

CANADA / JUDGMENT

Kwiatkowski v. Kwiatkowski

2001 BCSC 1149

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SUSAN ROSALIA KWIATKOWSKI AKA
ROSALIA SUSANA ANDERKO
PETITIONER

AND:

FELIX PATRICK KWIATKOWSKI
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE ROSS

Counsel for the Petitioner: R.S. Tretiak, Q.C.

The Respondent, F.P. Kwiatkowski:

In Person

Dates and Place of Trial: June 13-15, 2001

June 18-19, 2001

June 21-22, 2001

Vancouver, BC

- [1] The petitioner, Susan Kwiatkowski, who has remarried and is now known as Susan Cox, applies for a review of the custody and guardianship of the three children of the marriage: S., born September 15, 1991; J., born April 18, 1993; and D., born December 26, 1994. The parties were granted a divorce by order of Justice Cole dated February 26, 1999. In that order Justice Cole made an interim disposition with respect to custody and guardianship with a direction that those matters be subject to a subsequent review.

I. BACKGROUND

- [2] The parties were married on May 19, 1990. Justice Cole found that they separated in June 1997. As stated earlier, there are three children of the marriage. The petitioner remarried on December 30, 2000. She and her new husband have an infant daughter, B., born January 6, 2001.
- [3] The litigation has been contentious. There have been numerous applications brought and orders made. By way of background, I will summarize only those orders made which directly relate to matters at issue in the proceeding before me.
- [4] In a proceeding commenced by the respondent, Felix Kwiatkowski, in Provincial Court, an order was made by Judge MacGregor on October 3, 1997, providing for interim joint custody of the three children with the residence of the children to alternate weekly.
- [5] On October 17, 1997 Judge MacGregor varied the custody order and granted Susan Kwiatkowski sole interim custody with interim joint guardianship. The respondent was to have access in the terms specified in the Order.
- [6] Proceedings in this Court were commenced by the petitioner on November 10, 1997.
- [7] On March 25, 1998, Master Joyce, as he then was, ordered that the children would reside with the petitioner with specified access to the respondent. He ordered, inter alia, that a s. 15 report be prepared and that both parties attend the "Parenting after Separation" course.
- [8] On July 3, 1998, Master Joyce, as he then was, inter alia, made an order with respect to the respondent's access to the children over the summer holiday.
- [9] On September 4, 1998 Master Joyce, as he then was, made an interim order that the children would attend James Ardell Elementary School. He ordered costs payable forthwith in any event of the cause against the respondent and restrained the respondent from bringing on further interlocutory applications without leave.
- [10] The matter came on for trial before Justice Cole in February 1999. The question of the custody of the children was the main issue in those proceedings. Justice Cole's reasons with respect to this issue state: [Kwiatkowski v. Kwiatkowski (26 February 1999), New Westminster D40809 (B.C.S.C.).]

- [8] I find the petitioner has been the one supporting the children and the respondent has made very little financial contribution towards the family especially in the last few years.
- [9] The main dispute involves the custody of the children. The petitioner's position is that the respondent has failed to support her financially and emotionally. He was absent from the home on frequent occasions, the marriage deteriorated, she had an affair in December of 1996, there was an attempted reconciliation and counselling. Reconciliation was not possible and the parties have been embroiled in a custody battle ever since. The applications to the court have been so frequent, in fact that there is an order prohibiting the respondent from commencing any further applications without leave of the court. That particular order in my view should stand.
- [10] The respondent's position is that he supported the family and that the cause of the break-up was because of the wife's involvement with another man. Ever since this litigation commenced, the respondent has carried on a concerted effort to threaten anyone who does not agree with his version of the events. He has reported lawyers to the Law Society; he has reported psychologists or therapists to their professional organization; he has used a bogus Small Claims writ against one witness and has made serious allegations of improper conduct towards Mr. Cox who is now living with the petitioner.
- [11] Throughout this battle that has been raging between the petitioner and the respondent, the children have been caught in the middle and are suffering as a result of their parents' conduct. The respondent has a deep hatred towards Mr. Cox and the petitioner and her family have a strong negative attitude towards the petitioner [sic]. The petitioner's grandmother, who has been the daycare babysitter for these children, has expressed her negative feelings in front of these children. It is unfortunate the petitioner and the respondent are so insensitive and short-sighted that they do not understand and appreciate the harm they are causing these children.
- ...
- [13] I have had an opportunity to hear Dr. Pournadeali. I have found the conclusion she reached can be supported by the evidence that I have heard at this trial. I found her to be competent, thorough and fair and I accept her evidence without hesitation. At the trial she said that her original report was based on two alternatives, either custody to the mother or joint custody. She said that her view of what is in the best interests of the children however, is that they be placed in foster care. This shows how serious the situation is, how unfair and selfish these parents have been towards their children. Dr. Pournadeali however, suggested if the parents are prepared to immediately start counselling that counselling take place both with the parents one hour per week and one hour per week with the children, and that the situation should be given a six-month trial run to see if the petitioner and the respondent can put their past behind them....

- [14] Dr. Pournadeali suggests that there be an order for joint custody and joint guardianship, children shall spend one week with each parent. Her opinion is that the children at this particular age, spending one week with each parent is not detrimental to them. I am gravely concerned that these parents are so bitter towards each other, there is little communication, that joint custody will not work. However, putting the children in the custody of one parent as compared to the other also has a down side to it, as neither parent at this stage, is capable of treating the other in a fair and equitable manner. This is an unusual order in these circumstances. I agree that it should be given a chance to work on an interim basis.
- [15] I, therefore, make an interim order for the joint custody and guardianship of the infant children. They will spend one week with each parent. The week will commence on Friday and the parent will pick up the children at the daycare centre. Because of the attitude of the grandmother I order that she no longer provide daycare or babysitting services for these children. Instead of the children being with their grandmother, they will be placed in a daycare centre. I accept the recommendations of Dr. Pournadeali that it is best that these children have a routine, that neither parent be given a chance to "gain the upper hand". Therefore, if the father or mother is not working, these children will be in daycare when they are not in school, during the normal times that they had been with their grandmother prior to this order. Both parties will share equally the cost of daycare. I am satisfied that the daycare centre that will be used by the petitioner and the respondent will be the Little Discovery Daycare in Surrey. This daycare is across the street from the school that the children are presently attending. They can take all children immediately and I find it is appropriate. This daycare centre will not change unless there is a written agreement between the parties or by court order.

...

- [21] The petitioner and respondent are ordered not to make any negative comments about the other spouse or their relatives or friends, in front of the children and neither parent is to question the children about the conduct of the other parent. Hopefully the petitioner and respondent will start concentrating on their children and put their particular problems behind them. The continuation of this battle between the petitioner and the respondent and the battle that the respondent is carrying on with respect to all those people that disagree with him will only have a negative influence on these children.
- [11] Justice Cole made the following orders which bear upon issues of custody and guardianship of the children:

THIS COURT FURTHER ORDERS that the Plaintiff and the Defendant shall have interim joint guardianship and joint custody of the children of the marriage;

THIS COURT FURTHER ORDERS that the children shall spend alternating weeks with each parent, the week will commence on Friday and the parent will pick up the children at the day-care centre.

THIS COURT FURTHER ORDERS that the maternal grandmother shall no longer provide day-care or baby sitting services for the children'

THIS COURT FURTHER ORDERS that the children shall be placed in the Little Discovery Daycare in Surrey, British Columbia and even if a parent is not working, the children will be in the daycare when they are not in school and during the normal times that they had been with the maternal grandmother prior to this order;

THIS COURT FURTHER ORDERS that the cost of the daycare shall be shared equally between the parties and the daycare centre will not be changed unless there is a written agreement between the parties or court order;

THIS COURT FURTHER ORDERS that the Petitioner shall purchase a notebook and will keep on a daily basis a history of the children, their activities, their concerns and anything else relevant to their well-being and that when the Defendant has the children the notebook will be handed over to him and he will keep the notebook up to date;

THIS COURT FURTHER ORDERS that the children's homes and their school shall not be changed unless there is a written agreement between the parties or a court order;

THIS COURT FURTHER ORDERS that the parties shall immediately commence counselling with John Banmen, child psychologist and mediator, and that the Petitioner shall be responsible for organizing and setting up the first meeting;

THIS COURT FURTHER ORDERS that the counselling sessions will be one hour each week for the Petitioner and the Defendant and one hour each week for the children and that the costs of the sessions will be shared equally between the parties;

THIS COURT FURTHER ORDERS that after six months of counselling that John Banmen or whoever is then the psychologist and mediator shall prepare a report and the report shall be given to both parties and to Dr. Pournadeali;

THIS COURT FURTHER ORDERS that upon receipt of the report that Dr. Pournadeali shall prepare an updated custody and access report and that once her report is completed either party may apply to this court for custody and access of the children;

THIS COURT FURTHER ORDERS that the Plaintiff and the Defendant are not to make any negative comment about the other party or their relatives or friends in front of the children and neither parent is to question the children about the conduct of the other parent;

[12] Justice Cole varied his order by order dated May 15, 2000, deleting the provision for Dr. Pournadeali to prepare an updated report. The funds which were to have been used for that purpose had been exhausted. He also ordered that the children be returned to the Little Discovery Day Care pursuant to the February 26, 1999 Order.

- [13] Following the trial, the parties attended counselling sessions as ordered by Justice Cole. The sessions were held with Dr. H. Harder who replaced John Banner. The children also received counselling from Dr. Harder in separate sessions.
- [14] The children attend James Ardell Elementary School, consistent with the orders. The children's academic progress has been very good. For the most part, they have made good adjustments at school. J., however, has experienced some difficulties, more in terms of his social adjustment and emotional well being. The school counsellors have been working with him and he has made good progress. Both the respondent and the petitioner live outside the catchment area for the school. Their continued placement in the school is thus subject to the discretion of the school principal.
- [15] The petitioner is presently on maternity leave. She will return to her position as a secretary/receptionist with the Ministry of Transportation in January 2002. Her new husband is employed as a Regional Safety Officer with that ministry. When she returns to work it will be on the basis of a job-sharing arrangement and, essentially, part-time.
- [16] The respondent is not currently employed. He was employed as a custodian at a townhouse complex until approximately one year ago. It is not clear why he lost this position. He testified that the complex wanted to contract with a larger firm. He also testified that he lost the position because he had been taking the children to work with him because he could not afford day care. That was not acceptable to his employer.
- [17] The children are no longer attending day care. The fund which was used to pay for it has been used up. Neither party can afford the expense.
- [18] In these proceedings the petitioner seeks to set aside provisions of the order of Justice Cole concerning custody, guardianship, residence of the children and day care. The petitioner seeks sole custody and guardianship of the children. She concedes that the respondent should have the right to obtain information concerning the children directly from third parties including teachers, counsellor, medical professionals, and third party caregivers.
- [19] She proposes that the respondent should have access to the children on alternating weekends, as agreed between the parties during school holidays and on special occasions such as Father's Day and the respondent's birthday.
- [20] The petitioner is not seeking maintenance from the respondent, in the hopes that one source of contention would thereby be eliminated.
- [21] The respondent seeks to maintain the joint custody and guardianship arrangement with alternating weeks residence or, in the alternative, to have sole custody of the children with his to be the primary residence. He seeks an order for child maintenance from the petitioner.

II. ANALYSIS

A. Nature of the Proceeding

- [22] In my view, it is clear from the order of February 26, 1999 and from the Reasons for Judgment of Justice Cole, that these proceedings are in the nature of a review and not an application for a variation. Justice Cole ordered that there would be a trial period, during which custody and guardianship were to be governed by his interim order. During this period, the parties were to take counselling in order to, in his words, "see if the petitioner and the respondent can put their pasts behind them": see *Vlahovic v. Vlahovic* (1997), 34 R.F.L. (4th) 282 (B.C.S.C.).
- [23] This proceeding being in the nature of a review, there is no requirement to satisfy the threshold test of a material change in circumstance, see *Christensen v. Reid* (1997), 28 R.F.L. (4th) 230 (B.C.S.C.).

B. Appropriate Test

- [24] With respect to the determination of custody and guardianship, the authorities have made it very clear that there are to be no preconceptions or presumptions in addressing the question of the best interests of the children, see *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21 (C.A.). Specifically, there can be no presumption in favour of either joint or sole custody; no presumption in favour of either mother or father; and no presumption in favour of the status quo. In addition, there can be no concern about parents' rights save as those which are necessary to advance the children's best interest.

- [25] As Justice Huddart stated in *Robinson*, *supra*, at 23-31:

The concept of the best interests of a child has been called ephemeral. Certainly it is difficult to apply. However transitory it may appear, this concept is nonetheless the only test for guardianship and custody of a child available to a court in British Columbia.

The Divorce Act adds only two factors for a trial court to consider. Subsection 16(9) forbids the court from considering "the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child." Subsection 16(10) requires a court to "give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, [a court] shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

...

...The view expressed, however, is equally applicable to a presumption in favour of joint or sole custody. There simply can be none, whether the presumption comes from the judiciary as an institution or from the experience of an individual judge. Nor can there be concern about parental rights unless those rights are necessary to advance the child's best interest.

The only issue is the child's best interest. "The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation" (Gordon, *supra* at 59).

[26] It is clear that an existing joint custody arrangement may be preserved where it is in the best interest of the children, even if both parties seek an order for sole custody: see *Dorward v. Fisher*, [1998] B.C.J. No. 1874. It is appropriate, when considering the best interests of the children to look at the capacity of the parties to cooperate. In doing so, it is important to focus on the present and to distinguish between the inability to cooperate and the unwillingness to do so.

III. CUSTODY AND GUARDIANSHIP

[27] I have reached the conclusion that joint custody is not in the best interests of the children. There is, in my opinion, simply not the ability to communicate and co-operate which is required in order for such an arrangement to work.

[28] I find that the petitioner has, with the assistance of counselling, put the past behind her. She has tried to co-operate and to communicate with the respondent and has tried to make the joint custody arrangement work. Nevertheless, in my view, it has failed. The reason for that failure is, in my view, the inability of the respondent to respond in the same fashion.

[29] It was evident through the course of the proceedings that the respondent is obsessed with the past and with what he perceives as injustices arising from earlier dispositions in this litigation. This obsession poisoned the counselling sessions, under-mined the joint custody and guardianship arrangements and has detrimentally affected his children. By way of example, he has reported five lawyers to the Law Society and two or three psychologists to their professional body in connection with these proceedings. He has made allegations against the petitioner's new husband to his employer to try to get him fired.

[30] In the proceedings before me, he accused Dr. Harder of bias against him. The only basis for such a claim was the fact that Dr. Harder made accurate records of the counselling sessions. No significant omissions or inaccuracies in his notes were identified. My own observation was that Dr. Harder was scrupulously fair, objective and professional.

[31] The respondent has written to the Ombudsman and to the Prime Minister about this litigation. He agreed that he was obsessed with, what he termed, "all the abuse in these proceedings". He stated that I am convinced that there is a conspiracy against me and that the petitioner is not the centre of the conspiracy, she is like a puppet on the string but she could have stopped it.

[32] The respondent described the proceedings before Justice Cole as an "abuse". He testified that it is his belief that Justice Cole was "tricked" into not dealing properly with the matrimonial assets.

- [33] He agreed that he focused on the division of assets in the counselling sessions with Dr. Harder because, he said, the division was not fair.
- [34] He agreed that he will not let go of these matters until things are resolved in a way he thinks is fair.
- [35] In the course of these proceedings, he suggested in argument that the petitioner's counsel had stolen documents from him in the course of cross-examination in full view of the court.
- [36] The respondent believes that the previous orders regarding the children's schools and daycare were unfair. He wanted the children to attend a school near his home and a different daycare. He brought applications to vary the orders. When these applications were rejected, he failed to pay his share of the daycare expenses. He registered the children in a different daycare, contrary to the order of Justice Cole. He then registered the children in a different school, contrary to the order of Mr. Justice Cole and without consulting the petitioner.
- [37] Dr. Harder was of the opinion that the respondent's inability to look forward impeded the counselling and blocked any significant improvement in the parties' ability to communicate. He states in his final report to Dr. Pournadeali of November 1, 1999:

The central issue with the Kwiatkowski's has been their inability to communicate effectively, specifically with regards to the shared custody of the children. Improving this communication has been the focus of my sessions with the Kwiatkowski's. Unfortunately, I have only had limited success in improving their ability to communicate. As you know from my previous reports, we initially made respectable progress, however, this progress deteriorated as we came closer to the end of the counselling time and approached the next court date.

From the beginning Susan and Felix have had different views of their sessions with me. Susan has viewed the sessions as an opportunity to resolve issues with regards to the ongoing parenting of the children. This has included bringing specific issues forward in counselling so that they could discuss the implications of these for the children. Felix on the other hand, views these sessions as mediation and has continuously attempted to use the sessions in an attempt to right past perceived wrongs. He has persisted in this view despite many clarifications by myself regarding the intent of the sessions. It has become quite clear to me that while Susan is getting on with her life and has developed a forward-looking orientation, Felix has not been able to do so.

Felix is still dealing with a great deal of anger and hurt regarding the separation and divorce. These unresolved emotional issues are preventing him from looking towards the future. Even though there are many unresolved issues for Felix, I believe they can be placed into three general categories. First, he believes that his reputation has been damaged during the divorce and custody process. He specifically blames certain people for making allegations about him to the Ministry of Children and Families. Even though these allegations have been withdrawn he still feels that there is a stigma attached to him that has not been erased. This anger clearly affects his ability to deal with Susan and those around her. Second, is the issue of money. Felix believes that

if the marriage had continued they would by now be financially secure instead of bankrupt. He blames his current financial state primarily on the lawyers, who have been involved in the proceedings specifically, in that they caused unnecessary delays in the proceedings. He does not accept that he may have contributed to these delays. He also believes that Susan was able to hide some of the money during the proceedings and is of the opinion that she has this money tucked away and plans to use it once the custody proceedings are over. Essentially, he blames the process and the persons involved, for ruining his life. He has difficulty seeing how he may have contributed to this process. Third, Felix has been deeply hurt by the ending of his and Susan's relationship. He has not yet dealt with this emotional pain and as a result it surfaces, sometimes in negative ways, when he is near Susan. This impedes the communication between them and will not change until Felix is able to put these emotions behind him.

...

CONCLUSIONS

There has been limited progress in the Kwiatkowski's ability to communicate with each other. In my opinion, the major impediment to this communication lies with Felix. His insistence on resurfacing old issues, making sharp and hurtful comments towards Susan with regards to how their relationship ended, his anger at those involved in the divorce and custody proceedings has limited his ability to move forward with his life and clouded his ability to communicate with Susan regarding the joint custody and care of their children. Further joint counselling is not indicated until such a time Felix can resolve these issues and put them behind him.

- [38] Dr. Harder did not provide expert opinion evidence in these proceedings. He did produce his clinical notes and the reports he made to Dr. Pournadeali and provided testimony with respect to the content of the counselling sessions.
- [39] It was clear from the evidence that there were numerous examples of failure to cooperate and unilateral actions taken by the respondent in relation to the children. For example, there were on-going problems with the exchange of student planners, homework, report cards, daily reading diaries. The respondent frequently failed to provide these to the petitioner despite verbal and written requests.
- [40] The respondent made arrangements with the school for a friend to pick the children up without consulting the petitioner. Moreover, the petitioner was not comfortable with this person in such a role.
- [41] The use of the journals as a means of communication pursuant to the order of Justice Cole ceased when the respondent told the petitioner that the journals had been stolen. This was not the case. In fact, he produced the original journals at the hearing. He had no explanation for his conduct in relation to his claim to the petitioner that the journals had been stolen.

- [42] The respondent did not consult with the petitioner with respect to the children's extra-curricular activities. Instead he registered them in activities of his choice. He was then extremely critical of the petitioner for what he judged to be lukewarm support of these activities on her part.
- [43] The respondent took the children out of school, without consulting with the petitioner, or indeed, even informing her in advance, to take the children to attend a funeral in Penticton. The petitioner found out what had happened from a neighbour when she went to pick the children up at the respondent's home.
- [44] The respondent interfered with the children's telephone access to the petitioner. For example, on one occasion, J. phoned his mother from the respondent's residence upset because, he said, the respondent had choked him for throwing paper on the floor. The petitioner heard the respondent in the background tell J. to get off the phone. J. later told the petitioner that the respondent had smacked him for phoning her about the incident. The petitioner testified that when she raised this incident with the respondent he said it was "no big deal".
- [45] S. reported to Dr. Harder in a counselling session that the respondent was mad at her for phoning her mother when the respondent had left them alone at night and she awoke, frightened.
- [46] In these proceedings, the respondent submitted that the children suffered from parental alienation syndrome initiated at the hands of the petitioner. He suggested that she had manipulated the children and that concerns expressed by the children to Dr. Harder were the product of her influence. I found no evidence of any such conduct. Dr. Harder's evidence was that he saw no signs of such manipulation in the children.
- [47] On the other hand, it was clear that the respondent had made efforts to manipulate the children. For example, the children reported to Dr. Harder that the respondent had tried to get them to say they wanted to change schools when they did not.
- [48] The respondent had inappropriate and disparaging conversations with the children concerning the litigation. For example, S. reported that he told her that because he and mom were not together, he was having heart attacks. The children reported that he said he hated Rick (the petitioner's new husband) and that they should, too. S. reported that he told her that "Daddy hates Mommy and wants her money. Mommy stole his money and he wants it back".
- [49] While the respondent did not agree in cross-examination with the precise contents of these conversations, he admitted discussing his views of the litigation with the children and saw nothing inappropriate in this conduct.
- [50] He also admitted that after he received Dr. Harder's session notes which contained notes of the children's concerns, he discussed the children's comments with them.

- [51] There have been several incidents in which the respondent has left the children unattended. They have been frightened and, on at least some of these occasions, have telephoned the petitioner. In these proceedings, the respondent did not deny that these events had occurred. He displayed no recognition that such conduct put the children in peril and frightened them. His approach in these proceedings was to cross-examine concerning the exact timing of the incident, for example, whether one particular incident occurred at 9:45 p.m. or 10:00 p.m., and to use an apparent discrepancy to further his themes of conspiracy and parental alienation syndrome. Dr. Harder reported a similar pattern when these incidents were discussed in the counselling sessions.
- [52] As stated earlier, I have concluded that joint custody and guardianship is not in the children's best interests. There is simply not the necessary level of mutual communication and co-operation. In particular, I find that the respondent is not capable of participating in such an arrangement.
- [53] I find that the petitioner is the parent who has been able to put the children's welfare first. She has not, since the order of Justice Cole, unlike the respondent, drawn the children into the proceedings, disparaged her former partner or attempted to manipulate the children. Moreover, I believe that, based upon her testimony and the evidence presented by the parties, she is the parent who will preserve the children's relationship with the respondent. I therefore grant the petitioner sole custody of the three children of the marriage.
- [54] With respect to guardianship, I agree with the submissions of the petitioner's counsel that joint guardianship would simply foster more litigation. I therefore grant sole guardianship to the petitioner with the respondent to have the right to obtain information concerning the children directly from third parties.

IV. RESIDENCE AND ACCESS

- [55] The first issue with respect to residence and access is whether to continue the weekly rotation system which is presently in place. I find that the children have expressed on numerous occasions the desire to stop the weekly rotation. They find it dislocating. One described it as making him dizzy and tired.
- [56] The petitioner testified about the disruption caused by the weekly rotation, including disruption to their schooling, extracurricular activities and friendships. I find that these strains have been increased by the difficulties created by the respondent's uncooperative attitude.
- [57] Dr. Harder also expressed concerns about the disruptive aspects of the weekly rotation in his November 1, 1999 report to Dr. Pournadeali.
- [58] I have concluded that the rotation system in place is not in the best interests of these children. They need a primary residence - a home they can consider their's.

- [59] Both the petitioner and the respondent are active, committed parents, involved with their children's development, education and religious training. Both parties enjoy recreational and sporting activities with the children. However, I find that there are some significant concerns with respect to the respondent's judgment as exemplified in the situations in which he has left the children unattended.
- [60] It is my judgment that their mother is best able to provide a home that is stable and secure. Moreover, the children have expressed the desire to reside with their mother. Accordingly, it is my decision that henceforth the children's primary residence will be with the petitioner.
- [61] It is in the children's interests to maintain and hopefully enhance their relationship with their father. While they have expressed considerable anger toward their father in counselling sessions, there is a solid basic relationship. I suspect that if only the respondent could find a way to keep his feelings about the litigation to himself and to use his time with the children to focus on the children and their welfare, the relations would be improved. I am making an order with respect to access which attempts to preserve generous access for the respondent while providing the children with a sense of security and stability.
- [62] I direct the following with respect to access:
- (a) the children shall be with the respondent from Friday afternoon to Sunday at 7:00 p.m. for three consecutive weekends. On the fourth weekend the children shall be with the petitioner for the entire week. If a holiday weekend falls within the respondent's weekend, the children shall be with him until 7:00 p.m. on the Monday. I leave it to the parties to make the arrangements for the Friday afternoon pick up;
 - (b) the children shall be with the petitioner for the month of July and with the respondent for the month of August;
 - (c) the children shall be with the petitioner on Mother's Day and on her birthday and with the respondent on Father's Day and on his birthday. The parties will set reasonable terms for these days;
 - (d) the parent who does not have the children on a child's birthday may visit the child for three hours on that day, such time to be arranged between the parties;
 - (e) Christmas holidays and spring break shall be shared equally. Access for Christmas Day will alternate with the petitioner to have access in 2001. The parent who does not have access on Christmas day will have the children on Christmas Eve.

V. MAINTENANCE

- [63] I make no order with respect to maintenance for the children. In the interests of avoiding further litigation and acrimony, the petitioner has not sought such an order. Moreover, at the present time the respondent's financial circumstances are clearly extremely distressed. However, I do order the respondent to advise the petitioner with respect to any changes in his employment status and in his income.

VI. SCHOOL

- [64] An order has been sought with respect to the children's school. I do not think that it is in the children's best interests to change schools at the present time. This is particularly so in the case of J., who has been making good progress, assisted by the school counsellor. His safety net at school should not be disrupted. However, given their residence outside the school catchment area, a change at some point may be necessary. Therefore, I modify the order of Justice Cole to delete reference to the written agreement of the parties and to substitute the phrase "the James Ardell School will no longer accept the children for enrolment".

VII. DAYCARE

- [65] The petitioner has sought an order modifying the order of Justice Cole with respect to the daycare and the maternal grandmother. I think that it is appropriate, given the orders I have made with respect to custody and access, given the economic circumstances of the parties and the wishes of the children, for the constraints concerning daycare arrangements to be removed. The requirement that the children be in daycare when they are not in school, while it served an important purpose at the time, is now unworkable. The economic burden is too great for the parties. The parties should now be free, subject to my ruling with respect to the maternal grandmother, to make such daycare arrangements as they find to be workable in the circumstances. I therefore vary the order of Justice Cole of February 26, 1999, by deleting the paragraphs concerning daycare arrangements.
- [66] However, I am not prepared to modify his order with respect to the maternal grandmother. First, I do not believe that that aspect of his order falls within the scope of a review. That being the case, a material change in circumstance would be required to justify a variation and none has been made out in this case. However, if I am wrong in the conclusion with respect to whether this issue falls within the scope of the review, I find that I do not in any event have sufficient evidence before me to satisfy me that the proposed change is in the children's best interests.

VIII. SUMMARY

- [67] I vary the order of Justice Cole made February 26, 1999, to delete the following paragraphs:

THIS COURT FURTHER ORDERS that the Plaintiff and the Defendant shall have interim joint guardianship and joint custody of the children of the marriage;

THIS COURT FURTHER ORDERS that the children shall spend alternating weeks with each parent, the week will commence on Friday and the parent will pick up the children at the daycare centre;

THIS COURT FURTHER ORDERS that the children shall be placed in the Little Discovery Daycare in Surrey, British Columbia and even if a parent is not working, the children will be in the daycare when they are not in school and during the normal times that they had been with the maternal grandmother prior to this order;

THE COURT FURTHER ORDERS that the cost of the daycare shall be shared equally between the parties and the daycare centre will not be changed unless there is a written agreement between the parties or court order;

THIS COURT FURTHER ORDERS that the Plaintiff shall purchase a notebook and will keep on a daily basis a history of the children, their activities, their concerns, and anything else relevant to their well-being and that when the Defendant has the children the notebook will be handed over to him and he will keep the notebook up to date;

[68] I vary the order of Justice Cole made February 26, 1999, to delete the following paragraph:

THIS COURT FURTHER ORDERS that the children's homes and their school shall not be changed unless there is a written agreement between the parties or a court order;

And substitute the following:

THIS COURT FURTHER ORDERS that the children's school shall not be changed unless James Ardell School will no longer accept the children for enrolment or unless there is a further court order.

[69] I order that:

- (a) the petitioner shall have sole custody of the children of the marriage namely, S., born September 15, 1991; J., born April 18, 1993; and D., born December 26, 1994;
- (b) the petitioner shall have sole guardianship of the persons of the children of the marriage;
- (c) the petitioner shall have sole guardianship of the estates of the children of the marriage;
- (d) the respondent shall have the right to obtain information concerning the children directly from third parties including teachers, counsellors, medical professionals, and third party caregivers;
- (e) the primary residence of the children shall be with the petitioner;

- (f) the children shall be with the respondent from Friday afternoon to Sunday at 7:00 p.m. for three consecutive weekends. On the fourth weekend the children shall be with the petitioner for the entire week. If a holiday weekend falls within the respondent's weekend, the children shall be with him until 7:00 p.m. on Monday. I leave it to the parties to make the arrangements for the Friday afternoon pick up;
- (g) the children shall be with the petitioner for the month of July and with the respondent for the month of August;
- (h) the children shall be with the petitioner on Mother's Day and on her birthday and with the respondent on Father's Day and on his birthday. The parties will set reasonable terms for these days;
- (i) the parent who does not have the children on a child's birthday may visit the child for three hours on that day, such time to be arranged between the parties;
- (j) Christmas holidays and spring break shall be shared equally. Access for Christmas Day will alternate with the petitioner to have access in 2001. The parent who does not have access on Christmas Day will have the children on Christmas Eve;
- (k) I order the respondent to advise the petitioner with respect to any changes in his employment status and in his income.

[70] The petitioner is entitled to the costs of these proceedings.

"C. Ross, J."

The Honourable Madam Justice C. Ross

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