IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Bjarnason v. Bjarnason, 2007 NSSC 24

Date: 20070126
Docket: 1202-001409
Registry: Amherst & Halifax

Between:

Catherine Ann Bjarnason

Applicant/Respondent

v.

Kerry Bjarnason

Respondent/Applicant

Judge:	The Honourable Justice F.B.William Kelly
Heard:	November 23rd and 24th, in Amherst, Nova Scotia November 27th and 28th, in Halifax, Nova Scotia
Counsel:	Robert M. Gregan, for the Applicant Kerry Bjarnason, self represented

By the Court:

[1] Kerry Bjarnason (the father) and Catherine Ann (Noseworthy) Bjarnason (the mother) were married on the 29th of June, 1991. There were two children of the marriage, Erick James Bjarnason, born February 3rd, 1994 and Erin Bjarnason born December 19th, 1995. The parents have been living separate and apart since November 1, 2000. On July 9th, 2003, they entered into a separation agreement which included, *inter alia*, terms relating to the custody and access of the children and child support payable to the mother by the father in the amount of $1,040 based on his then yearly income of $81,300. The mother has a current annual income of $21,900. The father's evidence is that his income remains the same at the time of the hearing of this matter.

[2] Prior to the signing of the separation agreement, the parties had operated under an informal parenting agreement regarding the custody of the children which had been prepared by the father's counsel. The parties were divorced by Divorce Judgment on October 14th, 2005. The Corollary Relief Judgment of the same date provided, *inter alia*, that the children were to reside with their mother in the Halifax/Dartmouth area during the week. They were to spend time with their father on weekends and during parts of the week when he was not working

offshore. It further provided that Larry and Ruth Bjarnason ("the grandparents") could have the children in their care some of the time in the absence of their father. In accordance with the custody terms of the Separation Agreement and the Order of Justice Gass, the children resided with their mother, first at Dartmouth and subsequently at Halifax where they attended school during the school year.

[3] The mother now applies to vary the Corollary Relief, more specifically to vary the Corollary Relief Judgment dated October 14th, 2005, as amended by subsequent Orders dated December 8th, 2005 and February 9th, 2006. She is seeking the "sole custody, care and control of the children", with specified access to the father. She further seeks child support for the two children in the guideline amount, pursuant to the Federal Child Support Guidelines and payments of past child support obligations by the father.

[4] The father's position is that he should be awarded "sole custody' of the children, or, in the alternative, "primary access" to the children, both with "reasonable access" to the mother. The father submits that his application is to "provide a stable, secure and stress free environment for the children and not for any financial motive". His submission is that joint custody, with the children

residing with him in Athol, Cumberland County, and with him as the primary care giver, would be in the best interests of the children. On June 16th, 2006 the mother filed an application to vary the existing custody order, seeking sole custody, care and control of the two children with specified access to the father. She also sought child support in the guideline amount.

[5] A number of applications have been made by the parties from time to time over the intervening period between the date of the original Agreement of July 2003 signed by the parties and the hearing in this matter at Amherst and Halifax. Not all of them are significantly relevant to this application. Those that are will be referred to in these reasons.

[6] The divorce hearing was held by Justice Gass. The father was represented by counsel and the mother was self represented. A written decision was rendered, the general substance of which, as it relates to this application, is as follows:

> Gass, J. found she could not conclude that the original agreement was contrary to the best interests of the children as it provided the children with maximum contact with the parents, in part as it "would essentially give the grandparents primary care of the children". She further found that the grandparents were a stabilizing force in the children's lives. She subsequently noted for the parents that nevertheless the primary responsibility for the children lies with the parents and not with extended family:

> The mother should involve the children in at least one mid-week activity and advise the father of the details of the activity and suitably advise him of their schedule in that regard.
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> The mother was to sign the passport applications for the children. Neither party is to remove the children from the Province without the consent of the other, or with a court order.
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> The father is to pay guideline amount of child support which initially is set at $1,040 based at a salary of $81,300. She noted that although he receives that salary, his living expenses are nominal as he pays his parents $200 per month for rent and that he apparently does not make an RESP payment on the children's behalf.. The parties were to provide the other of any existing plan for funding the children's education.
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> The mother shall enroll in the Parent Information Program sponsored by the Family Division of the Supreme Court, and confirm her participation to the father by December 31st, 2005.

[7] Unfortunately the mother failed to complete the Parent Information Program and did not sign the passport applications. Her evidence was that she had concerns that the father might remove the children permanently from the country. I find no evidence to support this concern, and he clearly has established family roots in this province. The mother will be required by the order emanating from this decision to comply with the above two requirements, modified by changing the date of compliance to 30th, April, 2007.

The Issues

[8] The Issues are as follows:

> Issue #1. Section 17 of the *Divorce Act* requires there be a material change in circumstances since the original Separation Agreement and the subsequent court modifications to allow the court to consider the merits of either party's application relating to custody of the children. If the Court finds that there are such material circumstances, should it allow such a variation so as to comply with the request of either party, or indeed another variation which it determines to be in the best interests of the children?
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> Issue #2 - What is the appropriate access arrangement for the children?
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> Issue #3 - How should the Court deal with the mother's claim for arrears of child maintenance?
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> Issue #4 - The validity of mother's claim for costs.

Legal Considerations

[9] When considering whether a variation of a previous Court order should be considered, s. 17(5) of the *Divorce Act*, provides for a two-step test when an application is made to change a pre-existing court order. Here there are several pre-existing orders, commencing with the order of Justice Gass arising from the divorce hearing. The father proposes that there are " real and material changes which have occurred since the Separation Agreement with respect to the condition, means, need and circumstances." In essence he is proposing that both children live

at his parents' residence in Athol, Amherst County, Nova Scotia, and attend school there. This is their current situation as a result of the last order that was issued from the Court at Amherst. This arose from a rather unusual situation which occurred early February 2006, which will be discussed below.

[10] The following paragraphs of the Separation Agreement are the most relevant to this application:

> **Full and Final Settlement**
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> 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 statue in Nova Scotia or any other jurisdiction and any other remedies arising out of their marriage to each other.
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> **Custody and Access**
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> 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 December, 1995;
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> (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.
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> (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.

[11] The manner in which changes in this Agreement occurred after the Corollary Relief Order issued was explained by the witnesses and principally involves the evidence of the mother, the father, the grandmother (Mrs Ruby Bjarnason) and some other witnesses.

Evidence of Witnesses

[12] The mother's evidence was that she has always been the primary caregiver for the children as they have resided continuously with her since June 2001, in Dartmouth. They lived in a residential area and the children made many friends and generally thrived both socially and academically. Their father visited them during the weekends when he was not working.

[13] The mother had previously worked in a bank and in real estate in Amherst. She resumed her real estate career by March 2005 in Halifax, qualified financially to obtain a mortgage and purchased a home for the children and herself in Dartmouth. She told the court that child support payments from the father were not consistent, as he sometimes did not make payments or made payments less than the agreed Guideline amount. She claimed that he informed her on a number of occasions that if she registered the obligation with Maintenance Enforcement or

took other action against him, he would quit his job and cut off child support payments.

[14] As her real estate work was not sufficiently remunerative, she decided to start her own business, a Café in Dartmouth. After opening it, she kept work hours that allowed her to be home for the children's return from school. She had prepared a business plan and a cash flow forecast for the business and was initially successful. Eventually, however, business losses placed her in a difficult financial position, she fell into arrears on rent and believed she might have to cease operation. She attributes this situation, in part, to inconsistent child support payments.

The Ex-Parte Application

[15] In October 2005, the mother registered with the Maintenance Enforcement Program. On November 8, 2005, the father applied to vary the child support on the basis that he had a medical disability. In his supporting affidavit, he indicated he would be receiving short term disability payments and estimated his income would be reduced to $35,000 per year. He further undertook to immediately report any future changes in income. This was also an obligation for both parties, as it was

provided for in their Separation Agreement. An Order was granted reducing his child support payments to $494.00 a month, retroactive to October 31, 2005. The mother notes that she represented herself at this hearing and that the father was represented by counsel.

[16] The mother's evidence was that by January 2006, she was stressed by the potential loss of her home and her business and was working towards resolving these financial problems. She states that she was struggling to resolve her financial problems and provide for the children. During this process, she claims she was harassed by telephone messages from the father's parents' home in Athol, of which some 19 messages were taped, principally made by Karen MacDonald, then the partner of the father, who was working offshore at the time. The mother had erased about thirty more of these e-mails.

[17] In February 6th, 2006 she telephoned the children's grandmother, Mrs. Ruby Bjarnason, who apparently then was en route to Halifax, and told her that she was quite distressed by financial problems. The mother's evidence, as well as the grandmother's, is to the effect they both respect the other's interest and caring for the children, and frequently were the persons who dealt with the minor problems

and details of access and other matters in relation to the children. The mother's request was for assistance with the children until she could deal with financial and business matters, apparently scheduled for the next day. The mother also stated that she had no means to pay for child care for the children. The grandmother agreed to assist in this regard, picked up the children and drove them the two or two and a half hour drive to her residence at Athol. The mother stated that after a few days, on February 8th, she expected the children would be returned for certain scouting events and school. On contacting the grandmother in Athol a few days later, she states she was advised they would not be returned but would remain and attend a local school for the rest of the school year. She was also advised that this action was pursuant to an order of the Court. The mother told the court she was shocked by this statement as she had received no notice of any Court application.

[18] The mother stated that as a result of this action, her access to the children was considerably restricted and controlled by the father and at times she would be told the children would not be sent as they were busy at various activities such as birthday parties, scouts, sports, etc. She stated that she saw them subsequently when the grandparents transported them to Halifax for a visit, usually arriving Saturday and leaving Sunday. She felt the children were considerably stressed by

what had happened and she sometimes “had to force them to leave” her residence when it was time for them to return to Athol.

[19] The grandmother’s evidence was that she had transmitted the mother’s message regarding her “emergency” situation to the father and described how upset the children were when they were advised they could not return to their mother on October 8th as they had expected. She further advised the Court that she had not been informed of the *ex parte* application and the Order declaring the children should be moved to Athol and attend school there until sometime after the Order was issued. The mother stated that the grandmother was aware that the children would be returned to her on February 8, 2006 and the grandmother’s evidence did not contradict this. The father filed his application on February 9th and the Order was granted on the same day.

[20] The Running File on the matter indicates that the father’s counsel phoned the court office on February 8th, 2006, requesting the matter be heard as an emergency application. The next day the father filed affidavits and documents which were considered by the sitting Judge, who confirmed the terms of the Corollary Relief Judgment, except to allow the children to reside at the father’s

residence for “the week” and attend school locally. The Order provided the matter was adjourned without day and could be scheduled for return to court by either party subsequent to March 20, 2006. This delay until March 20th was apparently because the father was leaving for a work period from February 22nd until March 20, 2006. The Running File noted that the next involvement of the parties was an application by the father on June 22, 2006 to have his requirement to pay child maintenance terminated, which was scheduled for June 22, 2006. On that date, the mother made her application for “sole custody, care and control of the two children” with access to the father and payment of child support as referred to above.

[21] I conclude from the evidence of all parties, principally that of the father and the grandmother, that the father’s actual period of illness was from mid-October until the 15th of December, 2005, after which he returned to work. I have heard no reliable evidence of any reasonable cause why the father should not have restored his payments for the support of his children after that two month period. His income tax return of that year indicates he was paid his usual annual salary. His arrears in this respect should be paid and it is so ordered.

The Telephone Messages

[22] I turn next to the evidence of Constable Joanne MacNeil who attended at the mother's residence on February 8, 2006, after the mother discovered that the father would not let the children return after the "few days" she had arranged for the grandmother to bring them back to her residence, and was advised that the children were not to return but were to attend the River Hebert school in the Athol area. Constable Joanne MacNeil is a police officer with the Halifax Regional Police who gave evidence of her dealings with the mother on February 8, 2006 and subsequently. The mother had reported to police that she had been getting telephone calls from the father and others from his residence in Athol, which were concerning to her. Nineteen of these messages had been recorded. These messages have been transcribed and were placed in evidence. It is apparent from these messages and the general evidence on the subject that the parties on each end of the conversations were aware they would be recorded. The mother had two purposes for effecting this police involvement. First, she hoped that the police might deal with her harassment by the nature of the phone calls from the Bjarnason home in Athol. Secondly, she wanted to refute the claim made by the father in his successful application to change the custody of the children based on their mother not being able to provide for them.

[23] Constable MacNeil retrieved the telephone messages, which are discussed below, and, at the mother's invitation, she viewed the mother's food shelves and refrigerator. This apparently was in response to an allegation by the father that there was no food in the house and that the mother was in "crisis". The Constable advised the Court that there had been adequate provisions in the house for the family. A number of the archived messages from the mother's phone were retrieved and introduced into evidence. Some are not particularly disturbing, such as several short insistent requests of the father to talk to the children, demanding she apply a medication for a child's skin problem and a complaint that they are not going to Scouts. Others are more concerning such as one where the father admits he is in arrears but won't be paying her more child support until she obeys the Corollary Relief Order. He states she must quit lying to the children. A more serious message, assuming it was possible the children might be listening, was a particularly crude one way call relating to Ms. MacDonald's sexual activities with the father. She also indicates the children are hers and not the mothers. The most disturbing comment was her implication that one of the children had a father other than Mr. Bjarnason, and that perhaps a blood test be arranged. The general tone of these one sided messages were of a taunting nature directed to the mother and most

expressed in particularly foul and scathing language. To Ms. MacDonald's credit, she apologized on the stand for many of these comments and stated that they now embarrass her. She acknowledges she was the principal of most of these statements and regrets she made them.

[24] The messages were heard by the court and much of the content, principally that of Katherine MacDonald, then the partner of the father, was at times bantering, insulting, crude and unworthy of anyone with parental responsibilities for children.

[25] Robert Billings, a man who was in a relationship with the mother for about a year from September 2004 until August 2005, was called to the stand by the mother. His evidence mostly related his observations of the mother and her relationship with the children. He observed the relationship was a good one and that the children had a very close bond with their mother. His comment was "they were always beside her getting as close to her as they could". He noted the children had plenty of friends and were regularly attending Michael Wallace School. Mr. Billings also observed that they were attentive to their school work and that there were not any "big" issues at school with them. He indicated that

Erin was very good in attending to her school work at home and her homework was always done. At times, Eric needed some assistance and he and the mother helped him when necessary.

[26] Mr. Billings was asked to comment on the mother's relationship with the father and responded it was not a positive one and when they had conversations they ended with arguments - that they were "heated discussions" and she would be called names. When the father obtained the *ex parte* Order and would not return the children, he said, the mother was devastated and needed emotional support. They have remained friends. Some time after he had left the residence of the mother, the father contacted him to support his effort to gain custody of the children. He refused. Mr. Billings was present for and heard several of the telephone calls from Athol and referred to one where Karen MacDonald called and said she had heard the mother had been the "town tramp". He noted that at the end of the call, the person at the other end mistakenly did not properly hang up, and they could hear their continued conversation.

[27] The mother has two sisters living in the Halifax area who have kept in close contact with her and were especially supportive of her and the children when

conditions became difficult. One of them, Tracey Lynn Noseworthy, who worked at a restaurant bar, related to the court that she and her children, ages 10 and 12, and the mother and her children exchanged frequent visits to each others residence. She noted that she had lived with the mother for two years when first coming to Halifax and had frequently observed the mother's interaction with the children. She became close with the children and remains so. She commented that the mother was "a good mom" who loves the kids and they love her. She has never done anything wrong with them. When asked how the children were doing in school she responded that Erin was doing great, "she's a whiz". She has helped Eric in math and at times, he struggles at it, as many kids do, but she noted other subjects were fine.

[28] Ms Noseworthy noted that when the mother struggled with her business losses and with debt, she helped her with money. When asked if she has seen the children since they went with the father, she replied she had, that they appeared very unhappy, and "didn't look good". From her observation, things appeared unhealthy in judging from what the children told her "goes on there". When asked if she asked questions of the children as to what occurred at the father's residence, she replied that once when Erin did not look well, she inquired if she was ill. Erin

responded by “going on about how she felt about being at that house”. After being cautioned not to repeat what the child said, she was asked if Erin’s response was positive or negative. She responded “negative”.

[29] Ms. Noseworthy noted that the father drops into the bar where she works from time to time to visit with her. They discuss the children and the situation between the parents and on two occasions the father brought up the suggestion of one of the children not being his child. This reflects a similar suggestion from Ms. MacDonald in the telephone conversations.

[30] Tracey Noseworthy expressed her regret that she was out of the Country during the week in February of the *ex parte* application, and the children were brought to Athol. She regrets this because it was a time her sister, the mother, could have called on her to care for the children rather than impose on the grandmother to care for them for the few days while she attended at the emergency business meetings.

[31] In addition to his mother, the father himself gave evidence and also called Mr. Donald Russell, M.S.W., RSW, a social worker in private practice, who

authored the Home Study Assessment ordered by the Court after the first day of the six day hearing. The Court ordered the assessment with the consent of the parties and the hearing was adjourned for several weeks until it could be completed. Mr. Russell was provided with letters from both parties, along with their affidavits, various orders from earlier hearings involving the parties, and a transcript of the telephone recordings. I presume this correspondence included argument briefs of the parties. He was also provided with the Supreme Court files relating to this matter.

[32] Mr. Russell described the background of both parties and indicates he had interviews with the parties and with Karen MacDonald, Ruby Bjarnason, the two children with their mother, and other sources of information he considered relevant. Although he interviewed the father, he did not have the opportunity to arrange an visit to observe them in an interaction with the children due to conflicts in the father's offshore work requirement and the somewhat limited time available before the next court date. Although this would have been preferred, I would note there is little or any evidence the father does not interact with them well, except for the allegations that he may denigrate their mother in their presence, an action he would hardly do in the presence of the Assessor.

[33] The Assessor comment that the father “presents as a friendly, but somewhat angry person who expresses a lot of concern about his two children and how they were living with his ex-wife, and how she misused the money he sent her”, presumably a reference to his child support obligation. This assessment is similar to one I would have made from his court presence and preesentation. Mr Russell subsequently noted that the mother “presented as a friendly, intelligent and capable woman, who shows a remarkable level of resilience, considering what she has been through this past year. Her prime focus in life, she had told Mr Russell was providing a home for her children. I also find this assessment accurate in assessing the mother’s character.

[34] The report indicates that the mother’s opinion was that the father’s goal was to deny her any financial support at all for the children and that the current application was for that purpose. Mr. Russell recites her problems in early February of 2006, losing her business and her house and the financial and emotional stress of these events. He refers to the *ex parte* application to gain interim custody of the children and states “It now appears that the full facts did not emerge at the hearing and that misleading information may have been given”.

[35] Mr. Russell interviewed the children at the Athol home in the presence of Ms. MacDonald and the grandmother. Eric discussed his friends in Halifax and at the River Hebert School the children had transferred to. He expressed a great interest in sports such as skateboarding and had a lively interest in the Boy Scout Troop. Erin also was interested in sports, particularly soccer and scouts. Mr Russell interviewed the children again at their school. He attempted to obtain from them of their preference in living at Halifax or River Herbert. Eric responded "it's all the same to me, I have friends in both places". Erin responded, "let the Judge decide".

[36] Mr. Russell visited the mother twice in her Halifax home when the children were present. He noted they said they were happy to be there as it had been quite some time since they had seen her. Erin was doing craft work, consulting with her mother as she went along. Mr. Russell noted he was impressed "by the happy interaction between the children and their mother and the overt gestures of affection between them". The mother advised him both children did very well in their studies and liked school.

[37] When interview by the Assessor, the father expressed great fondness for the children and said he did activities with them. He also noted that his employment meant he was away from home six months a year. Mr. Russell commented in his report that this employment condition was a fact of life and "would not normally reflect on his ability to parent" and that such a fact made it difficult for him to assess the father's performance. Mr. Russell noted in his report the mother has been the chief caregiver of the children since their birth and she stated that this was a role she performed for the last five years with little support, emotional or financial, from the father. With reference to the appearance, deportment and ability to relate to others, he concluded the children had been well raised.

[38] He further states that the matter relates to the best interests of the children, both of whom are normal, loving children, in need only of a stable home life. In his opinion, there does not seem "to be any reason why the mother, who has cared for the children all their lives, should not continue to do so once again" and recommends the mother be granted the sole custody of Eric and Erin "with access to the father whenever it is appropriate to do so, on a generous basis". He adds that maintenance should be paid by the father on a regular basis.

[39] The father cross-examined Mr. Russell on his assessment and recommendations. He suggested that the assessment was deficient in that he was not interviewed with the children to assess his interaction with them. He referred the court to the decision of Justice Gass for the history of the mother relating to her frequent changes of partners and employment. In his opinion, the mother lacked stability. Although she now may have a stable relationship, her last one lasted only a year, and he believes her record in that regard will continue in "unstable" relationships.

[40] The father gave evidence and also a summary at the conclusion of all of the evidence. Assisting him throughout the trial was the grandmother, which appeared to be most useful for him. He is obviously a competent individual but like most self represented people, found his role sometimes difficult and confusing. The Court before and during the evidence assisted him in understanding that role an the court process and explained the relevant rules of evidence as the hearing proceeded. I found his organized and useful summary particularly effective.

[41] He stresses the mother is not always reliable in executing access plans for the children in that she is not always timely and in some instances was not present

when the children arrived, or had arranged for another person to be present to receive them. He is critical of how the mother deals with the child support and is angry about how it is spent. He is critical of her financial decisions, such as taking on the risk of opening her café and making home renovations. The father acknowledges that he communicates what is going on, such as the court proceedings, to the children as he says it is their right to know about such matters which involve them.

[42] The father also has complaints about the transportation for access, often supplied fully by his parents as the mother's vehicle is unreliable.

[43] The father and mother participated actively in the discussions on a new access schedule, agreeable to both parties, and expressed a desire that it be incorporated in the decision. I accept his recommendation and will incorporate the access arrangement the mother and father have agreed upon into the final order. I would emphasize that in the future it should only be amended or changed on the written consent of both parties.

[44] The father is critical that the mother does not encourage sufficiently the children's participation in sports, particularly soccer, a sport they both enjoy and play while at Athol in the summer. He also supports their activities in the Scout movement but doubts that the mother ensures they attend regularly. It is important to note that it is obvious the father has a great fondness for his children.

[45] The environment at Athol with the extended family and the children with friends at school is proposed by the father as best for the children, as it is a stable and supportive environment. He believes the children are not a priority for the mother, as at times she does not exercise her right of access. He submits that he is willing and able, with his family members at Athol, to provide for the children in a stable and consistent manner.

[46] He urges the court to dismiss the mother's application and "uphold" the current custody order that will allow the children to reside with him and his family during the school year.

[47] Goodfellow, J. in *Foley v. Foley*, [1993] N.S.J. No. 347, 1993 CarswellNS 328, provided a list of various factors for the courts to consider in determining what is in a child's best interests. He stated, beginning at paragraph 15:

In determining the best interests and welfare of a child, the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.

16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment;

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication of, or expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists, psychiatrists, etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

> 12. The financial contribution to the welfare of a child;
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> 13. The support of an extended family, uncles, aunts, grandparents, etcetera;
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> 14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);
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> 15. The interim and long range plan for the welfare of the children;
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> 16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
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> 17. Any other relevant factors.
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> 17. The duty of the Court in any custody application is to consider all of the relevant factors so as to answer the question.
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> 18. With whom would the best interest and welfare of the child be most likely achieved?
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> 19. The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

[48] Echoing the recommendation of Dellapinna, J. in *Ezurike v. Ezurike*, [2006] N.S.J. No. 80 at p.7, I would add to Goodfellow, J.'s fourteenth consideration the willingness of each parent to foster a positive relationship between the child and the other parent and, where appropriate, the willingness of each parent to work cooperatively with the other in the raising of the children.

[49] This application cannot be a substitute for any appeal process of any of the prior decisions relating to this matter and certainly not a re-hearing of earlier applications. The jurisdiction exists because of the material changes that have taken place since the Settlement Agreement and the Corollary Divorce Order that I described that makes it clear the best interest and welfare of the children require changes to provide more certainty and stability in their lives. At present, they reside with the father's extended family as a result of a Court hearing in which the mother had no notice nor input. Although the Order is somewhat vague in its expression of time, using the term "for the week", the father is acting on the assumption that he has primary custody until the Order is successfully challenged, as it presently is by the mother.

[50] The Guidelines in *Gordon* v. *Goertz*, 19 R.F.L. (4th) 177 and in *Foley* v. *Foley*, supra, have been considered by the Court and I will comment on those relevant to this matter. The weight assigned to any factor will normally vary from case to case and must be considered in relation to the other relevant factors. Here, the Court has considered only the relevant factors in order to determine the best interest and welfare of the children:

1. The physical environment of both residences is adequate. However, the clear evidence that some of the residents of the grandparents home, where the father lives and the children visit, have berated the mother in the children's presence is most concerning.

2. It appears from the evidence the discipline applied by both parents is effective and they are assessed by Mr. Russell as well balanced and respectful children.

3. There is no evidence of improper discipline and the children appear to be well disciplined.

4. On the role model issue, both parties are caring parents, with the father keenly interested in the activities of the children and the mother in the past struggling against adverse circumstances and succeeding to provide a level of security for them.

8. Both parents appear to take steps in their busy lives to be with the children where possible. The father is somewhat limited in this respect as he works out of the Province for half the year.

10. Both parents take steps in the physical and character development. The father stresses sports and Scouts which the mother supports to some extent. She appears to have been more relevant to their character development.

12. The mother's financial contribution is from employment at Stayner's Restaurant the Halifax waterfront where earns a limited income which is the basis for maintaining her simple lifestyle and that of the children. The father pays obligatory child support, but has reduced it considerably for a unduly long and inappropriate period of time. Unfortunately he appears to consider the children's support funds as "his money" and has criticized the mother for using it inappropriately.

13. Both parents have extended families at or living near their residences who have an interest in the children and are supportive of the parent in question and the children. The grandmother particularly is supportive in providing access and communication with the mother on that subject. The father and the mother are enormously adversarial and I doubt they will be able to communicate effectively on most subjects. They have, however, done so on occasion, such as determining the access arrangement with the guidance and encouragement of the Court.

14. The children's entitlement to access has frequently been problematic. In part because of last minute changes and emotional difficulties in communication between the parents. However, as stated above, to the credit of both they have

> now agreed on access and a method of communication, principally between the grandmother and the mother.
>
> 15. The interim and long term plan for the children has been expressed in the access agreement to which will be added my directions in the Order to try to improve the lives of the children in the respective residences. Parts of the order should forbid any of the persons involved with the children ever speaking negatively about the children's parents when they are possibly or actually within the hearing of the children. There are some other similar matters I may require in the Order to protect the children.
>
> 16. The mother is the most likely of the parents to maximize the contact of the children with the other parent.
>
> 17. There is some indication the father might or has involved the children in 'adult' issues.

Findings

[51] After considering Sections 16 and 17 of the *Divorce Act* and all of the evidence as well as the Assessor's Report and the summaries of the parties, I have come to the conclusion, on a balance of probabilities, that it would be in the best interests of the children that the mother have custody and primary care of the children. She has been the primary caregiver for the children from birth and for several years after their separation. They have resided continuously with her in the Halifax area since June 2001. She has been primarily responsible for their clothes, toiletries and other necessities. In part, I make this assessment on the basis that I believe the terms of access as agreed which will provide generous access to the

father and his extended family. These terms have already been included in an Interim Order which now will be extended. I request counsel for the mother to prepare a draft Order. I have little doubt that if a joint custody order was issued, the conflict between the parents would escalate to such an extent that it could affect the social and cultural development of the children. The level of discord and bitterness between the parties is so great that joint custody would likely be unworkable. I should note that throughout the hearing it was difficult to assess the demeanor of the mother from her calm presentation. However, when the father cross-examined her in a rather aggressive way, it quickly became apparent that she was not intimidated but displayed a confident, and even aggressive demeanor.

[52] As noted above, the father has a keen interest and affection for the children. His concerns are related to his claims of instability and was reliability on the part of the mother. However, I am satisfied on the evidence that she has, after a period of financial uncertainty, established herself by employment that provides her with a modest income and a residence that is satisfactory for the children's needs. The result of the reduction of child support by the father has been an exacerbation of a

fragile situation of the mother in the past. Child support should be strictly enforced in the future by registration with the Maintenance Enforcement Program.

[53] The mother has not been without fault on matters of access. I acknowledge that, in part, this is due to the apparent failure of the father to communicate with the mother in a calm and non-abusive manner, which might be more likely to exist if both parties had the best interests of the children at heart. Most fortunately, the grandmother does appear to deeply care for the children and understands that good communication does benefit the children. I would encourage that the grandmother and the mother continue to be the common sense link for the children's access and use the phone or the e-mail link, which has been useful in the past. If the grandmother must communicate the father's instructions or wishes, as she has suggested she may be obliged to do, presumably in his absence from the Province, she would identify the source of those instructions to the mother.

[54] The father's attempt to establish a new status quo with the children by the *ex parte* application, which, in his assessment, established a right to keep the children at his parents' residence and require them to attend school there, should not succeed. As a result of his allegation of an emergency situation that did not truly

exist and without involving the children's mother, and after twice previously undertaking to give notice to the mother of any intended application, it appears that he was more interested in obtaining a situation that he personally preferred rather than acting in the best interest of his children.

Costs

[55] Counsel for the mother has urged the Court to award costs in the event that the mother succeeds. In many such contests, the courts do not award costs, but find each party should bear their own costs. However, as the father was unrepresented, the mother's counsel was requested by the Court to take steps by way of dealing directly with the father in certain matters, to assist agreement on access and to prepare interim Orders, and now the final Order. In all the circumstances, I order costs to the mother in the amount of $750. The mother's claim for arrears in child support lacked sufficient evidence and she will have to pursue a separate application for this claim.

Justice F. B. William Kelly
January 26th, 2006