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Docket: S 1 FM 2013 000164

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MATTHEW BROST

Applicant

-and-

PATRICIA BULLIS

Respondent

MEMORANDUM OF JUDGMENT

Corrected judgment: A corrigendum was issued on August 15th, 2019, the corrections have been made to the text and the corrigendum is appended to this judgment.

Introduction

[1] The main issues in this case are custody, mobility, access and child support. The trial took place over 11 days. Although I have reviewed and considered all the evidence, I will not refer to all of it in this Memorandum.

[2] While considering the evidence, I have tried to bear in mind the anxiety, stress and trauma suffered by the parties resulting from the complicated and serious medical condition of their daughter, An., and the medical advice they were given prior to her birth that she would not likely survive. I have no doubt that the circumstances the parties now find themselves in are to a large extent the result of the many challenges this family has faced due to An.'s medical issues, which

include a heart transplant at the age of two and a half years. The law is clear, however, that my duty is to make a decision based on what I find to be in the best interests of the children, and not what may seem fair to, or in the best interests of, either parent.

Summary of circumstances and relief sought

[3] The parties began living together in 2002, when both were working in Alberta. They married in 2011. They separated in the summer of 2013, while living in Yellowknife, when their twin daughters, Ar. and An., were approximately 10 months old. Since the separation, the five children of their relationship have lived with Mr. B., subject to some changes that I will refer to. Ms. B. also has a two year old child. She is in a relationship with Brandon Paddon, the father of that child, but does not live with him on a full-time basis.

[4] O., the eldest child, is 19 years old and so her living arrangements are not part of the decision I have to make. She left Mr. B.'s home in 2016, when she was 16 years old, to live with her mother, Ms. B. and continues to reside with her in Yellowknife. She testified as a witness for Ms. B.

[5] K., the eldest son, is now 15 years old. In 2018, the parties agreed that he would live with Mr. B.'s parents in Ontario. He continues to live with them and attends school there. The parties agree that Mr. B. should have the day to day care of K., however they disagree on custody. Mr. B. seeks sole custody of K., while Ms. B. seeks joint custody.

[6] G., the youngest son, is 12, about to turn 13, and the twins, Ar. and An., are 6. They have been living with Mr. B. in Yellowknife since the separation in 2013. Each of the parties seeks custody of them. If Mr. B. is granted custody, he wishes to move with the children to Ontario to be close to his parents and other family members.

[7] Each of the parties also seeks child support, depending, of course, on the outcome of the custody issue.

Summary of Legal Proceedings

[8] The relevant legal proceedings between the parties commenced with an Emergency Protection Order ("EPO") made under the *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24, obtained by Mr. B. against Ms. B. on August 23, 2013. The EPO provided that Ms. B. was not to be within 50 meters of the

family home, and was to communicate with Mr. B. and the children only in the presence of a third party acceptable to Mr. B. That EPO was in force until October 23, 2013, on which date Mr. B. obtained a second EPO with more restrictive conditions against Ms. B. for a period of 90 days. Those conditions included that she have no contact with Mr. B. and the children. The circumstances in which Mr. B. obtained the EPO's are at issue and I will refer to them later in this Memorandum.

[9] Mr. B. commenced the within Supreme Court action for custody of the children in December 2013. On January 23, 2014, an order was made granting interim, interim day to day care and control of the children to Mr. B. It provided that Ms. B. was not to communicate with Mr. B. except regarding access, which was to be exercised on Sundays at a local church.

[10] On February 20, 2014, an interim consent order was made, granting sole custody of the children to Mr. B., with Ms. B. to have specified access to be exercised in Yellowknife. That order also provides that Mr. B. has to offer Ms. B. the first opportunity to care for the children if he has to take An. to Edmonton. It also requires Ms. B. to advise of any changes in her living arrangements and that she has overnight access to the children on condition that she has a safe and appropriate place for the access to occur.

[11] The February 20, 2014 order was continued by way of a consent order made September 17, 2015, which also increased access for Ms. B. and included conditions that she get training on An.'s medications and other medical requirements. The order provided that Mr. B. provide medication and clothing for access visits. A further interim consent order was made on December 17, 2015, which provides that Ms. B. has reasonable and generous access as well as specified access.

[12] A variety of other orders were made but those I have referred to above are the main orders dealing with custody and access.

[13] In the context of the issues in this case, it is also important to note that by order made on March 6, 2014, on consent of the parties, the Office of the Children's Lawyer was appointed to represent the interests of all 5 of the children. In December 2017, the lawyer who was representing the children ceased to act and the children have been without counsel since then. It was agreed by counsel for Mr. B. and Ms. B., however, that K. and G. should attend a judicial interview during the trial and the Office of the Children's Lawyer did provide counsel for that limited purpose as well as for a post-trial application regarding G.

Positions of the parties

[14] Mr. B. takes the position that Ms. B. has acquiesced in, and consented to, his custody of the children for the past several years. He says that she has not been diligent about exercising access and has shown little interest in the children. It is his position that in order to have extended family support and opportunities that are not available in Yellowknife, and would benefit both him and the children, he should be granted custody and allowed to move with the children to Ontario. He proposes that Ms. B. have access in person as well as by electronic means.

[15] Ms. B. takes the position that Mr. B. obtained custody of the children by misleading the justice of the peace who granted the initial EPO and that all subsequent court orders flow from that EPO. She says that Mr. B. has been unwilling to make the children available for access visits and that he has deliberately alienated her from the children. She also submits that his care of the children has not always been adequate and should give rise to concern. Ms. B. seeks custody of G. and the twins with access for Mr. B. She also opposes the proposed move to Ontario.

Credibility of the witnesses at trial

[16] Most of the evidence heard at trial was from Mr. B., Ms. B. and O.

[17] I found Mr. B. to be vague at times and he sometimes appeared to lose concentration when testifying. He was more precise in his testimony when talking about An.'s medical issues and procedures, and presented as quite knowledgeable about, and interested in, her medical situation.

[18] I found that Mr. B. tended to make broad statements which were contradicted, sometimes by his own testimony and sometimes by the testimony of others. One example of this is that he testified in direct examination that he and the children do not attend church in Yellowknife, because when there, he is subjected to verbal abuse by people connected to Ms. B. When asked for more detail about that in cross-examination, Mr. B. said that he could not identify the people who verbally abuse him, but that they mention the children. He then stated that the abuse does not happen at the church, but is what "typically" happens.

[19] Another example is Mr. B.'s testimony about An.'s delayed development. In direct examination, explaining why he had the twins repeat kindergarten, Mr. B. testified that both Ar. and An., who are 6, are underdeveloped and at the mental level of a 4 year old. In cross-examination, when pressed about his claim that An. can say how much medication she has to take and when, Mr. B. said he does not agree that her mental age is 4 and is of the view that it is perhaps at a 5 year old's level. Dr. McGonigle, one of An.'s paediatricians, testified that An. is "like a 4 year old".

[20] I will deal with other examples as necessary. All considered, I do have significant reservations about Mr. B's credibility and the reliability of his testimony.

[21] I found Ms. B. to be more consistent in her testimony in that I did not note any significant contradictions. Her description of some events was not very clear, such as a telephone application she said she made to a justice of the peace for custody of An. on a weekend a couple of months after Mr. B. obtained the initial EPO. Her testimony that the justice of the peace was going to call An.'s doctors seems unlikely in that a justice of the peace or judge does not normally contact witnesses. She testified that she told the justice of the peace to wait until Monday so as to speak with An.'s regular doctors, however she did not testify as to what, if anything, transpired after that. It may simply be that Ms. B. did not understand or misinterpreted whatever did happen in relation to the interaction with the justice of the peace.

[22] O. was called as a witness by Ms. B. She came across as intelligent and thoughtful in her responses to questions. She was quite emotional at first and it was clear to me that she found testifying in this trial difficult. She stated that she cares about and loves both her parents and that she was testifying on behalf of her siblings. In my view, O. tried in her testimony to be fair to her father, Mr. B., notwithstanding that much of what she said about his behaviour was negative. For example, she said that his communication with the children was both positive and negative; she acknowledged that he was confused and hurt when she left his home to move in with Ms. B.; and she said that in her view Mr. B. tries his best to care for the children, but it could be better.

[23] Those are my comments generally about the three main witnesses. I will comment on other witnesses as the need arises.

Specific issues raised by the parties

A. The EPO obtained by Mr. B. on August 23, 2013

[24] Ms. B. takes the position that Mr. B. misled the justice of the peace who heard his application for the EPO that was issued on August 23, 2013. She argues that he did this in order to obtain custody of the children and establish the *status quo* in his favour. She submits that he should not be allowed to benefit from that *status quo* and that the evidence on this issue should negatively affect my assessment of Mr. B.'s credibility.

[25] Mr. B. denies that he misled the justice of the peace. He says that in any event, he does not rely on the EPO as establishing the *status quo*, which he says has been established by the court orders made in the within action, with the consent of Ms. B.

[26] The EPO was preceded by a very stressful time for the family. After Ms. B. became pregnant with the twins, she and Mr. B. were given medical advice that there were complications with An. and that she was unlikely to survive birth. Ms. B. went to Edmonton a few weeks prior to her due date to await the birth; she and Mr. B. had discussions with the medical personnel as to whether to let nature take its course with An. or do everything possible in the hopes that she would survive. They decided on the latter. The twins were born on October 3, 2012 and An. did survive. She needed medical treatment in Edmonton after her birth and Ms. B. did not return to Yellowknife with An. until June of 2013. The parties were aware that An. would continue to require medical treatment.

[27] The parties also had financial difficulties. The company they had owned and worked in together had gone, or was in the process of going, bankrupt. The new business Mr. B. started was not doing well.

[28] Ms. B. testified that by the time the twins were born, she had decided she wanted to leave the marriage. She said that after she returned, she and Mr. B. were “tolerating each other”. She testified that she was not happy to find that Mr. B. had rented a camping spot at a local park as she felt it would be easier to stay in the family home with the twins. She said she was also not happy that he had made plans to send the older children to his family in Ontario for a visit as she felt they should spend time with their new siblings.

[29] Mr. B. testified that when Ms. B. returned to Yellowknife, her behaviour changed. He said she frequently went out drinking and would not talk to him. He testified that he moved to the camper in the park to escape Ms. B.'s verbal abuse. She was not at home for the children, neglected them and, on occasion, was

intoxicated in front of them. He testified that this got worse through the summer of 2013 and that the children were very upset by her behaviour. Ms. B. denied going out drinking and said she did not have time for that.

[30] At some point, Mr. B. came to believe that Ms. B. was having an affair with Brandon Paddon, a former employee of his. Both parties agree that there was an incident very late one night in July 2013 when Ms. B. had gone out and Mr. B. drove to the family home with the twins looking for her. He found Ms. B. there with Mr. Paddon. Mr. B. hit Mr. Paddon and threw him out of the house.

[31] Mr. B. testified that he thought Ms. B.'s relationship with Mr. Paddon was a "one off" thing. He wanted to reconcile with her. He admitted that he probably sent her the text which is Exhibit 2, and is dated August 11, 2013, telling Ms. B. that he loves her and misses her and wants her to leave Mr. Paddon and come back to their family.

[32] Mr. B. also admitted in his evidence that he spoke with Ms. B.'s friends, asking them to talk to her about reconciling with him. Carolina Kogiak, one of Ms. B.'s friends, testified that she received a text from Mr. B. (Exhibit 18) asking for her help with that on August 22, 2013, the day before Mr. B. obtained the EPO. However, Ms. B. did not wish to reconcile.

[33] Mr. B. testified that his wish to reconcile did not continue. He said that the reasons he applied for the EPO on August 23, 2013, included that Ms. B. was abusive and violent to the children. The only example he gave in his evidence about her acting that way was that she tried to grab the children by the arm. At another point in his evidence, he said that the violence was emotional and psychological. He also testified at trial that she made some "silly" parenting choices, giving the example of Ms. B. directing O., who was 12 at the time, to move her car.

[34] I find that Mr. B. was evasive when questioned about the contradiction between wanting to reconcile and applying for an EPO. He was inconsistent in his reasons for wanting to reconcile, saying that: he wanted them to continue to be a couple and a family; he wanted Ms. B. to be with the children; he just wanted to be friends with her so that they could communicate.

[35] Mr. B. also admitted that he told the justice of the peace who heard the EPO application that Ms. B. had threatened to rip up a small paycheque that he had coming to him, that she was trying to clean out his account and that he had no money to feed the children. At the trial in this court, he testified that the cheque in

question was one that he had received from a client of his business and that it was needed for payroll and other business expenses. He testified that he did not remember the amount of the cheque and did not think it was a $12,000.00 cheque that he was asked to identify in cross-examination. When presented with a bank receipt showing an account balance of over $8600.00, he said he could not say if it was connected with the business account.

[36] In her testimony, Ms. B. denied drinking, abusing and neglecting the children. She testified that she always had Mr. B.'s consent to use his or the business bank card and denied cleaning out his account. She testified that she picked up a $12,000.00 cheque from Mr. B.'s business client. When asked whether she threatened to rip it up, she said that she does not think she did and that she did not recall that, which I found, in the circumstances, to be a less than definite answer. Ms. B. did not identify the bank receipt.

[37] The question, of course, is not whether the justice of the peace was correct in granting the order. The question is whether it has been shown that Mr. B. intentionally misled the justice of the peace so that he could obtain custody of the children. At the time of this trial, the events in question were 6 years old and, as I have said, the parties were under a great deal of stress. I am not convinced that either one of them has a reliable recollection of what happened. I do think that Mr. B. exaggerated his fear of physical violence by Ms. B. and I base that on his inability to give any examples other than Ms. B. grabbing the children by the arm, and the fact that he seemed to back away from that description to describe the violence instead as emotional and psychological.

[38] As to whether Mr. B. lied about the financial issues, I find that there is a lack of evidence to tie the bank receipt to Mr. B.'s business and a lack of evidence as to how much money out of the $12,000.00 cheque, whether Ms. B. threatened to rip it up or not, was going to be available for the use of the family, as opposed to the business.

[39] The fact that Mr. B. was seeking reconciliation with Ms. B. right up to the day before he applied for the EPO does raise concerns about his sincerity and his motives in seeking the EPO. While his feelings about her and their family life together may have been conflicted, there was no evidence that any particular event precipitated his EPO application.

[40] However, the evidence, or lack of same, relating to the second EPO obtained by Mr. B. makes the matter more uncertain.

[41] Ms. B. testified that after the August 23, 2013 EPO was granted, she sought legal advice as to how it could be set aside. She was given some advice and some paperwork so that she could bring the application on her own. She testified that she did not pursue the matter because she was unfamiliar with the legal process and did not know if she had the confidence to proceed. That EPO expired on October 23, 2013 and the next day she was served with a second EPO.

[42] There was some confusion about the second EPO at trial. Prior to Ms. B.'s testimony, Mr. B. had testified that he had the first EPO "extended" to 90 days. During the course of the trial, counsel determined that this was not correct and that instead, a second EPO with a 90 day duration had been issued on October 23, 2013 (Exhibit 17). This second EPO was even more restrictive than the first one. It provided that Ms. B. was not to communicate with or contact Mr. B. and the children, directly or indirectly, by any means; and that she not be within 100 meters of the family home and anywhere she knows the children and/or Mr. B. are present.

[43] There is no evidence as to what led Mr. B. to seek the second EPO, and in particular, why it provided that Ms. B. have no contact at all with Mr. B. and the children, whereas the first EPO had provided for communication and contact in the presence of a third party. Presumably Mr. B. sought the more restrictive provisions of the second EPO, however what led to that was simply not canvassed at trial by either party. The circumstances surrounding the application for the second EPO might have shed more light on the entire situation, including Mr. B.'s motives at the time. Ms. B. did not apply to set aside the second EPO.

[44] For the above reasons, I find that the evidence is simply not sufficient to allow me to conclude that Mr. B. intentionally misled the justice of the peace in order to obtain the first EPO (or the second EPO) so that he could gain custody of the children and thereby establish the *status quo* in his favour. Having said that, I do find that Mr. B. exaggerated his fear of violence on the part of Ms. B. and that there is reason to question his motives and sincerity in switching so abruptly from wanting reconciliation to wanting an EPO.

[45] The fact that Ms. B. did not apply to set aside the second EPO is somewhat puzzling, especially because it did not allow her any contact with the children. She testified that she did not have legal counsel at the time and did not have the confidence to bring a court application on her own. She was also living at a friend's home with no room for the children. So she was certainly at a disadvantage. As I said, I find her inaction somewhat puzzling, but it does not lead me to conclude that she lacked interest in the children. When Mr. B. initiated these

proceedings, Ms. B. did appear in response, even though she had no counsel (Interim Order dated January 23, 2014 at Tab 20, Trial Record).

B. The Rule in *Browne v Dunn*

[46] Counsel for Mr. B. objected to some of the evidence adduced from certain witnesses called by Ms. B. about behaviour they had witnessed on the part of Mr. B. The objection was made on the basis that Mr. B. was not cross-examined about the alleged behaviour, contrary to the rule in *Browne v Dunn.*

[47] The rule in *Browne v Dunn* generally requires that if evidence is going to be used to contradict a witness, or impeach the credibility or character of the witness, that evidence must be put to the witness in cross-examination so that he has the opportunity to respond to it. The rule is said to reflect fairness to the witness; it prevents the witness from being ambushed on matters of substance by not being given an opportunity to state his position on evidence called later. Whether there has been a breach of the rule, and if so, what the remedy should be, depends on the circumstances of the case: *R v Quansah*, 2015 ONCA 237.

[48] Counsel for Ms. B. argued that she was not obliged to cross-examine Mr. B. on the behaviour her witnesses testified about because he knew what their evidence would be from the evidence summaries provided before trial pursuant to Rule 326. In counsel's submission, Mr. B. had an obligation to address, in his examination-in-chief, evidence that he knew from the evidence summaries could be adduced in Ms. B.'s case. Her argument is that she was obliged to cross-examine only on matters that Mr. B. testified about in chief.

[49] In my view this argument conflates the disclosure purpose of evidence summaries with the fairness purpose of the rule in *Browne v Dunn*. The evidence summaries tell a party to the litigation what the other party's witnesses can say, or are expected to say. However the witness may not be asked about everything in the evidence summary, or may not testify at all. The evidence summaries disclose the evidence the party may have to meet, whereas the rule in *Browne v Dunn* deals with fairness to the party as a witness.

[50] One aspect of Ms. B.'s position is that Mr. B. has never accepted her relationship with Mr. Paddon and has withheld the children from her in retaliation. In cross-examination of Mr. B., counsel for Ms. B. suggested that he has never got over the separation, is bitter and is obsessed with Mr. Paddon. Mr. B. denied all of this. In his evidence, Mr. Paddon testified about specific encounters with Mr. B. which were clearly aimed at contradicting the denial by showing that Mr. B. has

been verbally aggressive with Mr. Paddon, has threatened him, and was upset when he observed him with one of the children. Therefore, the incidents should have been put to Mr. B. in cross-examination so that he could respond.

[51] In his examination-in-chief, Mr. B. was asked whether he had ever caused a disturbance while drinking; he answered no. In cross-examination, he was not asked about an incident later described by Ms. Kameemalik, a witness for Ms. B. Counsel for Ms. B. argued that Mr. B. had denied knowing Ms. Kameemalik, and so there was no point in cross-examining him about anything Ms. Kameemalik testified about, however that is not correct; Mr. B. testified that he knew her as the mother of a neighbourhood boy with whom Mr. B.'s sons were having some problems. Ms. Kameemalik testified that that on one occasion she observed Mr. B. intoxicated and fighting in a parking lot and that the police attended at the scene. That evidence was adduced as an example of inappropriate behaviour by Mr. B., thus to impeach his character, and to contradict his assertion that he had never caused a disturbance while drinking. Accordingly, it should have been put to Mr. B. in cross-examination so that he could respond to it.

[52] One other aspect of Ms. Kameemalik's testimony is also said to attract the rule in *Browne v Dunn*. She testified that one day her son told her that Mr. B.'s son G. was upset because Mr. B. had said he wanted to commit suicide. In his examination-in-chief, Mr. B. had testified that he has never threatened suicide. Since Ms. Kameemalik's evidence was meant to contradict that assertion, it should have been put to him in cross-examination.

[53] In my view the rule in *Browne v Dunn* was breached in the instances I have identified. However, the remedy in this instance should not be that I ignore the evidence. Mr. B. could have been re-called to testify and respond to the evidence of Mr. Paddon and Ms. Kameemalik. He declined to do so. Therefore, I will consider the challenged evidence along with the rest of the evidence in this case, with one exception. The evidence about what Mr. B. is alleged to have said to his son about suicide is double hearsay. Counsel indicated that she did not wish to call either Ms. Kameemalik's son or Mr. B.'s son as witnesses; apart from that, no attempt was made to justify the admission of the evidence on the basis of necessity and reliability. In my view, it is not admissible as evidence to prove that Mr. B. told his son he wanted to commit suicide.

C. The message sent to O. by her aunt

[54] During the trial, O. received a message on social media from Mr. B.'s sister, Ms. Mitchell, who was also a witness at trial. She testified after O. did. I should

note here that in order to accommodate various witnesses and the wishes of counsel, the witnesses in this case testified out of the usual order, with Mr. B. testifying first, then Ms. B., then O. as a witness for Ms. B. and then Mr. B.'s witnesses, followed by the remainder of Ms. B.'s witnesses.

[55] Ms. B. submits that based on the message, I should find that Mr. B. discussed evidence with Ms. Mitchell, and his mother, Ms. Crawford who also testified after O., in breach of the order excluding witnesses from the courtroom before their testimony.

[56] To place this in context, although most of O.'s testimony was about her parents, she also testified about some incidents that occurred during the summer of 2018, while she was in Ontario. Her testimony about those incidents conflicted with the testimony of her aunt and grandmother. I will refer to that testimony later.

[57] After Ms. B. and O. had each completed their testimony, O. was recalled and testified that during a break in her testimony she had received an electronic message from Ms. Mitchell. In her own testimony, Ms. Mitchell admitted sending the message, which was as follows: "I am wondering: Do you, and your mom, realize that perjury is a criminal offence?"

[58] O. testified that she looked up the word "perjury" and then messaged back to Ms. Mitchell, "of course, why do you ask?", to which she received no reply.

[59] When asked about the message, Ms. Mitchell denied that Mr. B. had told her what O. and Ms. B. had said in their testimony. She said that she sent the message because she was concerned about O.'s lifestyle choices and she wanted to make sure that O. was sincere and truthful. She also said that she had reason to think that O. would lie because she had lied before. She acknowledged that she knew that O. was testifying on the day she send the message, however said that she had not purposely sent it during O.'s testimony. Her explanation of the message was, "It was a concerned aunt looking out for her niece".

[60] Ms. Crawford, was also asked about the message. She also denied that Mr. B. had spoken about O.'s testimony. She testified that she was aware that Ms. Mitchell had sent the message, "as an aunt to her niece". She denied that the message had anything to do with O.'s trial testimony.

[61] Ms. Mitchell's explanation of the reason she sent the message does not account for why she referred to Ms. B. in it. What is particularly striking to me is the similarity in the answers given by Ms. Mitchell and Ms. Crawford, explaining

that the message was just a message from an aunt to her niece. That explanation is not reasonable; in my view it does not make any sense. The tone of the message is not that of a friendly reminder to O. that it is important to tell the truth in court. To the contrary, the tone is accusatory, suggesting that both Ms. B. and O. have not told the truth.

[62] I infer that something other than concern for O. prompted Ms. Mitchell to send the message. While it may have been Mr. B. telling her what Ms. B. and O. said in their testimony, it may also have been simply a statement of his opinion that they lied. It could be either. So I cannot say with any certainty that Mr. B. disclosed the actual testimony or that he breached the exclusion order.

[63] The whole point of an order excluding witnesses is to ensure that a witness does not hear the testimony of others before his or her own testimony. If a witness hears the testimony of others, or is told what others have testified, he or she may be influenced by that or tailor their own testimony accordingly. It goes to the weight of their evidence. In this case, since I do not accept Ms. Mitchell's explanation for why she sent the message but cannot say for certain what prompted her to do so, I will simply exercise caution when considering her evidence.

[64] The similarity between the explanations given by Ms. Mitchell and Ms. Crawford for the message to O. suggests to me that they discussed how the message could be explained prior to their testimony. That is another reason to be cautious about their evidence.

D. Alienation

[65] Ms. B. argues that this is a case of parental alienation. She submits that there is ample evidence that Mr. B. has taken steps to cause the children to view her in a negative light so that they will not want to have a relationship with her, thus alienating them from her.

[66] No expert evidence was called on this issue. Ms. B. relies on the decision of the Alberta Court of Appeal in *V.M.B. v K.R.B.*, 2014 ABCA 334, in which the Court noted that there is no rule of law that a finding of alienation can only be made on expert evidence, and that the considerations of "best interests of the child" and whether one parent will "facilitate contact" with the other (both of which a court must consider under the *Children's Law Act* of the Northwest Territories, S.N.W.T. 1997, c. 14) are largely based on findings of fact which trial judges are entitled to make. There is a decision of the British Columbia Court of Appeal, *Williamson v Williamson*, 2016 BCCA 87, in which that Court said that alienation

is a serious allegation and as such requires proper expert evidence to support a finding of alienation and that the remedy suggested is in the best interests of the child. The decision of the Alberta Court of Appeal is more persuasive in this jurisdiction since members of that Court are also members of the Court of Appeal for the Northwest Territories. I accept, therefore, that there is no requirement for expert evidence before making a finding of alienation. However, I do think that caution should be exercised before such a finding is made, particularly if the remedy suggested would have significant consequences for the child.

[67] Counsel referred to five factors that were considered on the issue of alienation in *C.J.J. v A.J.,* 2016 BCSC 676, and submitted that all five factors are present in this case. To be precise, those factors were proposed by one of the expert witnesses who testified in that case. While I am not aware if the factors are generally accepted by those working in the field, they seem reasonable and relevant to the issue so I will consider them. They are as follows:

i. evidence that the disfavoured parent had an adequate relationship with the child prior to the current contact refusal;
ii. evidence of absence of abuse or neglect on the part of a disfavoured parent;
iii. evidence that the favoured parent engaged in intentional misrepresentation to professionals;
iv. evidence that the favoured parent engaged in behaviours consistent with alienation;
v. evidence that the child exhibited behaviours consistent with alienation.

[at paragraph 378]

[68] In considering the applicability of the factors in this case, I will proceed on the basis that Ms. B. is the "disfavoured parent" and Mr. B. is the "favoured parent":

i. evidence that Ms. B. had an adequate relationship with the children prior to the current contact refusal

[69] There is no evidence in this case that any of the children have refused contact with Ms. B. Although Ms. B. testified that her relationship with K. is "a mess", and that she had not yet seen him in the few days between his return to Yellowknife from Ontario and her testimony, that does not amount to a refusal of contact.

[70] Mr. B. conceded that Ms. B. was a good mother prior to her return from Edmonton in the summer of 2013. Since then, the adequacy of her relationship with the children has been affected by the restrictions on her access and Mr. B.'s behaviour. The only evidence of problems between her and the children is in relation to K. There is no evidence of problems between Ms. B. and the other children.

ii. evidence of absence of abuse or neglect on the part of a disfavoured parent

[71] The only evidence of abuse or neglect on the part of Ms. B. is from Mr. B.'s testimony about the reasons he applied for the first EPO. As I have already stated, I find that he exaggerated any such behaviour. Even if such behaviour did occur, on Mr. B.'s own evidence it occurred in a very short time frame, between the time Ms. B. returned from Edmonton with the twins in June of 2013 and August 23, 2013, when Mr. B. obtained the first EPO. I am not going to speculate as to what led to the second EPO. So there is no evidence of any such behaviour by Ms. B. since August 2013, almost six years ago.

iii. evidence that the favoured parent engaged in intentional misrepresentation to professionals

[72] I have already found that the evidence is insufficient regarding Mr. B.'s alleged misrepresentations to the justice of the peace at the time he obtained the first EPO in August 2013. There is also evidence that around that time, he contacted the police with a complaint about Ms. B.'s use of his bank or credit card; the parties differed on whether Ms. B. had permission to use the card and I do not consider that the type of misrepresentation that is contemplated by this factor. The evidence does not establish any ongoing or recent misrepresentations.

iv. evidence that the favoured parent engaged in behaviours consistent with alienation

[73] There is evidence that Mr. B. engaged in behaviours consistent with alienation. Much of that evidence comes from O.'s testimony.

[74] O. testified that generally the children were not allowed by Mr. B. to see or talk to Ms. B. outside of access visits. She said that for the first year and a half after the separation, Mr. B. would tell them that Ms. B. did not want them and

wanted to be with Mr. Paddon. She testified that as a result Ms. B. was "cut off" for a time, but that when O. heard that she was working at a local retail store, O. would take the children to visit her there without Mr. B.'s knowledge.

[75] O. also testified that Mr. B. tried to "drill into our heads" that Ms. B. was a bad person and that there was no reason the children should see or think about her. She said that "quite often" he would speak negatively about Ms. B., for example, telling the children that Ms. B. did not deserve them and portraying her as not loving or wanting them. O. testified that this was hard on her and her siblings. She did not believe what Mr. B. said about Ms. B. and knew that her mother wanted to see her, so she would visit and contact her without Mr. B.'s knowledge. Mr. B. generally denied behaving in the manner described by O., however I think her description of his attitude is supported by the texts from him that are in evidence as well as some of his other behaviour.

[76] O. also said that a few times, when she was visiting Ms. B., Mr. B. told her to get billing information, and text messages from Ms. B.'s cell phone. O. said that she was not comfortable doing this. One of the examples she gave is a text (Exhibit 6), which she testified she received on her phone, in which "Dad" tells O. to look in her mother's wallet for Mr. Paddon's bank card, and not to tell her mother what she is looking for. O. testified that she received this text during the summer of 2013. When it was put to Mr. B., he testified that he did not recognize or remember it and that it was not possible that it was from him to O. While it is not surprising that he might not remember a text from 6 years ago, his assertion that it was not possible that he sent it to O. is not credible and I accept her evidence that she received it from him.

[77] O. testified that there were occasions in 2014 when Mr. B. asked her to look for wifi and cable bills at Ms. B.'s. Later, she said, he would ask her to go through Ms. B.'s phone to look for messages and she identified text messages (Exhibit 13), in which Mr. B. told her to go through Ms. B.'s phone while Ms. B. was playing baseball, and to screenshot and send him messages between Ms. B. and Mr. Paddon and others, and not to let Ms. B. know about it. Again, Mr. B. said that he did not recall these messages, which is perhaps not surprising, but also said that he doubted that he had sent the messages, although acknowledging that it was his name on the social media account they came from. He denied asking O. to get information from her mother in secret. I do not find his denials credible and I am satisfied that he did send the messages to O.

[78] It is not clear from O.'s evidence how many times Mr. B. asked her to "spy" (the term used by counsel for Ms. B.) on Ms. B. O. made it clear that she was

uncomfortable doing it and was not a willing participant. However, when a parent asks or tells a child to do this sort of thing it represents an attempt by the parent to bring the child to that parent's side of the dispute against the other parent and to use the child against the other parent. It can negatively affect the child's view of that other parent.

[79] Other behaviour O. described on the part of Mr. B. was his telling the children to draw on the walls of Ms. B.'s home (which, from the evidence, seems to have happened once), and to find out if there were drugs in her home. Mr. B. denied that he did those things. Again, I accept O.'s evidence in this regard. In connection with this, I note that Mr. B. took the position in his evidence that he had concerns that there were drugs in Ms. B.'s home. When he denied, in cross-examination, that he had used the children to spy for him, he said that K. would send him photos of drugs in Ms. B.'s home, and that he would tell K. he did not need to see them. That response did not make any sense. In an attempt to show that he was not asking K. to spy for him, Mr. B. effectively said he did not want evidence of drugs in Ms. B.'s house, even though, if such photos indeed existed, that would prove one of his concerns about her.

[80] O. also testified that Mr. B. spoke to the children about what they should tell Ms. McIlmoyle, the lawyer who was appointed to represent them. O. said that she had a good relationship with Ms. McIlmoyle and found her very understanding. She testified that Mr. B. tried to make the children express to Ms. McIlmoyle their preference to move to Ontario and that they did not want more visits with their mother, which O. said was not how she felt. She also testified that Mr. B. told the children to write a letter to the effect that Ms. McIlmoyle was not telling the truth about what the children really wanted. She said the letter was written and then Ms. McIlmoyle was suddenly no longer their lawyer.

[81] For his part, Mr. B. denied talking to the children about Ms. McIlmoyle, except when they would raise the subject and he would tell them to write things down. He also said that the children did not feel comfortable with Ms. McIlmoyle and that it was his role to calm them down. So clearly there were some discussions between Mr. B. and the children about their dealings with their lawyer.

[82] Dealing with a lawyer can be difficult for adults, let alone children. I have no doubt that the older children initiated some discussions with Mr. B. about their interactions with their lawyer. I also have no doubt that Mr. B. expressed his own strong opinions to them about what they should think and want. All of the evidence in this case shows Mr. B. to be an individual who does not hesitate to express what he wants; the various texts to O. telling her to look at her mother's

phone and in her wallet illustrate this. I am satisfied, based on O.'s evidence, that Mr. B. did communicate to her that she should want to move to Ontario and should not want visits with her mother and that she should convey that message to the children's lawyer. I have no doubt that he communicated the same thing to K. and G.

[83] Another example of Mr. B. strongly, and inappropriately expressing his views to O. is Exhibit 14, a text she testified she received from him in 2017, after she had moved to Ms. B.'s. Mr. B. testified that he did not think he wrote the text, however could not suggest who else might have done so and I am satisfied based on O.'s testimony and the content of the text that he did write it. O. testified that she believes she received the text after she had sworn an affidavit. In the text, Mr. B. expresses his disbelief in things she has said and tells her she is "brainwashed" and that she hates him. The text is clearly meant to make O. feel guilty about what she has said about Mr. B. and to suggest that Ms. B. is lying to her.

[84] Counsel for Mr. B. made the point that many of the texts that were referred to at trial (not all of which were entered as exhibits) did not necessarily include texts that preceded or followed the texts that were put to the witness. That is so, however I think an analogy can be made to telephone conversations. A witness may testify about something said during a telephone conversation without being able to recall what was said before or after that particular part of the conversation. It simply goes to the weight of the evidence and I bear that in mind.

[85] Mr. B.'s lack of co-operation with, and his hindrance of, Ms. B.'s access to the children is also an example of alienating behaviour and I will refer to that issue further on.

v. evidence that the child exhibited behaviours consistent with alienation

[86] Although O. is no longer a child and so is not the subject of these proceedings, since so much of Mr. B.'s behaviour involved her, it is worth noting that his behaviour did not result in alienation in her case. Indeed, O. maintained regular contact with her mother, and chose at the age of 16 to live with Ms. B. and was still living with her at the time of trial.

[87] I do not find evidence of actual alienation in relation to G. O. testified that there were a couple of occasions when G. wanted to see Ms. B. and was very upset when Mr. B.'s response was to get angry at him. Ms. B. testified about an occasion when she was to have K. and G. with her for the weekend; G. telephoned her and said that he did not want to come because he had other plans. G. then whispered to

her that he had not wanted to say that, but did so because Mr. B. was there. Ms. B. also testified that G. calls her from his school. As I will explain further on, it was clear to me when I interviewed G. that he wants a closer relationship with Ms. B.

[88] There is no evidence that Ar. and An. have exhibited any behaviours consistent with alienation.

[89] K. does have a difficult relationship with Ms. B., although there is no evidence that he has exhibited some of the extreme behaviours that were described in *C.J.J. v A.J.* In fact, O. testified that he has visited Ms. B. along with the other children, although how recently is not clear. Ms. B. testified that he has taken things from her home. She also testified that he has become angry and frustrated with her, wanting her to agree that all the children can move to Ontario, and that he has told her that is what the whole family agrees should happen. That indicates to me that K. perceives Ms. B. to be standing in the way of the children’s and Mr.B.’s happiness and that he does not acknowledge her feelings about the children moving far away from her.

[90] I conclude that Mr. B. has taken steps to give the children a negative impression of Ms. B. and has hindered Ms. B.'s relationship with the children. However, it is really only K. who has exhibited some behaviour consistent with alienation. Although O. did things that her father told her to do, such as go through Ms. B.'s text messages, it is clear that she did not feel comfortable doing it.

E. Parentification

[91] Ms. B. submits that Mr. B.'s behaviour has resulted in the "parentification" of O. and possibly G. No authorities were cited as to the meaning of that term or its significance in the context of the best interests of the child. However, it is a matter of common sense that a child should not be expected to act as a parent to other children in the family.

[92] It is clear from the evidence that O. was given considerable responsibility in terms of looking after her younger siblings and administering An.'s medication. She testified that she began to administer An.'s medication when she was 14 years old, and when 14 or 15 years old, was sometimes left to do it when Mr. B. was not there. She testified that Mr. B. was the only person who showed her how to administer the medication and that he told her that An. could go into cardiac arrest if she was given the wrong amount. This caused O. particular concern when An. would spit out some of the medication and O. would then be uncertain how much more to give her. Although the medication was usually ready in syringes when she

was left to administer it, there were a couple of times, she said, when she had to measure it from the bottle. She said that there were times, mainly when the family was in Edmonton for An.'s medical appointments, when Mr. B. was gone for 5 or 6 hours at a time and she was left alone with the younger children and not able to contact him. She testified that she was also concerned about the feeding tube that An. had for some time; it would become detached and O. did not know what to do in that case.

[93] O. also testified that it was usually her job to do the laundry and that she often looked after her siblings. She testified that she decided to leave Mr. B.'s home in 2016 and move to her mother's because she felt she was given too much responsibility at her father's.

[94] I accept as fact that O. was given a lot of responsibility in Mr. B.'s home. However, I would not go so far as to find that she was made to act as a parent to the other children. Nor is there any evidence that G. was made to act as a parent. Mr. B. testified that others in the family had to know how to administer An.'s medication in case something happened to him, which is a precaution he should not be criticized for. The real question, in my view, is whether he used poor judgment in leaving O. alone to administer the medication without ensuring that she was properly trained and could communicate with him if she needed to. On this issue there is a significant contradiction between the evidence of Mr. B., O. and Dr. McGonigle.

[95] Mr. B. testified that that he made a point for O. to be present when he was trained on An.'s medications, which was in 2015 when O. was 15 years old. In contrast, O. testified that she was 14 when she started helping with An.'s medications. She said that she went to An.'s medical appointments only to babysit Ar. in the play area and did not participate in any training on the medications. Dr. McGonigle, the paediatrician member of An.'s medical team, testified that he does not remember meeting O. and did not train her on the medications. He said he was not aware that she, at age 15, was administering An.'s medications; he indicated that it might not be a problem if she is responsible and administers them only occasionally.

[96] I accept the evidence that no training was provided to O. on An.'s medications other than what Mr. B. showed her. I find that Mr. B. was not truthful when he said that she was present for the training he was given. The better course of action would obviously have been to ensure she got appropriate training and that he was always easily available to her by telephone when he left her alone with An. It is understandable that Mr. B. would want and need some time to himself,

however to leave O. alone in these circumstances does not demonstrate good judgment.

F. Access

[97] Both parties allege that the other has cancelled numerous access visits. Mr. B. takes the position that Ms. B. often cancels her access visits or does not take him up on offers to have the children with her. He says that this is one of the reasons she has rarely, if ever, looked after the children when he has to go to Edmonton for An.'s medical appointments.

[98] Ms. B. takes the position that it is Mr. B. who cancels her access visits, or does not have the children ready, or will not agree to access or reasonable changes to access. She argues that this is also evidence of an attempt to alienate her. I accept that denying or hindering access is a factor relevant to alienation.

[99] It is not clear on the evidence exactly what access regime the parties are currently operating under. The last order made in this action that deals with access is an Interim Consent Order made December 17, 2015 (Trial Record, Tab 29), which provides that Ms. B. is to have reasonable and generous access including specified access to all the children on every third weekend and access to the twins on every second Sunday afternoon and evening, with the older children having the option to join in that access. Under that order, Mr. B. is also to offer Ms. B. the first opportunity to care for the children should he have to take An. to Edmonton. In her testimony, Ms. B. said that the parties negotiated another schedule but that it did not continue and then access took place whenever Mr. B. would allow it and Ms. B. was able to exercise it.

[100] Carolina Kogiak, a friend of Ms. B., was involved as a third party to facilitate communication between the parties from the time of the first EPO until mid-2014. She testified that she would pick up the children to take them to Ms. B., however at times Mr. B. would cancel the visits or he would not have the children up and ready to go and she would have to wait. Sometimes Mr. B. would not allow her on his property or he would yell at her if she arrived early. I found Ms. Kogiak's testimony credible, particularly her explanation that she found all the waiting draining as she was doing this on her time off from work as a child and youth worker. However, her evidence is dated as she said she has not been involved with facilitating access since 2014. There is some more recent evidence, however; Mr. Paddon testified that Ms. B. asks to use his vehicle to pick up the children and will then return it, saying that Mr. B. has cancelled the visit. He testified that this happens a lot.

[101] In her testimony, Ms. B. referred to a chart (Exhibit 8) she had prepared for one of the pre-trial applications in this matter, recording access from February 20, 2014 to January 19, 2015. Of 94 occasions described as "specified access" in the chart, Ms. B. recorded that she exercised access 34 times, although on two of those occasions she was allowed to see only An. She recorded that she cancelled on 12 occasions because she had to work, or there was no third party available, or she was sick. She recorded that Mr. B. cancelled or did not respond on 14 occasions, on 4 of which he claimed that the children had to be kept in isolation. There were 34 occasions for which she had no records. So on this approximately one year sampling, the number of recorded cancellations for specified access are very similar for both parties. However, the chart also includes 19 occasions when Ms. B. says that she requested further access, but Mr. B. did not agree to it, including on the children's birthdays. She testified that generally, Mr. B. has more often denied, than allowed, access.

[102] Mr. B. denied that he discourages access by Ms. B. At one point in his cross-examination, he stated that it was only in the last three to four months that Ms. B. had expressed an interest in seeing the children, which clearly is not true based on the evidence at trial. He also claimed in his examination-in-chief that it is only in the last three to four months that Ms. B. has said she wants to attend An.'s appointments in Edmonton. In cross-examination he said that she had not always asked to go with An. to Edmonton; then he said that she probably did ask years ago, but that since he knows An.'s condition best and he and Ms. B. do not get along, he is the one who should go. I conclude from this that Mr. B. has taken the position that he is the one who should be at the appointments and that he has not agreed to her attending in his place or, if she has been available to be present at appointments when he is there, he does not agree to her attending with him. The parties have limited financial resources and there is no evidence before me as to whether financial aid is available for both parents to travel to Edmonton for the medical appointments.

[103] There is evidence that Mr. B. has used An.'s medical condition as an excuse to limit access. He claimed in his evidence that he had been told to limit An.'s visits to Ms. B.'s home to three days at a time, however he offered no corroboration of that and both of An.'s paediatricians, Dr. McGonigle and Dr. Scott, denied telling Mr. B to limit the visits in that way. Mr. B. also identified a dog that Ms. B. once had as a reason why An. should not go to Ms. B.'s home, however the medical evidence is all to the effect that dogs are not a problem so long as they are clean and their shots are up to date. Mr. B. claimed not to have received a letter from the hospital saying that and then claimed that the writer of the letter was not

qualified to say that. He also claimed that Ms. B.'s dog was not clean, that it scratched a lot and that his concern was that if An. was scratched and became infected there could be serious consequences because of her compromised immune system. However, at the same time he admitted that he has an elderly cat and its litterbox in his home and that he wants to buy An. a puppy. While it is not at all unreasonable for Mr. B. to be vigilant about An., I am satisfied that he was not telling the truth about being advised to limit visits to three days and that he was selective about Ms. B.'s dog being a problem and his cat and a future puppy not being a problem. Clearly there are other things he could have done to address the concern about infection, such as asking to check An. for scratches every few days, that would have allowed for longer visits.

[104] Exhibit 4 is an exchange of messages between Mr. and Ms. B. wherein Ms. B. asked to have the twins for 10 days over March Break so that she can treat them for lice. Mr. B. testified that she was always claiming the children had lice and that it was traumatizing for the children to be constantly checked for lice. He testified that, on the occasion of the Exhibit 4 messages, he would not let Ms. B. have the twins for 10 days, that she could have taken all the children other than An. and had An. for three days with a break after that. But he also testified that he and the children already had plans for March Break and that Dr. Scott had said they did not have lice. So it is difficult to know from his testimony what the actual reason was that Mr. B. did not want Ms. B. to have the children, especially since in one of the messages he asks Ms. B. if she wants to take the children from the 14th to the 21st, which is 8 days. Unfortunately, neither party testified as to what the result of all this was. Ms. B. did testify that she has asked to have the children for 10 to 14 days straight so that she can deal with the lice issue and he can clean out his home, but said he has never taken her up on it.

[105] Ms. B. testified that not long before the exchange of messages, she had taken the twins to Dr. Scott about the lice issue. Dr. Scott confirmed this in his evidence and said that both twins had nits, i.e. lice eggs in their hair. He did not see live lice. He recommended that the eggs be removed with a comb as the various treatments available kill live lice, but not the eggs. So in the messages about March Break, it was not unreasonable for Ms. B. to talk about wanting to treat the twins, however Mr. B. turned the discussion about access dates into an argument about whether she was making false accusations that the twins had lice. Either way, the children had a problem they should not have had, Ms. B. was offering to deal with it, and Mr. B., instead of taking her up on the offer, just wanted to argue. In my view, it was unreasonable of him to react that way and it is another indication of his unwillingness to facilitate Ms. B.'s access.

[106] Mr. B. testified that one of his frustrations with Ms. B. was that she would send the children home early on access visits, saying it was because of the lice. O. also confirmed in her testimony that this had happened during the time she has lived with Ms. B. It was not clear how many times Ms. B. did this, and she does have a young child in her home so the prospect of others bringing lice into the home would be a concern. O. also testified that when she lived at her father's they would periodically have a big cleaning to try to get rid of lice. So I have no doubt that there has been a lice problem, that Mr. B. has taken some steps to deal with it, that it has continued or at least re-occurred and that it is frustrating for him. But that in no way justifies his refusing to accept Ms. B.'s help when she has offered it.

[107] Based on all the evidence, I find that Ms. B. has tried to exercise both the specific access granted by court order and further access and that Mr. B. has often not been co-operative and has used unjustified excuses to limit or deny access.

G. Alcohol and drugs

[108] Mr. B. submits that Ms. B. has abused alcohol and raises that as a concern in regards to her ability to care for the children. He also points to drugs as a concern. Ms. B. in turn raises concerns about Mr. B.'s abuse of alcohol.

[109] Ms. B. admitted that she abused alcohol and marijuana as a teenager and that her parents arranged for her to attend treatment, including Alcoholics Anonymous.

[110] She also admitted that she was tested for FASD (which I understand to mean Fetal Alcohol Spectrum Disorders) because her biological mother drank during pregnancy. She was asked about a court order made shortly after O.'s birth, granting guardianship of O. to Ms. B.'s adoptive parents. Ms. B. explained that she had consented to the order because at some point O.'s biological father (not Mr. B.) had moved in with her against her wishes and she wanted to make sure that he would not get custody of O. She maintained that was the only reason for the guardianship order and denied that it was because she was having trouble dealing with O., who would have been just over a year old at the time.

[111] The guardianship order itself is not in evidence. Counsel included in Exhibit 1 the "Notice and Application for a Private Guardianship Order", filed by Ms. B.'s parents in the Provincial Court of Alberta on July 18, 2001 (Tab 49). The Notice states that the applicants believe that guardianship would be in O.'s best interests

because, "Her mother has a disability known as ARND, Alcohol Related Neuro-Developmental Disorder". There is a Consent by a Guardian form (Tab 50), in which Ms. B. consents to an order for guardianship, however there is nothing in that form about the reasons for the order.

[112] I did not get the impression that Ms. B. was intentionally trying to mislead the Court about the reason for the guardianship order. It may be that from her perspective, the situation with O.'s father was the reason she agreed to the order. There is no evidence before me that Ms. B. was actually having trouble dealing with O., merely evidence that her mother looked after O. while Ms. B. was working.

[113] In any event, the application for guardianship was filed 18 years ago. There is no evidence that Ms. B.'s parents ever tried to enforce their rights under the guardianship order to take over care of O. They were not added as parties to this action, which was commenced when O. was just 13 years old, so I take it that they must no longer have been her guardians at that time or at least were not recognized as such by the parties. So the fact that 18 years ago they applied for guardianship and said that they were doing so because of Ms. B. having an alcohol-related disability, and that Ms. B. consented to the guardianship, is of little relevance to the issues I have to decide.

[114] Both parties testified that they moved to Ontario in 2003, shortly after which K. was born. Mr. B. testified that Ms. B. had some help from his mother in caring for K. and that O. was a handful and Ms. B. was stressed out, however there was no indication that she was unable to cope. Neither Mr. B.'s mother, nor his sister, who also testified about being involved at the time of K.'s birth, referred to any concerns about Ms. B.'s care of the children or alcohol abuse by her.

[115] Mr. B., who testified that Ms. B. told him about her disability, also testified that he and she drank together during their relationship. He admitted that they both drank to the point of intoxication in their first year together and that they drank together frequently in Yellowknife before their separation. There is no evidence that alcohol affected Ms. B.'s ability to care for the children prior to the summer of 2013. Nor is there any evidence of alcohol-related behaviour on her part after 2013.

[116] Ms. B. testified that at this time, she does not drink a lot; she might have four glasses of wine if she goes out in the evening. O. testified that Ms. B. is not a big drinker.

[117] Mr. B. testified that he drinks when he can afford it and may have a glass of wine or a beer once a week. O. testified that when she was living at his home, he went through a case of 24 beer every week and would sometimes pass out on the couch. She also testified that when he got really drunk he would yell at her and that he had mood swings, which scared her. I accept her evidence in that regard.

[118] In his testimony, Mr. B. referred to an incident in December 2015 when he went to a friend's house on an errand and ended up drinking wine there. He testified that somehow he was hit in the head with a ceramic unicorn and came to in the hospital with a serious incision in his head. He said that the person who hit him was one of Ms. B.'s friends, who was visiting in the home at the time. He also testified that he later saw the unicorn in his shower at home, and that O. admitted to him that she got it from Ms. B. and put it there. Both Ms. B. and O. denied that. At some point around the time that Mr. B. was hit, someone contacted Social Services and the children were apprehended and placed in foster care for 10 days. Mr. B. testified that the apprehension was "invalid", but that he did not try to fight it. He also said that O., who would have been 15 at the time, was at home when the apprehension took place and then said that O. had gone out and K. who would have been 11, was at home.

[119] While I have no doubt that Mr. B. was injured, the lack of detail as to how it happened and the strange story about the unicorn leads me to infer that Mr. B. was most likely intoxicated and left the children alone for too long.

[120] There was also an incident in July of 2018, when Mr. B. was at the hospital in Edmonton because An. had to be treated for a respiratory illness. Mr. B. admitted that hospital personnel found two wine bottles in An.'s room the day before he was to fly back to Yellowknife with her.

[121] Mr. B.'s explanation was that he and six other people had shared the wine in a park and he took "a bit" back to the hospital room. He said that he was sober, but was on pain medication because of a broken jaw and was having an anxiety attack, because of alarms going off in the hospital. He fell asleep and was woken by a social worker and security guard. He testified that he was permitted to leave with An. in the morning and that Social Services in Yellowknife followed up with him on his return home.

[122] Dr. McGonigle testified that he saw Mr. B. daily during that hospital visit and that Mr. B. seemed impaired. He referred to Tab 36 of Exhibit 1, which is a Discharge Summary from the hospital. It indicates that Mr. B. seemed to be impaired much of the time. One morning, Dr. McGonigle found Mr. B. asleep and

was unable to wake him, despite shaking him and speaking to him. When Dr. McGonigle returned that evening, Mr. B. told him that his condition was caused by PTSD medication. Dr. McGonigle was so concerned, that Social Services was contacted. Dr. McGonigle testified that it was dangerous for Mr. B. to have An. in his care while he was in that condition. He contacted Dr. Scott, An.'s pediatrician in Yellowknife, to alert him to the situation and to the fact that Mr. B. was about to take An. back to Yellowknife.

[123] I am satisfied based on Dr. McGonigle's description of Mr. B. and the fact that wine bottles were found in An.'s room, that Mr. B. was drinking and that, perhaps combined with medication, caused him to be in an impaired condition. I do not find it credible that he would take two wine bottles back to the hospital room if there was only a bit of wine left. I also note contradictions in Mr. B.'s explanations about his medications. At trial, he testified that he is on a number of medications for anxiety, depression and PTSD, but that he does not need them when he is not in Yellowknife. He testified that when he was at the hospital in July 2018, he was on pain medication, yet Dr. McGonigle testified that Mr. B. told him that his condition was due to his PTSD medication. I accept Dr. McGonigle's evidence as to what Mr. B. told him.

[124] There was also evidence from Ms. Kameemalik, which I have already referred to, about seeing Mr. B. intoxicated and fighting in the housing complex's parking lot on one occasion during the summer of 2017. She testified that the police were involved and the twins and one of the boys were there when this happened. I accept her evidence about this incident.

[125] Mr. Paddon testified about an incident at a local gas station in 2017, when he saw Mr. B. wearing only underpants and a shirt, and with glassy eyes. Mr. Paddon testified that Mr. B. was verbally aggressive with him, and that much of what Mr. B. said did not make sense. It is not clear from Mr. Paddon's evidence whether Mr. B. was intoxicated or under the influence of some other substance or cause. I am satisfied that the incident did happen. Although there is no indication that the children were with Mr. B. at the time, since he usually has the care of the children, the behaviour described is cause for concern.

[126] To summarize, there is no evidence that alcohol has affected Ms. B.'s ability to care for the children in recent years. There is evidence that that in recent years Mr. B. has abused alcohol while the children were in his care and that negative consequences either did result or could have resulted.

[127] Mr. B. also testified that he has concerns about drugs being used in Ms. B.'s home and that Mr. Paddon, who is the father of her two-year-old child and still in a relationship with her, has been involved in drugs, specifically cocaine.

[128] Ms. B. testified that there are no drugs in her home. She admitted that she obtained an EPO against Mr. Paddon in March of 2017; she said that she applied for the EPO because she was afraid of him, he had threatened to take their six-month-old son from her, and she was concerned that he was selling cocaine and drinking too much. When asked about Mr. Paddon selling cocaine, Ms. B. said that at the time she applied for the EPO, she made an assumption that he was using and selling cocaine. She testified that he does not have a cocaine problem and that not long after she obtained the EPO, they were able to resolve her concerns. When Mr. Paddon was asked about cocaine, he denied both using and selling and there is no other evidence that contradicts him.

[129] O. also testified that there are no drugs in Ms. B.'s home, but that Mr. Paddon uses marijuana now and then. She acknowledged that she smoked marijuana starting at age 14, and in 2018 used cocaine for a couple of months, but said that she did not get it from Mr. Paddon. She also testified that she started drinking at the age of 13, when living in Mr. B.'s home. She has abused drugs and alcohol while living with each of her parents.

[130] There is not enough evidence for me to conclude that there is ongoing drug use in Ms. B.'s home. While O. has gone through a difficult time (for example, she quit school after leaving Mr. B.'s home), she testified that she is no longer using drugs and is planning to continue her education. Any difficulties she has had cannot be attributed solely to the time she has spent living with Ms. B.

[131] I have also considered the events that took place in the summer of 2018, when O. visited with her grandmother (Ms. Crawford) and her aunt (Ms. Mitchell) in Ontario. Much of the behaviour they described, such as leaving towels on the bathroom floor, is not unusual for a teenager and not relevant to the issues.

[132] Ms. Mitchell testified that she offered O. a glass of wine at dinner one night, whereupon O. helped herself to the rest of the bottle and later took beer and rum without permission. O. testified that her grandmother and uncle offered her alcohol, which was denied by Ms. Crawford; the uncle was not a witness. There is no dispute that after drinking one night, O. was intoxicated and was very sick the next morning.

[133] I cannot resolve all the contradictions in the evidence, however I conclude that O. likely assumed that she had permission to drink because she was offered wine, and then continued to drink on her own and sometimes in the presence of the adults, although not with their express permission. I do not consider O.'s memory of what happened reliable, because she was drinking. She and Ms. Mitchell also differed on whether O. removed some of Ms. Mitchell's prescription medication, however there is no evidence that O. actually used the medication and Ms. Mitchell said she never talked to O. about it, which I found a little odd in the circumstances, given that she was concerned about O.'s behaviour.

[134] O. admitted that she has abused alcohol and in my view the events described are simply illustrative of that.

H. An. and Ar.

[135] An. and her twin sister, Ar., now 6 years old, were born prematurely. An. has what Dr. McGonigle described as a complex medical condition. She was born with heart disease and other complications. She has had various medical procedures to address chronic lung and breathing issues. She has had feeding intolerance, which for a time necessitated a feeding tube through her abdomen to her stomach. She has had abdominal surgery, and had a heart transplant in 2015. She also has neurodevelopmental delay.

[136] Because of her heart transplant, An. is on anti-rejection medications, which she will remain on for the rest of her life. Dr. McGonigle testified that it is essential that she get the correct dose at the correct time, and that she have her medications every day; if she does not, she may die due to rejection.

[137] Dr. McGonigle described himself as the "gatekeeper" for An.'s care. He is the paediatrician on her medical team, which includes a cardiologist, cardiovascular surgeon, surgeon and pulmonologist. Dr. McGonigle communicates regularly with Dr. Scott, who is the twins' paediatrician in Yellowknife.

[138] Dr. McGonigle testified that An. will continue to be fragile in the future. She needs to be in a stable situation and to attend school regularly, both for education and for socialization; in his words, "to be the best she can be". She also needs speech therapy. He indicated that her health and medical condition should not require that she miss a lot of school.

[139] Dr. McGonigle also testified that any responsible, competent and capable adult can learn to deal with An.'s medical issues. If she moves to Ontario, his team would have to work on putting together a transplant team there as she would need intermittent appointments with a team similar to his and that would be possible only at a children's hospital. He said that putting together a team would require some work, but would not be impossible. An. also needs to be within an hour or two of paediatric care.

[140] Turning to Ar., Dr. Scott testified that she, too, is at risk for developmental delays due to her premature birth. Her speech and language development are delayed and in the last couple of years have not been as good as her peers, although not as poor as An.'s. He testified that in January 2018, An.'s speech pathology scores showed her at less than 3 years of age for speech and at 3.5 years for overall language development. She has improved over the years, but there is still a gap between her and her peers.

[141] It is clear from what both Dr. McGonigle and Dr. Scott said, that because of their developmental delays, both An. and Ar. need to be in school as much as possible. Their (and G.'s) school attendance is a significant issue. Ms. B. says that Mr. B. allows the children to miss too much school. Mr. B. disputes that, but does admit that they miss some school. He said that there are a number of reasons for this: illness; missing the bus; he does not always have gas to drive them; cold weather; lice; when he takes An. to her medical appointments in Edmonton, he usually takes Ar. along for emotional support.

[142] There are some issues about the accuracy of the school attendance records and I will discuss those further when it comes to G.'s records. The Report Cards for the twins (Exhibit 1, Tabs 29 and 30) for kindergarten in 2017/18 indicate that the percentage of time they were present at school over three terms ranged from a low of 60 to a high of 68.9 percent, with Ar. having one term where she achieved 73 percent attendance.

[143] In his testimony, Mr. B. pointed out that generally the teachers' comments in the Report Cards are very positive, and that is true. However, those comments are clearly meant to be encouraging for the students and parents. As Dr. McGonigle emphasized, learning to socialize and communicate is a significant benefit of going to school. From Mr. B.'s evidence, I conclude that he may not recognize that; he seemed to say that because of the positive comments and because he does things at home with the children, their absence from school is not a big problem.

[144] Dr. Scott's evidence is helpful on the issue of school attendance. He testified that he had recommended that An. and Ar. attend the speech pathology clinic at the hospital in Yellowknife rather than in the school setting, because at the clinic they would get more time and attention. An. and Ar. started at the clinic, but Dr. Scott said that because of transportation issues, the decision was made that they get speech therapy at school instead. Mr. B. testified that the twins stopped attending the clinic because he had to cancel some appointments and it did not work out. Now that An. and Ar. are 6, as I understand it, they can get speech therapy only at school. Thus, they did not get the recommended therapy at the clinic and so their regular attendance at school is even more important so that they do get the speech therapy they need.

[145] Dr. Scott testified that it was reported to him that the twins were missing a lot of school because they were unwell. In January of 2018, he discussed this with Mr. B., who agreed that An. and Ar. had missed a great deal of school and said it was because of illness. Dr. Scott testified that the illnesses described by Mr. B. were minor ones and so he emphasized to Mr. B. the importance of school attendance and asked him to keep a diary of days missed and the reasons they were missed, so that Dr. Scott could determine how to address the illnesses. Dr. Scott said that he has never seen the diary, if indeed it was kept. He referred to another meeting with Mr. B. in April 2018, where Mr. B. told him he was not able to keep the diary. Dr. Scott was not able to remember what reason Mr. B. gave for that. Given the importance placed on school attendance, I find Mr. B.'s failure to follow up on what Dr. Scott asked him to do very surprising and concerning.

[146] Dr. Scott also said that he was sufficiently concerned about the twins missing school that he raised the issue with Social Services when he contacted them about the report from Dr. McGonigle that Mr. B. was impaired at the hospital. He said, however, that he would not have contacted them about the attendance issue alone.

[147] In the Joint Book of Documents (Exhibit 1), there are several references in various reports to the need for An. to attend school and to have speech therapy. In one such report, from Alberta Health Services (Tab 32), dated July 5, 2018, it is noted at page 3 that:

> …[An.] has a disordered learning profile and definitely needs therapy with a speech language pathologist. At this time, she has poor verbal comprehension; does not understand terms such as "how many" as well as most verbal discussions held around her and to her, which puts her at a great disadvantage. Much of the instruction she is given she may not understand. ...

[148] And in the section entitled "Psychology" on page 2, it is noted that An., who was 5 and a half years old at the time, had difficulty understanding and answering even simple questions.

[149] The report at Exhibit 1, Tab 32 indicates that a copy was sent to Mr. B., so he was clearly made aware of these concerns about An.

[150] Dr. McGonigle testified that because of her developmental delay, An. is like a 4 year old and it would be appropriate for her parents to discuss her medications with her at that level. He said that he would not expect her to know what each medication is, what time it is to be taken, or the dosage. That seems consistent with what I have quoted above from Exhibit 1. In contrast, although Mr. B. testified at first that An., though 6 years old, is at the level of a 4 year old, he changed that when talking about An.'s medications. In cross-examination, he testified that An. is starting to learn about her medications, for example, learning why she is taking them and that she can say how much to take for each medication and how many times a day. He denied that she has any difficulty communicating and said that he thinks she is at the level of a 5 year old. This may be wishful thinking on his part; it is also an example of him contradicting himself. It also raises the concern that Mr. B. may in the future put too much responsibility on An. in relation to her medications, just as he did with O.

[151] It is important to note that Dr. Scott also testified that despite her medical issues, An. has been remarkably well. He is of the view that her overall medical care is appropriate and that it is not necessary for her to live in a larger center. Dr. McGonigle also testified that when he saw An. in the hospital in July of 2018, the blood and other tests done on her indicated that Mr. B. was providing adequate care for her, although the level of one of her medications (Tacrolimus) was not always what it should be.

[152] Much of the trial evidence focused on An. However, as I have indicated, it is also clear that Ar.'s development is delayed and that she should be attending school as much as possible. Ms. B. testified that she has concerns that Ar. is being held back because of An.'s medical issues and that in her view there is no need for Ar. to miss school because of An.'s medical appointments in Edmonton. She believes that Ar. is entitled to her own life and that the twins need to learn that they are individuals. These concerns have merit.

[153] Ms. B. also testified that there have been occasions when the twins have come to her with dirty, matted hair and that she has on occasion had to cut off parts of the hair because it is so matted. While the photographs (Exhibits 11 and 12) are

somewhat dated (2014 and 2016), they do show the twins looking very disheveled. She testified that the twins' (and G.'s) hygiene is not always good. Both she and O. testified that the twins do not go to the bathroom on their own and so Ms. B. has been teaching them about that. From the evidence of Ms. B., O., Mr. Paddon and Ms. Kogiak, I conclude that Ms. B. is quite particular about keeping her home and the children clean.

[154] Ms. B. also expressed concerns about the cleanliness of Mr. B.'s home, which is important because of An.'s health issues, although any recent observations she has made were from the entry when picking up the children. She described it as very cluttered. O. described the home, when she lived there, as chaotic and said that it was not very clean, dishes were often left to pile up and washed only when needed, and periodically the family would do a big cleaning or a washing to get rid of lice. Geneviève Piercey, who was Mr. B.'s homecare worker for about 3 years from 2013 to 2016, and visited the home regularly, described the home as "lived in". Her focus was the twins' development, but she did help Mr. B. with things like setting up a chores schedule for the children and cooking proper meals, so she was certainly in a position to observe how the home was kept. She testified that Mr. B. was receptive to her help. As far as the current state of Mr. B.'s home, there is really no evidence other than Ms. B.'s observations about it being cluttered.

I. G.

[155] The evidence before me indicates that G. who is now almost 13 years old, also frequently misses school, or is late. One of his grade 7 teachers, Ms. McBryan, testified as a witness for Mr. B. She indicated that G. requires step by step assistance at school and does best in a small group. He has problems with reading and writing and needs to be encouraged in those areas. He has a Student Support Plan, which is meant to ensure that he gets extra supports if he needs them, whether they be academic, social or behavioural.

[156] The report cards from G.'s school indicate a low percentage of days present. At Tabs 42 to 45 of Exhibit 1, the percentage of days G. was present is noted variously as 48% (grade 3), 56% (grade 5), 57% (grade 6, fall term) and 69% (grade 6, spring term). In the fall term for grade 7, that suddenly jumps to 92%, which is also recorded for the spring term of grade 7. Ms. McBryan was referred to the attendance record at Tab 48 of Exhibit 1, which she testified indicates that his attendance at school is significantly lower than 92%. There is a letter from the school principal (Exhibit 16), explaining that there are discrepancies between the attendance reports, such as Tab 48, and the report cards, such as Tabs 42 to 45. As I read the letter, and understand Ms. McBryan's testimony, the attendance records

should be considered accurate. I am satisfied on that basis, and on Ms. McBryan's evidence, that G.'s school attendance has generally been poor. Ms. McBryan also testified that his overall performance would improve if his attendance improved.

[157] Ms. McBryan also described G. as fun loving, kind and having a sense of humour. He has shown interest in certain school projects and from her description of him, I conclude that he could do quite well if his attendance was better.

[158] In his testimony about G.'s absences, Mr. B. seemed to say that the teachers often mark students absent and then do not correct that when the student is merely late. I am satisfied on Ms. McBryan's evidence that is something that does not happen, or if it does, it is extremely rare and would not explain G.'s record of absences. Mr. B. gave the same explanations for G.'s absences as he did for the twins. He also said that at times all the children would go with him to Edmonton for An.'s appointments, that they enjoyed it and it was like a holiday for them. It is not clear from the evidence how often G. missed school as a result of that, however Ms. McBryan said that it was her recollection that some of his poor attendance was attributable to the family being out of town for medical reasons.

[159] Mr. B. testified that G. knows how to administer An.'s medication. O., however, testified that she has never seen him do it and the evidence is not sufficient for me to come to a conclusion as to whether he has actually been given that responsibility.

Interviews with K. and G.

[160] At the request of counsel, I interviewed K. and G. pursuant to the authority contained in s. 83 of the *Children's Law Act*, S.N.W.T. 1997, c. 14. The interview was recorded and I ordered that a sealed transcript be placed on the court file. K. and G. had counsel, provided by the Office of the Children's Lawyer; their counsel was available, however advised that K. and G. preferred to speak to me without her present, which I agreed to do.

[161] I initially met with K. and G. together, and then briefly with G. on his own, at his request.

[162] K. presented as bright, well-spoken and very interested in the court case. When he and G. were together, I noted that K. tended to do most of the talking and

G. would defer to what K. said. G. was much more reserved than K. about expressing his thoughts.

[163] K. expressed very firm views on the family situation. He is obviously enjoying his life in Ontario and sees the city of St. Catherine's (which is the area where his grandparents live) as full of new opportunities for himself, his father and his siblings. It was clear to me that he perceives the years following the separation as having been very difficult for his father and the children, and he fully expects that will change if they move to Ontario and his father is able to return to his pre-separation occupation as an electrician.

[164] G. seems to have similar expectations of what life would be like in Ontario. It appeared to me that he is very influenced by the positive things K. says about Ontario and expects that his own experience there will be the same.

[165] I found that some of what K. and G. said in the joint interview was very similar to things said by Mr. B. in his testimony, for example, the reasons the children are absent from school and why they think a move to Ontario would be a good thing, about people who harass Mr. B. and why Ms. B.'s dog posed a risk to An. They seemed to have a great deal of information about the interactions between their parents, and although some of that could have come from discussions with their former lawyer, what was striking to me was their focus on negative things Mr. B. has said about Ms. B. Their view of things included very little reference to Ms. B., in comparison to their enthusiasm for moving to Ontario. K., in particular, appeared to expect Ms. B. to make a significant effort to accommodate his wishes. I also noted, especially with K., some resistance to Mr. Paddon's relationship with Ms. B., which likely reflects Mr. B.'s attitude to Mr. Paddon, but could also be a sign of resentment because of Mr. Paddon's role in Ms. B.'s life.

[166] From the joint interview, it was clear that K. and G. are very aware of the conflict between their parents. They identified with their father's position in that conflict and seemed to view a move to Ontario as a solution to all of the issues, including financial and An.'s health, which is likely not realistic.

[167] K.'s relationship with Ms. B. is clearly quite strained. On the other hand, my impression was that G. is open to, indeed wants, a stronger and closer relationship with her. This was confirmed when I spoke to him alone after the joint interview. My conclusion was that although he would like a closer relationship with his mother and to spend more time with her, what he hears from his father and K.

about the benefits of moving to Ontario and about the dispute between his parents has discouraged him from doing more to explore a closer relationship with her.

[168] A month after the trial was completed, counsel who represented the children in relation to the judicial interview brought an application before me on short notice, based on certain events that had occurred. Briefly stated, G. apparently had gone to stay at Ms. B.'s home and expressed a wish to stay there and not join his siblings for a visit in Ontario. I mention this only because the material that was filed included information that confirms my view that G. does wish to have a much closer relationship with Ms. B.

Further concerns relating to Mr. B.

[169] Mr. B. testified that he receives daily abuse by neighbours on the subject of the children, and that some of his neighbours videotape him. As I have already noted, he testified that he does not take the children to church because he receives abuse there, then retreated from that statement to say that he does not actually receive abuse at the church, but that abuse is what typically happens.

[170] Mr. B. also testified that he has anxiety, depression and migraines and severe PTSD from what he has seen and dealt with in the hospital. He sees a psychiatrist approximately every two months and takes four different medications for the conditions just described. He testified that these conditions began after the separation and that he still has bad anxiety attacks three times a day. He said that he is afraid to leave his house. He was asked about that in cross-examination and said that he has had anxiety attacks from people talking about him in line at a convenience store. He described those people as abusive and said they cursed at him, calling him an "idiot" and saying that he does not deserve the children. At first he said he did not know who they were; he then identified Ms. B.'s "ex" as having engaged in this behaviour. He referred to "on-line hate posts" by Ms. B. as contributing to his anxiety, although he gave no details. He testified that his anxiety about people talking about him is starting to develop into paranoia.

[171] Mr. B. also testified that when in Edmonton, or around family (by which I understood him to mean his relatives in Ontario), he does not suffer from the same issues and does not need medication. It strikes me as contradictory that he would claim not to need medication when in Edmonton, because when he goes there, it is for An.'s medical care, some of which takes place in the hospital, which he testified is the source of his PTSD.

[172] Counsel for Ms. B. submitted that Mr. B. tried to portray himself as a beleaguered father. While I think there is likely some truth to that, and in my opinion, Mr. B. was generally prone to exaggerate in his testimony, I do not discount the stress of raising five children, one of whom has very serious health issues, on social assistance and without having the support of extended family nearby. I am concerned, however, that the conditions Mr. B. has described - the anxiety, paranoia, fear of leaving his house, etc. - are unlikely to result in a healthy atmosphere for the children.

The proposed move

[173] Mr. B. wishes to move to St. Catherine's, Ontario with the children so that they can live where he has family support. He identified the benefits of the move as including better education for the children, a lower cost of living which will enable them to do more, more activities for the children, a vast number of support groups for An., proximity to emergency medical care in cities such as Toronto and Hamilton. Although he still has his electrician's certificate, which he testified would take a year or two to upgrade, Mr. B. would like to attend a two year college course to train as a respiratory technician. He testified that his sister would provide accommodation for a year at no cost and his parents would pay his rent for a year. He emphasized how well K. is doing there, and that K. has expressed an interest in attending university there. The fact that K. is doing very well is confirmed by the evidence of Ms. Crawford.

[174] Mr. B. also testified that the children are determined to go there, although I find it doubtful that the twins, especially An., could express that or have any real understanding of what the move is all about.

[175] Mr. B. proposes that the children can have electronic contact with Ms. B., alternate Christmas breaks, shared or alternating spring breaks, one of July or August each summer, and that she can come to visit the children in Ontario once a year at his expense.

[176] Ms. Crawford testified that she and her husband will put an addition on their home if Mr. B. and the children move to Ontario. She and her husband will feed, house and clothe them while Mr. B. goes back to school and obtains employment. Until the renovations are done, Mr. B. would stay with his sister. Ms. Crawford said she supports the proposed move and that she and her husband have enjoyed having K. live with them. They have a large extended family that would also be supportive.

[177] Mr. B.'s sister, Ms. Mitchell, testified that she also supports the proposed move. She and her husband would allow Mr. B. to live on their property for a few months until he obtains employment. She expressed some dissatisfaction with Mr. B.'s spending habits and acknowledged that he and Ms. B. owe her money. Nevertheless, she is willing to help him. Both she and Ms. Crawford have provided financial assistance in the past by buying things for the children.

The applicable law

[178] The governing legislation in this case is the *Children's Law Act*, S.N.W.T. 1997, c. 14. Section 17 provides that the overriding principle in determining custody is the best interests of the child and s. 17(2) lists a number of factors to be considered in determining the best interests, which collectively amount to "all the needs and circumstances of the child".

[179] The question whether the children should move to Ontario must also be determined in accordance with their best interests. There is no presumption in favour of the parent with custody, although that parent's views are entitled to great respect and the most serious consideration. Each case turns on its own unique circumstances and the only issue is the best interests of the child in the particular circumstances of the case. The focus is not on the interests and rights of the parents. Factors to be considered include the relationship between the child and the custodial parent as well as between the child and the access parent, the desirability of maximizing contact between the child and both parents, the views of the child, the disruption to the child of a change in custody and the disruption to the child consequent on removal from family, schools and the community he has come to know. The custodial parent's reason for moving is to be considered only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child: *Gordon v Goertz*, [1996] 2 S.C.R. 27; *Suchlandt v Diveky*, 2009 NWTSC 02.

[180] The criteria listed in *Gordon v Goertz* will apply where there is an existing custody order that a party seeks to have varied in order to be permitted to relocate, but many of them have also been applied where there is no existing custody order: *Suchlandt v Diveky.*

[181] In this case, there is a custody order, in fact there has been more than one custody order, although all orders have been interim ones. The situation is unusual in that Mr. B. has had interim custody of the children for over 5 years. Interim orders are meant as a short term solution until a matter can be heard at trial, or

resolved without a trial. The nature of interim proceedings are such that the evidence is given by way of affidavit and is often not tested by cross-examination. Here, the interim custody orders were made with the consent of Ms. B., who testified that there were changes in her legal representation over time and she always followed her lawyer's directions, although she was not content with Mr. B. having custody.

[182] Notwithstanding that the custody orders have been interim ones, factually there is a lengthy *status quo* in place because the children have in fact been in Mr. B.'s custody and day to day care for over 5 years. That *status quo* is but one factor to be considered. Under the *Children's Law Act* and the principles laid out in *Gordon v Goertz*, the Court must still embark on an inquiry as to what is in the best interests of the children at this time and that assessment has to deal with the present circumstances. Similarly, even if Ms. B. may be said to have acquiesced in Mr. B. having custody in the past, by consenting to interim orders, that is not determinative when assessing what is in the best interests of the children now.

[183] The point that a child's best interests will change over time was made by Vertes J. in *Kalaserk v Nelson,* 2005 NWTSC 4:

> [56] I wish to emphasize something first said by Abella J.A. (as she then was) in *MacGyver v. Richards*, (1995) 22 O.R. (3d) 481 (C.A.). The assessment of a child's best interests can be no more than an informed opinion made at a moment in the life of a child. Because there are stages to a child's life, what is in their best interests will vary from time to time. The assessment I make now is not cast in stone. It is simply my conclusion as to what, in the present circumstances, is the most conducive situation in which stress and instability will be minimized in an environment of care and nurture.

[184] Thus, in this case, the lengthy *status quo* has to be balanced against what has occurred over the last few years and what the current situation is in order to come to a conclusion about the children's best interests.

<u>Analysis</u>

[185] I have no doubt that both parents love the children and want the best for them.

[186] There can be no doubt that the twins and G. have a very close relationship with Mr. B., and strong emotional ties with him. He has been their primary caregiver since the separation and has borne primary responsibility for their well-being.

[187] Ms. B.'s relationship with the children is somewhat more difficult to characterize, because it has been interfered with by Mr. B. However, the fact that, like O., G. has taken steps to visit and communicate with Ms. B. without Mr. B.'s knowledge or permission, indicates to me that he does have an emotional tie to her. He has expressed a wish to strengthen that tie by pursuing a closer relationship with her. The twins are young and their relationship with Ms. B. is still developing. It is important that it be able to develop without being discouraged by Mr. B. From my assessment of the evidence, Mr. B. bears considerable responsibility for the children not having as close a relationship with Ms. B. as they should have. He has not recognized that the children have a right to a close, loving relationship with their mother.

[188] I also take into account that G. and the twins have a close relationship with O., who had significant responsibility for their care when she still lived in Mr. B.'s home. She still sees them when they are at Ms. B.'s home, but said that she seldom goes to Mr. B.'s home.

[189] Mr. B. has no other family in Yellowknife. I accept that he is very close to his family in Ontario. G. has spent some time in Ontario with Mr. B.'s parents during each of the last several summers. Mr. B.'s mother testified that prior to the trial, the twins had been to visit her in Ontario only once. Mr. B.'s mother and sister have visited him and the children in Yellowknife on occasion, although his mother said that she had not done so in 2017 and 2018. The children also have electronic and telephone contact with her. I accept that there are emotional ties between Mr. B.'s mother and the children; as to other family members, I accept there is a connection, however there was little, if any, evidence about that.

[190] K. is already living in Ontario and appears to have a very good relationship with his grandparents there. There is little evidence before me about his relationship with his siblings, however I do take into account that he most likely misses them and they him. Mr. B. testified that he speaks with K. frequently by telephone and is in touch by electronic means.

[191] Ms. B. testified that she is not in touch with her biological family, although some of them live in Behchokǫ̀, near Yellowknife. She would like her children to meet some members of her family. She is Tłı̨chǫ and would like the children to learn about their culture. Her adoptive parents do not live in Yellowknife and do not visit, however she testified that there is some communication with them. There was no evidence about G. and the twins' relationship with Mr. Paddon, who is frequently at Ms. B.'s home, or with her two year old son, but I infer that the children are familiar with both of them from visiting Ms. B. at her home.

[192] I have already referred to what I was able to glean about G.'s views and preferences in my interview with him and K. It was agreed by counsel that it would not be useful for me to interview the twins because of their developmental issues.

[193] I am satisfied that Mr. and Ms. B. are each able to act as a parent to the children. Each of them is able to give An. the special care she needs and Mr. B. conceded in his evidence that Ms. B. is familiar with An.'s medications and how to administer them. I have already referred to Mr. B.'s lack of diligence about the children's, especially the twins', school attendance and that is a significant consideration. I found that Ms. B. was more thoughtful with the concerns she expressed about Ar. being held back because of An.'s medical issues and the need for Ar. to understand that she is an individual.

[194] It is clear that Ms. B. has not been very involved in An.'s appointments in Edmonton. Dr. McGonigle did not remember having much contact with her. However, it is also clear that Mr. B. has insisted that he be the one to attend the appointments. Ms. B. has taken the twins to see Dr. Scott in Yellowknife. Dr. Scott testified that both parents have been very receptive to his recommendations about the twins' medications and care.

[195] If Ms. B. is granted custody of the children, that will result in some adjustments for them. They are used to Mr. B.'s household and his care. They are, however, familiar with Ms. B.'s household and with her care. The evidence is not clear as how lengthy their visits with Ms. B. have been over the last few years, but I infer that G., and perhaps Ar., have stayed in her home for something longer than the 3 days that Mr. B. has imposed for An. A change of custody would be a move within the relatively small community where they have always resided, so in many respects there would not be major changes.

[196] Another consideration is the permanence and stability of the respective family units. In relation to Mr. B., what brings stability into some question is the involvement of Social Services. I say that because if a child is apprehended from its parent or parents, that creates instability for the child and its security in a family unit. I have already referred to the fact that the children were apprehended for 10 days in December 2015; there is also the fact that Dr. McGonigle considered Mr. B.'s impaired condition at the hospital in Edmonton in July 2018 to be so dangerous for An. that Social Services were notified and advised to follow up on his return to Yellowknife. In the 2018 incident, Mr. B.'s actions created the potential for instability for An. and possibly also for the other children.

[197] Ms. B. and Mr. Paddon have been in a relationship since 2013 and have a child together. That relationship has been "on and off" according to Mr. Paddon, and they do not live together, so they are not what some might call a traditional family unit, however since their son lives with Ms. B., if she were to have custody of the other children, Mr. Paddon would in all likelihood be present much of the time. I have also considered the fact that Ms. B. obtained an EPO against Mr. Paddon in early 2017, which indicates some instability in that relationship.

[198] One of the factors that the Court has to consider in determining the best interests of the children is the willingness of the parent seeking custody to facilitate access between the children and the other parent. This is a significant factor in this case, because I am persuaded by the evidence that Mr. B. has not encouraged access by Ms. B. and in fact has discouraged the children from seeing Ms. B. and having a relationship with her. Mr. B.'s pattern of behaviour makes it very unlikely, in my view, that he will encourage or co-operate with access, or with G.'s wish for a stronger relationship with Ms. B. It may well be that one of the reasons that O. was able to maintain a relationship with Ms. B. was that she was older (13) at the time of the separation. Because the twins were only a few months old at the time of the separation and are only 6 at present, and with their delayed development, it is reasonable to think that they are, and will be for some time, more susceptible to Mr. B.'s influence. It is not in their best interests that they have a strained or inadequate relationship with Ms. B. The question, of course, is how to address that.

[199] Mr. B. testified that the children report to him that Ms. B. will not let them contact him when they are with her. Ms. B. and O. both denied that and O. said that since moving to Ms. B.'s home, Ms. B. has encouraged her to visit Mr. B., although O. has not wanted to. In light of Mr. B.'s tendency to exaggerate, I do not find his testimony on this issue credible.

[200] In connection with the best interests of the children, I have to consider the proposed move to Ontario. Unlike cases where one parent wishes to move because of a job offer, or a new partner's job offer, in this case Mr. B.'s position, as I understand it, is that everything will be better for him and the children if they move to Ontario. I have a very strong impression from his testimony that he is very dissatisfied with his life in Yellowknife. And indeed it has not been an easy one.

[201] I accept that the proposed move to Ontario would most likely be beneficial for Mr. B. He would have family support and would in all likelihood be happier there. The children would also benefit from more family support and exposure to

other experiences. If their father is happier, they are more likely to have a better life with him.

[202] On the other hand, based on Mr. B.'s past behaviour, I do not have confidence that he would encourage the children to maintain a relationship with Ms. B. In fact, I think there is a much greater likelihood that he will discourage access and find excuses so that, for example, telephone calls will not be returned and arrangements for face to face electronic access will not take place. Ms. B. was able to overcome some of that in Yellowknife by way of informal arrangements to see the children, such as when O. would bring them to her at work. There will be no chance of that if they are in Ontario.

[203] Another problem with the proposed plan is a practical one. Neither of the parties has worked for several years and there is no evidence that either has financial resources. It is highly unlikely that Ms. B. will be able to exercise access on anything close to a regular basis if the children move. The cost of her traveling to see them or them traveling to see her will simply be prohibitive. There was no indication in the evidence of Ms. Crawford or Ms. Mitchell that they are willing to assist with that cost, nor would they have any obligation to do so.

[204] Because of what has happened in the past, the children and Ms. B. need to improve and strengthen their relationship and a move to Ontario is not likely to serve that goal at all, in fact it is likely to hinder or even prevent it. I am satisfied from Ms. B.'s evidence that she wants to have a good relationship with her children and that she wants to play a much more significant role in their upbringing and in particular in the twins' healthy development. I am also satisfied from my interview with G. that he wants Ms. B. to play a larger role in his life.

[205] A move to Ontario would entail disruption for the children. They would have to get accustomed to a new school and a new community. For An. in particular, a move would mean new and unfamiliar paediatricians instead of the paediatricians who have treated her for years. While there is no reason to think that her medical care would be of any lesser quality in Ontario, I bear in mind that Dr. McGonigle testified that it would take some work to put together a team like she has in Edmonton. He did say that it would not be impossible to put together a new medical team, but other than the proximity to larger centers that Mr. B. referred to, nothing was identified medically-speaking that would be advantageous for An. Dr. Scott testified that despite her medical issues, An. has been remarkably well, her overall medical care is appropriate and it is not necessary for her to live in a larger center.

[206] After giving the matter a great deal of thought and having considered the relevant factors, I have concluded that it is not in the best interests of G., An. and Ar. to move to Ontario at this time. The main reason is that the Court cannot have confidence that Mr. B. will facilitate, rather than continue to hinder, Ms. B.'s access. The children's relationship with their mother needs to be encouraged and now is not the time to put that at risk.

[207] Although in most cases it might make sense to deal first with custody and then, if it is the parent with custody who wishes to move, decide on whether to permit the move, in this case I have dealt with the proposed move first. I have done that because on the evidence presented, Mr. B. really presented two scenarios to the Court. One is the scenario involving the move to Ontario, where, from his perspective, everything will be better for him and the children than it is in Yellowknife. The other scenario is to remain in Yellowknife, where, and I say this based on all the evidence, he is struggling with his responsibilities as a parent. On his own evidence, he has not been in a good frame of mind for some time.

[208] In determining which of the parents should have custody, many of the same considerations I have referred to in connection with the proposed move are relevant. I take into account that the *status quo* is in Mr. B.'s favour. I take into account that his care of the children has often been adequate, but has also been marked by some very concerning incidents, such as what happened at the hospital in July 2018 when he had An. in his care. I take into account the ongoing concerns about the children's poor school attendance, and the negative effect of that on An. and Ar., who already suffer from delayed development. Another significant consideration is Mr. B.'s behaviour around Ms. B.'s relationship with the children and what is possibly a failure, but more likely a refusal, to understand and appreciate that she has a role to play in their lives. Whether some of these problems are attributable to Mr. B.'s personal issues or his state of mind, or whether he is simply overwhelmed by all that has transpired in the last few years, I have concluded that he is simply not doing what needs to be done for the children. It is quite tragic that with all the issues this family has had to deal with, the parents have not been able to act together for the benefit of the children, and the evidence at trial has persuaded me that Mr. B.'s attitude toward Ms. B. is the main cause of that.

[209] Ms. B. knows how to administer An.'s medications, and is familiar with her medical requirements. She has demonstrated understanding of the importance of school attendance. There is no evidence of any problems in her care of her two-year-old son and no evidence that alcohol has affected her ability to be a good parent in the last several years.

[210] My task is to decide what is in the best interests of G., An. and Ar. at this time. After considering all the evidence and the options, I have come to the view that their interests will be best served if Ms. B. has custody of them. I see no realistic prospect of joint custody working. It is my hope that if Ms. B. has custody, her relationship with the children will be strengthened. The children will not have to feel constrained by Mr. B.'s negative attitude in their interactions with her, and they can pursue a normal relationship with her rather having to make arrangements to see her without Mr. B.'s knowledge. At the same time, Mr. B. will have an opportunity to deal with his own issues and in doing so, no doubt become a better parent and take steps to avoid any repetition of events such as what occurred at the hospital in July 2018.

[211] Mr. B. will have reasonable and generous access to G., An. and Ar.. The logistics of that will depend on whether he decides to stay in Yellowknife, or move to Ontario to be with K., and whether he does so for the long or short term. If counsel are of the view that a specific access schedule should be put in place, they may provide written submissions. The timelines for those submissions may be addressed by a joint letter to my attention, to be filed by September 7, 2019.

[212] There will also be an order that both parents have full access to the health and education records and reports pertaining to K., G., An. and Ar. Mr. B. will be entitled to provide Ms. B. with written input as to the health and education of G., An. and Ar. Ms. B. will be entitled to provide Mr. B. with written input as to the health and education of K.

[213] I have considered whether the parties should have joint custody of K., however in light of the difficulties between the parties and K.'s strained relationship with Ms. B., I do not think that is workable. So I order that Mr. B. have custody of K. Ms. B. will have reasonable and generous access as may be agree upon. With Mr. B. having custody of K., I do not see the need for an order that K. remain in Ontario. It will be up to Mr. B. to decide where K. lives. There will be an order that Mr. B. advise Ms. B. in writing if K. changes his residence from St. Catherine's Ontario.

Child Support

[214] Because of the custody orders I have made, Mr. B. has an obligation to pay child support to Ms. B. for G., An. and Ar., while Ms. B. has an obligation to pay child support to Mr. B. for K., each based on their respective income, pursuant to

the *Child Support Guidelines* under the *Children's Law Act*. The two obligations would normally be set off against each other, meaning that it is Mr. B. who will be making payments.

[215] Mr. B. has worked as an electrician in the past, although he testified that to do so again, he will need to upgrade his certificate, which will take one or two years. He testified that he is interested in training as a respiratory technician, which is a two year course. He has not worked since 2013 and has lived with the children on social assistance. He says that he is unable to work at the present time because of his anxiety, depression and PTSD and because of some physical issues relating to two or three incidents where his ribs were broken. There was no evidence presented to corroborate his claim to be unable to work at this time, however I do not think it is unreasonable in all the circumstances that he have some time to get back on his feet and become healthier. I am also mindful of the fact that because Ms. B. did not pay child support as ordered after 2015, Mr. B. was supporting the children on his own for several years with extremely limited resources in a difficult situation.

[216] To give both parties time to adjust to the new circumstances, I will order that no child support is payable by either of them until December 31, 2019. Commencing January 1, 2020, child support payable by Mr. B. will be calculated on yearly income that will be attributed based on minimum wage, subject to adjustment when his actual income is known. Since Ms. B. is unlikely to be in a position to work for a lengthier time, her obligation to pay child support will be based on her actual income, if it reaches the base amount in the *Child Support Guidelines*.

[217] I also order that by June 1st of each year, each party provide the other with a copy of their previous year's filed income tax return along with any notice or notices of assessment, so that adjustments to child support can be made.

[218] Past orders of this Court required Ms. B. to pay child support to Mr. B. for all of the children. The most recent of those was a Consent Order made August 13, 2014, which required that Ms. B. pay $1,148.00 per month, based on annual income of $40,997.00. On May 25, 2017, an Interim Order was made staying enforcement of all ongoing child support and arrears, and on June 1, 2017, the stay was continued by way of a Consent Interim Order.

[219] The Debtor Financial Report from the Northwest Territories Maintenance Enforcement Program (Tab 59, Exhibit 1) indicates that when the Program's file was closed (presumably because of the May 25, 2017 order), there was

approximately $31,400.00 owing (the Report is not clear as to that and I will leave it to counsel to confirm the correct figure).

[220] Ms. B. submits that the arrears should be rescinded. She testified that when the August 13, 2014 order was made, she was working, however she left her job at the end of 2015 as her doctor told her to take time off. She did not return to work in November 2016, although her doctor said she could, because she was 4 or 5 months pregnant with her son, who was born on February 10, 2017. After his birth, she stayed at home with him. She explained that she would not have been able to get a job that would cover the necessary child care costs. I also note that as at October 15, 2016, O. moved to Ms. B.'s home and was under her care and control (Trial Record, Tab 32, Interim Order of August 24, 2017), so Ms. B. was responsible for her support at that point.

[221] Tab 61 of Exhibit 1 is a "Work Absence Certificate" dated April 29, 2016 and signed by Ms. B.'s doctor, certifying that Ms. B. was assessed by him and is unable to work due to illness or injury from May 1, 2016 to November 1, 2016. There is no description of the illness or injury. Tab 62 is a "To Whom it May Concern" letter signed by the same doctor and dated August 26, 2016; it says that Ms. B. has had anxiety and stress since last year, has been attending a mental health counselor, and that her condition has improved and she will be able to return to work in November 2016.

[222] Ms. B. has no particular skills training. She has worked as a teacher's aide, a manager in a spa and a receptionist. She also did the administrative work in the company she and Mr. B. owned, however it is clear to me from her evidence that she did not feel she had the necessary bookkeeping and related skills for that work.

[223] Although the material from her doctor lacks detail, I will accept that Ms. B. was unable to work from May 1, 2016 to November 1, 2016. Prior to May 1, 2016 she was able to work. After November 1, 2016, she could have worked, although she may not have been able to obtain employment that would cover her day care costs after the birth of her son. There is a lack of evidence as to what, if any, efforts she made to find employment, but it was not unreasonable for her to stay at home with her young child.

[224] The question then is whether it has been shown on a balance of probabilities that Ms. B. is not now able, and will not in the future be able, to pay the arrears that have accumulated. That is the test that must be met before arrears of child support are rescinded rather than simply suspended: *Zoe v Fish*, 2013 NWTSC 51.

[225] With the custody order I have made, Ms. B. will have four children in her care, including her 2 year old son. In order to work, she will still require child care of some kind for the younger children. Whether she will be able to find employment that will cover child care costs and be worthwhile financially, is doubtful in light of the type of employment she has had in the past. Because of An.'s medical situation, Ms. B. may encounter difficulty in finding child care that would include sufficient care for An. The need to take An. to appointments in Edmonton or in an emergency is also likely to make it difficult for Ms. B. to maintain, if not find, employment. There is no evidence that she has any other financial resources and even if she did, they would likely be expended in caring for the children. All of these considerations persuade me that Ms. B. is not likely now, nor in the future, to be able to pay the arrears and so I order that they be rescinded.

Costs

[226] Costs normally follow the event, however in this case I question whether such an order is appropriate or realistic. If counsel wish to make submissions, they may do so in writing, to be filed by September 16, 2019.

Summary of orders made

[227] In summary, the orders I make are as follows:

1. Mr. B. will have custody of K., with Ms. B. to have reasonable and generous access.

2. Ms. B. will have custody of G., An. and Ar., with Mr. B. to have reasonable and generous access.

3. Should counsel wish to make submissions about specified access, they may do so.

4. Both Mr. B. and Ms. B. will be entitled to full access to all health and education records and reports pertaining to K., G., An. and Ar. Mr. B. will be entitled to provide Ms. B. with written input as to the health, medical care and education of G., An. and Ar. and Ms. B. will be entitled to provide Mr. B. with written input as to the health, medical care and education of K.

5. Each of the parties will advise the other in writing of any change in the place of residence of the child or children in their custody. Such notice is to be given 30 days before the change is made.

6. No child support will be payable by either of the parties to the other from now until December 31, 2019.

7. Commencing January 1, 2020, and subject to further order, Mr. B. will pay Ms. B. monthly child support for G., An. and Ar., based on attributed income calculated at minimum wage, with an adjustment for any child support that would otherwise be payable by Ms. B. for K., based on her actual income.

8. By June 30 of each year, each party will provide the other with a copy of their previous year's filed income tax return along with any notice or notices of assessment, so that adjustments to child support can be made.

9. The arrears of child support owed by Ms. B. are rescinded.

10. Costs may be spoken to by way of written submissions to be filed by September 16, 2019.

"V.A. Schuler"

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 13th day of August, 2019.

Counsel for the Children for purposes of the Judicial Interview: Margo Nightingale
Counsel for the Applicant: Paul Parker
Counsel for the Respondent: Candace Seddon

Corrigendum of the Memorandum of Judgment
Of
The Honourable Justice V.A. Schuler

1. The surname McRyan in paragraphs 155, 156, 157 and 158 has now been corrected to read **McBryan.**

2. An error occurred in paragraph 112

   Paragraph 112 reads:

   [112] (…) There is no evidence before me that Ms. B. was actually having trouble dealing with O, merely evidence (…)

   Paragraph 112 has been corrected to read:

   [112] (…) There is no evidence before me that Ms. B. was actually having trouble dealing with **O.,** merely evidence (…)

3. An error occurred in paragraph 175

   Paragraph 175 reads:

   [175] (…) and that she could come to visit the children in Ontario once a year at his expense.

   Paragraph 175 has been corrected to read:

   [175] (…) and that she **can** come to visit the children in Ontario once a year at his expense.

4. The citation has been amended to read:

   Brost v Bullis, 2019 NWTSC 30.cor 1

(The changes to the text of the document are highlighted and underlined)

S 1 FM 2013 000164

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MATTHEW BROST

Applicant

-and-

PATRICIA BULLIS

Respondent

Corrected judgment: A corrigendum was issued on August 15th, 2019, the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER