

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Bushell v. Griffiths, 2013 NSSC 68

Date: 20130327

Docket: SFSNMCA- 043938

Registry: Sydney

Between:

Norman Bushell

Applicant

v.

Jennifer Griffiths

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: February 4 and 5, 2013, in Sydney, Nova Scotia

Oral Decision: March 27, 2013

Written Decision: April 17, 2013

Counsel: Coline Morrow, for the applicant
Susanne Dixon, for the respondent

By the Court:

[1] **Introduction**

[2] Seven year old Brooke is the daughter of Jennifer Griffiths and Norman Bushell. Ms. Griffiths is Brooke's custodial parent, while Mr. Bushell exercises access.

[3] Conflict and communication difficulties characterize the relationship between the parties. These challenges reached their breaking point in September 2012 when Ms. Griffiths unilaterally attempted to leave the province with Brooke, without Mr. Bushell's permission, or without benefit of court order. Once Mr. Bushell became aware of the plan, he filed a variation application and an *ex parte* motion. An *ex parte* order issued which prevented Brooke's removal from the area.

[4] In September 2012, Ms. Griffiths left Nova Scotia without Brooke. Brooke began to live with her father by virtue of a second *ex parte* order which held that Brooke would remain in Mr. Bushell's care while Ms. Griffiths was out of province. Mr. Bushell enrolled Brooke in a school close to his residence.

[5] Ms. Griffiths returned to Nova Scotia about one month later. Brooke returned to her mother's custody and was transferred to another school. Ms. Griffiths also filed a variation application. While waiting for trial, the parties generally followed the parenting schedule outlined in the court order.

[6] The variation applications were heard on February 4 and 5, 2013. In addition to the parties, the court heard evidence from Mr. Bushell Sr., Ms. Lewis, and Ms. Giovannetti. The oral decision was rendered on March 27, 2013.

[7] **Issues**

[8] The following issues will be addressed in this decision:

- What principles apply to variation applications?
- Has a material change in the circumstances been proven?

- What factors must be considered in relocation/variation applications?
- Should the sole custodial designation be varied?
- What parenting schedule is in Brooke's best interests?
- What is the appropriate maintenance order?

[9] **Background**

[10] The court process is not foreign to Ms. Griffiths and Mr. Bushell. Since Brooke's birth in the fall of 2005, ten orders issued from the Family Division. They are as follows:

- An interim order, dated January 27, 2006, placed Brooke in the custody of her mother, with access to Mr. Bushell.
- In February 2006, a permanent order issued providing Ms. Griffiths with custody and Mr. Bushell with access.
- In July 2006, an interim variation order issued which furnished Mr. Bushell with extensive and specified access.
- An amended interim variation order issued in October 2006, which increased the specified access granted to Mr. Bushell.
- In April 2007, an interim *ex parte* order issued which suspended Mr. Bushell's access. This was followed by a consent variation order which reinstated access on a restricted basis.
- An interim order for child support issued on June 30, 2009.
- A varied consent order issued on May 20, 2010, which extended the access being exercised by Mr. Bushell.
- In September 2011, a consent variation order issued; sole custody was vested in Ms. Griffiths and extensive access to Mr. Bushell.

- An *ex parte* order dated August 31, 2012 prevented Brooke's removal from the Cape Breton Regional Municipality.
- The September 2012 *ex parte* order granted Mr. Bushell uninterrupted access to Brooke while Ms. Griffith was living outside of the area, and upon her return, the access and parenting provisions stated in the order of September 2011 would resume.

[11] In addition to the above, there were other family and criminal proceedings involving the parties that have since resolved.

[12] Both parties have applied to vary the current order. Ms. Griffith states that she secured employment and a home in the Fall River/Halifax area and wishes to relocate there, with Brooke. In the alternative, and if the move is refused, Ms. Griffiths objects to any variation of the current parenting arrangement.

[13] For his part, Mr. Bushell does not support the proposed relocation. Mr. Bushell is seeking shared custody of Brooke, or in the alternative, primary care should Ms. Griffiths move from the area.

[14] Ongoing conflict, fuelled by anger and past recrimination, characterizes the parties' relationship. Difficulties often evident in high conflict families are readily noted in the parties' dysfunctional relationship. Within this context, a decision about Brooke's best interests must be determined.

[15] **Analysis**

[16] **What principles apply to these variation applications?**

[17] All court decisions involving children must be based on their best interests. In assessing the evidence related to best interests, this court must have regard to the standard of proof and make credibility determinations. In **C.(R.) v. McDougall**, 2008 SCC 53, Rothstein, J. confirmed that there is only one standard of proof in civil cases - that is proof on a balance of probabilities. In every civil case, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must not be considered in isolation, but

must be based upon its totality. The evidence must always be clear, convincing, and cogent to satisfy the balance of probabilities test.

[18] Further, the court must assess the impact of inconsistencies on questions of credibility and reliability, which relate to the core issues. It is not necessary that every inconsistency be addressed, but rather a judge must address in a general way the arguments advanced by the parties: **C.(R.) v. McDougall**, *supra*, paras. 40, 45 and 49.

[19] In **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, this court reviewed factors to be considered when making credibility determinations at paras. 18 and 19, which state as follows:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" R. c. Gagnon, 2006 SCC 17 (S.C.C.), para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" R. v. M. (R.E.), 2008 SCC 51 (S.C.C.), para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re*, 2008 NSSC 283 (N.S. S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;

20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: R. v.

Norman (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Novak Estate, Re*, supra, at para 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 93 and *R. v. J.H.* supra).

[20] I have reviewed the totality of the evidence. I have only considered the evidence that was properly before the court by way of exhibits, or as elicited while a witness testified. I have not considered any factual information that was provided in submissions, or contained in other documents filed. I have considered the law and the legal submissions of the parties. I have assigned the civil burden of proof to Mr. Bushell in his application to vary the current order; to Ms. Griffiths in respect of her application to relocate with Brooke.

[21] I have also made credibility findings given the conflict in the evidence. I will now relate my findings for each of the witnesses. First, I accept, without reservation, the evidence of Mr. Bushell Sr. and Ms. Lewis. These individuals provided truthful and accurate accounts. Their evidence was clear, balanced, and logical. They were not evasive, and made admissions not supportive of Mr. Bushell Jr.'s position, on occasion, when responses required. There were no inconsistencies or weaknesses in their evidence.

[22] Mr. Bushell Jr., however, was not always credible when recounting his evidence. There were times when he fabricated evidence. For example, Mr. Bushell stated that his home had three bedrooms, when in fact there were only two, although a third bedroom was being constructed. Mr. Bushell also did not want to admit that, on occasion, all three children slept in the same bedroom. Mr. Bushell was evasive on the issue of Brooke's return to her mother's care after Ms. Griffiths came back from Winnipeg. I was, therefore, cautious in assessing Mr. Bushell's evidence.

[23] Further, I have some concerns about the evidence of Ms. Giovannetti. Ms. Giovannetti exaggerated the extent of Ms. Griffiths' parenting challenges,

although I do accept that Ms. Griffiths did engage in inappropriate parenting. I further accept that Ms. Griffiths did tell Ms. Giovannetti that she was moving to Winnipeg with Brooke.

[24] Finally, I have many concerns about Ms. Griffiths' evidence. Ms. Griffiths was consistently evasive and untruthful. She invariably provided false and misleading information to the court. Examples in support of this conclusion include the following:

- Ms. Griffiths was untruthful about her plans to relocate to Winnipeg. In her affidavit, and during her *viva voce* testimony, Ms. Griffiths stated that she had not planned to relocate with Brooke to Winnipeg, rather, her trip was only intended to be a vacation. These statements stand in stark contrast to what Ms. Griffiths told Justice Wilson during the hearing held on September 7, 2012.
- In an attempt to explain these inconsistencies, Ms. Griffiths stated that what she told Justice Wilson during the September hearing was “not totally true;” and that she was misleading “in some ways.” Upon being presented with a copy of the transcript of the September 7th hearing, Ms. Griffiths acknowledged that she told Justice Wilson that she had a new address in Winnipeg; that she had enrolled the children in school in Winnipeg; and that she had found employment in Winnipeg. During the variation proceeding before me, Ms. Griffiths stated that none of that information was correct. As a further explanation, Ms. Griffiths noted that she was not under oath when she provided the erroneous factual information to Justice Wilson.
- Ms. Griffiths was also misleading in relation to Brooke's enrollment in school in September 2012. During the September 7th hearing before Justice Wilson, Ms. Griffiths stated that she had enrolled her children in school in Winnipeg. During the hearing before me, Ms. Griffiths stated that she was actually referring to her older son, and not Brooke, when she made that comment to Justice Wilson, even though the proceeding before Justice Wilson did not concern the older son, and despite the fact that the older son did not travel to Winnipeg, but remained in Louisbourg with his father. Further, Ms. Griffiths gave

evasive and confusing evidence as to Brooke's enrollment in Sydney area schools in 2012.

- Ms. Griffiths was misleading about the nature of her relationship with Mr. Sheppard. In para. 13 of her affidavit, Ms. Griffiths stated that she was "in a relationship with Edgar Sheppard ("Edgar") for approximately the past six years. Edgar is the biological father of Elizabeth and Matthew." In para. 14, Ms. Griffiths stated that "Edgar is currently working in Northern Canada." During cross examination, Ms. Griffiths minimized her relationship with Mr. Sheppard after being confronted with his extensive criminal record, and confirmation of his incarceration. Ms. Griffiths then noted that she had only seen Mr. Sheppard at Christmas to exchange presents, and had not heard from him since. She also suggested that their relationship was "on and off" during the past six months.
- Ms. Griffiths volunteered during the hearing that she had no criminal record, and that she had a criminal records check completed. However, during cross examination when presented with a probation order, Ms. Griffiths acknowledged that she must have had a criminal record, although from her recollection all past charges had been dismissed.

[25] These are but a few of the many examples which confirm Ms. Griffiths' inability to testify in a candid and truthful fashion. I place little reliance on Ms. Griffiths' testimony. Ms. Griffiths has no difficulty misrepresenting, misleading, and providing false evidence to the court. She is not credible.

[26] **Has a material change in the circumstances been proven?**

[27] Section 37 of the *Maintenance and Custody Act* provides the court with the jurisdiction to vary a custody and access order. An application to vary is not an appeal of an original order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the date the order was made. The existing order can only be varied if a party proves that a material change in the circumstances exist, and as a result of that change, the current order no longer meets the child's best interests: **Gordon v. Goertz**, [1996] 2 S.C.R. 27.

[28] A material change is one which has not been foreseen or could not have been reasonably contemplated by the judge who made the original order: **Gordon v. Goertz, supra**. A material change must be more than a temporary or minor change. The change must be a substantial continuing one which impacts the child and the ability of the parents to meet the needs of the child.

[29] Although **Gordon v. Goertz, supra**, involved proceedings pursuant to the *Divorce Act*, the same legal principles apply to an application made pursuant to the *Maintenance and Custody Act*: **Rafuse v. Handspiker**, 2001 NSCA 1.

[30] The evidence demonstrates material changes in circumstances in relation to the parenting arrangement, which include the following:

- Ms. Griffiths seeks to relocate with Brooke to the Fall River/ Halifax area, and as a result, the parenting schedule currently in place must be examined.
- Ms. Griffiths has consistently used the sole custodial designation as a means to control, limit, and restrict the relationship that Brooke has with her father. Examples in support of this conclusion will be furnished later in this decision.

[31] The applications to vary are thus properly before this court.

[32] **What factors must be considered in relocation/variation applications?**

[33] Ms. Griffiths suggests that the court is limited in its options because of the current sole custody order. She states that the court should either permit her to relocate with Brooke to Fall River, or leave the current order as it currently stands. Mr. Bushell, in contrast, states the court has the authority to place Brooke in his care on a shared or primary care basis.

[34] I agree with Mr. Bushell. In **M. (E.S.) v. B. (J.B.)**, 2012 NSCA 80, Farrar, J.A. held that the relocating parent does not “drive the litigation and dictate what the court can or can not consider when it is the best interests of the child that are paramount:” para. 31. The Court of Appeal held that in considering the matter

afresh, the trial judge must examine the child's current needs and decide which parent is better positioned to meet those needs at the present time given the changing circumstances. The Court of Appeal also concluded that once the proposed move was deemed to be a material change in circumstance, it was open for the court to review the custodial arrangement, even though the evidence was that the mother would not move without the child. The option of the mother staying was just one of several available for the trial judge's consideration.

[35] In **Gordon v. Goertz**, *supra*, the Supreme Court of Canada listed the factors to be applied in relocation variation applications at paras. 49 and 50, which state as follows:

49 The law can be summarized as follows:

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 what is in 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.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[36] In addition, in applications involving parenting, including variation applications, factors similar to those expressed in **Foley v. Foley**, 124 N.S.R. (2d) 198 are often reviewed. These type of factors were recently made part of the statutory regime of the *Maintenance and Custody Act*, and were considered in my decision, as were the written and oral submissions of counsel.

[37] I will now review the various factors that have been identified in concert with the evidence presented.

[38] *Relationship Between Brooke and Each Parent*

[39] Brooke has an ongoing relationship with each of her parents. She loves them and they love her. Love, however, does not necessarily equate to the establishment of a stable, healthy, parent child relationship. I must examine the emotional connection between each parent and Brooke to determine the quality of the parent child relationship.

[40] Ms. Griffiths' relationship with Brooke is marred. Although Ms. Griffiths can be attuned to Brooke's emotional needs, there are times when Ms. Griffiths has not acted in Brooke's best interests and has failed to properly address Brooke's emotional needs. As an example, Ms. Griffiths does not recognize or foster the father daughter relationship. Ms. Griffiths does not appreciate the significant emotional support, guidance, and love that Brooke derives from her father. Ms. Griffiths' judgement is often clouded by anger, mistrust, and bitterness. Because of her failure to appreciate the importance of the father daughter relationship, Ms. Griffiths has consistently restricted and limited access and has acted unilaterally. Ms. Griffiths even attempted to relocate with Brooke to Winnipeg without benefit of court order. Unless checked, Ms. Griffiths' cavalier attitude toward Mr. Bushell will have a negative impact on Brooke's healthy emotional development.

[41] In contrast, Brooke has a strong emotional connection with her father. Brooke is happy in her father's care. Further, Mr. Bushell Jr. is attuned to Brooke's emotional needs, and does not, for the most part, attempt to restrict Brooke's relationship with her mother. Although he does not have an untarnished record, Mr. Bushell is usually capable of setting aside his negative feelings towards Ms. Griffiths in favour of Brooke's best interests. Brooke's emotional well-being is thus promoted.

[42] Brooke's relationship with her father is more supportive of her emotional well-being than is Brooke's relationship with her mother.

[43] *Desirability of Promoting Contact with Both Parents*

[44] Brooke will benefit from ongoing contact with both parents, provided Ms. Griffiths makes the necessary changes in her parenting and provided that she discontinues interfering with the father daughter relationship.

[45] Brooke's relationship with her father will be negatively affected if the relocation request is granted. Their relationship will be challenged because of geography and the economic circumstances of the parties. If the relocation request is granted, Brooke will not be able to spend sufficient time with her father, her paternal siblings, and her extended paternal family. This will negatively impact Brooke's social and emotional development.

[46] *Views of the Child*

[47] The court has no independent evidence of Brooke's views on either variation application.

[48] *Disruption to Child if Relocation Granted*

[49] Brooke will be negatively affected if the relocation request is approved. In CBRM, Brooke has a close and loving relationship with her father, her siblings (half and step), her step mother, and her paternal grandfather, Mr. Bushell Sr. Mr. Bushell Sr. has played a consistent and stabilizing role in Brooke's life for many years. All of these relationships will suffer if the relocation request is granted. These relationships are important to Brooke's healthy development of a sense of self and family. It is essential to Brooke's well being that these relationships be promoted and maintained.

[50] In addition, the court has serious reservations about the stability of Ms. Griffith's plan to move to Fall River. Ms. Griffiths' plan was not well-developed. She said that she secured employment as a child care worker, and had also found a home in the Fall River area. Few details and particulars were forthcoming. Further no evidence of a support network was led. In Sydney, Ms. Griffiths relies upon both the maternal and paternal extended family for support with Brooke, and her other children, to ensure that they attend medical appointments, birthday parties, and activities. There was no evidence of any support network available in Fall River. This is particularly troublesome because Ms. Griffiths would have less time available if she were working. Ms. Griffiths showed little insight into the impact that a move would have on Brooke.

[51] Brooke's life will be negatively impacted if her permanent residence was changed to Fall River.

[52] *Disruption to Child if Change in Custody Granted*

[53] Ms. Griffith has been Brooke's primary care parent. It is likely that Brooke will experience an adjustment if her primary care parent was changed. The potential for adjustment difficulties is mitigated for four reasons. First, Brooke

enjoys a healthy relationship with her father and her paternal family. She is content and happy while living with her father. There is structure and routine. Second, Brooke did not experience adjustment difficulties while living with her father during the month when Ms. Griffiths was in Winnipeg. Third, Brooke is no longer a baby and has transitioned well between homes. Fourth, any parenting plan that will be adopted will ensure quality time with both parents.

[54] *Physical Environment and Financial Ability*

[55] Ms. Griffiths had a suitable home for Brooke in the past. Brooke was fed and clothed in an appropriate fashion. I have no doubt that Ms. Griffiths will continue to do so in the future.

[56] Mr. Bushell's home is likewise appropriate, with the exception of a need for another bedroom so that Brooke will not have to sleep in the same bedroom, although in different beds, that she currently shares with her older stepsister and brother. I understand that the third bedroom is under construction and will be completed soon. The changes in the parenting schedule will take effect after the bedroom is completed.

[57] Mr. Bushell also ensured that Brooke's nutritional and clothing needs were met in his care, and will do so in the future.

[58] *Educational and Medical Needs*

[59] Ms. Griffiths often personally attended the medical appointments for Brooke. On other occasions, Mr. Bushell Sr. took Brooke to her appointments. Mr. Bushell Jr. also arranged necessary medical intervention for Brooke when Ms. Griffiths was living in Winnipeg. I have no concerns about Brooke's medical needs in the care of either parent.

[60] Further, Mr. Bushell Jr. is capable of meeting Brooke's educational needs. Mr. Bushell displayed appropriate skill and judgement when dealing with Brooke's educational issues while Brooke was in his care for the month in the fall of 2012.

[61] Although Ms. Griffiths appeared to meet Brooke's educational needs in the past, the court is nonetheless troubled about Ms. Griffiths' judgement on

educational issues in 2012. First, she unilaterally made arrangements to register Brooke in a school in Winnipeg. Following her failed attempt to take Brooke to Winnipeg, Ms. Griffiths then registered Brooke in a new school in the Sydney area, allegedly allowing Brooke to make that decision. Once Ms. Griffiths returned from Winnipeg, she transferred Brooke from the school where Mr. Bushell had Brooke enrolled, and where special educational programming had been accessed, to a different school. Ms. Griffiths failed to appreciate the instability that so many transfers could have on Brooke.

[62] *Activities*

[63] Brooke is exposed to similar activities in both homes. She attends birthday parties and other social activities appropriate for her age from both homes. She also attends the same religious program from both homes, although it is acknowledged that Mr. Bushell's understanding of the religious denomination in charge of the program may not be accurate.

[64] Brooke also engages in family related activities in both homes. The Bushell residence is situated next to the Bushell Sr. home which has a pool. Brooke takes advantage of the pool and other family activities which are available on the Bushell property. Similarly, Brooke engages in appropriate unstructured activities while in her mother's care.

[65] *Time Availability*

[66] Mr. Bushell is employed. When not working, Mr. Bushell spends his free time with his family. Mr. Bushell has the help of his partner, who is a stay-at-home mom. Further, Mr. Bushell Sr. is available to help both his son and Ms. Griffiths with Brooke whenever either party requests. Mr. Bushell Sr. has made himself available in this capacity for many years.

[67] Ms. Griffiths is currently not employed, and so has more time available for Brooke and her other children. If the relocation request is granted, however, Ms. Griffiths will have less time available because of employment commitments.

[68] *Violence*

[69] There is no violence in the home of Mr. Bushell.

[70] There has been violence in Ms. Griffiths' home. This violence involved Ms. Griffiths and Mr. Sheppard. Mr. Sheppard was charged and convicted of uttering threats. Despite this criminal behaviour, Ms. Griffiths maintained her relationship with Mr. Sheppard, and even travelled to Winnipeg to visit with him. I do not believe that Ms. Griffiths was unaware of Mr. Sheppard's other criminal convictions, nor of his incarceration. I am concerned about the potential for harm if Ms. Griffiths' maintains her relationship with Mr. Sheppard.

[71] *Role Model and Moral Development*

[72] Both parties must improve on their parenting skills in this area. Children learn primarily by example. Both parties were willing to fabricate evidence when each thought it would benefit his/her case. If each were willing to take such liberties with the truth in a court room setting, it is probable that each are engaging in dishonesty in the home. This is not the type of behaviour expected of parents and Brooke deserves much better. I urge the parties to make the necessary changes.

[73] *Discipline*

[74] Brooke appears to be a happy child who requires little discipline. The parties are fortunate that this is the case. I am concerned, however, that Ms. Griffiths displays inappropriate parenting by yelling and screaming at her children, including Brooke. More effective parenting techniques exist and Ms. Griffiths will be required to access some training in this area.

[75] *Conclusion on Relocation and Variation of Parenting Schedule*

[76] After considering the evidence, I conclude that the relocation request must be denied in Brooke's best interests. The relocation plan lacks stability and will jeopardize the relationship which Brooke enjoys with her father and her extended paternal family. In contrast, the proposed relocation will not produce any significant benefit that will improve Brooke's life.

[77] Further, it is likewise clear that the current parenting schedule must be varied to meet Brooke's best interests. The current parenting schedule does not provide Brooke with sufficient time with her father. Brooke's relationship with her father is negatively affected by Ms. Griffiths' poor judgement and interference in the father daughter relationship. This will likely negatively impact Brooke's healthy development.

[78] A parenting schedule must be crafted in a way that will reduce discretionary decision-making by Ms. Griffiths. Ms. Griffiths has used such authority in the past to restrict access. Transitions will occur at school to reduce potential conflicts. The parenting schedule must recognize that the parental conflict is mainly fuelled by Ms. Griffiths' anger, resentment, and need to control. Such qualities have resulted, and will likely result in the future, in poor parental decision-making on the part of Ms. Griffiths. The schedule will also take into account Mr. Bushell's work schedule. The particulars of the parenting schedule will be detailed after the court determines the variation issue involving the custodial designation.

[79] **Should the sole custodial designation be varied?**

[80] Ms. Griffiths seeks the continuation of the sole custody order in her favour. Mr. Bushell seeks a joint and shared parenting order, and in the alternative, primary care. I must focus on the arrangement that is in Brooke's best interests.

[81] In **Baker-Warren v. Denault**, *supra*, this court reviewed principles of custodial designations in high conflict families at paras 24 to 26 and para 32, which state as follows:

24 ... Where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that such a situation will change, joint custody is ordinarily not appropriate: *Roy v. Roy*, [2006] W.D.F.L. 2830 (Ont. C.A.) [2006 CarswellOnt 2898 (Ont. C.A.)]. This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: *Godfrey-Smith v. Godfrey-Smith* (1997), 165 N.S.R. (2d) 245 (N.S. S.C.).

25 Mr. Denault and Ms. Baker-Warren's interaction is marked by high levels of distrust and disrespect. Communication is poor. Therefore, joint custody, in its

traditional sense, would not appear to be viable. Despite this grim finding, sole custody is not the only option. A parallel parenting order must also be considered.

26 Courts have increasingly embraced the concept of parallel parenting in circumstances similar to the case at bar. A parallel parenting regime is a mechanism which can be employed where there is high parental conflict, and where a sole custody order is not in the child's best interests. A parallel parenting regime permits each parent to be primarily responsible for the care of the child and routine decision-making during the period of time when the child is with him/her. Significant decision-making can either be allocated between parents, or entrusted to one parent. Parallel parenting ensures that both parents play an active and fruitful role in the life of their child while removing sources of conflict through a structured and comprehensive parenting plan.

...

32 The adoption of a parallel parenting regime is not a solution for the vast majority of the cases before the courts. It is reserved for those few cases where neither sole custody, nor cooperative parenting meets the best interests of the child. This is one such case. The adoption of a parallel parenting regime is in the best interests of Kyra in the circumstances.

[82] It is in Brooke's best interests to vary the sole custodial designation to one that is based on shared and parallel parenting. The sole custody designation has been abused by Ms. Griffiths in the past to unilaterally restrict and limit access. Ms. Griffiths stopped the midweek access. Ms. Griffiths does not follow the access regime when it does not suit her. For example, on the eve of trial, she allegedly "forgot" that Brooke was scheduled to be with her father. She thereafter made a last minute sleep over arrangement and had Brooke negotiate directly with her father to arrange an alternate pickup time. Another example occurred when Ms. Griffiths reneged on her promise to provide "make-up" access after Mr. Bushell agreed that Brooke could travel to Montreal during his scheduled summer access. Ms. Griffiths cannot be entrusted with sole decision-making. Mr. Bushell has proven on a balance of probabilities that Ms. Griffiths will likely continue abusing the sole custodial designation, contrary to Brooke's best interests.

[83] Nor is it in Brooke's best interests to be placed in the sole custody of Mr. Bushell. He has not acted as a sole primary care parent for longer than a month. Further, Mr. Bushell is supportive of a shared and joint parenting arrangement.

[84] Both parties love Brooke. Brooke will benefit from a full relationship with each of her parents provided Ms. Griffiths makes the requisite changes in her parenting. A parallel parenting regime will ensure that Brooke's best interests are met despite the parental conflict.

[85] **What parenting plan is in the best interests of Brooke?**

[86] **Parallel Parenting** - Ms. Griffiths and Mr. Bushell will share custody of Brooke Erin Bushell born ** in a parallel parenting regime.

[87] **Regular Schedule** - Brooke will be in the physical care of Mr. Bushell every Friday at 9:00 a.m. until Monday at 9:00 a.m. Brooke will be in the physical care of Ms. Griffiths for the balance of the week. Mr. Bushell will be responsible for picking up Brooke after school on Friday, and transporting Brooke to school on Monday. Ms. Griffiths will assume this responsibility for the balance of the week.

[88] **Special Occasions and Holidays** - The regular schedule will be suspended for special occasions and holidays, and the following parenting schedule will be followed in its stead:

- a. **Labour Day Weekend** - Brooke will spend every Labour Day Weekend commencing Friday at 9:00 a.m. until Tuesday at 9:00 a.m. with Ms. Griffiths, at which time the parties will revert back to the regular schedule.
- b. **Thanksgiving** - Brooke will spend every Thanksgiving weekend with Ms. Griffiths commencing at 9:00 a.m. on Friday and continuing until Tuesday at 9:00 a.m., at which time the parties will revert back to the regular schedule.
- c. **Halloween** - Brooke will spend Halloween with the parent in whose care she is regularly scheduled to be.
- d. **Christmas** -
 - i. Christmas is deemed to cover the period from 2:00 p.m. on December 23rd until 2:00 p.m. on January 3rd.
 - ii. During the *odd numbered years*, Brooke will be in care of Ms. Griffiths from 2:00 p.m. on December 23rd until 2:00 p.m. on

December 25; and from 2:00 p.m. on December 28th until 2:00 p.m. on December 31. During the odd numbered years, Brooke will be in the care of Mr. Bushell from 2:00 p.m. on December 25 until 2:00 p.m. on December 28; and from 2:00 p.m. on December 31 until 2:00 p.m. on January 3rd, at which time the parties will revert back to the regular schedule.

iii. During the *even numbered years*, Brooke will be in the care of Mr. Bushell from 2:00 p.m. on December 23rd until 2:00 p.m. on December 25; and from 2:00 p.m. on December 28th until 2:00 p.m. on December 31. During the even numbered years, Brooke will be in the care of Ms. Griffiths from 2:00 p.m. on December 25 until 2:00 p.m. on December 28; and from 2:00 p.m. on December 31 until 2:00 p.m. on January 3rd, at which time the parties will revert back to the regular schedule.

e. **Spring Break** - Spring break is deemed to cover a nine day period from 9:00 a.m. on Friday of the last day of school until 9:00 a.m. on Sunday before school recommences. Unless the parties agree otherwise in writing, Brooke will spend spring break with Mr. Bushell during the even numbered years. Unless the parties agree otherwise in writing, Brooke will spend spring break with Ms. Griffiths during the odd numbered years. The parties will revert back to the regular schedule after the conclusion of the spring break holiday.

f. **Easter** -

i. Easter is deemed to cover the period from 9:00 a.m. on Good Friday until Easter Monday at 5:00 p.m.

ii. During the *even numbered years*, Brooke will be in the care of Ms. Griffiths from 9:00 a.m. Good Friday until 9:00 a.m. on Easter Sunday. During the even numbered years, Brooke will be in the care of Mr. Bushell from 9:00 a.m. Easter Sunday until 5:00 p.m. Easter Monday, at which time the parties will revert back to the regular schedule.

iii. During the *odd numbered years*, Brooke will be in the care of Mr. Bushell from 9:00 a.m. on Good Friday until 9:00 a.m. Easter Sunday. During the odd numbered years, Brooke will be in the care of Ms. Griffiths from 9:00 a.m. Easter Sunday until Easter Monday at 5:00 p.m., at which time the parties will revert back to the regular schedule.

g. **Long May Weekend** - The long May weekend is deemed to cover the period from 9:00 a.m. on the Friday before the long May weekend until Monday at 5:00 p.m. Brooke will be in the care of Ms. Griffiths for every long May week-end.

h. **Summer Vacation** - Each party will have Brooke for two weeks during the summer school vacation. At all other times, the regular schedule will be followed. Ms. Griffiths will provide Mr. Bushell with notice of the two weeks she intends to take for summer vacation no later than May 1st of each year. Mr. Bushell will provide Ms. Griffiths with notice of the two weeks he intends to take for summer vacation no later than May 15th of each year.

i. **Mother's Day** - Brooke will spend Mother's Day with Ms. Griffiths commencing at 9:00 a.m. on Sunday and overnight to 9:00 a.m. on Monday. Ms. Griffiths will be responsible to transport Brooke to school on that Monday.

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

[90] **Make Up Parenting Time** - On occasion when Brooke is too ill to be transported between households, make up time will be supplied to the other party at

times to be decided by the parent who lost the parenting time with Brooke, although make up access cannot be scheduled during the Christmas or Easter holidays. The parent who is scheduled to have Brooke will make the determination as to whether Brooke is too ill to be moved.

[91] **Travel** - Each party will notify the other party of travel plans involving Brooke. Notice will include dates of travel, location, address, and telephone numbers where Brooke can be reached, and any applicable flight details. Both parties will accommodate any requirements for passport documentation to allow Brooke to vacation with the other parent outside Canada.

[92] **Telephone Contact** - If a party does not have physical contact with Brooke on a given day, telephone access will be arranged with the other party at 7:00 p.m. unless previously scheduled plans make such contact impossible, in which case, another reasonable time will be scheduled.

[93] **Decision Making Authority** - Each party will have routine, day to day decision making authority and control when Brooke is in his or her physical care, including any child care decisions. Each party will notify the other by email of the following routine decisions made while Brooke is in his or her care: particulars of minor illnesses, and any medication that has been administered; particulars of homework assignments, projects, and tests; and particulars relating to significant social welfare matters.

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

[95] **Educational Decisions** - Both parties will determine major educational decisions affecting Brooke, including the choice of school and educational programs. In the event of disagreement after meaningful consultation, Mr. Bushell will have final decision-making authority.

[96] **Meeting, Concerts, and Activities** - Both parties are entitled to attend parent teacher meetings, and major school events such as concerts, programs, and

activities. In the event tickets are limited to such performances, each parent will have priority for tickets. The use of any additional tickets will be determined by the parent who has residential care of Brooke on the day the special event occurs.

[97] **Parental Contact With School** - The parent who has physical care of Brooke will be responsible for attending at the school should she become ill or should school be cancelled. The parties will provide the school with the schedule and contact information for each party for such purposes.

[98] **Education Assistance** - Each party is responsible for assisting with homework and any special needs training related to Brooke while Brooke is in his/her physical care. Each party will cooperate with all professionals to learn strategies, to assist Brooke with any special learning requirements.

[99] **Medical and Dental Treatment, Health Card and Insurance Forms** - Both parents will have the Health Card number for Brooke, and both parents will share particulars, and forms, of any health plan which covers Brooke.

[100] **Family Physician, Dentist, and Other Health Professionals** - Both parties may attend appointments scheduled for Brooke, if possible, and the party who has scheduled the appointment will provide timely notification to the other parent.

[101] **Information Sharing** - The parties will keep each other informed of all medical and dental decisions affecting Brooke, and any and all treatment in a timely and regular fashion through email communication, or telephone communication.

[102] **Extracurricular Activities** - Each party may chose and enroll Brooke in extracurricular activities which occur during their regular scheduled time. The party who has physical care of Brooke will be responsible for transportation to and from the activity. The cost of any special activity will be born by the party enrolling the child. Each party will keep the other party apprised of any extracurricular activities in which Brooke has been enrolled.

[103] **Access to Professional Records and Information** - Each party has the right to communicate with all professionals involved in Brooke's care, and each has the right to obtain information and documentation respecting Brooke from all medical

professionals, educators, health professionals, and social welfare professionals without the further consent from the other party.

[104] **Communication Between the Parties** - Matters respecting Brooke's health, education, or general welfare will be subject to communication between the parties. All communication will be respectful and child focussed, and will be facilitated by email communication and telephone communication.

[105] **Therapeutic Interventions** - The parties will attend counselling to learn better communication skills for separated parents. The purpose of such counselling is to learn techniques to ensure that Brooke is not placed in the middle of the parental conflict, and to enhance communication between the parties. In addition, Ms. Griffiths will attend educational counselling concerning the importance of fostering a father daughter relationship, to gain information on the negative impact that parental conflict has on children, and to learn effective discipline skills.

[106] **What is the appropriate maintenance order?**

[107] This parenting schedule triggers the shared parenting provisions of the *Child Support Guidelines*. Insufficient evidence was adduced to allow the court to complete the analysis stated by the Supreme Court of Canada in **Contino v. Leonelli-Contino**, [2005] 3 S.C.R. 217. This matter will therefore return for further hearing on a date that will be scheduled. The parties are to contact the scheduling office for this purpose. Counsel are to ensure that sufficient evidence is produced to permit the court to complete its review.

[108] **Conclusion**

[109] It is in the best interests of Brooke to refuse the relocation request of Ms. Griffiths, and to grant the variation request of Mr. Bushell. A shared parenting regime based upon parallel parenting principles, and subject to the terms and conditions noted, will ensure that Brooke's unique needs are met.

[110] The maintenance issue will be addressed once the parties have supplied the necessary evidence to complete the **Contino** analysis.

[111] If either party wishes to be heard on the issue of costs, written submissions are to be provided with 15 days. Ms. Morrow will prepare the order and forward to Ms. Dixon for her consent as to form.

Forgeron, J.