IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Marcus v. Marcus, 2004 NSSC 203

Date: 20040928
Docket: 1209-000955
Registry: Kentville

Between:

Mary Marcus

Petitioner

v.

Philip Marcus

Respondent

D E C I S I O N

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: September 27 and 28, 2004, in Kentville, N.S.

Written Release of Decision: October 12, 2004

Counsel: Pamela M. Stewart and Nichola Hewitt - for the Petitioner

Donald A. Urquhart, - for the Respondent

By the Court:

[1] Mary Odette Marcus , now 41, and Philip Lee Marcus, now 36, met November 24, 1989, and married July 6, 1991. They are blessed with three children, Aislinn Paulette Marcus, born November 20, 1988, now 15; Emily Mary Rose Marcus, born June 22, 1994, now 10; and Julia Lee Marcus, born September 12, 1997, now 7. The parties separated July 10, 2003.

[2] To the divorce - I will sign the divorce judgment as soon as it is presented to me and it will be dated yesterday's date - September 27, 2004.

[3] Custody - Upon separation the children are with their mother. An interim order was granted August 19, 2003, granting joint custody of the children with the primary control and ordinary residence being with their mother, who was also granted exclusive possession of the matrimonial home. This order provided the father with access and set out directions and instructions, including neither parent shall make negative comments about the other in the presence of the children when communicating between the parties and communication between the parties was to be through a third party, Margo Turner, or their legal counsel. This order was varied by further order dated December 17, 2003 and set out specific parenting time and reduced the spousal support of $1,000.00 per month to $750.00 per month effective November 1, 2003. This order provided a number of things such as transfer of automobiles when the black book value was determined. There was another variation order issued July 13, 2004. Mr. Marcus requested a further variation of spousal and child support and it was dismissed, as he had not made full financial disclosure. It again addressed appraisals, etc. and apparently the black book value for at least one of the motor vehicles was not available so it ordered the transfer of the van to Mrs. Marcus and Mr. Marcus kept the 1993 Nissan. This order also set out parenting for the summer of 2004, as the parties were unable to reach an agreement.

CUSTODY

[4] Custody is a very emotionally charged issue and particularly so in this case. The court holds the only objective view point that exists in the court room. Certain realities arise when a family unit no longer has the two parents within the unit. Mr. Marcus' approach is essentially for two family units, two family homes.

While shared custody is an ideal situation, rarely do the circumstances unfortunately exist that favour such a course. The circumstances here clearly do not favour a shared custody arrangement. Mr. Marcus' plan is essentially a shared custody one - one week with each parent, alternating. Given the history of Mrs. Marcus having been the dominant care parent throughout the lives of the children, which continued after separation, I agree with her that such a course would be devastating to the children. I could not think of a much worse situation contrary to the best interests and welfare of the children than Mr. Marcus' proposal. If Mr. Marcus were, for example, placed in the home with the children, the immediate effect would be to divide the family and three children would not be able to continue to live together in the circumstances before the court. Aislinn, now 15, has for some time refused to even see her father and very clearly would not reside with him at this time thereby separating her from her sisters for that period.

[5] I accept Mrs. Marcus' evidence that she and the daughter Aislinn have been inundated in the past with e-mails and voice box messages that indicate Mr. Marcus had difficulty and failed emotionally to accept, let alone reasonably adjust to the breakdown of this marriage. Secondly, both parents love their children deeply and have a desire to be involved in the lives of their children. Unfortunately Mr. Marcus' conduct is such that I gave very serious consideration to providing sole custody of all three children to their mother. The oldest does not and will not likely communicate with her father in the immediate future. Unless he eases up on the situation, it will continue for a long time and there is a risk of him alienating the other two children if he keeps up his pressure for resurrecting of a family unit that has totally broken down. In *Glavin v. Glavin* (1994), 130 N.S.R.(2d) 161, I concluded the level of disagreement between the parents was such that to continue a joint custody direction was not in the best interests and welfare of the child. In this case I think Mr. Marcus' love for the children is so deep that it is worthwhile directing a joint custody arrangement as long as it is defined as it was in *Loughran v. Loughran* (2000), 182 N.S.R. (2d) 143 at p. 147:

> The parties shall share joint custody of their children with the day to day parenting and residence of the children to be with their mother. The mother will make a reasonable effort to consider the suggestions and views of the father in parenting. It is recognized that the mother shall have the final determination in all aspects of parenting, including consideration of residence, school, discipline, health, extracurricular activities, etc.

[6] I do, however, find merit here in retaining a joint custody standing arrangement, much against the spirit of certain cases like *Glavin*, above. In the circumstances, I **suspend** the requirement of the mother having to make every reasonable effort to take into account the father's views for a period of approximately three months, that is, to the end of this year, the 31st December, 2004. I do so because it is necessary for Mr. Marcus to accept and recognize the end of this marriage and that henceforth their only relationship is as parents. His conduct, excessive e-mails, etc, in the past and indeed Mr. Marcus in his evidence acknowledges for now that there should be no interaction between the parents. What I am trying to do is settle this down; let the dust settle and if you abide by this then there is a reasonable prospect of some measure of trust and some measure of a capacity for communication to develop. While I have suspended this consultation process, it does not diminish the responsibility of Mrs. Marcus to keep the father fully informed on the health, etc., of the children and to provide him in a timely fashion with copies of school reports, etc.

[7] It is unfortunate that immediately post separation no real measure of access took place for a period of time and that situation should not take place again. I am including in the joint custody Aislinn. I agree that she should be treated as she is - a part of this family. She is one of the three daughters and so I make no differentiation in the order. We all recognize the reality though - that she is old enough and it will take a real measure of effort to have her, but I am confident over the long run in these cases, if the pressure is eased and if the measure of trust develops between the parents and they are able to communicate then it has an impact on children and she will, I hope eventually, have a relationship and a meaningful relationship with her father.

[8] With respect to access, I have already decided that the primary place of residence of the children will be with their mother and essentially I think the access is appropriate as advanced by Mrs. Marcus - two evenings a week creates an increasing degree of conflict with respect to the children's activities and their stability and my experience is this is only likely to increase with the children being older. One night a week plus the weekend access, etc. is more than adequate. Also what happens when the children are older is that they may at some point in time be able to come and go with the flexibility that would be desired if the parents were able to communicate properly. Long weekends should be as indicated by Mr. Marcus. With respect to the summer period, he is the only

working parent at the moment, he should be able to designate in writing no later than the 15th May, two sixteen day periods in the summer when the children will be with him. During that period of time there will be no access by the mother to the children but the children should be encouraged to communicate with their mother through e-mails and telephone calls. Similarly, for the balance of the periods of the summer there will be no weekend access or no access so that the mother will have her period of meaningful time with the children and of course, she should encourage and see that there is communication by telephone and e-mails with their father.

[9] I have read carefully and considered the access remarks filed in the annexes by Mr. Marcus and certainly it relates the difficulties from his perspective. I notice that they end September 12, 2003 and they ended up with a specific order of December 17, 2003. I do sense a measure of reluctance on the part of the mother and a desire by the father for equal time. The test is not a division of time. It is what is appropriate in the best interests of the children. The children need the stability of their home and not bouncing between two homes as would be in the circumstances if I accepted the proposal by Mr. Marcus. A specific schedule of access will promote stability and hopefully down the road result in the capacity for the desired flexibility. If there is a school snow day now, for the next, for the foreseeable, for the rest of this winter - it is just, I think it will be just too bad - there is just no capacity for these parents to agree on alternates and making up time for snow days lost. The parents are not likely able to communicate in the immediate future and if they attempt to, it seems to me that stress is likely to be the only result. I am recommending strongly that they stick with a specific schedule and not depart from it. The mother must avoid, as indeed the father as well, the chances of late pick up which apparently has occurred. In other words, rigidly adhere to the schedule and then after a period of time hopefully you will be able to introduce the desired flexibility.

[10] With respect to child support, we have the income of Mr. Marcus as $89,256.00 per annum. I agree with his counsel child support at the Child Guideline level of $1,466.00 per month shall be payable commencing October 1, 2004.

[11] With respect to spousal support, I have done a *Bray-Long v. Long* (2000), 181 N.S.R. (2d) 327 analysis and it clearly establishes Mrs. Marcus has an

entitlement to spousal support. The particular circumstances in the evidence and I may miss some of it but - they met in November, 24, 1989. She was working as a registered nurse. They married in 1991. In support of her husband's career, the family moved to Saskatchewan in March 1992. She had an income at that time of $30,000.00 approximately. She was paying into a pension and apparently got some measure of pension contributions. It is significant that a major result of the breakdown of this marriage is the economic disadvantage to Mrs. Marcus compared to his financial position. Look alone at what has transpired since July 10, 2003. Since July 10, Mrs. Marcus has, during this period, no Canada Pension Plan and no security of pension. Mr. Marcus has put aside thousands of dollars for his own future security. In addition to following him to Saskatchewan, she found some employment there in June 1992 and look at the contribution that she made to the marriage. She said that for at least a year she earned more than him and I think he conceded it was until about 1994 that she made more, none of which, unfortunately, provided her with any security. He was an officer/cadet in 1992 and now has his commission and is a Captain. They left there I believe in 1994 and went to Trenton. She had Workers' Compensation for a period of time. Emily was born June 22, 1994. She returned to work May 1996 as a casual, making again a contribution and again became pregnant and on September 12, 1997, Julie was born. She worked virtually up to the birth. My notes indicate that she worked until August 1997. So, very clearly, Mrs. Marcus has established an entitlement and indeed, what I am proposing, Mr. Marcus may have difficulty accepting as being reasonable, but in the totality of these cases that we have seen, for her putting a high degree of contribution into the marriage, what I am proposing, barely, if at all covers the economic disadvantage that the breakdown of the marriage finds Mrs. Marcus in.

[12] Now with respect to the period of spousal support, I want to suggest very strongly to Mr. Marcus that he should do everything possible to alleviate stress on Mrs. Marcus because it is in his best interests that she complete the course and return to nursing. My heavens, if she gets sick, or for some other reason, whatever, and is unable to return to employment, he can find himself paying support for a lot longer period. So it is certainly in his best interests that he create a climate that increases the prospect of full-time employment as a nurse. When I practised law I used to call it an insurance policy. For heavens sake provide your spouse with whatever is required in order to get the benefit of not having to pay

spousal support for an extended period beyond the termination period I conclude is appropriate.

[13] In any event, when I turn to the issue of spousal support, I think of Mr. Marcus' evidence saying that Mrs. Marcus earned more than him to at least 1994, is what my note indicates. Now they separated July 10, 2003, and Mrs. Marcus removed $11,400 plus an additional $1,000.00 from the joint bank account. I will come to the actual mathematics but I see nothing wrong with having done that and I see nothing wrong with an adjustment for some of those funds to be deemed both spousal and child support between July 10 and the 1st of September. It is not necessary for a claim, particularly for child support, to be advanced before the obligation arises. *Farnell v. Farnell* (2003), 209 N.S.R.(2d) 361 at p. 370 states:

> The obligation to support one's child arises from being a parent and not from a demand or court order enforcing the pre-existing obligation.

[14] I conclude it was reasonable for Mrs. Marcus to utilize some of those funds and I will take that into account in the mathematics. I do not want to put undue pressure on Mrs. Marcus in getting self-sufficient. Many of the cases provide support for three, four or five years. What I am going to direct is that spousal support be for a period to and inclusive of March 2006. That provides, subject to the mathematics, in addition to the spousal support that she has received and going back to, something slightly less than three years spousal support and I can tell Mr. Marcus if that turns out to be the case, then he can heave a huge sigh of relief. But I would not put undue pressure on her. She has three children at home, one has some problems with having a blood disorder. It is not unreasonable for her to take a reasonable period of time to complete her re-qualification for nursing, followed by a relatively brief grace period of adjustment to employment. You cannot deal with human nature by calculating bits and pieces of hours like a lawyer's bill. It seems to me reasonable that she can take it. If she can do it in better time than that so be it, but I think I have allowed the fifteen months plus some measure of grace period because it always take an adjustment and there are always additional expenses for that adjustment for your returning to employment, as I think Mr. Marcus himself mentioned.

[15] Now with respect to the quantum of it, I am going to order that he pay a lump sum of $1,364,00 which is the balance of the cost of the education. She has arranged for $1,400.00 grant and the balance of $1,364.00 will be adjusted in the amount of funds that she owes him on equalization. With respect to the quantum of the maintenance there are pluses and minuses in her budget. For example, as Mr. Marcus points out, the $290.00 a month is a heavy cost for education and we have primarily dealt with that, but it is also true that the child support will reduce from $1,500.00 to the Guideline level. It is also true, and here I must commend Mrs. Marcus, she is prepared to pay out of the child support, the entire cost of the additional children's activities. It might be something that the father down the road might want to do because sometimes when a child receives the benefit of an activity from a particular parent, it is a pleasant thing. I do not recommend you do it tomorrow, but also, I notice, that her costs will increase for those children's activities. That is only reasonable and legitimate. In addition she is going to have a cost no later than 30 days from yesterday and maybe even now for a medical program for at least the next 15, 16, 17, 18 months. The understanding being that when the divorce is final, she will no longer be covered by Mr. Marcus' Canadian Armed Forces plan. I have no evidence before me as to the exact amount - they are not generally very cheap - I do not know anything about her health and that. So I have concluded that an appropriate level, as is tax deductible, is that the maintenance starting the first of October will be at the rate of $850.00 per month. So you will end up if things work out the way they should, total contribution will be less than three years and a small lump sum and that barely, if at all, covers the economic disadvantage that Mrs. Marcus has suffered by virtue of her contribution to the marriage.

[16] I cannot begin to compensate people for their emotions for the breakdown of the marriage. Only two people know what went on within a marriage and there is no way that the court has the capacity to address that. If anybody believes somebody is at fault, fault is not a factor under the *Divorce Act* in any event. With the access that I have indicated, accepting that the program advance by Mrs. Marcus, in my view, meets the requirement of the maximum contact without destroying or impairing the stability of the children.

[17] Next, dealing with the matrimonial home, Mr. Marcus wishes to retain the home. To have him return to the home would, in my view, be an extreme disruption in the lives of the children. So, Mr. Marcus will transfer his interest in

the matrimonial home to Mrs. Marcus subject to the mortgage. I value their house at $161,000.00. I take in the real estate commission at 6 per cent of the first $100,000.00, 5 per cent on the balance of $61,000.00 and I have added in an estimate for legal fees. The fact that if the matrimonial home was given to Mr. Marcus would result in him avoiding any disposal costs on a military transfer, is of no consequences. Such is personal to him and not assignable to Mrs. Marcus. What was said in *Robski v. Robski* in 1997 bears repeating:

> **13.** Before spelling out specifically those terms, I turn to the value of the matrimonial home to determine the amount of Mr. Robski's interest which is to be postponed. The parties agree that it has a value of $95,000. Should this be reduced by the inevitable cost of a real estate commission and legal fees? Two or three years ago, this question would not likely arise because there was a uniform practice amongst the family law bar and the court in recognizing the inevitability of such disposal costs. For example, Bateman, L.J.S.C. (as she then was), *Bellemare v. Bellemare* (1990), 98 N.S.R. (2d) 140; 263 A.P.R. 140; 28 R.F.L. (3d) 165 (T.D.), *Clancey v. Clancey* (1991), 99 N.S.R. (2d) 147; 270 A.P.R. 147 (T.D.), *Gomez-Morales v. Gomez-Morales* (1990), 100 N.S.R. (2d) 137; 272 A.P.R. 137 (C.A.)., Hallett, J.A., commented in paragraph 41 that the trial judge did not deal with the question of disposition costs and stated, "In my opinion, the trial judge erred in his approach to this issue".
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> **14.** Hallet, J.A., went on to say in para. 45 at p. 149:
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> > The appellant will likely incur disposition costs if, as and when he sells which, based on today's prices, would be about $14,000. If he does not sell in his lifetime, then his estate when it sells the property will be reduced by the tax and disposition costs.
>
> **15.** There is a veritable legion of additional cases and the family law practicing bar has all but uniformly followed such a practice.

[18] The few exceptions that are appropriate have been where there has been evidence of unusual circumstances, ie., the parties have bought and sold properties in the past without engaging the services of a realtor. Any extension to the exceptions runs the serious risk of causing great uncertainty and cost to what still remains a virtual uniform practice amongst the family law bar and the court should exercise extreme caution before causing any disruption. The inevitability of legal fees and real estate commission is so highly probable that in all but very rare circumstances, such will eventually be incurred and in the past, injustice has

occurred often when the custodial parent has struggled to maintain the family home and failed.

[19] The totality of the disposition in following *Robski and Robski*, above, I take to be $10,000.00, reducing the net value to $151,000.00. When you take off the mortgage of $77,142.95 (subject to mathematics) it leaves an equity of $74,857.05, which would require at that point, a payment by Mrs. Marcus of $37,418.52. There are other adjustments. She is entitled to the reimbursement, which he acknowledges, of $612.00 for the orthodontics; he is entitled to an adjustment of $2,500.00 on the motor vehicles; I am correct in thinking he is entitled to an adjustment of $250.00 on the Mess dues and she is entitled to an adjustment of $300.00 on the income tax.

[20] With respect to the bank accounts, I have reviewed the material filed in argument by Mr. Marcus' counsel - the $1,800.00. If you take the child support alone from July 10 to August 30, it would be dramatically greater than the $1,800.00 out of the bank account. Indeed I will allow a further $1,000.00 deduction, which only means $2,800.00 support approximately from the 10th July to the 30th August. I will have to let counsel work out the mathematics. I may have overlooked something but I hope not.

[21] With respect to the life insurance, I understand he has $375.000.00. Life insurance should, probably at this stage, be divided to the point of 25 per cent for each of the children and 25 per cent for Mrs. Marcus, with hers to end when spousal support ends. I leave it to the parties to perhaps work out a better arrangement, but what I would like to project is that at some point Aislinn might be well into University, married or gone on her own, whereas the money is needed more for the other children, so you may want to work out a different formula. I will put the obligation on Mrs. Marcus when she has employment to disclose what she obtains through employment and the same formula should be followed - when Mrs. Marcus has insurance the father will be the sole trustee. With respect to the portion, three-quarters of the existing insurance to the children Mrs. Marcus will be the sole trustee. You can have an alternate trustee in the event of death or incapacity.

[22] Now, the RRSPs - the effective rollover - an equal rollover of the RRSPs. I am under the understanding that there has been no contribution since the

separation. Is that correct? Counsel confirm that this is right so we are safe on that.

[23] With respect to the medical, dental coverage, Mr. Marcus will continue that program for the children. I make no adjustment. If I did an appropriate adjustment, I would add that to the child support although the *Act* probably is somewhat different but, in any event, that is in addition to the basic Child Support Guideline and I think that is reasonable and fair, particularly where she is taking on the expense of those extra curricular activities.

[24] Now, that leaves the matter of the piano outstanding. It is an awful dilemma as there is so much here, because if we are moving the piano to Mr. Marcus it means Aislinn doesn't have it available. On the other hand, one of the probably most effective possibilities or measures of him getting back to a better and more meaningful relationship with his daughters is through music, as he has a far greater interest than Mrs. Marcus in music. So, I am going to agree that the order provide that the piano be transferred, but not for a period until Mrs. Marcus has an alternate one, or 45 days, which ever occurs first. It seems to me, my reading of it, is that music is very important to these children and it may be that it is one of the few luxuries that you can afford is to have one piano in each household. So, if Mrs. Marcus decides that she is not going to buy a piano then she should turn that one over immediately, but if she wants time to explore it I am giving her 45 days. When it is eventually removed it will be removed at the cost of Mr. Marcus.

[25] Now I urge the parties to rigidly adhere to what directions I have given you in the hope that the trust that is necessary for a better relationship with these parents will result. I don't pretend to have a magic wand. That is the best I can do. Everything I have done has been geared for the best interest and welfare of the three children that you are fortunate enough to have. Is there anything I have overlooked?

[26] **MS. STEWART:** A couple of clarifications. On the spousal support you noted the date of first of March, 2006 - Is that a fixed termination date or is that a review date?

[27] **THE COURT:** I made it a fixed termination date and thanks for raising it, but this determination recognizes the existence of (a) that the parties are not

precluded from their statutory right to apply for variation under s. 17, and (b) specifically with respect to 17(10). This is why I stressed that Mr. Marcus, if he is as intelligent as he appears to be, should make every effort to see that she gets that course because under 17(10) she has an opportunity to come back in, if she doesn't and if she doesn't have a job, to ask for an extension of the support, indefinitely, so. I have not articulated it too well, but I am glad you mentioned it. I have no right to preclude them from their application to vary statutorily nor her right to apply under 17(10). Even if she is successful in the course and obtains employment, the spousal support should continue to an inclusive March 1, 2006, when it will terminate absolutely, if there is no variation.

[28] **MS. STEWART:** So there is a variation of circumstances to either of them in . . .

[29] **THE COURT:** I made it to terminate unless there is an application to vary or an extension under 17(10). I mean your client is only 41 years, she is young, she is intelligent and . . .

[30] **MS. STEWART:** Oh no, I just wanted to be clear on the, for the order My Lord. The second clarification has to do with the bank account and I understood your Lordship, please correct me if I am wrong, you are considering that the bank accounts and money that she took in advance - an unequal division that . . .

[31] **THE COURT:** Well, he got the balance of the bank account, did he not? Yes, so he got his share, so to speak. The money she took out of it, I am saying that $1,585.00 of it already, using Mr. Marcus' figures, plus an additional $1,000.00 - which means that I have allowed $2,580.00 - whatever it is, roughly, as actual child and spousal support lump sum non-taxable from the 10th of July to the 3rd of September. So when you do . . .

[32] **MS. STEWART:** So, for the equalization payment you simply reduce another $1,000.00 for the equalization payment and the bank accounts are considered dry . . .

[33] **THE COURT:** That is correct. The bank account is a wash out. An additional $1,000.00 credit on the equalization payment.

[34] **MS. STEWART:** Thank you My Lord and the last one and I am sure my friend and I can agree to put this one in - it is with respect to the dog. We will work out how the dog goes back and forth, but the cost for the dog would be for Capt. Marcus. The only other clarification is ...

[35] **THE COURT:** I agree with respect to the dog. I am going to ask that the decision be typed as soon as possible. I am leaving for Europe on October 12th.

[36] **MS. STEWART:** The only other thing is the communications and I wasn't clear on that and you are continuing the limitations for communication between the parties as . . .

[37] **THE COURT:** Nothing. Nothing, except for emergencies between now and the end of this year. I want silence to descend, the pleasure of silence, the dust to settle, but any emergency - yes and as I say, timely reports. If the child breaks her ankle playing football or hockey, you know, and is with him then that is significant.

[38] **MS STEWART:** And after 31st December, 2004, it would then be a joint custody order . . .

[39] **THE COURT:** It is still a joint custody, I have suspended the consultation process under it; after that, it will be consultation starting the 1st of January, 2005, your client's obligation to consult with him and to try and take into account his views, but I have defined it as in *Loughran and Loughran*, above.

[40] **MS. STEWART:** Okay, and again, the volume of *Loughran* in the N.S.R's?

[41] **THE COURT:** 182.

[42] **MR. URQUHART**: My Lord, just for clarification, if I can. The equalization payment. Your Lordship said $37,418.52 on the house, you would deduct $612.00 being the orthodontic bill, we would add $2,500.00 being the vehicle equalization; we would add $250.00 being the Mess dues; we would

subtract $300.00 being the tax my client owes her, the tax refund and you are saying we subtract an additional $1,000.00?

[43] **THE COURT:** An additional $1,000.00 and the $1,364.00 lump sum for education.

[44] **MR. URQUHART:** Okay, thank you My Lord. those are my questions.

[45] **MS. STEWART**: I would like to speak to the issue of, two issues My Lord arising from the decision. The first is the contempt application. It is simply just not knowing what Justice Warner - he was supposed to come back and speak at the end of that matter on the Thursday but the file had all gone to your Lordship, I don't know where that is going or whether or not your Lordship is going to deal with that. If not that is fine.

[46] **THE COURT:** I am prepared to deal with it and I am prepared to dismiss it. I don't think it serves any useful purpose now.

[47] **MS. STEWART:** The second issue is with respect to costs. We feel there is substantial success and I use that word only for litigation purposes, not that it has been a success for the family at all. I think it is quite sad that the parties did have access at the commencement of this period of separation, $26,000.00 Mr. Marcus says on the stand in legal fees and I can't give you a figure for my own but most of this matter My Lord should have settled. The final decision I know, I haven't added it all up, but I can indicate looking at the last offer that was made, the decision is almost better than it would have been if it had settled before yesterday and given that we had two days of trial which in our view, the only purpose it served was to give Capt. Marcus his day in court and I am suggesting $7,500.00 My Lord.

[48] **MR. URQUHART:** My Lord we tried to settle this matter at a two day settlement conference last week, Tuesday and Thursday. We have made other overtures of settlement towards my friend. The difficulty in this file has been the communication between the parties has been so terrible that communication has been difficult simply because essentially counsel haven't been able to get clear instructions and the parties get involved and things get into a mess. We did have to respond to the interlocutory application brought by Ms. Marcus in August in

Annapolis Royal and there was no negotiation before that. My client brought his own application in November for more parenting time because he wasn't getting that. That was substantially successful. We responded . . .

[49] **THE COURT:** Costs weren't dealt with on the interlocutory applications?

[50] **MR. URQUHART:** No.

[51] **MS. STEWART:** No there was only four extra hours provided at that November hearing. I meant to mention

[52] **COURT:** Yeah, but it takes a lot of work and preparation - let me hear ...

[53] **MR. URQUHART:** Justice Boudreau did say on the November application that costs can be reviewed in the final determination. My client had to pay $1,000.00 in suit costs at that November application. That is in the order.

[54] **THE COURT:** Well, certainly it would be better if we could turn back the clock and make all this money available for your children. One of the major fundamental problems with this trial was the advancing of the idea of shared custody and that wasn't going to wash under any circumstances. It would just be a disaster for the children and so it has added a dimension which I am sure has made it extremely difficult to reach a final resolution and contributed more so on Mr. Marcus' side to the necessity of litigation so some relief in costs is appropriate. I will fix costs at $4,500.00. You have already had $1,000.00 suit costs so the additional $3,500.00 will be set off against his entitlement on the equalization.

J.