
CANADA / JUDGMENT

T.T.S. v. A.S.T.

2010 BCSC 10

COURT

Supreme Court of British Columbia

DECIDED

6 January 2010

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2010 BCSC 10 T.T.S. v. A.S.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.T.S. v. A.S.T.,

2010 BCSC 10

Date: 20100106

Docket: E1390

Registry: Chilliwack

Between:

T.T.S.

Plaintiff

And

A.S.T., formerly A.S.S.

Defendant

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

The Plaintiff appearing in person

Counsel for the Defendant:

L.A. MacDonald

Place and Date of Trial:

Chilliwack, B.C.

September 22 - 25; 28 - 29, 2009

Place and Date of Judgment:

Chilliwack, B.C.

January 6, 2010

Introduction

- [1] This proceeding has a long and complicated history. The trial of the action began before Madam Justice Kirkpatrick in May 2003 but was not concluded. The trial was continued in April 2004 but again was not concluded. On June 3, 2005, Kirkpatrick J. was appointed to the Court of Appeal. In or about April 2008 the parties advised the court that they wished to conclude the trial. I declared a mistrial and directed a new trial. With the consent of the parties, I ordered that the evidence in the earlier trial proceedings would form part of the evidence at the second trial. The new trial was originally set to begin in September 2008 but was adjourned by consent. The trial finally began before me on September 22, 2009.
- [2] The principal issue to be determined in this case is the custody and guardianship of and access to the parties' son, A.S., who is now eleven and one-half years old. A.S. has been in the primary care of his father, the plaintiff, since he was about 20 months old. The defendant, who has experienced mental health issues since before the child's birth, concedes that the primary residence of the child should remain with the plaintiff but she seeks a greater role in the care and upbringing of her son than she has enjoyed during the past several years. She believes that her mental health is stable and that there is no reason why she cannot share custody with the plaintiff in an effective way.
- [3] The plaintiff professes to want the defendant to be more involved with the child and have greater access to him but submits that her mental health issues make it inappropriate that she share custody and require the need for caution with regard to both the amount and nature of the access that the defendant has with the child.

Background and history of the proceedings

- [4] Since a great deal of time has passed since these proceedings began I think it is necessary to spend some time reviewing the history of the matter leading up to this trial.
- [5] The parties met in high school. They began living together in a basement suite in the home occupied by the plaintiff's parents in about 1997. They were married on December 20, 1997, when the plaintiff was 21 years old and the defendant was 19 years old. After their marriage, the parties continued to live in the basement suite but there was tension between the defendant and the plaintiff's mother. The defendant perceived a lack of privacy. The plaintiff's mother came to regard the defendant as disrespectful and ungrateful. She was also disturbed by the amount of fighting that went on between the young couple.

- [6] Matters came to a head on February 28, 1998 when the plaintiff's mother and her daughter entered the suite in order to clean it before realtors attended prior to listing the house for sale. Words were exchanged and ultimately the defendant brandished a kitchen knife. The police were called and the defendant was taken to the hospital. While the medical records indicate concerns about depression as early as 1995 and the defendant's doctor noted in January 1998 that the defendant had a major problem with anger management, this incident marks the defendant's descent into a major depressive disorder. Following the incident at the home of the plaintiff's parents, the parties moved into their own apartment in Chilliwack.
- [7] A.S. was born on June 12, 1998. Initially, both parties were involved in the care of the child. However, the relationship between the plaintiff and defendant deteriorated. The defendant believed that the plaintiff was encouraging her to distance herself from her friends and family and she felt isolated. As time went on, the defendant became increasingly disturbed and was having difficulty controlling her emotional outbursts, which at times resulted in her being physically aggressive towards the plaintiff.
- [8] At the plaintiff's office Christmas party in 1998 the defendant became angry and aggressive towards the plaintiff and other persons. She wanted to go home earlier than they had planned because this was the first time they had left A.S. with a sitter for any significant amount of time. Also, she felt embarrassed because she was aware that the plaintiff had discussed intimate details of their marriage with co-workers. At one point the defendant threatened one of the other persons at the party with a pool cue. She followed the plaintiff into the men's bathroom to urge him to leave with her. After the party, the defendant apologized to her in-laws and acknowledged that she needed to get some help.
- [9] In December 1999, the defendant's family doctor referred her to a psychiatrist, Dr. Ryan, whom the defendant began to see in January 2000. However, problems continued to exist between the plaintiff and defendant, culminating in an incident in February 2000 when the plaintiff told the child not to put a bottle of Tabasco sauce in his mouth and an argument ensued between the plaintiff and defendant. As a result of this incident, the plaintiff left the home and commenced these proceedings on February 25, 2000. On that date, he brought an application, without notice to the defendant, seeking interim custody of A.S. The application was adjourned, but the court made a temporary order, pending the hearing of the application, granting the plaintiff sole interim custody of A.S. The police were enlisted to remove the child from the home and place him in the custody of the plaintiff.
- [10] The plaintiff's application was heard on March 27, 2000, when he was granted interim sole custody of A.S. and the defendant was granted supervised access three hours every second day at times to be agreed between the parties. Access was to be supervised by a person from the Ann Davis Society in Chilliwack or such other persons as the parties might agree upon and was to be paid for by the plaintiff. The plaintiff was given exclusive occupation of the former matrimonial home.

- [11] Almost immediately there were difficulties with access and on May 1, 2000 the parties returned to court. An order was made that supervised access was to take place as follows:
- (a) each Tuesday from 8:30 a.m. to 12:00 p.m., supervised by Jennifer Dyke;
 - (b) each Thursday from 9:00 a.m. to 1:00 p.m., supervised by Chilliwack Community Services; and
 - (c) each Friday from 9:00 a.m. to 12:30 p.m., supervised by Beth Hunt.
- [12] Once again, access did not proceed smoothly. The supervised access by Chilliwack Community Services was in conjunction with a parenting program that the defendant was taking. That program ended in June 2000 and that portion of supervised access also came to an end. The other supervised access was sporadic.
- [13] On May 22, 2001 a further interim order was made that provided that a custody and access report be prepared pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128. The order also provided that there be supervised access on Tuesdays and Fridays and that the defendant have unsupervised access every Thursday at 10:00 a.m. for one hour.
- [14] The plaintiff unilaterally suspended the supervised access in June 2001 when he believed the supervisor had transported the child in a car without a proper car seat. The plaintiff also suspended the unsupervised access.
- [15] The parties put forward their own reasons for the problems with access but the precise cause is less significant than is the fact that A.S. did not have regular contact with his mother.
- [16] The defendant's mental health declined and on October 23, 2001 she was admitted to the Emergency Department at Chilliwack General Hospital, having exhibited increasing confusion and inappropriate behaviour. She slept on her landlord's couch for an unknown reason; talked to herself in the third person; and was exhibiting paranoia. The defendant left the hospital and was brought back by the police. The cause of her erratic behaviour was attributed to withdrawal from her antidepressant medication, Wellbutrin.
- [17] In November, 2001 the parties agreed on a supervisor and the defendant had supervised visits with A.S. for four hours each week until June 2002.
- [18] On July 29, 2002, Master Nitikman ordered that the defendant have supervised access three times per week for four hours on each occasion. The access was to be supervised by a person designated by Ms. Bobbi Jacobs, who was the Executive Director of the Ann Davis Society in Chilliwack. The plaintiff was ordered to contribute \$100 per month towards the cost of supervision. Master Nitikman also directed that the s. 15 report be prepared by Dr. Brian Atkinson.
- [19] Unfortunately, for various reasons, access did not occur as frequently as contemplated by the order of July 29, 2002.

[20] On May 12, 2003 the trial began before Madam Justice Kirkpatrick. Prior the noon adjournment on the second day of trial, Kirkpatrick J. enquired whether it would be beneficial for the parties to engage in settlement discussions. Over the next three days counsel, the parties and their respective parents negotiated a comprehensive agreement that appeared to settle all the issues between them. On May 16, 2003, Madam Justice Kirkpatrick granted a divorce, adjourned the balance of the trial to April 26, 2004 and pronounced a comprehensive interim order concerning custody and access. Under the order the plaintiff was given interim sole custody and the parties were to share interim joint guardianship on the terms of a "Master Joyce" model joint guardianship order. The defendant was to have interim access in accordance with a schedule that was set out on a calendar that formed part of the order. Other terms of the order included the following:

9. By consent, that the access schedule set out in this Order shall only be varied as follows:
 1. With the consent of both Parties;
 2. In the event the Plaintiff is incapacitated for a lengthy period of time, the Child will reside with his paternal grand-parents and the Defendant's access shall remain as set out in the access schedule;
 3. In the event that the Defendant is incapacitated for a lengthy period of time, the Parties shall negotiate access suitable for the circumstances, which access shall include contact between the Child and his maternal grand-parents;
 4. The Defendant's access to the Child shall be suspended in the event that she is hospitalized under the Mental Health Act;
 5. In the event of urgent circumstances where the continuation of the Defendant's access is a risk to the Child's safety, by immediate application to the Court; and
 6. In all other circumstances, by application to the Court in the usual manner, but only after the Parties have attempted to resolve the issue through the use of mediation, which mediation will be conducted by a mutually acceptable person, or, if the Parties cannot agree as to a mediator within three business days of a written request having been delivered by one of the Parties to the other, then by a Family Justice Counsellor in Chilliwack, or, if the Parties agree, initially by a Family Justice Counsellor in Chilliwack.
- ...
14. By consent, that the Defendant is to advise the Plaintiff, and keep the Plaintiff advised, as to the names, addresses, and phone numbers of her treating general practitioner(s) and treating psychiatrist(s) from time to time ("Treating Physicians");
15. By consent, that the Defendant is to take medications prescribed to address mental health issues in the manner prescribed by her Treating Physicians from time to time;

16. By consent, that, during the term of the interim custody order, the Defendant is to provide regular proof to the Plaintiff that she is filling her prescriptions from time to time by providing copies of receipts or print-outs from a pharmacy showing prescriptions filled by them, and the Plaintiff is to acknowledge receipt of same upon his receipt of same;
17. By consent, that during the term of the interim custody order, the Defendant is to provide an irrevocable direction to each of her Treating Physicians that, in the event she is hospitalized under the Mental Health Act, the physician is to, as soon as possible, notify the Plaintiff of that occurrence;
18. By consent, that, during the term of the interim custody order, the Defendant is to give an irrevocable Authorization and Direction to each of her Treating Physicians authorizing and instructing that Physician to discuss verbally with the Plaintiff, or on the Plaintiff's request to provide in writing, information pertaining to the Defendant's mental health status, such discussion or report to occur at the Plaintiff's expense;
19. By consent, that, in the event that the Plaintiff does request a report in writing regarding the Defendant's mental health status from a physician caring for the Defendant, the Plaintiff shall provide a copy of same to the Defendant;
- ...
22. By consent, that each of the Parties shall take a parenting course, and, subject to availability, Parenting After Separation;
23. By consent, that the Parties shall jointly participate in counselling aimed at improving their ability to communicate with each other;
24. By consent, that the Parties will jointly participate with their respective parents in a mediation process designed to improve communications between them all and to foster cooperation between them all for the benefit of the Child;
25. By consent, that the Child is to be placed as soon as possible in a counselling program for the purpose of addressing any psychological issues that may arise relating to his relationships with his parents and grand-parents and his adjustment to the access regime set out in this Order, with any net costs of such counselling to be shared equally;
26. By consent, that the Child's counsellor will, beginning in the month of August 2003, be requested to prepared a report at least once per month (with a copy to be given to each of the Parties) regarding the above issues, and the costs of same to be paid equally by the Parties;
27. By consent, that the Defendant will participate in counselling designed to improve her organizational and time management skills;

28. By consent that the Defendant shall, on an interim basis, pay the sum of \$205.00 per month, commencing June 1, 2003, to the Plaintiff for the support of the Child, and shall pay the same on the first day of each month thereafter:

[21] Despite the apparent good-will and effort that was reflected in the consent order, once again things did not go well in terms of access. On August 7, 2003 the plaintiff denied the defendant access as specified in the order. He gave a number of reasons for his unilateral decision to deny access. They include:

- (a) He was unhappy that access pick-up and drop-off was at his workplace, which was a business operated by his father, even though his father had suggested that location and the plaintiff had agreed to it.
- (b) He complained that the defendant did not attend the court-ordered mediation.

The defendant said she felt overwhelmed at the mediation sessions she did attend because the plaintiff dominated the discussions.

- (c) The defendant did not attend sessions with the counsellor chosen by the plaintiff to provide counselling to the child in accordance with the order.

The defendant only attended one session because she learned that her medical benefits through her employment did not cover the counsellor and she could not afford to pay her share of counselling.

- (d) The plaintiff suggested that on three occasions the defendant "abandoned" the child at his workplace.

In my view, this is an example of the plaintiff's exaggeration of events in order to justify his denial of access.

- (e) The late payment of child support.
- (f) The defendant's failure to take her medication.
- (g) The defendant's failure to resolve "outstanding issues".

[22] Following the refusal of access, the defendant's mental health deteriorated and on December 14, 2003 she was again admitted to Chilliwack General Hospital. Once again she had failed to take her anti-depressant medication, even though she told her psychiatrist, Dr. Antony, only days before that she was taking the medication. The defendant made good progress in recovering from this major depressive episode but, as of March, 24, 2004, Dr. Antony was of the opinion that she would require some form of supervision from her family or friends if she was to have access to her son. He thought that the supervision could be removed as the defendant's condition improved.

[23] By April 1, 2004 both parties had commenced contempt proceedings. With the exception of two brief visits, one on November 17, 2003 and the second on January 4, 2004, there had been no access by the defendant since August 2003. Kirkpatrick J. directed that the contempt applications be dealt with at trial. The trial resumed on April 26, 2004 and continued for six further days but once again did not conclude. On May 3, 2004, Kirkpatrick J. made another interim order that included the following terms:

2. That the Defendant shall have access to the Child as follows:
 - a) every Sunday from 1:00 p.m. to 5:00 p.m.
 - b) if the Child is attending school, from Wednesday after school (estimated to be 11:15 a.m. to 11:30 a.m.) to 5:30 p.m.
 - c) if the Child is not attending school, every Wednesday from 8:00 a.m. to 5:30 p.m.
 - d) from 9:00 a.m. to 1:00 p.m. on the Child's birthday, June 12.
3. That save and except when the Child is being picked up by the Defendant from school, the Child shall be picked up and dropped off at the Ann Davis Transition Society Offices on Airport Road in Chilliwack, British Columbia.
4. That pending further order, the Defendant's mother [L.T.] shall be present at all access visits, including pickup and drop-off at the Ann Davis Transitions Society Offices on Airport Road in Chilliwack, British Columbia.
- ...
9. That the Defendant shall:
 - a) Take all medications as prescribed;
 - b) Seek treatment and attend upon her physician and/or psychiatrist as recommended by the physician or psychiatrist;
 - c) Provide her counsel with proof of purchase of all prescribed medications for forwarding onto the Plaintiff's counsel;
 - d) Obtain notes on a monthly basis from Dr. Antony or any other treating psychiatrist relating to her current medical status.
10. That the Defendant shall forthwith obtain medical records from all treating psychiatrists and physicians from October 1998 to present and have them provided to her psychiatrist, Dr. Antony.
11. That the Defendant shall notify the Plaintiff if she is hospitalized for any reason and if necessary will provide a report as to the reason for the hospitalization.

[24] The order of May 3, 2004 also fixed arrears of child support at \$730.00 and reduced ongoing child support to \$105.00 per month commencing June 1, 2004. The trial of the action was adjourned to July 2, 2004.

[25] The trial did not resume in July 2004 but on October 8, 2004 counsel appeared before Kirkpatrick J. and provided her with an update. They advised that, subject to some minor issues, access was generally taking place in accordance with the court order, although the communication counselling between the two parents that had been ordered had broken down and a large amount of conflict continued to exist between them.

[26] On October 8, 2004, Kirkpatrick J. Made a further interim order that included the following terms:

1. The Defendant shall have access to the child, [A.S.], on each Tuesday, Wednesday and Thursday from 8:15 a.m. to 5:30 p.m.;
2. The Defendant's access to the child, [A.S.] on Tuesdays and Wednesdays, shall be supervised by Mrs. [L.T.] except that Mrs. [L.T.] is relieved of supervision on Tuesday, Wednesday pick up when the child is being taken directly to school;
3. Mrs. [L.T.] shall be present at all other times of access as required by this order;

...

6. The parties shall arrange adult counselling at Ann Davis Transition Society for counselling to begin as soon as an opening presents itself;
7. Adult counselling is to continue until the counsellor deems it unnecessary to attend further sessions or the counsellor refuses to continue;
8. The parties are to arrange a further hearing by February 25, 2005;

...

[27] On November 29, 2004 the plaintiff brought an application to suspend the defendant's access on the basis of alleged compliance issues with the access provisions then in force. That application was dismissed on December 14, 2004, when Kirkpatrick J. made a further interim order that included the following terms:

3. that each party attend individual counselling;
4. that each party arrange to have their individual counsellor provide a report to the Court addressing the following issues:
 - (a) dates of attendance, dates of the party for individual counselling; and
 - (b) progress, if any, of the individual being counselled of the issues of how the parties' conflictual relationship is affecting the child and progress that each party is making to address their behaviour;

5. that henceforth the pickup of the child by the Defendant, [A.S.T.] and the return of the child to the Plaintiff or his designated representative to be at the RCMP Station Detachment at 45924 Airport Road, Chilliwack, British Columbia;
 6. that the Defendant, [A.S.T.] be at liberty to pick up and drop off the child without the supervision of her mother, [L.T.];
 7. that save and except for the pickup and drop off of the child, [L.T.] needs to be present on two of three days on which the Defendant, [A.S.T.] has access to her child, [A.S.] and over the Christmas holidays [L.T.] must be present on Tuesday and Wednesday over the school Christmas holidays;
 8. that [L.T.] must supervise Christmas Day access as previously ordered and does not need to supervise the access on Boxing Day;
- [28] A further appearance before Kirkpatrick J. on April 18, 2005 resulted in a variation of the access regime, including, by consent, the removal of the need for L.T. to provide supervision. The order provided for the following regular access:
- (a) each Tuesday from 8:15 a.m. to 5:30 p.m.;
 - (b) overnight from Wednesday at 8:15 a.m. until Thursday at 5:30 p.m. in each week; and
 - (c) every third Saturday from 9:00 a.m. until 5:30 p.m., commencing April 23, 2005.
- [29] The order also provided that the defendant continue to obtain communication counselling and that the counsellor's reports be forwarded to the court. The order also provided that a short form report be prepared pursuant to s. 15 of the Family Relations Act. Finally, the order provided for a review of the matter in October 2005.
- [30] On June 3, 2005, Madam Justice Kirkpatrick was appointed to the Court of Appeal and I became seized of the matter.
- [31] Periodic reports that were received until March 2006 indicated positive progress by the defendant. A short custody report was prepared on December 21, 2005 in which the author, a social worker, opined that both the plaintiff and defendant "need assistance with developing trust as both parties misinterpret the other's messages and communication". She recommended that A.S.'s primary residence remain with the plaintiff and that the defendant have access on alternate weekends, from Wednesday evening until Thursday morning each week, and one week in the summer.
- [32] The defendant did not bring an application to vary the access, likely because of events in early 2006, which this Court did not become aware of until much later.

- [33] The lead-up to these events began in December 2005 when the defendant told Dr. Antony that she would like to reduce her dosage of anti-depressant medication. On December 30, 2005, Dr. Antony eliminated the evening dosage. He advised the defendant to tell him if she felt more depressed after she had reduced the dosage.
- [34] On January 19, 2006, Dr. Antony noted that the defendant appeared to be doing well as far as her depression was concerned. The defendant wanted to eliminate her anti-depressant medication entirely but Dr. Antony cautioned against doing so. He lowered her morning dosage from 200 mg. To 150 mg. On February 10, 2006 Dr. Antony noted that he planned to further reduce the Wellbutrin medication to 100 mg. in the morning, reduce the dosage to 100 mg. every other day for a couple weeks and then stop altogether.
- [35] Dr. Antony saw the defendant on March 24, 2006, after she had stopped using Wellbutrin and the defendant denied any symptoms of depression. However, Dr. Antony found her to be "somewhat scattered and slow".
- [36] Over the ensuing days, the defendant's mental health deteriorated significantly. She began to have difficulty controlling her emotions, became angry and verbally abusive to her parents and showed disorganized behaviour. Finally, on April 26, 2004 the defendant's mother, L.T., took her daughter to the hospital, where she was admitted to the psychiatric ward. The defendant remained in hospital until May 18, 2006.
- [37] The plaintiff was not informed of the defendant's hospitalization until May 1, 2006 when he received a fax from Mr. Macdonald. The plaintiff telephoned the defendant's father to enquire about the reason for the hospitalization and was told that it was due to exhaustion and a blood sugar imbalance. The plaintiff had earlier been informed that the reason the defendant missed access in late April was because she was taking a driving course, when it appears that her mental health problems were in fact the cause. On May 2, 2006, the plaintiff tried to speak to Dr. Antony but the doctor would not discuss the defendant's condition with him.
- [38] The plaintiff did not permit any access while the defendant was in the hospital.
- [39] On May 23, 2006, Dr. Antony sent a fax message to Mr. Macdonald advising that the defendant was well enough to resume access visits but that they should be supervised by L.T. for the first month and then reassessed. It appears that this fax was not forwarded to the plaintiff but on May 23, 2006 he was informed by telephone by Mr. Macdonald's assistant that Dr. Antony had advised that visits could be resumed. That afternoon, the defendant did not attend to pick up [A.S.] as planned and on May 24, 2006, the plaintiff sent a letter to Mr. Macdonald asking whether the defendant planned to attend future scheduled visits and stating that "I will assume that access will not continue until further notice".

- [40] In fact access resumed shortly thereafter. L.T. was aware that Dr. Antony had said that she should supervise the access. L.T. testified that Dr. Antony told her there should be supervision to give the defendant some support and help her out with her son and with everyday activities. She testified that she was present most of the time and that if she was not present, her husband was. She said that her daughter did quite well taking care of A.S.
- [41] According to Dr. Antony's notes, on June 28, 2006, L.T. informed him that "in the last couple of weeks [A.S.T.] has handled [A.S.] by herself and [L.T.] was not on the scene at all". By that time, Dr. Antony was of the view that the defendant did not pose any danger to her son and that it was safe to have access without any degree of supervision.
- [42] On July 18, 2006 the plaintiff first learned that Dr. Antony had recommended supervision and that supervision had been discontinued earlier than Dr. Antony had first suggested. The plaintiff wrote to Mr. Macdonald expressing his displeasure at this turn of events and imposing the following restrictions on future access:

Until a full set of medical records (Full records that are current to the 19th day of July 2006) is provided and sufficient time given to review them to ascertain the seriousness of the situation: visits will no longer continue unless they are supervised by a qualified professional. [L.T.] will not be considered as a qualified supervisor as she has willingly made unqualified decisions to leave [A.S.] alone in his mother's care when the Doctor had deemed it unsafe to do so.

...

Please be advised that I will be contacting legal counsel on July 24th to review my case and to discuss my current position in relation to these recent developments.

- [43] Despite these events, neither party brought the case back to court until April 2008. In the meantime, access was almost non-existent. There was a two-hour supervised visit on December 29, 2007 and a further supervised visit on March 2, 2008.
- [44] On or about April 2, 2008 the plaintiff delivered a notice of motion seeking an order that all access be supervised pending completion of the trial of the action. A date for the continuation of trial was secured for September 2008. The plaintiff's application was initially set for hearing on April 10, 2008 but was adjourned by consent. On April 10, 2008, I made an order for supervised access pending the hearing of the application and access in fact took place on April, 20, 24 and May 4, 2008.
- [45] The plaintiff's application was eventually heard on May 7, 2008. Prior to giving my decision, and with the consent of both parties, I interviewed A.S. on May 12, 2008. As I informed the parties, it appeared to me that A.S. still felt caught in the middle and did not want to do anything to displease either of them. A.S. also expressed a reluctance to see his maternal grandparents. In view of the fact that I believed there would be a trial in September, and being of the opinion that it was most important to try to restart the relationship between the child and his mother, I made an order on May 14, 2008 on terms that:

- (a) the defendant have unsupervised access every Sunday from noon until 5:00 p.m.;
- (b) during July and August the defendant have unsupervised access every Wednesday from noon to 5:00 p.m.;
- (c) the defendant have unsupervised access on August 2, 2008 from noon to 5:00 p.m.;
- (d) there be no access from July 12, 2008 to July 19, 2008 and from Aug 3, 2008 to August 9, 2008;
- (e) access not be in the presence of the defendant's parents;
- (f) pick-up be at plaintiff's residence at the beginning of access and drop-off be at defendant's residence at the end of access;
- (g) the defendant continue under the care of Dr. Antony and take her prescribed medications; and
- (h) the defendant provide evidence of her monthly injections.

[46] Once again, access did not occur in accordance with the order for very long. On July 20, 2008, the defendant took A.S. to her parent's residence, which was contrary to the terms of the interim order. When she was cross-examined as to why she took A.S. there, she couldn't give an explanation. L.T. testified that the defendant merely dropped in to get some money for lunch and brought A.S. with her without any prior knowledge on her part. The plaintiff testified that A.S. was upset at having been taken to his grandparents and afraid his mother would take him there again. Accordingly, the plaintiff suspended access, although he made it appear that he left the decision about whether or not access should continue and when entirely in the control of A.S. In an email dated July 29, 2008, the plaintiff advised the defendant:

I've talked to [A.S.] several times over the past couple days about this issue and he is still mad and quite upset at you for taking him to your parents and believes you may take him there again which I believe he has made quite clear, he does not.

He is not wanting any visits this week and next week is camp, so we'll have to touch base after that.

[47] On August 11, 2008, the plaintiff sent the defendant another email in which he said, in part: I did ask [A.S.] about continuing visits this week-end on the drive home from camp and his reply was to "stop bringing up the subject" and "he'll let you know when he's not mad at you anymore". As I said in the last email: there has been damage caused by taking [A.S.] to his grandparents against his will and it appears to me that [A.S.] now has some trust issues while in your care. It is not my place to tell you how to resolve this problem: however I will once again suggest that you should consider your available options as to repair the damage done.

[48] On September 10, 2008, the parties attended at court for a pre-trial conference, when I learned that access had once again stopped. I was further advised that the parties were not prepared for trial and that the trial would have to be adjourned. I directed that access resume and suggested that the plaintiff apologize to A.S. for having upset him by taking him to his grandparents' home. The plaintiff in fact sent A.S. a card in which she expressed her apologies.

[49] Access once again resumed but was sporadic. On September 21, 2008, the defendant did not show up for her scheduled access and the following week, when she arrived to pick him up, A.S. did not go with her. He did go on an access visit on October 5, 2008. I was not provided with evidence of what access took place thereafter but on March 1, 2009 the plaintiff again suspended access, ostensible in accordance with A.S.'s wishes. On February 23, 2009 the plaintiff sent the defendant a lengthy email to which he attached a letter in A.S.'s handwriting. The letter complained of the defendant's conduct around [A.S.] and the lack of cleanliness of her apartment and car and stated that he did not want to keep going on visits. The plaintiff's email said in part:

I'm uncertain as to what your observations have been regarding [A.S.'s] demeanour over the last several months; however he has continuously expressed to [L.S.] and me an increasing dissatisfaction with the conditions of access and behaviours that have made him feel uncomfortable.

...

... Upon returning from the last visit [A.S.] continuously stated that he has had enough and that he refuses to go to anymore visits and never see you again. Concerned, we asked him why and perhaps it would be best for him to write you a letter as to why he feels the way he feels. This letter is attached to this email ...

I do not believe [A.S.] when he says he does not want to see you anymore; however I do believe he want to see positive changes in your demeanour and a sincere effort of self improvement before he returns to access and thus building a relationship. It may be best for both you and [A.S.] to take a hiatus in visitation so that you have the ability to get your affairs in order before continuing and [A.S.] has time to let some water flow under the bridge.

I am well aware that it is court ordered to provide [A.S.] for visitation and that I must even physically push him out of the front door if need to ensure he is in front of the house waiting for you: I am prepared to do this; I ask however that (for now) you respect [A.S.'s] wishes and save him the stress and agony of weekly confrontations. [A.S.] has made it quite clear that he will not go. After a month or two he may feel differently. Telephone access is always available and may be a viable option.

Please let me know how you wish to proceed; whether you will be showing on Sunday or give [A.S.] a break from visits and you the chance to get your affairs in order.

- [50] On March 1, 2009 the defendant went to the plaintiff's home to pick up A.S. but he refused to go. He placed another copy of his letter on the windshield of her car and refused to get in. The following week, on March 8, 2009, A.S. again refused to go with the defendant. He once again placed a copy of his letter on the windshield of her car and refused to get in.
- [51] No further access visits took place until after a pre-trial conference was held on September 2, 2009. In the meantime, in June 2009 the defendant had sought help from the Ann Davis Society about steps that might be taken to regain access. On June 25, 2009 an employee of the Ann Davis Society wrote to the plaintiff to advise that the defendant was requesting that A.S. attend counselling in the hope that he would once again want to go on visits. The plaintiff essentially left the decision up to A.S., who declined the invitation.
- [52] Following the pre-trial conference, access resumed on Sundays and visits took place on September 6, 13 and 20.

Parties' current situations

The plaintiff and his wife

- [53] The plaintiff is an established businessman in the community and, while not wealthy, is financially secure and able to support his family. The plaintiff is now remarried to L.S., whom he met in March 2006. L.S. is currently a bookkeeper and is studying to become a primary school teacher. She has spent over 400 hours volunteering in schools. L.S. has a close, parental relationship with A.S. She says she loves him as though he was her own child and I believe that is true. The plaintiff and his wife clearly love A.S. and they clearly have the ability, financially and otherwise, to provide for and take care of A.S. The plaintiff has continuously provided primary care for A.S. for almost 10 years now.

The defendant

- [54] The defendant's mental health, which I will comment on more fully below, has been quite stable since her last hospitalization.
- [55] With regard to the defendant's living arrangements, for the past two and one-half years she has resided in a subsidized one bedroom apartment in a complex that is operated for persons with mental illness.
- [56] The defendant has ongoing personal support through Chilliwack Mental Health from Ms. Courtney Henry, a registered psychiatric nurse. Ms. Henry provides support by connecting the defendant with various resources and by providing any crisis management that may be necessary. Ms. Henry also oversees management of the defendant's medication and administers monthly injections of antipsychotic medication. Ms. Henry described the defendant as a very kind woman who is motivated and working hard to stay well. Ms. Henry believes the defendant very much wants to get her son back.

- [57] The defendant also has support from Ms. Nancy Jones, a mental health community worker. They have a good working relationship. Ms. Jones works with the defendant to establish goals that will assist her to live as independently as possible and to integrate with the broader spectrum of society and she monitors the defendant's progress in meeting those goals. Ms. Jones says the defendant misses her son terribly. She says that when the defendant is with [A.S.] she is more motivated. Ms. Jones believes that the defendant's strengths are that she is a lot of fun, brings laughter to young people, is easy to get along with and respectful of others. Ms. Jones has been at the defendant's apartment on several occasions and never had any concerns about the cleanliness of the apartment.
- [58] Since her release from hospital in May 2006, the defendant has been involved with a social and support network, known as the "Cheamview Clubhouse", which is operated by the Creative Center Society in Chilliwack. The Cheamview Clubhouse is a facility where people with mental illness get together, socialize and get involved in programs designed to try to help them integrate into the community. Mr. Rob Dueck, a mental health worker employed by Creative Centre Society, testified that when the defendant first came to the Clubhouse about three years ago she was extremely shy, tentative and non-assertive. He testified that over time the defendant has become quite outgoing, connects well with people and takes a leadership role. He said that the defendant was involved for some time in a peer support program but did not complete it and did not receive her certificate.
- [59] Mr. Dueck believes the defendant's strengths include kindness, empathy, a sense of humour, an ability to relate to people, gentleness and passion. Aspects of the defendant's personality that concern him include a lack of confidence in who she is and where she is going.
- [60] Mr. Dueck related two incidents of inappropriate conduct by the defendant at the Clubhouse, one involving taking a cookie that was being use for a craft fair and the other a dispute with another person about some sort of craft activity. In my view, neither of these was of major significance.
- [61] The defendant is not employed at the present time. With the exception of two short periods when she worked at fast food restaurants, the defendant has not been employed since late 2003. In or about March 2004 she qualified for disability insurance under a policy with Sun Life through her former employer and began receiving \$1,092 per month in disability payments. After some time, the defendant applied and qualified for CPP disability payments, in the amount of \$565 per month, which are deducted from her Sun Life payments. When the defendant first qualified for CPP disability, she received a retroactive payment, which she should have given to Sun Life but kept. Sun Life then suspended payments for a period of time until it could recover the amount it should have received. In order to survive, the defendant applied for social assistance and received, effectively \$297 per month. At trial, the defendant anticipated that by the end of 2009 she would have repaid the amount owing to Sun Life, at which time her Sun Life payments would increase and the social assistance would cease. She would once again receive a total of \$1,092 per month. In effect, therefore, since about March 2006 the defendant's income has been \$1,092 per month or \$13,104 per

year.

The defendant's mental health

[62] The defendant's mental health is clearly a significant issue in determining what custodial arrangement is best for A.S. The defendant has seen Dr. Antony on a regular basis both before and after her last hospitalization in April 2006. Dr. Antony provided a report dated October 11, 2008 in which he confirmed that in April 2006 the defendant was diagnosed with schizoaffective disorder, depressive type. The defendant receives ongoing treatment in the form of the following medications:

- (a) Fluanxol decanoate, an antipsychotic medication, which she receives by injection every four weeks;
- (b) Paxil, an antidepressant; and
- (c) Seroquel, which can be used as an antipsychotic but is prescribed in a relatively low dosage to the defendant to help her sleep.

[63] Dr. Antony says that the defendant has generally kept her appointments with him on a regular basis, although she has missed two of them. He believes that the defendant has been compliant with her oral medications and her injections are monitored so they are consistent.

[64] With regard to the nature of the defendant's illness and her diagnosis, Dr. Antony stated:

... [A.S.T.] was diagnosed with schizoaffective disorder, which is a diagnostic entity that has elements of both schizophrenia and affective illness. While the issue of diagnosis is important in making treatment decisions, as well as predicting the course of an illness, in my opinion, it would be more appropriate to focus on [A.S.T.'s] clinical stability, while making a decision on matters such as parenting capacity. ...

... Fluanxol decanoate is a long-acting antipsychotic medication, which is generally administered once every two to four weeks, depending on the patient's response. Please note that there are many patients in the community who are treated with this injectable form of antipsychotic medication on an outpatient basis ... In my opinion, [A.S.T.] has responded very well to the present dosage schedule of this medication and I have not identified any psychotic symptoms in her, since her discharge from the hospital in May 2006.

...

In addressing the issue of [A.S.T.'s] parenting capacity, I would like to point out that I do not have the appropriate expertise to comment on this topic and clearly, an opinion on this matter should come from a clinical psychologist, following appropriate assessments. Nevertheless, I would like to make some general comments that might prove helpful. In my opinion, suffering from a mental health condition such as schizoaffective disorder should not preclude a parent from providing care to his or her child. I would also like to add that any inferences on parenting

capacity should not be based on clinical diagnosis, but drawn from a thorough psychological assessment of parenting capacity. While [A.S.T.] has presented to me clinically stable and consistently so during the past two years, I am rather unable to comment on how well she could handle her responsibilities as a parent, if she were to assume full care of her child. Nevertheless, it is my belief that it would be in the best interest of [A.S.T.'s] mental health that she has the opportunity to reconnect with her son the earliest possible.

[65] Dr. Antony has made it clear that he is not expressing an opinion on the defendant's parenting capacity and I have not taken his report as such. He has, however, made a clinical diagnosis which I accept. He has also expressed the opinion that the defendant's illness is being treated effectively with appropriate medication and that she is compliant with her medications and with her visits to him for periodic review. While Dr. Antony's opinion does not go directly to the issue of parenting capacity, it is helpful in determining the issues in this case in that he believes that the mere fact that a person suffers schizoaffective disorder does not preclude the ability to parent if the illness is treated appropriately. In short, the mere fact that the defendant has this illness does not render her unable to parent satisfactorily.

Dr. Atkinson's s. 15 Report

[66] Prior to the start of the first trial, Dr. Atkinson provided a comprehensive custody and access report dated February 26, 2003. While the report is now quite dated and must be read in light of the defendant's subsequent hospitalizations and psychiatric diagnosis, I believe that it still is of some assistance in understanding the psychological makeup of the parties. Dr. Atkinson's impressions of the defendant as set out in his report, included the following:

She presented as being grounded in reality and demonstrated very good insights into the causes of her alarming past behaviours. As well, her discussion suggested an ability to develop and benefit from genuine emotionally based relationships. In effect, she seemed to possess empathy and have compassion for others.

With respect to her personality, [A.S.T.'s] demeanour and problem solving style suggested some feelings of inadequacy accompanied by dependency. She presented as the type of individual who invests a great deal in a relationship she believes will provide her with emotional protection and security.

[67] With regard to the defendant's parenting, Dr. Atkinson commented:

The discussions held regarding [A.S.] and his needs revealed what appeared to be a genuine love for the child. [A.S.T.] spoke in terms that suggested a well-developed understanding of her son's developmental features and personality style. [A.S.T.] was able to identify [A.T.S's] preferences and seemed to have a good grasp on strategies that would promote his development in a number of key areas.

[68] Dr. Atkinson's impressions of the plaintiff included the following:

It was noted in the description of events between [A.S.'s] birth and the marital separation that [T.T.S.'s] memories of [A.S.T.] were that she was a less than competent parent. He characterized her as having a poorly developed sense of how to guide [A.S.'s] development and as lacking in the ability to help the child develop skills and boundaries.

...

[I]t became apparent that [T.T.S.] believed that [A.S.T.'s] emotional problems were rooted in trauma experienced in her childhood. He was prepared to ascribe her condition to the effects of a dysfunctional family and abusive parents. ...

Throughout both clinical interviews it was evident that [T.T.S.] held his views about his wife and son with conviction. ... [H]e contended that [A.S.T.] suffered from a debilitating mental condition, which essentially precluded her from taking an active, independent role in raising their son.

...

Regardless of the pain he has experienced, [T.T.S.] has moved forward and developed his life on a number of fronts. He has become an accomplished graphic designer, a well-regarded colleague in a service club and above all, a good father. ...

Given [T.T.S.'s] personal history, the control of [A.S.'s] development became crucial to his sense of well-being and self-worth. It emerged as being so important that only a few trusted people ([T.T.S.'s] parents, a baby-sitter, a daycare operator) were allowed to have direct input into [A.S.'s] care.

...

...It was concluded that [T.T.S.] was an intellectually capable man who, in the parts of his life outside of the need to protect [A.S.], showed effective problem solving and reasonable judgment.

...

It was clear that through a combination of reading, discussing issues with knowledgeable people, intuition and a commitment to ensure a healthy sense of self-worth in [A.S.], [T.T.S.] has acquired a well developed sense of children and the child-rearing process. He espoused a strong child-oriented approach to parenting while at the same time seeing the need to provide a flexible structure to promote learning. In addition, his reflections on [A.S.'s] needs indicated an awareness of a breadth of requirements including creativity, the promotion of autonomy, ethics and the development of self-esteem. It was felt that [T.T.S.] had offered his son a great deal in the past and would continue to do so in the future as well.

[69] With regard to [A.S.], who at the time was only five, Dr. Atkinson observed, amongst other things:

[A.S.] presented as a very robust, energetic little boy who seemed to be confident and possess a good sense of his self-worth. His social skills were well developed and his ability to express his thoughts and feelings strongly suggested effective intellectual skills. His emotional expression and tone throughout the session was appropriate for the topics under discussion.

While the above qualities were seen as significant strengths, it was also evident that [A.S.] was extremely confused about family relationships. This child was clearly torn between the feelings he had developed for his mother based on experience and the expectations he felt he should hold based on external sources of communication. It was thought that while [A.S.'s] caretakers were likely attempting to protect him, the input was creating major conflicts for the child likely to adversely affect his perceptions of reality. He was regarded as being a very confused child at the present time.

[70] When he prepared his report, Dr. Atkinson thought that the parties possessed the strengths to redefine their relationship provided they had help and that in spite of their differences they were capable of managing a joint custody/joint guardianship arrangement. He also felt that A.S. needed to have some extended periods of contact with his mother.

Witness's observations regarding A.S.

[71] The picture that emerges of A.S. from his father and L.S. is of an intelligent, sensitive, well-behaved child. A.S. has friends. He enjoys sleep-overs. He does chores, including taking care of his pet guinea pig, mowing the lawn and cleaning his bedroom and bathroom.

[72] Both the plaintiff and L.S. testified that there have been many times when A.S. did not want to go on access visits and complained that his mother did things to embarrass him and make him feel awkward and treated him like a baby and that he did not have much quality time with his mother. L.S. testified that A.S. complained that his mother's apartment and car were dirty. L.S. testified that A.S. returned from access visits with his clothes smelling of garbage. She also testified that A.S. told them that his mother said mean things about his father and her. L.S. said that the plaintiff and she did not force A.S. to go with his mother if he did not want to.

[73] L.S. said that she believes that A.S. wants to have a relationship with his mother but he wants her to be normal. He realizes that she is sick and he is frustrated with her.

[74] The defendant described A.S. as very intelligent, loving and with a good sense of humour. She testified that A.S. talks to her about his friends, school and his teachers. She said A.S. is a little lethargic and usually just wants to watch television but she spoke of access visits in the past when they went to the park to play and do other things.

[75] The defendant believes that A.S. enjoys his visits with her and said there are always lots of hugs. She said he never told her that he did not want to visit her. She said he never told her that he felt unsafe with her and never complained about the smell or looks of her apartment or car.

- [76] Unfortunately, the parties could not afford the cost of obtaining an updated report under s. 15 of the Family Relations Act. They did, however, enlist the services of an individual, Ms. Geraldine Silver, to interview A.S. and provide a report on his views. Ms. Silver formerly worked in the aboriginal community as a child protection worker and has experience interviewing children. Ms. Silver spoke to A.S. in his father's home on September 18, 2009. Ms. Silver reported that A.S. was quite talkative and that they developed a good rapport. A.S. told her he wanted to live with his father but he did not give reasons and she did not ask him why. A.S. told Ms. Silver that he would like to see his mother on weekends but not on school days. He thought he might want to see his mother every other weekend but was concerned that the weekends were when he spent time with his friends from school. A.S. told Ms. Silver that he did not want to spend nights with his mother and thought that visits of between two and five hours might be right and that visits once a week would be good.
- [77] A.S. told Ms. Silver that he did not want to see his maternal grandparents at all. He did not want to talk about why he did not want to see them.

The maternal grandparents and A.S.

- [78] In the past, the defendant's parents, and particularly her mother, L.T., played a significant role in A.S. life. The plaintiff has come to believe, however, that they are a threat to A.S.'s physical and emotional well being and seeks to continue the no-contact provisions that were put in place in May 14, 2008, on what was thought would be a temporary basis until the evidence concerning the allegations against the grandparents could be assessed.
- [79] I have concluded that the plaintiff's fears concerning the grandparents, while perhaps honestly held, are not grounded in facts that support his belief. The plaintiff's concern regarding the maternal grandparents has two bases. First, he believes that the defendant was seriously mistreated by her father, C.T., when she was a child and that her mother did nothing to prevent the abuse. He is concerned that C.T. has been abusive to A.S. and will be abusive if he is allowed contact. The other reason for his concern is because of things that A.S. has told him the grandparents have done.
- [80] While the defendant has complained to others in the past about her relationship with her father, she denies abuse, as does C.T. The plaintiff suggests the fact that the defendant's brother is estranged from C.T. is evidence that C.T. was an abusive parent. C.T. provides a different explanation for the estrangement, one based on different religious beliefs. The defendant's brother did not testify. On the evidence before me, I am not prepared to conclude that C.T. was abusive.
- [81] Further, I am of the view that the evidence fails to establish some of the events said to have occurred between C.T. and A.S. and that other events have been misinterpreted and blown out of all proportion. The plaintiff said that in 2004, during a trip to Vancouver Island, C.T. grabbed A.S. by the arm and dragged him across a dock causing bruising of A.S.'s elbow. L.T. and C.T. both denied any knowledge of such an event. C.T. said that if A.S. got a bruise, he may have done so playing with the other children in a basketball court but he never

complained of a bruise.

- [82] The plaintiff also relies on incidents where it is alleged C.T. dragged A.S. out from under a bed, dragged him out of the closet and threw him on a bed. C.T. testified that on one occasion when playing hide-and-seek A.S. hid under a futon and he had to reach in and pull him out but no harm was done. He thought the recollection concerning the bed might have been the result of a time when A.S. went off to his room crying because he had been told he should flush the toilet after using it but he denied any abuse.
- [83] The evidence is simply insufficient to warrant a finding that A.S. would be at risk if his maternal grandparents are permitted contact with him.

The parties' submissions

Plaintiff's submissions

- [84] T.T.S. submits that he and his wife have provided A.S. with a clean, comfortable, stable home where he receives love and guidance that will ensure that he will continue to grow and mature into a healthy, happy and well adjusted adult. He submits that the defendant's mental health problems prevent her from being able to provide a similar stable and nurturing environment.
- [85] He submits that, with good reason, on many occasions A.S. has not wanted to visit his mother and that it would not be in his best interest to be forced to live with her, even on a part-time basis.
- [86] T.T.S. says it is important to remember that the issue in this case is what is in A.S.'s best interest, not what is best for the defendant's recovery or emotional state.
- [87] T.T.S. submits that A.S. is justifiably afraid to see his grandparents because of their mistreatment of him and that he should not have to do so.
- [88] T.T.S. submits that he should be granted permanent custody and guardianship of A.S. His initial submission was that access should remain as it has been under the most recent order but later he submitted that there ought to be occasional long weekend that A.S. could spend with him without interruption by a visit with the defendant.

Defendant's submissions

- [89] Counsel for the defendant did not suggest that it was in A.S.'s best interest that there be a change in his principal residence or that it was appropriate that he spend equal time with both parents. The thrust of his submission is that there should be an order that provides for a continuing relationship between A.S. and his mother and gives her a continuing role in her son's life. He submitted further that the order should provide for blocks of access time of a number of days duration because a few hours of access each week does not permit the forging of a true parent-child relationship. He also submitted that there should be a sharing of holiday periods.

- [90] Counsel for the defendant submitted further that there should no longer be a ban on contact between the maternal grandparents and A.S.
- [91] Finally, counsel for the defendant submitted that it was unlikely that the defendant would ever be able to pay the arrears, which he conceded were \$4,460 and asked that they be cancelled and that ongoing support be fixed at \$88 per month based on the defendant's Guideline Income of \$13,100 per year.

Discussion and Conclusions

Custody, guardianship and access

- [92] The plaintiff has had interim sole custody of A.S. since March 2000 and A.S. has done well in his care. Indeed, in most respects the plaintiff, with the assistance more recently of his wife, L.S., has done an excellent job raising A.S. and providing him with the care, guidance and emotional nurturing that he requires. My only concern is that I am satisfied that the plaintiff and L.S. are both firmly fixed in their belief that the defendant is not a competent parent and that A.S. is at risk when he is with her. I am of the view that the plaintiff's intractable belief in defendant's parenting deficiencies prevent him from understanding and accepting that she has a place in the child's life and that A.S. can benefit from greater involvement with her.
- [93] I do not doubt that the defendant's mental health challenges and setbacks have at times made it difficult for the plaintiff to work effectively with her and have created problems in arranging and following through with access schedules. However, I am also satisfied that the plaintiff has used the defendant's mental health issues to marginalize her role in her son's life. Too often, when issues have arisen the plaintiff's response has been to suspend or deny access unilaterally until the defendant has addressed and rectified the issues to his satisfaction. This approach has resulted in a frustration of this court's attempts to promote and maintain a relationship between the defendant and her child. That has been, in my respectful view, to the detriment of the child. The plaintiff has consistently taken the posture in his written communications to the defendant and in his submissions to this court that he is in favour of maintaining a relationship between A.S. and his mother but his actions too often have suggested a contrary belief, that he would prefer that the defendant not be a part of A.S.'s life at all.
- [94] I also have to say that I am troubled by the degree to which the plaintiff has effectively shifted the burden to A.S. of determining when there would be access and to what extent, particularly in the past two or three years. A.S. is an intelligent and sensitive boy and his views ought to be heard and given due respect. But he is still a boy and should not have to carry the weight of the decision making and of bearing the consequences. It has been noted by others that A.S. feels caught in the middle. I have no doubt that he knows that his father is not truly supportive of the defendant and her relationship with him and that puts undue pressure on him when he is asked to make decisions about whether to go on access visits.

- [95] Notwithstanding these concerns, it would not be in A.S.'s best interest to change the custody and primary residence arrangement that has been in place for such a long time and under which he is apparently doing quite well. Indeed, the defendant recognizes that it is in A.S.'s best interest that he remain in the primary care of his father. What she seeks is to be a bigger part of A.S.'s life.
- [96] I have no doubt that the defendant loves her son dearly and wants nothing more than to be his mother in every manner possible. I am satisfied A.S. will benefit from increased contact with her and he has indicated that he does want to spend time with his mother.
- [97] The defendant has health issues that have the potential to interfere with her ability to spend quality time with A.S. unless she takes proper care of her mental health. I believe that she realizes that is the case. She has done well since her last hospitalization in 2006, which appears to have been triggered by a decision, supported by her psychiatrist to go off her anti-depressant medication. Since she was released from the hospital the defendant has been consistent in taking her prescribed medications and seeing her psychiatrist for ongoing monitoring and she has done well. The defendant has a safety network of caring and competent individuals who can help her maintain her good mental health. Her parents know the signs to watch for and are committed to ensuring that their daughter will receive prompt treatment if her health deteriorates. Her anti-psychotic medication is received monthly by injection, administered by a psychiatric nurse. The plaintiff has a mental health worker who can assist her in becoming more independent within the community. She lives in an environment where help is nearby and she has a social network within the Clubhouse that can also help her become even more independent.
- [98] Having said this, I do not believe that the defendant is in a position to take on the responsibility of caring for A.S. for lengthy periods of time, nor do I think that would be in A.S.'s best interest at this time. The defendant does not have the capacity at this time to find and keep full-time employment. She requires help in setting goals and achieving those goals in terms of running her own home. I have the impression that she struggles to find things to do with A.S. during their access visits. That is not unexpected given the limited amount of time she has spent with A.S. and I do not criticize her for it but simply observe that I expect that A.S. would find it difficult to spend lengthy periods with her away from his routine and other family. Furthermore, the defendant's apartment is not well equipped for extended stays in that there is only one bedroom and A.S. is now of an age when his privacy and personal space are more important than when he was a young child. However, I believe that the occasional overnight access is appropriate and will allow A.S. and his mother to carry on a more normal parent-child relationship.
- [99] In my view, it is very important that there be consistent, reliable access. That is in A.S.'s best interest. It is also in the best interest of the defendant in terms of maintaining her good mental health. While I agree with the plaintiff that the focus of my decision must be what is best for A.S., the effect of the order on the defendant's health is related to the best interests of A.S. If the defendant can maintain good mental health and, as a consequence, be in a

better position to provide enjoyable, meaningful and consistent access for A.S., then that will ultimately be in his best interest.

[100] I am also of the view that it would be in A.S.'s best interest to be able to enjoy some full weekends with his father and step-mother rather than have access with his mother every weekend.

[101] I also believe that it is in A.S.'s best interest that the defendant be able to exercise a continuing responsibility to provide input into the major decisions that affect A.S. In my view she is fit to do so. It is important that the plaintiff not be able to make all the decisions without consultation with the defendant. So long as an effective mechanism exists to resolve any conflicts that may arise, then I think such a parenting scheme can work.

[102] I do not believe that the access schedule that I am going to fix should necessarily persist without change as A.S. gets older and other circumstances change. But I think it is necessary that I make a final order. If circumstances change, an application can be made to vary it. If the order is frustrated, an application to enforce, by way of contempt or in some other fashion can be made.

[103] I have therefore decided upon the following order regarding custody, guardianship and access:

1. The plaintiff will have sole custody of A.S.
2. The plaintiff and defendant will share joint guardianship of A.S. on what is essentially a "Master Joyce" model order, except that upon the death of the plaintiff the defendant will not automatically become A.S.'s sole guardian. The terms of joint guardianship are as follows:
 - (a) the parents are to be joint guardians of the person and estate of A.S.;
 - (b) in the event of the death of the defendant, the plaintiff will be the sole guardian of the person and estate of A.S.;
 - (c) the plaintiff shall have the right to nominate by will who is to become joint guardian together with the defendant upon his death;
 - (d) the plaintiff, who has the primary responsibility for the day-to-day care of A.S. will have the obligation to advise the defendant of any matters of a significant nature affecting A.S.;
 - (e) the plaintiff will have the obligation to discuss with the defendant any significant decisions which have to be made with respect to A.S., including significant decisions concerning his;
 - (i) health (except emergency decisions),
 - (ii) education,
 - (iii) religious instruction, and
 - (iv) general welfare.

- (f) the defendant will have the obligation to discuss the matters set out in paragraph (e) with the plaintiff;
 - (g) each parent will have the obligation to try to reach agreement with respect to major decisions referred to in paragraph (e);
 - (h) in the event that the parents cannot reach agreement with respect to any major decision referred to in paragraph (e) despite their best efforts, the plaintiff will have the right to make such decision and the defendant will have the right, under s.32 of the Family Relations Act, to seek a review of any decision which she considers is contrary to the best interests of A.S.;
 - (i) each parent will have the right to obtain information concerning A.S. directly from third parties, including teachers, counsellors, medical professionals and third-party care givers.
3. The defendant will be entitled to access on the following basis:
- (a) Regular access on an eight-week rotation, commencing Sunday, January 10:
 - (i) week 1 - from noon until 8:00 p.m. on Sunday,
 - (ii) week 2 - from noon until 8:00 p.m. on Sunday
 - (iii) week 3 - no access
 - (iv) week 4 - from noon until 8:00 p.m. on Sunday
 - (v) week 5 - from noon until 8:00 p.m. on Sunday
 - (vi) week 6 - no access
 - (vii) week 7 - from noon on Saturday to 8:00 p.m. on Sunday
 - (viii) week 8 - no access
 - (b) The defendant shall have access every Mother's Day from noon until 8:00 p.m. In the event that Mother's Day falls on a day of the 8-week cycle when the defendant would not otherwise have access, the Mother's Day access is in addition to the regular access.
 - (c) In the event Father's Day falls on a Sunday in the 8-week cycle when the defendant is to have access, her access is suspended from noon until 8:00 p.m. on Father's Day and the defendant is not entitled to another time in substitution for the suspended access.
 - (d) In even numbered years A.S. shall be with the defendant from noon on December 25 until noon on December 26 and with the plaintiff from noon on December 24 to noon on December 25, regardless of the regular access under the 8-week cycle.
 - (e) In odd numbered years A.S. shall be with the defendant from noon on December 24 until noon on December 25 and with the plaintiff from noon on December 25 to noon on December 26, regardless of the regular access under the 8-week cycle.

4. Access is contingent upon the defendant continuing to attend upon a qualified psychiatrist as directed by the psychiatrist upon her taking such medications as her doctors may prescribe from time to time.
5. The defendant is to continue to provide proof that she has taken medication by providing a notes signed by the person administering the medication.
6. The defendant is to notify the plaintiff forthwith of any change of psychiatrist or change in prescription medication.

[104] As I have said, one of my greatest concerns is to try to ensure that the access that has been ordered in fact takes place and, if it does not, that steps can be taken to enforce the access. Accordingly, I am going to order that I be seized of any applications for enforcement of access by way contempt proceedings or to vary access in the event of a change of circumstance. Further, I am going to order that each party file with the registrar of the court a document signed and dated by the party indicating whether the access that was ordered on each occasion did or did not take place. That document is to be filed at the registry the week following the time when access was to have occurred. I will direct the Registrar to provide a copy of those documents to me.

Contact with maternal grandparents

[105] I have concluded that no basis has been established in fact to warrant the grandparents being denied contact with A.S. when the defendant is exercising access. It must be recognized, however, that this has become an issue in A.S.'s mind and it will no doubt take some time and some care for the grandparents to demonstrate to A.S. that he is, in fact, in no risk when in their company. It would be helpful, in my view, for the grandparents to seek some professional counselling as to how they can best deal with repairing this problem.

Child Support and arrears of support

[106] As of the date of trial, the defendant was in arrears of the interim child support order to the extent of \$4,460. The last time the defendant made any payment on account of child support was in March 2006.

[107] As noted earlier, the defendant has not worked since her most recent hospitalization in 2006, with the exception of some brief restaurant employment. While the defendant's mental health is stable at the present time, having had the benefit of hearing her testify and having heard the testimony of other witnesses who have been working with her, I am satisfied that she is probably not employable at the present time and may not be employable for some time.

[108] I have determined the defendant's Guideline Income to be \$13,100 per year since approximately March 2006. According to the Guideline Tables, the amount of child support payable at that income is \$88 per month. The defendant seeks cancellation of the arrears

that have accumulated under the interim order of May 3, 2004. That application is made on the basis that the defendant cannot at present discharge the arrears. I am not prepared to cancel arrears entirely as that would require me retroactively to reduce the payments to \$0 per month for periods of time when the defendant in fact had the ability to pay.

[109] In my view, it is appropriate in these circumstances retroactively to vary the child support order by reducing the monthly amount payable to \$0 for January and February 2006 and to \$88 for the period from March 2006 to December 2009. I trust the parties can calculate the current quantum of arrears based on this order. If not, they have liberty to apply to have the arrears determined.

[110] I accept that the defendant has no present means to discharge these arrears and enforcement of them will be stayed pending further order of the court.

[111] There will an order that the defendant pay ongoing support in the amount of \$88 per month based on Guideline Income of \$13,100 per year, effective January 1, 2010.

"B.M. Joyce J."

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