SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Salah v. Salah, 2013 NSSC 308

Date: 2013-06-13
Docket:1201-062188
Registry: Halifax

Between:

David Joseph Salah

Applicant

v.

Melissa Ann (Reid) Salah

Respondent

Judge:	The Honourable Justice Carole Beaton
Heard:	June 10-13, 2013, in Halifax, Nova Scotia
Oral Decision:	June 13, 2013
Counsel:	LouAnn Chaisson, Q.C. for the Applicant Melissa Salah, Respondent

By the Court:

[1] This is an oral decision in the matter of Salah and Salah. And, as I indicated to the parties yesterday, yes, yesterday, I would endeavour to provide an oral decision this afternoon but oral decisions, by their nature, don't have the tidy flow that we at least endeavour to inject into written decisions. So, if there are pauses while I move around among my papers, I would ask you to bear with me.

[2] The matter is before the Court this afternoon on the question of a variation of access and/or custody, pursuant to Section 17 of the *Divorce Act*. Mr. Salah, as the Applicant, seeks to vary the order of this court that was made by Justice Campbell in May 2011. In that order, custody of the child, Joseph David Salah, whose date of birth is May 22, 2006, was granted to Mr. Salah.

[3] Specifically, Mr. Salah seeks to have the lengthy and detailed access provisions set out in paragraph six of the Partial Corollary Relief Judgement Order "adjusted so as to minimize the impact" upon Joseph of certain lifestyle decisions the Applicant asserts have been made by the Respondent since the last order was put into place. The Applicant says this may be accomplished by implementing a regime of supervised access for Ms. Salah for a period of time, followed by a later review to be conducted by the Court.

[4] The Respondent, Melissa Salah, opposes the Application and in response to the same, she has made an Application and seeks to have the Court reject Mr. Salah's request, and, instead, in view of the ongoing problems between the parents that this particular litigation has illustrated, Ms. Salah argues that the best interests of Joseph are served by having a more equal sharing of the parenting time.

[5] Specifically, Ms. Salah seeks a custodial designation with a 60 percent... pardon me, with 60 percent of the parenting time with her, a condition that Joseph not be in the company of Mr. Salah's sister, Pilar Salah, without supervision and provision for the preparation of a psychological assessment of Joseph.

[6] The following provisions of the Divorce Act guide the Court in coming to a determination on the matter. Those are as follows, and I quote:

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

[7] This case, as I believe I observed yesterday, has been filled with a tension between the parties that is palpable both in the evidence and in the courtroom during the hearing. The accusations levelled by each parent against the other are, on the whole, very, very dramatic, intense, and, by times, bordering on the scurrilous and/or the salacious. The whole of the body of evidence before me paints a vivid picture for the Court of a seven year old boy who is growing up with parents who are continually locked in a war waged in Joseph's name. This is surely one of those "high conflict cases" as that moniker has unfortunately come to be more and more frequently used in the legal and social sciences literature, and in reported case law across this country.

[8] If there was any room for sympathy in the Court's assessment of the evidence, which there is not, but if there was, surely that sympathy would go to young Joseph who any reasonable observer might well assume is very likely a

victim of the ongoing acrimony, hostility, and one-upmanship demonstrated by his parents toward one another.

[9] The evidence filed in the hearing was voluminous, augmented by two-and-a-half days of *viva voce* evidence from a number of people, including various members of extended family, Joseph's teacher and school principal, Ms. Salah's therapist, and several other parties with no apparent professional or familial interest in the matter.

[10] The burden rests on the Applicant, Mr. Salah, to establish on a balance of probabilities that there has been a change in circumstances since the making of the last order and that the change to that order which he seeks is therefore warranted. The burden rests with the Respondent, Ms. Salah in turn, to establish on a balance of probabilities that any change in circumstances the Court might find to exist warrants the changes to the order that she advocates.

[11] The thrust of the Applicant's case is that there are a number of distinct areas of concern regarding lifestyle choices made by or events involving the Respondent since the making of the last Order, demonstrating the Respondent has moved even further away from the child-centric focus she was urged to take when the last Order was made.

[12] Just briefly, those areas of concern relate to:

> (a) The Respondent's involvement in two abusive romantic relationships, with one of those partners at an earlier time reported by the Respondent to be a cocaine addict and alcoholic with whom she permitted Joseph to be engaged;
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> (b) The Respondent’s move to New Brunswick in 2011 and a concurrent request for an altered parenting schedule, which then led to numerous accusations by the Applicant of the Respondent's inability to abide by the times contained in the parenting schedule, and which the Applicant asserts demonstrates a relocation by the Respondent which failed to take into consideration that Joseph resides in Halifax;
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> (c) The nature of the Respondent's relationship with her sister, Vanessa Reid, whom the Respondent has, at an earlier time, reported to be a prostitute and cocaine addict who assaulted the Respondent and who, more importantly, the Respondent asserts also assaulted Joseph;

(d) The Respondent's current residence with her mother, whom the Respondent has reported at an earlier time to be an alcoholic;

(e) An incident in or around December 2012 during which the Respondent consumed cocaine at a drinking establishment;

(f) Repeated allegations by the Respondent that the Applicant's sister has sexually abused Joseph, which have subsequently been investigated by the Department of Community Services and determined to be unfounded;

(g) Repeated involvement by the Respondent with various police agencies and, most recently, the Respondent's March 2013 arrest for breach of the peace while under the influence of drugs and/or alcohol;

(h) The Applicant's evidence about his contact with one Sarah Stunden, as a result of which he asserts the Respondent has been involved in prostitution.

(i) Regarding this last matter, I'll have more to say about this later, but I do note that in terms of the Applicant's evidence, almost the entirety of the evidence with respect to Ms. Stunden is not before me because it was in the nature of hearsay. The Applicant did talk in his viva voce evidence before the Court and, in particular, in cross-examination conducted by the Respondent, about his involvement with the person Sarah Stunden. The most that he could say was that he recalled Krista Nickerson- whom it was suggested to him was an employee of the Department of Community Services- the most that he could recall was that Krista Nickerson had seen a photo and that she had reported at an earlier time that she was unable to specifically say if the photo was indeed a photo of the Respondent, Ms. Salah. That's just an aside about the evidence, but I thought it important to mention.

[13] The thrust of the Respondent's case is that she is the on-going victim of a campaign by the Applicant to assassinate her character and call into question her ability to parent, culminating in the hearing before this Court. The Respondent points to the following elements of what she says is an orchestrated effort by the Applicant to manufacture evidence:

(a) The Applicant's efforts to rely on one Ms. Stunden's photos and assertions as to prostitution activity by the Respondent, despite the Department of Community Services not substantiating the same and despite Mr. Salah's failure to produce Ms. Stunden for this hearing;

> (b) The frailties in the evidence of one Adam Ferguson as to cocaine consumption by the Respondent;
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> (c) The Applicant's submission on cross-examination that he, to use the Applicant's phrase from her submissions “cyber stalks” her on Facebook and;
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> (d) Postings that appear to have been authored by the Applicant on the site "Never Say Never," despite her insisting that she did not make them and is a friend of the owner of the site and in a doctor-patient relationship with the husband of the owner of the site.

[14] The Respondent's case did not put to the Court any detail as to specifically what the new parenting regime that she advocated would look like in terms of a schedule of time for Joseph with each parent, the proposed living arrangements for Joseph, the proposed schooling arrangements for Joseph and the like. Rather, the Respondent's position appears, as best I can understand it, to be that she is the victim of Mr. Salah's efforts to undermine her and the solution to that is to change the parenting arrangement.

[15] The Court must be satisfied that there has been a material change in the condition, means, needs, or other circumstances since the making of the May 2011 order. That change must be in relation to the child, not the parents. And if such a change is found to exist, any changes I might make to the order must be done only through the lens of what is in the best interests of Joseph as opposed to what either party might perceive as being in their own best interests.

[16] What does it mean to speak of a material change in circumstances? Guidance about that is found in any number of decisions, including the Supreme Court of Canada’s decision in Gordon v. Goertz. Recently in this court Justice Jollimore provided a helpful summary of Justice McLachlin's instructions in Gordon v. Goertz., found at paragraphs five, six, and seven of Legace v. Mannett, reported at 2012 NSSC 320 wherein Justice Jollimore stated, and I quote:

> (5). In an application to vary a parenting order, I am governed by Gordon v. Goertz., 1996 CanLII 191 (SCC). At paragraph 10 of the majority reasons in Gordon v. Goertz, then Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.

> (6). At paragraph 13, Justice McLaughlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are (1) There must be a change in the condition, means, needs, or circumstances of the child or the ability of the parents to meet the child's needs (2) The change must materially affect the child; and (3) The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
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> (7) Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of the child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests and must be changed to do so. Identifying the change which has occurred informs how the new order should be formulated to reflect the child's best interests in the new circumstances.

[17] The Court's reflection on that observation by Justice Jollimore of course then leads to the next question which is: what does it mean to talk about the best interests of a child? The concept of "best interests" was discussed at some length by the Supreme Court of Canada in Young v. Young. In a decision by my colleague, Justice Dellapinna in Tamlyn v. Wilcox, 2010 NSSC 266 he referenced the Young case and said as follows:

> In Young v. Young, (1993) 4 S.C.R.3 the Supreme Court elaborated on the best interests test. At paragraph 17, the Court stated:
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> > "The test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules designed to resolve certain types of disputes in advance may not be useful. Like all legal tests, the best interests test is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do."

[18] In the Nova Scotia Court of Appeal decision in Burgoyne v. Kenny, 2009 NSCA 34, Justice Bateman referenced the commentary of Justice Abella in MacGyvor v. Richards, (1995), 11 R.F.L. (4th) 432 (Ont. C.A.) in the context of noting that each case has to be decided on the evidence that is presented, and there's no matter of simply scoring each parent on a generic list of factors. Justice Bateman quoted from Justice Abella's decision in MacGyvor as follows:

> 27. Clearly, there is an inherent indeterminancy and elasticity to the best interests test which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what objectively appears most likely, in the circumstances, to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability...
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> 28. ...the only time Courts scrutinize whether parental conduct is conducive to a child's best interests is when the parents are involved in the kind of fractious situation that is probably, in the inevitability of its stress and pain and ambiguity, least conducive to the child's or anyone else's best interests.
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> 29. Deciding what is best for a child is uniquely delicate. The judge, in a custody case, is called upon to prognosticate about a child's future and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence on the understanding that deciding what is best for a child is a judgement, the accuracy of which may be unknowable until later events prove- or disprove- its wisdom.

[19] I quote that passage because I am of the view that it is important for the parties to understand the task and the role of the judge and what it is the judge can do and what it is the judge can't do, and what it means to talk about the best interests of a child within the framework of the legal test that I must apply, which is the test set out in Section 17 of the Divorce Act, which I have earlier reviewed; that is to say, has there been a material change in circumstances?

[20] The issue of credibility is also an issue which is front and centre in this matter. For example, the Applicant says the Court should not rely on the evidence of the Respondent where it is contradicted by other earlier sworn statements made by her which were generated in relation to other processes. One example of that would be any one of the “KGB statements” to which the Respondent was referred during cross-examination. The Respondent asserts in her evidence that the Applicant has been manufacturing evidence by hiring parties to spy on her and provide false information, or by creating false postings on Facebook or in text messages.

[21] Much has been written in the case law about the exercise of assessing credibility. I could go on at some length about what Courts have had to say and how credibility assessment has, by times, been described as more of an art than a science. But for the purposes of this hearing, I will explain to the parties that I am cognizant of discussions about credibility which are found in any number of Court of Appeal decisions in this province, not the least of which would be the discussion by Justice Cromwell in R. v. Mah, 2002 NSCA 99. It's a criminal case, but the discussion about the legal analysis of the credibility finding or credibility determination exercise as it relates to the burden of proof is one which is entirely apropos in the family law context, as well.

[22] Counsel for the Applicant had also referred me to the Court of Appeal decision in Hurst v. Gill, 2011 NSCA 100 which cites with approval from a decision of my colleague, Justice Forgeron in Baker-Warren v. Denault which is a 2009 decision reported at NSSC 59. I'm also cognizant of the case ... it's probably best described as the "old chesnut," Faryna v Chorney [1952] 2 D.L.R. 354. It's discussed in Baker-Warren v. Denault. Faryna v Chorney, goes back to 1952 and the principle enunciated there is still good law and still applies with respect to whether the evidence is in harmony with the preponderance of probabilities that a reasonable and informed person might expect in the circumstances.

[23] It may be helpful to the parties to reference a very succinct but useful list of factors taken into account when balancing credibility as enumerated by Justice Forgeron in Baker-Warren v. Denault. That list is found at paragraph 19 of the decision, wherein Justice Forgeron wrote:

> 19. With these caveats in mind, the following are some of the factors which were balanced when the Court assessed credibility:
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> (a) What were the inconsistencies and weaknesses in the witness' evidence which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence and the testimony of other witnesses? Re Novak Estate, 2008 NSSC 283;
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> (b) Did the witness have an interest in the outcome or was he or she personally connected to either party;
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> (c) Did the witness have a motive to deceive;

(d) Did the witness have the ability to observe the factual matters about which he or she testified;

(e) Did the witness have a sufficient power of recollection to provide the Court with an accurate account;

(f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would recognize ... pardon me, would find reasonable, given the particular place and conditions? Faryna v. Chorney [1952] 2 D.L.R. 354;

(g) Was there an internal consistency and logical flow to the evidence;

(h) Was the evidence provided in a candid and straightforward manner or was the witness evasive, strategic, hesitant, or biassed, and;

(i) Where appropriate, was the witness capable of making an admission against interest or was the witness self serving?

[24] So this is a list of factors. It's not intended to be an exhaustive list, at least in my view, but it is certainly a helpful list when the Court is required to conduct a credibility assessment. I have employed these factors and others related to or similar to this list in assessing the evidence of the witnesses.

[25] I must, for the purpose of allowing you to understand my decision, speak about the evidence of the witnesses, but I would want the parties to understand that where I speak about the evidence of the witnesses and I use examples to explain my reasoning, I'm not intending that the examples be an exhaustive list of the illustrations that I have found in the evidence to support my conclusions. So if I use an example, it is one among several or many that might be available to be looked to in the evidence.

[26] Further, it is my intention to focus only on certain aspects of the evidence and not to examine the evidence of each and every witness in depth or detail nor to examine each and every topic canvassed in the evidence in depth or in detail. If I did that, we would be here, undoubtedly, almost as long as it took to conduct the hearing itself.

[27] With respect to the evidence of Ms. Salah, I am of the view that her evidence was rife with inconsistencies, both internal to her own evidence and external to the

evidence of others. There are any number of examples of this found throughout the cross-examination which was conducted. In some cases, the inconsistencies were not even on cross-examination, they were inconsistencies within the direct evidence.

[28] Ms. Salah, by times, gave circular answers to questions or she gave answers to questions that never, in the end, addressed the actual question that had been put to her. In addition, she gave what I'll call anticipatory answers, meaning answers which did not address the question but attempted to anticipate the purpose for the question and resulted in editorializing about the perceived purpose of the question.

[29] The evidence of Ms. Salah with respect to her assertions that Joseph has revealed to her that he has been abused by the Respondent's sister, Pilar, are not accepted by the Court. Given my concerns about the Respondent's credibility, I am not prepared to rely on her evidence alone on the point, which is the only evidence before the Court. Further, other evidence shows that the appropriate authorities have looked into these concerns and, as in the previous contested litigation, have found these accusations to be unsubstantiated. The Court need go no further today.

[30] The Applicant argues I should rely on the KGB statements of Ms. Salah as put to her during cross-examination. And during those discussions, Ms. Salah alternatively, by times, attempted to deny what she had told the RCMP until the KGB statement was put to her, or by times she eventually adopted some of what ... or most of what had been captured in the KGB audio statement. She had no hesitation in adopting that she had made each and every one of the statements and that she had done so under the rubric of a KGB examination, which is to say an examination taken under oath after caution about the potential for further legal proceedings if statements are later established to be false or misleading.

[31] The difficulty for the Court is that what is contained in the KGB statements, having been proffered as sworn evidence at an earlier date, does not mean that the KGB statement is proof in and of itself about what Ms. Salah said in those statements or that what was said by her in those statements is true. Instead, what it tells this Court is that the Court should be very cautious about relying on information contained in either the sworn KGB statement or the sworn evidence of the Respondent in this hearing. The Court is left with the dilemma of competing sworn statements: is the earlier sworn statement the truth and the Court should

reject what is said now, or is it that the earlier sworn statement is not the truth and the Court should accept what is said now? This is a dilemma without solution.

[32] Just because Ms. Salah says something contradictory in this hearing doesn't mean that what she said in the KGB statement is proof of what she asserted to the police in those statements and I'm left not knowing what to believe. And I'm left having to make the observation that her credibility is highly in doubt.

[33] The Applicant admitted in cross-examination that he monitors the Respondent's Facebook account through others and that other parties have, in the past, come to him with information about the Respondent. The evidence does not persuade me to the requisite burden of proof, which is proof on a balance of probabilities that as the Respondent asserts, the Applicant has been manufacturing evidence against her. However, I cannot help but marvel at the Applicant's good fortune in this context, that so many seem willing to assist him unsolicited. I daresay it is likely that the word is out in Mr. Salah's circle of friends, relatives, and acquaintances that he is vigilant as to the Respondent's affairs and activity.

[34] I add here that the Applicant's evidence about Joseph's phone calls with his mother being conducted on speaker phone strikes me as problematic. At seven years of age, absent any evidence presented to the Court to suggest otherwise, Joseph is old enough to hold the phone and he and his mother are entitled to privacy.

[35] It is the Applicant's heightened vigilance and the Respondent's complaints about it that make her reported willingness, at a point last summer, and indeed her documented willingness in an email, to spoon feed ammunition to the Applicant about her family all the more remarkable. It is not remotely tenable that someone in her situation would say such scandalous things about her family members to the very same man she says has constantly harassed her since their separation through the divorce and in the post divorce period, all in an apparent effort to appease him. The question becomes, appease Mr. Salah as to what? There was no litigation ongoing last summer, to my knowledge, when these overtures were made. Having said that, the heightened vigilance by the Applicant raises concerns about what strikes the Court as subtle or passive efforts on his part to focus on the Respondent instead of on Joseph's relationship with the Respondent.

[36] The evidence of the Respondent with respect to the incident when her sister pushed Joseph is problematic. It is difficult for the Court to be sure if this incident occurred or if it is part of an ongoing pattern of chaos with respect to Ms. Salah's interactions with her own family members. And there is no police report before the Court to provide some independent background. The Applicant, as I understand the evidence, learned of the event in the same email to him where Ms. Salah spewed vitriol about her own family.

[37] The Court is left to try to conclude that either the incident did not happen and was only reported in the context that Ms. Salah was angry with her family or for other motives known to Ms. Salah, or perhaps the event did happen. But the only evidence about it is that of Ms. Salah. Even if I am to accept Ms. Salah's evidence on this point as credible, I would have to agree, given that it is the only evidence about the incident, that Ms. Salah's observations in her submissions yesterday were appropriate when she suggested that the event had been handled properly by her in terms of responding as a parent should when another person assaults their child.

[38] The evidence of Cst. Hodgeson and Cst. Starrett and that of Mr. Shawn Brown are all corroborative, one with the other, about the events in March of 2013. Ms. Salah has flatly denied that she was under the influence of alcohol or drugs. She's flatly denied that she was anything but a victim of the police on that particular evening. She's flatly denied her aggressive and abusive behaviour toward the police, and she's flatly denied that there was anything untoward or inappropriate in the way of an argument or an assault taking place in her apartment.

[39] The evidence of Cst. Hodgeson, Cst. Starrett and Mr. Brown would certainly suggest otherwise. Those are third parties who have no interest in the outcome of this proceeding. Those are third parties who all gave evidence that was corroborative one with the other. Cst. Hodgeson is a 25-year veteran of the police department and, as he described it, “the downtown beat.” Cst. Hodgeson and Cst. Starrett are well positioned to make assumptions, not about the precise substance that may be involved, but to make assumptions that individuals are presenting as though they were under the influence of some sort of intoxicant. Ms. Salah and her mother both deny the events of that evening. But the evidence of the three uninterested parties is clear, cogent, consistent one with the other and compelling.

[40] The evidence of Ms. Salah's mother, Melinda Abbass Reid, likewise in my view, is not credible. Ms. Reid contradicted her own daughter's evidence as to injuries Ms. Salah had reported to have suffered at the hands of Mr. David. Regarding the March night, Ms. Reid could not explain in any logical fashion why it was that the officers and Mr. Brown were hearing the commotion that they heard or why it was that the furniture was tipped over. She denies being under the influence of any alcohol or other substance despite the observations made by Cst. Hodgeson and Cst. Starrett to the contrary.

[41] Where the evidence of Ms. Reid and/or the evidence of Ms. Salah differs from that of Cst. Hodgeson and/or Cst. Starrett and/or Shawn Brown with respect to the events of that evening, I reject the evidence of the Respondent and her mother and I accept the evidence of the independent three witnesses.

[42] The evidence of Adam Ferguson is evidence which speaks to an incident in December ... on or about December of 2012 when the Applicant says Ms. Salah was involved in the consumption of cocaine. Mr. Ferguson, clearly an unwilling party who sought the protection of the Canada Evidence Act and who is, to my understanding, not at all connected with either party in this matter, gave evidence about his encounter with Ms. Salah and the fact that they went to the bathroom of the drinking establishment where he witnessed Ms. Salah consume cocaine.

[43] On cross-examination, Mr. Ferguson was challenged about where the event took place and who had asked who to go to the bathroom. The evidence of Pauline Nauffts, which I'll have more to say about later, was evidence proffered by Ms. Salah to demonstrate a contradiction in the evidence of Mr. Ferguson with respect to the location of the bathroom. Ms. Nauffts said the bathroom was not in the establishment but next door in the pizza restaurant.

[44] I heard nothing in the evidence of Mr. Ferguson and no questions put to Mr. Ferguson about the actual location of the bathroom relative to the restaurant, so there is a problem there in terms of the evidentiary rule in Browne v. Dunn, (1893) 6 R. 67 H.L. Furthermore, the essence, I am satisfied, of Mr. Ferguson's evidence, the ultimate flavour, tenor, and point of the evidence was that he and the Respondent were in a bathroom and she consumed cocaine. This is not a criminal case and a different burden of proof applies here. And I am satisfied on a balance of probabilities that this event occurred, despite the most minor of inconsistencies

or discrepancies which are not material that exist as among the evidence of Mr. Ferguson, Ms. Nauffts and/or Mr. Toulany.

[45] The evidence of Felicia Gomes is evidence which I am prepared to accept. I note that what Ms. Gomes said on direct in her Affidavit about her care of Pilar Salah was not, in any manner, impeached on cross-examination or by any other evidence that was offered in the hearing.

[46] The evidence of Catherine Salah, likewise, is credible evidence. On cross-examination, Ms. Salah was ... sorry. I'll try that again because there are two Ms. Salahs here. On cross-examination, the Respondent questioned Ms. Salah very carefully about the fact that there was a possibility that Joseph was being cared for in the home of his grandmother without his father being present. Clearly, the witness was not understanding the question that was being put to her and when she did finally understand the point of the question that was being put to her, and was put to her several times to the questioner's credit, finally the witness did acknowledge that, yes, indeed, there were times when her son, Mr. David Salah, was absent from the home for various reasons and that the child remained in the home with his grandmother and his aunt and ... his two aunts and other caregivers in the home.

[47] In the end, the evidence of the witness was consistent with what was being put to her by the questioner, the Respondent. I'm not sure, in the end, what the real value of the evidence is. It is hardly surprising to hear that a child in the home of a custodial parent might, by times, be left in the care ... briefly in the care of other individuals residing in the home, particularly when they are family members.

[48] The evidence of Marie Salah was that she no longer wishes to be involved in the transportation arrangements that occur during the transition from Joseph ... the transition, pardon me, of Joseph from one parent to another. She was cross ... she was asked on cross-examination about discussions with Joseph regarding who had secured Joseph's first Easter outfit. This may have been a point of concern for the questioner, but did nothing, in my view, to impeach the credibility of the witness and little, if anything, turned on that.

[49] The evidence of Amy Wiens was that she had provided therapy to Ms. Salah up until the spring of this year. The evidence of Ms. Wiens, as I understood it, allowed the Court to conclude that Ms. Wiens has provided ongoing sessions to

Ms. Salah which are conducted on the basis of Ms. Salah's self-reporting. Ms. Wiens confirmed on cross-examination that there has been no independent testing conducted of any nature, such as, for example, psychological testing, conducted in relation to the therapist/patient relationship between Ms. Wiens and Ms. Salah.

[50] The evidence of Ms. Wiens establishes for the Court that Ms. Salah has been attending at therapy sessions and in those therapy sessions she has been discussing events and problems in her life, not dissimilar or unlike the kinds of events and problems which were aired in this proceeding.

[51] The evidence of Mr. Jack Toulany really, in the end, added little to the proceeding. Mr. Toulany confirmed that he has, indeed, met with Mr. Salah and a one Mr. Abi Daoud, which again would seem to smack of the sort of efforts to keep close tabs on Ms. Salah by Mr. Salah but, really, adds little else because Mr. Toulany couldn't speak to having witnessed anything.

[52] The point, as I understood it, or the inference that was trying to be made was that Mr. Toulany had something to add about the event where Ms. Salah and Mr. Ferguson were involved in the matter of the cocaine. But Mr. Toulany was not impeached in his assertion that he left the establishment. He knew Ms. Salah was there, so his evidence puts her there when Mr. Ferguson was there but that's really all he can add.

[53] The evidence of Pauline Nauffts, this evidence was problematic because nowhere in the direct or the cross did I have an opportunity to understand, glean, or discern what time frame or what event it was that Ms. Nauffts was talking about. No time frame was put to her. Even if the Court was to make an assumption ... and, of course, evidentiary ... the evidentiary foundation can't be based on assumptions, but even if the Court was to make the assumption that the purpose of her evidence was with respect to the evening or the day that involved the cocaine and Mr. Ferguson and Ms. Salah, the essence of her evidence was that she had nothing to say about that because she had seen Ms. Salah at the restaurant ... or at the bar, pardon me, but then her shift ended. And Mr. Toulany's evidence was that it was another individual who had reported Ms. Salah's behaviour to him.

[54] That is only a brief canvass of the evidence but, as I said, it was in my view important that the parties leave with an understanding that I did consider the

evidence of each witness. And although I've not gone on at length or provided lengthy examples, I've tried to illustrate the basis of my reasoning.

[55] Joseph's school has also been drawn into the conflict between his parents, despite the principal and the teacher's apparent best efforts to avoid the same. Joseph's teacher, Madame Taylor and the principal, Madame Boudreau, both testified in the hearing. I thought it very telling that the principal, Madame Boudreau, stated she was, at one point in the spring of 2013, actually contemplating instituting peace bond proceedings against both parents in an effort to avoid having the school property used as a transfer point when Joseph was transitionned from one parent to the other.

[56] To paraphrase her evidence, the school did not want to be caught up in the drama between these parties. Her evidence as to Mr. Salah's contravention of school rules such as sitting in class with his son without permission or bypassing the office to sign Joseph out of school early underscore Mr. Salah's efforts, in my view, albeit more passive and subtle than those of the Respondent, to employ the school to his own ends when trying to limit Ms. Salah's contact with Joseph during the period when the Department of Community Services' investigation was being conducted earlier this year.

[57] In submissions, both parties spoke to their concern that the litigation will be never-ending and their prediction that the matter would continue returning to court in the future. This, in my view, speaks to the Court's distinct impression throughout this matter that the Court has become the parties' vehicle of choice through which to air the drama that seems to pervade their “relationship”. And I use the word "relationship" very loosely.

[58] There seems to be a fundamental misapprehension about the role and function of the Court and, more importantly, the actual capacity of the Court to remedy all ills as between them. With respect, this is not television. This is not a reality TV show and it is not the movies. The courtroom is not the place for the parties to keep airing their dirty laundry and running a pageant to demean one another.

[59] The Court is, in all cases, unimpressed by theatrics and is certainly never, in making any decision, held to ransom by the prospect of further litigation. The Court's task is the application of legal principles to the relevant evidence at hand.

When I look at the whole of the evidence, it provides, as I said earlier, great illumination about the depth and breadth of the poisonous atmosphere in which Joseph is being raised. What it does not do is persuade me to the requisite standard of proof that the events which have occurred constitute a change in circumstances.

[60] The previous decision of Justice Campbell that brought about the current custody and access Order found, among other things, that the Respondent was engaged in exotic dancing for hire, following evidence of an elaborate "sting operation" orchestrated by the Applicant to impeach her credibility. The decision also found that the Respondent was in need of counselling, given, and I'm quoting from the decision, "her history of various family, professional, and other relationship failures, her failure to accept direction from persons in authority, and her relentless pursuit of her allegation against the sister."

[61] The decision found that despite the Court's concerns about “a value system that provides a less than ideal role model for her son” the evidence, coupled with the Applicant's desire to see a relationship for Joseph with his mother, persuaded the Court to create the current parenting schedule.

[62] Two years have gone by and ultimately little has changed. The Respondent is still lacking in credibility in her evidence. She still operates by a value system that provides a less than ideal role model for Joseph, including excess alcohol consumption, consumption of cocaine, intervention by the police, involvement in abusive relationships, and chaotic relationships with her own extended family. It seems to me that none of that is any different than it was when Justice Campbell made the last order.

[63] For his part, the Respondent is still spending time and energy monitoring ... pardon me, the Applicant is still spending time and money monitoring the Respondent to seize upon opportunities to discredit her. I did not hear whether the Applicant continues in therapy at this time.

[64] As for Joseph, the changes he has experienced since the last order, as contained in the evidence are that he now attends elementary school, which was foreseen in the last order, and that his Aunt Marie no longer wants to act as the transition person during parenting exchanges. That ... or those items, in my view, do not constitute a change in circumstances that is of a magnitude that it meets the legal test the Court must employ.

[65] One other change is that Joseph has exhibited signs of being disengaged in school, a problem which is being properly addressed, according to the evidence, by his custodial parent and does not appear to have impacted the current access pattern or the provisions of the current order.

[66] There has not been any change in circumstances that could be said to be of a nature, kind, or magnitude that it would meet the test in Section 17 of the Divorce Act. Therefore, the application of Mr. Salah is dismissed and the application in response by Ms. Salah is also dismissed. The Order continues.

[67] I would be remiss if I did not make some recommendations. I cannot change the Order because I am not satisfied that there's a change in circumstances that would justify a change in the Order. However, I am going to recommend the following: (1) that the child be transitionned between parents as suggested by Mr. Salah, absent any other suggestions put before the Court, with the transitions to take place in the driveway of Mr. Salah's home. Joseph is now old enough to walk from a vehicle to the door of his home unescorted, without requiring his parents to engage with one another during that exchange.

[68] Number two, that the parents each secure counselling to assist them in dealing with the lack of trust and the lack of the effective communication that characterizes their dealings with one other and, as a result, that in the meantime they continue to employ Family Wizard as their communication tool.

[69] And also, finally, that Ms. Salah think very carefully about permitting Joseph to be in the presence of her sister Vanessa Reid at any time.

[70] It is regrettable, in my view, that there has been a tremendous amount of time and energy, to say nothing of expense, expended to focus on this case when the parties would likely have been far better off investing in developing strategies to communicate with and deal with one another, even if only in the most marginal of ways, for the sake of their child. Joseph has been treated like prize property by his parents, each vying for control of Joseph and control of the other parent's influence on and time with Joseph. I wish the parties good luck and I certainly wish Joseph good luck, considering the atmosphere in which he is being raised and the problems to which he is undoubtedly being exposed. If there's nothing else, we're adjourned.