

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Battyanyi v. Ching, 2009 NSSC 401

Date: 20091230

Docket: SFH-MCA 55703

Registry: Halifax

Between:

FERN LOUISE BATTYANYI

Applicant

v.

JOHN HORACE WALTER CHING

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

November 23 - 25, 2009

Counsel:

Colin M. Campbell for Fern Battyanyi
Angelina D. Cunningham for John Ching

By the Court:

[1] Elizabeth Ching has had an unusual upbringing. While her upbringing has had the potential to be supportive and nurturing, it has not. Elizabeth has been overlooked in a struggle between her extended maternal family and her father. In this application, Elizabeth's grandmother, Fern Battyanyi, seeks custody of Elizabeth, while her father, John Ching, also seeks custody and permission to return to his home country of New Zealand with Elizabeth.

Background

[2] Tina Battyanyi and John Ching struck up an acquaintance by way of the internet in 2000. At that time, Mr. Ching was in his mid-40s and had been working for about eleven years as a pension benefits administrator at an insurance and investment firm in New Zealand. In 2003 John Ching and Tina Battyanyi met in Nova Scotia, where she lived. They bought a home in Clam Bay shortly before they married in April 2003, but lived in that home for only six months before they moved into the home of Tina Ching's mother, Fern Battyanyi. This home was occupied by Tina Ching's family: her mother, grandmother and sister. According to Mr. Ching, the move was precipitated by Ms. Ching's pregnancy and her need to be close to a hospital. Fern Battyanyi says the couple couldn't afford to live in the Clam Bay house and that is why they moved in with her. At the time, Mr. Ching's immigration status prevented him from working in Canada.

[3] Elizabeth was born on April 30, 2004. From April to July 2004, Mr. Ching was incapacitated by diabetes. Following her birth, Elizabeth's care was provided by her mother's family while Tina Ching recovered from her Caesarian section. On his recovery, Mr. Ching found work: he started full-time work at Convergys in June 2004 and continued working there until January 2006. He worked the night shift.

[4] On Christmas Eve in 2005, Elizabeth's mother died. Elizabeth was twenty months old at the time and her maternal relatives assumed the majority of the responsibilities in caring for her. The home was renovated at Mr. Ching's expense, to provide him with a private space in which to live. The renovation had the effect of excluding him from aspects of Elizabeth's daily care, since she spent most of her time in the main portion of the home with the Battyanyis.

[5] Elizabeth is now a few months shy of her sixth birthday. She has grown up in an environment populated by adults: her great-grandmother (who recently died at the age of 89), her 63 year old grandmother, her 41 year old aunt and her father, who is 55. Elizabeth's relationships with her grandmother and aunt are closer than typical, as a result of their care-giving. Elizabeth's days are busy with play and crafts. Her grandmother enrolled her in ballet lessons and she has participated in gymnastics. She spends much of her time with her aunt. She has various health concerns which she seems to share with her maternal family.

[6] While this proceeding was ongoing, Mr. Ching moved from Fern Battyanyi's home and established his own apartment. This was part of a plan to enable him to exercise his parental

responsibilities. While it was anticipated Elizabeth would start visits with her father in September 2008, these didn't get underway until December 2008 and it is not clear when, if ever, Mr. Ching established a pattern of spending six days of every seven with Elizabeth. He claims his efforts have been thwarted by the Battyanyis. He says they have discouraged Elizabeth from spending time with him and have stood in the way of his relationship with her from the very earliest days of her life.

History of the legal proceedings

[7] Ms. Battyanyi applied for leave to seek custody of Elizabeth in November 2007 because she was worried about Mr. Ching's plans to move Elizabeth to New Zealand. By consent, in January 2008 she was granted standing to bring her application for custody. At the same time, Mr. Ching was given interim custody of Elizabeth, whose living arrangements were to be maintained, meaning that she was to remain living in the Battyanyi home. The order provided that an assessment (including psychological testing) would be done to determine the custody and access arrangements that were in Elizabeth's best interests. This order was amended three months later to delete the requirement of the psychological testing because it wasn't possible to complete the testing in time for the scheduled hearing. Wayne Hollett completed the assessment which was considered in the course of a settlement conference in July 2008.

[8] In his assessment, Mr. Hollett said that Elizabeth's family situation was not conducive to her longer-term adjustment or well-being: her father was quite isolated; her aunt was too involved with her; and there was constant tension and conflict between her father and her mother's family. Mr. Hollett recommended that John Ching be granted sole custody of Elizabeth. In order for Mr. Ching to discharge his parental responsibilities effectively, Mr. Hollett recommended that Mr. Ching obtain separate accommodations for himself and Elizabeth so they could live outside the Battyanyi home. Mr. Hollett recommended that Fern and Cindy Battyanyi have liberal daytime and alternate weekend access with Elizabeth.

[9] The settlement conference in July 2008 resulted in a further interim consent order which incorporated the recommendations of Mr. Hollett's report. The form of that order was not finalized until late September 2008. It gave Mr. Ching primary care of Elizabeth. He was directed to find a suitable home for himself and Elizabeth in the Halifax Regional Municipality. The order specified Elizabeth's access with both parties: she was to stay with Fern Battyanyi during the week (from Monday through Friday at times to be agreed upon) from September 1, 2008 to October 6, 2008. After that period, she would stay with her grandmother during weekdays with an overnight visit each Wednesday. Ultimately, Elizabeth was to be spending six overnights with her father each week. The parties agreed that Mr. Ching was to participate in a parenting program, which had been recommended by Wayne Hollett. Mr. Hollett had also recommended that an assessment be done in New Zealand to determine accurately the extent and quality of family, social and community supports that would be available to Mr. Ching and Elizabeth in Wellington. The order prohibited Mr. Ching from moving Elizabeth.

[10] The application was heard on November 23, 24 and 25, 2009. The parties testified and additional evidence came from Elizabeth's aunt, Cindy Battyanyi, Mr. Ching's friend, Richard Halvorsen, and Wayne Hollett, the certified clinical social worker who prepared the assessment.

Legal context of the custody application

[11] This is an application by each party for custody of Elizabeth. In addition, Mr. Ching asks for permission to relocate Elizabeth to New Zealand. My first step, according to Justice Bateman in *Burgoyne v. Kenny*, 2009 NSCA 34 at paragraph 26, is to determine in which party's custody Elizabeth's future will best be served. This is to be done on the basis of the available evidence that is relevant to Elizabeth's emotional and physical well-being.

[12] In determining the appropriate parenting arrangement for a child, the only consideration is the child's best interests. In *Foley*, 1993 CanLII 3400 (NS S.C.), Justice Goodfellow identified areas of parenting that are usually relevant to that consideration and listed these at paragraph 17 of his decision. Some of these factors are not relevant or not yet relevant for Elizabeth. At five years of age, there is no relevance to her wishes. There has been no evidence about some of the parenting areas identified by Justice Goodfellow, such as her religious and spiritual guidance. In my decision I have addressed those concerns identified by Justice Goodfellow which are relevant to Elizabeth and those where the parties offered evidence.

Statutory direction

[13] In *Foley*, Justice Goodfellow noted that the governing legislation may contain directions for decision-making. The directions under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, require that past conduct be considered only where it is relevant to parenting ability; a child should have as much contact with each parent as is consistent with the child's best interests; and the willingness of each parent to facilitate contact should be considered. This application proceeds under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 which does not contain directions akin to those in the *Divorce Act*. While these directions are not mandated by the *Maintenance and Custody Act*, they are relevant to Elizabeth's best interests and merit my consideration. Justice Goodfellow itemized the willingness of each party to facilitate contact with the other as a separate consideration and this will be reviewed later in my reasons.

[14] The current interim order divides Elizabeth's time between her father and her grandmother. Following the settlement conference, Mr. Ching was to establish a home for himself and Elizabeth and, after a month of transition, Elizabeth was to be spending six days and overnights each week with her father. Mr. Ching found accommodations and set up his home for his first visits with Elizabeth in November 2008. His progress in finding an apartment was hindered by his financial problems and delayed by Elizabeth's poor health. As of early January 2009 Elizabeth hadn't progressed beyond single overnight visits and her first weekend of two consecutive overnight visits occurred in late January 2009. Mr. Ching's evidence about when he began to have Elizabeth with him six days each week was inconsistent, ranging from the "beginning of 2009" to "spring summer" of 2009. Mr. Ching's journals and affidavits don't note when these visits started and nowhere do they note six consecutive days spent with her. Ms.

Battyanyi claims that Elizabeth has only once spent six consecutive days with her father, just prior to school starting in September 2009. Since school began, it is not contested that Elizabeth has spent most of her time with her grandmother.

[15] Ms. Battyanyi is concerned that Mr. Ching doesn't have the ability to be a full-time caregiver to Elizabeth because he lacks experience in doing this. She claims that Elizabeth has returned from visits, starving and dehydrated, wearing dirty clothes and not having bathed. While Ms. Battyanyi says that Elizabeth isn't sufficiently fed at her father's, she also complains that Elizabeth is gaining weight from the fast food he gives her. The basis for some of Ms. Battyanyi's remarks are comments attributed to Elizabeth and Ms. Battyanyi has no other basis for her knowledge. As well, she believes Elizabeth is afraid of her father and that Elizabeth is unsafe in his presence. Ms. Battyanyi says that Mr. Ching took Elizabeth to visit with a friend, Richard Halvorsen, who hit Elizabeth. She also claims that Mr. Ching has difficulty controlling his anger.

[16] The evidence satisfies me that Mr. Ching is able to meet Elizabeth's needs when she is with him. She is properly dressed and fed. She sleeps well and enjoys their activities together. Mr. Ching is reasonably attentive to Elizabeth's dietary needs, in terms of purchasing the organic food that Ms. Battyanyi says Elizabeth requires. Elizabeth and her father are affectionate and he is able to comfort her, if she wakes during the night. He has been attentive to health concerns such as her skin sensitivity, making sure to use gentle soap and detergent. He keeps necessary medication on hand in case it is needed. In the past, Mr. Ching has not had a full opportunity to spend time with Elizabeth, however he does have the skills necessary to meet her daily needs when they spend time together.

[17] In responding to concerns about his anger and misconduct by Richard Halvorsen, Mr. Ching has been candid and credible. Ms. Battyanyi's concerns are not based on her observations of Mr. Ching raising his voice at Elizabeth or Mr. Halvorsen striking her, but on what Elizabeth says. I accept the suggestion that Elizabeth is aware of the antipathy her grandmother and aunt have toward Mr. Ching and her reports to them of events at her father's have sought their approval. When asked about allegations, Mr. Ching has attempted to find some shred of fact in them which might be their basis. He has explained to my satisfaction why he would possess cassette tapes on anger management and provided photographic proof that Elizabeth did not have a red mark on her face following a visit, as her grandmother had alleged. I accept that during the early stages of her visits with her father, Elizabeth was anxious about them. It is clear from both Mr. Ching's and Ms. Battyanyi's notes that the Battyanyis did not attempt to soothe or comfort Elizabeth during these transitions, but they let Elizabeth demonstrate her upset in attempts to dissuade Mr. Ching from spending time with Elizabeth. She calmed down once visits were underway and there have been no recent reports of anxiety around visits. Wayne Hollett concluded that there was no reason to believe the level of concern expressed by Fern Battyanyi for Elizabeth's safety was valid.

[18] Elizabeth is to have as much contact with each party as is consistent with her best interests. She derives benefits from the time spent with each party as each attends to her different needs. Mr. Ching focuses on Elizabeth's immediate needs while she is with him, while

Ms. Battyanyi addresses Elizabeth's immediate needs and is aware, as well, of additional concerns, such as Elizabeth's need to be engaged with other children, to be involved in activities outside her home, to receive prompt medical attention and to be prepared for school. Mr. Ching has not fully utilized the parenting time that is available to him, nor has he managed to assume responsibility for meeting all Elizabeth's needs. He complains that the Battyanyis stand in the way of his doing both. Mr. Ching has been Elizabeth's custodial parent since January 2008. Regardless, it has been Fern Battyanyi who has been primarily responsible for meeting Elizabeth's health-care needs, enrolling her in extra-curricular activities and preparing her to start school. Mr. Ching has not initiated a response to these needs nor has he shared in them when Ms. Battyanyi has invited him to do so.

[19] Since the settlement conference in July 2008, a schedule has existed for Mr. Ching to increase his time with Elizabeth to six days each week. Mr. Ching has not taken full advantage of this. When school began, he says that he allowed Elizabeth to remain with her grandmother so that Fern Battyanyi could prepare her for school each day, doing her hair and dressing her. The parties disagree on how long this arrangement was expected to last. It is worrisome that Mr. Ching would not be capable of dressing Elizabeth for school or fixing her hair. After a pre-trial court appearance in September 2009, Mr. Ching had his lawyer write to Ms. Battyanyi's lawyer, saying the arrangement should end. Almost immediately, Elizabeth developed health problems that required her to miss school. Initially, her ill health compelled her to stay at Ms. Battyanyi's and Mr. Ching would not disturb her by taking her to his home in the evening or on weekends. When her health improved and she tore the ligament in her ankle, there was less reason for Elizabeth to remain at her grandmother's in the evenings and on weekends, but she continued to remain there, with her father merely visiting her. Mr. Ching asserts that he is "perfectly capable" of looking after Elizabeth, but he fails to take on the responsibility of doing so.

Physical environment

[20] Mr. Ching maintains an apartment which has a separate bedroom for Elizabeth. He moved to the apartment in the fall of 2008 and Elizabeth began her visits there shortly thereafter. Her room is decorated to her liking, with lots of colours that she has chosen. At her father's apartment, Elizabeth easily sleeps alone in her own bed in her own room. She is comfortable in his home and in her room there.

[21] Ms. Battyanyi's home is well known to Elizabeth. She has lived most of her life there. She slept in a bassinet in the livingroom (with her parents) for the first few months after her birth. Starting at the age of four or five months, Elizabeth began to share a bedroom with her great-grandmother. For some considerable period of time, Elizabeth and her aunt Cindy shared a bedroom and, in fact, a bed.

[22] According to Mr. Hollett's report, in September 2007, the Department of Community Services received a referral about Elizabeth. In investigating the referral, the Department learned about Elizabeth's sleeping arrangements and recommended that she be given a room and bed of her own. Fern Battyanyi said that as soon as the Department made its recommendation, Elizabeth stopped sharing a bed with anyone. Cindy Battyanyi said that the need to have her bed

“air out” meant that Elizabeth only had the bed available to her “within the last year” - which would mean sometime in the period after November 2008 (over one year after the Department had made its recommendation). Mr. Hollett’s assessment of July 2008 stated that Elizabeth was still sleeping in the same room with her aunt and, most often, they were sharing a bed. In her affidavit of January 2009, Fern Battyanyi said that Elizabeth now had her own room. During the hearing, Cindy Battyanyi said she continued to share a room with Elizabeth on occasion, sleeping at the end of Elizabeth’s bed or in a chair next to it, when Elizabeth is ill.

[23] According to Fern Battyanyi, Elizabeth and her aunt are in each other’s rooms: Elizabeth sleeps in Cindy’s room and uses her own room as a play room. Fern Battyanyi sleeps in the living room. She was to sleep in the bedroom occupied by her mother, but her mother died in this bedroom on a warm day and Ms. Battyanyi says it will be a few more months before she is able to move into that room from the living room.

[24] If I use the recommendation that Elizabeth have her own bed and own bedroom as a benchmark, the physical environment of the Battyanyi household is not yet arranged in an optimal way for Elizabeth.

Discipline

[25] Ms. Battyanyi says that Mr. Ching has used corporal punishment with Elizabeth. He says that once when Elizabeth slapped him in the face, he slapped her back. He says that he didn’t do this in anger, but he was trying to reduce her anger with him and trying to turn it into a game. He also admits that he raised his voice with her once, when she was playing with the curtains and he was concerned that she was going to pull the curtains and the associated hardware down on herself.

[26] One of Mr. Hollett’s recommendations was for Mr. Ching to attend a parenting course. It took considerable effort on Mr. Ching’s part to locate an available course. Mr. Ching took part in “Dads Making a Difference”, an eight to ten week program which started January 13, 2009. With regard to corporal punishment, Mr. Ching now says that he used to think corporal punishment was acceptable on rare occasions. As a consequence of attending the course and doing some reading, he says he thinks that physical punishment is bad and emotionally upsetting for a child. He says that hitting and hollering aren’t something he’d do now. It is not clear how Mr. Ching would discipline Elizabeth now, but I accept that he would not rely on corporal punishment.

[27] No concerns were raised about the methods of discipline used in the Battyanyi household. Elizabeth has been physically aggressive with her aunt, kicking Cindy Battyanyi on occasion. When this happens, Elizabeth has been told this is wrong, and she is made to sit and think about what she has done. She is required to sit for one minute for each year of her age. Cindy Battyanyi says that Elizabeth responds to this by crying and apologizing. Mr. Ching has not complained about this method of disciplining Elizabeth.

[28] Discipline in the Battyanyi household is a known and appropriate method. While I do not know how Mr. Ching disciplines Elizabeth, I accept that he does not rely on corporal punishment any longer.

Religious and spiritual guidance

[29] Both of Elizabeth's parents belong to the Christadelphian Church. Mr. Ching describes this as a Christian community which strongly stresses fellowship, family values and mutual support. He says "[t]here is no large Christadelphian community in Nova Scotia" and the closest one is in New Brunswick. There was no evidence that either party has exposed Elizabeth to her parents' faith or to any other.

Expert assistance

[30] Wayne Hollett prepared an initial assessment in July 2008. At the time of the assessment, Mr. Ching hadn't carved out a significant parenting role for himself. Elizabeth's attachment to him was anxious, which I understand to mean that she was not entirely comfortable in his presence. The recommendations in the July 2008 assessment were intended to provide Mr. Ching with the opportunity to exercise a parenting role.

[31] When trial dates were scheduled Mr. Hollett was asked if he could prepare an update to his assessment. He was unable to do so, given the short time between the pre-trial conference and the trial. In the time available, he did meet with the parties and with Elizabeth to check in on the current situation. Because he was unable to prepare a full review, Mr. Hollett declined to provide any new recommendations. He was able to comment on the present circumstances and his comments were helpful. He noted that Elizabeth's relationship with her father had improved. He questioned some of her comments. For example, when she said she had fear of her father, her accompanying actions did not demonstrate any fear, though that would be expected. As well, while she said she would like to stay in Canada, she is still of an age where she would not understand the consequences of relocating to New Zealand. Mr. Hollett said that Fern Battyanyi's views of Mr. Ching are more balanced than those of her daughter, Cindy, and that Fern Battyanyi's relationship with Elizabeth is a balanced one. In preparing his update, Mr. Hollett said that Mr. Ching still had difficulty exerting a parental role.

Each party's time available for Elizabeth

[32] Mr. Ching works full-time and he acknowledges that this means he cannot care for Elizabeth during the work day. He has relied on Ms. Battyanyi to do this. He says that any time has he taken a day off work which he has not spent with Elizabeth, it was only to deal with personal or domestic commitments because the time he spends with Elizabeth means that he falls behind with these obligations. His work means that he has often not participated in Elizabeth's medical appointments. He has, on at least one occasion, picked her up from her ballet lessons. Mr. Ching is not meeting all of Elizabeth's needs. His time management shows that he is not yet able to juggle meeting those of her needs that he is attending to and his own.

[33] Ms. Battyanyi retired from her employment with the provincial government more than six years ago. She delivers newspapers during the wee hours of the morning, from 12:30 p.m. until 5 a.m. Ms. Battyanyi's retirement leaves her with more time available for Elizabeth.

Elizabeth's cultural development

[34] Mr. Ching is from New Zealand. He wants Elizabeth to be exposed to this aspect of her heritage. He suggests the way to do this is by allowing Elizabeth to move to New Zealand with him. Elizabeth has spoken on the telephone with her father's half-siblings and has seen photos of them, but there was no other evidence of efforts he had made to expose Elizabeth to any other aspect of her New Zealand heritage, through books, toys, videos, maps or the internet.

Elizabeth's physical and character development by such things as sports participation

[35] Elizabeth has been involved in some activities, such as play school, gymnastics and ballet. Her participation in these activities has been arranged by her grandmother. Her grandmother has paid for Elizabeth's ballet lessons. Mr. Ching has not initiated Elizabeth's involvement in activities. He agrees that Ms. Battyanyi was instrumental in organizing Elizabeth's activities. His role has been minor: for example, on one Saturday he collected her after her ballet class had finished. It's not apparent that he watches her classes. Ms. Battyanyi is the person who has attended to this aspect of Elizabeth's development. On occasion, Mr. Ching has offered to assist financially with different costs that Elizabeth has, however he has not reliably followed through with his offers.

Emotional support to assist in Elizabeth's development of self-esteem and confidence

[36] Unfortunately when Elizabeth's regular visits with her father began, more often Elizabeth's anxiety was a point of conflict between the parties, rather than a focus of combined efforts to assist her. Ms. Battyanyi says that Elizabeth was distressed and pre-occupied by the prospect of spending time with her father and would pinch herself when she returned from her father's. In response to Elizabeth's anxiety about visits, both Cindy and Fern Battyanyi would tell Elizabeth that it was time to go or that her father was hungry and needed to get home for his supper. She wasn't comforted when she displayed her distress, but Mr. Ching was left alone to take her on the visit.

[37] Elizabeth's self-harm escalated to the point where she left red marks on her legs and around her genitals from pinching herself. These were investigated by the Department of Community Services following a visit to the emergency department at the IWK Health Centre. Ms. Battyanyi was concerned that Mr. Ching was directly responsible for the marks. The investigation determined that the bruises were self-inflicted. Neither party demonstrated any insight into the possible effect of the adult conflict on Elizabeth's self-harming behaviour. As time has passed, the parties' conflict has reduced, but they are not yet fully cognizant of the impact of their conflict on Elizabeth's emotional well-being.

[38] Since these early visits, the adults have made greater effort to accommodate her anxieties. Cindy Battyanyi provided Elizabeth with a vest, so she could sleep with it to keep her comfortable. Mr. Ching allowed Elizabeth to call her aunt and grandmother, if she wanted.

Financial contribution to Elizabeth's welfare

[39] There is no application for child maintenance, so I have not received Statements of Income or Expenses from either party. Ms. Battyanyi says her pension income is approximately \$2,000.00 monthly and the income from delivering papers is paid to Cindy Battyanyi.

[40] Mr. Ching worked for Convergys from July 2004 until January 2006. He then worked for Adecco Personnel Agency and currently works for ManuLife. In the spring of 2008, the interim order which provided for the assessment recorded his annual income at less than \$20,000.00. He found full-time work with ManuLife in August 2008. He is a mail administrator and earns \$24,000.00, which means his income is roughly equivalent to Ms. Battyanyi's.

[41] While living with the Battyanyis, Mr. Ching did not make regular financial contributions to the household. He says that rent was not requested and that he offered to provide money and was told "this was not required" by Fern Battyanyi, so he did not contribute financially, beyond purchasing groceries and diapers. After he moved to his own home, Mr. Ching made some financial contributions to the Battyanyi household, paying for Elizabeth's medicines and some clothing items. At this point, he was also paying for Elizabeth's costs during her visits to his home.

[42] This past summer, Ms. Battyanyi spoke to Mr. Ching about purchasing Elizabeth's clothing for school and he agreed he would pay. They agreed to shop together. Mr. Ching, according to his evidence, had no plan to purchase items. Mr. Ching didn't follow up on the matter further with Ms. Battyanyi. He said he was expecting her to "initiate something and advise me". When he didn't follow up, Ms. Battyanyi did the shopping herself and paid \$540.00 for the items Elizabeth needed. Mr. Ching has not paid her for these items.

[43] Mr. Ching has modest earnings. At his income level, the provincial Child Maintenance Guidelines would require him to pay child maintenance in the range of \$160.00 to \$200.00 each month. While he lived in the Battyanyi household he made minimal contribution to cover the expenses of his family. Mr. Ching moved from the Battyanyi household in the fall of 2008. Elizabeth's overnight visits began in December 2008 and, according to Mr. Ching's journal, until January 24, 2009, Elizabeth was visiting with him overnight only on Friday nights. While he was not providing Elizabeth with a home during this time, he was not contributing to her expenses at the Battyanyi home on a level consistent with his earnings.

[44] The parties dispute how often Mr. Ching has had Elizabeth with him for six days out of seven. Ms. Battyanyi says it occurred only once before this hearing, while Mr. Ching's statements about this have varied. In his testimony, he variously said that he had Elizabeth with him six days out of seven since the "beginning of 2009", "spring summer 2009" and "spring" 2009. Nowhere in the journal notes which accompany two of his affidavits does he describe six

days of continuous care for Elizabeth. Ms. Battyanyi's affidavit of November 12, 2009 clearly challenged Mr. Ching's claim that he had Elizabeth with him six nights out of seven. Despite this, he did not provide information to prove his claim. All the while that Elizabeth was with her grandmother, Mr. Ching was not making a meaningful financial contribution to her needs.

[45] Mr. Ching acknowledges that Elizabeth has not been in his primary care since she began school. Despite this, his financial contributions during that period were \$130.00. At the same time, he was bringing her items that the Battyanyis requested, or extras, like drinks Elizabeth would like or toys. Throughout her life, Elizabeth's primary financial support has been provided by her grandmother.

Extended family support

[46] With the exception of her father, Elizabeth's paternal family is located in New Zealand. Her father's family is comprised of his half-brother, his half-sister, their spouses and children. Her paternal grandparents have died. While Elizabeth has spoken with some of these relatives on the telephone and has seen photos, she has never met them and they're not available to provide any support in Nova Scotia.

[47] Fern Battyanyi has the assistance of her daughter Cindy in caring for Elizabeth. Cindy works delivering flyers and sewing. She is largely home-based and contributes extensively to Elizabeth's care. Elizabeth has participated in family activities at Easter and Christmas with Fern Battyanyi's nephew and his family.

Each party's willingness to facilitate Elizabeth's contact with the other

[48] Until late 2008 Elizabeth was living with both parties in the Battyanyi household. Since moving, Mr. Ching has approached the issue of Elizabeth's contact with her grandmother on the basis of what works for him. He has preferred if Elizabeth doesn't want to contact her grandmother or aunt by phone during their visits, as if he is worried that her desire for contact undermines her security with him. He has allowed Elizabeth a great deal of time with her grandmother when it meets the purposes of his work.

[49] Ms. Battyanyi has not prevented contact between Elizabeth and her father but, out of her concern for Elizabeth, has offered many excuses for why access ought not occur. Mr. Ching has frequently accepted these excuses, even when they lack merit. When Mr. Ching is firm that Elizabeth is to be with him, Ms. Battyanyi has accepted this fact.

[50] Both parties need to have a greater appreciation of the benefit that comes to Elizabeth from spending time with each of them and to see a willingness to facilitate such contact as a strength, not a weakness.

Interim and long range plan for Elizabeth's welfare

[51] Mr. Ching's long range plan for Elizabeth is to return to New Zealand where, with the assistance of family, friends and his church, he would raise her. If he could not return to New Zealand, he would remain in Nova Scotia and continue to rely, to some degree, on the Battyanyis in caring for Elizabeth. Ms. Battyanyi's plan would be to continue as she says she has, raising Elizabeth.

The financial consequences of custody

[52] Justice Goodfellow explained that this consideration related to housing: housing arrangements which compelled expenses for two homes could negatively effect the ability to pay the child's reasonable costs. Here, neither party claims any difficulty to meet Elizabeth's needs in the current financial circumstances. Ms. Battyanyi houses herself and her daughter in her home. Mr. Ching has his apartment and, as well, the former matrimonial home. The home is listed for sale for \$249,000.00 and is mortgaged for \$24,000.00. When it is sold, Mr. Ching will have a nest egg of at least \$200,000.00.

[53] Justice Goodfellow's list of considerations was not exhaustive and ended with the reminder to consider any other relevant factor. In this case, such a factor is Elizabeth's health.

Elizabeth's health

[54] I am told that Elizabeth has a common allergy to dust and, while not medically confirmed, that she is allergic to milk (though she eats both yoghurt and ice cream and enjoys sundaes) and she reacts to citrus and flowers. Her grandmother and aunt wonder whether she has environmental sensitivities, though these have not been diagnosed. As a consequence of her mother's premature death from heart failure, Elizabeth has begun annual monitoring by a paediatric cardiologist. Maintaining a healthy weight is important for her and she is not to become overweight. She eats many organic foods and, when she goes to school, she is at her grandmother's at noon to eat a lunch Fern Battyanyi prepares for her, rather than the meal available at school.

[55] Regardless of the caution about Elizabeth's weight, Fern Battyanyi does not know Elizabeth's current weight and has not known her weight for approximately one year. She believes that Elizabeth is gaining weight because her father feeds her treats, such as doughnuts and slushies. Mr. Ching admits he provides Elizabeth with treats, but says that he offers her these no more than once each week. Mr. Ching's notes record that he takes her for treats to fast food restaurants such as McDonald's and Dairy Queen every week. In his February 3, 2009 affidavit, Mr. Ching said that when he would see Elizabeth overnight from Friday to Saturday, he would take her to lunch which would include a doughnut and chocolate milk and that he had taken her for the occasional treat to the Dairy Queen for a chocolate sundae. His notes describe a Saturday when her diet was comprised of a doughnut, an ice cream sundae, a hamburger and French fries. He does not dispute the admonition that Elizabeth should not be overweight.

[56] Elizabeth's health appointments are not arranged by Mr. Ching. Ms. Battyanyi arranges the appointments and attends them. Mr. Ching says that the appointments are arranged during

work hours when he is unable to attend, though Ms. Battyanyi's affidavit of November 2007 states that Mr. Ching did accompany her to Elizabeth's appointments when Elizabeth was younger. He indicates that he has once contacted Elizabeth's doctor. She has not spent time at her father's home when she has been ill nor while her ankle was injured.

[57] Mr. Ching's journal notes extensive medical concerns for Elizabeth during the months since she began school: the torn ligament in her ankle, fluid on her lung and a bladder infection. Elizabeth has attended fourteen or less days of school from the start of September until November 24. Ms. Battyanyi says that Elizabeth has been under a doctor's care throughout this period. Mr. Ching does not dispute Elizabeth's ill health nor the fact that she becomes ill quickly and seriously.

[58] Elizabeth has had frequent visits to the doctor for other complaints. Fern Battyanyi has been primarily responsible for Elizabeth's health care and has Elizabeth's health card. While Mr. Ching has taken time off work to attend to personal matters, he does not say that he has ever used this time to visit with Elizabeth's doctor and discuss her health.

Legal analysis of custody applications

[59] Ms. Battyanyi is Elizabeth's grandmother. Mr. Ching is her father. He argues that his status as Elizabeth's parent makes him the presumptive guardian and I should not lightly set aside his claim. In *King v. Low*, 1985 CanLII 59 (S.C.C.) at paragraph 16, Justice McIntyre reviewed the different approaches taken by the Supreme Court of Canada in custody cases, noting that until the early 1980s, where a contest over custody involved a parent and a non-parent, the parent's claim was preferred, unless the parent was determined to be an unfit custodian. In the 1980s, there was an important move away from parental preference in custody disputes which was justified by making the child's welfare the paramount concern. In paragraph 27, Justice McIntyre explained that the child's welfare is the dominant consideration and all other considerations are subordinate to it. Economic circumstances, physical comfort and material advantage will not determine custody. They, and all other relevant factors such as the child's general psychological, spiritual and emotional welfare are to be considered. His Lordship directed that "It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult."

[60] Mr. Ching's February 2009 affidavit provided a copy of a journal he has maintained, making notes contemporaneously with his visits. This journal began on December 31, 2008 and continued for one month, until February 1, 2009. During that time, Elizabeth had five overnight visits with her father and two weekend visits, which lasted two nights. January 24 to January 26, 2009 was her first weekend visit with her father. In his October 2009 affidavit, Mr. Ching says that he is the person primarily responsible for Elizabeth's care. In the same paragraph of his affidavit where he asserts this, he offers his journal notes describing events during the period from June 9 to October 15, 2009. These entries are abbreviated and do not support his contention that he is primarily responsible for Elizabeth's care. For example, there are no entries

for the period from June 9 to August 2 and it appears that she was with her father at his home for only one overnight visit during the period from September 4 to October 15. I have noted elsewhere Mr. Ching's failure to prove that he has been primarily responsible for Elizabeth.

[61] Certainly, when Elizabeth is with him, Mr. Ching meets her daily needs. He provides her meals and clean clothing, he ensures her hygiene needs are met, entertains her and takes part in educational activities with her. However, he has not met her larger needs: he has not taken her to the doctor or dentist, he did not provide her with clothing for her start at school. He gave no evidence that he'd ever spoken to her paediatric cardiologist or to her school teachers during her extended absence from school. He has not arranged her extra-curricular activities. His regular work schedule does not permit him to attend to all his own needs and those of Elizabeth's which he meets. Without criticizing Mr. Ching, he relies extensively or entirely on Fern Battyanyi to attend to these aspects of parenting.

Custody conclusion

[62] John Ching has made considerable strides in his parenting since November 2008. Prior to that point, he met few of Elizabeth's needs. Elizabeth's maternal family had assumed responsibility for almost all of her care. As a result of the access he has exercised, Mr. Ching can now meet many of her day-to-day needs. He is not Elizabeth's primary care-giver and he does not shoulder the responsibilities of parenting Elizabeth as a single parent. Many extremely important parenting functions, such as Elizabeth's health care, her extra-curricular involvement, meeting her financial needs and preparing for school, have fallen to Fern Battyanyi because Mr. Ching did not attend to them himself.

[63] As Justice Bateman said in *Burgoyne v. Kenny*, 2009 NSCA 34 at paragraph 26, I am to determine in which party's custody Elizabeth's future will best be served on the basis of the available evidence that is relevant to Elizabeth's emotional and physical well-being. My concern is the current circumstances. Mr. Ching's parenting ability will, I hope, continue to improve. Improvement will benefit both him and Elizabeth. At the present, Ms. Battyanyi's ability to provide for Elizabeth's needs is superior to Mr. Ching's and Elizabeth's future will best be served in her grandmother's custody. This means that Ms. Battyanyi will be responsible for making decisions relating to Elizabeth. Elizabeth will live with her grandmother, subject to the access I outline below. Ms. Battyanyi must advise Mr. Ching of decisions she is making about Elizabeth and Mr. Ching is entitled to request information about Elizabeth and to obtain information about her, from her health-care providers, her educators and those who are involved with her in extra-curricular activities.

[64] Mr. Ching has argued that his role as a parent is not to be easily set aside. His position as parent does not overcome the requirement that custody be determined solely on Elizabeth's best interests, but it does inform the access arrangements I order. John Ching is Elizabeth's closest relative. Though he is unable to meet all of her needs, he and she should still have an especially close relationship as father and daughter. In terms of their time together, I order as follows:

- (A) During the school year,

- (i) Elizabeth shall be with her father every weekend from Friday evening until Monday morning, when she shall be returned to her grandmother's home before school;
 - (ii) When there is a long weekend and Mr. Ching is not working on the day when there is no school, Elizabeth's time with her father shall be extended either to begin after school on the Thursday before the long weekend starts or to end on the Tuesday morning when school resumes;
 - (iii) The extension of weekend access shall include the Easter weekend, the weekends at the beginning and end of the March Break and the weekends at the beginning and end of the Christmas break;
 - (iv) If Mr. Ching arranges his vacation to encompass the March Break or Christmas break, Elizabeth shall be with her father during this time; and
 - (v) Elizabeth shall be with her father throughout the period during the Christmas break when her father is not working.
- (B) During the months of July and August, Elizabeth shall be with her father as many as six days out of seven. If Mr. Ching is working, Elizabeth shall spend the days with her grandmother. If Mr. Ching is not, she shall spend her days with him.
- (C) Other occasions:
- (i) Elizabeth shall spend at least three hours with her father on her birthday and his, when these events occur on weekdays;
 - (ii) Elizabeth shall spend additional time with Mr. Ching at his request; and
 - (iii) If Mr. Ching wishes to visit New Zealand with Elizabeth, Ms. Battyanyi's authorization for such a visit shall not be unreasonably withheld.
- (D) Other contact:
- (i) Elizabeth's telephone contact with either party shall not be restricted; and
 - (ii) Both parties may attend Elizabeth's extra-curricular and public school activities.
- (E) Ms. Battyanyi shall:

- (i) provide Mr. Ching with the name, address, telephone and fax number and any email address for Elizabeth's doctor and dentist and notify him of all her appointments; and
- (ii) provide Mr. Ching with copies of all notices received from Elizabeth's school.

[65] As a result of granting Ms. Battyanyi's claim for custody of Elizabeth, it is not necessary for me to address Mr. Ching's mobility application. For Elizabeth's benefit, I encourage Mr. Ching to educate Elizabeth about New Zealand and her family's roots there.

J.S.C. (F.D.)

December 30, 2009
Halifax, Nova Scotia