SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *E.J.G. v. S.W.W.*, 2018 NSSC 109

Date: 20180511
Docket: 1201-066162
Registry: Halifax

Between:

E.J.G.

Applicant

v.

S.W.W.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Beryl A. MacDonald

Heard: April 9, 10, 11, 12 and 27, 2018

Written Decision: May 11, 2018

Keywords: Family, Corollary Relief Variation, Material Change, Custody, Parenting Time (Access), Child Support, Undue Hardship, Unusually High Access Costs, Standard of Living Test.

Legislation: *The Divorce Act*, R.S., 1985, c.3 s.17 (b)

Federal Child Support Guidelines, s.10

Summary: The Father requested enforcement of the joint custody and parenting time provisions contained in a Corollary Relief Order. He also requested a reduction in the amount of child support he was required to pay. He claimed Undue Hardship because he had unusually high costs associated with the parenting time provided in the Order. The

Mother requested changes to the Corollary Relief Order to give her custody and require the Father's parenting time to occur in Nova Scotia. The Order was varied to give the Mother custody, and to rearrange the parenting time. The Father did have unusually high costs associated with his parenting time. His standard of living ratio was lower than the Mother's but this was because of her partner's income. No reduction in child support was granted.

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation : *E.J.G. v. S.W.W.*, 2018 NSSC 109

Date: 20180511
Docket: 1201-066162
Registry: Halifax

Between:

E.J.G.

Applicant

v.

S.W.W.

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Heard:

April 9, 10, 11, 12 and 27, 2018

Counsel: E.J.G. with counsel, Laura McCarthy

S.W.W. with counsel, Donna Franey and Catherine Torraville, Senior Law Student

By the Court:

[1] This is a variation proceeding. Both parents are requesting changes to the Corollary Relief Order issued December 19, 2013. That Order placed their two children, ages 8 and 4, in their joint custody. These children are now 12 (soon to be 13) and 9. In this decision I will use the phrase "parenting time" as a substitute for the word "access".

Background

[2] The Corollary Relief Order contained the following provisions, presumably inserted to help the parties understand how they were to reach jointly made decisions.

- The parties were to have "meaningful consultation" with respect to "major developmental decisions" including but not limited to "education, medical attention, religious upbringing and social development" but when the Father was residing in the Yukon the Mother was to have final decision-making authority in respect to childcare.

- The parties were to have "full and complete access to all information and records of 3rd party care providers" including but not limited to "doctors, dentists, medical personnel, school personnel, child care providers, providers of extracurricular activities etc."

[3] The Father's parenting time was developed "in recognition of the fact that he resides in Whitehorse". It included 7 days over the Christmas school break, 7 days either to occur during the spring school break or over an Easter break, 3 weeks every summer, which may be consecutive at his election, and contact every Tuesday, Thursday and Sunday evening at 7 p.m. Nova Scotia time by way of Skype or other electronic means.

[4] The Order contemplated the Father attending at the Mother's home to pick up the children during his parenting time. The Order is silent about his responsibility to return them to her home at the conclusion of his parenting time. I do not interpret this omission to suggest he did not have a responsibility to return them. The Mother had primary care. The implication must clearly be that the children were to be returned to their Mother's residence at the conclusion of the Father's parenting time. The order also provides "if the children are travelling during the Father's parenting time they shall travel with the Father or through the unaccompanied minors travel program available through the airlines, or with a third-party known to the children as designated by the Father."

[5] The Order did not specifically state where the Father would be exercising his parenting time. The implication is it could be in the Yukon or it could be in Nova

Scotia. Because the order permitted the Father to travel with the children in Canada or elsewhere, he could also arrange to have parenting time in other places.

[6] The Father was to advise the Mother by January 1st about the specific 7 days during which he would exercise his parenting time, either for the spring school break or the Easter school break. The Order stated, "If the block parenting time is during the Easter Break, the Father shall endeavor to have the children attend school".

[7] To exercise his summer parenting time the Father was to inform the Mother by April 1st about the dates he requested.

[8] In October 2016 the parties' son, who was then 7 years old, told the principal of his school that his Mother's partner had physically disciplined him. This disclosure resulted in an investigation by the Halifax Regional Police and the Department of Community Services. The Mother's explanation is that this child has some difficulties dealing with his anger and frustration causing him to act out. During one of those occasions his stepfather "spanked his bum". The child "disclosed an exaggerated account of the spanking the next day at school". It appears that the Department of Community Services did not initially disclose their

investigation to the Father although it was informed about his telephone number and that he lived in the Yukon. (Exhibit "D" attached to affidavit of the Father filed September 1, 2017).

[9] The Mother did not disclose this event to the Father until January 2017. By that time both the Police investigation and the investigation conducted by the Department of Community Services were concluded. No charges were laid. The Minister's investigation did substantiate the concern about physical discipline. The Mother and her partner were advised to take several parenting courses which they have completed. The Minister was satisfied with their efforts and "closed its file". Because of this event, and for other reasons, the Mother was advised to obtain supportive counselling for their son. She has attempted to do so but often has been impeded in her efforts because of the Father's suspicions the therapists she would choose would not be supportive of him nor of the child.

[10] Since the child made his disclosure the Father has reported their son told him about additional physical abuse perpetrated by the Mother's partner, the majority having occurred prior to the October 2016 event, none of which have been substantiated to date by any of the investigating authorities. I will make further comment about this situation as I progress through this decision.

[11] On February 27, 2017 the Father sent an email to the Mother:

> I would like the kids from approximately July 6 to August 3. I will confirm the exact days once the flights are booked. (Exhibit "D" to the Mother's affidavit filed August 2, 2017).

[12] July 6th was a Thursday as was August 3rd. This request would provide 4 weeks parenting time. The Mother replied:

> Let me consider this before you book. Like I stated in my previous e-mail please keep all other items of discussion until the call. I am at work and to receive 4 or more e-mails from my ex-husband within a couple of hours is disruptive.

[13] I have examined all the email threads provided by the Mother. I am satisfied the Father's patterns of communication resulted in numerous e-mails many of which contained unreasonable requests and/or timelines for response. The tone of the e-mails range from polite to aggressive to dismissive to argumentative. Throughout this proceeding the Father has complained the Mother does not properly respond to his requests for information. On the contrary, I find the Mother has diligently endeavored to properly respond to the Father's requests in a timely fashion, but he has failed to recognize the difficulties caused by geographic distance and the stilted form of communication that is implicit in e-mail. Face-to-face communication can provide parties with an opportunity to seek clarification to

answers given, to provide reasons for those answers or to ask further questions. This results in a fluid back-and-forth dialogue that can serve to avoid misunderstandings. E-mail communication can often be counterproductive. These parents were not particularly good communicators while living together. Nothing has changed, and, because of the abuse allegations, communication has deteriorated.

[14] The Father argues this deterioration has resulted because of the Mother's failure to disclose the abuse of their son by her partner. This has caused him to suspect her judgment about services to be provided to the children and, as a result, he has become super vigilant to protect his children. While this may be an understandable result flowing from the abuse complaint, I do not accept it should have resulted in the Father's insistence that the Mother reply, in a very short time period, to his every request. For many of his information requests the Father could have contacted the third-party service providers to discuss his concerns directly with them. However, had he done so, he may have experienced the same problems in communication evident in the parental communication. The geographic distance mitigates against face to face communication with service providers and complicates telephone communication. Third party service providers rarely

communicate by fax or e-mail. This is why making joint decisions under these circumstances is fraught with delay and uncertainty. Delay and uncertainty are not in the children's best interest.

[15] Any expectation these parties can improve their communication style and reframe their conversations may be wishful thinking. If they lived closer to one another, and if they could financially afford appropriate communication counselling, that might have been possible. Geography and limited financial resources work against this as a solution.

[16] On March 13, 2017 the Mother sent an e-mail to the Father about his summer parenting time. She informed him she would know what dates might be best after March 23rd when the summer camps were available for booking. She did not consider the return date of August 3rd suitable because she works on August 4th and the children often "are not able to function for a couple of days after they return". She suggested any time after 5:00 p.m. on August 4th or 5th would be best. She e-mailed him again on March 23rd indicating any time on July 6 at 5:00 p.m. or later would be fine for a pickup. She also requested the return of the children on August 4th any time after 5:00 p.m.

[17] On April 27, 2017 the Father e-mailed the Mother that he had not yet booked the children's flights and would confirm once he had done so. This was his response after the Mother asked him in an earlier e-mail to confirm the summer dates.

[18] On May 4, 2017 the Father informed the Mother that, as of March, he and his partner were no longer living together. Because of this relationship breakdown he no longer had access to a vehicle. He asked the Mother to change the amount of child support he was required to pay. He could no longer afford to pay the costs associated with his parenting time. The Mother responded to the Father's e-mail reminding him that their settlement agreement had taken into account the cost of the children's travel. She alleged it was for that reason he was not sharing the cost to maintain the health and dental benefit plan, to pay for expenses not covered by insurance, to pay for childcare and for extracurricular activities. She reminded him child support was based on his annual income. The Father replied he understood the agreement had been based upon the fact that she was going to school, was not working and he did not have to pay for a vehicle. None of these facts were stated in the Corollary Relief Order as underlying factual circumstances that may justify a change to the amount of child support to be paid if any one of those circumstances

changed. I accept these were the facts of the parties' circumstances when they negotiated their agreement that was later incorporated into the Corollary Relief Order.

[19] Although I have no e-mail communication from the Mother complaining about the Father's failure to confirm the children's travel arrangements for the summer of 2017, I expect she must have done so because on May 10, 2017 the Father e-mailed the Mother, forwarding his original message sent February 27, 2017, stating this was his notice to her as required by the order. He does not say whether he had purchased tickets. He suggested alternative parenting time for less than 4 weeks but indicated:

> I will have to look at the cost implications as to the changes if any and advise you of them as I do not think it would be fair for me to have to cover them.

[20] On May 10, 2017 the Mother e-mailed the Father with a detailed response including the previous e-mail exchanges that had occurred between them. She said:

> Please see below as it is a more accurate forwarding of e-mails including my responses indicating the lack of confirmation of flights booked. There is still no concrete confirmation. Based on what you indicated I booked day camps around your 4 week visit schedule. My interpretation of the order and based on previous years is that there has been a collaborative approach when booking your time with the children for the summer. I have confirmed the date in July that the children are in camp. This is already paid for. I will not pay for camp for you to take them

> midway through the week and again drop them off midway through the week. I know a court would not argue about that. If you would like to cover the cost of the days that they are not in camp but have been registered I am agreeable to the dates that you advised. Camps are registered by the week, not day.
>
> Scott, you have altered the parameters of the court order by changing the duration of your visitation. I am happy for you to have the children for more time this summer if it was more convenient for you. This change comes with financial implications of 3 extra weeks of day camp for both children. This is a difficult undertaking due to the fact that camps are all waitlisted now. They are also able to be registered in summer activities which cost me in registration and equipment, which I will willingly provide to give them the opportunity if they are going to be around for the majority of the summer…

[21] The concluded arrangement required the Father to pick up the children at the Mother's residence on July 6th at 5:00 p.m. The children would be travelling back to Halifax as unaccompanied minors on July 19th at 5:21 p.m. This would provide parenting time, if one excludes the 6th and 19th, for 12 days. The Father's plan was to pick up the children in Nova Scotia and spend his parenting time with the children in Ontario where his parents resided.

[22] The Father confirmed the travel arrangements, including ticket information for both children, in an e-mail sent to the Mother on July 2, 2017 (attached as Exhibit "F" to the Mother's affidavit filed August 2, 2017).

[23] In an e-mail exchange attached as Exhibit "G" to the Mother's affidavit filed August 2, 2017 the parties discussed the clothing and other items that were to

accompany the children. The Mother informed the Father she would meet him in a public place for the exchange. She had a new residence and had not provided the Father with the address. She was not comfortable if he came to her residence. The Father insisted he had a right to inspect where the children lived and "the conditions". He said this was "especially important after what has happened in the last year". The Mother was increasingly worried about the tone of the Father's e-mails which she found to be bordering on harassment. They eventually arranged to meet at a neutral location.

[24] On July 19, 2017 the Father e-mailed the Mother to inform her their son had disclosed information about "spankings" and wanted to spend more time with the Father. As a result, the Father would exercise his remaining 2 weeks parenting time with their son while their daughter would fly back as planned. The Father said he would inform her later about when their son would return.

[25] On July 20, 2017 the Mother came home to find a card requiring her to contact the Department of Community Services. She did so. She learned that a complaint was made about abuse of the parties' son in her home. An interview was arranged including an interview of her partner and the parties' daughter. The

Department of Community Services made no recommendations after it completed these interviews.

[26] On July 28, 2017 the Mother e-mailed the Father asking for a confirmed date when their son would be returned to her care. The Father's response was he was concerned about their son's well-being if he returned to Halifax. He informed the Mother, Yukon children's services requested he keep their son for at least another week, and that both Nova Scotia and Ontario social services told him he was expected to keep their son with him. He had an appointment for their son to see a psychologist, so he could talk about his fears and about what happened to him in the past. The Father alleged their son wanted to stay with him and did not want to go back to Nova Scotia.

[27] On July 31, 2017 the Mother told the Father she did not give consent for their son to be interviewed by a psychologist because he already had a relationship with a therapist in Nova Scotia. She also informed the Father about prearranged doctor and dentist appointments for their son on August 9th. However, by July 31st the Father had already taken their son to a psychologist.

[28] In late July and early August there were difficulties between the parties about the Father's telephone contact with their daughter. She did not want to talk with her Father and he blamed the Mother for the daughter's decision. The Mother informed him their daughter was upset because he was refusing to send her brother home. That evidence is hearsay, but I accept it under the state of mind exception. That this child would be upset is believable, particularly when the Father's affidavit evidence indicates, when interviewed by the social worker, his daughter disclosed physical punishment by the Mother's partner. The Father was not taking any steps to protect her. The Father alleges their daughter went home because she did not want to spend more time with him. I accept that likely is true; but that decision, which the Father acted upon, can support the conclusion she acted independently, free from her Mother's influence, when she decided not to talk with her Father. She had her own reasons arising out of her direct experience with him.

[29] The evidence discloses the Father had their son interviewed in Ontario about the alleged abuse by the Mother's partner and he requested the Yukon Health and Services to interview the child. That service informed the Father it would not conduct an interview. It had contacted the Minister of Community Services in Nova Scotia and was informed the child had already been interviewed. It was also

informed the complaints of abuse, received after those investigated in October 2016, had been investigated and found unwarranted. Yukon Health and Services told the Father further interviews would expose their son to trauma and that the interviews he had already undergone may have done so.

[30] Relying on statements made by children, as truth of the facts revealed in those statements, is fraught with danger. Children do not always relate an event or a conversation precisely as it may have occurred. This is because their ability to perceive, store and accurately recite information is limited by their age and stage of development. Parents can take statements of children out of context, particularly when they are in conflict.

[31] Parents consider themselves justified when they accept, as truth, everything their child has said. This is not in a child's best interest.

[32] Children can lie although the process is not often deliberate. Children may be untruthful:

- to avoid getting punished;
- to elicit a reaction from a parent;
- to make their story more exciting or make themselves sound or feel better;
- to get attention;

- to say what they think their parent wants to hear;
- to make a parent pleased or to console a parent;
- to get something they want.

In fact, children's reasons for untruthfulness are not unlike the motivations behind adult untruthfulness. The difference is, in court, judges have an opportunity to test an adult's ability to provide an accurate information through cross examination. We rarely test children in this way.

[33] To rely on a statement made by a child we must understand when and where the event mentioned occurred, the location of the relevant parties, the age, intellectual capacity and maturity of the child, what was happening in the child's life, or in the lives of the child's parents, that might lead to a misunderstanding, a wrong interpretation, a reason to exaggerate etc. Judges are to conduct an independent examination called a "voir dire" to determine whether a child's statement can be admitted for the truth of its content. No voir dire was requested nor held in respect the children's statements made to their parents, or others, in this proceeding.

[34] Neither parent objected to the admission of the children's statements made during the investigation conducted by the Minister of Community Services.

[35] On August 2, 2017 the Mother was informed the child's therapist had received an angry e-mail from the Father accusing him of treating the parties' son without his written consent.

[36] On August 4, 2017 the Mother was contacted by a Child Protection worker and was informed it would close its file in respect to the complaint made by the Father. The Father was informed about that decision on August 3, 2017.

[37] On August 6, 2017 the therapist, who had been working with the parties' son, provided a report to the Mother and the Father. That report is attached as Exhibit "R" to the affidavit of the Mother filed September 6, 2017. The reason for the therapy was to help the parties' son learn to regulate his emotions and in particular to resolve anxiety difficulties he had when he returned from his Father's care.

[38] The Father believed their son needed therapy because he was very worried about the move into a new home and his attendance at a new school. The Father was upset he was not informed about the move nor given the new address when he requested it. He eventually did get that information. The Mother testified she was uncomfortable revealing her residence to the Father given the conflict that had

arisen between them. Because of my finding that the Father often made unreasonable and demanding requests of the Mother, and because he expressed his fear that the Mother and her partner might perpetuate violence against him, I do not consider this to be an egregious breach of the terms of the Corollary Relief Order justifying a penalty for that breach. It may have been best for the Father not to come to the Mother's residence for any of the children's transitions. The Father explained he insisted on receiving the Mother's new address because it was required by the airline, so he could arrange for their son to fly as an unaccompanied minor. The Father knew the Mother would be at the airport when their son arrived. He has produced no confirmatory evidence to suggest her address was required by the airline. The Mother did eventually provide her address, so her son could come home. I place very little emphasis upon the Mother's failure to inform the Father about her new address. This was another attempt by the Father to find a reason to refuse to return their son the Mother's primary care.

[39] The parties' son knew he would be changing his residence, attending a different school, and meeting new people. He was somewhat nervous about that. Previously the Father had requested their son see a therapist when he was having difficulties in school and at the conclusion of the Minister of Community Services

investigation. The Mother made the arrangements and the Father was provided with the name and contact information for the therapist the child eventually did see. The therapist did not require the Father to sign any consent form. This is the same therapist the Father later complained about.

[40] On August13, 2017 the Mother was advised the Father had filed a complaint against the therapist for failure to obtain the Father's permission to provide services to the child. This effectively prevented that therapist from continuing to assist this child. That was not in the child's best interest and was merely part of a power struggle initiated by the Father.

[41] I am satisfied the Father knew the child was receiving therapy and he made no complaint about the therapist the child was seeing until the Mother refused to permit the child to continue to reside with him in the Yukon.

[42] The Mother's affidavit filed as Exhibit #9 details the difficulties she has experienced in engaging professionals to provide services to the children. The Father has not denied his involvement but justifies it by asserting his right to "know" and his right to be a participant in decision making. I find his

"involvement" to have been counter-productive leading to delay and confusion in providing services to the children.

[43] On August 2, 2017 the Mother commenced her application to vary the Corollary Relief Order and she made an emergency motion to have the child return to Nova Scotia. On August 9, 2017 the motion was heard. The Father was represented by counsel at this hearing and he attended by telephone. Evidence was taken. The Father alleged abuse in the Mother's home. The Father was ordered to return the parties' son to Nova Scotia on or before September 5, 2017. No details about how the child was to be returned are in the Order. At the time neither parent knew what would be practical or feasible. Apparently, that was to be worked out between their counsel. The Mother did provide suggestions but those were rejected by the Father.

[44] On August 17, 2017 the Mother was contacted by a Child Protection Worker and was informed the Yukon Child Protection had received multiple e-mails, starting on August 5, 2017, from the Father requesting it to arrange for an interview of their son. She was told it refused to interview their son and wrote to the Father explaining it was detrimental to their son's mental health to expose him to multiple interviews and parental conflict.

[45] On September 1, 2017 the Father filed a Notice of Variation Application with this court. He requested primary care and custody of both children. The Mother was to have unsupervised access with their daughter but supervised access with their son. Once their son reached 13, and the Mother had completed therapy for anger and parenting courses, she could then have unsupervised access. She was to pay child support, the cost of moving expenses for the children to live with their Father, for expenses relating to therapy for the children and she was to continue the children on her medical plan and life insurance.

[46] Prior to September 1, 2017 parties reached an arrangement about the return of their son to the Mother's care. He was to return on September 4th. On September 2, 2017 (a Saturday) the Father sent e-mails to the Mother about her alleged failure to provide him with information contained in an affidavit she had prepared dated September 1, 2017. The Mother reminded him that affidavit had been provided by her lawyer to the lawyer acting for the Father. The Father was not satisfied with her answer. He warned her if he did not have the information by 9:00 p.m. Pacific Time he would not return their son to Nova Scotia. (Exhibit "F", affidavit of the Mother prepared March 29, 2018) In his e-mail the Father told the Mother he was uncomfortable sending his son back to Halifax without knowing his home address

or school address and the support that was available at the school. He had several other information requirements. He repeated his allegation about child abuse in the Mother's home even though, by this time, he had the information provided by the Department of Community Services and the Yukon Health and Services indicating there was no substantiation for those allegations.

[47] Desperate to have her son returned home the Mother did send the requested affidavit to the Father. Fortunately, she had a copy she could e-mail to him. However, the Father was under an Order to return their son to her care. There is no justification for the demands he made of the Mother to ensure that return. Those demands were abusive of her.

[48] The evidence discloses the parties' son refused to board the plane when arrangements were finally made on September 4th for him to fly home. Interestingly, the Father required the Mother's assistance to convince the child to board the plane. She spoke with the child and he boarded the plane.

[49] The Father told the Mother he wanted to speak with his son as soon as he arrived in Halifax. The Mother sent the Father a picture of the children upon their son's arrival indicating he appeared in good spirits. That was not satisfactory. The

Father continued to request telephone contact. He rang the Mother's phone "repeatedly". The Mother sent him an e-mail. She told him she wanted time to be with their son because she had not seen him for some time. I can understand her response and I do not fault her for refusing that request.

[50] The Mother alleges the child's statements about his wish to live with his Father relate more to his attempt to please his Father then to a mature decision about where he wanted to live. There is evidence to support this conclusion:

- The Mother admits their son frequently was sad and anxious when his parenting time with his Father ended. She engaged a therapist to help their son make that adjustment easier.
- I have no doubt this child is curious about his Father and enjoys being in his company.
- This child has not indicated a wish to live with the Father except when in the Father's care.

[51] On November 3, 2017 the Father filed an Amended Notice of Variation Application that requested changes to his access and included an undue hardship claim. He withdrew his request for primary care.

Variation Threshold

Parenting

[52] The Father and the Mother both view the events of the past year as a reason to request a variation of the parenting provisions in the Corollary Relief Order. I will explain why I have determined variation is justified.

[53] The Corollary Relief Order resulted from a settlement conference in which the parties were both represented by counsel. I conclude the expectation was that these parents would overcome the conflict that existed between them and would cooperate on issues of vital importance to the children. For cooperation to occur parents must be able to communicate effectively, with respect for one another, and in an atmosphere that is free from distrust. The evidence indicates these parents do not communicate effectively; they are very distrustful of each other; neither respects the other. If these parents lived close to one another and if they could afford appropriate counselling possibly these issues could be overcome. However, they do not live close to one another; they do not have significant financial resources, and so, effective counselling is illusionary. The parties' circumstances have changed from the original expectations. Their unresolved, and unresolvable conflict, constitutes a material change. The arrangement for parenting their

children must, as a result, be re-examined to determine if those arrangements continue to provide for the best interest of the children and, if not, to determine what the new arrangement should be.

Child Support

[54] The Mother is requesting a change in the amount of child support paid by the Father. His total annual income has increased.

[55] The Mother requests a dismissal of the Father's claim for Undue Hardship. He knew it would be expensive to exercise his parenting time when he agreed to the present arrangement. However, at that time the Father had the use of a vehicle he did not pay for, the Mother was not earning her present salary and it was unlikely the Father would have a lower standard of living ratio as required for the "standard of living test". I am satisfied there has been a material change of circumstances justifying an examination of the Father's Undue Hardship Claim.

Decision – Custody/Parenting Plan

[56] The Mother requests custody. She requests the Father exercise his parenting time with the children in Nova Scotia. It is unclear whether she is still requesting

supervision of his parenting time but her proposals, listed in her affidavit filed as Exhibit # 9 in this proceeding, do not appear to include that remedy.

[57] I must consider the children's best interest when asked to decide about who is to make decisions on their behalf and about the parenting arrangements. Several cases have attempted to provide guidance to the court in applying the best interest principle. (*Foley v. Foley* (1993) 124 N.S.R. (2d) 198 (N.S.S.C); *Abdo v. Abdo* (1993) 126 N.S.R. (2d) 1 (N.S.C.A)). However, the process of determining a child's best interest involves more than just reviewing a list of factors. In *Dixon v. Hinsley (*2001) 22 R.F.L. (5th) 55 (ONT. C.J), at para. 46 the following appears:

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

[58] The Father complains the Mother wants to be the sole decision-maker for the children to diminish and undermine his role as their Father. However, joint custody is not to be used to provide comfort to a parent who is fearful about his or her role in their children's lives. Joint custody must have some tangible benefit for the children and it must not be used against their best interest as has happened in respect to these children. I have explained the communication problems that exist

between these parents and with third party service providers. It is not practical nor desirable to expect these parents to make important decisions for these children jointly. The Father lives so far away he cannot realistically become informed about alternatives through active back and forth discussion with third party service providers or with the Mother. In addition, his lack of trust in the Mother's decisions has delayed the provision of services the children need. That cannot continue. The Mother must have sole custody. The Father is to be given the contact information for the institutions and persons providing services to the children, but the order will not require third party service providers to communicate with him should he seek direct information from them. The terms and conditions relating to this arrangement are attached as Schedule "A" to this decision.

[59] Because I have decided joint decision-making is impractical, has caused conflict and has provided very little benefit for the children, does not mean these children will suddenly no longer love or desire to be with their Father.

Parenting Plan

[60] The Mother will continue to provide primary care for these children.

[61] Determining the Father's parenting time is problematic. Face-to-face parenting time provides an opportunity for children to experience the knowledge, support and pleasure a parent can bring into the lives of their children. But geography and limited financial resources may severely limit the amount of time when a parent can provide children with that opportunity. Courts are directed to arrange for as much contact with both parents as is in a child's best interest. However, courts must balance parental contact with other best interest factors such as financial support. In this case the Father suggests he must be provided financial relief if he is to have any face to face contact with his children. Before discussing the financial issues, I must first decide what parenting time arrangement would appear to be in their best interest absent financial considerations.

[62] The Mother had been concerned about unsupervised contact between the Father and the children. She feared he would attempt to unduly influence them leading to further allegations, particularly made by their son, about abuse in the Mother's home. Because of what happened in the past, that is not an unfounded concern. Her present request is for his parenting time to occur only in Nova Scotia.

[63] I am not prepared to restrict the Father's parenting time to Nova Scotia because of her concerns. If he continues to make unsubstantiated complaints, as he

has in the past, and if it becomes evident he is attempting to convince his son that he is unsafe in the Mother's home, a court, in a subsequent proceeding, may deny him parenting time. I expect this is an outcome the Father will want to avoid.

[64] The evidence suggests the Father has had regular contact with the children in places other than Nova Scotia and that, at least until recent events, they were comfortable with him. They deserve to have an opportunity to continue their relationship with him without geographic restrictions.

[65] Because the Father lives in the Yukon I do consider it appropriate for these children to be able to spend up to a maximum of 4 consecutive weeks in his care. To avoid arguments about when this should occur those 4 weeks are to be in the month of July in every year. I have added a provision permitting the parties to choose an alternate time for the summer of 2018, and, for the Father to choose less time, or no time in the summer, but with strict communication requirements. Those provisions are outlined in Schedule "A" attached to this decision.

[66] Because it is appropriate that the children have an opportunity to spend some vacation time with the Mother in the summer, I have decided it is not in their best

interest to spend the entire summer or the majority of the summer in the Father's care.

[67] It is not practical or desirable to split the Christmas school break, if the Father intends to travel significant distances, with the children during his parenting time. The Mother has suggested the Father have parenting time with the children for the entire Christmas school break every 2nd year. She did require that parenting time occur in Nova Scotia. The Father has no friend or relative with whom he could stay while in Nova Scotia. He does have relatives in Ontario and may choose to exercise his parenting time there. He may also choose to fly the children to the Yukon. He may choose to exercise his parenting time in Nova Scotia. I have provided for those options in the attached parenting plan. Similarly, he may have parenting time with them during the Spring school break.

[68] Unfortunately, these opportunities for face to face parenting time may not be regularly exercised because of cost constraints.

[69] The Father can continue to have contact with the children through other means such as Skype or Facetime. Previously this was to occur three times per week at 7:00 p.m. Nova Scotia time. These parents reduced this contact to twice a

week. The Father wants to return to the previous arrangement. The children are often involved in evening activities during the week. They are older and that may present a challenge about how long, or how often, they want to talk with their Father. I have provided in Schedule "A" how and when this contact is to occur.

Undue Hardship

[70] In analyzing this claim, under Section 10 of the *Federal Child Support Guidelines*, I must first determine whether the Father has "unusually high expenses in relation to exercising access to a child". If I decide he does, I must next determine whether he has met the "standard of living test" to show he has a lower standard of living in his home then does the Mother in hers. There also appears to be an additional prerequisite, developed by some judges who have considered this Section, requiring evidence disclosing the exact nature of the parent's hardship, even if the claimant has met the lower standard of living test. Some courts have seized upon the word "undue" to indicate the hardship must be exceptional, excessive, disproportionate in all the circumstances. I had expected a Section 10 interpretation would recognize that the section itself provided the means by which to determine whether the access parent's hardship was undue. If a court found that the access costs were "unusually high" and the claimant met the "standard of living

test", the claim was successful. Having met the two criteria set out in the regulation the claimant established "undue hardship". The court was not obligated to reduce table guideline support, but it could consider a reduction.

[71] I find the additional criteria imposed to be without justification, but, because I may be wrong in that determination I will also consider this requirement in my analysis.

[72] Counsel have provided several cases for my examination. None describe an objective standard used to determine whether a parent's access expenses were "unusually high". In *Williams v Williams* 1997 CanLII 4486 (NWT SC) the judge decided the cost to fly children between Nova Scotia and the Northwest Territories were "typically high" and could not therefore be categorized as "unusual". That analysis effectively strips away any claim for undue hardship based upon the cost of flying. That is unreasonable. It gives no consideration to geographic distance. It did not consider what it may cost for an adult to fly as compared to a child flying as an "accompanied minor" or as an "unaccompanied minor". It made no attempt to link the analysis to the economic circumstances of the parent.

[73] I realize issues about ability to pay are examined in an undue hardship claim because of the "standard of living test". However, I do not consider this to be a reason not to use a financial analysis to determine whether a parent does have unusually high access costs. My interpretation of Section 10 indicates that, when faced with parents of limited financial means, the standard of living test has been inserted to tilt the balance in favour of financial support for children and away from contact with the non-primary care parent even when a parent has "unusually high" access costs.

[74] The Father has provided considerable information about the costs associated with the children's travel and what he must spend to exercise his parenting time. To fly the children on return flights from Halifax to the Yukon will cost from $2,500.00 to $3,250.00 depending on the time of year. If the Father brings the children to the Yukon he has no suitable accommodation for them. He lives in a one bedroom apartment. He must rent an alternate accommodation during their stay. He will have the extra cost of providing food, transportation and entertainment. If he brings the children to the Yukon for the summer, Christmas and Spring break parenting time I have no doubt he will have "unusually high" access expenses. He suggests the total cost would be $23,625.00. I do not accept

all the expenses he includes as legitimate, but I do consider it reasonable to conclude they will be as high as $18,000.00 per year. They may be reduced if he exercised his access in Nova Scotia but, if he is to have meaningful time with them here, he must rent an accommodation suitable for them and provide transportation. There will be costs associated with food and entertainment. It is more difficult to estimate those costs, but based upon his estimates they may total $9,000.00. Finally, he may exercise his parenting time in the summer in the Yukon and the remaining parenting time in Nova Scotia. Each of these scenarios result in "unusually high" access costs. To come to this conclusion, I have examined the Father's Statement of Income and Statement of Expenses. From these I have eliminated his budgeted expense for appliances and furniture repairs, children's allowances, child access costs, holidays, entertainment, savings, legal expense, and I have reduced his monthly debt payments from $250.00 to $150.00. His yearly living expenses are $17,784.00. His yearly mandatory deductions are $30,357.00. His total income, less union dues is expected to be $87,874.00. His yearly table guideline child support is $16,092.00. Deducting these expenses, he has a net disposable income of $23,641.00. This will provide him with barely enough money to exercise all his parenting time with the children in the Yukon. It does provide him with some money to exercise some time with them in the Yukon and in Nova

Scotia. However, I have not provided him with any money to upgrade his housing in the Yukon or to engage in some personal recreation and entertainment. In addition, he will increase his debt because he will pay less on the debt he does owe. To force him into such a bare-bones existence is not my intent. My calculations merely highlight why he is having difficulty paying the cost of access. Under these circumstances, I consider his access costs to be "unusually high".

[75] The mother argued the Father could afford to exercise all his parenting time in Nova Scotia. Her suggestion implied he would rent an accommodation for one person and have parenting time with the children in the evening, after their daily events ended and on weekends, but not overnight. While this may be a description of what the Father may be able to afford, I consider it inappropriate to analyse his Undue Hardship Claim based upon this type of cost analysis. As I indicated earlier in this decision, the court must first determine what parenting time is in the children's best interest absent financial circumstances. Meaningful parenting time is generally considered to require the children to be in the care of the non-primary care parent daily throughout the allotted time including overnight. Costs associated with exercising that meaningful parenting time are the focus for deciding whether a parent has "unusually high" access costs.

[76] I have the "standard of living" calculations provided by the Father. Both parties acknowledge his standard of living is lower than that of the Mother. I have reworked those figures with my estimates for his access costs – one calculation at $18,000.00 per year in which his ratio is 3.32 to the Mother's 4.9. For access costs of $9,000.00 per year his ratio is 4.2 to the Mother's 4.9.

[77] I am satisfied the Father will experience financial hardship that is exceptional, excessive, and disproportionate in all the circumstances if he was to exercise the parenting time I consider to be in the best interest of the children, whether in Nova Scotia or in the Yukon or elsewhere. In fact, he may be unable to exercise most of his parenting time and be forced to choose only one option per year.

[78] Although the Father has satisfied me he has proven his claim for Undue Hardship this does not automatically require any reduction in the amount of child support he must pay. The decision whether to reduce his child support is a discretionary decision. In exercising this discretion, I have looked at the financial needs of the children in their Mother's home recognizing their Mother must be able to contribute her fair share to joint living expenses with her partner and her partner has no responsibility to provide financial support for these children. I have

conducted a similar analysis of her Statement of Expenses and her Statement of Income as I did to determine the Father's financial situation after paying basic living expenses and mandatory deductions. I have included what the mother receives for table guideline child support. I have left in expenses she has for the children's recreation because I consider those to be important for the children. She has a yearly deficit of $34,440.00. The obvious conclusion is that the only reason the Father can meet the "standard of living" test is because of the financial wealth of the Mother's partner. If the Mother did not have a partner she may have a reduced housing cost and she would have to lower other expenses to meet her budget. Under such circumstances the Father, because of the differential in their incomes, would not be able to meet the "standard of living test". I also note the Father, with careful budgeting, can exercise some parenting time with the children. This is not a situation where he will be unable to have any daily parenting time. These factors have convinced me it would be inappropriate to reduce table guideline child support. To do otherwise would be to suggest the Mother's partner must subsidize the Mother's financial support of the children. No law requires him to do so.

[79] At a minimum the Father should be able to put aside at least $8,000.00 a year to have daily parenting time with his children under any of the provisions I consider to be in their best interest. How he will make that parenting time affordable will be his challenge to explore. Suggestions were made such as renting accommodations through Airbnb, and booking into recreational accommodation sites for the summer in Nova Scotia. Taking the children to the Yukon may be too expensive to arrange.

Child Support

[80] The Father has acknowledged the change in his income requiring him to pay table guideline child support on an income of $87,874.00. This appears to be his income for 2017 and is his likely income for 2018. The table guideline child support payment is $1,341.00 per month. He is required to pay this amount commencing January 1, 2017. As a result, he will have "arrears" to pay that will be approximately $2,295.00 if he commences payment of the $1,341.00 on June 1st, 2018 ($135.00 extra per month for 17 months). Commencing June 1, 2018, he is to pay those arrears in the amount of $150.00 per month.

[81] The Mother has requested a Recalculation Order. That Order may only be granted when both parties reside in the Province of Nova Scotia. In addition, recalculation is not yet available for support orders arising under the *Divorce Act.*

[82] The Mother has requested contribution from the Father for Section 7 expenses. She has not provided evidence about whether the recreational expenses for which she seeks contribution are necessary. She does have childcare costs and other Section 7 expenses. She did not seek contribution toward those previously because she knew the Father would have high access costs. She made that decision when she had very little annual income. Her annual income has increased. Under these circumstances I am not prepared to require the Father to contribute to the Section 7 expenses.

[83] The Father must add the children as claimants on his medical benefit policy. I realize this will increase the cost of his plan, but this must be provided for his children. The Father must also provide information to confirm he has life insurance and that the children are beneficiaries.

_____

Beryl A. MacDonald, J.

Schedule “A”

Parenting Plan

Decision Making

1. The Mother must have custody of the children, meaning the Mother has the sole responsibility and authority to make decisions that have significant or long lasting implications for the children for example, decisions about physical or mental health, dental care, physical and social development, counseling, education, choice of child care provider, choice of school.

Emergency Decisions

2. With respect to emergency decisions, the parent who has care of the children according to the parenting schedule must be the decision-maker with the other parent being advised as soon as possible about the emergency and the decision made.

Parenting Schedule

Primary Care

3. The children must be in the primary care of the Mother.

Parenting Time/Access

4. This parenting plan schedule is based upon the following requirements and considerations:

- Unless otherwise agreed between the parties, to implement the Father’s parenting time he must provide the transportation for the children from the Mother’s residence returning to the Mother’s residence or from and to whatever other location designated by the Mother.

- If the children must change planes to reach the Father, he must ensure there is an adult to accompany them. The oldest child is not to be expected to negotiate the younger through terminals to find the next flight. As a result, the Father may need to meet them at the furthest point to which a single flight from Halifax will fly. For example, that may be Calgary. He would travel with them from there.

- The Father may not be able to exercise all or any of his parenting time.

- If the Father confirms parenting time and then does not exercise that time, creating child care expense for the Mother, he must reimburse her for that child care expense not later than 30 days after she has provided him with the details about that expense.

- The Father must consult with the Mother prior to confirming when he will exercise his parenting time to ensure the dates and times chosen will not create any complications for the children and to ensure, when he makes travel arrangements, the children will be available on the dates and times chosen.

- For the summer of 2018 only, the Father may have parenting time with the children for such time as he can arrange not to exceed four weeks, and he must compensate the Mother for any prepaid child care arrangements for which she will not receive a rebate for the time they will be in the Father's care.

- Unless the parties agree otherwise, in 2019 and in subsequent years the Father's parenting time must be in the month of July. The Father must inform the Mother about his plan to exercise summer parenting time no later than April 1st and his information must be definite indicating:

    - He will not exercise any summer parenting time.

    - He will exercise the full four weeks parenting time from (exact date and time) to (exact date and time), explaining where he will

exercise that parenting time, and he must include copies of return tickets purchased; or confirm when those copies will be sent; or confirm other transportation arrangements if the children are to travel.

- He will exercise less than the full four weeks parenting time from (exact date and time) to (exact date and time) explaining where he will exercise that parenting time and he must include copies of return tickets purchased; or confirm when those copies will be sent; or confirm other transportation arrangements if the children are to travel.

- The Father must inform the Mother about his plan to exercise Christmas school break parenting time no later than October 15th and his information must include the exact dates and times for his parenting time, explain where he will be exercising that parenting time and include copies of return tickets purchased; or confirm when those copies will be sent; or confirm other transportation arrangements if the children are to travel.

- The Father must inform the Mother about his plan to exercise Spring school break parenting time no later than February 1st and his information must include the exact dates and times for his parenting time, explain where he will be exercising that parenting time and include copies of return tickets purchased; or confirm when those copies will be sent; or confirm other transportation arrangements if the children are to travel.

- If the Father fails to inform the Mother about his parenting time on or before the dates required, he will not have that parenting time with the children unless the Mother agrees to an alternate arrangement. There is no requirement for the Mother to agree to an alternate arrangement.

5. The Father must have parenting time with the children:

- four consecutive weeks every summer in the month of July;
- the entire Christmas school break in every even year commencing 2018 beginning on the second day after the last day of school before the break and ending two days before the children must return to school after the break;
- every Spring School break from the Sunday of the weekend at the commencement of the school break until the Saturday of the weekend at the end of school break.
- on additional dates and times, in Nova Scotia as is agreed upon with the Mother.

Other Contact

6. The Father must have contact time with the children twice a week, at 8:00 p.m. Nova Scotia time, by telephone or by means such as Skype or Facetime chosen as follows:

- the two days chosen are to be evenings when the children will be available because there is not a regular evening activity in which they will be engaged at that time;

- the Mother must inform the Father about the two evenings when the children will be available, and she must update him if the children's evening activities change;

- the Mother must endeavour to engage the children in evening activities that do not interfere with the two evenings previously chosen for this contact but if the activity is one in which the children, or a child, wants to be involved the Father must accommodate changes made;

- if the children want to be involved in a special event that is to occur on the dates already chosen for this contact, the Mother must provide an alternate contact time

- if the Father is unable to exercise this contact time he must inform the Mother and she is not required to provide him with alternate makeup time;

- the Mother must provide the children privacy during this contact time.

Terms and Conditions

Right to be Informed

7. On or before the end of every month the Mother must send the Father a summary of highlights in the children's lives including information about their physical and mental health, dental care, physical and social development, counseling, and education.

Contact Information About Service Providers

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

Parties' Addresses/ Contact Information

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

Passport and Consent to Travel

10. The Mother may apply for and receive passports, and renewals of passports, for the children and the children may travel with the Mother at any time outside of Canada.

11. The Father's consent is not required for the Mother to apply for or receive or renew a passport, or to travel outside of Canada with the children and his consent shall be deemed to be given as a result of this order.

12. If, for any reason, passport or border officials insist on participation by the Father he must cooperate and properly complete and sign all documents required and he must return the completed documents to the Mother no later than two weeks after the date he received those documents.

13. The Father must have the Mother's written and notarized consent to travel with the children outside of Canada.

14. If the Mother consents to the Father travelling with the children outside of Canada the Mother must provide the children's passports to the Father when he arrives to transport the children and the Father must return the children's passports to the Mother when they return.

Travel Notice

15. If the Mother intends to travel with the children outside the province of Nova Scotia she must, to keep the Father informed, provide details about that travel no less than 30 days prior to leaving on that trip.

Communication

16. Until the parents are ready to communicate either by way of face to face meetings or in telephone conversations, regular communication must be by e-mail except in the case of an emergency, or an event that requires communication on short notice when a telephone conversation or text message will be appropriate.

17. The e-mail message must deal with one topic at a time and provide the request, the reason for the request and any time limitations involved.

18. The parent receiving an e-mail must respond politely, within 48 hours of receiving the e-mail, with an explanation if a later reply is made and an explanation about why a request is denied, if a request is denied, or why information is unavailable, if it is unavailable.