

2005 CarswellOnt 1892
Ontario Superior Court of Justice

Sterling v. Sterling

2005 CarswellOnt 1892, [2005] W.D.F.L. 3032, [2005] W.D.F.L. 3054, [2005] O.J. No. 1936, 139 A.C.W.S. (3d)
320, 17 R.F.L. (6th) 377

PATRICK STERLING (Applicant) and JOANNE STERLING (Respondent)

Linhares de Sousa J.

Heard: February 28, 2005; March 1-4, 7-11, 14-16, 18, 2005; April 14, 2005
Judgment: May 12, 2005
Docket: 99-FL-59721C

Counsel: Jack E. Pantalone for Applicant
Joanne Sterling for herself

Subject: Family; Contracts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Family law

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Headnote

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

Parties, who had three children of marriage, separated in 1998 — Final separation occurred after father physically assaulted mother — In 2001, parties reached final minutes of settlement which were incorporated into consent order in 2002 — 2002 order provided for joint parenting of children — Under 2002 order, parties had joint custody of children with primary residence shared equally between parents — Father applied to vary order for order granting him sole custody of children with certain access to mother — Application granted — Granting of sole custody to father was appropriate on consideration of factors relevant to children's best interests — Both parties had love, affection and emotional ties to children — Except for first two years after separation of parties, children enjoyed on relatively equal basis care of both parents — Parents had each attempted to vilify one another — In latter part of marriage, father abused alcohol — However, father resolved issue in suitable manner — Although evidence showed that mother's allegations of sexual impropriety by father towards children were to be put to rest, mother continued to raise allegations and rely on them in conflict with father — Evidence indicated that mother had limited insight into her own contributions to conflict — Mother's lack of judgment impacted children's well-

being and curtailed possibility of reaching modicum of co-operative parenting — Children would have more direct parental attention during evenings at father's home, and, at father's home, children would have benefit of step-mother in their care — Evidence indicated that father had greater respect for mother's capacity as parent than she did for his abilities, and that father would be likely to support children's relationship with their mother.

Family law --- Custody and access — Access — Factors to be considered — General principles

Parties, who had three children of marriage, separated in 1998 — Final separation occurred after father physically assaulted mother — In 2001, parties reached final minutes of settlement which were incorporated into consent order in 2002 — 2002 order provided for joint parenting of children — Under 2002 order, parties had joint custody of children with primary residence shared equally between parents — Father applied to vary order for order granting him sole custody of children with certain access to mother — Application granted — Granting of sole custody to father was appropriate on consideration of factors relevant to children's best interests — Both parties had love, affection and emotional ties to children — Except for first two years after separation of parties, children enjoyed on relatively equal basis care of both parents — Parents had each attempted to vilify one another — In latter part of marriage, father abused alcohol — However, father resolved issue in suitable manner — Although evidence showed that mother's allegations of sexual impropriety by father towards children were to be put to rest, mother continued to raise allegations and rely on them in conflict with father — Evidence indicated that mother had limited insight into her own contributions to conflict — Mother's lack of judgment impacted children's well-being and curtailed possibility of reaching modicum of co-operative parenting — Children would have more direct parental attention during evenings at father's home, and, at father's home, children would have benefit of step-mother in their care — Evidence indicated that father had greater respect for mother's capacity as parent than she did for his abilities, and that father would be likely to support children's relationship with their mother.

Table of Authorities

Cases considered by *Linhares de Sousa J.*:

Cox v. Stephen (2002), 2002 CarswellOnt 2321, 30 R.F.L. (5th) 54, [2002] O.T.C. 499 (Ont. S.C.J.) — referred to

Ellis v. Ellis (2004), 2004 CarswellOnt 3813 (Ont. S.C.J.) — referred to

Kaplanis v. Kaplanis (2005), 2005 CarswellOnt 266, 194 O.A.C. 106, 10 R.F.L. (6th) 373 (Ont. C.A.) — considered

Kappler v. Beaudoin (2000), 2000 CarswellOnt 1636, 6 R.F.L. (5th) 269, [2000] O.T.C. 302 (Ont. S.C.J.) — referred to

Kruger v. Kruger (1979), 25 O.R. (2d) 673, 11 R.F.L. (2d) 52, 2 Fam. L. Rev. 197, 104 D.L.R. (3d) 481, 1979 CarswellOnt 299 (Ont. C.A.) — referred to

LeClair v. Leclerc (2003), 2003 CarswellOnt 1802 (Ont. S.C.J.) — referred to

Statutes considered:

Children's Law Reform Act, R.S.O. 1990, c. C.12

s. 24(2) — considered

s. 24(2)(i) — referred to

s. 24(2)(ii) — referred to

s. 24(2)(iii) — referred to

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

Generally — referred to

s. 16(8) — referred to

s. 16(9) — referred to

s. 16(10) — referred to

s. 17 — referred to

Regulations considered:

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

Federal Child Support Guidelines, SOR/97-175

Generally

s. 21(1)

APPLICATION by father to vary order regarding custody and access.

Linhares de Sousa J.:

Introduction

1 The issue in this case is the determination of the parenting arrangement that meets the best interests of the three children of the parties to this action. The children of the marriage are 11 years old Alanna Sterling, born April 9th, 1994, 9 years old Carley Sterling, born January 15, 1996 and 7 years old Daniel Sterling born March 8, 1998. The parents currently jointly parent their children under the order of Justice Belch dated April 10, 2002, which was granted on the consent of both parties. The parties had reached final Minutes of Settlement on July 12, 2001. As can be seen from tabs 6 and 7 of the trial record those Minutes of Settlement were finally incorporated into the order of April 10, 2002, which provides, among other things, for the parties to have joint custody of their children with primary residence shared equally with the children moving from one parent’s residence to the other on a weekly rotation. Holidays were to be shared. There was a resolution of a dispute relating to the children’s busing. The consent order also provided that any unresolvable disputes arising out of the joint parenting, relating to the education, religion, health and residence of the children were to be sent to “binding mediation”.

Position of the Parties

2 Since the signing of their Minutes of Settlement on July 12, 2001 the parties have been parenting their children under the joint parenting regime. Mr. Sterling now brings these proceedings seeking to vary the order of Mr. Justice Belch dated April 10, 2002, granting him sole custody of the children of the marriage with access to their mother every second weekend and one evening per week. Mr. Sterling takes the position that the joint custody arrangement has not worked in view of the inability of the parties to resolve their ongoing matrimonial conflict and to work harmoniously under the current regime. According to Mr. Sterling, the parenting arrangement has been unsuccessful and disastrous for the children who are suffering under it. Mr. Sterling argues that this is sufficient to establish a material change of circumstance under section 17 of the *Divorce Act* justifying a change in the parenting arrangement and the relief sought by him.

3 At the commencement of the trial, Ms. Sterling took the position that the existing joint custody arrangement should continue and that the order of Mr. Justice Belch should be upheld. It was her view that all three children were doing well under the current arrangement. In her home they are happy and well-adjusted children. Ms. Sterling felt, however, that the existing order required an enforcement clause. There should also be an amendment prohibiting Mr. Sterling from returning to court again in the future because she saw his legal proceedings as personally directed at her, to emotionally and financially distress her. Finally, she argued that the existing order should be amended to order the parents to go to counselling so that they could learn to put their differences aside.

4 During the presentation of her case, Ms. Sterling changed her original position on the question of custody. She indicated to the court that she wanted to amend her answer and ask the court to grant her sole custody of the three children. Her changed position was that joint custody between her and Mr. Sterling was not possible because of the conflict. In the interests of the children the conflict between their parents had to be eliminated.

5 For the reasons that will become obvious in the discussion that follows, the evidence clearly supports the finding that the existing joint parenting arrangement is not in the best interests of the children, which justifies a change in the custody order. As between the two parents, the evidence further supports the conclusion that the children should be in the sole custody of their father. I granted this order orally on April 14, 2005, when this matter came before me again on an emergency basis after the trial had finished but before my written reasons had been completed. What follows is my final and complete written reasons in this case.

Factual Background

6 The following are some relevant facts. The parties married on March 14, 1992. They had met at the school where they were both employed as teachers. For Mr. Sterling this was his second marriage. He had two children from his first marriage who were in the custody of their mother. For Ms. Sterling this was her first marriage. After the birth of the three children and a marriage of some six years, the parties finally separated in December of 1998. The final physical separation occurred after Mr. Sterling physically assaulted Ms. Sterling and was removed from the home by the police.

7 Both parties have very different views of the reasons why the marriage failed. Substantial evidence presented by both Ms. Sterling and Mr. Sterling was dedicated to expressing those views. It is not for this Court to resolve the mutually conflicting allegations of the parties nor is it necessary to do so. Suffice it to say that Mr. Sterling's unhappiness in the marriage demonstrated itself in his abuse of alcohol and his out of control assaultive behaviour in December of 1998. The evidence demonstrates that by the end of December 1998, Ms. Sterling was equally unhappy in her marriage but at trial did not recognize any personal responsibility for the sad state of affairs. She saw that it was rooted in her husband's abuse of alcohol and behaviour from the very beginning of their marriage.

8 After the physical separation in December of 1998, the children remained in the care of their mother in the matrimonial home. Given his personal history and the nature of the events that precipitated the physical separation of the parties, the evidence shows that Mr. Sterling recognized that alcohol had become a serious problem in his life. In his own words, alcohol had become a self-medication for the stress he was under as his marriage to Ms. Sterling began deteriorating. He commenced counselling sessions with a clinical psychologist, Dr. Suzanne Simond, as well as a psychiatrist who specializes in the treatment of alcoholism, Dr. Mark Ujjainwalla. On the advice of Dr. Ujjainwalla, Mr. Sterling entered and completed an inpatient treatment program for his addiction at the Homewood Health Centre where he stayed between December 30, 1998 and January 26, 1999 when he was discharged. After this program, Mr. Sterling has continued to receive counselling from Dr. Simond. He has also had some day follow-up treatment for his addiction. He has also attended at Alcoholics Anonymous.

9 In February of 1999, Mr. Sterling pleaded guilty to an assault charge against his wife and was placed on probation with a number of conditions, including anger management and the stopping of access to the children if Ms. Sterling felt physically threatened.

10 After the separation and during Mr. Sterling's treatment at the Homewood Health Centre, the parties were in communication with each other. In that early period after the separation, it appears that both parties were willing to consider a reconciliation. They even attempted some marriage counselling with their parish priest and a Dr. Lee, but without success.

11 According to Mr. Sterling, Ms. Sterling was becoming more and more restrictive with his access to the children. Ms. Sterling claims that she permitted more visits than that alleged by Mr. Sterling. Whatever the truth of the matter, there was no question that the possibility of visits between Mr. Sterling and his children was at that time totally in the control of Ms. Sterling and that the parties were not in agreement as to the frequency of the visits and as to whether the visits should take place in the presence of Ms. Sterling.

12 The next significant event occurred when Ms. Sterling was hospitalized at the Queensway-Carleton Hospital in the spring of 1999, having suffered “major depression”. Ms. Sterling was hospitalized for a six-week period. During this period, Mr. Sterling moved back into the matrimonial home to care for the children. After a period of time, Ms. Sterling was able to return to the home on weekends to be with the children. Mr. Sterling would then vacate the home for the weekend.

13 Ms. Sterling was finally discharged from the Queensway-Carleton Hospital on May 14, 1999, by Dr. West who diagnosed her with a “major depression” and “a passive dependent personality disorder” (see exhibit #37). Follow-up treatment was recommended, which she commenced with a psychiatrist, Dr. Crowe, who diagnosed her with an “adjustment reaction with disorder of mood” and a “narcissistic personality disorder” (see exhibit #37).

14 It was during Ms. Sterling’s hospital stay that her allegations of Mr. Sterling’s inappropriate sexual behaviour with the children began to surface. As a result, the Children’s Aid Society of Ottawa (the Society) became involved through contact from Ms. Sterling and from other professionals with whom Ms. Sterling had communicated her allegations.

15 The Society commenced an investigation of the matter. The children were examined by a child and youth protection team at the Children’s Hospital of Eastern Ontario. Exhibit # 40 is the report of Dr. Plint about this examination and indicates:

Examinations of the three children were non-specific, but Carley was observed to be uninhibited and exposed herself in the waiting room.

CAS has investigated and are unable to substantiate sexual abuse. However, the described interactions and Carley’s behaviour at CHEO are suggestive of sexual abuse.

16 The report further indicates that there was no review and no recommendations made. The police were never involved. It was the intention of the Society to close its investigation and to withdraw from the case, which they in fact eventually did do.

17 The involvement of the Society in their case gave both parties a forum for the expression of their concerns concerning the parenting ability of their spouse. For her part, Ms. Sterling expressed her concern for Mr. Sterling’s continuing alcoholism and possible sexual impropriety with the children. For his part, Mr. Sterling raised his concerns about Ms. Sterling’s mental stability, her religious fanaticism, her physical treatment of the children and her lack of judgment in developing and wanting to pursue a relationship with a young male co-patient while she was a patient at the Queensway-Carleton Hospital. This latter point was noted in the discharge report of Dr. West (see exhibit #37). For Mr. Sterling what convinced him to finally bring the matter to court on an emergency basis was a note that he received from Ms. Sterling, dated June 2, 1999, giving him custody of all three children and possession of the home, declaring herself “no longer fit to be called a wife and mother” (see exhibit # 3). The next day she changed her mind and asked him again to leave the house.

18 When the matter came on for hearing before Master Schreider in July of 1999, Master Schreider, in the interests of protecting the children, awarded Ms. Sterling interim interim custody of the children with supervised access to Mr. Sterling. There is no question that the outstanding and unresolved allegations of sexual abuse of the children and Mr. Sterling’s alcoholism were important factors in the decision of Master Schreider. The evidence further shows that at the time of the appearance before Master Schreider, Ms. Sterling was aware that the Society had ended its investigation into the sexual abuse allegations made by her against Mr. Sterling and did not communicate this fact to the court. Mr. Sterling only became aware of the Society’s closing of the case much later when the Society’s records were released to him by way of disclosure in this litigation.

19 Master Schreider also ordered a custody and access assessment of the parents and the children. In compliance with this order the parties retained Dr. Gail Beck to do the assessment, which was completed at the end of August 2000 (see tab 10 of the Trial Record).

20 While Dr. Beck’s assessment was in progress, the parties continued to litigate issues before this Court. The parties could not agree on the frequency of access and who the supervisors of that access would be. These questions had to be resolved by way of a court order (see my order dated August 10, 2000, filed as exhibit # 9).

Dr. Beck’s Psychiatric Assessment of the Sterling Family

21 Upon the release of Dr. Beck’s report at the end of the summer of 2000, the parties again found themselves before the

court. Dr. Beck's assessment was clearly favourable to Mr. Sterling on the parenting issues. Dr. Beck found the relationship between the children and their mother to be warm and loving. Ms. Sterling attended to their needs lovingly and always in a timely fashion. However, according to Dr. Beck, Ms. Sterling appeared to have "little appreciation or sensitivity for the children's need to have a relationship with their father that is appropriate." According to Dr. Beck, this was the main weakness in her parenting, namely, that she did "not support the children's relationship with their father, even in the context of their longing for him." Ms. Sterling expressed the desire that there be no visiting between the children and their father. Her solution to her children's longing to see their father was to see a therapist (see pages 20 to 21 of the report).

22 In her observations of the children interacting with their father, Dr. Beck observed that the children were very excited to see their father and were very comfortable with him. Parting from him was difficult. To Dr. Beck it was "evident that the three Sterling children still love their father and want to be with him". All three children were suffering for lack of seeing their father.

23 Dr. Beck felt that Ms. Sterling's twin allegations of Mr. Sterling's alcoholism and sexual impropriety with the children should not continue to restrict Mr. Sterling's active parenting of his children. She recommended that Mr. Sterling's supervised access continue until the question of his alleged paraphilia be put to rest by an expert assessment or prescribed treatment. This would then be followed by unsupervised access. Based on her assessment of the family, Dr. Beck indicated that she favoured joint custody. She states at page 25 of her report:

.....

With respect to custody, it is my view that Mr. Sterling should begin to have a say in his children's lives, whether his access is supervised or not. Ms. Sterling's attitude toward the children's need for their father has been insensitive and she has expressed the view that he should not have a part in their lives. She is not likely, in my view, to be able to support the children's relationship with Mr. Sterling or to include him in decisions with respect to schooling, religious upbringing, and other matters. For this reason, I would favour joint custody for this family. If joint custody cannot be managed by the couple and if Mr. Sterling is assessed by the Forensic Unit as not having a paraphilia, then I would favour him as the custodial parent because of his sensitivity for his children's needs. Also, he has far greater respect for Ms. Sterling's capacity as a parent than she has for his abilities and I feel he would be likely to support the children's relationship with their mother.

.....

24 Dr. Beck found that based on her own testing, Mr. Sterling did not meet the criterion for the sexual deviancy of "paraphilia". Recognizing that she was not an expert in this particular field of psychiatry, she recommended that Mr. Sterling should be referred to the Forensic Unit of the Royal Ottawa Hospital for an expert opinion in this respect (see page 9 of the report). With respect to his alcoholism, Dr. Beck concluded that Mr. Sterling had appropriately addressed this problem and recommended that he continue to see Dr. Simond and Dr. Ujjainwalla as they should direct (see page 11 of the report).

25 His discharge report from Homewood Health Centre had reported that Mr. Sterling's alcohol dependency was in remission. This was confirmed in the report of Dr. Ujjainwalla on Mr. Sterling dated September 12, 2000, in which he wrote:

In retrospect, I believe that Mr. Sterling was suffering from an Adjustment Disorder which caused him to deteriorate emotionally. He found himself drinking to excess in order to deal with his stressors. Consequently, he suffered from Alcohol Abuse.

It appears that Mr. Sterling has made almost full recovery from his Adjustment Disorder. As well his Alcohol Abuse is in full remission and I would not anticipate a relapse.

.....

26 With respect to Ms. Sterling, Dr. Beck confirmed Dr. Crowe's diagnosis of a Narcissistic Personality Disorder (see page 18 of the report). Of particular concern for Dr. Beck were Ms. Sterling's "lack of empathy" and the limitations of "her inability to see other's points of view". She saw her preoccupied with Mr. Sterling's actions and how they affected her with little consideration for her own responsibility for the circumstances in which she found herself. She strongly recommended that Ms. Sterling continue to receive "individual psychotherapy, in particular to help her deal with disagreements with others." (see page 19 of the report).

27 Dr. Beck also testified at the trial and confirmed the recommendations made in her report of August 29, 2000.

28 Upon the release of Dr. Beck's report, Mr. Sterling followed through with her recommendation to seek an expert

opinion about the issue of his alleged “paraphilia” at the Forensic Unit of the Royal Ottawa Hospital. To that end Mr. Sterling was assessed by Dr. Bradford. The results of Dr. Bradford’s sexual behaviours assessment of Mr. Sterling was filed as tab 11 of the Trial Record. His conclusion found at page 10 of this report dated March 23, 2001, is unequivocal:

.....

Using the background of sexual behaviours assessment as outlined above and reviewing the allegations as outlined, in my opinion these are false or exaggerated allegations. They are not typical of any pedophilic activity in my experience and cannot or should not be taken seriously at all. In my opinion, with a reasonable degree of medical certainty, Mr. Sterling is not a pedophile; he is not somebody who has a sexual profile that would relate to a tendency to sexually abuse children and there is absolutely no contra-indication for him having unsupervised access to his children. There is also absolutely no contra-indication to him having the custody of the children.

.....

29 Dr. Bradford was called to testify at the trial by Ms. Sterling. In her questioning she challenged his conclusions and the methodology of his testing. His testimony was not weakened in any way. Nor were the conclusions of his extensive and intensive scientific assessment. In his testimony Dr. Bradford adopted the conclusions in his report. I was given no reason on the evidence to doubt Dr. Bradford’s conclusions that the allegations lodged against Mr. Sterling concerning the sexual abuse of his children were “false or exaggerated” and that “with a reasonable degree of medical certainty, Mr. Sterling is not a pedophile.”

30 After the release of Dr. Bradford’s report, the parties once more found themselves in court. The extent and the conditions of Mr. Sterling’s access to his children continued to be in dispute. On April 12, 2001, the parties agreed to a consent order granting Mr. Sterling, for the first time, unsupervised access without prejudice to his children (see order of Manton J. dated April 12, 2001, at tab 4 of the Trial Record).

31 On May 7, 2001, after a contested motion, I granted temporary joint custody of the children to the parties. The children continued to reside with their mother but had access to their father from Fridays after school until Monday mornings, three weekends per month in addition to one overnight per week. Summer holidays were to be shared equally.

32 This order was to govern the parties until the matter could be tried on its merits. A trial was set for August of 2001. Shortly before trial, the parties were able to reach final Minutes of Settlement on July 12, 2001.

33 Despite the hope for promise of new beginnings represented by the parties being able to reach a final agreement on the questions of custody and access in the summer of 2001, both parties continued to fuel their unresolved personal conflicts whenever circumstances required them to deal with each other as co-parents. The parties found that they could not agree on matters that demanded their agreement if their children’s best interests were to be met nor could they even agree on how they might be helped to agree. In fact, issues arising from the Minutes of Settlement, such as the transfer of the children’s items and the home location for the children’s school busing, developed, almost immediately after the Minutes of Settlement were signed, into conflicts, the amicable resolution of which seemed to allude the parties. The parties had to once again return to court to resolve these problems and the issuance of the final order on April 2, 2002. Unhappily the fighting has continued.

34 Mr. Sterling began to fear for the effect that the existing regime was having on the children. Consequently, he started these proceedings in June of 2003 seeking sole custody of the children. As indicated, in the beginning, Ms. Sterling contested Mr. Sterling’s motion. She filed her own cross-motion in September of 2003 requesting various items of relief, including a restraining order, a contempt order and an order for damages against Mr. Sterling. She further sought an order for sole custody “if [Mr. Sterling was] not willing to undertake direct cooperation as a coparent”. She also requested the appointment of the Children’s Lawyer for the children. This request was revived by her at the commencement of this trial and refused because of the delay that it would cause in the hearing of this matter.

35 It appears from the evidence that the parties might have agreed to have the family assessed once more, in order to assist the court in its deliberation. They could not, however, agree on the assessor. On September 17, 2003, Mr. Justice Manton ordered that the family be assessed by Dr. Arthur Leonoff at Mr. Sterling’s expense. In Dr. Leonoff’s own words the assessment was meant “to provide a comprehensive look at the family and propose a parenting plan that would best suit the circumstances and need of the children in the light of the family’s serious limitations.”

36 Dr. Leonoff assessed the family as well as the current partners of the parties. Mr. Sterling by that time had married, in August of 2002, his second wife Linda Gibson who would be an integral part of his proposed parenting plan. Dr. Leonoff also interviewed once Ms. Sterling’s boyfriend, Mr. Charles Yellen, but he was not included in the assessment because he did not live with the family. Dr. Leonoff released his report on March 22, 2004. It was filed as tab 4 of the Trial Record.

Dr. Leonoff's Sterling Family Assessment

37 In his assessment of the Sterling family Dr. Leonoff observed two parents that were extremely polarized in their interactions and co-parenting dealings with each other. His report is replete with some very positive comments about both parents as parents to their children and as individuals and friends in the general community. However, their 6-year conflict was consuming both of them.

38 With respect to Ms. Sterling, Dr. Leonoff spoke in normal circumstances of a strong, determined, loquacious, confident, self-assured, efficient and energetic woman, one who places value on reliability and accomplishment. However, in conflict, under stress and when she feels she is under attack she can appear to be unyielding. She does not do well as her own advocate. Consequently, she remains inflexible, mistrustful and deeply wary of Mr. Sterling as her adversary. Dr. Leonoff wrote at page 18 of his report:

...As such, she is unable to extricate herself from the muddle that is consuming her and she digs a hole when issues arise that threaten her to the core. Nevertheless, I have no doubt that Ms. Parenteau-Sterling actually wants nothing more than to find a neutral zone where she does not have to be so threatened. So far this has eluded her but it would be in everyone's interests, especially the children in my view, if this could be achieved.

.....

39 With respect to Mr. Sterling, Dr. Leonoff wrote that he appears to have numerous personality strengths and self-esteem. He saw Mr. Sterling functioning quite adequately in terms of daily coping. At page 31 of his report, Dr. Leonoff described Mr. Sterling as "an essentially emotionally dependent man who has strong needs for affection and the attention of others." Indications of anxiety, tension states and depression in him were very low. According to Dr. Leonoff, Mr. Sterling "is most comfortable as a sociable, engaging man who enjoys the company of others and thrives when he has a chance to reach out and be the affable person he is at his core."

40 With respect to the allegations of the past that Mr. Sterling suffers from alcoholism and paraphilia, Dr. Leonoff hoped that it was now clear that these issues were no longer factors in the parenting question. The fact that they featured so prominently and voluminously in the court proceedings, he saw as a reflection of the degree of the dysfunction that existed in the relationship between the parents.

41 Dr. Leonoff had no doubt that Mr. Sterling only wanted what is "best for his children and that he is trying to bring some resolution to the impasse that has enveloped this family." What was less clear to Mr. Sterling was the degree to which the conflict with Ms. Sterling has grabbed his emotions especially his bitterness and deep resentment towards the way he perceives that he has been victimized in this situation with the unfounded allegations made by Ms. Sterling and his separation from his children. Unfortunately, he is "much more entrenched and spiteful than he lets on".

42 Dr. Leonoff interviewed all three of the Sterling children. He also considered their parents' perceptions of the children as well as school reports. All three children were clearly aware of their parents' conflicts and anger at each other. Daniel stated to Dr. Leonoff that "when I was born, mommy and daddy were angry." In fact, Daniel has lived most of his life in his parents' conflict.

43 Dr. Leonoff described Daniel in the following way at page 41:

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...Overall, I concluded that Daniel is a sensitive, caring child who may be having some problems with school adjustment due to social immaturity and large physical size. My sense is that this will improve with age and experience. Nevertheless, he could develop self esteem problems and he will need to be followed in order to ensure that he shows signs of improvement in the latter part of this year and carrying forward into the first year.

.....

44 Dr. Leonoff's discussion and observation of the child Carley referred a number of times to Carley's feelings of sadness and how it was connected to her family's problems and her parents' inability to agree on issues. At page 43 he describes Carley in the following way:

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As an individual, though, Carley is impressive in her aura of warmth and caring for others. She is a delightful child whom I am sure is already very popular with her peers. I do, however, see her as a risk of suffering depression when she reaches her teen years and beyond. The best defense against such an occurrence, of course, would be an improvement in her parents' relationship.

.....

45 In his discussions about Alanna, the eldest Sterling child, Dr. Leonoff spoke of her awareness and distress over her parents' conflicts. She was only too aware that some of her disappointments relating to her activities were anchored in her parents' conflict with each other. She expressed confusion over the conflicts and indicated to Dr. Leonoff that she did not know what to believe and was obviously upset. She described her parents' conflict as the "worst problem in her life." At page 45 of his report Dr. Leonoff concluded his discussion of Alanna with the following words:

.....

...Although she is obviously very distressed by her parents' situation and is herself a product of its stresses, she indirectly expressed an alliance with her mother. Of course, this is not unusual although it may add to her problems when she feels that her mother is under duress due to conflict with her father. Mainly, I perceived a cautious child who has had to incorporate a fractious family atmosphere into her daily life. Her capacity to learn and accomplish though are helping her cope. Hence, her adjustment has been satisfactory although puberty could well be problematic unless the family tensions decrease.

.....

46 In his oral evidence, both on his examination-in-chief and in his cross-examination, Dr. Leonoff reiterated again his concern for the strain under which all three children lived because of their parents' conflict. Despite their many positive traits and strengths, all three children worried him based on the already existing signs discussed earlier. In Dr. Leonoff's opinion, all three children were at risk of problems in their adolescent years because of what was going on in their family now. These risks he identified as self-esteem problems, mood and personality problems.

47 In the "Conclusions and recommendations" section of his report, Dr. Leonoff spoke of the parties and their interaction in the following terms:

...locked in a struggle; communication that 'has regressed to a push-pull pattern that leads nowhere' and the existence of a 'pathological field' between the parties, a 'pathological field saturated with layers of acrimony, threat, fear, resentment and mistrust' which prevented appropriate dialogue between them; '...culture of blame'...

48 Dr. Leonoff could not exonerate either party on the facts of this case. He saw both as equal contributors to the impasse, like "deer in the headlights" waiting for the next collision. Neither appeared to take real responsibility for the strain their children were under. The children were burdened by their parents' failure to work together. He did, however, have a positive impression of Ms. Gibson who had a capacity to help the family and calm somewhat the situation. Mr. Yellen's aggressive identification of Ms. Sterling's interests was not helpful.

49 Despite these conclusions, Dr. Leonoff concluded at the end of his report that joint legal custody and the existing parenting regime should continue. Based on the following comments found at page 48 of his report, he appears to arrive at this conclusion almost by default in view of the potential consequences that he saw for the family if either one of them was given sole custody of the children:

.....

The problem occurs when we examine the potential cost to the overall family if Mr. Sterling is handed this vindication. First, it will most certainly destabilize Joanne Sterling and this will have a direct negative impact on the children. If she tends to feel helpless now, this would signal a catastrophe in her eyes and the children, who are very attuned to her emotional state, would react with alarm. I cannot see how this would help the children and, indeed, it could split the family further, add to the overall stress, and even potentially force the older children to take sides. Moreover, it would make it even harder for Mr. Sterling to deal with his ex-wife as her fears and vulnerability would be greatly magnified. Essentially, it would replace one bad situation with another that could well be worse. In terms of Mr. Sterling, my concern is that he is simply too bitter to handle this level of responsibility and that his attempt would lead to ongoing

acrimony.

The opposite scenario, where Ms. Parenteau-Sterling acquired control, and Mr. Sterling was asked to play a secondary role, would also lead to negative consequences. She would feel emboldened and supported in her accusations against her former husband and, as much as she is now threatened by his legal foray, she would almost certainly use it against him. Moreover, she is too one-sided in her perspective. It would add to the deleterious family environment and this would also not serve the children's needs. In addition, any shift of custody would not help them communicate. This was tried during the period in which Ms. Parenteau-Sterling had temporary custody and Mr. Sterling had to endure supervised and limited access. My understanding is that it mainly did not work and the parents were, metaphorically at least, at each other's throats. Mainly, I do not foresee that either parent has the balance and perspective with each other to make a success of sole custody and to responsibly fill the shoes that such a role demands.

.....

50 In his addendum dated April 5, 2004, Dr. Leonoff explained certain points about his assessment that he felt were "crucial." He explained in point 2) that he came to the conclusion of continuing the joint parenting model, despite its obvious dysfunction, based on the principle of least detriment. He explained that the best interests of the children were also addressed when one keeps in mind the likely detriment of other options.

51 It is obvious from Dr. Leonoff's report and Addendum, that his recommendations for the continuation of the joint custody regime could only work and should only persist if the parents could address and manage their conflict and within the next six months create a "calmer, more productive environment for the children."

52 In his oral testimony, Dr. Leonoff indicated that he was influenced to recommend in his report the continuation of joint parenting in this case by the fact that joint parenting represented the status quo. Had that not existed he would have recommended a sole custodial model.

53 A number of witnesses were called by the mother to indicate that to their observation of the Sterling children in their mother's care they appeared to be happy and well-adjusted children. They could not observe any distress or difficult behaviour. Nonetheless, the concerns expressed by Dr. Leonoff relating to the distress suffered by the Sterling family by being caught in the middle of their parents' conflict was reinforced by the children's teachers who were called to testify at the trial.

54 Ms. Kelly McDonald was Daniel's teacher in grade one at St. John the Apostle school. She has observed some difficult and troubling behaviour on Daniel's part. She has heard him express wanting to kill himself when challenged in his school work. He has openly talked to her about how his stepmother hates his mother and how his mother does not like his dad. He has been observed banging his head on his desk when having difficulty with his work and he has been caught making up stories. Daniel's expression of wanting to kill himself precipitated a meeting between the parents and the school officials in November of 2004. Since January of 2005, Ms. McDonald has not observed anything unusual in Daniel's behaviour.

55 Ms. McDonald also taught Carley for two years. She remembered her as doing well academically and behaving well. She was a popular child and very sociable. She found her very quick to cry.

56 Ms. Balice taught both Alanna and Carley in their early years at school, between 1998 and 2002. She testified that during that period the parents' conflict found its way into the school. Alanna, based on the mother's own explanation, missed a number of days at school because of what was going on at home. She recalled that in the daily class prayers Alanna would ask that her parents not fight and get along. Ms. Balice recalls Carley crying a lot and complaining of being ill and having stomachaches. She recalls being concerned at that time that the parents' conflict was affecting the children. Ms. Balice even recalled meeting with both parents in an attempt to calm things down in the interests of the children.

57 The evidence indicated that since the parties entered into their Minutes of Settlement in July of 2001, they have had disputes about the following questions relating to their children which have resulted in court proceedings, lawyers' involvement, police involvement or the involvement or intermediation of school or medical officials. These disputes have always touched on the well-being of their children:

- (a) Transfer of items from one home to the other of children's items;
- (b) What clothes the children could take to each house;
- (c) The location of the children's busing;

- (d) Who should claim the children's primary residence for tax purposes;
- (e) Choice of medical doctor for the children;
- (f) Medical testing for the children;
- (g) The communication of medical information relating to the children, such as the existence of allergies;
- (h) The exchange of the children's medical cards so that the children could receive medical treatment when they needed it;
- (i) Whether a child was really sick when one parent asked for the child's medical card so that they could seek out medical treatment;
- (j) Whether a parent could volunteer at the children's school and when such volunteering could take place;
- (k) The children's ability to participate in a given activity because of it taking place during the "other" parent's time consequent with the children's disappointment;
- (l) Who would be the children's sponsor at confirmation to the point of the confirmation maybe not taking place;
- (m) When holidays would take place;
- (n) Whether there was an "overholding" of time by one parent and whether the other parent could have extra time because of it;
- (o) How March break was to be shared. The evidence further showed that the children were fully aware of this one and knew that the police might be called to resolve this conflict;
- (p) Telephone calls between the parents and the children and telephone blocks;
- (q) The communication book and its contents; what should be in it and what should not be it;
- (r) Whether the children should receive counselling and by whom; and
- (s) Mediation; whether it should happen or not.

58 Based on all of this evidence, one must come to the conclusion that the existing order is not working in the best interests of the children. Dr. Leonoff recommended joint custody on the "least detriment" principle that he felt also addressed the best interests of the children when one considered the "likely detriment of other options". He gave the parties a limited time frame to address the dysfunctional aspects of their co-parenting. Clearly, the parents have not done this. Many of his recommendations that he considered crucial to the joint custody regime working have not been followed by the parents. Since Dr. Leonoff made his recommendations, there has been no mediation, no joint separation counselling, no respecting of the children's extra-curricular activities, no resolution of the question of telephone access and no real and meaningful communication between the parties. This lack of real and meaningful communication is obvious when one reads their voluminous notes and letters between themselves and between Ms. Sterling and Mr. Sterling's counsel. Their children have continued to be caught in the "pathological field between their parents", to use the words of Dr. Leonoff and have suffered emotional and physical distress as a result. Left to their own devices they seem incapable of working together in the interests of their children.

59 Sadly, this trial does seem to have brought both parents to one common understanding. That is that they both now agree that joint custody cannot work in this case, although they each have their own separate explanation of why that is so. On the evidence, I am satisfied that there has been a material change since the existing order of Belch J., dated April 10, 2002 has been granted. Joint custody has been tried and been found not to be in the best interests of the children.

60 There is substantial case law to support the conclusion that in a case where there is intense conflict between the parents and no basis for cooperation then joint custody cannot be found to be in the best interests of children. (See *Kruger v. Kruger* (1979), 25 O.R. (2d) 673, 11 R.F.L. (2d) 52, 2 Fam. L. Rev. 197, 104 D.L.R. (3d) 481 (Ont. C.A.); *Kappler v. Beaudoin* (2000), 2000 CarswellOnt 1636, 6 R.F.L. (5th) 269 (Ont. S.C.J.); *LeClair v. Leclerc* (2003), WL 32497, 2003 CarswellOnt 1802, [2003] W.D.F.L. 293, [2003] O.J. No. 2046 (Ont. S.C.J.); *Ellis v. Ellis* (2004), WL 2034675, 2004 CarswellOnt 3813 (Ont. S.C.J.); and *Cox v. Stephen*, 2002 CarswellOnt 2321, 30 R.F.L. (5th) 54, [2002] O.T.C. 499 (Ont. S.C.J.))

61 More recently, in *Kaplanis v. Kaplanis*, [2005] O.J. No. 275 (Ont. C.A.), the Ontario Court of Appeal indicated that in order to justify awarding joint custody a court must find, that despite differences, parents are able to “communicate effectively with one another”.

62 At para. 11, the Court of Appeal explains why:

11. ...There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental needs, communication is even more important. In this case there was no evidence of effective communication. The evidence was to the contrary.

.....

63 The evidence clearly supports that custody be given to one parent with all the consequent decision-making authority. According to Dr. Leonoff, because of their high conflict history, these parents should have as little to do with each other as is possible. Consequently, access should be strictly defined and nothing should be vague or left to future negotiation. This is the parenting regime that will be in the best interests of the children.

The Parents’ Plans

64 Ms. Sterling proposes that she be given sole custody of the children. She currently occupies the former matrimonial home and intends to continue to live there with the children. The children will therefore remain in the same area and continue to attend their current school. They will also be involved in their current activities. She will continue to care for the children as she has done under the current week about parenting regime.

65 Ms. Sterling’s friend, Mr. Charles Yellen, has certainly actively involved himself, presumably with Ms. Sterling’s consent, in this litigation. At times he has acted inappropriately and aggressively. An example is his use of demeaning name calling in addressing Mr. Sterling (see tab 7 page 41 of the Applicant’s Book of Documents)). At the time of the trial the children had certainly been introduced to Mr. Yellen as a significant individual in their mother’s life. The personal support that he provided Ms. Sterling was appreciated by her according to Dr. Leonoff. However, Ms. Sterling adamantly maintained that Mr. Yellen was definitely not part of her plan. By the end of the trial he did not appear to be in her life any longer. While the loss of personal support is always regrettable, it does not seem that Mr. Yellen’s presence was in any way assisting the parties in managing their conflict. Dr. Leonoff said of him at page 49 of his report that “Nevertheless, Mr. Yellen acts too much like an enforcer and his involvement has too much aggression attached to it to be helpful.”

66 By all accounts on the evidence, Ms. Sterling is a talented music teacher. She directs her church’s choir and teaches piano in the evenings to support herself and to contribute to the support of her children. She also involves herself in other community and religious events. It appears from the evidence that she teaches piano from Monday to Thursday evening of each week. In order to accommodate her evening work schedule and to provide care for the children, Ms. Sterling hired Ms. Collette Pitt-Hewston to care for the children in the evening while she teaches piano. On the weekends, sometimes Alanna cares for her younger siblings while their mother teaches piano.

67 Ms. Pitt-Hewston testified that she began working for Ms. Sterling in September of 2000. She works during the school year only. She described her routine with the Sterling children. She would get them at the bus-stop after school, provide their supper, which Ms. Sterling would have cooked, supervise their homework and help the children prepare their lunches for the next day. Ms. Pitt-Hewston testified that she leaves at 8:00 p.m. Often times Ms. Sterling would be still teaching piano when she leaves. The children’s bedtime is at 9:00 p.m. Alanna, who she considers to be a very responsible child, would then be left in charge. Alanna has recently come to be expected to organize the children’s lunches for the next day. She has also at times taken the responsibility for putting Daniel to bed. Or, Daniel at times has put himself to bed. Alanna and Carley have also put themselves to bed while Ms. Sterling has continued teaching. Despite her teaching, Ms. Pitt-Hewston has observed Ms. Sterling to be very open to having interruptions to her piano lessons when her children wish to speak to her. Ms. Sterling proposes that this arrangement would continue.

68 With respect to access to the children’s father, Ms. Sterling submitted that the children could see their father any time they wanted but suggested that access be every second weekend (Thursday to Sunday) and one day in the week. Holidays should be divided equally. The children should not be restricted in pursuing their extra-curricular activities on a weekly basis.

69 Ms. Sterling further stipulated that if Mr. Sterling were to receive custody of the children, then she would like as much access as is possible. In that instance, she would like the existing regime to continue with an enforcement clause.

70 Mr. Sterling proposes that he be given sole custody of the children. His plan is that the children come to live with him and his new wife Linda Gibson. Ms. Gibson has been in his life since 2000. They were married in August of 2001. The children are very familiar with Ms. Gibson and she is fully integrated into their lives. She participates in the planning of their activities and required services. Ms. Gibson sees herself as a stepmother and does not attempt to replace the children's mother. The children do not call her "mom", nor does she expect them to. Ms. Gibson works but is currently on stress leave. According to the evidence, the stress of the conflict between the parties has also taken its toll on Ms. Gibson.

71 Mr. Sterling is retired and lives on his teacher's pension. In addition to this, he does some supply teaching and as an experienced magician also does some magic shows. Mr. Sterling also coaches at a competitive level touch football as a hobby. This commitment runs all year and involves a couple of nights per week as well as a number of weekends for out of town tournaments during the year. Because of his retirement Mr. Sterling is able to care for the children. In the past he has taken the children to his sports events. According to Mr. Sterling his activities have never interfered with his care of the children nor with the children's access to their mother.

72 Mr. Sterling testified that alcohol abuse is no longer a problem with him. He continues to receive counselling from Dr. Simond. He denies that he has ever acted sexually inappropriately with his children. He believes that he has been vindicated in this by Dr. Bradford's report.

73 Upon their marriage Mr. Sterling and Ms. Gibson purchased their current home, which can very comfortably accommodate all three children. The home is located near the children's current school so that if they were to come to live full-time with him the children can continue to attend their present school.

74 Mr. Sterling's proposal for access was filed as exhibit 2. At the end of the trial, after hearing the testimony of Dr. Leonoff, he amended this proposal somewhat providing for more generous access time to Ms. Sterling. Briefly, the proposal provides for weekend access from Friday after school until Monday after school. Holidays will continue to be divided equally. Summer holidays would be shared in two-week blocks. There would also be telephone access for Ms. Sterling at a designated time in the evening. The children would have unlimited telephone time to their parents at all times. Information about the children would be shared.

75 For Mr. Sterling the important point with the access regime would be that it would be defined very specifically. There would be little to discuss or to negotiate.

The Law

76 The decision of the custody of children is determined by what is in their best interests. The relevant sections of the *Divorce Act* that govern this matter are:

16.(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

77 The *Divorce Act* does not specifically define the term "best interests". However, the factors that the court must take into account in determining the best interests of children have been well established by the jurisprudence over the years.

78 The "best interests of child" factors are discussed in detail in section 24(2) of the *Children's Law Reform Act*. Section 24(2) stipulates as follows:

24(2) BEST INTERESTS OF CHILD — In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the

child including,

- (a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,
 - (ii) other members of the child's family who reside with the child, and
 - (iii) persons involved in the care and upbringing of the child;
- (b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;
- (c) the length of time the child has lived in a stable home environment;
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- (e) any plans proposed for the care and upbringing of the child;
- (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
- (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

79 While that provincial legislation does not strictly apply to the facts of this case, there is no question that all of the factors listed in section 24(2) of the *Children's Law Reform Act* have been recognized as relevant considerations in the jurisprudence found under the *Divorce Act* dealing with the custody and access of children. It is a good guide to use by any court that is deciding questions of this kind and I rely upon it in coming to my conclusions in this case.

Analysis

With respect to the "love, affection and emotional ties between the child" as outlined in s. 24(2)(a)(i)(ii)(iii)

80 On the substantial evidence produced at this trial no one can question the deep love, affection and emotional ties that exist between the three Sterling children and their two parents. A multitude of witnesses, representing friends, colleagues, neighbours, former spouses and partners and extended families and step-families were called to testify by both parties. There were some eleven such witnesses called for Mr. Sterling and some thirteen such witnesses called for Ms. Sterling. I do not intend to describe in detail that evidence because the record can speak for itself. It at times seemed as if personalities were indeed in contest. Nevertheless, what is clear from all of this evidence is how deeply both parents love their children and how attached, comfortable and happy the children are with each parent.

81 The professional witnesses, Dr. Beck and Dr. Leonoff also noted the love and attachment that existed between the parents and the Sterling children. Dr. Beck observed Ms. Sterling responding to her children in a loving and appropriate manner. She observed the children to be happy and excited to see their father. She spoke of their palpable feelings and suffering because of their father's absence in their lives.

82 Dr. Leonoff made similar observations. The children's love and attachment for their parents contributed to the distress they felt by their parents' conflict. Dr. Leonoff spoke of Carley's identification with her mother in some of her activities. He also referred to Alanna's indirectly expressed alliance with her mother that contributed to her distress when she perceived that her mother was under attack in the parental conflicts.

83 Clearly, the deep love, affection and emotional ties that exist in this family have rendered the conflict that much more difficult for the children. It has also made the unavoidable need to choose one custodial parent in the circumstances of this case that much more difficult.

With respect to "the views and preferences of the child, where such views and preferences can reasonably be ascertained"

84 To give credit where credit is due neither parent has put their children in the position of having to choose between them. On the evidence none of the children have expressed a preference for one parent over the other. They certainly have expressed the wish, even in prayer, that their parents would stop fighting. While in the care of each parent they appear to be happy to be there. They appear to move from the care of one parent to the care of the other without difficulty. They have accepted their disappointment arising out of their parents' conflicts with an amazing mature resignation of that is the way life is. I refer here to Alanna's disappointment at not being able to participate in an elite choir for which she was chosen because of her parents' inability to agree on the question of the children's activities.

85 Dr. Leonoff did speak of Carley's identification with her mother in the pursuit of certain activities. He also spoke of Alanna's indirectly communicated alliance with her mother in the various family conflicts. These are clearly emotional ties that have to be considered in favour of Ms. Sterling. I am not convinced, however, that they can be interpreted as proof of the children's preference for one parent over the other.

With respect to "the length of time the child has lived in a stable home environment"

86 Except for the first two years after the separation of the parties during which the allegations of sexual abuse were being resolved, the Sterling children have enjoyed on a relatively equal basis the care of both their parents, granted under some pretty stressful circumstances. The evidence supports the finding that in each of their parents' home the children are well cared for; they enjoy the love of extended family, friends and neighbours; and they enjoy a stable home environment.

87 Given the routine that exists at Ms. Sterling's home in the evening because of the nature of her work, it is evident that the children are expected to be a little more independent in their mother's home with respect to their evening routines and preparations for the next day than at the home of their father. Clearly, Mr. Sterling does not agree that Ms. Sterling should not be available to the children in the evenings during the week. It was his expectation that she would return to full-time day teaching as they had earlier discussed. Ms. Sterling has chosen not to do that arguing that she is more available to her children, energy-wise, with her current employment than she would be if she taught on a full-time basis.

88 By outward appearances the Sterling children have moved between the two homes easily, down to the different sets of clothes and different coloured lunch boxes that go with each home. This should make moving to the home of one parent on a more substantial basis that much easier. Generous access to the non-custodial parent would logically go with this.

With respect to "the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child"

89 Both parents are equally more than willing to provide their children with guidance and education, the necessities of life and any special needs that they may have. Both acknowledge that their children need peace and to have the fighting stop.

90 Furthermore, I was convinced on the evidence that alone and when the children are in their care both parents are capable of providing their children with guidance, education and the necessities of life. It is when they have to confront the reality of their circumstances, namely the need to interact and work with the other parent, that their judgments go awry and that they have not acted in the best interests of the children. In dealing with each other their insights have been shown to be limited and their judgments have been shown to be wanting. As Dr. Leonoff pointed out in his report both parents have to take responsibility for the troubling situation.

91 With this preamble, a relevant consideration in determining which of two capable and loving parents would best meet the best interests of the Sterling children by having custody of the children in these circumstances is, which of the two parents has demonstrated a greater insight into the situation and can best manage the conflict? In my view, the parent who can do that in this particular case is the parent who can best provide the Sterling children with the guidance, education, the necessities of life and meet any of their special needs. The Sterling children on the facts of this case have the special need of being able to love both of their parents and be nurtured by both of their parents without the cloud of the parental conflict that they have lived under since their parents' separation in December of 1998. Despite his shortcomings the evidence greatly favours Mr. Sterling for the following reasons.

92 Without a doubt both parents have attempted to vilify each other with respect to their weaknesses, dependencies and personality defects in order to have the court conclude that they were not able to parent. This was evident in their communications to the Society when it was involved with the family and to the various professionals who came in contact with them. On the whole of the evidence neither has been particularly successful in this regard. Their own conduct was more telling.

93 There was no question that in the latter part of the marriage Mr. Sterling was abusing alcohol. Had that continued he clearly would have rendered himself incapable of parenting. However, Mr. Sterling addressed the issue in a responsible and appropriate manner. His propensity and history of abusing alcohol is clearly something that Mr. Sterling will have to be vigilant about in the future. However, I am convinced, as were all of the professional witnesses who had occasion to assess Mr. Sterling, that from the point of view of his ability to parent his children this issue should be put to rest. Ms. Sterling has continued to raise it and even involve the police because of her suspicions that have proved to be unfounded. This has only contributed to the animosity between the parties.

94 The same can be said about the allegations of sexual impropriety. The evidence unequivocally shows that these allegations too should be put to rest. Once again, Ms. Sterling has continued to raise them and rely on them in her conflict with Mr. Sterling for far too long. There is also evidence to indicate that in the course of these long proceedings Ms. Sterling had not been completely candid with the court as to the status of the sexual abuse investigations. The fact that the Society had closed its case on the sexual abuse allegations when the parties appeared before Master Schreider in July of 1999 should have been communicated to the court.

95 Equally, much has been made by Mr. Sterling about the diagnosis of Ms. Sterling as having a “narcissistic personality disorder” that was made by Dr. Crowe at the time of her admittance to the Queensway-Carleton Hospital in the spring of 1999 (see exhibit #37). It was clear that Ms. Sterling does not agree with this diagnosis. Her attempts to refute it through her various witnesses and the cross-examination of the professional witnesses was not very convincing. There was no reason, on the evidence, not to accept that diagnosis as accurate. Ms Sterling did seek out some follow-up counselling. The evidence was not clear as to how long the counselling went on. She also appears to have sought out some individual counselling with the Catholic Family Services of Ottawa-Carleton in the fall of 2004 (see exhibit #42).

96 Despite that diagnosis, and, perhaps more importantly, just because Ms. Sterling has been diagnosed with that personality disorder, I cannot conclude that Ms. Sterling is not a capable and loving parent to her children. Her many witnesses who have had the opportunity to observe her interact with her children and they with her give the lie to such a conclusion. Ms. Sterling’s loving and nurturing ability to respond to the needs of her children was also observed by the both Dr. Beck and Dr. Leonoff. Furthermore, the evidence from Dr. Crowe and Dr. West, which was admitted on consent clearly stipulated that the diagnosis of Ms. Sterling with a “narcissistic personality disorder” does not in any way prevent her from parenting her children (see tab 11 of the Respondent’s Book of Documents). This issue should also be put to rest.

97 Where Ms. Sterling’s personality is relevant in a big way is in her management of the conflict between herself and Mr. Sterling. Both Dr. Beck and Dr. Leonoff identified Ms. Sterling’s mode of dealing with her conflict with Mr. Sterling, the limited insight she had into her actions in the conflict and her demonstrated lack of judgment, numerous times, at the expense of the children’s well-being and the possibility of reaching some modicum of co-operative joint parenting. The following are only some examples of such conduct and lack of judgment that was completely within her control.

- (a) Her inability to recognize the children’s need to see their father and the children’s need to foster their relationship with their father;
- (b) Her indiscriminate use of the police and her discussions with the children about calling the police to resolve the details of the conflicts between herself and Mr. Sterling;
- (c) Her failure to shield the children from Mr. Yellen’s identification with her matrimonial conflict and his unacceptable aggressive and negative treatment of the children’s father. Her consent to have Mr. Yellen present at a meeting planned with Mr. Sterling and one of the children’s doctors only aggravated the parental conflict at the expense of constructively dealing with the medical needs of one of the children at that time;
- (d) Her failure to respond appropriately to Mr. Sterling’s attempts at mediation when it became obvious that the conflict was not abating;
- (e) Her continually ascribing negative and persecutory motives to Mr. Sterling in his attempts to resolve their differences; and
- (f) Her inability to recognize the effect that the parents’ conflict was having on all three children and their need to be shielded from it.

98 With respect to the children’s need for counselling, Mr. Sterling was the first to recognize the need for it. To that end he contacted Dr. Sherman. Those initiatives seem to have ended once Dr. Sherman contacted Ms. Sterling. In the end, with

school intervention and the consent of both parents the Sterling children are now receiving counselling.

99 Ms. Sterling in the early years of the separation had both Carley and Alanna see a therapist, Ms. Suzanne Marcotte, at the Children's Hospital of Eastern Ontario (see tab 10 of the Respondent's Book of Documents and tab 9 of the Applicant's Book of Documents). Alanna was seen on some five occasions relating to the allegations of sexual abuse. Carley was seen on some eight occasions because of the feelings of sadness of missing her father. Ms. Marcotte, at that time, recommended to Ms. Sterling that she consider involving her children in some group counselling around separation issues. There was no evidence to indicate that this was done.

With respect to "any plans proposed for the care and upbringing of the child" and "the permanence and stability of the family unit with which it is proposed that the child will live"

100 Both plans proposed by the two parents have merit. Under both the Sterling children will be well cared for and loved. In their father's home the children will also have the benefit of the participation of Ms. Gibson in their care. Dr. Leonoff, at pages 36 and 49 of his report, described the positive contribution of Ms. Gibson to the children's care when they are with their father in the following way:

.....

In conclusion, we can note that Ms. Gibson is an important ancillary figure in the children's lives. She appears to have a sincere, active interest in their welfare and it was obvious that she views herself as a resource to them and Mr. Sterling...

.....

In regards to Ms. Gibson, I was left with a positive impression although, as I noted above, she is suffering in a similar way to the children as this conflict is too consuming and draining of healthy energies for anyone to thrive. I do believe, however, that she has a capacity for insight, which is the aptitude most in need in this instance. It is essential that she not be dragged into the strife to the degree that the parents have been although in Ms. Parenteau-Sterling's eyes, 'Ms. Gibson involves herself too readily'. ... I believe that Ms. Gibson can help the family and even learn to work with Ms. Parenteau-Sterling and this will most certainly serve the children's interests.

.....

101 Based on all of the evidence the relationship and union between Ms. Gibson and Mr. Sterling appears to be a happy, stable and permanent one for the moment despite the stressor of the intense parental conflict in the circumstances of this case.

102 With respect to Ms. Sterling she has developed a relationships with two individuals since the separation. The first was very short lived and developed when she was still hospitalized and clearly very fragile. The second was Mr. Yellen who by the end of trial was no longer part of her life. In the future, the children will have to adjust to any new partnership that Ms. Sterling may develop.

103 Given the employment that Ms. Sterling has chosen for herself, it is evident that the children will have more direct parental attention during the evenings of the week days at their father's home than at the home of their mother. In her father's home Alanna will not have to take on as much parental responsibility for her younger siblings that she seems to enjoy and take pride in according to Dr. Leonoff. However, Ms. Sterling's explanation of why she has chosen to continue with her evening piano lessons as opposed to taking on a full-time teaching position cannot be criticized.

With respect to "the relationship by blood or through an adoption order between the child and each person who is a party to the application"

104 The parents are equal.

105 Pursuant to section 16(9) of the *Divorce Act*, the court shall not consider the past conduct of the parents unless the conduct is relevant to the ability of that person to act as a parent. The evidence presented in this trial is replete with examples of conduct on the part of both Ms. Sterling and Mr. Sterling that does not reflect well on their parenting capacity. However, on the whole and for the reasons discussed earlier I must agree with Dr. Beck and Dr. Leonoff that Ms. Sterling has demonstrated greater lack of judgment in her conduct relating to her parenting of the children than Mr. Sterling. Furthermore, she has shown less insight into how her conduct has negatively affected her children. She has not as readily recognized their needs in the heat of the disputes between herself and the children's father.

106 Finally, the last factor of importance to consider is which parent will more readily facilitate as much contact with the

other parent as is consistent with the best interests of the children. The harmonious and generous movement of the children between their two parents that is presumed, and probably was intended, in the current parenting arrangement, has eluded the two parties in this case. Instead the parties have fought about “overholding” the children and “makeup time” for overholdings or failure to return the children on time. One parent was denied access to a function where the child would have been so proud to show her musical talents to the two people that she loved the most in the world. Communication between a parent and child is denied by telephone blocks.

107 Dr. Beck wrote at page 25 of her report that for the reasons explained by her, Mr. Sterling “has a far greater respect for Ms. Sterling’s capacity as a parent than she has for his abilities and I feel he would be likely to support the children’s relationship with their mother.” Dr. Beck thought that Ms. Sterling “was not likely, in [her] view, to be able to support the children’s relationship with Mr. Sterling or to include him in decisions with respect to schooling, religious upbringing and other matters.”

108 Dr. Leonoff, both in his written report and in his oral evidence, expressed a similar view. I must conclude that Dr. Beck’s and Dr. Leonoff’s expressed views in this regard are very consistent with the rest of the evidence in this case.

Conclusion

Custody

109 For the above reasons, I ordered on April 14, 2005 that, in the best interests of the children, Mr. Sterling be granted sole custody of the three Sterling children.

Access

110 Access in this case needs to be very specific and detailed in order to avoid any vagueness and any need, as much as is realistically possible, to have the parties negotiate and deal with each other in order to have access take place. To that end, Ms. Sterling is to have access to the children as follows:

(1) During the school year, every second weekend from Friday after school until Monday morning, at which time Ms. Sterling will deliver the children to the school. This was to commence April 22, 2005; and

(2) Every Wednesday from after school until 8:00 p.m. This was to commence April 20, 2005. One condition of this access is that the children’s extra-curricular activities decided by the custodial parent shall not be interfered with. In order to exercise this access Ms. Sterling will have to be willing to attend with the child or children at these extra-curricular activities.

111 If for any reason Ms. Sterling cannot exercise this regular access, she shall give Mr. Sterling twenty-four (24) hours’ notice of her inability to exercise access.

112 Apart from what is mentioned in (2) above, unless the other agrees, Mr. and Ms. Sterling will not schedule activities for a child during the other’s time with the child.

(3) Summer holiday access will be divided into two-week blocks. In all years, Mr. Sterling will have access from the last day of school until the first Saturday of the summer holiday at 7 p.m., and from the ninth Saturday until school resumes, at which time access will resume as per paragraph (1) above. In odd-numbered years, Mr. Sterling will have access from the first Saturday at 7 p.m. until the third Saturday at 7 p.m. Ms. Sterling will have access from the third Saturday at 7 p.m. until the fifth Saturday at 7 p.m. Mr. Sterling will have access from the fifth Saturday at 7 p.m. until the seventh Saturday at 7 p.m. Ms. Sterling will have access from the seventh Saturday at 7 p.m. until the ninth Saturday at 7 p.m. In even-numbered years, the parties’ access from the first to the ninth Saturdays will be reversed.

(4) In odd-numbered years, Mr. Sterling will have Christmas access from December 24 at 4 p.m. until December 25 at 2 p.m., and Ms. Sterling will have Christmas access from December 25 at 2 p.m. until December 26 at 4 p.m. In even-numbered years, the parties’ access will be reversed.

(5) The parties will share access equally during the balance of the school Christmas vacation. In odd-numbered years, Ms. Sterling will have access from Friday after school at 5 p.m. until the second Saturday of the Christmas vacation at 7

p.m. In odd-numbered years, Mr. Sterling will have access from the second Saturday at 7 p.m. until the end of the Christmas vacation at which time access will resume as per paragraph (1) above. In even-numbered years, the parties' access will be reversed with Ms. Sterling's access ending at 7 p.m. on the Sunday immediately prior to the commencement of school at which time access will resume as per paragraph (1) above. In the event that access as defined in paragraphs (4) and paragraph (5) conflict, priority will be given to paragraph (4).

(6) The parties will alternate March School Break. Ms. Sterling will have the children in odd-numbered years, from Friday after school at 5 p.m. until the Sunday immediately prior to the commencement of school at 7 p.m. at which time access will resume as per paragraph (1). In even-numbered years, Mr. Sterling will have the children from Friday after school at 5 p.m. until the Sunday immediately prior to the commencement of school at which time access will resume as per paragraph (1).

(7) Mr. Sterling will have the children on Father's Day from 10 a.m. until 7 p.m., if it does not fall on his weekend with the children, and Ms. Sterling will have the children on Mother's Day from 10 a.m. until 7 p.m., if it does not fall on her access weekend.

(8) On a child's birthday and if it does not fall on an access day, Ms. Sterling will have the children with her for two hours (5 p.m. until 7 p.m. if on a weekday, and 10 a.m. until noon if on a weekend).

(9) Regardless of the access schedule, the parties will alternate Thanksgiving and Easter weekends, with Ms. Sterling to have the children with her on Easter weekend in even-numbered years from Thursday after school at 5 p.m. until Monday at 7 p.m., and Thanksgiving weekend in odd-numbered years from Friday after school at 5 p.m. until Monday at 7 p.m., alternating annually.

(10) Any further and such other access as can be agreed upon between the parties.

Information and Communication

113 Mr. Sterling and Ms. Sterling will:

(1) Exchange information about the children on an ongoing basis via a Communication Book, to be transferred between the parties with the children.

(2) Encourage the children to have a good relationship with each other and with each parent.

(3) Refrain from making disparaging remarks to the children about the other parent.

(4) Maintain the children in counselling to assist the children in coming to terms with the separation.

(5) In as much as it is practicable to do so, consult each other regularly about important issue such as the children's education, health care and religious upbringing.

(6) Mr. Sterling will apply for a Canadian passport and a Euro passport for each child. Ms. Sterling will sign the passport applications. Mr. Sterling will keep the passports and give them to Ms. Sterling when she needs them for travel. Ms. Sterling will return the passports promptly.

(7) When the children are with Mr. Sterling, Ms. Sterling will have telephone access between 8 p.m. and 8:30 p.m. The children will have unlimited access to initiate phone calls to Ms. Sterling while they are in their father's care. The children will have unlimited access to initiate phone calls to Mr. Sterling while with their mother.

(8) Mr. Sterling and Ms. Sterling may communicate by e-mail with the children on a daily basis.

(9) Mr. Sterling and Ms. Sterling may make inquiries and be given information by the children's teachers, school officials, doctors, dentists, health care providers, summer camp counsellors or others involved with the children. Additionally, Mr. Sterling shall sign any necessary Releases to enable Ms. Sterling to access any relevant information and documentation directly from any professionals involved with the children.

(10) If either parent plans a vacation with the children, that parent will give the other a contact number.

(11) If either parent plans a vacation without the children, that parent will give the other a contact number.

(12) If either parent plans a vacation outside Canada with the children, the other parent will provide a notarized letter authorizing the children to travel.

(13) Both parents and their partners may attend all school functions and children's activities when they are not providing residential care. The parents will attend parent-teacher meetings separately unless the school requests to see the parents together. As part of the information that is to be exchanged between the parents, both parents are to have access to the leisure and sports schedule of the children so that parental participation is enhanced. For the sake of their children, both parents must undertake to show self-control and respect for their children's needs by never making a scene in front of their children.

(14) Mr. Sterling will provide Ms. Sterling with copies of school calendars, report cards and school notices.

(15) The parents will alternate attendance on school field trips. If one parent is unable to attend, he or she will notify the other immediately.

(16) Mr. Sterling and Ms. Sterling will not change the children's names without the other's written consent.

(17) The children will be raised in the Catholic faith.

Child Support

114 In view of the material change in custody effected by this order, the question of child support will have to be re-examined. For this purpose, there will be an order that Ms. Sterling pay to Mr. Sterling child support for the three children in accordance with the *Federal Child Support Guidelines*. This will include both the base support and her proportional share of the children's special or extra-ordinary expenses.

115 For the purposes of determining the question of child support, both parties will exchange the documents required in s. 21(1) of the *Guidelines* within 30 days of the release of this judgment. Following the completion of this disclosure if the parties cannot agree within 14 days on the question of child support, a motion shall be brought before me with supporting documents to determine the question.

116 Thereafter, the parties will exchange tax returns and notices of assessment and reassessment by June 1st of each year, commencing on June 1, 2006. Furthermore, they will review the child support and section 7 contributions annually, with any adjustment to support section 7 contributions to be based on the prior year's income and to take effect on July 1st, commencing on July 1, 2006.

117 I have found that the parties are now unable to jointly parent their three children. It may well be that once they have resolved their profound differences they will in the future be able to co-parent in the best interests of their children. Before they can do that, however, both will have to sincerely forgive the other.

Costs

118 The last issue is costs. Unless the parties can resolve the question of costs between themselves, Mr. Sterling shall have fourteen (14) days from the release of this judgment to serve and file his written submissions on costs, including any offers to settle that have been made. Ms. Sterling shall have two weeks from that date to serve and file her written submissions on costs, including any offers to settle that have been made. Mr. Sterling will then, if he so wishes, have seven (7) days from that date to reply.

Application granted.

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