

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *A.V. v. E.V.*, 2014 NSSC 204

**Date:** 20140612  
**Docket:** 1201-066849  
**Registry:** Halifax

**Between:**

A. V.

Applicant

v.

E. V.

Respondent

**Judge:** The Honourable Justice Beryl A. MacDonald

**Heard:** April 14 and 17, 2014, in Halifax, Nova Scotia

**Counsel:** William Leahey for the Applicant  
David Grant for the Respondent

**By the Court:**

[1] This is a divorce proceeding commenced by the Mother on March 5, 2013. The parties satisfied all jurisdictional requirements of the *Divorce Act* and the divorce was granted on April 29, 2014.

**BACKGROUND**

[2] The parties began living together in October 2005. They married in October 2010 and separated in December 2012. There are two children born of their relationship who are now five and seven years of age.

[3] On April 15, 2013 an interim hearing was held but was adjourned to July 16, 2013 for completion of the evidence. That hearing was not concluded because the parties did reach an Interim Consent Order issued on July 18, 2013. That order placed the children in the primary care of the Mother with access to the Father every second weekend from Friday at 5:00 p.m. until Monday at 8:00 a.m. The Father was also to have the children in his care every Wednesday overnight from 5:00 p.m. until Thursday morning at 8:00 a.m. The parties agreed that once school began in September the Father would take the children to their school on the Monday and Wednesday morning at the end of his access time. The Mother was to have contact with the children by telephone every evening when they were in their Father's care and if the children requested to return to their Mother's home the Father was to return them. The Mother had exclusive possession of the matrimonial home. The Father's annual income was recognized at

\$38,000.00 upon which his table guideline child support was to be \$544.00 each month commencing July 15, 2013.

[4] The issues to be resolved in this proceeding are the custodial arrangements, the parenting plan including holiday and special time parenting, table guideline and section 7 child support. The parties have settled the division of matrimonial property and debt resulting in a requirement that the Mother pay the Father \$12,321.50. She will become the sole owner of the matrimonial home. The Father is to receive the sum of \$5,000.00 as a partial payment and the balance is to be paid in monthly installments of \$750.00 until the Mother is able to remortgage the matrimonial home. The Corollary Relief Order is to confirm which assets and debts remain with each party as a result of their agreement.

[5] At an appearance before me on February 24, 2014 the Father's information was that he was requesting a joint custodial shared parenting arrangement with child support to be determined based upon that arrangement. At the trial the Father requested joint custody under the parenting plan provided in the Interim Order with additional parenting time for him during the summer months by placing the children in his care for four of the weekdays leaving the Mother to enroll the children in day camp one day a week during the summer. His rationale for this request was the fact that he will be working from his home and he cannot afford to contribute to a childcare expense.

[6] The Mother requested custody, primary care, and access to the Father every second weekend from Friday at 5:00 p.m. until Sunday at 6:00 p.m. She wants to eliminate the Wednesday and Sunday overnight access.

[7] The Mother's reasons for requesting custody and limiting the Father's parenting time with the children can be summarized as follows:

- he has abused her physically and mentally and does not provide an appropriate role model for the children
- there is significant unresolved and potentially unresolvable conflict between them
- he abuses alcohol and marijuana and she fears this may cause him to fail to attend to the children's needs
- he is unable to place the children's needs before his own and this can impair his parenting judgment
- he does not attend to the children's homework and the Monday and Thursday morning schedule is chaotic requiring the children to be on a bus for longer periods of time than is necessary

## **LEGAL ANALYSIS**

### **CUSTODY/PARENTING PLAN**

[8] There are no presumptions to apply when determining with whom children should be living under what arrangement. There is no presumption that parents should have joint custody, custody, primary care or shared parenting. There are only various directives.

Section 16 (10) of the *Divorce Act* requires a child to have:

...as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[9] In *Young v. Young*, [1993] 4 S.C.R. 3 Justice McLachlin, as she then was, when reviewing this section stated:

[18] This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase “as is consistent with the best interests of the child” means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted, but only to that extent.

[10] Several cases provide guidance about factors to consider when assessing best interest; *Foley v. Foley* (1993), 124 N.S.R. (2d) 198 (N.S.S.C.); *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S.C.A.); and particularly useful is the comment in *Dixon v. Hinsley* (2001), 22 R.F.L. (5th) 55 (Ont. C.J.):

46 “The best interests” of the child is regarded as an all-embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the child’s day to day needs but also to his or her longer term growth and development.

[11] What is in the child’s best interests must be examined from the perspective of the child’s need with an examination of the ability and willingness of each parent to meet those needs. Each parent’s plan for the child must be examined, not in respect to what the parent wants or needs, (parents have many wants and needs in relation to their child), but in respect to what the child requires to become an independent, healthy, educated, and socially able human being.

## CONFLICT

[12] Conflict between parents does not necessarily mean they cannot be awarded joint custody. Joint custody may continue to be appropriate if there is sufficient indication of their ability to place the needs of the child before personal needs and to cooperate on issues of vital importance to the child. The role of the court is not to determine which parent is better but to decide which plan for the child's care will best meet the child's developmental, educational, health and social needs. (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S.S.C.); *Rivers v. Rivers* (1994), 130 N.S.R. (2d) 219 (N.S.S.C.))

[13] It has been suggested that parents who have joint custody may be less likely to consider their parenting role to have been diminished and therefore are less likely to withdraw from meaningful contact with their children. Continuing to respect the role and responsibility both parents have in fulfilling parental obligations may encourage parents to overcome existing conflict between them. These are suggestions found in reported decisions. However, joint custody must not be granted as a form of wishful thinking. The nature and extent of the conflict between the parties must be analysed to determine if joint custody and the requested parenting plan is in a child's best interest. Of particular concern is conflict that results in acts of domestic violence.

## DOMESTIC VIOLENCE

[14] The words “domestic violence” are used to describe a phenomena, a construct, a process that is complex and many faceted. In *L. ( N. D.) v. L. ( M. S. )*, 2010 NSSC 68 I discussed this phenomena in detail and took judicial notice of its definition and effect.

[15] Domestic violence most commonly refers to a situation where an adult intimate or former intimate partner attempts by psychological, physical, financial or sexual means to coerce, dominate or control the other. This violence reveals a pattern of conduct that may be verbal, physical or sexual. The conduct targets another person’s self-esteem and emotional well-being. It can include humiliating, belittling, denigrating, intimidating, controlling or isolating behaviour. It can include physical assaults, sexual assaults, sexual humiliation, sleep deprivation, extortion, economic coercion, threats to harm or kill, destruction of property, threatened or attempted suicide, litigation harassment and litigation tactics, manipulation of children, of relatives, of investigation agencies and helping personnel, surveillance, monitoring, and stalking. The abuse and violence in intimate partnerships has a complex reciprocal dynamic not found in violence that occurs between strangers.

[16] The words “domestic violence” have been used to define a number of behaviours including isolated or rare incidents in a relationship - a push, a shove, rudeness, disrespect, and name calling all of which are unpleasant to those on the receiving end of these behaviours but which should not necessarily be accepted as an indication that the relationship requires judicial intervention. If these behaviours have no pattern of repetition and leave little if any lasting impact upon the recipient, or if they are a response to an abusive partner that carry no coercive

intent, they need not be monitored with the same vigilance as will be the case when coercive control is involved. Counselling programs for persons who are “unpleasant” toward others may be quite different from those designed for persons who resort to abuse as a mechanism of coercive control. Differentiation must be made between these two dynamics when both may be and frequently are referred to as “domestic violence”. In this decision I use the term only to refer to violence against an intimate partner which is persistent and has as its purpose coercive control over that partner.

[17] Not every victim copes with domestic violence in the same way. Some victims experience such loss of self-esteem that domination and control are accepted as normal; others attempt to cope by defending, by resisting or by trying to escape from the relationship; others rebel.

[18] There is little reason to suppose that a person who regularly threatens, harasses, demeans, intimidates and controls or attempts to control a partner, a person who has poor impulse control and little ability to accept responsibility, a person who resorts to aggression and violence, will, in the absence of successful intervention, lose those characteristics when alone with children.

[19] Children are harmed emotionally and psychologically when living in a home where there is domestic violence, whether they directly witness the violence or not. Exposure to domestic violence is not in the best interests of children. Those who are the perpetrators of domestic violence, who remain untreated and who remain in denial, are not good role models for their children. The fact that there is no physical evidence the perpetrator has harmed their child is an insufficient reason to conclude the perpetrator presents no risk to his or her child. One risk is



the perpetrator will continue to use violence in intimate relationships to which the child will be exposed in the future. Another is the child may model aggressive and controlling behaviour in his or her relationships with others. As children become able to exert their own desire for control they may be subjected to demeaning and intimidating conduct from a parent. Assessing and containing these risks will be the job of the court in determining what contact with the perpetrator is in the best interest of the child.

[20] Perpetrators of domestic violence may use his or her access with children to continue to abuse the other parent. For example, court orders may be rigidly interpreted, access exchanges may result in verbal or physical abuse and e-mail may not be restricted to discussions about the children. The potential for these effects must be balanced against the child's opportunity to have a relationship with the perpetrator parent. Children generally love and want to spend time with both of their parents.

#### **STANDARD OF PROOF/CREDIBILITY**

[21] When allegations of abuse are made they must be proven to have occurred by the person alleging the abuse. The standard of proof is on a balance of probabilities.

[22] If parties or their witnesses have different recollections of events the court must assess the credibility of their statements. I adopt the outline for assessing credibility set out in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37:

[36] There are many tools for assessing credibility:

- (a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
- (b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
- (c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
- (d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution *R. v. Mah*, 2002 NSCA 99 at paragraphs 70-75).
- (e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.* [2005] O.J. No.39 (OCA) at paragraphs 51-56).

[37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1966] 2 S.C.R. 291 at

paragraph 93 and *R. v. J.H.* supra).

[23] I may never know the truth about what happened. All I can do is apply the legal principles developed by our courts to assess “credibility”. The action imbedded in this word is a direction to sort out reliable from unreliable information. What information is most persuasive?

[24] In preparing this decision I will not recite all of the testimony I have heard. I will refer to testimony that I believe best assists an understanding about why I have made this decision.

## FACTUAL ANALYSIS

### CONFLICT/DOMESTIC VIOLENCE

[25] There has been significant conflict between these parties. The Mother testified that:

- Early in the parties relationship the Father developed “ a habit of pulling the car over while we were driving and refusing to start it up again until I apologized to him for some real or imagined offense which essentially means agreeing with everything he says and assuming the guilt for anything that is upsetting him. He then began a habit of not letting me leave the room during an argument or when I would escape from him and try to lock myself away in another room he would break the door lock.” (Exhibit 6 paragraph 1)
- There was “one argument where I was holding (the child) in my arms and trying to get away by retreating to the nursery and closing the door. As I was doing so, (the Father) forced it open roughly, slamming the door open and hitting me and (the child) with it in the process. (The child) got a bump on her head from this incident. The Father was devastated and very upset with himself and very apologetic. (The child) and I were crying and I felt helpless and terrified”. (Exhibit 6 paragraph 14)
- As the Mothers home daycare business became successful the Father became jealous and frequently threatened he would not “allow me to do it anymore” and threatened “to make scenes in front of the parents or call them. During one incident he actually called one parent with the intent of

telling them that I am poisoning their children because in his opinion we didn't have the right filter on our water tank (however, we never drank or cooked with tap water)". (Exhibit 6 paragraph 20 )

- In April on the Father's birthday he became enraged at the Mother "over some minor offence. He got so angry that he shook (the oldest child) and yelled out 'your fucking Mother' while he was shaking her. I quickly gathered up the children to bring them upstairs" but the Father followed them screaming. "I was begging him to just let me put the children to sleep and then we could talk about it. He refused to do so screaming 'I fucking hate you' over and over again pointing his finger in my face. At this point the children were huddled against me in the bed. (The oldest child) was crying and (the youngest child) went over and pounded his fists on the Father. (The youngest child) stated 'Daddy I hate you'. The Father turned to (the youngest child) and screamed 'I hate your fucking Mother, I hate her'. His eyes were bulging and he was spitting as he was screaming. We were all terrified. He was telling me that I am a spiteful cow and to admit to how horrible I am. He told me to say I am sorry and that he would go away. I said everything he wants me to say but then he said I didn't mean it and I am just being patronizing. I kept begging him to let me put the children to bed but he kept ripping the children's books out of my hands. Finally, I told him that I would call the police. Eventually he left and went outside. Upstairs I spoke to the children and tried to calm them down telling them that when Daddy gets angry he's not himself and it is not the real Daddy. (The youngest child) said 'It's like he has a robot in his head, a bad robot'. I tell them that the bad robot will go away soon and that the real Daddy will be back." (Exhibit 6 paragraph 40)
- In August, 2012 while the Father was in another one of his rages he threw the Mother against the wall and he kicked her. The Mother sustained a very significant bruise on her hip as a result of that kick. (The picture she attached to her affidavit confirms the seriousness of that assault.) The Father kicked the Mother while she was down on the ground crouching against the wall. The Father continued to yell and scream at her but eventually allowed her to leave the house with the children. When she returned he suggested they should separate and that he would find another place to live. He did not follow through with this suggestion. ( Exhibit 6 paragraph 36)
- On December 7, 2012 the Father learned he had been dismissed from his employment. He became increasingly agitated and on December 8, 2012 after the couple and their children returned from grocery shopping the Father "berated me about how I am just like my Mother and what a bad person I am. Finally, I stopped answering (the Father). At that point, (the Father) told me that if I won't talk I need to leave. He grabbed my arms

and twisted them behind my back, lifting me up and pushing me out into the hallway toward the front door. He finally stopped when he noticed that both children were crying hysterically trying to pull him off me. I spent the rest of the evening putting the children to bed, brushing teeth and reading stories while the Father tells me how intimidating I am and how I made him attack me by being such a bully." (Exhibit 6 paragraph 30)

- Events continued to escalate between the parties and on Monday, December 17, 2012 the Mother received a "threatening e-mail from (the Father) stating that he would claim that I had been physically violent and that he would 'make public' my 'criminal past' (I have none), seek equal custody of the children, forced me out of the house etc. He went on to state that unless I agreed to work things out he would do all these things. I realized at this point that this would never end and he would never agree to a separation. I also realized that his anger was going to escalate with the realization that I was not prepared to continue with him. At that point I called in to obtain an EPO...." (Exhibit 6 paragraph 35)
- The Father lost his job in November 2013. The wife believes he orchestrated that termination because on July 11, 2013 he sent her an e-mail telling her "got another warning from work... Don't have to tell you how that would affect your financial situation if I lost my job, and say, had to go back to freelance, where it is bust or boom. Any word on last offer?". (Exhibit 5 paragraph 11)

[26] There were times when the Father would be pleasant toward the Mother and she would believe their relationship was improving. Although their immediate family knew this couple was having difficulties the Mother explains she did not discuss the nature and extent of those difficulties because she was embarrassed and ashamed to do so.

[27] On occasion the Father appeared to understand he was committing acts of domestic violence. Examples of the evidence for this is as follows:

- In the spring/summer of 2012 he requested his physician to help him with his responses to the marital difficulties he was having. His physician referred him to the Cole Harbour Mental Health Clinic where he met with a psychiatry resident. The physician had requested "diagnostic clarification and treatment recommendations". The psychiatry resident reported that the Father informed her he was, "...mostly concerned with his anger and his feeling stressed. His irritability and angry outbursts resulted in marital

problems, and he is seeking help to change his behaviour, in order to save his marriage. His anger has become a major problem in this marriage in the last 2.5 years. He and his wife have communication difficulties which precipitate his anger outbursts. It seems they both have difficulty listening to the other. They have had bad fights, and on occasion (he) has got physical with his wife. He feels bad about his behavior and would like to learn to control his anger. It seems that anger is only a problem for him at home. He gets along with his coworkers, and functions well in the work environment. He denies any road rage or anger toward his friends, however, he did admit to having fights in his previous relationship as well. " (Exhibit 3)

- In an e-mail exchange on December 14, 2012 the Father writes to the Mother, "I'm lying here, in a strange bed and apartment wondering how I came to be here. I seem to be constantly circling around my problems in a never-ending approach.... How can you forgive me after everything I've done, I tell myself. I've played with our relationship in such a brutal way and I will be forever sorry. I treat you like some sort of sport, always making sure that I've got the upper hand or a well-thought-out rationale for why I won't agree with you or see your point of view. The stammering explanations I give you usually sound weak. That's because they are. Therapy helps don't get me wrong, but I have a profound distrust of the world at large that unassuming emanates from within, a profound insecurity..... I'll finish off therapy because it is helpful, it will help me see how I abandoned trust and deal with conflict with anger and violence. But I need a psychiatrist, or something more. It has to be a deeper talk about me in my past...I'm on a cliff-ready to blow away with the slightest breeze. I don't know what I would do without you or the kids. The transition would be demoralizing. I know that "getting you back" is going to be the hardest thing I've ever done. And at this point, I honestly don't know how I'm going to do that. Incredible though, that I somehow still feel hopeful... I am selfish. I need to repeat that 1000 times. Over and over again until the entire world knows. I need to place my mistakes on a table, in the open so everybody can see how foolish I am, how misguided I am. And I will be on my knees begging you for one last chance, not because I am weak, but because I know you and the kids are the source of my strengths and you will be at the core of my being until the day I die." (Exhibit 36)

- The Father in his e-mail to the Mother on August 22, 2013 comments about what he has been reading in books describing the effects of domestic violence and he says, "...they list 18 myths at the beginning of "why does he do that". Most I never believed and have not reinforced my entitlement to abuse I don't think, although #7, 11 and 12 have some kernels of truth. They all seemed pretty simplistic. Next chapter touches on the role of men and their sense of entitlement and control...The first sentence in a section called "the Abuser's Outlook on the Woman's Anger" hits it on the head... "One of the basic human rights he takes away from you is the right to be angry with him". I was surprised to see that in writing. It's exactly what I did... The book so far is full of men who are in denial. In fact, they seem justified that they used physical violence. I relate to that because I did give myself permission to use violence. Yet pretty early on I qualified this as never being justified. There is a little bit of contradiction I realize, so more chapters..." (Exhibit 29)

- In an e-mail sent September 25, 2013 the Father says, "... I do not blame you in any way for my abusive behavior. It was my decision and my decision alone that made me cross the line..." (Exhibit 32)

[28] In this hearing the Father testified it was the Mother who abused him and he didn't mean anything he said in the e-mails he sent to her. He only sent them because he thought, by telling the Mother what she wanted to hear, they could reconcile. Whatever happened in their relationship is primarily her fault. She didn't understand him. She did not support his efforts to become self-employed. She demeaned and disrespected him. She would not listen to him. She tried to control him. She threw objects at him and destroyed some of his property. He also contested the psychiatry resident's report about what he told her.

[29] The Father admits there were some occasions when "he got physical" with the wife but his versions of events are somewhat different than hers. I consider his responses to be nothing more than rationalizations. For example, in respect to the incident when he kicked the Mother, he says "... I did not swear like this in front of the children nor kick the (Mother) while she was on the ground crouching against the wall. The scuffle was a result of her destroying my personal property and me trying to stop her from doing so..." . He does not describe what personal property she was destroying. He admitted he kicked her in later oral testimony but he did so because he was trying to prevent her from hitting him with a "glass object" .

[30] I do not find the Father's testimony to be credible. His entire approach is self-serving and manipulative. For example he did acknowledge to the Mother that he was abusive of her. In an e-mail to him on September 11, 2012 she wrote:

“I am willing to let you stay in the house under a few conditions that must be adhered to strictly!

- You call Dr. (M) today and make an appointment for the next possible time.
- You stick to each and every appointment and don't miss or cancel or defer a single one of them
- When you become enraged and I ask you to stop talking/yelling or to leave the house, you do so (even if it is just for a few hours)
- You do not tell me or physically force me to leave the house or a room
- You never ever lay a hand on me again in any shape or form-that includes blocking my way or shoving/pushing/yanking/kicking/lifting me up/pulling on my arm or anything in between, above and beyond, remotely close to or resembling using your body or strength to make me do or say what you want or to hurt or punish me...” (Exhibit 33)

[31] The Father's reply “ I will. It's sinking in. I want to get better. I can't keep doing this. It's wrong. Thank-you.” (Exhibit 33)

[32] There was domestic violence in the parties relationship perpetrated by the Father. He is unrepentant and now views the Mother as the aggressor. His lack of empathy and respect suggests he will not be able to work objectively with the Mother when joint decisions are required. As a result I am satisfied joint custody is not in the best interest of these children. The Mother is to have custody.

#### PARENTING PLAN

[33] I am very concerned about the parenting the Father will give to his children when they are in his care. He believes he loves his children but I am not convinced it is the selfless love we expect from parents. He admitted to the psychiatry resident he “ used to drink heavily in the past and still drinks quite a lot” and “he had greatly increased his cannabis use since May”. In the



hearing he suggested the psychiatry resident reported his statements incorrectly and he denied abuse of either substance although he did admit he used both. I have determined that he will use these substances and likely abuse that use when he considers himself justified in doing so. He has an inflated sense of his abilities and may conclude he can use such substances to excess while caring for the children.

[34] The Father's understanding about what children need is questionable. My support for this concern is the episode when he left his sleeping children locked in his car in a Mall shopping lot on a hot summer day without the windows down while he went inside to purchase whatever it was he was seeking at the time. He completely failed to recognize the danger this posed to the children. A security guard came across the children and was concerned enough to track him down and to call Children and Family Services. In this proceeding he did not accept that the situation presented any danger to the children. He argued that it was not hot that day and he wanted to let them continue sleeping. Perhaps he has learned his lesson but I, like the Mother, have concerns about his judgment.

[35] If I did not have concerns about the Father's judgment and his domestic abuse of the Mother it might have been desirable for the children to be in his care week days during the summer. These parents will find it difficult to pay for the necessary child care. However, because of the concerns I have detailed I do not consider the Father's plan for summer parenting to be in the children's best interest. In addition, he should be focusing extensively on opportunities to increase his, and his children's, economic security either by obtaining employment in the summer or by finding a way to make his graphic design business successful. He should be

attending appropriate counseling to reduce his likelihood of committing acts of domestic violence toward former or future intimate partners.

[36] While the Father may now be attending to the children's homework, his work as a bus driver does require the children to be on a bus for much longer than is the case when they are in the Mother's care. Often we require young children to endure lengthy bus rides because we are convinced the detriment of the long bus ride is balanced by the opportunity to spend time with a parent. Given the circumstances of this case I am not convinced the Sunday and Wednesday overnight time is productive and in the best interest of these children.

[37] I am concerned about the Father's failure to accept he is responsible for the abuse he inflicted upon the Mother. The children may become pawns in his continuing search for vindication. However, the Mother does see benefit to the children from a continuing relationship with the Father and she has not asked that his contact with the children be limited until he has undergone counselling. I have accepted her submissions about the regular and holiday time access schedule. If the Father does use his opportunity to parent his children as a means by which to continue his abuse of the Mother, that behaviour could trigger a variation proceeding.

[38] The parenting plan I order is attached as Schedule "A". It includes the terms and conditions of that plan.

[39] I have considered the Mother's request for daily telephone access when the children are in the Father's care including a provision that the children are immediately to be returned to her care if they request "to go home". Sometimes these provisions cause more conflict than they

resolve. The Father may also wish to say goodnight to the children when they are in the care of the Mother. When parents have such a provision in an order they must remember to inform the other parent if they are not going to be in the home with the children when the call is to be made. If not contempt applications may be the result. Mature parents recognize it may be important for a child to hear from the other parent as he or she is settling down for the night. However, for some children this does not help them settle but creates a plea to go "home" to the other parent. I have heard nothing about how this provision in the Interim Order worked for the children other than a passing reference that the Father did return the children to the Mother on an occasion when they did ask. I am not going to attempt to micro manage this issue between these parents. I will say that it is appropriate to permit a good night call to a child if to do so helps the child settle rather than distress a child. If a child cannot be settled it is appropriate to seek the assistance of the other parent including returning an inconsolable child if other strategies have not worked. I leave this issue to be managed by these parents expecting them to make decisions in the children's best interest. If goodnight calls are to occur they should be short and occur at the same time every evening. Parties should inform each other if they are to be away for an evening with the children if the children will be unavailable to take the call.

#### CHILD SUPPORT

[40] The Mother testified the Father frequently threatened her with his loss of employment. Given his e-mail to her on July 11, 2013 (paragraph 25 of this decision) I find her proposition credible. He lost his employment in November 2013 because he used "company resources during company time to look for alternative employment". He had been previously warned in the past

about “using company resources to conduct personal affairs”. (Exhibit H attached to Exhibit 4 – excerpts from dismissal letter received by the Father from his employer)

[41] The Mother suggests the Father orchestrated his dismissal to reduce or eliminate payment of child support. Furthermore, although he now has employment as a bus driver, it is seasonal and, in previously filed Statements of Income he had not included any income from his self-employment as a graphic designer. He suggested he had an undue hardship claim although he did not pursue that claim in this hearing. The Mother believes his combined income will be \$38,000.00, the income amount reflected in the Interim Consent Order, an amount not contested at the time by the Father.

[42] Section 19 (1) of the *Federal Child Support Guidelines* permits a Court to impute such amount of income to a spouse “as it considers appropriate in the circumstances,” which circumstances include nine defined situations. The defined situations are not an exhaustive list and the section gives the court a significant amount of discretion in imputing income. The enumerated circumstances that may be relevant in this case are:

- (a) the spouse is intentionally underemployed or unemployed, other than where the underemployment or unemployment is required by the needs of the child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;

These provisions effectively require court not only to consider the amount of income a spouse actually earns but also the amount of income that spouse could earn if he or she was working to capacity. The age, education, experience, skills and health of the payor are factors to be considered in addition to such matters as the availability of work, the freedom to relocate and other obligations. However, persistence in unremunerative employment may entitle a court to impute income. The financial obligation to support children should not be reduced to assist a parent who is pursuing unrealistic or unproductive career aspirations.

[43] Courts in Nova Scotia and some other provinces have concluded that this section of the guidelines is not confined to circumstances where a parent deliberately seeks to evade his or her child support obligations or recklessly disregards his or her children's financial needs while pursuing his or her personal choice of employment or lifestyle. It also applies to those who have not taken reasonable steps to secure or maintain employment commensurate with his or her age, health, education, skills and work history.

[44] The discretionary authority to impute income must be exercised judicially. It is not to be exercised arbitrarily. There must be a rational and solid evidentiary foundation upon which to impute income. The burden of proof rests with the person seeking to impute income. In this case that burden rests upon the Mother. She considers the Father to be underemployed.

[45] The Father's income information is:

- 2010 Notice of Assessment - \$26,568.00
- 2011 Notice of Assessment - \$24,326.00

- 2012 Income Tax Return with no supporting attachments - \$35,454.00
- 2013 Income Tax Return with no supporting attachments - \$33,144.50
- Statement of Income filed February 14, 2014 with insufficient attachments from which to confirm calculated income - \$32,712.00

[46] There is no evidence to suggest the Father has ever earned \$38,000.00 nor that he likely could earn this level of income. While he has earned income from self-employment, there is nothing to suggest he could do more than supplement earned income from regularly paid work. In fact it was his relative lack of earning capacity, while self-employed, that led to many of the arguments between this couple. The Father needed to find and retain regularly paid employment. His self-employment income was insufficient.

[47] I accept the Father's estimate of this earnings for 2014 as revealed in his Statement of Income. He is warned that these documents are taken seriously by the court and if he earns less than this amount he may not be granted a retroactive variation by the court should he file a variation request. The Father's income for 2014 is \$32,712.00. The table guideline child support he is to pay to the Mother for two children is \$476.00 per month commencing January 1, 2014.

[48] The Mother has requested the Father pay his proportional share of the expense for child care, and uninsured medical expenses. She also has claimed these on a retroactive basis. In order to understand the likely yearly cost of those expenses I have examined her historic payments and considered the changes that will occur when the children go to school. An estimated yearly total for these expenses is \$7,240.00 building in some flexibility because the children may need

assistance in French Immersion as in the past. I have placed information about these expenses, as well as other required information, into the computer program Divorce Mate and the proportional share of the net cost of these expenses required to be paid by the Father would be \$111.00 per month. However, this payment would leave the Father, after paying the table guideline amount of child support, with a net monthly disposable income of \$1,602.00. His monthly expenses for rent, heat, electricity, telephone, food reduced to \$400.00, car payment, and gas reduced to \$175.00 total \$1,949.00. He does not have the financial capacity to contribute to the section 7 expenses. I realize the Mother also has a budget deficit but the Father would be unable to pay what I consider to be very basic reasonable living expenses if his net disposable income was reduced to \$1,602.00. The Mother will receive a yearly child tax benefit in the amount of \$4,918.00, and the yearly \$1,200.00 UCCB payment, with these her net monthly disposable income will be \$3,625.00. Unfortunately she will need to adjust some of her expenses. There is simply not enough money to meet everyone's needs.

[49] Section 7 of the child support guidelines directs that the court "may provide an amount to cover all or any portion of" the expenses listed in that section. The decision is discretionary and as a result I can decide not to grant a Section 7 request. At his present income the Father is not required to contribute to the section 7 expenses.

[50] The Mother wants a retroactive recalculation of child support to the date of separation, December 2012, based upon the requested imputed or the Father's actual annual income. The Father wants a retroactive recalculation to the date of the Interim Order, July 15, 2013 based

upon his actual annual income for that year and for 2014. I have already explained why I have not imputed income to the Father.

[51] I am familiar with the directions provided to the court in *DBS v. SRG*, *LJW v. TAR*, *Henry v. Henry*, *Hiemstra v. Hiemstra*, 2006 SCC 37, a case involving retroactive claims. In this case the Mother will face financial hardship if I readjust the amount of child support she received pursuant to the previous order. The order was based upon the Father's submissions at the time about his likely income from his employment, employment he may have retained but for his use of the employers' computers for his own purposes. The Mother's financial resources are limited and the Father cannot contribute to Section 7 expenses. This matter may have been resolved earlier had the Father properly completed income disclosure requirements and avoided the delay caused by his request for time to file and perfect an undue hardship claim. I dismiss the Father's retroactive claim.

[52] Given that the Mother is to pay the Father an equalization payment, he has financial capacity to pay a retroactive award. I find no principled reason why he should not have paid child support since the date of the parties separation. For most of the time in question the Mother was paying the mortgage and while the Father may have been paying some matrimonial debt, that does not excuse his lack of contribution by way of child support. His evidence is that his income in 2013 was \$33,144.50.

[53] This income would require him to pay a table guideline amount of \$482.00 per month for two children. He is to pay this amount from January 15, 2013 until June 15, 2013 resulting in a



total retroactive claim of \$2,892.00 which is to be deducted from the amount owed to him by the Mother for the equalization payment.

[54] I had earlier informed the parties that I consider the Mother to be the successful party to this litigation and I requested submissions on costs. I have reviewed those submissions.

Application of the Tariff of Costs and Fees would result in an award of \$10,250.00, the amount requested by the Mother. Deducting this amount from the property equalization payment would result in a requirement for the Father to pay the Mother \$820.50, if she has not yet paid him the \$5,000.00.

[55] The Father does need some money to establish and maintain an appropriate residence to accommodate the children when they are in his care. He does not have significant income at this time but the expense of this hearing was primarily due to his failures to disclose income, the necessity for the Mother to respond to the many affidavits he filed in the proceeding and to his denial about the abuse he perpetrated upon her. The Father is to pay the Mother costs in the amount of \$5,000.00. These costs are to be deducted from the equalization payment.

Beryl A. MacDonald, J.

**Attached: Schedule "A"**

**Schedule "A"**

**DECISION MAKING**

**Custody**

1. The Mother shall have custody of the children meaning the Mother has sole authority to make decisions that have significant or long lasting implications for the children or that impose responsibilities on a parent - for example, decisions about physical or mental health, dental care; counseling; education; choice of child care provider.

**PARENTING PLAN**

**Primary Care**

2. The children are to reside with and be parented primarily by the Mother.

**Access/Parenting Time**

**Regular Schedule**

3. The Father is to parent the children:

a) Every second weekend from Friday after school, if the Father's work schedule will accommodate picking the children up at their school and if not from 5:00 p.m. until Sunday at 6:00 p.m.

b) During the week when the Father will not have the children in his care on the weekend, and only if the Father can pick the children up from their school, child care provider, or Mother's residence, every Wednesday and Thursday from after school or at 3:30 p.m. until 6:00 p.m.

c) If the Father's parenting time occurs on a Long Weekend (in May, September, October) the children shall be returned to the Mother's residence on Monday of that Long Weekend at 6:00 p.m.

### **Summer Vacation**

4. Each parent shall have two consecutive weeks exclusive parenting time during the children's summer school break.

5. In 2014 and in every subsequent even year the Father shall have first choice of his exclusive two weeks summer parenting time provided he informs the Mother of his choice no later than June 1 in that year. (Because June 1 has passed the Father is to inform the Mother before June 23, 2014 for this year only).

6. In 2015 and in every subsequent odd year the Mother shall have first choice of her exclusive two week summer parenting time provided she informs the Father of her choice no later than June 1 in that year.

**Easter**

7. In 2014 and in every subsequent even year the Mother shall have the children in her care for the Easter long weekend beginning after school on Thursday until the beginning of school on Tuesday morning.

8. In 2015 and in every subsequent odd year the Father shall have the children in his care for the Easter long weekend beginning after school on Thursday until the beginning of school on Tuesday morning

**Christmas**

9. In 2014 and in every subsequent even year the Mother shall have the children in her care on Christmas Eve and Christmas Day and the Father shall have the children in his care from 10:00 a.m. December 26<sup>th</sup> ( Boxing Day ) until 6:00 p.m. on December 28<sup>th</sup> .

10. In 2015 and in every subsequent odd year the Father shall have the children in his care from 12:00 p.m. on Christmas Eve until 6:00 p.m. on December 26<sup>th</sup> ( Boxing Day ).

**School Spring Break**

11. The Spring School Break refers to the weekdays Monday at 9:00 a.m. until Friday at 5:00 p.m..

12. In 2015 and in every subsequent odd year the Father shall have the children in his care during their spring school break.

13. In 2016 and in every subsequent even year the Mother shall have the children in her care during their spring school break.

14. If the spring school break follows the Father's regular weekend regular parenting time, the children shall remain in his care and will not be returned to the Mother's care on Sunday at 6:00 p.m.

### **Changes to Parenting Plan**

15. Changes to the parenting plan, including the provision of additional parenting time, may be made upon agreement of the parties in writing and an exchange of e-mail confirming clear acceptance of the proposed change is an "agreement in writing" for this purpose.

### **Missed Access/Make Up Time**

16. If parenting time is missed by the Father, whether due to a cause that is or is not within his control, that parenting time is not required to be replaced or made up at alternate times by the Mother although she may choose to do so.

## **TERMS AND CONDITIONS**

### **Transportation**

Unless otherwise agreed between the parties the Father shall be responsible for the transportation required to exercise his parenting time with the children.

**Right to be Informed**

17. The Mother must inform the Father about any significant changes, problems or recommendations relating to the children's physical and mental health, dental care, physical and social development, and education, and must provide copies of all written reports received from service providers about these changes, problems or recommendations.

**Right to contact Third Parties**

18. The Father shall be entitled to directly contact the children's doctors, dentists, therapists, teachers, and other third party service providers to request and receive information and consult about the children.

**Contact Information About Service Providers**

19. The Mother must provide the Father with the name, address and telephone number, or other contact information for the persons or institutions providing services to the children for example, the children's physician, dentist, therapist, teacher, and recreational provider and she must update him if there are any changes.

**Listed as Contact**

20. Each parent must be listed as a contact parent on all documents pertaining to the children.

### **Passport and Travel**

21. The Mother has the necessary authority to apply for and receive a passport for the children and the children may travel at any time outside of Canada. No consent from the Father is required on any application for a passport nor to permit the child to travel outside Canada. If Passport Canada requires the Father's consent it shall be deemed to be given as a result of this order.

22. The Mother must provide the Father with an itinerary and contact information for any travel with the children outside of Canada.

23. It will be the Mother's decision whether to permit the children to travel with the Father outside of Canada.

24. Neither parent shall take the child outside the province of Nova Scotia without notifying the other parent. The traveling parent shall give the other parent a travel itinerary and a cell phone or other number where he or she may be reached while traveling.

### **Parties' Addresses/ Contact Information**

25. The parents must provide each other, and continue to provide each other, current addresses, telephone numbers, and e-mail addresses and all other contact information.