SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacDonald v. Ross, 2013 NSSC 117

Date: 20130410
Docket: 59662
Registry: Sydney

Between:

Alicia MacDonald

Petitioner

v.

Glen Michael Ross

Respondent

Judge: The Honourable Justice Kenneth C. Haley

Heard: February 25th , 26th, 27th and 28th, 2013

Counsel: Jennie Donnelly MacDonald, for the Applicant
Darren Morgan, for the Respondent

By the Court:

[1] This is the Application of **Alicia MacDonald**, hereinafter called the "Applicant", who seeks to vary a Consent Shared Custody Order, issued July 22, 2010, in relation to her 6 year old son, K. MD. The Applicant now seeks primary care of her son.

[2] **Glen Michael Ross**, hereinafter called the Respondent, opposes the Application and alternatively seeks that he be awarded primary care of his son, K. MD., who was born on December 5, 2006.

[3] The current order issued by Justice MacLellan states as follows:

> **THE FOLLOWING PROVISIONS ARE HEREBY ORDERED PURSUANT TO THE *MAINTENANCE AND CUSTODY ACT* RSNS 1989, C. 160**:
>
> **Custody & Access**
>
> 1. The Applicant, Glenn Michael Ross (hereinafter referred to as " the Applicant") and the Respondent, Alicia MacDonald (hereinafter referred to as "the Respondent") shall have shared custody of the dependent child; namely, K.MD., born December 5, 2006.
>
> 2. The Applicant shall have the care of the child from Monday at 10:30 am to Thursday at 10:30 am each week. The Respondent shall have the care of the child from Monday at 10:30 am to Monday at 10:30 am each week, with the child attending day care on one of the Respondent's days with the child.
>
> 3. Both parties shall be entitled to access all medical, educational and other information from all third party professionals involved in the care of K.
>
> 4. Both parties recognize that it is important that the child spend time with both parents during holidays and agree to be flexible in arranging holiday time accordingly.
>
> 5. Neither party shall remove the child from the jurisdiction of the Cape Breton Regional Municipality for the purpose of relocation without first obtaining the other party's express consent or an order from a court of competent jurisdiction.

6. Both parties shall be entitled to extended time with the child for trips, special events or occasions, provided that the party requesting the additional time provides the other party with 2 weeks' notice.

7. Both parties shall use their best efforts to make decisions involving the child jointly; however, in the event that the parties cannot come to an agreement, they shall engage the services of a mediator, or return to court.

Child Maintenance

8. In consideration of the shared parenting arrangement for the dependent child, there shall be no child maintenance payable by either party. Both parties shall be responsible for the child's daily living expenses and clothing while the child is in their care. The parties have considered the child's best interests and have satisfied themselves that he is appropriately financially supported.

Enforcement

9. All sheriffs, deputy sheriffs, constables and peace officers shall do all such acts as may be necessary to enforce this order and for such purposes they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this order.

[4] The parties were in a relationship for 8 to 8 1/2 years and separated in 2007, 3 months after K. MD. was born. The Applicant continued to live in Glace Bay with K. MD. until 2009 while the Respondent moved to Sydney, Nova Scotia. Both parties re-married and were living in Westmount, Nova Scotia at the time of the Consent Order was issued.

[5] Final decision making issues arose between the parties in terms of K. MD.'s education; medical care; supervision and discipline which has caused conflict between the parties.

[6] As a result each party requests the Court award primary care of their son to one and not the other.

[7] K. MD. plays an integral part in the lives of both families and enjoys younger step siblings in both his mother's and father's new homes.

[8] In 2011 the Applicant decided to re-locate back to Glace Bay from Westmount, Nova Scotia to be closer to her parents as her husband's work required him to be away in New Brunswick for the majority of the time.

[9] The Applicant is a stay at home mother who is taking some online university courses to hopefully prepare her for a career in child care within the next 5 years. She relies fully upon her husband's resources for support which amounts to $120,000 per year.

[10] The Respondent is a Diesel Mechanic Apprentice with an alleged flexible work schedule. His wife is self employed and operates a hair salon with one other employee. The Respondent and his wife earn $31,000 and $38,000 respectively and currently rent a home in Westmount, Nova Scotia, which they hope to purchase in the near future.

[11] The proceeding was conducted on February 25th, 26th, 27th and 28th, 2013 and the Court thus received evidence from the following witnesses, namely:

1. Alicia MacDonald, Applicant;
2. Dan MacDonald; Father of the Applicant;
3. Cheryl MacDonald, Mother of Applicant;
4. Stephanie Hanahran, Alleged Godmother;
5. Glen Ross, Respondent;
6. Marlie Ross, Respondent's wife;
7. Dr. Roderick Bird, MD., FRC.P, Pediatrician;
8. Andrew Culligan, Principal, Robin Foote Elementary;
9. Colleen MacCormick, Teacher, Adam Foote Elementary.

[12] Exhibits admitted into evidence by the Court are as follows:

1. Notice of Variation Application dated August 11, 2011.

2. Affidavit of Alicia MacDonald sworn to on August 11, 2011.

3. Ex parte Application dated September 6, 2012.

4. Affidavit of Alicia MacDonald dated September 6, 2012.

5. Consent Order dated July 22, 2010.

6. Applicant's Booklet of Photographs.

7. Oak Meadow online curriculum.

8. YMCA Learn to Swim Progress Card.

9. Health Board e-mail authored by the Applicant on December 11, 2006.

10. Health Board e-mail authored by the Applicant on November 24, 2010.

11. E-mail from the Applicant to the Respondent dated July 2, 2012.

12. E-mail from the Applicant to the Respondent dated June 13, 2012.

13. E-mail from the Applicant to the Respondent dated December 9, 2010.

14. Curriculum vitae for Dr. Roderick Bird.

15. Expert Report of Dr. Roderick Bird dated April 18, 2012.

16. Expert Report of Dr. Roderick Bird dated February 12, 2013.

17. Certificate of Birth and Baptism of K. MD.

18. Respondent's booklet of photographs.

19. E-mail correspondence between the Applicant and the school principal dated November 19, 2012 and November 26, 2012 respectively.

20. Robin Foote Elementary Report Card for K.MD.

21. E-mail correspondence between the Applicant and Respondent dated December 15, 2011 to December 16, 2011.

22. E-mail correspondence between the Applicant's Respondent dated February 28, 2012 to March 1, 2012.

[13] The Court reserved its decision on February 28, 2013 with written submissions to be provided to the Court on March 18, 2013.

ISSUES:

1. Has the Applicant demonstrated there has been a change in circumstance sufficient to vary the existing court order?
2. If so, which parenting plan is in the best interests of the child, K. MD.?
3. Subject to the determination of issue 2, what, if any, is the appropriate quantum for child support?

APPLICANT'S EVIDENCE

[14] Currently the Applicant cares for K. MD. on Thursday, Friday, Saturday and Sunday of each week. The Respondent has K. MD. on Monday, Tuesday and Wednesday.

[15] The Applicant has good support from her parents, Dan and Cheryl MacDonald, who also live in Glace Bay, Nova Scotia. This is especially important to the Applicant since her husband, who runs his own IT business, is away doing consulting work with the New Brunswick government. The Applicant testified her husband is away every second weekend and "is not around that much".

Applicant's New Husband

[16] The Applicant testified the Respondent is concerned about her husband being around K. MD. She denied she was in an abusive relationship with her husband as suggested by the Respondent who placed reliance upon Exhibits 9 and 10 which were Health Board posts authored by the Applicant seeking on line advice about her relationship. The Applicant testified:

> I forgot about that...it wasn't abuse...not physical...he prevented me from leaving ...a lot has changed since then...

[17] The Applicant acknowledged her husband has since taken Anger Management and has visited professionals to address his temper issues in both Halifax and Sydney.

[18] The Applicant testified her husband poses no risk to K. MD. and testified about an incident when K. MD. was hit by a door when opened by her husband (Exhibit 13)

[19] The Applicant testified the incident was "accidental" and K. MD. received "a little bruise on his head".

[20] The Applicant testified that "there was nothing to worry about" and she was satisfied there was "absolutely no risk" to K. MD. in the presence of her husband.

[21] The Applicant testified about the continued disagreement she has with the Respondent in terms of K. MD. 's education, medical care and discipline. Mediation efforts contemplated by paragraph 7 of the Consent Order (Exhibit 5) have proven to be either unsuccessful or did not occur.

Education

[22] With regard to education the Applicant enrolled K. MD. in "Tiny Town Daycare" without the assistance, financial or otherwise from the Respondent. The Applicant testified the Respondent stated he would only assist when he had K. MD. 50 % of the time. K. MD. was not enrolled in daycare while in the care of the Respondent.

[23] Upon completion of daycare it was the Applicant 's wish to register K. MD. at St. Anne's Elementary in Glace Bay, Nova Scotia. The parties discussed the issue at length with no resolution as the Respondent opposed K. MD. attending school at that time. Mediation services failed to alter the impasse.

[24] As a result the Applicant did not enroll K. MD. in school, and in 2011 decided to home school K. MD. using the Oak Meadow Program as identified in Exhibit 7. The Applicant testified that the educational milestones were the same

as those in grade primary but she was unable to complete the program due to an injury to her shoulder.

[25] The Applicant testified the Respondent did not participate and "refused to assist". In the Applicant's opinion this program better prepared K. MD. for school. The Applicant worked extensively with K. MD. in this regard.

[26] In 2012 the parties disagreed about which school K. MD. should attend, the Applicant favoured St. Anne's Elementary in Glace Bay, Nova Scotia while the Respondent preferred Robin Foote Elementary in Westmount, Nova Scotia.

[27] The Applicant testified she investigated both schools and found St. Anne's, to be a newer and better equipped school. The Applicant offered no evidence in support of this position.

[28] The Applicant testified:

> ...Glen means well, but education is not his thing...

[29] The Applicant testified Robin Foote Elementary would be a difficult choice for her due to travel implications since she relocated back to Glace Bay, from Westmount.

[30] In September 2012, the Respondent enrolled K. MD. in Robin Foote Elementary without the expressed agreement of the Applicant. The Applicant testified the Respondent disregarded Paragraph 7 of the Consent Order which states as follows:

> Both parties shall use their best efforts to make decisions involving the child jointly; however, in the event that the parties cannot come to an agreement, they shall engage the services of a mediator, or return the matter to court.

[31] As a result of the unilateral action taken by the Respondent the Applicant made an Ex- Parte Application to the Court as evidenced by Exhibits 3 and 4. The Ex-Parte Justice requested that the parties and their counsel try to work toward a resolution, however the child remained at Robin Foote up to and including the time of this hearing.

Medical/ Dental Care

[32] The Applicant testified that the Respondent is concerned K. MD. may have Attention Deficit Disorder. The Applicant understands the concerns of the Respondent, who himself has Attention Deficit Disorder, but the Applicant does not agree that her son has the condition.

[33] The Applicant was not consulted by the Respondent when he arranged a referral to, Dr. Bird. She understands that, at this point in time, Dr. Bird has not made a final diagnosis one way or the other.

[34] The parties have likewise not agreed on K. MD's dental treatments. The Applicant arranged for K. MD. to see a dentist in Glace Bay when he was age 4. She did not discuss this with the Respondent in advance.

[35] K. MD. had 9 cavities and the Applicant's dentist was of the opinion sedation may be necessary and recommended a referral to a specialist.

[36] The Respondent took K. MD. to a specialist who practiced in Port Hood, Nova Scotia. The Applicant was unable to attend due to illness.

[37] As it turned out the specialist was not required to sedate K. MD., however the Respondent wished to maintain the services of the specialist in Port Hood for K. MD.'s ongoing dental care.

[38] The Applicant was of the opinion Port Hood, Nova Scotia was too far to travel for follow-up checkups and re-booked K. MD. with her dentist in Glace Bay, Nova Scotia.

[39] The Respondent did not agree with the Applicant's decision to return to her choice of dentist in Glace Bay.

Supervision

[40] The Applicant and the Respondent do not agree as to what may constitute sufficient supervision for their son, K. MD.

[41] The Applicant testified that the Respondent was upset and concerned about two separate incidents where K. MD. wandered off. Reference to these incidents can be found in e-mails marked Exhibits 11 and 12, wherein the Applicant advised that Respondent of same.

[42] On the first occasion K. MD. was playing with a friend on the front step which was gated. The Applicant took a "quick shower" and left K. MD. unattended, which the Applicant acknowledged was an error in judgment on her part. The children took the gate down and K. MD. was found in the back yard unharmed.

[43] The second occasion involved an incident when the Applicant's parents were looking after K. MD. K. MD. was told he could play in his grandparent's backyard. They were watching from the kitchen. K. MD. wandered off and a neighbour called to advise the grandparents of K. MD.' s whereabouts. K. MD. was returned unharmed.

[44] The Applicant testified that "he did not go missing". K. MD. was disciplined with the use of " time out" and the removal of "privileges ".

Other Concerns -

(a) The Applicant is concerned that K. MD. calls his stepmother "mom". She testified "it hurts".

(b) The Applicant is concerned that K. MD's swim card (Exhibit 8) had the surname Ross and not MacDonald. The Applicant testified K. MD. says that he has two names.

(c) K. MD. has a pet spider which is a concern to the Respondent. The Applicant does not agree and sees no issue.

(d) The Applicant testified that the Respondent "means well" and that she believes he wants what is best for K. MD. Nonetheless, she questions some of the Respondent 's decision making and is disturbed by the fact the Respondent does not

> provide her with regular updates regarding K. MD. She testified:
>
> ....updates are not regular and not very informative."

Relief Sought

[45] The Applicant does not want to take time from the Respondent. She has no concerns with the Respondent as a father.

[46] The Applicant nonetheless requests primary care of K. MD., specifically during the week so she can attend to K. MD's educational needs. She would like to enroll K. MD. in St. Anne's in Glace Bay, Nova Scotia.

[47] The Applicant testified that she can provide a happy, healthy and safe home for K. MD as evidenced by photographs marked Exhibit 6.

[48] K. MD shares a bedroom with his brother, but he could have his own room "if that was what he wanted".

[49] Although not her preference for family support reasons, the Applicant testified that she would move back to Westmount to help resolve this matter.

[50] The Applicant does not seek child support.

[51] **DAN MACDONALD** - is the father of the Applicant. He lives in Glace Bay with his wife Cheryl in his family home. Mr. MacDonald is well educated and currently is self employed in the I. T. field.

[52] Mr. MacDonald confirmed the evidence of the Applicant in terms of the Applicant's past history with the Respondent. In particular, Mr. MacDonald confirmed that the Respondent moved out in April, 2007 and that the Applicant and K. MD. remained in the basement apartment in his home for the next three years.

[53] Mr. MacDonald described his neighbourhood as safe and child friendly.

[54] Mr. MacDonald was questioned about the incident when K. MD. left his property. He testified he or his wife are usually outside with K. MD. and if not they would maintain a view from their kitchen.

[55] On this particular occasion Mr. MacDonald could not locate K. MD for about five minutes. Mr. MacDonald had taught K. MD. the home phone number and he received a call from a neighbour on an adjoining property. Mr. MacDonald went right over to pick up K. MD. Mr. MacDonald was embarrassed by the incident but felt overall it was managed properly from a discipline perspective.

[56] In general, K. MD now visits about once a week to have supper or a sleep over.

[57] Mr. MacDonald testified about the spider which is of concern to the Respondent. Mr. MacDonald testified it was a:

> big, ugly, black, hairy spider.

which, in his opinion did not pose a threat to K. MD.'s safety.

[58] Mr. MacDonald testified:

> Alicia is a good Mom, her children are happy, content and well behaved.

He testified K. MD. is a

> "great kid" .... "smart as a whip"

[59] Mr. MacDonald is fully supportive of his daughter 's new husband and family, although conceded he did not know much about his daughter's personal life.

[60] **CHERYL MACDONALD** - is the mother of the Applicant. She is an Operating Room nurse at the Glace Bay Hospital.

[61] Mrs. MacDonald described her daughter as a "level headed parent". She testified:

> I am quite proud of how she raises the children.

[62] Mrs. MacDonald is very close to K. MD. and they have a strong bond. Mrs. MacDonald is very proud of K. MD. She testified:

> ....he is the light of my life....he's my man.....

[63] Mrs. MacDonald confirmed the Respondent is a "good person" and that his family are good people. She nonetheless questions the Respondent's decision to investigate the possibility of K. MD. having Attention Deficit Disorder. Mrs. MacDonald testified that she saw nothing of concern in this regard, but it would be different if there was a medical diagnosis.

[64] In response to questioning regarding the incident when K. MD. wandered off, Mrs. MacDonald testified that K. MD. has been left unsupervised in the backyard. In that circumstance she or her husband would call every five minutes. She testified:

> sometimes he can be a little bugger and not respond

[65] Mrs. MacDonald confirmed that K. MD. was spoken to about his behaviour in this regard.

[66] Mrs. MacDonald testified that her daughter's new husband was a "good guy" and that she had no concerns, although aware that he had a temper.

[67] **STEPHANIE HANRAHAN** - According to the Applicant this witness was asked to be a "second godmother" to K. MD. Ms. Hanrahan testified she was not at the church ceremony and confirmed her name is not on the Certificate of Birth Baptism marked Exhibit 17.

RESPONDENT'S EVIDENCE

GLEN ROSS

[68] The Respondent is a heavy duty diesel mechanic apprentice who earns approximately $31,000.00 per year. He has remarried, and his spouse earns approximately $39,000.00 per year. They have a daughter.

[69] Pursuant to the current shared custody arrangement, the Respondent has K. MD. in his care on Monday, Tuesday, and Wednesday of each week. The Respondent has good relationships with his family and extended family, all of which is to the benefit of K. MD.

[70] The Respondent testified that he and his wife's work schedule can be as flexible as it needs to be to ensure K. MD. always has a primary caregiver available to him.

[71] The Respondent's home is clean, safe, and provides a happy and healthy environment for K. MD., as evidenced by photographs in Exhibit 18. The Respondent is currently renting his home in Westmount, but he hopes to be able to purchase the home in the near future.

[72] The Respondent testified:

> ...all our money goes to the children 100%
>
> ...every minute we have we spend with them...we are dedicated to the children.

[73] In this regard it was pointed out during cross examination that a motorcycle was purchased for K. MD., however he is too young to drive. The Respondent testified he got excited and made the purchase.

[74] The Respondent seeks primary care of K. MD. as he finds the current Order is not working.

Applicant's New Husband

[75] The Respondent testified he is not comfortable with the Applicant's new husband being around K. MD. There are a number of incidents that bothered the Respondent, in particular, the time when K. MD. was struck by the door. The Respondent testified:

> ...I can't let that go...

[76] The Respondent acknowledged that he had no proof to substantiate his concerns about alleged abuse in the Applicant's home.

Education

[77] The Respondent testified he "insisted" that K. MD. not attend daycare on one of his appointed days. He acknowledged he did not contribute toward the cost of daycare, which was paid for by the Applicant.

[78] The Respondent testified he thought it was a good idea for K. MD. to attend YMCA Preschool, but he did not contribute toward the cost or participate with the program.

[79] When the Applicant proposed that K. MD. attend school the Respondent objected, believing K. MD. was not ready, and it was too early to place him in grade primary. The Respondent testified he believed K. MD. may have some behavioral and/or emotional issues which were similar to the problem he had himself growing up. He wanted to have K. MD. assessed in this regard.

[80] The Respondent tried to reach a compromise with the Applicant, but in the end K. MD. did not attend school in 2011. As a result the Applicant home-schooled K. MD., which was opposed to by the Respondent. He testified:

> There was no rush to put the child in school.

[81] The Respondent confirmed he did not participate in the home schooling program. He testified:

> ...everything she was doing I do on a regular basis...
>
> ...I read to my son every night when he is at my house...

[82] The Respondent confirmed that he and the Applicant disagreed as to which school K. MD. would attend in 2012. He preferred Robin Foote Elementary in Westmount. The Applicant preferred St. Ann's Elementary in Glace Bay. The Respondent was not in favour of K. MD. attending school in Glace Bay. He testified that travelling to Glace Bay did not appeal to him.

[83] The Respondent testified he heard "a lot of bad things" about St. Ann's Elementary, but acknowledged he did not visit the school, nor did he actually investigate the Glace Bay School system.

[84] Although the Respondent testified he wanted to have K. MD. assessed before starting school, he registered K. MD. in Robin Foote Elementary in advance of any assessment. When asked if he had made the decision for K. MD. to attend Robin Foote Elementary unilaterally he testified:

> ...Yes, I did.

[85] The Respondent testified he had an "automatic love" for Robin Foote, and that the school "really appealed to me". He acknowledged that he went ahead with the school registration without the Applicant's agreement, and that he was aware of her opposition to K. MD. attending Robin Foote Elementary. The Respondent conceded he was aware of the Court Order's requirement to engage a Mediator or return to Court in the event of any such disagreement.

[86] The Respondent testified that his son has remained in Robin Foote Elementary since September 2012 and that he is "doing exceptionally well". K. MD. settled in very well, and that he is at "the top of his class".

[87] The Respondent did acknowledge, although reluctantly, that K. MD. benefited from both preschool and home school. He confirmed that the Applicant played a major role in the success of a recent school project done by K. MD.

Medical/ Dental Care

[88] The Respondent ultimately made arrangements for K. MD. to see Dr. Bird. He testified:

> "I insisted on the arrangements."

[89] The Respondent confirmed since he has Attention Deficit Disorder he wanted to be sure K. MD. was okay. K. MD. has had six visits with Dr. Bird, but Dr. Bird has not yet come to a final conclusion regarding the diagnosis.

[90] The Respondent testified he wanted a "good dentist" for his son. The Respondent had no history with the dentist selected by the Applicant, so he disagreed with the choice. The Respondent agreed that he had no basis upon which to suggest that the dentist selected by the Applicant was not qualified.

[91] The Respondent travelled with K. MD. to Port Hood with the expectation K. MD. would have to be sedated for the procedure. In the end K. MD. was not sedated, but the Respondent found the specialist in Port Hood to be "excellent" and "child oriented".

[92] The Respondent would have preferred that K. MD. continue to travel to Port Hood for his dental work and he was prepared to undertake that responsibility.

Supervision

[93] The Respondent testified as to his concern about K. MD. wandering off. He testified:

> If he is missing I need to know.

[94] The Respondent did acknowledge that K. MD. will sometimes try to extend his boundaries. He testified that he is very careful with K. MD.:

> He will bolt sometimes.

[95] The Respondent testified he took a twelve week program called the "Strongest Family Program" wherein he learned to be a better father. Reinforcing positive behavior is the goal.

[96] The Respondent did not agree with the discipline the Applicant used for the wandering incident. He testified:

> "I would have handled it differently."

<u>Other Concerns</u>

(a) The Respondent sees no issue with K. MD. calling his step-mother "Mom". He testified that this behaviour is not encouraged, but that

K. MD. “chose to do this on his own”. The Respondent testified that he and his wife explain that K. MD. has “two mommies”, but that the Applicant is his “real mom”.

(b) Regarding the use of the surname Ross on K. MD.’s swimming card, the Respondent testified it was done only for the purpose of having K. MD. registered at the Y.M.C.A. Due to the outstanding daycare bill owed by the Applicant, the Y.M.C.A. refused to register K. MD. for swimming. The Respondent used the surname Ross to alleviate the registration problems without having to pay the $300.00 owed by the Applicant. The Respondent testified:

> ...I. am not proud if it
>
> ...I just wanted him in swimming lessons
>
> ...it was nothing personal.

The Respondent testified he does not teach K. MD. that his surname is Ross and not MacDonald, but did acknowledge he would like the surname Ross to be part of K. MD.’s name.

(c) The Respondent was “surprised and concerned” to learn that the Applicant allowed K. MD. to have a pet spider. He acknowledged he may have “jumped to conclusions” that the spider was poisonous, and agreed there was no proven risk to K. MD. He nonetheless testified:

> ...I don’t think he should be playing with them.

(d) The Respondent testified that he tried his best to keep the Applicant updated, however, he is of the opinion the Applicant does not openly share information with him. As a result he did acknowledge that he sometimes did not share information about K. MD. with the Applicant.

Skating Incident

(e) The Respondent acknowledges that on one occasion K. MD. did not have the proper helmet for skating. K. MD. was equipped with a bike helmet, fell on his head, leaving a "little red mark". The proper helmet was purchased the next day.

Godmother

(f) The Respondent testified that he did not agree that Stephanie Hanrahan be K. MD.'s godmother. He testified:

> ...I would never have allowed Ms. Hanrahan to be K. MD.'s godmother.

Relief Sought

[97] The Respondent seeks primary care of K. MD., specifically during the week. He testifies that he and his wife have the ability and flexibility to be present with K. MD. during the school week.

[98] The Respondent testified that he can provide a happy, healthy, and safe home for K. MD., as evidenced by the photographs in Exhibit 18.

[99] The Respondent emphasized that K. MD. has his own room, and that the children are always in the presence of either himself or his wife. In the event the Respondent needed help he has a large family of between 10-15 people to reply upon, if needed.

[100] The Respondent does not seek child support.

[101] **MARLIE ROSS** - is the new wife of the Respondent, and stepmother to K. MD. Mrs. Ross confirmed the evidence of the Respondent and testified

> ...Glen is a busy, active dad....
>
> ...Glen is a confident father...
>
> We make a pretty good team I think...

[102] Mrs. Ross testified she is a stepchild herself, and fully understands the importance of the biological mother in a child's life.

[103] Mrs. Ross testified it was hard to watch the Applicant make major decisions without the Respondent's input. She testified:

> ...Sometimes things are done out of emotion to upset Glen

[104] Regarding the skating incident Mrs. Ross testified:

> ...we made a booboo.
>
> ...it was too late to get one the night before.

[105] In this regard the Applicant was re-called in rebuttal. She testified that she had offered a helmet to the Respondent the night before the skating event, and that the Respondent refused the offer.

[106] **ANDREW CULLIGAN** - is the principal of Robin Foote Elementary.

[107] He testified about the size of the school, its structure, layout, class size, staffing and security, concluding there was nothing of concern for student's well being in the school.

[108] He described K. MD. as a "normal primary student". He testified that K. MD. has "adjusted very well, and is "doing very well".

[109] When asked by the Applicant to investigate a concern that K. MD. was unhappy, and had no friends (Exhibit 19), Mr. Culligan concluded:

> "I found no evidence of him being unhappy in school."

[110] **COLLEEN MACCORMICK** - is K. MD.'s primary teacher. She discussed the class operations and general learning approach for primary students.

[111] Ms. MacCormick testified that K. MD. is "very strong academically". He is a good producer, and has good social interaction.

[112] Ms. MacCormick reviewed K. MD.'s report card (Exhibit 20), and concluded:

> Overall he is a strong academic student with strong social skills.

[113] Ms. MacCormick testified about a recent assignment, and described K. MD.'s blue and white checkerboard poster as "fabulous", "very creative", and "very cute". She testified:

> He was proud to show all his friends.

[114] **DR. RODERICK A. BIRD** - is a well recognized local pediatrician who was qualified to give expert evidence in the field of pediatric medicine (Exhibit 14) . K. MD. is his patient and to date he has had six sessions with the child.

[115] The Doctor has prepared two reports dated April 18, 2012 and February 12, 2013. These reports have been marked Exhibits 15 and 16 respectively.

[116] Dr. Bird testified that the Respondent arranged for the initial appointment and attended the appointment with K. MD. Dr. Bird testified:

> ....mainly the concern was that he was an impulsive, active, rambunctious little boy who didn't always appreciate danger, didn't always listen, and was inclined to some temper tantrums and was distractable.

[117] Dr. Bird further testified:

> "Well Glen is concerned, that his son may have inherited his tendency to be distractable and impulsive, because in the past Glen has been treated for Attention Deficit Disorder, and school was a struggle for him in the first few years until he found his way."

[118] Dr. Bird further explained that Attention Deficit Disorder is a condition that is diagnosed by making a series of sequential observations about the child's behaviour by gathering the family history and information from people who know the child best, such as, parents, teachers, close family members and care givers. There are no specific scientific tests for Attention Deficit Disorder.

[119] Dr. Bird confirmed that the Applicant has attended his office as well. He testified:

> ....she's expressed her concerns about his behaviour. They were right, but his behaviour is absolutely not insurmountable....

[120] Dr. Bird testified that the best thing for a child is two loving parents living in the same home together providing a consistent nurturing so that the child eventually becomes an adult ready to join his or her place in society. The doctor testified:

> ....but a consistent thread through the five times I have seen K. MD. is a message to his parents that if you can't live together, then you need to at least parent together.

Dr. Bird further testified:

> ....I think all children need consistency in scheduling a routine. I think that never back fires....

[121] Dr. Bird stated in his February 12, 2013 report (Exhibit 16 at page 2 as follows:

> Today I was very impressed with everybody including K.
>
> All the adults focused on what was best for K., as we went over their various concerns. Alicia wondered whether K. should see a psychiatrist, or at the least, a pediatric psychologist. Glen voiced his concerns that he still can't trust K. to play outside safely on his own. As K.'s pediatrician, I pointed out to both that he is still very young, and their role as parents is to teach him the thing that he does not yet fully understand. This is a process, and it takes many years before a child is independent and/or responsible. K. is at the very beginning.
>
> Nevertheless, there are some principles that both households must respect. For example, K. needs a routine at both households, and the routine should be very similar. In other words, bedtime , mealtime, praise, consequences, and discipline, etc., all should be much the same because otherwise K. will get mixed messages and he will not know how to behave. Many of these things are covered in the Strongest Families Program.

> Moreover, K. does not yet have the vocabulary or the complex thought processes to explain why he behaves as he does. He is mostly reacting to his situation.
>
> It is vital that neither household be critical or say nasty things about the other home within K.'s hearing. K. loves both his parents, and he will have divided loyalties if they put him in the middle or use him as a weapon. His parents must put his needs ahead of their own, and no matter how angry or frustrated they are with each other, they cannot vent in his presence.

[122] Dr. Bird, at this point in time, is not prepared to make a final diagnosis one way or the other for K. MD. He concluded his testimony as follows:

> **THE COURT:** And I took note of the comments that you made that although K. is only six years old, has basically sent a message saying that if my parents can't live together then they should be able to parent together.
>
> **DR. BIRD:** I hadn't thought of it that way, but that is absolutely correct, this little boy...but we see, as a Judge presiding over these kinds of hearings I am sure this message comes home to you repeatedly but when little people are caught in a jam they react to their environment and their behavior gets chaotic and then it will masquerade as Attention Deficient Disorder. They will be flying off the walls, they will be argumentative and stubborn, and if they are not going to bed at the right time they will be sleep deprived the next day and their behavior gets derailed. They don't know how to behave because in each place despite the best intentions of parents they are getting different messages. If you can minimize the chaos and maximize the routine, many of these children their behavior will turn around and then we will say in retrospect it wasn't Attention Deficient Disorder, it was a child reacting to their environment. So that's why in K.'s situation or in any other child in his circumstances, I am not yet prepared to say he has Attention Deficient Disorder. If he was in the best possible routine in all homes and I think they have been trying to do that, and with a bit more time and with the programs that the strongest families programs then teachers start remarking that he is really doing his best but he is not finishing his work, its all left to be done at the end of the day, disrupting my class because he is impulsive and can't stay still. Then I would reconsider this, but this is an ongoing thing, when we start seeing these children for us its not usually once it's a serious of visits until we get a handle on what's going on or until things improve and that's where we are with K. He could still have an element of ADD and he like I said has great potential, his dad has turned out pretty well, so I have every hope for him.

APPLICANT'S SUBMISSIONS

[123] Counsel for the Applicant submits as follows:

– That the Respondent's allegations/concerns regarding abuse in the Applicant's home are unfounded and without evidentiary support.

– That the Respondent's allegations/concerns regarding the Applicant's supervision of K. MD. are unfounded and without evidentiary support.

– That the Respondent's allegations/concern about K. MD. being permitted to play with a "poisonous" spider are unfounded and without evidentiary support.

–That both the Applicant and the Respondent are capable and caring parents.

– That the Applicant was denied the opportunity to enroll K. MD. in St. Anne's Elementary as a result of the "unilateral" action of the Respondent.

– That the unilateral action taken by the Respondent in this regard was contrary to the current court order issued July 22, 2010.

– That the primary reason that the Respondent had for enrolling K. MD. in Robin Foote Elementary was an attempt to take control and have K. MD. attend school close to his home in Westmount, Nova School.

– That the Respondent should not be able to have achieved a tactical advantage as a result of his unilateral conduct.

– That the Applicant is the parent who is better equipped to address K. MD.'s educational needs.

– That the Applicant took the initiative to have K. MD. attend the dentist office in Glace Bay to seek treatment.

– That there has been no diagnosis of Attention Deficit Disorder to support the Respondent's concern.

– That the Respondent's need for control makes it difficult for the parties to work together in parenting matters.

– That the Applicant is a stay at home mother and has the time and flexibility to parent K. MD. on a full time basis.

– That the Respondent's evidence as to having a flexible work schedule is speculative and without evidentiary support.

– That both the Applicant and the Respondent households can provide a suitable physical environment for K. MD.

– That the Respondent provides K. MD. material things to excess, for example, a small motorcycle which is inherently dangerous.

– That the evidence shows that the Respondent has failed to provide proper safety standards for K. MD.

– That the Applicant has the support of her parents who have a strong bond with K. MD.

– That by the Respondent permitting K. MD. to call his step mother "mom", demonstrates that he is not inclined to support the reality of K. MD. having a home with both parties.

– That permitting K. MD. to call two people "mom" will lead to confusion for K. MD. in terms of his identity.

– That the Respondent using the surname Ross for K. MD. will lead to confusion for K. MD. in terms of his identity.

– That the e-mails authored by the Respondent show that he is not willing to share information regarding K. MD.

– That the Respondent acted inappropriately by manipulating the registration process at the YMCA in an effort to avoid paying the $300 outstanding day care bill.

– That the Respondent has repeatedly demonstrated disrespect to the Applicant and the Court.

– That the status quo of the existing order favours the position of the Applicant.

– That the Court should award joint custody of K. MD. to the parties with primary care and final decision making to the Applicant.

– That such a decision is in the best interests of K. MD.

– That although the Applicant has expressed a willingness to re-locate to Westmount, this is not choice she should have to make.

– That the parenting schedule be Monday to Friday mornings with the Applicant and Friday to Monday mornings with the Respondent.

RESPONDENT'S SUBMISSIONS

[124] Counsel for the Respondent submitted as follows:

– That the evidence led at trial clearly establishes that the physical environment offered by the Respondent is far more stable, secure, safe, comfortable, and beneficial to K. MD. than that which can be offered by the Applicant.

– That the Respondent's participation is the Strongest Families Program provides him with tools and techniques that the Applicant has not learned, and does not utilize.

– That the Respondent has, as his utmost priority, the safety and well being of his family, and is extremely diligent in advancing those interests.

– That the Respondent places his family, and in particular, his children above all other interests.

– That the Applicant's current relationship is unstable, and she has no established long term goals.

– That the Applicant attempted to minimize the seriousness of abuse allegations in her household.

– That the Applicant has demonstrated an extreme lack of judgment with regard to her son and his safety.

– That K. MD. is doing well, and is happy attending Robin Foote Elementary.

– That the Applicant and her witnesses appear to minimize, and even dismiss, the concern of the Respondent regarding the possibility of K. MD. having Attention Deficit Disorder.

– That Dr. Bird's opinion appeared to accord with the position taken, and judgment showed by the Respondent.

– That the Respondent enjoys full flexibility in scheduling his work hours as a mechanic.

– That the Respondent and his wife coordinate their respective schedules to ensure at least one of them is home at all times.`

– That the Respondent and his wife come from diverse cultural backgrounds.

– That the Respondent can offer K. MD. exposure to family members with various cultural backgrounds.

– That the Respondent has taken an active interest in K. MD.'s extracurricular activities.

– That the Respondent and his wife are well equipped to provide financially for K. MD.

– That the Applicant is not employed, and relies totally upon her husband for financial support.

– That the Applicant's husband primarily resides outside of Cape Breton.

– That it would not be in K. MD.'s best interests to be solely reliant upon the Applicant's husband for financial support.

– That the Respondent has the support of extended family who are ready, available, and willing to help with K. MD. whenever needed.

– That the judgment and reliability of the Applicant's parents is suspect in view of the supervision evidence before the Court.

– That the Applicant's parents were unaware of the alleged abuse in their daughter's household, which calls into question the nature of the relationship she has with them.

– That the Respondent is prepared to facilitate contact between K. MD. and the Applicant.

– That awarding joint custody to the parties with primary care and final decision making vested in the Respondent is in the best interests of K. MD.

– That the Respondent concedes he unilaterally placed K. MD. in Robin Foote Elementary without the consent of the Applicant.

– That the Respondent acted in the best interests by enrolling K. MD. in Robin Foote Elementary.

– That Robin Foote Elementary should be determined by the Court to reflect the "status quo".

– That the evidence illustrates that both parents need to work together in co-parenting in the future, and to keep each other fully informed.

– That there is a clear need for one of the parties to be granted primary care with final decision making authority.

– That the current shared custody order is not working, and should be varied to name the Respondent as the primary caregiver, with full final decision making authority.

– That K. MD. be placed in the primary care of the Respondent from Sunday at 5:00 p.m. until Friday after school, at which time the Applicant would assume care and control until the following Sunday at 5:00 p.m.

LAW AND ANALYSIS

ISSUE 1 - Has the Applicant established that there has been a change of circumstance sufficient to vary the existing order?

[125] Section 37 of the *Maintenance and Custody Act* requires a material change in circumstance to be established before the Court will vary an existing order.

[126] A material change in circumstance has been defined as one where, had the facts existed at the time of the prior order, the judge would likely have crafted a different order. A material change in circumstance can include a situation where something unexpected happens which fundamentally alters the foundation upon which the current order is based. Alternatively, a material change in circumstance can include a situation where something that was expected to happen does not. Further a minor or temporary change in circumstance is insufficient to justify the court invoking its jurisdiction to vary. The alleged change in circumstance must be significant and long lasting.

[127] The burden of proof is upon the Applicant. It is proof on a balance of probabilities as defined by the Supreme Court of Canada in C.(R.) V. McDougall 2008 SCC 53 at paragraph 40:

> Like the House of Lords, I think it is time to say, once and for all in Canada there is only one civil standard of proof at common law and that is proof on a balance of probabilities...

And further at paragraph 46 the Supreme Court of Canada stated:

> .....evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[128] The evidence is that the Applicant has relocated from Westmount, Nova Scotia to Glace Bay, Nova Scotia to be closer to her parents Dan and Cheryl MacDonald for support purposes. It has also been established that K. MD. has started school which is a material change since the issuance of the July 22, 2010 Consent Order.

[129] This evidence is sufficiently clear, convincing and cogent to establish that there has been a material change in circumstance, thus permitting the Court to entertain this Application. The Respondent has also conceded this point without argument.

ISSUE 2 - Which parenting plan is in the best interests of the child, K. MD.?

[130] The primary question with respect to any custody issue is "what is in the best interests of the child?" Section 18 (5) of the *Maintenance and Custody Act* states as follows:

> 18 (5) In any proceeding under this *Act* concerning care and custody or access and visiting privileges in respect to a child, the Court shall apply the principle that the welfare of the child is the paramount consideration.

[131] In looking at the "best interests" of the child, Justice McIntyre speaking on behalf of the Court in **King v Low**, [1985] 1 S.C.R. 87 stated at paragraph 27 as follows:

> 27 "I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and the material advantages that may be available in the home of one contender or the other. The

> welfare of the child must be decided on consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of the child, to choose which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside"

[132] Justice Goodfellow, in his often quoted decision **Foley v. Foley** [1993] N.S.J. No. 347, outlined factors generally relevant to an assessment of what parenting arrangement is in a child's best interest. At paras. 16-20, he wrote:

> 16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
>
> 1. Statutory direction *Divorce Act* 16(8) and 16(9), 17(5) and 17(6);
>
> 2. Physical environment;
>
> 3. Discipline;
>
> 4. Role model;
>
> 5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;
>
> 6. Religious and spiritual guidance;
>
> 7. Assistance of experts, such as social workers, psychologists- psychiatrists- etcetera;
>
> 8. Time availability of a parent for a child ;

9. The cultural development of a child:

10. The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The *Divorce Act* s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

17 The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question. With whom would the best interest and welfare of the child be most likely achieved?

18 The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

19 Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of

> such until long after the maturity of the child makes the question of custody mute.
>
> **20** On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[133] In **N.D.L. V M.S.L.** (2010) 289 (N.S.R.) (2d) 8 (NSSC) Justice MacDonald stated as follows:

> "What parenting arrangement is in the best interest of this child? Many courts have attempted to describe what is meant by "best interests". Judge Daley in **Roberts v Roberts**, 2000 Carswell NS 372 (Fam. Ct.) said:
>
> > 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..."

[134] In reviewing the parties submissions and supporting cases I think it is appropriate to stipulate from the onset my agreement with the remarks of A.C.J. O'Neil in **Murphy v Hancock**, 2011 NSSC 197 at paragraph 49:

> Jurisprudence of the issue of whether shared parenting should be ordered is very fact specific I agree with the comments of Justice Wright in **Hackett v Hackett** [2009] N.S.J. 178 at paragraph 13:
>
> > 13 It is all well and good to look at other cases to see how these principles have been applied but the outcome in other cases is really of little guidance. Every case must be decided on a fact specific basis and nowhere is this to be more emphasized than in custody/access/parenting plan cases. To state the obvious, no two family situations are ever the same.

[135] There is no doubt that the Applicant and the Respondent love their son, K.MD., very much. To date they have provided their son an excellent up bringing, but their ability to do so has been compromised by the intense hostility and ongoing conflict that exists between them. The evidence of Dr. Bird can be

interpreted to suggest that K. MD. may have been negatively impacted by his parent's inability to cooperate with major parenting issues and thus possibly a contributing cause to K. MD.'s behavioural concerns.

[136] K. MD. is a 6 year old boy who wants and needs the love and support of both his parents. Unfortunately the adversarial relationship which exists between the two parents has thrust K. MD. into a "To and Fro" battle, one of which he wants no part. He has been put into the middle of his parents's conflict.

[137] The primary issue before the Court is very narrow in that the parties differ only as to whom should be vested with primary care and final decision making. Each party acknowledges the other is a good parent and capable of caring for K. MD. They just can't or won't cooperate with one another to successfully co-parent.

[138] To decide this issue the Court need only access the go-forward parenting plan of the parties in the child's best interests. The historical differences of the parties which regard to allegations of unsubstantiated abuse; child supervision concerns; choice of dentists; allegedly poisonous spiders; registering at the YMCA with a different surname, and disagreement over godmothers, with respect, do not assist in this analysis.

[139] No one parent is perfect. In this instance the Respondent submits the Applicant is not a capable or preferred parent because her approach to some issues with the child differs from what he would have done. With respect, the Court finds it is more a matter of his control than his concern over the Applicant's parenting. The testimony of the Respondent, with respect to his attacks upon the Applicant's new husband were baseless and without merit. Similarly his other concerns about K. MD. "going missing", although worthy of a parent's concern, were exaggerated and blown out of proportion. The same can be said about his concerns about the allegedly poisonous spider and the godmother issue.

[140] Raising children is an adventure due to the unpredictable nature of curious, developing children who have a thirst for knowledge and exploration associated with no sense of danger. In spite of a parent's best efforts, children will blindly challenge parental authority being totally unaware of the very risks that parents

attempt to protect their children from. Growing up can be an inherently risky business as even the Respondent discovered at the skating event.

[141] Justice B. MacDonald made the following noteworthy comments in **Minister of Community Services v B(E.P.),** 2007 NSSC 265, at paragraph 85:

> There are risks for J. B. in his mother's care, but living is full of risk and no on raises children free of risk. Some view certain childhood activities as risky, others view the same activities, for example, climbing a chair, as appropriate for gross motor skill development....

[142] As a result it is not the Court's intention to unduly focus on historical events which are either unproven or of little or no consequence. The Court prefers to weigh and to access the respective merits of each party's parenting plan as they pertain to K. MD.'s best interests.

[143] Currently the parties have shared custody. The Applicant does not believe it is working since she has moved back to Glace Bay and her son was unilaterally registered in Robin Foote Elementary in Westmount without her express agreement. The Applicant would prefer that she have control over K. MD. 's education.

[144] The Respondent agrees that the current order is not working, however in addition to wanting control over K. MD's medical issues, it appears to the Court he has and is attempting to gain full control as evidenced by his conduct and actions which clearly favours his point of view, regardless of merit to the exclusion of the Applicant's views.

[145] In the Court's opinion the Applicant has been very cooperative and compliant with the court order and has demonstrated her commitment to K. MD. by deferring to the Respondent regarding K. MD. attending school in 2011. The Applicant home schooled K. MD. which the Court finds has played a major part in K. MD's success in grade primary to date.

[146] The same cannot be said for the Respondent who unilaterally made the decision to enroll K. MD. in Robin Foote Elementary which violated the provisions of the court order.

[147] That being said, the issue about which school K. MD. should attend was before this Court by way of an Ex - Parte Application, filed by the Applicant on September 6, 2012. The Justice who heard that matter concluded that where both parties were represented by counsel, the issue of school venue should be determined at a full and final hearing and thus declined to deal with the school issue on an Ex - Parte/ Emergency basis.

[148] The Applicant's choice for school was in Glace Bay. She relies upon the status quo doctrine to support her contention that K. MD. should attend school at St. Anne's Elementary. The Applicant submits at page 9 - 10 of her written submissions as follows:

> As set out in the Pre Trial brief in this matter, it is respectfully submitted that it should be noted why K. is attending Robin Foote School. The Respondent, Mr. Ross, unilaterally enrolled K. in Robin Foote against the express wishes of the Applicant, Ms. MacDonald.
>
> In reviewing the case law in the Pre Trial brief, the case of **A.M. v N. B**., 2005 NSSC 352, Forgeron, J., discussed the concept of **status quo**. Paragraphs 31 and 32 were reproduced in that brief and they are reproduced below for convenience:
>
> > (31) The **status quo** which is to be maintained is the status quo which existed without the unilateral conduct of one parent unless the best interests of the child dictates otherwise. In **Kimpton v Kimpton** [2002] O. J. No. 5357, Wright, J. Defined **status quo** in para 1 which reads as follows:
> >
> > > There is a golden rule which implacably governs motions for interim custody: stability is a primary need for children caught in the throes of matrimonial dispute and the **de facto** custody ought not to be disturbed **pendente lite**, unless there is some compelling reason why in the interests of the children, the parent have **de facto** custody should be deprived thereof. On this consideration hangs all other considerations. On motions for interim custody the most important factor in considering the best interests of the child has traditionally been the maintenance of the legal **status quo**. This golden rule was enunciated by Senior Master Roger in **Dyment v. Dyment**, [1969] 2 O. R. 631, (aff'd by

> Laskin J. A. At [1069] 2 O. R. 748), by Laskin J. A. Again in **Papp v. Papp**, [1970] 1 O. R. 331 at pp. 344-5 and by the Nova Scotia Court of Appeal in **Lancaster v Lancaster** reflex, [1992], 38 R. F. L. (3d) 373. By **status quo** is meant the primary or legal **status quo**, not a short lived **status quo** created to gain tactical advantage. See on this issue **Irwin v. Irwin** reflex, (1986), 3 R.F.L. (3d) 403 and the annotation of J. G. McLeod to Moggey v. Moggey reflex, (1990), 28 R. F. L. (3d) 416.

(32) this principle is more firmly reviewed in the annotation of James McLeod in the Decision of **Moggey**, supra, when McLeod, J. states in part:

> **"Status quo"** is not just the short term living arrangement. It is the way of life that existed before the current issue of custody or access arise. On a variation application the court should continue the legal custody order in the absence of clear evidence that the welfare of the child requires another disposition.

The same analysis would suggest that one person cannot unilaterally remove a child from the family home without a custody order and claim that the "status quo" should be maintained pending the hearing. As Vogelsange Prov. J. held in **Lisanti v. Lisanti** (1990, 24 F. F. L. (3d) 174 (Ont. Prov. Ct.,) the removal violates the custody rights of the other parent. The bottom line is that self - help should discouraged.

[149] The Respondent similarly refers the Court to another decision of Justice T. Forgeron in **MacDonald v Burns** 2005 Carswell II NS 577 (NSSC) at paragraph 31 where she states:

> "The status quo to be maintained is the status quo which existed without the unilateral conduct of one parent unless the best interests of the child dictates otherwise (emphasis added)

[150] I agree with the above decisions by Justice Forgeron. It, must nonetheless be noted it was the Applicant's decision to move back to Glace Bay from Westmount when K. MD. was not attending school. This decision put the issue of

school in play which resulted in the Respondent, making the decision, albeit unilaterally, to place K. MD. in Robin Foote Elementary.

[151] The Applicant submits that this has provided the Respondent a "tactical advantage" in terms of deciding which school K. MD. should attend. That may or may not be correct, but the reality is it was not in K. MD. 's best interests to lose his school year as the result of a non-agreement between his parents and the Court 's decision to defer the matter until a final hearing was scheduled.

[152] Under the circumstances I find that the status quo for school has been and must be established as Robin Foote Elementary. The Court is nonetheless mindful that the status quo is only one factor for the Court to consider on a Final Custody Hearing.

[153] Justice T. Forgeron stated in **Cooke v Cooke** 2012 NSSC 73 at paragraph 33 as follows:

> Joint Custody is not usually appropriate where parental relationship s are rift with mistrust, disrespect and poor communication, and where there is little hope that the situation will change: **Roy v Roy** [2006] O. J. 1872, 2006 Carswell Ont 2898 (CA). 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 Godrey-Smith** [1997], 165 NSR (2d) 345 (S.C.)

[154] Justice Forgeron continued at paragraph 34 as follows:

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

whether a parallel parenting regime, rather than sole custody, is appropriate:

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

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

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

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

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

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

[155] In consideration of the above factors I find that an order for joint custody, as requested by each of the parties, is not in the best interests of K. MD. The parental relationship is adversarial and combative which is primarily the result of the Respondent's ongoing attempts to gain control. Although the Applicant is not without blame in this instance, she clearly has been the parent who made more diligent efforts to compromise and reach agreement in the best interests of K. MD.

[156] The parties have demonstrated that they do have the ability to cooperate and work together, as observed by Dr. Bird, but a joint custody order nonetheless, cannot be granted at this time.

[157] Both the Applicant and the Respondent have strong ties to K. MD. Each was generally involved in K. MD's life, although the Respondent's involvement never reached the level of the Applicant's involvement.

[158] Both parents present with parenting strengths and weaknesses. Their cumulative strengths outweigh their cumulative weaknesses. Both parents are competent, loving parents who can meet K. MD's needs. K. MD requires the experience and wisdom of his two parents.

[159] This Court stated in **MacDonald v MacDonald** 2011 NSSC 317 at paragraph 50:

> Where a Court is of the opinion that the parental relationship is too conflicted to make a joint or shared custody order work in a meaningful way, the Court may instead establish a form of"parallel parenting". Parallel parenting has been offered as an option in situations where both parents want a high level of involvement in their child's life, but the level of conflict between the parents makes this difficult. The Order can be constructed by specifying the time the children will spend with each parent and each parent's responsibilities while the child is with him or her.

[160] This concept is further emphasised by Justice T. Forgeron in **Baker-Warren v Dinault**, 2009 NSSC 59 at paragraph 26:

> 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.

[161] Applying the **Foley**, criteria to this matter I am satisfied that both parents love their child and can provide an adequate physical environment. They are both prepared to deal with disciplinary issues, and both are good role models. Each parent is sensitive to K. MD.'s emotional and medical needs. Both parents are readily available to their child and have the involvement of extended family.

[162] The parties do not live as proximate to one another as they once did, however the Court finds that although the distance between Westmount and Glace Bay may cause some inconvenience to the parties, it is not so distant that agreeable arrangements cannot be made to assist in the execution of the parenting plan in K. MD.'s best interests.

[163] After examining the factors enunciated by Justice Goodfellow it is apparent that each parent has a reasonable plan to care for their child. It is also apparent each parent has practical strengths in terms of being better able to deal with different child care issues.

[164] It is important to recognize that K. MD. now has two families with a new step father; a new stepmother; a brother and two sisters. It is in his best interests to maximize contact with everyone. K. MD. now has two families not one.

[165] The best interests of K. MD. dictate that the parties continue to share custody with a parallel parenting regime structured as follows:

(1) PARALEL PARENTING REGIME

- The Applicant and Respondent will share custody of K. MD., age 6, in a parallel parenting regime.

(2) ROUTINE DECISIONS

- Each party will have routine, day to day, decision making authority and control when K. MD. is in his/her physical care, including any child care decisions.

- Each party will notify the other, by email, of routine decisions made, such as: particulars of minor illness and any medication that has been administered; particulars of assignment of homework, projects and tests; particulars of any disciplinary measures; and particulars relating to significant social welfare matters.

(3) <u>EMERGENCY DECISIONS</u>

- In the event of a medical emergency, the party having physical care of K. MD. Will be entitled to make decisions which are necessary to alleviate the emergency, and will notify the other party as soon as practically possible as to the nature of the emergency and treatment.

(4) <u>EDUCATIONAL DECISIONS</u>

- The Applicant will determine major educational decisions on behalf of K. MD. The Court nonetheless finds it is not in the best interests of K. MD. to be removed from Robin Foote Elementary and any future consideration given to removing or transferring K. MD. from this school must be reviewed by this Court before doing so.

- Both parties are entitled to attend parent teacher meeting and major school events such as concerts and programs.

- The parent who is providing residential care for K. MD. will be responsible for attending to K. MD. should he become ill at school, or when the school requires contact for any other reasons. The school will be provided with the parenting schedule and contact information for each party for such purposes.

- Each party is responsible for assisting K. MD. with homework and school assignments.

(5) MEDICAL AND DENTAL TREATMENT

- Both parties shall be provided with the health card number for K. MD.

- the parties will continue to have K. MD. attend medical and dental appointments with his current doctors and dentist. The Applicant will determine major dental decisions on behalf of K. MD. The Respondent will determine major medical decisions on behalf of K. MD. Each party will be responsible for scheduling and taking K. MD. to his non-emergency checkups while in their respective care.

- The parties will keep each other informed of all medical and dental decisions that are made and any and all treatment in a timely and communicative fashion through e-mail.

(6) **EXTRA CURRICULAR ACTIVITIES**

- Each party may enroll K. MD. in extra curricular programs that are scheduled during K. MD's residential time with each of them. If a tournament, or special event related to that program is scheduled during the time that K. MD. is in the residential care of the other party, the party who has physical care of K. MD. will have first option of taking K. MD. to the activity. If the residential parent is unable to do so the other party shall be notified and that party will be entitled to transport K. MD. This arrangement does not preclude both parents from attending the event if they so choose.

(7) ACCESS TO PROFESSIONAL RECORDS AND INFORMATION

- Each party has the right to communicate with all professionals involved with K. MD., and each has the right to obtain information and documentation respecting K. MD. from all medical professionals, and educators without the consent of the other party.

(8) **COMMUNICATION BETWEEN THE PARTIES**

- Matters relating to K. MD.'s health, education and general welfare will be the subject of communication between the parties. All such communication will be respectful and child focused.

- The parties will provide to each other current e-mail addresses, residential addresses and telephone numbers, for the purpose of having effective communication regarding K. MD.'s general welfare.

(9) **COUNSELING**

- The parties will cooperate and participate in individual counseling to address their conflict and communication issues.

SCHEDULE

The current order dated July 22, 2010 will thus be varied as follows:

The Applicant and the Respondent will have physical care of K. MD. on an alternating weekly basis from Sunday at 5:00 p. m. to the following Sunday at 5:00 p.m. The party whose week is about the commence will be responsible for pick up and drop off. This schedule will commence Sunday April 14, 2013 with the Respondent commencing the rotation. During the alternate weeks of non-residency the non-resident parent shall have access to K. MD. every Wednesday after school until 7:00 p. m. at which time K. MD. shall be returned to the resident parent's home. The non-resident parent shall be responsible for both drop off and pick up. During non - school periods this visit shall be extended from 12:00 p.m. to 7:30 p.m. subject to the respective vacation schedules of the parties.

[166] The Court has elected not to detail holiday, special events and /or summer schedules with the expectation that the parties can negotiate these matters with further confirmation of their respective schedules. In the event the parties are unable to reach agreement they may request the Court's assistance in addressing the conflict.

ISSUE 3: CHILD SUPPORT

[167] In view of the above decision no child support shall be payable by either party. The Order will state as follows:

> In consideration of the shared parenting arrangement for the dependent child, there shall be no child maintenance payable by either party. Both parties shall be responsible for the child's daily living expenses and clothing while the child is in their care.

CONCLUSION

[168] I have scrutinized the evidence with care and have considered all of the evidence, exhibits along with submissions of counsel. The Court has applied the standard of proof which is on a balance of probabilities. In determining the civil burden of proof I have looked for clear, convincing and cogent evidence. Whether or not the Court has specifically commented upon all aspects of the evidence, I have nonetheless considered the totality of the evidence in making this decision.

[169] It is ordered that the parties shall continue to have shared parenting pursuant to the parallel parenting regime as earlier outlined by the Court in this decision. Despite some past difficulties respecting the role of co-parenting the Court is confident that the parties can and will now move forward in a cooperative and positive manner to the benefit of all concerned, and more importantly in the best interests of K. MD.

[170] It is the hope of the Court that the parties will follow the very good advice offered by Dr. Bird in his testimony regarding the provision of similar routines and discipline in each household to provide K. MD. consistency in parenting.

[171] The Court acknowledges this decision may cause the Applicant to reconsider whether or not she should move back to Westmount.

[172] The Court is not making an Order in this regard. It is a decision that is best left to the Applicant to assess her circumstances in light of the Court's decision.

[173] In the event, the Applicant elects to remain living in Glace Bay, the Court believes it would be reasonable, practical and in K. MD.'s best interests that the

Respondent equally share in the transportation of K. MD. to and from school at Robin Foote Elementary in Westmount during the week that the Applicant has physical care of K. MD. Such a proviso shall be included in the court order with the specific details to be agreed upon by the parties.

[174] Order Accordingly,