

ONTARIO  
SUPERIOR COURT OF JUSTICE

**B E T W E E N:**

M.B.

Applicant

**- and -**

D.T.

Respondent

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) *M.B.*, representing himself  
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) *Alexandrea Jones and Lisa Kadoory*, for the  
) Respondent  
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)  
) **HEARD:** November 7, 8, 9, 10, 15, 16, 18,  
) 21, 22, 2011  
)

**Herman J.**

[1] M.B., the father, and D.T., the mother, have three children, ages 7, 11 and 13. They have been separated since May 2010 (according to the father) or November 2009 (according to the mother).

[2] The evidence reveals that both M.B. and D.T. are competent parents. They are devoted to their children and actively involved in their lives. However, they have been unable to agree on custody and parenting arrangements. The father seeks an order for joint custody and an equal division of time with the children on a weekly basis. The mother seeks sole custody. Her proposal is that the children reside primarily, but not solely, with her during the school week and have significant time with the father.

[3] The parties have also been unable to resolve the equalization of property and the disposition of the matrimonial home. They agree that the court should grant a divorce.

### Confidentiality

[4] The mother seeks a sealing of the court record. She is concerned that the children, particularly R.B., will access the information and it could be harmful to him.

[5] The father opposes sealing. He is agreeable, however, to the use of initials for the parties and the children.

[6] Openness and transparency are fundamental values of the Canadian judicial system. Sealing orders should only be granted in the rarest of cases, for example, where there is a significant risk of harm to a child (see: *Labadie v. Labadie*, [2006] O.J. No. 3052, *M.S.K. v. T.L.T.*, [2003] O.J. No. 352 (C.A.)).

[7] I am not satisfied that the circumstances of this case rise to a level that would justify a sealing order. It is, however, appropriate that the parties be identified by initials only.

### Background

[8] The parties were married on July 4, 1998. They lived together for several years prior to their marriage. They also worked together for a period of time as lawyers.

[9] A few months before their marriage, the father's parents transferred a house in Scarborough to the parties. That house remained the matrimonial home throughout the parties' marriage.

[10] The parties' first child, R.B., was born on [...], 1999. R.B. is now 13 years of age. Their daughter, I.B., was born on [...], 2000 and is now 11 years of age. The youngest child, M.M.B., was born on [...], 2004 and is 7 years of age.

[11] The parties agreed that the mother would stay home with the children and the father would continue to work. The mother was the primary care-giver, although the father was involved with the children in the evenings and on weekends.

[12] The mother returned to work in 2008 for the first time since the birth of the children. She obtained a job at the office where the father worked. Both parties continued to work there at the time of the trial.

[13] Once the mother returned to work, the children were looked after during the day by a care-giver. The father's day-to-day involvement with the children increased.

[14] The parties experienced difficulties in their marriage for several years prior to their separation. The children were aware of and exposed to the parents' conflict. For example, I.B. told Ms. Genesove, the investigator for the Office of the Children's Lawyer ("OCL"), that she

was sad when her parents separated, but not surprised; she had heard them fighting since she was seven years of age. The parents' next-door neighbour testified that she had heard a lot of screaming for about two years.

[15] The parties went to marriage counselling at various times in an attempt to save the marriage. The mother said she gave notice to the father that the marriage was over at the end of November 2009 when he refused to continue with the counselling. The parties, however, continued to live under the same roof.

[16] Matters came to a head on the long weekend in May 2010. The mother left the home on May 23. She returned on a few occasions to see the children. On each occasion, there was conflict between the parents. The children were exposed to and upset by the conflict.

[17] A few days later, the mother moved back into the home. She brought her mother with her. The father then asked his father to stay with them as well. In the result, the mother, father, maternal grandmother, paternal grandfather and the three children were all living under one roof.

[18] On the morning of May 27, 2010, the parents and the children went to see the family doctor. In a letter, dated June 3, 2010, Dr. Vaughan described the visit of May 27:

I met with the parents together then both children individually and then parents again. I was struck by the intensity and the degree of acrimony between the parents. It was almost impossible for either of them to say a sentence without being negative and destructive about the other person. I must say strongly that this was equally shared by both parties and I can only imagine how incredibly difficult this must be for their three children who must love them both. I did not find one parent more responsible than the other but was saddened and shocked by the degree of sheer hatred these two people have for each other.

[19] Dr. Vaughan suggested that the parents alternate time in the home. The father did not agree with the suggestion; he said he did not want to leave the children alone with their mother. Dr. Vaughan indicated that the reason for this was not clear to her, as the mother had been the primary care-giver until her return to work and had always been appropriate and observant of the children's needs.

[20] Dr. Vaughan contacted the Catholic Children's Aid Society. The CCAS interviewed the parents and the children. They were of the opinion that the parents were seeking the appropriate resources and they closed the file.

[21] Also on May 27, 2010, sometime after the doctor's visit, the father sought an *ex parte* order in court. The father testified that it was not his intention not to serve the mother, but he left the matter of service to his lawyer who, according to him, was unable to serve the mother.

[22] In his affidavit in support of the motion, the father indicated that the motion was urgent because “[the mother’s] behaviour has escalated to such a point that it is no longer safe for the children to be in her care.”

[23] The father went on to state in his affidavit that should the motion be delayed for regular service, there could be serious consequences and irrevocable harm to the children in terms of their emotional and mental state and this could potentially place the children in physical danger. However, the father did not clearly explain that two of the children’s grandparents were living in the home at the time.

[24] Paisley J. made an *ex parte* order, granting the father temporary custody of the children and exclusive possession of the matrimonial home, and providing for supervised access by the mother, either at a supervised access centre or with a mutually agreed to third party.

[25] The mother exercised access to the children in the home of the children’s care-giver.

[26] The *ex parte* order has had long-term consequences in terms of parenting arrangements and the parties’ relationship. It should not have been brought on an *ex parte* basis: there was no reason the mother could not have been served, given that she lived in the same home and worked in the same office as the father; and, although the living situation was likely not sustainable for a long period of time, the children were not in any imminent danger, particularly given the presence in the home of the two grandparents.

[27] The matter returned to court on June 8, 2010. In his endorsement, Perkins J. characterized it as a “high conflict case.” He indicated that the evidence did not show that the mother posed any risk to the children that a separation and counselling would not address. He further noted that the children were under pressure and did not need a withdrawal of one of their parents.

[28] In the result, Perkins J. terminated the order of May 27 and provided that the parties would have joint custody of the children. He granted a “nesting order” whereby the children would remain in the matrimonial home and the parents would move in and out on alternate weeks. The change-over was to occur every Monday at 9:00 a.m.

[29] The order expired on October 31, 2010. The parties agreed to extend it. The mother testified that she agreed to the extension not because she thought it was a good arrangement, but because she was fearful of what the father would do if she did not agree, and she could not afford another court motion. The nesting arrangement remains in place.

[30] By order dated September 23, 2010, Perkins J. requested the involvement of the OCL. The OCL agreed to provide services pursuant to s. 112 of the *Courts of Justice Act*, R.S.O. 1990, c C.43. Ms. Tamara Genesove was the clinical investigator. She undertook her investigation from November 2010 to February 2011 and issued a report, dated February 9, 2011. Ms. Genesove also testified at the trial, at my request.

## **A. Custody and Parenting Arrangements**

### The Parties' Positions

[31] The father seeks joint custody whereby the parents will jointly make decisions affecting their children's health, education and religion. He believes that once the trial is over and the dust settles, he and the mother will be able to co-parent and make the necessary decisions in their children's best interests.

[32] The father proposes an equal week-about arrangement, whereby the children would be with one parent in Week 1 and the other parent in Week 2, with mid-week overnights with the other parent.

[33] The mother seeks sole custody. In her submission, she and the father are unable to make decisions jointly.

[34] The mother also disagrees with the father's proposal for alternating weeks. She submits that such a schedule does not give the children the consistency they need. She proposes, instead, that the children's residence be with her during the majority of the school week, along with significant time spent with the father.

### General Principles

[35] The court's decision on custody and access must be based on its determination of what is in the best interests of the children.

[36] The *Divorce Act*, R.S.C. 1985, c. 3 provides that the best interests of the children are determined by reference to their "condition, means, needs and other circumstances" (s. 16 (8)).

[37] The *Children's Law Reform Act*, R.S.O. 1990, c. C.12 sets out a more fulsome list of factors for the court to consider:

24. (2) The court shall consider all the child's needs and circumstances, including,

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child, and

(iii) persons involved in the child's care and upbringing;

(b) the child's views and preferences, if they can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;

(e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;

(f) the permanence and stability of the family unit with which it is proposed that the child will live;

(g) the ability of each person applying for custody of or access to the child to act as a parent; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

[38] In considering the best interests of the children, courts often refer to the factors in both pieces of legislation, in the absence of any inconsistency (see: *Morrone v. Morrone*, [2007] O.J. No. 5341 (S.C.); *Warcop v. Warcop*, [2009] O.J. No. 638 (S.C.)).

### The Children

[39] The children all attend the same public school in Scarborough, close to the matrimonial home.

[40] The OCL investigator, Ms. Genesove, agreed that these three children have special needs. However, she did not classify these needs as "extreme special needs" or high needs".

*R.B.*

[41] R.B. is the oldest child. He is 13 years of age and is in grade 7.

[42] Both parents described R.B. as being extremely bright, as did his teacher. R.B. excels at piano.

[43] R.B. is closer with his mother and has had difficulties with his father. The father acknowledged past difficulties in his relationship with R.B. However, he said the relationship has improved significantly, as a result of R.B.'s counselling at the Willow Centre.

[44] R.B. and the mother both reported to Ms. Genesove that the father had been physically aggressive towards R.B. The father said the allegations were exaggerations.

[45] The other two children told Ms. Genesove about conflict between R.B. and their father.

[46] Ms. Genesove reported that R.B. appeared to be experiencing significant anger towards his father. He viewed his parents' situation in black and white: his mother was only positive and

his father was only negative. R.B. told Ms. Genesove that he was very close to his mother because she stayed home and took care of him for ten years. He said he had no concerns about his life with his mother, stating: "I take joy of everyday being with Mom." R.B. was very clear that he wished to spend the bulk of his time with his mother.

*I.B.*

[47] I.B. is 11 years old. She is in grade 6.

[48] The mother said I.B. is quieter than her brothers. She expressed concern that I.B. was withdrawing after the separation.

[49] Both parents expressed concern that I.B. had gained weight after the separation.

[50] I.B. is receiving counselling at the Willow Centre. Her therapist told Ms. Genesove that I.B. was not in "particularly good shape." The therapist described her as someone who did not open up easily and was fearful of saying anything about her mother or father.

[51] Ms. Genesove reported that I.B. presented as a "sad girl" who was having difficulties at school and in her interpersonal relationships.

*M.M.B.*

[52] The parties' youngest child, M.M.B., is 7 years old. He is in grade 2.

[53] M.M.B. is very bright. He does not have any academic difficulties. He is, however, experiencing behavioural problems at school.

[54] M.M.B.'s paediatrician reported to Ms. Genesove that there had been some behavioural issues at school. Unfortunately, it appears that M.M.B.'s behavioural difficulties have worsened since the time of Ms. Genesove's investigation.

[55] In June 2011, the school principal called the mother to pick up M.M.B. The principal indicated that M.M.B.'s behaviour was affecting him socially and there was a concern he would be stigmatized. He recommended a paediatric developmental assessment.

[56] On September 27, 2011, M.M.B.'s current teacher contacted the parents, indicating that she had concerns. She said that M.M.B.'s inappropriate behaviour had been escalating since the beginning of the school year. The teacher was concerned that M.M.B. was constantly getting into trouble and being singled out. It was affecting his ability to make and keep friends. He also had difficulty staying on task and seeing things through to completion.

[57] M.M.B.'s teacher instituted a behaviour tracking system. She entered into a contract with M.M.B. to address his listening and speaking behaviour and his "on-task" behaviour. The teacher and M.M.B. review his behaviour four times a day and if he does well, he receives a

reward at the end of the week. The teacher testified that M.M.B. is doing fairly well within these parameters, but his behaviour remains an ongoing concern.

[58] The family doctor and the school recommended that M.M.B. get an assessment from the ADHD clinic at the Hospital for Sick Children. However, the father has not provided his consent because he would prefer to get a private assessment. M.M.B. has not yet received an assessment.

### Custody/Decision-making

[59] The father seeks an order whereby the parents would jointly make decisions affecting their children's health, education and religion.

[60] He submits that the parents communicate well. There are weekly e-mail exchanges – with more frequent e-mails, if necessary – dealing with the children, the household and legal matters. While there have been some instances of non-communication or non-agreement, the father submits that it is more a case of “delayed responses” than no decisions. He expressed his opinion that no harm has resulted from the delays. He maintains that once the trial is over and the dust settles, he and the mother will be able to co-parent and make the necessary decisions in their children's best interests.

[61] The mother disagrees. Her position is that she should have the decision-making authority because she and the father are unable to make decisions jointly. The mother submits that the critical point is not who is at fault, but the fact that they are unable to reach decisions jointly.

[62] There were several examples of the parties' difficulties in arriving at joint decisions. The most significant examples are:

(i) The parties could not agree on the same care-giver. The father dismissed the care-giver who had been looking after the children at the time of the separation and hired someone else to look after the children during his weeks. The mother brought a motion to reinstate the care-giver, as a result of which the original care-giver was reinstated. However, after the term of the order expired, the father reduced the care-giver's hours. The care-giver resigned and the father hired his own care-giver for his weeks. At the time of the trial, the children continued to have different care-givers for the mother's and father's weeks.

(ii) The parties could not agree on who the emergency contacts should be at school. The mother disagreed with the father's inclusion of his parents and his care-giver as contacts. This issue was also dealt with on a motion. It was ordered that the mother could not select an emergency contact person for the children's school without the father's consent.

(iii) After the separation, the two older children, R.B. and I.B., received regular counselling at the Willow Centre. In early January 2011, the father advised the children's therapists that he was withdrawing his consent for any further



counselling appointments for the children beyond one final appointment because the mother had exhausted her private insurance coverage and he was not able to privately fund the services. The mother immediately responded that her insurance would allow funding for 2011 and that both she and the father received annual health care allowances through their employer. She expressed her opinion that immediate cessation of the children's treatment would be damaging to the children. The father, however, said it was not clear to him that the mother was prepared to commit to funding the counselling. As a result, the children stopped going to counselling until March 2011, when the father was satisfied that the mother had made a clear commitment.

(iv) M.M.B.'s paediatrician and the school special education committee recommended that M.M.B. go to the Hospital for Sick Children's ADHD Clinic for an assessment. The father did not provide his consent because the clinic has a 6-7 month waiting list and he believed a private assessment could take place sooner. His plan is to obtain a private assessment once the court settles the equalization issue and funds are available. At the time of the trial, no arrangements had been made for M.M.B. to be assessed either at the Clinic or by way of a private assessment.

(v) The father took M.M.B. for an appointment at the Willow Centre in April 2011 for counselling. The mother did not consent to ongoing counselling because the counsellor was unable to accommodate a weekday appointment. (The other two children's appointments were on Wednesdays.) The mother said there were activities she wanted to do with the three children on Saturdays. At some point at the beginning of August 2011, the mother gave her consent to the counselling. She explained that she had changed her position because M.M.B.'s need for counselling became more evident. M.M.B. subsequently started counselling at the Willow Centre on Saturdays.

[63] The OCL investigator, Ms. Genesove, recommends joint decision-making. She acknowledged that this was a high conflict situation. However, she believes that the parties will be able to jointly make decisions in the children's best interests once the court process is finished. When asked what she based her opinion on, she said the parents had said that joint custody was workable. Furthermore, the parents had a history of joint decision-making prior to the beginning of the conflict between them, that is, prior to around 2004. Ms. Genesove also noted that there was no history of calls to the police or CAS involvement, with the exception of the events in May 2010.

[64] In the mother's submission, Ms. Genesove's recommendation is flawed in that it is based on the belief that, over time, the conflict between the parties will subside and they will be able to make decisions. She noted that Ms. Genesove's assessment that the parties were able to agree in the past, prior to their conflict, was based on a period prior to 2004, when the mother was the primary care-giver and made most of the decisions.

[65] In *Kaplanis v. Kaplanis*, [2005] O.J. 275 (C.A.), the Court of Appeal considered the issue of joint custody. Weiler J.A. indicated, at para. 11, that “hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody.”

[66] In a more recent decision, *May-Iannizzi v. Iannizzi*, [2010] O.J. No. 3147 at para. 2, the Court of Appeal referred to *Kaplanis* and other cases, which indicate that “there must be an evidentiary basis for belief that joint custody will be feasible.”

[67] Fortunately, in the case at hand, the high conflict that existed at the time of separation appears to have subsided. There is no evidence that the children have been exposed to the parents screaming and arguing, as had been the case prior to the parties’ physical separation. It has been 1 ½ years since separation and there is a degree of calm and routine in the children’s lives.

[68] However, notwithstanding the return of a measure of calm and routine, the parents do not appear to have become any more adept at making joint decisions. They cannot even agree on when and whether they have an agreement. The mother said she was clear in her January 2011 e-mail that she had agreed to fund counselling for the older two children. However, it took two more months for the father to be satisfied that she had, indeed, committed to funding. The critical point is not whose interpretation is correct but the fact that the parties could not agree and the children needlessly missed out on counselling sessions.

[69] I do not agree with the father’s assessment that no harm has been done as a result of the lack of decisions or the delay in making decisions. While some areas of disagreement involved trivial matters, others directly affected the children’s well-being. The children would likely have benefitted in the aftermath of the separation from having the same care-giver during both parents’ weeks. R.B. and I.B. missed two or three months of counselling at a critical time. The start of M.M.B.’s counselling was delayed for several months. Nothing has been done to get an assessment for M.M.B, despite the fact that both parents agree an assessment is desirable and it was recommended by both his doctor and the school.

[70] There is no evidence of similar problems with respect to education issues. At the same time, no significant education-related decisions have had to be made – except with respect to the implementation of the school’s recommendations regarding M.M.B. In view of the nesting arrangement and the children remaining in the matrimonial home, the children’s continued attendance at the neighbourhood school was not an issue.

[71] However, there will be important decisions that will need to be made for the next school year. The parents will have separate households and will be living in different parts of the city. The father wants the children to continue in their current school until grade 8. The mother wants the children to go to schools in her new neighbourhood in the 2012/2013 academic year. I am not optimistic that the parties will be able to agree on this issue, given their current positions and the history of difficulty in making joint decisions. The likelihood that the choice of school will

inconvenience one parent more than the other will make joint decision-making even more difficult.

[72] The father submits that I should not reward the parent who has been uncooperative by granting custody to that parent. He contends that it is the mother who has been uncooperative.

[73] I disagree with this submission for two reasons. Firstly, I do not find that the mother has been more uncooperative than the father. Both parents bear responsibility for their inability to make joint decisions.

[74] Secondly, to characterize a decision on custody as a reward is, in my opinion, mistaken. The focus of the decision must be on the best interests of the children. While I appreciate that a parent may perceive such a decision as a “win” or a “loss,” that is not a basis for making the decision.

[75] I conclude that the parents are not able to co-parent effectively. They have not shown an ability to make decisions that affect their children’s welfare on a timely basis. I do not share Ms. Genevose’s confidence that they will be able to make such decisions once the dust settles on the litigation. While the high conflict that characterized the parties’ separation has subsided, I do not see any evidence that their ability to make joint decisions has improved.

[76] If the parents are unable to make decisions jointly, there are two options: a third party can make the decisions or one of the parents can.

[77] With respect to the third party option, it is in no one’s interests – neither the children’s nor the parents’ – for the parents to be returning to court when they cannot decide something. While mediation/arbitration or a parenting coordinator may be another option, both parties have expressed concerns about having limited resources to pursue such an option.

[78] The remaining option, therefore, is to grant decision-making to one parent. One approach is to provide one parent with full decision-making authority in all areas. Another approach is sometimes referred to as “parallel parenting”. In some cases, a parallel parenting order provides that each parent has the final decision-making authority with respect to a different area. In other cases, parallel parenting means that each parent has the right to make major decisions respecting the child when the child is with that parent.

[79] In *Ursic v. Ursic*, [2006] O.J. No. 2178 (C.A.), the Court of Appeal recognized that joint parenting under a parallel parenting regime may be appropriate where both parents play an active role in their children’s lives, but have difficulty coming to an agreement with respect to issues affecting the children.

[80] In *V.K. v. T.S.*, [2011] O.J. No. 4046 (S.C.), Chappel J. conducted a helpful review of the cases on parallel parenting. At para. 96, she set out the factors that a court may consider in deciding whether a parallel parenting regime is appropriate. Of those factors, the following apply to the circumstances of this case:

- (a) The strength of the parties' ties to the child, and the general level of involvement of each parent in the child's parenting and life.
- (b) The relative parenting abilities of each parent, and their capacity to make decisions that are in the child's best interests.
- (c) The extent to which each parent is able to place the needs of the child above their own needs and interests.

[81] In the case at hand, each parent has strong ties to the children and is actively involved in their lives, with the exception that R.B. is closer to the mother than to the father. Both parties are competent parents. Each is able to place the needs of the children above their own needs and interests when they are making decisions on their own; they are less able to do so when it involves making decisions jointly.

[82] As a starting point, the parent who has the children in his or her care should have the responsibility for making the day-to-day and emergency decisions. Each parent should keep the other parent fully informed of any decisions they have made or information they have received related to the children's health or education.

[83] With respect to longer-term decisions, the parents should consult and attempt to come to a timely agreement. If they are unable to come to such an agreement, one parent should have the ultimate responsibility for making the decision.

[84] Turning to decisions regarding health, I do not question either parent's ability to make such decisions. However, in the circumstances, a choice must be made. The evidence is that the mother has been more involved in health-related issues such as doctors' appointments even after her return to work.

[85] I also find that the mother has generally been more likely to identify problems that need addressing and to take action. During the course of the trial, the father tended to downplay the impact of the separation and the parties' difficulties in arriving at health-related decisions. His refusal to consent to M.M.B.'s assessment because of the long waiting list at the Hospital for Sick Children has unfortunately resulted in further delay. On the other hand, it was the mother who delayed in providing consent to M.M.B.'s counselling.

[86] In the circumstances, it makes sense that the mother would have the ultimate decision-making authority over health matters in the event the parties cannot agree on a timely basis.

[87] Turning to education, the evidence also shows that both parents are actively involved in the children's education and with the school. M.M.B.'s current teacher testified that she has had communications with both parents. His grade 1 teacher reported to Ms. Genesove that both parents wrote in his agenda and e-mailed her equally. I.B.'s teacher from last year reported that the mother had been in the classroom more, but the father was involved as well. R.B.'s teacher reported that he had met both parents briefly.

[88] At the same time, it appears from the evidence that the mother takes a more active role in the children's homework, particularly M.M.B.'s homework. The father testified that during his weeks, the homework is largely supervised by the care-giver and is mostly done by the time he returns home from work.

[89] The mother was also the parent who was more involved in the children's education prior to her return to work in 2008.

[90] An important factor in this case is the interrelationship between M.M.B.'s health and his school. It would be to his benefit that the parent who has ultimate decision-making in the area of health also be responsible for decision-making in the area of education.

[91] For these reasons, the mother will also have final decision-making authority in the area of education, should the parents be unable to agree. This is not meant to detract from the father's ongoing active involvement in the children's schooling. The children can only benefit from the active involvement of both parents in their education. Indeed, given the significant time the children will spend with each parent, that involvement is critical.

[92] There was no evidence with respect to religion and decision-making, other than references to attending church. To the extent that a decision needs to be made, it is appropriate that the father have final decision-making authority.

### Parenting Schedule

[93] The parties agree that the children benefit from spending a significant amount of time with both parents. They do not agree, however, on how that time should be allocated.

[94] The parties' parenting abilities are not in question. They are both actively involved in their children's lives and are able to meet their children's needs when their children are with them. The parties have not, however, shown an ability to parent in cooperation with each other.

### *The father's proposal*

[95] A copy of the father's proposal is attached as Appendix A.

[96] The father proposes an equal week-about arrangement. In Week 1, the children would be with the mother from Monday to Sunday, except on Thursday, when they would be with the father. Week 2 would be the reverse, that is, the children would be with the father every day from Monday to Sunday, except Thursday, when they would be with the mother.

[97] In the father's opinion, the children have adjusted well to the week-about schedule. While two separate residences will be a change, he believes the children will get used to it. He said the children have mentioned the mother's new home and they look on it as something that is exciting, not traumatic. He contends that the only potential challenge or inconvenience will be travel time, since the mother's home is located in another part of the city.

[98] The father said the parties are in regular communication on a weekly basis by e-mail – more often if there are emergencies – at which time they let each other know what happened with each of the children during their week and whether there is anything the other parent should know about.

[99] There was a suggestion during the trial that each child would benefit from one-on-one time with each parent. While the father thinks the idea of one-on-one time for each child with each parent is attractive, he is concerned that a “date night” on Thursdays, as proposed by the mother, would result in too long a period for the other children to go without seeing a parent. He does not agree that one-on-one time should be scheduled, but he is hopeful that he and the mother will be able to be flexible and agree on one-on-one time, perhaps on the weekends.

[100] The father’s plan is to purchase the mother’s interest in the matrimonial home and stay in that home. The children would continue in the same school. That school goes up to grade 8.

[101] If he is unable to purchase the mother’s interest in the home, the father hopes to purchase a home in the same neighbourhood with his portion of the proceeds of sale.

*The mother’s proposal*

[102] A copy of the mother’s proposal is attached as Appendix B.

[103] The mother proposes that the children’s primary residence be with her during the school week while still spending significant time with the father. She believes the children need consistency. In her submission, her proposal provides both the necessary consistency and a significant amount of time for the children with both parents.

[104] The mother presented three scenarios. Her preferred scenario provides that in Week 1, the children would be with her from Monday to Wednesday. Thursday nights would be “date night”, that is, the children would have an opportunity for one-on-one time with each parent on a rotating basis: one child would be with the father and two would remain with her. All three children would be with the father from Friday to Sunday.

[105] In Week 2, the three children would be with her from Monday to Wednesday; two children would be with the father on Thursday and one with her; all three children would be with the father on Friday; and the children would be with the mother on Saturday and Sunday.

[106] The mother indicated that she felt this schedule has several benefits: it gives the children a lot of time with each parent; it provides them with consistency during the school week, including the ability to participate in extracurricular activities on a consistent basis; and it ensures that the father will be included in the school community.

[107] The mother’s second scenario provides that in Week 1, the children are with her from Monday to Wednesday and with the father from Thursday to Sunday; and in Week 2, they are with her throughout the week, except for Thursday, when they are with the father.

[108] The third scenario is a variation of the first scenario: the first three weeks are all like Week 1, that is, there is a “date night” on Thursdays and all the children are with the father from Friday through Sunday; and in Week 4, the children are with the mother throughout the week, except for a “date night” on Thursdays.

[109] In all the scenarios, the mother’s proposal is that the pick-ups take place after school. The father’s drop-offs are at school on Monday morning, except in the second week of the first scenario, when the drop-off is Saturday morning.

[110] The mother intends to move into a home with her new partner in the Bathurst-St. Clair area of Toronto. It is a significant distance away from the matrimonial home in Scarborough, where the father hopes to continue to live.

[111] The mother agrees that the children should continue at their current school for the remainder of this school year. She then proposes that they change to a school in her new neighbourhood the following year. She has researched various schools and the availability of extracurricular activities in the neighbourhood. She said that she and her partner chose the house they did, in part, because there are many excellent opportunities for children in the area.

*Recommendations of the OCL investigator*

[112] The recommendations of the clinical investigator, Ms. Genesove, are similar to those of the father. She recommends that the children continue to reside with each parent for one week at a time, with the transition continuing to take place on Mondays during school. She also recommends that during each parent’s week, the children be with the other parent from Thursday after school until Friday after school.

[113] Ms. Genesove consulted with various professionals who have been involved with the parents and the children. None of them had any concerns about either party’s parenting.

[114] Ms. Genesove reported that both I.B. and M.M.B. are content with both parents. R.B., however, indicated that he wanted to spend the bulk of his time with the mother. Ms. Genesove expressed concern that there was a significant risk that if R.B. were given the power to make this decision and spent less time with his father, he might choose over time to sever the relationship entirely. She also felt that if R.B. were granted additional time with the mother, there was a risk that his siblings would feel rejected by the mother.

[115] In her testimony, Ms. Genesove clarified that her concerns with respect to R.B. only applied if there were a different parenting schedule for him than for the other two children. If all three children had the same schedule, she did not have these concerns.

[116] Ms. Genesove conducted two observational visits: one with the mother and the children on a week-night; and one with the father and the children on a weekend.

[117] The mother raised several concerns with Ms. Genesove's report and her methodology: she did not take M.M.B.'s special needs into consideration; she minimized the reports of physical discipline of R.B. by the father; her observational visit with the father and the children was on the weekend, that is, "fun time", while her observational visit with the mother and the children was on a school night; and Ms. Genesove noted the physical proximity between the father and the children, but made no note of the physical proximity between the mother and the children.

[118] While I appreciate the mother's concerns, a decision in this case does not, by and large, turn on the respective parenting abilities of the parties nor on their closeness with the children. The one exception is the relationship between R.B. and the father. It is not in dispute that that relationship has been a troubled one and that R.B. is closer to his mother and would prefer to spend more time with her.

[119] There have also been changes since Ms. Genesove conducted her investigation and wrote her report. In particular, M.M.B.'s behavioural difficulties have escalated.

[120] A further significant change is that the parents will be living in two separate households. Ms. Genesove's report does not address this situation. Her recommendations were made at a time when the children remained in the home and the parents moved in and out.

[121] In her testimony, Ms. Genesove indicated that her recommendations would be the same even if the nesting arrangement were no longer in place. In her opinion, two households would not have an impact. However, she stated that her week-about suggestion had been based on the nesting arrangement. If there were two separate households, it was her opinion that the split between the mother's time and the father's time could be allocated in different ways.

[122] Ms. Genesove also testified that she hoped that the parents would live close to each other so the children would be able to travel independently between the homes. If, however, the parents were living in two different neighbourhoods, school might be an issue. As it turns out, the parents will be living a considerable distance from one another.

#### *The children's wishes*

[123] I.B. and M.M.B. told Ms. Genesove that they are comfortable with equal time with both parents. Both have settled well into the routine of spending one week with each parent and both interact well with each parent.

[124] M.M.B. told Ms. Genesove that he is happy with both of his parents equally.

[125] I.B. told Ms. Genesove that although the week-about schedule was difficult at first, she was now used to it. She said she loved both her parents the same. She indicated that during her mother's weeks, the atmosphere was a little more cheery and relaxed.



[126] R.B.'s response to the week-about schedule was very different than that of his siblings. He has had a difficult time with the transitions to the weeks with his father. The father referred to a problem of frequent and lengthy phone calls between R.B. and the mother during his weeks. The father of one of R.B.'s friends testified that R.B. spent more time at his house on his father's weeks. He said R.B. frequently used the phone to call his mother.

[127] R.B. told Ms. Genesove that he wanted to spend 70% of the time with his mother and 30% with his father. R.B.'s therapist confirmed to Ms. Genovese that R.B. said he would be comfortable spending the majority of his time with his mother. However, the therapist also stated that there was no clinical basis to indicate that R.B. should spend more or less time with either parent, and while R.B. might be upset if the 50/50 arrangement continued, he would be able to tolerate it.

[128] There is no evidence that either parent is trying to deny the children's relationship with the other parent, with the exception of the father's *ex parte* motion.

#### *The status quo*

[129] The mother submits that the father should not be able to benefit from the *status quo*. She argues that the current nesting arrangement resulted from the father's ill-conceived *ex parte* motion. In her submission, the father obtained the *ex parte* order on the basis of a misleading affidavit. That order, which provided for sole custody for the father and supervised access for the mother, then led to the second order, which provided for a nesting arrangement.

[130] The mother contends that had the father not obtained the original *ex parte* order, the second order would not have been granted and the current 50/50 nesting arrangement would not be in place.

[131] I agree that the *ex parte* motion was not justified in the circumstances. Furthermore, there was misleading information provided to the court with respect to the danger the mother posed to the children.

[132] I do not know what the court would have ordered had the original motion been brought on notice to the mother. The one thing that is clear is that the parties' living situation at the time of the order was not sustainable for a long period of time. It was in everyone's interests, including the children's, that the parties not continue to live under the same roof.

[133] While the father should not gain an advantage from the *ex parte* motion, my overriding consideration must be the children's best interests.

#### *Concerns with the current schedule*

[134] The mother is concerned with the lack of consistency in the children's lives as a result of the week-about arrangement. She pointed to three areas in particular: school; rewards and discipline; and extra-curricular activities.

[135] The evidence is that both parents are in touch with their children's teachers. There was no evidence, however, that they are in touch with each other about the children's homework. The mother said that the lack of consistency has been a problem, particularly with respect to M.M.B.'s school work. The father did not consider it a problem. The school teachers did not report any problem to Ms. Genesove.

[136] The father said that during his weeks, the care-giver supervises most of the homework. The mother indicated that she is the one who supervises homework during her weeks.

[137] The mother expressed the concern that she and the father have different approaches to discipline and rewards. The mother has implemented a rewards system for M.M.B. similar to his teacher's behaviour tracking system: if M.M.B. has no problems for four days, he gets a coupon and with the coupon, he can get a toy. The mother reported that one week, M.M.B. did not get a coupon because he was only good for three days, but the father went ahead and got him the toy during his week.

[138] M.M.B.'s current teacher agreed that routine and consistency would be important for him. She added that she would say that would apply for most of her students.

[139] The father said his general approach to discipline is based on "consequences". With R.B. and I.B., the consequences may be no television or no computer. With M.M.B., he uses a "time out chair". He did not know if the mother uses a "time out chair" with M.M.B.

[140] The parents also have different approaches to allowances and money. The father testified that his system was based on need, that is, if the children need something specific, such as school supplies, he asks them if they want an allowance amount or they want him to go with them and buy it. According to the mother, R.B. had to earn money to get a cell phone, whereas the father bought a cell phone for I.B.

[141] Ms. Genesove testified that while consistency is desirable, children can do well without consistency between two households as long as each parent is internally consistent within his or her own household.

[142] I do not agree that this is the case for M.M.B. M.M.B. has particular challenges and needs at the moment, which cry out for a consistent approach by the parents. His teacher has gone to great lengths to implement a system in which he is rewarded for good behaviour. Ideally, the parents would each have systems at home to complement the teacher's efforts.

[143] However, no schedule will entirely solve this problem. The problem of inconsistency arises regardless of what the parenting schedule is and what days of the week each parent is with the child.

[144] The mother's final area of concern is the decrease in the children's participation in extracurricular activities. She said the children have gone from being very active children to being involved in a minimum of activities.

[145] There is no doubt that the children's extracurricular activities have decreased. Prior to separation, R.B. was involved in piano and advanced soccer. Both I.B. and M.M.B. went to karate. At the time of the trial, the only extracurricular activities were R.B.'s weekly piano lessons and I.B.'s Girl Guides.

[146] The father attributed the decrease in extracurricular activities to the stress of the litigation.

*Analysis – parenting schedule*

[147] The evidence is that each parent is an effective parent on his or her own, but they are not able to effectively co-parent. The parenting schedule should reflect the reality that the parents may well have different approaches to matters such as school work, behavioural issues and extracurricular activities.

[148] The father's proposal is attractive because it is straightforward, it gives the parents equal time with the children and the children are used to it.

[149] At the same time, there are factors that arguably favour the mother's proposed approach. If the children were to alternate weeks with the parents, they would likely have to travel a long distance to school every other week. If the children were primarily with one parent during the school week, the problem would be lessened, although it would not be eliminated.

[150] If the children were with each parent on the same night each week, it would also likely facilitate the children's participation in extracurricular activities. The parties' inability to make joint decisions has likely been a factor in the decrease in their participation.

[151] Finally, if the children were primarily with the mother during the school week, there would be more consistency in the approach to homework. There is no indication that consistency in homework is an issue for the older two children, but there is evidence that it may be an issue for M.M.B.

[152] While R.B.'s wishes are different than those of I.B. and M.M.B., it would not, in my opinion, be in his best interests – or the interests of the other two children – for the children to have different schedules.

[153] The perfect parenting schedule would accomplish the following:

- (i) Maximize the children's time with each parent;
- (ii) Maximize each parent's involvement in all aspects of the children's lives, including school, extracurricular activities and "fun" time;
- (iii) Minimize the period of time during which the children do not see a parent;

- (iv) Minimize transitions;
- (v) Minimize the transportation time to and from school;
- (vi) Facilitate the children's participation in extracurricular activities;
- (vii) Provide consistency and stability during the school week;
- (viii) Take the children's wishes into consideration; and
- (ix) Be simple and easy for everyone to understand and remember.

[154] Unfortunately, there is no perfect schedule and it is not possible to perfectly accomplish all these objectives.

[155] On balance, it is my opinion that the schedule that best meets these objectives and the needs and conditions of these children provides for the following: three school days with the mother (Monday to Wednesday); two school days with the father (Thursday and Friday); and alternating weekends (Saturday and Sunday) with each parent.

[156] A copy of the schedule is attached as Appendix C. It is similar to the mother's second scenario, except that every Friday night will be with the father, instead of alternate Friday nights.

[157] This schedule meets the following objectives: it provides significant time for the children with each parent; the children's participation in extracurricular activities is facilitated because they are with the same parent on the same day during the school week; it provides some consistency during the school week; each parent has time with the children during the school week and the weekends; and it is relatively easy to understand and remember. It also provides R.B. with a bit more time with his mother, while not significantly diminishing the time all the children spend with the father.

[158] What the schedule does not do is provide the father with exactly 50% of the time, which is what he is seeking. For the reasons set out above, it is my opinion that the best interests of the children are best met through a schedule that provides something less than exact equality but nonetheless provides significant time with and the active involvement of both parents.

[159] While the "date night" idea proposed by the mother is attractive, I am concerned that it complicates the schedule and works against the need for stability and consistency on school nights. Furthermore, given the extent of the parents' time with the children and the support systems available to each of them, they should be able to arrange one-on-one time while they are with the children. I have therefore not incorporated one-on-one time into the schedule.

[160] The parents agree that holidays and vacations should be divided equally between them.

Counselling and other resources

[161] The parents agree that, subject to financing, they should continue in counselling as should the children.

[162] The parties also agree to use the services of a parenting coordinator or other counsellor to assist them with issues involving the children, should finances allow. It would be of great benefit to the children if the parties did so.

[163] The father has investigated the possibility of using the services of Families in Transition for assistance once the nesting arrangement has ended and the children are living with the parents in two different households. He is hopeful that their services will be available and will be affordable. I would strongly encourage the parties to use these services or other available services.

#### ADHD referral

[164] The mother asks that I order that M.M.B. be referred for an assessment at the ADHD Clinic. The father disagrees. He proposes that the parties explore other options because a private assessment might happen more quickly.

[165] Given the history of this case, the recommendations of both the school and M.M.B.'s doctor and the length of time that has passed, I am concerned that the father's proposal will lead to more delay, not less. It is important that action be taken now, not at a later date.

[166] In view of my determination that the mother will have the final say on health-related matters, it should not be necessary to dispense with the father's consent. However, out of an abundance of caution and to ensure that there is no further delay, I will order that if the father does not consent to the referral to the ADHD Clinic, his consent should be dispensed with.

#### Child Support

[167] The issue of child support was not argued because, at the time of the trial, the parents' incomes were similar and the parenting schedule that I was going to order was unknown.

[168] The children will be with the father more than 40% of the time. As such, it is a shared custody situation under s. 9 of the *Child Support Guidelines*.

[169] The father indicated that his current contract was to expire at the end of December 2011. He did not know what he would be doing after December 31.

[170] In these circumstances, I make no order with respect to child support at this time. However, if either party wishes to seek child support, he or she may do so.

## **B. Property Issues**

[171] While the mother's position is that the parties separated on November 24, 2009, she is prepared to accept the father's separation date of May 23, 2010 for the purpose of the determination of equalization.

### Loans

[172] The primary equalization issue in dispute relates to the father's claim that he has various debts to his father, P. B. Unfortunately, P.B. passed away last summer. Any debts, therefore, are debts to the estate.

[173] The mother's position is that these amounts are not debts but were, instead, gifts from the father's parents.

[174] As a general proposition, where a parent gives money to a child, the advance is presumed to be a gift absent evidence to the contrary. The onus is therefore on the father to establish that the funds given to him by his father were, indeed, loans, not gifts.

[175] The mother points out that the father has never repaid all or any part of the alleged loans. Furthermore, repayment has never been asked for or demanded.

[176] The father points to the evidence that the loans were all entered into pre-separation, in support of his assertion that they were not entered into for the purpose of affecting the equalization of property.

### *Loan for the home*

[177] The father claims a debt of \$75,000 related to the matrimonial home.

[178] The father's parents transferred the home to the parties in April 1998. The parties were not married at the time. The consideration for the transfer was \$2.00. The parties took title as joint tenants and assumed the mortgage of \$152,000.

[179] The parties married on July 4, 1998.

[180] The father testified that a few months later, he was concerned that the house was worth more than the \$152,000 mortgage. He felt it was not fair that his parents just gave them the house. The father discussed his concerns with his father, P.B.

[181] According to the father, he and P.B. then agreed to enter into a "floating demand" loan agreement. The understanding was that the father would repay the money when he was able to repay it and when his parents were older and needed it. The father described the agreement as recognition of the favour P.B. had done for him and the mother.

[182] The father produced in evidence a document, dated September 19, 1998, signed by him and P.B. The agreement indicates that: “FOR VALUE RECEIVED TOWARDS [the matrimonial home], WE PROMISE TO PAY [P.B.], or order the sum of \$75,000...with interest thereon at the rate of 7% per annum, calculated semi annually...payable 15 days after demand...”

[183] Unfortunately, P.B. passed away last summer. He never demanded repayment from his son and the amount has never been repaid in whole or in part.

[184] The father’s mother, D.B., testified. She said she understood the agreement was that her son would repay the loans when he was able to do so. Her understanding, however, was based on what her husband had told her and is therefore hearsay.

[185] D.B. indicated that she had provided loans to her other children and small amounts had been repaid. She also said she had assisted some of her other children in getting a home.

[186] There are, in my opinion, two difficulties with classifying this agreement as a loan for purposes of equalization. The first relates to the likelihood of repayment. The second relates to the timing of the agreement.

[187] In the case of *Locke v. Locke*, [2000] B.C.J. No. 1850 (B.C.S.C.) at para.20, Wilson J. reviewed a number of cases on the question of whether an advance made by parents was a gift or a loan and indicated that the factors considered by the courts have included:

1. whether there were any contemporaneous documents evidencing a loan;
2. whether the manner for repayment is specified;
3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties; and
6. whether there was any expectation, or likelihood of repayment.

[188] The possibility of repayment was considered in *LeVan v. LeVan*, [2006] O.J. No. 3584 (S.C.); appeal on other grounds dismissed [2008] O.J. No. 1905 (C.A.). Citing the cases of *Poole v. Poole* (2001), 16 R.F.L. (5<sup>th</sup>) 397 (Ont. S.C.) at para. 41 and *Cade v. Rotstein*, [2002] CarswellOnt 3871 (S.C.) at para. 61, Backhouse J. indicated that the value of a loan can be discounted based on the likelihood that the lender will not insist on payment. In determining whether and how much a loan should be discounted, courts have considered various factors including:

- (a) The lender does not demand repayment.
- (b) The borrower does not intend to repay the loan.
- (c) There were no demands for repayment until after separation.
- (d) The loan would not have been repaid if the parties had not separated.
- (e) The lender does not need the money.

[189] In *LeVan v. LeVan*, Backhouse J. concluded that it was highly unlikely that the husband would have to repay the amount to his mother. She discounted the loan to zero. In *Poole v. Poole*, the loan was discounted to 10% of its face value and in *Cade v. Rotstein*, the debts were discounted to 5% of their face value.

[190] The evidence from both the father and his mother, D.B., is that the father would repay the money when he was able to do so, after he had paid off his interest-bearing debts and when his parents needed it. D.B. did not indicate that she needed the money. On the contrary, she testified that she was willing to provide further assistance to her son to help him purchase the mother's interest in the home.

[191] In the circumstances, it is my opinion that there is little likelihood that this money will ever be repaid. P.B. has passed away, D.B. is elderly and D.B. agreed that the father would not be expected to pay anything until he had paid off his other debts. By his own admission, the father has debts amounting to about \$125,000. The father hopes to purchase the mother's interest in the matrimonial home which will only increase his debts and his financial reliance on his mother.

[192] Another difficulty is that the loan agreement was entered into several months after the transfer of the home. In *Jones v. Jones*, [2001] O.J. 3324 (C.A.), the Court of Appeal considered whether the father intended to make a gift of property to his daughter only or to both the daughter and her husband. The court indicated that the court's task was to determine the intention of the donor at the time the gift was made.

[193] The evidence in the case at hand is that at the time the father's parents transferred the property to the mother and the father, it was intended as a gift. It was only several months later, that the father and P.B. decided to turn it into a loan because the father wanted to repay the favour.

[194] I conclude, therefore, that the father has not rebutted the presumption of a gift. Had the father established that it was, indeed, a loan, I would have discounted the loan to zero given the unlikelihood that it will ever be repaid.

*Promissory notes*



[195] The father presented in evidence two promissory notes signed by him, as the borrower, and his father, P.B., as the lender.

[196] The first promissory note indicates that the father promises to pay \$4,800 plus 4.5% interest to P.B. on demand, for value received. It is dated July 18, 2009. The father testified that his father loaned him \$4,800 to buy a second hand car. He presented in evidence a bill of sale for a car in that amount.

[197] The second promissory note, dated May 16, 2010, was for \$1,280, with 4.5% interest. According to the father's Net Family Property Statement, dated October 7, 2011, this loan was for car repair. This note was signed after the mother had advised the father that the marriage was over, but while they continued to live in the same house.

[198] A family friend testified and identified her signature as the witness on both promissory notes.

[199] For the reasons set out above, I conclude that it is unlikely the father will ever repay the loans. I therefore discount these debts to zero.

### *Cheques*

[200] The father presented copies of five cheques signed by P.B. in the following amounts: \$15,000 (March 22, 2000); \$3,700 (May 19, 2004); \$2,000 (November 20, 2004); \$3,000 (August 18, 2005); and \$5,600 (January 10, 2006). All the cheques but the last are made out to the father. The last one is to the parties' law partnership.

[201] The father testified that cheques such as these typically arose to help him deal with a crisis such as a car repair or an overdraft. He said the March 22, 2000 cheque was to help him pay his taxes. He was not sure what the May 2004 cheque was for but thought it might have been for car repair. He said the cheque to the parties' law partnership was either an emergency GST payment or was to deal with an overdraft.

[202] Although the father claims these amounts as debts in his Net Family Property Statement, he did not testify as to any agreement with respect to their repayment. There was no evidence of any promissory notes or loan agreements.

[203] The father's mother, D.B., testified that she was not involved with these transactions; her husband dealt directly with their son. She understood that her husband had loaned money to their son but she did not know the details except that their son would repay them when he could. Again, the mother's understanding was based on what P.B. had told her.

[204] The father has never repaid the money. Payment has never been requested or demanded.

[205] In the case of the last cheque, that is, the one to the parties' law partnership, if it is a debt, it is a joint debt of both the parties.

[206] In my opinion, the evidence is insufficient to establish that any of the cheques were loans. As stated by Harvey J. in *Wiens v. Wiens* (1991), 31 R.F.L. (3d) 265 at 271 (B.C.S.C.) and cited by Pitt J. in *Seiffert v. Bryce*, [2001] O.J. No. 969 (S.C.) at para. 12:

In the absence of clear evidence, like a promissory note specifying the amount or any other secured document showing to the court that the advancement is a loan, the court must assume that the money advanced is a gift.

[207] There is no such clear evidence here.

[208] I conclude, therefore, that the father has not established that the funds advanced by way of these five cheques were debts on the valuation date. Had I concluded otherwise, I would have discounted their value to zero given the unlikelihood of repayment.

#### *Jewellery*

[209] In his Net Family Property Statement, the father claims that the mother had jewellery worth \$15,000 on the date of marriage and jewellery worth \$22,500 on the valuation date.

[210] The mother's evidence is that any items of jewellery she had that were worth more than \$200.00 were either gifts from the father, a former boyfriend or her mother, or an inheritance from her grandmother. She testified that she received most of the jewellery prior to marriage. She introduced appraisals into evidence which place a total value on various items of jewellery at just under \$23,000. The appraisals are from August 1997, that is, prior to the parties' marriage.

[211] The father agreed that the diamond engagement ring and a watch were gifts but he did not agree that the other items were gifts. He did not, however, present any evidence with respect to any other items of jewellery. His submission was that it would be hard to believe that the mother did not purchase any jewellery during the marriage.

[212] Given the mother's detailed account of the various items of jewellery and the appraisals pre-dating the marriage, it is my opinion that the mother's position is more compelling. I find that the various jewellery items were either gifts or an inheritance. Furthermore, most of the items were received prior to the parties' marriage.

#### *Art*

[213] The father also claims that the mother has an art collection worth \$4,050. The mother testified that the father had bought her a piece of art as a Christmas present and that the purchase price was \$3,500.

[214] There was no other evidence with respect to this piece of art or additional pieces of art. I am therefore prepared to accept the mother's position that her art was a gift and should be excluded.

*Other property in dispute*

[215] The father claims a debt of \$1,394.20 related to a Staples credit card. It is in collections at the current time. The Staples' debt is in the name of the parties' law practice. I therefore conclude that this is a joint debt.

[216] The father also claims a debt of \$332.15 to Allergy Canada for medication. A payment reminder related to this debt is dated March 15, 2010, that is, about two months prior to separation. In the absence of any evidence to the contrary, I accept the father's position that this is a debt which was outstanding at the time of separation.

[217] The only other disputed items relate to the father's claims of property at the date of marriage: \$500 for a print; \$1,500 for camera equipment; and \$1,500 for a car. Although the father did not provide any documentation in support of these claims, I accept that it could be difficult to provide proof of the value of items he owned in 1998. In the absence of any evidence to the contrary, I accept the father's claims with respect to these items.

[218] The parties indicated that they had agreed on the amount of taxes the father owed for the 2009 taxation year. In closing argument, they presented a work sheet with two different amounts: \$16,905.00, presented as the father's position; and \$16,783.57, presented as the mother's position. I do not know which figure the parties agreed to.

*Equalization payment*

[219] I would request the parties to calculate the equalization in accordance with my determinations, above, and their prior agreement with respect to the taxes owed. If they are unable to agree on the calculation, I would ask them to make an appointment to see me.

**C. The Matrimonial Home**

[220] The matrimonial home is jointly owned by the parties. The father wants to purchase the mother's half-interest.

[221] An appraisal indicates that the value of the home was \$457,000 as of May 23, 2010. The mortgage balance was \$216,294.17 as of November 1, 2011. The current mortgage payments are \$730.25, paid semi-monthly.

[222] The father wishes to remain in the home. He feels that it is important that the children have something familiar as they change from a nesting regime to two separate households.

[223] The father does not have a current proposal as to how he will purchase the mother's interest. He said he has had preliminary discussions with the credit union about remortgaging the property.

[224] In cross-examination, the father agreed that he has personal debts of about \$37,000 plus his portion of the joint debts, amounting to about \$125,000. His hope is to pay off his debts with the refinancing.

[225] The father's mother, D.B., testified that she was willing to help her son purchase the mother's interest. D.B. owns a home and two cottage properties. She acknowledged that she did not know what amount of financial assistance would be required but she would help out to the extent she was able.

[226] The father requests time to arrange financing. If he is unable to purchase the mother's interest in the home, he asks that the home not be sold until the end of the school year.

[227] The mother submits that the father has had since June 2010 to make arrangements for financing but has done nothing about it. Although the father's mother said she would help, she had no idea about the amount of money involved. Furthermore, the mother questions the father's ability to refinance the mortgage, maintain the costs of the home on his own (these costs are currently being shared by the parties) and deal with his debts.

[228] Notwithstanding the mother's concerns, she is prepared to give the father 30 days within which to purchase her interest, failing which the home should be listed for sale.

[229] The mother is unwilling to consent to delaying the sale until the end of the school year because she needs her share of the equity to pay her own expenses. She does not agree that the children would be adversely affected because the children will continue in the same school until the end of the school year regardless.

[230] The parties agree that the mother will contribute her share of the mortgage and property tax payments until the disposition of the home but the father will pay other home-related costs such as utilities once the nesting arrangement is no longer in place and the mother is living elsewhere.

[231] In the circumstances, it is appropriate that the father be given 45 days within which to finalize an agreement with the mother to purchase her interest in the matrimonial home, failing which the home will be listed for sale.

[232] Given the children's continued attendance at their current school until the end of the school year, I do not think it necessary to delay the sale until the end of the school year.

Furthermore, the timing is such that any sale may well not close until after the end of the school year, in any case.

[233] If the parties cannot agree on the terms and conditions of the sale, it may be dealt with on a motion.

[234] The parties will divide the proceeds of sale equally, after the payment of any mortgages or charges on the property and any disposition costs.

## **D. Conclusion**

### General

[235] The parties are granted a divorce, to take effect in thirty-one days.

[236] The parties and the children are to be identified by initials only.

### Parenting Issues

#### *Decision-making*

[237] The mother and father will have joint custody of the children. The parent who has the children in his or her care will have the responsibility for making day-to-day decisions and dealing with any emergency.

[238] With respect to decisions other than emergencies and day-to-day decisions, the parents should consult and attempt to come to a timely agreement. If they are unable to come to such an agreement, the mother will make the final decision if it affects health or education and the father will make the final decision if it affects religion.

[239] The mother will advise the father of the children's medical appointments and he may attend them, if he so wishes.

[240] Each parent will keep the other parent fully informed of any decisions they have made or information they have received related to the children's health or education.

[241] The parties are each entitled to obtain directly from any teacher, school, health practitioner, counsellor or other person, hospital, company, institution or agency information and documents relating to the children.

[242] The children will continue at their current school until the end of the 2011/2012 school year.

[243] If the father does not consent to M.M.B.'s referral to the ADHD Clinic at the Hospital for Sick Children, his consent is dispensed with.

*Parenting schedule*

[244] The parenting schedule will take effect on the Monday following the March 2012 school break.

[245] There will be a two-week parenting schedule.

[246] In Week 1, the children will be with the mother from Monday after school until the beginning of school on Thursday morning. The children will be with the father from Thursday afternoon after school until the beginning of school on Monday morning.

[247] In Week 2, the children will be with the mother from Monday after school until the beginning of school on Thursday morning. The children will be with the father from Thursday afternoon after school until 10:00 a.m. on Saturday morning. The children will be with the mother from 10:00 a.m. on Saturday morning until the beginning of school on Monday morning.

[248] Each parent is entitled to attend all public events and school activities involving the children, even when the child is in the care of the other parent.

*Holidays and vacations*

[249] In even-numbered years, the children will be with the father on December 24 from 1 p.m. until December 25 at 10 a.m. and with the mother from December 25 at 10 a.m. until December 26 at 10 a.m. In odd-numbered years, the children will be with the father from 1 p.m. until 10 p.m. on December 24 and with the mother from December 24 at 10 p.m. until December 26 at 10 a.m.

[250] The children will celebrate the Easter holiday with the father in even-numbered years and with the mother in odd-numbered years. The Easter holiday will begin on Thursday pick-up after school and go until Tuesday morning drop-off at school.

[251] The children will celebrate the Thanksgiving holiday with the mother in even-numbered years and with the father in odd-numbered years. The Thanksgiving holiday will begin on Friday pick-up after school and go until Tuesday morning drop-off at school.

[252] The children will spend March break according to the regular parenting scheduling unless either parent wants to travel with the children. If either parent wants to travel with the children, that parent will give the other parent 90 days' notice. The consent of the other parent is not to be unreasonably withheld. If the children are with one parent for the entire March break in one year, the other parent will have the priority in the following year.

[253] Each parent will have the children for two consecutive weeks during the summer vacation months. The father will have first choice of the two weeks in even-numbered years and the mother will have first choice of the two weeks in odd-numbered years. The parent with first

choice will advise the other parent of that choice by April 1 in that year; the other parent will advise the other parent of his or her choice of two other weeks by May 1 in that year.

[254] The children will be with the mother on Mother's Day and with the father on Father's Day from 10 a.m. on the Sunday until the drop-off at school on Monday.

[255] The children will celebrate Halloween with the father in even-numbered years and with the mother in odd-numbered years. The parent who has the children for Halloween will be responsible for arranging the costumes.

[256] The children will spend Professional Development days and Family Day according to the regular parenting schedule. However, if the parent is unable to spend the day with the children on that day, the other parent will be given the opportunity to spend the day with them, if he or she so chooses.

[257] Any other long weekend that is not mentioned above will be spent with the parent who has the children on that weekend.

[258] The children will spend their birthdays according to the regular parenting schedule.

[259] In the case of the parents' birthdays, the children will spend time with the parent celebrating the birthday. If it is a school night and it is not that parent's regular time, the children will be with the parent from after school pick-up until the next morning drop-off. If it is a weekend and it is not the parent's regular time, the children will be with the parent from 4 p.m. on the birthday until the next morning at 10:00 a.m.

#### *Other parenting issues*

[260] When the children are with one parent, they may contact the other parent daily for a reasonable amount of time.

[261] The parties will communicate with each other concerning the children by e-mail.

[262] Neither parent will disparage the other parent in front of the children.

[263] Neither parent will remove any of the children from the province of Ontario without the written permission of the other, such permission not to be unreasonably withheld. The parent will provide complete travel details to the other parent, including transportation arrangements, information as to where they will be staying and a phone number at which the children can be reached.

[264] The children will continue in counselling, if finances allow.

[265] The parties will use the services of a parenting coordinator or other services to assist them with issues concerning the children, if finances allow.

### Child Support

[266] No order is made for child support at this time. This is without prejudice to either party seeking child support on the basis of shared custody.

### Equalization of Property

[267] The parties have agreed on the valuation of the majority of items. With respect to the items they do not agree on:

- (i) the funds from P.B. to the father are not accepted as loans or are discounted to zero;
- (ii) the mother's jewellery qualifies either as gifts or inheritance and is therefore not subject to equalization;
- (iii) the mother's art qualifies as a gift;
- (iv) the debt of \$1,394.20 related to a Staples credit card is a joint debt;
- (v) the debt of \$332.15 to Allergy Canada is accepted as a debt of the father's;
- (vi) the father's claim that he had a print, camera equipment and a car worth a total of \$3,500 at the date of marriage is accepted.

[268] The parties indicated that they had agreed on the amount of the father's income tax debt but I do not know the amount of that debt.

[269] I would ask the parties to calculate the equalization payment based on the above determinations. If they are unable to agree on the result, I would ask them to arrange to see me.

### Matrimonial Home

[270] The father will have 45 days from the date of the release of this decision, within which to finalize an agreement with the mother to purchase her interest in the matrimonial home. Failing an agreement, the home will be listed for sale as soon as possible thereafter. If the parties cannot agree on the terms and conditions of the sale, it may be dealt with on a motion.

[271] Once the mother establishes her own household for herself and the children, the father will assume the ongoing costs to maintain the matrimonial home, with the exception of the mortgage and property tax costs, which will be shared equally by the parties up to the date of disposition.

[272] The parties will divide the proceeds of sale of the home equally, after the payment of any mortgages or charges on the property and any disposition costs.

### Costs



[273] I would encourage the parties to resolve the issue of costs. If they are unable to do so, they may provide written submissions. The father's submissions should be provided within 14 days of the release of this decision. The mother's submissions should be provided within 14 days thereafter. The father will have a further 14 days within which to respond.

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Herman J.

**Released:** February 17, 2012

**APPENDIX A**

**Father's Proposed Schedule**

	<b>Monday</b>	<b>Tuesday</b>	<b>Wednesday</b>	<b>Thursday</b>	<b>Friday</b>	<b>Saturday</b>	<b>Sunday</b>
<b>Week 1</b>	Mother	Mother	Mother	Father	Mother	Mother	Mother
<b>Week 2</b>	Father	Father	Father	Mother	Father	Father	Father

**APPENDIX B****Mother's Proposed Schedules**

#1	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
<b>Week 1</b>	Mother	Mother	Mother	1 child with Father; 2 children with mother	Father	Father	Father
<b>Week 2</b>	Mother	Mother	Mother	2 children with Father; 1 child with Mother	Father	Mother	Mother

#2	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
<b>Week 1</b>	Mother	Mother	Mother	Father	Father	Father	Father
<b>Week 2</b>	Mother	Mother	Mother	Father	Mother	Mother	Mother

#3	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
<b>Week 1</b>	Mother	Mother	Mother	1 child with father; 2 children with Mother	Father	Father	Father
<b>Week 2</b>	Mother	Mother	Mother	2 children with Father; 1 child with Mother	Father	Father	Father
<b>Week 3</b>	Mother	Mother	Mother	1 child with Father; 2 children with Mother	Father	Father	Father
<b>Week 4</b>	Mother	Mother	Mother	2 children with Father; 1 child with Mother	Mother	Mother	Mother

**APPENDIX C**

	<b>Monday</b>	<b>Tuesday</b>	<b>Wednesday</b>	<b>Thursday</b>	<b>Friday</b>	<b>Saturday</b>	<b>Sunday</b>
<b>Week 1</b>	Mother	Mother	Mother	Father	Father	Father	Father
<b>Week 2</b>	Mother	Mother	Mother	Father	Father	Mother	Mother

**CITATION:** M.B. v. D.T., 2012 ONSC 840  
**COURT FILE NO.:** FS-10-359625-00  
**DATE:** 2012/02/17

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

M.B.

Applicant

**- and -**

D.T.

Respondent

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**REASONS FOR JUDGMENT**

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Herman J.

**Released:** February 17, 2012