

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: M.A.B. v. L.A.B., 2013 NSSC 89

Date: 20130312

Docket: 1201-065983, SFHD-079735

Registry: Halifax

Between:

M.A.B.

Petitioner

v.

L.A.B.

Respondent

Judge:

The Honourable Justice Beryl MacDonald

Heard:

February 18 and February 19, 2013

Counsel:

Nicole Figueira, counsel for the Petitioner
Stacey Dawn O'Neill, counsel for the Respondent

By the Court:

[1] This is a divorce proceeding. I am satisfied all jurisdictional requirements of the *Divorce Act* have been met and there is no possibility of reconciliation. I am further satisfied there has been a permanent breakdown of this marriage. The parties have lived and they continue to live separate and apart from one another for a period in excess of one year from the commencement date of this proceeding. A divorce judgment will be issued.

[2] These parties have two children ages 8 and 6. The Mother requests custody and primary care with a defined access (parenting time) schedule for the Father. The Father requests joint custody under a shared parenting plan that would place the children in his care every other week. Child support and the division of assets and debts are also issues in this proceeding.

[3] Counsel on behalf of the Mother has raised several objections to paragraphs in the Father's affidavits. As is often the case neither counsel wanted to take the time to discuss each complaint and receive an individual ruling for each complaint. I have applied the same analysis to the objections raised as I did in *Clark v. Saberi*, 2012 NSSC 310. I do not intend to review the results of that analysis in detail. I have rejected irrelevant material in all affidavits filed in this proceeding. I have ignored opinions, speculations, commentary, hearsay, submissions, innuendo and argument.

Custody/Access

[4] There are no presumptions to apply when determining with whom children should be living under what arrangement. There is no presumption that parents should have joint custody, custody, primary care or shared parenting. There are only various directives.

Section 16 (10) of the *Divorce Act* requires a child to 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.

In *Young v. Young*, [1993] 4 S.C.R. 3 Justice McLachlin when reviewing this section stated:

[18] This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. 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.

[5] What parenting arrangement is in the best interest of these children? Many courts have attempted to describe what is meant by the term “best interest” . Judge Daley in *Roberts v. Roberts*, 2000 CarswellNS 372 said:

5 ...These interests include basic physical needs such as food, clothing and shelter, emotional, psychological and educational development, stable and positive role modelling, all of which are expected to lead to a mature, responsible adult living in the community...

[6] In *Dixon v. Hinsley* (2001) 22 R.F.L. (5th) 55 (ONT. C.J), at para. 46 the following appears:

The “best interests” of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual, and moral well being of the child. The court must look not only at the child’s day to day needs but also to his or her longer term growth and development ...

[7] Several cases have attempted to provide guidance to the court in applying the best interest principle: See for instance *Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C); *Abdo v. Abdo* (1993) 126 N.S.R. (2d)1 (N.S.C.A).

[8] In one of the early decisions providing guidance about the factors to consider when applying the best interest principle to a request for shared parenting Justice Goodfellow commented in *Farnell v. Farnell* [2002] N.S.J. No. 491:

[10] “...Shared custody rarely in my experience works and only seems to where there is present an environment where the children thrive when the children are able to fluidly move from one home to another by reason of parents who are mature in circumstances and reside in such close proximity that the children can go back and forth themselves, continue in the same school, continue with extracurricular activities, church or other activities that they would normally engage in. Such a situation is next to impossible to attain and continue when children live at long distances...”

[9] Recent decisions, *Baker-Warren v. Denault*, 2009 NSSC 59, *Murphy v. Hancock*, 2011 NSSC 197, suggest consideration of the following factors:

- impact of two residences upon the child’s presently established relationships with a school, a day care facility or non parental caregiver, friends, extended family and recreational activities. Will they be maintained or diminished? How will the parent help the child adjust to the changes required?

- whether there are significant differences in the residences and the lifestyle of the child when living with either parent;
- impact of transitions between residences upon the child and the parents. Will these have negative consequences for the child? How will the parents help the child adjust? Will these cause conflict between the parents? How can that be avoided? Can these transitions be accommodated within each parent's work schedule?
- availability of each parent, step parent (if there is step parent), or extended family members to personally care for the child and availability and willingness to provide care when the parent, in whose care a child is to be according to the schedule, is unavailable;
- whether there are significant differences in discipline technique, daily routines, value transmission, support for required medical, dental and educational interventions, and support for recreational activities;
- whether there has been conflict, including domestic violence, in the parents' relationship and its impact and potential impact upon the child;
- whether both parents' "parenting style" provides a "good fit" for development of the child's personality and interests;

Parents in a shared parenting arrangement must exhibit an ability to cooperate and jointly plan for their children. They must be able to do so on a continuous basis, far more frequently than is expected from parents who have other parenting arrangements. Conflict and the potential for conflict must be at a minimum. Each parent must respect the other and their value systems and methods of discipline should not be substantially dissimilar. They must be able to communicate face to face. They must respond quickly to inquiries from the other parent about issues involving the child, focussing on the child's need not on the parent's issues. Routines in each household should be similar to ensure the child is not confused by or encouraged to become oppositional because of different standards and expectations in each home.

Conflict Between Parents

[10] Conflict between parents does not necessarily mean joint custody or shared parenting is inappropriate. (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S.S.C.); *Rivers v. Rivers* (1994), 130 N.S.R. (2d) 219 (N.S.S.C.)) It has been suggested that parents who have joint custody may be less likely to consider their parenting role to have been diminished and therefore are less likely to withdraw from meaningful contact with their children. Continuing to respect the role and responsibility both parents have in fulfilling parental obligations may encourage parents to overcome existing conflict between them. These are suggestions found in reported decisions.

However, joint custody and shared parenting must not be granted as a form of wishful thinking. The nature and extent of the conflict between the parties must be analysed to determine if joint custody or shared parenting is in a child's best interest. Of particular concern is conflict that results in acts of domestic violence.

Domestic Violence

[11] The words domestic violence are used to describe a phenomena, a construct, a process that is complex and many faceted. In *L. (N. D.) v. L. (M. S.)*, 2010 NSSC 68 I discussed this phenomena in detail and took judicial notice of its definition and effect.

[12] Domestic violence most commonly refers to a situation where an adult intimate or former intimate partner attempts by psychological, physical, financial or sexual means to coerce, dominate or control the other. This violence reveals a pattern of conduct that may be verbal, physical or sexual. The conduct targets another person's self-esteem and emotional well-being. It can include humiliating, belittling, denigrating, intimidating, controlling or isolating behaviour. It can include physical assaults, sexual assaults, sexual humiliation, sleep deprivation, extortion, economic coercion, threats to harm or kill, destruction of property, threatened or attempted suicide, litigation harassment and litigation tactics, manipulation of children, of relatives, of investigation agencies and helping personnel, surveillance, monitoring, and stalking. The abuse and violence in intimate partnerships has a complex reciprocal dynamic not found in violence that occurs between strangers.

[13] Not everyone copes with domestic violence in the same way. Some victims experience such loss of self-esteem that domination and control are accepted as normal; others attempt to cope by defending, by resisting or by trying to escape from the relationship; others rebel.

[14] There is little reason to suppose that a person, who regularly threatens, harasses, demeans, intimidates and controls or attempts to control a partner; a person who has poor impulse control and little ability to accept responsibility; a person who resorts to aggression and violence, will, in the absence of successful intervention, lose those characteristics when alone with children.

[15] Children are harmed emotionally and psychologically when living in a home where there is domestic violence whether they directly witness the violence or not. Exposure to domestic violence is not in the best interests of children and those who are the perpetrators of domestic violence, who remain untreated and who remain in denial, are not good role models for their children. The fact that there is no evidence the perpetrator has actually harmed the child is an insufficient reason to conclude the perpetrator presents no risk to his or her child. One risk is the perpetrator will continue to use violence in intimate relationships to which the child will be exposed in the future. Another is the child may model aggressive and controlling behaviour in his or her relationships with others. As children become able to exert their own desire for control they may be subjected to demeaning and intimidating conduct from a parent. Assessing and

containing these risks will be the job of the court in determining what contact with the perpetrator is in the best interest of the child.

[16] When allegations of abuse are made they must be proven to have occurred by the person alleging the abuse. The standard of proof is on a balance of probabilities.

[17] There has been significant conflict between these parties. The Mother testified that during their marriage the Father:

- was very jealous of her;
- would review her Visa bills and question her about dinner engagements and ask who she was eating with at the time;
- made threatening statements to harm her if he ever caught her with anyone;
- has been aggressive and angry;
- pushed holes in the walls in their apartment in Petawawa and broke the coffee table;
- punched holes in the walls of their Halifax home and punched doors, the fridge and coffee table and broke their bed by lifting it up and smashing it on the floor during an argument while she was in the bed
- would scream in her face calling her names like “bitch” and “pig” and tell her he hated her, often in front of the children and on one occasion in front of her mother while she was visiting;

[18] However there were times when the Father would be pleasant toward the Mother and she would believe their relationship was improving. Although their immediate family knew this couple were having difficulties the Mother explains she did not discuss the nature and extent of those difficulties because she was embarrassed and ashamed to do so.

[19] The Mother and the Father separated following an incident when they were arguing and the Father grabbed the Mother’s arm in front of the children. The mother left the home with the children and stayed at a neighbour’s home from August 22 until August 29, 2011. When the Mother went to the home on August 23, 2011, to retrieve some clothing for the children, the Father told her he was going to kill her and no one would find her body. He called her a “bitch”, a “cunt”, and a “whore”. He told her he wished she was dead and he once again grabbed her arm as she tried to leave the home. The Mother described several other incidents when the Father threatened her and became physically aggressive. These incidents were not reported to the police

because the Mother was afraid this would escalate the Father's violence toward her and she did not want the children's father to be in jail.

[20] However, the Mother did report the incident that occurred on September 25, 2011. The Mother was again at the matrimonial home with the children. While she and the children were in her vehicle the Father told her she only wanted his money and he was going to kill her. While speaking these words he made a slicing motion across his neck with his hand. The Mother left with the children and reported the incident to the police. The Father was arrested and charged with uttering threats toward the Mother.

[21] The Father admits he has called the Mother a "bitch, a pig and a whore". He admits he has screamed at her. He says she called him names and screamed at him also. He denies ever threatening her or physically restraining her. Because she is employed with the Military Police he accuses the Mother of using her knowledge to "set him up". He voluntarily entered into a peace bond because he did not have the money to contest the allegation in a criminal proceeding, not because he was admitting he actually threatened the Mother.

[22] I do not intend to recite in detail all the contradictory facts provided by each of these parties and their witnesses. I have carefully read the affidavits each has presented and the other documents filed. I have considered the information provided upon cross examination. In a case such as this, when each of the parties and their witnesses present divergent information about events upon which I must adjudicate, an analysis of credibility is critical to any decision to be made as is application of the civil standard of proof.

CREDIBILITY

[23] I adopt the outline for assessing credibility set out in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37:

[36] There are many tools for assessing credibility:

a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

b) The ability to review independent evidence that confirms or contradicts the witness' testimony.

c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.

d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution *R. v. Mah*, 2002 NSCA 99 at paragraphs 70-75).

e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.* [2005] O.J. No.39 (OCA) at paragraphs 51-56).

[37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1966] 2 S.C.R. 291 at paragraph 93 and *R. v. J.H. supra*).

[24] I cannot presume to know the truth about what happened between these parties and their children. I was not present to witness anything that happened. All I can do is apply the legal principles developed by our courts to assess “credibility”. The action imbedded in this word is a direction to sort out reliable from unreliable information. What information is most persuasive?

[25] I have decided the information provided by the Mother and her witnesses, is credible and when it differs from the information given by the Father and his witnesses, I have accepted the Mother’s version of events. Examples I use in this decision to explain a point I have made are often not the only example I could have used.

[26] After reviewing the evidence in this case I am satisfied the Father was and is a perpetrator of domestic violence against the Mother.

[27] The most significant evidence leading to this conclusion was the testimony given by the Therapist employed by the military who, after a discussion with the Father, had sufficient concern about the threats he made against the Mother that he called the military police and reported his concern. This Therapist is a trained social worker who has been practising his profession since 1993 with a particular emphasis on counselling those who commit acts of domestic violence. He had no prior or subsequent contact with the Mother. The Father had come to him for counselling for a period from September 2011 to November 2011. During discussions with the Father on October 26, 2011, the Father threatened bodily harm to the Mother if she reduced his parenting time with the children. He said he would “kill her” if her actions ever harmed the children. He referred to the Mother during their sessions as the “fat pig”.

[28] If the Father had so little control over his emotions that he threatened to harm the Mother before a therapist who had informed him of his duty to report if he perceived any potential harm to others, I have little doubt he would threaten the Mother directly when he was angry or frustrated. I am satisfied there is a pattern to his aggression. Its purpose initially was to coerce the Mother into remaining in the relationship and later to share parenting. As so often is the case

with those who resort to domestic violence with a partner who has the strength to leave, he made his situation worse, not better.

[29] The Father does not accept that he needs anger management counselling, nor is he likely to accept that he requires counselling with a therapist who has an expertise in treating those who commit acts of domestic violence. However, the conflict between these parties is unlikely to be resolved without this counselling. The Father's demeanour in court was further evidence of the difficulty he has in regulating his response to his emotions. When he heard something he disagreed with or disliked, his arms gesticulated, his face contorted, it became flushed, his eyes stared. While he resisted speaking, it was evident he wanted to do so. If this is his response when others in his presence displease him, and I have little doubt that it is, I can understand why he has been described as "intimidating". The Mother has good reason to be afraid of him. Until he has evidenced change, counselling to assist these parents to improve their communication may be of little use.

[30] I am satisfied the Mother's intent in initiating legal proceedings was not for the purpose of limiting contact between the children and their Father. The restrictions around the time when they were to be in his care resulted from a combination of the following factors:

- the Father's acts of domestic violence that resulted in a Peace Bond preventing contact except through third parties;
- the Father's failure to act upon, and in many cases read, e-mails sent to him by third parties chosen by the Mother;
- the Father's failure to inform the Mother or the court about who may be acceptable third parties for communication and transportation purposes (lawyers are not always available in a timely manner);
- the Father's continuing threatening and intimidating behaviour that caused the Mother to be fearful of him and thus reject direct communication with him even after termination of the restrictions imposed by the Peace Bond;
- practical issues relating to the child care required because of the Father's work schedule.

Parenting Plan

[31] Joint custody under a shared parenting arrangement is not in the best interest of these children.

[32] Given the Father's present unresolved anger toward the Mother co-operative parenting of any kind is not possible. While the Mother has the willingness and skill to communicate around

the children's needs, and to take into consideration the positive role the Father could have in their care and upbringing, the Father is extremely disrespectful of the Mother and is unable to address her concerns about the children without name calling and fault finding. There is nothing in the evidence before me to suggest he has, as yet, changed this behaviour. He has convinced himself all of the problems he has experienced since the separation are "caused" by the Mother. He has no insight into the effect his own behaviour has had on this situation. He is in a state of denial and he takes no responsibility for what has happened; a not uncommon reaction of those who have a tendency to commit acts of domestic violence.

[33] The children love their Father and will be confused and upset if he has less contact with him than they presently do. I may have considered a parenting plan with less contact but the Mother has not requested this result. I am guarded about the plan I have devised but I have attempted to build in sufficient terms and conditions to address the domestic violence concern.

[34] While the Father can meet the children's basic needs he will have difficulty nurturing them to respect their Mother. His world revolves around his feelings and needs. He may not be able to recognize that good parenting often requires adults to modify or set aside what they want in favour of what is required to raise a psychologically healthy child. Children love and want to continue to love both parents. They have a right to do so. This can be undermined if one parent continues to express anger and disrespect of the other parent. The Father must be educated and counselled about his propensity towards acts of domestic violence, as he must be educated about parenting after separation and divorce, if his contact with his children is to be a positive experience for them. The parenting plan I will order assumes his obedience to it. The consequence of his failure may be a reduction in his parenting time. The Father has much to offer his children as a parent but he must learn how to reconstruct his life after separation recognizing he and the Mother remain parents of these children and it is best for the children that the conflict between them come to an end.

[35] The Mother requests a number of restrictions in respect to communication and transitions. I realize face to face communication between these parents must be limited for some time. However, continuing communication through third parties is not practical or desirable. The telephone may need to be used for emergencies. For non urgent matters, E-mail and text communication does provide a record of what was said. The Father has ignored this reality and his communication with the Mother and others has been insulting and intimidating. This must stop. The communications must be directed toward resolving an issue involving the children. They must be, whenever possible, short and to the point.

[36] During the proceeding the Mother suggested the children would be parented by the Father if she was required to leave for a period of time for work or education related reasons. I am not ordering this to occur because, under the present circumstances, the Father's work schedule does not accommodate the children's present child care arrangement. These children have experienced enough change in their lives for now. I recognize more change may come; that is unavoidable, but it is important for parents not to impose change upon children just to accommodate a parent's

need to parent at times that may not be in the best interest of children. When considering a child's best interest courts, and insightful parents, balance all children's needs to reach an outcome. It is important for children to have a positive relationship with both parents and to be cared for each on a regular basis. However, children also should have, whenever possible, for example, a continuity of caregivers, schools they attend, peers with whom they interact, and participation in recreational activities they enjoy. On occasion "time" with a parent should give way to these other considerations.

[37] I do not consider it in the children's best interest to, at this time, be introduced to a stranger to provide them with care to accommodate additional parenting time to the Father, especially given his, as yet, untreated propensity to commit acts of domestic violence. There will be times, particularly during holiday and special time, when he may need a caregiver other than himself. If he cannot make arrangements with the present caregiver, but has a family member or other person familiar to the children who will provide the necessary care while he is working, that should be accommodated. To accomplish this goal I am requiring the Mother's consent to arrangements he will make but under direction that her consent is not to be unreasonably withheld.

[38] I expect the Mother will make the necessary arrangements and provide appropriate caregivers for the children should educational or work requirements require her to be out of the home for an extended period. She, of course, may choose to have the Father parent the children if this can be arranged in their best interest at the time.

[39] When children are transported to and from their parent's residence, it is not an ideal situation for them if their parents cannot contain their emotional and physical response requiring transfers to occur in a mall parking lot or at some other "public" location. While often this is necessary, it is not a fit response to include in most "final" orders, particularly when children are old enough to exit a vehicle on their own. In this case when a parent is required by the parenting schedule to pick up the children at the other parent's residence he or she is to remain in the vehicle in the driveway or in front of the other parent's residence. That other parent is to remain inside his or her residence. The children can leave the residence and walk to the vehicle. The transporting parent can then leave.

[40] The Mother does not want the Father to be present at the children's recreational activities when she is present. I consider it more appropriate, and in the children's best interest, that both parents be free to attend these events. While I accept the Mother's evidence about the Father's acts of intimidation at the children's recreational activities on previous occasions, I expect him to pay attention only to his children when he attends in the future. He is not to attempt to engage the Mother visually or in conversation. The children can go to where he is standing or sitting to engage him as they wish. He is to remind them to return to their Mother when appropriate, as should she when he has taken them to an event she also is attending. This is the behavioural expectation at any time these parties are in a public place with the children. Until the Father has completed the counselling I require, and the Mother is comfortable with face to face

communication, there should rarely be an occasion that requires face to face communication between these parents.

[41] The details of the custody and parenting plan I am ordering into effect is attached as Schedule "A". The parties may agree to different arrangements for the Father's holiday and special time parenting and that is to be reflected in the order prepared following this decision. Except for Christmas and Summer parenting time neither parent was completely clear about the specifics of "shared" holiday time. In addition they did not specify what "two consecutive weeks" in the summer meant by giving a start and end day. I have suggested what often is typical in situations like this. The schedule I have provided for the holiday and special time parenting is to appear in the order if the parties are unable to agree on different arrangements.

Child Support

[42] The Mother is seeking table guideline and section 7 child support from September 1, 2011. This court must establish a commencement date for the payment of that support. Because it is now March 2013, much of her claim is "retroactive" and while there have been arguments about whether the principles expressed in *DBS v. SRG*, *LJW v. TAR*, *Henry v. Henry*, *Hiemstra v. Hiemstra*, 2006 SCC 37 apply to original proceedings, I accept they do provide guidance.

Prospective Child Support

[43] The Father's income in 2011 and 2012 has not been confirmed. He has not provided an income tax return or a notice of assessment. He did provide a T-4 for 2011 but none for 2012. His financial disclosure is therefore inadequate. I will use the income analysis provided by the Mother and I find his annual income in 2012 to be \$67,400.00. I have no information suggesting his 2013 income will be less than it was in 2012. Table guideline support for two children on this income is \$934.00 per month. He is to begin paying this amount on March 1, 2013.

[44] It appears each of the parties may have been paying the child care provider directly. The Mother has requested the Father pay her his proportional share of the net cost of this expense. She has calculated that expense to be \$148.00 per month for 10 months. She also has requested wording in the order to provide for the annual adjustment of this amount. Those provisions are not enforceable by the Maintenance Enforcement Program. For these parties certainty is required. I also note the Mother has requested proportional sharing of extracurricular expenses. Neither party fleshed out submissions in respect to that issue. I have decided the Father is to pay an additional \$150.00 per month as his contribution toward all section 7 expenses commencing March 1, 2013. The payment is to continue every month. Variation will then be available to either party if there is a change in circumstances. For instance, the Mother may apply to vary this provision if it becomes inadequate. The Father may apply to vary if the expenses are no longer required or are reduced.

Retroactive Child Support

[45] Neither the Mother's Notice of Application nor her Interim Motion, both filed September 27, 2011, requested child support. The Father's Petition for Divorce filed March 2, 2012 did request child support as did the Mother's Answer filed April 18, 2012. On May 22, 2012 the Mother did file a motion for interim child support but this was not set down for a hearing. There were discussions between the parties through counsel about child support sometime between the filing dates of these proceedings. The Father did pay a portion of the section 7 child care expense after separation. He has paid no table guideline amount.

[46] I am satisfied the Father knew, at least by February 2012, that the Mother wanted to receive more than section 7 child support. Hoping this matter would move to a final hearing in the shortest time possible the Mother did not pursue an interim support application. Knowing that a court can order retroactive support her decision cannot now be interpreted as delay on her part.

[47] This couple was in turmoil as a result of their separation. The Father was in denial and would not focus on the economic issues that needed to be resolved. Instead he blamed the Mother for failing to pay the mortgage on a home she could not occupy at a time when she needed to pay for alternate housing for herself and the children. Had he become more positively engaged, many of the adverse financial consequences may have been avoided or reduced. However reviewing his financial circumstances helps one understand why he believed, at the time, that he did not have the money to pay table guideline child support particularly when the Mother earned more, approximately \$9,000.00 more per year, than he did and the children's financial needs were apparently being satisfied. However, the burden of paying family debt was shouldered by both and the Father did not pay a disproportionate share thus relieving him of the responsibility to pay child support.

[48] The Father has been criticized for purchasing a home once it became clear he would not be retaining the matrimonial home. He did so in the expectation he would share parenting. Perhaps he should have waited until the parenting arrangement had been decided but he would have needed housing in the interim. He wanted to live close to where the children were living. I cannot fault him for that. I have no evidence that cheaper suitable housing for the Father and the children in the immediate area was available when he needed it. The Father may have not been thinking as clearly and rationally as the Mother might have wished but was his conduct blameworthy?

[49] Bastarache, J. discusses blameworthy conduct in *D.B.S.* at paragraphs 105 to 109 of that decision. A great deal of emphasis has been placed on his comment "... courts should take an expansive view of what constitutes blameworthy conduct in this context. I would categorize as blameworthy conduct anything that privileges the payor parents own interests over his/her children's right to an appropriate amount of support." However I consider that these words must be interpreted with the assistance of the examples he later provides about what may or may not be considered blameworthy conduct. He says:

[106] . . . thus, **a payor parent cannot hide his/her income increases** from the recipient parent in the hopes of avoiding larger child-support payments:. . . **A payor parent cannot intimidate** a recipient parent in order to dissuade him/her from bringing an application for child support . . . And **a payor parent cannot mislead** a recipient parent into believing that his/her child-support obligations are being met when (s) he knows that they are not.

[107]. . . Even where a payor parent does nothing active to avoid his/her obligations, (s) he might still be acting in a blameworthy manner if (s) he consciously chooses to ignore them. Put simply, **a payor parent who knowingly avoids or diminishes his/her support obligation** to his/her children should not be allowed to profit from such conduct: . . .

[108] **On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behavior.** . . . (my emphasis).

[50] I am satisfied there came a point in time, in the face of the obvious reality that the Mother had primary care, that the Father knowingly avoided his support obligation. He had counsel and knew or should have known that the Mother had a legitimate claim for table guideline child support as long as the children were in her primary care. The Father had no supportable claim for undue hardship. Certainly by March 16, 2012, when a written agreement was entered into by the parties to resolve some of their financial issues relating to the matrimonial home, the Father should have commenced paying child support. His argument now is he does not have ability to pay a retroactive award. Only hardship may excuse his failure to pay because I am satisfied that, although the children's financial needs were met since the parties separation, they will benefit from a retroactive award.

[51] In *DBS* the court directed that "a broad consideration of hardship" is appropriate. One essential question is whether there is a capacity to pay the retroactive award taking into account the ongoing child support payments and the payor's legitimate requirement for sufficient financial means to support himself and exercise the parenting considered appropriate in a parenting plan. This requires, among other expenditures, those for housing, food and transportation that may not be required in similar amounts by a single person with no dependents.

[52] I have reviewed the Father's Statement of Expenses attached as Tab "S" to Exhibit # 1 filed in this proceeding. There is a double entry under the item "motor vehicle payment". He uses a lesser income than I have attributed to him. There is no explanation why he has a line of credit upon which he must pay \$400.00 per month. However, overall his expenses are modest and he will have difficulty paying the table guideline, his share of the child care expenses and the matrimonial property equalization.

[53] What would have happened if the request for child support had been placed before the court in March 2012? In this case, the fact is, the court would have ordered the Father to pay child support even though that payment would cause him financial hardship. He would have been expected to rearrange his financial budgeting to accommodate that order. If he is not ordered to make up that deficiency now what message does that send to other payors? The message may be

to put off paying until ordered to do so at the last possible moment in the expectation that no retroactive award will be made. In this case it is therefore inappropriate to refuse to grant a retroactive award.

[54] One way to make a retroactive award that does consider the reality of a payors financial situation is to order a repayment plan that appears reasonable under the circumstances. Given the Father's financial circumstances he may have difficulty borrowing money to pay retroactive child support. As a result he is to pay the retroactive table guideline child support from March 1, 2012 until February 28, 2013, a total of \$11,208.00, in installments of \$200.00 per month commencing March 1, 2013 and continuing until he has completely paid that amount.

Other Terms Related to Child Support

[55] The Mother has requested, and I grant, with some amendments, incorporation of the following terms into the Corollary Relief Order.

- Provision for the parties to exchange income information yearly.
- Continuation of the health insurance coverage each parent has through present employment with a requirement that he or she obtain similar coverage in the event either changes employment.
- Both parties maintain life insurance, for as long as the children remain "children of the marriage" pursuant to the *Divorce Act*, in the amount of at least \$150,000.00 requiring his and her executor/trustee to administer this amount (or such greater amount as may be chosen by the party) for the benefit of the children.
- Both parties are to retain and administer the RESP accounts created for the benefit of the children. The RESP is only to be used toward the children's education expense but if one or both are not eligible to receive those funds, the parties are to ensure that child/children receive his or her share directly less any tax consequences incurred by the parties.

Matrimonial Property Division

[56] The parties have agreed each is to retain his and her pension free from claim by the other.

[57] At the end of the hearing each counsel provided submissions about the amount of the equalization payment. Each expected payment from the other. It became apparent that a different amount may result when all assets and debts were included. Previous charts provided by the parties appeared selective. I requested recalculation and further submissions if the parties arrived at a different amount and payor. I received a very detailed submission from the Mother. It provided information about the documentary evidence in the file to support the values used in the

calculations. I received no such detailed information in the submissions from the Father although his calculations were quite different from those presented by the Mother. Both charts contained errors. Once the errors became apparent I referred to the documentary information to obtain accurate numbers. I have accepted as matrimonial debt items disputed by the Father.

[58] From the information provided I have calculated the division of property in the chart attached as Schedule "B" attached to this decision. The value of the matrimonial home is its value after deducting the following - Atlantia Law Group Statement of Account \$753.25 (mistakenly shown as \$735.25 in the Mother's chart), discharge registration fee \$85.18, real estate commission to Century 21 \$6,503.75 and to Royal LePage \$7,503.75, mortgage \$201,268.51 (mistakenly shown as \$201,268.14 on the Mother's chart), Scotia Bank Line of Credit \$35,261.14, loan on Kia Spectra \$6,400.88. The debt on the Kia Spectra has been shared equally because it was deducted from the proceeds of the sale of the home. The asset value must also be shared equally. The money remaining and presently held in trust is \$2,567.93 and I have added it as an asset to the Mother's ownership. RRSP's are to be discounted for tax. The Father's values did not reflect this discount.

[59] The Father is to pay the Mother \$7,882.01 to equalize matrimonial assets and debts.

Costs

[60] If costs are requested and cannot be resolved between the parties written submissions are to be provided to this court by the Father, with a copy to the Mother no later than April 4, 2013. The Mother's submissions are to be filed with this court and copied to the Father no later than April 18, 2013. If the Mother has raised an issue in her submissions not considered in the Father's submissions he may file and copy to the Mother a further submission addressing those issues no later than April 25, 2013.

Beryl MacDonald, J.S.C.

Attached: Schedule "A" and "B"

SCHEDULE "A"

PARENTING PLAN

Custody/Access

The Mother shall have custody and primary care of the children. She shall have care of the children at all times not provided to the Father by the terms of this parenting plan. The children are to be returned to the Mother's care at the end of the Father's parenting time.

For the purpose of this parent plan the Father may pick up the children from their caregiver or school earlier or later depending on his work schedule.

When the Father is to pick up the children at the Mother's residence he may do so at an earlier or later time depending on his work schedule but this must have been prearranged with the Mother.

The Father shall have the children in his care (access) at the following times:

Regular Schedule

The regular parenting schedule is to be a two week alternating schedule:

Week One: From 5:00 p.m. until 7:30 p.m. on Wednesday and from 5:00 p.m. on Friday until 6:00 p.m. on Sunday.

Week Two: From 5:00 p.m. until 7:30 p.m. on Wednesday and Thursday.

Holiday and Special Times:

All arrangements for holiday and special time parenting are subject to the following requirements:

1. If the Father is working at any time the children are to be in his care, the children are to be cared for by their usual caregiver or under other arrangements consented to by the Mother whose consent is not to be unreasonably withheld.
2. The regular schedule does not apply during holiday and special times but is to resume when holiday and special time parenting has ended.

Summer School Break

The Summer School break, for the purpose of this Plan, shall be all the weeks in July and all but the last full week in August when the regular schedule shall resume as Week 2, regardless of the application of the regular schedule prior to that week.

The consecutive weeks taken shall begin from Sunday at 5:00 p.m. at the start of the first week until Sunday at 6:00 p.m. at the end of the second week. It is recognized that this Sunday is, on a calendar, the beginning of a third week.

The Father shall have the children in his care in all even numbered years for two consecutive weeks in July and the Mother shall have the children in her care for two consecutive weeks in August.

The Father shall have the children in his care in all odd numbered years for two consecutive weeks in August and the Mother shall have the children in her care for two consecutive weeks in July.

The parties shall inform each other about the weeks chosen by each on or before May 15 in every year.

Christmas

The Father shall have the children in his care in all even numbered years from December 26 at 5:00 p.m. until the children are to return to school in January and the Mother shall have the children in her care from the beginning of the school break until December 26, at 5:00 p.m.

The Father shall have the children in his care in all odd numbered years from 5:00 p.m. on the last day of school prior to the Christmas school break until December 26 at 5:00 p.m and the Mother shall have the children in her care from that time until they are to return to school in January.

March School Break

The Father shall have the children in his care for one half the March School Break to coincide with the weekend when the children will be in his care according to the regular schedule so that he will either have the children from a Friday at 5:00 p.m. until Wednesday at 7:30 p.m. or from a Wednesday at 5:00 p.m. until Sunday at 6:00 p.m.

Easter School Break

The Father shall have the children in his care in all even numbered years from Thursday at 5:00 p.m. at the beginning of the Easter School Break, until 3:00 p.m. on Saturday and the Mother shall have the children in her care from that time until the end of the Easter School Break.

The Father shall have the children in his care in all odd numbered years from 3:00 p.m. on Saturday until Easter Monday at 6:00 p.m and the Mother shall have the children in her care from Thursday at 5:00 p.m. at the beginning of the Easter School Break until 3:00 p.m. on Saturday.

Long Weekends

If the Monday following a weekend when the children are in their Father's care is a holiday, the children are to remain in his care until Tuesday morning when they return to school, their caregiver or to the Mother.

The Father is to have the children in his care at all other dates and times that have been agreed upon between the parties in writing and an e-mail or text message exchange shall be a "writing" for this purpose.

TERMS AND CONDITIONS

Counselling

The Father shall access and complete counselling that has as its primary purpose behavioural change that will assist him to control the behaviour that has led him to commit acts of domestic violence.

The Father shall access and complete parenting programs that teach parents about the needs of children at the various ages and stages of their lives with a particular focus on the challenges faced by separated and divorced parents.

Transportation

If at any time the parents must transport the children between their residences, the Father shall be responsible for transporting the children from the Mother's residence to begin his parenting time and the Mother shall be responsible for transporting the children from the Father's residence for the return to the Mother's residence at the end of the Father's parenting time.

Recreational Activities

When the Father has the children in his care he is to ensure they attend all recreational activities in which they are enrolled including games and practices and that they attend other children's birthday parties and sleep overs to which they have been invited.

Right to be Informed

The Mother is to inform the Father about any significant changes or problems relating to the children's health, education, psychological or social development, and she is to provide copies of school progress reports, information about school events and recreational activities that may be attended by parents, and other reports she has received from those who provide health, educational, psychological and recreational programs to the children.

Right to Contact Third Parties

The Father shall be entitled to directly contact the children's doctors, therapists, teachers, and other third party service providers to request and receive information directly and consult about the child.

Contact Information

The Mother must provide the Father with the name, address and telephone number, or other contact information for the children's physicians, therapists, teachers, recreational and other third party service providers and she must update him if there are any changes.

The Father and the Mother must provide each other, and continue to provide each other, current addresses, telephone numbers, and e-mail addresses.

Travel With Children

Neither parent shall travel with the children for more than a day outside of Halifax County without notifying the other parent. The traveling parent shall give the other parent a travel itinerary and a telephone number where he or she can be reached if there is an issue that must be discussed relating to the children.

Residence Relocation

The Mother shall provide the Father 120 days notice of her intention to change the children's residence to a location outside Halifax County and she shall not change the children's residence unless she has his consent or an order permitting the move from a court of competent jurisdiction.

Telephone Contact with Children

The parent who does not have care of the children is entitled to make one telephone call per day to the children, in the evening to say good night and to have a short general conversation. This call is not to be used to question the children about parenting methods or activities of the other parent. The telephone call is to be made at 7:30 p.m. unless the parent has been notified the child will not be available in which case an alternate time is to be provided.

Requests by the children to contact a parent are to be accommodated by the parent who is caring for the child when the request is made.

SCHEDULE "B"

DIVISION OF MATRIMONIAL ASSETS			
DESCRIPTION	VALUE	OWNERSHIP	
		HUSBAND	WIFE
Matrimonial Home	\$2,567.93		\$2,567.93
Kia Sedona	\$6,400.88	\$6,400.88	
Kia Spectra Loan overpayment	\$283.71	\$283.71	
Furniture	\$1,465.00	\$795.00	\$670.00
Kia Sedona	\$2,000.00	\$2,000.00	
RRSP710	\$5,378.40		\$5,378.40
RRSP447	\$7,246.38	\$7,246.38	
Chequing acc....386	\$359.57		\$359.57
Savings acc.....625	\$13.86		\$13.86
Chequing acc....780	\$716.90	\$716.90	
Asset Sub Total	\$26,432.63	\$17,442.87	\$8,989.76
DEBT			
Visa30	\$1,170.64		\$1,170.64
Future Shop....01	\$749.89		\$749.89
Forces Loan....093	\$4,640.48		\$4,640.48
Forces Loan....730	\$749.89		\$749.89
Debt Sub Total	\$7,310.90		\$7,310.90
EQUITY	\$19,121.73	\$17,442.87	\$7,310.90
½ Equity =	\$9,560.86		
Equalization		-\$7,882.01 \$9,560.86	+\$7,882.01 \$9,560.86