Pilon v. Pilon 2011 NWTSC 41

Date: 2011 08 16
Docket: S-1-DV-2006103771

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JEANNINE DIANE PILON

Petitioner (Applicant)

- and -

ROGER ERNEST PILON

Petitioner (Respondent)

MEMORANDUM OF JUDGMENT

[1] This is my decision after a trial of the petitioner's application for variation of a corollary relief order issued in this action on December 7, 2006 (the "CRO"). Under the terms of the CRO, the parties have joint and shared custody of their son, A., on a week to week rotating basis. The petitioner says that there have been changes since 2006 and that joint and shared custody is no longer workable and no longer in A.'s best interests. She seeks sole custody. The respondent says that joint and shared custody is working. However, if only one parent is to have custody, he says that it should be him.

[2] At the commencement of the trial on March 8, 2011, on consent of the parties I vacated the restraining order that was granted against the petitioner on October 9, 2008. The parties also agreed that the issue of child support should be deferred until a decision is rendered on custody.

Background

[3] The parties began to cohabit in 1992 and were married in 1996. A., the only child of the marriage, was born on March 24, 2001. The parties separated when A. was two years old, but remained in the same home until 2004. They began a shared parenting regime after their separation which was incorporated on consent in the CRO. At present, the schedule they observe is that A. spends alternate weeks with each parent and holidays are divided by agreement between the parties.

[4] The petitioner is single and A. is her only child. Until recently, her employment required that she travel outside of Yellowknife. Her current employment does not involve travel.

[5] The respondent is self-employed in Yellowknife. He has remarried and he and his wife, K., have an infant son. His wife's two teenage sons from her previous marriage reside in Alberta, but visit frequently.

The child, A.

[6] A. is now ten years old. Although no current medical or psychological evidence was tendered at trial, the evidence of A.'s parents, his teachers and the psychologists who saw him in 2009, makes it clear that he is a special needs child. He has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Pervasive Developmental Disorder ("PDD"). He has had episodes of seizures. He lacks social skills, exhibits unusual and inappropriate behaviour and can be aggressive and violent with other children. He becomes angry easily and has tantrums and what some witnesses referred to as "meltdowns" where be will be angry and cry for long periods of time. He has problems learning and an Individualized Education Plan ("IEP") has been developed by his school to accommodate his needs. It is clear from all the evidence that A. is and always has been a very challenging child.

[7] Understandably, A. was not called as a witness at the trial. Some of the witnesses repeated things that A. has said to them about which parent he wants to live with or how he feels about living with one or the other parent. However, the witnesses who were probably the most objective, his teachers, testified that he will speak negatively about both parents, depending on which one he happens to be

angry with at a given time. When questioned about why he is angry, it often turns out that the cause is something that happened in the past which may have no connection with what is happening at the time he expresses the anger.

[8] For those reasons, I give no weight to anything alleged to have been said by A. about which parent he wants or does not want to live with. I cannot be satisfied that what he has said is a reliable expression of his actual wishes. At the same time, I do accept that the issue of where he will live is a cause of concern to A.

Change in circumstances

[9] The first issue is whether there has been a change in circumstances since the CRO. Section 17(5) of the *Divorce Act* requires that before the Court makes a variation order in respect of a custody order, the Court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child occurring since the making of the custody order. The burden is on the applicant for variation, in this case the petitioner, to show that a change has occurred. That applies even where the custody order was made on consent, as was the CRO in this case.

[10] The petitioner submits that there have been a number of changes since the CRO issued: A. is now in school in a special program, which was not contemplated in 2006; he requires constant supervision; he has been diagnosed as a very complex child with specific problems and is not simply a child going through a phase, as the parties were originally told; both parties have changed their employment, which is particularly significant in the case of the petitioner, who is no longer required to travel; the respondent's remarriage has introduced new dynamics and conflicts into the parties' relationship; there have been other conflicts between the parties over such things as A.'s medication regime and medical travel.

[11] The respondent submits that most of the circumstances relied on by the petitioner were, in substance, contemplated by the parties at the time of the CRO. They have always known that A. has behavioural issues. A.'s issues are being addressed and improved by his individualized school program. The respondent says that changes in the parties' respective employment are not significant and do not relate to A.'s needs. He also argues the conflicts arising from his remarriage spiked in 2008 to 2009, a short period of time within the eight years that the parties

have been sharing custody, and nothing noteworthy has occurred since then. The respondent also says that with respect to conflicts over medications and medical travel, both parties have to some extent acted immaturely and each must bear some responsibility for the problems.

[12] In my view, a number of circumstances have changed. At the time of the CRO, A. was five years old, he is now ten. He has a number of problems and issues that are currently being addressed, but both the issues and the way of addressing them can reasonably be expected to change as he gets older. While the parents have been aware for a long time that A. has behavioural issues, it is clear that they were not aware of the extent to which those issues would affect A.'s life and his everyday activities, such as his ability to interact appropriately with other students at school. There is, for example, no indication that the parents anticipated that he would have to be supervised at all times at school and have to leave early at the end of the day to avoid confrontations with other children - these are measures that have been put in place by his school. Further, an assessment done at the Glenrose Hospital in Alberta in 2008 appears to have been a turning point in bringing some clarification to A.'s condition.

[13] The week to week transfer between his parents' households has been marked by difficulty, both for A. and for his parents. Some of the difficulty arises from A.'s reaction, as is evident from the incident at a local fast food outlet that I will describe further on and some of it arises from a lack of communication between the parents. At present, A. meets with a school counselor each week to discuss the transfer between households.

[14] There have been significant disagreements between the parents over such things as medical travel and medications in recent years.

[15] There is a clear issue, arising from the evidence of A.'s teachers, caregivers and the professionals he has seen, as to whether consistency and structure beyond what is offered by the current shared custody regime would better address A.'s needs in light of his poor ability to adapt to change. The fact that the petitioner need no longer travel means that from her perspective, there is no need for A. to move between households.

[16] Finally, the assessment report submitted by Dr. Seitz in 2009 and her evidence given at trial pursuant to s. 29 of the *Children's Law Act*, S.N.W.T. 1997, c. 14, raise the issue of possible alienation of the petitioner from A., which was not an issue at the time of the CRO. Whether alienation exists or is ongoing is an issue to be decided, but the fact that it was flagged as a concern by the professional appointed to do the assessment is, in my view, sufficient to constitute a change in circumstance that permits the Court to review what is in the child's best interests.

[17] The foregoing changes as a whole allow the Court to determine whether the existing custody regime is still in A.'s best interests, or whether it should be changed to better address A.'s needs as they are now understood. Even if some of the issues identified may be less prominent or even resolved for the time being, A.'s unique characteristics and needs make it likely that further issues, related or not, will arise in the future. The extent to which any of the issues have been resolved does not go to whether there has been a change in circumstances, but instead to the ultimate issue of what is in A.'s best interests.

[18] Before going on to deal with A.'s best interests, I will address some issues arising from the evidence.

Evidentiary issues

[19] The first issue relates to the evidence of two witnesses who were qualified as experts. Both are psychologists: Dr. Seitz and Mr. Bowerman.

[20] Dr. Seitz conducted an assessment of the family circumstances pursuant to s. 29 of the *Children's Law Act* in 2009. At that time, the trial was scheduled to take place in July of 2009, but it was adjourned when the respondent terminated the services of his counsel. Subsequently there was an unsuccessful attempt at mediation and both parties changed their counsel. The trial was ultimately rescheduled to take place in March and April of this year. Dr. Seitz was not asked to update her assessment; counsel explained this was because of the cost that would be incurred.

[21] Similarly, Mr. Bowerman completed his assessment of A. in 2009 and it was not updated for this trial. No explanation was offered at the trial, although there

was an indication at one of the pre-trial conferences that the petitioner would not agree to an update.

[22] I refer to this simply because it obviously poses some difficulty when the evidence about family dynamics or a child's needs is not up to date. Fortunately, in this case there is evidence from other witnesses that may confirm or refute some of the evidence of the experts. However, the fact that the evidence of the experts was not brought current in that neither of them had seen A. or his parents since 2009, is a weakness in their evidence. The fact that cost was an issue does not mean that the weakness is to be ignored or given little weight.

[23] The petitioner and the respondent both made references in their evidence about things said to them by Dr. Hnatko and Dr. Lebeau who were or are A.'s physicians. Neither of these physicians testified, nor were any reports authored by them placed in evidence. Any evidence given by the petitioner or the respondent about things the doctors said only establishes what the parties understood or the reasons why they took certain actions.

[24] Dr. Seitz referred in her report and her testimony to observations and opinions she obtained from records or reports authored by Dr. Hnatko. Those records or reports may explain why Dr. Seitz came to certain conclusions, but they are hearsay evidence and counsel did not agree on what use could be made of them.

[25] To the extent that any facts relied on by Dr. Seitz were not established in the evidence, that affects the weight of her opinion: *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.).

[26] The petitioner sought to put into evidence a very large number of email messages and other documents bound in four volumes. Although counsel agreed that some of the emails and documents could be admitted, there was little or no consensus on many others. Counsel for the petitioner acknowledged that some of the material was simply not admissible and did not pursue it, for example emails from the petitioner to lawyers. Other documents, such as the journals kept by the parties and by K., were marked for identification purposes but were not the subject of questioning when the parties and K. were on the witness stand. Other emails and documents, even if referred to in the petitioner's evidence, were of marginal relevance to the issues.

[27] Accordingly, I have relied only on those relevant emails and documents that were testified about by a witness or were otherwise referred to and admitted by consent of counsel.

[28] Finally, I will make a few remarks about credibility. Each party challenged the other's credibility.

[29] The main challenge to the petitioner's credibility arises from a contradiction in her evidence. At trial, the petitioner testified that when she and the respondent separated, she wanted A. to stay in her care, but she gave in to the respondent's wish for shared parenting because she was scared of him. She admitted that at her examination for discovery in July 2008, she had testified that at the time she agreed to the custody order in 2006, she had no reason to be concerned or fearful for her well-being. She gave no explanation for this contradiction. She gave no evidence at trial of being afraid of the respondent. She did refer to the fact that the respondent has guns as a reason she did not answer the door when the respondent came to her home at night in what I refer to further on as the "bath incident".

[30] It was not submitted in argument that the petitioner fears the respondent in any event. The contradiction on this one issue does not taint the rest of the evidence given by the petitioner.

[31] The petitioner challenges the respondent's credibility based mainly on the manner in which the respondent testified. Counsel for the petitioner submitted that the respondent was evasive in answering questions and instead of giving a straightforward answer "wants to write a book". The respondent did tend to give lengthy answers, sometimes losing sight of the question put to him. However, the manner in which a witness testifies is only one factor in the assessment of credibility.

[32] I will comment as necessary on any credibility issues in relation to the evidence and the issues. However, notwithstanding any credibility issues, there are very few instances where the parties' versions of events differ. The main points of contention are their perspectives on what is best for A. and their parenting styles.

Is the current regime meeting A.'s needs?

[33] As I have indicated above, under the current regime A. goes from one parent's home to the other's each week after school on Friday. Typically, after school on Friday at the end of a week with the respondent, A. goes to Ms. Liard, the childcare provider arranged by the petitioner. The petitioner picks him up there after she finishes work. He is in the petitioner's care until the following Friday after school, when he goes to the respondent's home. Counsel referred to Friday as the "transition day" so I will use that term.

[34] The petitioner testified that on the Thursday when A. is with her prior to the transition day, he is sad or defiant and does not want to go to the respondent. When he returns to the petitioner's home after his week with the respondent, A. is extremely tired, difficult and "hyper". It takes the petitioner two days to get him to obey her household rules.

[35] The respondent testified that on transition day from his home to the petitioner's, A. will make negative comments about having to go to the petitioner's but will back off when the respondent does not react to the comments. The respondent testified that transition days are not as difficult now as they once were.

[36] Ms. Liard has been A.'s after-school carer since 2008, but only during the time he resides with the petitioner. She testified that on the Friday after he has spent a week with the respondent and is to go to the petitioner, A. is more sad and aggressive than usual and does not want to play with the other children. At the end of his week with the petitioner, A. is again aggressive and secludes himself from the other children. He does not show this behaviour during the rest of the week when he is with the petitioner. However, since Ms. G.L. does not see A. during the week when he is with the respondent, I cannot conclude from her evidence that the way he acts is caused by being with the respondent. It is equally likely that it is the transition between homes that is causing him to act that way.

[37] Ms. Howard also testified. She provides care for A. two Sundays a month. Although it was not clear from the evidence why A. is in her care those days, this appears to be the case only on Sundays when he is in the care of the petitioner. She also provided care every second week in the summer of 2010 when Ms. Liard was on maternity leave. She too spoke of A. being more aggressive after a week

with the respondent and less so when in the petitioner's care. She has never looked after A. when he is in the care of the respondent so again, her evidence establishes nothing more than A.'s difficulties with the transition day. The fact that she sees A. only on Sundays when he is in the petitioner's care does not support a conclusion that being with the respondent causes A. to be more difficult and aggressive since there is a gap between Sunday and the transition day.

[38] Ms. D'Avignon, who is an education assistant at A.'s school and last worked with him in June 2010, testified that A. has a hard time with change and can overreact to big and small changes alike. She testified that his response to a change is not always proportionate to the extent of the change.

[39] A.'s school has recognized that transition days are difficult for him. The Individual Education Plan developed specifically to meet his needs in March 2011 includes a provision that he meet every Thursday with a personal counselor to talk about the transition from one parent's home to the other.

[40] Mr. Bowerman, a psychologist, testified that it was his perception when he was seeing A. in 2009 that A. found the transition between households difficult. Interestingly, he also testified that he had recommended in 2009 that the parents have breaks from A. because he is such a difficult child. He also recommended that the parents communicate better and that they synchronize their households. He thought they would meet with him about that, but they did not do so.

[41] In considering the transition between households, it is not only the change of homes and all the inconveniences that go along with the change that are important. The parties also maintain very different households. At the petitioner's home, she and A. are the family. At the respondent's, A. has a step-mother and now a little brother. He also has two older step-brothers who visit from time to time.

[42] From the evidence it appears to me that the petitioner is strict, perhaps somewhat rigid when it comes to A.'s schedule and discipline. The respondent appears to be less so; he will sometimes ignore or wait out A.'s outbursts, whereas the petitioner is more likely to react immediately and strongly to deal with them.

[43] All of these differences require adjustment on the part of A. each week when he goes from one home to the other. It would not be easy for an adult and it cannot be easy for a child, especially one with his problems and his difficulty generally dealing with change.

[44] I conclude that A. would be better off with a regime that provides more consistency and stability so that he has fewer and less frequent adjustments to make. The difficulty lies in deciding what sort of regime would better serve A.'s interests. I will review the allegations and circumstances that were focused on in the evidence and that are relevant to a determination of what is in A.'s best interests.

Allegations of physical abuse and reports to Social Services

[45] Both parties gave evidence about incidents that have caused them concern about physical abuse of A. by the other.

[46] The respondent testified that he has seen marks on A. that he believes were caused by the petitioner: a cut on his lip that required stitches, bruising on his arms with visible hand prints. His spouse, K., also testified that she saw a hand print on A. that A. said came from the petitioner squeezing him. She testified also that A. would regularly talk about the petitioner slapping him and twisting his arm.

[47] The main allegation against the petitioner arises from an incident in the summer of 2007 when she, by her own admission, grabbed A. while he was riding or walking his bicycle, scratching him with her nails in the process. She testified that she grabbed A. because he had become angry and she was afraid he would run into traffic. The respondent testified that the petitioner told him that she grabbed A. by the neck and arm, scratching him, because he was angry and would not listen to her and she lost control. A couple of days after the respondent learned about the incident, he observed what he described as a puncture wound that was scabbed over on A.'s neck. K. described it as a huge gouge that had pus in it. She photographed the injury, along with scratches on A.'s neck and arm. She testified she took the photographs in case a pattern developed.

[48] The photographs that were placed in evidence reveal a small red wound or cut with a yellowish center and a separate red scratch on A.'s neck, along with a small red scratch on his arm.

[49] The respondent and K. spoke to Social Services about this incident, an issue I will discuss further on. However, K. testified that A. has not said anything about the petitioner hitting him since April 2009. The respondent testified that he now has no concerns about abuse whatsoever. He testified that at some point there was a meeting at the school between the petitioner and various officials after A. had threatened to stab the petitioner. It was unclear whether the respondent also attended the meeting. After that A. said nothing more about the petitioner hitting him. The respondent testified he believes the meeting was a "wake up call" for the petitioner which made her realize that neither the respondent nor A. would tolerate her behaviour.

[50] The petitioner did not testify about that meeting. She did testify that when A. was younger and would have an angry outburst or misbehave, she would grab him by the arm and lead him upstairs. She would also smack him once or twice to move him along; she testified that sometimes his bum would be a little red as a result. She also testified that there have been times in the past when A. would be aggressive or violent to her and that he has hit, kicked and slapped her, although he no longer does that.

[51] The only allegation made by the petitioner against the respondent arises from an incident when A. was 6 or 7 years old. When the petitioner asked A. about a purple-green mark on his thigh, A. told her the respondent had hit him on the leg with a stick because he was peeing on a campfire. The respondent testified that he had attempted to move A. away from the fire and in doing so clipped him on the leg with a branch he was carrying. This appears to have been accidental and the petitioner did not attempt to characterize it as anything but minor.

[52] Neither party now asserts that A. is at risk of harm from the other. However, the petitioner alleges that the respondent wants "power and control" in general, and to pursue that, he attempted to build a case against her to take to Social Services. She relies largely on the fact that the bicycle incident was not reported to Social Services until six months after it happened; she accuses the respondent of

making a mountain out of a molehill since the scratches were minor and it was she who told the respondent about the incident in the first place.

[53] I cannot dismiss the respondent's concerns about the injuries from the bicycle incident as completely unfounded. Although the scratch on the arm looks minor, the marks on the neck look more serious. The respondent's understanding from what he was told was that the petitioner lost control and grabbed the child by the neck. It is not surprising to me that the respondent was concerned, nor is it particularly surprising to me that K. took photographs to document the marks, considering her background as a police officer. She testified the child said it happened when the petitioner was angry because he stopped his bicycle while she was jogging beside him.

[54] The bicycle incident was not reported to Social Services until several months later, in late February 2008, after another incident occurred. I will call this other incident the "bath time" incident.

[55] The petitioner testified that A. was in the bath at her home when the respondent telephoned to ask her to drop off A. at his home on the next transition day. The petitioner refused his request. The respondent called again and asked to speak to A. who was crying because the petitioner was washing his hair. She told him he could not speak to A. because he was in the bath. When the respondent called yet again she let the answering machine pick up the call. After A. got out of the bath, the doorbell rang. The petitioner saw that it was the respondent and shut off the lights. She testified that she was scared because she knows the respondent has guns. She saw him drive back and forth for a few minutes and she called the police, who arrived after the respondent had left.

[56] The respondent testified that when he called the petitioner about the transition day arrangements, he could hear A. screaming in the background. The petitioner told him that A. was having a meltdown but she would not let the respondent speak to him to calm him down. She hung up and the respondent called back. At that point he could not hear A. so he asked to speak to him but the petitioner refused, saying he was in the bath. When she did not answer his next call, the respondent called Social Services to say that he was afraid because A.'s screaming had stopped. He said they advised him to go to her home and ask to see

A., but when he did that, the petitioner turned off the light and would not open the door. He acknowledged that the police questioned him about this incident.

[57] The Social Services records in evidence indicate that the respondent did contact Social Services and it was suggested to him that he go to the petitioner's home and try to see A. to ascertain that A. was all right. It was during that contact with Social Services that the respondent referred to being concerned about A.'s safety while in the petitioner's care and about the injuries from the bicycle incident.

[58] There is no evidence that A. was harmed or was in any danger of being harmed in the bath time incident. What this incident illustrates, in my view, is a significant level of mistrust between the parents and a failure of communication. The respondent probably overreacted to A.'s crying or screaming. He knows that A. can be a difficult child and has angry outbursts; on the other hand he had concerns at that time about the petitioner's physical interactions with A. The petitioner could have compromised to address the respondent's concern. For example she could simply have let the respondent speak to the child either by phone or when he arrived at her home. In light of her other contradictory evidence about fear of the respondent (referred to earlier in these reasons), I do not put any weight on her statement about knowing the respondent has guns, rather I am satisfied that she simply did not want the respondent to become involved. On the other hand, there was evidence from K. that she has observed that A. would get angry if one parent appeared, for example at a medical appointment, when it was not their week to be with him. So allowing the respondent to speak with A. would not necessarily have calmed A. down and may have made him more upset or difficult to handle. The bottom line however is that both parties could have acted differently and the situation might not have escalated as it did.

[59] In all these circumstances, however, I do not consider the taking of the photographs or the timing of the report to Social Services evidence that the respondent was trying to build a case against the petitioner or exert power and control in some way that is relevant to the decision I have to make. I am satisfied that he was genuinely concerned about A.

[60] Another very unfortunate incident occurred in August of 2008. During the summer while A. is not at school, the parties' transition day routine is to meet early Friday morning at a fast food outlet. On the day in question, they met at 7:30 a.m.

for A. to start his week with the petitioner. According to the petitioner, A. initially seemed pleased to see her but soon began screaming that he hates her and that she is a bad mother. He refused to go with her. The respondent did nothing to stop A.'s behaviour; he simply repeated that the child did not want to go with her and he would not put A. in the petitioner's vehicle. Both parties left, the respondent taking A. to his home where he arranged for a babysitter to be with A. while the respondent went to work.

[61] The petitioner testified that on her then lawyer's advice, and because it was her week to have the care of the child, she went to the respondent's home. When the babysitter and A. came to the door, she picked A. up and put him in her vehicle. He questioned what she was doing and began to cry.

[62] The respondent testified that although A. was happy when they first arrived at the fast food outlet, he became angry and upset when the petitioner arrived and was rude to her. The respondent testified there had been other times when he had forced A. kicking and screaming into the petitioner's vehicle. He said he does not normally confront A. when he is that upset and would not do so this time. It is his view that allowing A. to calm down when he is in that state makes the event causing the upset less significant to A. than it would be if A. is forced to do something. After the petitioner left, A. did calm down and it was the respondent's intention to take A. to the petitioner's home in the afternoon.

[63] Although the babysitter, who was 11 years old at the time of the incident, was not called to testify, her father testified that he and the respondent made arrangements for her to babysit A. that morning. She called her father just after 9 a.m., crying and very upset, asking him to pick her up at the respondent's home. She continued crying in his truck. As a result of the incident her father will no longer allow her to babysit A.

[64] I infer from the evidence that this was a very upsetting incident for both A. and the babysitter as both ended up in tears after it. The petitioner testified that she too was upset when she got to her home with A. It is reasonable to infer from all this that A. reacted very negatively when the petitioner took him from the respondent's home.

[65] It may well be that the respondent could have done more at the fast food outlet to calm down A. or communicate to him that his behaviour was unacceptable. On the other hand, having seen the state A. was in, the petitioner might also have contacted the respondent to make arrangements to pick up A. in such a way as to avoid a further angry or upset outburst from the child, rather than simply taking him from the respondent's house as she did.

[66] The incident had further repercussions. The respondent's spouse, K., who was working out of town at the time, understood from what she was told about the incident (presumably by the respondent and/or the babysitter) that the petitioner had taken A. kicking and screaming from the respondent's home. She called Social Services and told them what she understood had happened and that she and the respondent were concerned about A.'s safety when in the care of the petitioner.

[67] The petitioner testified that someone from Social Services came to her home later that day to speak to A. The Social Services records in evidence indicate that no further action was taken.

[68] In my view, along with the distrust and lack of communication between the parents, this incident also illustrates that they have very different ways of dealing with A. The petitioner appears to be somewhat inflexible and more inclined to want to force A. to do something, even in the face of his refusal and anger, while the respondent appears more inclined to wait out the anger and change the situation that seems to be triggering the anger.

[69] Although this incident, too, led to a report to Social Services, it appears to have been the last one. As I have indicated above, the respondent acknowledges that he has not had concerns about physical abuse by the petitioner for some time.

Medical issues and interactions with professionals

[70] Various disagreements have arisen between the parties relating to A.'s medical and other needs. The disagreements are mainly about medical travel, medication and payment for both. A related issue is the respondent's reaction when dissatisfied with individuals involved in A's care.

[71] It is clear to me from the evidence that the parties have had different opinions about A. since he was very young. The petitioner testified that she felt almost from the beginning that there was something seriously wrong with him because he would have daily fits and meltdowns about minor things. Early on, various professionals told her that it was a phase, but she was convinced that A. was not acting normally.

[72] The petitioner says that when she expressed her concerns to the respondent, he would tell her that she was not strict enough with A. or that A. was just roughhousing. He would also say that A. was imitating her bad temper and did not act that way at the respondent's home.

[73] The respondent testified that he did not notice behavioural problems early on, although it was his opinion that A. was having problems with the petitioner and the daycare providers she arranged. He did not experience the same level of frustration with A. that he observed the petitioner to have. When A. was four or five years old, the respondent began to notice problems in his comprehension and behaviour and realized that he was not just a rambunctious child. The respondent's way of dealing with A. is to distract him or re-direct his attention from what he is upset about; he said that taking a firm stand just aggravates A.

[74] Even at present, the parties have different views about A. The petitioner testified that his maturity level is about that of a 6 or 7 year old. K., the respondent's spouse, testified that he is socially immature, more immature than most children his age. However the respondent testified that emotionally and in terms of relationships, A. is far more mature than a 9 year old.

[75] The main disagreement between the parties arose after A. was prescribed the drug Risperidone in 2007. The only evidence before me as to the nature of that medication and what it is for comes from the petitioner and the respondent.

[76] The petitioner testified that A. was prescribed Risperidone because it can treat different conditions and A. at that time had not been fully diagnosed. The Risperidone was to take the edge off A.'s extreme violence. The petitioner said she was advised the side effects were upset stomach, headaches, and similar things.

[77] The respondent testified that Risperidone is an anti-psychotic drug and he was hesitant about it because he discovered that it has some serious side effects, such as permanent nerve damage. He agreed to it, however, because the dosage prescribed by Dr. Hnatko was minimal.

[78] At the end of February 2008, according to the petitioner, another of A.'s physicians, Dr. Lebeau, told her that the dosage of Risperidone could be doubled. The petitioner had already formed the view, based on a discussion with a friend, that giving A. Risperidone twice a day rather than only once could help him. She testified that Dr. Lebeau contacted her about some tests A. had had and in the course of that discussion Dr. Lebeau told her that a second dosage could be given. Although the petitioner denied that she asked Dr. Lebeau about this (and Dr. Lebeau was not called as a witness), her evidence was vague on that point and I believe that she must have raised the subject with Dr. Lebeau. In any event, there does not seem to be any issue that Dr. Lebeau told the petitioner that the dosage could be doubled such that it would be administered twice a day instead of once.

[79] This conversation took place on the Friday of a long weekend when the respondent was out of town and, to the petitioner's understanding, out of cell phone range. When he returned, he found a message from the petitioner saying that she had doubled the Risperidone on Dr. Lebeau's advice. The respondent testified that he was furious because he had not consented to the increase in medication and because Dr. Lebeau had not consulted with Dr. Hnatko. He and the petitioner had a meeting scheduled with Dr. Lebeau on the following Tuesday and there was no urgency. He testified that without the increased dosage, the worst that might happen is A. might have a tantrum.

[80] The respondent sent the petitioner an email message in which he wrote that she had "once again" gone behind his back and started new therapy for A. He insisted that their respective lawyers would have to become involved (the petitioner had already commenced these proceedings by that point in time). He stated that he was discontinuing all medications while A. was in his care and that all further medical treatment for A., including an appointment at the Glenrose Rehabilitation Hospital scheduled for the summer of 2008, was on hold. He also stated he would tell Dr. Lebeau that he would take legal action against her if she prescribes or alters medication without his consent.

[81] The respondent testified that part of the reason for his strong reaction was that he found the petitioner's message advising him of the increase bizarre and confusing because it seemed to tie the increase in medication to seizures revealed by the tests done by Dr. Lebeau, but Risperidone does not control seizures. As a result, he doubted that what the petitioner said about Dr. Lebeau's advice was true.

[82] The message from the petitioner to the respondent is certainly capable of being interpreted the way the respondent interpreted it. Whether he is correct that the medication has nothing to do with seizures is unknown. However, choosing to react the way he did rather than clarifying with the petitioner what Dr. Lebeau had said and why she had authorized the double dosage is simply not reasonable. Despite what he said in his email message to the petitioner about once again going behind his back, this was the only incident the respondent could recall when he was not aware that a medication had been prescribed or a dosage changed. Eventually the parties with the assistance of A.'s physicians resolved the medication issue without any serious effects on A.

[83] After the incident involving Risperidone, A. developed hives from another medication, Carbamazepine, because, according to the evidence before me, Dr. Lebeau prescribed too great a dosage. After this, the respondent did not want Dr. Lebeau to treat A. and refused to accept her recommendation that A. go back on Risperidone. As a result, A. received the latter only during the weeks he was with the petitioner. The petitioner testified that the respondent encouraged A. to refuse to take the medication by telling him it would make him sick. There is insufficient evidence about the medical aspect of this to allow me to say whether the respondent was right or wrong to be dissatisfied with the physician, but clearly involving A. in the disagreement between the adults is unfair both to the child and to the other parent and does not assist in resolving the problem.

[84] Although the evidence is not clear as to when it occurred, at some point the respondent confronted Dr. Lebeau in a grocery store about all this and a testy exchange followed between them.

[85] Although, as I have indicated, the respondent could not identify other occasions where he was unaware of medications or dosages prescribed for A., he did testify that numerous tests and reports were done on A. that he learned about only after the fact and to which he objected. He described the tests he objected to

as sensory, hearing and dexterity tests. His reason for objecting to the tests was that he felt he was being left out of the loop, which was frustrating to him as a parent. At some point, he testified, he contacted A.'s school and told them they no longer had his consent to contact A.'s doctors and they were not to do any testing or treatment without his knowledge.

[86] The evidence also revealed an incident in approximately 2006 where the respondent wrote to a day care threatening legal action against the staff because (according to what the respondent understood from A.) a worker there had commented to A. that he would be better off if his mother had custody of him.

[87] There is a pattern in the respondent's hasty and, in my view, extreme reactions in the situations I have described. There are also consequences. Threatening legal action against the people who are meant to be caring for A. is not helpful to an already difficult situation and is likely to create tension and discord, which is not going to help A.'s progress. Withdrawing or refusing consent for routine tests is likely to be counter-productive.

[88] Although both parties testified that things are better now than before, there is little doubt that more tests and perhaps other medications will be needed or recommended in the future. The respondent testified that A. will need to go back to the Glenrose for assessments every three years, but that he (the respondent) questions that. He gave no explanation for why he is skeptical about the need for further assessments and considering all the problems A. has, this statement left me with the impression that he is simply reluctant to follow the advice of professionals when it comes to his son.

[89] Medical travel has been another area of dispute between the parties. The Department of Health would pay the expenses for one parent to accompany A. to Edmonton for the appointment at the Glenrose in 2008. The parties agreed that the petitioner would use that benefit and would contribute to the respondent's cost so that he could go along as well. According to the petitioner, she did not receive any receipts from the respondent and so she did not pay. According to the respondent, the receipts were provided to his lawyer and were to have been passed along to the petitioner's lawyer. This did not get resolved.

[90] In November 2008, A. was scheduled to have an EEG in Edmonton to investigate his seizures. The respondent refused to provide his consent for the test unless his expenses were paid to travel to Edmonton, so the test was not done. A.'s physician was concerned by this and re-booked the test. Again the respondent refused to provide his consent unless his expenses to accompany A. were paid. The petitioner testified that she let him take A. for the test and she did not go.

[91] Subsequently, the respondent wanted an MRI done on A. to rule out concerns about a lesion or tumour. The MRI was scheduled for a date in April 2009. The respondent sought the petitioner's consent to the MRI. She did not respond until March and then did so indicating that she wanted to take A. for the MRI and asking for the respondent's consent to that. In response, respondent proposed an arrangement whereby both of them would go; he would use the Department benefit and he and the petitioner would split the cost of her airfare, which he would do in part by crediting the amount she owed him for the Glenrose visit. The petitioner did not respond to this suggestion. The respondent then decided not to take A. for the test since it was not an emergency.

[92] The respondent testified that these problems arose because he was being kept out of the loop. He had tried to negotiate that he and the petitioner would alternate using the benefit provided by the Department to accompany A. to Edmonton for his various tests, but the petitioner would not agree. The respondent said he regrets that they argued about this and concedes that it was silly of him to delay the test in November 2008 because it was an important one.

[93] In explaining that he felt he was being left out of the loop, the respondent testified that the Glenrose had said that both parents had to be present for tests. There is no evidence substantiating this and it was contradicted by the petitioner's evidence that the respondent alone took A. for the test that was re-booked by the physician. In my view this was simply an excuse put forward by the respondent for his refusal to allow the test to proceed.

[94] Having said that, there is no explanation before me as to why the petitioner did not respond to the respondent's request to come to an agreement about how they could share the expenses so both of them could be present at A.'s appointments and tests. There is no evidence before me suggesting that it would be a financial hardship on either of them to contribute so that both could go. In my view, neither

party acted reasonably when it comes to this issue. The respondent's refusal of consent for the seizure test in November 2008 clearly did not put A.'s interests first and is the most serious of these incidents.

[95] Another area of disagreement between the parties arose from the petitioner's lack of a drug plan after she was laid off from her employment in 2009. She testified that she had to pay out of her own pocket for A.'s medication for three months because the respondent would not let her use the drug plan he had through his spouse. The respondent testified that the petitioner insisted on picking up her half of the medication using his or his spouse's drug plan but that when she spent extra time out of town he would be left short and she would not arrange for him to have the medication she had picked up. He would have to pay out of his own pocket to get the extra medication from the pharmacy. This led to him removing her from his or his spouse's medical coverage.

[96] From the emails that were referred to by the parties, a large part of the problem seems to have been caused because the petitioner did not want the respondent to pick up the medication paid for by his plan and drop off the amount she would need at her home. She insisted instead that she pick up her half of the medication at the pharmacy. In her trial evidence, she said that she did this because she did not want to have contact with the respondent, although she gave no reason why in this context contact would be a problem.

[97] This again is a situation where compromise and communication were lacking. However, it was resolved when the petitioner got new employment and obtained medical coverage. Considering the challenges these parents have with A., it seems very likely that the frustration and difficulty they experience in parenting him also result in problems dealing with each other.

[98] In my view, all of these disagreements over payment for medication and payment for medical travel, and in particular communication with doctors and each other over medical issues, cannot help but create unnecessary uncertainty and tension in the life of a child who has required and is likely in the future to require a significant level of professional attention. The only solution, in the absence of an agreement between the parties, is to give one parent the ultimate authority to consent to medical treatment (including tests) and to use any benefits provided by the Department of Health.

Movies and television

[99] Another area of dispute between the parties is the type of movie or television that A. is permitted to watch.

[100] The petitioner's view is that A. is immature; he acts six or seven years old instead of his age of 10. She is concerned because he acts out the violence he sees in movies and television. She monitors what he watches at her home, but is concerned, based on what A. has told her that at the respondent's home he is allowed to watch movies that are violent or not meant for children his age.

[101] The respondent testified that he does not allow A. to watch horror or "R" rated movies. He will let him watch some movies that are for children over the age of 13 depending on their content. He has taken A. to movies that involve attacks on other people by make-believe creatures and to others that involve guns or violence.

[102] A substantial portion of the parties' testimony was taken up with references to different film categories, not all of which were consistent, and to different films, some of which were not described in any detail. I do not intend to review that evidence as I did not find it very helpful.

[103] Of greater significance is the evidence relating to an incident at a local swimming pool in November 2009. While at the pool with the respondent, A. choked another child. It was clearly a serious incident. The respondent described it in an email message to the petitioner as "an aggressive violent choke and this boy [I understand this to mean the victim] was white".

[104] The petitioner said that this occurred after A. watched the movie "Abbott and Costello Meet Frankenstein" at the respondent's home. In the movie, Frankenstein chokes someone. The petitioner concluded that A. was imitating the violence in the movie and therefore should not be allowed to watch that type of movie.

[105] The respondent said he had lent the same movie to the petitioner at some point and understood that she had also watched it with A. He testified that he does not believe that the movie influenced A. or that there is a connection between the

movie and A. choking the other child. He testified that when he, the petitioner and A. discussed the incident, A.'s reaction was that the choking was not his fault, it was because he watched the movie. The respondent's view is that A. is manipulative and blames a film when he does something bad; A. needs to realize that it is just a film and not something he should imitate.

[106] In my view the respondent's view does not make any sense. Whether A. imitates violence he sees in a film or whether he simply uses the film as an excuse after he has been violent, the film is obviously affecting his behaviour. One way of dealing with this is to ensure A. does not watch films that provide him with something violent to imitate or give him something to blame after he has taken the opportunity to act violently. I find the respondent's view of this issue even more illogical because the respondent admitted in his evidence that A. does act out things he has seen in films: he gave the example of A. having watched a movie with a gorilla in it. Afterward, A. was posturing like a gorilla and the respondent was contacted by the school because A. was doing this in an aggressive fashion toward other children.

[107] The respondent's insistence that A. does not act violently and that movies have nothing to do with how A. acts is simply not supported by the evidence. While most children eventually realize that what happens in the movies is not appropriate or acceptable in real life, A. is not most children. There is ample evidence that A.'s aggression toward other children is a concern for the school and requires that he be supervised when with them and even separated from them. Mr. Bowerman, the psychologist, also testified that in his view, based on his 2009 report, A. needs almost constant adult supervision and guidance to keep himself and others safe.

[108] Since the evidence is that A.'s behaviour has improved somewhat, his aggression may not now be as big a problem as it was. However, it is clear to me that because of the view he takes, the respondent is likely to be less strict than the petitioner about the kinds of movies and television A. watches and less diligent about the effect on A.'s behaviour. I find that to be the case, notwithstanding that both of them allowed him to watch the movie that prompted the choking incident.

<u>The parties' plans to leave the Northwest Territories</u>

[109] Both parties were questioned about plans they once had to move from the Northwest Territories. In the end, neither carried out those plans nor do they currently plan to move so those past plans are of no relevance. The petitioner placed some emphasis on the fact that the respondent's plan to move also involved seeking sole custody of A., however since he did not follow through with the plan, I draw no significance from it. It would be surprising, considering some of the difficulties the parties have had with each other and the challenges with A., if each had not given at least some thought to seeking sole custody.

Dr. Seitz's report

[110] While the petitioner relied on Dr. Seitz's evidence and her finding that some actions by the respondent and K. have alienated A. from the petitioner, the respondent challenged Dr. Seitz's evidence and the methods by which she came to her conclusions.

[111] Dr. Seitz, a clinical psychologist with 25 years' experience, was appointed by agreement of the parties to complete a report pursuant to s. 29 of the *Children's Law Act.* As I have earlier indicated, her report was completed in 2009 and has not been updated since. I bear that in mind when considering her evidence.

[112] Some of what Dr. Seitz testified is borne out by the rest of the evidence : A. is a vulnerable child due to his complex neurological and psychiatric condition. Both parents and his step-mother are capable of providing a good home for him and reasonable and effective parenting. Her opinion that the best situation for a child with A.'s challenges would be a highly predictable and stable home and school environment is supported by the rest of the evidence.

[113] The contentious part of Dr. Seitz's evidence is her finding that A.'s behaviour and that of his parents and K. as she observed it in early 2009 suggests that there are ongoing alienating processes at play, by which the petitioner is more and more the alienated parent. Dr. Seitz made it clear that this is not a case of what is usually referred to as "Parental Alienation Syndrome", which she explained as a syndrome in which the child is the victim of behaviour by one parent which is aimed at alienating that child from the other parent. What she found in this case was "parental alienation" which she described as a family dynamic, not focused on actions by one parent.

[114] Dr. Seitz found that this family dynamic had resulted in A. having the belief that the petitioner is mean to him and hurts him, although his manifestation of hostility toward her was inconsistent. She also found that the respondent and K. had a shared conviction that the petitioner was mistreating A. and so perceived her actions in that context, thus reinforcing A.'s belief.

[115] As I understood her evidence, Dr. Seitz based her finding of parental alienation mainly on the following circumstances.

[116] Dr. Seitz testified that the first "red flag" was A's spontaneous declaration that he hates the petitioner. When she was interviewing A. in his bedroom at the respondent's home, he spontaneously began to talk about how he hates his mother and about wanting to hit her and about her hitting him. He returned to this theme despite Dr. Seitz's attempts to distract him. She formed the view that A. was putting on a show for both her and the respondent, who was within earshot, and that he was doing this because he wants to live with the respondent. A. made similar negative comments about the petitioner and about wanting to live with the respondent to Dr. Seitz when she spoke with him at the petitioner's home. However, when she observed him on her arrival at the petitioner's home, A. seemed relaxed and was enjoying himself playing cards with the petitioner.

[117] An "alarm bell" and an important factor in Dr. Seitz's assessment was A. self-correcting himself when referring to the petitioner as "mom". She said he would self-correct to call the petitioner by her first name. However, Dr. Seitz did not actually hear or observe A. doing this, nor, she testified, did she ask the respondent or K. about it. She testified that she got this from the respondent's journal and her impression from that journal was that the respondent and K. encouraged it. There was no evidence as to how many times she understood this to have happened.

[118] The problem with this part of Dr. Seitz's evidence is that neither the respondent nor K. testified about the content of their journals, which were included in a volume of documents marked as an exhibit for identification. Nor did they testify about whether they encouraged A. to call the petitioner by her first name. K. was asked some questions and gave answers about A. wanting to call her, that is,

K., "mom" and telling him that is not appropriate because he has a mother. That evidence suggests she wanted him to call the petitioner "mom".

[119] The law is that before an expert's opinion can be given any weight, the facts upon which the opinion is based must be found to exist: *R. v. Lavallee, supra*. The weight I can give Dr. Seitz's opinion is negatively affected by the absence of evidence of what she described as an important factor in her assessment.

[120] Dr. Seitz also relied on reports of A's extreme distress at having to go to his mother's home. There is evidence about that from the parties themselves.

[121] At the time Dr. Seitz prepared her report, the respondent and K. were planning to move to Manitoba and wanted to take A. with them; this was also a factor in her findings about the petitioner being alienated. That factor is no longer an issue.

[122] Circumstances that Dr. Seitz did not refer to in her report, but are present in the evidence, are A.'s difficulties with the transition between both households. She also testified that she was not aware of the fact that A. has spoken negatively about both parents at school.

[123] It is clear from her evidence that Dr. Seitz was not convinced that the petitioner had mistreated A. Absent mistreatment, in her view the only explanation for A.'s hostility to the petitioner was the alienation dynamic that she described.

[124] The significant thing in my view is that Dr. Seitz described all this as a dynamic, not an intentional course of action by the respondent. Although it is clear that Dr. Seitz tended to accept what she was told by the petitioner and was more skeptical about what she was told by the respondent and K., her conclusion was that all are reasonably good parents to A. And although Dr. Seitz testified that she would not now change her opinion, her opinion is still affected by the fact that her observations were made and her information gathered more than two years ago. The testimony of the petitioner indicates that her relationship with A. has improved since then. The respondent no longer has concerns about her mistreating A. From this I conclude that even if Dr. Seitz is correct and the family dynamic was causing some alienation of the petitioner, that has significantly decreased or changed, possibly because the respondent and his spouse have consciously changed any

behaviour on their part that may have contributed to the dynamic. For those reasons, I do not view Dr. Seitz's opinion as to alienation of the petitioner as determinative of or very significant for the decision I have to make. I am not saying that there is no validity to her concerns, but they are concerns that appear to have been addressed.

The petitioner's ability to cope with A.

[125] The respondent raised concerns about the petitioner's ability to cope with A. It is and has generally been the respondent's position that although he has little trouble with A., the petitioner experiences a level of frustration and stress that has affected her relationship with the child. Dr. Seitz suggested in her evidence that this is one of the reasons for disagreements over medication and that the respondent may view medication as unnecessary because he feels that many of A.'s problems are caused by his difficult relationship with the petitioner rather than any psychiatric issues. This issue was not thoroughly explored in the evidence, however, and so I do not make any finding about it.

[126] There is evidence that the petitioner was on medication for stress and depression for a period of time in 2003. She was not on it for long. This was also the year the parties separated, so it is not surprising that she experienced stress and depression.

[127] The respondent testified that in November or December 2007 the petitioner told him she was struggling and having trouble coping with A.; she asked him to take A. for some of the time he was to be in her care so she could get counseling. As a result, A. was in the respondent's care for 50 out of 70 days, although part of that time the petitioner was away on business or on holidays. K. also referred to this as a time when the petitioner was going through difficulties.

[128] The petitioner denied having trouble coping with A. She said that the reason A. spent so much time with the respondent at that time was because she was traveling for work and took some vacation.

[129] The email messages sent by the petitioner to the respondent contemporaneous with Christmas 2007 do not refer to her having problems coping but there is other evidence that she was having difficulties at that time. In a letter to the Glenrose

Hospital that is undated but appears from related documents to have been written in December 2007 or January 2008, the petitioner describes A.'s meltdowns and then refers to being scared of him and feeling like she is walking on eggshells when she is with him. She states that she feels trapped and does not know what to do anymore.

[130] The letter has to be considered in context; she was writing to the Glenrose to provide them with information about A. and much of what she says is very affectionate and describes A.'s good qualities. However, clearly the letter also reveals stress and anxiety. I accept, therefore, that the petitioner was having difficulty coping with A. at that time and as a result A. spent more time than usual with the respondent.

[131] The petitioner also testified that in the past A. has been aggressive, even violent, to her. Both the respondent and K. say that he has not been violent to them.

[132] However, even if A. has not been physically aggressive with his father, the respondent does experience difficulties with this challenging child. The situation at the fast food outlet that I described earlier is an example where the respondent could not control A. and instead allowed A. to continue his outburst and in effect decide what would happen.

[133] The respondent and K. both testified about an incident when the respondent told A. he was to go to bed early and A. responded by yelling that he hated everyone in the respondent's house and calling them "garbage". He insisted on going to the petitioner's home, which he did. According to K., his behaviour was so extreme that it left her and one of her sons in tears.

[134] The respondent and K. also testified that A. is becoming more manipulative, getting different answers from each parent to the same question and then accusing one of lying to him.

[135] Because A. is such a difficult child, it is not surprising that his parents will have problems dealing with him from time to time and will express frustration and stress as a result. They will probably deal with that in different ways. On considering all the evidence, while I accept that the petitioner has had some

difficulty coping with A. in the past and their relationship has not always been as good as it should be, that seems to have improved. There is no evidence of any recent difficulties and no reason to think that she will not be able to cope in the future, or obtain the assistance she needs to be able to cope.

The relationship between the parties

[136] As I indicated earlier in these reasons, a very large number of email messages between the parties were put into evidence. Although the messages back and forth do indicate levels of anger, frustration and disagreement about a number of things, to the parties' credit they are for the most part free of the obscene language and disparaging personal comments that the Court sometimes sees in correspondence between parents over custody and related issues.

[137] The respondent clearly feels strongly about what he sees as what is best for A. and how doctors and others should deal with him as a parent and some of his messages to the petitioner can fairly be described as lecturing her on how she should be doing things. On the other hand, it appears that the petitioner sometimes ignored him when he would attempt to resolve matters, for example, the issue of medical travel, or explain A's reactions to events at her home. So both have to accept some responsibility for the communication problems.

[138] Many of the communication problems have resulted from uncertainties - misplaced items, unexpected events - because of A.'s weekly transition from one house to the other, which is not surprising.

[139] On the whole, although there have been problems, I find that the petitioner and the respondent are able to communicate in a reasonably effective manner.

The petitioner's attitude to the respondent's new family

[140] Another matter that bears mention is the petitioner's attitude to the respondent's new family. K. testified that the petitioner has met her sons, but will not speak to them other than to say hello and does not acknowledge them if they are present when she picks A. up on transition days. K. also testified about a telephone call in which the petitioner screamed at her because A. had not arrived home when he was supposed to. Although K. testified, with some emotion, that it

has been a struggle to deal with the petitioner, she also said that she is willing to attend counseling with her.

[141] The petitioner, on the other hand, is adamant that she will have nothing to do with K. Although she has had very little interaction with her, she maintains that she does not like her. She testified that she will not work with K. about how to parent A. and that if K. were to contact her for guidance in that regard, she would not help her. She takes issue with K. speaking when the parents meet with doctors and other professionals; this has been a significant point of tension, so much so that K. testified she no longer attends such meetings.

[142] The petitioner also testified that although Mr. Bowerman, the psychologist, recommended that she and the respondent attend counseling and the respondent agreed to it, she has refused to do so, even though she knows that it will be better for A. if his parents get along better. She has not observed the respondent with A. in his home and has not asked him how he deals with A. even though the respondent has told her that he does not have problems controlling A. She adamantly refuses to sit down with the respondent to talk about different ways of dealing with their child or how they communicate about their child.

[143] One of the considerations in making any order for custody is the principle set out in the *Divorce Act* that the child should have as much contact with each spouse as is consistent with the best interests of the child. For that purpose, the Court is to consider the willingness of the person for whom custody is sought to facilitate such contact [*Divorce Act*, ss. 16(10) and 17(9)]. The ease and quality of contact may be affected by one parent's attitude to the other parent's new family. The better the relationship, the more smoothly contact is likely to go.

[144] In this regard, the petitioner's attitude toward the respondent and his new family does raise some concerns. While there is no suggestion that she would actively discourage contact between A. and them, she appears unwilling to encourage any relationship with the respondent's new family. One example of this is her refusal to allow A. to spend Hallowe'en at the respondent's home even after the respondent told her that A. was excited about dressing up in costume with his younger brother.

[145] A. is an only child who until recently had no friends according to the petitioner's testimony and who is monitored at school because of his difficulties in interacting appropriately with other children. It is reasonable to think that living in a household with a new baby brother and with older stepbrothers visiting from time to time would be a positive experience for A. and would help him adjust better. I acknowledge that the petitioner did say A. complains to her about the stepbrothers being mean to him but for reasons already referred to, I do not give his statements any weight. One of his teachers testified that he keeps a picture of the baby in his locker and K. testified that he is good with the baby. It is troubling that the petitioner either cannot or will not see the benefit of all this to A.

[146] It is also of concern that the petitioner is unwilling to follow Mr. Bowerman's advice to attend counseling with the respondent and that she is unwilling to discuss with the respondent ways of dealing with A. In this respect, she is not putting A.'s interests first.

Variation and order

[147] Because of A.'s unique challenges and situation, it is difficult to come to a satisfactory solution in this case. By all accounts, even his parents', he has been doing better under the individualized program that has been developed for him at the school. His behaviour toward his parents, especially the petitioner, has improved. So one might say "why rock the boat" and that it would be better to let the current situation continue, which is essentially what the respondent is saying.

[148] On the other hand, I have no doubt that a week to week transition schedule for a child with A.'s challenges does not provide A. with the stability he needs. The respondent himself testified that he felt a two week transition would be preferable. Since the petitioner no longer travels for employment purposes, there is no need to maintain a regime that has A. frequently changing homes with all the obvious drawbacks that entails.

[149] There is no doubt that any change in A.'s regime will be a difficult adjustment for him and one that may take him some time to overcome. The situation may also have to be revisited as he gets older.

[150] Despite the many difficulties the parties have had, I am satisfied that joint custody is still the preferable option in this case, subject to some provisions about decision-making. In other words, one parent should have the ultimate say on such things as medical treatment to ensure that the medical side of A.'s life goes more smoothly.

[151] I am satisfied that A. needs and will benefit from the involvement of both parents. Although their views and ways of dealing with him are quite different, in my view it is in his best interests that they both continue to play a significant role in his life. I note that there is no history of either parent having A. in his/her sole care for an extended period of time (by which I mean several months). And while I have outlined concerns raised by the evidence in relation to both parents, it is clear that both parents want the best for A. and are trying their best to deal successfully with the challenges he presents.

[152] In my view, what will best serve A.'s interests, at least for the foreseeable future, is a regime whereby he will spend alternate years with each parent. Accordingly, the CRO will be varied. A. will commence a year residing with the petitioner, starting when school begins this September. His year with the respondent will then start in September 2012 and he will spend alternate years with each parent thereafter.

[153] I have chosen to start the regime with the petitioner because I think the progress that has been made in her relationship with A. should be encouraged and that will be more likely if he begins with a year in her care.

[154] A.'s time with the parent with whom he is not residing will be every other weekend from Friday after school until Sunday at 7:00 p.m., the month of July, half of the school spring break and half of the Christmas holidays. The parties are free to agree to any adjustments to this aspect of the order.

[155] I find from the evidence that the petitioner is the more reasonable parent when it comes to dealing with medical issues and medical and other professionals. The petitioner is to keep the respondent advised of all changes and recommendations in relation to A.'s medical situation and his education. She is also to seek and consider the respondent's input. However, in the event of a disagreement as to medication, treatment or testing, the final decision will be hers.

She will also have authority to consent to testing at school without the need to obtain the respondent's consent. These provisions relating to decision-making will continue to apply when A. is in the care of the respondent, unless the petitioner agrees otherwise.

[156] The petitioner will also be entitled to use any travel benefit provided by the Department of Health in any case where that benefit is available to only one of the parents.

Costs

[157] Success has been divided and costs may not be appropriate in this case. However, should counsel wish to speak to costs, they may submit their available dates to the registry for that purpose.

V.A. Schuler
J.S.C.

Dated this 16th day of August 2011.

Counsel for the Petitioner: Donald Large
Counsel for the Respondent: Andre Duchene

Docket: S-1-CV-2010000167

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

JEANNINE DIANE PILON
Petitioner (Applicant)

- and -

ROGER ERNEST PILON
Petitioner (Respondent)

MEMORANDUM OF JUDGEMENT
THE HONOURABLE JUSTICE V.A. SCHULER
