

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

**Citation:** *DD v. JD*, 2017 NSSC 147

**Date:** 2017-05-23

**Docket:** *Sydney* No. 1206-006685

**Registry:** Sydney

**Between:**

**DD**

Applicant

v.

**JD**

Respondent

Judge: The Honourable Justice Theresa Forgeron

Heard: *In 2016:* February 10 and 11; May 25; July 8; September 8, 9 and 13; and November 23. *In 2017:* January 25; February 28; March 3 and 24; and May 23 in Sydney, Nova Scotia.

Oral Decision: May 23, 2017

Written Decision: June 22, 2017

Counsel: Alan Stanwick, for DD  
Jessie Denny, for JD

**By the Court:**

**Introduction**

[1] This high conflict divorce involves the mother JD, the father DD and their five children, who range in age from six to 17 years. The high conflict arose because of the circumstances surrounding the parties' separation. In 2010, while renovating the family home, the father suffered third degree burns. The father almost died. The parties separated about seven months later. The mother eventually formed a new relationship and had another child.

[2] The father has not accepted these life changes. He resents and blames the mother; he is angry and bitter. Such polarizing emotions have coloured the father's judgement and have hampered a peaceful resolution of the two outstanding issues.

[3] The first outstanding issue concerns the parenting plan that is in the children's best interests. The mother seeks primary care of the children. The mother notes that she was the primary care parent until the summer of 2016, when the father unilaterally kept three of the children in his care in defiance of a court order. The mother further states that the father negatively draws the children into the conflict. The mother states that the father should have access to all children except the youngest. The mother wants access between the father and the youngest child to be supervised.

[4] In contrast, the father seeks primary care of four of the children, or at the very least, primary care of three of the children and shared parenting of the other two children. The father agrees that the wishes of the oldest child should be respected. In addition, the father denies negatively influencing the children. He also asserts that the mother violated a court order by failing to allow the youngest child access to him.

[5] The other outstanding issue concerns property division. The mother seeks an equal division of the assets, although she would prefer to postpone paying the father his share until the children are older. For his part, the father seeks an unequal division of the assets. He says that the mother dissipated the insurance money and that she wasted other money, such as the money raised from the benefit dance and the money that the father states was donated by his union. The mother denies these allegations.

## **Issues**

[6] In order to resolve these issues, I will answer the following four questions:

- Should an order for primary care or shared parenting issue?
- What parenting schedule is in the best interests of the children?
- Should an unequal division of the assets be granted because the mother dissipated assets?
- What is the appropriate property division?

## **Background Information**

[7] Before I begin my analysis, I will briefly outline some background and procedural facts to provide context.

### *Marriage and Life in British Columbia*

[8] In 1998, the mother and father met while they were living and working in Calgary; the father was training as a professional boxer. In September 1999, the parties married in White Rock, B.C. About two weeks later, the father's professional boxing career came to an abrupt end because of serious injuries he sustained in a car accident involving both parties and a drunk driver. A law suit eventually netted about \$150,000 in damages, less legal fees.

[9] In 2000, the parties' first child, a daughter, was born. The mother assumed the primary care role.

### *Life in Sydney, Nova Scotia*

[10] In 2002, the family moved to Sydney, N.S. where the father lived as a child. The parties used some of the settlement money to buy a mortgage free home. The family soon grew with the addition of two more children, one born in 2004 and the other in 2005.

[11] The parties' relationship continued to follow a traditional model. The father worked at various jobs while the mother primarily remained at home caring for the children. In 2005, the parties opened a gym where the father was employed. He

worked many hours. Despite the father's efforts, the gym was not a financial success. The family's financial situation was so difficult that on occasion a friend purchased oil to heat the family home and to heat their gym. The gym eventually closed.

[12] The father next found work in a gym in Membertou. That employment lasted about a year. Financial difficulties remained an ongoing challenge. The father and mother decided that they would relocate to improve their circumstances.

### *The Return to British Columbia*

[13] In 2007, the family moved to British Columbia. To finance the trip, a \$40,000 mortgage was taken out on the family home. After getting situated, the father tried to find employment. He worked in a series of jobs, including jobs that required frequent travel. The father could not find suitable employment in British Columbia.

[14] In December 2008, the family moved back to Sydney, but with one additional family member – a fourth child was born in 2007.

### *The Return to Cape Breton and the Explosion*

[15] Once home, the father began to work out west as a labourer. His schedule typically involved four weeks of work followed by one week at home. While working out west, the father had daily telephone contact with the children.

[16] In the fall of 2009, the father found a job in Baddeck, N.S. where he worked until he sustained a workplace injury. He started to collect WCB.

[17] The wife became pregnant in 2010. In February 2010, the father began renovating the family home in anticipation of the fifth child's birth. While renovating, an accidental explosion and fire caused the father to suffer life-threatening burns. Thankfully, the father survived.

[18] In addition to the father's personal injuries, the family home and contents were completely destroyed by the fire. Fortunately, the home and contents were insured. The mortgage was paid out with some of the insurance proceeds. The balance of the insurance proceeds was used to replace the household contents, buy a van, rebuild the home and pay outstanding debt.

### *Hospitalization and Separation*

[19] After the explosion, the father was immediately airlifted to the Burn Unit in Halifax. The mother remained at his side, while a family member cared for the children. Once the father's condition stabilized, the children temporarily moved to Halifax with the mother. The mother homeschooled the children and took them to visit the father daily.

[20] After the fifth child was born in September 2010, the mother and children returned to Sydney to live in rental accommodations until the home construction was completed. Periodically, the mother and children travelled to Halifax to visit the father. Travelling with five children, one of whom was an infant, was difficult.

[21] Marital problems surfaced. The parties separated in January 2011.

[22] The father remained in the Burn Unit in Halifax until May 2011, when he was transferred to the Regional Hospital in Sydney. The father continued to be treated at the Regional Hospital until he was moved to the Rehabilitation Unit. In January 2013, the father's hospitalization was concluded.

[23] Throughout the father's hospitalization, the mother maintained the primary care role. In addition, she regularly took the children to visit their father and she facilitated telephone contact.

### *Mother's New Relationship*

[24] After separation, the mother formed a relationship with another man. Their union led to the birth of a child in February 2013. Although engaged, the mother and her fiancée do not live together. They each maintain separate homes. The fiancée works out west.

### *Father's Health Status*

[25] The father is unable to work; he receives CPP disability benefits. At the time of trial, the father was awaiting a kidney transplant.

### *Court Proceedings*

[26] Understandably, the father was distressed about his life changing circumstances, the separation and the mother's new relationship. Regrettably, the

passage of time has not dampened the father's upset, nor healed his emotional wounds. To the contrary, time has only intensified the father's negative emotions and intransigence. Court proceedings were inevitable.

[27] The father filed a *Maintenance and Custody Act* application soon after separation. The matter was assigned to Justice Haley. The following court orders issued under the provisions of the *MCA* and the *Matrimonial Property Act*:

- An *Ex Parte* Order dated April 28, 2011 prevented the removal of the children from N.S. absent consent.
- An Interim Order dated January 19, 2012 prevented the permanent relocation of the children from Cape Breton absent consent, and further provided the father with telephone and in-person access as arranged by the parties.
- An Interim Consent Order dated February 3, 2012 essentially provided the same relief as stated in the previous order.
- An Interim Order dated July 26, 2012 provided the mother with exclusive occupation of the matrimonial home.
- An Interim Order dated April 16, 2012 required the parties and the children to participate in a Home Study to be completed by a psychologist.
- An Order dated November 19, 2012 allowed Alfred Dinaut to be removed as Solicitor of Record.
- A Consent Order dated January 25, 2013 granted a joint custody regime, with the mother having primary care and the father reasonable access. Reasonable access was not to include overnights during the school week, but was to include an equal sharing of week-ends. No child support was awarded, although the father was to ensure that the children's portion of the CPP was directed to the mother.

[28] The mother filed a Divorce Petition in May 2014. About one year later, the divorce proceeding was assigned to me at a Date Assignment Conference. The following orders issued under the provisions of the *Divorce Act and the MPA*:

- A Date Assignment Conference Memorandum/Order dated May 5, 2015.

- A Consent Order for Paternity Testing dated June 13, 2016 as requested by the father in respect of the youngest child. The test results confirmed that the father was the child's biological parent.

*Trial Dates*

[29] As previously indicated, this matter first came before me on May 5, 2015 - over four years after separation. During the Date Assignment Conference, the parties requested four days for trial. The first available dates were not until February 2016.

[30] Regrettably, the parties underestimated the number of days required to hear this trial. The divorce was actually heard over multiple days in 2016 and 2017. In 2016, the divorce was heard on February 10 and 11; May 25; July 8; September 8, 9 and 13; and November 23. In 2017, the trial was held on January 25; February 28; and March 3 and 24.

[31] At the conclusion of the hearing, counsel provided oral submissions which were augmented by both pre and post-trial submissions. Post-trial submissions were received on April 7 and 21, 2017.

[32] The oral decision was rendered on May 23, 2017.

*Protracted Nature of Proceeding*

[33] The hearing was unfortunately drawn out for four reasons:

- The parties consistently underestimated the amount of trial time required to complete their case, which resulted in the divorce being rescheduled on several occasions.
- My court docket was heavily booked. This created scheduling difficulties when I attempted to accommodate the conflicting and busy schedules of each of the lawyers.
- Some trial dates were lost as a result of counsel becoming unexpectedly ill.
- Some trial dates were bumped for child protection hearings which have statutory priority.

[34] These four factors produced a most unfortunate delay; the delay was not in the best interests of the children.

*Trial Evidence*

[35] Evidence was received from the following people: Terri Lynn Baxter; Doug Thorne; Sergeant Barry Best; AP; CP; SA; DD; PM; the mother; Fr. Paul MacGillivray; GD Jr; GD Sr.; GML; and the father.

[36] I have considered all admissible evidence and the able submissions of counsel for each party.

*Agreements Reached on Other Issues*

[37] During the trial, the following agreements were noted and approved:

- The mother's name will be changed to her maiden name.
- Neither party will pay spousal support to the other.
- Neither party will pay child support to the other because both parties earn below the threshold of the *Child Support Guidelines*.
- The joint custody regime will continue.

[38] The divorce was also granted as all jurisdictional issues were proven.

**Analysis**

[39] **Should an order for primary care or shared parenting issue?**

*Position of the Parties*

[40] The mother seeks primary care of the children for a number of reasons, including the following:

- She was always an excellent primary care parent, both before and after separation.
- She is best able to meet the needs of the children; she loves them dearly.

- The father engaged in alienating conduct and has consistently spoken negatively about her to the children.
- The father does not follow court orders.
- The youngest child does not know the father because she was born after he was hospitalized and did not spend much time with him.
- The oldest child is 17 years old and wants to live with her mother. Given her age and maturity, the daughter's wishes should be respected.

[41] In contrast, the father seeks primary care of all of the children, or at least of the middle three, and shared parenting of the oldest and youngest children for a number of reasons, including the following:

- The mother did not assign priority to the children's needs. For example, the mother formed a new relationship with another man while the father was hospitalized for life-threatening injuries. The children were confused by the mother's conduct. The children were focused on their father's health and should not have been introduced to a new father figure. The children's confusion was compounded when a child was born to the mother and her fiancée.
- The father didn't follow the court order because the three middle children ran away from the mother's home and will continue to run if they are forced to live with their mother.
- The mother is responsible for the poor relationship which she has with the middle three children. The father denied engaging in alienating conduct.
- The mother does not ask to visit with the three middle children who have been living with him since June 2016. She doesn't care enough about the children. The children are hurt by the mother's actions.
- The mother did not follow the court order as it relates to the youngest child. The mother has effectively kept the youngest child away from the father.

- The mother does not keep him up-to-date about important matters affecting the children. She places little value on his parenting contribution.
- He was and is an excellent father.
- He loves all of his children and wants to be involved in their lives.
- He is more than capable of caring for the children as is apparent because the three children in his care are doing amazingly well.

*Law*

[42] Section 16 of the ***Divorce Act*** states that all parenting decisions must be decided in the child's best interests. The best interests test is described as one which has an inherent indeterminacy and elasticity: **MacGyver v. Richards**, 1995 11 R.F.L. (4th) 432 (Ont.C.A.) at paras. 27 to 29. To determine a child's best interests, I must review the plans of rival claimants and select the course that will best provide for the child's healthy development: **King v. Low** [1985] S.C.J. No. 7 (S.C.C.).

[43] The ***Divorce Act*** also directs judges on two other important aspects of the best interests test. First, I must not consider parental conduct unless the conduct is relevant to the child's best interests. Second, I must ensure that a child has as much contact with each parent as is consistent with their best interests.

[44] In determining whether a primary care or shared parenting arrangement is appropriate, I must address relevant factors that compose the best interests test. These factors are varied, and are dependent upon the unique circumstances of each case. Goodfellow, J., in **Foley v. Foley** 1993 N.S.J. No. 347, enumerated a number of factors which courts typically examine when determining a contested custody dispute.

[45] Further, in **Gibney v. Conohan**, 2011 NSSC 268, O'Neil, ACJ. noted that although there is no presumption in favour of joint custody, jurisprudence has evolved to allow for more shared parenting orders because of the changing dynamics of family life and parental roles. O'Neil, ACJ. stated that there is an increased acceptance that fathers have the ability to parent.

[46] I conclude that where both parents are competent, capable, and caring, shared parenting should be considered as a viable parenting option to be examined through the lens of the best interests test.

[47] In deciding what parenting plan is in the children's best interests, I must make credibility and reliability determinations given the evidentiary inconsistencies. In so doing, I applied the law as set out in **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100. Further, I applied the civil standard of proof, which is proof on a balance of probabilities as reviewed in **C. (R.) v. McDougall**, 2008 SCC 53 (S.C.C.).

### *Decision*

[48] In presenting their case, each of the parties focused on the **Foley** factors; I therefore will do the same. My decision will thus address the following factors in the context of the best interests test:

- Children's Physical Needs
- Children's Emotional Needs
- Discipline Practices
- Role Model
- History of Childcare
- Children's Educational Needs
- Children's Spiritual, Social, Recreational and Cultural Needs
- Ability to Foster Relationship with Other Parent
- Views and Preferences of Children
- Relationships with Important Family Members
- Ability to Communicate and Co-operate
- Time Availability

### *Children's Physical Needs*

[49] I find that both parents can and usually do ensure that the physical needs of the children are met. For example, both parents have an appropriate home. The mother lives in the family home. The father currently lives in a four bedroom home which he rents. Both homes are suited to the children's needs.

[50] In addition, both parents ensure that the children have nutritious meals and are properly clothed.

[51] Further, neither party poses a safety risk to the children. Neither parent engages in physical violence. Neither parent abuses drugs or alcohol. Neither parent is in an abusive relationship.

[52] Despite these positives, I am, however, concerned about the father's inappropriate use of medicine. On one occasion, the father and paternal grandfather gave one of the children medicine that wasn't prescribed for her; the medicine was prescribed for the paternal grandfather. The mother correctly prevented the child from taking the grandfather's medicine.

[53] I do not believe the father's explanation as to why he gave his daughter the grandfather's medicine. The father's explanation is not plausible or probable. If the father simply wanted the daughter and mother to know the name of the medication, he could have easily texted that information or wrote it out on a piece of paper. He did not. The pills were given because the father wanted his daughter to take the grandfather's medicine to cure her acne.

[54] It is important that such an event not occur again. Medicine does not necessarily have the same effect on children as it does adults. Medicine must only be taken by the person for whom it is prescribed and while under doctor's care. This is the only lawful use of prescription medication.

[55] In summary, and although I find that both parties can meet the physical needs of the children, I am nonetheless concerned about the father's judgement because he gave his daughter medicine prescribed for the grandfather and then attempted to minimize the seriousness of the issue by misrepresenting his intentions to the court.

### *Children's Emotional Needs*

[56] There is a significant disparity in the parties' ability to meet the children's emotional needs. I find that the mother is better equipped to meet the emotional needs of the children than the father for the following reasons:

- The mother, for the most part, tried to shield the children from the conflict. The mother recognizes the emotional toll that the conflict has on the children. The mother sought out medical treatment for one of the children who started to cut herself. I accept the evidence of the mother.

- The father is bitter and angry because of the mother's decision to leave the marriage and commence a relationship with another man. Six years of separation have done little to soften the father's entrenched position. To the contrary, the father has not only convinced himself of the righteousness of his belief, but he ill-advisedly communicates his narrative to the children.
- The father engaged in harmful conduct when he called the mother negative names in front of the children, as was reported by the mother and as observed by two friends, AP and CP, whose evidence I accept.
- The father engaged in harmful conduct when he skillfully planted seeds of doubt about the mother, while attempting to elicit sympathy for himself, as is evidenced in various messages and Facebook postings, such as:
  - When he told one of the children that the mother left him because of how he looked.
  - When he allowed one of the children to believe that the mother engaged in an affair before separation by saying that Shirley said that the mother and her fiancée were together before the fire.
  - When he apologized to one of the children for getting hurt, and confirmed that he had to hang on so he could improve the children's lives and get their house back, even though the children were actually living in the home with the mother.
  - When he said to one of the children that he wished that they were all still together, that he loved being a family, that he tried to fix the marriage but the mother would not because she didn't like how he looked.
  - When he discussed the court proceedings with the children.
  - When he called the mother the "cheap woman", or when he said that it wasn't fair that the mother only gave the oldest child money for weekends, and when the mother used his money to pay for "pigboys movies".

- When he tried to elicit sympathy and division by stating that he thought maybe one of the children did not want to talk to him because that child had hung around with the mother earlier in the evening.

[57] The detrimental impact of these statements was not neutralized by the father telling the child that they were only carrying on and that he wanted the children to love both parents.

[58] The father does not appreciate that his children are being emotionally harmed when he manipulatively involves them in the parental dispute. The father does not appreciate that it is his duty and responsibility as a parent to protect his children from the conflict. The father does not appreciate that the children are not his confidants; they are not his friends. The father does not appreciate that the children do not have the maturity or skills to properly navigate the parental dispute. By involving the children in the conflict, the father assigned priority to his own needs and has sacrificed the emotional stability of his children. This is most troubling.

[59] Despite the father denying that he engaged in alienating and questionable conduct, the messages and posts confirm otherwise. The messages and posts were introduced for impeachment purposes during cross-examination. Although there was no objection to their introduction, the father nonetheless expressed concerns about privacy. For the father's benefit, I will now address his concern.

[60] In **R. v. Jarvis**, [2002] 3 S.C.R. 757, the Supreme Court of Canada, albeit in the criminal context, held that "... relevant evidence should be available to the [trier of fact] in the search for the truth."<sup>1</sup> Evidence is relevant if it has a tendency to prove or disprove a material fact in issue, and where its probative value outweighs its prejudicial effect, and provided its admission is not subject to an exclusionary rule of law or policy.

[61] In recent years, some courts have questioned the wisdom of admitting relevant evidence obtained in a questionable manner, such as through the surreptitious recordings of conversations between family members or through the copying of social media communication by a party who was neither its author nor the intended recipient. In **Sordi v. Sordi**, 2011 ONCA. 665, Epstein, J.A., at para 12, dismissed an appeal based on a trial judge's decision to exclude taped recordings because the trial judge properly assessed "... solid principles that took

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<sup>1</sup> Paciocco, David & Lee Stuesser. *The Law of Evidence*, 7<sup>th</sup> ed (Toronto: Irwin Law, 2015), pp 2-3.

into account not only the sound public policy of trying to discourage the use of secretly recorded conversations in family proceedings but also his assessment of the probative value of the tapes in relation to the issues before him.”

[62] I find that the social communication evidence referenced in para 56 of this decision was properly before me for the following reasons:

- The court’s overriding mandate is to ensure the best interests of the children. Where issues surrounding alienating conduct, inappropriate pressure and negative influence are raised, it is essential that the court have all relevant, probative and reliable evidence at its disposal. In such cases, the probative value of the evidence will often be found to outweigh any prejudicial effect: **Reddick v. Reddick**, [1997] O.J. No. 2497 (Ont.Gen.Div.).
- The messages and postings were only introduced for impeachment purposes because the father’s oral testimony was inconsistent with what he earlier had said to the children. A party should not be able to evade cross-examination on prior inconsistent statements, nor should a party be able to circumvent the truth by seeking to declare otherwise relevant evidence inadmissible. The administration of justice is concerned with truth, especially when decisions about children are being determined. In these circumstances, best interests concerns trump privacy interests.
- The messages and postings were not secretly recorded. The father knew that he was writing the messages and posts; he did so unprompted by the mother or the children. The communication was voluntarily produced by the father. The messages and postings are a reliable and true representation of the father’s communication with the children.
- I also question whether there was an expectation of privacy in the circumstances of this case. The father should have known that a prudent parent, such as the mother, would monitor the social communication received by the children to ensure their safety and well-being.

[63] In summary, I find that the messages and postings referenced in para 56 of this decision support my finding that the father did not meet the emotional needs of the children when he manipulated the children to feel sympathy for him and disapproval towards the mother. The father negatively influenced and pressured the children to support his position. In so doing, the father gave priority to his own

needs; he compromised the short and long term emotional health of the children. The father must change if he is to ensure that the children's emotional needs are to be met.

[64] In contrast, I find that the mother recognized the emotional pain that the children were experiencing. She sought medical advice. I also find that, for the most part, the mother does not directly involve the children in the parental dispute, although she does use the children as messengers, which is inappropriate and which must likewise stop.

### *Discipline Practices*

[65] I find that the mother is the better disciplinarian. As the historical primary care parent, the mother has a lengthier record of providing the children with consistent discipline and structure. The mother does not engage in physical discipline, rather she usually removes a privilege, takes away a favorite toy, game or phone. She employs time out for the younger children and grounds the older children. The mother's expectations and rules are appropriate and consistent.

[66] The father is not as effective a disciplinarian as is the mother. The father is more interested in having the children view him as a friend than ensuring that their disciplinary needs are met. In addition, the father failed to support the mother's discipline in an attempt to drive a wedge between the children and their mother. For example, in June 2015, one of the children got into a squabble with two of her siblings. The mother grounded the child. The child then jumped out the window and ran to her grandfather's home and then to her father. Rather than ensuring the child's immediate return to the mother, the father allowed the child to stay with him. The unspoken message thus delivered by the father is that it is acceptable to disobey the mother and it is acceptable to avoid consequences for poor behaviour. The father uses leniency to improve his bid to secure primary care of three of the children. The father's choices and conduct are troubling.

[67] The mother's plan is superior to the father's as it relates to discipline.

### *Role Model*

[68] On the surface, both parents appear to be excellent role models. Both appear to be loving and involved parents. The mother is the volley ball coach; the father used to be involved in personal training and boxing. The father has overcome

extreme adversity by surviving and moving forward with his life after the fire, despite the pain, setbacks and challenges of life.

[69] Unfortunately, some of the father's post separation conduct diminished his capacity to act as an effective role model. The gains that the children could realize from the father's strength and resilience are lost because the father used the children as weapons in the acrimonious separation and divorce.

[70] I recognize that the father deeply loves his children. I am hopeful that he will be able to recognize the errors of his ways and immediately change his approach because of his love for the children. If he does, the children will discover a wonderful role model and a positive influence.

### *History of Child Care*

[71] The mother was the primary care parent of all five children from their birth until the father's unilateral conduct in June 2016 when he, without benefit of court order, assumed primary care of the three middle children. The mother was and is a superior primary care parent. She was an involved, active stay-at-home mother who consistently ensured that the needs of the children were met.

[72] Although the father was an active and loving father, he was neither a primary care parent nor an equal care giver. The father was the bread winner of the family and he also spent significant time at the gym training other people. In the later years of the marriage, the father worked out west for several months. The father does not have the same experience as a primary care parent as the mother.

### *Children's Educational Needs*

[73] Both parents are capable of meeting the educational needs of the children. Although before 2013, this responsibility primarily fell to the mother, the father has since shown that he too can meet the children's educational needs. He, like the mother, attends parent teacher meetings, supervises homework and provides a supportive voice to the children's educational pursuits. Neither party's plan is superior in respect of the educational needs of the children.

### *Children's Spiritual, Social, Recreational and Cultural Needs*

[74] Both parents are attuned to meeting their children's spiritual, social, recreational and cultural needs. Both are Catholic. Both want their children raised

in their faith, although the father appears to have a firmer commitment. The father's faith was a source of immense support in the aftermath of the fire.

[75] Both parties ensure that the children attend various activities available through the school and the community. The older girls play volleyball; the mother is the coach. The son plays basketball. The children are involved in the Boys and Girls Club. They also visit friends and have sleep overs. Three of the children are actively involved in their church.

[76] Both parents are encouraged to ensure that the spiritual, social, recreational and cultural needs of the children are met.

*Ability to Foster Child's Relationship with Other Parent*

[77] Both parties must make significant improvements in this area. Both parties ignored the court order. The mother acted unilaterally in respect of the youngest child; the father defied the primary care designation in respect of the middle children. The court abhors unilateral conduct. Unilateral conduct has no place in parenting disputes and reflects negatively on the parent who acted unilaterally.

[78] Despite these cautionary words, I note that when the middle children were in the mother's primary care, they had liberal contact with their father, usually every week-end, during some evenings through the school week, and expansive summer contact. The mother did not usually attempt to limit contact between the four older children and the father, although there was a time when visits were stopped while child protection authorities completed their investigation.

[79] For his part, the father does little to foster a relationship between the three middle children and their mother. The father attempted to poison the children's attitude towards their mother. Further, there has been little contact between the children and the mother since the father unilaterally kept the children in his care. There is little credible evidence to suggest a decisive falling out between the middle children and the mother. Indeed, she continues to be their volleyball coach and they stay with her during tournaments. I do not accept the father's suggestion that access did not occur because the mother was not interested. This is not true. During the proceeding, the mother consistently requested the return of the children. The father did not comply.

[80] Both parties would benefit from therapeutic counselling to gain a better understanding of the importance of the children having an open and positive relationship with the other parent.

#### *Children's Views and Preferences*

[81] The evidence suggests that the oldest and youngest children want to be in the primary care of the mother, while the middle children want to live with the father.

[82] My findings in respect of the wishes of the children are as follows:

- The oldest child is 17 years old. She has a good relationship with both parents. She is mature. The oldest child's wishes are to be respected.
- The wishes of the middle children have been negatively influenced by the father's manipulative conduct. In addition to that previously discussed, I also note that the father decided that a sizeable amount of the children's CPP benefit should be placed in their individual bank accounts to be used by each of the children as they see fit. I am concerned about the father's decision to do so for three reasons. First, the CPP should be used to pay for the direct and indirect needs of the children given the family's pressing financial circumstances. Second, it appears that the father is trying to buy his way into the hearts of the children. Third, these young teenagers should not be provided with so much discretionary money.
- The wishes of the middle children are but one factor that I must consider when determining their best interests.
- The youngest child is six years old so her views are assigned little weight.

#### *Children's Relationship with Important Family Members*

[83] The children have a close relationship with the father's family including the grandfather and uncles and aunt who live in the Sydney area. The children also have a close relationship with their half-brother who lives with the mother. In addition, the children have the love and support of many friends and extended family. It is important that these relationships are maintained and fostered, and in particular the children's relationship with their half-brother.

*Ability to Communicate and Cooperate*

[84] Communication between the parties is poor. It is laden with mistrust, and is often fueled by resentment and anger. The parties must make efforts to improve their communication. I will outline how this is to be achieved later in my decision.

*Time Availability*

[85] Both parties are available to parent the children. Neither is employed outside the home. The father is occasionally unavailable because of health commitments. Currently, his kidneys are shutting down; he attends dialysis on a regular basis while awaiting a transplant.

*Decision on Primary Care and Shared Parenting*

[86] I have reviewed and balanced the above best interests factors and have grappled with developing a parenting arrangement that will best meet the individual needs of each of the children. I find that it is in the best interests of the children to have different parenting arrangements.

[87] The oldest child will be placed in the primary care of the mother. This child is a mature 17-year-old teenager who continues to prosper under her mother's primary care. The oldest child visits the father, but lives with the mother. A primary care order will best provide for the oldest child's healthy development and will ensure that she meets her potential.

[88] The youngest child will also be placed in the primary care of the mother. The youngest child has a positive relationship with the mother, and a secondary relationship with the father. Until the father makes significant parenting improvements, it is not in the youngest child's best interests to have unsupervised contact with the father. To put it bluntly, it is not in the youngest child's best interests to be exposed to the manipulation that the other children have experienced in their father's care.

[89] The situation with the middle children is not as easy to resolve. These children have aligned with the father, albeit because of his negative pressure and influence. If I abruptly remove the middle children from their father's care, these children will likely view their father as even more of a victim and their mother as an even worse offender. They will also likely experience more trauma.

[90] On the other hand, if I don't remove the children, they will have little opportunity to develop positive relationships with the mother and their three other siblings. Further, if I don't remove the middle children from their father's care, the father may continue to expose the children to inappropriate adult matters.

[91] Given these circumstances, I find that it is in the best interests of the three middle children to be in the shared parenting of both the mother and father. This finding is subject to the father making immediate changes to his negative parenting style and participating in therapeutic counselling to improve his parenting skills. This finding is also subject to change should the father not follow the court imposed parenting schedule or should the father continue to draw the children into the parenting dispute. If either occurs, the mother may apply to the court for an *inter partes* hearing to vary the shared parenting regime. Further nothing in this decision is meant to limit the right of either party to apply for enforcement orders.

[92] **What parenting plan is in the best interests of the children?**

#### *Joint Custody and Residence*

[93] The father and the mother will share joint custody of their five children.

[94] The mother will have primary care of the oldest and youngest children. The residence of the oldest and youngest children will be with the mother.

[95] The mother and father will share primary care of the three middle children according to the parenting schedule stated in this order. The residence of the three middle children will be shared equally between the mother and the father.

#### *Decision Making Authority*

[96] The mother and father must consult with each other, on a timely basis, about important decisions which impact on the children's health, education, religion, heritage and general welfare. All such discussions must be meaningful, child focused and respectful. If after meaningful discussions, the parties are unable to reach agreement, then the mother will have final decision making authority on all issues, including therapy and counselling for the children.

[97] In the event of a medical emergency, the party having physical care of the child will be entitled to make decisions which are necessary to alleviate the

emergency, and will notify the other parent as soon as possible, as to the nature of the emergency and emergency treatment.

### *Communication*

[98] All communication between the parties must be child focused and respectful and shall occur through e-mail, except in the case of an emergency. Both parties will exchange e-mail addresses to assist with communication. Text messages, telephone calls and in-person discussions should be avoided where possible.

[99] Neither party will speak disparagingly of the other party, or their family, in the presence or hearing distance of any of the children.

[100] Neither party will use the children to relay messages to the other party.

[101] Each party must notify the other by email of the following routine decisions made while the children are in their care: particulars of minor illnesses and any medication that was administered; particulars of homework assignments, projects and tests; particulars involving activities, practices, games and tournaments; and particulars relating to significant social welfare matters. All such notifications must be timely, and must provide sufficient details so that both parties can attend any special function or appointments for the children, if they are able to do so. All such communication must be respectful and child focused.

### *Meetings, Concerts and Activities*

[102] Both parties are entitled to attend parent teacher meetings, and all major school events, including concerts, programs and activities. In the event tickets are limited to such performances, each parent will have priority for tickets. The use of any additional tickets will be determined by the parent who has physical care of the child on the day the special event occurs.

[103] Each party must ensure that the children attend school, their activities and special events, and birthday parties where at all possible, except when the children are ill or are away from the area, or in the case of inclement weather, or for such other reasonable excuse.

### *Educational Assistance*

[104] Each party is responsible for supervising the completion of homework and assignments by the children when they have physical care of the children, and each

party must cooperate with educators to ensure that the educational needs of the children are met.

#### *Health Cards*

[105] The mother will provide the father with a copy of the health cards for each of the children. The mother will retain the original health cards.

#### *Access to Professional Records and Information*

[106] Each party has the right to communicate with all professionals involved with the children's care, and each has the right to obtain information and documentation respecting the children from all medical professionals, educators, health professionals and social welfare professionals without the further consent of the other party.

#### *Travel*

[107] Each party will notify the other of travel plans involving the children. Notice will include dates of travel, location, address, and telephone numbers where the children can be reached, and any applicable flight details. Both parties will accommodate any requirements for passport documentation to allow the children to vacation with the other parent outside Canada, and both parties will sign any necessary letter to permit travel outside of Canada.

[108] The children's passports will be maintained by the mother, but she must make the passport available to the father for any children's vacation outside of Canada. The parties will equally share the cost of any passports obtained for the children.

#### *Telephone Contact*

[109] Each party will have reasonable telephone contact with the children when the children are in the care of the other party.

#### *Therapeutic Interventions for Father and Mother*

[110] The father must attend therapeutic counselling with the following stated objectives:

- To obtain education about the short and long term effects arising from the father exposing the children to adult matters, including the father advising the children about court matters; the father making derogatory comments about the mother to the children; and the father negatively influencing the children so that they would support his views about the mother.
- To obtain better insight into the dynamics of parental conflict.
- To obtain better insight into the role that personal reflection, accountability and responsibility play in the reduction of parental conflict.
- To acquire skills to communicate respectfully, reasonably and responsibly with the mother on matters affecting the children.
- To acquire skills to ensure that the children are not placed in the middle of the parental conflict.
- To acquire de-escalation techniques and healthy problem solving practices.
- To obtain counselling to better manage his anger, resentment and hostilities arising from injuries the father suffered in the fire and the break-down of his marriage with the mother.

[111] The mother must attend therapeutic counselling with the following stated objectives:

- To obtain education about the short and long term effects arising from the children's exposure to parental conflict.
- To obtain better insight into the dynamics of parental conflict.
- To obtain better insight into the role that personal reflection, accountability and responsibility play in the reduction of parental conflict.
- To acquire skills to communicate respectfully, reasonably and responsibly with the father on matters affecting the children.
- To acquire skills to ensure that the children are not placed in the middle of the parental conflict.

[112] Each party must file, with the court and each other, proof that they have successfully completed therapeutic counselling on the stated objectives.

[113] Each party must supply the therapeutic counsellor with a copy of this order and written decision.

[114] Both parties must participate in the Co-Operative Parenting through Separation and Divorce Program sponsored through Family Services of Eastern Nova Scotia.

*Regular Parenting Schedule for the Youngest and Oldest Children*

[115] The father will have parenting contact with the oldest child in keeping with her wishes and as they both determine is appropriate.

[116] The father will have parenting contact with the youngest child through the YMCA supervised access program twice per week until the father has successfully completed the therapeutic counselling previously outlined. Once the father has completed the therapeutic counselling, access will be unsupervised for two hours a day, three days a week for four months. If that access goes smoothly, access will be increased to include overnight access one night a week. In the event the parties are unable to agree as to any details of the expanded access schedule, then the access will be set during an access review hearing which will be scheduled in six months. The parties are directed to contact scheduling to obtain a court date.

*Regular Parenting Schedule for the Middle Children*

[117] The middle children will be in the physical care of the father and mother based on the following two week rotating schedule:

- *Week One:* During week one, the three middle children will be in the physical care of the mother from Tuesday after school, or 2:00 pm if there is no school, until Saturday at 2:00 pm. The three middle children will be in the physical care of the father for the balance of the week.
- *Week Two:* During week two, the three middle children will be in the physical care of the mother from Wednesday after school, or at 2:00 pm if there is no school, until Saturday at 2:00 pm. The three middle children will be in the physical care of the father for the balance of the week.

### *Special Occasions and Holidays*

[118] The regular schedule will be suspended for special occasions and holidays, and the following parenting schedule will be followed instead for the three middle children, unless the parties reach an alternate arrangement as confirmed in writing:

[119] *Mother's Day and Father's Day:* The three middle children will spend the Mother's Day weekend with the mother and the Father's Day weekend with the father, commencing after school on Friday and continuing until 6:00 p.m. on Sunday, at which time the parties will revert back to the regular schedule.

[120] *Summer Vacation:* Each party will have the three middle children in their care for 10 consecutive days during the summer. During the even numbered years, the father will provide notice to the mother of the 10 days he wishes to take no later than May 1st, and the mother will advise the father of the 10 days she intends to take no later than May 30th. During the odd numbered years, the mother will provide notice to the father of the 10 days she intends to take no later than May 1st, and the father will advise the mother of the 10 days he intends to take no later than May 30<sup>th</sup>.

[121] *Christmas:* Christmas is deemed to cover the period from 2:00 p.m. on December 23rd until 2:00 p.m. on January 3rd. *During the even numbered years,* the three middle children will be in the care of the father from 2:00 p.m. on December 23rd until 2:00 p.m. on December 25th, and from 2:00 p.m. on December 28th until 2:00 p.m. on December 31st. *During the even numbered years,* the three middle children will be in the care of the mother from 2:00 p.m. on December 25th until 2:00 p.m. on December 28th; and from 2:00 p.m. on December 31st until 2:00 p.m. on January 3rd, at which time the parties will revert back to the regular schedule. *During the odd numbered years,* the three middle children will be in the care of the mother from 2:00 p.m. on December 23rd until 2:00 p.m. on December 25th; and from 2:00 p.m. on December 28th until 2:00 p.m. on December 31st. *During the odd numbered years,* the three middle children will be in the care of the father from 2:00 p.m. on December 25th until 2:00 p.m. on December 28th, and from 2:00 p.m. on December 31st until 2:00 p.m. on January 3rd, at which time the parties will revert back to the regular schedule.

[122] *Spring Break:* Spring Break is deemed to cover the period from 9 a.m. on Friday of the last day of school until 9 a.m. on Sunday before school recommences. The middle children will be in the care of the mother during the March breaks of the even numbered years, and in the care of the father during the

March breaks of the odd numbered years. The parties will revert back to the regular schedule after the conclusion of the Spring Break holiday.

[123] *Easter*: Easter is deemed to cover the period from after school on Holy Thursday until Easter Monday at 2:00 p.m. The three middle children will be in the care of the father during the Easters of the odd numbered years and with the mother during the Easters of the even numbered years. The parties will revert back to the regular schedule after the conclusion of the Easter holiday

#### *Ad Hoc Special Family Events*

[124] The parties will use their best efforts to accommodate any special family reunion, wedding, or other event that is scheduled at a time when the children are in the care of the other party. Written notice must be provided, in advance of the scheduled event, to determine if the regular schedule can be altered to permit the children's attendance at the special function. The parties will be as flexible as possible in such circumstances, however, no change in the schedule will occur without the written authorization of the party in whose care the children are scheduled to be at the time of the special family function. If accommodation cannot be made, the party refusing must provide the other party with written reasons for their refusal. Make up time will be provided to the party who agrees to rearrange the schedule as that party requests.

[125] **Should an unequal division of the assets be granted because the mother dissipated assets?**

#### *Position of the Parties*

[126] The father seeks an unequal division of the matrimonial assets because he believes that the mother dissipated the assets. He states that she squandered the fire insurance payout for the household contents. The father said that he told the mother to save that money. Instead, he notes that she spent and wasted this money which was needed for the future. The father also complains that the mother spent or hid money that was donated from the benefit dance and from his union.

[127] The mother takes exception to these allegations. She states that she did not dissipate, waste, hide or squander any money. She used the fire insurance proceeds to buy a reliable van for the children given that their other vehicle was repossessed. She states that she also used the fire insurance payout to buy furniture, appliances, linen, clothing, and all household contents that had been destroyed in the fire. She

notes that the parties were literally starting from scratch. The mother further testified that she paid bills and bought supplies for the construction of the new home with some of the insurance money.

[128] The mother testified that she never received money from the union or from the benefit dance. The mother understood that the money from the benefit dance was used for the construction of the home.

### *Law*

[129] The *Matrimonial Property Act* allows the court to order an unequal division of assets where an equal division would be unfair or unconscionable. As the father is seeking an unequal division, he carries the burden of proof. It is a burden which requires proof of unfairness or unconscionability: **Harwood v. Thomas**, (1981), 45 N.S.R. (2d) 414 (NSCA). At para 23 of **Morash v. Morash**, 2004 NSCA 20, Bateman, J.A. discussed the interplay between the equal and unequal division provisions of the *Matrimonial Property Act*, which states as follows:

[23] The presumed equal division of matrimonial assets recognizes marriage as a partnership with each spouse contributing in different ways. A measuring of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Matrimonial assets may be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. (**Young v. Young**, *supra*). In applying s. 13, the question is not whether an unequal division would be fair or fairer, but whether the usual equal division dictated by the *Matrimonial Property Act*, would be unfair or unconscionable. “. . . [t]he issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair.” (**S.B.M. v. N.M.** (2003), 14 B.C.L.R. (4<sup>th</sup>) 90; B.C.J. No. 1142, (Q.L.)(C.A.) per Donald, J.A. at ¶ 23). Absent a factual context supporting unequal division, the court is not free to exclude from division assets acquired by one party prior to marriage. The trial judge did not engage in the s. 13 analysis, nor, had he done so, would the circumstances here have warranted an exclusion of the pre-marriage pension credits.

### *Decision*

[130] I reviewed the evidence, case law, and the submissions of the parties. The father did not dislodge the burden upon him. An equal division would not produce a result that would be either unfair or unconscionable. This was a marriage in excess of ten years during which five children were born. It is appropriate that both parties share in the benefit of the assets that were accumulated as a result of

their joint efforts, unless the father proved that the mother dissipated the assets. I find that the father did not.

[131] The father did not prove that the mother dissipated the assets for the following reasons:

- Where there is a conflict in the evidence, I accept the evidence of the mother in priority to the other evidence.
- The fire insurance payout was intended to replace the entire contents of the home. The parties and their children lost everything in the fire. The mother had to replace all furniture, appliances, linens, clothing, toys, decorations, school supplies, dishes, pots and pans. The mother properly used some of the insurance payout to replace household contents.
- Because the mother was frugal, she was also able to buy a van that was safe and reliable. The children needed transportation. A van was appropriate because there were five children. The van that the parties owned prior to the fire had been repossessed. The decision to purchase a van was reasonable.
- The mother used some of the insurance payout to buy goods and supplies that had been stolen, to buy material to complete the home's construction, and to pay outstanding debt. These actions were reasonable.
- The mother did not receive the funds from the benefit dance; these funds were handled by others.
- The mother did not receive money allegedly donated by union members. There was no credible evidence that the union provided money to the father, or to the mother or to anyone connected to the father.

[132] An unequal division has not been proven. To the contrary, the evidence overwhelmingly supports the appropriateness of an equal division given the years of marriage, the number of children and the roles assumed by the parties.

[133] **What is the appropriate division of the assets?**

[134] The assets that existed at separation are as follows:

### *Matrimonial Home*

[135] The matrimonial home is appraised at \$80,000. The amount will be discounted for real estate commission and legal fees, as suggested by Mr. Stanwick. The assigned value for division purposes is \$74,250.

[136] The mother will retain the matrimonial home provided she buys out the father's interest based on the equalization schedule which will be produced. Should the mother be unable to buy out the father's interest, then the father will be given the option of buying out the mother's interest.

[137] I find that the mother should maintain the matrimonial home for the following reasons:

- She has more children in her care than does the father.
- She lived in the home since it was built.
- She maintained the home since it was built.
- The father found alternate accommodations which meet the children's needs.

### *Vacant Land*

[138] No independent market valuation was provided for the vacant land. The father indicated that he wanted the land kept for the benefit of the children. He may therefore buy out the mother's half share. If not, the property is to be listed for sale and the net proceeds will be equally divided between the parties.

[139] For division purposes, the vacant land is valued at \$17,000. I did not reduce for notional disposition costs because neither party provided a market value for the land. I am left with the assessed value, which is usually less than market value.

### *Household Contents*

[140] The mother spent about \$32,000 to replace the household furniture and appliances. Some of the furniture is used by the children, such as their bedroom sets. The value of the contents used by the children is traditionally deducted for division purposes. I therefore assign the value of \$25,000 for the household contents retained by the mother.

*Vehicles*

[141] The mother retained the 2010 van which was bought for about \$24,000 just before separation.

*Bank Accounts*

[142] Because I find that the mother spent the fire insurance money and other money, such as the CPP payments and Child Tax Benefit, appropriately and to meet the needs of the family, I will not impute a higher amount for the bank account balances. The balance in the bank accounts at separation was \$2,226 and \$26. These amounts are credited to the mother.

[143] The Equalization Chart is expressed as follows:

<b>Asset</b>	<b>Value</b>	<b>Husband</b>	<b>Wife</b>
Home	\$74,250		\$74,250
Contents	\$25,000		\$25,000
Vacant Land	\$17,000	\$17,000	
Van	\$24,000		\$24,000
Bank Accounts	\$2,252		\$2,252
<b>Total</b>	<b>\$142,502</b>	<b>\$17,000</b>	<b>\$125,502</b>

[144] The mother must pay the father the equalization sum of **\$54,251** upon the father executing a deed in which he releases all of his right, title and interest in and to the matrimonial home in favour of the mother. The mother will have 60 days to secure financing.

**Conclusion**

[145] In summary, the following relief is granted:

- The divorce.

- The mother's name change.
- A joint custody order with the mother having primary care of the oldest and youngest children, and both parents having equal shared parenting of the middle three children, subject to the detailed parenting schedule, including the much-needed therapeutic counselling.
- A review hearing to be scheduled in six months to assess an expansion of the parenting time between the father and the youngest child which is contingent upon the father successfully completing the therapeutic counselling and the parenting course as outlined.
- An equal division of the matrimonial assets with the mother retaining the home, contents, van and bank accounts provided she transfers the equalization payment of \$54,251 to the father within 60 days upon receipt of the deed.

[146] Ms. Denny is to prepare and circulate the orders.

Forgeron, J.