2003 CarswellAlta 891, 2003 ABQB 20

Ganden v. Kovalsky

MARK EDWARD GANDEN (Plaintiff) and MARNI JEAN KOVALSKY (Defendant)

Alberta Court of Queen's Bench

Park J.

Heard:
Judgment: January 14, 2003
Docket: Calgary 9901-09863

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Counsel: Linda Goold for Plaintiff

Diann P. **Castle**, Jane M. Hoffman for Defendant

Subject: Family

Family law --- Support — Child support under federal and provincial guidelines — Retroactive award.

Family law --- Custody and access — Factors to be considered in custody award — Conduct of parent — General.

Family law --- Custody and access — Terms of custody order — Mobility.

Family law --- Custody and access — Access — Factors to be considered — Conduct of parent.

Family law --- Custody and access — Evidence.

Cases considered by *Park J.*:

> *Gordon v. Goertz* (1996), [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, (sub nom. *Goertz c. Gordon)* [1996] R.D.F. 209, 1996 CarswellSask 199, 1996 CarswellSask 199F (S.C.C.) — considered

> *Starko v. Starko* (1990), (sub nom. *S. (D.G.) v. S. (S.L.))* 74 Alta. L.R. (2d) 168, 1990 CarswellAlta 83, 106 A.R. 62 (Alta. Q.B.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act

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1982 (U.K.), 1982, c. 11

s. 7 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 282 — referred to

s. 283 — referred to

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

Generally — referred to

Rules considered:

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

R. 218(1) — referred to

Regulations considered:

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

Federal Child Support Guidelines, SOR/97-175

Generally

s. 7

***Park J.*:**

1 T.G. was born on September 9, 1998. She is the daughter of the 35 year old Plaintiff, M.E.G., (hereinafter known as "M.E.G.") and the 35 year old Defendant, M.J.K., (hereinafter known as "M.J.K."). At issue in the trial, which lasted some 40 days (albeit all of which were not full trial days) were the following:

1. Custody of T.G.;

2. Mobility of T.G.;

3. Access to T.G.;

4. Retroactive child maintenance for T.G. claimed by the Plaintiff for the period of April 1, 2001 until any change in custody awarding T.G. to the Defendant.

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History of the Relationship

2 In October of 1997 M.E.G. and M.J.K. started dating. They continued to date on a casual basis until T.G.'s birth. After the birth the nature of the relationship changed. Dating continued but they agreed to co-parent T.G. However, each continued to live in a separate residence.

3 In September of 1998 M.E.G. was in the first month of operation of his hearing aid business, called the Alberta Hearing Aid Centre. M.J.K. was unemployed. She had applied for social assistance in the last months of her pregnancy with T.G. in August of 1998. Initially social assistance had refused to provide her with any assistance on the basis that she and T.G. were M.E.G.'s responsibility. But she was able to convince social assistance that she was not employed, was not the responsibility of M.E.G. and had no funds. She was granted social assistance in November of 1998. By November of 1998 M.E.G. had commenced paying M.J.K. $200.00 per month for the support of T.G. The $200.00 a month support was the result of an earlier promise made by M.E.G. when M.J.K. voiced her fears to him of being a single mother with two children. She was, and is as well, the mother of C.K., who is now 14 years of age. M.J.K. has had the custody of C.K. since she separated from her husband and C.K.'s father in 1992. She receives no financial assistance from C.K.'s father although she continues to encourage C.K. to see her father. The father has a substance abuse problem and M.J.K. will not allow C.K. to have any overnight access with him as a result.

4 M.J.K. remained on social assistance from November of 1998 until May of 1999. She had left her previous employment in the summer of 1998 when she was almost full term with T.G. From the summer of 1998 until the commencement of her social assistance in November of 1998 she supported herself, C.K. and T.G. on money borrowed from family and friends. She as well depleted funds she had received from a motor vehicle accident settlement. With trips to the food bank, the settlement monies, and the financial assistance of her family and friends, she was able to survive until her social assistance started in November of 1998. She, as well, convinced Social Services by November of 1998 that she was receiving only the sum of $200.00 per month from M.E.G. for T.G.'s child support.

5 M.J.K. and C.K. were sharing a house in the fall of 1998 with a lady named T.C.M. M.E.G. was living in his own apartment. Because he was dating M.J.K. in 1998 he frequently came to M.J.K.'s house. After the birth of T.G. he was a more frequent visitor. During the course of his visits he noted that M.J.K. was an untidy housekeeper. It was his belief from his observations during these visits and during the course of his relationship with her that M.J.K. failed to discipline C.K. or set appropriate boundaries for C.K. according to his standards.

6 T.G.'s birth was not an easy birth for M.J.K. She was discharged from the hospital in a weakened condition. M.E.G. to his credit was present and supportive during T.G.'s birth. With M.J.K.'s consent M.E.G. took T.G. to his own residence for T.G.'s first night out of the hospital after her hospital discharge. M.J.K. consented because she wished (and still does) T.G. to enjoy a good bonding relationship with M.E.G.

7 M.E.G. returned T.G. to M.J.K. the next day to allow M.J.K. to continue nursing T.G. During these first few days M.J.K. received help in the care of T.G. from both M.E.G. and her roommate, T.C.M.

8 M.E.G. worked full time as an audiologist at his business until June of 2001 when he closed the doors and walked away from it.

9 After T.G.'s birth M.J.K. remained at home on social assistance caring for T.G. on a full time basis. In February of 1999 she began to do some part time work for M.E.G. in his business. She remained as T.G.'s primary care giver until January of 2000.

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10 M.E.G. was very much involved in T.G.'s life and care. He is a meticulous note taker and note keeper. He has recorded in his diary some 486 pages of notes from T.G.'s birth until November of 2001 regarding the events of his life proceeding this trial. He noted in his testimony that from September 9, 1998 until July of 1999 he had T.G. in his care some 144 times. This care consisted of partial one or two hour visits at a minimum and varying 1, 2 or 3 days of overnight access at the maximum. Some of these overnight access visits included M.J.K. and C.K. when they came to spend the weekend with him. All four would spend time together as a family unit during those weekends. On other weekends M.E.G. would have T.G. by himself at his apartment. He as well with the consent of M.J.K. took T.G. to Medicine Hat to visit his parents on some additional weekends.

11 Although M.E.G. claimed in evidence that for the first 9 months of T.G.'s life he cared for her one-half the time, I find that M.J.K. was the primary care giver for T.G. during that time period. She was nursing T.G. and was at home full time with T.G. When she started part time work in February of 1999, she and M.E.G. were both situate at his place of business. However, he was at work on a full time basis. M.J.K. was not. In addition when M.E.G. had T.G. overnight, he would return her to M.J.K. in the mornings.

12 When M.J.K. began her part time work in February of 1999 she left T.G. in the care of her mother, Diane Blackstock, who lived in the City of Calgary. M.E.G. did pay M.J.K. a little money for her part time work at the business but she was still receiving support from social assistance.

13 From February of 1999 until July of 1999 M.J.K. continued to be the primary care giver for T.G. although again M.E.G. was involved in T.G.'s life on a frequent and regular basis. T.G. was shared between the two parties on a consensual basis but M.J.K. certainly did the majority of the parenting. She parented T.G. both night and day while M.E.G. parented her alone in his access periods and with M.J.K. when they were together. He, of course, could only parent T.G. in his free time away from his full time employment. M.J.K. was most obliging in allowing him to care for T.G. as much as he could in his time away from his employment.

14 Since the date of T. G.'s birth M.E.G. has been critical of M.J.K.'s parenting of C.K. and T.G. He was, as well, critical of M.J.K.'s own personal behaviour. He claimed she was not providing basic staples for T.G. such as diapers and food. But I note he did not contribute any funds himself to M.J.K. in her pregnancy and he only started to pay $200.00 child support in October of 1998. He felt M.J.K. was spending her money foolishly on a car lease which she had entered into months before T.G.'s birth. But I note the car provided M.J.K. with needed transportation. M.E.G. was as well critical of M.J.K. having a cell phone and providing treats for the children when there were no special occasions. However, I note that M.J.K., despite being in dire financial straits and on social assistance with only minimal financial support from M.E.G., never allowed her children to be without the necessities of life. M.E.G. did nothing to assist M.J.K. when she was on social assistance and caring for T.G. other than to pay the $200.00 per month. M.E.G.'s criticism of M.J.K. during this period of her life was not well founded. She provided adequate care for the children with no neglect or irresponsibility on her part.

15 On April 26, 1999 M.E.G. reported M.J.K. to the child welfare authorities in the City of Calgary for her alleged neglect of the children. He allowed M.J.K. to believe that it was her roommate, T.C.M., who had reported her. This belief on the part of M.J.K. caused her friendly relationship with her roommate to turn sour. T.C.M. advised M.J.K., when confronted by M.J.K., that it was not she, who had reported M.J.K. to the authorities. Although T.C.M. advised M.J.K. she knew who had reported M.J.K., she nevertheless, refused to name that person. T.C.M.'s refusal was based on her promise to M.E.G. that she would not reveal his secret, that it was he, who had reported M.J.K. to the authorities. As a result M.J.K. and T.C.M. parted company as roommates near the end of June of 1999. In the interim the child welfare authorities had conducted an investigation and quickly had closed the file with no findings of neglect or child abuse against

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M.J.K. towards the children.

16 The breakup with T.C.M. caused M.J.K. and the two children to move during the second half of 1999. They initially moved in with M.J.K.'s mother. However, a short time later M.J.K. and her two children moved to a basement suite in north Calgary.

17 Despite M.J.K. sharing T.G. with M.E.G. and providing him with generous access, he did not feel satisfied nor content with his legal position. On June 16, 1999 after he and M.J.K. had shared a dinner at a restaurant together, he had a process server serve M.J.K. with an order of this Court. He did not notify M.J.K. that she could expect the order. He caused his counsel to attend on an ex parte basis in this Court and obtain an order of interim joint guardianship and joint custody. When M.J.K. subsequently confronted him about his tactics in obtaining the ex parte order, he advised her that he was frightened that he didn't have any rights on paper. He needed parental recognition. M.J.K. in her testimony indicated all that M.E.G. had to do was to ask her and she would have consented to such an order. In any event she consented to a subsequent court order and the ex parte order by consent was confirmed shortly thereafter on review. The subsequent order contained a declaration of parentage in favour of M.E.G.

18 A further reason advanced by M.E.G. in support of his instruction to his counsel for the application for the ex parte order of 1999 was a fear that M.J.K. would leave the Province of Alberta with the children as he alleged she had threatened to do in the past.

19 Although the parties were continuing to date and co-parent T.G., by June of 1999, their relationship was proving to be a stormy one. In the summer of 1999 they took counselling to help heal and maintain their relationship from one Kim Blight, a counsellor. Her efforts proved to have little impact. The relationship remained troubled. However, despite their temptuous relationship M.J.K. asked M.E.G. in the fall of 1999 if he would join her as a tenant in a rental home commencing in January of 2000. Although she previously had been pressuring him to move in with her during the early months of 1999, he never did. However, he changed his position and did move into this rental house with her and the children in January of 2000.

20 It was M.J.K.'s belief, that once she and M.E.G. began living together, that they, at least, would be trying to make the relationship function as a family unit. Yet M.E.G.'s reasons for entering into the move was to maintain contact with T.G. and to ensure that T.G. was cared for properly and was safe. He had a further belief that M.J.K. wished him to move in with her and the children in order to support them.

21 Prior to the parties' move into M.J.K.'s rented house, they continued to co-parent T.G. from their separate residences. M.J.K. was still the primary care giver for T.G. as she remained at home. From June of 1999 until January of 2000 they continued to date. M.J.K. continued to work at the hearing aid business on a part time basis during the fall of 1999. Although they co-parented and shared the care of T.G. to a greater extent than they had prior to June of 1999, it was still M.J.K. who was working part time and caring for T.G. She allowed M.E.G. in the spirit of the June of 1999 court order and their subsequent agreement in June of 1999, to participate more and more in the parenting of T.G. But the fact remained that M.E.G. in the fall of 1999 was living in a separate residence and was only dating M.J.K. Despite his almost 50% parenting of T.G., when he was not working, it was M.J.K. who remained the primary care giver for T.G. She was working very few hours at his place of business from June of 1999 until November of 1999.

22 In November of 1999 the situation had again changed. In that month M.J.K. started to work on a full time basis with M.E.G. at his business. This meant that both parties were at work during the day. M.J.K. was still T.G.'s primary care giver but due to her work schedule both she and M.E.G. shared in the care and babysitting of T.G. M.J.K. continued to use her mother as a babysitter. M.E.G. used his relatives and M.J.K.'s mother to babysit T.G. when he was responsible

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for her care but was not able to be physically present. This arrangement was totally agreeable to both parties as M.J.K. had asked M.E.G. to help share in the babysitting of T.G. This request by M.J.K. was made shortly after the June 1999 court order. M.E.G. was only too happy to oblige. He was a major participant with respect to the care of T.G. from June of 1999 to January of 2000. However, he was still not the primary care giver.

23 When M.J.K. broached the subject of sharing the same house starting in January of 2000 M.E.G. was only too happy to accept the invitation. As set out earlier, he was concerned about T.G.'s care and safety and he wished to have more control over his daughter. He was concerned that he still could lose T.G. When he and M.J.K. continued to have their frequent and heated arguments during the latter months of 1999, M.J.K. during the course of the arguments, would threaten to take T.G. away from him. M.E.G. felt he could address his concern regarding those threats if he was living in the same residence as T.G.

24 In January of 2000 they commenced living together with T.G. and C.K. However, despite their agreement to share the same residence each had a wholly different concept of the nature of their relationship. M.J.K. believed that she and M.E.G. and the two girls were going to attempt to establish a family unit. She believed they had agreed on a plan to establish a six month trial relationship to determine whether a family unit would work. M.J.K. was aware that she and M.E.G. had contentious issues. However, she felt with the aid of their earlier counselling from Blight and the church, they could work on their differences and create a family unit. As a result she reached the opinion during the subsequent months of 2000 that she and M.E.G. formed a boyfriend/girlfriend or mother/father relationship. She became confident the relationship would become more intact and a family unit would result as time progressed. She had high expectations that they would make a valid effort to become a couple with children. In accordance with this belief she testified that M.E.G. never advised her that he was moving into the residence in January of 2000 only to care for T.G. Rather she indicated M.E.G. advised her that it was his intention to form a family unit. In this connection she testified they lived together, ate together and made love together. They each had separate bedrooms but she felt that such a living arrangement was necessary because they still had some relationship problems to overcome. The separate bedrooms gave them necessary space, both in time and distance, if one desired a break from the other's company. As well she indicated the two of them engaged in family recreational activities and attended social and festive gatherings held in the homes of their friends and relatives. Finally, she testified M.E.G. introduced her as his girlfriend, wife or significant other as the situation required. In the eyes of M.J.K. this housekeeping arrangement meant they split the household expenses equally. T.G. slept part time in M.J.K.'s bedroom and part time in M.E.G.'s bedroom depending on who put T.G. to bed. C.K. had her own bedroom. Further M.J.K. indicated the two of them looked after the children together in the same house. They worked together at M.E.G.'s business. They split housework on the basis of need and convenience. As described earlier, each of them was responsible on an alternate basis for separate babysitting care for T.G. when both were working full time at M.E.G.'s business. M.J.K. used her mother as the babysitter. M.E.G. used his relatives, M.J.K.'s mother on an ever decreasing basis, and an independent day care agency. As a forewarning of the lack of trust and lack of communication, which was demonstrated by each of them toward the other during the year of 2000 and during the course of this trial, M.E.G. did not advise M.J.K. the name of that independent day care centre. M.J.K., who is a naive and trusting person, never pushed him to find out the name or location of it. From January of 2000 until June of 2000 the two of them split the care of T.G. on a equal basis. During the evenings they were both at home and they both cared for T.G.

25 M.E.G. provided a different version of events in his testimony. He indicated he and M.J.K. were merely roommates. He decided to move into the residence in January 2000 because of his fear of M.J.K. absconding with T.G. and his fear for the safety and improper care of T.G. which M.J.K. had been exhibiting since T.G.'s birth. In this connection he testified he had numerous complaints about M.J.K.'s care of T.G. and her behaviour towards T.G. In becoming M.J.K.'s roommate he hoped to demonstrate a new and better standard of care for T.G. He was concerned about M.J.K.'s failure to provide the basic staples of life to T.G. He felt M.J.K. spent her meagre funds foolishly in the wrong areas and not on the

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proper necessities for T.G. He noted M.J.K. was a sloppy housekeeper and not a cleanly person. She left wet towels, clothes, dirty dishes and food debris throughout the house. He was concerned this lack of cleanliness and sloppiness would impact upon T.G.'s health. He noted M.J.K. would often leave T.G. clad only in a diaper at times. She did not properly clean T.G.'s baby bottles. She slept with T.G. and did not use T.G.'s crib for anything but a storage bin. When she slept with T.G., he was worried that M.J.K. would roll over and crush T.G. He observed M.J.K. to allow T.G. to be strapped loosely in a baby swing. At other times T.G. would be placed in front of the television set. This behaviour caused M.E.G. to worry that T.G. would be exposed to radiation emanating from the television. He worried about M.J.K.'s driving habits when she transported T.G. in her vehicle in 1999. He noted M.J.K. allowed diaper rash to break out on T.G.'s body. He further noted that M.J.K. would not bathe T.G. properly and would leave caked baby formula on T.G.'s neck. He finally noted in 1999 M.J.K. would often talk on the telephone in her home and leave C.K., who was eleven years old at the time, to look after T.G. In general M.E.G. believed M.J.K. was a neglectful mother and irresponsible.

26 After he moved into the residence in January of 2000 it was his belief that things did not improve. M.J.K.'s lifestyle, neglectful care of T.G., sloppiness and untidiness continued despite his protestations. As a result he and M.J.K. only shared accommodations and he took steps to take over T.G.'s care. He described his efforts in that respect. It was his testimony that he and T.G. started to live together in his separate bedroom. He placed a lock on his door in order to protect his possessions and to allow him to care for T.G. properly in safety and privacy. He noted M.J.K. had exposed T.G. to various safety issues in the house including:

1. Broken glass in a garbage bag;

2. Water left standing in a full bath tub;

3. Hair dye left within reach of T.G.;

4. M.J.K.'s curling iron left within reach of T.G.;

5. M.J.K. left a hot iron within reach of T.G.

He was concerned about M.J.K.'s lack of care on these safety issues bearing in mind T.G. was now a toddler in 2000. He noted M.J.K. allowed T.G. to touch a hot element and burn herself. As well he was concerned about T.G.'s care and safety when she was in the care of M.J.K.'s mother. He noted he had to pull 10 to 15 slivers per day from T.G. when she was left on an old wooden deck outside the mother's home. He as well alleged that on one occasion the mother left T.G. in the care of a boarder who in turn was not aware that T.G. was in the house at the time. Finally, he was critical of M.J.K.'s care of her older child, C.K. Before he moved into the house in January of 2000 he had been very critical of the manner in which he perceived M.J.K. was raising C.K. He noted she allowed C.K. to sleep late on school days and as a consequence C.K. had an inexcusable number of late attendances and missed attendances at school. This was attributed to his belief that M.J.K. and C.K. watched late night television programs. Further he was concerned that M.J.K. failed to meet C.K.'s needs with a proper diet. Breakfast was often missed and C.K. was sent to school with "junk" food. He noted further C.K. often returned home at the end of the school day and nobody was at home to greet her or guide her. He further felt M.J.K. failed to guide C.K. in doing her homework. M.J.K. was a failure in his eyes in her attempts to discipline C.K. adequately.

27 He had hoped to have M.J.K. correct these flaws in C.K.'s care when he moved into the home in January of 2000. He testified that it was their initial plan that in sharing the accommodations, M.J.K. would care for C.K. and he would care for T.G. However, over the course of the year (2000) he noted M.J.K. failed to improve her care of C.K. She contin-

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ued to fail in the proper discipline of C.K. There were no guidelines set for C.K. C.K. continued to be late for school. He testified from January 2000 until the end of school in June of 2000, C.K. and M.J.K. left the residence late for C.K.'s school on 84 occasions. This fact was kept in his voluminous diary. I do note that the approximate length of the school year from M.E.G.'s move into the residence in January of 2000 until the end of June 2000, excluding spring break and teacher's professional days, would be somewhat over a hundred days. Not counting the days that C.K. was absent from school, this figure as counted by M.E.G., would make C.K. late for school nearly every day in that time period. He testified he initially tried to awaken C.K. and her mother but they refused to get up. As a result, he testified, he soon gave up and turned his attention to the care and needs of T.G.

28 In this connection he advised that he locked his bedroom door when he put T.G. to sleep at night in order to prevent M.J.K. from entering the bedroom, awakening T.G. and then playing with her until 1:00 o'clock a.m. He alleged this interfered with T.G.'s schedule. If accepted, I would certainly agree with his analysis on such an interruption of a young child's schedule.

29 He further indicated he was responsible for T.G.'s breakfast preparations and transporting T.G. to her day care in the year 2000. He looked after T.G.'s diapers and bottles. He obtained all of her necessities and attended to her medical needs. He and T.G. ate together. He cleaned up those attendant dishes. He indicated he did all the yard work and cleaned the entire house save and except for the bedrooms of C.K. and M.J.K. He picked T.G. up at 5:00 o'clock p.m. and he cared for her until her bedtime. He spent the weekends with her. He further testified that he entertained and cared for T.G. 95% of the time in 2000. He estimated M.J.K. only spent 20 % of her time with T.G. He testified that he began to take "shortened" work days from his business in order to care for T.G.

30 Despite his hopes for the improved behaviour of C.K., he noted M.J.K.'s standard of care did not improve. He further noted C.K.'s consequent behaviour did not improve. He had posted house rules to govern the activities and conduct of everyone. He advised M.J.K. and C.K. refused to follow the rules which related to cleaning up their own mess. He noted in his testimony that M.J.K. and C.K. never once vacuumed their rooms in 54 weeks. Debris and clothing were left strewn around their rooms. C.K. and M.J.K. purchased snack food and then would fail to clean the kitchen.

31 With this deteriorating situation he testified that the weak relationship between him and M.J.K. started to disintegrate. There were more and more heated arguments. As well he advised that he was threatened physically in the year 2000 by the Defendant. He indicated M.J.K. would threaten him both at the business and at home. He testified on one occasion M.J.K. yelled at him for 7 hours in order to "get her way". As a result of M.J.K.'s attitude and her neglect of T.G., he spent more and more time with his daughter. He noted in the fall of 2000 M.J.K. spent long hours at work and did not arrive home until 9:00 o'clock p.m. As a result in the last 6 months of 2000 he believed he was the primary care giver for T.G.

32 He noted further that M.J.K. did not demonstrate the required standard needed for C.K.'s responsibilities and accountability in the house. He found C.K. began to behave more and more like her mother with respect to her cleanliness, her responsibilities and her accountability. Because of the foolish and dangerous things that he believed C.K. had done he testified in his own words that she was behaving like a "vacant bimbo". He advised M.J.K. that he did not want to see T.G. develop such behaviour.

33 In her testimony M.J.K. did not agree with M.E.G.'s criticisms of herself and C.K. However, she did agree with one area of evidence which M.E.G. adduced in the trial. This area dealt with the state of the business in the latter half of 2000. M.E.G. was only in the office from 9:00 a.m. to 5:00 p.m. at maximum on most days. She believed the business was failing and somebody needed to take appropriate steps to keep the business healthy. Accordingly she began to work

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10 or 11 hour days at the business in order to keep it successful. She believed that it had to be kept financially viable in order to support the family unit. She noted M.E.G.'s shortened working days would not achieve or help in laying a successful profitable foundation for the business. In order to compensate for his lesser time she worked longer hours. This in turn allowed M.E.G. more time with T.G. As a consequence I find that in the last few months of 2000 M.E.G. did become the primary care giver of T.G.

34 Over the year of 2000 M.E.G. maintained in his testimony that M.J.K. threatened their relationship and him. In particular he testified M.J.K. threatened T.G., his access to T.G. and his business. He provided specific examples of threats which he alleged M.J.K. had made. He testified that he would have left the relationship prior to January 15, 2001 but he did not know what to do with T.G. He was not prepared to leave T.G. in that environment.

35 Finally, in early January of 2001 he took action. He testified he made arrangements with his father, Ted M.E.G., to come to Calgary from Medicine Hat. As soon as M.J.K. left for work on the morning of January 15, 2001, T.G. was taken to his aunt's home in Calgary. He and his father removed his possessions from the shared home. He cancelled the telephone. He indicated he had to leave T.G. in a safe place because of the threats and the harassment of M.J.K. He testified that he believed M.J.K. was capable of carrying out these threats.

36 As a result he arranged for his mother and father to transport T.G. from his aunt's residence to a farm outside of Medicine Hat later that same day. The location was not revealed to M.J.K. because of her behaviour. This entire move took place on January 15, 2001.

37 He testified he contacted M.J.K. by telephone on the evening of January 15, 2001 and they discussed the issues surrounding her behaviour and T.G. The following morning, on January 16, 2001, he and M.J.K. met at his business offices. He indicated he wished to advise M.J.K. of the repercussions she was visiting upon him, the children, and the business by her behaviour. He again advised that he wanted her to be more accountable and responsible with C.K.

38 When he met with M.J.K. on January 16, 2001 he testified that he found her to be hysterical. He swore he saw no hope of accomplishing anything and he decided to proceed judicially. He, on January 15, 2001, had sworn an affidavit in support of his application for custody of T.G. in his counsel's office. This affidavit was sworn before he met with M.J.K. on January 16, 2001. Subsequently he instructed his counsel to attend before the Honourable Madam Justice Nation in this Court on January 17, 2001 in the morning. His counsel, knowing Edward Wolfman, had acted previously for M.J.K. in the previous judicial proceedings in 1999, left a voice mail message on Wolfman's telephone voice mail. That message relayed the information that she was attending upon this Court in order to obtain an ex parte custody order. In fact the order was obtained by his counsel on ex parte basis. It gave M.E.G. the following relief:

> 1. The Plaintiff shall have interim interim primary day-to-day care and control of the child until further order of court.
>
> 2. The Defendant shall have the right to supervised access until further order of the Court.

39 On January 17, 2001 M.E.G. served M.J.K. with the ex parte order. He advised her she could see T.G. in the presence of a neutral third party. Even after this state of affairs had occurred, M.J.K. worked together with M.E.G. for a few additional days after the January 17, 2001 ex parte order. However, with the start of this litigation between them it became obvious they could not continue to work together. M.J.K. had worked those few days in order to assist M.E.G. and the business in the turn over of her work and to meet her ongoing obligations to her clients who were purchasing hearing aids.

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40 This action by M.E.G. prevented M.J.K. from exercising her planned course of action. Because of her heavy work load in the late fall of 2000 she had begun to feel ill. Accordingly she had taken steps to have somebody replace her in the hearing aid office by mid-February of 2001. She wanted to be at home in 2001 with her two daughters.

41 M.E.G. remained in the Alberta Hearing Aid Centre from January 15, 2001 until the middle of June, 2001. The business continued to fail. It finally failed in the latter part of June, 2001. Accordingly he locked the doors of the business and walked away from it leaving unsatisfied and unpaid creditors. He then moved to Medicine Hat in early July of 2001 and moved in with his parents and T.G. in his parents' Medicine Hat residence.

42 His parents had been the primary care givers of T.G. from January 15, 2001 until he arrived in their home in July, 2001. He lived and worked in Calgary from January 15, 2001 until July, 2001. He would drive to Medicine Hat on the weekends in order to care for T.G.

43 M.J.K. in that time period was granted by the ex parte order supervised access of T.G. The supervisors were initially the Plaintiffs father and sister. Later M.J.K. was able to change the supervisor to an independent third party, one Deb Tetrault. Eventually, M.J.K. was able to obtain unsupervised access to T.G. She presently has access to T.G. from Thursday evening until Sunday evening on 3 weekends out of 4 in each month. She has as well enjoyed Christmas and summer access with T.G. The access presently takes place in Calgary.

44 In the summer of 2001 M.E.G. obtained employment in Medicine Hat as an audiologist for four working days per week. In order to accommodate T.G.'s access to her mother he spends Thursdays driving T.G. to Calgary and returning home to Medicine Hat alone. On Sundays he initially drove to Calgary and returned to Medicine Hat with T.G. Now by agreement he drives to Brooks, Alberta where he and M.J.K. exchange T.G. and he returns home to Medicine Hat with T.G.

45 At present M.E.G. still lives in his parents' home in Medicine Hat with T.G. He pays no rent and makes some contributions for food and other household expenses. His parents and his aunt care for T.G. while he is at work on the week days other than Thursdays. Upon his return from work on those weekdays he immediately assumes the care of T.G.

46 M.J.K. in her testimony provided a different view of the events surrounding the ex parte order obtained by M.E.G. on January 17, 2001. She advised she drove C.K. to school on that morning and spent the balance of the work day in the hearing aid office with M.E.G. Near the close of the work day she offered to pick T.G. up from the day care but M.E.G. indicated he would do it. Accordingly she went to the hospital to visit her sister and then drove to meet C.K. C.K. and she arrived home later to find M.E.G., T.G. and M.E.G.'s furniture and possessions gone. The telephone was disconnected. She went to her mother's home in a distraught state and attempted to reach M.E.G. by telephone. Her telephone calls, which were placed to M.E.G. and the homes of his parents and his siblings, went unanswered. Finally she telephoned the police. At 11:00 p.m. in response to the police M.E.G. telephoned M.J.K. at her mother's home. M.J.K. and M.E.G. spoke on the telephone for approximately 3 hours. He advised her that T.G. was hidden on a farm. He wouldn't tell her anything more. She described the telephone conversation as primarily a conversation wherein M.E.G. berated her. At the conclusion of the telephone conversation they agreed to meet the next morning at his business office. She testified at the office M.E.G. offered to return with T.G. if she would sign custody of T.G. over to him. She advised that she told him she didn't believe him and she signed no such agreement.

47 She testified she learned later that T.G. was at his parent's home in Medicine Hat during this entire time. She indicated 2 or 3 days lapsed before she could speak to T.G. on the telephone. She saw T.G. on a supervised basis on the following Saturday, January 20, 2001.

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48 She indicated under oath that M.E.G. knew before January 15, 2001 that her lawyer was Edward Wolfman of the City of Calgary. Wolfman had represented her subsequent to M.E.G. obtaining the ex parte order in June of 1999. As well she testified that she advised M.E.G. in the meeting of January 16, 2001 between the two of them to have her lawyer contacted by his lawyer. She indicated Wolfman was not present at the ex parte application of January 17, 2001 but that he did receive subsequent correspondence by fax from the Plaintiffs counsel enclosing a photocopy of the ex parte order which had been obtained.

49 On January 17, 2001 while M.J.K. was working with M.E.G. at the Alberta Hearing Aid Centre she was served with a copy of the ex parte order. T.G. was at that time in Medicine Hat at the residence of M.E.G.'s parents.

50 The ex parte order was confirmed on February 1, 2001 by the Honourable Mr. Justice Lutz. It confirmed the ex parte interim order granted by Nation, J. It also provided that M.J.K. should have supervised access for 6 hours each weekend in Calgary. It further provided that the matters of custody and access should be heard by way of a lengthy special chambers hearing with viva voce evidence on the trial list on April 17, 18, 19 and 20 of 2001. However, M.J.K.'s new counsel at that time and present counsel now, successfully applied for an adjournment of the April special sittings on the basis that additional time was needed for M.J.K. to marshal her evidence and to obtain expert reports. In that connection Nation, J. eventually ordered that Margo Kushner, MSW, complete a bilateral child custody assessment of T.G. pursuant to Rule 218.(1) of the *Alberta Rules of Court*. Kushner commenced her independent bilateral assessment during May of 2001 and completed it on or about July 23, 2001. Subsequently the services of Dr. Stephen Edwards, a Clinical Psychologist, were requested by M.E.G. and consented to by M.J.K. for a second bilateral custody/access assessment of T.G. At the trial, which commenced in November of 2001 and ended in July of 2002 both experts reports were tabled in evidence. M.J.K. called both experts.

51 From the ex parte chambers application on January 17, 2001 until early July of 2001 M.E.G.'s parents were caring for T.G. in Medicine Hat with M.E.G.'s assistance on the weekends. Since early July of 2001 both M.E.G. and his parents have been caring for T.G. in the parent's residence in Medicine Hat save and except for M.J.K.'s access periods.

52 M.J.K. has been living in Calgary with C.K. since January, 2001. Reports of her weekend supervised access to T.G. from January, 2001 to May 2001 were completed.

53 As a result of the reports of Deb Tetrault, the access supervisor, on June 12, 2001 Nation, J. ordered access to T.G. for M.J.K. on an unsupervised basis for 3 consecutive weekends from Thursday at 5:00 p.m. until Sunday at 6:00 p.m. The 4th weekend T.G. remains in M.E.G.'s care. That rotational access has continued with 1 or 2 exceptions to this day. It was further ordered the issue of the mobility of T.G. would be dealt with at trial.

54 However the access of M.J.K. to T.G. has not been without problems. In accordance with the parties' inability to communicate there have been many arguments and disagreements over the manner in which T.G. should be transported to Calgary and returned to Medicine Hat. Initially M.E.G. and his family did all of the transportation on M.E.G.'s own initiative. Later M.E.G. believed that M.J.K. should share in the driving due to time and expense constraints. M.J.K. objected to any sharing of any driving because of her belief that T.G. was only in Medicine Hat due to the unilateral move of T.G. by M.E.G., and which she believed came very near to child abduction. Since the trial commenced, the access issue has not been as thorny and troublesome due to specific court orders.

55 In addition to the 2 experts, who testified at trial, there were a number of other witnesses who testified. I provide a summary of the evidence of each material witness.

TED M.E.G.

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56 He is the Plaintiffs father. He and his wife cared for T.G. from January 15, 2001 to early July of 2001. The Plaintiff returned to Medicine Hat on the weekends to assist them in T.G.'s care. During the weekdays the Plaintiff in this time period was working full time in Calgary.

57 As one would expect, Ted M.E.G. was very supportive of the Plaintiff. He testified that his son is very caring for T.G. and always takes care of her needs. He noted his son and T.G. now live with them on a full time basis in his Medicine Hat home. He and his wife continue to care for T.G. when the Plaintiff is at work at his day time job in Medicine Hat. He noted that his son and T.G. could continue to live with him and his wife until T.G. turned 18. He added that he would continue to assist his son financially unless it was not needed with respect to T.G.'s maintenance. He and his wife contribute in a number of ways both financially and in the day-to-day care of T.G.

58 Ted M.E.G. and his wife are obviously very loving grandparents. They are caring and generous with respect to T.G.'s needs. In his testimony he was very supportive of his son's parenting.

59 By way of background Ted M.E.G. was a supervisor of M.J.K.'s initial access visits with T.G. in early 2001. He came to Calgary in January in 2001 and assisted his son with the sudden move of T.G. to Medicine Hat. He transported T.G. to Medicine Hat with his wife and he kept T.G. incommunicado from her mother for at least one day. He knew of the planned move of T.G. to Medicine Hat well in advance before it occurred. In that connection he testified he and his son went to the Medicine Hat police before the ex parte order of January 17, 2001 was granted. Their purpose in visiting the police was to alert the Medicine Hat police that there could be some telephone calls from M.J.K. regarding T.G.'s move to Medicine Hat. He planned with his son to move T.G. to Medicine Hat before any court order was obtained. He admitted that he and the Plaintiff plotted to find a suitable time to move T.G. and his son's possessions when M.J.K. was not at her home. He indicated the move to Medicine Hat was done to avoid any confrontation with M.J.K.

60 In that he actively assisted his son in T.G.'s move to Medicine Hat, Ted M.E.G. was not an objective witness. His actions initially thwarted M.J.K. from learning of the location of her daughter when she was frantically trying to locate the child on January 15, 2001. He and his wife refused to answer their telephone in Medicine Hat when M.J.K. was desperately trying to gain information about her missing daughter. They were aware of M.J.K.'s frantic pleas because the messages were left on their telephone answering machine. Ted M.E.G. explained they ignored her messages because he and his wife felt it was their son's responsibility to explain to M.J.K. where T.G. was located. He did not wish to interfere in this situation. However, I note despite this wish he was interfering in the situation because he and his wife were hiding T.G. without any court order being in place.

61 Ted M.E.G. was extremely critical of M.J.K. in his assessment of her parenting abilities. As a supervisor of the early access visits he made notes of her interactions with T.G. As well in subsequent telephone conversations he had with M.J.K. over the first 6 months of 2001, he made notes of her conversations in her telephone calls. In listening to his evidence I formed the conclusion that he presented as a very rigid disciplinarian. It was obvious he had no respect for M.J.K. On the supervised visits of M.J.K. with T.G. he noted:

1. M.J.K. placed the kitten's litter box and the cat food in T.G.'s bedroom.

2. M.J.K. had difficulty in disciplining T.G.

3. T.G. was constantly scratched by the kitten on every supervision visit.

4. T.G. would be provided snacks by M.J.K. before a meal time.

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5. M.J.K. gave T.G. a whole box of fish crackers to eat while they watched a video.

6. He noted some cold cut meat was bad and had to be thrown out before they ate it.

7. He noted there was no soap in the bathroom.

8. He noted that M.J.K. would interact with T.G. by having T.G. sit on her lap watching videos.

9. He noted that M.J.K. allowed T.G. to do pretty well anything she wanted to do.

62 In addition to his critical observations on M.J.K. on the supervised visits he testified that it was his belief in the future that she should only receive access with T.G. for visits of 6 to 8 hours in duration every 2 weeks with no overnight access.

63 In addition to his demonstrated non-objectivity I found his evidence not to be particularly helpful in that he portrayed an evasive demeanour in many of his answers provided on cross-examination. He provideded an extremely fixed and negative view of M.J.K. and her ability to parent. In addition his reasoning was based upon many misconceptions of the actual factual situation between his son and M.J.K. It was obvious that his sources of information were not based upon any lengthy observation of M.J.K.'s interaction with T.G. but rather were based on information provided by his son. His opportunities to view M.J.K.'s parenting abilities were basically limited in duration to the 7 visits of supervised access and 3 other unsupervised occasions in his Medicine Hat home when M.J.K. and T.G. were present.

64 Although I attach little weight to his evidence I do note that his observations were accurate in 2 areas. The first area relates to his observation of non-communication between his son and M.J.K. The second area relates to his observation that it is not in T.G.'s best interests to be driving on a regular basis to Calgary and return on 3 out of 4 weekends.

65 In keeping with his negative view of M.J.K. and her parenting abilities he testified that he was surprised at the opinions of the 2 experts, Ms. Kushner and Dr. Edwards, regarding custody and access.

66 I note, as well, that the real reason the Plaintiff obtained the ex parte order of January 17, 2001 is to be found in the evidence of Ted M.E.G. Ted M.E.G.'s evidence indicates T.G.'s move to Medicine Hat was not made because T.G. was in any danger. It was made at a time when M.J.K. was not to be found at the shared home of his son and M.J.K. and a confrontation would be avoided. The prior visit to the Medicine Hat police by the Plaintiff and his father confirms this finding.

T.C.M.

67 The Plaintiff called her as a witness. I note that she was a reluctant witness. She had been a friend and roommate of M.J.K. from 1997 to 1999. Her friendship with M.J.K. faltered with the argument based on M.J.K.'s accusation that it was she, T.C.M., who had called child welfare to report on the alleged neglectful care of the children. T.C.M. understood that M.E.G. had informed M.J.K. that it was T.C.M. who had reported M.J.K. T.C.M. testified that it was M.E.G., who had reported M.J.K. After he told T.C.M., that he had made the report to child welfare, M.E.G. swore T.C.M. to secrecy on the very fact that it was him. T.C.M. testified that she did not tell M.J.K. that it was M.E.G. because of M.E.G.'s request. Thus, when the accusation was made by M.J.K. and the truth was not told to M.J.K., bad blood ensued between the 2 women. This bad blood was in effectually caused by the confrontation. Both women, naturally, were upset.

68 That confrontation laid the foundation on which T.C.M. agreed to testify for M.E.G. at this trial. While on occasions T.C.M. was critical of M.J.K.'s discipline of C.K. and M.J.K.'s inability to achieve proper school attendance and

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punctuality for C.K., she did not provide evidence to me which indicated M.J.K. was incapable of parenting either C.K. or T.G. She was concerned that C.K. was a latch-key child. She was as well concerned that C.K. was not fed as nutritiously as T.C.M. would have preferred. However, she noted a fantastic relationship between C.K. and M.J.K. She noted M.J.K. was not a child abuser. She did not have any safety issues with M.J.K.'s care of the children. Most importantly to the issues in this case T.C.M., in summary, advised that M.J.K. was a good care giver for T.G. She was well testified that she and M.J.K. had an arrangement wherein M.J.K. paid her $50.00 per month to take care of the house cleaning, which was not an area in which M.J.K. excelled.

Debra Tetrault

69 She is an experienced access supervisor with a social work background. She watched M.J.K. on 5 supervised visits of 6 hours each in April and May of 2001 with T.G. Tetrault described M.J.K. as an attentive and child focussed mother who adhered to T.G.'s safety and maintenance needs. She observed much physical and verbal affection between mother and daughter. M.J.K. played and interacted with T.G. in an age-appropriate manner. T.G. followed M.J.K. around seeking her mother's attention. Tetrault had no concerns regarding M.J.K.'s parenting skills. She noted M.J.K.'s home was clean and orderly and presented a safe environment.

70 She observed C.K. and T.G. interact well together and were genuinely pleased to see each other.

71 Her evidence indicated that T.G. was quiet and withdrawn at the end of each visit and had difficulties leaving her mother. T.G. was happy on her return to see her father. She noted M.E.G. on the return of T.G. from the visits would check T.G. for kitten scratches and as well would check the diaper bag to see how many diapers had been used on the visit.

72 Her final report presented to the parties caused the Plaintiff to consent to an Order in this Court, wherein the supervised visits were terminated and the present unsupervised access commenced.

Queenie Lai

73 I do not rely on this witness' observations of M.J.K. or what this witness told M.J.K. Although she was a witness for M.J.K. I noted her observation period was not of sufficient duration to be helpful to me in this case.

Tracy Sims

74 She was called as a witness for M.J.K. She is a married women with 3 children. As a friend of M.J.K. she knew both M.E.G. and M.J.K. on a personal basis. She testified she viewed M.E.G. and M.J.K. as a couple. She noted they ate together and spent weekends together. She observed them together in their home. She indicated she had the M.E.G. family over to her house for a baby shower and for Christmas dinner. It was her thought the next step would be marriage for M.E.G. and M.J.K.

75 She worked as well at the Alberta Hearing Aid Centre for 6 months on a full time basis. Her testimony noted M.E.G. would make unnecessary derogatory comments regarding M.J.K. and he would berate M.J.K. for improper care of her possessions. It was her evidence that she found M.E.G. to be a controlling person. She found him to be a nitpicker. She as well advised that it was her impression that he was an angry and hostile person.

76 She noted a mercurial relationship between the parties. One moment they would be loving and affectionate and the next moment they would be screaming at each other.

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77 She advised the court that M.J.K. was a hands-on parent who had a special gift of being able to entertain and socialize with her children. She found M.J.K. to be a creative person. Sims believed M.J.K. attended to the children's physical needs. As well she noted M.J.K. interacted properly with T.G. and C.K. on a myriad of day-to-day activities. When she observed M.J.K.'s home, she found it to be basic but clean and tidy. She further noted that M.J.K. was not a physical abuser. She testified that M.J.K. was initially the primary care giver to T.G. in her first year of life. In her observations she found T.G. to be healthy and playful. She had no concerns whatsoever about M.J.K.'s care of her children.

78 However, Sims admitted that M.J.K.'s weaknesses lay in setting priorities and boundaries. She believed M.J.K. needed help with child discipline and help with structure and routine.

Andrea M.E.G.

79 She is the Plaintiffs sister who supervised M.J.K.'s access visits. She noted M.J.K. made comments in front of T.G. regarding M.J.K.'s unhappiness with the Plaintiff and the manner in which the Plaintiff had obtained interim custody of T.G.

Kristopher Phillips

80 He is M.E.G.'s now 15 year old son from a relationship with Kristopher's natural mother. M.E.G. provided $4,800.00 to the mother as a lump sum child maintenance settlement early in Kristopher's life.

81 Kristopher did not testify but from evidence provided from M.E.G., I learned that his access to Kristopher was irregular in the first 10 years of Kristopher's life. Thereafter Kristopher was advised that M.E.G. was his father and Ted and Wally M.E.G. were his grandparents. In the last 5 years M.E.G. and Kristopher enjoy regular access once or twice per week. Kristopher is a well-adjusted young lad who interacts very well with T.G. on a regular basis. Evidence was provided to me that Kristopher and T.G. would miss the company of each other if T.G. was returned to her mother's care in Calgary.

Armand Roy

82 His evidence was not relevant to the issue before me, namely the best interests of T.G.

Shane Dinapoli

83 He was presented and qualified as an expert in the field of accounting. His evidence was based on assumptions on facts which were not placed before him. There was no supporting documentation of necessary financial records placed before this witness upon which he could base his opinion.

84 I attach no weight to his evidence due to this lack of supporting documentation. His evidence, had it been given any weight, related to measuring M.J.K.'s income stream over the last few years in order to determine the correct amount of child maintenance to be ordered paid by her if I decide to award child maintenance for T.G. payable to M.E.G.

Expert Reports

85 There were two expert reports relating to the child custodial assessment tendered in evidence by M.J.K. One report of 59 pages was provided by Ms. Kushner as ordered by Nation, J. under Rule 218.(1). The second report of 48 pages plus a 2 page addendum was completed by Dr. Stephen Edwards. As well as the 2 reports, entered as exhibits, there was extensive examination-in-chief and cross-examination of both witnesses. I now summarize their relevant evid-

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ence as heard and determined by me with respect to the issue of the best interests of T.G.

86 Ms. Kushner was qualified as an expert in child custody assessment. She did a child custody evaluation, which was extensive and thorough, using information provided by counsel, the pleadings and collateral sources. She conducted lengthy interviews and assessments of both parties. She as well received a report from a Dr. Shustak, a Child Psychologist. T.G. was observed as well by Ms. Kushner. I am satisfied that Ms. Kushner researched and prepared an objective parenting assessment which met the needed criteria in this area.

87 Her report detailed the following important observations. I do quote excerpts from those observations as noted on the following pages of her report:

> **Page 40:**
>
> Both parents have determined they should have sole custody. They are correct in their assessment that T.G.'s needs would not be well addressed by a joint custody arrangement.
>
> It is my belief that joint legal custody operates most effectively when the parents are able to cooperate regarding planning for their children. Power imbalances are not an issue in these scenarios. Personality types are not rigid, and the parents involved are willing to believe that it is important that the child see both parents. This is unfortunately not the case with T.G.'s parents.
>
> **Page 42:**
>
> To provide Mr. M.E.G. with sole custody status, in my opinion, would be making it difficult for Ms. M.J.K. to remain involved in her daughter's life. It would be clearly detrimental to this young child to not see her mother on a regular basis. Ms. M.J.K., in my opinion, is the fairer parent.
>
> Separations from her mother have proven to be trying for T.G. In my opinion, T.G. needs to spend as much time as possible with her mother to catch up for the separation anxiety she has experienced since January when Mr. M.E.G. left unannounced with T.G. and moved to Medicine Hat.
>
> In regards to providing Ms. M.J.K. with sole custody status, I have no concerns with her ability to make sound decisions for her daughter. The complaints Mr. M.E.G. has regarding Ms. M.J.K. are, in my opinion, petty and indicative of sloppy housekeeping which does not satisfy his standards.
>
> **Page 43:**
>
> Ms. M.J.K. has, in my opinion, been too lax regarding following a regular routine with C.K. She needs to learn from this experience or T.G. will not achieve to her potential. T.G. could benefit from her mother's parental experience.
>
> Ms. M.J.K. does not deny that she is a "nighthawk". She prefers to stay up late in the evening. I just have a difficult time withholding T.G. from her mother on a regular basis because her mother stays up until 11:00 p.m., playing card games on her computer. Her behaviour does not qualify for Child Welfare to be involved or for this child to be denied regular contact with her mother. If Mr. M.E.G. was provided sole custody status, T.G.'s development would be seriously affected because he feels so very justified in minimizing, if not removing, Ms. M.J.K. from T.G.'s life.
>
> **Page 44 and 45:**

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A major concern this Evaluator has in this assessment pertains to the fact that Mr. M.E.G. has been documenting and building what appears to be a case for custody of T.G. since the first year of her life. He reported spending 144 days with T.G. in her first year of life. It is interesting to this Evaluator that he would take the time and effort to document such. Is he malicious? Mr. M.E.G. has called Social Services regarding M.J.K. and they did not find M.J.K. to be either an abusive or neglectful parent. M.E.G. moved T.G. out of Calgary without consent of the Court. T.G. needs the protection of the Court or she will lose the benefit of a significant relationship with her mother.

Page 46:

T.G., in my opinion, displays the majority of these factors, which depict attachment to both of her parents. She is, in my opinion, secure in the presence of either parent.

Page 47:

T.G., in my opinion, experiences a positive relationship with both of her parents.

M.E.G. moved T.G. to Medicine Hat to benefit from the support of his parents, who he and T.G. reside with. It is important to have a support system while raising children. This is especially true for single parents. In this situation, T.G.'s relationship with her grandparents should not supersede that of her mother and sibling. M.E.G.'s employment in Medicine Hat could very likely have occurred in Calgary. He only earns $15.00 per hour in a very specialized field. To expect M.J.K. and her teenage daughter to relocate to Medicine Hat is expecting too much. T.G.'s needs can be addressed by both parents in Calgary. There was no compelling reason for M.E.G. to move to Medicine Hat.

Page 48:

It is very evident T.G.'s parents have equally provided for her care.

In my opinion, M.E.G. is not encouraging a relationship between T.G. and her mother. He has no difficulty believing T.G. would do well only seeing her mother for five days per month or alternate weekends. His lack of respect for M.J.K. is evident. Allowing M.E.G. to move T.G. would only exacerbate an existing problem.

Page 49:

T.G. requires frequent contact with both parents. M.E.G.'s move to Medicine Hat inhibits such.

T.G., in my opinion, has experienced attachment disruption with her mother since M.E.G. moved to Medicine Hat. It is definitely not in T.G.'s best interests to be expected to only see her mother or father for alternate weekends.

If T.G.'s parents both reside in Calgary, she will benefit from frequency of contact. M.E.G. seems to be of the opinion that because his childhood experience in Medicine Hat was so very positive that T.G. would benefit from the same. What M.E.G. fails to recognize is the loss T.G. will experience when expected to withstand lengthy separations from her parents is not in her best interests. It is my opinion a relationship with one's mother supersedes a relationship with a community.

Page 50:

If T.G. is reared by her mother in Calgary, I am convinced she will make all attempts to ensure T.G. sees her father. A move to Medicine Hat will perpetuate further loss for T.G. Her relationship with her half-sister, C.K., will be rep-

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> resentative of more loss. T.G.'s relationship with her grandparents can be maintained without T.G. having to reside with her grandparents in Medicine Hat.
>
> **Page 52:**
>
> What is clear to this Evaluator is that all custody and access questions should be decided according to the best interests of the child, and not the best interests of these parents. M.E.G. desires to move to Medicine Hat because of his own history in Medicine Hat and that fact that he sees it as a wonderful town to raise children in. What he fails to recognize is that his daughter would experience a significant loss from her mother and her elder sibling, C.K.
>
> **Page 54:**
>
> I do not support M.E.G.'s reasons for moving to Medicine Hat, as his plan does not support T.G.'s relationship with her mother, which is significant.
>
> It is difficult for this Evaluator to support T.G.'s parents in rearing her under the auspices of a joint custody regime. They are unable to communicate, and have a dysfunctional history which has never been resolved. I have provided ample criteria regarding success in joint custody scenarios. The M.E.G.-M.J.K. parents do not qualify for such. The only rationale I would have for recommending joint custody was to alleviate the need for a lengthy and expensive child custody trial. To do so would only result in T.G.'s life being full of conflict because of the need in joint custody scenarios for parents to communicate effectively. It is well documented in the literature the devastating effect joint custody can have on children whose parents remain conflicted. One can only predict the schism-like arguments which will ensue over where T.G. will attend school if the matter of her custody was one of shared parenting.
>
> The parent, in my opinion, who would be the fairest in making decisions for T.G. would be Ms. M.J.K. A major determining factor in this decision was based on my opinion that M.E.G. is not friendly nor willing to cooperate with M.J.K. If he were to be provided sole custodial status T.G. would not have an opportunity to know her mother. M.E.G. is angry and convinced M.J.K. is a neglectful mother warranting Social Services' involvement. This is clearly not the case.

88 Having heard all of the evidence in this trial and having read all of the exhibits, I find that Ms. Kushner's personal observations as set out in her report and set down in this judgment in an abbreviated fashion are relevant, necessary and reliable. Her observations in her report accord with her evidence provided both in examination-in-chief and extensive cross-examination. I do not pay any attention to any evidence where Ms. Kushner has dealt with collateral sources. I only paid attention to Kushner's opinion and recommendations where she based it upon her personal observation and information provided to her by the Plaintiff and the Defendant.

Dr. Stephen Edwards

89 He was qualified as an expert in Clinical Psychology specializing in child custody and access cases. He had been retained by the Plaintiff for a second bilateral assessment after the bilateral assessment of Ms. Kushner had been provided. His notes, correspondence and his extensive report were marked as exhibits in this trial. He spent considerable time with each party separately and as well some time observing each party's respective interaction with T.G. He as well watched C.K. interact with T.G. in M.J.K.'s home. He looked at all the information provided by the parties including affidavits filed in this action and the reports of Ms. Kushner and Dr. Shustak. He did interview some of the collateral witnesses such as Ms. Blight and Ms. T.C.M.

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90 He noted the parents are distrustful and antagonistic to each other and as a result are too adversarial. They were not able to parent as a unit and have parented T.G. in their own manner throughout the course of this litigation. He expected them to continue that practice of parallel parenting because of their conflictual and negative relationship. He was concerned that there was a high risk that the hostility will continue into the future. In turn his view was that the risk of drawing T.G. into this hostility was high. With such continued conflict T.G. could be damaged emotionally and receive less nurturing. She could be caught in the continued conflict.

91 As a consequence he did not recommend joint custody nor shared parenting. He noted M.E.G. was particularly antagonistic about the mother's involvement in the parenting of T.G. He identified M.E.G. to not be a particularly friendly parent with respect to M.J.K. He believed M.E.G. would demonstrate a limited willingness to cooperate with M.J.K. over T.G. It was his belief M.E.G. viewed the mother as terrible parent. While Dr. Edwards did admit that M.J.K. had on occasions demonstrated some poor parenting skills and less than the best judgment, he was unable to find anything to suggest that she was an incompetent, negligent, violent or abusive parent. He found that M.J.K. was not nearly as bad as M.E.G. described her. He, like Ms. Kushner, perceived the mother as the less restrictive parent and would grant the father more access to the child. The father, he perceived, would exercise power and control of the child to limit T.G.'s relationship with her mother. He was also concerned with M.E.G.'s antagonism, resentment, criticism and restrictiveness towards the mother. Dr. Edwards feared that these feelings combined with M.E.G.'s rigidity in his lifestyle and discipline for T.G. would significantly restrict the mother's involvement with her child. Dr. Edwards further noted there could be further litigation unless M.J.K. had sole custody of T.G. with liberal and specified access to M.E.G. He recommended an access schedule which must provide M.E.G. with good contact with T.G. but which must specify access in excruciating detail in order to avoid further litigation.

92 Dr. Edwards indicated C.K. and T.G. have a close and warm relationship, having been together since birth. M.E.G.'s son in Medicine Hat on the other hand, he noted, did not grow up with T.G. despite having a good relationship with T.G.

93 Dr. Edwards further indicated he did not believe removing T.G. from her father's care at this point would be dramatic or destructive. M.E.G. would continue to enjoy consistent and regular access. He cautioned against passing T.G. back and forth between the parents excessively as it could lead to some instability and inconsistency of parenting. T.G. requires a more stable home base.

94 While he noted M.E.G. to be the more structured and organized parent in terms of routine and discipline, he thought M.J.K. to be the more emotionally expressive and open parent. This emotional warmth will build T.G.'s self-esteem and self-confidence.

95 Dr. Edwards both in examination-in-chief and in 415 transcript pages of cross-examination dealt with the numerous issues of parenting complaints that M.E.G. raised with him regarding M.J.K.'s parenting capabilities. He found them not to be of any huge concern.

96 Dr. Edwards noted that neither party suffers from any significant physical, emotional or mental condition. He found both parties could adequately parent T.G. if given the chance. He found them both to be intelligent.

97 However, he did note that if one parent was persistent, either consciously or unconsciously, in deprecating the other parent to the child, there is a risk of parental alienation. He thought in the circumstances of this case there could be a moderate possibility M.E.G. could develop a parental alienation in T.G. towards M.J.K. if M.E.G. continued to criticise or deprecate M.J.K. on the basis of M.E.G.'s belief that M.J.K. is an incompetent parent.

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98 Dr. Edwards further believed that in light of M.E.G.'s lengthy association with M.J.K. he should have possessed a better appreciation whether she was a genuine high risk to kill herself or the children. He suggested there was not much evidence that the mother was so mentally ill and disturbed that she was a genuine threat to the children. Rather he believed M.E.G. should have been able to make some reasonable layman's judgmental assessment of risk in the circumstances. Dr. Edwards testified that he had not heard anything that would lead him to conclude that M.E.G. had a substantial body of really strong and valid information that M.J.K. was going to kill herself or the children. He thought M.E.G. should have known better and as a result there was not a substantial risk of harm to the children. Dr. Edwards testified this alleged risk to the child, when added to M.E.G.'s belief that he had other good reasons to move to Medicine Hat, resulted in the end that the mother's access to the child was restricted. "While Dr. Edwards did believe part of M.E.G.'s actions and motives in relocating the child to Medicine Hat was to restrict the mother's access, that belief was not an overriding influence on his final recommendations. Rather of the two parents he found the mother to be the less antagonistic, restrictive and manipulative parent. In short, she was the more friendly parent who would be more likely to ensure T.G.'s contact with her father.

99 Dr. Edwards was concerned in his evidence about C.K.'s school attendance and her chronic lateness. But he pointed out he did not know the reasons behind her lateness, (whether she was just a little bit late or quite late or whether it was M.J.K.'s fault or C.K.'s fault). As well, he indicated until the time of separation C.K.'s school achievement was average. After the separation is the time when her marks dropped considerably.

100 He indicated as well to prognosticate how T.G. will do in school based on C.K.'s school record is something which should be looked at very carefully. They are two different children and the circumstances later will be very likely different. As well T.G. is a child of superior intellectual ability.

101 It is Dr. Edwards' view that the father did not support the mother's relationship with T.G. He looked at M.E.G.'s attitudes demonstrated to him during the assessment. He looked as well at M.E.G.'s criticism of M.J.K.'s parenting ability and he found the existence of that criticism would tend to weaken the mother-daughter relationship. He looked to the father's position on requiring court supervised access as restricting the mother-daughter relationship. He noted M.E.G. as well wished to restrict the mother's access to the child because more access could damage T.G.'s routine. While routine, structure and stability in T.G.'s life are most important, involving the mother in T.G.'s life will not damage that routine, structure and stability. Both parents can provide that. T.G., in Dr. Edwards' opinion, felt the loss of her mother after the move to Medicine Hat. She showed anxiety about her mother's absence. While Dr. Edwards did admit there were shortcomings to M.J.K.'s parenting, those shortcomings are not as substantial as M.E.G. indicated. It is important to keep the mother, as the more flexible parent, in T.G.'s life.

Evaluation of Expert Evidence

102 Plaintiffs counsel submitted that Ms. Kushner's recommendations regarding custody of T.G. should be rejected as the recommendations were based on inaccurate facts and bias. I listened carefully to Ms. Kushner's evidence and I read her report in all its detail. I did not regard Ms. Kushner as a biased witness nor did I find her report or evidence to be biased or to provide the perception of bias. Ms. Kushner did not reject either parent as the custodial parent. She found both parents were suitable parents for the care and control of T.G. She recommended M.J.K. as the custodial parent because of her strong belief, based on M.E.G.'s prior actions and attitudes, that M.E.G. would not provide as much access to T.G. for M.J.K. as would M.J.K. provide access to M.E.G. She relied on M.E.G.'s advice to her in that respect and in the circumstances surrounding the ex parte order. She believed M.E.G.'s actions in January, 2001 amounted to an abduction of T.G. Further, it was her opinion that any subsequent access was granted not by M.E.G.'s voluntary actions, but instead it was granted on a minimal basis. She noted M.E.G. had little, if any, respect for M.J.K. That was her assessment

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based upon his conduct and advice to her and her observations of him.

103 On the basis of the facts independently proved before me on evidence other than that of Kushner or Edwards, I agree with her assessment, save and except for her opinion on the abduction issue. However when one regards sections 282 and 283 of the *Criminal Code of Canada* it would appear at first blush that M.E.G. committed the *actus reus* of these offenses when he secreted T.G. in Medicine Hat without the knowledge or consent of M.J.K. and before he had any court order other than the order of Phillips, J. from June of 1999. However his *mens rea* may have been such that he lacked the necessary intent of deprivation. While I do not go so far as to agree with both Ms. Kushner and Dr. Edwards in this area I do note that there was at least a triable issue on any charges under these sections of the *Criminal Code*. He may have been able to avail himself of the defences as set out in the *Criminal Code*. Yet, I do note in my view, on assessing the availability of these specific defences, and after the advantage of hearing all of the evidence on this trial, there were no threats to T.G. nor was there any indication she was in imminent danger. However, that is not the issue before me.

104 While Plaintiffs counsel submitted a number of instances wherein Ms. Kushner based her recommendations on inaccurate facts, I note Ms. Kushner explained her interpretation of those facts very adequately and accurately when she was tested in cross-examination. None of her recommendations in my view were based upon the foundation of inaccurate fact from her personal observations. Her explanations provided in cross-examination were very satisfactory.

105 Further, as I noted before, I did not follow any of the recommendations of either Ms. Kushner or Dr. Edwards where those recommendations or opinions were based upon the foundations of hearsay evidence. Rather, I made my decision on the admissible facts as I heard them and not on hearsay evidence. My decision is based on the evidence I heard and determined to be admissible. The expert reports were a factor in the final decision as would any piece of evidence be a factor in a final decision. I relied on the facts as I found them and not on the facts as interpreted by the experts.

106 I found both Ms. Kushner and Dr. Edwards to be objective and credible witnesses. Their lengthy cross-examination did not destroy or impair the credibility of either of them. Rather the cross-examination demonstrated to me the care and thought which they demonstrated in the preparation of their reports and which underlined their evidence. Both experts were suitably independent and they exhibited no bias or distortion. I note, in that respect, both experts found both parties to be more than adequate parents.

107 Plaintiffs counsel argued that Dr. Edwards was incorrect in his assessment of the Plaintiff as being an unfriendly parent. In argument she cited 8 factors on which Dr. Edwards relied to order to reach this assessment. She indicated that there was little support or evidence for any of those factors. However, the evidence before me and on which I rely, to come to the conclusion that M.E.G. is the more unfriendly parent, is based upon the following factors:

1. M.E.G.'s actions, words and continued criticism of M.J.K. and his demeanour on the witness stand, adequately demonstrate his attitude that M.J.K. is a "terrible parent". My assessment is that M.J.K. is a very good parent. I was not convinced that M.E.G.'s concerns or reasons for his assessment of M.J.K. as a terrible parent are objectively valid.

2. M.E.G. has not supported M.J.K.'s relationship with T.G. He has been involved since T.G.'s birth gathering "evidence" against M.J.K. to prove her inadequacies in all areas of her life. Such a mission does not demonstrate friendliness in respect of the other parent.

3. His reasons for secreting T.G., which did not prove to be valid, when viewed on an objective basis.

4. His actions in negotiating with M.J.K. before sending his counsel to this Court to obtain an ex parte order when

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there were no exigent circumstances.

5. His suggested belief in January 2001 that M.J.K. required supervised access.

6. His actions in removing T.G. to Medicine Hat which has effectively shut M.J.K. out of any decision making in her child's life for the last 2 years.

7. His continued belief that M.J.K. should enjoy only 4 or 5 days of access per month if he receives sole custody. This belief does not accord with or meet T.G.'s need to see her parents frequently. His belief is not in T.G.'s best interests.

8. He wishes to remain in Medicine Hat which inhibits M.J.K.'s access. Distance and his proposed access schedule will restrict T.G. from seeing her mother.

9. His subsequent position on requiring M.J.K. to share the driving involved in T.G.'s transportation to Calgary and return from Medicine Hat, when it was his initial actions in January, 2001 which placed T.G. in Medicine Hat.

10. While both parties are antagonistic to each other, M.E.G. has demonstrated to me on the evidence he has a higher level of antagonism towards M.J.K. than she exhibits towards him.

11. He does not respect M.J.K., her situation, or her position.

12. He has not involved M.J.K. in any consultation regarding T.G.'s care since the move to Medicine Hat.

13. M.E.G. originally moved T.G. to Medicine Hat without the benefit of a court order. His subsequent ex parte order required supervised access for the mother on the basis of alleged threats and alleged violence which did not exist at that time. Since the supervised access was removed M.E.G. has not genuinely facilitated access. Access has been facilitated since that time by M.J.K. bringing court applications to which M.E.G. eventually consented. Yet, I do note since M.J.K. received her present access schedule, M.E.G. has facilitated the transportation of T.G. to her mother.

108 Based on those factors I find that the Plaintiff is the more "unfriendly" parent.

109 In assessing the evidence of Ms. Kushner and Dr. Edwards I found it to be relevant, reliable, necessary and non-prejudicial. It provided me with the specific knowledge and experience which was outside my experience and knowledge in the area of child custody evaluations. I used that probative evidence to guide me in my final decision on the issue of the best interests of T.G. I did not use their evidence to find facts but instead used their evidence only to draw inferences from the facts as I found them. Those inferences allowed me to weigh the evidence and reach my final judgment.

Dr. Sirota

110 The Plaintiff called this witness, who was qualified as an expert in Clinical Psychology, to provide expert evidence on the issue of mobility in a custody situation. Dr. Sirota's expertise was based not in personal research in this case but in his review of textbooks, papers and personal discussions with colleagues, professionals, parents and children in custody disputes.

111 Dr. Sirota had not met either of the parties or T.G. He had no idea of T.G.'s response to her parents with respect to travel.

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112 He testified that as a basic premise it is not against a child's best interest to travel more than 3 hours for access to a parent. He qualified that premise by stating that it depends on the child. Physical health of the child, road conditions, weather conditions, travel conditions, driving conditions, travelling companions and the amount of stimulation provided to the child during the trip are all specific factors, to name a few, which could modify that basic premise. Other factors such as the quality of the trip itself and what is in store by way of the visit at the end of each trip do come into play. Further as the child becomes older, the child is likely to develop their own prospective bearing in mind the child's lifestyle. He indicated the psychological impact of travel is probably more relevant than the physical impact of travel.

113 Finally, he looked at the factor of the necessity to travel. In other words was the move by the parent to another city a necessity or was there an invalid reason.

114 Dr. Sirota admitted that 3 hours of one way of travel can be accomplished but a trip of mat length of time is stretching it. Presumably 6 hours of travel every 3 weekends out of 4 weekends makes it even more onerous based upon Dr. Sirota's reasoning.

115 Dr. Sirota indicated that if the basis of the different locations is acceptable, and the relationship with the parents and access to both parents is a prime interest for the child, and the child is not suffering from it, then travel for the most part is a necessity and one would probably recommend it.

116 However, Dr. Sirota testified that if the basis for change in location is not acceptable or considered capricious or arbitrary, and especially if the child didn't appreciate the travel, then one would not recommend it. It would probably be the worst thing to recommend it. Following from that, if that situation existed, a child might start to develop some alienation to one or both the parents and an alienation situation could develop.

117 Dr. Sirota indicated, what is to be weighed, is who is the best parent for the child in all of the circumstances as opposed as to weighing who is the better parent. It is not a contest.

118 Dr. Sirota testified that if the term of reference is what one person might call negligence and another person might call a permissive parenting style, you must look at the bigger issue which has to be weighed against these other issues:

1. The love and affection that the child has with the parents.

2. The bond and relationship the child has with the parents, extended family and the community.

3. Access to services and programs that are in the best interests of the child.

4. Consistency and stability.

5. Parents' attitude toward parenting.

6. Parents' attitude towards the other parent.

7. Parents' physical and emotional health.

119 Dr. Sirota deferred his opinion on giving a definitive answer in this case because he felt he must possess the knowledge as to how T.G. is experiencing the travel. He testified that he has absolutely no idea how this affects T.G.

120 Dr. Sirota went on to indicate in his testimony that all other things being equal, if M.E.G. didn't have to move,

not only would it be in the best interests of T.G. to have both parents in the same city but it must be asked why M.E.G. moved and whether there was some intention to estrange the child from the mother. He concluded that if M.E.G. was correct in his belief that M.J.K. is so negligent and incapable of parenting, that the only way M.E.G. could protect T.G. was to move to a different city and to restrict the access as much as possible, then the travel becomes acceptable.

121 Dr. Sirota indicated that it is up to the trier of fact to decide the legitimacy of M.E.G.'s decision. If M.E.G.'s actions are other than genuine then the travel issue must weigh heavily against T.G. doing the travelling.

122 I approach Dr. Sirota's opinion with caution and I do not attach any real weight to it due to his non-involvement in any fashion with either party or T.G. Further, I note, he deferred his opinion in giving a definitive answer because of his lack of personal knowledge as to T.G.'s reaction to the travel. Yet his opinion must be recognized to a certain extent when he testified that any travel would not be in the best interests of T.G. if M.E.G. didn't have to move. In that I find there was no personal danger to T.G.'s safety at the time of the move to Medicine Hat, nor was there any economic advantage to M.E.G. (short of lower living expenses as long as he lives with his parents), it follows there was no valid reason for M.E.G. to leave Calgary. In fact, he didn't leave Calgary until approximately 5 months after T.G. was moved. M.E.G.'s actions in moving were not genuine actions but were made under a subterfuge to separate T.G. from her mother. In that respect I do note that Dr. Sirota opined the travel issue must weigh heavily against T.G. doing the travelling. In short I note that Dr. Sirota's opinion accords with my finding that in such circumstances continued and lengthy travelling between Medicine Hat and Calgary is not in T.G.'s best interests.

Dr. Shustak

123 Dr. Shustak prepared certain documentation for Ms. Kushner. Dr. Edwards and Ms. Kushner made reference to Dr. Shustak's finding in their reports and evidence. However, Dr. Edwards testified that clinical impressions set out in reports like that of Dr. Shustak are not to be taken as being of great significance without a full and proper assessment being completed by Dr. Shustak.

124 Dr. Shustak's evidence is hearsay and I will not use it to guide me. Because he did not testify before me, I cannot and will not weigh his evidence. I do not use it to find facts nor do I pay any attention whatsoever to any opinions offered by either Ms. Kushner or Dr. Edwards in their reports and evidence before me.

Credibility

125 I have no difficulty with M.J.K.'s credibility. I listened closely to the evidence and I observed her demeanour on the witness stand and in the court room. It was an emotional, lengthy and litigious trial. While she did have certain outbursts of emotion in the trial, I am convinced the outbursts were the result of frustration and stress. She was truthful and consistent in her evidence. Her evidence was not overblown. She was subjected to a lengthy and skilful cross-examination by Plaintiffs counsel. She provided some inconsistencies in her evidence but I am satisfied those inconsistencies were not advertent attempts to mislead the Court. Her overall version of events was believable and plausible. I accept her evidence as being truthful and reliable.

126 I found that M.E.G. had the ability to pick and choose his answers to questions. He was selective on occasions in giving evidence which would continually help his position before the Court. When he became selective in his answers, he at the same time became evasive. He used every opportunity he could in order to provide an answer which was detrimental to M.J.K. and her position, and which conversely, would be helpful to him and his position. His criticism of M.J.K. often led to answers which were not directly responsive to the question posed. When he was not responsive on those occasions, he appeared to be evasive in his evidence.

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The Ex Parte Application of January 15, 2001

127 M.E.G. instructed his counsel to appear on an ex parte basis in morning chambers on January 17, 2001 before the presiding justice. On that basis and on the strength of his affidavit, which was sworn 2 days prior, he was granted an order providing him with the interim, interim primary care and control of T.G. with supervised access to M.J.K.

128 I have set out the basic facts providing the background to this ex parte order earlier in this judgment.

129 Ex parte orders have the potential to prejudice severely the other party. Lawyers and their clients have a heavy onus in ex parte applications to place all of the facts before the Court. There should be no lack of disclosure. In the case at bar T.G.'s move to Medicine Hat and the dates and circumstances under which the many alleged threats made by the Defendant were not disclosed to the Court in the affidavit. Plaintiffs counsel did not have the necessary information provided to her by M.E.G. when he instructed her to make the ex parte application. M.E.G. and his father had secretly moved T.G. and the possessions to Medicine Hat, some 2 days before the ex parte order was granted. M.E.G. was required to disclose that information. He did not. He only advised the Court that T.G. was in a safe location. He was under a duty to act in good faith and to make full, fair and candid disclosure of all of the facts. He did not disclose essential and material facts. In this connection he failed to advised the Court on the ex parte application in any affidavit that he had a lengthy 3 hour telephone conversation with M.J.K. on the evening of January 15, 2001 - after he had sworn his affidavit in support of the ex parte application. He failed to advise the Court in any affidavit that M.J.K. was frantic in that telephone conversation regarding the location of her daughter. He failed to advised the Court in any affidavit that in those circumstances M.J.K. could hardly be expected to cause any harm to T.G. He further failed to advise the Court in any affidavit that he met with M.J.K. on the following day, January 16, 2001 at his office premises. He failed to advise the Court in any affidavit that he and M.J.K. negotiated over T.G.'s custody at that meeting. He failed to advise the Court in any affidavit that he instructed his counsel by telephone to adjourn the ex parte application in order that he and M.J.K. could talk. This telephone conversation took place in the presence of M.J.K. He further failed to advise the Court in any affidavit that after the negotiations failed, that he then instructed his counsel to make the ex parte application on January 17, 2001.

130 The ex parte application should never have been made. Notice should have been provided to M.J.K. If M.J.K. knew of the possibility of such an application through the negotiations and the telephone conversation in her presence, then there could be no possible reason not to provide her with further notice as to exact time and place of the application. In addition, I note his counsel telephoned on the morning of the application to M.J.K.'s counsel and left a voice mail message that she was intending to make that application.

131 There certainly was no exigency in those circumstances for this application and the Court should have been presented with those additional facts.

132 To instruct his counsel to bring an ex parte application in light of those factors and in light of the lack of exigent circumstances was inappropriate. M.E.G.'s lack of advice and instructions to his counsel on those missing facts was as well inappropriate and was done in bad faith.

133 This ex parte application, unbeknownst to his counsel, was indeed an application to deal with the mobility rights of T.G. and a change in custody. His application, unbeknownst to his counsel, was brought under the guise of the issue of the safety of the child. His counsel believed it was done for the safety of the child. However, by failing to bring to the Court's attention those very important factors, the application was disguised as to its true nature.

134 It can hardly be argued that the situation was exigent or T.G. was exposed to potential harm when M.E.G. with-

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held from the Court that he was negotiating with a frantic mother who did not know her child's location. I am certain the Court would have been interested to know that he had spent some considerable time in negotiations with M.J.K. in that crucial time interval of 2 days between swearing the original affidavit and making the ex parte application.

135 M.J.K. testified before me that the crux of the negotiations revolved around M.E.G. returning to the residence with T.G. if M.J.K. provided a written guarantee addressing his concerns regarding her parenting abilities and her lifestyle. M.E.G. in his subsequent affidavit of January 21, 2001 and filed as Exhibit 16 in this trial, deposed that he never said in the negotiations that he would return if she provided him with sole custody. Instead he deposed he could not move back unless things really changed. Whichever version is true is not important. What is important is the inference that his subsequent negotiation and his position on T.G.'s return (if things changed), does not demonstrate any real ongoing concern by him at that time regarding T.G.'s safety. At worst he would return if things changed was his advice to her. Those words and that conduct does not demonstrate that he took M.J.K.'s many alleged threats seriously on either an objective or subjective standard. He did not and could not in all good faith believe there was any imminent potential danger to his daughter or to himself as he alleged in his Affidavit of January 15, 2001. That too, is demonstrated further when he continues to work with M.J.K. for a few days after January 17, 2001 after she knew of T.G.'s location and after he had obtained the ex parte order.

136 I note too (and this is not a criticism of Plaintiff s counsel) that Plaintiffs counsel attempted to contact the Defendant's counsel before she made the ex parte application. If M.J.K. was to be placed on notice through her counsel, then the situation could hardly be termed exigent or potentially harmful to T.G. T.G. was in a safe and unknown location to M.J.K. M.E.G. could not have concern for any immediate danger or mischief to T.G.'s person when a voice mail telephone conversation to M.J.K.'s counsel was given, negotiations had been conducted between the parties, and the child was in a safe and unknown haven. The Chambers Justice was placed in an unfortunate position by M.E.G.'s failure to detail and disclose the occurrence of and the contents of his interim negotiations with M.J.K. on January 16, 2001. M.E.G. used M.J.K.'s concerns over the location of her daughter as a negotiating tool or ploy to gain a tactical advantage over M.J.K. in order to obtain his desired goal of custody of T.G.

137 The basis for an ex parte order in child custody situation is that such an order should only be sought when it is necessary to prevent a serious risk or irreparable harm to the physical and emotional well-being of the child. Here there was no necessity in the circumstances to prevent a serious risk or irreparable harm to T.G. In addition to the factors I have already enumerated, I find that M.E.G. did not possess a legitimate fear at the time of the swearing of his affidavit, or at the time of the subsequent ex parte application, that M.J.K. would do something dangerous if she found out he was leaving their home with T.G. before he obtained an order. The alleged threats by M.J.K. were not real nor current. The evidence heard at trial disclosed that one alleged threat was the result of a nightmare which M.J.K. had experienced and which she had disclosed earlier to M.E.G. The other threats were old threats which were made on a hypothetical basis by M.J.K. in earlier arguments with him.

138 In January, 2001 M.J.K. was emotionally stable. She had spent New Year's Eve of 2000 with M.E.G. at a mutual friend's home. M.E.G. and M.J.K. continued to work together up to and after January 17, 2001.1 find that M.E.G. had no reasonable grounds on an objective basis in January of 2001 for any fear that M.J.K. would do something dangerous to him or to T.G. if she learned he was leaving the home. I find further on the evidence heard by myself that M.E.G. did not possess a legitimate belief that M.J.K. posed any type of danger. In reaching that finding I look specifically to the following factors:

1. Hiding T.G. in an unknown location, to M.J.K.

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2. Swearing an affidavit deposing dangers which did not realistically exist.

3. Instructing his counsel to defer making the ex parte application while he negotiated custody with M.J.K.

4. Allowing M.J.K. to remain working in his office from January 15 to January 22, 2001.

5. Not notifying M.J.K. of T.G.'s location despite her frantic efforts to ascertain the location before and during the negotiations.

6. Instructing his counsel to make an ex parte application on January 17, 2001 without disclosing the additional material facts to the Court.

7. Instructing his counsel to apply for supervised access for M.J.K. to T.G.

139 I find, after listening to all of the evidence, that his grounds for obtaining the ex parte order were frivolous grounds. They were not true. He could not possess an honest belief in that respect. His beliefs were not reasonable on either an objective or a subjective basis. A reasonable person would not have come to the conclusion in all of the circumstances that T.G. was any danger from M.J.K. On a subjective basis M.E.G. knew that there was no real danger. Even his counsel admitted that in her argument before when she indicated at page 4566 of the trial transcript:

And I think that he probably knew there was no real danger.

He knew there was no real danger and his affidavit could not be truthful in that respect. He cannot and must not in the trial be allowed to argue that it was misjudgment at worst on his part. Rather he deliberately allowed his counsel to make an ex parte order with no effectual notice to M.J.K. after he had hidden T.G., but before he swore his affidavit, and after he negotiated with M.J.K. to return if she mended her ways. Mending her ways did not ever encompass forgoing any contemplated violence to T.G. by her. M.E.G. knew M.J.K. was not violent and he used the Court process and his own counsel, to try and effect an advantage for himself in the custody battle. M.E.G. was malicious in his assessment of M.J.K. since T.G.'s birth and as well during the course of his evidence at this trial. I accept the evidence of the very expert he retained that he should have known that M.J.K. would not harm or kill the children. This was not a situation where M.E.G. could realistically state in all of the circumstances that he was not prepared to take a chance on his daughter's safety. There was no realistic evidence before or after the ex parte order that M.J.K. would harm T.G. If M.E.G. truly believed M.J.K. was potentially violent, but T.G. was safe, he should have brought his application on notice to M.J.K. His position or T.G.'s position would not be prejudiced by effectual notice in that T.G. was hidden in an unknown location. M.J.K. could hardly be in a position to do harm or commit mischief in that situation.

Final Order

140 Despite my findings on M.E.G.'s credibility and on his motives for instructing his counsel to bring an ex parte application for interim interim custody of T.G., I must turn my attention to the issue of what is in the best interests of T.G. as far as custody is concerned. It is both parties' position and the position of the 2 experts that joint custody cannot occur in this case because of the non-communications and continuing conflicts between them. I agree with that assessment. Joint custody cannot be awarded. T.G. would be adversely affected by joint custody. An order of joint custody would not be in her best interests. It would in all likelihood expose her to ongoing conflict and hostility and stress.

141 I am not prepared to make an order for parallel parenting. I am aware that parallel parenting is a model that has been developed for high conflict situations. However I am not satisfied that either party could successfully allow the other parent to assume responsibility for T.G. during the time that T.G. was in the other parent's custody. Each parent, I am

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satisfied, would continue to argue and bicker over the actions of the other parent while T.G. was in that other parent's care. Neither of these parties could exercise the rights and responsibilities associated with custody independently of each other. Past conduct has demonstrated in this case that there would be overlapping disputes in the area of decision making when T.G. was in the care of the other parent. T.G. would continue to be a pawn between the two parties. Each party would not recognize the other party's exclusive jurisdiction to make unimpeded decisions for T.G. when T.G. was in the care of the other party. Finally, parallel parenting would not be effectual or practical as long as the parties reside in two different areas of the Province of Alberta.

142 The only effectual manner in which T.G. can be raised is for one party to have sole custody. The question is: which party should receive sole custody? The best interests of T.G. must govern the answer.

143 The parties have experienced a very turbulent relationship since they initially met. T.G.'s birth was a happy event which brought them closer together for a brief period but now the question of T.G.'s custody has driven them further apart. There can be no doubt that T.G. has a significant bond to each party. Both parents, I find, are healthy in an emotional and physical sense. Neither has any health or substance abuse problem. I have no concerns about M.J.K.'s alleged depression or suicidal behaviour as alleged by M.E.G. during the course of this litigation.

144 I have no concern about T.G.'s safety while in the care of either parent. Neither home has been proven to contain any dangers for T.G. While M.J.K. may not be the best housekeeper, her house is far from filthy or a concern for T.G.'s health or safety. Poor housekeeping does not beget poor parenting. T.G. enjoys all of the necessary physical amenities in both M.E.G.'s parents' home and in the home of M.J.K. Both parties have provided consistently for all of T.G.'s needs. Both parties have provided the necessaries of life and proper physical care and health care for T.G. Both M.E.G. and M.J.K. are loving and conscientious parents for T.G. Both parties can parent properly and have demonstrated in the past a respective ability and willingness to parent properly and adequately. They are both aware of T.G.'s needs. Since her birth both parties have spent many hours with T.G. Even at present with T.G. living in Medicine Hat M.J.K. spends 9 days per month with her daughter. M.E.G. spends a little more time with her. However, it must be remembered that for at least 17 working days per month that T.G. is in the care of his mother for the majority of those working days.

145 Both parents have the ability to make sound decisions for T.G. M.E.G.'s complaints regarding the Defendant's inept housekeeping and providing a lack of necessaries, physical amenities, physical care, stability, structure, routine, opportunities to learn and develop, discipline, and finally the lack of ability to set boundaries, have not been proven to my satisfaction, wherein any of those factors would significantly impact upon T.G.'s life. In listening to M.E.G.'s total evidence in this area I was struck with the impression through his evidence and his demeanour that he is a rigid, and controlling individual who sets very high standards of care for others. He was not at all friendly towards M.J.K. The only area in which he could make a positive statement about M.J.K. was with respect to her inter-personal skills and her ability to keep T.G. amused through the medium of play. The balance of his evidence was directed to criticism of her. M.E.G. did not bring forth significant evidence to prove that M.J.K. was a negligent and neglectful parent. The majority of his many criticisms of her as a parent relate to a difference in parenting style. For example, I do not find that the broken glass in the garbage, the curling iron status, or the hair dye incident impacted T.G. I accept M.J.K.'s explanations that she provided in evidence. She is not neglectful nor irresponsible. T.G. has never been at risk in M.J.K.'s care. In looking at the six categories provided in *Starko and Starko* (1990), A.J. No. 432 (Q.B.), a decision of the Honourable Madam Justice Picard (as she then was), I find on a review of all of the evidence that both parties meet the standards set out in each category. I have no difficulty with either parent receiving custody of T.G.

146 It has been argued by M.E.G. that T.G. should remain with him because she has been in his care and control since January 15, 2001. His argument continues that any travel involved between Medicine Hat to Calgary and return is

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outweighed by the benefits of T.G. remaining in Medicine Hat. In short, it is argued that M.E.G. has been the most consistent and reliable care giver in T.G.'s life especially since January 15, 2001. T.G., it is suggested, is happy with the situation. M.E.G. concludes his argument that it is therefore in T.G.'s best interests to remain in Medicine Hat where she has a better opportunity to be provided the criteria as set out in the *Starko v. Starko*, [1990] A.J. No. 432 (Alta. Q.B.) decision.

147 However, M.J.K. meets the criteria in *Starko* equally as well as does M.E.G. Further I note that it is M.E.G.'s parents who provide much of the amenities. While I appreciate T.G. and M.E.G., in the view of M.E.G.'s father, could remain there indefinitely, it is still a temporary situation. Further, while I have no doubt about M.E.G.'s ability to meet these criteria, should he ever decide to leave his parents' home with T.G., he would not in my opinion meet the criteria in *Starko* any better than would M.J.K. I further note that it was M.E.G., who precipitated the ex parte order, and who created that situation. It has taken M.J.K. almost 2 years to convince this Court that she is not violent or neglectful. She has been deprived of her daughter's care and control for almost 2 years. It is fruitless in my view for M.E.G. to argue, as a result of improper steps which he took, that T.G. should remain with him because of the excellent care and opportunity he has provided to her over the last 2 years. The evidence demonstrates that T.G. will receive excellent care and opportunities if she is placed in her mother's care. The evidence of Ms. Kushner suggests that T.G. is developing a loss of attachment to her mother and separation anxiety. Dr. Edwards was not of the same belief but he was concerned about T.G. being removed from her mother's life. In the last 2 years the ability to provide T.G. with opportunity and resources to learn has been expanded. It has only been in the last 2 years, while in the care of M.E.G., that T.G. has been old enough to take advantage of such opportunities as play school, reading class, Sunday School and athletic endeavours. M.J.K. has been inhibited from providing these opportunities and resources due to the ex parte order. I look to M.J.K.'s care of her daughter, C.K., and I see that C.K. has been provided with these resources and opportunities (figure skating, speech etc.). C.K. has excelled in these areas of her life. I note further M.J.K. has testified that T.G. will be placed in ECS in Calgary if she is awarded custody. Finally, I look to the evidence of the experts who indicated M.J.K. plays, draws and interacts very well with T.G.

148 Both parents wish T.G. to develop into a healthy and well-rounded individual. Both parents wish the other parent to be involved in T.G.'s life. However, M.J.K. is the more friendly parent between the two of them. That is not to state that M.E.G. is an unfriendly parent but his past conduct and professed intentions do not indicate a desire to involve M.J.K. in T.G.'s life as much as M.J.K. wishes to involve him in T.G.'s life. M.J.K. supports the father seeing the child. She initially wished joint custody, but as this litigation developed, she recognized the communication difficulties and changed her position to seek sole custody.

149 I am left with one parent, M.E.G., who would be restrictive of access and one parent, M.J.K., who would encourage access. I am confident, that if M.E.G. receives sole custody, both M.J.K. and T.G. would receive only the minimum access specified in a court order. I do not have that same fear regarding M.E.G.'s right to access if M.J.K. receives sole custody. That is my measure of the unfriendliness that M.E.G. exhibits towards M.J.K. This unfriendliness manifested itself throughout his evidence and demeanour before me during the trial. It is demonstrated by his documentation of M.J.K.'s lifestyle and by his constant checking for evidence of M.J.K.'s lack of care of T.G. since January of 2001. It manifested itself in his demands for supervised access, his attitude towards the supervision, and finally his attitude after each supervised visit when he checked on the condition of his daughter. He even arranged for a mechanic to be present to check M.J.K.'s vehicle in Medicine Hat when she arrived for an access visit. An access visit, I might add, which was necessitated only by his actions in unilaterally moving the child to Medicine Hat without a court order and by his subsequent actions in having his counsel apply for an ex parte custody order in the absence of exigent or dire circumstances. He was not forthright in his disclosure to M.J.K. or to this Court in January of 2001.

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150 M.E.G. refuses to communicate with M.J.K. M.J.K., too, is not a parental model in terms of her communication with M.E.G. But I suspect that his disdain and lack of communication with M.J.K. is the foundation for his unfriendly attitude towards M.J.K. and for T.G.'s right to enjoy the care, love and companionship of her mother. M.E.G. as well extends his allegations of neglect and negligence toward M.J.K.'s mother as far as the care of the child is concerned. I listened carefully to his evidence on the care T.G. received from M.J.K.'s mother. I found his concerns to be overblown on trivial matters. There was no evidence before me that demonstrated that the maternal grandmother was negligent. M.E.G. by his own conduct utilized the services of M.J.K.'s mother as a care giver and babysitter for T.G. from T.G.'s birth until January of 2001. His actions do not match his words. T.G. has never come to any harm while in the care of any grandparent.

151 I am frightened that this demonstrated unfriendly attitude by M.E.G. will someday be transferred possibly to T.G. This attitude transference could impact negatively on T.G.'s relationship with her mother. That must not happen.

152 The experts are the persons to whom I pay attention. They are independent experts. Ms. Kushner was appointed under Rule 218(.1) of the Alberta Rules of Court as a court appointed expert. M.E.G., not being satisfied with her report, then retained Dr. Edwards. Dr. Edwards did not support M.E.G. receiving sole custody or being really involved in the decision making process. M.J.K. called Dr. Edwards when M.E.G. did not present evidence from him. Both of these witnesses were supportive of M.J.K. receiving sole custody. They were not mislead by M.J.K. nor by any other material placed before them. All other things being equal they opined that M.J.K. should receive sole custody and the right to make unilateral decisions for T.G. on the basis of the non-cooperativeness of the parties and M.E.G.'s professed unfriendliness towards M.J.K. being involved in any meaningful way in T.G.'s life. M.E.G. would have M.J.K. involved in T.G.'s life in a summary fashion. On the facts I am convinced M.J.K. will be the fairer parent in terms of encouragement of access. I note as well the importance of both parents sharing equally in T.G.'s life.

153 M.J.K. must make all the decisions for T.G. I do not believe the parents can jointly make decisions because of the non-cooperative spirit which flows between them on issues regarding T.G. M.E.G.'s attitude as demonstrated on the evidence and his demeanour on the witness stand impedes his right to have sole custody or be a decision maker in T.G.'s life.

154 I do order that M.J.K. will receive sole custody of T.G. in Calgary with specific access to M.E.G. I will set out the terms of the specified access subsequently. If M.E.G. wishes to relocate to Calgary, as he possibly proposed to do in his evidence, then I am certain his specified access will be and should be increased to provide him with greater impact into his daughter's life. That is, of course, a future decision and it will depend upon the hours of employment of the parties and their lifestyles. Hopefully such a contingent future event for his specified access can be accomplished by consent. However it should be specified access based on the parties proven inability to communicate and agree. Similarly M.J.K. must receive the sole decision making ability for the care of T.G. This, too is based on the parties proven inability to communicate and agree. Future litigation in this matter must be discouraged in the best interests of T.G. Similarly, it is in the best interests of T.G. that I have awarded sole custody of her to M.J.K.

155 M.E.G. did present to me the argument that T.G. is not unhappy in her current life situation in Medicine Hat and that the evidence presented demonstrated that it is T.G.'s best interest to remain in his parents' family home. However the evidence demonstrates that T.G. currently sees her mother at least 9 days per month. It also demonstrates that T.G. spends almost 1 full day on the highway per month (6 trips at 3 hours driving time each plus any additional time dedicated to trip preparations). The balance of the month is currently spent with M.E.G. and his parents. Such an argument does not succeed before me in light of T.G.'s best interests. Both experts have stressed the importance of T.G. seeing her parents equally and as frequently as possible. The latter concept is in T.G.'s best interests. To allow M.E.G. to be suc-

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cessful in his argument in light of his unilateral move of T.G. to Medicine Hat without a court order would not be equitable. Further my order in locating T.G. to Calgary to be in her mother's sole custody will not be traumatic for T.G. T.G. is not going to a new home or a totally new situation. Since the summer of 2001 she has spent at least 9 days of access per month with her mother in Calgary.

156 On the mobility issue I have determined that it is not in T.G.'s best interest to travel between Medicine Hat to Calgary and return. The move was not precipitated by M.E.G.'s financial security. He continued to work in Calgary for at least 5 months after T.G. moved. "When he did move to Medicine Hat, he did not have employment nor did he know what his eventual expenses would be. Nor did he know what future employment hours he would be required to work. Medical coverage and employment benefits were as well unknown. His debt load is not enormous. He would, of course, have that debt load regardless of his city of residence.

157 Plaintiffs counsel referred me to the decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.) in the Supreme Court of Canada regarding the mobility issue. It dealt with the principles which govern an application for a variation of an order relating to custody and access as set out in the *Divorce Act*, R.S.C., 1985 C 3(2nd Supplement). The Honourable Madam Justice McLachlin held that the *Act* directs a two stage inquiry. She stated at page 42 as follows:

> The principles which govern an application for a variation of an order relating to custody and access are set out in the ***Divorce Act***. The ***Act*** directs a two-stage inquiry. First, the party seeking variation must show a material change in the situation of the child. If this is done, the judge must enter into a consideration of the merits and make the order that best reflects the interest of the child in the new circumstances.

158 While the case at bar is not a change of custody under the *Divorce Act*, it is an initial application by M.E.G. for a change of custody from joint custody, as granted by Phillips, J. in June of 1999, to sole custody with the primary care and custody to him and access being provided to M.J.K. While M.E.G. obtained the ex parte order of custody on January 17, 2001, which was later confirmed by Lutz, J. on February 1, 2001,1 still regard this trial before me as the application of M.E.G. It was M.E.G. who moved T.G. to Medicine Hat on the basis of his unilateral decision. The ex parte order was obtained without M.J.K.'s knowledge and the confirmation order never inquired into the merits of the move. In my view it is M.E.G. who now bears the burden of demonstrating a material change in the circumstances of T.G. In that connection I do follow the reasoning set out in the judgment of McLachlin, J. although the situation in the case at bar is not under the *Act*.

159 Was there a material change in the circumstances? I think not. Since the order of Phillips, J. the parties lived together in the same residence in 2000 sharing joint custody of T.G. M.E.G.'s affidavit in support of his ex parte application suggest alleged threats made by M.J.K. in reference to the child and the child's safety. I have found any such alleged threats were not real or current in January of 2001. T.G. was in no danger from M.J.K. Subsequently, M.E.G. suggested through his evidence that his move with T.G. to Medicine Hat was completed due to financial considerations. In January of 2001, when the move of T.G. was completed, M.E.G. did not move her for financial reasons. He moved her ostensibly for her own safety and before he obtained even the ex parte order. At no time did he express in January of 2001 that the move was based on financial considerations. Rather he remained in Calgary for another 5 $^{1}/_{2}$ months while he continued to operate his audiology business. He eventually shut the doors on this business at the end of June of 2001 and moved to Medicine Hat where he sought and obtained new employment in July. He did not look at any time for other work before July of 2001 in Calgary in any type of field of endeavour. His subsequent employment in Medicine Hat is at a lower salary. In turn due to the advantageous position of receiving financial assistance from his parents through free accommodation and reduced food and other living expenses, his expenses are lower. But that is the end result and not the reason for his move of T.G. in January, 2001 to Medicine Hat. In the absence of threats to T.G.'s safety and with his contin-

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ued employment in Calgary, there was no material change in circumstances and M.E.G. has failed to meet the threshold condition.

160 In addition, I find that M.E.G.'s move to Medicine Hat is not a temporary move. He intends to reside in Medicine Hat permanently. He offered no evidence of any intention to return to Calgary until and unless M.J.K. is awarded custody of T.G. with T.G.'s residency being in Calgary. M.E.G. did not move to Medicine Hat with T.G. for the purpose of having l a lower cost of living. That, fortuitously, turned out to be the result but it was not his original intention.

161 If, I am incorrect, and there has been a material change in circumstances demonstrated by M.E.G., I must still enter into a fresh inquiry into the best interests of the child having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to meet them.

162 In the case at bar the relationship of T.G. to both parents is excellent. Access of T.G. to M.J.K. has been adversely affected by the ex parte order. M.J.K.'s access has deteriorated from enjoying T.G. on a joint custody basis through a sequence of supervised access to access of 9 days per month with transportation difficulties and issues. Access has been affected adversely by the move in terms of time, danger, cost and quality. M.E.G. has not actively pursued M.J.K.'s access. While he eventually consented to each and every application for increased access by M.J.K., it has not been without extensive and often threatening correspondence between the parties counsel on the instructions of the parties. Indeed this trial has been extremely litigious with extreme emotion being demonstrated by both parties. At this date M.E.G. still wishes to restrict M.J.K.'s access to 2 weekends per month plus travelling between Medicine Hat and Calgary. T.G. is far too young to have her wishes regarded. M.E.G., in moving T.G. to Medicine Hat, was motivated in part by unacceptable motives. The continued travel between the two cities is not in T.G.'s best interests. She is too young to travel alone. Air travel is out of the question on the grounds of expense and T.G.'s age.

163 M.E.G. cannot now argue that he provides a stable home in Medicine Hat and it is therefore in T.G.'s best interests that she remain with him. M.J.K. will provide a sufficient home in Calgary and will encourage T.G. to have contact with M.E.G. I am convinced that M.E.G. will not encourage T.G.'s access with her mother. Rather I believe he will continue to restrict M.J.K.'s access and input into T.G.'s life if T.G. remains in his care and custody. There were no benefits for T.G. in M.E.G.'s move of her to Medicine Hat in January of 2001. There are some benefits now to T.G. remaining in Medicine Hat but there are more benefits for T.G., if she is to be returned to her mother's care. T.G. will have the maximum contact with both parents with M.J.K. having sole custody with T.G. residing in Calgary. T.G. will not be disrupted or adversely affected by a return to Calgary. Her mother is far from a stranger or interloper in T.G.'s life. A return to Calgary and her mother is not punishing T.G. It is in her best interests.

Plaintiff's Access to T.G.

164 It is important for M.E.G. to have frequent access to T.G. Unfortunately upon T.G.'s return to Calgary he will remain in Medicine Hat. I have no evidence that he will return to Calgary other than some indication from him he will possibly return depending on some contingent factors such as suitable employment. I must therefore set his access on the basis that T.G. will be in Calgary and he will be in Medicine Hat. If that changes, he can seek increased access which should be favourably received. However, because of the turbulent relationship and non-communication between the parties, I intend on setting specified access.

165 The foundation for specified access rests on my belief that it is not in T.G.'s best interest to travel frequently between Calgary and Medicine Hat. Thus M.E.G. will be entitled to exercise access in Medicine Hat on 1 out of every 4 weekends per month. That access will be from 4:00 p.m. on Thursday until 7:30 p.m. on Sunday. M.E.G. will be responsible for the transportation of T.G. and for all attendant expenses from Calgary to Medicine Hat and return. If there is a

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long holiday weekend falling within that specific weekend, his access will be extended accordingly to allow him to include the additional day. The hours of pickup and return on that long weekend shall remain the same as a normal weekend. M.E.G. shall be entitled to choose the initial weekend for the access in Medicine Hat. M.J.K. will have the care and custody of T.G. for the following weekend with no right of access to M.E.G. On the next following weekend M.E.G. again will enjoy access from 4:00 p.m. on Thursday until 7:30 p.m. on Sunday. On this weekend the access to T.G. must occur within the City of Calgary. Again, M.E.G. will enjoy the privilege of any additional day for any holiday falling within his weekend. On the fourth weekend M.E.G. will enjoy no right of access to T.G. After the forth weekend the cycle of access will recommence and M.E.G. shall be entitled to his 1 weekend of access in Medicine Hat if he so chooses.

166 This cyclical access shall continue on the same basis when T.G. commences grade 1. However on the weekend when M.E.G. can exercise his 1 weekend of access in Medicine Hat, his access shall commence on the same day and same hour but T.G. will not miss any school days. M.E.G. must exercise his access on the Thursday night and Friday of that week in Calgary. He will be allowed to enjoy access on that weekend with T.G. in Medicine Hat after she has completed her Friday schooling.

167 M.E.G. will be entitled to unrestricted access for 1 uninterrupted week at Christmas in each and every year. However the timing of that access will alternate from year to year. Commencing on December 29, 2003 at 4:00 p.m. he shall be entitled to 1 week of access. He shall return T.G. on January 5, 2004 at 7:30 p.m. The following year, 2004, he shall enjoy his 1 week of uninterrupted access from December 22, 2004 at 4:00 p.m. until December 29, 2004 at 7:30 p.m. His Christmas access in odd numbered years shall accord with the specified access of the year 2003 and his Christmas access in even numbered years shall accord with the specified access of the year 2004. Again he will be responsible for transportation arrangements and any attendant costs.

168 M.E.G. will be entitled to 1 week of uninterrupted access of his choosing each and every spring break. His access will commence on the date of his choice at 4:00 p.m. and he will return T.G. at 7:30 p.m. 1 week later during the spring break.

169 In the summer months M.E.G. will be entitled to 4 weeks of uninterrupted access to T.G. However the 4 weeks will not be contiguous but instead will be broken up into 2 segments of 2 weeks each. Again M.E.G. shall be entitle to choose the commencement of each of the segments. M.J.K. shall be entitled to have at least 1 week of the care and custody of T.G. between the 2 segments. Again the access shall commence at 4:00 p.m. on the commencement day and will end at 7:30 p.m. on the termination day, 2 weeks later. Again M.E.G. will be responsible for transportation arrangements and attendant costs.

170 Written notice shall be given to M.J.K. at her current address or subsequent change of address by M.E.G. of his intentions to exercise spring break access and summer holiday access at least 90 days prior to the commencement of each access period. In that notice M.E.G. shall detail the commencement date and the termination date for each access period. If M.E.G. fails to provide such written notice prior to the 90 day deadline, then M.J.K. shall be at liberty to inquire in writing of M.E.G. whether he wishes to exercise that access. If M.E.G. indicates he wishes to exercise his access, then M.J.K. will be at liberty to set the specific access dates for the Plaintiff in that situation. The setting of such access dates shall be completed by M.J.K. within 45 days after the expiry of the 90 day deadline.

171 During the course of M.E.G.'s access during the Christmas holidays, the spring break and the summer holidays, his weekend access shall stand suspended. The cycle of his next weekend access shall commence on the second weekend following the end of the Christmas, spring break or summer holiday access. It will be understood that the first weekend

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access will be the next sequential access for either his Medicine Hat or Calgary weekend access depending on whether his previous weekend access was Medicine Hat or Calgary respectively.

172 M.E.G. shall have reasonable telephone access to T.G., a minimum of 3 nights per week, the day and hour to be designated specifically. M.J.K. shall ensure that the child is present at least $^{1}/_{2}$ hour before and after the designated time for the call.

173 M.J.K. shall have reasonable telephone access when the child is in M.E.G.'s care.

174 Both M.E.G. and M.J.K. shall use their best efforts to ensure that each party has contact with the child on her birthday each year and that the child has contact with each of the parents on mother's day, father's day and on their own birthdays.

175 M.E.G. and M.J.K. shall each inform the other parent of medical emergencies as soon as is practicable after they occur.

176 Should either M.E.G. or M.J.K. travel more than a short distance outside the respective cities of Calgary and Medicine Hat with T.G., which includes an overnight stay, proper contact information shall be provided to the other parent, including a telephone number and itinerary.

177 Should M.J.K. intend to remove the child permanently from the City of Calgary then M.J.K. shall provide M.E.G. with 90 days written notice of such intention of change of permanent residence of the child.

178 M.E.G. shall be entitled to receive from all health care providers, educational authorities, religious providers and extra curricular activities providers all necessary information and documentation which relate to T.G.

179 It is to be understood that the parties can vary any of the terms of this specified access by mutual written consent.

180 Transference of T.G. shall take place at the home of M.J.K.

181 It would be hoped that the parties commence using a log book where they can provide one another with concise details regarding T.G. at the transference.

Child Maintenance

182 M.E.G. seeks retroactive child maintenance for T.G. from April 12, 2001 until the present. Since January of 2001 M.J.K. has paid no child support. It is her position that no child maintenance should be payable due to M.E.G.'s unilateral move with T.G. to Medicine Hat and his subsequent ex parte custody order. She cites travel inconvenience and access costs and her legal fees as factors to be taken into consideration as well. She further asks that if retroactive child maintenance is ordered, her legal fees from January, 2001 to present, her child supervision costs, her experts witness fees and subsequent court attendance costs, and her access costs should be set off against any child maintenance payable.

183 However she does accept the fact that if I exercise my discretion against her position, she will pay it. It is obvious that a mark of responsibility for her child is her obligation to pay child maintenance. She has an obligation to pay child maintenance regardless of her child's location. She has tried to avoid the obvious need for child maintenance by adopting this position. I exercise my discretion in favour of M.E.G. who has made if clear since April of 2001 that he intended to seek appropriate child maintenance. T.G.'s needs required to be met over this period of time. I am mindful of the

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financial assistance of M.E.G.'s parents but both parents have an obligation to support the child. In that connection I will make an order for child maintenance for T.G. on the Federal Child Support Guidelines commencing on May 2, 2001 and each and every month thereafter up to and including December 1, 2002.1 set M.J.K.'s income for that period of time at $27,000 per annum. I note, that in the year 2002, I have not been given her final income. Further on the evidence I heard, I do not accept Plaintiffs counsel's argument that M.J.K.'s annual income could be as much as $42,000 less certain unknown expenses to be deducted. M.J.K. will pay monthly child maintenance on the guideline annual income of $27,000. There were no Section 7 expenses claimed other than play school costs of $100 per month, which I do not find extraordinary or necessary. I do set off the cost of her supervision reports for the spring of 2001 against that total retroactive amount. I will not set off the rather minimal access costs or telephone costs. The claim for legal fees and expert witness fees and disbursements are matters which are reserved for a taxable party-and-party costs application.

184 In that M.J.K. will have sole custody commencing on January 18, 2003, M.E.G. will pay child maintenance for T.G. commencing February 15, 2003 and the 15th day of each and every month thereafter on the Federal Guideline amount payable based on an annual imputed income of $27,300.1 note he had the following employment income:

1998	$ 27,888.27
1999	17,921.65
2000	14,845.78

He currently works 4 days per week and is paid at a lesser rate in Medicine Hat than he would be capable of earning in Calgary in his profession. He is underemployed at the present time while he carries out transportation of T.G. to Calgary. He is capable of earning $15.00 per hour with his training and expertise in his field as an audiologist. I have no evidence that he cannot presently perform that work. If he chooses to remain in Medicine Hat with a reduced work week, he will have made the choice to be underemployed for no valid reason. I impute his annual income on the basis of a 35 hour work week for 52 weeks at $15.00 per hour. He will be entitled in any event to paid vacations. M.J.K. can, of course, claim any eligible Section 7 expense when she learns of any of those expenses and their respective amounts. M.E.G. will not be entitled to any access costs as it was his decision to move to Medicine Hat for reasons previously detailed.

Charter of Rights and Freedoms

185 M.J.K. argued that there was a breach of her rights under s. 7 of the *Canadian Charter of Rights and Freedoms, Constitution Act*, 1982 s. 52. Her argument becomes moot in light of my decision to award her sole custody of T.G. with all major decision making responsibilities being granted to her. In addition I do find that she has failed to convince me on the proper standard of proof that there was a breach of any of her s. 7 rights under that legislation.

Final Order

186 In summary M.J.K. shall have sole custody of T.G. with all major decision making responsibilities for T.G. M.E.G. shall have the specified access as detailed herein and each will be paid child maintenance as detailed herein.

Costs

187 Counsel may make an appointment with me to speak to costs.

END OF DOCUMENT

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