SUPREME COURT OF NOVA SCOTIA
Citation: Denninger v. Ross, 2013 NSSC 237

Date: July 25, 2013
Docket: 1201-063281
Registry: Halifax

Between:

Kristopher Denninger

Applicant

and

Jennifer Ross

Respondent

DECISION

Judge:	Justice Carole A. Beaton
Date of Hearing:	June 24, 25 & 26, 2013
Date of Written Decision:	July 25, 2013
Counsel:	Colin Campbell, counsel for Kristopher Denninger Christine Doucet and Mary Jane McGinty, counsel for Jennifer Ross

By the Court:

[1] The two children who are the subjects of this parenting dispute are fortunate to have divorced parents who not only love them , but wish to each actively engage in parenting them. Unfortunately, the parents respective positions as to how to maximize the children's circumstances are very different, complicated by the fact there is no communication or contact between them. Therefore, there is no ability on the part of either parent to discuss meaningfully or at all with the other what might be in the best interests of the children. As a result, the matter has come before the Court for determination.

[2] A three day hearing on the father's Application to Vary a Corollary Relief Judgment and the mother's Reply to the Application raised the following issues:

(1) Has there been a change in circumstances and if so, does that necessitate change(s) to the Order in the best interests of the children?

(2) Is shared parenting in the best interests of the children?

(3) Which parent should have final decision making authority in respect of the children?

(4) Are there arrears of child support owing?

(5) What should be the financial arrangement between the parties regarding childcare and are there arrears of section 7 *Guideline* expenses owing?

Background

[3] The parties entered into an Agreement and Minutes of Settlement in May 2009, which document was eventually incorporated into a Corollary Relief Judgment ("the Order") in April 2010. The agreement provided for joint custody, with the primary residence of the children with the Respondent mother and a broad provision for "reasonable parenting time" for the Applicant father. It identified the parties would continue their practise of making jointly the major decisions for

the children, with day-to-day or emergency medical decisions being made by the parent then having care of the children. The agreement also spoke about full access to information and the children's events by both parties. Also in 2009 the parties developed a more structured schedule for parenting by the father than that originally set out, whereby the children were in his care each Wednesday afternoon - evening period for several hours and every second weekend from Friday after school until Sunday evening. By all accounts the parties were living within the spirit of, and the children were the beneficiaries of, clause 16 of the agreement which provided:

INTENT OF JOINT CUSTODY

16. Both parties acknowledge the fitness of the other parent and the importance of the other parent to the children. In agreeing to joint legal custody, the parties intend that:

(a) Each of them shall continue to have a full and active role in providing a sound moral, social, economic, and educational environment for the children;

(b) Both parties shall exert their best efforts to work cooperatively in making future plans consistent with the best interest of the children and to amicably resolve any disputes that arise;

(c) The parties shall consult in all substantial questions relating to the children, including, but not limited to, religious upbringing, education, significant changes in social environment and non-emergency health care; and

(d) The parties specifically agree not to use their custodial rights to frustrate, deny, or control the relationship between the other parent or the children. Each parent shall exert every effort to foster a feeling of affection between the children and the other parent. Neither party shall do anything which would estrange the children from the other, injure the opinion of the children of either parent, or impair the natural development of the children's love and respect for either parent.

[4] The evidence of both parties was that post-separation they enjoyed a positive relationship and engaged in productive communication concerning the children. Both cited examples of mutual activities and outings they shared with the children. While theirs was not classified as a shared parenting arrangement in the Order, they conducted themselves in a fashion that demonstrated the high level of coordination, flexibility and cooperation one would expect in such a parenting arrangement.

[5] The capacity for mutual respect of each parent's role and time with the children deteriorated markedly and somewhat quickly following the Respondent's remarriage in early 2012. On the evidence before me it was clear both parties have been and are failing to live up to the intent of the joint custodial designation and each of the provisions of clause 16 of the Order (as set out above) and each parent blames the other for the current state of affairs. On April 13, 2012 the Applicant filed the Application to Vary that is before the Court, seeking to change the joint custodial arrangement to a shared parenting regime whereby the children would rotate week about in the home of each parent.

[6] In the fall of 2012 the Applicant's parenting time was extended by agreement of the parties to include overnights each Wednesday, but he did not take the Respondent up on her suggestion to also extend his alternate weekend parenting time from Sunday evenings to Monday mornings.

[7] The Applicant relies on each and all of the following events as constituting the requisite change in circumstances needed to trigger a variation of an order pursuant to section 17 of the *Divorce Act*, R.S.C. 1985, c. 3:

(a) his remarriage in February 2012, and the availability of his wife to assist in parenting (around her employment schedule);

(b) his mother's move to Nova Scotia in October 2012, coupled with the anticipated arrival of his father, once retired, in November 2013, and the availability of those family members to assist in providing child care, rather than having the children attend daycare or an after-school program;

(c) his change in employment circumstances. When the parties separated

his duties with the military required him to go to sea periodically and he is no longer required to do so. Most recently he has been engaged in part time work, and has applied for a release from the military as a result of an earlier diagnosis of post-traumatic stress disorder;

(d) the location of his last two homes have placed him within very close proximity to the primary residence of the children and to the elementary school both children will attend as of September 2013;

(e) over time, the increase in the number and frequency of extra-curricular activities in which the Respondent has enrolled the children has interfered with and had the effect of reducing his parenting time with the children.

(f) the separation agreement which eventually became the Order was made at a time when the children were very young - three years and seven months respectively. The children are now seven and almost five, and the nebulous wording in the Order as to his parenting time does not reflect the nature of his current relationship and father-child bond with the children;

(g) the current Order lacks the type of structure, detail and specifics needed to avoid and/or resolve problems that currently exist between the parties concerning the parenting arrangement;

(h) the deterioration in the parties' relationship and the high level of conflict that now exists between them did not exist prior to 2012.

[8] The Applicant's position is that the parenting plan in place no longer works because it prevents him from enjoying an equal amount of parenting time with the children, and further, that he in concert with his family members are now positioned to be able to provide that equal amount of time to care for the children. He argues that as the Respondent has become increasingly aggressive and dictatorial in her communication with him over time, he has been forced to restrict her ability to contact him, to the point where there is presently no verbal communication and he has had to systematically eliminate all electronic forms of communication, in order to avoid harassment by her. The Applicant's position is

that the Respondent desires to have full authority over the children and undermine his role as a parent.

[9] In her Reply to the Application, the Respondent claimed a contribution by the Applicant to section 7 *Federal Child Support Guidelines*, SOR/97-175, childcare expenses, and retroactive child support and section 7 expenses to June 2010. The Respondent's position is that the Applicant has failed to establish on the evidence and to the requisite burden of proof any change in circumstances, and the Application should be dismissed as all the changes the Applicant relies on are changes in his own circumstances that do not translate to changes for the children. The Respondent maintains that the status quo of the current parenting schedule works for and is in the best interests of the children. In the alternative, the Respondent argues that the sole change in circumstances can be found in the conflict that now exists between the parties, which recently culminated in the Applicant eliminating all avenues of communication, leaving her with only his mother's cell phone number to leave messages and then only in case of an emergency. The Respondent's very recent position, not articulated until just prior to the hearing, is that the appropriate response to the discrete change in circumstances is for the court to adjust that portion of the Order which currently requires joint decision making by the parents on major issues, by transferring all decision making capacity to her alone.

[10] During the three day hearing the Court heard from the Applicant, his mother, his wife, his psychiatrist and a social worker from the Department of Community Services. The Respondent also testified, as did her mother and Cst. Gabriel of the Lower Sackville RCMP detachment.

[11] A considerable portion of the first day of trial centered on the evidence of social worker Kassandra Hawker. Her evidence established that in early 2013, well after commencement of the Application, there were three separate complaints about the Respondent's parenting made by the Applicant and/or his wife and/or his mother to the Department of Community Services. All three referrals were investigated, and after meeting with the children, each parent and collateral contacts (e.g. teachers) the concerns could not be substantiated and the Department's file was closed. Most illuminating was Ms. Hawker's evidence that during the investigation she spoke to both parents about the need for each of them to take responsibility for their part or role in contributing to their ongoing conflict,

and the impact of such conflict on the emotional well-being of the children.

[12] The Court received lengthy and detailed evidence from both parties about several areas of concern and numerous specific incidents each points to as demonstrating fault on the part of the other that has contributed to the deterioration of their capacity to parent jointly. Neither party went so far as to suggest to the court that the other parent was so deficient in their care of the children that the court should now reduce or restrict that parent's time with the children.

[13] The Applicant's evidence focussed on all of the past incidents he maintained illustrate why the Respondent's attitude and approach toward his role as a father meant the only solution to his problems in dealing with her would be to divide the children's time equally between the household of each parent. The Applicant's evidence coupled with that of his mother and his wife made it plain that those parties have reorganized their work schedule (his wife) and their province of residence (his mother) to make themselves available to assist the Applicant in executing the parenting schedule he puts forward as a solution.

[14] The Respondent's evidence focussed on all of the past incidents she maintained illustrate why the Applicant's refusal to communicate with her and the unnecessary insertion of his mother and his wife both into communication between them and into the Applicant's parental role has left her helpless to deal with him as a joint parent. The Respondent also maintained that any change to the status quo parenting time is unnecessary because the children are well settled in their current routine.

[15] I considered carefully the evidence offered by each party. To list at length herein the numerous examples cited and incidents relied on by each in support of their respective positions would serve little purpose other than to extend the reading of these reasons. Suffice it to note the list of matters complained of by each party ran the gamut in variety and severity. For example, the Applicant's complaints ranged from the more minor matter of the Respondent having sent the younger child to him without the child's teeth having been brushed, to an incident during which the Respondent was very aggressive toward, and "caused a scene" at the home of his mother in front of the youngest child. Similarly, the Respondent's complaints ranged from the Applicant refusing to collect the older child's sports

equipment from her when needed, to his failing to inform her in a timely manner when the younger child was taken to the doctor and a prescription secured while in his care.

[16] Numerous copies of the contents of various electronic communications between the parties as filed by each party demonstrated each party as capable by times of being strident, aggressive, hostile or rude to the other in those communications.

[17] The Applicant clearly wishes to spend more time with the children. His frustration over the state of his relationship, or more correctly the absence of any relationship, with the children's mother was palpable in his evidence. The Applicant recounted his unsuccessful efforts to persuade his ex-wife that it would be to the children's benefit to spend more time with him. He testified as to his aggravation over having to take the children to various activities arranged for them by the Respondent but scheduled during his parenting time. He spoke repeatedly of his desire to have the children spend more and "quality family time" with him and members of his extended family, in particular his new wife and his parents.

[18] The Respondent presented as articulate and intelligent, but the tenor of her evidence demonstrated a rigidity and inflexibility which likely extends to her dealings with the Applicant. This was illustrated numerous times during cross examination of the Respondent by counsel for the Applicant, when she was asked to comment on various portions of the Applicant's affidavit evidence. The Respondent constantly required clarification of otherwise plain and understandable words used in those Affidavits, and parsed out words from sentences to challenge their meaning or context. She conducted herself in a polite and respectful manner with opposing counsel, but frequently failed to actually answer questions put to her, due to her overriding focus on the need to be overly cautious, exacting and precise with definitions, usage, or context of words or phrases. More troublesome for the Court were the numerous instances when a question which seemed to command a positive reply so as to be consistent with earlier related questions and the answers thereto, caused the Respondent to reply that she could not recall or remember the matter being put to her. It was clear the Respondent was prepared to suffer amnesia when she perhaps misguidedly perceived a positive response to a question to be detrimental to her position. The entirety of the cross examination did not cause me to form the impression the

witness was untruthful, but it left the Court easily able to accept the Applicant's assertions about his on-going challenge in engaging in *productive*, *two-way* communication with the Respondent.

Issue No. 1 - Has there been a change in circumstances and, if so, does that necessitate change(s) to the Order in the best interests of the children?

[19] Section 17 of the *Divorce Act*, *supra* gives jurisdiction to vary an Order and guides the Court on the question of a change in circumstances:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> ...
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> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person
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> ...
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> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
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> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought
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> ...
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> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[20] The burden rests on the Applicant to establish on a balance of probabilities that there has been a *material* change in the conditions, means, needs or other circumstances in relation to the *children*, not the parents, and if change is found to

exist, any adjustment(s) to the Order determined to be necessary as a result must be made only in response to the best interests of the children, as opposed to what either parent might perceive as being in their own interest.

[21] What does it mean to speak of a material change in circumstances? In *Legace v. Mannette* [2012] NSSC 320, Jollimore, J. articulated the test found in section 17 of the *Act, supra* as follows:

> [5] In an application to vary a parenting order, I'm governed by *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.). At paragraph 10 of the majority reasons in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.), then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.
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> [6] At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:
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> 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 child's needs;
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> 2. the change must materially affect the child; and
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> 3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
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> [7] Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of the child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests and must be changed to do so. Identifying the change which has occurred informs how the new order should be formulated to reflect the child's best interests in the new circumstances.
>
> . . .
>
> [9] Not every change is a material one: the change must be one which materially affects the child or a parent's ability to meet the child's needs. (emphasis added)

[22] It is not enough for the Court to be persuaded on a balance of probabilities that material change has occurred; the second and equally as important aspect of

the task is the determination as to what if anything a new Order might contain to properly reflect the children's best interests.

[23] The "best interests" concept was discussed in *Young v. Young*, 1993 4 SCR 31 wherein McLachlin, J. (as she then was) noted:

> [203] ... Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.

[24] The Respondent referred this Court to *Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C.) "...which in this Province is often cited as the source of a comprehensive listing of the factors which may assist a court in assessing a child's best interests": *Burgoyne v. Kenny* 2009 N.S.C.A. 34 (para. 24). In that case, Bateman, J.A. said this about the list of 17 factors enumerated in *Foley, supra*:

> [25] The list does not purport to be exhaustive nor will all factors be relevant in every case. Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent on a generic list of factors. As Abella J.A., as she then was, astutely observed in *MacGyver v. Richards* 1995 CanLII 8886 (ON CA), (1995), 11 R.F.L. (4th) 432 (Ont. C.A.):
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> > [27] "Clearly, there is an inherent indeterminacy and elasticity to the 'best interests' test which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and

> instability.
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> [28] . . . the only time courts scrutinize whether parental conduct is conducive to a child's best interests is when the parents are involved in the kind of fractious situation that is probably, in the inevitability of its stress and pain and ambiguity, least conducive to the child's or anyone else's best interests.
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> [29] Deciding what is best for a child is uniquely delicate. The judge in a custody case is called upon to prognosticate about a child's future, and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence, on the understanding that deciding what is best for a child is a judgment the accuracy of which may be unknowable until later events prove -- or disprove -- its wisdom."

[25] Reaching any conclusion about the best interests of these parties' children must be done without the benefit of knowing how the children's respective futures will unfold, and must also be done with the focus squarely on them and their needs, while avoiding the "politics" of the relationship between the parents. In doing so I have considered the evidence of the parties within the framework provided in *Foley, supra.*

[26] The evidence underscored the high level of mistrust between the parties. In relation to many if not most of the incidents recounted, my observation was that no matter which parent was the catalyst for the event that irritated, chagrined, upset or even outraged the other, eventually, although perhaps not always immediately, the other parent lived up to Newton's third law of motion by providing an equal and opposite (re)action that only served to inflame matters. For example, the Applicant complained of the Respondent's failure to inform him in a timely manner of the older child's need for extensive dental work and the Respondent criticized the Applicant's failure to contact her when the younger child required a stitch to a cut lip acquired during his parenting time. Another example was the incident in late summer 2012 when the Respondent's unannounced and inappropriate appearance at the Applicant's home during his summer holiday time with the children, and the Applicant's resulting inappropriate and aggressive behaviour toward the Respondent, both contributed to the children being upset and confused during the "scene" that unfolded. In my view both parents are responsible for the current state of affairs.

[27] Nothing in the evidence persuaded me that the shortcomings in conduct

each parent has resorted to in the past year or so makes them inappropriate to parent independently of the other parent. The inappropriateness, as it relates to the children, would be in allowing opportunities for contact between the parents to continue beyond that which is absolutely necessary for each to keep the other properly informed about the children or transition them between each parent's home.

[28] The sole item the parties agree upon in the entirety of the lengthy evidence before the Court is that their previous positive relationship is now one of conflict, marked by a complete absence of communication. Each has a different view of how and why this has come to pass, but the evidence most certainly persuades me, and would have persuaded me even if the parties were not in agreement on it, that the conflict constitutes a change in circumstances that affects the children, and one which must be addressed in a new Order by attempting to minimize it as much as possible.

[29] The change in circumstances relates to the deterioration in the parents' relationship and the concurrent rise in their level of mutual hostility. That change does not require significant adjustments to the current schedule for each parent's time with the children. The evidence supports that more specifics and mechanisms for minimal contact and conflict reduction are needed in the once flexible but now unworkable Order, the terms of which are at present broad and without specificity in certain areas. I disagree with the Respondent's alternative argument that if I am persuaded there has been a material change, of which I am so persuaded, that the solution rests only in changing the attribution of decision-making powers as between the parents. To do so would fall short of addressing the problems being experienced under the present Order.

[30] Two aspects of the evidence that do, in my view, need to be specifically addressed by the Court are with respect to the disagreements over the younger child's surname and the scheduling of the children's extra-curricular activities. Regarding the former, the Applicant seeks to have the name of the younger child changed from the Respondent's surname to his surname. The evidence established the Respondent purposely registered the birth surname of the younger child, born after the parties separated, under her surname unlike the older child who carries the father's surname. There was no satisfactory explanation provided by the Respondent as to why this was done. Indeed, the copy of the birth registration (Court Exhibit 6) clearly shows the surname first entered on the form as that of the

Applicant and then crossed out and initialled by the Respondent and replaced with her surname. The Respondent objects to the Applicant's request on the basis that to now change the surname might confuse the child. With respect, the current state of affairs might well create future confusion for *both* children, being of the same parents but bearing different surnames. With the younger child commencing school very soon, this is the ideal time to remove the potential for such confusion. Pursuant to this Court's jurisdiction found in the *Change of Name Act*, R.S.N.S. 1989, c.66 the consent of the mother is hereby dispensed with and the surname of the youngest child is changed from Ross to Denninger effective immediately.

[31] Regarding the latter disagreement, there is a marked divergence of opinion between the parents as to the role extra-curricular activities should play in the children's lives. The Applicant says the Respondent's practise of enrolling the children in too many activities, some of which interfere with his parenting time, disregards the need for the children to have quality time with him. The Applicant's evidence suggests to the Court he does not fully appreciate the valuable role extracurricular activity can play in the children's development. It is regrettable the Applicant sees their independent activities as depriving him of time with the children, when in fact neither parent "has" the children with them when the children participate in their activities. The Applicant might be advised to choose instead to focus on allowing the children to form memories of a father who encouraged them and accompanied them to their events, supporting their efforts and interests.

[32] The Respondent maintains the children are very active and need to be kept busy through the outlet of activities which they enjoy. However, she is unable to respect the Applicant's parenting time as having any modicum of priority over such activities. It is regrettable the Respondent has not in past made more effort, recognizing the children have less time to spend with their father than with her under the parenting schedule, to try to schedule more of their activities outside of the Respondent's parenting time.

[33] The parties' disagreement about how many activities the children should attend underscores the value of approaching such matters from the perspective of the children, not the parents. Although they are young, with the second child about to start elementary school both children will now have their own schedules to adhere to, being the fixed time spent away from both parents while in the school

setting. This leaves only a finite number of hours in each week to be spent with either parent. Then there is the time consumed by sleeping, and the time consumed by social events and extracurricular activities. All are important to the physical, social and emotional development of the children, but because of their present ages, most of the children's social and recreational activities will require a parent to transport the children and remain close by or available. As the children grow, they will undoubtedly seek to increase their time away from either parent to engage in such events. In the end, it would seem the only practical solution the Court can offer is for the new and varied Order to allow each parent to have a role in selecting activities for the children, with specifics regarding the mechanisms of that process.

Issue No. 2 - Is shared parenting in the best interests of the children?

[34] The present circumstances put the parties likely about as far apart as possible in terms of the potential for a shared parenting arrangement to be feasible. There is little if anything that resembles communication, much less reasonable or productive communication, between them. The Applicant has self-imposed a communication embargo, completely defeating the Respondent's ability to reach him directly, even in an emergency situation. While the wisdom of the Applicant's solution to his frustration with the constant barrage of emails and text messages from the Respondent is, objectively speaking questionable, it is clear from the evidence that it was a choice borne out of, not surprisingly, frustration with the tone, content and volume of the Respondent's communications with him over the past year or so.

[35] The content of many of the texts and emails between the parties that were in evidence establish the Respondent is either unable or unprepared to let the Applicant parent independent of her ongoing input. This does a disservice to the Applicant, as there is nothing in the evidence to persuade me he is not suited to properly and appropriately care for the children and meet their physical and emotional needs during his parenting time. More significantly it also does a disservice to the children, who are entitled to experience their father's parenting style, even when it is not a precise mirroring of their mother's style. I do not suggest consistency in parenting is not valuable when possible, but the reality is that even in households where children's parents reside *together* the children do not necessarily experience a singular or united parenting style.

[36] Ideally, *all* children of separated or divorced parents would benefit from a common view and intention as to parenting on the part of their parents, and an opportunity for their parents to demonstrate an equal capacity to contribute to the raising of the children while leading separate lives in separate households. Ironically, in this case, the children were previously able to benefit from just such a harmonious and joint parenting approach, but no more.

[37] Recent case law in this jurisdiction speaks to a common recognition by trial judges that shared parenting requires at a minimum a functional level of communication, ideally coupled with respect for the role of the other parent: *Hewitt v McGrath*, 2010 NSSC 275; *Harrison v MacKinnon*, 2010 NSSC 445; *Murphy v Hancock*, 2011 NSSC 197; *Gibney v Conohan*, 2011 NSSC 268; *Hammond v Nelson*, 2012 NSSC 27; *Conrad v Skerry*, 2012 NSSC 77. Each of these cases discusses factors important to maintaining a shared parenting arrangement. Each and every factor cited in these decisions need not necessarily exist in each circumstance where shared parenting may be found to be appropriate, and some factors might be more prevalent or pronounced in some cases than others (each situation being fact specific), but it is nonetheless conceptually difficult to accept that shared parenting might be workable in the instant case. A total absence of any communication between the parties is not solely the fault or responsibility of the Applicant, but is a critical flaw in the plan he advocates. These parties' situation lacks "...the necessary degree of cooperation ...an unusual level of cooperation between the parties on a day in and day out basis...": per Dellapinna, J. in *Hammond v Nelson*, *supra* at paragraph 69(7).

[38] I am not persuaded on the evidence that a complete re-working of the parenting schedule in the manner suggested by the Applicant is in the best interests of the children. While the Order requires greater structure to try to reduce the conflict, the children are well-entrenched in, and by all accounts doing well with, the current and relatively long standing schedule that sees them reside primarily with the Respondent and spend one night per week and every other weekend with the Applicant. The evidence of both parents and the social worker Ms. Hawker was that the children are settled in this routine. A wholesale re-working of the current parenting times is not a solution to the problems with the Order, and I am not persuaded there is any need to or justification for changing the parenting schedule to a week on - week off rotation as the Applicant suggests.

[39] It is difficult to reconcile the Applicant's argument that he objects to the

children being with third-party caregivers when they could be with him, with his suggestion that in a week on - week off arrangement the children would likely spend some time in the care of his wife or parents instead of with him. Some time with third party caregivers may be inevitable for the children regardless of which parent they are with at any given time, but under the present parenting schedule the Respondent, as the person having the children in her care more of the time, has been able to arrange her employment schedule so as to be available for the children during some weekdays when she might otherwise have had to work, achieved by working a large number of hours when the children are in the care of the Applicant. Changing the children's schedule is not going to eliminate the present reality which is that because both parents work the children are sometimes with third party caregivers, and sometimes that caregiver is another family member. Indeed, imposition of a week on-week off arrangement could well have the potential to increase the amount of time when third party childcare might be required.

[40] Both parties corroborated the other regarding the Respondent's acquiescence, albeit reluctantly, to the Applicant's insistence that the younger child spend one weekday in the care of his mother rather than at daycare. The Applicant would have the younger child spend most if not all time in the care of his mother over daycare; the Respondent insists daycare provides a healthy social outlet for the child. There is merit to the children being cared for in either setting, when child care is needed. However, the fact the Applicant's mother is available does not justify changing a schedule to which the children are well adjusted, in order to require that they always be cared for by a family member.

[41] The Applicant testified he finds the Wednesday overnight time difficult to manage because it creates scheduling challenges for him; his evidence left me unclear as to exactly what his challenges were, only that they were present. It was no at all clear how a change to a week on-week off schedule would alleviate the Wednesday evening - Thursday morning challenges the Applicant spoke of in his evidence.

[42] The Applicant's evidence leaves the Court puzzled as to why, if he wishes more time with his children, he would not have taken the Respondent up on her earlier suggestion to have the children remain for the additional Sunday night of those weekends spent with him. He rejected the merit of an extension of his weekends into Monday morning on the basis that it would mean merely that the

children would sleep additional time at his home, as opposed to him being able to enjoy additional quality family time with them. I do not accept the Applicant's view that such additional time, the bulk of which the children would indeed spend sleeping, could not be meaningful or quality family time. To the contrary, given the children's young ages it would seem that ending the day, preparing for bed, and commencing the next day would be key time in the parent-child relationship. Having repeatedly emphasized his laudable desire for quality family time to engage in activities with the children, the Applicant's evidence on this point seemed to suggest he does not recognize that in his role as a parent the tasks of parenting are equally as important as the fun of parenting. The children deserve to see their father engaged in *all* aspects of parenting them. It makes sense to extend the Applicant's weekend time with the children to Monday mornings, thereby providing him with a modest amount of additional parenting time, but with minimal disruption to or adjustment of the children's routine.

Issue No. 3 - Which parent should have final decision-making authority?

[43] A varied Order is needed to lend tighter structure to the parties' parenting arrangement, with the goal of reducing the opportunities for conflict between them. In doing so, I am not prepared to tip the balance of power in the parenting arrangement by permitting the Respondent to have sole decision making authority over the children. There is no evidentiary basis for concluding the Applicant cannot make reasonable decisions for the children. Furthermore, I am concerned about the Respondent having unilateral authority over the children given the apparent decline in recent times in her ability to respect the Applicant's role as father of the children.

[44] Whether intentional, what the Applicant advocated through the case he presented is the imposition of a "parallel parenting" arrangement. Parallel parenting was explained in *Cooke v Cooke*, 2012 NSSC 73:

> [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 para. 96, which states as follows:

> 96 "A review of the case-law respecting parallel parenting suggests 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, but 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 that 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." (emphasis added)

[45] A canvass of caselaw reveals parallel parenting orders are becoming more frequent in this province in recent years. One could reasonably speculate this may be a function of the increasing number of cases where high conflict makes a workable joint custodial designation unrealistic, but where the Court is reluctant to unduly "empower" one parent over the other when the children are accustomed to frequent engagement with both parents.

[46] Perhaps there is a fundamental misapprehension on the part of the parties to this case about the capacity of the Court to remedy the communication ills between them. The Court is, as in all cases, required to apply legal principles to the relevant evidence and the factual determinations made therefrom. There is little the Court can do to assist these parties with their fundamental problem, which is a complete breakdown in their ability to communicate and cooperate. Rather, the Court's primary focus must be the children. The whole of the evidence before me provides great illumination about the atmosphere in which the children are being raised, and the impact of their conflict upon the children was reluctantly but marginally recognized by both parties in their evidence. A parallel parenting arrangement is needed in this case.

[47] While the parties are no longer able to parent jointly, the solution to their conflict and lack of communication will not be found in arbitrarily putting one parent solely in charge of the children, but instead in making each parent responsible for separate areas of decision-making. Therefore, paragraphs 15 and 16 of the Order shall be varied to the extent that they shall be replaced with the features listed below. Paragraph 16(d) of the present Order is excluded from the variation and shall continue. The parties will recognize certain of the provisions listed below as intending to delineate their respective areas of responsibility, some as addressing certain disagreements between the parties that were chronicled in the evidence and others as addressing difficulties with or deficits in the previous Order:

1. The parties shall parent the children in a parallel parenting arrangement, during which the children shall have a primary residence with the mother. The mother shall not relocate the children outside a 30 kilometre radius of the father's residence unless with the father's advance agreement or by Court order.

2. The "regular" parenting schedule is that period when the mother has the children in her care, or when the father has the children in his care each Wednesday from after school until the following morning when the children are returned to school, and every second weekend from Friday after school until Monday morning when the children are returned to school. In the event the father's weekend falls on a weekend that includes a holiday Friday or Monday for the children, his parenting time shall commence on the Thursday and/or end on the Tuesday.

3. Any aspect of the parenting schedule may be modified in any manner at any time and from time to time as the parents might mutually agree upon.

4. Regarding transportation and transitions, the father or any third party on his behalf known to the children, shall pick up the children from school upon commencement of his parenting time, and return the children to school at the completion of his parenting time. Whenever it is necessary for either parent to deliver the children to the other parent outside school hours, the party transporting the children to the other parent's residence shall park in the driveway and shall not leave the vehicle but shall ensure from their vantage point that the children have been received by an adult visible at the door of the residence. There shall be no communication between the transporting party and the receiving party.

5. In the event that either parent is for any reason unable to parent during their regular parenting time, as soon as they become aware of the same they shall provide the other parent with the first option of caring for the children, prior to arranging for a third party to provide child care. This is not intended to preclude either parent from leaving the children with a third party as might reasonably be required in the normal and ordinary course for a period of time during their respective parenting time.

6. Day to day decisions respecting the children shall be made solely by the parent having care of the children at any given time on any given day. This shall include any decisions made with respect to third party child care that may be required from time to time.

7. Each parent shall notify the other in a timely manner regarding anything other than routine decisions made while the children are in their care and regarding those decisions that will impact on transition of the children to the other parent's home, including but not limited to details of health, educational or social matters such as minor illness, medications to be administered, schoolwork, events and activities.

9. Each parent shall advise the other of all important events, functions or appointments for the children in a timely manner, and with the exception of family or other private social events, both parents shall be entitled to attend and participate in the children's events, functions or appointments.

10. Communication between the parents shall be conducted through an internet based program such as "Our Family Wizard" or a similar program available to be used as a communication tool by divorced parents. The parties shall share equally in the cost of purchasing and

maintaining the program account. All communication must be respectful and child-focussed. Each parent shall be responsible to monitor for messages or postings at least every twelve hours. Only either parent may enter information in to the program account and the parents shall not permit the children to access the program unless and until such time as both parents agree that doing so would be age appropriate for the child.

11. The parents are free to employ at any time any alternate method of communication upon their mutual consent.

12. In the event of a medical emergency the parent having care of the children at that time shall be entitled to make decisions which are necessary to address and/or alleviate the emergency, provided the parent shall notify the other parent as soon as reasonably possible and practicable regarding the nature of the emergency and any treatment. In the event the parent having care of the child is unable to reach the other parent during an emergency medical situation, after making reasonable efforts to do so, or in the event the time required to do so would in the opinion of the attending health care professional place the child at risk, the parent having the child in their care shall have the right to make medical or health care related decisions under the circumstances.

13. Each parent shall be responsible to keep the other informed from time to time of their primary telephone number, only for the purpose of allowing the other parent to communicate an emergency that concerns or affects the children.

14. Each parent shall be entitled to make decisions with respect to the children's religious instruction and spiritual development when in their care, and both parents shall respect the children's involvement in and observances of the other parent's religious practices and

holidays.

15. The mother shall be responsible for all health care decisions for the children, excluding emergencies. The mother shall select the family doctor and dentist, schedule all appointments, and notify the father of appointments in advance so that he might have an opportunity to attend them. (This does not preclude either parent from administering over-the-counter medications and treatments to a child during their parenting time as they may deem necessary.)

16. The father shall be responsible for all education decisions for the children. Each parent shall be entitled to attend school meetings and events. The father shall be listed as the first point of contact and the mother as the second point of contact for the school officials. The parent scheduled to provide the care at the end of any school day during which a child falls ill at school shall be responsible for attending to the child.

17. Each party has the right to communicate with professionals involved in the children's lives, including but not limited to the right to obtain information and documentation from files maintained by all health care professionals and educators.

18. Extra curricular activities are those that operate independently of school-based events and activities. Each parent may choose to enroll either child in a maximum of two extracurricular activities at a time unless otherwise mutually agreed by the parents from time to time that more or less than two at a time is appropriate for a child. Only one of the two activities is permitted to fall on the parenting time of the other parent unless the parents agree otherwise in advance of enrollment in the particular activity. The enrolling parent shall be responsible for all costs and

transportation associated with the activity and shall notify the other parent of the days and times of the activity. If any of the times for an activity fall on the parenting time of the other parent, and then only because such scheduling conflict was otherwise unavoidable, then the other parent shall have the first option of transporting the child to and from the activity. If the other parent is unable to transport the child at any time and for any reason, the enrolling parent shall be notified in a timely manner and shall be responsible to transport the child. The enrolling parent may sign any consents necessary for the child to participate in the activity without the consent of the other party.

19. Whenever the children are in the care of a parent for in excess of 72 consecutive hours other than during the "regular" parenting schedule referenced in item number 2 above, the parent having care of the children shall facilitate a telephone or other electronic, real-time face conversation between the children and the other parent, to occur every third day and at a time to be scheduled through use of the parents' internet communication tool.

20. Each parent shall speak respectfully of the other and of his or her extended family in the presence of either child and each parent shall immediately remove the child from the presence of any third party who is speaking disrespectfully of the other parent or his or her extended family.

21. It is recognized the children's holiday time with each parent will be dictated for the most part by the parameters of the school year. The regular parenting schedule is suspended during the Easter, March Break and Christmas holidays. Holidays shall be in addition to regular parenting time and shall be divided as follows:

    (a) The children shall spend three one week periods or

alternatively one two week period and a one week period with the father in each summer, outside of or in addition to the regular parenting schedule. The father shall notify the mother of the dates he chooses for his summer time with the children no later than May 15 of each year.

(b) In each odd numbered year the children shall be in the care of the father from December 26 at noon until January 2 at noon and in even numbered years they shall be in the care of the father from the end of the last day of school until December 26 at noon.

(c) In even numbered years the children shall be in the care of the father during the Easter weekend from the end of school on Thursday until Sunday at noon and in odd numbered years they shall be in the care of their father from Sunday at noon until Tuesday morning.

(d) In even numbered years the father shall have the children during March break from Friday after school to Wednesday at 3:00 p.m. In odd numbered years the father shall have the children from Wednesday at 3:00 p.m. to Monday morning.

22. In the event either parent wishes to travel with the children outside of Halifax Regional Municipality for a period in excess of 48 hours in duration, that parent shall notify the other parent of the dates of travel, the address and the telephone number where the children may be reached at the destination. Neither parent may remove the children from Canada without the prior written consent of the other party or by an order of a court of competent jurisdiction. The mother shall maintain custody of the children's passports and shall not unreasonably withhold them from the father when requested.

23. Regardless of which parent has the children in their care

on the first day of school, the mother shall transport the children to the first day of school in odd numbered years and the father shall do so in even numbered years. Nothing prevents the other parent from being present at the event and communicating with the children.

24. Regardless of which parent has the child in their care on the child's birthday, the other parent shall identify to that parent 10 days in advance the consecutive two hour period of time commencing anytime between 4:00 p.m. and 6:00 p.m. during which the other parent chooses to have the child in their care.

25. It is strongly recommended both parents seek assistance in a therapeutic setting specifically intended to teach them skills they may use to critically assess their behaviours, to understand the effects that poor communication between them may have on the children now and in future, to learn skills to ensure that the children are not placed in the middle of parental conflict, and to learn skills which will aid in effective communication with the other parent.

Issue No. 4 - Are there arrears of child support owing?

[48] The current Order requires monthly *Guideline, supra* table child support to be paid by the Applicant. After commencement of this variation application the parties executed a Consent Variation Order in October 2012 requiring the Applicant to pay $907.00 per month in child support consistent with his 2011 income of $65,334.00. Accordingly, pursuant to that variation order child support payments would be required from June 2012 through June 2013, based on the Applicant's 2012 income and thereafter the Applicant must pay child support effective June 1, 2013 based on his 2012 income of $66,542.00 equating to a table amount of $922.00 per month, payable on the first day of each month through to June 1, 2014 when presumably the next adjustment will be made, contingent on the amount of the Applicant's 2013 income.

[49] The evidence of the Applicant was that in the past the parties always came

to a verbal agreement on child support quantum from time to time. He reported he paid $950.00 per month child support until April 2011, based upon the prior agreement of the parties, an amount which he asserts was above the table amount attracted by the *Guidelines, supra*. In October 2011 the Respondent was agreeable to reducing the amount of support to $750.00 per month to reflect the Applicant had increased time with the children. In her evidence (Court Exhibit 5a) the Respondent agreed the history of actual payments reported in the Applicant's evidence was accurate. The Respondent does not take umbrage with the amounts the Applicant says he has paid; rather she asserts the payments have not been reflective of the Applicant's *Guideline* obligations. The Respondent argues that once she received full disclosure of the Applicant's income by virtue of the filing requirements for this hearing, a proper calculation of child support paid versus child support that should have been paid commensurate with the Applicant's income establishes that there are arrears.

[50] The evidence of each party corroborated the other as to the lack of exchange of income tax information annually in the years following their separation and divorce, despite a requirement in the Order that they do so. The Applicant reported their practise was that he would advise the Respondent as to his income, calculate an amount and when he showed the Respondent how he arrived at that amount they would agree upon it. The figure reached was based on the Applicant's report to the Respondent as to his income. The parties were periodically able to come to an agreement on child support based upon the Applicant's advice to the Respondent about his income. The Respondent concurred as to their practise in her evidence.

[51] The Respondent testified she understood the Applicant was earning $63,276.00 per year when they separated and he reported to her he had earned $55,333.78 in 2009 but she never saw his income tax return until he made the Application now before the Court. The Respondent accepted the Applicant's indications to her that his salary had decreased and so she agreed to a decrease in child support effective January 2010 to $750.00 per month. As a result of his filings during this proceeding the evidence establishes the Applicant's income was $64,862.00 in 2009 and $65,425.00 in 2010. During those years the Applicant never changed his contribution to child support to reflect the changes in his income.

[52] The Court is satisfied by the Applicant's evidence regarding emails he

received from the Respondent in March 2012 (Court Exhibits 8 and 9) that the Respondent placed him on notice at that time of her intention to seek the table amount of child support plus a contribution to childcare costs, retroactive to at least the prior year. The Applicant has asserted this notification was merely in the way of "retaliation" by the Respondent, which I do not accept, particularly in light of the Applicant's own evidence he had already discussed the matter of child support with his counsel. The Applicant is hardly the first party to come before this Court whose application regarding custody issues prompted a reply from the other party to the litigation regarding calculation of child support.

[53] The Applicant's 2009 income of $64,862.00 was used to calculate child support from June 1, 2010 to December 31, 2011. Under the terms of the present Order his 2010 income ($65,42500) should have been used to set the child support from June 1, 2011 to May 31, 2012. His contribution thereafter would be based on his 2011 income, which was $65,333.78. The Applicant's May, 2013 sworn Statement of Income (Court Exhibit 10) reveals at present an annual income of $62,442.00.

[54] Pursuant to the principles articulated in *D.B.S. v. S.R.G*; *T.A.R v. L.G.W*; *Henry v. Henry*; *Himestra v. Himestra*, 2006 S.C.C. 37. The Applicant cannot now rely on the progression of verbal agreements made between the parties if he was not accurate in disclosing his income to the Respondent at the time they were made. Some of the Applicant's evidence with respect to the "sufficiency" of his child support payment is tied up in large measure with his position on his responsibility to pay for child care expenses; that is to say, the evidence of the Applicant was that he paid an amount intended by him to cover his obligation to all aspects of the children's expenses which will be the subject of separate discussion under the heading of issue No. 5 below.

[55] The evidence supports that the Respondent did not occasion any delay in seeking the proper quantum of child support, but rather simply accepted what the Applicant reported to her as to his income. The Respondent was in no position to understand independent of the Applicant's information the status of his annual income. The Applicant cannot now claim the benefit of having failed to accurately report or under-reporting his income, even if both parties failed to live up to the technical requirement of the Order that they exchange income tax returns in each year.

[56] In considering a claim for retroactive child support, *DBS, supra* sets out that a Court must consider four specific factors in assessing whether a claim is justified, summarized as

> "...whether there is a reasonable excuse why support was not sought earlier by the payee; the conduct, blameworthy or otherwise, of the obligor; the circumstances of the child; and any hardship that would be occasioned by a retroactive award. There is no priority to these factors and none is decisive; the court must take a wholistic approach." [Julien N. Payne and Marilyn A. Payne, *Child Support Guidelines in Canada, 2012* (Toronto: Irwin Law Inc., 2012) at 438.].

[57] There is no evidence before me to support the children have necessarily suffered or been specifically deprived as a result of the underpayment of child support. However, the evidence is clear that during the same time frame the Respondent was required to increase her hours of work in order to meet her financial obligations, and yet the Applicant was able to achieve savings (e.g. his TFSA account), while not bearing any of the burden of childcare costs.

[58] There is no suggestion whatsoever in the evidence of the Applicant that he would suffer any particular hardship were he required to pay the arrears of child support calculated by the Court as owing, over and above the presumed challenge that faces any payor found to owe monies retroactively.

[59] The evidence establishes the following child support payments were both actually made and required to have been made, based upon the income of the Applicant as recorded in his income tax returns:

	Line 150 Income	Support Required	Support Paid (June 1-May 31)	Under-Payment
June 2010 to May 2011	$64,862	$916 (Monthly) $10, 992 (Annual)	$11, 300	($308 over-payment)
June 2011 to May 2012	$65,425	$922 (monthly) $11, 064 (annual)	$9,000	$2,064
June 2012 to May 2013	$65,333	$907 monthly $10,884 (annual)	$10,679	$205

Total Arrears	**$1961.00**

Child support arrears are fixed at $1960.00 as of June 1, 2013, which figure does not include any amounts that may be owing since that date in light of any difference between what the Applicant has actually paid in child support for June and July 2013 versus the amount payable effective June 1, 2013 and forward as discussed earlier herein.

Issue No. 5 - What, if any, are the section 7 expenses and are there arrears owing?

[60] The *Guidelines, supra* provide for special or extraordinary expenses, including child care, as follows:

> 7.(1) **Special or extraordinary expenses** In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> > (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment...
> >
> > ...
>
> (2) **Sharing of expense** - The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
>
> (3) **Subsidies, tax deductions, etc**. - Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense

[61] The Respondent seeks to enforce that which the current Order already provides, but only as it relates to section 7 expenses for child care:

> 23. In addition to the Guideline amount, the Husband and Wife agree to proportionately share s.7 expenses (including but not limited to

> child care), based on their respective incomes. This parties' respective proportionate obligations are determined in the same manner as the Husband's Guideline obligation, i.e. according to the parties' actual income from the previous year, as evidence by their tax returns and Notices of Assessment, and shall be adjusted retroactively each June 1 based on the actual s.7 expenses incurred during the previous 12 months. For 2009, the child care expenses are estimated to be $800 per month.

[62] There is, pursuant to the existing Order, an obligation on the Applicant to contribute proportionately to childcare expenses. The position of the Respondent is that the Applicant has not historically contributed to child care costs with the exception of "a few payments".

[63] The Applicant maintains that he has previously provided the Respondent with the opportunity for "free" child care and after school care every other week, consistent with the parenting schedule he advocated during the hearing. Furthermore, the Applicant suggests that his mother is available to provide "free" childcare at anytime during the work week (Court Exhibit 8). Both in his affidavit evidence and through cross examination the Applicant asserted that with respect to child care he has been making a global payment in each month, intended to capture both child care and child support, "based on what I can afford".

[64] The history of this family is that both parents have worked outside of the home to pursue their respective careers and to assist in supporting the family. There is nothing in the evidence to suggest that the Respondent is unreasonably incurring child care expenses which should be ameliorated by having the Applicant's mother provide childcare. The evidence was that since separation both the Applicant's mother and the Respondent's mother have been relied upon to provide child care from time to time, in addition to the Respondent reluctantly agreeing most recently to the Applicant's insistence that his mother be responsible for caring for the younger child one day per week. Despite the Applicant's assertions that his family is available to provide all childcare, the evidence establishes that both children have been in long - standing (relative to their ages) child care arrangements which have worked well.

[65] I am not persuaded that the costs of child care, in relation to the needs of this family, are unnecessary, unreasonable or excessive. Further, each parent is in a financial position to contribute to those costs given their respective financial circumstances. There is no undue hardship application before the Court. In short,

there is no basis upon which the Court can be properly persuaded it would be inappropriate or unjust for the Applicant to make a contribution to a reasonable expense that was clearly contemplated at the time of separation and continues to be reasonably incurred today.

[66] I am satisfied the Respondent has established there are indeed expenses for childcare in the amounts asserted by her. The Respondent's updated Statement of Special or Extraordinary Expenses (Court Exhibit 18) identifies the present monthly child care costs of $597.00, which will reduce modestly to a total monthly amount of $559.00 when the younger child commences school in September. The figures put forward by the Respondent also permit the Court, as it is required to do, to take into account the benefit of the income tax deductions/credits that the Respondent realizes as a result of claiming the child care expense on her annual income tax return. The Respondent says the total cost before taxes is $7174.00 annually and once the tax deduction in her favour is factored in, this would calculate to a proportional contribution of $85.00 per month from the Applicant, decreasing to $69.00 per month in September when the younger child begins school. Going forward, the Applicant shall continue to provide a proportionate contribution to child care as the current Order requires, being $85.00 per month as his contribution from June 1, 2013 forward, adjusted to $69.00 per month effective September 1, 2013 and forward.

[67] The Respondent also seeks retroactive section 7 child care expenses to June 2010, adjusted each June in accordance with the parties' previous years' incomes and the actual section 7 expenses of the previous year. The Respondent asserts the arrears of section 7 expenses for child care contributions by the Applicant may be calculated as follows:

	Dad's Income (previous year)	Mom's Income (previous year)	Childcare Expenses (tax return)	Required Section 7 Contribution	Section 7 Under-payment
June 2010 to May 2011	$64,862	$46,974	$5014	$133.00(monthly) ($1596 (annual)	$1288
June 2011 to May 2012	$65,425	$57,774	$10,920	$216.00 (monthly) $2592.00(annual)	$2592
June 2012 to	$65,333	$47,387	$4721	$144 (monthly)	$1728

May 2013	$1728 (annual)
Total Arrears	**$5608.00**

[68] I agree with the calculations put forward in the Respondent's evidence which are not contradicted by any of the Applicant's evidence on the point. There was nothing in the evidence to provide a satisfactory explanation as to why the Applicant has not made a contribution to child care expenses on a regular basis. The Applicant may feel that he has "paid what he can" but that is not the test. With all due respect, the Applicant is required to organize and arrange his financial affairs such that he meets his obligations to the children under the Order concurrent with meeting his own basic needs, and in priority to other discretionary expenditures on his part. Given the Respondent's acknowledgement that there have been "a few payments" by the Applicant, I exercise my discretion to fix the Section 7 child care expenses arrears owed by the Applicant at $5000.00 as of June 1, 2013 plus any amounts that may be owing since that date.

Conclusion

[69] The total arrears of $6960.00 owing for both child support and section 7 expenses shall be satisfied by requiring the Applicant to pay the sum of $200.00 per month toward the arrears effective September 1, 2013 and continuing in each consecutive month thereafter until the arrears are paid in full.

[70] Counsel for the Applicant shall prepare: (a) a Varied Corollary Relief Order giving effect to this decision and (b) an Order pursuant to the *Change of Name Act*, both to be consented to as to form only by counsel for the Respondent.

[71] In the event the parties are unable to agree on the matter of costs by August 23rd, 2013, they may contact the Court scheduling office to secure one hour on my docket for a hearing on the matter. Once scheduled, counsel for the Applicant shall file written submissions six days in advance of that date and counsel for the Respondent shall file written submissions three days in advance of that date.

J.