all aspects of a child, including the child's physical, emotional, intellectual, and social well being. I am concerned not only with the day to day needs of Ryan, but also as to his ability to mature, develop, and grow into a confident, happy, and well adjusted young man. The Supreme Court of Canada, in **King v. Low** [1985] S.C.J. No. 7, directs the court to review the plans of rival claimants and choose the course which will best provide for the healthy development of the child. In **Foley v. Foley** 124 N.S.R. (2d) 198, Goodfellow, J. provided a series of factors for courts to consider and balance in determining the best interests of the child.

[24] Further, in making my decision, I must review the burden of proof and credibility principles. In **C.(R.) v. McDougall** 2008 SCC 53, Rothstein J. confirmed that there is only one standard of proof in civil cases - that is, proof on a balance of probabilities. In every civil case, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must not be considered in isolation, but must be based upon its totality. The evidence must always be clear, convincing, and cogent to satisfy the balance of probabilities' test.

[25] Credibility impacts upon burden of proof. In **Baker-Warren v. Denault** 2009 NSSC 59, this court reviewed the factors to be considered when making credibility determinations at paras. 18 to 20. I have applied this law.

[26] **What custodial designation is in the best interests of Ryan?**

[27] *Position of the Parties*

[28] Ms. Cooke seeks an order of sole custody for a number of reasons, including the following:

- a) The parties previously acknowledged that sole custody was appropriate. Clause 3.2 of the separation agreement provides Ms. Cooke with "sole care, custody, and control."
- b) The parties lack any ability to communicate effectively and appropriately in relation to Ryan. The hostility, distrust, and bitterness between the parties has increased since their separation.
- c) Ms. Cooke is the parent who traditionally made decisions about Ryan, and was in constant contact with educational, and medical professionals since Ryan was born. Mr. Cooke has played a secondary, and at times, a disinterested role.
- d) Ms. Cooke has greater insight into Ryan's difficulties and needs, and has proven that she can act maturely and

responsibly, especially in the face of the difficulties that occurred between the fall of 2010 until 2011.

- e) Ms. Cooke is the parent who is best able, and is best equipped, to make decisions about Ryan.

[29] Mr. Cooke disagrees with Ms. Cooke. He seeks a joint custody order for a number of reasons, including the following:

- a) He is concerned that a sole custody designation will be abused by Ms. Cooke, and will be treated as an invitation to interfere in his relationship with Ryan. Mr. Cooke states that access was problematic and difficult before September 2010. A joint custody order is needed to prevent this from reoccurring in the future.
- b) Dr. Landry, a child psychologist, who completed the parental custody assessment, suggests a shared parenting arrangement with a 50/50 split in parenting time. Although Dr. Landry does not mention joint custody, it is clear that equal decision making authority is warranted in a shared parenting arrangement.
- c) Although parenting arrangements proved problematic beginning in the fall of 2010, such problems have resolved. Ryan is finally happy. The parties have finally learned to communicate. A joint custody order will ensure this continues. Ryan will be the winner.
- d) Mr. Cooke was excluded from the decision making process by Ms. Cooke until the fall of 2010, when she had no other choice. Once Mr. Cooke was involved, Ryan's emotional health improved. Mr. Cooke wishes to continue his involvement in the future.

[30] Decision of the Court

[31] The court must decide on the custodial designation that will meet the unique needs of Ryan. The court has three options - sole custody, joint custody, or parallel parenting. I must now determine which option is in Ryan's best interests. The separation agreement is but one factor for me to consider.

[32] In **Gill v. Hurst**, 2010 NSCA 98, Hamilton J.A., dismissed an appeal where the trial judge made an award of sole custody. The Court of Appeal held that the trial judge made no reversible error in that she recognized that the starting point was to determine if joint custody was appropriate.

[33] Joint custody is usually not appropriate where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that the situation will change: **Roy v. Roy**, 2006 CarswellOnt 2898, (C.A.). This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith** (1997), 165 N.S.R. (2d) 245 (S.C.).

[34] In the past, many courts found that if joint custody was not viable, then the only solution was an order of sole custody. However, in recent years a third option has evolved, that is an order for parallel parenting. In **Baker-Warren v. Denault** 2009 NSSC 59, this court held that a parallel parenting regime is usually reserved for those few cases where neither sole custody, nor cooperative joint custody, will meet the best interests of the child. In **K(V.) v. S(T.)** 2011 ONSC 4305 (S.C.J.), Chappel J. reviews the factors to be balanced when considering a parallel parenting arrangement at para. 96, which states as follows:

96 A review of the case-law respecting parallel parenting suggests that the following factors are particularly relevant in determining whether a parallel parenting regime, rather than sole custody, is appropriate:

- a) The strength of the parties' ties to the child, and the general level of involvement of each parent in the child's parenting and life. In almost all cases where parallel parenting has been ordered, both parents have consistently played a significant role in the child's life on all levels.

b) The relative parenting abilities of each parent, and their capacity to make decisions that are in the child's best interests. Where one parent is clearly more competent, responsible and attentive than the other, this may support a sole custody arrangement. On the other hand, where there is extensive conflict between the parties, but both are equally competent and loving parents and are able at times to focus jointly on the best interests of the child, a parallel parenting regime may be ordered.

c) Evidence of alienation by one parent. If the alienating parent is otherwise loving, attentive, involved, competent and very important to the child, a parallel parenting arrangement may be considered appropriate as a means of safeguarding the other party's role in the child's life. On the other hand, if the level of alienation is so significant that a parallel parenting order will not be effective in achieving a balance of parental involvement and will be contrary to the child's best interests, a sole custody order may be more appropriate.

d) Where both parties have engaged in alienating behaviour, but the evidence indicates that one of them is more likely to foster an ongoing relationship between the child and the other parent, this finding may tip the scale in favour of a sole custody order.

e) The extent to which each parent is able to place the needs of the child above their own needs and interests. If one of the parties is unable to focus on the child's needs above their own, this may result in a sole custody order, even if that parent is very involved with the child and otherwise able to meet the child's day to day needs.

f) The existence of any form of abuse, including emotional abuse or undermining behaviour, which could impede the objective of achieving a balance of roles and influence through parallel parenting.

[35] An order for joint custody in its truest form is not in Ryan's best interests. The parental relationship is marred by abundant animosity and distrust. Parental conflict almost destroyed Ryan. Mr. and Ms. Cooke's ability to engage in healthy dialogue about parenting issues is limited. Therefore, the joint custody order sought by Mr. Cooke cannot be granted.

[36] I also reject Ms. Cooke's application for sole custody. In the circumstances of this case, I find that it is in Ryan's best interests for a parallel parenting regime to issue. I draw this conclusion based upon the following factual findings:

- a) Both Mr. and Ms. Cooke have strong ties to Ryan. Each was generally involved in Ryan's life, although Mr. Cooke's involvement never reached the level of Ms. Cooke's involvement. Ms. Cooke was the primary care parent. Mr. Cooke was an active and involved co-parent. Mr. Cooke resumed the active and involved co-parent role after separation, beginning in the fall of 2010. Ryan has benefited from his involvement. Mr. Cooke will continue to play an important and active parenting role in Ryan's life, if he is permitted to do so. Likewise, Ms. Cooke has, and will continue to play an active parenting role.
- b) Both Mr. and Ms. Cooke present with parenting strengths and weaknesses. These strengths and weaknesses complement each other, and when the parties are not polarized, or engaged in heated conflict, their cumulative strengths outweigh their cumulative weaknesses. Both parents are competent and loving parents who can meet Ryan's day to day needs. Mr. Cooke was a more effective disciplinarian than Ms. Cooke. Ms. Cooke has learned and implemented new strategies that have proven effective. Ms. Cooke is better organized and more structured, while Mr. Cooke is more relaxed. Ms. Cooke appreciates the need for organized activities, while Mr. Cooke emphasises unstructured family time. Ryan can and will benefit from both forms of parenting.
- c) Both parties have attempted to limit Ryan's time with the other. Mr. Cooke took advantage of a situation that developed in the fall of 2010. Mr. Cooke manipulated the circumstances, to some extent, to ensure that Ryan did not return home to his mother. Mr. Cooke allowed video games to be played that had been banned. He

indirectly encouraged Ryan's defiance. Mr. Cooke was blinded by the conflict. Mr. Cooke's behaviour during this period was most disturbing, and had he not corrected this behaviour, the court would not be in a position to contemplate a parallel parenting arrangement.

- d) For her part, Ms. Cooke also fails to fully appreciate the importance of the relationship between Mr. Cooke and Ryan. Ms. Cooke harbours a great deal of resentment towards Mr. Cooke. She blames Mr. Cooke for Ryan's actions in the fall of 2010. She failed, and to some extent continues to fail, to recognize the need that Ryan has to be with his father. Dr. Landry noted that most 7 to 12 year old males naturally push away from their mother to identify with their father. Dr. Landry said that boys of this age tend to refuse maternal affection and express an aversion to girls. Boys are developing a new sense of power and aggressiveness. They look to their fathers as role models. Rather than accepting that some of Ryan's conduct resulted from this developmental stage, Ms. Cooke blamed Mr. Cooke. Ms. Cooke wants to continue this trend by reverting to the access times stated in the separation agreement. These times are not in Ryan's best interests.
- e) Both parties lack the insight that is necessary in a custodial parent. Both, at times, become so mired down in their own conflict, that despite their good intentions, place Ryan's needs in a secondary position. Both have taken steps, through professional counselling, to stop this negative trend. I am hopeful that with more counselling, the parties will improve their communication skills and will engage in critical, self-analysis, so that Ryan's needs will take priority.

[37] In the circumstances, neither party is equipped to act as a sole custodial parent. Mr. and Ms. Cooke each have different backgrounds, skills and abilities. Ryan requires the experience and wisdom of his two parents. The best interests of Ryan dictate that a parallel parenting regime be instituted based upon the following provisions:

1. ***Parallel Parenting Regime:***

1.1 William Glenn Cooke and Tracey Elizabeth Cooke will share custody of Ryan Avery Cooke, born \*, in a parallel parenting regime.

2. ***Decision-Making Authority:***

2.1 **Routine Decisions** - Each party will have routine, day-to-day decision making authority and control when Ryan is in his/her physical care, including any childcare decisions. Each party will notify the other by email of the following routine decisions made while Ryan is in his/her care: particulars of minor illnesses and any medication that has been administered; particulars of assignments for homework, projects, and tests; particulars of any disciplinary measures; and particulars relating to significant social welfare matters.

2.2 **Emergency Decisions** - In the event of a medical emergency, the party having physical care of Ryan will be entitled to make decisions which are necessary to alleviate the emergency, and will notify the other party as soon as possible and practical as to the nature of the emergency, and as to the nature of the emergency treatment.

2.3 **Educational Decisions**

a) **Major Decisions** - Tracey Cooke will determine major educational decisions on Ryan's behalf, including the choice of school and educational program.

b) **Meetings, Concerts, and Programs** - Both parties are entitled to attend parent teacher meetings and major school events such as concerts and programs. In the event, tickets are limited to such performances, each parent has priority for tickets. The use of any additional tickets will be determined by the parent who has residential care of Ryan on the day the special event occurs.

c) **Schedule will Determine Parental Contact with School** - The parent who is providing residential care for Ryan will be responsible for attending to Ryan should he become ill at school, or when the school requires contact for any other reason. The school will be provided with the schedule and contact information for each party for such purposes.

d) **Educational Assistance** - Each party is responsible for assisting with homework and any special needs training related to Ryan while Ryan is in his/her residential care. Each party will cooperate with all professionals to learn strategies to assist Ryan with any special learning requirements he may have.

## 2.4 **Medical and Dental Treatment**

a) **Health Card and Insurance Forms** - Tracey Cooke will provide Glenn Cooke with the health card number for Ryan and particulars/forms for any health plan which covers Ryan's medical expenses. In the event, Glenn Cooke obtains a health plan, he will provide Tracey Cooke with particulars/forms for any health plan which covers Ryan's medical expenses.

b) **Family Physician and Dentist** - The parties will continue to have Ryan attend medical and dental appointments with his current doctors and dentist. In the event, a new dentist or family physician is required in the future, the parties will reach agreement on the appropriate doctor or dentist. Each party will be responsible for scheduling and taking Ryan to his non-emergency check ups at times that Ryan is scheduled to be with him/her. Emergency treatment will be determined by the parent who is exercising residential care.

c) **Information Sharing** - The parties will keep each other informed of all medical and dental decisions that are made and any, and all treatment in a timely and regular fashion through email communication.

## 3. ***Extracurricular Activities***

3.1 Each party may enroll Ryan in extracurricular programs that are scheduled during Ryan's residential time with each of them. If a tournament, or special event related to that program, is scheduled during the time that Ryan is in the residential care of the other party, the party who has physical care of Ryan will have first option of taking Ryan to the activity. If the residential parent does not wish to do so, he/she will notify the other party, who will then be entitled to transport Ryan.

## 4. ***Access To Professional Records and Information***

4.1 Each party has the right to communicate with all professionals involved with Ryan, and each has the right to obtain information and documentation respecting

Ryan from all medical professionals, educators, and all social welfare professionals without the prior consent of the other party.

## **5. *Communication Between the Parties***

5.1 Matters relating to Ryan's health, education, religion, or general welfare will be the subject of communication between the parties. All communication will be respectful and child focused and will be facilitated by the following:

a) **Email Communication** - The parties will communicate through email exchanges, unless there is an emergency. All email communication will be compellable for court purposes. Each party will provide the other party with an up to date email address where he/she can be reached, and changes thereto on a timely basis. Each party will maintain internet access and a current email address so communication can be facilitated. Each party will review his/her email once a day, unless health or other commitments make daily access impossible.

b) **Telephone and Residential Address** - The parties will advise each other of his/her residential addresses, telephone numbers, and changes thereto on a timely basis.

## **6. *Therapeutic Intervention***

6.1 The parties will cooperate and participate in individual therapeutic counseling, with a qualified professional, to learn the following information and skills:

- a) To acquire information about the impact that parental conflict has on children.
- b) To acquire skills on how to isolate children from parental conflict.
- c) To acquire skills to have a more balanced and realistic perspective of his/her parenting weaknesses and strengths with an aim to strengthen parental ability.

d) To acquire skills that will aid in effective, child-focused communication with the other parent.

e) To acquire information about stages of development in children and youth so that each party is able to meet Ryan's ever changing needs, including the need for appropriate and consistent boundary setting and discipline in both households.

[38] **Should a primary care parent be designated?**

[39] *Position of the Parties*

[40] Ms. Cooke states that she should be Ryan's primary care parent, while Mr. Cooke states that Ryan should spend an equal amount of time with both parents. In order to resolve this question, in Ryan's best interests, I must examine the various factors that compose the best interests test in the context of the parenting plans that each party presented. The **Foley** factors will form the framework of this discussion.

[41] *Physical Environment*

[42] Both parties have suitable home environments that meet Ryan's basic needs. The homes are clean, safe, and well maintained. Ryan has his own bedroom in each home. Ryan is comfortable and happy in each of his homes. Both homes are situated in an appropriate location. Ryan is able to access his school, friends, and family from both locations. Neither home is superior to the other.

[43] *Discipline*

[44] Mr. Cooke was the disciplinarian before the parties' separation. Dr. Landry noted that Mr. Cooke, for the most part, uses effective and appropriate discipline. Ryan listens to his father. I am satisfied that Mr. Cooke provides Ryan with rules and limits that are age appropriate, and will likely do so in the future.

[45] Ms. Cooke, on the other hand, found discipline to be somewhat of a challenge. Before separation, she relegated this parenting task to Mr. Cooke. After separation, Ms. Cooke experienced great difficulty with limit setting and following through with consequences. Because Ms. Cooke was not consistent in

these areas, Ryan often did not follow Ms. Cooke's reasonable instructions. As a result, Ms. Cooke would yell and scream in anger. Yelling usually does not stop negative behaviours in children. Ryan was no exception.

[46] The seriousness of this parenting deficit became apparent in the fall of 2010 when Ryan refused to return home. Ms. Cooke became increasingly more exasperated, but was unable to employ effective parenting techniques to change Ryan's behaviour. As a result, Ryan presented with weeks of hostile, oppositional, and defiant behaviours, usually directed at his mother.

[47] Ms. Cooke sought professional help. She learned effective disciplinary techniques. Ms. Cooke finally took charge in a competent fashion. She reassured Ryan that she loved him, but set out ground rules for daily living. Ryan would be allowed to return to her home when he changed his negative attitude and conduct. Although this was a difficult decision, it was the correct one in the circumstances. Ryan's destructive behaviours soon resolved because Ms. Cooke employed consistent and appropriate disciplinary techniques. I find, on a balance of probabilities, that Ms. Cooke will continue to enforce appropriate rules and limits in Ryan's best interests. I am hopeful that the days of ineffective yelling are long past.

[48] I, therefore, find that both parents understand the importance of limit setting and each party is now capable of enforcing appropriate rules and boundaries.

[49] *Role Model and Emotional Availability*

[50] Both parties present as good role models for several reasons. Both love Ryan a great deal, and both place emphasis on the importance of family. Both are employed and each has a positive work ethic. Ms. Cooke has a greater appreciation for the need of a solid education, while Mr. Cooke spends more time participating in activities that Ryan enjoys, such as fishing and tinkering with cars in the garage.

[51] Neither party is the perfect parent, nor the perfect adult. Their flaws and weaknesses were the subject of much scrutiny. From the court's perspective, the most significant flaw concerns the inability of each party to assume responsibility for their own actions. Rather, each readily assigns blame to the other. Their refusal to accept responsibility, resulted in Ryan experiencing significant

emotional problems. Ryan's problems would have resolved much more readily if the parties had better insight. Anger, bitterness, and distrust clouded each party's judgement.

[52] This anger, bitterness, and distrust made the parties blind to the emotional needs of Ryan beginning in and around the fall of 2010. At that time, Ryan began to become defiant. He was expressing anger towards his mother. Rather than examining how their own conduct might be contributing to Ryan's adolescent behaviour, each party chose to blame the other.

[53] Ms. Cooke thought Mr. Cooke was manipulating Ryan to have joint custody so that he would not have to pay maintenance. In contrast, Mr. Cooke blamed Ms. Cooke for being a bad parent who was trying to alienate his son. Because their focus was on each other, and not on Ryan, neither party was able to entertain the possibility that Ryan's conduct was arising because of the substantial changes that were occurring in his life, including the following:

- a) Ryan was entering a new phase of his development. He required more time to bond with his father, and was distancing himself from his mother.
- b) Ryan was now having to share his mother's attention with another man. Ryan had always had his mother's undivided attention. Ryan did not know how to adapt to his feelings of jealousy, especially at a time when he was entering the new adolescent phase of development.
- c) Ryan wanted more and exclusive time with his father. Instead, his father was not only involved with another woman, but she was having a baby. Ryan was troubled; he was concerned about the impact that a new sibling would have on his relationship with his father.
- d) His parents were engaged in an emotional battle. Police and child protection authorities were called. Ryan was interviewed. Ryan was getting a great deal of attention from all adults because of his negative conduct. Ryan was placed in a decision making role. This was destructive to Ryan because he lacked the maturity and insight necessary to make healthy decisions.

[54] Since the fall of 2010, both parties have engaged in therapeutic counselling. There still remains room for improvement. On a positive note, both parties are beginning to grasp the connection between their conflict and Ryan's emotional well-being. I am hopeful that they will each continue to make strides in this area. The court order details the type of therapy that is required to ensure that Ryan's best interests are met and will continue to be maintained.

[55] Ryan's Wishes

[56] The court was advised of Ryan's stated wishes by Dr. Landry, Ms. Eyking, and the parties. Dr. Landry met with Ryan as part of the assessment process. Ryan also met with Ms. Eyking, the school counsellor, on many occasions. By his words and actions, I am able to conclude that Ryan wishes to spend more time with his father. For several months, Ryan even refused to visit his mother.

[57] Dr. Landry stated that Ryan clearly identifies with Mr. Cooke, which is to be expected for boys of his age group. Ryan also discussed his concerns with Ms. Eyking. Ryan's statements to the school counsellor represent his feelings, as viewed from his perspective, a perspective that was heavily influenced by exposure to parental turmoil, life changes, and uncertainty.

[58] Ryan's wishes are not determinative of the parenting issue. Ryan is only nine years old. He is not mature. He was also deeply enmeshed in the parental conflict. Ryan's stated wishes do not necessarily reflect what is best for him. I assign little weight to Ryan's wishes in the circumstances.

[59] Religious, Spiritual & Moral Development

[60] Very little evidence was provided on this topic, although it appears that Ms. Cooke has taken charge of Ryan's religious upbringing. Mr. Cooke does not appear to be opposed to this decision.

[61] In addition to formal religious training, Ryan will learn moral lessons from the example of his parents. Ms. Cooke is concerned that Ryan will learn negative moral behaviour from Mr. Cooke, including not disclosing income to Revenue Canada and engaging in domestic violence with his current partner.

[62] Ms. Cooke did not present the clear, convincing, and cogent evidence that is required to prove such allegations. I am, however, somewhat sceptical of Mr. Cooke's excuses and explanations concerning the police presence. Overall, the parties' plans on this issue were not significantly different.

[63] Assistance of Experts

[64] Dr. Landry completed the parental capacity assessment. He was thorough and professional. His assessment provides helpful background and clinical detail about the parties, the nature of the conflict, and their ability to meet the unique needs of Ryan. His opinion, although exceedingly helpful, is not determinative of the issue before me. The court can never delegate its decision making role to another professional. Nonetheless, Dr. Landry's assessment is supportive of a shared parenting regime.

[65] Time, Stability, Structure & Routine

[66] Both parties are employed. Each states that he/she is committed and available to care for Ryan when not employed. I find, however, that Ms. Cooke's plan is superior to Mr. Cooke's plan as it relates to stability, structure and routine. Ms. Cooke ensures that Ryan follows a regular schedule and routine, although there is room for flexibility.

[67] Mr. Cooke, on the other hand, does not appear to understand the need for more consistency, structure, and routine. When living with Mr. Cooke, Ryan will overnight in his father's home, in his grandmother's home, and also in Ms. Rudderham's home, who lives in a different community. Although, it is not uncommon for children to have sleep overs, especially at a loving grandparent's home, I am nonetheless concerned about their frequency when Ryan has his week with Mr. Cooke. These frequent sleep overs create too many transitions.

[68] Educational Development

[69] Both parties participate in Ryan's education. Prior to 2010, Ms. Cooke was more involved with Ryan's education than was Mr. Cooke. Since the fall of 2010, Mr. Cooke has been as involved with Ryan's education as Ms. Cooke. School officials commented on the positive commitment both parents have made to Ryan's

educational needs. I find that such continued involvement is in Ryan's best interests.

[70] *Cultural & Character Development*

[71] Both parties share similar backgrounds and have exposed Ryan to cultural and family activities typical of the area. Ryan appears to enjoy these.

[72] In addition, Ms. Cooke arranged for Ryan's participation in organized sporting activities. These are not fully supported by Mr. Cooke. Because of the alternating week about schedule, Ryan does not participate in many ongoing, organized activities.

[73] Mr. Cooke tends to favour less organized activities, such as fishing and hanging out in the garage where cars and other equipment are repaired. Ryan enjoys this bonding time with his father.

[74] I find that Ryan benefits from both organized activities, and the ad hoc bonding moments that he shares with his father. The parenting schedule, however, must be altered in such a way that Ryan will have the opportunity to participate in organized activities on a weekly basis. At present, Mr. Cooke does not take Ryan to the activities during Ryan's time with him.

[75] *Financial Contribution*

[76] Both parties have the financial resources and employment income to adequately meet Ryan's needs.

[77] *Extended Family Support*

[78] Both parties have support from friends and family. The involvement of third parties has usually been helpful, not harmful. Ryan is especially close to his paternal grandmother. She provided child care for years prior to, and after, the separation. This relationship is a positive one.

[79] The court does, however, have one concern in this area. Mr. Cooke's partner, Ms. Rudderham, has acted in a divisive fashion at times. She encourages Mr. Cooke to react impulsively and negatively. For example, Mr. Cooke felt that

Ryan wasn't telling the truth about Ms. Cooke not reviewing homework. Yet, Ms. Rudderham encouraged a different response. Ms. Rudderham even took it upon herself to contact the school about Ms. Cooke's alleged failure. Ms. Rudderham's actions were not helpful, and represent regressive steps at a time when the family dynamic had improved.

[80] Mr. Cooke must be diligent in the future when Ms. Rudderham encourages a reactive response that will increase the polarization between the parties. The parenting of Ryan is best left to Ryan's parents, and not to a partner who fosters impulsive and negative reactions.

[81] Maximum Contact Principle

[82] Ryan needs to maximize his time with both parents, provided the parental conflict is minimized. Ms. Cooke's parenting proposal fails to recognize the maximum contact principle. Her proposed access schedule is unduly restrictive. Nonetheless, I am satisfied that Ms. Cooke will respect and follow the parenting provisions of a court order.

[83] Long Range Parenting Plan

[84] Both parties share similar dreams for Ryan. They each want him to be happy, loved, and fulfilled. They each have the parental capacity to ensure this occurs if they stop nursing their anger, bitterness, and hostility, and instead, direct their attention to Ryan.

[85] Summary of the Primary Care Parent Issue

[86] I have reviewed the provisions of sec. 16 of the *Divorce Act*, the case law, the custody provisions of the separation agreement, and the evidence of the various witnesses, together with the submissions of counsel. I have determined that it is in Ryan's best interest to have Ms. Cooke designated as the primary care parent, subject to Ryan having liberal, specified, parenting time with Mr. Cooke. It is not in Ryan's best interests to continue with the alternating, weekly schedule. In particular, I am concerned about Mr. Cooke's lack of stability and routine; Ms. Rudderham's over involvement; and Mr. Cooke's failure to support organized activities for Ryan. For these reasons, I have determined that the following parenting schedule is in Ryan's best interests:

## 1. ***Parallel Parenting Regime***

1.1 Glenn Cooke and Tracey Cooke will have parenting time with Ryan Avery Cooke, born \*, according to the terms set out in the following parallel parenting regime.

## 2. ***Schedule***

2.1 **Regular Schedule** - Ryan will be in the physical care of Tracey Cooke every Saturday at 8:00 p.m. until Thursday at 9:00 a.m. Ryan will be in the physical care of Glenn Cooke from 9:00 a.m. every Thursday until Saturday at 8:00 p.m.

2.2 **Special Occasions and Holidays** - The regular schedule will be suspended for special occasions and holidays, and the following parenting schedule will be followed:

a) **Labour Day Weekend** - Ryan will spend every Labour Day weekend with Tracey Cooke commencing Friday at 5:00 p.m. until the conclusion of the Labour Day weekend, at which time the parties will revert back to the regular schedule.

b) **Thanksgiving** - Ryan will spend every Thanksgiving weekend with Glenn Cooke until Monday at 5:00 p.m., at which time the parties will revert back to the regular schedule.

c) **Halloween** - Ryan will spend Halloween with the parent in whose care he is regularly scheduled to be.

d) **Christmas** - Christmas is deemed to cover the period from 2:00 p.m. on December 23rd until 2:00 p.m. on January 3rd. During the *odd numbered years*, Ryan will be in care of Tracey Cooke from 2:00 p.m. on December 23rd until 2:00 p.m. on December 25th; and from 2:00 p.m. on December 28th until 2:00 p.m. on December 31st. During the *odd numbered years*, Ryan will be in the care of Glenn Cooke from 2:00 p.m. on December 25th until 2:00 p.m. on December 28th; and from 2:00 p.m. on December 31st until 2:00 p.m. on January

3rd, at which time the parties will revert back to the regular schedule. During the *even numbered years*, Ryan will be in the care of Glenn Cooke from 2:00 p.m. on December 23rd until 2:00 p.m. on December 25th; and from 2:00 p.m. on December 28th until 2:00 p.m. on December 31st. During the *even numbered years*, Ryan will be in the care of Tracey Cooke from 2:00 p.m. on December 25th until 2:00 p.m. on December 28th; and from 2:00 p.m. on December 31st until 2:00 on January 3rd, at which time the parties will revert back to the regular schedule.

e) **Spring Break** - Spring break is deemed to cover a nine day period from 9:00 a.m. on Friday of the last day of school until 9:00 a.m. on Sunday before school recommences. Ryan will be with Glenn Cooke during the even numbered years. Ryan will be with Tracey Cooke during the odd numbered years. The parties will revert back to the regular schedule after the conclusion of the Spring break holiday.

f) **Easter** - Easter is deemed to cover the period from after school on Holy Thursday until Easter Monday at 2:00 p.m. Ryan will be in the care of Tracey Cooke during Easter of the even numbered years. Ryan will be in the care of Glenn Cooke during Easter of the odd numbered years, at which time the parties will revert back to the regular schedule.

g) **Long May Weekend** - The long May weekend is deemed to cover the period from 2:00 p.m. on the Friday before the long May weekend until Monday at 2:00 p.m. Ryan will be in the care of Glenn Cooke during the long May weekend of the even numbered years, and with Tracey Cooke during the long May weekend of the odd numbered years.

h) **Summer Vacation** - Each party will have Ryan for three weeks during the summer school vacation, which may be consecutive or nonconsecutive. At all other times, the regular schedule will be followed. Glenn Cooke will provide Tracey Cooke with notice of the weeks he intends to take for summer vacation no later than May 1st of each odd numbered year. Tracey Cooke will provide Glenn Cooke with notice of the weeks she intends to take by May 15th of each odd

numbered year. Tracey Cooke will provide Glenn Cooke with notice of the weeks she intends to take for summer vacation no later than May 1st of each even numbered year. Glenn Cooke will provide Tracey Cooke with notice of the weeks he intends to take by May 15th of each even numbered year. At all other times, the regular schedule will be followed.

i) **Father's Day** - Ryan will spend Father's Day with Glenn Cooke from 10:00 a.m. until 5:00 p.m.

j) **Telephone contact** - Each party will have reasonable telephone access to Ryan when he is in the care of the other parent.

k) **Ad Hoc Special Family Events** - The parties will use their best efforts to accommodate any special family reunions, weddings, or events, which are scheduled at a time when Ryan is in the care of the other party. Written notice will be provided, well in advance of the scheduled event, to determine if the regular schedule can be altered to permit Ryan's attendance at the special function. The parties will be as flexible as possible in such circumstances, however, no change in the schedule will occur without the express and written authorization of the party in whose care Ryan is scheduled to be at the time of the special family function. If accommodation cannot be made, the party refusing must provide the other party with written reasons for the refusal. Make up time will be provided to the party who agrees to rearrange the schedule as that party requests.

### 3. *Make Up Parenting Time Due to Illness*

3.1 On occasion when Ryan is too ill to be moved between households, make up time will be supplied to the other party at times to be decided by the parent who lost the parenting time with Ryan. The parent who is scheduled to have Ryan will make the determination of whether Ryan is too ill to be moved.

### 4. *Travel*

4.1 Both parties will notify the other of travel plans with Ryan. Notice will include dates of travel, location, address, and telephone numbers where Ryan can

be reached, and any applicable flight details. Both parties will accommodate any requirements for passport documentation to allow Ryan to vacation with the other parent outside Canada. This will include signing any letter that is required for travel with children.

[87] **What child support order, if any, should issue?**

[88] Mr. Cooke's income changed dramatically since the separation agreement was signed. The 2010 consent order on maintenance reflects this reality.

[89] In 2010, Mr. Cooke earned \$22,350 from Employment Insurance and other benefits. Since May 2011, Mr. Cooke has been employed. Over a 19 week period, Mr. Cooke grossed \$11,123, which prorated over the year, equals \$30,442. Maintenance is set at \$256 per month commencing February 2012. It will be payable in two equal monthly installments on the 1st and 15<sup>th</sup> of each month. The usual disclosure requirements are also mandated.

[90] Ms. Cooke also seeks s. 7 expenses. These expenses relate to child care, health expenses, and expenses for extracurricular activities. The separation agreement dated April 2008, confirmed an equal sharing of "agreed upon" extraordinary expenses as stated in clause 3.5. Mr. Cooke disputes the payment of any additional sec. 7 expenses.

[91] This court reviewed the law concerning sec. 7 expenses in **MacDonald v. Pink** [2011] N.S.J. No. 618, at paras. 55 - 58. I have applied this law in my decision. I have determined that sec. 7 expenses will not be paid in the circumstances of this case for the following reasons:

- a) The court was provided with little detail as to Ms. Cooke's financial circumstances. The court, therefore, lacks the clear, convincing, and cogent evidence that is required to discharge the burden of proof in relation to sec. 7 expenses.
- b) Although a shared parenting arrangement has not been achieved, Ryan is nonetheless spending a significant quantity of time with Mr. Cooke. When Ryan is with Mr. Cooke, Mr. Cooke is responsible for all of Ryan's needs.

- c) Ms. Cooke earns a greater salary than does Mr. Cooke. This situation may change, depending upon the government's final decision on the closure of Service Canada in the local area. Based upon the evidence before me, Ms. Cooke's income is such that the table amount of child support will be sufficient to meet the needs of Ryan in the unique circumstances of this case.
- d) Ms. Cooke suggested that Mr. Cooke earned additional income, although she did not formally pursue an imputation of income argument pursuant to sec. 19 of the *Child Support Guidelines*. The evidence adduced, falls well below the threshold that is required to impute income to Mr. Cooke, and in such circumstances, it is not appropriate for the court to consider the possibility of additional income being available to Mr. Cooke.
- e) The receipts produced show that the claimed sec. 7 expenses are not that extensive, especially in light of the available income tax deductions and credits.

[92] If the parties circumstances change, or the quantum, or type of sec. 7 expenses change, an application to vary, supported by appropriate documentation can be filed.

[93] **RELIEF SOUGHT**

[94] The following relief is hereby granted:

- a) A divorce.
- b) A division of assets and debts as stated in the separation agreement dated April 2008.
- c) A parallel parenting plan according to the terms and provisions outlined.
- d) An order requiring Mr. Cooke to pay child support in the amount of \$256 per month effective February 2012.

- e) An order changing the surname of Ms. Cooke to her maiden name.

[95] If either party wishes to be heard on the issue of costs, they are to provide written submissions to the court no later than February 17, with responses to be provided by February 24.

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Forgeron, J.