FAMILY COURT OF NOVA SCOTIA

Citation: C.A.S. v. E.L.K.S., 2010 NSFC 26

Date: 20101201
Docket: FKMCA-071228
Registry: Halifax

Between:

C.A.S.

Applicant

v.

E.L.K.S.

Respondent

Judge:	The Honourable Judge Marci Lin Melvin
Heard:	November 2 and November 3, 2010 in Kentville, Nova Scotia
Written Decision:	December 1, 2010
Counsel:	Marc Comeau, for the Applicant, C.A.S David R. Thomas, for the Respondent, E.L.K.S.

By the Court:

APPLICATIONS BEFORE THE COURT

[1] There are two Applications before the Court, both made by the Applicant.

[2] The first Application was made on July 16, 2010, and requests the following relief:

> **1. Joint custody of the child, MICPS, born May 11, 2009, with primary care with the Applicant;**
>
> **2. Reasonable access for the Respondent on reasonable notice to the Applicant, the details of which to be agreed upon between the parties;**
>
> **3. Child maintenance in accordance with the Child Support Guidelines.**

[3] The second Application was made on September 1, 2010, and requests the following relief:

1. **An Order pursuant to Section 18 of the *Maintenance and Custody Act* granting leave to the Applicant to apply for custody of the child, KLEBR, born August 8, 2004;**

2. **Should leave be granted, or not be required, an Order pursuant to Section 18 of the *Maintenance and Custody Act* for joint custody of KLEBR, born August 8, 2004, with primary care to the Applicant;**

3. **Reasonable access for the Respondent on reasonable notice to the Applicant, the details of which to be agreed upon between the parties;**

4. **Child maintenance in accordance with Child Support Guidelines;**

5. **That the Application involving the same parties bearing Court No. FKMCA-071228 be joined with this Application to include both children, MICPS, born May 11, 2009, and KLEBR, born August 8, 2004;**

6. **An Order pursuant to Section 20 of the *Maintenance and Custody Act* requiring the Respondent to return the children to the Province of Nova Scotia forthwith;**

7. **In the alternative, an Order for joint custody of the children, MICPS, born May 11, 2009 and KLEBR, born August 8, 2004, with primary care to the Applicant on an interim basis pending further disposition of the Court, and an Order pursuant to Section 20 of the *Maintenance and Custody Act* requiring the Respondent to return the children to the Province of Nova Scotia forthwith.**

[4] CAS argues that Nova Scotia has jurisdiction to hear this matter, that he has been KLEBR's guardian, or, in the alternative, be granted leave of the Court as he is the only father she has known and that he is the better parent to care for both children.

[5] ELKS argues that Nova Scotia has lost jurisdiction because she and the children had been in British Columbia at the time the matter was heard for five months. She argues that she is the better parent.

FACTS DETERMINED UPON HEARING THE EVIDENCE

[6] CAS and ELKS were married on May 18, 2007, having dated for approximately five months prior to that. CAS is not KLEBR's biological father. KLEBR was approximately two and a half years old when the parties married.

[7] CAS and ELKS have cohabited together as a married couple with KLEBR and, subsequently with MICPS until ELKS removed the children from their home in June 2010.

[8] KLEBR is now six years old. CAS has been the only “father figure” she has known.

[9] Subsequent to their marriage, CAS was transferred to the Canadian Forces Base in Borden, Ontario, and ELKS and KLEBR moved into the residence in Borden on September 1, 2007.

[10] In February 2009, CAS and ELKS, along with KLEBR, moved to Greenwood, Nova Scotia, and on May 11, 2009, MICPS was born.

[11] The marriage was turbulent with ELKS having had an affair, and CAS having anger issues.

[12] In May 2010, ELKS took the children to a shelter for abused women and children, but returned to the matrimonial home on May 22, 2010.

[13] The Department of Community Services became involved as a result of CAS slapping KLEBR on the face and leaving a bruise.

[14] When ELKS returned from the shelter, CAS and ELKS, in conjunction with the Department of Community Services, discussed ELKS's options for removing herself and the children from risk, and the possibility of ELKS travelling to Alberta and British Columbia to visit with the family was decided upon. CAS agreed to participate in an anger management program while she was away.

[15] CAS bought plane tickets for ELKS and the children to fly from Halifax to Calgary and purchased train tickets for himself as well as for ELKS and the children to return from British Columbia in two months.

[16] Before leaving the province, ELKS signed an undertaking to return to Nova Scotia with the children no later than the end of July 2010. (She testified she did not have legal advice when she did this and only did so to make sure she and the children could leave Nova Scotia.) On July 8, 2010, ELKS informed CAS that she had no intention of returning to Nova Scotia.

[17] On July 14, 2010, CAS contacted the British Columbia Provincial Court and was informed that ELKS had filed documents with the Court for custody of the children. He was the only Respondent. (CAS testified he was informed by the

British Columbia Provincial Court that the British Columbia Provincial Court did not have jurisdiction to hear the matter.)

[18] On July 16, 2010, CAS commenced proceedings with the Nova Scotia Family Court for custody of MICPS. On September 1, 2010, CAS made a further Application with the Family Court in Nova Scotia for leave and custody of KLEBR.

[19] CAS was never served with the Application made with the British Columbia Provincial Court. However, ELKS has been personally served with the Applications in the Nova Scotia Family Court respecting the children.

ISSUES

[20] A number of issues have arisen as a result of this matter. They are:

1. **Does the Court have to consider the issue of jurisdiction first, or CAS's application for leave to apply to the Court for custody of KLEBR?**

> **2. Does Nova Scotia have jurisdiction to hear this matter, or is it more properly heard in British Columbia where the mother and children have resided for five months?**
>
> **3. Is the Respondent, CAS, the child KLEBR's guardian, as defined in the *Maintenance and Custody Act* R.S.N.S. 1989, c. 160?**
>
> **4. If the Respondent, CAS, is not the child, KLEBR's guardian, as defined in the *Maintenance and Custody Act*, should the Court grant him leave to apply for custody of KLEBR?**
>
> **5. Is this matter properly before the Court, given the other two men named as being putative fathers for KLEBR?**
>
> **6. If the Court determines that Nova Scotia is the proper jurisdiction and CAS is granted leave, then who should have custody of these children?**

(1) JURISDICTION VERSUS AN APPLICATION FOR LEAVE

[21] Counsel for ELKS argued that CAS has no standing to apply for KLEBR and therefore Nova Scotia has no jurisdiction, at least with respect to KLEBR. He argues:

> **"Since CAS has no statutory rights regarding custody of KLEBR unless he be granted leave, the child's ordinary residence remains that of the mother. Since at least July 10, 2010, that residence is Kamloops, British Columbia, and this is where any custody application involving KLEBR should be heard."**

[22] However, this is not merely an Application for leave to apply for custody of a non-biological child. It is also an Application for custody of a biological child, so the issue of jurisdiction, at least with respect to that child, is properly before the Court. Furthermore, the Court has determined that prior to considering any Application before the Court, including the Application of standing, it is logical and indeed imperative to determine if the Court has jurisdiction to do so. Therefore, the Court has embarked on the issue of jurisdiction as a first step.

(2) JURISDICTION

The factors a Court must consider when determining jurisdiction are set out in: **N.R.R. v. D.E.A.F.**, 2009 NSFC4, (unreported) as restated in **C.L.J. v. R.A.M.**, 2010 NFC 5 (unreported), both being decisions of this Court and are as follows:

(1) is the child ordinarily or habitually resident in the jurisdiction?

(2) is the child present in the forum?

(3) does the child have a real and substantial connection with the forum?

(4) which province or jurisdiction is the most convenient forum?

(5) would the child be at risk if jurisdiction is not assumed?

(6) where is the best evidence available?

(7) which venue allows for a full and sufficient inquiry of the issue?

(8) what is the status of the relationship between the parties?

(9) has a party to the proceedings consented to the child being in another jurisdiction?

(10) has a party to the proceedings acquiesced in the child's remaining in another jurisdiction?

(11) is there any evidence of abduction?

(12) how much time has passed with the child being in another jurisdiction?

(13) what is the age of the child as it pertains to the child's familiarity with the competing jurisdictions?

(14) if applications have been filed in concurrent jurisdictions, taking in account any administrative difficulties, whose application was first in time?

(15) avoidance of multiplicity of proceedings;

(16) what are the wishes of the child, when applicable and appropriate, taking into account the maturity of the child to appreciate to gravity of her or his wishes?

(17) what was the intent of the parties, if any, with respect to where the child would live and how does that impact upon the best interests of the child?

(18) considering all of the foregoing, as applicable, what is in the best interests of the child taking into account all aspects of the case before the Court?

(a) Are the Children Ordinarily or Habitually Resident in the Jurisdiction?

[23] As noted above, the parties had been living together as a family in Greenwood, Nova Scotia, from February 2009, until ELKS's departure to British Columbia in June 2010.

[24] It is apparent from the evidence that the events leading up to this departure were turbulent and stressful on both parties.

[25] CAS sets stage for this departure in his affidavit, as follows:

1. **"Shortly after we came back to Nova Scotia, ELKS took the children and went to a Shelter for Abused Women and Children, which**

surprised me. She told me that she had made complaints of me being bad to KLEBR."

2. **"After this occurred, I went to the Wing Padre at work for some guidance and also set up an appointment with a social worker; eventually I convinced ELKS to come back home with the children."**

3. **"After ELKS returned from the shelter, we had meetings with Geri Tobin, who was a social worker stationed at CFB Greenwood and ELKS and I informed her that we had been working on our relationship since her return from the shelter."**

4. **"On May 22, 2010, she came back with the children. When she returned, I came to the realization that I had anger management issues which needed to change. As a result, I agreed to seek counselling and attached hereto as Exhibit "A" is a true copy of a letter from my counsellor confirming my progress and successes with respect to my counselling."**

5. **"Within a few days after ELKS's return from the shelter, I was informed that we had a choice between ELKS temporarily relocating back to the shelter, or for her to stay with the children with her relatives in Alberta and British Columbia on a temporary basis. After meeting with the social workers, it was agreed by all parties that ELKS would take the children to Alberta and British Columbia and stay with her relatives for a couple of months. After this decision was made, I bought ELKS and the children plane tickets to fly from Halifax to Calgary and attached hereto as Exhibit "B" are true copies of the plane tickets I purchased."**

6. **"Before leaving, ELKS signed an undertaking to return to Nova Scotia with the children no later than the end of July 2010. Attached hereto as Exhibit "C" is a true copy of the undertaking signed by ELKS and I."**

7. **"During the time that ELKS was in Alberta and British Columbia with the children, she would call me to request money from time and time, and I would deposit money in her Bank of Montreal account. The first of these requests was made on June 9, 2010. After this request, I sent money to ELKS every payday."**

[26] CAS did not waiver from this telling of events during his testimony.

[27] ELKS's affidavit differs somewhat:

1. **"Due to the continual spankings and what I viewed as an escalation in CAS's anger, especially towards KLEBR, I reported the incident to the Minister of Community Services upon our return to Nova Scotia."**

2. **"Upon speaking with Kenneth MacLean, a worker with the Nova Scotia Minister of Community Services, I was advised that due to CAS's anger issues, I should take the children and leave the home. Accordingly, I left with them and went to Chrysalis House in Kentville where I stayed for about a week. I then returned home at the end of that week hoping that matters could be worked out."**

3. **"In late May 2010, another incident of violence occurred, this time involving CAS and MICPS. KLEBR was at school and CAS, MICPS and myself were in the bedroom. CAS was on the telephone. MICPS began hitting the keys of CAS's computer whereupon CAS grabbed MICPS by one arm and yanked him away from the computer. MICPS cried out in pain, and upon examination I noted bruising to MICPS's shoulder area."**

4. **"Since it appeared to me that CAS had injured MICPS in pulling him up by the one arm, I wanted MICPS to be seen by a doctor. CAS would not allow it. I subsequently reported this episode to my worker with the Minister of Community Services."**

5. **"During this same time period, CAS and I had been discussing separation. I was fearful especially following the said incident with MICPS, that the Minister of Community Services might remove the children from my care unless I immediately took steps to obtain alternate accommodation. I waw mindful as well that I did not have permission from the workers for the Minister of Community Services when I left Chrysalis House and returned to CAS."**

6. **"The matter was discussed between CAS and myself. We agreed in the circumstances that it would be best if I took the children out west where my family could assist me. CAS wanted me to wait until the end of June 2010, when the tax monies would arrive, but I was too fearful of possible intervention by the Minister of Community Services if we delayed. We finally agreed that I would leave with the children on June 3, 2010."**

7. **"On June 3, 2010, the day of departure, CAS presented me with a consent form which he had written out and which would require me to return with the children to Nova Scotia by July 31, 2010. CAS insisted that I sign this document or he would cancel the air plane tickets."**

8. **"The flight was scheduled for 8:00 p.m. CAS presented me with his ultimatum in early afternoon of the same day as the flight. I had no money with which to make alternate arrangements. Moreover, I did not know whether the Minister of Community Services might remove my children from me if I stayed.**"

[28] Jennifer Robyn Hill, a social worker with the Military Family Resource Centre testified on behalf of CAS. She testified that she met with them as a couple and it was discussed that one party would leave the province. She said on June 2, 2010, ELKS walked into her office and asked her about emergency housing.

Chrysalis House was contacted at that time. On June 3, 2010, Ms. Hill testified that three options were discussed: that ELKS take the children and move to Chrysalis House; that CAS vacate the family home and move to “Barracks”; that ELKS go out West.

[29] She further testified that CAS had asked her for a letter saying she witnessed the conversation that took place in her office to confirm that ELKS intended to return to Nova Scotia. She testified that she told him to contact legal services.

[30] The Court thought it appropriate to provide the evidentiary backdrop above, in light of the well-established caselaw pertaining to whether a Court should find the children “ordinarily or habitually resident in the jurisdiction”.

[31] **The Annual Review of Family Law, 2008**, noted that the definition of habitual residence is as follows: **“The child is habitually/ordinarily resident in the place where he or she last lived with the parents.”**

[32] In **Bedard v. Bedard**, 242 D.L.R. (4th) 625, the Court found that one parent cannot unilaterally change the ordinary or habitual residence by moving a child’s

residence without the other parent's consent or a Court order and that consent to a temporary removal is insufficient.

[33] **In Sutton v. Sodhi**, infra, Judge Sparks references the case of **Burgess v. Burgess** (1979), 19 N.S.R. (2d) 6889 (NSCA) and states:

> **The Burgess case held that generally the place where the child is ordinary resident is the most convenient forum in determining whether to exercise jurisdiction, the court of presence should look to the welfare of the child and the administration of justice unless there is fear of harm to the child. The oft-quoted words of Lord Denning in Re P.(G.E.) (an infant), supra, are helpful: a child's ordinary residence is the last place in which the child resided with his parents . . . so long as the father and mother are living together in the matrimonial home, the child's ordinary residence is a home - and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns. When a father and mother are at variance and are living separate and apart and by arrangement the child resides in the house of one of them - then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time . . . Quite generally, I do not think a child's ordinary residence can be changed by one parent without the consent of the other . .**

[34] Judge Sparks further comments at paragraph 23:

> **I accept that a child's ordinary residence is where it last resided with its parents and a child's ordinary residence cannot be changed without the consent or acquiescence of the other parent.**

[35] It is clear from having reviewed all of the evidence and the pertinent legislation that the children therefore are ordinarily resident of Nova Scotia.

(2) Are the children present in the forum? They are not.

(3) Do the children have a real and substantial connection with the forum?

[36] MICPS was born in Nova Scotia, and the parties had been living in Nova Scotia since February 2009, when CAS was posted to Greenwood from Borden, Ontario. During the time that they resided there, KLEBR was enrolled in school in Greenwood and the evidence is that she has friends in this area. Therefore, the children have a real and substantial connection with the forum.

(4) Which province or jurisdiction is the most convenient forum?

[37] Counsel for CAS argued:

> **"We submit that Nova Scotia is the most convenient forum for determination of matters of custody, due to the fact that the children's ordinary residence is here in Nova Scotia, and that the proper administration of justice should discourage abduction or wrongful withholding of children as well as forum shopping. On the issue of forum conveniens and habitual residence, Judge Melvin quoted from Hjorleifson v. Gooch (1986), 73 N.S.R. (2d) 271 (NSCA) at paragraph 24 of the *N.R.R.* decision as follows:**
>
> **Further, Power on Divorce and Other Matrimonial Causes, 3rd ED. Vol 2 at pp. 259 - 260 states the matter thusly: The place where the child is ordinarily resident, in most cases, the most convenient forum to hear the case. Yet, the place where the child is also has jurisdiction. In determining whether to exercise its jurisdiction the court where the child is physically present will bear in mind two considerations: the administration of justice and the welfare of the child. Clearly, abduction of children should be discouraged from the point of view of proper administration of justice and it is in the best interests of the child that the case be heard by the forum conveniens which, as if stated above, is generally the place of ordinary residence."**
>
> **Therefore, due to the facts as established above, and that the ordinary or habitual residence is the Province of Nova Scotia, in accordance with the decision of the Nova Scotia Court of Appeal as quoted above, the most convenient forum to hear the matter is the Province of Nova Scotia."**

[38] The Court, having considered the facts and the jurisprudence, finds that Nova Scotia is the most convenient forum.

(5) Would the children be at risk if jurisdiction was not assumed in Nova Scotia?

[39] While counsel for ELKS argues that there is " . . . no credible evidence before the Court that harm would befall KLEBR if the Nova Scotia Court declined jurisdiction . . .", counsel for CAS argues that there is a possibility that the children would be " . . . at risk by remaining in British Columbia due to ELKS's history in Kamloops with prostitution and drugs."

[40] This allegation was set out in CAS's affidavit, although little was made of it at trial. This is an example of a statement made to inflame the sensibilities of the parties prior to Court and it is always of concern to the Court when such a method is used. Whatever ELKS's past, CAS must have believed she had changed, as he married her and they raised children together.

[41] That being said, there is no credible evidence before the Court that harm would befall the children if Nova Scotia assumed or declined jurisdiction.

(6) Where is the best evidence available?

[42] The parties were husband and wife in Nova Scotia when they resided with the two children for approximately 16 months, one of whom was born in Nova

Scotia during that time. ELKS was not in British Columbia for a month before she filed in the Provincial Court in British Columbia for custody of the children.

[43] Logically, there would be no evidence of her parenting abilities versus those of CAS's in British Columbia, and it would be a substantial stretch to find there to be any credible evidence at all in British Columbia, specifically with respect to CAS.

[44] Would this constitute "the best evidence available"?

[45] In **Fregehen v. Kendrick**, 72 R.F.L. (6th) 1, Justice Ottenbreit determined that the evidence and witnesses respecting the domestic circumstances of the mother were in Saskatchewan, including a Social Services Worker, who had been contacted regarding the mother's situation. Therefore, the majority of the key witnesses regarding the mother's fitness and circumstances were in Saskatchewan, tipping the balance of convenience in Saskatchewan's favour.

[46] In Nova Scotia, similarly, there are witnesses available to testify regarding both parties and their care of the children, and whether it is good care or not makes

little difference in satisfying this particular test. The Court, to determine any issue, requires "the best" evidence available. In this case, the best evidence available is evidence of both the parties and their parenting abilities.

[47] Therefore, the best evidence is available in Nova Scotia, not British Columbia.

(7) Which venue allows for a full and sufficient inquiry of the issues?

[48] As noted above, and as was held in this Court's decision, **N.R.R. v. D.E.A.F.**, supra., this factor goes hand-in-hand with the previous factor and therefore, as Nova Scotia is the venue which allows for a fuller and more sufficient inquiry of the matters at issue.

(8) What is the status of the relationship between the parties?

[49] The evidence is that there appears to be a permanent breakdown in the marriage of CAS and ELKS. The parties have been separated for five months and ELKS testified that there is no chance of reconciliation. However, the evidence is

that when ELKS took the children to British Columbia, the parties were taking a break from the relationship as they were having difficulties with their marriage. If ELKS considered the marriage to be over at this time, there is no evidence that she communicated this to CAS. The Court accepts as evidence that the understanding between the parties was that CAS would participate in anger management and that ELKS would take the children to British Columbia so that Family Services would not apprehend the children. The Court further accepts as evidence that ELKS led CAS to believe that both she and the children would return to Nova Scotia.

(9) Has a party to the proceeding consented to the children being in another jurisdiction?

[50] The evidence on this factor is clear: CAS believed his wife and children were returning to Nova Scotia, he agreed they could leave Nova Scotia only if ELKS signed a consent to return, and CAS in no manner whatsoever consented to the children being in another jurisdiction on a permanent basis, but rather for two months while he completed an anger management program so that the family could live together without living in fear of the children being apprehended by Family and Children's Services of Kings County.

(10) Has CAS acquiesced to the children remaining in another jurisdiction (British Columbia)?

[51] Again, clearly not. The evidence is that within two days of CAS being made aware of ELKS's intention not to return to Nova Scotia, CAS made his application to the Family Court of Nova Scotia for custody of MICPS.

(11) Is there any evidence of abduction?

[52] Counsel for ELKS makes an interesting argument on this issue:

> **It is arguable that ELKS's action in taking the children to Alberta and British Columbia did not constitute abduction, since she had CAS's permission to travel; however, the children are being wrongfully detained in British Columbia and ELKS has breached her undertaking to return.**
>
> **It is clear on the evidence that the decision was made unilaterally by ELKS to remain in British Columbia and it would appear that ELKS took the children to British Columbia with the intention of not returning before she even left Nova Scotia. This is therefore akin to an abduction, since CAS has had no input on the matter, and because ELKS used the guise of a promise she never intended to keep in order to obtain CAS's consent to a temporary removal of the children from the Province of Nova Scotia.**

If the facts of this case were different, and the only difference was that ELKS had taken the children outside of Canada, then the *Child Abduction Act,* R.S.N.S. 1989 c. 67 would apply, which would mandate that, not only would the courts of habitual residence of the children is the appropriate forum to determine matters of custody, but also would mandate the immediate return of the children to Canada and to Nova Scotia. Looking to the purposes and application of the *Hague Convention and Civil Aspects of International Child Abduction*, 1980, C.T.S. 1983/35; 19 I.L.M. 1501, as adopted by the *Child Abduction Act*, in the Nova Scotia Court of Appeal decision of *A. (J.E.) v. M. (C.L.)*, 2002 Carswell NS 425, Justice Cromwell stated the following at paragraphs 27 and 28:

27 The purposes of the Convention all flow from this underlying principle and supporting assumption. The Convention seeks to secure the prompt return of children wrongfully removed and to ensure effective respect of rights of custody and access. Convention, Article 1. The Convention presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately repatriating them to their original jurisdiction where the merits of custody should and, but for the abduction, would have been determined: see, of example, *Thomason v. Thomason*, [1994] 3 S.C.R. 551, [1994] S.C.J. No. 6 (S.C.C.) at paras. 39-49 and *Droit de la famille - 1763* (1996), [1996] 2. SC.R. 108 (S.C.C.) [Hereinafter V.W. v. D.S.] at paras. 21-29 and particularly at paras. 36-37.

28 The strong policy of the Convention in favour of ordering immediate return is " . . . intended to deter the abduction of children by depriving fugitive parents of any possibility of having their custody of the children recognized in the country of refuge and thereby legitimizing the situations for which they are responsible." see V.W. v. D.S. at para. 36. As had been said, ". . . the foundation of the [Convention] is the rapidity of the mandatory return process and the principle that the merits of issues related to the custody of children who have been wrongfully removed or retained are to be determined by the courts of their habitual place of residence . . ." *V.W.* at para. 38.

Justice Cromwell held that the child should be returned to the State of Iowa by applying the *Child Abduction Act* due to the fact that the child's habitual residence was the State of Iowa before the mother wrongfully removed the child from the United States to move,

initially, to British Columbia, and then subsequently Nova Scotia. Although, again I recognize that the *Child Abduction Act* does not apply to interprovincial custody matters, we submit that the comments made by Justice Cromwell are useful and provide guidance in the case at bar, due to the fact that ELKS has wrongfully retained the children in British Columbia. Had she travelled with the children to anywhere outside of Canada, the *Child Abduction Act* would come to CAS's aid.

Under the *Child Abduction Act*, the underlying principal is that the courts of the place of the child's habitual residence are best suited to protect the child and make suitable arrangement for his or her welfare. We submit that this is the general underlying principal looking at the factors noted in the *C.L.J.* decision, respecting issues of jurisdiction and the habitual residence of the children. On this issue, Justice Cromwell stated the following at paragraph 24 of the decision:

> ***This general approach is compelling. A person who abducts a child in violation of rights of custody determined by the courts of the place of habitual residence is, by the abduction, attempting to circumvent the due process of law in that place. In addition, the abducting parent is seeking to establish new and artificial jurisdictional links with the courts of another place more to his or her liking. The abducting parent is, therefore, not only unilaterally severing the child's relationship with the other parent but also is unilaterally selecting a forum most convenient to the abducting parent for consideration of the child's best interests.***

We submit that the above passage speaks to the facts in the case at bar and, as stated above, these unilateral actions which have been undertaken by ELKS should be discouraged. Her actions have had the effect of unilaterally severing the children's relationship with CAS, and since she is originally from Kamloops, she is now attempting to unilaterally select British Columbia as the appropriate forum, since it suits her needs. However, these actions do not suit the children's best interests since it has had the effect of, not only removing them from the environment they have become familiar with in Nova Scotia, but also because they have been removed from any contact with CAS. This is especially true in relation to MICPS since he is at an age where his contact with his parents is important for his social development as well as the development of a meaningful relationship with his father.

[53] Counsel for ELKS argues that there is no evidence of abduction.

[54] If the Court accepts the evidence of CAS that he truly believed the children and his wife would only be in British Columbia for two months while he concentrated on his anger management program, then the Court must consider whether the children have been abducted. Whatever legislation governs whatever level of Court in whatever jurisdiction, certainly Justice Cromwell's comments in **A. (J.E.) v. M. (C.L.)** 33 R.F.L. (5th) 1, as noted directly above, resonate at all levels of Courts dealing with children.

[55] ELKS signed a document saying she would return with the children in two months and testified she would have done much more than that to be able to leave. She deliberately misled CAS, she manipulated him into purchasing plane tickets, she outright lied to him to take the children out of Nova Scotia. She had other options, but she resorted to dishonesty to sever MICPS and KLEBR's relationship with CAS.

[56] Many other applicants come to this Court on what is commonly called a mobility Application and go through the proper channels if they want to move from the jurisdiction with their children.

[57] ELKS had other options, but she circumvented honesty and proper legal procedure by acting in the manner in which she did.

> (12) How much time has passed with the children being in another jurisdiction?

[58] The children have been in British Columbia for five months, although this application was made when they had been in British Columbia for less than one month.

[59] Does a five month period, given the circumstances of this particular case, lend itself to sufficient time in the competing jurisdiction of British Columbia, to [retain] jurisdiction?

[60] Obviously the ***Divorce Act***, R.S., 1985, c.3 (2nd Supp.), does not apply to this proceeding; however, section 3.(1) of the ***Divorce Act*** states:

> **"A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding."**

[61] If one applies this definition of "ordinarily resident" to child custody proceedings, clearly ELKS's argument falls far short.

[62] One might also consider that a child's sense of time is different from that of an adult. MICPS, for instance, spent the first 16 months of his life in Nova Scotia with both parents. Did he know where he was? No. But he did know on some level that he was with his mother and his father.

[63] For the last five months he has not seen his father, and neither has KLEBR seen the only man - the evidence showed - she has had in her life as a father figure.

[64] So, has sufficient time passed, given all of the evidence before the Court and having taken into consideration a child's sense of time, for the children to be ordinarily resident of British Columbia?

[65] It is the finding of this Court that five months is not sufficient time to allow a Court to deem the children ordinarily resident in British Columbia.

(13) What is the age of the child as it pertains to the child's familiarity with the competing jurisdiction?

[66] MICPS spent his first 16 months in Nova Scotia and five more in British Columbia. His greatest knowledge is not of where he has lived but with whom.

[67] KLEBR moved to Nova Scotia when she was three years old and started school in Nova Scotia so she does have a substantial familiarity with Nova Scotia.

(14) If applications have been filed in concurrent jurisdictions, taking into account any administrative difficulties, whose application is first in time?

[68] ELKS's Application was filed with the British Columbia Provincial Court on July 13, 2010 and CAS's Application before the Family Court of Nova Scotia was made on July 16, 2010. As noted in paragraph 34 of CAS's Affidavit, the British Columbia Provincial Court informed him that in the circumstances, they

did not have the jurisdiction to hear ELKS's Application for custody and that she would be required to file an Application with the British Columbia Supreme Court in order to proceed. Therefore, CAS's Application is first in time.

(15) Avoidance of multiplicity of proceedings: Not applicable

(16) Wishes of the Children.

[69] This evidence is not before the Court.

(17) What was the intent of the parties, if any, with respect to where the child would live and how does that impact upon the best interests of the child?

[70] Both parties have given evidence of their intentions and CAS's evidence is that if he is awarded custody, the children will live with him at his home in Greenwood, Nova Scotia, and that due to his work schedule, his father, whom KLEBR is familiar with, would provide child care while CAS is at work. ELKS's evidence is that the children will remain with her in Kamloops, British Columbia, should she be awarded custody.

(18) Considering all of the foregoing, as applicable, what is in the best interests of the child taking into account all aspects of the case before the Court?

[71] Having considered all of the evidence before the Court and giving serious weight to the aforementioned factors, it is in the best interests of the children that the matter be heard in Nova Scotia where they last resided with the two people the children viewed as their parents.

(3) IS THE APPLICANT, CAS, THE CHILD, KLEBR'S, GUARDIAN AS DEFINED BY THE MAINTENANCE AND CUSTODY ACT, R.S.N.S., 1989, CH. 160?

[72] Guardian is defined in the **Maintenance and Custody Act**, supra*, as:*

> **" . . . a head of a family and any other person who has in law or in fact the custody or care of a child . . ."**

[73] In **Fitzgerald v. Sieperski,** (2000), N.S.J. No. 451 (N.S. Sup. Ct. Family Division), Hood, J., states at paragraph 24:

> **"There are two groups which must support children under the Family Maintenance Act: parents, regardless of whether the parent has custody or care of the child; and guardians, where**

> **the child is a member of the guardian's household and is in that person's legal or de facto custody or care. One does not become the guardian of a child by co-habiting with the child's parent, in this case, the mother."**

[74] In **V.S. v. J.S.** [2007] N.S.J. No. 368, August 20, 2007, Comeau, CJFC, as he then was, commented on **Fitzgerald v. Sieperski**, supra. At paragraph 16 of that decision, he states:

> **"In F. V. S. (2000) N.S.J. No. 451, 2000 docket number SFHF 1999-004074 Justice Hood of the Nova Scotia Supreme Court concluded that at the time of the application the Respondent was not a guardian because he was no longer the head of the family and did not have custody or control of the children, they were not members of his household. This was so even if the appropriate time to view the household make-up was at the time of cohabitation. In conclusion she found the step-parent not to be a parent nor a guardian under the Maintenance and Custody Act and not obliged to pay child support. She also refused on the facts of the case to exercise her parens patriae jurisdiction."**

[75] The Family Court of the Province of Nova Scotia, unlike the Nova Scotia Supreme Court (Family Division), has no inherent *parens patriae* jurisdiction. This situation was clarified by Judge Sparks in her decision in **M.A.B. v. T.L.B.**, (2002) N.S.J. No. 192 where the learned Judge states in paragraph 9:

> **"Terminology used in the Family Maintenance Act and the Divorce Act are distinguishable. As the Family Court, a statutory court, which has exclusive jurisdiction over the Family Maintenance Act, has no inherent parens patriae jurisdiction caution, in my opinion, must be exercised when transferring legal terminology from the Divorce Act to the Family Maintenance Act, and thus there is no automatic in loco parentis' standing under the Family Maintenance Act."**

[76] The Applicant argues that he is KLEBR's guardian because he is either the "head of the family", and/or at the relevant time, KLEBR was "a member of his household". With regard to the former, Judge Levy in the case of **Plante v. Plante**, [1990] N.S.J. No. 443, at p. 6 asked the following relevant questions:

> **Was he a "head of a family"? In fact what is a head of a family? Can a family have two heads or more? If only head per family, is it the male or female?**
>
> **Interesting though this quaint phrase might be for analysts, the working of 2(e) ties to the phrase, "a head of a family" the further phrase, *". . . and any other person who has in law or in fact the custody or care of a child".* In short, whatever the definition of a head of a family, it implies someone who has *"in law or in fact"* the custody or care of a child. . .**

[77] In **Casey v. Chute**, F.A.M. 97-0057, at page 7, paragraph 1, DeWolfe, JFC, states:

> **"The Nova Scotia [Court] of Appeal in Reed v. Smith (1988), 86 N.S.R. (2d) 72 (N.S.C.A.) held that a step parent is neither a "parent" or a "guardian" . . . as such I cannot make an order for child support . . ."**

[78] In the case before the Court, the parties are married, and although CAS did not adopt KLEBR, he was the "father figure" in the household and according to the evidence, the only "father" KLEBR had known.

[79] Counsel for CAS made an interesting argument that the parties had "not separated". He argued:

> **"Therefore, in all of the above cases, the court was dealing with a situation where there was a separation and the husband was no longer the head of the family and no longer had custody or control of the children. Although it could be argued that CAS no longer has custody or control of the children due to the fact that they are with ELKS in the province of British Columbia, the facts of the case at bar are distinguishable from the settled jurisprudence determining the status of guardianship due to the fact that there had been no separation between CAS and ELKS as was the case in other decisions. Therefore, the severance of the family relationship and defacto custody and care of the children was not determined by the parties, but rather, determined by ELKS alone.**
>
> **We submit that, since the parties had not separated, the parties' home in Nova Scotia was the home base from which the parties would travel and return. As noted above in the passage from Lord Denning, quoted in the N.R.R. decision, even if the child were away at boarding school, the home that they lived in with their parents was still their habitual**

> **residence and the home base from which they operated. In the same way, the home in Nova Scotia is this home base, where CAS remains the head of the household. Therefore, travel arrangements which are intended to be temporary in nature do not act to sever this guardianship relationship."**

[80] Although interesting, it is likewise problematic. The evidence is and the Court finds as fact that CAS truly believed ELKS and the children would be returning to Nova Scotia to resume their relationship. The Court also finds as fact, however, that ELKS had no such intention. She and their children remained in British Columbia and did not intend to return. In fact, she testified in cross-examination: "I had no intention of returning. Our marriage fell apart a long time before I left."

[81] A separation clearly does not have to be a mutually agreed upon entity and often is not. A separation is when one person decides he or she cannot continue to be involved in the relationship and leaves it. This is what ELKS did, therefore, whether CAS wants to be separated, or accepts that he is, he and ELKS are separated. He is not, therefore, . . . "a head of family . . ." as defined by the legislation, as antiquated as the term may be, and therefore not KLEBR's guardian as defined by the Act.

(4) SHOULD THE COURT GRANT LEAVE TO THE APPLICANT, CAS, TO APPLY FOR CUSTODY OF THE CHILD, KLEBR?

[82] In **MacLeod v. Theriault**, 2008 NSCA 16, Bateman, J., at paragraph 15 stated:

> **"The best interests of the child is the predominant consideration in any proceeding concerning children. Parents are the presumptive custodians of the children (MCA, s. 18(4)). As such they make decisions about the interests of their children. The courts will interfere with that decision making only for substantial reasons."**

[83] Bateman, J., held that there is no single test to be applied on leave Applications. The Court must balance a number of factors in considering whether or not leave may be granted. The relevant factors must be gleaned from the context of each particular situation. However, there is a threshold test that the applicant bears the onus of meeting in order to be granted leave.

[84] Bateman, J., cited Justice Goodfellow's decision in **G. (C.) v. G. (M.)** (1995), 147 N.S.R. (2d) 369 (N.S.S.C.), paragraph 20:

> **"On an application for leave the person who is applying must meet a threshold test showing that the granting of**

> **leave is likely to be of benefit to the welfare of the child. This is the threshold or test that must be met by the applicant, and I agree with Justice Legere's review of many of the factors that constitute important considerations depending on the particular facts of each case where she concluded at page 38: any one of these factors in and of itself is not the test."**

[85] In the Nova Scotia Supreme Court decision of **Ainslie v. Lively-Mannette**, 2001 Carswell NS 589, Ferguson, A.C.J., granted leave to the paternal grandmother after determining that she had met the threshold test of showing that her Application was likely to be of benefit to the child. Ferguson, A.C.J. noted that the applicant had a positive relationship with the child and had visited with the child through the biological father regularly since birth, until the respondent had terminated the applicant's ability to have access with the child.

[86] The factors to be considered in leave Applications, as noted by this Court in **MCS (Annapolis County) v. B.R. and T.S. v. B.B., M.M. and S.M. v. I.B. v. P.E.M.; A.H. and D.H. v. R.M. v. W.H.** (all unreported) are:

> (1) Is there a sufficient interest and/or connection between the child and the Leave Applicant and is there an obvious benefit to the child?

(2) Is the child emotionally attached or bonded to the leave Applicant, or is the connection one of which the child is aware?

(3) Does the Leave Applicant have a familial relationship she/he wants to foster?

(4) Is the application frivolous and vexatious?

(5) Are there other appropriate means to resolve the issue? (For example, mediation (especially under C.F.S.A.), or access in conjunction with the other parent (if this is a grandparent application).

(6) Are there risk factors apparent on the evidence that would preclude the Applicant from having contact with the child if the leave application were granted?

(7) Will the granting of a leave application place the child in more risk of litigation and uncertainty?

(8) Are there extenuating circumstances? (Such as the death of a parent, or a parent not exercising parenting time due to being in jail, or out of the province for extended periods of time).

(9) Is, or would, the involvement of the third party be destructive or divisive in nature?

(10) Would leave put undue stress on the custodial parent, if the Leave Applicant were successful in the application for access?

(11) Would granting leave, and the possibility thereafter, granting access, threaten the stability of the Family unit?

(12) Would a Court Order preserve a positive relationship between the child and the leave applicant?

(13) To what extent does the custodial parent's decision affect the child and is it a reasonable decision in the particular circumstances of each case?

(14) In a case under the C.F.S.A., would the granting of a leave application provide the child with a potentially feasible plan to reintegrate into the child's own family that would be in the best interests of the child?

(15) Considering all of the above, is the granting of leave, in the best interests of the child?

[87] The Court has applied the factors to the evidence as follows:

[88] (1) Is there a sufficient interest or connection that would be an obvious benefit to the child? CAS acted as KLEBR's "father" for the entire time the parties were together and KLEBR does not "know" her biological father (whomever that may be), so there is a sufficient connection to the child. There was no specific evidence adduced as to what benefit to KLEBR a continued relationship with CAS would be, however, KLEBR's brother would be seeing

CAS, and given KLEBR's connection with respect to CAS, the Court finds there would be a benefit for the child to have continued contact with CAS.

[89] (2) Is the child emotionally attached or bonded to the leave applicant? ELKS would certainly have the Court believe that any bond between CAS and KLEBR is a negative one. She states in her affidavit:

> **8. "During our three years of marriage, CAS became increasingly controlling and abusive towards me as well as towards KLEBR." . . .**
>
> **14. "According to CAS, childcare for both KLEBR and MICPS was my responsibility. As soon as supper was done, CAS liked to nap for anywhere from one to two hours. I was expected to keep the children quiet during that time or CAS would become upset."**
>
> **15. "There was little interaction between CAS and the children. When CAS was home on weekends, he would usually lie on the couch and watch television."**
>
> **17. "In the event I was permitted to go to the store leaving CAS with the children, CAS would neither feed the children nor change a diaper. To CAS, these were my jobs and I was expected to take care of it as soon as I arrived home."**

18. "CAS is easily angered. When upset, he yells. Whenever I try to reason with him, he will merely repeat himself, raising his voice with each repetition."

19. "CAS was especially angered by KLEBR. He would become upset with her if she failed to clean her room and/or the living room, or did so but not to his satisfaction. CAS would also become angry at KLEBR if she failed to finish her meal or if she was too slow at eating. CAS would sometimes react by pulling her hair."

20. "Whenever KLEBR did anything that upset CAS, he would usually resort to corporal punishment. This consisted of a minimum of three, hard, consecutive slaps to the bottom. During the three years that we lived together as a family, KLEBR received continual spankings at CAS's hand."

21. "Frequently, I tried to intervene when CAS became angry at KLEBR and he resorted to hitting me. But when I made such attempts, CAS would raise his voice and yell at me, telling me to "back off"."

24. "The situation came to a head when CAS had leave between February and the end of April 2010, respectively. During that time we visited with family in both Ontario and British Columbia."

25. "On March 20, 2010, while at his parents' home in Toronto, an incident occurred during which CAS assaulted KLEBR. More than anything, this incident made me realize that for my sake and that of the children, I could not continue to endure CAS's emotional and physical abuse."

> **26. "KLEBR, who was 5 at the time of the assault, had two baby teeth which were loose. CAS wanted to pull them out but I suggested we wait until the teeth came out on their own."**

> **27. "On March 20, 2010, I had to go out to the store. While I was away, CAS made a unilateral decision to pull the teeth which resulted in, what was for KLEBR, a frightening loss of blood."**

> **28. "When I arrived home a short time later, I observed a huge bruise on KLEBR's face extending from the corner of her mouth to her ear lobe. CAS admitted that he had lost his temper and had smacked her across the face. This occurred the day before we were scheduled to fly from Toronto to British Columbia."**

[90] CAS testified that this was a one time mistake and he regretted it greatly and had apologized for it. In his original affidavit he states:

> **14. "One night during that visit in British Columbia, ELKS came to me crying and apologizing for everything, pleading with me to stay with her. ELKS said that she'd do anything, even if she had to kill the baby if it turned out not to be mine. I was shocked at her comment, but agreed to forgive her, hoping that our new child would bring us together."**

> **15. "In February 2009, we moved to Greenwood, Nova Scotia, and on May 11, 2009, our son, MICPS, was born. Notwithstanding the issues between me and ELKS, I have no doubt he is my son."**

> **16. "ELKS became focused on MICPS, while I started to spend more time with KLEBR so she wouldn't feel neglected. ELKS continued to have issues with KLEBR not listening to her and making it hard for her to deal with KLEBR in the morning before she went to school. As a result, it was necessary for me to prepare KLEBR for school before I could go to work."**
>
> **17. "I would get KLEBR out of bed every morning and get her to brush her teeth and get dressed, make her breakfast and make her lunch for school. Also, I would help ELKS during the day, when I was home, with MICPS and would often take MICPS out for walks and/or KLEBR for a walk or a bike ride. I tried many times to convince ELKS to come out for a walk with me and KLEBR and MICPS, but she always refused as she preferred to stay home to that she could smoke and talk on the phone."**

[91] CAS refuted ELKS 's affidavit and stated in his supplementary affidavit:

> **10. "As to paragraphs 14, 15, 16 and 17, I state that I spent a great deal of time caring for the children and would also wake up with MICPS the majority of the time when he was crying at night to settle him back down; ELKS rarely got out of bed to settle MICPS. I further state that I would often play board games, do some gardening, go biking with KLEBR, or that I would take the children for walks or to the park when I was home, but that ELKS preferred not to participate in these activities in favour of time on her own."**
>
> **11. "As to paragraphs 19, 20 and 21, I deny resorting to corporal punishment when I became upset with KLEBR and deny pulling KLEBR's hair or hitting her in any way other than slaps on the bottom, aside from the incident outlined in paragraph 29 of my original**

> **Affidavit. I state that ELKS resorted to spanking KLEBR often, and also instructed me to spank KLEBR if she continued to misbehave so that she would not take me softly. I further state that ELKS never intervened to stop me from spanking KLEBR and, in fact, would often use me as a "scarecrow" by telling KLEBR that if she didn't behave, she would call me to spank her."**

[92] ELKS was cross examined with respect to the dysfunction and abuse in their relationship. She said she was fearful and that she feared the escalation of the abuse.

[93] She testified further on cross-examination: (regarding signing a document saying she'd return to Nova Scotia):

> **"Yes, but I would sign my life away to protect my children."**

[94] CAS testified that KLEBR called him "Daddy" and he had developed a positive relationship with her. However, ELKS sets out the following:

> **38. "As to paragraph 3, I deny the allegations therein and particularly the allegation that CAS has "developed a positive relationship with KLEBR". As set out in paragraph 15 hereabove, there was very little interaction between CAS and the children. On those occasions when CAS did take KLEBR and MICPS out for a walk, it would be of short duration and would usually end with CAS losing his temper and yelling at KLEBR. CAS**

> **could not tolerate a child whining, and when as usually happened, KLEBR complained of her feet hurting, CAS would tell her to "suck it up" and to "keep going". On more than one occasion, CAS lost his temper with KLEBR, yelling obscenities and belittling her."**

[95] Katherine McIntyre testified on behalf of CAS, although she knows both parties and did not undermine ELKS. Her affidavit evidence, tested under cross-examination, and meeting the test, sets out:

> **9. "I have known CAS for more than three years now and have had the opportunity to observe him as a person and as a father throughout the approximate 1 ½ years that he was posted at the Canadian Forces Base in Borden, Ontario."**
>
> **10. "As indicated above, my daughter, Alexis became good friends with KLEBR. As a result, I spent a lot of time with my daughter and KLEBR with CAS. I would observe CAS playing outside with KLEBR and observed her to be a very happy young girl."**
>
> **11. "During times that I spent with CAS and KLEBR, I observed that she affectionately referred to him as "daddy" and they did a lot of things together as a father and daughter would; for example, I recall one time when CAS took both KLEBR and my daughter Alexis to the Toronto Zoo, which they both thoroughly enjoyed."**
>
> **12. "Over the approximately one and a half years in Borden, I also observed that CAS did the sort of things that any good parent would do; for example, I recall on one occasion when KLEBR fell in the driveway and**

> **skinned her knee and CAS consoled her and made her smile."**
>
> **13. "CAS would also play with KLEBR out in the snow, which she always seemed to enjoy and would get her dressed to go out trick or treating on Halloween. On these occasions, CAS would stay home to pass out treats to the "little girls" (myself, ELKS, KLEBR and Alexis) could go out together for the evening. Even though I observed him to enjoy spending every minute he had with KLEBR, he also had a great understanding that she needed to spend time and play with her friends."**
>
> **14. "I have observed CAS to be a great father and he has always been there for his children; he is a man who takes great pride in being a father and caring for his children."**
>
> **15. "During the time I knew CAS in Borden, Ontario, I observed him to be an outstanding father who showed genuine love and affection for KLEBR, and he put her needs above his own. As a result, I have no doubt he would do the same with respect to both children."**

[96] Neither CAS, nor ELKS, were shaken on cross-examination; however, the fact remains that ELKS did leave Nova Scotia with the children, whether temporarily or permanently, as a result of the involvement of the Department of Community Services because of CAS's assault of KLEBR. To slap a child for any reason is a horrible action; to slap her simply because she does not want her tooth

pulled out is reprehensible and certainly lends substantial credibility to ELKS's evidence of CAS's temper.

[97] CAS's testimony is that he regretted it, and realizes now that there are other ways to deal with frustration, anger, and he now recognizes - due to 14 sessions in anger management - that there are other ways to discipline children that don't involve spanking.

[98] Both parties have "pulled out all stops" in their evidence against the other. Neither has a pristine track record. The truth undoubtedly lies somewhere in the middle.

[99] The Court accepts the evidence of Katherine McIntyre and finds the child may have an emotional attachment with the leave Applicant.

(3) Does the Leave Applicant have a familial relationship he wants to foster?

[100] The evidence is that the leave Applicant does have a familial relationship he wishes to foster, as KLEBR is a step-sister to his biological child.

[101] However, the Court is concerned about CAS's Application for leave from this perspective: Originally CAS made an Application by his legal counsel on July 16, 2010. It was for joint custody of MICPS, with primary care to CAS, reasonable access to ELKS, and child support in accordance with the Child Support Guidelines. No mention whatsoever was made of KLEBR.

[102] It was not until September 1, 2010 that CAS applied for leave to apply for custody of KLEBR. Furthermore, CAS submitted as an attachment to his affidavit a letter from his father who said he would be willing to move to Nova Scotia and care for MICPS. No mention was made of KLEBR again, although CAS testified his father would look after KLEBR too.

[103] CAS's affidavit reads as follows, and he did not waiver in his testimony:

> **45. "I am concerned about the confusion that is, or may be being experienced by KLEBR with respect to the uncertainty surrounding who her biological father is due to her age and ability to comprehend the situation; for the majority of her life, she has known me to be her father."**

> **46. "I have been a loving father and devoted husband, notwithstanding the hardships and stress during my relationship with ELKS, and want to ensure the safety and well being of my children."**
>
> **47. "Due to my work schedule and need for child care, should this Honourable Court award custody to me, I have discussed the matter with my father, and he has agreed to relocate from his residence in Toronto to live with me in Greenwood, and assist me in raising MICPS and KLEBR. Attached hereto as Exhibit "E" is a true copy of a letter from my father, confirming his willingness and ability to do so."**
>
> **48. "I recognize that Exhibit "E" only makes reference to MICPS, however, I have subsequently confirmed with my father that he is prepared to relocate to assist me in caring for MICPS and KLEBR."**
>
> **49. "I recognize that the initial application deals only with my son MICPS, due to the fact that I am his biological father. I had initially excluded KLEBR from this application due to ELKS informing me that she was trying to re-connect herself and KLEBR to KG, whom she believes to be KLEBR's father. However, due to my concerns about ELKS, I have also made an application for leave to apply for custody of KLEBR, even though I am not her biological father."**
>
> **50. "I make this Affidavit in support of my application for custody of my children MICPS and KLEBR."**

[104] One must pause for a moment to consider this evidence in light of "a familial relationship he wished to foster." There was no evidence that satisfied the Court as

to CAS's motivation for excluding KLEBR at the beginning of this process, both with respect to the Applications before the Court, and with his father's written commitment to care for one child, but not the other. The concerns he has had about ELKS were certainly present when he applied initially for custody of MICPS, not KLEBR, in July of 2010. It seems as if the addition of KLEBR may have merely been an afterthought.

(4) There is some merit in the Application for leave, whether it is granted or not, and therefore it is not frivolous or vexatious.

(5) Having consulted all of the evidence, the Court finds that there are some risk factors which are apparent on the evidence that may preclude the Applicant from having contact with the child should leave be granted.

[105] CAS testified that he felt regret over the "tooth pulling" incident.

[106] In CAS's affidavit, he states:

> **18. "In January 2010, I took parental leave from the military and we all went to Ontario to visit my parents**

> **for a vacation in February and March. After visiting with my parents in Ontario, we travelled to British Columbia to visit ELKS's parents in March and April."**
>
> **19. "During the time leading up to, and during this vacation, ELKS and I were struggling with our relationship and it was a very stressful time for the both of us. Due to this stress, one evening while we were still staying with my parents, I lost my cool with KLEBR and slapped her across the face. I had pulled the loose tooth for her and when she noticed that her gums were bleeding, she yelled at me that I was an idiot."**
>
> **20. "I apologized for the incident to ELKS, to her family and to KLEBR, and I regret the above incident to this day; I do not consider myself to be an angry or violent person, and state that this was a one-time lapse of judgment on my behalf."**

[107] Further, the evidence is that the reason he believed ELKS and the children were leaving was to give himself time to take an anger management program.

(7) Will the granting of a leave Application place the child in more risk of litigation and uncertainty?

[108] The Court can only speculate on this factor. There is some evidence to suggest that ELKS now believes a man named KG is KLEBR's biological father, but he is not a party to these proceedings, although if ELKS believed he was the

child's father, she might have included him in her own Application in British Columbia. However, there is also evidence that a third man, SW, is named as father on the child's birth certificate and he or his family also have access to the child.

[109] The child's life in litigation, with the three noted male players, is certainly uncertain at best.

(8) Not applicable.

(9) There is no evidence to suggest this.

(10) Would leave put undue stress on the custodial parent, if the leave applicant were successful?

[110] The evidence of dysfunction and abuse on the part of both parties in the relationship between CAS and ELKS is palpable.

[111] The evidence of both CAS and ELKS is equally damaging and the Court finds as a fact that neither party is without fault.

[112] Complicating the leave issue of KLEBR, is CAS's Application for custody of his biological child, MICPS. CAS is obviously at some point and in some manner going to have parenting time with MICPS. Would granting leave put undue stress on ELKS given the above? There is no clear cut evidence before the Court to answer this question.

(11) Would granting leave threaten the stability of the family unit?

[113] There is no evidence before the Court on this factor, however, as CAS will have parental rights of some sort to MICPS, it is unlikely that granting leave will threaten the stability of the family unit of ELKS and the two children.

[114] What may threaten the family unit, however, is - as was alluded to earlier - the confusion KLEBR may suffer from having not only CAS as a "father figure" for three years, but another man who is named as her father on her birth certificate,

and whose mother has an order for access, and yet another man who ELKS now purports to be KLEBR's biological father.

[115] CAS is the only father KLEBR has known. But the evidence was lacking otherwise. For instance, would ELKS want the two children to have parenting time with CAS together? Would KLEBR feel hurt and alienated if MICPS and CAS had parenting time and she was excluded? Is KLEBR frightened of CAS or is she frightened of ELKS?

[116] There is no evidence to allow the Court to answer these questions.

(12) Would a Court Order preserve a positive relationship between the child and the leave applicant?

[117] The Court has found that there exists some attachment: the child speaks with the Leave Applicant on the phone; she calls him "Daddy"; he is the only "father figure" the child has known; he is the father of her brother. If there is a positive relationship between them, a Court Order would likely preserve it.

(13) Not considered.

(14) Not applicable.

(15) Is the granting of leave in the best interests of KLEBR?

[118] The Court has very serious concerns about both parties. Considering the foregoing, the evidence is that the child calls the Applicant "Daddy"; he is the only "father figure" she has known; he is the father of her brother; and she does speak with him on the telephone.

[119] Given the above, whatever type of parenting time CAS has with MICPS may impact upon KLEBR negatively if she is excluded, although there is no direct specific evidence of this. One can only apply a basic understanding of human nature to understand that KLEBR may feel left out if she is excluded from time with CAS and MICPS, when she was previously included and part of the family.

[120] CAS says he regrets his altercation with KLEBR over the tooth pulling incident and has had counselling sessions to ensure he has better control over his temper. The Court accepts his evidence on this point.

[121] It is therefore the finding of this Court - whatever the Court may determine with respect to what parenting time, if any, CAS might have with KLEBR - that it is in KLEBR's best interests for leave to be granted.

ISSUE # 5

[122] Having gone through the factors considered by a Court on a leave Application, the Court has considered one further issue: Is this Application properly before the Court, having heard evidence of two possible fathers for KLEBR?

[123] Section 18 of the ***Maintenance and Custody Act,*** RSNS, Chapter 160, s. 18 sets out the legislative framework which gives the Court the authority to determine care, custody and access of a child. It states:

18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

(4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise,

(a) as provided by the *Guardianship Act*; or

(b) ordered by a court of competent jurisdiction.

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S. c. 160, s. 18, 1990, c. 5, s. 107.

[124] The evidence, as noted previously, is that KLEBR is not the biological child of CAS and neither has she been adopted by CAS. The evidence further is that KLEBR is the child of unmarried parents: ELKS and either KG, SW who is apparently on KLEBR's birth certificate, or possibly there is another man whose name is not before the Court.

[125] Although there is nothing specific in the ***Maintenance and Custody Act*,** the Family Court Rules, or the Civil Procedure Rules, SNS, 2nd ed., 2008, which set out whether a biological parent or a named parent, although not the primary players in a specific proceeding, should be given notice of a proceeding, s. 18 (5), of the ***Maintenance and Custody Act***, authorizes the Court to apply the principle that the welfare of the child is the paramount consideration.

[126] Should KLEBR's named father, and her biological father, have had notice of these proceedings, and been included as parties whether or not they chose to participate? Although they may have a link to the child's life, the evidence is that they have had little, if any, involvement in the child's life. When ELKS was questioned as to why she did not include KG in her Application before the Court in

British Columbia, her response was because she did not believe he was ready to be KLEBR's father.

[127] Further, there is no evidence that if either one of these parties had been named as KLEBR's father, that they would have accepted that responsibility. There is no evidence that there is any original Application before any Court naming either of the two men as a putative father, and neither is there any evidence that, if named, they would consent to being her father. They may request DNA tests. The DNA tests may exonerate both of them. Therefore, without either an Order of the Court naming either of these men as a putative father, or DNA tests confirming one of them is the father, the Court has no obligation to include them in the present Application before the Court. To do so would open the floodgates to allow anyone to be named as a party whether they had any involvement or not.

CUSTODY

[128] CAS did not make an Application for parenting time with the children in the event his Applications for custody were not granted.

[129] The Court has considered all of the evidence, much of which has been noted previously in this decision, and assessed the credibility of the witnesses and the plans for custody the parties have provided to the Court.

[130] CAS's affidavit enumerates numerous concerns regarding ELKS's parenting abilities. They are set out in his affidavit and include:

> **7. "In August 2007, I was transferred to the Canadian Forces Base in Borden, Ontario to start training to become an Aviation Technician. ELKS and KLEBR joined me in Ontario on September 1, 2007."**
>
> **8. "In Ontario, I became increasingly concerned with ELKS's parenting skills. I felt she was neglecting KLEBR. Among the incidents that have alarmed and concerned me are the following:**
>
> > **I) After coming back from work, on occasion I would find KLEBR, who was then about three years old, around outside the house unsupervised and not dressed for the cold temperature; ELKS would be inside the house reading a book.**
> >
> > **ii) On several occasions while visiting my parents in Ontario, ELKS wouldn't look after KLEBR and refused to discipline KLEBR when she was misbehaving, on the expectation that me or my parents would take care of her and discipline her if necessary. She spent her time at my parents' house on the couch, watching television or reading a book."**

9. "During our time in Borden, ELKS found work as a home day care giver and would spend her days caring for KLEBR as well as other children."

10. "Around June-July 2008, I was informed by ELKS and do verily believe to be true, that she had sexual relations with DG, while she was watching KLEBR and other children in her care. I was also informed by JW, and do verily believe it to be true, that he had concerns about ELKS resulting in the removal of his child from her care."

11. "By August 2008 ELKS was becoming more assertive and taking more responsibility for KLEBR, however, she lost her temper with KLEBR often, and spanked her several times. It was also around this time that ELKS told me she was pregnant."

12. "Around the same period, I was informed by ELKS, and verily believe it to be true, that she had sexual intercourse with another man, in addition to the incident noted in paragraph 10 above, which called the paternity of the child into question and caused a rift in our relationship. I am further informed by ELKS and do verily believe it to be true, that they were under the influence of drugs on this occasion."

[131] He continues at paragraph 38 of his affidavit:

38. "I am informed by my solicitor, Marc Comeau, and do verily believe it to be true, that he communicated with the British Columbia Supreme Court and was informed that no matter involving the children had been commenced by ELKS, or any other individual."

39. **"I am informed by ELKS and do verily believe it to be true, that she has arranged for KLEBR to live with ELKS's parents for the time being but that MICPS is residing with ELKS ."**

40. **"I have significant concerns regarding the well-being of the children while in ELKS's care, due to her history of involvement with drugs and prostitution, and am concerned that she has returned, or will return, to this lifestyle now that she is back in Kamloops, British Columbia."**

41. **"I am informed by ELKS , and do verily believe it to be true, that prior to meeting me, she was engaged in prostitution, as well as the fabrication and distribution of crack cocaine and methamphetamines."**

42. **"I am also informed by ELKS, and do verily believe it to be true, that she fabricated crack cocaine with a Miss Heather Pipkie, who is the mother of RW, the man who is listed on KLEBR's birth certificate as her father."**

43. **"I am informed by ELKS, and do verily believe it to be true, that she was involved with drugs and prostitution before and after KLEBR was born and therefore have concerns that the addition of MICPS will not prevent her from returning to this lifestyle."**

44. **"I am informed by Rick Thompson and do verily believe it to be true, that in August of 2007, he witnessed ELKS and another man engaging in sexual relations while under the influence of alcohol and that he observed KLEBR to be nearby at the time. I am further informed by Rick Thompson and do verily believe it to be true, that ELKS requested that he go out and purchase more alcohol for ELKS and her partner**."

[132] According to CAS's evidence, and indeed ELKS's evidence on cross-examination, while she babysat other children in Ontario, she would pack up a picnic lunch for the children, having told their parents they were going to an other person's house on a playdate. However, when she got to that other person's house, she would leave the children with someone else, while she had a sexual relationship with another man.

[133] ELKS was very glib in her testimony, she had an answer for everything, and spoke as if all of her actions were justified. She admits in her affidavit to having sexual relations with a DG two years ago, she admits to spanking KLEBR, she uses marihuana for pain (caused from breaking her neck when she was 9 years old, she claims), she only smokes outdoors, she was a prostitute before she knew CAS and had children, stating: **"I have had no involvement in prostitution since before KLEBR's birth"**. ELKS also stated she was a heavy user of crystal meth but swears she has been clean for over seven years, and she was never involved in the fabrication and distribution of crack cocaine and methamphetamines. ELKS clearly has a less than exemplary background.

[134] CAS, for the most part, presented as sincere; he regretted his assault on KLEBR and had enrolled in an anger management program. This was not only as a result of the Department of Community Services becoming involved and the spectre of CAS and ELKS losing their children unless this action was taken, but according to CAS, he enrolled because when ELKS returned from a home for abused women, he realized he needed help with anger management.

[135] His affidavit states:

> **21. "I am also informed by the Department of Community Services, and do verily believe it to be true, that they investigated the above noted incident and came to the conclusion that it was a one time incident and lapse of judgement on my behalf."**
>
> **22. "Shortly after we came back to Nova Scotia, ELKS took the children and went to a Shelter for Abused Women and Children, which surprised me. She told me that she had made complaints of me being bad to KLEBR."**
>
> **23. "After this occurred, I went to the Wing Padre at work for some guidance and also set up an appointment with a social worker; eventually I convinced ELKS to come back home with the children."**
>
> **24. "After ELKS returned from the shelter, we had meetings with Geri Tobin, who was a social worker stationed at CFB Greenwood and ELKS and I informed her that we had been working on our relationship since her return from the shelter."**

> **25. "On May 22, 2010, she came back with the children. When she returned, I came to the realization that I had anger management issues, which needed to change. As a result, I agreed to seek counselling and attached hereto as Exhibit "A" is a true copy of a letter from my counsellor confirming my progress and successes with respect to my counselling."**
>
> **26. "Within a few days after ELKS's return from the shelter, I was informed that we had a choice between ELKS temporarily relocating back to the shelter, or for her to stay with the children with her relatives in Alberta and British Columbia on a temporary basis. After meeting with the social workers, it was agreed by all parties that ELKS would take the children to Alberta and British Columbia and stay with her relatives for a couple of months. After this decision was made, CAS bought ELKS and the children plane tickets to fly from Halifax to Calgary and attached hereto as Exhibit "B" are true copies of the plane tickets I purchased."**
>
> **27. "Before leaving, ELKS signed an undertaking to return to Nova Scotia with the children no later than the end of July 2010. Attached hereto as Exhibit "C" is a true copy of the undertaking signed by ELKS and I."**

[136] CAS believed ELKS and the children were returning to Nova Scotia.

> **29. "On June 12, 2010, I bought train tickets for ELKS and the children to return to Toronto so that we could drive from Toronto to Nova Scotia, and attached hereto as Exhibit "D" are true copies of the train tickets purchased through VIA Rail Canada."**

[137] The Court notes that date on the Exhibit purchase is June 12, 2010. He only found out that the Respondent was not returning to Nova Scotia in July, as previously noted.

> **30. "Throughout the month of June, I had the opportunity to speak with KLEBR to see how everyone was doing and told her how myself and her friends were looking forward to her return to Greenwood in the beginning of August."**
>
> **31. "Between June 12, 2010 and July 8, 2010, I received various messages from ELKS and had several brief telephone conversations with her to keep updated on how everyone was doing."**
>
> **32. "On July 8, 2010, ELKS indicated that she had to pay for some medications for MICPS out-of-pocket, and I replied that she should keep the receipt so that we could claim it against our medical plan when she returned to Nova Scotia. At this point, ELKS informed me that she was not planning on returning to Nova Scotia."**
>
> **33. "On July 14, 2010, I was informed by Pam, at the British Columbia Provincial Court, and do verily believe it to be true, that ELKS attempted to make application for custody with the British Columbia Provincial Court, and that she filed documents to do so."**
>
> **34. "On July 14, 2010, I was informed by Michelle, of the British Columbia Provincial Court, and do verily believe it to be true, that they do not have the jurisdiction to hear this matter and that only the British Columbia Supreme Court has jurisdiction to hear this particular matter."**

> **35. "On July 16, 2010, after learning of these events, and consulting with my counsel, I commenced an application for custody of my son MICPS."**

> **36. "Between July 20 and August 20, I was in contact with Mr. Kenny MacLean, of the Department of Community Services, to raise concerns about ELKS's parenting skills and potential neglect of the children. As a result of my concerns, I am informed by Mr. MacLean, and do verily believe it to be true, that he forwarded on this information to Childrens' Services in British Columbia to investigate the matter further."**

> **37. "On August 11, 2010, I filed a report with the RCMP Detachment in Kingston with respect to ELKS's actions of leaving the province with the children and not returning, as she had agreed to in her undertaking."**

[138] ELKS testified that she would "sign her life away" to protect her children, which is why she signed the agreement to return. She testified she never intended to return.

[139] ELKS set out in her affidavit that CAS had grabbed MICPS and yanked him away from the computer, bruising MICPS's shoulder area, and she took him to the doctor and subsequently reported this to her worker with the Department of Community Services. This is uncorroborated. CAS denied this allegation.

[140] Miss Jennifer Hill, a social worker at the Military Family Resource Centre, testified that she met with the parties on June 3, 2010, having met previously with ELKS on June 2, 2010, when she walked in Ms. Hill's office to ask about emergency housing.

[141] Ms. Hill said they discussed three options, as a result of the Department of Community Services being involved: (1) ELKS could move back to Chrysalis House with the children; (2) CAS could leave the family home and move into Barracks; (3) ELKS could go to Calgary for a "cooling off period."

[142] The parties had various discussions and then left her office. ELKS called her at 3 p.m. and said she was going to Calgary. Ms. Hill said that on June 2nd, ELKS was " . . . very teary, very confused, unsure about what she was going to do."

[143] Ms. Katherine McIntyre testified that she knew CAS and ELKS; in fact, ELKS babysat Ms. McIntyre's daughter in Ontario. She said in her affidavit that ELKS told her that " . . . she was sleeping with somebody in the house while she was supposed to be caring for the children and left them unattended." Ms. McIntyre

stated CAS was a great father " . . . who takes pride in being a father and caring for his children."

[144] In determining custodial issues, as with everything involving children, the Court must determine what is in the best interests of these children.

[145] In **Foley v. Foley** 1993 Can LII 3400 (N.S.S.C.), Goodfellow, J., enumerates the factors a Court must consider in determining the best interests and welfare of a child.

[146] They are:

1. Statutory direction ***Divorce Act***; (not applicable to this case)
2. Physical environment;
3. Discipline;
4. Role model;
5. Wishes of the children;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists, psychiatrists, etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child;

13. The support of an extended family, uncle's, aunt's, grandparent's, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent;

15. The interim and long range plan for the welfare of the children;

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any

other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

[147] Justice Goodfellow states:

> **"The duty, of the court in any custody application is to consider all of the relevant factors so as to answer the question.**
>
> **With whom would the best interest and welfare of the child be most likely achieved?**
>
> **Nevertheless, some of the factors generally do not carry too much, if any weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of the child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.**
>
> **On the other hand, underlying many of the other relevant factors is the parent making herself, or himself available to the child. The act of being there is often crucial to the development and welfare of the child."**

[148] In the case before the Court, ELKS unilaterally decided she and the children would not return to CAS. She decided to keep them in British Columbia. The children have now been in British Columbia with ELKS for five months.

[149] The Court has reviewed the evidence regarding the plans for custody of each party in light of the criteria as noted above in **Foley v. Foley**.

[150] Neither plan is ideal. ELKS's evidence is that she will be relying on social assistance for income, which will significantly reduce the lifestyle to which the children have become accustomed. She is a fully licensed aesthetician and an experienced cashier and plans to return eventually to the workforce. She has a two bedroom apartment in Kamloops, and each child has his or her own bed. KLEBR attends a local elementary school six blocks from their apartment, and she has friends and classmates whom she sees daily, when at school or when at home.

[151] Her evidence is further that the two children have a doctor who had been her own doctor when she was growing up. MICPS will be attending day care. Her evidence is that MICPS is too strongly attached to her, so he requires external socialization. KLEBR is in a child abuse program. ELKS's parents are nearby in a

more rural setting and KLEBR has her own horse. ELKS's parents are very helpful with her and the children.

[152] Counsel for ELKS argues that CAS's evidence, pertaining to his child care plan, is not realistic. His plan is for his 63 year old father to leave Ontario and his wife of 34 years and move to Nova Scotia to look after the children. CAS testified this his father had a heart attack three years ago, and CAS does not know what heart medication he is on. Although CAS's father sent a letter, attached to CAS's affidavit, saying he would look after MICPS, nothing was said about KLEBR. CAS said his father would look after KLEBR, too, but CAS's father did not testify.

[153] Should CAS's father move to Nova Scotia to look after the children, there is no evidence as to how he would care for them, take care of the house, take them to school, make meals, there is nothing; no evidence before the Court on what the plan would be.

[154] The Court agrees that CAS's plan of care is, although inventive and involving a great sacrifice on the part of his parents, not very well thought out. It is a nebulous plan, lacking foresight, detail and direction. Although the Court

commends CAS for trying to come up with a solution that would put him on the playing field for custody, the solution fell far short of the mark.

[155] CAS's evidence was that he could have asked for a transfer in the military to Comox, British Columbia. He said that would have been a compassionate posting and he did not want to request it because it would interfere with his career. He may at some point wish to reconsider this decision.

[156] The most unfortunate result of most custody hearings where each parent drags the most cruel and vicious memories of actions, and their own interpretation of those actions before the Court, is that neither party ends up benefiting. Perhaps more telling is how it affects the children. When parents are simmering with resentment over what the other parent has said, children are likely to sense it. That is never in a child's best interests.

[157] CAS and ELKS are unfortunately now in that position and the Court cautions them to keep the children innocent of the parties' thoughts and feelings for one another.

[158] Life in the military lends a peripatetic quality to a child's life. CAS and ELKS would likely have moved a number of times with the children had they stayed together, so the move to British Columbia, in itself, was not terribly different from what would have happened in the regular course of events.

[159] The manner in which it happened was less than satisfactory. Clearly, ELKS was afraid, certainly of her children being apprehended by the Department of Community Services, if she remained with CAS. And also, afraid of what she saw as CAS's escalating temper and violent behaviour.

[160] She left Nova Scotia on the guise that she would return.

[161] The Court, having heard the evidence, read everything on file, considered the arguments put forth by counsel, observed the demeanour of the witnesses and considered the jurisprudence, finds:

(1) Nova Scotia has jurisdiction to hear this matter;

(2) CAS is not a guardian to KLEBR;

(3) CAS has standing to apply for parenting time to KLEBR;

(4) CAS's applications for primary care of both children are denied;

(5) The parties will share joint custody of both children;

(6) CAS is to be notified immediately of all medical or other health-related, educational and extra curricular issues, events and/or activities involving the children;

(7) There is no formal Application made in the alternative by ELKS for custody. Neither is there an Application for parenting time to CAS, made by CAS in the event he was not successful in his Application for primary care. Should CAS transfer to Comox, British Columbia**,** such parenting time would certainly be more frequent. In the circumstances, the terms of parenting time between the parties is to be determined by the parties through their counsel, bearing in mind that it is the children's right to know both parents or, if counsel are unable to define the terms, by further Application to the Court.

M. MELVIN
Judge of the Family Court
for the Province of Nova Scotia