

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Moore v. Moore, 2013 NSSC 252

Date: 2013-08-14

Docket: 1201-062239; SFH-D 055919

Registry: Halifax

Between:

Barry Allan Moore

Petitioner

v.

Christine Anne Moore

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: January 30, 31 and June 7, 17, 18 and 19, 2013

Final Submissions: July 15, 2013

Counsel: Christine Moore, on her own
Jane Lenehan, for Allan Moore

By the Court:

Introduction

[1] Christine Moore has applied to vary the parenting terms of a 2009 Corollary Relief Judgment and a 2011 variation order which relate to eight year old Angeline. She also asks that I order a child's wish report be prepared.

[2] Allan Moore seeks an interim variation of the same parenting provisions: he wants the circumstances of his parenting to be determined as quickly as possible, without waiting for a full variation hearing. He also requests that if a professional opinion is required, it not take the form of a child's wish report, but be a complete custody and access assessment.

The nature of this hearing

[3] After all motions were filed, there was a pre-hearing conference. Recognizing the potential for a considerable overlap in the evidence that would be called, I told the parents that I'd hear evidence regarding Ms. Moore's variation application and her motion for a child's wish report and Mr. Moore's interim motion at the same time. I told them that if I determined that a child's wish report or a custody access assessment was warranted, I'd make an interim decision relating to parenting. If I dismissed the request for a child's wish report or a custody and access assessment, I'd rule on the variation application.

[4] The parents were told to treat the hearing, in terms of the evidence and argument, as one which could result in a "final" order, in as much as any parenting order is final.

[5] In deciding to proceed in this way, I was mindful of the Court of Appeal's decision in *Marshall*, 1998 CanLII 3191 (NS CA). In that case, the trial judge turned an interim proceeding for custody and child support into a divorce proceeding. Justice Roscoe, with whom Justices Pugsley and Bateman concurred, held that the trial judge was in error in doing this. As Her Ladyship explained, if Mr. Marshall's interim custody application was dismissed, then at the divorce, the child's custody would be determined without emphasis on the *status quo*. In contrast, where a final order was made, if Mr. Marshall wanted to challenge this order, he would need to apply to vary and to prove a change had occurred since the final order was made. As well, events prior to that final order wouldn't be relevant. Changing the nature of the hearing from interim to final would result in a very different burden for Mr. Marshall on a subsequent application.

[6] In these circumstances, I don't believe my approach contains such an error. I'm not dealing with an interim application and a final application, but a variation application.

[7] I am aware of the divergent appellate opinions relating to interim variation applications. The Saskatchewan Court of Appeal held that there is jurisdiction to make an interim order varying an existing custody order under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 in *Dorval*, 2006 SKCA 21, though it's not explicitly provided for in section 17 of the *Divorce Act*. The British Columbia Court of Appeal has taken the opposite view in *Vargas v. Berryman*, 2009 BCCA 588, as a result of its reading of subsections 16(1) and (2) of the *Divorce Act*. As will be seen, this difference of opinion is not one I need to resolve.

[8] Interim or otherwise, I am dealing with a variation application. The threshold of material change is the same in either circumstance. If I grant an interim variation order, the basis for a "final" variation doesn't differ, so Ms. Moore is not prejudiced by my approach.

[9] While unusual, I adopted this approach in the interest of sparing the parents the time and expense of multiple proceedings, hoping to achieve the object of our Civil Procedure Rules, stated in Rule 1.01: a "just, speedy, and inexpensive determination" of the proceeding.

Preliminary and mid-application motions

[10] Various motions were made before and during the hearing. The motion at the commencement of the hearing to strike all or portions of the affidavits of David Mensink and Susan Coldwell is reported as *Moore*, 2013 NSSC 175. The motions made during the hearing are unreported and relate to Allan Moore's request to file a second supplementary affidavit, Christine Moore's motion to file additional affidavits after closing her case, and for leave to bring a motion for an order for production and to bring a motion to strike portions of the affidavit of Mr. Moore's fiancée, Debbie Wright.

[11] I dismissed Mr. Moore's motion to file a second supplementary affidavit and Ms. Moore's motion for leave to bring a motion for a production order. I deferred Ms. Moore's motion to file additional affidavits until the conclusion of Mr. Moore's case (when I dismissed it) and granted her motion for leave to bring a motion to strike portions of Debbie Wright's affidavit.

[12] Mr. Moore objected to the late filing of Ms. Moore's brief. He asked that I ignore her brief or, alternately, that I award him costs of \$250.00. He asked that I deal with this objection at the conclusion of the hearing.

[13] I issued a conference memorandum which identified various filing deadlines, including one for pre-hearing briefs, which were due two weeks before the trial as provided for by Civil Procedure Rule 51.04. As is typical, the memorandum stated: "If documents are not filed on the deadlines set, the proceeding may be adjourned. Alternately, pleadings may be struck and costs may be awarded. Adverse findings may be made against a party who does not file required materials." There is later mention: "Leave of the court is required to file material late. If leave is not granted, the application can be struck, costs awarded and the material can be ignored."

[14] Ms. Moore's brief was filed at the court two days after it was due. Mr. Moore's counsel was sent the brief by email shortly after her office closed that day (a Friday) with the result that she first saw the brief the following Monday.

[15] Mr. Moore says that Ms. Moore did not seek leave to file her trial brief late.

[16] Ms. Moore says that she had hired a third party to do research for her and then, "due to uncontrollable events of mine, this person was unable to fulfil this agreement." Ms. Moore says she was ill and to "try and figure out what forms to use to request a delay [. . .] would have further delayed the Brief". She argues that disregarding her brief would limit "useful information". She doesn't identify when she became aware that her brief would be late and doesn't explain how she was able to file a copy of her brief at the court on January 18, yet she was unable to email it to counsel's office until after that office was closed. Filing the brief at the court meant it was delivered to the court by 4:30 p.m. It should have been possible to email the brief to Mr. Moore's counsel when the brief was sent to the court, if not earlier. This would have had the brief reach counsel on Friday rather than Monday.

[17] I am prepared to accept and consider Ms. Moore's brief. The hearing was not concluded until July so the delay in filing the brief did not disadvantage Mr. Moore's legal argument at the hearing's end. Both parties were to file their briefs on the same date, so Mr. Moore did not lose any opportunity to see Ms. Moore's brief before his was due.

[18] I will deal with costs as they relate to the entire hearing rather than on a piecemeal basis.

[19] Final submissions were made in writing. In her final submissions, Ms. Moore identified changes which had occurred since 2009 and 2011 and provided her view of the reasoning behind various points of the Corollary Relief Judgment and the 2011 variation order. She outlined what she described as “inconsistencies” in the evidence of Mr. Moore and Ms. Wright and offered reasons explaining why she believed her proposal was best for Angeline. I will not review her brief in detail but I must be clear: I am not considering information contained in her brief which was not entered into evidence at the trial. Final submissions are not an opportunity to offer unsworn evidence which cannot be challenged by cross-examination or refuted by Mr. Moore.

[20] Similarly, Ms. Moore forwarded correspondence between herself and Mr. Moore’s counsel to me at the time she filed her final submissions. I have no knowledge that Mr. Moore was aware these materials would be filed, and I have no agreement from him that I may consider these new materials. Since her submissions were filed, Ms. Moore has sent me other letters about recent events. Mr. Moore has expressly objected to my consideration of these materials. I will not consider the information contained in these materials. Evidence of past events should have been adduced during the hearing when Mr. Moore could have challenged and responded to it. Events which have transpired since the hearing concluded are not before me.

[21] Ms. Moore filed eight affidavits and a Parenting Statement in support of her application. These documents comprise over 320 pages. She filed additional affidavits in support of her mid-hearing motions. Mr. Moore objected to none of the contents of those of her affidavits which were filed in accordance with the Rules; he objected to the admission of a further affidavit after her case was closed. Ms. Moore has had ample opportunity to offer evidence without continuing to do so once the hearing was concluded.

Child’s wish report

[22] The first issue for me to decide is whether to grant Ms. Moore’s motion for a child’s wish report.

[23] Ms. Moore filed two affidavits in support of this motion. She says she wants a “stand alone child’s wishes assessment” which will give Angeline a voice. Ms. Moore says that a child’s wish report is better for Angeline for a number of reasons: a third party would be able to assess what Angeline’s needs and desires really are and the report would be done without the influence of other people (parents, step-parents, peers or step-siblings). She said that it would subvert the

purpose of a child's wish report to have anyone but Angeline present when she spoke with the person preparing the report.

[24] Ms. Moore approaches the motion for a child's wish assessment as an enterprise intended to benefit Angeline, saying that Angeline has been silenced, it's important that Angeline be able to "speak her heart and mind", and "silencing [Angeline] to the wishes and benefit of others is harmful" to Angeline.

[25] Mr. Moore opposes a child's wish report. If I order a child's wish report, he asks that I order "a more thorough and detailed assessment" and that the person preparing the report be permitted to review the in-depth psychological report prepared by Dr. Carol Pye in 2008 and a 2012 letter prepared by Dr. Carolyn Humphreys, a psychologist who counseled Angeline. Mr. Moore asks that the person preparing the report speak to Dr. Humphreys, have the opportunity to meet each parent and each parent's new partner, conduct home visits and meet Claire and Olivia, Debbie Wright's daughters.

[26] Ms. Moore rejects a more detailed assessment. She says the past assessment is "irrelevant, inaccurate, unexamined, and historical". Dr. Pye's assessment was done when Angeline was three years old, according to Ms. Moore.

[27] Ms. Moore's motion is pursuant to subsection 32F(1) of the *Judicature Act*, R.S.N.S. 1989, c. 240 which provides that I may direct a family counsellor, a social worker, a probation officer or some other person to make a report concerning any matter that, in my opinion, is a subject of the proceeding.

[28] There has been debate amongst judges about when reports should be ordered. This debate is paralleled in the positions of these two parents. Some authorities hold that assessments should be "limited to cases in which there are clinical issues to be determined, in order that such assessments can provide expert evidence on the appropriate manner to address the emotional and psychological stresses within the family unit in the final determination of custody". Here I am borrowing the language of Justice Pazaratz at paragraph 23 in *Baillie*, 2012 ONSC 3728, a decision pursuant to section 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. This is Mr. Moore's position.

[29] Other judges take the view that an assessment should be ordered where it is in the child's best interests. This is Ms. Moore's position: it would be beneficial for Angeline to speak with someone, so a report should be ordered.

[30] Like Justice Pazaratz and for the reasons he offers, I am of the view that assessments should be restricted to cases where clinical issues are to be

determined. While there were three sets of reasons in *Young*, 1993 CanLII 34 (SCC), all agreed that expert evidence is not always necessary to determine a child's best interests. Assessments are costly. They can prolong litigation. They are intrusive. A child's wish report may offer me little assistance where, as here, the child is young.

[31] I heard evidence from Dr. Carolyn Humphreys. Dr. Humphreys earned a doctorate in applied psychology at the University in Toronto in 1980. Her *curriculum vitae* lists over two dozen courses in family therapy, child therapy, and particularized therapy, dedicated to treating depressing, trauma and high conflict families, for example. She is a registered psychologist and, since completing her academic education, she's acted as an instructor and academic advisor at Saint Mary's University and Dalhousie University. Prior to her recent retirement, she worked for thirty-five years as a psychologist and had been qualified to offer expert testimony on more than two dozen occasions. Her qualifications as an expert in the fields of child psychology, family psychology, attachment theory and practice were accepted by both parties, and I determined that she was qualified to offer expert testimony in these areas.

[32] Angeline met with Dr. Humphreys on a half-dozen occasions from October 2011 until May 2012. Angeline's meetings with Dr. Humphreys were compelled by the parents' consent variation order. Since the order was granted with the parents' consent, it didn't result from a judicial finding that Angeline was in need of therapeutic treatment. I was told that the purpose of the meetings was to deal with Angeline's feelings and reactions to her living arrangements with her parents. At the outset, Mr. Moore was concerned about specific behaviours of Angeline's, while Ms. Moore felt that therapy would be helpful for a child with two families. From Dr. Humphreys' perspective, her responsibility was to help Angeline talk to her parents. Dr. Humphreys' relationship with Angeline was based on an agreement that Dr. Humphreys wouldn't tell anyone what the two of them discussed, unless Angeline agreed or wanted Dr. Humphreys to speak with her parents. On this basis, Dr. Humphreys recommended that Angeline not be made aware of her testimony. I encourage her parents to respect this recommendation.

[33] Dr. Humphreys was asked about child's wish reports which were described to her as an assessment where someone would meet with Angeline, determine her wishes, and identify whether her wishes had been influenced by anyone or if they were reliable. Dr. Humphreys said she would never consider it "a professional piece of work to just speak to a child without anything else". She explained this by saying that her experience with Angeline "was that things changed, and she changed in what she was saying and what she wanted and how she was relating to

each of her parents". Dr. Humphreys gave the example of an instance where, during one of their meetings, Angeline "insisted that she was - - she wanted, or her mom and she had decided" that she would live with her mother. When Dr. Humphreys raised this issue at their next meeting, Angeline said, "Oh well, we're kind of not talking about that now."

[34] Dr. Humphreys said that if Angeline was worried about something at one parent's home, she'd tell her other parent. She wouldn't speak directly to the parent involved. She didn't want to hurt that parent's feelings. Angeline was "very aware of what she could say" and she "knew her reactions had an impact on her parents". Dr. Humphreys said,

I don't think, in this situation - - I think this is - - I think the child - - this child hears a lot, she's told a lot. [. . .] I'm not sure that any child who's in a situation where there's information being given to them that is not appropriate for their age or gives them a sense of being too involved in the adult issues - - Angeline said to me, "I don't want to hurt their feelings. I'm not going to say anything to either of them that's going to -- that I think will upset them." She wouldn't even meet with them with me to discuss issues, you know, so I'd be really cautious that she could actually do that [participate in a child's wish report] in a way that was - - that's going to give us any value information.

[35] Dr. Humphreys testified that Angeline has been given inappropriate information from her mother. Angeline volunteered details about when this happened to Dr. Humphreys. Dr. Humphreys said, "There's too much that [Angeline] hears, way too much, and too much that she's asked to give opinions on" and "[Angeline]'s sensitive to what her parents are thinking and feeling and what they both - - certainly what her mom wants for her."

[36] Dr. Humphreys' testimony that Angeline's opinion will depend on the circumstances in which she's asked makes it clear that there's likely to be little value in Angeline's comments.

[37] According to her parents, Angeline tells each parent she prefers that parent's home.

[38] Neither parent's Parenting Statement identified Angeline as having any special needs. There's been no evidence of any need for a professional opinion in the context of this litigation.

[39] Since Ms. Moore is requesting the child's wish report, the burden is on her to show that a professional opinion is required. Reports should be ordered where there's a specific need for the type of information they generate and the information would not otherwise be available because it falls within the special knowledge of the expert. Ms. Moore hasn't met this burden.

[40] I dismiss Ms. Moore's motion for a child's wish report.

[41] Mr. Moore's request for a custody access assessment doesn't stand on its own. I was to consider it only if I believed that I needed to hear from Angeline in some way. Where I am dismissing the motion for a child's wish report, I don't need to consider his request.

[42] Since I have dismissed the request for a child's wish report, I am ruling on Ms. Moore's variation application.

Threshold for variation application

[43] Subsection 17(5) of the *Divorce Act* governs applications to vary a parenting order. This subsection was considered by the Supreme Court of Canada in *Gordon v. Goertz*, [1996 CanLII 191 \(S.C.C.\)](#). At paragraph 13 of the majority reasons, then-Justice McLachlin was specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:

1. there must be a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the needs of the child;
2. the change must materially affect the child; and
3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[44] All parenting applications, including variation applications, are determined on the basis of the child's best interests. The requirement of proving there's been a material change since the prevailing court order was granted focuses attention on

the child's needs and how they are met in the new and unforeseen circumstances. This ensures that the child's best interests are met in these circumstances. So, a material change in circumstances is more than a threshold to be crossed before varying a parenting order, it is also the basis for determining what variation should be made.

[45] Ms. Moore says that the change in circumstances occurred in August 2011 when Mr. Moore's work began to require him to train and work overseas for long periods of time.

[46] Mr. Moore is a helicopter pilot. Since August 2011 his work and training have taken him to Scotland, the Falkland Islands and Africa. He's required to travel to the work site to work there for six weeks and to return home at the end of the six week work period. While his schedule is described as "six weeks on, six weeks off", he actually works for six weeks and his time travelling to and from the international work site comes from his six weeks off. As well, while his schedule was to be fixed, Mr. Moore says that it's never been that way and there's a "total lack of certainty" in his work schedule. Ms. Moore argues that Mr. Moore "is away more of the time than he is home." She also says that Mr. Moore's absence from Nova Scotia was never anticipated when Angeline's parenting arrangement was determined.

[47] Mr. Moore concedes that this change in his employment is a change in circumstances.

[48] Essentially, the change is that Mr. Moore is no longer always available to parent Angeline in person.

Orders sought to be varied

The Corollary Relief Judgment

[49] The Corollary Relief Judgment was granted in 2009. A number of its terms are relevant to this application. The Judgment provided that Angeline was in her parents' joint and shared custody and, when she began school in 2009, that she would move between her parents' homes on Fridays after school. During her week with each parent, she'd have an overnight visit with the other parent. She has her overnight visit with her father on Monday night and her overnight visit with her mother on Tuesday night.

[50] It was ordered that Angeline would attend the early French Immersion program at École Tantallon Elementary School and that she would continue to attend the French Immersion program at that school and the junior and senior high schools into which it feeds until her parents agreed in writing to some other arrangement or a judge ordered otherwise.

[51] The Corollary Relief Judgment said that Angeline was to take the bus to and from school each day, travelling with her step-sisters and leaving from her father's home. If Angeline was at her mother's, then her father would pick her up at her mother's and return her there, unless returning her to her mother's made it necessary to hire a babysitter for Claire and Olivia, who were then aged nine and one-half and almost seven, respectively. If a babysitter was necessary, then Ms. Moore would pick up Angeline.

[52] Mr. Moore was ordered to provide Ms. Moore with "an advance notice pick-up schedule for the upcoming month" on the twenty-fifth day of each month.

[53] The Judgment outlined a schedule for Christmas, March Break, Easter, Angeline's birthday, Mother's Day, Father's Day and summer holidays. It made no provision for other statutory holidays.

[54] The Corollary Relief Judgment specifically provided that each parent "shall be permitted to choose one activity for Angeline to participate in and the other party shall ensure that Angeline participates in that activity while she is in their care."

The 2011 variation order

[55] The Corollary Relief Judgment was varied in February 2011. A number of changes were made but the only relevant change was to paragraph 18 of the Corollary Relief Judgment which provided that all pick ups and drop offs during the school year would occur at Mr. Moore's home in time to ensure that Angeline always traveled to and from school on the bus.

[56] The variation order revoked the requirement that Angeline's transfer point would be her father's home so she could take the bus to school. This provision was replaced with the requirement that during the school year when Angeline was with her mother, Ms. Moore would drop Angeline off and pick her up at school. The variation order further provided that if Mr. Moore was driving Angeline home after school, he was to deliver her to Ms. Moore at a specified school parking lot immediately after Angeline finished school rather than waiting until after her step-

sisters were out of school to drive Angeline to her mother's. This latter aspect (found in subsection 1(b) of the variation order) would have little application: if Ms. Moore was regularly driving Angeline directly to and from school during the weeks Angeline was with her, there would be few occasions when Mr. Moore was driving Angeline to her mother's.

Variation sought

[57] Ms. Moore seeks to vary terms contained in the Corollary Relief Judgment and in the 2011 variation order. Specifically, she asks that:

- a) Angeline live with her when Mr. Moore is away;
- b) Angeline attend J.W. McLeod / Fleming Tower school;
- c) Angeline be permitted to attend her extra-curricular activities (lessons and events) from both her homes and that either parent be able to take her to her activities, even if they occur the other's time;
- d) there be a review every two to three years;
- e) Angeline have a child advocate; and
- f) Angeline spend holiday time equally with each parent.

Family history

[58] Allan and Christine Moore separated in November 2007 when Angeline had just turned three years old. Ms. Moore remained in the matrimonial home in Lower Sackville, and Mr. Moore began to cohabit with Debbie Wright and her daughters in Hubley. Ms. Wright is a registered nurse. She's worked for the Capital District Health Authority and its predecessors for twenty-five years and is pursuing further studies in health administration. Angeline calls Ms. Wright "Debbie" and describes Ms. Wright as her step-mother, while she considers Claire and Olivia her sisters.

[59] At some point in 2008 while training in intensive psychotherapy, Ms. Moore met David Mensink. They became engaged in 2009. Until some point earlier this year, Ms. Moore lived in the former matrimonial home in Lower Sackville and Dr. Mensink lived in his own home in Halifax. While each had a home, they did spend some time together as a family at Dr. Mensink's home.

Almost all of Ms. Moore's evidence about transporting Angeline to school in Tantallon focused on the distance from Lower Sackville to Tantallon, so I conclude that most of Angeline's time was spent with her mother in Lower Sackville and not with her mother and Dr. Mensink in Halifax. In any event, Ms. Moore and Angeline now share a home with Dr. Mensink. This home is in a new neighbourhood for Angeline. It is not in a neighbourhood where she had ever previously lived with her mother or Dr. Mensink.

[60] Mr. Moore filed an interim application just after the parties separated. Some matters were resolved and the parents consented to preparation of a custody and access assessment. There was a contested hearing before then-Associate Chief Justice Ferguson, reported at *Moore*, 2008 NSSC 38. His Lordship ordered that Angeline remain in Christine Moore's care and Allan Moore's access was limited so he had no overnight contact.

[61] While the assessment was underway, in May 2008, Mr. Moore filed an interlocutory application for production of materials by the Department of Community Services. That matter was resolved by consent in June 2008.

[62] In July 2008, Mr. Moore filed an amended interim application, seeking to vary the terms of his interim access. This was resolved by consent.

[63] A settlement conference was held in November 2008. At the time of this settlement conference, dates and deadlines were set for an additional settlement conference, an organizational pre-trial conference and the divorce trial, which was scheduled for two days in April 2009. Ultimately, the settlement conference was extended to two, half days in February 2009, and some success was achieved. Despite the additional time, the parties weren't able to agree on an arrangement for Angeline's parenting time commencing in the fall when she'd start school, where she would attend school, child support or spousal support.

[64] At a pre-trial conference in March 2009, Justice Campbell ordered the parties to continue their negotiations and to provide him with copies of letters outlining their positions. He reduced the amount of time set for trial and, after hearing evidence over two days in April 2009, he gave an oral decision which concluded the terms of the Corollary Relief Judgment. The parties were divorced. As a result of Justice Campbell's decision Angeline's parenting arrangement began to change so that by the time she began school in September, she was dividing her time between her parents' homes on a weekly basis. She began early French Immersion at École Tantallon Elementary School, taking the bus with her step-sisters and neighbourhood children.

[65] There was no litigation for the next ten months.

[66] In March 2010, Ms. Moore applied to vary the Corollary Relief Judgment as it related to custody, access and spousal support. An organizational pre-trial conference was held at the end of that month. Justice B. MacDonald questioned whether the threshold requirement of a material change in circumstances had been met and adjourned the conference for one month, recommending that Ms. Moore obtain legal advice. When the conference resumed, Ms. Moore expressed concerns about compliance with the Corollary Relief Judgment. Justice B. MacDonald continued to question whether there had been a material change in circumstances. Her Ladyship recommended that the parties work with a mediator to resolve their problems and further adjourned the conference to allow this, directing the parties to return to Justice Campbell.

[67] The parties' meeting with Justice Campbell occurred in September 2010. Ms. Moore hadn't complied with the Rules for filing documents and, it appears, she sought to file some materials which weren't in the proper form. Additionally, it seems insufficient time was scheduled before Justice Campbell, so the application was adjourned. To ensure the application would proceed smoothly, there was an organizational conference in January 2011.

[68] Though scheduled, the application didn't proceed in February 2011. Justice Campbell suggested a binding settlement conference. The parties and their new partners participated and the application was resolved by consent. The resulting variation order was issued in July 2011.

[69] The court's file was inactive from July 2011 until December 2011 when Ms. Moore filed an affidavit. One of the court's conciliation officers wrote her a letter, explaining that there was no outstanding application and letting her know the steps to start an application, if she wanted to do so. Ms. Moore did nothing further until late August 2012, when she filed this application. The hearing was scheduled for two days at the end of January 2013. At the conclusion of those two days, I'd heard Christine Moore's case and from two of Allan Moore's witnesses. I hadn't heard from Mr. Moore or his fiancée. Various mid-hearing motions were argued in June. The evidence was completed in June 2013 and final submissions were made in July. While the hearing was adjourned, the parents participated in a settlement conference where they reached a "without prejudice interim agreement" about Angeline's access pending the completion of the hearing.

[70] From November 2007 to date, Angeline has only twice had a reprieve from her parents' ongoing litigation. Prior to the divorce trial in 2009, there were three

applications. There have been three settlement conferences (two were binding settlement conferences) and numerous organizational conferences. Most recently, of course, there has been this five day application, which itself involved two organizational conferences, a half-day of mid-hearing motions and a settlement conference. This was the second application to be filed since the divorce was granted.

[71] Though Mr. Moore began to work overseas in August 2011, Angeline continued to spend alternate weeks at her father's home. This continued until mid-2012 when she stopped going to her father's home unless he was in Nova Scotia.

[72] From 2007 until some time in 2013, Ms. Moore lived in Lower Sackville. When Ms. Moore and Angeline moved, Dr. Mensink became a permanent member of their home. Prior to this move, Angeline and her mother didn't permanently live with Dr. Mensink. At no time prior to 2013 did Angeline live in the area of her mother's current home.

[73] Since starting this application, Ms. Moore has filed two Parenting Statements. In these, she describes Angeline as having no special needs or disabilities.

Perspectives on parenting: pillars and silos

[74] Angeline's parents don't share a perspective on Angeline's family relationships.

[75] Christine Moore, perhaps because of her training as a counsellor, believes that her home and Mr. Moore's home should be like pillars supporting a roof, each parent working with the other to support Angeline. This relationship requires each parent to be open and trusting. It requires effective communication and respect.

[76] Allan Moore believes that the households should operate as silos, each isolated and functioning entirely on its own. When Angeline is in one household, the inhabitants of the other should withdraw. This arrangement requires less ongoing contact, communication, co-operation and trust. Mr. Moore says that the relationship he has with Ms. Moore isn't a very good relationship, but that they have been able, for the most part, to put aside their differences so that they can have a shared parenting arrangement.

[77] Often the conflict that dogs a couple at an early stage in a separation is short-lived and, as time passes, former spouses are able to establish a different and

more effective relationship as parents. For some families, this doesn't happen. This hasn't happened for the Moores. For example:

Christine Moore deplors that Allan Moore has provided "so much false information or just non-communication and non-information over time". Yet, when she relocates with Dr. Mensink to a new home she will not provide the civic number for Angeline's new home to Mr. Moore.

Debbie Wright complains that Christine Moore denied Angeline the opportunity to take part in Olivia's birthday in 2012. In the various emails attempting to schedule access at this time, Ms. Wright makes no mention that she's trying to schedule Olivia's birthday party.

Allan Moore complains that Christine Moore compelled him to return to Nova Scotia from his work overseas so he could accompany Angeline on a family trip and that Christine Moore provided appropriate travel documentation only a couple of days before the departure. In contrast, Debbie Wright testified that "[b]y a stroke of luck Allan's employer also sent him home a week early" and that the travel permission letter arrived on January 7, one week before their trip. (In all likelihood, the letter probably arrived one day earlier than Debbie Wright even says: Angeline switches homes on Friday and the letter was in her backpack. It's likely the letter was in her backpack on Friday, January 6 when she arrived at her father's home after school, rather than on Saturday, January 7, as Debbie Wright testified.)

While Christine Moore says she wants Angeline to have one integrated family, she excludes Debbie Wright from emails about Angeline and only selectively communicates with her when Allan Moore is absent. Christine Moore says that parenting is restricted to her and Allan Moore and doesn't involve Debbie Wright, though she insists that David Mensink be included in communications.

When Christine Moore and David Mensink have the opportunity to select a location for their home, they choose one not close to Angeline's home with her father, perpetuating the difficulties of transportation.

The parents guard their time with Angeline, picking her up from school to usurp the other's time with her.

The RCMP intervene on multiple occasions to address disputes about parenting time and contact.

[78] In these and numerous other circumstances, the parents try to create the impression they are co-operative, while not actually co-operating.

[79] Many years ago, prior to the parties' divorce, there were two referrals made to the Department of Community Services about Angeline. There was an investigation. The investigation gave rise to no child protection concerns. Ms. Moore says that the referrals were appropriate and reasonable. Mr. Moore disagrees. A third referral was made and is the subject of similar disagreement: Ms. Wright thinks it was appropriate while Ms. Moore thinks the comments which prompted the referral were blown out of all proportion. These events, and others like those listed in paragraph 77, have nourished the parents' antipathy toward each other. At this date, so many years removed from the events, it isn't possible to assess reactions and reactions to reactions so as to decide whether reactions were appropriate. In any event, the parents' views of each other are entrenched.

[80] My task isn't to choose which parenting philosophy I prefer. I note the conflict in parenting philosophies and the antipathy because it's relevant to determining Angeline's best interests. The parenting arrangement I fix for her must recognize this context which has existed since the Moores separated.

Angeline's residence while her father is away

[81] Christine Moore says that all of Angeline's time should be with her while Mr. Moore is outside the province. Ms. Moore says that both she and Angeline want Angeline to live with her while Mr. Moore is away. She says that this, too, maximizes the time Angeline spends with a parent, in this case, her mother. Ms. Moore claims that Angeline should not be in the custody of someone who is not her parent (Debbie Wright) when Mr. Moore is away. She suggests that when Mr. Moore is in Nova Scotia, Angeline resume her schedule of weekly alternation

and, when Mr. Moore is away, she have the opportunity to spend time with her step-sisters.

[82] Allan Moore proposes that Angeline continue her schedule of weekly alternation while he is away. He says that Ms. Moore will not facilitate his contact with Angeline. He says Ms. Moore refuses to let Angeline visit his home while he is away. He also says that until November 9, 2012 when there was a conference at court, Ms. Moore limited his contact with Angeline. He'd make calls to Ms. Moore's home, her cellphone and to her fiancé's home. He said it was "very rare" that he'd reach Angeline and then the conversations would be "very short and very stilted". He offers an opinion as to why this was the case. Where I have struck portions of other affidavits which offer opinions, I do the same here and disregard Mr. Moore's opinions.

[83] Mr. Moore says that his plan will maximize his contact with Angeline, since he Skypes with Debbie Wright and the girls during breakfast and as soon as the girls return home after school. He says the computer is on the kitchen table so he's "present" through the dinner hour and speaks to the girls in the evening when he helps with homework and is "present".

[84] As this hearing was being scheduled, Christine Moore requested Allan Moore's phone records so she could assess this claim. Mr. Moore refused to provide them. On June 7, I heard Ms. Moore's motion for leave to bring a motion for an order that would compel Mr. Moore to provide his phone records. Mr. Moore opposed the motion. I determined that the records were relevant but, given the timing of the motion, I did not grant leave. Mr. Moore made his phone contact with Angeline relevant, but has not adduced evidence to support his claim and has spurned all efforts to challenge it.

[85] With regard to Skype contact, Ms. Moore made repeated efforts to arrange for contact between Angeline and her father via Skype. She sent emails to Mr. Moore about this, purchased a tablet for Angeline and set up a Skype account. Mr. Moore didn't respond.

[86] On the basis of this evidence, I don't accept that Christine Moore has denied Angeline telephone or Skype contact with Allan Moore. For the first year of Mr. Moore's off shore employment, Angeline continued to visit at her father's home when he wasn't there.

Ms. Moore's wishes

[87] In her testimony Ms. Moore repeatedly stated that she, as Angeline's mother, wants Angeline to remain with her while Mr. Moore is away. A parent's wishes don't determine custody. Subsection 17(5) of the *Divorce Act* says that I am to take into consideration "only the best interests" of the child when varying a custody order. A parent's wishes can be helpful information if they reveal something related to the child's best interests. However, when a parent's wishes are an expression of emotion, they offer me little insight in determining custody. Here, Ms. Moore's wishes are expressed in terms of her long and loving relationship with Angeline: "I am Angeline's mother and have cared for her since birth"; "I love her more than anything or anybody." I acknowledge her love for Angeline. Both Angeline's parents love her and want her to live with them, so this cannot determine Angeline's parenting arrangement.

Angeline's wishes

[88] Ms. Moore says that Angeline wants to live with her when her father is away. Mr. Moore says this is not what Angeline tells him. I have already determined that there'd be little value from a child's wish assessment because Angeline's wishes appear to be heavily influenced by her desire to keep each parent happy and not to offend either of them.

[89] In terms of Angeline's wishes generally, I heard evidence from Dr. Carolyn Humphreys.

[90] Mr. Moore proposed that Dr. Humphreys appear and be qualified as an expert witness and that the parties would then withdraw from the courtroom so that I could ask Dr. Humphreys questions provided by each of them. He proposed that the parties and counsel wouldn't be present for this discussion and that it wouldn't be recorded. Ms. Moore was willing to accede to this proposal, but I rejected it. I was not prepared to hear evidence, particularly expert evidence, which was not available to the parties to question or challenge, nor to receive evidence that would be unavailable to the Court of Appeal or to another judge of this court hearing a future variation application.

[91] Dr. Humphreys met with Angeline six times in the period from October 26, 2011 until May 9, 2012. The initial referral was made by Mr. Moore on May 31, 2011 and, prior to any meetings with Angeline, Dr. Humphreys met with Mr. Moore in July 2011 and with Ms. Moore in August 2011. On her retirement, Dr. Humphreys recommended that Angeline continue in therapy with another

psychologist and expressed her willingness to assist in Angeline's transition to a new therapist. This recommendation hadn't been pursued at the time Dr. Humphreys testified.

[92] Angeline's meetings with Dr. Humphreys were compelled by the parents' consent variation order. The purpose of the therapy was to deal with Angeline's feelings and reactions to her living arrangements with her parents.

[93] Dr. Humphreys described Angeline as a child whose maturity was within the range of what would be expected of a child her age. Angeline was generally quite willing to talk, answer questions and discuss what was going on in her life. She did this at a "fairly average level." At times Angeline could be hesitant and, sometimes, more talkative and easier to engage. Dr. Humphreys said that Angeline spoke fairly well about things that concerned her, talking about what made her happy, sad and scared. She "did quite well talking about her feelings" and "was reasonably open."

[94] At their first meeting in October 2011, Angeline explained to Dr. Humphreys that she was coming to the sessions because her mother thought she shouldn't be going back and forth between homes. During this session, Angeline mentioned her mother's concerns about her being at Mr. Moore's home when he wasn't there and, according to Dr. Humphreys, Angeline understood "pretty clearly, that her mom was concerned" about Angeline being at her father's home when he wasn't present.

[95] According to Dr. Humphreys, during the meetings, Ms. Moore's concerns "certainly seemed to come up several times for" Angeline, who reported that her mother doesn't like Debbie Wright. Angeline didn't know if Ms. Wright doesn't like Ms. Moore.

[96] As I've noted, Angeline told Dr. Humphreys that if she was worried about something at one parent's home, she'd tell her other parent. She didn't want to hurt a parent's feelings by speaking directly to that parent. Dr. Humphreys said that Angeline was "very aware of what she could say" and she "knew her reactions had an impact on her parents." In discussing the prospect of a meeting with each of her parents, Angeline expressed concerns about her relationship with her mother and backed down from a meeting with her mother. Once she did this, Angeline then said she wouldn't meet with her father, because he knew what the problem was anyway.

[97] Dr. Humphreys testified that Angeline's been given inappropriate information from her mother. Angeline volunteered details about when this happened to Dr. Humphreys: for example, after a phone call between her parents Ms. Moore would say to Angeline, "you won't believe what your dad's done this time." Dr. Humphreys said, "There's too much that [Angeline] hears, way too much, and too much that she's asked to give opinions on ... [Angeline]'s sensitive to what her parents are thinking and feeling and what they both - - certainly what her mom wants for her." Dr. Humphreys formed the opinion that Ms. Moore "shared too much information with [Angeline]. She [Angeline] knew a lot about [Ms. Moore's] disagreements with [Mr. Moore]."

[98] As a result of this evidence I accept that Angeline does make remarks to each parent that are supportive of that parent's position. However, I do not give these remarks any weight. Dr. Humphreys' testimony supports Mr. Moore's view that Angeline tells each parent what she believes that parent wants to hear to avoid hurting his or her feelings.

"Maximizing" parental contact

[99] In making a variation order, I am to give effect to the principle that Angeline should have as much contact with each of her parents as is consistent with her best interests. This is provided for in subsection 17(9) of the *Divorce Act*. While this is often reduced to the phrase "maximizing parental contact," the principle is more nuanced than that. The principle requires that the child's best interests must be considered in determining the optimum amount of contact the child should have with each parent. For this reason, I prefer to think of subsection 17(9) as *optimizing* parental contact: what is the greatest amount of contact that is in the child's best interests in the existing circumstances?

[100] Ms. Moore proposes that Angeline live with her while Mr. Moore is overseas, having the opportunity for a weekly visit with Claire and Olivia, and that the weekly alternation resume when Mr. Moore is in Nova Scotia. Mr. Moore's work schedule is one of working for six weeks, spending six weeks travelling home, being home and travelling back to work. The result of this proposal would be to reduce Angeline's time in her father's home from twenty-six weeks each year to roughly twelve weeks.

[101] According to Mr. Moore, there's a "total lack of certainty" in his work schedule. It isn't a fixed schedule. Mr. Moore says that he gets a flight itinerary often only 24 to 48 hours in advance of when he must leave for work.

[102] Angeline's circumstances are ones where she is accustomed to spending half of her time in each parent's home. She is upset by conflict between her parents. She believes that her mother dislikes Ms. Wright. She has resided in Hubley on a half-time basis since she began school in September 2009 and she will be entering Grade Four this fall. In Hubley, she has a step-mother and step-sisters who have been part of her life since she was three years old.

[103] Ms. Moore's proposal has two significant effects on Angeline's life. First, it takes her away from that half of her life which is based in Hubley: her step-mother, step-sisters, her formal activities (Brownies, piano, swim team and Sunday school) and her informal activities in her neighbourhood. Some of this can be replicated if Angeline is driven back and forth, but Ms. Moore has made clear that she believes the driving is a negative experience, and she wants there to be only one visit each week between Angeline and those in Hubley. So if Angeline is to live with her mother while her father works overseas, the half of Angeline's life which is based in Hubley will not be fully replicated.

[104] While telephone and Skype communication may be available at Ms. Moore's home, it will be more comfortable for Angeline to communicate with her father through these means from the home in Hubley, where she can do so with her step-mother and step-sisters.

[105] Dr. Humphreys speaks positively of Angeline's relationships in Hubley. They are important ones. It is positive for Angeline to see former spouses, like Ted Mercer and Debbie Wright, who co-operate for the sake of their children. It is beneficial for her to learn to get along with close peers, like step-siblings. Dr. Humphreys gave evidence that Angeline is exposed to inappropriate conversations about adult topics by her mother. Mr. Moore's home provides a reprieve from this exposure.

[106] Second, because Allan Moore's work schedule is unpredictable and comes with little notice, it would require considerable parental co-operation to co-ordinate the schedule adjustments that would result from Christine Moore's proposal. Ms. Moore recognizes that this is problematic. In her final submissions she wrote, "I am requesting written clarity of the court orders; for all parenting time to be specific with dates." The RCMP have been called on multiple occasions to deal with the parents' disagreements. There's been no violence, but the parents have been unable to resolve their differences and have resorted to enlisting the police. These parents haven't demonstrated the flexibility and co-operation required for Ms. Moore's proposal. As Ms. Moore suggests, specifics are needed. Where

specific details are lacking, there is conflict. Conflict doesn't serve Angeline's best interests.

Residence with a non-parent

[107] It was well over fifty years ago that biology was the basis for parenting decisions: *Re Baby Duffell Martin v. Duffell*, 1950 CanLII 11 (S.C.C.), *Hepton et al. v. Maat et al.*, 1957 CanLII 18 (S.C.C.), and *Re Agar*, 1957 CanLII 22 (S.C.C.). Since 1980, the Supreme Court of Canada has departed from the view that biology is an appropriate basis for determining parenting (*Beson v. Director of Child Welfare (NFLD.)*, 1982 CanLII 32 (S.C.C.), *Racine v. Woods*, 1983 CanLII 27 (S.C.C.) and *King v. Low*, 1985 CanLII 59 (S.C.C.)). In the very opening paragraph of *Racine v. Woods*, 1983 CanLII 27 (S.C.C.), Justice Wilson wrote “that the law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests.”

[108] Since 2007, the home in which Angeline has lived with her father (and Debbie Wright and her two daughters) has not changed. The home, its occupants and the surrounding community have been the most enduring circumstances in Angeline's life. Her mother's relationship with David Mensink is not as long. The new neighbourhood she occupies with her mother and living with Dr. Mensink are circumstances of much more recent vintage.

[109] Dr. Humphreys observed that, for Angeline, everyone in her two homes mattered to her and was important to her. Angeline's step-sibling relationships are important to her. Dr. Humphreys said that Angeline's description of life with Claire and Olivia, sounded like “fairly healthy step-sibling relationships”: there are times when they like each other and times when they don't, sometimes they get into arguments. In addition to interacting with older step-siblings, when in Hubley, Angeline is exposed to a parenting relationship that differs from her parents'. Debbie Wright and her former husband, Ted Mercer, have a co-operative relationship. Claire and Olivia's schedule with their father is adjusted by their parents so that they can be with their mother when Angeline is in Hubley.

[110] In her conversations with Dr. Humphreys, Angeline said more than once that she preferred to be at her father's home when he was there. She explained this by saying she missed her father and that she felt her step-mother was a bit stricter than her father, though she wasn't able to elaborate on this, beyond pointing to two situations: in one, Ms. Wright said Angeline was lying and she wasn't, and in another, Angeline said she had soap in her eyes and was crying, and Ms. Wright didn't know it, and Angeline was upset with her. Upsetting to Angeline, these are

not significant incidents. I have greater concern because Angeline knows that her mother doesn't like Ms. Wright which could undermine Angeline's relationship with her step-mother.

[111] Dr. Humphreys approached her work with Angeline in a number of ways, using different tools. One tool was preparing a scale of Angeline's comfort, safety and happiness in each household. According to this scale, the most comfortable, safe and happy home was Mr. Moore's home when he was there. The second most comfortable, safe and happy home was her mother's home - this was a bit better if Dr. Mensink was present. In third place was her father's home when he was absent. None of these homes was unacceptable to Angeline.

[112] Angeline has positive relationships with each of her parents. She has a long history in the community where she lives with her father and positive relationships with her step-mother and step-sisters. She has only recently moved to a home where she lives with her mother and her mother's fiancé in a neighbourhood that is new to all of them. The most stable situation for Angeline is the one in Hubley. She's been there since 2007 and lived there, half-time, since 2009.

[113] The flexible proposal Ms. Moore suggests requires these parents have attributes that they have not demonstrated in the six years since they've separated. It dramatically reduces Angeline's connection with a significant portion of her life.

[114] I don't accept the suggestion that Ms. Moore has restricted Angeline's contact with her father. Angeline could have Skype and phone contact with her father from her mother's home, but this would not allow Angeline to maintain the important relationships she has with her step-mother and step-sisters or to have this contact with her father in an open and comfortable setting.

[115] I conclude that the arrangement which optimizes Angeline's time with her parents is the continuation of the current weekly alternation throughout the year, regardless of where Mr. Moore is working.

Angeline's school

[116] The Corollary Relief Judgment reflects the parents' intention that Angeline would "continue to attend the French Immersion Program at Tantallon Elementary School and the Junior and Senior High Schools which Tantallon feeds into" unless they agreed otherwise or it was otherwise court ordered. When they reached this

agreement, Christine Moore was living in Lower Sackville and Allan Moore was living in Tantallon.

[117] In 2009, Angeline started Grade Primary in the early French Immersion program at École Tantallon Elementary School. At her father's, she takes the bus to school with the other girls. At her mother's, Ms. Moore drives her to and from school. This fall she will start Grade Four

[118] Ms. Moore wants Angeline to attend J.W. MacLeod / Fleming Tower School. In her briefs, she asks, "Should Angeline have to drive an hour a day to school each day when with her mother she can walk next door?" The reference to the school being "next door" is not literal: Ms. Moore has provided evidence that the school is close to the home that her fiancé purchased last summer, but it is not next door.

[119] Angeline has been commuting to school since she began grade primary in 2009. The Corollary Relief Judgment anticipated that this would continue through junior and senior high school. The distance from Christine Moore's home in Lower Sackville to the school was known and winter road conditions could be anticipated.

[120] As a result of Ms. Moore and Dr. Mensink's move, they now live closer to Angeline's current school, so her commute is reduced. The location of this home was determined with regard to Dr. Mensink's circumstances. His vision is impaired so he cannot drive and for health reasons, he rides a bicycle.

[121] Dr. Humphreys asked Angeline if travel to school was too hard and was told "it is a little bit." Angeline didn't like the long drive to school when she was with her mother, but she didn't complain about the bus ride to school from her father's home.

[122] Despite the drive to school from Lower Sackville, Angeline was very positive about her school: she loved school and enjoyed it. Her school was a place Angeline felt comfortable. Angeline said school was "really fun," and she liked "all the kids and teachers". Angeline was very positive about school. Her troubles were very limited. Angeline told Dr. Humphreys that in the past there was one teacher who wasn't fun and Angeline had had a difficult time with another child.

[123] I heard testimony from Denise Lefort who was Angeline's teacher in Grade Three. Angeline completed Grade Three in June.

[124] Ms. Lefort describes Angeline as a good student who doesn't struggle with any aspect of the academic portion of her schooling. Occasionally, she's needed some extra practice at home with certain skills she's learning, but this isn't out of the ordinary. She also needed occasional reminders about paying attention and listening and, again, these reminders are nothing out of the ordinary for a third grader, according to Ms. Lefort. Socially, Ms. Lefort says Angeline does well. She's a quiet student with a good circle of friends. Outside of this circle, there are others with whom she's friendly. She isn't observed to get into conflict with other children and seems to get along quite well with others. Her maturity is that of an average eight year old girl, and she sometimes needs prompting because she's not always ready to speak in her own words. Initially shy, she became more comfortable as the school year progressed. She's a well-adjusted, content and happy student according to Ms. Lefort, who had no concerns about her.

[125] After Angeline had been late several days in a row, Ms. Lefort sent an email to her parents. Ms. Moore came to speak with Ms. Lefort and each parent sent her an email. Ms. Lefort says that each parent was "not very friendly about the other parent and the other parent's involvement" with Angeline. Ms. Moore suggests that a new school will offer the parents a fresh opportunity to improve their "affections". There is nothing to suggest that relocating Angeline's school will inspire her parents to change the habits of almost six years.

[126] I was provided with a copy of Angeline's first term report card for Grade Three and a single page from her first term report card for Grade One. According to her first term report card for Grade Three, she earned good marks in all her subjects, demonstrating that she has achieved most or all of the expected learning outcomes addressed during the term. Her "profile" on her report card is one of a responsible, respectful girl who consistently interacts positively with others, resolves conflicts appropriately and works collaboratively.

[127] Ms. Lefort felt that it's best for a child who is academically adjusted and content, to stay in the current school. Ms. Lefort testified that a transfer at the end of a school year is less of an academic concern than a mid-year transfer. She said that if Angeline was transferred at the end of the school year, she'd get along fine with new students and new friends.

[128] Ms. Lefort testified that Angeline would get along well if she transferred to a new school. However, this is not the question I am asked: I am asked what is in Angeline's best interests. Is it in her best interests to remain at her current school or is it in her best interest to change schools?

[129] Ms. Moore's evidence supporting her request that Angeline change schools is framed in terms relating to transportation: she says that Mr. Moore hasn't met his court-ordered obligation to transport Angeline and that she must sacrifice two hours of her day to take Angeline to school. She raises other points (such as the benefits of walking to school, going to school with children in her new neighbourhood), but her focus is the drive. She says the drive is long and that it is dangerous in the winter. (These facts were known at the time of the Corollary Relief Judgment and the variation order.) Ms. Moore says that the responsibility for the drive, unfairly, rests on her, though the Corollary Relief Judgment placed the burden on Mr. Moore. Ms. Moore's relocation has reduced Angeline's commute, but because the parents do not live in the same community a commute is unavoidable.

[130] In her final submissions, Ms. Moore argues that the responsibility for driving Angeline to school was arranged in the Corollary Relief Judgment to address her environmental sensitivities. She offered no evidence to support this at the hearing. The Corollary Relief Judgment specifies the hair product, body lotion, sunscreen and moisturizer that may be used on Angeline. It makes no reference to "organophosphates and aromatic compounds" or negative effects of fueling a car, highway pollution or paving. I should note here that in her pre-hearing brief and her final submissions Ms. Moore offers information that was not found in any affidavits or heard in any testimony. I do not intend to dwell on this information. It was not available to be challenged by Mr. Moore. It was not sworn. It is not evidence before me. It cannot be the basis of my decision.

[131] Ms. Moore hasn't expressed any significant concerns about Angeline's education, academic progress, social development or relationships with students or faculty at the school in Tantallon. She has identified an instance where Angeline was being bullied by another student and circumstances where Angeline's current teacher and her Grade Primary teacher said that Angeline had problems following directions at school. While Ms. Moore says that Ms. Lefort testified that "in comparison to the other children she seems distracted", the transcript of Ms. Lefort's evidence shows that she said the extra homework she'd sent home is "nothing out of the ordinary that I haven't done with other students in the room. And occasional reminders for attention and listening, but again, nothing out of the ordinary for that grade level, for that classroom."

[132] The independent witnesses, Ms. Lefort and Dr. Humphreys, describe any difficulties Angeline has had as typical problems any child experiences at school. There's no evidence offered which suggests those problems wouldn't arise at any other school. The only evidence I have about the school Ms. Moore proposes is

that it is near to her new home and attended by children in her new neighbourhood. I assume that it offers an early French Immersion program, but I have no evidence of this.

[133] Having regard to Angeline's best interests, it has not been shown that it is in Angeline's best interests that she be removed from her current school or that she attend a new school, so I dismiss Ms. Moore's request that Angeline change schools.

Attendance and transportation to extra-curricular activities regardless of when they occur

[134] The Corollary Relief Judgment provides that each parent shall be permitted to choose one activity for Angeline to participate in and the other parent shall ensure that Angeline participates in that activity regardless of when it occurs. Since Angeline alternates weeks between her parents' home, it's possible that she might never be able to attend more than half of any activity's sessions: during her week with her mother's, she'd miss activities at her father's and *vice versa*. This provision of the Corollary Relief Judgment ensures that Angeline has two activities (one selected by her mother and one selected by her father) in which she can fully participate. The provision limits the extent to which one parent can pre-occupy Angeline's time with the other parent by ensuring that the other parent only needs to sacrifice enough of his or her time with Angeline for Angeline to take part in one of her activities.

[135] At her father's home, Angeline is active in Brownies and she takes piano lessons. On Sundays, she goes to Sunday school at St. Luke's church. During her time with her father during the summer, Angeline's on a competitive swim team, the Breakers. During the winter, she takes part in its winter "maintenance program." As a result of the summer schedule, Angeline isn't able to participate fully in the swim team. Similarly, her Sunday school attendance isn't regular. Her Brownies and piano lessons are both scheduled for Monday evening. Monday Angeline spends overnight at her father's during her mother's week. As a result, she can participate in Brownies and piano lessons all the time, without any incursion on her time with her mother.

[136] At her mother's home, Angeline is involved in ballroom dancing lessons, violin lessons and a children's choir. Occasionally she takes part in a chess club and volunteers at a dog "daycare and spa." She also attends Sunday school. She participated in these activities when she and her mother lived in Lower Sackville. I don't know if any of these have changed now that they have moved. I wasn't told

when these activities are scheduled and whether Ms. Moore had scheduled some or all of them activities on Tuesday evening when Angeline is regularly with her during her father's week or if they are scheduled throughout the week. As well, I wasn't told which of the activities Ms. Moore has designated as the one activity that Mr. Moore must ensure Angeline attends during the time she is with him.

[137] Ms. Moore proposes that regardless of where Angeline lives, she attend all her lessons and events. One consequence of this proposal would be that either parent could fill Angeline's time with activities. For example, if Mr. Moore scheduled Angeline into a dozen activities, then Ms. Moore's time with Angeline would be controlled to the extent that Angeline must attend all these activities.

[138] The Corollary Relief Judgment ensures that Angeline fully participates in two activities: each parent shall ensure Angeline participates in one activity of the other's choosing. So, if Mr. Moore enrolls Angeline in piano lessons and Angeline's recital is on a Wednesday evening during Angeline's week with her mother, Ms. Moore must ensure that Angeline takes part in the recital. If Ms. Moore enrolls Angeline in ballroom dancing lessons on Thursdays after school, then Mr. Moore must ensure that Angeline attends those lessons. Ensuring participation includes transporting Angeline to and from the activity.

[139] Currently, Angeline has six formal activities (ballroom dancing, violin lessons, children's choir, piano lessons, Brownies and swim team). Additionally, she has occasional activities (chess club and dog walking) and she regularly attends Sunday school. It's a busy schedule if she attends every single activity every single week.

[140] I find that the limit of one activity imposed by the Corollary Relief Judgment is reasonable. It ensures that Angeline participates fully in two activities each year. It allows her time with each of her parents for unstructured family activities and it limits the control each parent has over the other's time with Angeline.

[141] Each parent's ability to select an activity shall be limited to one activity during the school year. Access in the summer is for block periods and either parent may want to spend the block period (or some part of it) out of town or with guests who are visiting from out of town. To preserve the integrity of each parent's summer block time, I am ordering that neither parent may designate a summer activity as one which the other must respect. I do appreciate that this will forestall Angeline's continuous involvement in any activity throughout the summer. I am not imposing a similar requirement during other periods of block

access such as Christmas and the March Break. Typically, extra-curricular activities are suspended at these times or the event is special one, like a concert or recital, which I will address in paragraph 144 below.

[142] The requirement that each parent ensure Angeline's attendance at one particular activity carries with it the burden of transporting Angeline to and from these activities. If I ordered Angeline attend all her activities, this could require a significant amount of communication between Christine Moore and Allan Moore to co-ordinate transportation. Given the effect of their conflict on Angeline, I want to avoid this.

[143] Ms. Moore suggests it will be more important as Angeline grows up that she fully participates in each of her activities. Ms. Moore does not explain why this is. Given the large number of activities Angeline has, I might expect that Angeline would reduce the number of her organized activities, focusing on her one or two favourites, as she makes more time for increasing schoolwork and social activities.

[144] To minimize the potential for conflict, I will clarify the terms of the Corollary Relief Judgment by adding that if a parent is entitled to attend a lesson, meeting or practice, the parent or adult who transported Angeline to the lesson, meeting or practice may be present. At some activities parents aren't permitted to remain. Where a parent may remain, the parent or adult who takes Angeline to the activity may be there and the other may not. If the activity presents a public event, such as a concert, recital, tournament or ceremony, both parents and their partners may attend but it is not required that all attend. If there are school activities such as picnics or field days, the adults in the household where Angeline is spending the week have the first option of attending these, exclusive of the others. If those adults are not available, the adults in the other household will have the option of attending

Periodic reviews

[145] Authority for granting a review order is found in subsection 16(6) of the *Divorce Act* which provides that I may make an order "for a definite or indefinite period or until the happening of a specified event". Section 16 of the *Act*, of course, addresses original custody and access applications. This isn't an original application, but a variation application. It isn't necessary for me to determine whether I have authority to grant a review order in a variation application because a review order isn't appropriate in this case.

[146] Review orders were considered by the Supreme Court of Canada in the context of spousal support in *Leskun*, [2006] 1 S.C.R. 920. The unanimous reasons of the Court were written by Justice Binnie who, at paragraph 36, described review orders as ones which entitle “one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order.” “Review orders,” he continued in paragraph 37, “where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion [. . .] without having to demonstrate a material change in circumstances.”

[147] His Lordship said, at paragraph 39, that I should resolve the dispute before me and make an order that’s permanent, subject to variation under section 17 where a change in circumstances has been proven. He continued that if I believe a review order is “essential” I’m to “tightly delimit” the issue for future review. It’s necessary to specify the focus of the review.

[148] In a variation application, the first step is to determine whether there’s been a change in circumstances. In the context of a custody order, this means analysing what has changed so that the existing order is no longer in the child’s best interests. This makes it possible to focus on the child’s best interests and to craft an order serving the child’s best interests in the new, changed circumstances. This analysis isn’t required in a review application, so unless the judge who orders the review identifies the focus of the review, the judge who hears the review doesn’t know the focus he or she is to have.

[149] Ms. Moore wants reviews to monitor Angeline’s situation. This purpose is not recognized by the *Divorce Act* as an appropriate basis for a review order. Without a reason to have a review, I cannot frame a review as the Supreme Court of Canada said I should. I dismiss the request for a review.

Child advocate

[150] Ms. Moore asks that I order Angeline have representation in future litigation. Children are not typically represented in private custody disputes in Nova Scotia.

[151] I cannot predict whether it would be appropriate for Angeline to participate in future litigation or, if she was to participate, the appropriate method of that participation. Those decisions can only be made in the context of future events. I dismiss this request.

Spending holiday time equally with each parent

[152] The Corollary Relief Judgment addresses how Angeline will spend the March Break, Easter and her birthday. These alternate annually. The Judgment designates where Angeline will spend Mother's Day and Father's Day. Its provision for Christmas addresses Christmas Day, Boxing Day and New Year's Day, while the summer schedule takes care of Canada Day and Natal Day. No mention is made of the other statutory holidays (Victoria Day, Labour Day, Thanksgiving and Remembrance Day).

[153] Ms. Moore has raised the issue, "How can Angeline be assured she is able to spend holiday time equally with each parent?" She doesn't explain what she means by "holidays" in her submission and otherwise only addresses this issue by writing, "To prevent future misinterpretation and conflict between parties I am asking for clarity of all court orders with specific dates and times of holiday parenting time."

[154] The Corollary Relief Judgment doesn't state how holiday access fits with the regular custody rotation. Is the regular rotation suspended for Christmas and the summer holidays, resuming once these holidays are over? Do Christmas and summer holiday schedules become part of the schedule, so that if one parent's designated time ends, the other's begins? There is a gap in the Corollary Relief Judgment's drafting. There are two possible options and the parents disagree on which applies. Absent guidance in the Corollary Relief Judgment, there is no reason to prefer one interpretation over another. Through her affidavit and her cross-examination of Mr. Moore, Ms. Moore exposed the annual conflict arising from the different interpretations.

[155] To create certainty and fill the drafting gap with regard to the summer, I order that from 8 a.m. on July 1 until 8 a.m. on July 15, Angeline shall be with her father. She shall be with him, as well, from 8 a.m. on August 1 until 8 a.m. on August 15. At all other times from 8 a.m. on July 1 until 8 a.m. on September 1, Angeline shall be with her mother.

[156] During the school year, Angeline's alternating week schedule pivots on Friday afternoons after school. One Friday afternoon she goes to her father's and the next, to her mother's. Dates play no role in the schedule's regular operation: it's all about Friday. The summer schedule I'm ordering applies dates and since I want to be explicit in explaining how it fits with the regular schedule, I offer the following comments. Unless July begins on a Friday, if Ms. Moore is with Angeline at the end of June she will not have a full week with her. Similarly,

unless September begins on a Friday, the parent with Angeline when the regular alternating schedule resumes will not have a full week with Angeline.

[157] The summer schedule will take over from the regular schedule. So, for example, if Allan Moore has Angeline at the end of June, when the regular schedule resumes at 8 a.m. on September 1, Angeline will be with Christine Moore, and she will stay with her mother until the afternoon of the first Friday in September when the weekly rotations will resume and she will go to her father's. If Angeline is with her mother at the end of June, at 8 a.m. on September 1, Angeline will be with her father and she will stay with him until the afternoon of the first Friday in September when the weekly rotation will resume and she will go to her mother's. I recognize that in this may mean that Angeline will have an extended period with her father if she is with him at the end of June and this runs into his time with her at the beginning of July. Similarly, she may have an extended period with her mother as the end of August runs into the beginning of September until the weekly alternation resumes.

[158] In other words, the summer schedule takes over from the regular schedule. Mr. Moore's July access will likely catch one parent mid-week (either cutting short Ms. Moore's contact with Angeline or extending his own at the end of June). Once the summer is over, the first few days of September (if September doesn't start on a Friday) may provide Mr. Moore with less than a full week until the weekly alternation resumes.

[159] The Corollary Relief Judgment provides that in even-numbered years, Angeline will be with her father from 9 a.m. on the first day of the school Christmas vacation until 2 p.m. on December 25th and she'll be with her mother from 2 p.m. on December 25th until 2 p.m. on January 1. This flips in odd-numbered years. To make clear how the parents will transition from the Christmas schedule back to alternating weeks, I order that if, before the Christmas break began, Angeline was with her mother, then she'll be with her father from 2 p.m. on January 1 until the first Friday in January when she'll go with her mother and weekly alternations resume. If, before the Christmas break began, Angeline was with her mother, she'll be with her father from 2 p.m. on January 1 until the first Friday in January, when she'll go with her mother and weekly alternation will resume. Again, I acknowledge that, depending on the year, this may mean Angeline has an extended time with one parent or the other at the beginning or end of the Christmas break.

[160] There shall be no change to March Break or Easter. Again, I recognize that as March Break has operated, it may mean that one parent or the other will have Angeline with them for three weeks.

Conclusion

[161] I am dismissing Ms. Moore's motion for a child's wish report and determining Ms. Moore's variation application.

[162] Angeline shall continue to alternate homes each week, regardless of where her father is working. During the times when Mr. Moore is away, Ms. Moore shall be responsible for transporting Angeline to and from school. When Mr. Moore is in Nova Scotia, he shall be responsible for transporting Angeline to and from school. Angeline will continue to attend École Tantallon Elementary School and continue to follow the educational plan set forth in the parents' Corollary Relief Judgment.

[163] Mr. Moore says that he gets a flight itinerary often only 24 to 48 hours in advance of when he must leave for work. The flight itinerary would disclose when Mr. Moore is in transit (and have limited ability to communicate) and provide some idea, subject always to change, about when he is in the province and when he is overseas. It will let Ms. Moore know where Mr. Moore is, allowing her to understand delays in his receipt and response to emails if he is many time zones away.

[164] I order that Mr. Moore provide Ms. Moore with his flight itinerary within six hours of its transmission to him. In keeping with this, he will adhere to paragraph 17 of the Corollary Relief Judgment, providing Ms. Moore with a driving schedule which will, to the greatest extent possible, confirm his general whereabouts and driving responsibilities as I've outlined them in paragraph 162 above. Ms. Moore must understand that this is not within Mr. Moore's control and subject to change, but the driving schedule will provide her with some idea of her obligations.

[165] In her various applications, Ms. Moore has claimed costs. Mr. Moore has not claimed costs in his main application, only in his pre-hearing application to strike Dr. Mensink and Susan Coldwell's affidavits. If either party wishes to be heard on costs, briefs must be filed by September 6, 2013. If further submissions are needed or I require attendance in person, this will be arranged.

[166] Once costs, if any, are determined, Mr. Moore's counsel will prepare the order.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia