

2002 CarswellAlta 1931,

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Heritage (Next Friend of) v. Lorenzetti

Mark Amadeo Heritage by his next friends Carol Cecilia Fuller and Gordon Brian Fuller, Plaintiffs and Theresa Joy Lorenzetti and Johnathon Paul Heritage, Defendants

Theresa Joy Lorenzetti, Petitioner and Jonathon Paul Heritage, Respondent

Alberta Court of Queen's Bench

Cairns J.

Heard: February 6, 2002

Judgment: February 6, 2002

Docket: Calgary 9801-08888, 4801-85000

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Counsel: Ms. L. Campbell, for Plaintiffs

Ms D. **Castle**, for Defendants

Subject: Family

Family law --- Custody and access — Variation of custody order — Factors to be considered — Miscellaneous factors.

Cases considered by Cairns J.:

Bowes v. Gauvin (2001), 2001 ABCA 206, 2001 CarswellAlta 969, 202 D.L.R. (4th) 573, (sub nom. *B. (A.) v. B. (G.J.)*) 286 A.R. 395, (sub nom. *B. (A.) v. B. (G.J.)*) 253 W.A.C. 395, 20 R.F.L. (5th) 301 (Alta. C.A.) — followed

D. (W.) v. P. (G.) (1984), 54 A.R. 161, [1984] 5 W.W.R. 289, 41 R.F.L. (2d) 229, 11 D.L.R. (4th) 320, 32 Alta. L.R. (2d) 232, 12 C.C.C. (3d) 161, 1984 CarswellAlta 86 (Alta. C.A.) — referred to

Hepton v. Maat (1957), [1957] S.C.R. 606, 10 D.L.R. (2d) 1, 5 R.F.L. Rep. 62, 1957 CarswellOnt 42 (S.C.C.) — referred to

K. (K.) v. L. (G.) (1985), [1985] 1 S.C.R. 87, [1985] 3 W.W.R. 1, [1985] N.W.T.R. 101, 16 D.L.R. (4th) 576, 57 N.R. 17, 58 A.R. 275, 44 R.F.L. (2d) 113, 1985 CarswellNWT 54, 1985 CarswellNWT 58 (S.C.C.) — referred to

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Langdon v. York (1994), 25 Alta. L.R. (3d) 378, 161 A.R. 279, 1994 CarswellAlta 278 (Alta. Q.B.) — referred to

Martin v. Duffell (1950), [1950] S.C.R. 737, [1950] 4 D.L.R. 1, 1950 CarswellOnt 126 (S.C.C.) — referred to

Moores v. Feldstein (1973), [1973] 3 O.R. 921, 38 D.L.R. (3d) 641, 12 R.F.L. 273, 1973 CarswellOnt 156 (Ont. C.A.) — referred to

W. (K.K.) v. R. (E.J.) (1989), 69 Alta. L.R. (2d) 95, 102 A.R. 106, 1989 CarswellAlta 135 (Alta. Q.B.) — referred to

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 17 — referred to

s. 17(1)(b) — referred to

s. 17(2) — referred to

s. 17(5) — referred to

Domestic Relations Act, R.S.A. 2000, c. D-14

Generally — referred to

s. 50(1) — referred to

s. 52 — referred to

s. 53(1)(b) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

Sched. C, Tariff of Costs, column 1 — referred to

Cairns J.:

1 These are my reasons for judgment in the consolidated actions as follows: Action 9801-08888, between Mark Amadeo Heritage by his next friends Carol Cecilia Fuller and Gordon Brian Fuller, plaintiffs, and Theresa Joy Lorenzetti and Jonathon Paul Heritage, defendants, referred to as the "Domestic Relations Action"; and Action 4801-85000, Theresa Joy Lorenzetti, petitioner, and Jonathon Paul Heritage, respondent, referred to as the "Divorce Action."

2 In the Domestic Relations Action, Mr. and Mrs. Fuller claim custody and guardianship of Mark Amadeo Heritage. In the Divorce Action, they seek custody of Mark on a variation of a divorce judgment, which granted sole custody to Ms. Lorenzetti in November of 1995.

The Parties to the Action

3 The plaintiffs/applicants, Carol and Gordon Fuller, referred to as, "The Fullers," are the mother and stepfather of Theresa Lorenzetti. Ms. Lorenzetti, referred to as either "Theresa," or "The Mother," is the former wife of Jonathon Paul Heritage and the mother of Mark Heritage, referred to as, "Mark," born July 14, 1993. Mr. Heritage took no part in these proceedings.

The Agreed Statement of Facts

4 The salient agreed facts are as follows:

1. Theresa is age 37, has a B.Sc. in Biology from the University of Calgary and some art training.
2. Carol and Gordon Fuller have been married since 1973 and own and have operated Woodbine Travel since 1985. They live in the southwest Calgary community of Woodbine and are 58 and 55, respectively.
3. Jonathon Heritage, Mark's father, separated from Ms. Lorenzetti five months before Mark's birth in July of 1993. He has never seen Mark or otherwise been involved in his life. A divorce judgment was granted by Mr. Justice Moshansky February 21, 1995. An earlier order of Mr. Justice Forsyth granted her sole custody of Mark.
4. Since Mark's birth, he consistently lived with his mother until February of 1998 in either Calgary, Edmonton, or Vancouver.
5. Between 1993 and February of 1998 the Fullers assisted Theresa financially and in addition, permitted Mark and his mother to reside at their residence in Woodbine.
6. In January of 1998, Theresa determined to travel indefinitely to Mexico, to develop her art. She left Mark with the Fullers. She executed a document authorizing their decision-making. In early February of 1998, Mark came to live with the Fullers and remains with them to this day.
7. Theresa travelled alone through Mexico for several months, keeping in occasional contact with Mark and the Fullers.
8. In June of 1998, Theresa indicated that she wanted to take Mark to Mexico.
9. In July of 1998, the Fullers obtained "ex parte", an order giving them residential care and prohibiting his removal from Alberta. This was known as "The Bensler Order."
10. Theresa was served with The Bensler Order in Mexico and notified of an application scheduled for October 6, 1998. She returned to Calgary October 5, 1998, and that application was adjourned.
11. On December 15, 1998, Justice J.S. Moore granted interim-interim joint custody of Mark to Theresa and the Fullers, with residential care and control to the Fullers.

12. Access to Mark was afforded to Theresa on each two out of three weekends and by telephone. Custom and agreement between the parties resulted in further access on special days and one-half of the school holidays. All parties have followed, with vigilance, the access regime, with the Fullers attending to the transportation requirements.

13. Mr. Jeffrey Chang, Psychologist, completed a bilateral custody assessment in September of 1999 and he updated his report in January of 2002.

5 The action proceeded to trial before me for four days, commencing Monday, January 28, 2002, with oral argument on Tuesday, February 5 and my oral reasons delivered today, Wednesday, February 6, 2002.

The Evidence

6 I do not intend to exhaustively review the evidence in this case. Suffice it to say that the evidence of the four witnesses called, three on behalf of the plaintiffs/applicants, Mr. and Mrs. Fuller, and Mr. Chang, and Theresa on her own behalf, had very few disparities.

7 Other evidentiary facts over which there was little dispute include the following:

8 A. As to Mrs. Fuller, the evidence indicated that she and Mr. Lorenzetti married in 1962 and separated in 1968, after having had two daughters: Theresa, and about one year earlier, Gwenda. She married Mr. Fuller in 1973, after a two-year courtship. She and Mr. Fuller had one daughter, Melissa, born in 1974, and, thus, now 27 years of age. Ms. Fuller worked in various capacities while with Lorenzetti and also following her meeting and marrying Mr. Fuller up to and until their purchase of Woodbine Travel in 1985.

9 Mark came to live with them February 4, 1998, with the concurrence and at the request of Theresa. The evidence indicated that the initial trip to Mexico was to be in the order of three weeks and then two or three months. As it turned out, Theresa was gone from February 3, 1998 until October 5 of the same year, a total of eight months. In that eight-month period, the evidence indicated two fax communications in August of 1998 (Exhibits 20 and 21), two letters in July of 1998 (Exhibits 6 and 7), and between 17 and 19 telephone calls from Theresa to Mark and the Fullers. The evidence on the number of telephone calls varied. However, from Exhibit 1, Ms. Fuller's journal, and from Exhibit 5, her telephone bills, I am satisfied and find as a fact that there were about 20 telephone calls from Theresa in Mexico to the Fullers and Mark between February and October of 1998.

10 Prior to Mark coming to the Fullers, Theresa had prepared a document giving decision-making to Ms. Fuller.

11 That was entered as Exhibit 4 at trial, whereby Theresa "assigns temporary guardianship" to Ms. Fuller "... for whatever duration she would be travelling in the U.S., Mexico and possibly Central America."

12 The Fullers from time to time assisted Theresa both financially and emotionally. Examples of this support included:

- (1) sending money to Theresa in Mexico, to assist her return on at least two, and perhaps three, occasions;
- (2) in 1993, giving her \$10,000 so that Theresa could open an English-teaching school to Home School students, which operation ultimately failed;

(3) sending \$1,000 to Montessori School in British Columbia to assist with Mark's schooling;

(4) allowing Theresa, and later Mark and Theresa, to stay in their home from time to time;

(5) financially assisting Theresa with her wedding and marriage to Mr. Heritage.

13 Additionally, she has facilitated access between Mark and Theresa, although both she and Mr. Fuller have refused to return Mark to Theresa, despite Theresa's requests. The rationale of the Fullers is that Theresa has not stabilized her life from a residential perspective or from an employment perspective.

14 Additionally, a major stability concern of the Fullers was the suggestion by Theresa in 1997 that she give Mark up for adoption. The Fullers offered to take Mark rather than he going to "another family." The idea and suggestion of the adoption of Mark dissipated, although it was then, and seemingly is now, a major concern of the Fullers.

15 Upon Theresa having not returned from Mexico and upon talk of her taking Mark to Mexico, the Fullers commenced the Domestic Relations Action and obtained, on July 10, 1998, the "ex parte" residential Order from Madam Justice Bensler, Exhibit 23 in these proceedings. The concern at that stage was Theresa's "stability and her decision-making capabilities". Ms. Fuller wrote Theresa (Exhibit 8) and also discussed the Order with her over the phone. Over the next month or so, money was sent to Theresa and she was expected home, however did not arrive until October 5, 1998, the day before the court application.

16 Upon her return, while Theresa visited Mark at the Fuller residence, she was not welcome to stay there. As earlier stated, the Fullers were responsible for transportation of Mark to facilitate access between Mark and Theresa. To that extent, Ms. Fuller was aware that Theresa resided both temporarily and permanently in various residences between October 1998 and January 2002. The evidence is clear, however, that at least three of those residences were permanent and long-term, that is to say:

(1) 12th Avenue for 5 or 6 months in 1999;

(2) Varsity Acres from October, 1999 to March, 2000; and

(3) the 8th Avenue property for about 21 months, March of 2000 to January of 2002.

17 She conceded that the access was generally satisfactory and that the only access that was denied was when Theresa was "homeless."

18 Further, she agreed with the "Chang report", that Mark should remain with them as:

(1) that would appear to be Mark's choice;

(2) that after four years, "he is settled" in school and activities, such as Cubs and soccer; and

(3) that to move him would be disruptive and that he has already experienced "too many changes in his life."

19 In cross-examination, she readily conceded:

(1) That Theresa has no problems related to drugs, alcohol or criminal conduct.

(2) That Theresa, up until October of 1998, would always come or phone home when troubled.

(3) That during the 4 $\frac{1}{2}$ years prior to February of 1998, while her visits with Mark and Theresa were sparse, Mark was always well cared for, with no hospitalization or suggestions of sexual abuse, or other major issues between Mark and Theresa.

(4) That her differences with Theresa were related to "lifestyle differences." She is a "gypsy, a wonder lust, a free spirit," she testified.

(5) That, as a single mother in the late 60's, she also had thoughts of giving up her own children, as did Theresa. Of course, and fortunately, neither occurred.

(6) That upon Theresa's return to Calgary, in early October of 1998, she and Mr. Fuller did not return Mark to Theresa, "because she was not able to care for him." Yet, in the same breath, she conceded that Theresa had well looked after Mark prior to going to Mexico in February of 1998.

(7) That Theresa was resourceful in: (i) existing in Mexico with very little money; and (ii) providing for the needs of Mark and herself for 4 $\frac{1}{2}$ years, 1993 to 1998, without "many resources".

(8) In conclusion, in cross-examination, Ms. Fuller denied that she had betrayed Theresa's trust and "kept Theresa's most prized possession," and would not return him to his mother.

(9) She had earlier stated that she had had no concern for Mark's care up to February of 1998.

20 B. As to Mr. Fuller, he confirmed much of his wife's evidence as to the early years with Ms. Fuller and the two girls, although he clearly understood his role as a stepfather. They did the normal things of a family respecting meals, transportation, holidays, homework, activities, and the like. He vehemently denied the reporting by Theresa to Jeff Chang that he had "done nothing for Theresa and Gwenda," saying, "I was there for them." And he further denied the suggestion in the Chang report of inflicting sexual harm upon Theresa. "It was just Theresa striking out," he testified.

21 Theresa, in her evidence, denied having said those words to Chang.

22 As to Theresa in Mexico, he stated that his expectation for the duration of her stay was three weeks, later extended to three months. He conceded that Theresa, upon being advised of the "ex parte" Bensler Order, used the word "immobilized" and he imagined her to be "in shock." Their hope at that time was "that Theresa would come home, stabilize and parent Mark".

23 In cross-examination, he conceded that if Theresa stabilized, had a home and had a job, (and necessarily in that order), then they would return Mark to Theresa.

24 At the same time, he conceded that:

(1) Theresa has lived the past 18 months in the same residence.

(2) She has supported herself.

(3) She has been diligent regarding access, except where it was denied as she had no permanent home.

(4) Access has gone well.

25 He fails to believe that the "Windsor Park residence" will materialize, or if it does, it will be short-lived.

26 He further conceded that Mark very much loves Theresa and that there is always warmth between them.

27 In conclusion, he stated that: "The perfect world for a child and a parent would involve the crucial elements of a stable residence and a stable job." He concluded by stating and testifying that he would like nothing better than to see Theresa succeed in both.

28 C. As to Jeff Chang, he essentially compared the so-called Fuller situation with that of Theresa's situation and concluded, on a "best interests" basis, that Mark should remain with the Fullers. He interviewed all of the parties, alone and together with Mark, and recommended on the basis of the interviews, the reports of the three adults, the tests of the adults and Mark, and the comments of Mark, that Mark remain with the Fullers. His evidence was consistent with his two reports, Exhibits 11 and 12.

29 He is an experienced psychologist, having done between 80 and 100 bilateral custody assessments and a similar number of Child Welfare-related assessments. Indeed, a few of his assessments involved a contest, as here, as between grandparents and parents; and further, a few of those involved "ex parte" orders within those proceedings. He conceded that the parent in those latter situations would invariably feel betrayed, leading to paranoia and suspicion, and a likely elevation on the "MMPI" scale.

30 He conceded that there were no reports from the Fullers or self-reporting by Theresa of any difficulties involving drugs or alcohol, nor of health or mental problems, other than stress. He had stated in-chief that her goals were "pie in the sky" due to lack of achievement, yet he conceded the following achievements of Theresa:

(1) That she graduated and finished Grade 12.

(2) That she earned a B.Sc. in Biology, University of Calgary.

(3) That she was and had been a ski instructor.

(4) That she had earned a certificate to teach English as a foreign language educator with merit from the Scottish International Learning Centre in Edinburgh, Scotland.

(5) That the teaching of English as a second language had been achieved and she had postings and contracts in Japan twice, Switzerland and Paraguay.

(6) That she had the further achievement of being fluent in two foreign languages.

(7) He conceded her achievements as an artist and surviving in Mexico for eight months with little money.

(8) He conceded her local artwork.

(9) He conceded her volunteerism.

(10) He conceded that she had given art lessons to Calgary Public School students under a program called CAPES.

(11) He also acknowledged her careers in teaching, as a marine biologist and in the Arts.

31 The instability of which he spoke related to her three residences while the study was ongoing, yet he conceded that Mark was bright and well-adjusted, and being an expert in child development, conceded that the well-being of a child is established in the formative years of a child.

32 He was reminded that: Mark had been with his mother virtually exclusively for the first 4 $\frac{1}{2}$ years of his life, July 1993 to February of 1998; further, that attachments and bonding usually occur within the first 18 months of a child's life and that Mark had no attachment problems; further, that as a result of Theresa's nurture, in part at least, Mark was able to relate to people such as the Fullers.

33 He defined development to include: physical development, motor skills and speech and language development. In Mark's case, he noticed superior language and speech skills, the foundation for which would have been laid within the first three years of Mark's life.

34 Further, Mark was observed to have no problems with motor skills or physical development. In other words, he stated that Mark was "on target" as of February of 1998 and that Theresa had provided "adequate care" to Mark up to that time. There was obvious affection between them, and on both reports, Mark indicated a desire to spend more time with his mother. Yet, at the same time, Mark wanted things to remain as they were, i.e. living with the Fullers.

35 He conceded that her nurture and care of Mark the first 4 $\frac{1}{2}$ years could not be faulted and that Mark had developed "just fine and nothing happened in those first four years to derail his development," he testified. He further stated, "That as far as I have seen, they interact well, they communicate well, there is obvious affection, she had done an adequate job." At the same time, Mark had received warmth and consistent care at the Fullers' residence.

36 He had earlier stated in-chief that Theresa had many of the hallmarks of parenting to include: spontaneity and appreciation of the wonder of childhood and childhood experiences, an ability to set limits, a connection with Mark and an ability to make choices.

37 His primary concern was "environmental stability", which I understood to be the number of moves or transitions in Mark's residences. He again reiterated that there is no evidence of physical, sexual or emotional abuse, and that Mark is (and was) a "well-functioning child" in all periods, to include:

- (1) while with her prior to February of 1998;
- (2) on her return in October of 1998;
- (3) when he first met Mark and the adults, and considered this case in September of 1999; and
- (4) as of now, January of 2000, on his update to his report.

38 He further conceded that Theresa has been consistent, as have the Fullers, with access, which indicates a level of commitment that can sustain a relationship under "insulting, difficult conditions." There has been no alienation by any party and indeed, Mark does not apparently know of these proceedings, "for which all parties are to be commended," he said. I echo that commendation.

39 He stated that the best predictor of the future is to look at the past, provided there is no change in direction. He was not critical of her upbringing of Mark and did not for a moment suggest she was not "fit" to parent Mark. That I find to be poignant in view of the issues in this case. Indeed, he was complimentary of Theresa and the emotional connection with Mark, which was of a high degree of warmth and emotion reciprocated by Mark. That, he said, was indicative of nurturing care for Mark's first 4 ¹/₂ years. Any shift in Mark's emotions would be at least partially attributable to Mark being with the Fullers the last four years and any return to Theresa would result in another emotional shift.

40 He concluded by suggesting a "60-40" split on a frequent basis in favour of the Fullers, in order that Mark might maintain all connections, including with his mother, the Fullers, the school, and his extracurricular activities.

41 Regrettably, the impact of his conclusions and recommendations have been largely negated by his proceeding on an incorrect test, that is, of "best interests," rather than "fitness" of Theresa. Having said that, I can state that his evidence was helpful and enlightening to the court.

42 As to Theresa, in my judgment, her achievements are remarkable. While she has foibles, idiosyncracies and some "warts", to use an expression, she has done remarkably well with a minimum of support, either financial or emotional. She is what I would term a "survivor." She has completed high school, completed a B.Sc. in Biology, been a marine biologist, become fluent in two languages, French and Spanish, is able to speak two others, Italian and Japanese, has taught English as a second language in three foreign countries, endured the trauma of an abortion and a bad marriage, and yet raised a well-adjusted son on very little resources. In addition, she has become adept at scuba diving and has performed serious volunteer work. She has also become adept, and perhaps even commercially viable, with her art.

43 There is no evidence whatsoever that she is not a "fit" person to parent Mark. None of the criteria that a court looks for when considering fitness of a parent are present in this case. Those, while in no sense exhaustive, relate to: abandonment, neglect, amoral conduct, an inability or unwillingness to care for Mark, abuse of drugs or alcohol, or abuse, sexual, physical or emotional of a child. None are present here.

44 Moreover, there is no suggestion whatsoever of any cruel or unusual punishment, or any inability to meet Mark's needs. Indeed, to the contrary, the evidence sustains and supports her position that she is indeed a "fit parent". With that assessment, I agree.

45 I say that despite the fact that individuals of my generation and that of the Fullers are often hard-pressed to understand her form of lifestyle. In our judgment it may, in accord with our standards, show relative instability to not have a regular job and a permanent residence. But those factors do not an unfit person make. They are clearly balanced by her love and commitment to Mark, despite those obstacles. She has never, on the evidence, abandoned him, either permanently or temporarily, and I so find.

46 She has, on the evidence, never neglected him or failed to provide him with the necessities of life, to include: food, clothing and shelter. On the contrary, the evidence indicates that on transfer to Mrs. Fuller in February of 1998, she provided, in addition to clothing, the following items: bikes, toys, books, etc. Mark apparently was deprived of nothing and that, in large measure, accounts for his advanced reading and learning skills, all enhanced by Theresa's obvious attention to him. By all accounts, there is no suggestion of any improper conduct in her life, nor any improper treatment by her of Mark.

47 I find that not only is she not an "unfit" mother, I will go one step farther and find that she is indeed a "fit parent" who, despite obstacles, has done a very good job of raising Mark. That includes the period July, 1993 to February, 1998 and the period during her so-called "pilgrimage" to Mexico, where she communicated with Mark and the Fullers, and the period during the assessment, and to the extent possible under the circumstances, between October of 1998 to the present, during which she has had access only.

48 The most impressive aspect of this case is the obvious care she gave Mark between 1993 and February of 1998, and Mark's obvious development in those so-called "developmental, formative years." As Jeff Chang said, "The past is the best indicator of the future, absent change of direction." I see no change in direction of Theresa.

49 I say all of that despite the findings of Jeffrey Chang, that she is "flighty, has delusions of grandeur, is paranoid and narcissistic", all of which may be explained or at least rationalized by her circumstances, that being the temporary loss of her son.

50 If the test in this case is "best interests," it may well be that in the short-term, at least, Mark is best to remain with the Fullers, for clearly, they can provide, due to their economic circumstances, a better and more materialistic lifestyle than can Theresa. Whereas, on the other hand, if the test is "fitness", it is incumbent on the Fullers to satisfy the onus of proof that she is not a fit person to parent Mark. They have failed in meeting that onus.

The Issues

51

1. What is the appropriate test in determining guardianship and custody of a child in a contest between a mother, an obvious guardian, and grandparents?
2. If the test is "fitness", have the Fullers satisfied their onus of proof?
3. Are grandparents "legal strangers" to a child?
4. Does the test differ as it relates to Section 17 of the *Divorce Act* on a variation application based on "change of circumstance"?

Analysis

Issue Number 1:

52 Dealing initially with the applicable test, I have had regard to initially the *Domestic Relations Act*, and then to the recent decision of the Alberta Court of Appeal in *Bowes v. Gauvin*, [2001] A.J. No. 1003 (Alta. C.A.). The relevant sections of the *Domestic Relations Act* that are engaged in this case are Sections 50(1), 52 and 53(1)(b), and specifically, Section 53(1)(b) of the Act. Those are the sections that are relevant.

50(1) Unless a court of competent jurisdiction otherwise orders, the joint guardians of a minor child are

(a) the mother, and

(b) the father, if

(i) the father was married to the mother of the child at the time of birth of the child,

(ii) the father was married to the mother of the child and the marriage was terminated by

(A) a decree of nullity of marriage granted not more than 300 days before the birth of the child,
or

(B) a judgment of divorce granted not more than 300 days before the birth of the child,

iii) the father cohabited with the mother of the child for at least one year immediately before the birth of the child, or

(iv) the father married the mother of the child after the birth of the child and has acknowledged that he is the father of the child.

52 The court may from time to time appoint a guardian of the person and estate, or either, of a minor to act jointly with the father or mother of the minor or with the guardian appointed by the deceased father or mother of the minor.

53(1) If on the application of a minor, or of anyone on behalf of the minor, it appears

(b) that the parent or lawful guardian is not a fit and proper person to have the guardianship of the minor,

the court may appoint a guardian or guardians of the person and estate, or either, of the minor.

53 The case of *Bowes v. Gauvin* (supra) is dispositive of this issue. The Court of Appeal determined in July, 2001, in a virtually identical case, (the only difference being "paternal" as opposed to "maternal" grandparents, that the appropriate test was "fitness" and not "best interests of the child." The court in that case considered, as have I, the Supreme Court of Canada decision in *K. (K.) v. L. (G.)*, [1985] 1 S.C.R. 87 (S.C.C.), and the Alberta Court of Appeal decision in *D. (W.) v. P. (G.)* (1984), 54 A.R. 161 (Alta. C.A.). In sending the case back for a re-trial, the court held that the grandparents were "legal strangers" to the child and that the test to apply was that of "fitness of the mother" and not "best interests of the child."

54 I have also read and considered other decisions submitted to me by Ms. Campbell, to include: *Moore v. Feldstein* (1973), 12 R.F.L. 273 (Ont. C.A.); *Hepton v. Maat*, [1957] S.C.R. 606 (S.C.C.); *Martin v. Duffell*, [1950] S.C.R. 737 (S.C.C.); *Langdon v. York* (1994), 25 Alta. L.R. (3d) 378 (Alta. Q.B.); *W. (K.K.) v. R. (E.J.)* (1989), 69 Alta. L.R. (2d) 95 (Alta. Q.B.), the latter two decisions of the Alberta Court of Queen's Bench.

Issue Number 2:

55 It is my considered opinion that on the "fitness" test, the Fullers have failed to satisfy the onus of proof on a balance of probabilities that Theresa is unfit to parent Mark. Indeed, there is virtually no evidence from any witness that she is not fit to parent. On the contrary, the evidence is that she is indeed a fit parent within the criteria discussed above.

56 She fits within the dictionary definition given to me by Ms. Campbell of "fit," meaning, "suitable, appropriate, competent."

57 The indicia relied upon by the Fullers include:

- (1) Paranoia and a tendency to blame others;
- (2) Ideas of grandiosity;
- (3) Changing residences;
- (4) Lack of a permanent job;
- (5) Poor judgment on thoughts of giving up Mark for adoption in 1997 and going to Mexico in 1998;
- (6) Poor money management.

58 These, in my judgment, do not either individually or cumulatively make her unfit to parent Mark.

Issue Number 3:

59 The Fullers, being grandparents and therefore neither parents nor guardians at law, must be deemed "legal strangers at law" to the child Mark (*Bowes v. Gauvin* [supra]).

Issue Number 4:

60 The relevant subsections of Section 17 of the *Divorce Act* provide as follows. Section 17(1) provides:

Order for variation, rescission and/or suspension: (a) a court of competent jurisdiction may make an order varying, rescinding or suspending prospectively or retroactively [and then down to the germane subsection] (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

17(2) Application by other person:

A person other than a former spouse may not make an application under paragraph 1(b) without leave of the court.

61 In the instant case, I am informed by Ms. Campbell that Mr. Justice McMahon granted leave to the Fullers by fiat October 6, 2001.

17(5) Factors for Custody Order:

Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

62 In this case, the Fullers, as grandparents, fall into the category of "any other person" in Section 17(1)(b) and assert a material change in circumstance sufficient to vary the custody order granted by Mr. Justice Forsyth on the 18th of January, 1995, which is Exhibit 18 in this proceeding. That order granted sole custody of Mark to Ms. Theresa Lorenzetti. The change in circumstances averred by the Fullers relates to her stated desire, in June of 1998, to take Mark to Mexico, to live. That, of course, did not occur, perhaps in part due to The Bensler Or-

der of July 10, 1998.

63 In any event, it is my judgment that, that change is not materially sufficient to vary the custody order. Indeed, there are no other changes that I heard in this trial, which would be sufficient to vary the custody order. In other words, I am not satisfied that her stated intention, or any other evidence, would in this case be a change in the "condition, means, needs or other circumstances of the child of the marriage" sufficient to vary the prior custody order.

64 Despite the wording of the section, that the test is that of "best interests," my earlier determination of the "fitness test" would, in my judgment, be applicable, even had a sufficient and material change been shown, which of course, it has not. If I am wrong in that conclusion, I would still refuse the application on a "best interests" test.

65 Counsel were unable to provide me any authority respecting this section and a contest between a parent and grandparent, as opposed to a contest between parents/former spouses. The application to vary the custody order is thereby denied.

Conclusion and Determination

66 In the result, then, the Fullers' action for guardianship and custody of Mark is denied, as is their application to vary the 1995 custody order transferring custody from Ms. Lorenzetti to them. It necessarily follows that sole custody is confirmed in Ms. Lorenzetti.

67 Now, Ms. Castle and Ms. Campbell, having made those determinations, I would like to hear submissions as it relates to the transfer of Mark, and I guess what I am particularly interested in knowing initially is, in view of the offer of access by Theresa to the Fullers, despite the decision, whose weekend is this?

MS. LORENZETTI: The Fullers'.

MS. CASTLE: It's the Fullers' weekend, My Lord.

THE COURT: Okay. Well, what submissions do you wish to make about transfer of Mark back to mom?

MS. CASTLE: Mom would like Mark transferred back to her as soon as possible, and — and if this is the Fullers' weekend, perhaps Monday. Now, I understand, I mean, schools are going on — well, he is in the public school, they're on strike on the 19th.

THE COURT: Maybe.

MS. CASTLE: Well —

THE COURT: Likely.

MS. CASTLE: Well, if we listen to our Premier, they are, but —

THE COURT: No more money?

MS. CASTLE: Right. So, I — I leave it to you. I'm not sure — I mean, this is not an easy thing to do from the Fullers' point of view, but my client has accommodation for Mark on Monday. If the Court thinks that

the child needs a bit more time to be told of the transition, then I leave it in your discretion, My Lord.

THE COURT: Ms. Campbell.

MS. CAMPBELL: Sir, I would like to consult with my clients for a moment —

THE COURT: Okay.

MS. CAMPBELL: — if that's all right with you.

THE COURT: Do you want me to do that, do you want me to rise for a few minutes? And then, perhaps, the two of you can have a discussion and the Fullers and Theresa can have a discussion. Let me know when you are ready to talk to me. This is my third offer to settle. This one, I expect, will bear some fruit, while the other two did not, and I do not say that critically. They needed a decision and they got one.

MS. CASTLE: Thank you, My Lord.

MS. CAMPBELL: Thank you, sir.

THE COURT: Okay, so let me know through my Clerk when you are ready to resume.

68 (ADJOURNMENT)

THE COURT: Good afternoon.

MS. CAMPBELL: Good afternoon, sir.

THE COURT: Okay, what submissions do we have on this matter?

MS. CAMPBELL: Actually, sir —

MS. CASTLE: We have agreed —

MS. CAMPBELL: — we don't have submissions, we have agreement. The weekend after this coming weekend is the professional development holiday, Thursday, Friday, and then Family Day the following Monday, so what works very well for everyone is if Mark finishes his school until next Wednesday and then is packed up and Theresa comes and gets him on the afternoon of what I believe is Thursday, the 14th of February, sir.

THE COURT: Valentine's Day.

MS. CAMPBELL: That's correct, sir.

THE COURT: All right. In addition to my earlier orders, there will be an order that Mark continue to reside with the Fullers to and including — now, are we talking about the end of the school day, the start of the school day, noon of that Thursday?

MS. CAMPBELL: It's not a school day, sir, it's a day off, the 14th of —

THE COURT: Yes, that is right. Of course, it is the Thursday and the Friday that are these professional days

—

MS. CAMPBELL: That's correct, sir.

THE COURT: — or whatever they are called?

MS. CASTLE: Yes.

THE COURT: All right. What time? Do you want me to set a time?

MS. CAMPBELL: I had said 12:00 or 1:00. I haven't heard whichever is —

MS. CASTLE: That's fine. Whatever you want.

MS. CAMPBELL: 1:00.

THE COURT: Okay.

MS. CAMPBELL: 1:00 on the 14th.

THE COURT: Mark will continue to reside with the Fullers until Thursday, February 14, at 1:00, at which time he will be transferred to Ms. Lorenzetti, together with his items of a personal nature.

MS. CAMPBELL: Sir, the words "transferred to" would indicate that the Fullers should do the transportation and our understanding was that Ms. Lorenzetti was going to be arranging that.

THE COURT: Well, whatever.

MS. CASTLE: She will be there to pick him up.

THE COURT: I do not know how that is going to work, but that will be the physical transfer of him from the Fullers to Mrs. Lorenzetti, together with his items of a personal nature.

All right, now, even though you questioned my jurisdiction, Ms. Castle, in your materials that you have submitted and again reiterated in your argument yesterday, we will talk of regular access back to the Fullers, and let me say this about that. That is generous of Ms. Lorenzetti, but it is also essential insofar as the Fullers are concerned, in view of the fact that they have "stepped up to the plate" for the past four years and looked after Mark, and I say, on the basis that they felt it was best for Mark. As it turned out, their position was not vindicated, but the fact of the matter is that was a legitimate interest that they had in Mark.

MS. CASTLE: Ms. Campbell has indicated that they want one weekend out of three, I believe is what I have been told.

MS. FULLER: If that's all we can have, yeah.

MS. CAMPBELL: Oh, well —

MS. FULLER: I would prefer every other weekend.

MS. CASTLE: Well —

MS. CAMPBELL: Sorry, you have heard my clients indicate that alternate weekends would be preferable.

THE COURT: Well, the brief and the proposal, I gather, and I am reading now, "every second weekend, from Friday evening to Sunday at noon."

MS. CASTLE: Yes, My Lord.

MS. CAMPBELL: Yeah.

THE COURT: And you do not resile from that?

MS. CASTLE: Not at all My Lord, and telephone — and I think, didn't I say —

THE COURT: Oh, oh, yes, it goes on, telephone access, summer access and special occasion —

MS. CASTLE: Yes.

THE COURT: — access, but I have got to deal with them one at a time. Any submissions, Ms. Campbell?

MS. CAMPBELL: Actually, sir, I don't have the brief in front of me, so perhaps you could repeat those details?

THE COURT: Well, I am going to deal with them one at a time. The first heading was, "should be given regular, specified access," and then I will read it verbatim, "every second weekend, Friday evening to Sunday at noon." Any submissions?

MS. CAMPBELL: I think a little later on Sunday, sir. Noon strikes me as odd, that's all.

MS. CASTLE: It's the church requirement. My client wants to take her son to church every Sunday.

THE COURT: Yes, that is a legitimate reason, because they do not, and I do not say that critically. I am not a church-goer myself, but I am a believer and just because they do not go to church, I am not critical of that. But if noon is set as a parameter around which Mark is attending church, that is important from a spiritual upbringing of a child and I am sure they understand that.

MS. CAMPBELL: My only concern, sir, is that — and I actually do go to church, so I understand this. But my only concern, sir, is that, if you have plans for a weekend, particularly if the weather is good or somebody wants to go away, then 12:00 provides a severe restriction.

THE COURT: Well, there has to be a balance —

MS. CAMPBELL: Perhaps —

THE COURT: — Ms. Campbell.

MS. CAMPBELL: — one — one weekend 12:00 and one weekend not, so —

THE COURT: Well, I would hope that, maybe —

MS. CAMPBELL: There could be some flexibility.

THE COURT: — they will start talking and they will start communicating back and forth between them. I certainly, as I said during the trial sometime, sense a softening of the enmity between Theresa and Carol, but maybe I am wrong in that, maybe that is a misconception. But I would hope that they could, you know, discuss things and talk about that. I mean, if "we are going camping", maybe Mark can go to mass at 7:00 at night, and you know, those sorts of things. But I think there has to be at this stage some structure —

MS. CAMPBELL: Okay.

THE COURT: — attached to it.

MS. CAMPBELL: Oh, no, I like structure, sir.

THE COURT: Yes, and I think that is important in this case.

MS. CAMPBELL: Okay.

THE COURT: And I think it is, as I said earlier, generous of Ms. Lorenzetti to make that proposal when she does not have to and the Domestic Relations Act, as I understand it, does not envisage access on a specified basis or at all, perhaps, to grandparents, and I think it is also important for the Fullers, and I think it is also important for Mark —

MS. CAMPBELL: For Mark.

THE COURT: — and he is the one I am interested in, in this whole piece.

So, the next order will be — and this would follow the business about the transferring on the 14th — Mr. and Mrs. Fuller shall have access, specified, to Mark, or he to them, whichever way you want to say that, alternate weekends, Friday evening, 6 p.m. to Sunday noon, that access to commence — now, I would give you a little help with that, if I had a calendar, but it will be 10 days after the 14th, whatever day that is.

MS. CAMPBELL: Twenty-two.

THE COURT: That would be the 22nd, Friday, February 22nd and continuing alternate weeks thereafter.

MS. CAMPBELL: Sir, my client's business is open until 6:00, so —

THE COURT: Well, and that is what I was —

MS. CAMPBELL: — pickup at 6:00 is difficult.

THE COURT: It's hard to keep all the balls in the air up here —

MS. CAMPBELL: Yeah.

THE COURT: — to deal with school —

MS. CAMPBELL: That's why —

THE COURT: — and her requirements, and their business.

MS. CASTLE: Is 6:30 okay?

THE COURT: 6:30, 7:00, whatever is your pleasure. I picked 6:00, thinking that would fit in with the travel business.

MS. CAMPBELL: Is there any possibility that Ms. Lorenzetti could do some of the transportation, which would solve part of that problem?

MS. CASTLE: She doesn't have a vehicle.

MS. CAMPBELL: Okay, then, 6:30 or 7:00?

MS. FULLER: Does she have a bus pass?

MS. CAMPBELL: Okay, 7:00? 7:00?

MS. FULLER: 7:00 —

MS. CAMPBELL: Okay.

MS. FULLER: — is the soonest we can do it —

MS. CAMPBELL: Okay.

MS. FULLER: — which is what we're doing.

MS. CAMPBELL: Okay, 7:00, sir, works better.

THE COURT: My attitude, Mr. and Mrs. Fuller, on access is he or they who get access have to facilitate the — and I do not like to talk of "transfer" of kids, "transportation" of kids, because it sounds like we are talking about a piece of meat, and you know, that is far from accurate, but my attitude is, and I hope I have been consistent with this and intend to be in the future, that he or they who get access have to make the arrangements insofar as transportation is concerned. So, 7:00, Ms. Campbell?

MS. CAMPBELL: Yes, sir.

THE COURT: All right, 7:00 Friday, noon Sunday, commencing February 22, 2002, and on alternate weekends thereafter.

The next paragraph, Ms. Campbell, in Ms. Castle's brief, telephone access —

MS. CAMPBELL: That's acceptable, sir.

THE COURT: I think that is a good idea. Mark is now eight, he is obviously literate, he knows how to work the phone, I am sure he is interested in talking to his grandparents from time to time. But I am not going to specify that. I am just going to say regular telephone access. The less that I specify, the better it is, in my view. As soon as you start specifying, then things fall through the cracks and people are back before us.

MS. CAMPBELL: Perhaps I can just explain, because we haven't discussed these kind of things. You are going to specify that there will be telephone access, but what — the way you're using the word is in some

cases, you set a time, "There will be a phone call at 8:00 on Wednesday," and I don't think —

THE COURT: Yes, that is —

MS. CAMPBELL: — anybody wants that. We just want —

THE COURT: That is —

MS. CAMPBELL: — the freedom to be able to phone.

THE COURT: That is what I mean.

MS. CAMPBELL: Okay, do you understand the difference?

MS. FULLER: And — and we can phone?

THE COURT: Yes.

MS. CAMPBELL: It can go both ways, right?

THE COURT: And he can phone.

MS. FULLER: Okay.

MS. CAMPBELL: Okay. Yeah, okay.

THE COURT: And when I say, "reasonable," it does not mean every 20 minutes. I mean, that is a stupid example —

MS. FULLER: No.

THE COURT: — but once every other day, once every —

MS. CAMPBELL: Yeah.

THE COURT: — two or three days, you know, that kind of stuff, just to say, "Hi, how was soccer? How was cubs?" you know, that kind of business.

MS. CAMPBELL: I just wanted to explain what you were —

THE COURT: Reasonable —

MS. CAMPBELL: — meaning by "specified."

THE COURT: Yes, reasonable telephone access both ways.

MS. CAMPBELL: Thank you, sir.

MS. CASTLE: Both ways?

THE COURT: Sure.

MS. CASTLE: Okay.

THE COURT: And I do not put any obligation on Mrs. Lorenzetti to compel Mark to phone.

MS. CAMPBELL: No.

THE COURT: He is old enough where he can dial their number, if that is his pleasure, and I do not for a moment think that you will interfere with that.

Then, paragraph 3, Ms. Campbell says, "two weeks in the summer."

MS. CAMPBELL: Sir, as my clients have indicated to me, more is better. They — they like Mark. So, two weeks would be wonderful, three weeks would be even more so, sir.

THE COURT: Well, I have to again balance all of these things. At the end of all of this, there is going to be a catch-all, "subject to whatever the parties might agree upon by way of variation", or however we want to term that.

MS. CAMPBELL: "Other times as agreed" kind of thing, sir.

THE COURT: Yes, that is more articulate, Ms. Campbell, and thank you for that. But I am going to, at this stage, order two weeks in the summer, consecutive, the election by the Fullers to be made by May 1. Is that reasonable? You know, I do not know how they plan their holidays, who looks after the "store" when they are not there, if they have a manager, if they close it. I doubt if they close it, but — do you close it?

MS. FULLER: We have staff.

THE COURT: Yes, yes, so you do not close it?

MS. FULLER: No. We only have one staff because of the events of last year, we have had —

THE COURT: But that person runs the store whilst you take some holidays?

MS. FULLER: We will try.

THE COURT: Well, yes, all right. Two weeks in the summer, the election to be made by May 1 in each year, communicated to Ms. Lorenzetti.

And then the fourth prong, Ms. Campbell, deals with "special occasion" access and I do know what in Ms. Castle's vernacular that means. Does it mean Christmas? Does it mean —

MS. CASTLE: Well, when I say "special" —

THE COURT: Does it mean Easter? Does it mean Father's Day? I do not know what it means.

MS. CASTLE: It means all of those things, My Lord. And — but as you see, I didn't specify it. I was hoping that there would be some communication between these parties, because Mark has been exercising access at Christmas and Easter to all of the Fuller family, to the exclusion of his mother, so I mean, I don't know what we're going to do there — under the circumstances, and so I leave that to you, because we have got parties

that aren't even speaking right now and I know that my client feels fairly strongly about wanting Christmas, like Christmas Eve and all day Christmas, and Boxing Day. I know this coming Christmas, My Lord —

THE COURT: Well, you can define those things, you know, until you are blue in the face and it is one of those things, Ms. Castle, where they only work if people want to make them work and there are lots of reasons why they do not work. I prefer, generally speaking, to say "reasonable and generous access."

MS. CASTLE: Yes.

THE COURT: But obviously, we have got to go farther than that in this case. But I am not going to sit here and define "special occasion access."

MS. CASTLE: I just put it out as an olive branch. I don't know, My Lord, how else — I mean, can you say "special occasion access as agreed between the parties"?

THE COURT: As agreed, yes.

MS. CASTLE: Then maybe we start there and if it doesn't work, I guess we'll see you back in court.

THE COURT: Well, that would not be desirable insofar as any of the parties are concerned. Let us put some closure to this business. But having said that —

MS. CAMPBELL: Sir, I understand your concern about not wanting to set dates, times, hours, to limit people, particularly over Christmas. I wonder if it could be a little bit stronger, that — that it be, say, at least "a few days over the school Christmas holiday," or something like that, so that there can be some time around there?

THE COURT: Yes, but they are still going to have to communicate one with the other —

MS. CASTLE: Yes.

THE COURT: — to determine what the days are.

MS. CAMPBELL: Oh, I agree, sir.

THE COURT: Well, I will say —

MS. CAMPBELL: I agree, sir.

THE COURT: I will say, special —

MS. CAMPBELL: I just want some time specified; I didn't say what dates.

THE COURT: Special occasion access over the Christmas holidays and the Easter school break —

MS. CAMPBELL: Okay, very good, sir.

THE COURT: — to be arranged by and between the parties.

MS. CAMPBELL: Okay.

MS. CASTLE: Sir, can you also put limits, I mean, that they should discuss maybe a month prior, or something, or the same thing that you have done with the — the summer holidays, or are we just getting too specific again?

THE COURT: Well, those sorts of limits are —

MS. CASTLE: Restrictive.

THE COURT: Well, they are restrictive, but they are also as important for the Fullers as they are for Ms. Lorenzetti. She has got to know whether or not she can go and visit her pal in Red Deer, for example, over the Christmas holidays. She has got to know. They have got to know whether then can fly to Kenora, Ontario, to visit their relatives for example). I mean, they have to be sensible about these sorts of things, and sure, there have to be some arrangements made in advance, so everybody knows what the "lay of the land" is.

So, I am not going to say those arrangements have to be made by the 1st of December, the 15th of December, or whatever. I mean, you are dealing with intelligent, sensible people here and they can resolve it. If they cannot resolve it, then of course, there is access to the court, and I am not trying to encourage anybody to continue with litigation in this matter. In fact, quite to the contrary, I am suggesting that there should be closure, and that is what I was trying to promote last Thursday and then again yesterday, but that did not occur, for whatever reason, and that is why I tried to put some closure to it today. But it may be a career file for you ladies, I do not know. But you have got to make some arrangements early enough so you can have access to the courts if those arrangements are not made.

MS. CASTLE: In a reasonable period of time.

THE COURT: Sure.

MS. CAMPBELL: Okay. And the catch-all, "other times as agreed," sir.

THE COURT: Yes. And you can put that in the order. And I expect Ms. Castle will be preparing the order and you will be approving it.

MS. CAMPBELL: Mm-hm.

THE COURT: And —

MS. CASTLE: I must raise the issue of costs.

THE COURT: Yes.

MS. CASTLE: On the cost issue, I would argue that we have been successful. Because I am on a Legal Aid retainer, I — I am obligated to make it and also because of my client's financial position. I can tell you that the costs on a — I'm not asking for court costs, because court costs would be much more, My Lord, than probably what my Legal Aid retainer will pay me. I can advise the court that there has been a Legal Aid account rendered by Brad Spier and one by myself, and then I will be able to —

THE COURT: Well, let me just see if I understand. You are not asking for party and party costs when you

say, "court costs"?

MS. CASTLE: Well, all I'm asking is that the extent of the Legal Aid account would be paid. Now, right now, I know there's \$3,000 outstanding. I'm going to probably be able to render a bill for about another \$1800, so the total cost that — of our Legal Aid bill would be approximately \$5,000. If I did it on the bill of costs, then we would recover more than what she has paid to Legal Aid, and all I'm seeking is that her costs to the Legal Aid Society of Alberta be paid in full, which is a — I mean, if I went under the Rules of Court, I think that I would get substantially more than that.

THE COURT: I do not know whether you would or not. Under Column 1 of Schedule 'C'?

MS. CASTLE: On Column 1 for five days. I just did one where I got about \$4500 just for trial time and prep, so I — all I'm seeking My Lord, is that the Legal Aid Society account be paid, and they're accepting \$125 a month towards that. I have to render my final account, and I — I could provide at a later date the total cost that's outstanding to Legal Aid, if you want us to come back and make submissions on the costs. Instead of me here mumbling to you about what I think it might be, I would have an actual number for you, My Lord, and provide that to you, because I have to just get a hold of the authorities and they will give me the number with respect to Mr. Spier's account and then mine. But I can't see it being much more than \$5,000 since the beginning and to conclude this trial. And —

THE COURT: Well, I would like to also see a comparative analysis, insofar as the Column 1 of Schedule 'C' —

MS. CASTLE: That would be close, probably, to \$10,000 to \$12,000.

THE COURT: — is concerned. Okay, well —

MS. CASTLE: Because if I add all the discoveries and —

THE COURT: I have been on the bench —

MS. CASTLE: — and I will do that for you.

THE COURT: — 20 years now, so I am well past getting into the area of taxing accounts, either my own or anyone else's.

MS. CASTLE: But I will do that for you, sir, because I would be interested in seeing that myself, because then you know I — I think that Legal Aid lawyers should at least be paid what the bill of costs says. But anyway, I will — I can do that for you.

THE COURT: Okay, Ms. Campbell.

MS. CAMPBELL: Sir, I'm aware that my friend has been successful and I wouldn't deny that. I would suggest to you, sir, that until last July, from that definitive case which we didn't look up until beginning the research for the case, this was not a matter that was, from the content of it, all that clearly defined. I would also submit to you, sir, that my clients did not take reasonable steps to harm anybody, they took steps solely with the best interests of the child in mind and nothing else, and that for those reasons, sir, they're not here out of any malice or selfishness —

THE COURT: Oh, there is no —

MS. CAMPBELL: — or to gain for themselves.

THE COURT: There is no suggestion of that, Ms. Campbell. They are here out of a sincere desire/interest to make sure that Mark is protected, and I believe that. The —

MS. CAMPBELL: Absolutely, sir.

THE COURT: The difficulty is that their position was not successful at law.

MS. CAMPBELL: No, I am aware of that, sir. The costs are —

THE COURT: What I think I —

MS. CAMPBELL: The costs are within your discretion, sir. I appreciate my friend saying she would claim the Legal Aid certificate, because I think she is correct that Legal Aid is probably less than the bill of costs —

THE COURT: What I —

MS. CAMPBELL: — but I think —

THE COURT: I think what I would like to do is I would like to have some very brief submissions on costs. I am going to make an order here in a minute, but what I have got in mind is, I am also aware that the Fullers paid for the bilateral assessment.

MS. CAMPBELL: They have, sir.

THE COURT: And Chang, while you led his evidence, is really, in my world up here, a court expert. In other words, yes, he was paid by the Fullers, but he was not their "hired gun."

MS. CAMPBELL: No, it started out —

THE COURT: He was —

MS. CAMPBELL: — as a bilateral, sir.

THE COURT: Yes.

MS. CAMPBELL: We don't know how they are going to come out.

THE COURT: He was an expert, you know, for the benefit of the court.

MS. CAMPBELL: Perhaps I can ask them how much that cost, sir —

THE COURT: And —

MS. CAMPBELL: — because the bill didn't come to me.

THE COURT: Well, what I want you to consider is a credit to the Fullers for 50 percent of that account. They should not have to pay. It is not a win or lose scenario insofar as that account is concerned. That, in the ordinary course on a bilateral basis —

MS. CAMPBELL: Would be divided.

THE COURT: — is generally paid by both parties.

MS. CAMPBELL: Okay.

THE COURT: So, I want you two to consider that in the submissions that you make to me.

69 But let me just make a comment about costs generally and then I will hear submissions as to quantum, having regard to the Legal Aid business, having regard to Column 1 and Schedule 'C', having regard to, particularly, the disbursement for Chang.

70 Whilst I have been on the bench, I have attempted to be consistent with the issue of costs. Costs in my chambers, or costs in my court, follow events. That is not particularly erudite because that is what the Rules of Court say, that if the court is silent on the issue of costs, then they follow events.

71 The event of this litigation has been success by Ms. Lorenzetti and non-success — I do not like to say "failure" — by the Fullers. There is no suggestion that their action was specious or spurious. However, the fact of the matter is, it did not, on the law and on the evidence, carry the day.

72 If costs are to be awarded in a specious or spurious case, then those costs are in the discretion of the court often punitive, such as exemplary, such as a multiple of a column, and the like. But in an ordinary case where everybody comes to court with good faith, clean hands, and those expressions, costs follow events without any punitive aspect. That is the case in the instant case.

73 I will reserve on the question of costs. I would like to receive materials, say, within two or three weeks from each counsel as to the issue of costs, and then I will render my decision. I specifically reserve in order that I not become functus. And those are the three issues that I am interested in: the Legal Aid indemnification, and I expect that, that is hanging over Ms. Lorenzetti's head —

MS. CASTLE: It is, and I — I need to get that information from them, which when you tell me three weeks, I will start the ball rolling right now, to get that information.

THE COURT: Okay, well, today is the 6th. Let's say by the end of February.

MS. CASTLE: Okay. I will tell them that we require it for your review by then.

THE COURT: That probably will not impress them much, but there you are.

And then I am interested in the comparison between Schedule —

MS. CASTLE: '1'.

THE COURT: — 1 of Column 'C', what that amount would be. And then I am interested in giving the Fullers a credit for one-half of the Chang account. So, I will receive those materials, I will crunch some

numbers, and then I will have you back and if you want to make submissions, that is okay, or if you just want to await my decision, that too is okay. You can let me know what your pleasure is.

MS. CAMPBELL: Thank you, sir.

THE COURT: All right. Let me, in conclusion, apart from the costs, thank Ms. Campbell and Ms. Castle for a very well-conducted case. It was conducted certainly with professionalism that we have come to expect that in these courts. It was conducted without "grit" insofar as the cross-examinations were concerned. There was no, I am pleased to say, demonstration between the litigating parties, and I say that is commendable, particularly in view of the emotions. We, in the courts, deal with all sorts of matters, but none of the matters we deal with entail the emotions of a custody lawsuit, so I am obliged to counsel and I am obliged to the Fullers and to Ms. Lorenzetti. It was conducted with professionalism and all of the witnesses handled themselves with dignity and charm, despite the emotions. So, I am obliged for that. Thank you.

MS. CASTLE: My Lord, thank you.

MS. CAMPBELL: Thank you, sir.

74 PROCEEDINGS CONCLUDED

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