SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Smith v. Cross, 2012 NSSC 423

Date: 20121206
Docket: SFHMCA068120
Registry: Halifax

Between:

Tanya Cross

Applicant

v.

Annette Smith and Bruce Manders

Respondents

Judge: The Honourable Justice Moira C. Legere Sers

Heard: October 18, 2012 in Halifax, Nova Scotia

Counsel: Colin Campbell, counsel for Tanya Cross
Mark Bailey, counsel for Annette Smith
Bruce Manders, Not Present

By the Court:

[1] On April 12, 2012 Tanya Cross, the biological mother of two children Kaylea and Keira, filed notice of her application to vary an order of the court dated January 21, 2010.

[2] The order in question between the parties Annette Smith, Tanya Cross and Bruce Manders, states as follows:

> The Applicant, Annette Smith, shall primary care of the children, Kaylea Angel Cross, born December 20, 2004 and Keira Kaylynn Cross, born March 20, 2008.
>
> The Respondent, Tanya L. Cross, shall have access with the children, Kaylea Angel Cross and Keira Kaylynn Cross, as arranged by agreement between Annette Smith and Tanya L. Cross.
>
> Annette Smith and Tanya L. Cross shall notify the Minister of Community Services of any changes in the custody or access regime.

[3] The biological mother wishes to have the children returned to her care and wishes an order of access for Ms. Smith.

[4] At the time of the January 2010 court order Ms. Smith, the current custodial parent, was self-represented. The respondent mother was represented by counsel. Mr. Manders was unrepresented and did not appear.

[5] In this application both Ms. Cross and Ms. Smith are represented by counsel. Mr. Manders has not participated in these proceedings.

[6] The Minister of Community Services has been notified of this application and has chosen to not appear or make representation.

Facts/History

[7] Kaylae was born December 20, 2004 and will be eight years old on December 2012. Keira was born on March 20, 2008 and is currently four years old.

[8] The oldest child has been in the care of Ms. Smith since she was five to six months old and the youngest child since birth. The children have remained in the care of Ms. Smith since the order dated January 2010 up to and including the date of the hearing of October 18, 2012.

[9] Ms. Cross is currently 31 years old. Ms. Smith is currently 50 years old.

Facts

[10] Ms. Smith was in a common-law relationship with Ms. Cross' cousin, Mr. Gilbert.

[11] Ms. Cross first met Ms Smith in May of 2005 at a party at the home of a relative of Mr. Gilbert. Kaylae was with her mother attending this party.

[12] At this party discussions ensued between Ms. Smith and Ms. Cross. As a result of those discussions, Kaylae went home to stay with Ms. Smith on that very day.

[13] Kaylae was *approximately* five months old, when she first met with and began to stay with Ms. Smith, intermittently at first and gradually for extended periods of time until Ms. Smith took over her total care.

[14] Ms. Cross confirms she allowed Ms. Smith to take her daughter home with her because she was comfortable with the fact that Ms. Smith was married to her uncle.

[15] Kaylae stayed with Ms. Smith for a few weeks before Ms. Cross asked that she be returned.

[16] In March 2008 Ms. Smith picked up Ms. Cross when she was discharged from the hospital after the (second) youngest child was born. Ms. Smith recalls that approximately one week later the youngest child Keira came to stay with her on a full-time basis.

[17] In September 2009 the mother signed over custody of her two children to Ms. Smith (Ms. Cross' Affidavit March 30, 2012, paragraph 1).

[18] The legal rights to have the children in the primary care of Ms. Smith was confirmed by court order on January 21, 2010, when Kaylae was six years old.

[19] Ms. Smith has since separated from Mr. Gilbert and retained custody of the children.

[20] Ms. Cross also had two other children whom she left with Ms. Smith for extended periods of time.

[21] The Minister of Community Services was involved with Ms. Cross at the time this arrangement was formally confirmed by court order.

[22] At the time, the Minister of Community Services was investigating Ms. Cross with respect to her ability to parent her children.

[23] Ms. Smith was advised by an agent of Community Services that the girls would have to be placed in protective care if Ms. Smith did not step forward and provide them with primary care and residence.

[24] Ms. Smith has continued to do that since that period of time.

[25] Ms. Cross acknowledges that at the time she agreed to her children staying with Ms. Smith she was at a low point in her life. In her words, "I had to take a breath and get myself together. My life for the five years prior to this time was in constant turmoil. Kaylae had been born premature."

[26] Ms. Cross acknowledges that, at the time that Community Services was involved, if the children did not go with Ms. Smith in all likelihood she would have lost her children to a permanent care order. She advised, "I was being investigated by the Department of Community Services because of my addiction problems as well as the abusive relationship I was in at the time with Bruce Manders."

[27] In describing her difficulties that resulted in placing the child with Ms. Smith, she said as follows in paragraph 8 of her Response Affidavit sworn September 20, 2012:

> . . . When Keira was young I suffered from 2 broken legs (two separate times)a tubal-ligation, followed by a hysterectomy, as well as a hospitalization because of a throat abscess. Unfortunately I chose to turn to drugs and alcohol for relief from reality, and my children as well as myself continue to pay for those choices.

[28] She indicates in her affidavit that it was her belief it would take her up to three or four years to complete all of the recommended therapy.

[29] Ms. Smith also had an older son with a brain injury and an older daughter who had cancer. After her daughter finished her cancer treatments, Ms. Cross reconciled with Kaylae and Keira's father. It was, she described, a very "unhealthy abusive relationship". At the time she was pregnant with Keira.

[30] After Keira's birth, Ms. Cross has several medical problems to deal with, including tubal ligation, hysterectomy, and two broken legs.

[31] She confirms, "I felt my world was coming down around me and I began to abuse drugs and alcohol."

[32] Keira has lived with Ms. Smith almost exclusively since her birth in 2008. Kaylae is currently enrolled in school and is an "A" student. Kaylae also attends school and enjoys going to school. Kaylae participates in cheerleading.

[33] Ms. Smith's daughter works in a daycare. Keira attends a daycare on occasion with her when there is space. She is to be enrolled in a preschool in September where she will attend 3 to 5 days per week. Ms. Smith intends to enrol her in French Immersion.

[34] Both children are well settled in their community.

[35] Ms. Smith has assumed almost complete financial responsibility for these children. Ms. Cross has not contributed financially nor was she asked to contribute.

[36] The children's needs including transportation and clothing have been addressed by Ms. Smith.

[37] Ms. Smith participated in driving the girls to Ms. Cross' residence in order to allow her to exercise access.

Access Regime

[38] According to Ms. Cross, she continued to visit her children as she could and eventually had visits with them every second weekend at her father's home until she moved from her father's home to Westphal and commenced a common-law relationship with Mr. Durling.

[39] Ms. Cross now lives with Mr. Durling and his seven year old son.

[40] After moving, she wanted to have the girls with her every weekend and on in-service days. She also began visiting on Wednesdays, keeping them for supper, taking Kaylae back after supper and keeping Keira through the weekend. Her oldest child Kaylae would join her on Fridays.

[41] Ms. Cross testified she contacted child protection to put pressure on Ms. Smith to permit more contact; Ms. Smith, however, does not recall being pressured by anyone other than Ms. Cross to expand access. There is no evidence before me to indicate that child protection have taken any stance on these issues at all.

[42] Subsequently, there was an interruption in the frequency of contact. Ms. Smith advises that occasionally Keira would go to daycare with her daughter when she was able to go. The goal was to prepare her for school.

[43] Currently and since 2011 Ms. Cross lives in Woodlawn, Dartmouth. When her older two children are with her and the two younger children are with her, there are five children including her stepson.

[44] In the meantime, Ms. Smith moved to her own place in Eastern Shore, a short distance from her previous home.

[45] There is no indication in the evidence that this was a move intended to thwart access; more to re-establish Ms. Smith in her own premises. Ms. Smith

rents this home and lives with her two grown children, both girls. This move has not caused a change in the children's school.

[46] Currently, Ms. Cross has the girls every weekend and in-service days as well as holidays.

[47] Ms. Cross is suggesting that the girls finish up their school year and then change their school and come to live with her.

[48] She promises to continue Ms. Smith's involvement.

[49] Essentially, this regime and conflict resembles a typical custody and access scenario where one parent wants to vary the status quo to alter the parenting schedule.

Material Changes in Circumstances

[50] The children's schedule is fairly consistent. Their life circumstances are described as stable and appropriate. They have been settled in their community and nurtured by Ms. Smith in what resembles a primary parent role, a sole custody strategy.

[51] They have a home base and a relationship with their biological mother.

[52] Ms. Cross tendered certificates of completion for three different parenting programs. She has confirmed her involvement with Capital Health Mental Health Services and successfully completed mental health day treatment program. She has also provided proof regarding her assessment at Addiction Prevention and Treatment Services. She advises that she has been drug free for almost two years.

[53] Ms. Fraser with Cole Harbour Community Mental Health provides a brief summary of her involvement. She states as follows:

> Tanya Cross was initially assessed in September 2010 at Cole Harbour Community Mental Health. She attended regular follow up appointment with our clinic until she was admitted to the Mental Health Day Treatment Program in June of 2011. Tanya Cross completed the seven week day treatment program and was discharged on July 18, 2011. The discharge summary and collateral contact with

> Jennifer Eames (case coordinator at the program) indicate that Tanya was an active participant who made significant progress.
>
> Tanya Cross continues to be followed by Cole Harbour Community Mental Health for ongoing follow up at her discretion.

[54] The clinical therapist with the Addiction Prevention and Treatment Services reported on November 7, 2011 as follows:

> Ms. Cross had been referred for a drug and alcohol assessment in May 2009 and at that time partially completed the assessment process. Ms. Cross recognizes that in the summer of 2009, she was unable to manage multiple stressors and became overwhelmed with the demands being placed on her. Although Ms. Cross did not complete the drug and alcohol assessment with APTS, she remained connected with Community Mental Health Services and followed through on recommendations for treatment. It was through this support that Ms. Cross reports being able to build capacity for coping anxiety; which was corroborated with clinician at Mental Health Services. Client has been able to implement changes to substance use; abstaining from drugs for over the last 12 months and maintaining low harmful involvement with controlled drinking. (Emphasis mine)
>
> Based on the results of the drug and alcohol assessment, Ms. Cross has been assessed as low risk for developing a harmful involvement with drugs or alcohol. There is no evidence of a dependency or addiction to alcohol or drugs. Ms Cross' pattern of use has been a result of poor coping. Ms. Cross has addressed symptoms of anxiety with the support of Community Mental Health Services which has allowed for increased capacity in managing life stressors. Ms. Cross is committed to maintaining mental health treatment for as long as this is recommended by clinician. As a result, there are no recommendations for further alcohol or drug assessment or services at this time.

[55] The basis of the application to vary is less focussed on the best interests of the children and more focussed on the changes in Ms. Cross' life.

Residential instability- Ms. Cross

[56] Ms. Smith raised a concern relating to Ms. Cross' frequent changes in residence.

[57] Ms. Cross has moved several times during the past few years, at times sharing an apartment with other roommates or living with friends.

[58] When first before the family court, Ms. Cross had to leave home "because of an electrical fire(twice in 1 week, both times I called 911)" and due to "an extensive flood from a broken pipe" (Ms. Cross' Response Affidavit dated September 20, 2012, paragraph 14).

[59] In February 2010 Ms. Cross stayed with her father until June of 2010.

[60] After leaving her father's home, she moved to Broom Road with her current partner Mr. Durling, his son, her brother and his girlfriend.

[61] They lived there for two years until September 2011 but were required to move out because the landlord claimed bankruptcy and the house was auctioned off.

[62] Ms. Cross and Mr. Durling and his son then moved to Hilton Drive, near Woodland. Her cousin and her fiancé lived in this home with them.

[63] They moved from this residence after an inspector stated the home was a danger to their family and the public because of flood issues.

[64] They were then approved for emergency housing, put their belongings in storage and went to stay with a friend until the end of April 2012 until they could move into their own unit on May 24, 2012.

[65] Ms. Cross is currently renting an apartment in the centre of Dartmouth. She continues to share this apartment with her partner Mr. Durling, and his child. Ms. Cross advises she may have to move from this residence as well.

[66] Ms. Cross advises she is currently having difficulties with her landlord and the condition of the rented premises. She may again have to relocate. She promises not to do this during the school term.

Delay - a Child’s Sense of Time

[67] Ms. Smith acknowledges that initially she took the children knowing that if she did not, the children would be placed by child protection. She was aware that

at some point the mother may want or may be in a position to ask for her children back.

[68] Ms. Smith did not anticipate that it would take this length of time for Ms. Cross to put herself in a position to parent her children.

[69] Ms. Smith believes that the children are now fully attached and secure in her home and that removing them would not address their best interests.

[70] Ms. Cross believes that she had made important and significant changes in her life as well as her lifestyle. This forms the foundation of her application to vary.

The Law

The Best Interests of the Child

[71] Section 18 (5) of the *Maintenance and Custody Act*, R.S., c.160, s.1; 2000, c.29 states as follows:

> (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**. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

[72] The best interests' test is the ultimate test in **any proceeding**, **Young v. Young,** 1993 CanL1134.

[73] While the legislative vehicle that brings the parties to court may differ, the best interests of children remains the ultimate test within the context of laws that regulate and protect children on the basis of public policy or laws that pertain to private matters of family relations.

[74] Whether public sector interests regarding child protection or private custody matters, each piece of legislation is designed to address the regulation of parental relationships within the context of a child's best interests.

[75] The focus **must** be on the child. The "rights based approach" has been specifically rejected by the Supreme Court of Canada in *Young v. Young*, *supra*.

[76] In the context of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), Chief Justice McLaughlin noted that Parliament has adopted the best interests of the child test as the basis upon which custody and access disputes are to be resolved.

[77] The "best interests of the child" is the only test. This means that parental preferences and "rights" play no role.

[78] Thus, whether applying section 3(2) of the *Children's and Family Service Act* or section16(8) of the *Divorce Act* or section 18(5) of the *Maintenance and Custody Act* or their respective variation sections, we are reminded with some consistency of our legislative obligation to use the best interests of the child as the ultimate test.

[79] We are also guided by *stare decises*: "Judges are obliged to respect the precedent established by prior decisions" (*Black's Law Dictionary* (9th ed.)).

[80] The best interests' test **is** a positive test, encompassing a wide variety of factors including the desirability of maximizing contact between the child(ren) and each parents if compatible with the best interests of the child.

[81] McLachlin, J. said as follows:

> The custodial parent has no right to limit access. The judge must consider all factors relevant to determine what is in the child's best interest. The risk of harm to the child, while not the ultimate legal test, may also be a factor to consider. This is particularly so where the issue is the quality of access . . . what the access parent may say or do with the child.

[82] Sopkina, J. addresses best interests as well.

> While the best interests of the child test is the ultimate determination in deciding issues of custody and access, it must be reconciled with the *Charter*. General language in a statute which, in its breath, potentially confers the power to override *Charter* values must be interpreted to respect those values. Here the best interests test must be interpreted to allow the *Charter* right to freedom of religious expression to be overridden only if its exercise with occasion, consequences that

> involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent.

[83] He concluded that long term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the *Divorce Act*. Each parent therefore can engage in those activities which contribute to identify the parent for what he or she really is. Sopinka J. continued:

> The best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post divorce relationship with both parents. The "rights" must be distributed between the custodial and access parent so as to encourage such a relationship. The traditional notion of guardianship giving the custodial parent the absolute right to exercise full control over the child, even when the other parent is exercising his or her right, is at odds with this concept.

[84] The Supreme Court of Canada said in **K.K. v. G.L.**, [1985] 1 S.C.R. 87, (1985 CanLII 59) and **B.J.L.**,SCC 1985 Carswell NWT 58 as follows:

> The welfare of a child must be decided on the consideration of all relevant factors, including the general psychological, spiritual and emotional welfare of a child. The court must chose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must be seriously considered but must be set aside where the welfare of the child requires it. (Emphasis mine)

[85] In **Young and Young,** *supra* (paragraph194) the Court cited with emphasis section 16(10) of the *Divorce Act* to describe the court's responsibility when weighing best interests:

> . . . the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[86] The Court also emphasizes the requirements under section 17(5) to ensure the court is satisfied:

> . . . that there has been a change in the condition, means, needs and other circumstances of the child . . . occurring since the making of the custody order or last variation order . . . and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[87] The "test is broad" according to McLaughlin, J.:

> Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the best interests of the child by reference to the "conditions, means, needs and other circumstance" of the child.

[88] Critical to the judicial task and to the task assigned to parents by the Supreme Court, Chief Justice McLaughlin said as follows:

> Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all tests, it is to be applied according to evidence, in the case, viewed objectively. **There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.**
>
> Third, s. 16(10) [of the *Divorce Act*] provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of a child . . . By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature would suggest that children benefit from continued access. Michael Rutter, Maternal Deprivation Reassessed (1981), Robin Benians, "Preserving Parental Contact: a Factor in Promoting Healthy Growth and Development in Children", in Jo Tunnard, ed., Fostering Parental Contact: Arguments in Favour of Preserving Contact Between Children in Care and Their Families (1982).

[89] There is no reason to suggest that children in common law situations or children in nontraditional familial relationships have any less need for continuity of care or for preservation of the significant parental relationships that enhance their life, address their best interests and promotes their self-esteem and self-sufficiency.

[90] Thus, it is clear that the task of the trial judge is to look at the child in the community in which the child exists and draw from that community all those elements that promote the integrity of the child within his or her community.

[91] It is not the task of the court or a judge to impose prejudices and predilections which come from our historical or cultural context particularly as it relates to the definition of family or of parent.

[92] Rather, we must recognize the evolution of the definition of family in the context of the child's life; the child that is before us within the context of the family **as that child has come to know and appreciate his or her family.**

[93] It is an objective analysis sometimes better seen through the eyes of the child's life, the possibilities afforded to that child in a very real context, identifying the significant parental influences whether those influences are provided by a biological parent, an adoptive parent, a guardian, a caretaker, a custodial parent or other significant parental figure.

[94] There are many factors enumerated in case law. Most notably in **Foley v. Foley**, 1993 CanL11 3400 (N.S.S.C.), Goodfellow J. itemized what is now a well worn list of factors to consider, including:

> statutory direction, physical environment, discipline, role model, wishes of the children, religious and spiritual guidance, assistance of experts, time availability of a parent, the cultural development of the child, physical and character development of the child by such things as participation in sports, the emotional support to assist the child develop self esteem and confidence, the financial contribution to the welfare of the child and the support of extended family, uncles, aunts, grandparents etc., the willingness of a parent to facilitate contact with the other parent.

[95] This last refers to the recognition of the child's entitlement to access each parent and each parent's obligation to promote and encourage access to the other parent, the interim and long range plan for the welfare of the children and the financial consequence of custody and any other relevant factors.

[96] I have highlighted those that are relevant to this case and about which I have some limited evidence.

[97] And finally as it relates to a variation application, **Gordon and Goertz** [1996] 2 S.C.R. 27 identified a number of relevant factors for the courts consideration.

1. The parent applying for a change in the custody or access order **must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.**

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

[98] The court is told not to commence with a legal presumption in favour of a custodial parent although the custodial parents views are entitled to great respect.

Analysis

[99] We know the statutory direction and case law.

[100] Of the factors included in an analysis of best interests, we have physical criteria (geography, physical environment) and more subtle psychological criteria.

[101] In this case, I have little information about the physical environment of each party. I suspect that is because it is not an issue. I know that Ms. Smith is the principal financial contributor to these children.

[102] I know Ms. Smith has had and continues to have the support of her family.

[103] I know little of the family or extended family support available to Ms. Cross although I do know at one point she lived with her father.

[104] There has been no evidence to suggest that Ms. Smith is not a good role model for the children.

[105] There has been no historical information placed before me other than Ms. Cross herself placed the children with Ms. Smith.

[106] The more subtle but none the less critical factors that must be carefully assessed include such things as attachment, continuity of care, status quo, the availability of the parent to the children and the emotional support to assist the children develop self esteem and confidence.

Continuity of Care

[107] The focus is not on one specific element rather those elements relevant to the fact situation before the court.

[108] The court has been directed by the Supreme Court of Canada to take a holistic approach that creates the best possible package or plan to address the best interests of children.

[109] When the initial change in *de facto* custody took place, the parties were facing the possibility of government intervention within the context of a *Children and Family Services Act* proceeding.

[110] The solution in that regard was for Ms. Cross to choose to place her children herself or to face the possibility of a permanent care order removing the children from her care absolutely.

[111] She was then and for a considerable period of time thereafter unable to address her children's needs.

[112] Ms. Cross asked a woman virtually unknown to her, one whom she trusted by virtue of the fact she was with a relative of hers, to care for her children.

[113] In this case, Ms. Cross transferred her right to sole custody of her daughters to Ms. Smith.

[114] Ms. Cross retained the right of access.

[115] She agreed to an order placing the children voluntarily in the care of a person selected by her, acceptable to the agency, to address the best interests which she could not address.

[116] There the children remained, with Ms. Smith who was responsible for their day to day care.

[117] As a specialized court, we have evolved in our assessment of custody and access matters from the rather more dated unsophisticated and drastic either/or parenting choices made based on a "rights analysis" to a child-centred approach, one that hopefully preserves for the child that which is already working at addressing their needs.

[118] Between parents and guardians either/or choices tend to be restrictive, exclusive and can result in cutting out from a child's life that which has become significant in favour of one option or the other.

[119] A "right's based" approach fails to respect the integrity of the child's actual family and community that has supported and sustained the child.

[120] To lean more heavily on a "right's based" approach (the mother's right to have the children returned) diverts the court from the search for best interests.

[121] For these children, family is and includes Ms. Smith who was the primary caregiver, the significant adult who has created the stability necessary to nurture and address the emotional physical educative welfare of these two children.

[122] In 2005 at perhaps the worse time in Ms. Cross' life she met a woman, Ms. Smith, at a party who was only known to her **as** her uncle's partner.

[123] For no other obvious reason she willingly gave her children to this woman to take care of on an intermittent basis, such that by 2010 Ms. Smith was formally and officially given the legal power and authority and responsibility to have the primary care of both children.

[124] The *de facto* parental role started much earlier in increments from 2005 forward almost within six months of Kaylae's birth.

[125] The *de facto* responsibility for the care of Keira commenced at birth.

[126] Ms. Cross had many obstacles to overcome. Her own seriously ill older children; her significant lifestyle issues; drug and/or alcohol misuse and transient lifestyle.

[127] She was not in a position to address the needs of her own children and she chose bravely but definitively to hand over the care of her children to another person who was prepared and able to address and meet the needs of the children on an ongoing basis.

[128] There was some evidence that Ms. Cross believed it was a temporary matter.

[129] There was some evidence from Ms. Smith that she understood that Ms. Cross would be looking at using the intervening period of time to rehabilitate herself and address her own personal needs in order to place herself in a position of parenting.

[130] However, the needs of Ms. Cross to rehabilitate herself took a **considerable period of time** during which time the priority and needs of the children had to be addressed, attachments were made, patterns of life were created, stability of residence and environment were established, school attendance commenced, medical issues became addressed outside of the custodial care of Ms. Cross and very much within the community of care provided for by Ms. Smith.

[131] Now, in 2012 Ms. Cross believes she has addressed her own personal needs. She believes the changes that she puts forward to the court are significant and material enough to put her in a position to parent.

[132] Ms. Cross asks the court to remove the children from the care of Ms. Smith and to place them in her day to day care and custody because she is ready to address the day to day needs of these children.

[133] This is a problematic approach to attempt to address the best interests of these children.

<u>The Child's Sense of Timing</u>

[134] We know that the law recognizes the child's unique sense of timing.

[135] The preamble of the *Children and Family Service Act* 1990, c.5 gives us some direction in that regard.

> . . . children have a sense of time that is different from that of adults and services provided pursuant to this *Act* and proceedings taken pursuant to it must respect the child's sense of time.

[136] We know from the *Children and Family Services Act* that when the government intervenes, they and the Courts are mandated to act in a timely manner respecting the child's sense of time.

[137] If a child is under the age of six, permanency planning must take place within 18 months of the application to intervene.

[138] If a child is over the age of six when they enter into the legal system, permanency planning must take place within two years (section 45). The younger the child, the shorter the duration of time.

[139] Whether or not the matter comes to the court using a vehicle of child protection legislation, the *Divorce Act* or the *Maintenance and Custody Act*, the court must be concerned about the "children's sense of timing and their specific age and stage of development".

[140] The court must focus on what is in the best interests of the child as it relates to the needs, means and circumstances of these children, not specifically and solely focussed on the changes that have been made in the mother's life that she feels puts her in a position to parent.

[141] In exercising its jurisdiction, the court must be certain not to remove, cut out or terminate positive influences unless to do so would address the child's interests.

[142] Congruent with the philosophy stated in legislation and case law, the court attempts to preserve the best of what these children have experienced to enhance the children's ability to be in association with significant individuals in their lives.

[143] This is not a superficial enquiry. It requires significant evidence to justify interference with a child’s life and circumstances.

[144] The court must approach this enquiry with a view to do as little harm or injury as necessary and to act only if the court is able to choose a plan that gives a child at least as much if not more than they have. To the extent possible we ought to do no harm.

[145] If the mother meets the burden of proving a change in circumstances, the court must then weigh the competing plans, assess the risk and benefits and determine what plan best serves the children before us, as demanded in *Young v. Young*, *supra*.

[146] This is demanded not only of judges but also of parents and persons who stand in the place of parent.

[147] The court must determine the benefits and harm to each proposal to come up with the best possible scenario for the children.

Attachment

[148] What we do know generally is that the development of young children is strongly impacted by their care giving environment.

[149] We know generally that exposure to negative influences may destabilize children and have a detrimental impact on the development of children.

[150] We know generally that good, solid care giving experiences help children overcome adversity.

[151] To disrupt that care giving situation ought to require considerable evidence and a weighing of competing factors.

[152] The court must be convinced on the totality of the evidence on the balance of probabilities that these children ought to move from one home to another because it is in their best interests and not simply because one parent or another believes they have a right or they have made changes or they are ready to parent.

[153] The court must be alive to the issue of harm which involves a significant disruption and possible termination of a significant and life-sustaining relationship with the legal and *de facto* custodial parent.

[154] Otherwise, we become involved in parking children in homes while the needs of parents are addressed.

[155] Moving children without regard to attachment issues and continuity of care can create harm and can damage their sense of security and attachment.

[156] This is a delicate enquiry requiring specific information about the child's attachment, the benefits of that attachment (secure or otherwise) and the harm that may arise if we tamper with that attachment.

[157] These factors are not always readily visible or discernable by the untrained eye.

[158] Judges have to a lesser or greater extent untrained eyes. The science is not always available to us.

[159] The effect of removal of these children, particularly the youngest child, may be considerable.

[160] We must avoid taking our eye off the child who is the true subject matter of the proceeding.

[161] These children are attached; they are doing well.

[162] Child protection and the biological mother endorsed this placement.

[163] The reason for changing this from the biological mother's perspective is because the mother has changed.

[164] What I do not know about Ms. Cross' situation exceeds what I do know.

[165] I have little evidence to support Ms. Cross' view in weighing plans that she can present a better plan for these children.

[166] I have very little information other than the few affidavits to identify the serious risks associated with her lifestyle that placed her in a position originally to have the children moved from her care.

[167] As of the date of the hearing, her residential circumstances were precarious.

[168] While I have information about courses she has taken, other than self-reporting, I have little independent information as to her progress or the development of insight.

[169] I have her assurance that she is drug and alcohol free.

[170] I have no knowledge about the significant persons in her life, including her current partner and his child and the effect that household will have if they embark on raising two additional children.

[171] I am unable to weigh the differences in the plans between the physical set up and I am unable to draw conclusions about Ms. Cross' ability to sustain her current residence and stability and to sustain the relationship in which she currently finds herself.

[172] I have evidence that she has been fairly transient, moving from place to place although that may not be always within her control.

[173] Ms. Cross has found herself in places that are unsuitable, that would certainly not meet her needs let alone her children's needs and I have no ability to predict how long her current situation will be stable (Affidavit dated March 30, 2012, paragraph 18).

Contact with the Other Parent

[174] What I also know is that Ms. Smith has facilitated quite extensive contact with the mother and has lived by the principles set out in case law and legislative history regarding custody and access of children.

[175] She has sustained this without financial contribution from the mother.

[176] I am unable to determine whether the mother can at least equally address the financial stability of the children, such that a transition of the girls from Ms. Smith to Ms. Cross would not have detrimental consequences.

[177] To change the situation without the danger of cutting out an important, stable aspect of these children's lives, I would need sufficient weighty evidence that convinced me on the totality of the evidence on the balance of probabilities that the plan being put forward by Ms. Cross is the better plan that addresses the best interests of these children.

[178] I do not have this information.

[179] I also do not have information that would cause me to conclude that Ms. Cross has established herself in a stable relationship.

[180] Ms. Cross has made improvements in her life. She has had extensive contact with her children.

[181] I do not have evidence however that Ms. Cross' plan addresses the best interests of the children such that I should disturb the current status quo and the stability that has been offered in the household of Ms. Smith.

[182] I have no other evidence but Ms. Cross' evidence.

The Children's View

[183] I have no reliable information in which I could assess the views of the children. I am aware that Ms. Cross indicates that the children wish one course of action.

Disruption

> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[184] A move would be a significant disruption. It would disrupt the children's current family, school and the community they have come to know.

[185] Indeed, the school community and the context in which these children have grown up in the last few years would be disrupted significantly given the geographical distance between Ms. Cross and Ms. Smith.

[186] In this circumstances, Ms. Smith has kept the children in contact with their mother and by weekend access these children have come to know and appreciate both households.

Conclusion

[187] Ms. Cross had an opportunity to present evidence to convince the court that a change in the custody order would be in the best interests of the children. Based on the above, she has not met that burden.

[188] I would preserve the status quo and the stability of the children. This gives them the best of both worlds, the presence of Ms. Smith as the custodial parent and contact with their biological mother and siblings. As long as this can be done with their best interests in mind, this strategy should continue.

[189] The children are reaching an age where they need **not** be pulled between Ms. Smith and Ms. Cross; rather, where they can live in an environment in which they understand that there are significant people in their lives who are prepared to be focussed on their stability and their well-being.

[190] I do not accept that Ms. Smith deliberately misrepresented the enrolment of Keira in Busy Bee Daycare. Her daughter works at the daycare and she wants Keira to attend when there is available space and when she is able.

[191] If her daughter can have the child in daycare, reasons that benefit the child, then that ought to be a way to prepare the child for school.

[192] The current situation is that Ms. Cross has the children weekly from Friday at dinnertime until Sunday between 3:00 and 5:00 pm. Occasionally she has week day contact.

[193] Ms. Cross lives in Dartmouth and Ms. Smith lives in Chezzetcook.

<u>Contents of the Affidavit of September 20, 2012</u>

[194] Counsel commenced this proceeding by an objection to the contents of Ms. Cross' affidavit of September 20, 2012. I indicated that I would address this issue

after and determine what, if any, weight would be given to statements of opinion and unsupported allegations.

[195] There are paragraphs in Ms. Cross' affidavit that are opinion, not based on facts, and accusations against Ms. Smith that have not been proven including that she has misrepresented the children's whereabouts.

[196] On the one hand Ms. Cross indicates she will love Ms. Smith forever and will facilitate contact.

[197] On the other, Ms. Cross spends time in her affidavit accusing Ms. Smith of lying to her.

[198] This does not argue well for a future relationship in which Ms. Cross would be prepared to ensure that the children maintained contact with Ms. Smith.

[199] Regarding paragraph 5, I do not place great weight on the conversations between Ms. Forbes and Ms. Cross as well as between Ms. Maloney and Ms. Cross. They are pieces of the puzzle that form part of the perception of Ms. Cross as to the circumstances that surrounded the custody order.

[200] The custody order was granted without conditions. While there may have been differing expectations by the parties, what Ms. Cross suggests was a temporary order had different significance to Ms. Smith.

[201] The length of time between the original order and the application to vary is significant to the children.

[202] There is contradictory information as to the involvement of the Minister of Community Services after the order was entered into and whether or not they interjected in order to address the custodial and access provisions. The parties have different perceptions and I make no conclusions with respect to those.

[203] Ms. Cross has made an allegation as to the deficiency in the parental structure provided to the children by Ms. Smith and specifically accuses her of failing to follow up on the recommended therapy with Dr. Hann.

[204] I have no information on which I can conclude that Ms. Cross' expectation is correct or reasonable. Ms. Smith was absorbing the financial and emotional responsibility of raising the children. I am not aware as to what efforts were made by child protection to sustain any ongoing involvement with Dr. Hann which did not create a financial burden on Ms. Smith. As such, I place no weight on those accusations.

[205] Ms. Cross has made allegations against Ms. Smith that she has sabotaged her access to the children. Clearly, the access to the children by Ms. Cross over the years has been liberal to say the least.

[206] The current situation would benefit from some definition. The evidence on Ms. Cross' residential circumstances was unsettled.

[207] I modify the order to better reflect the evidence. Ms. Cross acknowledged that the order stipulated access as can be arranged. At one point she was visiting every second weekend. This she said was increased to every weekend, in-service days and shared holidays.

[208] However, in her parenting statement there is mention of every second weekend. In her testimony she said every weekend when it was allowed. Mid-week access also occurred sometimes.

[209] Ms. Smith says weekend access occurred between Friday and Sunday although it was sporadically exercised. She acknowledged in-service days and shared holidays were the norm.

[210] Ms. Smith is prepared to assist Ms. Cross with some of the transportation if she has access to a vehicle.

[211] In the current situation, the children are out of their community every weekend. This may affect extra curricular community activities. In addition, given Ms. Cross' evidence of residential difficulties, I am not clear about their stability on weekends in the future.

> I order access for the mother three (3) of every four(4) weekends in a month from Friday after school to Sunday at 6:00 pm providing she has appropriate accommodations to house the children.

I order one (1) weekend out of four (4) the children shall remain with Ms. Smith.

Both Ms. Smith and Ms. Cross may have reasonable access to third party service providers including doctors and educational authorities directly without having to get this information from another source.

Ms. Smith will continue to make the custodial day to day decisions including the family doctor, dentist, etc.

Ms. Smith shall consult with Ms. Cross on major decisions. She shall enter into meaningful discussions.

Ms. Smith shall be responsible for resolving these decisions by way of obtaining professional opinions from doctors and educators as an example should there be disagreement between the two.

Ms. Smith and Ms. Cross are entitled to attend at the parent teacher providing it remains civil and reasonable and focussed on the best interests. In the event that there is a problem, each may attend separately in accordance with the rules of the school.

Each shall keep the other informed as to major events in the children's life and to day to day medical needs.

The parties shall share major vacations including Christmas.

The parties share equally the Christmas holidays. The schedule of access for the children shall be that they spend from Christmas Eve to noon Christmas Day with one party; then from noon Christmas Day to Boxing Day with the other party.

Ms. Smith shall have the children Christmas Eve to noon Christmas Day this year and all even numbered years. Ms. Cross shall have the children Christmas Eve to noon Christmas Day on odd numbered years for Ms. Cross.

March Break shall be split.

In the summer the regular schedule of contact shall continue unless otherwise agreed upon between the parties.

[212] Counsel for Ms. Smith shall draft the order.

Legere Sers, J.