

HK = Mother
SK = Father
NK = Daughter (6)
RK = Son (4)

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SFSND1206-3877
IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

H.K.

PETITIONER

- and -

S.K.

RESPONDENT

DECISION

Cite as: H.K. v. S.K., 2002, N.S.S.F. 044

HEARD: Before the Honourable **Justice M. Clare MacLellan**, at Sydney, Nova Scotia, on June 20, 2001; June 21, 2001; June 22, 2001; July 24, 2001; July 26, 2001; August 3, 2001; November 1, 2001; December 19, 2001; December 20, 2001

DECISION: June 19, 2002 (oral)
October 23, 2002 (written)

COUNSEL: Elizabeth Cusack, Q.C., Counsel for the Petitioner
Darlene MacRury, Counsel for the Respondent

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M.C. MacLellan, J:

FACTS

The matter before the Court is for decision in relation to S.K. and H.K., who were divorced in June during one of the first Court appearances.

The parties were married on May 5, 1992 in India. N.K. was born November 27, 1995 and she is 6 years old. R.K. was born on April 19, 1999. He is 4 years old.

The parties separated permanently on June 21, 2000. All conceivable issues are in dispute - custody, access, child support, spousal support, child care costs, division of assets, percentage of division of assets and accounting for use of matrimonial funds.

The hearing was originally scheduled for three (3) full days, commencing June, 2001, but required nine (9) days to complete.

Evidence was heard on June 20th, 21st, 22nd, 24th, July 24th, July 26th, August 3rd, November 1st, December 19th, and December 20th. The divorce was granted on June 20th, 2001, with reservations that the Divorce Decree would, in no way, impinge on Corollary Relief.

The Court completed the financial aspects of this case about the end of January, 2002, early February, 2002. I took all this additional time to consider the issue of custody and weigh the nine (9) days of evidence. I reviewed the two hundred and fifty-two (252) pages of handwritten notes, the extensive two (2) briefcases full of documents Counsel provided, and case law. Although there is no doubt the delay has been onerous to all the parties involved, it was unavoidable.

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The mother, H.K., is a licensed psychologist employed at the Cape Breton Regional Hospital. The father, S.K., is employed at the University College of Cape Breton. Both parties work full-time. S.K., the father, has some flexibility in his work schedule but basically they both work a 40-hour week. H.K. has had defacto custody since the separation with very liberal access to S.K.. The parties' parents have been very involved with the children, pre- and post-separation. The parties own two properties - one is the current matrimonial home and the other was a former matrimonial home where they had resided early in their marriage.

EVIDENCE CALLED BY H.K.

Nancy MacIsaac

Nancy MacIsaac advised that H.K. is a good mother. Both parties participated in the children's events. She classified R.K. as a "clingy" child. She saw H.K. do most or the majority of the child related chores when she was present.

Betsy Marcin

Betsy Marcin has a Ph.D. in Psychology. She has known H.K. since 1992. She is H.K.'s supervisor for Candidate Registrar and a good friend. In her view, H.K. was always the principle caregiver and was able to stimulate the children. Both children are viewed as being very close to their mother. She observed that when the couple were together, H.K. provided for the physical needs of the children. S.K. had a positive relationship with both children and could also discipline properly. He was responsible for taking the children to the outdoor activities the children enjoyed.

Debbie Dean

Debbie Dean is a neighbor and babysitter since R.K. was 7 months old. She babysat four (4) days a week until Mrs. Singh, H.K.'s mother, came to live with the Kochhars. The children, at that time, began to use daycare facilities for limited

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time periods. The witness got along well with both of the parties. S.K. use to be the first one home at the beginning of her babysitting period, but that changed prior to separation. He began to come home later, which required H.K. to come home earlier. Both children were very attached to H.K.. She continues to see S.K. do activities with the children. The children are very happy to see their father. She still babysits for H.K.. She babysat two (2) to three (3) nights a week when H.K. was setting up her private practice.

S.K. took N.K. to dancing, swimming, and gymnastic classes pre-separation and for awhile post-separation. She recalls that the children have, for the past year, ceased to attend the paternal grandparents' home on Tuesday night for prayer and dinner. This was the practice prior to separation.

Prior to September, S.K.'s and H.K.'s parents use to speak to each other and after the separation there was some limited exchange, but now there is no interaction between the grandparents. The witness found the situation embarrassing.

Mrs. Singh

The Court next heard from Mrs. Singh, who is H.K.'s mother. She came from India to help H.K. and S.K. with both pregnancies and early childcare. She stayed three months on the first trip and six months on the second trip. She and her husband, a retired engineer, now live with H.K. full-time. She explained it is the Indian custom for a family member to come and help out when a new baby is born. There was friction between S.K. and Mrs. Singh during both visits as to how each saw their role. With the birth of R.K., S.K. was home less. When S.K. wanted to go to India, Mrs. Singh stayed two more months with H.K. and left when S.K. returned home. When they were all a family unit, it was Mrs. Singh's observation that S.K. did little or no chores around the house. Mrs. Singh indicated that S.K. was good with the children when he was home, but that, in her view, he was not

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home a great deal. She viewed that her daughter did everything for the children and that they were very attached to her. H.K. spends all her time with the children except when she is at her job.

Mrs. Singh was not very pleased when her daughter married S.K.. She feels her daughter's match was not what it could have been. She and her husband had planned to live with their son, but believes now H.K. needs them and so they are staying with her to help her with the house and children. She believes her daughter is an achiever and S.K. is not as ambitious.

Their son, H.K.'s brother, Sherry, lived with the parties for two years when he attended the University College of Cape Breton. This caused some friction as well, especially when Mrs. Singh was also in the household. The Singh family spoke different languages in the home which annoyed S.K. as he was not fluent in all the languages spoken in the household.

S.K. and Mrs. Singh now only say "hi" at access exchanges, and avoid even that communication if they possibly can. Mrs. Singh indicates that she is hurt about the breakup of her daughter's marriage. However, she does agree that S.K. was good to take the children to outdoor events.

Mr. Singh

Mr. Singh, H.K.'s father, gave evidence. He is a retired mining engineer. He and S.K.'s father were friends in India. They shared the same profession. He recalls when the parties were together, H.K. did the physical care-giving and S.K. did the outdoor events with the children and took N.K. to school. Towards the last stages of the marriage, S.K. went out by himself, four or five times per week after supper, returning at 11:00 or 11:30. Mr. Singh attempted, without success, to help S.K. upgrade his skills. He believes the children have a good relationship with their father and should spend time with him. This witness and S.K. did, and still

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do, enjoy a good relationship, although their interaction has been limited during the course of the trial.

Ikdeep (Sherry) Singh

The Court heard from Sherry Singh, who is H.K.'s younger brother. He is a System's Analyst with Proctor & Gamble. He attended the University College of Cape Breton between 1994 and 1996 and lived with the young Kochhars. During that time, he witnessed his sister doing the housework and his brother-in-law did the handiwork around the house. The father was very good to take the children out to their events and on drives. He also cooked the meals on the weekends. After R.K. was born, S.K. was home less often.

Sherry classifies his former brother-in-law as a good father but not the principle care-giver during cohabitation.

At one time, S.K. and H.K. visited Sherry in Halifax. S.K. used Sherry's computer. This enabled Sherry Singh to check S.K.'s work, which led to the discovery that S.K. was writing e-mail letters of an inappropriate nature to another woman.

Ken MacAdam

The seventh witness called was Ken MacAdam. He is a friend of both parties, and it appears that S.K. confided in him regarding problems at home. S.K. told Ken MacAdam that he was going to the U.S.A. to seek employment opportunities.

H.K.

The Court heard from H.K.. She is thirty-two (32) years of age and has a Masters in Psychology. She was a gold medalist in her University in India. She

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has worked at the University College of Cape Breton and is now employed at the Cape Breton Regional Hospital. As well, she has done some private work for the Workers Compensation Board, but this supplementary private practice has been reduced as a result of the separation. H.K. passed her qualifying exam in Psychology on the first attempt, which is classified as an unusual achievement.

The parties have two properties, one on Main Street and one on Beechwood. H.K. believed, at the time she gave evidence, that S.K. should have the property on

Main Street and she should retain the property on Beechwood Street. The Main Street property is rented, but the rental income is not sufficient to cover the actual expenses. The property will be paid off in approximately five and one-half (5.5) years.

The approximate value of Beechwood is ninety-seven thousand dollars (\$97,000.00), (Exhibit #1), and it is encumbered in the amount of sixty-eight thousand, nine hundred and fifty-two dollars (\$68,952.00).

The Main Street property is worth approximately forty-eight thousand five hundred and eleven dollars (\$48,511.00), (Exhibit #1), and is encumbered in the amount of approximately thirty-four thousand eight hundred and three dollars (\$34,803.00).

H.K. advised that N.K. is 6 years of age. She is a healthy, adaptable child involved, at that time, in swimming, dancing and gymnastics. When the parties were together, S.K. took N.K. to all these activities, as well as other outdoor activities, including playing with the children outdoors. H.K. does not believe that N.K. could continue her swimming lessons because she had a recurring ear infection.

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It would appear from all sources that N.K.'s extra curricular activities were reduced post-separation and in part, because of the separation, and in part due to financial restrictions.

R.K. is now 4 years of age and attends the University College of Cape Breton Daycare two days a week. At present, R.K. is cared for by both sets of grandparents, his father, his mother and daycare. The paternal grandparents have part of one day one week, he is in daycare for parts of two days one week, he is with his father part of one day that week, the rest of the week is with his mother and the paternal grandparents. The parties alternate weekends.

Religion

The parties here appear to have no religious problems and never had. H.K. is Sikh and S.K. is Hindu. Both sets of grandparents are religious people. H.K., although she is a Sikh, maintains a Hindu temple in her home. As well, she was taught the Hindu prayers and religion as a child in school. She is capable of teaching the children their prayers as well as their father.

S.K.'s father has a special prayer night one night a week - that has been the practice that the parties and the children would attend a prayer night at the paternal grandparents and have supper. That was the practice up until separation.

For a time during the trial which extended over six months, S.K. was co-residing with his girlfriend, Soheir Butt, who is Muslim. The religious mix was not, at first glance, a major issue to the parties, although it may have become one if Ms. Butt and S.K. planned to marry, as it would be a requirement that one of the parties convert. However, at the end of the day, nuptials were not planned given that Ms. Butt had to relocate to England due to immigration problems.

At the time that Ms. Butt did reside with S.K., H.K. was uneasy in the event

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that there was a marriage, and the necessary conversion. The parties recognize all Hindu and Sikh religious practices and observe most of the social aspects of Christmas and Easter. It was always the plan to raise the children in the Hindu faith.

H.K. advises she was the responsible disciplinarian and she uses rewards as her main form of correction. She is responsible for the Children's indoor play. She advised that S.K. was responsible for outdoor play and extra-curricular activities. She advised as well that he has never missed the children's medical appointments, dental appointments and haircuts.

Overnight Access

In relation to overnight access, H.K. advised that S.K. had told her his new relationship with Ms. Butt was experimental. Moreover, she believes that her culture does not permit sleep-overs between men and women who are not husband and wife. Overnight access became a problem when Ms. Butt moved in with S.K.. It was the mother's view that N.K. was uncomfortable with Ms. Butt and began to wet the bed. H.K. does not believe it is morally correct for N.K. to see her father overnighing with another woman. She believes it is all too new. H.K. agrees that S.K. can have overnight access at his parents and/or without his girlfriend. At the time in giving evidence, the relationship between S.K. and his father would not permit that form of overnight access at his father's home.

Day-time Access

Day-time access had some of the usual problems seen in the Family Court on a day-to-day basis. According to H.K., S.K. was not always on time for pick-ups and drop-offs and that he would keep the children past R.K.'s bedtime. H.K. felt they could not work through the access problems or the problems around his girlfriend as they always ended up arguing.

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H.K. believed that R.K. was overly attached to her and would not thrive in the back-to-forth changes between her house and S.K.'s house. She attributes this to S.K.'s numerous trips away from their home during the time of R.K.'s birth and their separation. As well, R.K. had had some slight developmental delay, which was being dealt with during the time of the hearing. H.K. believes he requires more stability. She believes both children require stability to deal with the break-up of the marriage. H.K. describes how S.K. kept himself busy and away from the family for the last months before separation. He made two trips to the U.S. and one to India during this time.

H.K. believes and cites examples where S.K.'s hygiene practices with the children are insufficient. H.K. also advises that N.K. and S.K. are close and enjoy a good father/daughter relationship. She advised S.K. took N.K. to swimming, gymnastics, dancing and day-care, as well as playing with her outside. S.K. was responsible for bedtime stories when the parties lived together.

Communication

H.K. advised that S.K. does not intend to speak to her once the Court proceedings are finalized. H.K. advised that she loved S.K. and had to attend therapy to deal with her anger at his betrayal of their marriage. Of late, S.K. has not been invited to family birthdays. H.K. has changed the children's dentists and not told S.K. although she knew this would be of interest to him.

Currently H.K.'s parents are living with her. She helps to financially support them and they help with the house and children. They had planned to live with their son, Sherry, but moved in with H.K. as they believed she needs emotional support at this time. When she eventually needs a structured babysitter she will pay her parents for this service and they will help with many of the chores around the property.

H.K. advised that the parties attempted to work through valuation and division of assets without success. The date of valuation was also in dispute.

H.K. is against joint custody as she and S.K. cannot communicate. It bothers her that he wants to know everything about the children - doctor, dentist,

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hair cuts. She advises that if she forgets to tell him, she is “under siege”. H.K. writes S.K. as she and he cannot communicate without arguing. He accuses her of being a control freak. She does not share this view.

Finances

The parties have maintained separate finances since May, 2000 when they restructured their financial situation with the bank.

H.K. has a small private practice with sessions at lunch time. She earns from all sources fifty-eight thousand dollars (\$58,000.00) per year. S.K. earns from all sources approximately thirty-nine thousand dollars (\$39,000.00). His income was higher in past years, however, he has recently given up some part-time work which he had maintained during the marriage.

The one thing the parties both agree on is that they each have, and will maintain, a thirteen thousand dollar (\$13,000.00) investment. The chattels are divided with the exception of two chairs which were to go to S.K., along with the table, but the chairs have remained with H.K. as she felt she was pressured into the personal property agreement.

EVIDENCE CALLED BY S.K.

Rakish Kochhar

The Court next heard from the 9th witness, Rakish Kochhar. He is S.K.’s brother. He had given the couple financial counselling. He has two children who are close to the parties’ children. He has seen his brother with his children performing all tasks necessary for their care. He observed that S.K. and H.K. bring good values and strengths to the marriage. He also observed the poor relationship between S.K. and his mother-in-law, Mrs. Singh.

Mrs. Elle Inbrahim

The Court next heard from Mrs. Elle Inbrahim. She is a retired nurse and long time friend of S.K. and his family. She is considered to be the third grandmother to the children. She describes S.K. as admirable and generous. She believes he was there to fill the children’s needs. She describes him as a “devoted”

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father. The witness has spent time with the parties and has helped care for the children for a time. She observed both parents caring for the children but viewed S.K. as the more patient parent.

She observed H.K.'s reaction to S.K. at N.K.'s recent birthday party. It was her view that he was not well received in H.K.'s home.

S.K. now lives rent free in a small house on Duncan Street. It is owned by this witness and her husband. He is not required to pay rent now or in the future but he does pay utilities and property taxes. While the witness still visits with H.K. and the children, she experiences a new coldness especially from Mrs. Singh, H.K.'s mother.

Lynn Ann Kochhar

The Court's eleventh witness, the third witness called by S.K., is Lynn Ann Kochhar. She is the former sister-in-law of S.K. and former wife of Rakish, S.K.'s brother. Her children are eleven (11) and nine (9) years of age. They spent time with the parties' children and the parties' children are welcome in her home. Despite the estrangements, Lynn Ann Kochhar believes that all of the Kochhars still constitute a family.

When the parties were together, she saw both perform the child rearing chores. She believes S.K. puts great value on family. It is a first priority for him.

The witness believes that she shares a closer relationship with H.K. than S.K., however, she believes that H.K.'s proposed access regime for S.K. is too rigid.

Lisa Patterson

The twelfth witness called was Lisa Patterson. She is a professional colleague and friend of S.K.. He confided in her to the point that he asked her to help interpret letters sent to him by H.K. early in their relationship. Ms. Patterson

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does not know H.K. well.

Ms. Patterson warned S.K. when he was in the United States that his wife had found e-mails sent by him to another woman and from that woman to him.

Ms. Patterson describes S.K. as a very good father and a good friend. She also described him as honorable, loyal and conscientious.

Allison MacInnis

The thirteenth witness was Allison MacInnis. She is a long time friend of S.K.. She has seen him with his children when he visits at her home. She describes him as a gentle but stern parent who is capable of caring for the children's needs. She observed S.K. manifest great stress as a result of the separation. She understands at the time he gave evidence, that S.K. was living full-time with his girlfriend, Soheir Butt.

This witness had discussions with S.K. for years over his wish to find work elsewhere. She knew of his e-mail friendship with Soheir Butt and his reasons for trips to the United States.

Soheir Butt

The Court heard from Ms. Soheir Butt. The witness is a British citizen who, until she met S.K., lived with her husband and child in the United States. She has an early childhood training skills course. At the time she gave evidence, she planned to go to the University College of Cape Breton for four (4) years. She was hopeful she would receive her Visa permitting her to remain in Canada.

She met S.K. on a chat line. They were just friends at first and she offered

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him to come and stay at her home in the United States while he was seeking new employment.

They met in March and by June both professed to have special feelings for each other. He returned to the United States in July and stayed at her home with her husband and child.

Ms. Butt advised her parents and S.K.'s parents were upset with the religious mix as he is Hindu and she is Muslim.

In October, 2000, she and S.K. went on a vacation together. According to Ms. Butt, her marriage had ended in 1999. It was her view that S.K.'s marriage was rocky at the time she and he commenced their courtship.

Soheir Butt moved in with S.K. in December, 2000. She was not a landed immigrant and had not started the process. Her daughter and S.K.'s daughter, N.K., played well together. Ms. Butt received four hundred and fifty dollars (\$450.00) U.S. in support from her husband. She was unable at the time to work in Canada, however, it was her view that she would like the newly constructed family to move into larger quarters. When questioned, she did not know that Duncan Street was rent free due to the generosity of friends.

Ms. Butt viewed the access regime between the Kochhars as rigid. She explained to N.K. that "mom has deadlines". Ms. Butt has not commenced her divorce. She did not know her husband's income, she was unaware of the amount of the value of the assets in the United States or the state of the family investments. She was unfamiliar with S.K.'s finances. She believed that she shared expenses with S.K. but could not provide any details. While her expenses far exceeded her income, she maintained that she could "fiddle" around with her income and be able to manage.

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She had some distant plan to marry S.K., but acknowledged the religious differences would cause problems. At the time she gave evidence, she and S.K. were not welcomed in his father's home. She did agree that she sent S.K. a letter in May of 2002, critical of H.K.. At this point, she had never met H.K..

By the time the trial was completed, Soheir Butt lived in England due to immigration problems, which are likely to last eighteen months or longer. Her re-entry to Canada is not certain.

Mrs. Kochhar, Sr.

The Court next heard from Mrs. Kochhar, Sr., who confirmed that she and her husband were good friends of H.K.'s parents, the Singhs, since 1965.

Her son, S.K., lived with his aunt in Germany for four to five years as a teenager and then returned home to attend the University College of Cape Breton.

Mrs. Kochhar, Sr. advised that her son and H.K. only dated for four months before they married. After the marriage, the couple lived with S.K.'s parents. Shortly after they moved to Duncan Street and then H.K.'s brother, Sherry, moved in with them.

Mrs. Kochhar, Sr. advised that Mrs. Singh's visits to the couples' home were lengthy and uncomfortable. It was Mrs. Singh's idea to buy a bigger house and so Beechwood was purchased. She describes H.K. as very ambitious. She believes her son likes to work, but was not as ambitious as H.K.. Mrs. Kochhar, Sr. believes both parents are good, capable parents, however, she believes her son is more patient. She describes the children as happy and loving. They spend every Wednesday night with she and her husband. She and her husband teach the children Hindu prayers.

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Mrs. Kochhar, Sr. described the past interaction of the families as pleasant with visits back and forth. Now the relationship is strained. Mrs. Kochhar, Sr. advised that all family members on both sides were upset to learn of S.K.'s infidelity. She knew he was unhappy living with H.K. but did not know a breakup was about to occur. When H.K. learned of Soheir Butt, it was Mrs. Kochhar Sr. who came to her to help her deal with her upset and loss.

Mrs. Kochhar, Sr. misses H.K.. She wishes her son and daughter-in-law could be more civil as the current situation is hurtful to everyone, especially the children. However, she believes that H.K. is busier with her career than S.K.. She believes career comes first for H.K..

S.K.

The Court next heard from S.K., who has been employed at the University College of Cape Breton since 1987. He is the Co-ordinator of the Multi- Media Department. S.K. has a Bachelor of Arts Degree and courses in Computer Science and Political Science. He has applied for his Masters, in order to advance his career.

Neither party, according to him, brought any sizeable assets into the marriage. He maintained that he had introduced H.K. to the staff at the University College of Cape Breton and she was able to find work at the University. Eventually she passed a Master's equivalency exam and began work at the Cape Breton Regional Hospital.

The parties agree that it was always understood that H.K. would work outside the home and that she needed financial independence. Prior to the marriage, S.K. promised H.K.'s father that he would support her in her stated goal, a Ph.D. in Psychology.

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While working at the Cape Breton Regional Hospital she took private referrals. These referrals have been reduced now to lunch time referrals only for Worker's Compensation.

After living with S.K.'s parents, S.K. invited H.K.'s brother to stay with them and attend school. They bought a house on Main Street. There were no children of the marriage at that time. The mortgage was four hundred and sixty-two dollars (\$462.00) per month and there were two salaries in the household, yet money was in short supply.

S.K. wanted a larger home, and his brother, who was a financial advisor, advised against it. S.K.'s father gave them the money for the down payment. Now the couple had two homes. The Main Street property would not sell and so it was rented. The rental income falls short of the property's operating expenses and had to be supplemented each month. The rental versus mortgage is short forty-six dollars (\$46.00) per month, plus the cost of water, insurance and repairs.

The couple repaid Mr. Kochhar Sr. the twenty-five thousand dollars (\$25,000.00) down payment and borrowed an additional seven thousand dollars (\$7,000.00) to lend to Mr. Singh. Money continued to be a problem. The young couple were also helping H.K.'s brother, Sherry, for the two years he was at the University College of Cape Breton. The couple co-signed a Promissory Note to help Sherry pay for the two-year course at the University College of Cape Breton. S.K. felt and assumed responsibility for Sherry, his brother-in-law.

S.K. cared for the children while H.K. studied for her equivalency exams. Both were working full-time. S.K. advised that while H.K. studied for her Master's exam, he assumed many of the child rearing chores which allowed her time to study and pass the exam.

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S.K. was responsible for all of N.K.'s athletic pursuits - swimming, gymnastics and dancing. He advised that since separation the events are reduced and that three year old R.K. was not enrolled in any activities. He believed that N.K. was in dance but that she had been removed from her dance class by H.K. without consultation.

When together, S.K. never missed an appointment for the children whether doctor, dentist or haircut. S.K. advised that H.K. would meet him at these appointments or be late with her arriving, or on some occasion, not come at all.

Post-separation, H.K. refused to tell him of any appointments and so when he is not there his daughter N.K. questioned his absence. S.K. advised that he always tells H.K. if he has taken the children to the doctor. On one occasion when H.K. did arrive at the hospital, she would not sit with the family in the emergency waiting room.

H.K. invited S.K. to N.K.'s birthday this year but the atmosphere was not warm. He was not invited to his son's birthday party. H.K. decorated the house for Father's Day but he was not invited to her home on that day.

The parties did have some success with respect to religious practices, however, when S.K. suggested that R.K. be blessed in his mother's temple, Mrs. Singh gave R.K. a Singh name and not his own name, and that spoiled the event for his father. S.K. advised that when Mrs. Singh was present, his role as parent is reduced. This has been the situation pre- and post-separation.

Despite his agreements with H.K. to have the children say Hindu prayers, he believes they are now only saying Sikh prayers. They also now give a Sikh greeting when they were raised to give a Hindu greeting.

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S.K. advised that he is not allowed to see the children if it is not his weekend. For example, one main Hindu festival (Diwali) took place, not on his access weekend, and he was unsure if he could see the children, although it was the practice in the past when the parties were together. The festival is more a social function with a certain segment designated solely for children.

S.K. advised he receives only the visitation H.K. grants. They cannot communicate without arguing and the children have, to a degree, witnessed this conflict.

Originally the children were allowed to stay with their father and his girlfriend overnight according to his recollection, but this changed in December, 2001. He views every request for increased access causes major difficulty to H.K.. He is not allowed overnight access if his girlfriend is present. He cannot take the children to Halifax to visit relatives. S.K. feels N.K. believes he does not love her as she does not see him as often as in the past.

S.K. presented an access schedule to H.K. but she refused to negotiate, stating that since they were in the middle of the Court process, she would rather the Court decide the access issue. Early on she had provided him with an access schedule as well, however, neither party found the other party's access schedule appropriate.

S.K. wants shared custody. When H.K. had *de facto* custody, he believed he was was not treated fairly. If he had shared custody he would make sure that H.K. is treated fairly. He believes he has more free time for the children. He plays with them more and he believes he is the recognized disciplinarian.

S.K. proposes one month about with weekends to the other parent. He wishes to be the primary caregiver. He provided a detailed schedule for

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shared-parenting which has the children spending time with both parents and grandparents as well as time in daycare.

If S.K. does not receive shared custody, he wants the same amount of access as if he was a shared-custody parent. S.K. outlines access problems stemming from the fact that Mrs. Singh does not speak to him now and so she urges the children to be outside as he arrives for access. He advises that he has no relationship with Mrs. Singh and he views that all access problems are to be partly her responsibility and/or the fault of H.K..

His plans for the future, when he originally gave evidence, was to settle down with Soheir Butt, but given the current immigration problem, that plan has been put on the back burner.

S.K. seeks spousal support. He believes he supported his wife and when she became successful, he was required to leave the matrimonial home.

He acknowledges that H.K. barred him from their home when she found romantic letters on the Internet between he and Soheir Butt. H.K. discovered that he was seeing Soheir Butt in the United States and not job hunting as he had advised his wife. He spent matrimonial funds to finance these visits to Ms. Butt.

During the course of the marriage, S.K. completed seven courses. He still maintains H.K. interfered with the furtherance of his education.

Under cross-examination, it was clear that his income for the year 2001 was approximately thirty-nine thousand dollars (\$39,000.00) and he had no requirement to pay rent at his current residence.

S.K. advised that within days of the separation, he and H.K. went to the bank

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to arrange to live separately and to make suitable arrangements for debts. The parties agreed to pay the matrimonial debt in ratio of their incomes. As well, H.K. paid seven thousand dollars (\$7,000.00) which had been given to her parents. Neither party factored loan interest in this arrangements. He believes, however, that H.K. ended up with the assets and that she uses these assets which were paid for by his loan payment. S.K. wants this situation rectified and he feels the payments he has made should entitle him to spousal support. His monthly payment to the bank of four hundred and forty-two dollars (\$442.00) for this post-separation loan was designed to finance his share of the pre-separation debt, including the spousal R.R.S.P. S.K. wishes H.K. pay the mortgages on both properties.

Originally, S.K. wanted to keep the Main Street property. Now he advises that he can't afford to do so. He has collected the rent cheques from the tenants on Main Street since July, 2001. The rental payment per month is less than the mortgage payment on this property and this shortfall has to be met by additional contributions from the parties.

S.K. agreed to check with the Toronto-Dominion Bank regarding the problems with the Main Street post-separation account given that the rental cheques did not arrive at the bank. H.K. put money in the account to meet the shortfall, and it is agreed between the parties that she did meet the shortfall at least to a degree. Rental cheques that S.K. collected were not reflected in these accounts. He advised that the cheques from the rental property were given to the bank by him and he could not explain why the cheques were not processed by the bank.

Counsel provided the Court with color-coded accounts, but there was some error in the color-coding, which caused confusion.

S.K. believes that H.K. is responsible for the financial woes suffered by the family as she was in charge of money management. He does, however, agree that

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he enjoyed several long-distance trips during their years together.

S.K. agreed the Visa was six thousand dollars (\$6,000.00) and the line of credit or loan at the Toronto-Dominion was seventeen thousand dollars (\$17,000.00).

One week before S.K. gave evidence, he advised N.K.'s school personnel to call him and not to call the mother, in the event N.K. became ill. On another occasion, he and H.K. were to go to the school's registration together for N.K.. This had been agreed. S.K. went to the registration one hour earlier than the agreed time. He was asked on cross-examination why he did this and stated he did so because he felt H.K. was trying to get back at him and make him "look stupid".

At the end of S.K.'s evidence in November, 2001, he advised that his girlfriend, Soheir Butt, had to return to England due to immigration problems. He believes that she will be gone one or two years. The relationship may continue, however, this is unclear.

A large portion of the cross-examination dealt with correspondence between the lawyers regarding overnight access, access times, birthday parties and differences of interpretation. The parties certainly saw a lot of the problems from different points of view. I do not attach much significance to confusion arising from counsel's correspondence dealing mainly with smaller issues.

John Nicholas Koil

The Court, as well, heard from Mr. Koil, who advised that S.K. did earn five thousand five hundred dollars (\$5,500.00) on a 5-week contract with Virtual Media.

REBUTTAL EVIDENCE BY H.K.

The Court heard from H.K. on December 19, 2001. She denied any

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allegation of a special person in her life. She complained that S.K. was late on the drop-off and pick-ups with the children. She advised she and S.K. are still unable to communicate. She believes he lost interest in the family in 1999.

The remainder of her rebuttal is “he said, she said”, which comments deal with smaller issues and added nothing significant to the fact-finding analysis the Court is required to conduct.

Of significance was H.K.’s evidence re post-separation financial arrangements for the Main Street mortgage. This account was set up to pay the Main Street mortgage and expenses associated with Main Street. However, S.K.’s R.R.S.P. loan payment was still deducted from that account, and the rental cheques were not deposited. The bank personnel called H.K. to deal with the issue. For the most part, in viewing that exhibit (there are a couple of errors), the yellow markings are rent and the blue markings are extra money H.K. put into the account to try to keep this account solvent, until she could find out what happened to the cheques and come up with a plan for payment. The plan she and S.K. put together did not work mainly because the rental cheques were misplaced.

H.K. believes S.K. sent the rental money to his Halifax account and somehow or other, a transfer was made back to the Cape Breton Toronto-Dominion post-separation account. H.K. advised she paid one thousand two hundred dollars (\$1,200.00) to maintain this account.

H.K. maintains S.K. is responsible for the rental cheques on Main Street from June, 2001 to December 19, 2001.

H.K. indicated as well that some overnight visits had occurred between S.K. and the children, once Soheir Butt left for England.

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H.K. advised that her discussion with S.K. regarding toilet training or gift shopping for the children are unsatisfactory. She believes that he misunderstands her message when she speaks to him. S.K. has asked her for an access proposal for the summer and H.K. advised she would rather wait for the Court to decide the issue as she believed the decision would be rendered shortly.

She indicates she does not care for the current access regime, as the children spend too much time in too many homes and R.K. is a clingy little boy who needs her. The access schedule was basically alternating weekends, Monday with father until 3:30, all Tuesdays with mother, Wednesday with father until 3:30, but exercised at the paternal grandparents and father was not there, Wednesday at 4:30 until 7:30 with father, Thursday with father until 3:30 p.m., Friday (on his weekend) he would pick them up at 5:30 until 7:30 Sunday, and the same thing would happen the next week, but the next weekend would be the mother's weekend.

“UPDATED” EVIDENCE BY S.K.

S.K. was re-called to update evidence since his last appearance. He provided many incidents of conflict between he and H.K. since the last day in Court - 6 weeks earlier. He stated it was his practice, due to her rudeness, to say as little as possible because she will “take it the wrong way”.

...

DECISION

Property Issues

H.K. shall be entitled to purchase the equity in the Beechwood property. The parties are one thousand dollars (\$1000.00) apart so the difference shall be split. She shall assume responsibility for the mortgage and attempt to have S.K.'s name removed, if possible. The bank does not always agree with, therefore, she is only to make the effort.

From the value of this home - the equity from this home - as S.K. would be entitled to half, she will be entitled to the following deductions: all monies that she put into the Main Street account to keep it solvent. I have different amounts and different accounts and different amounts between post-trial summations and *viva*

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voce evidence, however, I am going to make an attempt to reach a calculation, but I will permit counsel to re-define the amounts some lunch hour if I am in error.

There is approximately four hundred and fifty-four dollars (\$454.00) that H.K. deposited to this account from Child Tax Credit. There is approximately four hundred and twenty-five dollars (\$425.00) from the former joint account, which S.K. used.

There is forty-three dollars (\$43.00) X 9 for the amount of three hundred and eighty-seven dollars (\$387.00) which is the amount H.K. paid for S.K.'s insurance.

H.K. will be compensated as well for any R.R.S.P. loan payments taken from this account by S.K. from the end of May, 2000 onward.

H.K. is to be entitled to credit for one-half (1/2) of the repairs on Main Street. I have looked for the receipts and all I can locate is Exhibit #1, Tab 11, indicating in H.K.'s hand-writing that she paid six hundred dollars (\$600.00) which would entitle her to three hundred dollars (\$300.00). Ms. Cusack's post-trial summations indicate there is a more substantial amount. The claim for arrears on child support is the amount of two thousand eight hundred and twenty-six dollars (\$2,826.00). I award one-half (1/2) of that amount.

In any event, S.K. is to receive a credit for the money he paid towards the mortgage on Beechwood, if any, since the separation. If H.K. can afford to purchase S.K.'s equity in Main Street, she shall have the first option to do so. If she opts not to exercise this option, then S.K. may purchase the property if he wishes to do so. Both parties will outline their option - each will have two weeks to think about it. If neither wish to purchase the other's interest on Main Street, it is my view that Main Street will have to be sold at the best reasonable price. It may be unrealistic for the parties to think that they can acquire, or save, the twelve

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thousand dollars (\$12,000.00) equity in this property, when their rental does not cover their mortgage and the other expenses. At the end of the day, they are both going to have a substantial debt to carry. It may be well advisable for them to get rid of the property at the best price they can, even if it does not preserve the equity in Main Street.

In any event, if I am wrong and they somehow feel they can budget around it, then the first option shall go to H.K. and the second option to Mr. I am giving H.K. the option first because she has spent a lot of time and effort trying to keep that property solvent, and I do not think she received much help.

If either party buys the Main Street property, then the usual real estate commission and H.S.T. is allowed. All contributions made by S.K. are adjusted in the Beechwood property as that is the most likely property to be retained. That is why the deductions were taken from that property.

As indicated already, the Court is unable to work through the colour-coding. Although it is a good idea, it didn't work this time. If the figures are more capable of verification, Counsel can meet with the Court to review the exhibits at the time that the Corollary Relief Judgment is drafted I will meet with them on short-notice on a lunch hour, however, I have given you the best figures that I can based on the evidence.

In any event, as I have indicated, there are competing figures - for example, H.K.'s figures in Exhibit #1, and Ms. Cusack's figures in the post-trial submission brief, simply do not line up. It may be these amounts were given at different points in time, but it makes the calculation difficult. The Court is entitled, of course, to repudiate this figure. I don't think it is equitable to the parties to do so and so I will meet them on short notice in the event that I missed a receipt or that they are able to come to an agreement on what the amount is.

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Both parties shall share in the equities and losses on a 50/50 basis, after the set-offs and credits outlined are made. Any banking charges on the Main Street property for insufficient funds, or any additional interest, due to insufficient funds are to be borne by S.K. because I find his conduct totally caused the additional expenses. Regular interest is not a factor, but any additional charges incurred by failure to take care of the account, and any charges by the bank, if readily ascertainable, shall be borne by him.

Pensions

The parties shall share their pensions on a 50/50 basis for the portions that accrued from the date of marriage to the date of separation. The date of separation, which was in dispute is June 21, 2000. The parties can do an actual transfer of one to the other, they can use R.R.S.P.'s, or they can use the property as a set off. Any documentation necessary to complete valuation shall be made available to the opposing party within 14 days. The parties are to elect the least intrusive tax avenue in any property set off.

Automobiles

I accept the Porky MacMullin evaluation of four thousand eight hundred (\$4,800.00) for H.K.'s car, from Exhibit #10. According to Exhibit #10 it would appear the best estimate for S.K.'s car, because his car is a year older than the evaluation provides, is worth about three thousand dollars (\$3,000.00) or less, so the Court fixes the credit to S.K. in the amount of eight hundred dollars (\$800.00) as the approximate differences between the value of the vehicles.

All R.R.S.P.'s in existence, as the parties have agreed, are to be divided on a 50/50 basis.

Assets

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The personal property has been divided between the parties to their agreement, as I understand, except for two chairs that H.K. agreed to give to S.K. but did not because the chairs matched a table she retained. She is to return the two chairs to him within fourteen days.

Loans at the Bank

S.K. has a loan of seventeen thousand dollars (\$17,000.00) and H.K. has a loan of twenty-eight thousand dollars (\$28,000.00). This is something the parties worked through themselves. Her twenty-eight thousand dollars (\$28,000.00) includes seven thousand dollars (\$7,000.00) to her parents, which I find is not a matrimonial loan. She took more of the debt and the parties had worked through the debt arrangement, and I do not intend to disturb their agreement.

There are some outstanding credit cards which are to be divided on a 50/50 basis up to the date of separation, if that has not been already included in the parties' post-separation banking consolidation. It was unclear, but the best I could guess at the end of the day was that there was at least one Visa account outstanding.

Spousal Maintenance

The Court will next examine the issue of spousal maintenance. The law on spousal maintenance set out in the Divorce Act, Section 15.2(1):

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

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- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

That is the standard to consider. I have examined all the evidence and as I have indicated, reviewed the 252 pages of evidence on numerous occasions and had portions of the trial transcribed.

S.K. is, and I put this succinctly, professionally, personally and economically better off as a result of his marriage. I find he fits none of the criteria for spousal support. The marriage was of a relatively short term. H.K. was a good mother and a good financial supporter. The parties, when left alone, could co-parent. If anything, in the last year of marriage H.K. had more responsibility for the children. In relation to Section 15(6), if S.K. experienced any economic hardship from the breakup of the marriage, he is more responsible for that hardship than his former wife who was left to deal with most of the economic

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fall-out of the breakup at least on the short term. S.K. could have worked at a second job as his wife did while she had defacto custody. He could have taken fewer trips and he could have been more prudent on his managing of the Main Street account. H.K. is left with a larger income and a larger debt, and a difficult job - counselling is a difficult job. I find there is no basis within Section 15 to award spousal maintenance to S.K..

Custody

The law on custody is governed by the Divorce Act, Section 16(8), (9), (10), and is as follows:

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Best interests, as further defined in the case law, by the often cited case of King v. Low, [1985] 44 R.F.L. (2d) 113 at page 126, Justice MacIntyre held:

I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the

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custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

The most important part of this statement is “the welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child”, basically so that the child will be able to mature and prosper as a healthy adult. That case is from 1986 - it is 16 years old - and it is still a clear statement of the Court role in examining evidence.

There’s been a helpful decision of Justice Goodfellow in *Foley v. Foley*, (1993), 124 N.S.R. 190, which provides the checklist used in this Court and others. It provides sixteen (16) items for the Court to consider. The checklist helps to remove emotional carryover the Court has heard and focus primarily on the little people involved. The use of the checklist, in my view, provides the Court with a tool for objective and thorough analysis. In this case, the Court finds *Foley* most helpful given the substantial amount of evidence heard as to “feelings” and “hurt feelings” of the parties involved. It is the Court’s view that feelings of parties have some relevance, and feelings of the children, if accurately communicated, are very relevant, however, I believe the feelings of grandparents and extended family have very limited relevance, if any at all.

It is clear at the end of the day that this young couple had almost no time alone to learn to be a couple. Both of them supported involvement by their extended family, but I am left to wonder if the result of their union may not have been different if they had more time alone and less helpful input from the extended family. In any event, it is too late for this type of speculation. As of June, 2000, the union no longer existed. It is still essential for the parties to learn to work

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together and to make up their own minds without input from family members that may not be helpful on the parenting issues.

The statutory provisions put forward by *Foley* (Item I have already discussed).

2. Physical Environment

On examination of the physical environment, it would appear that H.K. has a physical environment superior to that of S.K.. The accommodation appears more appropriate, and also it is the home the children know better.

3. Discipline

Both parents appear to be capable of disciplining, although I accept the evidence that S.K. is the more patient in this regard.

4. Role Model

S.K. has behaved dismally as a husband. He has lied and betrayed his wife - talked about her behind her back - and put little or no effort into trying to make the marriage work, or at least leaving the union with some dignity, as opposed to subjecting her to the "other woman" situation.

H.K. is an ambitious woman and she has been, by some, condemned for her ambition. This is a fact that everybody knew before the marriage. She made no secret of what she hoped to do with her life and, in fact, her former husband committed to that plan with her before they married. H.K. has been open and forthright with her character traits and her goals and she has stuck to them. As a role model on how one runs their life, it is very clear that H.K. would provide a superior role model.

5. Wishes of the Children

The only evidence the Court heard was that N.K. and R.K. Kochhar have a good relationship with both parents. R.K. is a clingy little boy who likes to be with his mother. N.K. is more outgoing and she is three years older. She has reported, by witnesses, to really enjoy her time with her dad. It would appear that N.K. is, at least, discernible that she wishes to have time with both parents and enjoys her time with her father. I think all parties agree that she has a

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good relationship with her father.

6. Religious and Spiritual Guidance

The parties have done an admirable job pre-separation on this issue. The children are to be raised in the Hindu religion and H.K. agreed this will continue. Pre-separation, the main thrust of the children’s religious training was the one night with the paternal grandparents, as S.K.’s father is a learned man in religious practices and he practices his faith consistently and sincerely. H.K. has undertaken to continue to say Hindu prayers at night with the children, however, she has indicated some reluctance to allow the children to spend substantial periods of time with the paternal grandparents, as was the pre-separation practice. As well, the children are now exchanging Singh greetings as opposed to the Hindu greetings that they did in the past. This could simply be the result of being in the presence of the maternal grandparents. However, there is conflicting evidence as to the prayers, and because of that conflicting evidence, I accept H.K.’s evidence that she will continue to support the children’s training in the Hindu faith, and to continue to say those prayers with them.

Spiritually, H.K. appears to live her life in a fair and well-meaning manner. S.K. appears to do less so as was already discussed under the “Role Model” heading. In the *Divorce Act*, and in the case law *Wagg v. Wagg (2000), 184 N.S.R. 124*, require the Court to examine matrimonial conduct only if it relates to custody and only if it relates to the custody of these children. I find his manner in acquiring a new partner and his expectations of his wife to accept this new partner shows an inability to understand fair play and respect. Fair play and respect have a spiritual basis.

I find the parties are equal on the religious issue, but the mother is superior on the spiritual issue. I have other concerns which are more remote now in relation to Ms. Butts, but I discuss them under this heading, re her concept of finances, her absence of respect for H.K., her comments to N.K. about having deadlines. Since she will not be in the area for a long time, if at all, I am not dealing with her as an actual problem at this time. I find if her involvement continued, it would not be viewed as a positive influence on these children.

7. Assistance of Experts

This is not really a relevant issue in relation to this case. I understand that H.K. had some counselling to deal with her hurt feelings with the way her marriage ended. I understand

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S.K. had one session but does not believe that he needed any further counselling. I think S.K. received his counselling from his friends. I believe both parties would benefit from some counselling in relation to prioritizing the children’s needs as more important than their own hurts and more important than the driving need for both of them to win custody.

8. Time Availability

S.K. has a more flexible schedule and H.K. has a predictable schedule. The parties are basically even on this point as both work 40 hours per week.

9. Cultural Development

H.K. has training in classical Indian music and can teach the children to appreciate same. Both parents wish to teach the children Indian customs. S.K. is interested in teaching the children North American customs as well. He views the Indian practice of women waiting on the males of the household to be inconsistent with modern North American custom. He wishes to teach his son to be more independent. The parties have done an admirable job of teaching Indian custom to the children.

10. Physical and Character Development (for example, sports)

Physical development - this responsibility was well discharged before separation by S.K.. H.K. is less interested in outdoor activities, although she does stimulate the children with indoor activities. Outdoor activities and sports are not her forte. Since the separation, N.K.'s outdoor activities have been reduced - she was in swimming, dancing and gymnastics. R.K. is not in any activities to date, but as he’s turned four, this is now becoming relevant. S.K. is the more involved parent regarding outdoor activities - enjoying the outdoors and sports. He and the children have enjoyed these activities in the past. S.K. values these activities as an important part of growing up. The Court shares his view on this issue.

Character Development - H.K. knows the value of hard work. She is ambitious and disciplined in how to achieve her goals. I use the term “ambitious” in this decision as a positive, not as a negative as some of the witnesses for S.K. have used the word. The household would not have survived without her drive and children have to watch role models who know how to work so that they know that work is part of their own self-sufficiency and part of developing self-esteem. A hard-working person is not a negative in the Court’s view.

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11. Emotional Support

Both parents grasp the importance of this item and both parents are equally able to provide emotional support to the children.

12. Financial Support

If S.K. remains in his rent-free home and H.K. remains with her current debt load associated with Beechwood, both will have equal financial ability which, due to the Main Street debt load and the separation, resources are going to be stretched, so they are essentially equal in this area.

13. Support from Family

There is a supportive family on both sides, however, Mrs. Singh has some work to do re her attitude towards S.K. in front of the children - this has been borne out by other witnesses as well. Support does not mean creating negative environments. Also, Mr. Kochhar Sr., who does not speak to his son, due I am told to his son's infidelity, this is also a stressor for the children who certainly must feel the tension. This is an unhappy situation. Mrs. Kochhar Sr. is definitely a positive influence on this case in all aspects. She is helpful, broad-minded, and non-intrusive, as is H.K.'s father. The parties turn out more or less equal on the extended family, with pluses and minuses on both sides.

14. Willingness to Facilitate Access

S.K. has tried for months to establish a long-term access regime. He has printed out helpful calendars - example, Exhibit #6, Tab 11, of July 24th. H.K. would rather wait for the Court to decide, although in the earlier days she did provide a schedule as well. S.K. requested to take N.K. to Halifax to visit with family and was refused. Although the negotiation became so protracted at the end of the day, it was hard to decipher who was responsible for this little child being disappointed that she could not go to Halifax to see her cousins.

H.K. is a very clever, moral, hard-working person. She wants to do what is right as she sees right. She does, however, sadly devalue the father's role and has become possessive of the children. This was seen to a degree in relation to the Halifax trip and in relation to the Dewali Festival last Fall. I must be clear that I support H.K. and her views of sleep-overs when Ms. Butts was living with S.K.. However, her possessiveness has extended beyond any recognition that S.K. has a value to the children. I do not believe that she will facilitate access. I believe

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that she is anxious to get over her disappointing marriage - which is understandable to her, but part of her remedial measures must not be a reduction in the role of S.K.. I acknowledge that she has more than ample reason to be angry and disappointed with him as a husband, however, once parties have children, they have to put their own hurts and disappointments second, and look at the other parent objectively and say, "Are my kiddies better off with you, or are they not? Are they better off with you some of the time? Can you fill functions that I can't fill?" These are the questions that must be examined.

Items 15 and 16 have already been answered in the other points 1 - 14 already discussed.

17. Other considerations

S.K. must take care to monitor some of his inappropriate actions, i.e. (1) turning up one hour earlier than he and H.K. had agreed when they were going to do something as pleasant as registering the child for school; (2) telling the school to call him and not the mother if the child is hurt, and then not telling H.K. about this; (3) not being prompt on his pick-up and drop-offs; and, (4) not being polite or at least cordial when he does. If Mrs. Singh continues to be not cordial during the pick-ups and drop-offs then she should be not allowed to attend them, but S.K. should, at all times, exchange a pleasant greeting so the children can witness his maturity. The children should not be out on the step with one party looking out the window and another party picking them up. There is to be an appropriate exchange. If that cannot be done, then Mrs. Singh will not be present if she is the one responsible for the tension and S.K., if he is responsible, may run the risk of reduced access.

H.K. must take care to monitor some of her inappropriate actions, i.e. (1) changing dentists without telling S.K., when she knew that S.K. always attended such appointments pre-separation; (2) her reluctance to let the children run to their father when they saw him at the Dewali Festival; (3) not sitting with the family when one child was in the hospital.

The issue remains, with whom would the "best interests" of the children be most likely achieved? S.K. seeks joint custody. H.K. seeks sole custody. The law on joint and sole custody is well stated in the decision of Justice Goodfellow in Stefanyk v. Stefanyk (1996), 156 N.S.R. (2d) 161, paragraphs 44-49:

[44] **There is much in the evidence that is commendable of both parties as it**

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relates to their children. There is also considerable evidence that clearly calls into question whether or not they have a sufficient degree of respect and communication to function as joint custodial parents discounting to some extent the turmoil of litigation, both parents project a concern that somehow when the children are not with them, that such is a limitation on their position as a parent.

[45] They have shown at times a capacity to overcome their differences, for example, Ms. Clancy has, on occasion, provided the financial resources for Mr. Stephanyk to exercise access to the children. On one occasion, when the boy expressed some concern about being away from home, the parties were able to work out an arrangement whereby for the balance of the access period, Mr. Stephanyk was able to move back into the former matrimonial home. Rarely are separated parents able to reach such a level of agreement and have it work.

[46] Unfortunately, however, as I have said, they have not able to maintain any consistent capacity for respect for each other or the ability to consistently communicate and cooperate to the level that is essential to the working of a joint custodial declaration.

[47] In *Glavin v. Glavin* 91994), 130 N.S.R. (2d) 161; 367 A.P.R. 161 (S.C.), at p. 166, I related, in paras 23 and 24:

“There is no presumption in law in favour of joint custody. If there is any presumption, it is that each parent is entitled to custody of the child, and where required, a determination of custody is to be determined solely on the best interest and welfare of the child.”

[48] A consideration of custody, joint or otherwise, requires consideration of all facts and circumstances relevant to the best interest and welfare of the child.

[49] Bateman, J., as she then was, dealt with the contention that a court cannot award joint custody where one party disagrees with that disposition in *McCann v. McCann* (1993), 120 N.S.R. (2d) 59; 332 A.P.R. 59 (S.C.):

“The mother submits, as well, that according to the law in Nova Scotia, a court cannot award joint custody where one party disagrees with that disposition.

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That has been modified by the Decision of Godfrey-Smith v. Godfrey-Smith (1997), 165 N.S.R. (2d) 245 (S.C.), paragraphs 13 to 22. Associate Chief Justice J. Michael MacDonald refers to the ability as opposed to a willingness to work together.

[13] The parties agree that the children should remain in the day-to-day care of their mother. They have also agreed that Mr. Godfrey-Smith shall continue to have liberal access. I have been asked to make some adjustments in this regard and I will do so later in this judgment.

[14] There remains however one very contentious issue. It involves the struggle for control over all major decisions affecting the children. The parties have become very entrenched in their respective positions in this regard.

[15] For her most part Mrs. Godfrey-Smith seeks to secure sole custody. While acknowledging an obligation to consult, she wishes the final say in the event of a deadlock. Mrs. Godfrey-Smith states historically she has always been the primary caregiver and as such she has always made such decisions. She views her husband's attempt to deny her sole custody as an unwarranted interference designed solely to control her life and meddle with her privacy. She feels that they have little or no ability to cooperate. As such, she feels any attempt at joint custody would be futile.

[16] For his part Mr. Godfrey-Smith states he is motivated solely by his love and concern for his children. He wants an equal say on all issues involving his children. He feels that his wife is being totally obstinate on this issue because of her acknowledged lack of cooperation. He wants joint custody which would force the parties to negotiate on an equal footing. "Deadlock" he feels should be resolved on a case-by-case basis whether by him (as he views himself as being the more reasonable of the two), or alternatively by the court. To award Mrs. Godfrey-Smith sole custody he feels would only perpetuate the conflict.

[17] It is painfully obvious to me that these parties in recent months have demonstrated a depressing lack of cooperation. This has resulted in the vitiation of virtually all direct communication between them. They do not meet face to face. They do not talk on the phone. Their e-mails are curt at best. They use their children as messengers and then wonder why things get lost in the translation.

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[18] This situation has been very stressful not only upon the parties, but certainly upon the children. It has reached the point now that their unwillingness to communicate has overshadowed all other issues in this trial. In fact had these parties only communicated, I am convinced that this matter would never have come to court. It is sad to see two intelligent, capable and loving parents become so caught up in their own discord. Ironically all this may appear to support Mrs. Godfrey-Smith's submission for *sole custody*; with cooperation being perceived as a necessary ingredient of joint custody. I refer specifically to the judgment of the late Chief Justice MacKeigan in *Zwicker v. Morine* (1980), N.S.R. (2d) 236; 69 A.P.R. 236 (C.A.), where at paragraph 23 he noted:

“A joint order may be helpful, and not harmful, only where the parties agree to cooperate and are capable of cooperating. Paradoxically, such an order would thus be unobjectionable only when the parents are the kind for whom no controlling order is necessary at all! For such parents, an order would merely affirm or approve their agreement as to how they propose to bring up their children. Such parents, and their children, do not need to care whether any order is issued, or whether a formal order purports to give legal rights of custody to the father, to the mother or to both.”

Associate Chief Justice J. MacDonald concludes that the pivotal evidence to examine is whether the parties are able or unable to work towards working together through a joint custodial arrangement. There is a difference between “unwilling” and “unable”.

Recent studies in the social sciences show adult children of divorced parents have significantly commented on one feature that they would change if they were able to go back in time, and that was the limited time with the non-custodial parent.

Custodial parents who had frustrated access ended up with a loss of emotional attachment from the grown child. A study performed by Fabricus and Hall in the *Family and Conciliation Court Review*, October 2000, Volume 28, indicates:

The purpose of this study is to examine the outcomes of divorce from the perspective of young adults who grew up with their parents' divorces. Important consequences of their parents' divorces for these young adults include the perceptions, attributions, attitudes and feelings they were left with as they began the process of

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starting their own adult life. There is increasing consensus that the perspective of the children should be taken into account and decisions made by divorcing parents and the courts and young adults who have lived through their parents' divorces can be an important source of information about younger children perspectives, but divorce researchers have typically not queried young adults about their parents' divorces. One important aspect of the lives of the children of divorced parents involved the living arrangements that they had with each parent. Decisions about living arrangements are usually made early in the separation and divorce process intend to be perpetuated throughout the children's divorced family life. In most cases, these decisions are made for them. Because these arrangements set the context of their daily lives, children of divorced parents are likely to form strong perspectives in relation to the issue of living arrangements.

The summary of that article indicates there is increasing consensus that the perceptions of children need to be taken into account in decisions made by divorcing parents and the courts and the young adults who have lived through their parents' divorces can be an important source of information about the children's feelings. In this study, the authors assessed the perceptives of 820 college students from divorced families on the issue of the children's living arrangements after divorce. Children wanted to spend more time with their fathers as they were growing up and the living arrangement they believed was best was equal time with each partner. The living arrangements they had as children gave them generally very little time with their father. Respondents reported that their fathers wanted more time with them, but generally the mothers were not supportive.

There is a follow-up study on this same feature, which is broken down into many interesting questions reflecting the views of children from every social economic class. The study was performed by the same author. It is still under peer review and it will not be reported until next year, but in the same magazine, *Family and Conciliation, Court Review*, I had an opportunity to attend the session in which the authors interviewed over 1200 college students with a double control. They indicated the children who were refused time with the father became detached

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from the mother as grown adults and ended up with no strong attachment to either parent and that the reverse was true - if the mother encouraged access and the father had a lot of access, then the children ended up with a bond demonstrating an attachment to both parents and a resilience to help them through the division of the family unit.

I do not think we need the studies - they are interesting - they show what another discipline is doing in various parts of the world. What we have in Canada and Nova Scotia is the "best interests" rule. The children are to spend maximum time with each parent if it is in their best interest. I find here that the parties have been able to meet and discuss issues on financial restructuring. They were able to reach the issue of overnight access once Ms. Butt left Canada. Both have told me that there have been agreements on various issues put into place, but once arrangements were reduced to writing, then lack of clarity or whatever took over and the arrangement could not be implemented.

I find that both parties have very different strengths and interests. Together they can provide these children with an exceptional and healthy environment. It is my view that litigation has taken over what would otherwise have been sound decision making. I believe once the litigation is completed that both parties will feel less threatened and they will be in a better position to cooperate more fully. It is necessary for S.K. and H.K. to learn to respect each other more as parents. They may not like each other as former mates, and they do not have to, but they have to learn how to respect each other as parents and to work harder to talk over the issues.

As H.K. indicated, and I accept her evidence, that when she attempts to talk over the issues S.K. will just walk away. I do not know her manner in approaching the problem, but this is something that they can, I believe, work through.

It is the Court's decision that the parents are to share these children on a joint custodial basis. The principle residence will be with the mother. Access will be

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as it has been on the day-to-day basis. I do not accept that the many moves are hard on the children. This has been the status quo and the children have thrived. I believe this is the manner in which maximum contact between each parent can be achieved and a routine can be established. The special days will go as follows:

(1) Christmas

Christmas will be split.

(2) Easter

Easter will be split.

(3) Summer months

Summer will be split - a week about, unless the parties want to change it, otherwise, it will be a week about, with the first week to go with the father, the second week with the mother.

(4) Birthdays

The children are to be shared between the parents. Whoever does not have custody that day will be entitled to visit with the children and take the children for a three-hour period.

(5) Mother's Day/Father's Day

Both the mother and the father will have the children on these days - that is, regardless of the weekend, if it's Mother's Day, the mother will have the children on that day; if it's Father's Day, the father will have them, and that will extend from 10:00 a.m. to 7:00 p.m.

(6) The Dewali Festival

The parties will have alternate years unless the parties can agree to co-attend; this year it will be H.K.'s turn and hopefully if the parties are there they can all just enjoy each other as if they are co-parenting the way I hope they are going to be able to.

(7) School, medical, social, athletic and dental appointments

The parties are to notify each other in advance and arrange who will take the children, or if both will go.

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(8) Sporting events

The father shall arrange two (2) outdoor activities for N.K. and one (1) for R.K.. The father shall be responsible to have the children at these events, regardless of who has defacto custody at that time. He is to try to schedule these events on his own access time, as much as possible, but with alternating weekends, this may be difficult. H.K. is to take the children to these events if they are in her care at the time. If she cannot then it is primarily S.K.'s obligation to ensure that the children are picked up, dropped off and supervised during these activities. When R.K. is six years old his activities shall be increased to two. These activities, as arranged by the father, are to be reasonable in time and in cost - for example, the events that N.K. enjoyed prior to separation. S.K. is not to arrange an activity that would be everyday.

(9) Principle Residence

The principle residence of the children is to be with H.K.. The parties shall consult on all issues and in the event of disagreement, H.K.'s view will prevail, except for extra-curricular events where S.K.'s view will prevail, unless the children are experiencing ill health and the outdoor activity is inappropriate, then it will be the mother's responsibility to advise S.K. that, for example, "N.K. has an earache, so this cannot take place", or whatever. S.K. is ultimately in charge of outdoor activities, with the proviso that she has an overriding discretion whether or not the children are well enough to participate. I assume since both children enjoy good health, this will happen rarely.

In the event that she wants a weekend in Halifax and it is her weekend with the children or a weekend in P.E.I., this is going to happen from time-to-time, and S.K. will not be able to indicate, "No, you cannot go", so hopefully some arrangement can be made. I cannot micro-manage the start-off for this co-parenting any more than I have.

For clarity, I find it is in the best interests of N.K. and R.K. Kochhar to be raised in a joint custodial setting with maximum contact with both parents and with each parents to have areas of exclusive responsibility according to their strengths and their pre-separation practices.

Neither child will leave Canada on vacation or otherwise without expressed written consent of the other party. Vacation travel is to be encouraged, as generally it is a benefit to the children, but both parties have accused the other party of possibly leaving with the children, so there will be no leaving the country without expressed written permission of the other party. The children will not re-locate without written agreement or Court Order.

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For clarity to S.K., I want to indicate that I would not order joint custody if Ms. Butts was still living with him, as I believe she did not have a positive influence on the family. It would not be in the best interests of the two children if she was still part of the father's life.

Child Support

Prior to conciliation, S.K. paid the babysitter as his maintenance, and after he paid four hundred and seventy-one dollars (\$471.00). There is no evidence as to the actual cost of the daycare which Ms. Cusack believes to be two hundred dollars (\$200.00) per month, however, I have no after-tax treatment, so I am not going to award any of this amount to H.K. for this cost. I understand in the future that her parents will be helping out with this bill and possibly by paying them and the tax deduction it may resolve itself. It is unclear based on the evidence presented.

S.K. shall pay child support according to his income pursuant to the Guideline amount.

As I have indicated, retroactive child care costs is not awarded as I am unsure of the sum. I have already set the sum for retroactive child maintenance. S.K. is to provide H.K. with all his T4's and Tax Assessment by the last day of June for the year 2002, and the last day of June for so long as the children remain dependent children. In the event that his income is more than what was awarded in that year, there will be a yearly adjustment. He is to watch what he makes and to bank sufficient funds so that by Christmas of each year if he thought he was making thirty-nine thousand dollars (\$39,000.00) and he really made forty-five thousand dollars (\$45,000.00), then he will be paying that year on the Table amounts for forty-five thousand dollars (\$45,000.00). He is responsible to keep track of that money and to have it available. Failure by him to do so could result in a retroactive award that will not contemplate his basic shelter costs.

The parties are to share the costs of the children's extracurricular pursuits on a 50/50 basis. Given their limited resources, care must be taken in selecting these activities. Both parties have had some successes and therefore I exercise my discretion and grant no Order for costs.

Justice M. Clare MacLellan
Justice of the Supreme Court of Nova Scotia
Family Division