

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bjarnason v. Bjarnason, 2005 NSSC 205

Date: 20050711

Docket: 1202-001409

Registry: Amherst

Between:

Kerry Bjarnason

Petitioner

v.

Catherine Ann Bjarnason

Respondent

Judge: The Honourable Justice Deborah Gass

Heard: June 9 and 10, 2005, in Amherst, Nova Scotia

Decision: July 11, 2005

Counsel: Wanda M. Severns, for the Petitioner

[1] Kerry Bjarnason, the petitioner, and Catherine Bjarnason, the respondent, were married on June 29, 1991. They have two children, Erik James Bjarnason, born February 3, 1994 and Erin Bjarnason, born December 19, 1995. The parties separated in November of 2000.

[2] In July 2003 they signed a separation agreement. That agreement addressed all outstanding issues relating to their marriage.

[3] The petitioner commenced divorce proceedings in May 2004. The respondent filed an answer in July 2004. The sole issue before the Court is custody, and flowing from that access and maintenance.

[4] When the parties separated in November of 2000, Erik was six, almost seven years of age; Erin was almost five.

[5] The parents operated informally under a joint custodial parenting regime for almost three years prior to entering into the separation agreement, which formalized their joint custodial arrangement.

[6] In the petition for divorce issued in May of 2004, the petitioner claimed sole custody of both children with reasonable access to the respondent/mother.

[7] The respondent seeks sole custody or alternatively to remain the primary caregiver of the children.

HISTORY

[8] The parties in this proceeding lived with the husband's parents in Athol, Cumberland County from the beginning of their marriage until 1999. During this time, and continuing to the present, the husband worked on the oil rigs which necessitated him being away for three weeks of a six week cycle. Thus he was away from the family fifty percent of the time.

[9] In 1999 the family moved to their own home in Amherst when the children were six and four years of age. Ms. Bjarnason worked at the bank, eventually in real estate, and Mr. Bjarnason continued his work on the rigs.

[10] When the parties separated in November of 2000, Mr. Bjarnason returned to live with his parents in Athol and Ms. Bjarnason moved to Cape Breton with the children to help look after her ailing mother. The children's father and grandparents visited them in Cape Breton.

[11] The children also spent long weekends and holidays with their father and their grandparents in Athol. During this time, their maternal grandmother was dying of cancer. They spent most of the summer of 2001 on the farm.

[12] In September 2001 Cathy Bjarnason moved to Dartmouth. The children joined her there to begin school. They have resided with their mother in Dartmouth and have attended school there ever since. They continue to spend many weekends and holidays at the paternal grandparents' farm.

[13] Eventually the parties entered into a separation agreement in July of 2003, in which it was acknowledged that the children spent at least 40 percent of their time with Mr. Bjarnason and his parents in Athol during the school year and holidays. This arrangement has continued to the present.

MR. BJARNASON'S APPLICATION

[14] Mr. Bjarnason has petitioned for divorce. He seeks to have the terms of the separation agreement that the parties entered into on the 9th of July, 2003 incorporated and form part of the Corollary Relief Judgment with the exception of the provisions set out in paragraphs six and seven relating to custody, access and maintenance.

[15] The sections of the separation agreement that are relevant to this proceeding are set out in paragraphs five to eight:

Full and Final Settlement

5. The parties acknowledge that the within agreement is made in full and final satisfaction of their respective rights and obligations for division of matrimonial and non matrimonial assets and any other remedy pursuant to the Matrimonial Property Act of Nova Scotia and for relief under the Divorce Act, 1985, Canada, the Family Maintenance Act of Nova Scotia or any successor statute in Nova

Scotia or any other jurisdiction and any other remedies arising out of their marriage to each other.

Custody and Access

6. (a) The husband and wife shall have joint custody of the children of the marriage, namely, ERIK JAMES BJARNASON, born on the 3rd day of February, 1994, and ERIN BJARNASON, born on the 19th day of December, 1995;

(b) The wife shall have the children during the week during the school year for the attendance by the children at school. During the school year, the husband may have the children on the weekends when he is not at work on the oil rigs and may spend such other time with them during the week as he can reasonably arrange when off work.

(c) The husband presently lives in the same home as his parents, Larry and Ruby Bjarnason, in the rural community of Athol, in the County of Cumberland. The wife acknowledges that because the husband works on an oil rig that the children will be at the husband's home some of the time in the care of Ruby and Larry Bjarnason. The wife agrees that this is a positive arrangement in the best interests of the children and consents to the children being with Larry and Ruby Bjarnason at their home during that part of the year when the children are in the custody of the husband whether or not the husband is at work or at home. The wife further acknowledges that the husband has had the children either with him or with his parents or jointly approximately forty per cent (40 %) of the time since the date of separation and that the husband and wife shall work at ensuring this arrangement continues.

Maintenance

7. (a) The husband declares that his present annual income is Eighty-One Thousand Three Hundred Dollars (\$81,300.00) and the husband agrees to pay to the wife for the maintenance and support of the children, ERIK JAMES BJARNASON and ERIN BJARNASON, the sum of One Thousand Forty (\$1,040.00) per month for so long as

they remain children of the marriage within the meaning of the Divorce Act, 1985.

(b) Neither the husband nor the wife shall pay any amount for the maintenance and support for the other and each hereby specifically releases his or her right to claim such maintenance whether pursuant to the Divorce Act, 1985, the Family Maintenance Act of Nova Scotia or any successors thereto.

Material Change in Circumstances

8 (a) The husband and wife intend sections 6 and 7 of this Agreement to be final except for variation due to a material change in circumstances;

(b) If a material change in circumstances takes place, only the provisions of sections 5 and 6 (a) of this Agreement may be varied;

(c) The husband or the wife seeking a variation will give to the other a notice of the variation he or she is seeking and the husband or the wife may then confer with each other personally or through their respective solicitors to settle what, if any, variation should be made;

(d) If no agreement has been reached thirty (30) clear days after notice has been given under section 7 (c), variation in relation to custody, access and maintenance may be determined at the instance of either the husband or the wife by an application pursuant to the Divorce Act, 1985, or any successors thereto.

[16] In support of his application, Mr. Bjarnason cites changes in circumstances since the signing of the agreement.

EVIDENCE ON BEHALF OF FATHER

[17] The court heard the evidence of the petitioner himself, his live-in girlfriend, Karen MacDonald, Bridget Michaels, who is a former friend of the parties, the petitioner's parents, and his cousin, Stephanie Delaney.

[18] Stephanie Delaney, the petitioner's cousin, spent many of her formative years growing up on the family farm in Athol, Cumberland County. She was

positively influenced by her time there. She maintained friendship with Ms. Bjarnason post separation, and their communication was primarily through MSN communication on the computer. She indicated that through their communication on a few occasions as recently as April of 2005, Ms. Bjarnason indicated to her that she had been smoking marijuana. It was unclear from her evidence whether the children were present.

[19] Ms. Bjarnason's friend, Bridget Michaels testified that she worked with Cathy at Scotiabank in Amherst and then lived with her for a few months after Ms. Michael's marriage broke down, first in Amherst and then in Dartmouth for approximately three months. It appears that this would have been in the fall of 2001. It was her evidence that the mother did not involve herself with her children and that she did not seem to have time for them. She also described a couple of incidents where she felt that the mother's conduct with men in the house was inappropriate, although it was acknowledged that on at least one of those occasions the children were away with their father and both occurred late at night. She acknowledged that she had encouraged Ms. Bjarnason to leave her marriage. She also acknowledged that she was calling a psychic hot line for advice during the period of time that she was staying with Ms. Bjarnason before she finally moved out. She also testified that she expressed her concerns about Ms. Bjarnason's conduct to Ruby, the petitioner's mother, during the time she was living there in 2001.

[20] Mrs. Ruby Bjarnason, the petitioner's mother, testified and explained how the payments for child support were made to Ms. Bjarnason as she was involved in the process. She also testified about the well being of her grandchildren. It was her view that the mother did not give first priority to them. She also testified that most of the time when the pick up and the delivery occurred they dealt mostly with Ms. Bjarnason's sister, Tracey. She indicated that the children spend most weekends and holidays with them even when their father is away. She has always been available to the children when they need her. She did acknowledge that Bridget shared her concerns about Ms. Bjarnason back in 2001 when she was living with her. The grandparents, and particularly the grandmother have consistently been involved with the children and supportive of them. She expressed some concern about the physical care of the children but did acknowledge that it might be just her standard of care as opposed to someone else's. Her evidence was that they continue to have regular telephone contact with

the children during the week and there is free communication back and forth between the two households. Whenever she is in the city she picks them up and takes them out. She never goes to the door to see who is at home. She acknowledged that there have been discussions with the children about changing residence and schools. She also testified that her son was concerned about the children not being involved in extracurricular activities. It is her view that the children's schooling is not given enough attention by their mother and they attempt to assist in that regard when the children are with them in Athol. She acknowledged that there are four adults present in the home in Athol when the children are there and there is a lot of leisure time to spend with the children.

[21] Mr. Bjarnason, the grandfather, essentially confirmed the evidence of his wife and described one incident when Erik called him to ask if he had the phone number to reach his mother. He was home alone after school and wanted to ask her permission to go out to play. He confirmed that they have the children with them during most weekends, summer vacations and school breaks even when their father is not present. They have established a pattern as grandparents to make the back and forth arrangement work for the children but he feels the children do not have the care and attention they deserve when they are with their mother. He acknowledged that he spent a lot of time with the children's mother when the children were young, up until 1999 before they moved to Amherst. He acknowledged that he worked in the fields with Ms. Bjarnason gardening, caring for the livestock and that the children were involved in a lot of activity during that period of time. He also acknowledged that she did the cooking and the cleaning and was the significant homemaker. He also acknowledged that he really did not know much about her home life now but that she was actively involved in homemaking when they lived on the farm.

[22] Karen MacDonald, the petitioner's girlfriend, has been with the petitioner since June of 2001, six months after he and Ms. Bjarnason separated. She lives on the family farm with the petitioner, his parents, and her teenage son. When Mr. Bjarnason has been away, she was involved in the pick up and delivery of the children and she indicated that the mother was hardly ever at home. She said she was never invited into the house. Usually the mother's car was not there and the children's Aunt Tracey would come to the door.

[23] She indicated that Mr. Bjarnason outfitted the children for school and bought them their school supplies. She described going to a Christmas concert in December of 2003 which their mother did not attend. She indicated that she and Mr. Bjarnason went to the classroom to find the children following the concert and when she went into the classroom, she was mistaken for the children's mother. She indicated she didn't go to the concert in 2002. In 2004 there was a snow storm and they did not go. She indicated that Kerry, her partner, has gone on a field trip and has attended the school spring fling. She indicated that she has also helped with school work and the children's penmanship. They spend at least an hour out of the weekend on homework. For a time they were picking the children up from school on Fridays and dropping them off on Monday mornings. As a result they had access to the children's school work and were able to provide them with some assistance.

[24] She described an upsetting incident at the end of March Break 2004. When she brought the children home, it appeared that their mother was not present at 4:00 o'clock as she had promised. She said that Erik was extremely disturbed about their mother not being at home. She described another weekend when the child, Erik, was very ill and was told by his mother that he had to go for his access with his father.

[25] Ms. MacDonald described the children in a very loving fashion, saying they are great children who get along well with her own children. She said the children have respect for her, that she helps them deal with issues and she treats them as her own. She said that Kerry, her partner, was becoming frustrated over the existing arrangement in that the mother made promises to the children which she did not fulfil. They feel that the children are missing out on activities in their community, and that the mother is not available to take them to events and extracurricular activities.

[26] The children's father, Kerry Bjarnason, also filed extensive affidavits and gave viva voce evidence in the matter. He testified that after his wife moved to Cape Breton with the children, he visited them every weekend that he was home, and that he and his parents stayed with the children in Ms. Bjarnason's home in Cape Breton during Christmas of 2000. The children spent the remainder of the Christmas holiday that year in Cumberland County with their grandparents. Mr. Bjarnason indicated in early December 2001 she went on a holiday and left the

children behind without notifying him or his parents or what the arrangements for child care were while she was gone. The children usually spend every weekend that their father is home with him, and he picks them up now on Friday after school and sometimes returns the children on Monday morning.

[27] His evidence is that he has attended most of the concerts that the children have been involved in. He participated in a field trip and a spring fling. He also testified that when the children come to Cumberland County for the weekend, he signs their homework agenda and they ensure that the work is done.

[28] His concern is that the children have not been involved in extracurricular activities, and he does not accept that financial circumstances have prevented them from being involved. He indicated that he was prepared to pay for their participation.

[29] His evidence is that he has been involved in arranging extracurricular activities such as Taekwon-Do for Erik but his attendance was not regular and not continued. He also has indicated that the children have a family doctor in Cumberland County and he has also made arrangements for the children to have dental appointments. They are regularly involved in a soccer club in Amherst, Cumberland County during the summer and they are registered with the Fundy Youth Soccer Club. They had also been involved in the YMCA swim program. They have a membership in the pool at the local Wandlyn Inn.

[30] His evidence was that they entered into the separation agreement in July 2003 because Ms. Bjarnason needed an agreement in order to be in a position to buy a home for herself and the children. He acknowledged that all along they had a joint custodial arrangement and he engaged a solicitor to draw up an agreement that reflected that. He said it had been his expectation for the children to fully participate in activities in the Halifax Regional Municipality. He indicated that had he known what was going on he would have taken steps to procure custody. He is of the view that the children watch entirely too much television and that they have seen movies that are inappropriate, and that they are not being adequately monitored.

[31] He says he has spoken to the children about the parenting arrangements and that they have inquired about what it would be like to go to school in Cumberland

County. He has told them he was seeking legal advice. He says he has been in contact with the children's school and receives information. In particular he was concerned about their non-participation in the milk program. He indicated that he has participated in a spring fling and that he also went on the Corn Maze trip with Erin to Windsor. He has attended two concerts. He has never received a telephone call from the school regarding problems with the children and the report cards would indicate that all is well with them. The school is aware that he is away at work every three weeks out of six.

[32] Since he has begun picking the children up from school on Fridays, he is able to go through their school work and help them with projects. He is now able to make direct contact with the school through their web site.

[33] He indicated that the children lack consistency in their parenting from their mother. He did not know that his son, who at age ten, would be alone after school and was concerned about the fact that there was an occasion when Erik was home without an emergency contact number and called his grandfather. He had some confidence in the children's living arrangement because Ms. Bjarnason's sister, Tracey, was living in the home with them, and it appeared that Tracey was very involved in the care of the children.

[34] Mr. Bjarnason's concern is that the children need more attention although it appears that may be improving now if their mother has a home based job. He was also concerned that the mother seemed not to be concerned about the children not having the necessary school equipment, such as a protractor. He is of the view that the children should be involved in playing ball after school and other extracurricular activities as well as winter activities such as skating. At one point, there appeared to be some behavioural problems with Erik but it appears that the situation resolved itself and he did not know if there needed to be any intervention.

[35] He is also concerned about the number of jobs that Ms. Bjarnason has held, indicating that six years ago she was involved in real estate in Amherst, then she moved to Sydney with the children, then to Dartmouth where she worked as a waitress and a bartender. Subsequently she got involved in real estate again, then back to bartending, then restaurant supplies, and now she is doing something else.

[36] He expressed concern about the number of boyfriends in Ms. Bjarnason's life. He was of the impression that a person named Jamie was living in the home because he also answered the phone and did some of the driving for the children. Prior to that a person named Andrew was in her life, and before the parties entered into the separation agreement there was another person with the name of Doug.

[37] Mr. Bjarnason testified with respect to the inordinate amount of expense involved in exercising his access driving back and forth to the city. He also testified with respect to his request to have her sign the children's passport application, indicating that he had no intention of departing the country with the children but rather was seeking it for holiday purposes.

[38] He emphasized that he always encourages the children, especially Erik, to mind their mother and to respect her, but he is also realistic about their expectations from their mother when promises are made. He does acknowledge that he lives in a busy household that is made up of two families. The home includes himself and his girlfriend, Karen, her teenage son as well as his parents. In addition, the two children are in that household frequently.

[39] Mr. Bjarnason said he would never have signed the agreement in 2003 if he knew what was going on. In that regard, he was speaking of the events since their separation in 2000. He says he wants to salvage what is left of the children's childhood and that they need to have a life outside of school. He feels that the money he is paying for the children is not benefiting the children and that their mother lacks parenting skills. He indicated that if he were to be granted custody of the children, the access arrangements could not be reversed. Such access would have to be modified to reflect the children's circumstances and it would be his view that the arrangement would not be the same as it is now, should the primary care roles be reversed.

EVIDENCE ON BEHALF OF MOTHER

[40] The mother's evidence is that she has been attempting to improve her financial circumstances since the party's separation in the year 2000. She has held down different jobs but in each job it has been with an effort to increase her

income. It is her view that by advancing her employment and increasing her income, it benefits the children. She is now involved, having signed a two-year contract, with a company selling marketing tools to the real estate industry which enables her to work from her home office.

[41] The mother believes that the environment at the farm is a very beneficial environment for the children. She is of the view that the arrangement that the children currently have is an arrangement that works well for the children. They live with her during the week and have the benefit of the farm on weekends and holidays.

[42] Her evidence is that Mr. Bjarnason has only recently become involved in the children's schooling since he filed the Petition for Divorce. She says the children are well established in their school and community and they have been in her primary care since the parties' separation in 2000. Because Mr. Bjarnason is away a full six months of the year, any other arrangement involves child care being provided by third parties. She also testified that even though he is home for three full weeks at a time and the children are with him during those weekends, he does not make any effort to come to the Dartmouth area mid week to spend time with the children or to visit their school. She is of the view that the children are content with the current situation and do not wish it to change. Her evidence as well is that there is no communication between the two of them, as parents of these children.

[43] Ms. Bjarnason described her financial history. It was necessary for her upon separation to establish a credit rating because she had no credit history on her own. She was a self-employed licensed realtor at the time. In April of 2002 she resumed her career in real estate and by June of 2003 she was informed that she would need a formal separation agreement to prove the payment of child support as income, so that she would be in a position to purchase a home in the community in which she had been residing with her children since 2001. She then approached Mr. Bjarnason to address the subject of a separation agreement and he engaged counsel to prepare the agreement.

[44] The children have been attending the same school, Michael Wallace Elementary School, for the past four years. Her evidence is that the children do

well in school, both academically and socially. While there have been some behavioural problems noted with Erik, these have essentially been resolved.

[45] With reference to the evidence of Bridget Michaels, Ms. Bjarnason indicated that Ms. Michaels had been a friend of hers and had stayed with her from September to November of 2001, which was shortly after she moved to Dartmouth after the death of her mother. Her evidence was that Ms. Michaels was rarely there and that she was in a state of transition. Ms. Michael's circumstances were very unstable and she had moved numerous times with her daughter. She produced her telephone bills for this time frame. For the period from September to December, some bills were high as \$579.00 a month and she was left having to pay off this expense incurred by Ms. Michaels. She produced her monthly bills following the departure of Ms. Michaels which were in the \$50.00 - \$60.00 range.

[46] Ms. Bjarnason testified with respect to issues of concern raised by Mr. Bjarnason. It was her evidence that Erik had an interest in hockey and that Mr. Bjarnason had indicated he would register him but it did not happen. She acknowledged that she has dated since 2000. She has had three relationships. Andrew lived with his father and went out with her for a year and a half. She was involved with Jamie for only about six months. She now lives with Robert Billings.

[47] She was shocked to receive the Petition for Divorce and learn that her husband was applying for sole custody of the children. She and the children have lived under the shadow of these divorce proceedings for the past year. It is her view that the stress of these proceedings has taken its toll on everyone and has made the past year particularly difficult for the children who have felt the impact of the anxiety and uncertainty created by these proceedings.

[48] Her view is that Mr. Bjarnason is very demanding of the children and has expectations in some areas that the children are unable to meet and that this has caused some difficulty, particularly for Erik. At the same time, she acknowledges that Mr. Bjarnason is a very good father to the children and she appreciates his recent involvement in helping the children with their homework, although she indicates that this has only happened in the last year since the Petition for Divorce has issued. She did express some concern that perhaps he was overly involved in

assisting with one of the projects in that it was suggested by the teacher that Erik should use his own words.

[49] Ms. Bjarnason is concerned that he has gone ahead and acted unilaterally in enrolling them in school in Cumberland County and that he has inappropriately engaged them in conversations with respect to the future. It is her position that because he is away 50 percent of the year, the actual parenting of the children would be transferred to the hands of the grandparents or his girlfriend.

[50] Ms. Bjarnason is adamant that the grandparents' home in Athol is a wonderful place and that it is very important for the children to spend as much time as possible there. She said that he had never communicated any of these concerns that he has raised in these proceedings to her. She stated she wished she was able to do more for the children's extracurricular activities but she is financially unable to do so. She has however been able to purchase a home in a nice neighbourhood and the children are able to continue in the school they have attended for the last four years.

[51] Ms. Bjarnason's belief is that if the parents were able to communicate better with each other many of these concerns would not be brought to the court. She is also of the view that he undermines her as a parent in the eyes of the children. She said it is difficult because he refuses to communicate with her and he becomes hostile when she tries to communicate with him.

[52] She indicated that Mr. Bjarnason was helpful to her after the separation. He took her to get her eyes lasered, a computer for her, and he helped her establish a credit rating. She also testified that she had a great relationship with the children's paternal grandparents and that they were very supportive to them as a family and have continued to be very supportive to the children throughout.

[53] She acknowledged that she has engaged in smoking marijuana but that Mr. Bjarnason did so as well, many times when they were together. She says she has never smoked in the presence of the children.

[54] Her evidence was that she found that the conflict was so high that she avoided being present for the transition, which why it sometimes appeared that she was not around when the children were returned.

[55] She testified that Mr. Bjarnason has full access to the school for information with respect to the children. She said that he never asked the children to bring their school bags or school work with them prior to initiating the divorce proceedings.

[56] Ms. Bjarnason indicated that it was not until the year 2004 that Mr. Bjarnason came to school with the agreement and asked the principal to put it in the file. She acknowledged that he attended one spring fling and a couple of concerts and that he went on a field trip with Erin. She said that approximately 18 months ago he began keeping the children over on Sunday nights after picking them up after school.

[57] With regard to the incident following March break, she said that in fact she was at home when Ms. MacDonald returned the children. She testified that Tracey was out in her car and it would be reasonable for Ms. MacDonald to assume that if her car is not there then she was not at home.

[58] With regard to Erik's Taekwon-Do membership, it was Ms. Bjarnason's evidence that he wanted to attend with his sister, Erin, and he did not want to continue without her.

[59] With regard to child support, she said she agreed to accept less than the \$1,040.00 per month as stipulated by the guidelines and set out in their agreement, if he was putting the balance into an RESP.

[60] Robert Billings, Ms. Bjarnason's boyfriend, testified. He indicated that he began dating her after Thanksgiving of 2004. He also described Erik as becoming more emotionally stressed as the time came closer to these court proceedings. He said that the children come first in the household and that the movies and videos they watch are monitored. He said he just began actually living in the house with Ms. Bjarnason and the children, although he spent most nights in their home since November. He has his own business in automotive repair. He acknowledged that they have smoked marijuana but never around the children. He says that he has never gone on his own to pick up the children. The children's mother is always with him. He stated that although he had never been introduced, the children were dropped off with him at the meeting place while their mother was in the store.

[61] Ms. Bjarnason's sister, Tracey, testified. She indicated that the children go with their father on weekends and her son has visited the farm with his cousins. To her knowledge the children did not have mid week access with their father. She became the "go between" for the parents because communication between them was strained. She described Erin and Erik as normal, good children who have friends in their community. She said they play and lead normal lives. With regard to the concern about Erik being alone after school, she said he would only have been home for about 20 minutes before she would get home because he didn't want to go to the babysitters. Erin, on the other hand, went to the babysitter's house. She recalled the incident at the end of March Break. She arrived late and Ms. MacDonald left the children with her. She described one incident when the children were dropped off at her work as there was no one home. She arranged for a sitter who only had to stay for about 45 minutes before she got home. She denied ever calling Karen MacDonald to say that the mother had not arrived home until three in the morning. She said she has never telephoned the farm. She also indicated that on many occasions when Mr. Bjarnason or members of his family came either to pick up or retrieve the children, Ms. Bjarnason is at home but she does not participate in the exchange because of the conflict.

[62] Wendy Varrence, another sister of the respondent testified. She and the respondent were not raised together and only reunited as adults. Ms. Varrence lived with the respondent and her children for a couple of months. She testified that she has found Erik and Erin to be mature, loving and nurturing children. She found them to be very responsible children for their age. She was of the view that this contested proceeding has created a lot of pressure for Erik and that he feels some responsibility for his mother. This has resulted in some behavioural issues. She says that children live with the uncertainty of where they will live and they are hurting and frustrated. She said she has not, and would not, ask the children to express a preference, although she indicated that Erin had recently claimed she liked things the way they are. She indicated that as recently as June 5, Erik came home from the farm with a hair cut that caused him some embarrassment at school. She described the children as "lovely kids", social and well rounded, who have the best of both worlds.

THE ISSUES

[63] 1) Has there been a material change in circumstances since the parties' separation agreement of July 2003, to warrant a review of the arrangement and a fresh determination of the parenting arrangements on the merits?

[64] This proceeding as it relates to custody, is governed by s. 16 of the *Divorce Act*.

16.(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

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

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

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

[65] This is an order in the first instance. There is however, a separation agreement which sets out the custodial arrangements. This agreement has the same effect as an order. Counsel for the petitioner suggests the provisions of s. 17(5) relating to variations of custody orders, applies.

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(b) custody order or any provision thereof on application by either or both former spouses or by any other person.

17(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 the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[66] Considering that it is not an application to vary an existing order, s. 17(1) of the *Divorce Act* does not apply, but because the parties have a separation agreement, which terms were intended to survive the divorce proceeding and have the force and effect of an order, the same requirements as set out in s. 17(5) do apply.

[67] Thus the court must first be satisfied that there has been a change in the “condition, means, needs or other circumstances” of the children, and only if the

court is satisfied there has been such a change, does the court then conduct a fresh examination of all the circumstances and determine the arrangement that is in the best interests of the children. This two step process is established by the decision of the Supreme Court of Canada in *Gordon v. Goerts* (1996), 19 R.F.L. (4th) 177 (S.C.C.).

[68] In *Rafuse v. Handspiker* (2001) NSCA, 11 R.F.L. (5th) 363, Oland J.A. stated at paragraphs 11 and 12:

11. The respondent pointed out that in this case, no court had granted an earlier custody order and that the application for custody was the original proceeding and not an application to vary. He submitted that accordingly, *Gordon v. Goertz* does not apply. With respect, I am unable to agree.

12. The parties had voluntarily entered into an agreement in 1993 which reflected their decision as parents on the matters of custody, access and maintenance. Each of them honoured its terms. Neither the appellant's day-to-day care nor the respondent's enjoyment of access was challenged or disturbed for some six years following their agreement. While there was no indication that it had ever been made a court order, the agreement was long-standing and respected. In these circumstances, the absence of a formal court order does not have the effect of excluding the application of the principles in *Gordon v. Goertz*.

[69] Has the petitioner met the threshold requirement of demonstrating a material change in circumstances affecting these children?

[70] The petitioner asserts that since the agreement was signed in 2003, the respondent has had two or three different jobs. The respondent's evidence is that she has changed jobs in an effort to improve her financial circumstances. The evidence would suggest she changed jobs also before the agreement.

[71] He also indicated she has had several boyfriends since the agreement. She stated she has dated since the parties' separation almost five years ago but the totality of the evidence does not suggest there was a significant change in the pattern of dating before and after the agreement, nor did the evidence establish that it impacted on her parenting.

[72] The petitioner testified that he thought there were proper care arrangements at the time of the agreement, and that the children's Aunt Tracey would continue

to be there to assist. Apart from the fact that Tracey is no longer living there, there was little evidence to show that the child care arrangements were significantly different from before.

[73] The children's schooling was cited to be of concern, although the reports do not seem to bear that out. The father believes that they could be doing much better. It is difficult to ascertain from the evidence whether this is a change since the agreement, whether it is something that the father has become involved in recently, or whether it is because the demands of school increase as the children get older. Whatever the reason, the children no doubt can benefit from the extra assistance being provided by the adults in the petitioner's home.

[74] The father expressed great concern and frustration over the children's lack of involvement in extracurricular activities. This appears to have been an issue since they moved to Dartmouth in 2001.

[75] The father expressed concern that the mother was not involved enough in the children's lives. It appears he had this concern at the outset.

[76] He is now in a stable relationship. The evidence suggests he has been in this relationship since June 2001.

[77] A review of the evidence in its entirety does not establish the requisite changes in circumstances to warrant a fresh inquiry into the best interests of the children.

[78] 2) Is a change in circumstances necessary if the original agreement is not in the best interests of the children?

[79] It is suggested that if the original agreement is not in the best interests of the children then it should be set aside. There is no question that in all matters relating to custody, the paramount consideration is the best interests of the children (*King v. Low* (1985), 44 R.F.L. (2d) 113 (S.C.C. MacIntyre J.).

[80] The court should therefore turn its mind to the agreement and whether it was the best parenting arrangement to meet the needs of these children.

[81] It is hard to imagine a situation where the parties would enter into an unreasonable custodial arrangement in the absence of significant duress. There is no evidence of duress here.

[82] The father always has been away fifty percent of the time. When he comes home, he lives with his parents. The children are with their father every weekend he is home, and they visit their grandparents often when he is not there.

[83] The parties' agreement reflected a long-standing arrangement which was respected and upheld. The agreement itself articulated the benefits of their arrangement and asserted that it was reasonable. Is what was reasonable then, reasonable now? This analysis becomes circular in that the agreement was clearly considered reasonable then. It reflected the unique circumstances of the family. The father arranged for the preparation of the agreement and even sought the "40 percent clause". The arrangement which enabled the children to be with their mother during the school week and with their father or his family most weekends and holidays, provided for maximum contact with both parents. Their agreement embodies the importance of maximum contact as spelled out in s. 16(10) of the *Divorce Act*.

[84] A change in custody would destroy the spirit and intent of this agreement.

CONCLUSION:

(a) DIVORCE

[85] I am satisfied that the procedural and jurisdictional requirements have been met. I am also satisfied that the grounds for divorce have been established as evidenced by the fact that the parties have been living separate and apart in excess of one year, being November 1, 2000.

[86] The Divorce Judgment is hereby granted.

(b) **COROLLARY RELIEF:**

[87] I am not satisfied that the petitioner has established sufficient material changes in circumstances to warrant a complete review of and consequent change in the parenting arrangements agreed upon in July 2003.

[88] If I am wrong in that regard, and I turn to the petitioner's contention that the agreement was not in the best interests of the children and should be overturned, I conclude the following:

1) The agreement of July 2003 was a reflection of the parenting arrangement that the parties had informally adopted since their separation in November 2000. This arrangement had worked for the children (and the parents) for two and one half years before they formalized it. There was plenty of opportunity to renegotiate the parenting before the agreement.

2) While the agreement may have come about at the behest of the respondent, it was the petitioner who engaged counsel to prepare the agreement, which articulated the spirit and intent of the existing parenting arrangements and included the "40% clause" at the petitioner's insistence.

3) While the petitioner stated that "... had he known what was going on," he never would have agreed to the continuation of the arrangement, the specifics of what was going on, and when, are unclear insofar as they influenced his decision to start divorce proceedings and seek custody.

4) The petition was issued in May 2004. The first incidents of concern that the petitioner relies on were outlined by Ms. Michaels. They occurred between September - November 2001. It is unclear when these concerns were conveyed to the petitioner. The court is left to wonder, if those concerns were considered to be so serious, why nothing was done about it at the time, or at least before the agreement was made.

5) The marijuana issue appears to have been raised only in April 2005, a year after the petition was issued, and hygiene concerns are unspecific as to time or frequency.

6) The petitioner's concerns with regard to enrollment in extracurricular activities go back to 2001, long before the agreement. The reality of these children's lives was and is that they spend substantial time at their grandparents' farm and have done so since the parties' separation. They are with their mother from Monday to Friday and some weekends. They have busy lives.

7) School monitoring began in earnest following the issuance of the petition. The children no doubt benefit from the extra assistance now provided by the adults in the petitioner's home.

[89] Thus, on the whole of the evidence, I cannot conclude that at the time the parties entered into the agreement in July 2003, the circumstances were such that it was not in the best interests of the children to continue the arrangement which had worked well for the children since separation. Had the circumstances been so terrible as the petitioner urges the court to accept, then those concerns would either have been raised with the petitioner by his mother or his girlfriend, or others, or they would have been so apparent to him that the petitioner would not have instructed counsel to prepare the kind of agreement that reflected a continuation of the arrangement.

[90] Thus I cannot conclude that the agreement is so contrary to the best interests of the children that it ought to be overturned. In fact, the agreement provides the children with maximum contact with both parents. A change in the status quo would significantly reduce the mother's time with the children and would essentially give the grandparents primary care of the children. They are clearly a stabilizing force in the children's lives, and their role should continue as the supportive grandparents they are.

CUSTODY

[91] Thus the agreement of July 2003 shall be incorporated and form part of the Corollary Relief Judgment. It is my conclusion that it is appropriate, and in the best interests of the children to add some terms and conditions to this order for joint custody.

- 1) The respondent shall enroll in the Parent Information Program sponsored by the Family Division of the Supreme Court at Halifax and she shall confirm to the petitioner her participation in the program by December 31, 2005. (The petitioner has already participated.)
- 2) The respondent shall forthwith inform the petitioner of the name, address and phone number of any of the children's caregivers and shall ensure that if she is not at home after school, or any time, the children are left with only those caregivers of which the petitioner has knowledge.
- 3) The respondent shall enroll the children each in one mid-week activity and shall ensure that they attend regularly. She will forthwith advise the petitioner of the activity and the schedule so that he may also attend when able to do so.
- 4) Arrangements for pickup and delivery of the children shall be made with the children's mother and she shall be available for this purpose at all times unless she communicates to the petitioner or his family the specifics of other arrangements.
- 5) The mother will sign the passport applications for the children.
- 6) Neither party will remove the children to reside outside the Province of Nova Scotia without the express consent of the other, or a court order.

MAINTENANCE

[92] The terms of the agreement with respect to maintenance shall also be incorporated and form part of the Corollary Relief Judgment. The petitioner shall pay the sum of \$1,040.00 per month, based on an annual income of \$81,300.00, effective on or before July 31, 2005 and on or before the last day of each month unless an alternative payment schedule is agreed upon.

[93] The respondent will maintain the children on his medical and dental plan.

[94] With regard to child care expenses, it is noted that there has been no contribution in that regard and that the petitioner has paid less than the table amount stipulated on a monthly basis.

[95] It is significant that while he earns \$81,000.00 his living expenses are nominal (e.g. he pays his parents \$200.00 per month rent). There is no category in his expense statement showing any payment into an RESP for the children.

[96] However, because of the significant access time and associated cost, there will be no order for a contribution to child care pursuant to s. 7. This is on the basis that the monthly table payable to the respondent for the support of the children will actually be \$1,040.00. Any contribution to an RESP will be additional at the discretion of either party, who shall provide (forthwith and annually) updates to the other of any existing plan for funding the children's education.

AFTERWORD

[97] It is anticipated that the parents will continue the access pattern that has evolved over the past five years as generally spelled out in the agreement.

[98] It is hoped that this decision will be a wakeup call to the mother to be more involved with her children, and diligent in their care and education. It also confirms the importance of the father's role in every aspect of their lives, not just holiday and leisure time.

[99] This decision also acknowledges and affirms the important supportive role of the grandparents, but it impresses on the mother and the father that the primary responsibility for parenting lies with the parents. These children have the best of both worlds and are fortunate to have so many loving and caring adults in their lives.

[100] Order accordingly.