IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: C.E.G. v. D.B.E., 2005 NSSC 251

Date: 20050914
Docket: No. 1201-57983 / SFHD-26999
Registry: Halifax

Between:

C. E. G.
(Formerly "E.")

Petitioner

v.

D. B. E.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	August 25 and 26, 2005, in Halifax, Nova Scotia
Written Decision:	September 14, 2005
Counsel:	Graydon Lally, for the Respondent (Applicant) Krista Forbes, for the Petitioner

By the Court:

[1] Mr. E. (the Applicant) applied pursuant to section 17 of the *Divorce Act* to vary the custody, access and child support provisions of the Corollary Relief Judgment granted by the Honourable Justice D.M. Gass on the 1st of April, 2005.

[2] The parties lived together for approximately 13 years before marrying on July [...], 1998. They have two children, namely C. J. E., born February [...], 1999, and C. I. E., born October [...], 2000.

[3] The parties separated in November, 2002. In August, 2003 Ms. G. (the Respondent) petitioned her husband for a divorce. Also in August, 2003 the Respondent filed an application for interim relief seeking an order for interim custody, an access assessment, interim child and spousal support and costs.

[4] In December, 2003 an access assessment was ordered and access was granted to the Applicant each weekend as well as "those other and additional times that are necessary for the assessor to carry out his or her assessment in the manner and at the times the assessor chooses or deems advisable or necessary".

[5] After a hearing on September 23, 2004 Justice Gass granted the parties' divorce and, among other things, ordered that the parties would share joint custody of their children with the children residing primarily with their mother. The Applicant was granted specified parenting time with the children including overnight weekend access, equal time with the children during their annual summer vacation from school as well as on other special occasions such as during the children's Christmas holidays, March Break and Easter.

[6] The Respondent has denied the Applicant the access specified in the Corollary Relief Judgment, a fact that is not disputed by the Respondent. She believes that the Applicant has sexually molested their children and states in her affidavit ". . . I did not believe I could send the children for access with their father without putting the children at risk. This was something I was unwilling to do."

LEGISLATION

[7] The *Divorce Act*, R.S.C. 1985, c.3 provides as follows:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> . . .
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> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
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> . . .
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> **Terms and conditions**
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> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> **Factors for child support order**
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> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> **Factors for custody order**
>
> (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 the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> **Conduct**
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> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.
>
> **Guidelines apply**

> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.
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> . . .
>
> **Maximum contact**
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> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

ISSUES

[8] The issues are whether there has been "a change in the condition, means, needs or other circumstances" of the parties' children since the granting of the Corollary Relief Judgment, whether the order should be varied and if so, in what way.

DISCUSSION

[9] According to the written decision of Justice Gass released on November 9, 2004 the Respondent, at the parties' divorce trial, was seeking primary care of the children and "limited daytime access with the father until the children's therapist [felt it was] appropriate for overnight access to occur". It was apparent from Justice Gass's decision that the Respondent did not agree with the interim access order granted by the court in December, 2003 and that she did not comply with that order.

[10] During the hearing of this application the children's family physician, Dr. David MacNeil, testified. His records show that on January 14, 2004 (approximately eight months prior to the trial heard by Justice Gass) the Respondent brought both children to him claiming that the parties' daughter was exhibiting anxious behaviour and was upset upon returning from her visit with her father. She also claimed that their son was having bad dreams, was wetting the bed and he too seemed upset since his visit with his father ten days prior to their appointment with Dr. MacNeil. Neither of the children expressed to Dr. MacNeil any concern with their visits with their father. Instead Dr. MacNeil's notes indicated that their son said he enjoyed his visits with his father. As a result of his

examination Dr. MacNeil referred the parties' daughter for a mental health assessment at the request of the Respondent.

[11] Colleen Maloney, an intake worker for the Sackville District Office of the Department of Community Services testified with respect to the Respondent's involvement with the Department. Her records show that on January 18, 2004 (shortly after the Respondent took the children to Dr. MacNeil) the Department's emergency duty after hours worker received a call from the Respondent who said that the children were displaying behaviour that was out of character for them ever since a weekend visit with their father two weeks previous. She said they were "rocking" and having anxiety attacks and did not want to be left alone. The referral information note stated that the Respondent advised she felt "something happened to her son that he was unable to articulate". She also said that she was not going to be returning the children to their father.

[12] On January 19, 2004 the Department received a referral from the Halifax Regional Police whose referral indicated the Respondent contacted the police to report that the children had been left alone while visiting their father in [...] (which visit presumably had been two weeks previous). One of the workers contacted the Respondent who apparently provided a list of concerns with respect to the children's behaviour including panic/anxiety attacks during which the children were "crying for hours at a time", that their son who had been toilet trained was now back in diapers and that the children had been left all alone by their father. She also said that their son told her he had a secret but "isn't allowed to tell because she will get mad".

[13] It was determined that no further investigation was warranted because there was no specific incidents of abuse or neglect and in any event the Respondent was ensuring the safety of the children.

[14] On January 30, 2004 the Respondent took her son to the emergency room at the Izaak Walton Killam Hospital for Children to have him examined. The department notes indicate that while there C. was examined by Dr. Kathryn Morrison who is a pediatrician on the IWK child protection team. Her report formed part of Dr. MacNeil's file notes. In her report dated February 2, 2004 addressed to the Sackville District Office of the Department of Community Services, she stated, among other things:

> [The Respondent] expressed concerns that C.'s behaviour had changed following recent visits with his father. In addition, she reported finding inner thigh bruises on C. yesterday morning [January 29, 2004].
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> . . .
>
> [The Respondent] describes the children's relationship with their father as strained, with sporadic contact until a court order in December 2003 awarding [the Applicant] weekend custody.
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> [The Respondent] reported significant behavioural changes in the children following a weekend visit with their father on the weekend of January 3rd, 2004. She described C. as being clingier, unhappy with periods of great sadness, tearful, and having panic attacks. She also noted a rash, regression to diapers, and decreased food intake.
>
> The children next spent the weekend with their father on January 24/04. The mother reportedly had kept them home for two weekends due to her above-mentioned concerns and the possible relationship of these changes with the previous visit with their father. She stated that she then noted bruising on the inside of C.'s thighs on the morning of January 29/04.

[15] Under the heading "Physical Examination", among other things, Dr. Morrison stated:

> There were two areas of discoloration on the inner aspect of the distal thighs, which seemed to have 3 distinct sides of a square. His mother confirmed that that was the area she had been concerned about. I was able to wipe off this area of discolouration with an alcohol swab therefore it did not represent bruising but rather discolouration from another source.

[16] There's nothing in Dr. Morrison's report to indicate that C.'s examination in any way supported physical abuse. Their case was however referred to the Department of Community Services "due to the mom's concerns regarding possible abuse in the home while at their father's house . . .".

[17] After considering the information provided by the Respondent and the report of Dr. Morrison the Department decided to investigate further.

[18] It would appear that regular weekend access by the Applicant was continuing at this time.

[19] When a worker met with the Respondent and the children on February 18, 2004 C. made no disclosure of anything that could be categorized as physical or emotional abuse and said that when with his father he was happy. Similarly C. said that she liked her visits with her father.

[20] The Department's running file notes indicate that on March 22, 2004 Elizabeth Simms of Simms Counselling Services contacted the Department worker. Ms. Simms was conducting the court ordered assessment. The notes indicate that Ms. Simms had no concerns regarding abuse or any worries for the children.

[21] On March 30, 2004 the Respondent phoned the Department's worker, Ms. Moore, and told her that C. said that his father locked them in his house and that C. is now "peeing on everything, his blankets, the corner of his room and his bed post". During his testimony the Applicant denied ever leaving the children alone other than for a few seconds when he may have had to leave them in the house momentarily to collect something from his car in the driveway. He also said the children demonstrate no emotional problems of any kind when they are with him. Indeed it's his evidence that they are excited and happy to be with him and disappointed when they have to leave him.

[22] On April 6, 2004 the Agency worker, Ms. Moore, again met with the Respondent and the children. According to the Agency notes Ms. Moore engaged C. in a conversation about his feelings. He said that he was happy when his sister gave him hugs, when his mother gave him hugs and tickles and when his father tickles, hugs, kisses and plays with him. He did not identify anything that made him sad with respect to his mother or his father and he could not identify anything about his father that made him angry.

[23] At the conclusion of the parties' divorce trial on September 23, 2004 Justice Gass rendered an oral decision which was later transcribed. Justice Gass concluded that the Respondent had been the primary caregiver to the children during the marriage but that the Applicant was "an involved parent". Justice Gass stated:

> [34] The mother has expressed concern about the children's emotional well being resulting in some bizarre soiling on the part of C., who is the oldest child and soon will be six in February. She says that C. says that he doesn't want to stay

overnight at his father's, and she now has both of the children enrolled in therapy. The father, on the other hand, sees no such problematic behaviour when the children are in his care.

[35] The Court ordered an assessment and there was put into place an Interim Order providing for Dad to have a schedule of access including overnights. This arrangement was something that was not agreed upon by the mother prior to the Court making the Order and subsequent to the making of the Order the mother did not comply with the Order, as a result, in her evidence, of the children's behaviour, their wishes and her concerns. She changed the access and stopped the overnight visits. Now the children primarily see their father during the day, although there have been some overnight visits, and Ms. E.'s brother has been there for the pick-up and drop-off, which has exacerbated the tension between the parents.

[36] As a result of an Assessment Order the report of Ms. Simms was produced and it was produced in April of 2004. That report recognizes the importance of the children to have maximum input and contact with both parents. In addition, Mr. E. himself engaged a professional social worker to observe him with the children. Neither of the professionals observed anything untoward about the children while in the care of either of the parents. The only report of a bizarre behaviour comes from the mother. That is not to say that it is not true, but it does lead to a concern that it is not necessarily because of access and parenting time that the children have with their father, but other surrounding issues that could relate very well to the mother's feelings about what is happening.

[37] The sole consideration for the Court is what is in the best interests of the children. This has been a very difficult decision for the Court because the evidence of the parents diverges significantly in how these children are behaving and how they relate to their parents. I am, therefore, primarily relying on the independent evidence that I have heard and read from both of the assessors, that is the one engaged by the Court, and that is the one engaged by Mr. E..

. . .

[39] The Court is also mindful of the fact that the children have been in the primary care of their mother since the parties' separation, and as well I would conclude that she was the primary caregiver, although the father was very involved with the children during the time that the children were residing with the parents together. Therefore, I am concluding that the children's best interests right now, and relying on the assessment as well of Ms. Simms, would be best met by the children remaining in the primary care of their mother, although I caution that this could change if the mother persists in resisting Court Orders about the children's parenting time with their father. **There is no evidence properly before me to support the contention that their time with their father ought to be**

curtailed. I have absolutely no independent or objective evidence to suggest that their time with their father ought to be curtailed in the manner in which the mother is seeking. In fact, I conclude that by doing that the wrong message is being sent to these children, and they must learn that it is important for them to spend as much time as possible with their father as it is for them to spend as much time as possible with their mother.

[40] Thus, while I am ordering that the primary care of the children be with the mother, with the father having the right to all information respecting their health, education, upbringing and the right to participate in major decisions respecting same, and I will spell out the parenting time that the father has later, **the Court makes this decision very much cautioning the mother of the necessity of adhering to the parenting regime and failure to do so could constitute a change in circumstances that could result in a change in the parenting time that is allotted to each of the parents. I have concluded on the basis of the evidence before me that the children need more and regular contact with their father, and not less.**

[41] The mother attempted in her evidence to justify her position regarding the denial of access more recently to what appears to have been a January, 2004 incident, when all of the evidence as far back as a year ago is against overnight access. **As I've indicated, on the basis of all of the evidence, including the independent evidence, the difficulties that the children are having, in my view, are as much a result of the mother's unwillingness to accept the parenting time that was imposed, and as a result the somewhat sporadic and inconsistent parenting time that the children have had with their father as a result of the mother's unilateral determining when the children can go with their father, thus creating a system of uncertainty and inconsistency, and, if anything, these children need predictability and consistency in their lives.** But primary care is not a punishment or a reward for conduct, and that is why I'm maintaining the primary care with the mother with that significant caution to her.

. . .

[43] In coming to this decision, I want to assure the parties that I've had a chance to review these detailed Affidavits and to hear the parents' evidence on this issue and to ponder it, and it has been a difficult decision. **I conclude that both parents are very good parents and each has a lot to offer the children. I also conclude, on the basis of everything before me, that the father's emotional fragility as a result of the separation may have had some impact on some of his parenting over the chaos and uncertainty of recent months. But, by the same token, I conclude that the mother has contributed significantly to the children's anxiety, and I find on the evidence, as I've indicated, that the concerns that she has expressed are not demonstrated while the children are in their father's care.**

> [44] **There is no doubt that these children have been confused and uncertain about the future because of how things have gone on for the past two years. And there's also no doubt in my mind that they pick up on their mother's anxiety. There is, on the basis of the evidence before me, a very real concern about the children's potential alienation from their father. I'm very concerned that a three year old and a five year old are in therapy and that they've already had ten sessions in therapy. That in and of itself is of great concern.**
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> . . .
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> [46] Certainly it is clear that the mother did not agree with the Order that the Court made and was opposing overnight access long before the Court imposed the Order in December, and that subsequently she has, on many occasions, failed to comply with it.
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> [47] One of the factors the Court does consider in determining primary care is the willingness of each parent to facilitate maximum contact with the other parent. All things being equal, this could tip the balance in favour of that parent. **Thus, future refusal to comply with Court Orders with respect to parenting time could constitute a change in circumstances and could result in a change in primary care.** . . . (emphasis added)

[24] As for the specifics of the Applicant's time with the children, Justice Gass ordered that the Applicant would have the children with him the following Saturday, September 25, 2004 from 9:00 a.m. to Sunday, September 26, 2004 at 6:00 p.m. and again on Saturday, October 2 from 9:00 a.m. until Sunday, October 3 at 6:00 p.m.. Beginning October 15, 2004 and every second weekend thereafter the children were to be with their father from Friday after school until Monday morning when he would deliver their son to school and their daughter to the home of the Respondent. There was further access specified for special events such as Christmas, Easter, March Break and summer vacations.

[25] The Applicant exercised access to the children as ordered by Justice Gass on the weekends of September 25/26, October 2/3 and October 15-18, 2004. He did not get to see the children on October 29. According to the Department's notes, on October 20, 2004 the Department received a call from a Joan Rankin of the IWK Child Protection Team who reported that the Respondent brought her daughter into the hospital complaining that C.'s vagina was reddened. The Respondent reported that she had recently returned from an access visit with her father. The Respondent stated that her daughter said someone had "touched" her

"down there" but gave no further details. A physical examination at the IWK noted nothing of concern.

[26] On October 29, 2004 the Respondent obtained an Emergency Protection Order (EPO) from a Justice of the Peace pursuant to the terms of the *Domestic Violence Intervention Act*. The EPO had the effect of overriding the order of the Supreme Court granted a month earlier. It contained provisions that prohibited the Applicant from communicating directly or indirectly or contacting the Respondent and his two children. Further he was to remain away from the Respondent's residence. The Order provided that he had the right to apply to the Supreme Court of Nova Scotia for a hearing to either set aside or change the order. As a consequence of this Order the Applicant was denied his access the weekend of October 29, 2004. He had no prior notice that the Respondent had applied or obtained an EPO. In fact after he got off work on October 29 he drove from his home in [...] to [...] to retrieve the children. It was then that the Respondent told him that C. told her that his father yelled at him and had hit him on the back of the head and that he had also done that to C.. She also told him that C. told her that he had "touched" her and that he was going to be served with court papers probably that night. She did not allow him to take the children with him. Later that night he was contacted by the police in [...] and served with the EPO.

[27] The Applicant retained counsel to apply on his behalf for a hearing to set aside the EPO. By the time his lawyer was able to secure a tape of the conversation between the Respondent and the Justice of the Peace that resulted in the EPO and was able to schedule a hearing date, the term of the EPO (one month) expired. A copy of the tape of the "hearing" which resulted in the EPO was entered into evidence. The quality of the recording was so poor that the Respondent's voice was barely audible. From what I could understand, the Respondent's complaints were a repeat of some of the evidence that was heard by Justice Gass approximately a month earlier bolstered by the disclosures the Respondent attributed to her daughter. As a result of that order not only did the Applicant not have access to his children the weekend of October 29 but also the weekends of November 12 and 26, 2004.

[28] According to the notes kept by the Department of Community Services, on the same day that the Respondent applied for the EPO (October 29, 2004) she phoned the Department demanding that there be an investigation regarding her ex-

husband. Apparently she did not believe that the Agency was taking her concerns seriously. The file note indicates that the Respondent repeated her belief that the children were being physically and now sexually abused by their father and that she wanted his access to stop. Because of the Respondent's "high level of concern", the seriousness of her allegations and, it would seem, the high credibility that they gave to the EPO the Department workers decided to investigate further. Ms. Maloney contacted the [...] RCMP Detachment to advise that the Department had a referral requesting a joint investigation by the Department and the police.

[29] Arrangements were then made for the children to be interviewed by Ms. Maloney and a Constable Krista Rolls of the [...] Detachment of the RCMP. That interview took place on December 3, 2004.

[30] According to Ms. Maloney C. was interviewed first. Although she was quite verbal she made no disclosure of sexual abuse by her father but said that her mother hit her on "the behind" and that her father "hits them on the leg".

[31] C. also made no disclosure of any sexual abuse. He too said that his mother disciplined him by hitting him with a hand on "their behind" and that their father hit them on the leg or the top of the head. Following that interview the RCMP advised that they were closing their file. The Department's file notes also contain the following entry subsequent to that interview:

> Concern of both this worker and Const. Rolls was that the children were well aware of why they were being interviewed and advised that their mother told them to talk to worker and the officer regarding the bad things that daddy does to them.

[32] Ms. Maloney's notes indicate that both parties were instructed on more appropriate methods of disciplining the children and that both parties denied ever physically striking either child. As of December 16, 2004 the Department ended its investigation.

[33] After the expiration of the EPO the Applicant's next scheduled weekend with the children was to commence on December 10, 2004 but the Respondent again denied the Applicant access. His next access with the children was from December 26, 2004 to December 28, 2004. He had them again from January 14 to 18, 2005.

[34] His next weekend after that was to be February 4, 2005 but because he was moving that weekend he asked the Respondent if they could trade weekends so that instead of February 4 he would pick the children up on February 11. On February 11, 2005 he received a telephone call from the Respondent at approximately 4:00 p.m. informing him that the children were ill and therefore there was no point in coming in to town to pick them up.

[35] On Friday, February 18, 2005 he received another call from the Respondent informing him not to bother picking up the children as they were still sick. Subsequently he phoned the Respondent on a couple of occasions to see if he could see his son over the weekend of February 25 since it was his son's birthday. His phone calls were not answered or returned.

[36] What the Applicant later learned was that the Respondent had arranged for the children to see a counsellor for play therapy. That counsellor was a psychologist by the name of Ms. Marg delaSalle. On February 10, 2005 Ms. delaSalle made a referral to the Department of Community Services in which she stated that the parties' son had told her that his father hit him and his sister and that his father had touched his penis. She testified that the latter disclosure was made on one occasion, in the presence of his mother and immediately after there was a whispered exchange between the child and his mother. Ms. delaSalle did not see it as her role to try to verify the information provided by the child but rather to ask the Agency to remain involved and to make their own assessment.

[37] Because of the source of the referral and the Respondent's numerous previous allegations against the Applicant the Department decided to investigate.

[38] The Agency again made a referral to the RCMP to request a joint investigation. The Respondent again denied the Applicant access pending the outcome of the investigation.

[39] On February 8 the Respondent took the children to Dr. MacNeil for a physical examination. She informed Dr. MacNeil that their son had disclosed to her that his father touched his penis and had him touch his sister and also touch his father's penis. Dr. MacNeil's examination of their son disclosed no abnormality

but based on the information provided by the Respondent he made a referral to the IWK Protection Team.

[40] The Agency's file contains a note dated February 21, 2005 prepared by Ms. Maloney. The note states that she spoke on the phone with the Respondent on that date and that the Respondent informed her that she did not want the Applicant finding out about the investigation as that would give him an opportunity to "destroy evidence". When Ms. Maloney inquired what she was talking about the Respondent stated that she had concerns that the Applicant was taking pornographic pictures of the children. The Respondent testified that their daughter had told her that her father took pictures including video pictures of her dancing. Apparently the fact that the Applicant took pictures of his daughter and the style of her daughter's dancing was enough to cause the Respondent to believe that the Applicant may be involving the children in child pornography. She also told the worker that she had concerns that the Applicant was in some way drugging the children by sprinkling something on their ice cream.

[41] The children were interviewed by Ms. Maloney and Constable Glenda Rubia of the RCMP on March 1, 2005. Neither child disclosed any information that would suggest that their father was abusing them in any way. Also, neither child reported being fearful of their father or having any other concerns. Their son said he enjoyed his visits with his father.

[42] The RCMP ended its investigation. Ms. Maloney contacted the Applicant on March 4, 2005 to advise him of the Agency's involvement. He agreed to meet with Ms. Maloney on March 7 at which time he was given the full details of the referral and the subsequent investigation and findings.

[43] The Agency held a conference on March 9, 2005. In attendance was Ms. Maloney, Ms. Debbie Totten and Ms. Jane Tolson, the long-term supervisor. The minutes of that meeting conclude with the following note:

> Given the concern about the previous involvement that has resulted in the children being interviewed repeatedly and there being no disclosure **causes the concern to arise regarding emotional harm**. [The Respondent] advised that she is open to participate in any assessment. **It is this agency's decision that this situation requires further assessment of risk which would entail implementing services to assess [the Respondent] and her mental health.** File to open for long-term

> agency intervention pursuant to section 22(2)(G) of the CFSA [*Children and Family Services Act*]. (emphasis added)

[44] The Agency is conducting its own parental capacity assessment. The results of that assessment were not available at the time that this application was heard. As part of the assessment process the Applicant has seen his children in a supervised setting on four occasions being July 23, 24, August 6 and August 22, 2005. The access facilitator's reports were provided to the court. The notes of the July 23rd visit detailed appropriate interaction between the Applicant and his children. At the conclusion of the visit the notes indicate that the parties' son became upset when they had to get ready to leave. He asked his father why his father doesn't see him anymore and he cried when he left his father.

[45] On July 24 the parties' son again started to cry when it was time for him to leave.

[46] At the conclusion of the August 6 visit, when the children were being prepared to leave, their daughter hugged and kissed her father and climbed into his car. Their son again became upset and started to cry when he knew it was time to leave and asked his father when he would see him again.

[47] At the conclusion of the August 22 meeting their son again became upset and started to cry when it came time for him to leave.

[48] On all occasions the Applicant appears to have reassured the children in an appropriate fashion.

[49] Other than the four supervised access visits, the Applicant has not seen his children since he dropped them off at the residence of the Respondent on January 18.

[50] At no time did the Respondent apply to this Court to vary the Corollary Relief Judgment.

CONCLUSION

[51] The Respondent has made numerous serious allegations of misconduct against the Applicant. The evidence shows that each new allegation by the Respondent tended to be more serious than the last. Initially she said that the children returned from visits with their father emotionally upset and exhibiting uncharacteristic behaviour, headaches, nightmares, bed wetting and the like. Then the Applicant was accused of leaving the children unattended, yelling at them and hitting them.

[52] The allegations then were that he "touched" his daughter, then that he touched his son's penis, had his son "touch" his daughter and had his son touch his penis. Eventually the Respondent suggested to the Department's social workers that the Applicant may be involving the children in child pornography and even drugging them.

[53] There is no physical evidence to support any of the Respondent's allegations. The children have been seen by numerous professionals including their family doctor and physicians at the IWK experienced in detecting child abuse. None of them have been able to come up with any evidence to suggest that there is any foundation to the accusations made by the Respondent. The "bruise" detected by Dr. Morrison was washed off with a swab. The children have been interviewed numerous times by therapists, social workers employed by the Department of Community Services, a court appointed assessor and by two different police officers. None of them concluded that the Applicant has in any way molested or abused his children.

[54] There is considerable evidence to suggest that the children, and in particular their son, enjoy their visits with their father. The notes from the access facilitator show that their son was quite upset when he had to leave at the conclusion of each session with his father.

[55] The one and only time that either of the children made a disclosure of inappropriate behaviour to a third party was their son's statement to Ms. delaSalle. The circumstances of that disclosure lead me to believe that the child was likely prompted by his mother to say what he said.

[56] The Respondent has not satisfied me that the Applicant at any time physically abused the children or conducted himself in an inappropriate fashion with them. I find that he did not.

[57] As Justice Gass had concluded, the Applicant has been an involved parent. He loves his children and is genuinely concerned for their welfare.

[58] I find that there has been a change in the children's circumstances since the granting of the Corollary Relief Judgment. That change is the Respondent's repeated denial of access to the children by their father. The Respondent has also failed to comply with other provisions of the Corollary Relief Judgement including sections requiring her to keep the Applicant informed about all professionals involved with the children which in turn has made it impossible for him to contact those professionals and be informed of the nature of their involvement with the children. I also conclude that as a result of the changed circumstances that a variation of the Corollary Relief Judgement is warranted.

[59] The *Divorce Act* provides that in making a variation order the court is to take into consideration only the best interests of the child as determined by reference to the change.

[60] In the past the Respondent has demonstrated that she is capable of being a caring mother. She has shown an ability to attend to their physical needs. I am concerned, however, that whereas the Respondent continues to hold on to the belief that the Applicant has molested the children, and would continue to do so, that she will continue to deny access. I am concerned that her behaviour will result in the children being alienated from their father.

[61] If the children's relationship with their father continues to be disrupted as it has since the granting of the Corollary Relief Judgment I believe that they will suffer emotionally and perhaps psychologically and their bond with their father may eventually be harmed, even destroyed.

[62] The Applicant is now seeking sole custody. It is his position that if the children remain in the primary care of their mother that the children will be poisoned against him and his access continuously denied. He has presented his own plan of care. According to his affidavit evidence his employer has reduced

his hours of work so that he now has every Monday off and only works from Tuesday to Friday. He has investigated the possibility of their son attending school in his school district as well as day care for the parties' daughter. On those days that he is working he will employ the assistance of a care provider who will ensure that their son gets to and from school on time and their daughter to day care. That care provider will also provide the children with their meals when necessary until their father picks them up after school. That same person is able to provide care for the children during the summer months.

[63] He is prepared to follow the court's direction regarding access by the Respondent, although on his behalf it was argued that the Respondent should have only supervised access until or unless the court can be satisfied that the Respondent, during her access periods, will not try to turn the children against him.

[64] I have considered the relevant sections of the *Divorce Act* and in particular sub-sections 17(1), (3), (5), (6) and (9). I have also considered the factors listed by Goodfellow, J. in *Foley v. Foley* (1993), 124 N.S.R.(2d) 198 which are intended to assist the court in assessing what is in a child's best interests for custody purposes. I have concluded that the Applicant is quite capable of meeting the children's physical, emotional, psychological and other needs. I find too that as between he and the Respondent he is much more likely than she to follow the court's direction regarding access between the children and the so called non-custodial parent. As a result the children are more likely to have a meaningful relationship with both of their parents if they reside primarily with their father then would be the case if their primary residence continued to be with their mother. I believe too that if the children were to remain in the primary care of their mother that there would be a significant risk that they will suffer emotional harm and that their relationship with their father will be irreparably damaged.

[65] I therefore order that effective immediately the Applicant shall have custody of the children. Under the circumstances the continuation of the joint custody arrangement is not workable and not in the children's best interests.

[66] I considered curtailing the Respondent's access and requiring that such access be supervised. Supervision however is not a long term solution. Rather than requiring supervision I intend to review the Respondent's access in

approximately two months. It is my sincere hope that the assessment currently being conducted by the Department of Community Services will provide the parties with some useful recommendations. For example, it may be their determination that psychological counselling for the Respondent would be appropriate.

[67] I believe the Respondent loves the children and has a lot to offer them as does their father. She must however stop falsely accusing the Applicant of abusing the children and refrain from saying anything to the children that would negatively impact on their relationship with their father.

[68] I order that the children be delivered to the Applicant no later than Friday September 16, 2005 at 5:00 p.m. and thereafter the Respondent will have access to the children every second weekend from Saturday at approximately 10:00 a.m. to the following Sunday at approximately 6:00 p.m.. Such access shall commence on September 24, 2005.

[69] This matter will be brought back before me for a one hour review hearing the week of November 27, 2005 (subject to the availability of counsel) to assess the Respondent's ongoing access. The Applicant shall file an affidavit ten days prior to the assigned date and the Respondent five days prior to the date. Depending on the Respondent's conduct between now and then the Court will consider at that time whether to expand (or reduce) the Respondent's weekend access and her access during special event occasions including Christmas, March Break, Easter and summer vacations. Until then the provisions which are now contained in paragraph 9 of the Corollary Relief Judgment are also varied. Both parties will have reasonable telephone access to the children while they are in the care of the other parent. The Applicant will keep the Respondent informed of all professionals who are involved in any way in the care or education of the children. Except in the event of an emergency, the Applicant, not the Respondent, shall be responsible for ensuring the attendance of the children at all of their medical and dental appointments and he will keep the Respondent informed of all matters relating to the children's health, education, recreational activities and the like.

[70] No evidence was presented regarding the ability of either party to provide transportation for the purpose of effecting access. If either of the parties wish I am prepared to hear argument on that issue and if necessary receive further evidence.

However, assuming that both parties have access to vehicles, it would seem reasonable for them to share the transportation of the children.

[71] The Applicant's obligation to pay child support to the Respondent is hereby varied such that with the exception of any arrears of child support that may be owing up to and including September 1, 2005 which, if any, shall be paid, the Applicant shall not pay any further child support to the Respondent. At the hearing of the application the vast majority of the parties' evidence and all of counsel's final arguments concentrated on the custody and access issues. I am prepared therefore to give counsel a further opportunity to offer argument on the child support issue but it appears based on the Statement of Guideline Income filed by the Respondent that her present income is such that she would not be required to pay any child support pursuant to the Child Support Guidelines and in particular the Nova Scotia Table.

Dellapinna, J.