

2008 CarswellOnt 560  
Ontario Superior Court of Justice

Trépanier v. Cadieux-Trépanier

2008 CarswellOnt 560, [2008] W.D.F.L. 1957, [2008] W.D.F.L. 1961, [2008] W.D.F.L. 2006, [2008] O.J. No. 426, 163 A.C.W.S. (3d) 988, 49 R.F.L. (6th) 399

**JOANNE TRÉPANIÉ (Applicant) and SUZANNE CADIEUX-TRÉPANIÉ (Respondent)**

M. Linhares de Sousa J.

Heard: October 1-5, 9-12, 2007  
Judgment: February 6, 2008  
Docket: 05-FL-2691

Counsel: Jack E. Pantalone for Applicant  
Julie Audet for Respondent

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 — Joint custody — Primary residence of child

Parties committed themselves to each other as same-sex couple in 1999, married in 2003, had two children, and separated in 2005 — C was biological mother of children — After separation, children remained in C's primary care — Consent interim order provided that C have sole custody of children as well as sole decision-making power — Both parties were actively involved in care of children — Parties' post-separation relationship was highly conflictual — T brought application for joint

custody of children — Application granted — Parties were awarded joint custody with equal time sharing — Order for joint custody was necessary to protect T's parental rights — Expert and other evidence established that C was systematically attempting to limit T's participation in lives of children — C was not prepared to nurture development of children's relationship with T, and there was nothing in evidence to indicate that this would change — C's exercise of sole custody and her wish for continued sole custody would not adequately meet needs of children.

Family law --- Custody and access — Factors to be considered in custody award — Conduct of parent — General principles  
Parties committed themselves to each other as same-sex couple in 1999, married in 2003, had two children, and separated in 2005 — C was biological mother of children — After separation, children remained in C's primary care — Consent interim order provided that C have sole custody of children as well as sole decision-making power — Both parties were actively involved in care of children — Parties' post-separation relationship was highly conflictual — T brought application for joint custody of children — Application granted — Parties were awarded joint custody with equal time sharing — Order for joint custody was necessary to protect T's parental rights — Expert and other evidence established that C was systematically attempting to limit T's participation in lives of children — C was not prepared to nurture development of children's relationship with T, and there was nothing in evidence to indicate that this would change — C's exercise of sole custody and her wish for continued sole custody would not adequately meet needs of children.

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

## Table of Authorities

### Cases considered by *M. Linhares de Sousa J.*:

*A. (N.) v. W. (C.M.)* (2003), 2003 CarswellOnt 1928, 39 R.F.L. (5th) 1 (Ont. S.C.J.) — considered

*Andrade v. Kennelly* (2006), 2006 CarswellOnt 3762, 33 R.F.L. (6th) 125 (Ont. S.C.J.) — considered

*C. (B.A.) v. C. (D.L.)* (2003), 48 R.F.L. (5th) 15, 2003 BCCA 672, 2003 CarswellBC 3143 (B.C. C.A.) — considered

*G. (J.A.) v. R. (R.J.)* (1998), 1998 CarswellOnt 1487 (Ont. Gen. Div.) — considered

*Hildinger v. Carroll* (2004), 2004 CarswellOnt 444, 2 R.F.L. (6th) 331 (Ont. C.A.) — considered

*Kaplanis v. Kaplanis* (2005), 2005 CarswellOnt 266, 10 R.F.L. (6th) 373, 194 O.A.C. 106, 249 D.L.R. (4th) 620 (Ont. C.A.) — considered

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

*Maceus-Agyekum v. Agyekum* (2005), 2005 CarswellOnt 1311 (Ont. S.C.J.) — considered

*Maceus-Agyekum v. Agyekum* (2006), 2006 CarswellOnt 2281 (Ont. C.A.) — considered

*Ursic v. Ursic* (2006), 2006 CarswellOnt 3335, 32 R.F.L. (6th) 23 (Ont. C.A.) — considered

**Statutes considered:**

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

s. 4(1) — referred to

s. 24(2) — referred to

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

Generally — referred to

s. 16(4) — referred to

s. 16(8) — referred to

s. 16(9) — referred to

s. 16(10) — referred to

*Family Law Act*, R.S.O. 1990, c. F.3

Generally — referred to

**Regulations considered:**

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

*Federal Child Support Guidelines*, SOR/97-175

Generally — referred to

s. 7 — referred to

APPLICATION by parent for joint custody of children and determination of retroactive child support.

***M. Linhares de Sousa J.:***

**Introduction**

1 The principal issue in this matter is what parenting arrangement is in the best interests of twin boys, Maxim Cadieux-Trépanier and Jasmin Cadieux-Trépanier, born on April 11, 2003 and who are now almost 5 years old. These children were born to the parties, the Applicant, Ms. Joanne Trépanier, and the Respondent, Suzanne Cadieux, who in 1999 committed themselves to each other as a same-sex couple and, when legally able, entered into a same-sex marriage in August of 2003.

2 The children were conceived through the process of artificial insemination through an anonymous donor. Ms. Cadieux became the biological mother and gave birth to the two boys.

**Issues to Which Parties Agree and Issues Outstanding**

3 When this action commenced there were a number of issues outstanding both under the *Family Law Act* and the *Divorce Act*. Happily, the parties have resolved amicably all of their property issues under the *Family Law Act*. Neither party is owed an equalization payment and all claims under that Act are satisfied. There will be an order to that effect.

4 At the outset of trial the parties also informed the Court of the agreement of the parties relating to certain aspects of the parenting of the children. They agreed to an order restricting both parents from moving the children's residence from outside of the Ottawa-Gatineau jurisdiction. They agreed on an order restraining both parents from changing the surnames of each child from Cadieux-Trépanier without the written consent of the other parent. Finally, they agreed to an order that Ms. Trépanier be declared to be a "parent" of both children of the marriage pursuant to section 4.(1) of the *Children's Law Reform Act*, R.S.O. 1990, c. 12, as amended. My decision in this matter will incorporate the consent of the parties to these questions.

5 There continue to be some outstanding minor issues regarding arrears of child support and extraordinary expenses, an accounting of some expenses relating to minor repairs made to the matrimonial home prior to its sale that were incurred by Ms. Trépanier, and the equitable division of some memorabilia.

## **Divorce**

6 The parties were legally married. As a result of irreconcilable differences that I shall discuss in more detail later, they separated in April of 2005 although they continued living in the matrimonial home. Finally, at the end of June, 2005 they physically separated when Ms. Cadieux left the matrimonial home with the children. The children have been in her primary care since that time. Based on the evidence there is clearly no possibility of reconciliation and the separation ground for divorce exists. A divorce judgment will therefore issue.

## **Positions of the Parties**

7 Ms. Trépanier is seeking joint custody of the children. She seeks to have an active part in the substantial decisions relating to the care of her children and she seeks to share a generous amount of time in the care of her children. She acknowledges the high conflict she has experienced with Ms. Cadieux since their separation but she is willing to try to work with her to make a joint custody regime work. Ms. Trépanier sees this request as necessary if her role in the lives of the children is to be protected. Ms. Trépanier is convinced that without that legal protection Ms. Cadieux will systemically continue to cut her out of the children's lives, by blocking information about the children and by blocking and interfering with her contact with the children as she has done leading up to the trial. According to Ms. Trépanier, when she asks Ms. Cadieux for information about the children she is told that it is not her business or there is no response. Ms. Cadieux has also since separation made some substantial decisions relating to the children, such as choice of daycare and medical care without consulting her.

8 In recognition of the difficulties that exist between her and Ms. Cadieux, Ms. Trépanier's plan for the children is described in three options which she has outlined for the Court's consideration (see exhibit #1 tab. 2). With repeating the details of what is contained in Ms. Trépanier's parenting plan, it essentially provides two options for decision-making, namely, joint custody or joint decision-making relating to the children's health, education and general well-being with the assistance of an agreed-upon parenting coordinator to resolve any disputes and parallel parenting or separate decision-making authority divided between the parties along defined areas pertaining to the children's upbringing and well-being. Finally, as a third option Ms. Trépanier proposes that she be given sole custody of the children with the authority to make any and all major decisions pertaining to the children, upon consultation with Ms. Cadieux.

9 With all three of these options for decision-making powers, Ms. Trépanier proposes an equal time sharing of the daily care of the children as well as their holidays. Ms. Trépanier suggests a week about rotation.

10 Ms. Trépanier has a new partner, Ms. Sylvie Beaulieu. Ms. Trépanier and Ms. Beaulieu have been cohabiting since October, 2005 and are committed to each other. Ms. Beaulieu supports Ms. Trépanier in her parenting plan for Maxim and Jasmin.

11 Ms. Cadieux's plan for the children is the continuation of the interim agreement entered into between the parties in July of 2005. Ms. Cadieux's understanding of the agreement in her own words is the following:

Bien, c'est moi qui ai les enfants. C'est moi qui prend les décisions pour les enfants. Je m'occupe des enfants puis Johanne a des visites avec les enfants. J'informais Johanne de ce qui se passait, si un enfant se blessait ou faisait quelque chose. C'était ma compréhension que j'avais de cette entente-là. (See page 99 of transcript of Ms. Cadieux's

Examination in Chief).

12 She would continue to have sole custody of the children as well as sole decision-making power relating to the children. Ms. Trépanier's access would be as stated in clause 3.2 of the agreement, namely:

i) Week 1 — each Wednesday evening from 4:00 p.m. to 7:00 p.m., and from Friday at 4:00 p.m. to Sunday afternoon at 4:00 p.m.;

ii) Week 2 — each Wednesday and Thursday evenings from 4:00 p.m. to 7:00 p.m.

13 Holiday time would be shared as they have done in the past in recognition of the fact that the children belong to a large extended family. Ms. Cadieux would also like to be able to make decisions relating to taking the children with her when she has work related trips away from home even though this may interfere with Ms. Trépanier's access.

14 It is Ms. Cadieux's position that given the events leading up to this trial it has been shown that there is no trust between the parties. She cited as examples the conflicts the parties had surrounding the division of their property and the introduction of Ms. Trépanier's new partner into the home. According to Ms. Cadieux the parties are not able to co-operate nor to respectively communicate with each other. She cannot see working with Ms. Trépanier. There is therefore no possibility of joint decision making nor joint custody working in the best interests of the children. Ms. Cadieux is convinced that Ms. Trépanier must always have things her way. Ms. Cadieux admitted to not responding to a number of questions put to her by Ms. Trépanier regarding the children and to making certain decisions, such as their participation in the CIAS program or her consultation with Dr. Bernard without informing Ms. Trépanier. She resents the continual questioning about her decisions or the information that Ms. Trépanier endlessly asks for relating to the children's health and schooling. She questions Ms. Trépanier's good faith and is convinced that it is Ms. Trépanier's way of continuing to control her which was part of the dynamics in their relationship.

15 Ms. Cadieux denies that she speaks negatively about Ms. Trépanier to the children or in front of the children. It was her position that she encourages the children's relationship with Ms. Trépanier as well as with Ms. Trépanier's extended family.

16 Ms. Cadieux sees the children as stable and happy in their current situation. Their conduct has improved and there have been no further disturbing disclosures. Her plan is to continue providing the children with their current stability. She will remain living in her current home where the children enjoy a good and established neighbourhood. She has tried to keep the same professionals for the children despite the move from Ottawa to Gatineau with the exception of Dr. Sequin who is too far from her home. Since moving to Gatineau she has also had to change the children's daycare because of the parents' conflict.

17 Ms. Cadieux testified that she lives alone and is not in a relationship with another person at this time. At the time of her interview with Dr. Van Gijsegem, Ms. Trépanier indicated that she believed, through information that she received from the children, that Ms. Cadieux had another girlfriend.

### **Factual Background**

18 The evidence clearly establishes that the pregnancy of Ms. Cadieux with twins and the subsequent birth of Maxim and Jasmin were happily welcomed by both parties. Both attended pre-natal classes. Ms. Trépanier accompanied Ms. Cadieux on her medical appointments during the pregnancy.

19 When the children were born it was decided that Ms. Cadieux would remain home with the children for one year on an extended maternity leave before returning to her employment with the federal government in Ottawa. Ms. Trépanier took an extended holiday from her employment with the federal government of five weeks immediately after the birth of the twins. The evidence supports the finding that during that period both parents were equally involved in the care of the children.

20 Once Ms. Trépanier returned to work the parties entered into a certain routine in the care of the children. Ms. Cadieux was the primary caregiver of the children during the day as well as the homemaker. Ms. Trépanier would assist with the children's routine in the evening after her work as well as carry out other chores, usually outside chores, relating to the maintenance of their matrimonial home, which they had purchased shortly before the birth of the children.

21 When Ms. Cadieux returned to her employment in 2004, new routines had to be adopted. But once again, the evidence

appears to support the conclusion that both parents were actively involved in the care of the children such as taking the children to daycare, once that began, and retrieving them from daycare at the end of the day. They shared in the evening care and bedtime routines of the children. Both attended the children's doctors appointments. They covered for each other in the care of their children when the other was pursuing her own personal and professional pursuits. In the case of Ms. Cadieux, this occurred when she took evening yoga classes or had to go out of town with her employment which occurred a number of times in 2004 and 2005. In the case of Ms. Trépanier, this occurred when she tried to pursue jogging for a short period of time or when she began her certificate program in public management and governance.

22 The parties also had the good fortune of enjoying the assistance of both their mothers in the care of the children. Prior to the children attending at daycare, both grandmothers shared certain week days caring for the children. Ms. Trépanier's mother, Mrs. Delia Trépanier, who lives in Cornwall would travel into Ottawa to care for her grandchildren and would stay overnight with the parties. Mrs. Céline Cadieux, who lives closer to Ottawa in Gatineau, continued to be involved in the care of the children even after the boys commenced attending daycare. She would pick up the children from daycare at the end of the day or when the children were sick when neither parent could go to retrieve them for work or other reasons. When Ms. Cadieux was out of town with her work or other commitments and when Ms. Trépanier had study and other commitments, Mrs. Céline Cadieux would also care for the children for periods of time during the weekends.

23 Shortly after Ms. Cadieux returned to work the parties began to experience stress and differences in their relationship, differences that subsequently became irreconcilable. Mutual resentments grew up between them. After the return of Ms. Cadieux from one of her business trips in 2005, because of a letter and picture which Ms. Trépanier found in the possession of Ms. Cadieux, Ms. Trépanier became convinced that Ms. Cadieux was involved in an extra-marital affair. While Ms. Cadieux denies this, there was evidence to indicate that Ms. Cadieux had entered into an intimate relationship with another individual that was no doubt incompatible with Ms. Trépanier's expectations of the party's matrimonial commitment to each other. For her part, Ms. Cadieux indicated that together with her preoccupation with the care of the twins and the pursuit of her own career, Ms. Trépanier's personal demands of her were untenable. Ms. Cadieux was also convinced that she did much more in the way of caring for the children.

24 By April of 2005, the parties realized that the marriage was at an end. They both continued to live in the matrimonial home but essentially began leading parallel lives in and out of the matrimonial home while still jointly caring for the children.

25 Ms. Trépanier, according to Ms. Cadieux, began to spend more and more time away from the matrimonial home. According to Ms. Trépanier she attempted during this period to discuss future parenting arrangements with Ms. Cadieux but nothing could be resolved between them.

26 Shortly after the separation in April of 2005, the evidence indicated that Ms. Trépanier began to emotionally commit herself to her current partner, Ms. Sylvie Beaulieu. Ms. Cadieux testified that she had no difficulties with Ms. Trépanier's new relationship with Ms. Beaulieu. Nor did she have any difficulties with Ms. Trépanier seeing Ms. Beaulieu in front of the children. Nonetheless, in the absence of some mutually acceptable resolution of the live matrimonial issues between the parties, conflicts arose among the three of them. Ms. Cadieux took exception to the presence of Ms. Beaulieu in the matrimonial home with the children. Neighbours became partisan and began reporting the comings and goings of Ms. Trépanier to Ms. Cadieux. A physical altercation took place in the home and police had to be called. Who was right or wrong in these circumstances is not necessary, if not impossible, to determine. What is important from this evidence, in my view, is that, firstly, all of these events contributed to the increasing animosity between the parties which rendered an amicable resolution of their outstanding issues more difficult. Secondly, and perhaps more importantly, in their treatment of each other neither of the parents were capable of protecting the children from their conflict. Unfortunately, this has continued to the present.

27 The living of parallel lives vis-à-vis the children continued between the parties after their April, 2005 separation. Each began making unilateral decisions regarding the children and imposing their decisions on the other without much consultation nor discussion. Ms. Cadieux unilaterally decided to take the children with her on one of her business trips to Montreal at the beginning of June in 2005. There is an issue on the evidence as to whether Ms. Trépanier knew where Ms. Cadieux was with the children during this period and whether Ms. Trépanier had telephone contact with the children during that week. But, there is no question that Ms. Cadieux unilaterally decided to take the children with her on that business trip where she spent time with the individual who had been the source of difficulties between the parties in April of 2005.

28 Ms. Trépanier for her part unilaterally decided to pick up the children from daycare on June 27, 2005 and take them home for supper. This apparently was against Ms. Cadieux's wishes and when Ms. Cadieux arrived at the matrimonial home, Ms. Trépanier refused her entry into the home wanting to spend time alone with the children. Once again the police were called and an arrangement for the evening was worked out between them with the assistance of the police. All of this was in the presence of the children. When Ms. Cadieux returned to the home that evening after it had been vacated by Ms. Trépanier she took the children and went to live in her mother's home in Gatineau. She also took the children out of the daycare in

which they were registered at the time and registered them in another daycare. Ms. Cadieux continued to reside in her mother's home with the children until the matrimonial home was sold in the latter part of 2006 and she was able to purchase and move into her own home with the children. Ms. Trépanier continued to live in the matrimonial home until its sale.

29 After moving to her mother's home with the children, Ms. Cadieux controlled Ms. Trépanier's contact with the children. She refused to grant her access to the children unless she entered into a series of Undertakings regarding the individual visits (see Undertakings dated June 30, July 13, July 14 and July 20, 2005 signed by Ms. Trépanier and witnessed by different individuals at tab. 3 of exhibit #1, Applicant's Book of Documents). Ms. Trépanier testified that she felt she had no choice but to sign the Undertakings if she was to see her children on a continuous and regular basis.

30 Both parties, through the assistance of counsel, finally arrived at an interim separation agreement on a "without prejudice basis" in anticipation of arriving at a final separation agreement. That interim agreement can be found at exhibit #1 tab #1. With respect to the agreed upon interim parenting arrangements the interim agreement reads as follows:

### **Parenting Arrangements**

3.1 Joanne wishes to have joint custody of the children. However and for the time-being, the parties agree that Suzanne shall have interim sole custody of the children namely, Jasmin Cadieux-Trépanier and Maxim Cadieux-Trépanier born April 11, 2003.

3.2 Joanne wishes to share time with the children on an equal basis with Suzanne. However and for the time-being, Suzanne shall have the primary residence for the children Jasmin and Maxim. The children shall be in Joanne's care at the following times:

i) Week 1 — each Wednesday evening from 4:00 p.m. to 7:00 p.m., and from Friday at 4:00 p.m. to Sunday afternoon at 4:00 p.m.;

ii) Week 2 — each Wednesday and Thursday evenings from 4:00 p.m. to 7:00 p.m.

3.3 For the 2005 summer period, Joanne shall have the children from July 24 at 4:00 p.m. to July 31 at 4:00 p.m. Suzanne shall have the children from August 12 to August 26. During each party's vacation time with the children, the regular schedule shall be suspended.

3.4 Each parent shall have reasonable telephone contact with the children at reasonable times, at a minimum one time during the weekend. During the summer vacation periods, the parent who does not have the children shall be entitled to two weekly telephone calls with the children, of reasonable duration, and which calls shall be facilitated by the other parent.

3.5 The parties agree that items that travel with the children between homes such as clothing, toys and the car seats shall be returned with the children at the end of the children's time with that parent.

31 The interim agreement defines the parenting arrangement that has been in place since that time. Ms. Trépanier has faithfully exercised her legal access rights to her sons without interruption except for two short periods when her visits were suspended in 2006 as a result of investigations into allegations of sexual abuse carried out by the Child Protection Services of Gatineau (Direction de la Protection de la Jeunesse, "DPJ") at the end of 2006.

32 The agreement further provided for its termination upon 14 days notice by either of the parties' if they so wished to terminate the agreement. The agreement also provided at clause 5.2 that the agreement was "without prejudice to the rights of the parties to pursue any claims arising from the separation of the parties, including but not limited to the issues of custody and access and quantum of ongoing and retroactive child support."

33 Finally, at clause 5.3 of the interim agreement, the parties agreed that they were to have "another four way meeting (with their respective counsel to be scheduled no later than the end of the first week of September, 2005 in order to review these issues and discuss any further outstanding issues."

34 Ms. Cadieux testified that at the commencement of their separation and through their discussions, she and Ms. Trépanier agreed that she, Ms. Cadieux, would have sole custody and primary care of the children as being in the best

interests of the children. Her recollection was that because of this their entering into and signing the interim separation agreement was done fairly quickly.

35 Ms. Trépanier agrees that they discussed the custody of their children post separation, but that they never reached any understanding or agreement about what parenting arrangement was in the best interests of their sons. She always believed that some kind of joint custody with equal time sharing would be in the best interests of Maxim and Jasmin.

36 I cannot find on the evidence that any agreement was ever reached by the parties as to what parenting arrangement would be in the best interests of their children. The unilateral actions taken by both of them regarding the care of their children immediately preceding their physical separation at the end of June, 2005 belies the existence of any such understanding. The nature and content of their counsel's correspondence leading up to the signing of the interim separation agreement reveals their fundamental and profound differences of opinion on what parenting arrangement would be in the best interests of the two children. Finally, the agreement itself, by its wording indicates that the legal issues of custody and access were far from resolved and that continuing dialogue was expected and anticipated.

37 As can be seen from the correspondence between their counsel during 2005 and 2006, the parenting regime provided for by the interim agreement was not without its problems. Contacts between the parents at the exchanges of the children were saturated with conflict. A physical altercation took place between Ms. Trépanier and Mrs. Céline Cadieux at one of the exchanges. From their behaviour at these exchanges, it was evident, on the evidence, that the children were not being protected by their parents from this conflict.

38 A dispute arose between the parties concerning the sharing of the care of the children during the Christmas holidays for 2005. This became the subject of a court order dated December 15, 2005. Disputes arose over extending Ms. Trépanier's weekend visits during long weekends. A dispute arose as to whether Ms. Cadieux could take the children to Toronto with her on a business trip when such trip would interfere with Ms. Trépanier's weekday access.

39 The parties, through their counsel, discussed the possibility of participating in a parenting assessment. Ms. Cadieux refused to pay for such an assessment in view of her other financial priorities. The parties finally agreed to participate in an assessment with Dr. Hubert Van Gijsegheem, a psychologist from Montreal, upon Ms. Trépanier agreeing to pay for the cost of the assessment, which she did.

40 The assessment took place during the months of May and June of 2006 and Dr. Van Gijsegheem's assessment was finally completed and given to the parties at the end of July of 2006. His report can be found at tab 6 of the Trial Record. It was through this report that Ms. Trépanier first learned of Ms. Cadieux's allegations that Ms. Trépanier was sexually abusing the children. I will discuss these allegations more fully below.

41 During the summer of 2006, without the knowledge of Ms. Trépanier, Ms. Cadieux changed the children's doctor from Dr. Sequin to Dr. Jean-Serge Lalonde. Her explanation was that while she tried to maintain as much stability as she could for the children, she changed doctors because of the distance and her move to Quebec. Ms. Cadieux also obtained a one month medical leave from Dr. Lalonde in August of 2006. Upon a referral from Dr. Lalonde and at the request of Ms. Cadieux, the children were referred to a « pédopsychiatre » at the Centre Hospitalier Pierre-Janet de Hull (see report of Dr. Serge Lalonde dated September 25, 2007 at exhibit #1 tab 10). Ms. Cadieux testified that she asked for such a referral because of the troubling disclosures and accompanying behaviours of the boys.

42 Maxim and Jasmin were examined by Dr. Danyelle Bertrand, a pediatric psychiatrist at the Centre Hospitalier Pierre-Janet de Hull. Her report is dated November 9, 2006 and found at exhibit #1 tab 10. The impressions and conclusions of Dr. Bertrand concerning her interview with Ms. Cadieux and the children is the following:

Au moment de la rencontre d'évaluation, il apparaît surtout que la mère est très anxieuse et apeurée par le pouvoir de son ex-conjointe et il semble s'agir d'un conflit d'aliénation parentale car la mère m'apparaît craindre l'ex-conjointe. ...

43 For both children Dr. Bertrand concluded:

### **Impressions Diagnostiques**

Pour l'instant, compte tenu du fait que la situation pour la garde des enfants est encore en litige, des recommandations d'usage simples sont données. Je crois que la mère devrait statuer assez rapidement sur ce qu'elle désire par rapport à ses enfants et obtenir de l'aide pour se renforcer car elle a tendance à être soumise et inquiète et donner le pouvoir à l'ex-conjointe, ce qui fait qu'elle a beaucoup de craintes lorsque les enfants visitent son ex-conjointe mais elle n'arrive pas à



s'affirmer. Alors je lui suggère d'avoir de l'aide pour s'affirmer et je n'irai pas plus d'avant dans le suivi des enfants qui n'apparaissent que réagir à la situation. De toute façon, lorsqu'il y a des conflits de garde non résolus, nous attendons qu'un juge se prononce pour voir si les symptômes résiduels nécessitent de l'aide psychothérapeutique. Les enfants ne m'apparaissent pas en danger pour le moment.

44 There were no follow-up visits with Dr. Bertrand with the children.

45 After the release of Dr. Van Gijseghem's report and the termination of the sexual abuse investigation carried out by the DPJ at the end of 2006, Ms. Trépanier brought a motion to have the parenting regime that the parties had agreed to in July, 2005 changed by the Court to one of joint custody with each party having the children in their care on a week-on week-off basis. On March 21, 2007, Mr. Justice Smith refused this motion. His written reasons for refusing the motion can be found at tab 10 of the Trial Record. He decided to maintain the status quo parenting arrangement until the matter could be heard on the merits. As part of the order Ms. Cadieux was to provide 30 days written notice to Ms. Trépanier before making any major change affecting the children.

46 The evidence indicated that at various times leading up to the trial of this matter both parents were ready to consider mediation as a way of resolving their conflict. Unfortunately, in view of the events of 2005 and 2006 neither was ready to pursue mediation at the same time. When one was ready to consider it the other was not and vice versa. Consequently, it never happened.

### **The Allegations of Sexual Abuse**

47 It was the evidence of Ms. Cadieux that as a result of certain disclosures made to her by her son Maxim in July of 2005 and also as a result of observing certain problematic behaviours on the part of her son Justin, Ms. Cadieux became convinced that Ms. Trépanier was sexually abusing their children. She tape recorded the children's statements. Unbeknownst to Ms. Trépanier, Ms. Cadieux began to consult a number of professionals about her suspicions. In the fall of 2005, she contacted the DPJ and had her doctor, Dr. Sequin, examine Maxim. He did not find any physical evidence of sexual abuse. In December of 2005 Ms. Cadieux filed her answer to Ms. Trépanier's Application and did not raise the issue of the potential sexual abuse by Ms. Trépanier. As indicated, the first time Ms. Trépanier became aware of Ms. Cadieux's allegations of sexual abuse against the children was when she read about it in Dr. Van Gijseghem's report released in July of 2006.

48 When Dr. Van Gijseghem was retained by the parties, he was retained to do a parenting capacity assessment. As can be seen from his curriculum vitae, he is not only an expert in the field of parenting assessment but also in the field of sexual abuse of children. With the consent of the parties and after hearing evidence concerning his education, his work experience and research and his publications he was qualified as an expert to give evidence in both fields

49 Dr. Van Gijseghem, himself, testified to his surprise at Ms. Cadieux's delay in reporting to him, in the course of the assessment, her suspicions that Ms. Trépanier might be sexually abusing the children, in view of how longstanding her suspicions had been. In view of this reporting and the seriousness of the allegation to parenting capacity, he naturally included an examination of this question in his report. I can take no issue with this decision. For the reasons stated in his report, Dr. Van Gijseghem found that there was absolutely no basis for concluding that Ms. Trépanier had sexually abused her sons, nor were the children's disclosures reliable in the context of how they were questioned by Ms. Cadieux in the first instance and subsequently by others.

50 In the spring and summer of 2006, after some insistence on her part when the Centre suggested that the children might be too young for the program, Ms. Cadieux enrolled the two children in a sexual abuse prevention program at the Centre d'Intervention en Abus Sexuels pour la Famille (CIAS) which ran from August to October, 2006. This was again done without Ms. Trépanier's knowledge.

51 Ms. Cadieux informed Dr. Van Gijseghem of her intention to enroll the children in the CIAS in "un groupe". Dr. Van Gijseghem counseled against it because of his opinion that despite protestations to the contrary, these types of programs worked "to elicit disclosures, and that's exactly what happened in this case." (See page 23 of Dr. Gijseghem's cross-examination).

52 Ms. Cadieux was not in agreement with Dr. Van Gijseghem on this point and continued with the children's participation in the program. She testified that the program gave her and the children some tools to help her deal with the reality of the situation.

53 Ms. Huguette Joly, the Director of the CIAS, testified to the mission of her organization which is to provide a

prevention program for children that are potentially at risk of being abused sexually. She emphasized that the organization was not there to investigate or prove the incidence of sexual abuse. It was Ms. Joly's testimony that she had no recollection of Ms. Cadieux informing her that the family was undergoing an assessment by Dr. Van Gijseghem, nor was this fact noted anywhere in her notes. She testified that this information would have been useful to know.

54 It was the evidence of Ms. Joly that on two occasions during group activities in the CIAS program both Maxim and Jasmin disclosed being sexually abused by Ms. Trépanier. The DPJ was contacted and commenced an investigation. Ms. Trépanier's access was suspended during this investigation from October 19, 2006 until November 6, 2006.

55 Shortly after this a second disclosure was made by the children suggesting that Ms. Trépanier had sexually and physically abused Jasmin. This was as a result of a red mark on Jasmin's penis at his daycare. Ms. Trépanier's access was again suspended from November 23, 2006 to December 1, 2006 while the DPJ conducted another investigation, including a supervised access visit at the children's daycare.

56 When physically examined the red mark on Jasmin's penis was diagnosed as a medical ailment. The evidence indicated that, while Ms. Trépanier was very upset by the suspension of her access to the children and the allegations made against her, she cooperated fully with the DPJ. The supervised visit Ms. Trépanier had with the boys at their daycare was reported by both Ms. Colette Nadeau and Ms. Marianne Roy in very positive terms. The affection which the boys had for Ms. Trépanier and her for them was evident to these two observers.

57 At the end of its investigation the DPJ closed its file concluding at page 4 of its report, dated December 5, 2006:

#### **Analyse et Motifs Justifiant La Decision**

Notre évaluation de la situation ne nous permet pas de relier les verbalisations des enfants à de l'abus sexuel ou physique. Nous croyons toutefois que le conflit entre Madame Cadieux et Madame Trépanier a des impacts sur les enfants et c'est pour cette raison que les enfants verbalisent des choses comme « Mom fait bobo, Mom n'est pas gentille ». Pour sa part, Madame Cadieux est convaincue que Madame Trépanier maltraite ses enfants. Elle va donc interpréter toutes verbalisations ou comportement des enfants à la faveur de cette hypothèse. Les verbalisations de ses enfants l'inquiète et elle a de la difficulté à relier cela uniquement au conflit. Nous avons tenté de sécuriser Madame en ce sens. Il est primordial que Madame Cadieux recommence à faire confiance à Madame Trépanier dans son rôle de parent. Selon nous, les deux parents ont leur part de responsabilité dans cette situation et dans l'intérêt des enfants à court et à long terme nous leur suggérons fortement de faire appel à un médiateur dans le but de régler leur conflit.

#### **Compte tenu**

- Que les verbalisations des enfants ne nous permettent pas de conclure à de l'abus physique ou sexuel.
- Du conflit de garde important entre Madame Cadieux et Madame Trépanier.
- Du fait que les enfants fonctionnent très bien à la garderie et qu'ils se développent bien.

Nous concluons que les faits contenus dans le signalement sont non fondés en vertu de l'article 38 GS et GP de la loi de la Protection de la Jeunesse et que la sécurité et le développement de Jasmin ne sont pas compromis. Par conséquent, nous orientons le dossier vers une fermeture.

(See tab. 13 of exhibit #1).

58 Ms. Colette Nadeau of the DPJ met with both parents together at the end of the sexual abuse investigation and urged both parents to resolve their differences which were having a significant impact on the children. She urged them to consider mediation. It is clear from Ms. Nadeau's notes that Ms. Cadieux continued to have difficulty with embracing wholeheartedly the children's visits with Ms. Trépanier.

#### **Parenting Assessment of Dr. Van Gijseghem**

59 The details of Dr. Van Gijseghem's parenting assessment of the two parents are found at tab 6 of the Trial Record. It is not necessary to repeat that detail here. What one can conclude from the report is the following. Firstly, in his examination of this family, Dr. Van Gijseghem interviewed the two parents and had occasion to observe the two parents interact with the two

children. He further conducted psychological testing on the parties. He also had access to the parties' legal documents in this litigation and he made collateral contacts with individuals whose names he obtained from the parties. He also assessed Ms. Sylvie Beaulieu and Mrs. Céline Cadieux.

60 An issue was raised on the evidence about the accuracy of Dr. Van Gijseghe's recollection of his discussions with certain collateral contacts, in particular two suggested by Ms. Cadieux, namely, Ms. Annik Verreault and Ms. Julie Deschênes. After examining the substance of this evidence including the cross-examination of Dr. Van Gijseghe's on this point, I have concluded that it does not in any way undermine the conclusions found in Dr. Van Gijseghe's evaluation. Contrary to the assertions of Ms. Cadieux, I cannot find that Dr. Van Gijseghe approached his task and conducted his evaluation of the information given to him in a biased manner. Many of his significant conclusions are supported by other evidence.

61 In his psychological testing of both parents Dr. Van Gijseghe found both parties to be capable parents. Of Ms. Trépanier he stated the following at page 10 of his report:

Mrs. Trépanier is a person free of psychological pathology. She apparently has an obsessive-compulsive personality structure. Her discipline serves to control oppositional feelings, resulting in apparent submission and serving public compliance. She could be somewhat arrogant and intolerant of others' feelings. She is a rather independent person with a great deal of energy and high activity level. Non-conforming, she is willing to take risks.

She has a quality attachment toward the children and wants to play an active role in their lives. ... Her relationship with the kids tends to be more traditionally "paternal" (doing things, discipline..).

62 With respect to Ms. Beaulieu, through his testing, Dr. Van Gijseghe ruled out psychological pathology and at page 27 of his report indicated that "Mrs. Beaulieu invests the children well and has a warm and nurturing attitude towards them."

63 With respect to Ms. Cadieux, Dr. Van Gijseghe states at page 21 of his report:

Mrs Cadieux is devoid of psychological pathology. Her personality structure would likely place her in the histrionic register, illustrated by the fact that she is gregarious, that she requires the attention of others and can be quite demonstrative in doing so in order to fulfill her wish to be appreciated.

She is also a very naive and suggestible person, and lacks insight. Very feminine and conservative, she remains sensitive to others' needs.

Our investigation as a whole shows that she has very good basic parental capacities. It is possible that she lacks distance with the kids. She is somewhat "all over" them which could interfere with proper structuring. Her extreme suggestibility also can play tricks on her. (By this he meant, as an example, what he referred to as her crusade to "validate" sexual abuse on the part of Ms. Trépanier).

64 His observations of the interactions between the children and the two parents led him to conclude that the children appeared to be extremely comfortable in both homes where they received much love and attention and were well cared for. According to Dr. Van Gijseghe, Ms. Cadieux had a "life arrangement totally centered on the boys. The bond between the boys and their mother is a harmonious one. The grandmother [Mrs. Céline Cadieux] is also part of the action and the boys are clearly close to her." (See page 23 of the report). He also stated at page 36 that, "Mrs. Cadieux is a very feminine and maternal person and has excellent basic parental capacities. Her relations with the boys are warm and nurturing."

65 With respect to Ms. Trépanier, he concluded at page 24 of his report that between Ms. Trépanier and the children he saw a "harmonious and natural relationship."

66 At page 36 of his report Dr. Van Gijseghe states:

Mrs. Trépanier has a quality attachment to the children. She is eager to play an active role in their lives and, according to our investigation as a whole, she is able to do so. She tends to play a "paternal" role.

67 Many of Dr. Van Gijseghe's own observations of the parent-child interaction were confirmed by information he

received from the collateral contacts. The observations of some of the daycare providers were that both parents were warm and loving. Ms. Cadieux at times had difficulty with the routine and discipline of the children but that this had improved over time. Ms. Cadieux herself testified that she had enrolled in some parenting programs to improve her skills in this area.

68 Dr. Van Gijseghem saw both parents as equally capable and bonded to their children. Despite questioning to the contrary, he refused to conclude that one parent was more of a psychological parent than the other or that one parenting style was more suited to the age of the children. He maintained throughout that based on his assessment of this family these children needed both these parents to be actively involved in their lives.

69 For the reasons stated in his report Dr. Van Gijseghem concluded that, when considering how both parents were able and ready to involve the other parent in the lives of the children, he had to conclude that Ms. Cadieux had been positively attempting to proscribe and limit the role played by Ms. Trépanier in the upbringing and care of the children and hence limit her participation in their lives. At pages 37 and 38 of his report he states:

It so happens that our investigation as whole indicates to us that, in this case, Mrs. Trépanier protects the image of Mrs. Cadieux more in the minds of the children than the other way around.

The communication between the parents is presently contaminated by the litigation. The context of the lawyers' letters, of the statements and the conflicts that erupt over the slightest decision to be taken, are a good illustration of the lack of flexibility and the hardening of the positions of the parents.

It should be noted that when met separately, the two parents are two excellent individuals. It is to be deeply regretted that mediation attempts failed and that these persons have fallen into an adversarial mode that resembles a fight to the finish. Unfortunately for the children, they are the ones at stake.

Both of these parents tenderly love their children and want the best for them. It is fortunate that the children themselves remain (still) attached to each parent.

We are aware of the fact that the serious conflict going on at the present time between the parents is a major pitfall with respect to the adoption of any form of joint custody. All the same, research shows also that if this type of conflict exists, a formula related to joint custody remains perhaps the only guardrail, against a threatening parental alienation.

In the present case alienation has not yet taken place, and that is one more argument in favor of the guardrail provided by joint custody.

70 It is for the above reasons that, in his final recommendations to the Court, Dr. Van Gijseghem suggests a joint custody regime as being in the best interests of the children. At pages 40 and 41 of his report he states:

That both parents continue to assume joint legal custody (parental authority) in the sense that no important decision affecting the lives of the children may be taken by one parent without the explicit consent of the other parent.

That both parents exercise a joint residential custody, from the Friday night, after school (or the equivalent) to the Friday night (or, if preferred, an equivalent formula).

That the parents recognize that there must be sufficient flexibility to allow the children to be present at the important events in each one's life. The same should apply for the important events in the lives of the children. This flexibility should also exist in the sharing out of the festive days, such as Christmas and New Year's.

The custodial parent must favour telephone contacts but each must understand that a child is not always interested in this type of contact and the parent must accept the fact that the child may interact only briefly on these occasions, without undue interpretation.

In addition, a certain limitation of telephone contacts in a case such as this one seems nevertheless indicated so that each parent may establish a quality time that is not broke. Three short weekly contacts seems [*sic, seem*] to us enough.

71 Cognizant of the reality of the conflict between the parties, Dr. Van Gijseghem, at the end of his report indicates that for his recommendations to be "fully operational" the parties would have to follow through on the following:

- (a) Begin to trust the custodial capabilities of the other parent.
- (b) Maintain a mutual contact solely centred on the good of the children and not full of other messages or reproaches.
- (c) Total abstention from discrediting the other parent to the children.
- (d) That Ms. Cadieux develop some insight and perhaps seek professional assistance with the issue of her belief and subsequent actions regarding the question of the sexual abuse allegations that have been shown to be unfounded.
- (e) Both parents seek out professional advice in order to achieve the best co-parental attitude because of the particular situation of this family, namely, non-traditional family and allegations of sexual abuse.
- (f) The parties should commence joint discussions regarding the children's daycare and school. This could be done with the assistance of a neutral professional who may help the parties with a form of "coaching" in arriving at joint decisions.

72 Dr. Van Gijsegem's closing words are the following:

... We have attempted to make this report to the greatest extent possible an "educational" document. Even if we expect claims and other complaints, we invite these two parents to put an end to their judiciary guerrilla in the sole interest of the children. Should the quarrel continue, it is inevitable that it is the children who will be the losers.

All these recommendations and cautions have but one purpose: to give these children **both** parents, which is definitely in their interest.

### **The Children and Their Best Interests**

73 Pursuant to section 16(8) of the *Divorce Act* "only the best interests of the [children] of the marriage as determined by reference to the conditions, means, needs and other circumstances of the [children] determines the question of the custody and access of [children]." Furthermore, pursuant to section 16(9) of the *Divorce Act*, the past conduct of a parent is not taken into consideration unless such conduct is relevant to the ability of that parent to act as a parent. Throughout this trial one heard substantial evidence, presented by both parents regarding the conduct of the other parent that had little to do with each others parenting abilities. Rather, it had more to do with their qualities as spouses. This evidence did not in any way detract from the conclusion of this Court that we have here two very good and capable parents who love their children very much.

74 All of the evidence relating to the development of the children indicated that they are developing well and normally. There do not appear to be any special needs that have to be considered in this case. Their affection and attachment to both parents were confirmed by a number of witnesses at the trial and by way of affidavits presented at trial on consent of the parties. Both Ms. Trépanier and Ms. Cadieux were asked to describe their two children and the relationship they enjoyed with them. The descriptions that each parent gave of their children were surprisingly similar. There is no question on the evidence that the two children have been touched by their parents' conflict.

75 Pursuant to S. 16(10) of the *Divorce Act* the Court is directed as follow:

(10) MAXIMUM CONTACT — 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.

76 Dr. Van Gijsegem dealt with this principle in his parenting capacity assessment. He concluded, for the reasons stated in his report, that Ms. Cadieux in her conflict with Ms. Trépanier, was failing to support and nurture the children's relationship with their other parent, Ms. Trépanier. Ms. Cadieux denied this. Nevertheless, I must conclude that there is

substantial other evidence to support that conclusion.

77 The following facts also support that conclusion. After the physical separation of the parties Ms. Cadieux unilaterally determined Ms. Trépanier's contact with the children by way of a series of Undertakings. From the moment of their physical separation Ms. Cadieux began to make significant unilateral decisions regarding the children without informing Ms. Trépanier or consulting her. Some examples of this were the change of the children's residence, child care and a choice of medical doctor and treatment. She consulted medical professionals and enrolled the children in programs without informing Ms. Trépanier. It took a court order for Ms. Cadieux to finally and fully disclose the identity of the children's daycare. The last time the parties appeared before this Court prior to trial, in their motion before Mr. Justice Smith, there was a court order requiring Ms. Cadieux to not make any major decision affecting the children in the areas of their education, their medical care including counselling and their extracurricular activities, except in situations of an emergency without first giving Ms. Trépanier 30 days prior written notice. Because of the dynamics of the relationship between Ms. Cadieux and Ms. Trépanier, Ms. Cadieux continues to have difficulty with providing Ms. Trépanier with information concerning the children.

78 There is as well Dr. Van Gijseghem's opinion and analysis of the allegations of sexual abuse raised by Ms. Cadieux that have been shown to be unfounded. The notes of Ms. Nadeau of the DPJ also revealed the difficulty Ms. Cadieux was having encouraging the children to go on their visits with Ms. Trépanier. There was some evidence to indicate that some of the negative comments coming from the children regarding Ms. Trépanier were words stated by Ms. Cadieux to the children.

79 At the commencement of trial, Ms. Cadieux indicated that she was not opposed to a declaration that Ms. Trépanier be declared a "parent" of the children of the marriage. However, this request remained an issue until the commencement of the trial and necessitated an amendment to the pleadings by Ms. Trépanier to legally preserve her right to claim it. Ms. Cadieux admitted to seeking legal advice upon her move to Quebec to determine whether Ms. Cadieux would have the right in that province to claim such declaratory relief. In fairness to Ms. Cadieux, she did not pursue this.

80 Section 24(2) of the *Children's Law Reform Act (CLRA)* enumerates factors that courts should consider in the deciding questions of custody and access of children. While this case is governed by the *Divorce Act*, the factors enumerated in Section 24(2) of the *CLRA* certainly reflect factors found in the jurisprudence under the *Divorce Act* which have been found to be relevant to the question of custody and access. The factors are as follows:

***(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 child's care and upbringing;

81 On the evidence of this case both parents share an equal love, affection and emotional ties with their two children and they for them. In this, I can find no distinction between the parents. Dr. Van Gijseghem found that the boys were clearly close to their grandmother, Mrs. Celine Cadieux. The evidence also showed that the children continue to see Ms. Trépanier's mother every second weekend.

***(b) the child's views and preferences, if they can reasonably be ascertained;***

82 On the evidence the children are too young to express their views and preferences which can reasonably be ascertained.

***(c) the length of time the child has lived in a stable home environment;***

83 Up until the physical separation of the parents the children enjoyed the care of both their parents. Since that time they have been in the primary care of Ms. Cadieux but have experienced some changes in their residence, daycare and medical doctors. Since Ms. Cadieux moved into her home the children have been in a stable home environment. The continuing conflict between their parents has caused emotional upset to the children to the observation of others. The children have experienced police presence and altercations between those they love. Exchanges between the parents can still cause some change in the children's behaviour.

***(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;***

84 On the evidence both parents are equally able and willing to provide the child with guidance and education, and the necessities of life. As Dr. Van Gijsegheem indicated, in his opinion, these children need both parents in their life. Each parent has their own unique contribution to the well-being of these two boys and it is in their best interests that both parents be permitted to make that contribution. In his view, and as supported by the evidence, Ms. Trépanier can best protect the active involvement of both parents in the lives of these children. Ms. Trépanier's role in the care of Maxim and Jasmin must be safeguarded from what has been happening leading up to this trial.

***(e) any plans proposed for the child's care and upbringing;***

85 Both parents have presented reasonable plans for the care and upbringing of the children. Ms. Cadieux's plan guards against change for the children from what they have known since the separation. It offers continuity and stability but perpetuates the minor or secondary role attributed to Ms. Trépanier based on Ms. Cadieux's very restrictive interpretation of the Interim Agreement. According to Dr. Van Gijsegheem there is a real danger in Ms. Cadieux's plan for the children, based on the history of this case as well as on the individual personalities of the parents, that Ms. Trépanier's participation in the children's lives would be further limited by Ms. Cadieux in the future. This danger is a real one on the evidence. Ms. Cadieux's plan offers no solution to the possibility of the continued conflict between the parties, a conflict that has gone on under the existing regime to the detriment of their children. Ms. Cadieux's plan offers no resolution to the potential lost benefit to the boys by having Ms. Trépanier's participation in their lives so circumscribed.

86 Ms. Trépanier's plans, regardless of what option is chosen will introduce change into the children's lives. It will, however, ensure the continuation and nurturance of her "quality attachment" to the children in their best interests. It will allow her an active participation in the lives of her children and in the decisions relating to their well-being. Her plans also address the question of the ongoing conflict between the parties. The parenting proposals provide a mechanism for dealing with such conflict either through distinct areas of decision-making or through the use of an agreed-upon parenting coordinator if joint decision-making were to be chosen by the Court.

***(f) the permanence and stability of the family unit with which it is proposed that the child will live;***

87 To date, Maxim and Justin have enjoyed with some permanence and stability the parental love of both parties. There is no question on the evidence that both parents are dedicated to the children. Ms. Cadieux lives alone but enjoys, as do the children, the love and support of her large and loving extended family. I do not see this changing. Ms. Trépanier testified that she was in a permanent relationship with Ms. Beaulieu who supports Ms. Trépanier's parenting plans. Dr. Van Gijsegheem saw a positive interaction between Ms. Beaulieu and the children. There was no question on the evidence that Ms. Beaulieu played a supportive role in Ms. Trépanier's parenting of the children.

***(g) the ability of each person applying for custody of or access to the child to act as a parent;***

88 Both Ms. Trépanier and Ms. Cadieux are equally able to do this on the evidence.

***(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.***

89 Ms. Cadieux is the biological parent of these children who were conceived by an anonymous donor through a process of artificial insemination. After the birth of the children the parties commenced the process of the adoption of the children by Ms. Trépanier. While both parties had a different recollection of why this process was not completed, it is evident from the evidence that their commitment to their relationship began to unravel before the process could be completed. The declaratory order granted by this decision makes both parties, in law, equally the parents of Maxim and Jasmin. According to Dr. Van Gijsegheem neither parent in this case has any greater claim to being these children's psychological parent.

**Sole Custody or Joint Custody**

90 Pursuant to Section 16 (4) of the *Divorce Act* the Court may make an order granting custody of, or access to, any or all

children of the marriage to any one or more persons. Based on the evidence as set out earlier I am convinced that there should be an order for joint custody of the two children of the marriage. I am persuaded that such an order is required to protect the parental rights of Ms. Trépanier which I find to be in the best interests of the children. On the evidence I find that Ms. Cadieux, under the current exclusive custody regime, has systematically attempted to limit Ms. Trépanier's participation in the lives of the children, without a reasonable cause. In so doing, she has interfered with the nurturance of Ms. Trépanier's parental relationship with the children. All of this has been to the detriment of the children. Because of this and in this way, Ms. Cadieux's exercise of sole custody to date and her wish for continued sole custody, will not, in my view, adequately meet the needs of the children as recognized by Dr. Van Gijseghem. As recommended by Dr. Van Gijseghem the children should spend more time in the care of Ms. Trépanier than they currently do. Furthermore, Ms. Trépanier should be allowed to more actively participate in the decisions relating to the children.

91 The real issue in this case is what form of joint custody would be in the best interests of the children, given the parental conflict? In the decision of *Kaplanis v. Kaplanis* (2005), 249 D.L.R. (4th) 620 (Ont. C.A.), the Ontario Court of Appeal made it clear that a judge's wish and hope for improved communication between parents in a highly conflictual case once the litigation is over does not provide a sufficient basis for making an order for joint custody.

92 In *Kruger v. Kruger* (1979), 104 D.L.R. (3d) 481 (Ont. C.A.), the majority decision of Mr. Justice Thorson stated at page 20:

Above all, it requires a willingness by both parents to work together to ensure the success of the arrangement. Such a willingness must be sincere and genuine; by its very nature it is not something that can be imposed by a court on two persons, one or both of whom may be unwilling or reluctant to accept it in all its implications. Like marriage itself if it is to succeed it is an arrangement that has to be worked out by two persons who are determined, of their own will and in good faith, to make it work.

93 More recently in *A. (N.) v. W. (C.M.)* (2003), 39 R.F.L. (5th) 1 (Ont. S.C.J.) Ingram J. found on the facts before him as follows at page 7:

The parties, despite having been separated for over a year, still are unable to communicate. The Ontario Court of Appeal, first in the decisions of *Baker v. Baker* (1979), 8 R.F.L. (2d) 236 and *Kruger v. Kruger* (1979), 11 R.F.L. (2d) 52 and more recently in *Johnson v. Cleroux* (2002), 23 R.F.L. (5th) 176 (C.A.) have directed that a high level of cooperation between the parties is needed before the court should make an order of joint custody.

The issues of potential conflict, the present lack of communication between the parties and the directive of the appellate court dictate that this case be decided by an order of sole custody. ...

94 Decisions of this kind essentially imply that unless the parties agree to a regime of joint custody, it is unlikely that a court would ever order joint custody in the face of opposition from one party.

95 However, since those decisions other parenting arrangements have come to be considered in order to assist parents in high conflict cases co-parent when such co-parenting is found to be in the best interests of their children for one reason or another. Some of these parenting arrangements have been accepted by our courts.

96 In *Maceus-Agyekum v. Agyekum*, [2005] W.D.F.L. 2380 (Ont. S.C.J.) joint custody was ordered in the face of one parties' opposition to it and on facts where there was notable conflict between the parents. In that case the mother, who had sole custody of the child, argued against an order of joint custody being sought by the father because the parties found it difficult to communicate; they did not share the same view as to the children's need for extracurricular activities; and the father had been a passive parent in the past. On the facts, Metivier J. found that there had not been any problems with access between the parties for some time. Nor did the parents have a history of a failed sharing of parenting. However, Metivier J. found there was mistrust between the parties. In coming to her decision, Metivier J. found that the mother's wish to have sole custody would not provide adequately for the needs of the children. The father's bond with the children was strong and he was willing and able to care for the children. Consequently, Metivier J. ordered joint custody. As part of her order Metivier J. remained seized of the custody issue for one year. She stated that in the event that the joint custody regime was not working for the children an application for review could be brought before her before the end of the year.

97 On appeal of this decision (see *Maceus-Agyekum v. Agyekum*, [2006] W.D.F.L. 2442 (Ont. C.A.)), the Ontario Court of Appeal upheld the judgment of Metivier J. and stated at page 2 of its short reasons:



The trial judge was concerned that the mother's wish to have sole custody would not provide adequately for the needs of the children. She concluded that the parties would share the joint custody of the children and the mother was to be the primary residential parent and have primary care and control of them. She remained seized of the issue of custody for a period of one year. We see no basis to interfere with the trial judge's disposition of the issue of custody.

98 One of Ms. Trépanier's parenting plans is the option of parallel parenting whereby parents have decision-making power in defined areas pertaining to the well-being of the children. This form of joint custody is used where joint decision-making is impractical and unworkable. Questions of parallel parenting have made their way to our Courts and have been discussed in the jurisprudence. Orders of this kind have been upheld by our Courts.

99 In *Hildinger v. Carroll*, [2004] W.D.F.L. 167 (Ont. C.A.), the father sought an order for joint custody in the form of parallel parenting. On the facts of that case the relationship between Ms. Hildinger and Mr. Carroll had been acrimonious from the birth of their child. Two independent assessors recommended against any form of joint custody and the trial judge ordered sole custody to the mother. On appeal of this decision the Ontario Court of Appeal upheld the order of the trial judge stating at page 5 of their decision:

The trial judge cannot be faulted for applying the established jurisprudence of this court. However, assuming without deciding that parallel parenting is now a viable option where the parties are uncooperative, I see no justification for it in this case. The overwhelming evidence accepted by the trial judge pointed to but one conclusion: granting Ms. Hildinger sole custody was very much in Nancy Mae's interests.

100 In the case of *Ursic v. Ursic*, [2006] W.D.F.L. 3290 (Ont. C.A.), the Court of Appeal dismissed an appeal against a trial judge's decision to order joint custody in the form of parallel parenting in a high conflict case. On the facts of that case it was found that there was considerable conflict between the parents although both parents were found to be competent and caring and each had a loving relationship with the child. Because of the conflict, the trial judge recognized that co-parenting was not the starting presumption. In fact, it was quite the opposite. However, the court found that, if awarded sole custody, the mother would unreasonably and deliberately cut the father and his family out of the child's life which was against the child's best interests. In order to ensure that the father had the authority to parent, a parallel parenting regime was ordered with each parent being given roughly equal time to care for the child.

101 Laskin J. A. speaking for a unanimous court states at page 8 of the decision:

Also, importantly, the trial judge did not merely order joint custody. He included with it a parallel parenting order. Many trial courts have recognized that joint custody under a parallel parenting regime may be suitable where both parents love the child and should play an active role in the child's life, yet have difficulty communicating or reaching a consensus on the child's upbringing. See *M. (T.J.) v. M. (P.G.)* (2002), 25 R.F.L. (5th) 78 (Ont. S.C.J.) and *Mol v. Mol*, [1997] O.J. No. 4060 (Ont. Gen. Div.). The trial judge viewed parallel parenting to be suitable in this case, and I am not persuaded that he erred in ordering it.

102 The Court of Appeal upheld that order with some minor changes in view of new evidence.

103 In *Andrade v. Kennelly* (2006), 33 R.F.L. (6th) 125 (Ont. S.C.J.) a Court made an order for joint custody in mode of parallel parenting with the children residing primarily with the father. This order was made in the context of an application brought by the mother, who up until that time had had custody of the children, to relocate to another city with the children. The relationship between the parents had been characterized by high levels of acrimony. The children had developed a strong relationship with their father after access was normalized. The Court found that the mother did not have a strong commitment to developing and nurturing the relationship between the father and the children. She was unable to appreciate the importance of the father's relationship to the children. Her plan for the children was rejected because of the effect such a move would have on the relationship between the father and the children. After a thorough examination of the jurisprudence on joint custody and parallel parenting the Court concluded:

... I am unable to accept the mother's parenting plan for two reasons. First of all, her proposals for access by the father following a move by her and the children to Ottawa are impracticable, both financially and in terms of the demands that the travel would place upon the children. Second, her access proposals are predicated on a level of commitment from Dr.

Kennelly, which I cannot find to exist on the evidence before me.

104 The court went on to make an order for joint custody in the mode of parallel parenting, which was detailed in the decision.

105 In *G. (J.A.) v. R. (R.J.)*, [1998] O.J. No. 1415 (Ont. Gen. Div.) a longstanding sole custody order was changed from a mother to a father where allegations of sexual abuse against the father by the mother were declared to be unfounded. Custody was given to the father because he would promote the relationship with the mother despite the conflict between the parents. It was the father's hope that communication would improve and he welcomed more communication in day-to-day activities and decision-making from the mother which had not been reciprocal. The court concluded with these words at page 14:

Custody is neither a reward nor a punishment. It is a regime based upon many considerations to promote the best interests of the child. The week about arrangement has worked well for B.. She has a good sense of home and belonging to each parent. Sole custody to the father will best promote co-operative decision making. This serves B.'s best interests.

106 A similar result occurred in the case of *C. (B.A.) v. C. (D.L.)* (2003), 48 R.F.L. (5th) 15 (B.C. C.A.). In that case the British Columbia Court of Appeal upheld a trial judge's decision to change custody from a mother to a father in circumstances where a mother alleged that the father had sexually abused the children. At trial it was found that the allegations of sexual assault had no substance to them. It was found that the mother had undertaken a concerted campaign to remove the father from the children's lives. If the mother were to have sole custody she would disregard the children's interest in having a meaningful relationship with their father.

#### **Dispositon Relating to Custody and Access**

107 In summary, for the reasons stated earlier, I am not satisfied that an order for sole custody to Ms. Cadieux is in the best interests of the children. Ms. Cadieux's purposeful attempts to limit the role that Ms. Trépanier plays in the lives of the children indicates that she does not appreciate the strong and loving parental relationship between the children and Ms. Trépanier. Nor is she prepared to nurture its development. There is nothing in the evidence to indicate that this attitude on her part will change. This has not served the needs of the children to have both parents actively present and participate in their lives. I therefore make the following order:

(1) The parties shall share joint custody of the children. On an ongoing basis, the Applicant and the Respondent shall share time equally with the children on a week about rotation, from Friday at 4 p.m. to the following Friday at 4 p.m. with the children to be picked up at their school. This time-sharing will reduce to a minimum the number of exchanges between the parents. I am also satisfied on the evidence that the parties live close enough that this time-sharing is workable in the best interests of the children. This is to commence forthwith, with Ms. Trépanier providing the transportation for the exchanges as she has agreed to do.

(2) During the summer months each party shall be entitled to spend two consecutive weeks' holidays with the children which shall supersede the regular week about parenting regime if the parent chooses to spend the two weeks outside of the National Capital Region. Notice of such intended holidays shall be given to the other parent by May 1 of each year.

(3) Unless the parties otherwise agree, the parties shall share the Christmas holidays in the following way which shall supersede the regular week about parenting regime: the period between December 23 at 4 p.m. to January 2, at 4 p.m. shall be shared equally between the parties. If, in that period, one parent has the children on December 25, the other parent shall have the children on January 1. Those two dates shall alternate between the parents from year to year unless the parents can otherwise agree. If the parents cannot agree then Ms. Cadieux shall have the children for December 25 for the year 2008 and Ms. Trépanier shall have the children for January 1, 2009 and the two dates shall alternate between them thereafter from year to year.

(4) Unless the parties otherwise agree, the children's spring break shall be shared equally between the parents and shall supersede the regular week about parenting regime.

(5) Unless the parties otherwise agree, the Easter long weekend from Thursday 4 p.m. to Easter Monday 4 p.m. shall be shared equally between the parents and shall supersede the regular week about parenting regime. Unless

the parties otherwise agree they shall share on an alternating yearly basis Easter Sunday with the children with Ms. Cadieux having the children Easter Sunday of 2008.

(6) With respect to Mother's Day, unless the parties can otherwise agree, the children shall spend at least three hours with the parent who does not have the care of the children that day. This shall supersede the regular week about parenting regime.

(7) With respect to the Parties' birthdays, unless the parties can otherwise agree, the children shall spend at least three hours with the parent who has the birthday and does not have the care of the children that day. This shall supersede the regular week about parenting regime.

(8) With respect to the children's birthdays, unless the parties can otherwise agree, the child who has the birthday shall spend at least three hours with the parent who does not have the care of the child who has a birthday that day. This shall supersede the regular week about parenting regime.

(9) The parties are free to agree to any other changes they may wish to have in order to accommodate any other special event in the children's lives in their best interests or in the parents' lives.

(10) Neither party shall permanently move outside the National Capital Region without the other's consent or court order and, in any event, either party must give 60 days notice to the other of any intention to move outside of this Region.

(11) Both parents shall be entitled to attend the children's extracurricular activities, including school events, religious events and sporting activities in which either child is participating. The parent entrusted with the care of the children at the time of the event or activity will ensure that the children are brought to the event or activity.

(12) The parties shall notify the other of any travel planned with the children more than 150 kilometres outside the National Capital Region during their respective parenting time, 30 days in advance of the travel. The parent shall provide dates of travel, location, flight details (if applicable), address and phone numbers where the children can be reached.

(13) Both parties shall sign any necessary Consent in order to enable the other to travel outside of Canada with the children.

(14) Unless the parties otherwise agree, both parties shall be entitled to telephone access to the children while in the care of the other parent each Sunday and Wednesday at 7 p.m.

(15) In the event that one party is unable to care for the children during her parenting time (as a result of illness, employment or otherwise) or is required to travel outside of the National Capital Region at a time when the children are to be in school, the other parent shall be entitled to first refusal to care for the children.

(16) If a parent is required to travel outside of the National Capital Region at a time when the children are to be in school, the children shall not be taken out of school in order to travel with that parent without 30 days notice to the other parent and unless they have the written consent of the other parent.

(17) Ms. Trépanier shall have decision-making authority over the health, medical and dental issues and extracurricular activities pertaining to the children.

(18) Ms. Cadieux shall have decision-making authority over all other major areas pertaining to the children, including but not limited to child care, education and religion.

(19) Before making any final decision in their area of decision-making each party shall inform the other of their intended decision. They shall consult with one another in regards to any and all major decisions and shall seek the other's input over the areas in which they have authority. It is only after this consultation process that the party shall be able to make a decision and, upon doing so shall immediately inform the other party of the decision that she has made. Neither party shall be entitled to make a major decision in their area of decision-making power without first giving the other party 30 days prior written notice.

(20) The parties shall sign any necessary Releases to enable both parties to obtain information and documentation directly from any third party professionals, and both parties shall instruct the third party professional to advise both parents of any appointments, issues or documentation involving the children.

(21) In the event of a medical emergency involving either child, the parent who has care of the child shall

immediately inform the other parent of the emergency.

(22) The children's health cards shall travel with the children between households.

108 I agree to remain seized of this matter in the event that problems arise in the operation of this order for joint custody in the form of parallel parenting. While recognizing that cooperation cannot be ordered, I urge the parties to consider seeking the services of an agreed-upon parenting co-coordinator to assist them in being able to make as many decisions jointly as are possible in the best interests of their children.

### **Outstanding Financial Issues**

109 To a large measure the parties have reached a consent on these issues in accordance with the "ARRÉRAGES DE PENSION ALIMENTAIRE" provided by counsel for Ms. Cadieux which reads as follows:

#### **Retroactive table support**

##### ***Facts***

1 — Ms. Trépanier paid \$780 per month throughout the period of September 2005 to September 2006

2 — Beginning on October 2006, she began paying \$869 per month

3 — Beginning in July 2007, she began paying \$899 per month

4 — Ms. Trépanier began contributing to the children's daycare costs in April 2006

5 — The gross daycare costs for the boys are in the amount of \$3,640.00 per annum (\$14 per day for both children for 260 days per annum or \$303.33 per month for both children)

6 — The net daycare costs for the boys are in the amount of \$3,036 per annum (daily tax saving per day per child =  $\$1.16 \times 2$  children = \$2.32. Net daily costs for two children per day is \$11.68 or \$253 per month for both)

(see accountant's letter Recueil de documents de l'intimé, Tab 8)

7 — Ms. Cadieux's income for 2005, 2006 and 2007 varies from \$50,505 (in 2005) to \$51,262 (in 2007). For the purpose of calculating the parties' share of extraordinary expenses, we are using \$51,000 per annum for all years.

#### **Table Amount**

##### ***July and August 2005***

1997 Table amount for two children based on Ms. Trépanier's annual 2004 income of \$56,500 is \$780 per month

$\$780 \times 2 = \$1,560$

Amount owing: \$1,560.00

##### ***January 2006 to April 2006 (new Guidelines coming into force)***

1997 Table amount for two children based on Ms Trépanier's annual 2005 income of \$57,777 is \$795 per month

Ms. Trépanier paid \$780 per month, should have paid \$795

$$\$795 - \$780 = \$15 \times 4 = \$60$$

Amount owing: \$60.00

***May 2006 to September 2006***

2006 Table amount for two children based on Ms. Trépanier's 2005 income of \$57,777 is \$869

paid \$780, should have paid \$869

$$\$869 - \$780 = \$89 \times 5 = \$445$$

Amount owing: \$445.00

***October 2006 to December 2006***

2006 Table amount for two children based on Ms. Trépanier's 2005 income of \$57,777 is \$869

Has paid \$869.

No arrears owing for that period

***January 2007 to June 2007***

2006 Table amount for two children based on Ms. Trépanier's 2006 income of \$59,836 is \$899

Has paid \$869, should have paid \$899

$$\$899 - \$869 = \$30 \times 6 = \$180$$

Amount owing: \$180.00

**Daycare Costs**

Ms. Trépanier's proportionate share is \$131.75 (actually, it is a bit more given that her income has increased a little, however, the difference in the parties' respective proportionate share being minimal, we have kept this figure)

***September 2005 to March 2006***

\$131.75 × 7 months = \$922.25

Amount owing: \$922.25

**TOTAL AMOUNT OF ARREARS OWING: \$3,167.25**

110 Ms. Trépanier agrees to all of the above amounts. Ms. Cadieux agrees that \$500.00 should be deducted from the amount owed to her as her share of the costs required to fix up the house in preparation for its sale which were paid by Ms. Trépanier.

111 With respect to arrears of daycare costs. Ms. Trépanier takes the position that she should pay her share of those costs retroactive to July, 2007 only and not to January, 2007 because of the unjustified delay on the part of Ms. Cadieux to provide, even in the face of a Court order to do so, full disclosure of the children's daycare. This happened only in July, of 2007. I order this payment to be retroactive to January, 2007.

112 The total amount of arrears owed by Ms. Trépanier to Ms. Cadieux is found to be \$3,167.25 less \$500.00 or \$2,667.25 payable forthwith.

113 With respect to ongoing child support, based on the *Child Support Guidelines*, Ms. Trépanier's ongoing child support responsibilities are \$899 per month for two children. This support continues to be payable subject to the parties wishing to raise before me the question of a change to this order in view of my decision concerning the custody of the children.

114 The only ongoing extraordinary expense of the children raised on the evidence was the daycare costs of the children. The parties are to share this expense in proportion to their respective incomes pursuant to section 7 of the *Child Support Guidelines*.

115 Financial disclosure on the part of Ms. Cadieux has been found to be incomplete. In her oral testimony she gave a reason why she did not provide her up to date income tax returns. I did not find her reasons acceptable in view of the time that has passed since the request was made. Ms. Cadieux is to provide her financial disclosure as requested within 30 days of the release of this order. Thereafter, the parties are to exchange their income tax returns and notices of assessment by July 1 of each year (the first being July 2008) in order to calculate and determine the appropriate child support payments and respective contributions towards the children's section 7 expenses. If any party fails to provide such financial disclosure as required by this order then the other party is entitled to withhold payment of their share of the children's extraordinary expenses until such disclosure is completed.

116 Finally, Ms. Trépanier is ordered to make a copy of the birth video. Once she has a copy she is to give Ms. Cadieux the original video upon Ms. Cadieux paying her half of the cost of copying the video. Proof of cost of copying is to be provided to Ms. Cadieux.

117 The last issue is costs. Ms. Trépanier shall have two weeks from the date of the release of this judgment to file and serve her written submissions on costs including any offers to settle that may have been made. Ms. Cadieux shall have one week from that date to file and serve her written submissions on costs including any offers to settle. Ms. Trépanier shall then have one week from that date to file and serve a reply if she so wishes.

*Application granted.*

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