NOVA SCOTIA COURT OF APPEAL
Citation: ***Doncaster v. Field***, 2014 NSCA 39

Date: 20140415
Docket: CA 413485
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judges:	MacDonald, C.J.N.S., Oland and Farrar, JJ.A.
Appeal Heard:	November 13, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $3,500, per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Farrar, J.A. concurring
Counsel:	Ralph I. Doncaster, Appellant in Person
	Janet M. Stevenson, for the Respondent

Reasons for judgment:

[1] A judge responsible for determining the custody and access of children must weigh multiple, complex factors and apply the relevant law. Forbidding a parent any access whatsoever is rare, but in certain circumstances this is what the best interests of the children demands.

[2] In this appeal, a father denied access says that the judge erred in making this Order and in awarding costs against him. Having carefully considered her decisions, the record and the submissions of both parents, I would dismiss the appeal regarding access and costs.

Background

[3] The parties are the parents of four children. Their marital separation led to a series of upsetting events and prolonged and acrimonious litigation. This appeal is from the Order of Justice Cindy Bourgeois pursuant to her decision (2013 NSSC 85) regarding interim custody and access of the children and her costs decision (2013 NSSC 152). But in order to understand the issues on appeal and to place the matter in context, it is necessary to start earlier.

[4] The appellant did not work outside the home. In early 2011, the parties separated. For the remainder of the year, they shared custody of their children on alternating weeks.

[5] Very early on New Year's Day of 2012, Mr. Doncaster punched his son, Max, four times in the shoulder. This triggered a cascade of events over the next three months. On January 2, 2012, Ms. Field contacted the police; the appellant was arrested, charged with assault, and released on an undertaking which prohibited any communication with his family, or going to their home or certain schools.

[6] The next day Ms. Field applied for sole custody with no access for the father. During January 2012, the undertaking pursuant to the assault charge was varied so that the appellant was permitted access to his three daughters.

[7] On January 20, 2012, Ms. Field, concerned for her safety and that of her children, successfully applied for an emergency protection order pursuant to the

Domestic Violence Intervention Act, S.N.S., 2001, c. 29. Justice Kevin Coady terminated the order on review a week later.

[8] On January 30, 2012, Judge Tim Gabriel of the Provincial Court found the appellant not guilty of assaulting his son. That same day, because of alleged actions by him in regard to the family, near the children's school and otherwise which made her afraid of him, the respondent applied for a peace bond pursuant to s. 810 of the *Criminal Code*.

[9] Family Court Judge Corrine Sparks heard Ms. Field's application for sole custody on February 1, 2012. She decided that the parties would have interim joint custody of their children and Mr. Doncaster reasonable unsupervised access, including twice a week after school and from morning to suppertime every second Saturday and Sunday. Her Order stipulated that the appellant "shall not have overnight access" until the matter returns to court and that, while with either parent, the children were to be able to communicate with the other parent.

[10] In early February, the Chignecto Central Regional School Board issued the appellant a Notice pursuant of the *Protection of Property Act*, R.S.N.S., 1989, c. 363, to refrain from attending the school site. Disputes as to after-school pick up and access had led to the appellant arguing with school staff and causing disruptions. He later contacted the media claiming interference by the school with his access rights.

[11] After going to Ms. Field's home in the very early hours of February 13, 2012, Mr. Doncaster was charged with trespass. On Saturday, February 16, 2012, Mr. Doncaster had his daughters Grace and Kate with him. He was to return them by 6:00 p.m. He did not. The girls stayed with him overnight, and the next weekend, Ms. Field denied him access. She denied access pursuant to Judge Sparks' Order thereafter.

[12] Matters escalated further. The appellant was charged with criminal harassment of the respondent's friend, Tracy Lawlor. He was charged with breaches of his undertaking to keep the peace and be of good behaviour and not to have contact with the Lawlors. He faced two charges of mischief for unlawful interference with the use and enjoyment of the school, and after continuing to contact the school, was arrested.

[13] This was the tumultuous and emotional situation when Scanlan, J. of the Nova Scotia Supreme Court (as he then was) heard the appellant's motion seeking

interim joint custody and shared custody on March 5, 2012. In the decision under appeal, Justice Bourgeois stated at ¶ 13 that she was bound by the factual findings reached on March 5, 2012 and, if not, from the evidence before her, she agreed entirely with them. As a result, I will now describe that proceeding and the unreported decision of Justice Scanlan in some detail.

[14] The judge heard further details of the New Year's Eve incident with Max. He learned of the appellant's self-diagnosis and self-medication before his formal diagnosis of ADHD, the litany of criminal charges, and how the school had changed their dismissal and entrance times because the parents and teachers were afraid of the appellant showing up. In his affidavit, RCMP Sgt. Craig Burnett deposed that since early 2012, the RCMP had had to investigate 30 matters involving the appellant, in all but two of which he was a suspect or charged person, and there were numerous current criminal charges against him including mischief, trespasses at night, criminal harassment and breaches of court orders. His affidavit read in part:

> 36. As a result of the several investigations regarding Mr. Doncaster, the RCMP have assessed Mr. Doncaster's domestic situation and have concluded that it is one of "high risk for lethality".
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> 37. The factors taken into account in making this assessment are Mr. Doncaster's unpredictable nature, the numerous, escalating criminal behaviour exhibited by him and his overt and continual lack of respect for the judicial system.

[15] In his testimony, among other things, the appellant claimed that on February 16, 2012, his daughters had asked to stay overnight with him. He denied isolating or locking up his children for hours as a form of discipline, and stated that in the fall of 2011, his son had mentioned suicide because he felt sad and mad. He acknowledged that his anger management impulse control issues were "[c]ertainly related" to his ADHD, and confirmed that he was not then enrolled in any anger management program.

[16] Ms. Fields gave evidence that, prior to the New Year's Eve incident with Max which she described as a "turning point", there had been no complaints to the police about the appellant since he had slapped her five years earlier. She confirmed that an incident where he had pushed Kate was "a couple of years ago". She also described how, several times, the appellant had put six-year-old Kate outside on the open back deck in the dark, when the child got out of bed during the night and he didn't think she should have.

[17] After hearing this evidence of a family in crisis, the appellant's health issues and his behaviours, his treatment of his children, the criminal proceedings against him and the submissions of counsel for the parties, the judge gave an oral decision. He spoke of these children having been caught in a "somewhat epic battle" that had gone on for a long time before Ms. Field commenced custody proceedings, how the appellant putting a child outside in the dark spoke "volumes as to the complete lack of judgment, insight, and understanding", how he whacked Max several times in the arm because he thought it was educational, his adverse effect on the school's routine, his pounding on the respondent's door at 1:00 a.m. and his unilateral decision to keep the girls overnight. He continued:

> All of these things bespeak to me terribly poor judgment at very best. And I'm not sure that your self diagnosis was right in terms of your ADD or ADHD because I am very, very concerned that you have some problems that are psychological or psychiatric in nature to the extent that I am satisfied that this court should and must be concerned about each and every bit of access that you have to these children until such time as this court is able to have a full understanding as to what's going on with you. … I'm not satisfied you should have any access, whatsoever, supervised or otherwise until this court has a better understanding of the dynamics in terms of your psychiatric state and the dynamics of this family.

[18] The judge added that he was concerned about stalking and about the criminal matters that were proceeding through the courts. He described the appellant as having adopted a "scorched earth policy" which included inappropriate contact with the media, the school and the Lawlors. He then stated:

> If and when these children are re-introduced to you, it will be slowly after you've had a great deal of counseling and this court is assured that you're going to deal in a more appropriate way with these children and if not, then you will not be seeing these children until I, or some other Judge in this court, is satisfied that it would be in their best interest. It is very, very seldom, almost unheard of, that a court at this juncture would go so far as to say you cannot see these children at all. And in addition, I'm ordering you have no contact with them by email. If they want to email you, that's fine but you will not even respond to them. You have no contact, direct or indirect until we get some counseling for them so they can understand what's going on in their lives.

And later continued:

> Mr. Doncaster, given the fact that you've seen these children and been caring for these children for a substantial part of their lives, I have no doubt you care deeply for your children. It is important for you and for the children because

> I'm removing a very important part of their lives, hopefully on a temporary basis. It is important for you and for them you get the treatment and the assessment with the professionals as I've directed. So that if there is a chance of you being re-introduced into their lives it will happen at the earliest, best opportunity for the children, okay?

[19] The judge ordered that Ms. Field have interim sole custody of the children and make all decisions regarding them, and that Mr. Doncaster have no access or any contact, direct or indirect, with the children; they may email him, but he was not to respond. Moreover, the appellant was ordered to have a full assessment completed, including a parental capacity and psychological assessment, at Gorman and Garland Associates and he was prohibited from travelling on the portion of the highway that goes in front of the school and the respondent's home, except to cross the intersection.

[20] The appellant initially appealed this interim order. After failing to obtain a stay, he abandoned the appeal.

[21] The appellant proceeded by way of a motion for interim relief, seeking a return to custody on alternate weeks as in 2011 or, at the least, access. Justice Bourgeois heard the motion on November 19, 20, 21 and December 18, 2012. Her written decision issued March 7, 2013 and, after receiving and considering submissions, her costs decision on May 13, 2013. Her Order pursuant to both decisions did not issue until July 5, 2013.

[22] Mr. Doncaster was self-represented when he appeared before Justice Bourgeois. Ms. Field asked that the March 5, 2012 Order denying him access continue.

[23] In support of his motion, the appellant filed a Psychological Assessment Report and a Parental Capacity Report on June 1 and October 2, 2012 respectively, prepared by psychologist Olga Komissarova. She was not among the psychologists contemplated in the earlier order. Ms. Komissarova testified, as did Deborah Bird, the psychologist providing counselling services to the children; Ms. Field's psychologist since April 2009; a psychologist who had been involved with the parties prior to their separation; a Sparks leader; the appellant's maternal aunt; his fiancée; his current family physician; his previous family physician; Mr. Doncaster; and Ms. Field.

[24] The judge understood that there were aspects of this proceeding which made it unusual. She began her March 7, 2013 decision thus:

> [1] The Doncaster-Field family is, and has been for some time, in turmoil. Caught in the middle, as is unfortunately often the case when parents separate, are four children ranging from 13 to 8 years of age. This however is no "typical" parental separation. At the time of writing this decision, Mr. Doncaster has not seen his children, by Court order, in over a year. That is a rare circumstance. Mr. Doncaster's diagnosis of ADHD and potential Asperger's syndrome also poses unique considerations.
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> [2] Further, this marital separation has spiralled, sucking into the vortex, friends, neighbours, employers, the RCMP, and even the Girl Guides of Canada. In the middle of this vortex is the Doncaster children, Max – 13, Mia – 12, Grace – 9, and Kate – nearly 8.

After considering the evidence and submissions in November and on December 18, 2012, the judge gave oral comments on December 19, 2012, so that the parties could quickly commence matters as directed, in advance of her written decision. The judge stated that, except as otherwise contemplated in her decision, the appellant would have no access with the children. Her findings and directions were incorporated in her March 7, 2013 written decision wherein she set out her reasoning.

[25] Her Order dated July 5, 2013 provided that Ms. Field shall have sole custody of the children and make all decisions regarding them. It denied Mr. Doncaster any access or contact, direct or indirect, with his children or any information from third party providers regarding the children. The appellant was ordered to pay $16,745.60 inclusive of disbursements.

Issues:

[26] The appellant represented himself on his appeal. In his Notice of Appeal, he raised several grounds which can be distilled into two:

(a) whether the judge erred by failing to apply the maximum contact principal in s. 16(10) of the *Divorce Act* and relying on parenting conduct from years past that is not relevant to his current ability to parent; and

(b) whether she erred in awarding costs based on a misapprehension of his financial situation.

The appellant also brought a motion to introduce fresh evidence.

Standard of Review

[27] In *Haines v. Haines*, 2013 NSCA 63, Farrar, J.A., for the Court stated:

> [5] This Court has consistently stressed the need to show deference to trial judges in family law matters. In the absence of some error of law, misapprehension of the evidence, or on the award that is clearly wrong on the facts we will not intervene. We are not entitled to overturn an order simply because we may have balanced the relevant factors differently. (**Hickey v. Hickey**, [1999] 2 S.C.R. 518, ¶10-12.)
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> [6] Findings of fact, or inferences drawn from the facts are reviewed on a standard of palpable and overriding error. Matters involving questions of law are subject to a correctness standard. When the matter is one of mixed fact and law and there is an extricable question of law, the question of law will be reviewed on a correctness standard. Otherwise, it is reviewed on a palpable and overriding standard. (**Housen v. Nikolaisen**, 2002 SCC 33.

[28] L'Heureux-Dubé J. in *Hickey* explained the reasoning behind narrow scope of appellate review in cases involving custody and access:

> 10 … [Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> ...
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> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
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> [Emphasis added]

Although *Hickey* involved support orders, these principles related to appellate review are equally applicable to orders concerning custody and access.

[29] See also *MacKay v. Murray*, 2006 NSCA 84, at ¶ 22-23 and *C.B. v. T.M.*, 2013 NSCA 53, at ¶ 16 and 17.

The Order Under Appeal:

[30] In order to provide context, I must begin with Justice Bourgeois' December 18, 2012 oral comments which were given in advance of her written decision. Among other things, the judge advised the parties that her order would provide that once the appellant started cognitive behavioural therapy, he could, with the guidance of his therapist, begin contacting his children by written letter to each child twice a week; the letters were to be reviewed for appropriateness by his therapist and sent to Deborah Bird, the children's therapist, for review for appropriateness from the children's point of view in terms of their emotional and psychological wellbeing; and the children could respond, in writing, if they wished. Copies of all letters were to be retained for the court's review. The judge indicated that although there would be more detail in her written decision, she was telling the parties about some of the things she was expecting they would do "because I want you to do it tomorrow" and not when her written decision was finally released. She also permitted the appellant to send Christmas cards to his children.

[31] In her March 7, 2013 written decision, the judge began with a review of the March 5, 2012 proceeding. After observing that that decision was interim rather than final and determining that s. 17(5) of the *Divorce Act* requiring a change of circumstances did not apply, she continued:

> [13] The above being said, it is not this Court's function to conduct a re-hearing of the matter before Scanlan, J., or to determine whether his findings were correct. That is the function of the Court of Appeal, not this Court on a subsequent interim hearing. In my view, the findings reached on March 5, 2012 are facts to which I am bound. Even if I am wrong in this regard, I have during the course of the present hearing, been provided with the evidence presented at the March 5, 2012 hearing and of course, additional evidence from both parties. If I am obligated to consider matters on a de novo basis, I agree entirely with the factual findings reached by Scanlan, J., and adopt them.

[32] The interim order had called for a psychological assessment and a parental capacity assessment of the appellant. Mr. Doncaster relied on those prepared by

Ms. Komissarova to support his argument that he was fully capable of undertaking a full and meaningful parental role. Ms. Field submitted that, on its face, the psychological assessment was reliable, but not the conclusions reached in the parental capacity assessment.

[33] The judge observed that Ms. Komissarova was a psychologist, but not one with Gorman and Garland Associates as had been contemplated in the interim order. After expressing concerns as to whether Ms. Komissarova was an entirely impartial expert, she reviewed her reports and evidence.

[34] The judge recounted the conclusions in Ms. Komissarova's parental capacity assessment and some of the reasons underlying that conclusion:

> [34] She concludes that "Mr. Doncaster presented as a capable parent who is able to recognize his children's social-emotional needs."
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> [35] As noted above, both parties cross-examined Ms. Komissarova at the hearing. In response to questioning from Mr. Doncaster, Ms. Komissarova testified that she had reviewed a psychiatric report prepared by Dr. Kronfli, and agreed with his observations/opinion. The Kronfli report was entered as an exhibit by Mr. Doncaster through this witness. That report, dated April 11, 2012, was prepared in relation to criminal proceedings. Its purpose was to determine whether he was fit to stand trial, and whether he suffered from a mental disorder which would serve to exempt him from criminal responsibility.
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> [36] Ms. Komissarova agreed with Dr. Kronfli's diagnosis that Mr. Doncaster suffers from ADHD. On that topic, the Kronfli report provides:
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> > Mr. Doncaster does suffer from a clear adult attention deficit hyperactivity disorder that is only partially controlled with medication. In addition, there seems to be many facets of his personality that would also lead to some symptomatology but not full criteria for Asperger's disorder. He clearly does have some inability to perceive his environment clearly and also the way he is perceived when he becomes enmeshed in the minutias and little details. He goes on to be quite obsessive about those details. In essence, he lacks social grace and his personality profile makes him lose track of the "bigger picture". Having said that, it does not appear that Mr. Doncaster has at any time had any malicious intent. He tends to over-analyze and over-rationalize a lot of the behaviour and when he does perceive injustice he tends to not be able to let go.
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> [37] Ms. Komissarova agreed with the above and in particular, that Mr. Doncaster does not act with "malicious intent". She further agreed with Dr. Kronfli's assessment that Mr. Doncaster is a very low risk for violence.

The psychologist had not reviewed the March 5, 2012 transcript or decision, or the transcript of the peace bond hearing. Nor, since she had not been asked to undertake a full psychological assessment, had she spoken with the RCMP officer whose affidavit stated that the appellant had been assessed as being at a "high risk for lethality."

[35] In her testimony, Deborah Bird described her interaction with the children whom she was counselling, and gave their views regarding their family situation. Max did not want to see his father; he feared his anger and was angry at him for his actions toward his mother and the community. Mia did not want to see him, and was fearful for her younger siblings who cannot read his cues and avoid his anger which arises very quickly and over unpredictable things. She was also afraid her father will abduct her and her siblings. Grace was reportedly open to seeing her father, but only if Mia was present. Kate was uncertain whether she wanted to see him.

[36] In his testimony, the appellant spoke of his efforts to improve his parenting skills, including his taking a twelve-week parenting program, and difficulties in obtaining referrals to an appropriate psychiatrist and practitioner with experience with his disorders. He confirmed that since the March 5, 2012 hearing, he had initiated numerous legal proceedings, including against the respondent, RCMP officers, the School Board, his former physician, Girl Guide leaders, and witnesses at that hearing. In his view, some of these had wrongfully interfered with his access to the children pursuant to Judge Sparks' Order which granted him unsupervised access; others had defamed him, committed breaches of confidence or contract by disclosing information, etc. Ms. Field gave evidence of the negative impact of his behaviours, the proceedings, and his communication with the media regarding their divorce and other legal proceedings, on the children and on her.

[37] The judge noted (at ¶ 109) that "[a]lthough [the appellant] ultimately seeks a full return to his care, he, at a minimum, wants some form of access." She wrote a lengthy and thoughtful decision on the custody and access matters. Her reasons included the following:

> **FINDINGS:**
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> [114] This Court has a tremendous amount of empathy for all members of the Doncaster-Field family, most notably Max, Mia, Grace and Kate. They are all seemingly trapped in a nightmare, although certainly the perspectives of these

parents are very different as to the nature and cause of the hardships being suffered.

[115] On a custody and access determination, the best interest of the children is the Court's paramount consideration. Notwithstanding the empathy the Court may have for the parents, this is secondary to the children's needs.

[116] Mr. Doncaster asserts that Ms. Field is an unreliable witness, has perjured herself, is actively alienating the children and has prohibited access. I cannot agree with any of the above assertions.

…

[118] As it relates to the matters before me, that is custody, access and issues relating to the children generally, I found Ms. Field to be a credible witness. I accept her description of Mr. Doncaster's conduct towards the children in her presence. I further accept she is accurately conveying to the Court the concerns being expressed by the children regarding seeing their father.

[119] Regarding Mr. Doncaster's claim of parental alienation, I do not accept based on the evidence before me that this is such a case. The Courts have consistently denounced parents who actively attempt to undermine the other parent's relationship with a child. Mr. Doncaster points to the children's unwillingness to see him and access difficulties as signs of alienation.

[120] There are, however, reasons why a child may refuse or be reluctant to exercise access with a parent other than parental alienation. Children may be genuinely fearful and have real anxiety surrounding access with a parent, which are based in reality, or at least their perceptions of reality, and not the conduct of the other parent. I find this is such a case.

[121] Mr. Doncaster has acted in a volatile and unpredictable fashion towards, or in the presence of, the children. By way of example, he has struck Max to teach him a lesson; placed Kate on a dark patio at night as a form of discipline; was arrested and handcuffed at Grace and Kate's school in their full view; he has come to their home in the middle of the night banging on doors and bedroom windows; he has, by his own admission, frequently lost his temper with the children, yelling at them, and on one occasion knocking Kate into a ditch. It is Mr. Doncaster's own behaviours which are serving to create an estrangement between himself and his children.

[122] Regarding Mr. Doncaster's claim that Ms. Field is inappropriately denying access, I cannot agree. Since March 5th, 2012, there has been a Court order prohibiting access, and accordingly Ms. Field cannot be faulted for complying with same. Significant evidence was called regarding access difficulties prior to the March 5th hearing. In his interim decision, Justice Scanlan

determined that Ms. Field's denial of access was not only appropriate, but warranted to protect the children. Again, my role is not to revisit findings of fact made by Scanlan, J. If it was, however, I would readily conclude that Ms. Field had ample reason to tread cautiously in terms of the access being implemented. I cannot conclude that she inappropriately breached the February Family Court order, or otherwise acted inappropriately in her decisions surrounding access. I further cannot conclude that Ms. Field is abusing the processes of the Court in any fashion.

[123] The evidence before the Court permits me to conclude that Mr. Doncaster suffers from ADHD. Although he believes he also has Asperger's Syndrome, I cannot reach such a conclusion at this time. Mr. Doncaster requires medication to control the consequences of the ADHD, including impulsivity, lack of tolerance and angry outbursts. At the time of the hearing, his medical status was unclear. He had only seen his new family doctor three times and was just commencing psychiatric treatment. Without his condition being properly monitored and his medication appropriately managed, he will remain at risk for volatility, impulsivity and a lack of emotional control. This impacts significantly on his ability to effectively parent the children, and meet their emotional needs.

[124] Mr. Doncaster is clearly highly intelligent. I do not disagree with Ms. Komissarova's description of him as gifted. In her psychological assessment, Ms. Komissarova outlined various personality features which Mr. Doncaster is likely to possess given his standardized testing results. These are noted at paragraph [28] above. The evidence before the Court supports a conclusion that Mr. Doncaster shows a distinctive contempt for conventional morals, is impulsive, restless and moody. "His communications may be characterized at times by caustic comments and callous outbursts, and he may act rashly, using insufficient deliberation and poor judgment."

[125] In the same report, Ms. Komissarova notes that Mr. Doncaster's results on the STAXI-II suggests "a low probability that Mr. Doncaster's anger (sic) feelings can spin out of control." Although the standardized test results may produce the stated result, I cannot apply this finding to Mr. Doncaster. The evidence before this Court has established that Mr. Doncaster has had, on a number of occasions, his anger get out of control. Without appropriate pharmacological measures, this continues to be a risk.

[126] The treatment plan suggested by Ms. Komissarova in the parental capacity plan included some fairly intensive cognitive behavioural therapy aimed at assisting Mr. Doncaster in "re-establishing his psychological balance, gaining insight, and developing necessary social skills." I agree with the approach suggested by Ms. Komissarova in terms of Mr. Doncaster's therapeutic needs.

[127] The Court encounters a real difficulty when then turning to the Parental Capacity Assessment. With respect to the author, it would almost seem that the

reports are written about two entirely different people. The concerns identified in the psychological assessment are seeming entirely resolved in the parental capacity assessment. This is notwithstanding the fact Mr. Doncaster had little medical follow-up and absolutely no psychological intervention in the intervening period between reports.

[128] I cannot agree with Ms. Komissarova's conclusion in the Parental Capacity Assessment that "Mr. Doncaster presented as a capable parent who is able to recognise his children's social-emotional needs." Although Mr. Doncaster has undoubtedly had much hands-on parenting of these children, there is significant evidence to establish he lacks insight as to their emotional needs. His actions have caused considerable emotional damage to his children. He does not, as of yet, recognize this fact.

[129] I have no hesitancy in concluding that Mr. Doncaster loves his children. I do not believe that he would intentionally want to harm them. He has however, through his impulsivity, poor emotional control and lack of insight, caused them harm. Mr. Doncaster's lack of insight is manifested in a number of ways. Primarily, he seems to not appreciate the connection between his behaviours and the childrens' emotional upset. Mr. Doncaster seemingly points to his ADHD and purported Asberger's Syndrome as the cause of his behaviours. Mr. Doncaster appears to lack insight that although such may help explain his behaviours, it does not excuse them. Nor does it change the impact of his behaviours on those being exposed to it, most notably the children.

[130] Mr. Doncaster appears to be unable to appreciate how his behaviours are being very negatively viewed by others, and the potential ramifications of this. In his unrelenting attempts to prove that his view of matters is correct or justified, he has subjected himself, Ms. Field and their children to incredible public scrutiny. In fact, he has sought it out, oblivious to the potential ramifications for the older children hearing or reading about their parents' legal disputes.

[131] Unless he changes his approach, it is very likely that Mr. Doncaster will continue to alienate people around him who could be sources of support for him and his family. He does not seem to appreciate that when he makes Ms. Field's life difficult, this will very likely impact negatively on his children.

[132] Mr. Doncaster is undoubtedly highly intelligent. It is questionable however, whether this is a "gift" given how this seems to set him apart from most other people. Mr. Doncaster is very much a "square peg" in a round world. It must be incredibly frustrating for him to think and perceive things differently than most others around him.

[133] I am acutely aware of the time which has passed since March 5th, 2012. I am mindful of the "maximum contact" principle contained in s.16 (10) of the

Divorce Act. I cannot conclude however, that it is in the best interest of these children to re-initiate access with their father at this time.

[134] In order to move towards normalizing his relationship with the children, Mr. Donacaster has much work to do. I accept the recommendations of Ms. Komissarova in her psychological assessment in terms of the therapeutic approach to be taken with and by Mr. Doncaster.

[135] It is also important however, for all parties to recognize that the overall goal should be to re-integrate Mr. Doncaster into the lives of his children, if it is in their best interests to do so. This is premised however, upon him engaging in therapy and gaining insight into his behaviour and obtaining control over his behaviour. The children need to continue with their own therapy, and when appropriate, be prepared for re-initiating in person contact with their father.

[136] Getting this family out of the vortex and back into some semblance of normalcy will not be easy. The parties and the children will need to continue with their current therapy. It would be prudent for their respective therapists to be provided with a copy of this decision and Ms. Komissarova's psychological assessment. The ultimate success rests squarely with Mr. Doncaster. He needs to understand that if his behaviour and general approach does not change, re-initiating access with the children may be postponed indefinitely.

CONCLUSION:

[137] The children are to remain in the sole care and custody of their mother, Jennifer Field. She will be responsible for all decisions relating to their health, education, social development and all other aspects of their care. Mr. Doncaster will have no access with the children, either directly or indirectly, except as otherwise contemplated in this decision.

[138] Mr. Doncaster is to continue treatment with Dr. Taylor and Dr. Amr-Aty and follow any and all recommendations made by them. Before considering implementing direct access with the children the Court will need to know the status of his ADHD treatment and to what extent his behavioural symptoms are under control.

[139] Mr. Doncaster is to make whatever arrangements necessary to commence cognitive behavioural therapy, the goal of which is to assist him in gaining insight as to how his behaviours are perceived by others, including his children, and for him to gain the necessary tools to conduct himself in a way that will be more positively and accurately viewed by others. This should also include a component of anger management.

[140] Once Mr. Doncaster commences cognitive behavioural therapy he can, with the guidance of his therapist, begin contacting the children via written letter,

> to each child, on a twice monthly basis. The letters are to be reviewed by Mr. Doncaster's therapist initially, and are to be sent to Ms. Bird for her review. The letters, if deemed to be appropriate by Ms. Bird in terms of the psychological and emotional well being of the children, will be provided to the children. They may respond, either in writing or by email if they wish. Copies of all letters should be retained for any necessary review by the Court.
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> [141] I specifically contemplate that Mr. Doncaster's cognitive therapist and Ms. Bird will consult with one another as it relates to Mr. Doncaster's progress, as well as the children's responses, positive or negative, to the written contact with their father. It is important for this communication and feed-back mechanism to be in place so that Mr. Doncaster can understand how his words are being perceived by the children, so he can gain insight in this regard, and be re-directed if necessary.

[Emphasis added]

[38] On March 25, 2013 – after the issuance of the March 7, 2013 written reasons but before the issuance of the Order – the appellant brought a motion against, among others, the respondent and Ms. Bird, seeking "an order directing Ms. Bird to comply with a decision of the Honourable Justice Cindy A. Bourgeois in this proceeding by presenting my letters" to his children. His affidavit in support deposed that, according to the clinical social worker to whom he had been referred for cognitive behavioural therapy and to whom he had given letters for his children, his letters had been sent to Ms. Bird and he believed that they had not been presented to his children.

[39] On May 1, 2013, the judge heard the appellant, counsel for the respondent, and counsel for Ms. Bird. In her decision dated May 7, 2013 (2013 NSSC 149), she held that her December 19, 2012 oral comments were not intended to be enforceable against either party or Ms. Bird and further, until a written order issued, the written decision released March 7, 2013 was also unenforceable. The judge was not aware if cognitive behavioural therapy had commenced or if Ms. Broome, the clinical social worker to whom the appellant had referred, was qualified in that regard. She learned that although Ms. Bird was prepared to continue her therapeutic relationship with the children, she was no longer willing to be involved in efforts to initiate access and her involvement as "gatekeeper" of the letters might place her in conflict with her professional obligations to the children. Mr. Doncaster acknowledged that he had made a misconduct complaint against Ms. Bird to her professional governing body.

[40] In her decision dismissing the appellant's motion and determining that Ms. Bird's role, if she was willing to continue as such, would be solely the provision of therapeutic intervention to the children, the judge stated:

> [36] This issue is much broader than whether letters have been passed along to the children or not. The real issue is whether Mr. Doncaster has done what was expected of him in preparation of those letters being sent. Has he meaningfully undertaken the steps required to gain control over his behavioural unpredictability, and gain insight as to the impact of his actions on his children?
>
> [37] The above inquiry is relevant to what the Court should now do, in light of the fact that Ms. Bird will no longer be involved in reviewing the letters intended for the children. I am not satisfied that Mr. Doncaster being permitted to send letters directly to the children is appropriate. Further, the Court has no evidence before it at present to establish that Mr. Doncaster has engaged an appropriately trained therapist or that he or she would be willing and able to knowledgeably review his letters. As such, I do not consider it appropriate to assign a "gatekeeping" role to either Ms. Broome or some other person unknown to the Court.
>
> [38] Should Ms. Field be expected to receive and assess the appropriateness of letters from Mr. Doncaster? No. Although that may not be an unreasonable request of a custodial parent in some circumstances, given the highly conflictual nature of this family dispute, placing Ms. Field in such a position would almost certainly generate additional conflict and litigation.
>
> [39] So where does that leave the Court in terms of considering access between Mr. Doncaster and his children? Although both are extremely important considerations, the best interests of the children must take precedence over Mr. Doncaster's right of access. The Court previously concluded that direct access was not in the best interest of the children. Implementing access via correspondence is simply not workable at the present time. There is no other form of access that the Court views as being in the best interest of the children at this time.
>
> [40] Accordingly, the March 7, 2013 decision of the Court will be modified as it relates to the access provisions. Mr. Doncaster is to have no contact directly or indirectly with the children. The appropriateness of access may be reviewed in future, no earlier than 3 months from the issuance of the order incorporating the March 7th decision, as supplemented herein. On any future review, Mr. Doncaster would be well advised to provide evidence as to the status of his medical treatment in relation to his ADHD, as well as his participation in cognitive behavioural therapy.

> [41] In order to better understand the issues of concern to the Court, Mr. Doncaster is to provide to his treating physicians and therapist copies of Ms. Komissarova's psychological assessment, the Court's written decision of March 7, 2013, as well as this decision.

In a separate decision (2013 NSSC 213), the judge awarded costs on this motion of $1,200.00 to the respondent and $1,500.00 to Ms. Bird.

[41] In her costs decision following her March 7, 2013 decision on custody and access, the judge found that the appellant had significantly and unnecessarily extended the proceeding by advancing evidence on matters previously before the court, and Tariff A was appropriate. The respondent claimed $16,745.60 inclusive of disbursements; the appellant submitted that he had no ability to pay a costs award. The judge was not satisfied that he did not have the ability or resources to pay costs, and was of the view that an immunity from costs would be contrary to the interests of justice. To avoid a material impact on his ability to participate in cognitive behavioural therapy, she ordered him to pay $8,000.00 forthwith and a further award of $8,745.60 at the conclusion of the divorce proceedings.

[42] In the result, her Order which issued on July 5, 2013 incorporated her March 7, 2013 decision as amended by her May 7, 2013 decision, and her costs decision. It prohibited any contact whatsoever between the appellant and his children. This Order which is the subject of his appeal reads in part:

> 6. Ralph Doncaster shall have no access or any contact, direct or indirect, with the children of the marriage or receive information from third party providers regarding the children of the marriage.
>
> Ralph Doncaster
>
> 7. Ralph Doncaster shall continue treatment with his family physician, currently Dr. Lindsay Taylor, and his psychiatrist, currently Dr. Amr-Aty, and follow any and all recommendations made by them regarding his treatment.
>
> 8. To assist Ralph Doncaster to gain: (a) insight into how his behaviours are perceived by others, including his children; and (b) the tools necessary to more positively conduct himself, he shall arrange to commence cognitive behavioural therapy with a therapist who has the requisite qualifications to provide cognitive behavioural therapy. Ralph Doncaster's therapy shall include a component of anger management.
>
> 9. Ralph Doncaster's therapist and the children's counsellor shall be provided with copies of Olga Komissarova's psychological report on Ralph Doncaster,

> the written decision in this proceeding of March 7, 2013 and the written decision dismissing Ralph Doncaster's motion of May 1, 2013.
>
> …
>
> Review
>
> 12. Ralph Doncaster shall not be permitted to initiate a review of the decision regarding access with the children of the marriage for a minimum of three months from the date of the issuance of this order.

The costs decision was unchanged in the Order.

Fresh Evidence Motion:

[43] Rule 90.47 of the *Civil Procedure Rules* permits this Court, on a motion of a party, to admit fresh evidence on "special grounds". In *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, leave to appeal denied, [2012] S.C.C.A. No. 237, Justice Fichaud for the Court indicated (at ¶ 77) that the test under this rule stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759:

> [77] … Admission is governed by four factors: (1) whether there was due diligence in the effort to adduce the evidence at trial; (2) relevance to the issue at trial; (3) credibility of the new evidence; (4) whether the evidence could reasonably have affected the result. …
>
> [78] The evidence must be in admissible form. …

[44] The appellant sought to introduce three items into evidence:

(a) his affidavit affirmed October 15, 2013, to which were attached copies of his letters to his children, and a July 8, 2013 letter from a psychologist who had diagnosed him with Asperger's and Autism Spectrum Disorders;

(b) a letter dated August 19, 2013 from Craig Botterill, Q.C., Senior Crown Counsel, to the Supreme Court of Nova Scotia regarding the appellant's application for disclosure of the disciplinary record of the investigating officer in a mischief charge against the appellant; and

(c) a letter dated August 20, 2013 from Revenue Canada to the appellant regarding the status of his objection to its assessment of his 2005 income tax return.

[45] Through his affidavit, Mr. Doncaster sought to show his compliance with the judge's oral comments on December 19, 2012, and her March 7, 2013 decision which called on him to continue treatment with certain physicians, to commence cognitive behavioural therapy, and to begin contacting his children through twice monthly letters reviewed first by his therapist and then by the children's therapist. Most of this material had been before the judge on his unsuccessful motion to compel Ms. Bird to review and pass his letters to his children, to them. The exceptions are the letters to his children, the letter confirmation of Asperger's and his assertion that he has been told that the local health authority did not have anyone capable of providing cognitive behavioural therapy for someone with his disorders.

[46] Much of the case law in family law on the admissibility of fresh evidence after trial arises in child protection cases. This Court's discretion to apply the test in *Palmer* flexibly in child protection cases derives from two sources: firstly, s. 49(5) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 states that "(5) On an appeal pursuant to this Section, the Court of Appeal may in its discretion receive further evidence relating to events after the appealed order", and secondly, the Supreme Court of Canada's decision in *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165]. In *M. (C.)*, Justice L'Heureux-Dubé endorsed the remarks of Cory, J.A. (as he then was) in *Re Genereux and Catholic Children's Aid Society of Metropolitan Toronto* (1985), 53 O.R. (2d) 163. At ¶ 20, she emphasized the importance of the court having up-to-date and accurate information of the situation at hand in cases involving the welfare of children.

[47] This, however, is not a child protection case. Whether the modified *Palmer* test applies where an appellant seeks to demonstrate a change of circumstances following trial is less clear. There is some authority from other appellate courts that suggest the modified *Palmer* test can be applied in family law appeals, other than child protection cases, where the best interests of the child are at stake. See for example: *Children's Aid Society of Peel v. W. (M.J)*, [1995] O.J. No. 1308 (Ont. C.A.) and *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61. It appears that the Saskatchewan Court of Appeal has taken the position that, in custody disputes, all evidence bearing on the issue of the best interests of the child should be before the court: *J.L.L. (Re)*, 2002 SKCA 78.

[48] The sole decision from this Court on this point is *Irving v. Irving*, [1997] N.S.J. No. 520 (N.S.C.A.) which concerned a challenge to a separation agreement.

Bateman J.A. for the Court held that a modified version of the *Palmer* test applied in child welfare cases, given the importance of accurate information and a flexible approach in assessing the best interests of the child. Acknowledging that the case before her was not a child protection matter, she found that the full test was "neither appropriate nor workable" in the circumstances. She applied the modified *Palmer* test, finding the new evidence to be reliable and credible, and admitted it on that basis.

[49] In this case, it is not necessary that I determine whether the flexible *Palmer* test should be applied. Even assuming, without deciding, that it were, the contents of the letters from both Mr. Botterill and Revenue Canada are not relevant to the grounds of appeal claiming legal error in failing to grant access and in awarding costs. The material in the appellant's affidavit, other than its attachments, were substantially before the judge when she dismissed the appellant's motion to oblige the children's therapist to deliver his letters to them. Quite simply, it is not fresh evidence. The appellant does not claim that she misapprehended the evidence by finding, for example, that the appellant had not sought cognitive behaviour therapy or written letters to the children for review, in accordance with her oral directions and her March 7, 2013 written decision. Thus, that material and the letters are not relevant nor could they have affected the result. The statement that he has recently been advised that no one in the local health district is qualified to provide the requisite cognitive behaviour therapy does not indicate that the appellant sought any referrals from anyone, such as a medical doctor, other than his clinical social worker. The letter confirming an Asperger's diagnosis does not provide any detail whatsoever regarding this condition or how, if at all, it affects the appellant and any access to his children. Consequently, it is not at all clear how they are relevant.

[50] For these reasons, I would dismiss the appellant's motion to admit fresh evidence on the appeal.

Access

[51] The appellant argues that, the judge not having made any finding that access would create a substantial risk of harm to the children, she had no justification for denying him any contact or access. He emphasizes that her Order did not allow access under supervision or with restrictions; rather, the prohibition against communication and contact was complete.

[52] I begin with s. 16 of the *Divorce Act* which authorizes a court to make orders respecting the custody of, or the access to, any and all children of a marriage. It reads in part:

> **Factor**
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> **Past conduct**
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> **Maximum contact**
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[53] To a large extent, custody and access decisions are fact-based and discretionary. A trial judge has the enormous advantage of observing, hearing and assessing the parties and witnesses first hand. She or he must consider the unique circumstances of the particular child or children involved and the factors, both positive and negative, which can affect them. This Court does not retry the case. It will not interfere with custody and access decisions unless there is material error, a serious misapprehension of the evidence or an error in law.

[54] In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada considered what the "best interests of the child" test in s. 16(8) of the *Divorce Act* requires. McLachlin, J. (as she then was) wrote at pp.116-118:

> Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
>
> First, the "best interests of the child" test is the <u>only</u> test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look <u>only</u> at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.

> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.
>
> Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the bests interests of the child, it may be restricted. But only to that extent. …
>
> ...
>
> I would summarize the effect of the provisions of the *Divorce Act* on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of the child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child. [McLachlin, J.'s underlining]

[55] Courts are hesitant to totally deny access to the non-custodial parent. As has been explained, contact between a child and each parent is seen as desirable. The significance of the maximum contact principle embedded in s. 16(10) is apparent: it is the single factor a judge must consider in deciding custody and access. A complete denial of access has been ordered only infrequently, where the behaviours of the parent seeking access were extreme, access would place the child at risk of emotional or physical harm, or access was otherwise not in the best interests of the child. Each case is unique and driven by its specific facts.

[56] The following are illustrative of the behaviours or situations that have led to determination that access would not be in the child's best interests: *Pereira v. Pereira*, [1995] B.C.J. No. 2151 (B.C.S.C.) – father convicted of theft, fraud, forgery and attempting to arrange the murder of children's mother; *Neill v. Best*, [1995] N.S.J. No. 553 (N.S.F.C.) – father convicted of indecently assaulting an infant child with whom he lived; *DiMeco v. DiMeco*, [1995] O.J. No. 3650 (Ont. C.J., Gen'l Div.) – father with lengthy criminal record given to episodes of violence and rage, including threats to kill his wife and the children; *Bourque v. Jimmo*, [1997] N.B.J. No. 523 (N.B.Q.B.) – father found guilty of uttering death threats against mother; *Johnson v. Johnson*, [1987] B.C.J. No. 2832 (B.C.S.C.) – father killed the mother's child from a prior relationship; *P.F.G v. P.D.C.L.*, 2000 BCSC 217 – father murdered the mother; *Gorgichuk v. Gorgichuk*, [1997] S.J. No. 211 affirmed in *Gorgichuk v. Gorgichuk*, [1999] S.J. No. 462 (S.K.C.A.) – access ended after the father had a sexual encounter in back seat of car while child was in the front seat; *Williams v. Ellul*, [1996] O.J. No. 335 (O.N.C.A.) – father charged with murdering their mother was later acquitted; the children who had not been in contact with him for seven years did not want to commence a relationship with him.

[57] In other instances, the judge found that, despite concerns raised by the custodial parent, access would be permitted. For example, in *R.A.T. v. I.R.D.J.T.*, [1990] N.S.J. No. 478 (N.S.F.C.), the mother, who had been given custody with access to the father, claimed that the children, who had seen him physically and verbally abuse her, refused to visit him; he drank to excess; and he had a violent temper when drunk. The father had already been denied access for seven months. After reviewing the evidence, Judge Daley was unable to conclude that the children would be in serious physical danger by visiting with their father for short periods if there were conditions such as ones forbidding the use of alcohol and other harmful behaviours. See also *S.W. v. P.W.*, [1991] N.S.J. No. 637 (N.S.F.C.), where the judge ordered that access be resumed for the applicant father who had not had any contact with his five year old child for a year, but by only gradual re-introductions. In *T.A.M. v. L.P.L.*, 2006 SKQB 285 (Sask. Q.B. (Family Law Division)), the father who petitioned for custody of a six year old had an extensive criminal record, and had been incarcerated for serious offences including assault causing bodily harm, theft, and possession of a narcotic for the purposes of trafficking. The judge had the benefit of an extensive custody and access report. He noted that all the criminal convictions except two motor vehicle offences occurred over ten years ago, and found that the father had turned his life around and his past conduct was not relevant to his ability to parent. He ordered joint

custody, the primary residence of the child to be with the mother, and the father to have reasonable access with reasonable notice and stipulated minimum access.

[58] The appellant relied on *Nova Scotia (Community Services) v. N.L.*, 2011 NSSC 369 (N.S.F.D.). That case is distinguishable because it is a child protection, rather than a custody and access, matter. In any event, the judge found from the evidence of the clinical therapist and access supervisor that the parents had made such progress in their individual and couples' counselling and in following the case plan, that the issues of domestic violence, anger management and couples' communication were no longer a protection concern. However, she decided not to return the child to their care because of a substance abuse issue which continued to pose a real chance of danger to the child.

[59] In this case, the judge's decision was founded on evidence that the appellant had "acted in a volatile and unpredictable fashion towards, or in the presence of, the children". She determined that he suffers from ADHD which led to "impulsivity, lack of tolerance and angry outbursts" which requires appropriate mediation and monitoring to control. She heard of the appellant having caused physical or emotional harm to the children, including his hitting his son, pushing his daughter causing her to fall and hit her head, on another occasion knocking his daughter into a ditch after she tried to hold his hand, instances of sudden and unpredictable anger, his shouting, his pounding on a child's bedroom door, and his being confrontational with the school and others. According to one of his physicians, the severity of the appellant's ADHD is such that it requires medication for effective treatment and he took a lot of liberties with how the medications were used, although overall the appellant did take them "most of the time". The judge also heard that the children were angry, frustrated and humiliated by their father's behaviour. While the judge was convinced that the appellant loves his children and would not intentionally harm them, she found that his behaviours and lack of insight had caused his children harm.

[60] In her decision, the judge did not err in law as to the proper test applicable to the case – she correctly stated at ¶ 115 that the best interests of the children are the court's paramount consideration. It is clear that she was aware of the "maximum contact" principle that, according to s. 16(10) of the *Divorce Act,* must be considered. At the outset of her March 7, 2013 decision, she observed that Mr. Doncaster not having had any access to his children was "a rare circumstance." And at ¶ 133, she stated:

> I am acutely aware of the time which has passed since March 5th, 2012. I am mindful of the "maximum contact" principle contained in s. 16(10) of the **Divorce Act**. I cannot conclude however, that it is in the best interest of these children to re-initiate access with their father at this time.

[61] Moreover, the judge crafted a means for the children and their father to recommence communications. Relying on the testimony of Ms. Komissarova, the psychologist retained by the appellant, she ordered Mr. Doncaster to start cognitive behavioural therapy and allowed letters from him to go to his children, if deemed appropriate by his and their therapists. She gave oral comments soon after the end of the hearing to avoid any delay pending the release of her written reasons.

[62] As explained earlier, the judge's proposal for resuming contact in this way had to be jettisoned after the involvement of the children's therapist ended. The judge was then of the view that there was no other way of permitting access until the court was satisfied as to the appellant's improved control of his behaviours.

[63] In these circumstances, I cannot say that the judge erred in law by failing to take into account the requirements of the maximum contact principle. Rather, the record shows that she was well aware of s. 16(10) and strove to find a way to start normalizing relations between the children and their father.

[64] The appellant then argues that, unless the judge had found that access would create a "substantial risk of harm", there was no justification for denying him any access.

[65] Certainly, the risk of harm is one of the factors to be considered in deciding custody and access. However, it is not determinative. In *Young*, McLachlin, J. (as she then was) stated at p. 120:

> … The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access — what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any

> other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence.
>
> [Emphasis added]

[66] As this passage indicates, while reducing a child's risk of harm should be beneficial, "the best interests of the child" concept is broader. It requires a more fulsome assessment than simply assessing whether there is any risk of harm and, if so, how great or small it may be.

[67] In this case, the judge found at ¶ 129 of her decision that the appellant has unintentionally caused his children harm. In describing that harm, she did not use the adjective "substantial" or similar wording. In my view, it was not essential that she do so in order to deny access.

[68] The cases I described where access was completely prohibited would imply that those courts found a significant risk of harm. They often featured threats or acts of intentional violence. However, the courts have not relied on a finding of "substantial risk of harm" to ground their decisions. That phrase is often not explicit in the decisions. Even the word "harm" does not always appear. Rather, each judge examined all the circumstances of the particular case, and ultimately determined that access was not in the best interests of the child.

[69] Here, the judge on her assessment of the evidence found that the appellant's behaviours had harmed the children. It is implicit from her consideration of the maximum contact principle together with other factors that affect "the condition, means, needs and other circumstances of the child" that, in her view, the high threshold for denying a parent access had been crossed.

[70] The appellant then submits that, in speaking of his "volatile and unpredictable" actions towards or in the presence of his children, the judge misapprehended the evidence. He points out that some of the events in her ¶ 121 were dated or singular. For example, the occasion where he pushed his daughter is now three years ago. There was no evidence that his middle-of-the-night disruption at the respondent's home, was ever repeated. In addition, several of the criminal charges against the appellant were dismissed. The appellant emphasizes that even before the March 2012 hearing, he had been acquitted of the charge of assaulting his son, and the seven-day emergency protection order had been terminated on judicial review. Afterwards, he says, and court records verify, that

charges of mischief and trespassing at night and of criminal harassment of the respondent and Ms. Lawlor were dismissed.

[71] In this case, his actions pertaining to the children that led to criminal charges against the appellant could be offset in part by the fact that he was neither found guilty nor plead guilty to some of the charges which were outstanding and appeared alarming when access was first considered and denied in March 2012. However, a favourable disposition of criminal proceedings does not mean that they disappear from a judge's view. Evidence about an event which may be viewed one way in a criminal matter with its criminal standard of proof, may be viewed in another way in the context of a family law proceeding. For example, the underlying facts, type and timing of a criminal charge may remain relevant.

[72] Moreover, there are many other criteria that the judge had to review, including the children's wishes not to see their father. Their anger towards and fear of him, and fear for their own safety and that of their siblings, are real. These concerns are not groundless; they are based on their past experiences with the appellant.

[73] I have found this appeal difficult. At first glance, a complete denial of access appears harsh. The appellant's behaviours since the beginning of 2012 do not appear as extreme as those in much of the case law where access was forbidden. However, the evidence shows that there have been long-standing difficulties in his relationship with the children, and with others that impact on his children. Mr. Doncaster is who he is. It cannot be denied that he has ADHD which, as he himself has acknowledged, means that he sometimes focuses on the less important or wrong detail, or does not make good decisions. Nor can it be denied that he loves his children deeply; that is obvious. How much and how quickly the troublesome behaviours which affect him and his children being together or in touch, can be improved by medication and/or therapy, if available, still remains unknown.

[74] I am conscious that these children and their father have not seen each other since at least March 2012. They have not spoken to each other, or communicated in any way – not by telephone, letter, email, Skype or FaceTime. He cannot send them birthday cards or gifts. Parent and child have not held hands or hugged. There has been no contact whatsoever for two years. The appellant's fear that unless some access is soon permitted, his attachment or bond with all or some of

his children may be lost, resonates. He maintains that he is willing to accept and follow any conditions imposed on his having access.

[75] I cannot, however, identify any error in law or misapprehension of the evidence that would permit appellate intervention of the judge's decision to deny access. In my view, she understood the evidence and appreciated and applied the law. She wrestled with what to do in the best interests of these children. It is now for Mr. Doncaster to demonstrate that he has taken all action as required in her Order or to explain why he is prevented from doing so, so that contact and communication with the children is seen to be acceptable and beneficial. He can initiate a review in the Supreme Court of Nova Scotia of the decision regarding access and, as the judge indicated in her May 7, 2013 decision regarding his motion concerning the children's therapist, evidence as to the status of his medical treatment in relation to his disorders and participation in therapeutic treatments would be helpful to the judge.

Costs

[76] According to the appellant, when the judge ordered costs of some $16,000.00 against him, she misapprehended his financial situation. In particular, the judge erroneously concluded that the 2005 income tax assessment of over $400,000.00 against him was not a final assessment. Moreover, he submits that she erred in finding that he unnecessarily prolonged the hearing as the transcripts show that the majority of the time for the hearing was taken by counsel for the respondent's cross-examination of Ms. Komissarova.

[77] With respect, there is nothing on the record which supports the appellant's argument that the judge confused his income tax assessment with the director's liability assessment. As to the prolongation of the hearing, it is not surprising that Ms. Komissarova, on whose reports and testimony the appellant's case relied, would be closely questioned. But the judge had a different focus regarding the length of the proceeding. She stated at ¶ 14 that:

> … in my view, the proceeding was significantly and unnecessarily extended by his advancing of evidence on matters which had been previously before the court.

Her decision indicates acceptance of the argument that the appellant had lengthened the proceedings by attempting to re-litigate access that had been before the 2012 hearing and by calling a number of witnesses who were not relevant to matters before the court.

[78] I can see no error that would call for appellate intervention and would dismiss the appeal as to costs.

Disposition

[79] I would dismiss the appeal as to custody and access, and as to costs. I would award costs of $3,500.00 payable to the respondent.

Oland, J.A.

Concurred in:

MacDonald, C.J.

Farrar, J.