

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT, S. N. S., 1990**, CHAPTER 5 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION. SECTION 94(1) PROVIDES:

"94(1) NO PERSON SHALL PUBLISH OR MAKE PUBLIC INFORMATION THAT HAS THE EFFECT OF IDENTIFYING A CHILD WHO IS A WITNESS AT OR A PARTICIPANT IN A HEARING OR THE SUBJECT OF A PROCEEDING PURSUANT TO THIS ACT, OR A PARENT OR GUARDIAN, A FOSTER PARENT OR A RELATIVE OF THE CHILD."

PUBLISHERS OF THIS CASE FURTHER TAKE NOTE THAT IN ACCORDANCE WITH S. 94(2) NO PERSON SHALL PUBLISH INFORMATION RELATING TO THE CUSTODY, HEALTH AND WELFARE OF THE CHILDREN.

IN THE SUPREME COURT OF NOVA SCOTIA

FAMILY DIVISION

[Cite as: M. v. H. et al, 2003 NSSF 037]

BETWEEN:

D.M.M.,

-Applicant

-and-

J.B.H.,

-Respondent

-and-

MINISTER OF COMMUNITY SERVICES,

-Intervener

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on May 2, 2008.

DECISION

BEFORE THE HONOURABLE JUSTICE R. JAMES WILLIAMS

PLACE OF HEARING: Halifax Nova Scotia

DATE OF HEARING: April 7, 8, 9, 10, 11 and May 6, 2003

DATE OF SUBMISSIONS: June 13, July 10 and July 29, 2003

DATE OF DECISION: October 15, 2003

COUNSEL: Judith Schoen, counsel for the Applicant

Heather McNeill, counsel for the Respondent
James Leiper, counsel for the Intervener

WILLIAMS, J. S. C. (F. D.)

D.M.M. and J.B.H. have two children:

A.J.H., born [in 1992]; and

A.D.J., born [in 1994].

There has been conflict between these parents over issues of custody, access and support for literally years. This proceeding, dealing with cross-applications under the Maintenance and Custody Act, concerns all of these issues. In addition to D.M.M. and J.B.H., the Minister of Community Services participated in the proceeding (as an Intervener). Their participation followed the completion of a separate (child protection) proceeding under the Children and Family Services Act. The child protection proceeding arose primarily from the conflict between the parents. That proceeding terminated March 27, 2002.

A. AGREED STATEMENT OF FACTS - MARCH 27, 2002

On March 27, 2002 (as the child protection hearing terminated) the parties signed an Agreed Statement of Facts. It outlines a chronology of the legal proceedings and events to that date. It reads as follows:

1. On March 17, 1998, an Order issued from the Family Court for the Province of Nova Scotia granting sole custody of the children, A.J.H. and A.D.J., to the Respondent, D.M.M.. The Respondent, J.B.H., was granted 'generous and liberal access'.
2. From 1993 to 1999, the relationship between the Respondent, D.M.M., and the Respondent, J.B.H., was conflicted.
3. On or about September 12, 1999, the child, A.J.H., was taken to the [...] Hospital by the Respondent, D.M.M., as she had pain between her legs.
4. By report dated September 15, 1999, Dr. John Anderson, Child Protection Team, IWK-Grace Health Centre, reported no sign of sexual abuse after examining the child, A.J.H..
5. On February 13, 2000, the Respondent, D.M.M., alleged the child, A.J.H., had disclosed that she had been sexually touched by the Respondent, J.B.H..
6. On February 15, 2000, the child, A.J.H., was interviewed by a representative of the [...] District Office of the Department of Community Services and of the Halifax Regional Police Service.
7. On February 15, 2000, the child, A.J.H., reported that the Respondent, J.B.H., had rubbed a cream inside her vagina.
8. On February 15, 2000, Constable Jim Williams of the Halifax Regional Police Service determined no criminal charges would be brought as a result of the interview with the child, A.J.H..
9. On February 15, 2000, the child protection involvement with the child, A.J.H., was terminated subsequent to her interview.

10. On February 15, 2000, the Respondent, J.B.H., denied having applied cream to the vagina of the child, A.J.H..
11. In or about February, 2000, the Respondent, D.M.M., took the child, A.J.H. and A.D.J., and hid at a friend's residence for approximately two weeks to prevent the Respondent, J.B.H., contacting the children.
12. On February 29, 2000, the Respondent D.M.M., reported that the child, A.J.H., had further disclosed sexual abuse by the Respondent, J.B.H.. This allegation was not substantiated.
13. On April 14, 2000, a Hearing was held before this Honourable Court with respect to the Application by the Respondent, D.M.M., to terminate the access of the Respondent, J.B.H..
14. On April 14, 2000, this Honourable Court made a referral to the [...] District Office of the Department of Community Services.
15. In or about April or May, 2000, the Respondent, D.M.M. and J.B.H., and the children, A.J.H. and A.D.J., were referred to the IWK-Grace Health Centre, Community Mental Health Services, Assessment Services, for a parental capacity assessment.
16. On June 20, 2000, the Respondent, D.M.M., reported that the child, A.J.H., had made a further disclosure of sexual abuse by the Respondent, J.B.H..
17. On August 17, 2000, the child, A.J.H., reported that, while on a trip to the Province of Prince Edward Island, the Respondent, J.B.H., had touched her vagina. This allegation was not substantiated.
18. On October 11, 2000, the assessment of Suzanne Eakin, Assessment Services, was received.
19. On October 13, 2000, the children, A.J.H. and A.D.J., were placed with C.H., their Aunt, until such time as a proceeding pursuant to the Children and Family Services Act could commence.
20. On October 16, 2000, the Applicant, the Minister of Community Services, made Application pursuant to the Children and Family Services Act with respect to the children, A.J.H. and A.D.J..

21. On October 17, 2000, the initial Hearing in the proceeding herein was held. The children continue to be placed with C.H. on the condition that the Respondent, J.B.H., and his partner, S.T., reside with C.H.. Access for the Respondent, D.M.M., was ordered to be supervised by the Applicant, the Minister of Community Services.
22. On November 9, 2000, the Interim Hearing in the proceeding herein was completed. The children, A.J.H. and A.D.J., were placed in the care and custody of the Respondent, J.B.H., on the condition that he not be alone with the child, A.J.H..
23. In or about November, 2000, Martin Whitzman began providing counselling services for the Respondent, J.B.H., and his partner, S.T..
24. On or about December 6, 2000, the Respondent, D.M.M., was referred to Lise Godbout for counselling.
25. On January 12, 2001, the children, A.J.H. and A.D.J., were found to be in need of protective services pursuant to Section 22(2)(f) of the Children and Family Services Act.
26. In or about March, 2001, the child, A.D.J., was assessed by David Cox, Psychologist.
27. In or about April, 2001, the children, A.J.H. and A.D.J., were referred to Donna Doran for therapy.
28. On April 3, 2001, the Disposition Hearing herein was completed with the children, A.J.H. and A.D.J., remaining in the care and custody of the Respondent, J.B.H..
29. On September 7, 2001, a Review Hearing was held in the proceeding herein at which time the supervision of the access for the Respondent, D.M.M., with the children, A.J.H. and A.D.J., was reduced to partial supervision.
30. In or about September, 2001, the Respondent, D.M.M., and the Respondent, J.B.H., were referred to Martin Whitzman for counselling with respect to parenting of the children, A.J.H. and A.D.J..
31. On or about November 1, 2001, a Review Hearing was held in the proceeding herein at which time the requirement of supervision for the access for the Respondent, D.M.M., was removed.

32. In February, 2002, both the Respondent, D.M.M., and the Respondent, J.B.H., provided access and custody proposals to this Honourable Court, each of which proposed that the respective Respondent would have primary care and custody of the children, A.J.H. and A.D.J..

The proceeding under the Children and Family Services Act was terminated on March 27, 2002 . An Interim Consent Order under the Maintenance and Custody Act placed the children in J.B.H.'s custody. A pre-trial was set for April 9, 2002. D.M.M. was to file a witness list prior to that date.

B. THE APRIL 14, 19 AND MAY 17, 2000 PROCEEDING

Though not referred to in the “Agreed Statement of Facts” in detail, an “interim” variation proceeding was held on April 14, 19 and May 17, 2000 - an application to vary on an interim basis the existing (March 1998) Order made under the (then) Family Maintenance Act. The evidence focussed on allegation(s) of sexual abuse - of A.J.H. by J.B.H..

An assessment (the Eakin Assessment) was ordered and was in process when the application was completed.

Evidence was heard from S.K., M.B., W.R., Dr. Tahira Ahmed, D.M.M., K.H., S.T. and J.B.H.. As well, reports from the IWK Hospital were before the Court.

D.M.M. had denied access to J.B.H..

Police and the child welfare agency had investigated the allegations and found them unsubstantiated. D.M.M. persisted in the belief that “something had occurred”, at one point removing herself and the children from her home to avoid any contact with J.B.H.

I concluded:

With respect to the allegation of sexual abuse, I cannot conclude that an event of sexual abuse has been proven.

Some changes in the Order were made. J.B.H. continued to have unsupervised access - the assessment was in process. Transcripts of evidence from this proceeding were ordered to be prepared and made available to the assessor.

D.M.M.’s views that sexual abuse had occurred had been reinforced by views expressed by Dr. Ahmed. Dr. Ahmed’s opinion indicating abuse had occurred was flawed, not considering some available information (for example the IWK records and the report of Dr. John Anderson), being uninformed of other information and following no balanced process or protocol. The events it was purportedly based on were not adequately recorded (in any way). The issues appeared beyond Dr. Ahmed’s area of expertise.

C. LEGAL PROCEEDINGS SUBSEQUENT TO MARCH 27, 2002

As stated, the proceeding under the Children and Family Services Act was terminated on March 27, 2002 . An Interim Consent Order under the Maintenance and Custody Act placed the children in J.B.H.'s custody. A pre-trial was set for April 9, 2002. D.M.M. was to file a witness list prior to that date.

A series of appearances followed:

1. **April 9, 2002** - D.M.M. was unable to file a witness list. She was directed to file an affidavit setting out the nature of the order she was seeking one week before May 15, 2002. A witness list was (again) requested for that date.
2. **May 15, 2002** - The matter was scheduled for trial for four days (April 21-23, 2003).
3. **June 13, 2002** - J.B.H. had brought an application for child support. D.M.M. was having an operation and would be receiving E. I. benefits until after September 1, 2002. The Court directed that the children be referred to a pediatrician as a result of on-going disagreement regarding their treatment.

4. **September 30, 2002** - Directions were given regarding the identification of exhibits for the trial (to all parties).
5. **December 10, 2002** - Counsel for the Department of Community Services was directed to file a draft exhibit list. Counsel for D.M.M. indicated that she had not been able to meet with D.M.M. to review the documentation that had been filed. D.M.M.' (then) counsel verbally requested that a guardian be appointed for the children. The Court directed her to review her request, provide details to the Court as to how the appointment could be effected (under the Maintenance and Custody Act), and formalize the motion (were it to go forward). D.M.M. was directed to disclose (in an affidavit) her income situation since ending Employment Insurance.
6. **January 22, 2003** - D.M.M.'s counsel indicated she had been unable to secure the information to prepare the affidavit requested. No application with respect to a litigation guardian was made. Trial dates were moved up to April 7, 8, 9, 10 and 11. The Court directed that:
 - (a) D.M.M. was not to have contact with the school or school personnel pending further review;
 - (b) J.B.H. was to cooperate with the Minister of Community Services and make the children available to Dr. Van Houten.

D.M.M. was to file an affidavit by February 21, J.B.H. by February 28, and the Minister by March 5, 2003.

7. **March 6, 2003** - J.B.H. appeared with counsel (for the first time since September of 2001). D.M.M. had changed counsel - Ms. Schoen appearing on her behalf for the first time. Counsel for the Minister filed a witness list. Affidavits had not been filed by the parents as directed. Counsel for the parents were directed to exchange affidavits and witness lists by March 24.
8. **March 27, 2003** - The Court was advised that some witnesses were unavailable for the trial dates. It was agreed that Donna Doran, a therapist the children had seen, would be examined by phone as she now resided out of the country. Ms. Schoen indicated (orally) that she sought a variation in the existing order prior to trial. The request was denied, as no notice of the "motion" was provided to the other parties and the trial dates were imminent.
9. **April 7, 8, 9, 10, 11 and May 6, 2003** - The trial was held. Evidence was heard from Suzanne Eakin, David Cox, Lise Godbout, Donna Doran, Martin Whitzman, A.J., D.C., A.Y., A.B., D.E., K.M., M.H., S.J., G.B., D.M.M., S.T., Constable Stephen Bishop, J.B.H., Dr. Ronald Van Houten, S.B., Dr. Stacey Schwartz and Dr. Tahira Ahmed. Thirty-seven exhibits including lengthy files, records and transcripts were filed.

10. Submissions were received from counsel on June 4 and July 29 (from J.B.H. and the Department of Community Services) and June 13, July 10 and July 29, 2003 (from D.M.M.).

D. THIS PROCEEDING

The matter has been before the Court for years. The original Order under the Maintenance and Custody Act (in its former form) was made March 17, 1998. I conclude that this Order followed conflict between the parents that led D.M.M. to seek a Court Order that defined where the children would be. It placed the children in the custody of D.M.M.. A series of events including the conflict between the parents and allegations of sexual and other abuse, a superceding proceeding under the Children and Family Services Act, and an “interim order” made March 27, 2002 have intervened. The children have been in the physical care of J.B.H. since November 2000. I will treat this proceeding as a variation proceeding, a variation of the March 17, 1998 Order.

The legislation provides:

¹ This Act may be cited as the *Maintenance and Custody Act*. R.S., c. 160, s. 1; 2000, c. 29, s. 2.

...

Maintenance order

⁹ Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s. 4.

Powers of court

10 (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

(2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.

...

Custody

18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

...

(4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the *Guardianship Act*; or

(b) ordered by a court of competent jurisdiction.

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

...

23 (1) An application may be made by a person claiming maintenance on his own behalf or on behalf of his dependent child or dependent parent.

...

32 The court may order maintenance to be paid to the person for whose benefit the payment is ordered, to that person's parent or child, to some other responsible person or to the court. R.S., c. 160, s. 32.

Periodic or lump sum payment

33 A court may order maintenance to be paid periodically or in a lump sum or in a combination thereof. R.S., c. 160, s. 33.

Contents of maintenance order

34 An order for payment of maintenance shall specify

(a) the amount to be paid;

(b) when payment is to be made;

(c) where or to whom payment is to be made;

...

(e) the names and birth dates of the children, if child maintenance is ordered;

...

Powers of court

37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

(2) When making a variation order with respect to child maintenance, the court shall apply Section 10. R.S., c. 160, s. 37; 1997 (2nd Sess.), c. 3, s. 11.

Existing order preserved

56 An order for the payment of maintenance or expenses made under the former *Children of Unmarried Parents Act*, the former *Children's Maintenance Act*, the former *Parents' Maintenance Act* or the former *Wives' and Children's Maintenance Act*, or an order respecting care and custody or access and visiting privileges in relation to a child made under the former *Wives' and Children's Maintenance Act*, shall continue in force according to its terms, and may be enforced, varied, rescinded or suspended in the same manner as an order made pursuant to this Act. R.S., c. 160, s. 56.

The legislation directs (s. 18(5)) that the Court shall apply “the principle that the welfare of the child is the paramount consideration” when dealing with issues of custody/access. I have done so.

Section 37(1) provides that the Court may make an order varying an Order (of support or custody) where there has been “a change in circumstances since the making of the order or the last variation order.”

Here there have been a plethora of changes, including the on-going conflict, sexual abuse allegations, intervening child protection proceeding,

and the change in physical care of the children since the making of the original order. There is no difficulty in saying a change in circumstances has occurred.

E. THE SEXUAL ABUSE ALLEGATIONS

Allegations that J.B.H. had inappropriately touched A.J.H. were made in February and subsequent months of 2000. Donna Doran provided counselling to/for A.J.H. from November 2000 through June of 2002. Her report of March 5, 2002 outlines an explanation for their existence (at pp. 7-8):

...A.J.H. described another poster showing a man touching a child's leg with his hand, as promising the child something and the child pushing him away. A.J.H. stated that the touch was 'bad', and that the child should go tell her father. I specifically asked A.J.H. if anyone had tried to touch her the same way, and she indicated that no one had. I specifically asked A.J.H. if anyone did attempt to touch her in a way that made her feel uncomfortable, such as trying to touch her personal body parts, what would she do. Instead of A.J.H. jumping up and hiding this time, which I expected would happen, she calmly stated that she would run away and tell her father. During this session, A.J.H. disclosed that she had a secret she is scared to tell. Although anxious, she did not run to the box, but appeared genuinely worried. I asked her if she has shared this secret with anyone she knew, and she reflected only one person knows about it, who she did not tell, who is her father. When I asked what the secret was, A.J.H. began to cry, but did not run away and hide, nor restore herself quickly. She stated that she had 'lied' about her father doing 'you know what'. I stated to her that I was not aware of exactly what she was talking about, so she would need to clarify her statement if she wanted me to know the secret.

She stated that she was talking about her father touching her, reporting 'that's why he knows the secret because he didn't touch my privates'. I asked A.J.H. if her mother knew this information, and she stated that she didn't and that she never wants her to know, because she will be 'upset and mad' at A.J.H.. When I stated to A.J.H. that her mother would be most likely happy to know that A.J.H. wasn't hurt, A.J.H. said 'no she won't and don't tell her', 'She thinks it is true'. When I asked A.J.H. why she is now telling me about the secret, she stated that she didn't mean to lie. A.J.H. stated that her mother and other people have asked her many times if her father had touched her, and she lied about it. A.J.H. specifically stated that it started when her mother asked her about it and A.J.H. did not smile, so her mother thought it was true. A.J.H. stated 'that's where I think it started'. A.J.H. stated that she does not have to tell her father because he already knows. A.J.H. using eye contact stated that she told many people a lie. A.J.H. did not receive any positive reinforcement regarding her statements. We continued to work, and she was informed that we could talk about this more the next time she came back to play therapy if she wanted to.

These statements by A.J.H. are hearsay. To be admissible to prove the truth of their content, it must be necessary to secure the evidence in this fashion and there must be a circumstantial guarantee of their reliability. I would conclude that it would not be in A.J.H.'s interests to testify in this proceeding - indeed I would conclude that it would be harmful to her to attempt to do so in any manner. It is "necessary" to receive this hearsay evidence. To be admissible to prove the truth of their content, the statements must also be found to be reliable, to have been made in circumstances that provide a circumstantial guarantee of trustworthiness. Put another way, reliability flows from the circumstances in which the statement is made. A.J.H. has had some statements attributed to her (for e.g., those reported by D.E.'s daughter, supra) that other evidence demonstrates to be unreliable. Are these statements to Ms. Doran (which themselves contradict earlier assertions) reliable? They were made to a therapist who was engaged with A.J.H. for some time. They were given

privately with an apparent expectation of privacy. There is no apparent inducement, reinforcement or pressure to make the statement. A.J.H. appears to have been emotional when giving the statement. The therapist was reporting on these statements. I conclude that they meet the reliability standard for admissibility to prove the truth of their content - that she lied about the sexual abuse, felt/feels pressure to maintain "the lie" and has been asked repeatedly about such events. Reliability in this context, it should be noted, does not refer to the ultimate reliability of the statements.

Once admitted, this evidence must be weighed and considered with the totality of the other evidence.

The conclusion I made May 14, 2000 - that sexual abuse had not been proven - was not re-visited in an evidentiary sense in this proceeding. There was no evidence brought suggesting that this conclusion should be re-visited beyond the indirect suggestions that the Eakin report was wrong, inappropriately influenced Donna Doran, and others.

I have again reviewed those transcripts and considered the issue with the other evidence available to me.

I conclude from the evidence of D.M.M., J.B.H., Suzanne Eakin, the hospital, agency and police records filed, records of A.J.H.'s statements, and the evidence of Donna Doran and her report of A.J.H.'s statements and explanation of these events, that no sexual abuse has been demonstrated to have taken place. In coming to this conclusion I have, as

stated, also reviewed and considered the transcripts of previous stages in this proceeding, and considered the evidence of D.M.M., Dr. Tahira Ahmed, and M.B. from those previous proceedings or appearances, and, where applicable, this proceeding.

It appears that D.M.M. has not completely let go of the belief that sexual abuse occurred. Her evidence suggests that she is struggling with this. Her September 26, 2002 Affidavit suggests that she wants the children to see an independent therapist, that Donna Doran was biased. I cannot agree.

F. THE EAKIN REPORT

Suzanne Eakin is a clinical psychologist who at the time her assessment was completed (October 11, 2000) worked for the IWK Health Centre, Community Mental Health, Assessment Services. She was qualified as an expert witness, as a person able to conduct and prepare psychological and parental capacity assessments. The Order/referral for the assessment was made with the agreement of all parties.

D.M.M.' counsel is critical of the report; asserting that the report is/was biased and that it, unfortunately influenced or was relied upon by subsequent professionals involved in the proceeding.

A number of concerns were raised in D.M.M. submissions and during the cross-examination of Ms. Eakin.

The concerns expressed by D.M.M. or her counsel regarding the Eakin report included (all are not addressed):

- a. the suggestion that there was a lack of emphasis on drug use by J.B.H.. The evidence, including that of J.B.H., indicates that J.B.H. has used drugs. The concerns expressed seem to relate mainly to marijuana use and are expressed primarily in terms of “it is illegal”, “he has a friend(s) who was incarcerated”. While this is of concern, there is little, if any, evidence to indicate that this has impacted upon J.B.H.’s parenting of the children since the date of the original order (March 1998), I cannot conclude that Ms. Eakin was “wrong” in her consideration of the “drug use” issue. It has not, relative to the other concerns involving this family, been demonstrated to impact significantly upon J.B.H.’s parenting.
- b. the suggestion that Ms. Eakin’s description of the home environments of each parent demonstrated bias. I cannot agree. The descriptions appear to reflect for the most part what Ms. Eakin saw or was told. Concern about snacking or treats was referred to in reference to both homes. This part of the report appears to be of limited significance when seen in the context of the whole report, and circumstances.

- c. the suggestion that Ms. Eakin misunderstood the events that predated the March 1998 Order. Ms. Eakin's report makes it clear that a high degree of conflict predated the order and, that each parent had their own version of those events.
- i. Counsel for D.M.M. suggests there "is nothing to substantiate" the assertion by J.B.H. that he contacted Children's Aid in 1997. This proceeding involved the Department of Community Services. J.B.H.'s affidavit of February 2, 1998 (para. 50, 51) asserts that he spoke with Brian Stevens, an intake worker with the Children's Aid Society, on October 24 and October 27, 1997. The C.A.S. file is not available to me.
- ii. Counsel for D.M.M. suggests that the following excerpt from the Eakin report demonstrates bias as there is no substantiation that the "police were involved in the return of the kids".

"D.M.M. reports that in 1997 J.B.H. 'kidnapped' the children and took them to a friend's house down the street and would not return them to her. J.B.H.'s account (underlining added) is that he was so distressed by her physical neglect of the home, emotional abuse of the children...that he removed them from her care for a few days... As D.M.M. was considered the primary caretaker, the children were returned with police assistance."

Ms. Eakin appears to have realized that these were “he said/she said” events. The police were involved that October in visiting the “friend’s” home. It does not appear they “returned the kids”.

I do not conclude that this demonstrates any bias by Ms. Eakin, or any misapprehension of the on-going issues between these parents and children.

- d. the suggestion that Ms. Eakin’s observation time of D.M.M. with the children was limited to one visit of 20-30 minutes demonstrated bias or inadequacy. This is limited time. Ms. Eakin saw J.B.H. with the children on only one occasion also. She had three other interviews with D.M.M. (September 8, 13 and 20); two other with J.B.H. (September 21 and 22). While any consideration of the assessment must consider these limits, they are not indicative of bias in and of itself. I have considered this “limit” in my review of Ms. Eakin’s report.
- e. the suggestion that Ms. Eakin’s treatment of collaterals in the report is, at times, somewhat incomplete, generalized, and/or less than complete. I agree. I have considered this in my consideration of the report’s conclusion and evaluation of the whole of the circumstances before me.

I do not conclude (based on these or the other issues raised) that Ms. Eakin's report was biased. It is less than perfect. I have considered the report in that context. Her observations (in the report included):

re A.J.H. (at p. 57):

A.J.H. is an intelligent little girl who is feeling very triangulated in the on-going conflict between her parents where she has been a central figure, especially in the last year. There may well be some secondary gain to all the attention she is receiving but there is also clearly a 'down side'. She feels loyalties and positive feelings towards both parents but it is clear that she senses that her mother is placing barriers between her and her father. A.J.H. is left in a Catch 22 situation as she likes to see her father but knows this will anger her mother and this has become a chronically stressful and emotionally confusing situation for her. She continues to make occasional references to her father having touched her inappropriately but this emerges in short phrases with no elaboration and with no associated affect and it does not appear to "ring true". It is fully acknowledged that determination of such issues is the mandate of other professionals, who, however, also doubt the validity of the allegations. The many positive comments she makes about her father, her continuing desire to see him, her known capacity to fabricate events for attention-seeking purposes, and perhaps most significantly, her observable state of contentment, affection, and relaxation when in her father's presence also raise reasonable doubts. The present situation is definitely a source of emotional harm to this child and any means of further clarifying whether the allegations are valid or false will be very beneficial to all concerned. She is currently a child who needs therapeutic support in sorting out her feelings.

...

It is also evident that the child has an anxious bond with her mother and is well aware of not only her mother's overreaction to any reports of harm but also her overt feelings of personal antipathy to both the children's father

and his partner S.T., which long predate the current family crisis.

re A.D.J. (at p. 50):

...His [A.D.J.'s] manipulative ploys and negative attention-seeking suggesting a child who is accustomed to having his own way but his level of anger and aggression also suggested a concerning level of emotional disturbance. Attempts were made to engage him, redirect his energies and also to 'sit it out' calmly but when he was responsive to none of these and exhibited more and more emotional and behavioural dyscontrol, it was decided to contact his mother and ask that she return to pick him up at an earlier time than planned. The phone call to his mother precipitated a full blown temper tantrum with the child yelling at me to phone his mother back NOW as he anticipated that she would ground him to his room for an extended period and he wanted to avoid this. His very loud and aggressive manner of speech and derogatory tone suggested a youngster with little experience of appropriate adult/child boundaries. Another attempt to proceed with the assessment was made on the mother's return and her partner G.B. accompanied the child to the testing room but the child remained uncooperative. He did, however, offer to show me how he could write his name, as if feeling somewhat contrite about his previous outburst. A further assessment appointment was not scheduled as it was felt that the child was experiencing enough stress and had already undergone far too many professional assessments as it was, so collateral impressions were sought from school personnel and mental health professionals to gain a better sense of the child's current functioning...

Ms. Eakin was very critical of D.M.M.' parenting (at p. 58):

...The psycho-social history on D.M.M. revealed that this woman experienced a highly traumatic childhood marked by chronic chaos, family violence, a mentally ill mother, extreme domestic violence perpetrated by her mother's partners and extensive personal experiences of sexual, emotional and

physical abuse. She was raised with a mother who was emotionally volatile and over-reactive, highly psychosomatic, unpredictably violent... Many of the behaviour patterns and emotional difficulties in D.M.M.'s current functioning appear to arise from these very negative experiences in her family of origin. She exhibits many of the characteristics of those who have sustained chronic childhood trauma - hypervigilance (extreme sensitivity to potential abuse of herself, of her loved ones or anything that "triggers" memories of past trauma), poor regulation of affect (difficulty calming herself down once emotionally distraught), impulsivity...histrionic attention seeking behaviour...somatic preoccupations...and chronic anxiety.

Ms. Eakin, in describing the impact of this on D.M.M.' parenting, observes (pp. 59-60) :

...Concerns about D.M.M.'s parenting are much broader than her mishandling of the sexual abuse allegations. She models very histrionic, manipulative behaviour which A.J.H. in particular is starting to emulate. She provides little predictability in the children's lives as she is impulsive, disorganized, and tends to live moment to moment... She confounds manipulation and misbehaviour with emotional distress and is prone to reinforce, rather than extinguish, negative behaviours in her children... She provides poor adult/child boundaries which affects the children's ability to relate appropriately to other authority figures and overburdens them with adult concerns. She models intrusive manipulative social interactions and encourages her children to discuss personal matters with non-family members...

Ms. Eakin had concerns about J.B.H. - his involvement in this highly conflictual relationship, drug use and debt load, amongst them. It is clear, however, that Ms. Eakin regarded J.B.H. as being the more emotionally stable parent.

Ms. Eakin concluded (from her limited observations) that the children were calmer and more well mannered in the care of their father, that he provided a more stable, predictable environment with appropriate adult-child boundaries. Ms. Eakin felt they were more verbally aggressive, non-compliant, stressed and agitated in D.M.M.' care. She felt for D.M.M., over-reaction emotionally, interfered with her ability to parent effectively.

The report recommended that the children be removed from D.M.M.' care. They were placed with a paternal aunt initially (October 13), then, by consent, with J.B.H. on November 9, 2000.

Finally, it must be noted that Ms. Eakin's report was more than two years old at the time of this hearing. I have been cognizant of this in considering it and the other the evidence before me.

G. THE AGENCY INTERVENTION

The child welfare proceeding commenced October 16, 2000 - after the receipt of the Eakin Report, and resulted in a number of services being provided to the family (from 2001 on). They included:

- parenting skills and counselling for J.B.H. and his partner, S.T. (with Martin Whitzman);
- individual counselling for D.M.M. (with Lise Godbout);
- counselling for the children (with Donna Doran);

- psychological assessment of A.D.J. (with David Cox);
- counselling for D.M.M. and J.B.H. with respect to access/visitation (with Martin Whitzman);
- counselling with Dr. Ron Van Houten (for, potentially, all).

1. Mr. Whitzman saw J.B.H. and S.T. with respect to parenting support from January 2001 to March 2001. He saw D.M.M. and J.B.H. from September 2001 to mid-January 2002.

Mr. Whitzman indicated in his report of January 4, 2001 that:

On December 22, I had the opportunity of seeing J.B.H. and S.T. with their children. The children interacted well with the adults with only minor, typical behaviours exhibited. A.D.J. was somewhat active but his father kept a good watch on his behaviour and managed the situation well. No concerns were noted....

In a later report (March 20, 2001), he stated "J.B.H. and S.T.'s parenting style has worked with few exceptions". Things were going relatively well then.

Mr. Whitzman was unequivocal, however, in indicating that J.B.H. and D.M.M. have a problematic communication style. He described them when returning for counselling as "returning for more punishment".

His efforts were to assist them in finding an enduring custody/access arrangement. His report of January 16, 2002 concludes:

D.M.M. is not comfortable as an access parent and believes that the children would be best cared for in her custody. It appears as though the remaining issue of custody will have to be decided by a Judge.

Overall, Mr. Whitzman's evidence indicates that J.B.H. and D.M.M. had a volatile, unhealthy communication pattern, each wanting custody of their two children. The children had been and were in the middle.

Mr. Whitzman's evidence indicated that S.T. and J.B.H. provided the children with adequate care.

Mr. Whitzman felt that the children were not accurate reporters (to either parent) of events that were said to occur while in the care of the other (parent).

2. Lise Godbout, a psychologist, provided individual counselling to D.M.M. from approximately December 2000 to the spring of 2002. D.M.M. was diagnosed as having Attention Deficit Hyperactivity Disorder and Mood Disorder during this time. D.M.M. felt that the agency was unfair - that she was held in a higher standard of care than J.B.H.. Ms. H. felt the Eakin report was "a piece of garbage". Ms. Godbout, like others, described the children as being caught in

the middle of unhealthy parental conflict. She indicated that while D.M.M. had made progress, she had triggers that would make her more argumentative (especially in the area of safety of the children). Ms. Godbout felt that D.M.M. would become more defensive without on-going support or counselling.

Ms. Godbout felt D.M.M. was motivated to address her problems. Ms. Godbout had concerns (regarding D.M.M.), which were expressed:

(a) in her January 11, 2002 report:

Her vulnerabilities continue to lie within her struggle of not having the children in her day to day care, and in her lack of confidence that the children's day to day needs will be met in the future, and that access contact will be maintained once the Agency's involvement ceases. When D.M.M. is triggered, her response can at times be somewhat compromised by her impulsivity, and factors related to her early childhood history.

(b) in her April 7, 2002 report:

Throughout the therapeutic relationship D.M.M. has remained engaged in the therapeutic process, worked diligently and permitted a great deal of education and challenging as required. Until most recently, she has been able to demonstrate flexibility and greater levels of openness than noted before the Agency's involvement... Her progress was noted to be quite consistent, although she tended to return to old patterns of communication when she felt mistreated or afraid that her relationship with the children

would not be permitted to progress or was at risk of remaining stagnate. She would also regress in moments of pain or embarrassment, such as when the children's stepmother reportedly undermined D.M.M.'s position or was indiscreet. Once calmed, D.M.M. was able to use these incidents to increase her self-awareness to a certain degree.... D.M.M. was very wounded by the contents of the Assessment Services report and continues to carry the sting of this experience into her future. Additionally, she has been unable to shake the perception that she has been discriminated against because of her disability, that is, her Mood Disorder and Attention Deficit Disorder. And finally, she has returned to her perception that the children's father will return to her earlier patterns of interaction with her once the Agency is no longer involved with this family... She fears this controlling nature will be what she is left to cope with once the Agency withdraws its involvement. She fears the implications of the imbalance of parental influence should J.B.H. receive sole custody... She has noted that, with the support of therapy, she is able to settle more readily, face challenges and stress in a healthier manner, can emotionally process her fear and hurt in a more effective manner, can discuss issues with greater clarity, and she can take the time to determine a more appropriate course of action. She reports no current impact of her earlier childhood history on her current day to day life other than her vulnerability to perceptions of being betrayed... D.M.M. is an ideal candidate for supportive therapy for early childhood trauma... Finally, it is important to mention the children who are caught in the middle of this unfortunate and destructive dispute. I have not read the children's therapist's most recent report. I can only assume that it continues to confirm that the children have settled in their current placement and that no outstanding therapeutic issues remain.

3. David Cox, a psychologist, saw A.D.J. on March 16, 2001. A.D.J. was almost 7, he was living with his father. Mr. Cox found A.D.J. to be a difficult child who presented with two concerns:

- a. oppositional, defiant behaviour- testing of adult requests, limits, rules. He felt A.D.J. was in need of very clear behavioural limits and at risk of developing a serious behaviour disorder.
 - b. his behaviour was “suggestive of” Attention Deficit Hyperactivity Disorder. Mr. Cox saw A.D.J. two years before the trial dates. He felt that if A.D.J.’s problems were not continuing it would reflect well on the care he was arranging.

4. Donna Doran provided counselling to the children, A.J.H. and A.D.J., from November 2000 until July 2002. I have referred to portions of Ms. Doran’s work in reference to the sexual abuse allegations. Ms. Doran felt it important that the access be very structured. While acknowledging that A.J.H. was loyal to her mother, at times saying she wished to live with her, Ms. Doran’s opinion was that both children should reside with their father, that predictability and reduction in the chronic conflict between the parents was important. She suggested that controlling the parents’ problems and conflict would go a long way towards assisting the children’s adjustment. She observed that while D.M.M. was in individual therapy there were no or reduced allegations concerning abuse or care of the children and that allegations were again more frequent after D.M.M.’ individual therapy with Ms. Godbout had terminated. Ms. Doran indicated that A.J.H. would, in the face of conflict between her parents, be prone to fabricate allegations to attempt to gain control of her own, A.J.H.’s , life. Ms. Doran indicated that both these children would be difficult to

parent. At the conclusion of her involvement, Ms. Doran stated, regarding:

a. A.D.J. (June 10, 2002 report):

...The last update, March 23rd, 2001, indicated that A.D.J. was no longer attending play therapy sessions. This has since been the case for A.D.J.. Although A.D.J. continues to present with challenging behaviours, he has been coping quite well. In checking with the school, it was reported that A.D.J. continued to do very well. He has demonstrated a marked improvement since the beginning of the year. His teacher also pointed out that he continues to progress, having made improvements since Christmas. The only concern which the teacher reflected was that A.D.J.'s behaviours after weekend visits with his mother were challenging and it usually takes a day or two to have him settle back into the routine of the classroom. There have been no concerns reported by D.M.M. to the undersigned over the past few months, regarding the children's behaviours during access visits. J.B.H. has reported that although A.D.J. continues to test limits, he is doing quite well both at home and at school. He has also spoke of difficult times getting A.D.J. to settle subsequent to access visits, however it is unusual for children to take a day to settle after having access with a parent for an entire weekend. It would appear that all parties are handling his behaviours, as no one is stating that A.D.J. is unmanageable or out of control. I have not observed A.D.J. since March 1st, 2002.

b. A.J.H. (June 10, 2002 report):

A.J.H. has over the past two months presented as happy and content. She is doing much better in school according to her teacher. Although homework was a concern, the teacher has reported most recently that this appears to have improved. A.J.H.'s teacher has stated that A.J.H. presents as a very different child than from the beginning of the year, with more self esteem, less anxiety and a better understanding of her own responsibilities. There continues to be concerns with respect to her organizational skills, and the effective use of time, however the teacher has reported progress in this area as well. A.J.H.'s teacher's only concern was that A.J.H. can be difficult to manage after weekend access visits with her mother, however the teacher appears to be quite understanding of the situation and A.J.H.'s behaviours are handled effectively. A.J.H.'s teacher also spoke of how proud and happy the school has been of A.J.H. being able to demonstrate the ability to perform a solo during a school concert and for the family to have been so supportive of her in their attendance.

Ms. Doran then recommended the termination of her involvement and a referral of the Applicant and the Respondent to Dr. Van Houten for instruction with respect to the parenting of children with Attention Deficit Hyperactivity Disorder (ADHD).

Ms. Doran later indicated (in a November 25, 2002 report prepared after her involvement but when parental conflict was again arising and the Department of Community Services had queried her regarding the appropriateness of A.J.H. and A.D.J. re-entering therapy) that the children needed structured, predictable, clear

messages about where they would live, D.M.M. should follow through with individual therapy, it was unlikely the parental conflict would resolve or dissipate, that J.B.H., S.T. and D.M.M. should continue/re-engage contact with Dr. Van Houten, and that the children should not be pathologized, made to seem to be the problem by being put into further therapy.

5. Dr. Ron Van Houten

Dr. Van Houten is a psychologist. He became involved with the family in the fall of 2002. He has seen A.D.J. and A.J.H. - and has been prepared to see both parents to assist them with the “management” of their children.

He felt A.D.J. was “borderline” ADD. In his view, A.D.J. was doing acceptably well in school in the fall of 2002. A.D.J. was one year behind academically. Dr. Van Houten recommended a behaviour management strategy for parenting A.D.J. that emphasized consistency and clear expectations.

Dr. Van Houten did not feel A.J.H. had ADD. She was reading at grade level, was behind in math and had difficulty organizing herself (as was seen in her homework completion record).

D.M.M. cancelled her first two appointments with Dr. Van Houten. He first met her November 27, 2002 (and on one other occasion). He

found her to be focussed on J.B.H. and his shortcomings, not the children.

In relative terms, J.B.H. attended regularly. Dr. Van Houten felt that J.B.H. was more, focussed on the children (than D.M.M.). Dr. Van Houten is “coaching” J.B.H.’s parenting of the children.

Dr. Van Houten was “drawn into” checking out the allegations of physical abuse by S.T. on A.J.H. in January and February of 2003. He did not conclude that abuse occurred.

Like others, Dr. Van Houten found that many of A.J.H.’s allegations and comments with respect to her father and S.T. were inconsistent, exaggerated, and prone to be more negative after contact with her mother.

H. [...] SCHOOL (2002-2003)

A.B., the Vice-Principal of [...] School, and A.Y., A.J.H.’s Grade 5 teacher, both testified. Both children attended this school in 2002-2003.

A.Y. indicated that A.J.H. had difficulty getting organized. She did not reliably complete homework. In November, December of 2002 less than 20-25% of A.J.H.’s homework sheets were completed. From January on

this improved to the 50% range. About 5 of the 25 children in the class had similar homework records. J.B.H. was perceived as being supportive of the school's efforts. A.B. had nothing negative to say of J.B.H.'s efforts. A.Y. felt A.J.H. had difficulties with motivation. A.J.H. would speak of having ADHD and of this being why she could not complete homework. Overall A.Y. felt A.J.H. was doing "fine" and that the H./T. household was "doing the best they can".

A.B. was the Vice-Principal of the school. Beginning in mid-late October of 2002, D.M.M. began calling the school. Multiple calls were made, often more than one a day. D.M.M.' personal boundaries were less than rigid. The calls asked that A.B. intervene - and asserted that A.J.H. was not in a safe environment, that A.B. should talk to A.J.H.. A.B. recorded calls having been made November 12, 21, 28, December 3, 10, 12, 19, 20, January 7 - I would conclude that there were a number of other calls made, and that on many days D.M.M. called more than once. On November 28 A.J.H. told A.B. "Mom said A.B. has control over where I live..." On another occasion, A.J.H. reported that "S.T. will sleep with anyone". On December 19, 2002 A.B. met with A.J.H. and D.M.M. - part of the conversation consisted of this exchange:

D.M.M.: Tell the truth...
A.J.H.: I want to go home with Mom...

D.M.M. on occasion would say "A.J.H. wants to talk to you". On January 13 A D.E. reported that her daughter said that A.J.H. had said that

she (A.J.H.) had been “beaten” by S.T. (J.B.H.’s partner). A.J.H. was called to the office on January 14. I conclude that there was no evidence, bruising or indication of a “beating”. D.M.M. called the police about these events on January 15, 2003. D.M.M. reported to the police that A.J.H. had spoken to A.B., that A.J.H. was physically abused by S.T. - there was a pushing incident and A.J.H. had a small bruise from it. The events of January 13, 14 and 15, 2003 are somewhat confusing - the allegations were fluid in their content. The police investigated, spoke to A.B.. J.B.H. declined a request to have A.J.H. interviewed. The police file concluded that it was “undetermined” whether an assault took place. Through this time period, A.B. saw both children. She felt, at times, they had been “coached”.

In mid-January J.B.H. directed that the school should not interview the children without his permission. On January 22, this Court directed that D.M.M. have no further contact with the school or school personnel. A chaotic time at the school (for the children) seems to have since normalized.

D.M.M.’ contact with the school through this period was inappropriately disruptive and unhealthy for the children.

I. THE OTHER WITNESSES

1. D.E.

D.E. referred to an incident “over a year ago” (i.e. prior to April 2002) when she overheard S.T. yelling at A.J.H.. As reported by D.E., the incident is of concern.

D.E. also said her daughter (J.) told her (D.E.) that A.J.H. said her step-mom is “punching and kicking me. I have bruises all over my legs”. D.E. contacted the school. A.J.H. was examined at the school. One small bruise was found. These were the events of mid-January 2003 referred to by A.B..

2. K.M.

K.M. is a “friend” of D.M.M.. She had read a number of the professional reports in this proceeding. She appears to have participated in 2-3 events where the children were allowed if not encouraged by D.M.M. to resist going home with J.B.H. after visits. She lied to J.B.H. about D.M.M. being home on one occasion. I am left with the impression that K.M. and D.M.M. believe that A.J.H. was sexually abused by her father. K.M. met D.M.M. in October 2002. I did not find her evidence to be credible. Her presence during access visits by D.M.M. exacerbates the problems and is not consistent with the welfare of the children.

3. M.H.

M.H. has been a friend of D.M.M. for 4-5 years. On February 16, 2003 she was called, invited to dinner at D.M.M.. She went - A.J.H. reported that she had called the police regarding S.T.. A.J.H. was there for an access visit. D.M.M. was very upset.

4. Stephen Bishop

Mr. Bishop is a [...] policeman. He was called to D.M.M.' home on February 2, 2003. D.M.M. said A.J.H. had made statements to A.B. at school. A.J.H. called S.T. "a bitch", said S.T. slaps them. A.D.J. said there was no physical abuse, but S.T. yelled at them. D.M.M., his evidence and notes indicate, was emotionally upset, distraught. D.M.M. seemed to be "almost coaching her, egging her on to say things" (re A.J.H.). J.B.H. was there to pick up the kids. He was "more than cooperative". A.J.H. ran at one point and was chased by Mr. Bishop and J.B.H.. Eventually she went to J.B.H.'s car calmly. A.J.H. asked him to be a witness. Mr. Bishop had no concerns regarding the safety of the children with J.B.H.. Before leaving, Mr. Bishop gave D.M.M. the Community Services phone number - she threw down the note with the number and said words to the effect "fuck them". Forty minutes after he left D.M.M. called him to clarify, ensure he knew that A.J.H. had made the call to the police.

5. S.J.

S.J. has known D.M.M. since 1995. She had reported D.M.M. to Children's Aid on May 9, 1996 - saying it appears that D.M.M.' home was a mess. S.J. had difficulty recalling this. She described D.M.M. as "frustrated", she (D.M.M.) "wants to get her kids back". S.J. is of the view that D.M.M. cannot let go of the belief that A.J.H. was sexually abused.

6. S.B.

S.B. is an acquaintance of D.M.M.. She is a taxi driver who drove D.M.M. on occasion to pick up the children. They had to wait up to 20 minutes for the children to come out of J.B.H.'s home. S.B. heard A.J.H. say that her step-mother hit her.

J. THE OTHER PROFESSIONALS

1. Dr. Stacey Schwartz

Dr. Schwartz is a pediatrician. He saw both children in the fall of 2000 and again in November of 2002. A.J.H. was appropriate in his office, not overly active. He prescribed no medication for her. A.D.J., in the fall of 2002, had some behaviour issues, temper issues, was "behind in math". He had no recommendations regarding A.D.J. in

2002. Dr. Schwartz had seen him in 2000 - at that time it was felt an ADHD diagnosis was warranted and A.D.J. was placed on a Ritalin trial - D.M.M. had insisted on this rather than a placebo trial, which was apparently Dr. Schwartz's preferred course. The doctor indicated ADHD is a "soft diagnosis", "there is no lab test for it". There are, he indicated, different ways to treat ADHD. There was no indication, in his view, that these children were being improperly treated by Dr. Van Houten.

2. Dr. Tahira Ahmed

Dr. Ahmed is a family physician. She has treated D.M.M. for some time. She indicated that she had treated D.M.M. for a major mood disorder, a bi-polar mood disorder, since August of 200, with a variety of medications. She described D.M.M. as bright, very disorganized, very impulsive. She said D.M.M. was at times despondent over not having her children, that she "won't let it go". D.M.M. has insomnia. She has adult ADHD. She suffers from chronic pain and is "on disability" as a result of this. Dr. Ahmed's evidence makes it clear that D.M.M. suffers from a number of medical conditions that impact, or potentially impact, upon her interactions with others.

K. THE PARENTS

I do not intend to review the lengthy history, actions, allegations, events from either parent's point of view.

D.M.M. is partnered with G.B.. He is in [...] and is away for substantial blocks of time. It is evident that when he is present he is a stabilizing force. Few, if any, of the crises have occurred when he is home. He was away for most of the winter of 2002-2003.

I would also conclude that D.M.M. had more control, she was less a source of instability to the children when she was being counselled by Lise Godbout.

D.M.M. testified. She denied telling A.J.H. that "S.T. will sleep with anyone", but said "she might have overheard me...". This is not atypical of D.M.M.' tendency to re-interpret events to diminish her responsibility for her actions or their consequences.

D.M.M. has real difficulty with boundaries of behaviour - recent examples of that include the persistent calls to the school from November to January past, and asking Dr. Van Houten if K.M. could come to therapy with her.

D.M.M. indicated she is not working. She is on a disability benefit or pension with severe chronic pain.

"In her heart" she is unable to let go of the sexual abuse allegations.

Her last affidavit is dated March 6, 2003. She states at paragraphs 46 and 47:

46. I understand that while dealing with these recent allegations of physical abuse by S.T., I may have been, at times, over zealous in an attempt to look out for the better welfare of the children. It is increasingly difficult to maintain hope and confidence that A.D.J. and A.J.H.'s needs are being addressed due to inaction of many people in this case. It is also difficult to determine the severity of the abuse report by A.J.H.. I do, however, verily believe that the children are very unhappy with the care provided by J.B.H. and especially his partner, S.T..
47. It is my belief that the Intervenor, Minister of Community Services, suggests these new allegations are due to conflict created by me. I acknowledge being very distressed by reports of abuse which have been alleged both by the children and third parties. It is frustrating from my perspective, that the allegations are being summarily dismissed. There is no doubt I have directed my frustration to the Agency. However, it is my hope that my actions, which may perhaps be viewed as overzealous, do not prohibit this Honourable Court from seriously examining J.B.H.'s actions as well as my own.

D.M.M. proposes that she be the custodial parent and that J.B.H. have two weekends per month access, half of the summer months, shared special occasions and daily telephone access. She proposes that he have access to education and health professionals working with the children but that she be the decision-maker. She seeks child support. If she is the access parent she would want to be at least a co-decision-maker on health and education issues. Her whole proposal is conditional upon J.B.H. having an assessment at drug dependency and his following their recommendation and S.T., J.B.H.'s partner, having counselling and anger management therapy.

S.T. has lived with J.B.H. since 1998. She described their relationship as stable and long term. She says her relationship with A.J.H. is “complicated”. She has yelled, thrown a hair brush. She has gone to a variety of counsellors, and on school field trips. A.J.H. has, at times, expressed dissatisfaction with her relationship with S.T.. I cannot conclude that S.T. is a “bad” step-mother. She has had difficulty at times.

J.B.H. has, while fielding and dealing with a myriad of allegations over the last few years maintained his employment (with a carnival), gone to a variety of different kinds of counselling, assessments and provided a relatively stable home for his children.

J.B.H.’s proposal is that he have primary care and control of the children, be the decision-maker regarding medical, education and that D.M.M. have access each second weekend. He essentially proposes sharing special occasions except Thanksgiving which he wants to allow the children to go to a family celebration. Significantly, he asks for the authority to cancel or suspend access. He asks for child support. Were he the access parent, he seeks an order similar to the original order - which provided for “generous and liberal access”.

L. THE CUSTODY DECISION

The statute directs that the welfare of the children is paramount. The evidence indicates that the children care for both parents. There is some indication that A.J.H. has from time to time expressed a preference to live with her mother. I have given this serious consideration but also considered the fact that A.J.H. has, on more than one occasion, been unreliable in making statements and allegations. She and A.D.J. have been caught in a vortex of conflict and pulled by their mother towards her.

D.M.M.'s message to the children (and others) has not been simply that "you would be better with me" - rather it has consistently been that "you are inadequately cared for and abused in your father's home". The "wishes" have been expressed in this context, not one that shows any sign of independent, uninfluenced, reasoned decision-making.

I have considered the children's circumstances as described by the evidence. They have been caught in the middle of their parents conflict.

The whole of the evidence indicates that D.M.M. is, as her doctor, Dr. Ahmed, stated, "bright, very disorganized, very impulsive". Most of the professionals involved have identified analogous or similar concerns with her actions, behaviours. She is fearful, and acts out those fears. She repeatedly interprets what happens through these fears, and often projects her fears onto the children. She has at times very little ability to recognize behavioural boundaries - involving the children, neighbours and friends, the school and police inappropriately with concerns and fears that have often been exaggerated. To use the phrase D.M.M. used in her affidavit, she is

“at times, over zealous in an attempt to look out for the better welfare of her children”. I would conclude that she is well intentioned, but that her many medical and health conditions, including mood disorder, chronic pain and adult ADHD, have contributed to the difficulties D.M.M. has experienced personally and visited upon others. D.M.M. also suffers from a tragic personal history which appears to have impacted upon and compromised her interpersonal relations. In spite of these challenges, D.M.M. has demonstrated that she is capable of responding well to reasonable supports (whether once engaged in counselling, as with Lise Godbout, or through the “in person” support of G.B.). Her former therapist (Lise Godbout) has indicated that D.M.M. could benefit from counselling concerning her past. The on-going presence of such supports would assist her. She was not, at the time of the trial, engaged in a counselling program that could “see her through” G.B.’s absences from the home.

However well intentioned, D.M.M.’ actions, accusations, exaggeration of events and heightened emotionality have created on-going turmoil, confusion and crisis for her, J.B.H. and the children.

She is fixed in her concerns - sexual abuse, drinking and/or drug use by J.B.H., physical abuse by S.T. that have not, in repeated hearings, been borne out by the evidence. I would conclude that in the absence of on-going counselling or G.B.’s “in person support”, that she is almost incapable of on-going reasonable communication with J.B.H..

The evidence is consistent in indicating that J.B.H. and S.T. have provided relatively stable, but less than ideal parenting since the fall of 2000. They have been able to cooperate with the school and counsellors. They have been patient. They are parenting two children who need support educationally, not disruption, who have been emotionally battered by parental conflict over a period of years. There are concerns within their home - reports of yelling, pushing; the "homework" issue amongst them.

This is not a situation where one custodial option is ideal, the other not. The evidence indicates, however, that J.B.H. and S.T., however imperfect in their parenting, are at this time able to provide these children with more stability, consistency and appropriate support (to the children personally and on their behalf with school, medical professionals and counsellors), than D.M.M. (even with the support of G.B., when present).

I conclude that the changes, events and occurrences of the past number of years and current circumstances make it clear that it is in the best interests of these children to be in the custody of their father, J.B.H.. The situation desperately needs to be controlled.

The order will provide that:

- (a) J.B.H. have sole custody of both children.
- (b) J.B.H. be the final decision-maker regarding their health, medical and educational welfare. D.M.M. is to have no contact with the school, or

health providers of the children except with the express permission of J.B.H.. J.B.H. will provide her with information related to the education and health care of the children on a timely basis, and attempt to consult with D.M.M. prior to making significant decisions regarding the education and health care of the children.

- (c) D.M.M. shall have access to the children:
- (i) each second weekend from 6:00 p.m. Friday to 6:00 p.m. Sunday and the “off weekend” Friday from 4:00 p.m. to 8:00 p.m., it being understood that such access would not include:
 - Thanksgiving weekend;
 - J.B.H.’s birthday ([...]);
 - Father’s Day;
 - other holidays, occasions dealt with herein.
 - (ii) D.M.M.’ birthday;
 - (iii) G.B.’s birthday, if he is present;
 - (iv) Mother’s Day;
 - (v) one-half of March Break (attached to her weekend);
 - (vi) Christmas Eve 2:00 p.m. until 2:00 p.m. Christmas Day, the children to be with J.B.H. from, at least, December 25 at 2:00 p.m. until December 27 at 10:00 a.m.;
 - (vii) alternating New Year’s Eve (December 31, 2003 with J.B.H.);
 - (viii) alternating Easter weekend (2004 with J.B.H.);

- (ix) two weeks each summer month (to be designated by May 1 by D.M.M. in writing to J.B.H.);
- (x) other access agreed to by J.B.H..

These children have been caught in the middle of parental conflict for an inordinate amount of time. The order will provide that J.B.H. may suspend the above access at his discretion for a period of up to one month provided he immediately advises D.M.M. and the Department of Community Services in writing of the reasons for doing so and the alternative access he is proposing. D.M.M. would be at liberty to apply to the Court to alter the suspension, its “terms”, or the Order. If the conflict between these parents persists there must be some mechanism for the custodial parent to provide these children with a “time out” from the conflict. There are limits on the Court’s ability to manage conflict between parents. These children should not be subjected to repeated “emergency” contacts with teachers, police, doctors, etc. should D.M.M. revisit in the kind of behaviours that occurred in and around the school in the winter of 2002-2003 and in the spring of 2000 regarding the sexual abuse allegations. I recognize that giving J.B.H. the authority to suspend access is unusual. It is, however, providing some structure to what many custodial parents (including D.M.M. in the spring of 2000) assume they have the authority to do. Explicitly dealing with this issue, providing that authority, and some structure to it, is in the interests of the children here. If D.M.M. has child welfare concerns, they should be made known to the child welfare agency.

I would strongly recommend, though I cannot order it, that the Department of Community Services make every attempt to ensure that J.B.H., S.T. and the children have the support of Dr. Van Houten as a counselling resource for at least the next year - and that attempts be made to have individual counselling (such as that recommended by Lise Godbout) made available to D.M.M. on an on-going basis. There is no doubt that both parents and children would benefit from such interventions.

I would also strongly recommend, but cannot order, that the Department of Community Services maintain this as an “open file”, and establish some sort of regular (perhaps monthly) contact with the family, especially the children. If the Department of Community Services keeps the file “open”, I would require that J.B.H. consult with them before any suspension of access.

K.M., the evidence indicates, has contributed to this conflict between the parents. There is no reason for her to have contact with these children. The Order will contain a condition providing that she have no contact with the children during D.M.M.’ periods of access.

J.B.H. will give ninety days’ notice of any intention to relocate outside Halifax. Neither parent shall remove the children from the Maritime provinces (N.S., N.B., P.E.I.) without the written consent of the other.

M. CHILD SUPPORT

D.M.M. states she earns \$12,492.00 annually from her disability payments. The Guideline Table amount for two children for this amount is \$187.00 per month. The Order will provide that she pay this amount in child support to J.B.H. commencing the last day of the month the trial commenced (April 30, 2003) and on the last day of each month thereafter until further order of the Court. The payments will be made through the Director of Maintenance Enforcement. I am not satisfied that the karate lessons are properly treated as s. 7 expenses. There will be no s. 7 order.

J. S. C. (F. D.)

Halifax, Nova Scotia