2001 CarswellOnt 1143
Ontario Superior Court of Justice

R. (C.) v. A. (I.)

2001 CarswellOnt 1143, [2001] O.J. No. 1053, 104 A.C.W.S. (3d) 705

C. R., Applicant and I. A., Respondent

Blishen J.

Heard: October 10 - November 3, 2000
Judgment: February 26, 2001
Docket: 97-FL-435A

Proceedings: additional reasons at *R. (C.) v. A. (I.)* (May 8, 2001), 97-FL-435A (Ont. S.C.J.)

Counsel: *Jack Pantalone*, for Applicant
Doug Smith, for Respondent

Subject: Family

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

Family law

IV Support
IV.3 Child support under federal and provincial guidelines
IV.3.c Determination of spouse's annual income
IV.3.c.iii Imputed income
IV.3.c.iii.A Deliberately unemployed or under-employed

Family law

IX Custody and access
IX.2 Factors to be considered in custody award
IX.2.i Miscellaneous

Family law

XX Costs
XX.1 In family law proceedings generally
XX.1.k Offer to settle

Family law

XX Costs
XX.5 Custody and access

Family law

XX Costs

XX.6 Support

Headnote

Family law --- Custody and access — Joint custody — General

Parties met at conference in Russia — Mother was Russian Inuit and father was Manitoba-born Mennonite — Parties never married or lived in common-law relationship but father was very involved in child's life — In year before applications, parties had joint custody, with child spending one week with mother and next week with father — Father had final decision regarding education and mother had final decision regarding medical care — Father paid $199 per month in child support — Friction between parties arose largely from mother's refusal to co-operate or compromise with father and from father's concern that mother was too cavalier about medical needs of child — Father brought application for order for sole custody and for child support and mother brought application for final order maintaining existing arrangement and for child support — Joint custody to continue, with father as decision-maker and father ordered to pay increased child support — Mother unable to communicate, co-operate or compromise in any meaningful way — Mother's behaviour showed that she was not always acting in best interest of child because she put her own needs and interests first — Father's aggressive approach in resolving custody issue likely made mother's behaviour worse — Father to be decision-maker on all issues but mother to be consulted — Since father was to be decision-maker, child would spend slightly more time with him, while maintaining shared physical custody arrangement.

Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual income — Imputed income

Parties met at conference in Russia — Mother was Russian Inuit and father was Manitoba-born Mennonite — Parties never married or lived in common-law relationship but father was very involved in child's life — In year before applications, parties had joint custody, with child spending one week with mother and next week with father — Father had final decision regarding education and mother had final decision regarding medical care — Father paid $199 per month in child support — Father brought application for order for sole custody and for child support and mother brought application for final order maintaining existing arrangement and for child support — Joint custody to continue, with father as decision-maker and father ordered to pay increased child support — Father found to have been intentionally underemployed for four years — Given education, expertise and skills, father should be earning substantially more than his predicted $30,060 — Present income imputed at $40,000 but father should be capable of earning $55,000 or more within three months — Child support of $265 per month ordered, to increase to $450 per month after three months — As mother ordered to pay 20 per cent of child care costs, child support payments reduced by $100 per month.

Table of Authorities

Cases considered by *Madam Justice J.A. Blishen*:

Anson v. Anson (1987), 10 B.C.L.R. (2d) 357, 1987 CarswellBC 9 (B.C. Co. Ct.) — considered

Baker v. Baker (1978), 3 R.F.L. (2d) 193, 1 Fam. L. Rev. 226 (Ont. H.C.) — considered

Hanson v. Hanson, 1999 CarswellBC 2545 (B.C. S.C.) — applied

Herbert-Jardine v. Jardine (1997), 39 R.F.L. (4th) 13 (Ont. Gen. Div.) — referred to

Heyman v. Heyman (1990), 24 R.F.L. (3d) 402, 1990 CarswellBC 437 (B.C. S.C.) — referred to

Kaemmle v. Jewson (1993), 50 R.F.L. (3d) 70 (Ont. Gen. Div.) — considered

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.) — considered

Mudie v. Post (1998), 40 R.F.L. (4th) 151, 72 O.T.C. 29 (Ont. Gen. Div.) — considered

Parsons v. Parsons (1985), 48 R.F.L. (2d) 83, 55 Nfld. & P.E.I.R. 226, 162 A.P.R. 226, 1985 CarswellNfld 33 (Nfld. T.D.) — referred to

Quintal v. Quintal (1997), 1997 CarswellOnt 3213, 38 O.T.C. 68 (Ont. Gen. Div.) — applied

Salvador v. Salvador (August 21, 2000), Doc. F1381/99 (Ont. S.C.J.) — considered

Tacit v. Drost (1998), 1998 CarswellOnt 4873, 43 R.F.L. (4th) 242 (Ont. Gen. Div.) — referred to

Van Gool v. Van Gool (1998), 44 R.F.L. (4th) 314, 64 B.C.L.R. (3d) 94, 113 B.C.A.C. 200, 184 W.A.C. 200, 166 D.L.R. (4th) 528, (sub nom. *V. (J.A.) v. V. (M.C.)*) 59 B.C.L.R. (3d) 395, [1999] 7 W.W.R. 443 (B.C. C.A.) — considered

White v. White, 1988 CarswellOnt 1360 (Ont. Fam. Ct.) — referred to

Statutes considered:

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

s. 24 — considered

s. 24(2) — considered

s. 24(3) — considered

s. 28 — referred to

Regulations considered:

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

Federal Child Support Guidelines, SOR/97-175

Generally

s. 7(1)(a)

s. 7(2)

s. 9

s. 19

s. 19(1)(a)

s. 19(1)(f)

s. 19(1)(g)

s. 19(2)

s. 21(1)(d)

Sched. I, s. 4(a)

APPLICATION by father for order for sole custody and order for child support; APPLICATION by mother for final order maintaining existing joint custody and equal time-sharing arrangement and for child support.

***Madam Justice J.A. Blishen*:**

Introduction

1 I. R. is generally a healthy, happy, inquisitive, developmentally precocious, thoughtful and loving five year old girl. She is fortunate to have two intelligent, talented and loving parents, both of whom have distinct cultural backgrounds which can greatly enrich I.'s life. Unfortunately, the considerable benefits available to I. from her parents have been undermined by their conflict, hostility and battling over custody and access issues since she was 16 months old.

2 I. A. is I.'s mother. She provided the majority of day to day care for I. during her first four years of life.

3 C. R. is I.'s father. He and Ms. A. were never married and never lived in a common law relationship. He has always been an extremely committed parent. When I. was six months old, he moved to Denmark, returning to Canada when she was 16 months old. At that time, he began to play a more significant role in her life, exercising court ordered access two and one half days a week.

4 Since October 1999, Ms. A. and Mr. R. have had joint custody of I. with essentially a week on, week off time-sharing schedule. Final decisions on educational issues are made by Mr. R. and on medical issues are made by Ms. A. This has been the status quo on an interim basis for over a year. Mr. R. pays interim child support of $199 per month based on an estimated income of $22,600.

Issues

5 Mr. R. argues that the current arrangement is not in I.'s best interests. He seeks sole custody with his home as I.'s primary residence and an order that Ms. A. pay child support. Ms. A. requests a final order maintaining the current joint custody and equal time-sharing arrangement. She further requests an order that Mr. R. pay child support based on an imputed income pursuant to s. 19 of the *Child Support Guidelines*.

Background

6 I. A. is a Russian Inuit. She was born in Providenya, Russia and raised in a northern settlement of approximately 350 people. C. R. was born in Manitoba and raised in a Mennonite community of approximately 10,000 people. Ms. A. and Mr. R. first met in Providenya, Russia when both were working for the Inuit Circumpolar Conference (ICC).

7 In November 1994, Ms. A. came to Canada as part of a six month Inuit youth exchange program. Mr. R. met her upon

her arrival in Ottawa and a friendship developed between the couple. Ms. A. spent time at Mr. R.'s home in Lost River, Quebec and they spent most weekends together. After a trip to Manitoba together in March of 1995, they were involved sexually for the first time. Ms. A. was hopeful that there could be a long-term commitment but Mr. R. wanted only to continue his friendship with Ms. A.

8 Upon her return to Russia in April 1995, Ms. A. found out she was pregnant and informed Mr. R. by letter in July 1995. Shortly thereafter, they met at an ICC General Council in Nome, Alaska. Ms. A. indicated that she was having some difficulties with the pregnancy and had been hospitalized in Russia for high blood pressure. Mr. R. was concerned about the welfare of the unborn child and was able to make arrangements for Ms. A. to come to Montreal for a full prenatal examination and ultrasound. The ultrasound showed evidence of a significant difficulty with the upper lobe of the left lung. Concerns were raised about whether the baby would survive and it was suggested that emergency surgery at birth might be required. The Montreal doctors recommended serial ultrasounds until birth. Ms. A. decided to return to Russia and Mr. R. assisted by arranging to have medical reports translated into Russian for her. Upon her return, she was unable to find appropriate specialists in Russia to deal with the difficulties and therefore Mr. R. made arrangements for her to return to Ontario in October 1995 to await the birth of the child.

9 For the remainder of the pregnancy, Mr. R. and Ms. A. resided together at Mr. R.'s sister's home in Ottawa and at Mr. R.'s home in Lost River, Quebec. They did not have an intimate relationship. Mr. R. took a leave from his job in order to assist Ms. A. with settling in and with translation as she spoke little English. He assisted in finding a prenatal consultant and was present at the birth as Ms. A.'s birth coach. In addition, he paid for the birth expenses.

10 I. was born on December 18, 1995 in Ottawa. At birth I.'s lungs appeared to be functioning well and she returned with her parents to Mr. R.'s home in Lost River, Quebec. Approximately three weeks later, when I. was back in the hospital for an examination, it was determined that she would require immediate surgery on her lung. On January 17, 1996, she underwent a lobectomy to remove the upper lobe of her left lung.

11 From January to July of 1996, the couple resided together in apartment in Ottawa. Mr. R. continued to work and Ms. A. remained home with I.

12 In July 1996, Mr. R. moved to Copenhagen, Denmark, having accepted a senior position with an arctic indigenous people's organization. Ms. A. had applied for landed immigrant status. It was Mr. R.'s understanding that Ms. A. would follow him to Copenhagen, but she decided to remain in Canada as she felt that was best for the child and she did not wish to again adapt to a new country. During this time, she was making friends in Ottawa and continued to receive the support of Mr. R.'s sister and niece who both resided in Ottawa. In addition, Mr. R. made it clear that if she moved to Denmark, they would live separately. It continued to be Ms. A.'s hope that now that the baby was born, Mr. R. would make a commitment to a relationship with her. However, this was not his intention.

13 While residing in Copenhagen, Mr. R. was able to return to Ottawa approximately every three weeks, in order to spend time with I. On his trips back to Ottawa, Mr. R. and Ms. A. discussed various options with respect to parenting I. but nothing was resolved. Mr. R. became concerned regarding Ms. A.'s mental health, as she appeared to be somewhat paranoid. She talked about taking I. back to Russia to live with her and began to make it difficult for Mr. R. to see I. on his trips back from Denmark.

14 Mediation with Wilma Stolman of the Family Service Centre was attempted in December 1996 but was not successful in resolving the parenting issues. In January 1997, Mr. R. consulted with a lawyer as he was concerned about his access and about Ms. A.'s stated intention to consider a return to Russia. The letter sent by his lawyer to Ms. A. precipitated an aggressive outburst on her part. During this time period, in January of 1997, it was determined that I. had an allergy to peanuts and almonds. Mr. R. had additional concerns that Ms. A. was not taking this seriously.

15 Upon his return to Denmark in mid January 1997, Mr. R. resigned and returned to Canada in April 1997. His focus was on attempting to reach some form of a shared parenting arrangement with Ms. A., but she was not agreeable. After the attempt at mediation in December 1996, both parties continued to see Ms. Stolman for individual counseling. Ms. Stolman who was qualified as an expert in both mediation and family counseling, testified that Ms. A. was deeply hurt by the fact that Mr. R. was not prepared to make a commitment to a long term relationship with her. This resulted in a great deal of anxiety and insecurity for Ms. A. In addition, Ms. Stolman commented on the significant cultural differences between I.'s parents and how they affected expectations regarding shared parenting. The idea that two separated parents could remain involved with a child was a foreign concept to Ms. A. She made it clear to Ms. Stolman that, in her culture, the mother is in total control of the child and can make decisions without the involvement of the father. It was Ms. Stolman's view that Ms. A. required guidance, education and more familiarity with western childcare practices and expectations. Ms. A.'s cultural background also created somewhat ambivalent feelings towards western medicine and a somewhat casual approach to I.'s health problems

which was concerning to Mr. R. Again, it was Ms. Stolman's impression that Ms. A. could benefit from continued education regarding western practices. She did not see Ms. A. as a neglectful mother.

16 Mr. R. reports further aggressive outbursts towards him by Ms. A. in March and in April 1997.

17 In May 1997, Mr. R. refused to return I. to Ms. A. as he was concerned that she was not giving I. antibiotics prescribed for an ear infection. He agreed to return I. only if Ms. A. would agree to allow him to come over to supervise the dispensing of the medication to I. Ms. A. would not agree and the police were called. At that time, after negotiations with the police, I. was left with her father. Five days later, Ms. A. brought an emergency motion and an order was made for joint custody with I.'s primary residence with her mother. Mr. R. was to have access two and one half days per week. By this point in time, it was clear that the relationship between the parties had completely deteriorated.

18 Since the first interim order in May 1997, there have been numerous court appearances and ten further interim orders dealing with custody, access, child support and spousal support. There have been eight attempts to resolve the outstanding issues by way of mediation, settlement meetings with counsel and the director of Legal Aid and three settlement conferences through the court. In addition, the Office of the Children's Lawyer has been involved. Nevertheless, the parties have been unable to settle the issues of custody, access and child support.

19 During the course of this matter, there have been two full family assessments. The first was completed by Dr. Sharon Harrison, a registered psychologist in May 1998. She recommended that Ms. A. continue as I.'s custodial parent and that Mr. R. have access three days per week. The second assessment was completed by Dr. David McLean, the director of the Ottawa Family Court Clinic, in June 1999. He recommended a shared parenting plan with a home base in Ottawa and I. spending week on, week off access with her mother and father. He further suggested that the non access parent have overnight access for one night during the week. These recommendations were implemented in a temporary court order on October 12, 1999. There has never been a final order made in this case.

20 Mr. R. now lives fulltime in rental accommodation in a pleasant residential neighbourhood of Ottawa, near his sister and niece, both of whom spend time with I. when she is with her father. He sold his farm property in Lost River, Quebec in April 2000.

21 After leaving his employment in Denmark, Mr. R. did some contract work for the Arctic Council Indigenous People's Secretariat and the Inuit Circumpolar Conference. He declared personal bankruptcy in 1998 and now runs his own consulting business on a fulltime basis, generally working on contracts for indigenous people's organizations.

22 Since May 1997, Ms. A. has lived in a two bedroom apartment in the Vanier area of Ottawa. She is now employed by the Inuit Circumpolar Conference in Canada as a Russian project administrator. As with Mr. R., she must travel out of the country from time to time. Make up access for time spent travelling has been a significant issue.

23 I. now attends French immersion senior kindergarten at First Avenue School near her father's home. Although there was no evidence from her teachers, her parents agree she is thriving and doing extremely well in the school environment. She now knows or is learning three languages: English, her mother's native language and French.

24 As previously indicated, I. is an inquisitive, bright, developmentally advanced child. She currently has no significant health problems. Both her parents and alternate caregivers are aware of her nut allergies and have epi-pens in the event of an emergency. Although she is generally a happy child, over the last few months, Mr. R. has noticed she appears more anxious and clingy. He is also concerned that she has been masturbating, at times almost compulsively, since August 2000.

25 Under the current interim order of October 12, 1999, one parent drops I. off at school or daycare on Monday morning and the other parent is then responsible for her until the following Monday morning drop off. The non-access parent also has a mid week overnight visit on Wednesday and can have some lunchtime visits as agreed. Mr. R. makes the final decisions regarding educational issues and Ms. A. regarding medical issues. The parties communicate using a communication book and, more recently, by e-mail.

Custody

Legislation

26 Mr. R. seeks an order pursuant to s. 28 of the *Children's Law Reform Act* for sole custody of I. It is Mr. R.'s position that both legal custody and physical custody be awarded to him as being in I.'s best interests. Ms. A. argues that a joint

custody order with shared decision-making would be in the child's best interests.

27 Section 24 of the *Children's Law Reform Act* makes it clear that the merits of any application for custody or access must be determined on the basis of the best interests of the child. Section 24(2) states:

> 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 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 necessaries 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.

28 It is important to note that the past conduct of a person is not relevant to determining custody or access "unless the conduct is relevant to the ability of the person to act as a parent of a child". (Section 24(3), *Children's Law Reform Act*)

29 Despite the consent shared parenting order made in October 1999, the majority of Mr. R.'s evidence was with respect to Ms. A.'s past conduct, which he argues is relevant to her ability to act as a parent of I.

Past Conduct

Violence

30 Mr. R. described Ms. A. as being violent towards him on a number of occasions when the child was present. He alleged that in January 1997, Ms. A. struck him in the face while he was holding I., who was extremely upset by the altercation. Mr. R. also testified that in March 1997, there were two further incidents when he came to pick up I. and Ms. A. did not want to let the child go and struck him. In April 1997, there was an incident when Mr. R. was driving the car, with I. in the back seat. During a discussion about a possible shared parenting arrangement, Ms. A. became extremely upset, grabbed Mr. R. by the neck and struck him while he was driving the vehicle. The police were called on this occasion and the police report, which was filed as an exhibit, noted a red area on Mr. R.'s neck.

31 Ms. A. denied any violence during her interviews with Dr. McLean and when she testified before the court. There is corroborative evidence from both the police report and Mr. R.'s sister as to some incidents of violence. In addition, it was Dr. McLean's view that Mr. R.'s account of any violence in the relationship was more credible than Ms. A.'s. I agree with Dr. McLean's assessment and found Mr. R. more credible on these issues.

32 It is important to note that these incidents occurred in the few months immediately following Mr. R.'s retaining counsel who wrote to Ms. A. in January 1997. During this time, Mr. R. was continually trying to discuss the possibility of a shared

parenting plan with Ms. A. As previously noted, given Ms. A.'s cultural background, she has a great deal of difficulty understanding the concept of shared parenting. It is in this context that her violent reactions occurred. Nevertheless, she was putting her child's physical and emotional wellbeing at risk by behaving in this manner.

Sexual Abuse

33 In the fall of 1998, Mr. R. became concerned that I. was compulsively masturbating and making comments indicating that her mother may be sexually touching her. He reported these concerns to the Children's Hospital as well as to Dr. McLean. Earlier, Ms. A. had concerns regarding possible sexual abuse and took I. to the Children's Hospital on February 16, 1998. At that time, she expressed concerns that I. would masturbate a great deal after visits with her father. Children's Hospital records indicate that I.'s examination was normal and there was insufficient data to support sexual abuse. Ms. A. indicated to Dr. McLean that she now believes her daughter may simply masturbate more, if she is upset. This behaviour appeared to subside from December 1998 until the summer of 2000 when Mr. R. indicated that he was again seeing more compulsive masturbatory behaviour.

34 Dr. McLean saw I. in interaction with both parents and also twice individually. His overall examination did not provide any data identifying sexual abuse. Based on all the evidence, I do not find, on the balance of probabilities, that I. has been sexually abused by either parent.

Physical Abuse

35 Both in his evidence and at the Family Court Clinic, Mr. R. outlined a number of injuries which concerned him as being possible physical abuse. The most notable were marks noted by Mr. R. on August 13, 1998. He had not seen I. for 10 days, and on that visit noted, what he described as, deep marks or abrasions on her upper thighs, below the panty line. It was his evidence, that I. stated, "Mommy put scissors there.". Mr. R. took I. to CHEO on August 15 to have the marks examined. The emergency physician described the marks as healing lesions but was unable to tell if they were old abrasions or contact dermatitis. Ms. A.'s explanation was that she had put new panties on the child which may have become wet causing an allergic reaction. Mr. R. was not satisfied with this explanation nor with the report from the Children's Hospital and therefore undertook his own investigation. He requested the receipt for the panties, which Ms. A. provided. He attended at Zellers and indicated he was able to track down the salesclerk who, he stated, recalled Ms. A. returning the panties. He reported the matter to the Children's Aid Society who investigated and could not substantiate abuse. Finally, on October 7, 1998, Mr. R. took I. for a dermatological assessment by Dr. Melanie Pratt. He found Dr. Pratt through searches on the Internet for experts in contact dermatology.

36 Dr. Pratt's report dated October 26, 1998 was made an exhibit and she also testified. She is an internationally renowned expert in contact dermatology and one of only two doctors in Canada who focus on this particular sub-specialty. In addition, Dr. Pratt is the past president of the American Contact Dermatology Association. She is eminently qualified to provide evidence in this area.

37 She testified that she observed two, linear, brown, hyper-pigmented, flat lesions on the upper anterior thighs which were symmetrical. It was her opinion, that these lesions were definitely not from contact dermatitis due to an allergic reaction to underwear or underwear that was too tight. Any allergic reaction to underwear would be red, swollen, itchy and spreading and would not produce symmetrical linear lines on the upper thighs. She was adamant there was no possibility that this was an allergic reaction. It was her view that the marks were caused from some form of injury. They were superficial, not deep and there was no scarring. Dr. Pratt testified that there could be a number of different explanations for these injuries. They could be from a sharp-edged instrument; sharp-edged furniture such as a glass coffee table edge; or for example, a sharp-edged ruler. The instrument would have to be long enough to cause the symmetrical marks on both thighs. She ruled out the possibility that these marks could have been caused by scratching after an allergic reaction as she indicated that the scratching would not cause such symmetrical marks.

38 On September 15, 1998, Mr. R. again brought I. to the emergency department of the Children's Hospital, where it was noted that there was a single, small, second-degree burn on I.'s left wrist. On December 5, 1998, I. was again taken to the Children's Hospital emergency, by her father, for a superficial laceration below her belly button extending to the left side of the abdomen. I. was reporting that her mother had caused the mark with a knife.

39 The child protection team at the Children's Hospital discussed this case on September 9 and October 28, 1998. The Children's Aid Society had investigated and was unable to substantiate abuse by either parent.

40 Mr. Ron Ensom, M.S.W., who chairs the Children's Hospital child protection team, was contacted on a number of occasions by Mr. R. beginning in September 1998. Mr. Ensom, as indicated in his letter of December 3, 1998, had concerns regarding the child's health and safety and regarding possible physical abuse. He further outlined his concerns regarding the custody dispute and its possible detrimental effects on I. He recommended a thorough comprehensive assessment be completed by the Family Court Clinic.

41 In his assessment, Dr. McLean did not obtain any further information which would assist in substantiating physical abuse. He was clear that there was still the possibility that abuse might have occurred but felt it was important to add that there was no suggestion of Ingira being fearful of either parent.

42 In the course of the Children's Aid Society's investigation, a case planning and review conference was held on November 12, 1998. The notes from that meeting indicate that abuse could not be substantiated although the explanation given by Ms. A. was not satisfactory. The note as referred to by Dr. McLean, further indicates:

> the father has been displaying a high degree of vigilance regarding potential abuse of his daughter while in mother's care; his vigilance seems to go beyond what would be prudent under the current circumstances and mother has in turn, become over protective in order to avoid any situation which would lead father to making allegations against her.

The Children's Aid Society notes that any escalation of the conflict leading to a traumatic level of emotional harm would require further action on the part of the Society.

43 In conclusion, although the circumstances are suspicious, there is not sufficient evidence for a finding, on a balance of probabilities, that Ms. A. has physically abused her daughter.

Neglect/Inappropriate Medical Care

44 Mr. R. made it clear in his evidence that he believed Ms. A. did not handle I.'s medical care in an appropriate manner. He gave examples of her administering medication to I. which were not appropriate for her age and in particular, outlined his concern that she was not administering antibiotics to I. when she had an ear infection. The incident, which arose in May of 1997, has been earlier referred to. Mr. R. was very concerned about I.'s nut allergy and had concerns that Ms. A. was not taking this seriously. At times, he indicated Ms. A. threatened to give I. nuts when she was angry with him. Dr. McLean was unable to render a strong opinion with respect to any neglect issues, one way or another.

45 In her report of May 29, 1997, Wilma Stolman of the Family Service Centre made it clear that Ms. A. had ambivalent feelings regarding western medicine and therefore, at times, would not follow pediatrician's orders which would be worrisome for Mr. R. Nevertheless, it was Ms. Stolman's view that this was a shortcoming and mistake that young and inexperienced mothers often make. It was her evidence that, at that time, Ms. A. needed guidance and education and to simply become more familiar with western childcare practices and expectations. It was Ms. Stolman's expert opinion that Ms. A.'s hurt and angry feelings towards Mr. R. resulted, at times, in what she termed "outrageous and threatening statements towards him". Nevertheless, it was Ms. Stolman's view that Ms. A. was not a neglectful mother. Based on the evidence before me, I agree.

Parental Alienation

46 Once again, Mr. R. went into a great deal of detail, in his evidence, as to the numerous incidents which he terms alienating. In particular, he focused on the behaviours and statements made by Ms. A. during the exchanges of the child for access. These statements and behaviours are of concern with respect to the emotional wellbeing of the child. Both Mr. R.'s sister, Ms. H., and his niece, Ms. L., observed some of these exchanges and Ms. H., in particular, was very concerned about the impact of Ms. A.'s behaviour on the child. It was Mr. R.'s evidence that Ms. A. would often be late for the visits and would walk extremely slowly towards him, hold on very tightly to I. and make facial expressions which would communicate fear and concern about handing I. over to her father. At times, she would squeeze I. and make statements such as, "Oh, don't go, I'll miss you.". It was Ms. H.'s evidence that I. would be very anxious and wary, looking from one parent to the other. Ms. H. found this horrifying and very difficult to observe in terms of the interests of the child.

47 Ms. A. reported and Mr. R. agreed, that there were occasions when I. would be crying and upset about having to go with her father. Mr. R. focused on Ms. A.'s behaviour; whereas Ms. A. was of the view I. simply did not wish to go.

48 There is sufficient evidence to find that Ms. A. behaved inappropriately on access exchanges and by her behaviours and statements put her child at some risk of emotional harm.

49 Both parties agree that difficulties with exchanges have subsided and have not been a problem for some time.

Conclusion

50 In considering the evidence of Ms. A.'s past conduct, although I do not find physical abuse, sexual abuse or any significant neglect, the evidence is sufficient for a finding that Ms. A., in the past, put her own needs and interests before those of her daughter. Her distrust of Mr. R. and her hurt and angry feelings towards him, at times, precipitated behaviour that was not in the child's best interests. In particular, the behaviour on access exchanges and the incident of violence while Mr. R. was driving, placed the child at risk for emotional and physical harm.

Mr. Reimer's Past Conduct

51 Mr. R. was described by Ms. Stolman as being a gentle and responsible man who is deeply concerned for his child. There is no question that Mr. R. has shown himself to be a committed and responsible parent. In Dr. Harrison's report, dated May 11, 1998, she describes Mr. R. as an intelligent, capable and confident man who usually copes with stress and is able to solve daily problems. She also indicates that he is prone to softness, sensitivity and domestic involvement. The testing conducted by Dr. Harrison suggested that Mr. R. is more likely aware of his virtues than his shortcomings and that this shortage of insight could lead him into difficulties in conflicted situations. He has a tendency to blame and find fault, which can interfere with cooperation and compromise.

52 Dr. McLean indicates that Mr. R.'s aggressive approach in attempting to resolve the custody/access issues may well have worsened the situation through Ms. A. becoming more threatened and thus acting in an impulsive and potentially irrational way. It was Dr. McLean's view that Mr. Reimer has many positives to offer his daughter but that he must be able to put aside past concerns and suspicions and focus on the future.

October 1999 Order

53 All of Mr. R.'s concerns were carefully considered by Dr. McLean in his Family Court Clinic Assessment of June 23, 1999. Despite these concerns, it was Dr. McLean's recommendation that I. would benefit from a shared parenting plan with consideration for sole custody only as a last resort if co-parenting failed. Both parties eventually agreed with Dr. McLean's recommendations which were incorporated into the temporary order for joint custody made in October 1999. In consenting to this order, Mr. R. was, in essence, acknowledging that Ms. A. was an appropriate parent. He was prepared to agree to both shared decision-making and shared physical custody of I. on a temporary basis.

54 Dr. McLean was clear that the biggest obstacle to co-parenting would potentially come from Ms. A.'s lack of support for the plan. He was equally clear that, if she attempted to sabotage the arrangement, then strong consideration should be given to I. having her primary residence with her father or being placed in his sole custody or both. Dr. McLean felt that the most difficult part of a shared parenting arrangement for this couple would be the issue of decision-making. It was his recommendation that mediation be considered in order to deal with disagreements. In the interim, it was ultimately agreed that Mr. R. would make final decisions regarding educational issues and Ms. A. regarding medical issues.

Joint Custody

55 In the early cases of *Baker v. Baker* (1978), 3 R.F.L. (2d) 193 (Ont. H.C.) and *Kruger v. Kruger* (1979), 11 R.F.L. (2d) 52 (Ont. C.A.), the Ontario Court of Appeal concluded that any kind of joint custody is rarely appropriate in cases where the parties are not in agreement and custody is disputed, which is clearly the situation in the case at bar.

56 However, recently a number of cases have re-examined the concept of joint custody, favouring a more flexible approach: *Anson v. Anson*, [1987] B.C.J. No. 127 (B.C. Co. Ct.); *Parsons v. Parsons*, [1985] N.J. No. 101 (Nfld. T.D.); *Heyman v. Heyman*, [1990] B.C.J. No. 484 (B.C. S.C.) ; *White v. White*, [1988] O.J. No. 2376 (Ont. Fam. Ct.) ; *Tacit v. Drost*, [1998] O.J. No. 5256 (Ont. Gen. Div.) ; *Mudie v. Post*, [1998] O.J. No. 3180 (Ont. Gen. Div.) ; and, *Salvador v. Salvador* (August 21, 2000), Doc. F1381/99 (Ont. S.C.J.) .
Justice Campbell in *Salvador , supra*, refers to the *Anson , supra* decision in which Justice Huddart, at p. 6, quotes A.D.

Fineberg's paper "Joint Custody of Infants, Breakthrough or Fad", (1979) 2 Can. J.F.L. 417:

> ...the joint order may assume one of two forms. One kind provides that both parents have custody in the broad sense of the term with only one parent having "care and control". The other has the same element of "legal custody", but the parents alternate periods of "care and control". It should be stressed that the flexibility of the arrangement requires that the ultimate decisions on the practical aspects of joint custody must rest with the individual family.... It is thus probably erroneous to speak of "joint custody" as if it were a single finite disposition; rather it should be viewed as a broad range of post-separation custodial arrangements, the details of which are, of necessity, best worked out by the families involved [if possible].

57 In *Anson , supra* Justice Huddart indicates at p. 7:

> In essence, in a joint custody arrangement, the parents continue to share the same duties, rights responsibilities and input as cohabiting parents, save and except for those responsibilities of everyday parenting that go with physical care and control. Usually, neither custodian is given final decision-making authority. The parties have to consult with each other and decide what is best for the child. If they cannot agree they can seek the help of a professional third party or apply to the Court for direction. Because it involves such an equal sharing the order is rarely made without some indication that the parents can co-operate.

58 This is the traditional concept of joint custody. However, there are, in my view, two possible aspects of what may be considered a joint custody order: decision making and physical custody. It is possible to fashion a custody order which provides for sharing, dividing or splitting each of these two aspects, depending upon the circumstances and what is in the child's best interests.

59 In *Kaemmle v. Jewson* (1993), 50 R.F.L. (3d) 70 (Ont. Gen. Div.) and *Mudie , supra*, Justice Salhany proposes that the concept of joint custody can be a shifting one. In *Kaemmle , supra*, he observes at p. 73:

> When the child is under the care and control of a particular parent pursuant to a joint custody order, why can not that parent have exclusive legal as well as physical custody, care and control of that child for the duration of the period specified in the order?

Thus the idea of divided decision making is proposed. It is my view that joint decision making can only be in the child's best interests in cases where there is at least the ability to communicate effectively and some potential for co-operation and compromise.

60 Mr. R. and Ms. A. have had a shared parenting arrangement over the past year in which they shared physical custody and divided decision making with respect to medical and educational issues. They attempted to make all other significant decisions jointly.

61 Has this arrangement been in I.'s best interests?

Physical Custody

62 In determining what is in I.'s best interests, I must consider all her needs and circumstances with particular attention to the considerations outlined under s. 24(2) of the *Children's Law Reform Act*, as outlined above.

63 The vast majority of Mr. R.'s evidence, at this trial, focused on the past and the conflict between the parties. He offered very little evidence as to what has happened with I. since the October 1999 joint custody order. There was no evidence from I.'s teachers, doctor, daycare provider, Sunday school teacher or any other objective third party. Similarly, Ms. A. offered no such evidence, other than the testimony of C. G., who babysat I. from February 1999 to August 2000. It was her evidence that I. was very close to her mother and was a playful, inquisitive, intelligent child.

64 There is no question that I. is closely attached and bonded to both her parents. This was the evidence of Dr. McLean, who particularly recognized the significant attachment of I. to her mother. Ms. A. provided the majority of care for I. for the first four years of her life.

65 Mr. R. has shown his devotion, love and affection for I. since her birth. His sister, J. H. and his niece, C. L. have also been involved as extended family members in caring for I. from time to time and according to the evidence, she is very fond of both of them. Ms. A. does not have any extended family in Canada, but I. should have the opportunity to meet members of her mother's extended family, if that can be arranged.

66 I. is just five years of age and it is not possible to ascertain her views and preferences. She appeared to be relaxed and at ease with both parents, when observed by Dr. McLean. Until the order of October 12, 1999, I. had lived primarily with her mother. Over the past year, she has had equal time with both parents. As previously stated, she is generally a happy, healthy, inquisitive, developmentally precocious, thoughtful and loving five year old. She has no special needs and appears to be thriving in the school environment. Mr. R. has concerns that she appears more anxious lately and has, once again, started masturbating. It was Dr. McLean's evidence that the child may masturbate more if upset or distressed. It would be inconceivable that the battle and conflict over custody and access between her parents would not have affected a bright, sensitive, young child like I. The reactions of her parents to the stress and strain of this battle can only have a negative impact on I.

67 Both Mr. R. and Ms. A. have considerable resources and talents which can benefit their daughter. It is the battling and conflict which have undermined those benefits. In the past, Ms. A.'s emotional and physical reactions to Mr. R.'s aggressive approach in attempting to resolve custody and access have placed I. at some risk. Over the last year, other than the stresses of the litigation on the parties and the inevitable impact on I., the evidence is that I. has been doing well at home, in the school and in the community under the shared physical custody arrangement. Both parents are able to provide for her physical, mental and emotional needs on a day-to-day basis. It is imperative, however, that the battle over custody and access end immediately.

68 In conclusion, having considered all of the evidence, the criteria listed under s. 24(2) of the *Children's Law Reform Act* and the case law, I see no reason to make significant changes to the existing shared physical custody arrangement. A relatively equal time sharing arrangement is in I.'s best interests.

Decision-making

69 After the recommendations of Dr. McLean in June 1999, Ms. A. continued to have difficulties with a shared parenting regime which included shared decision making. There were difficulties with the summer access schedule and in August 1999, there was a conflict over registering I. for school in the fall. Ms. A. attempted to register I. in a school without Mr. R.'s consent. Mr. R. then tried to obtain Ms. A.'s consent to a school registration but she would not provide it. Finally, Mr. R. brought a motion, returnable September 1, 1999, to permit him to make the decision regarding schooling. At court that morning, Ms. A. consented to Mr. R. making educational decisions.

70 After the order was made on October 12, 1999, Mr. R. testified that Ms. A. remained reluctant to follow the parenting agreement. It was his evidence that there were significant difficulties with communication and cooperation on Ms. A.'s part. The parties agreed to attend open mediation with Dr. McLean. The mediation sessions focused largely on makeup access time, lunch hour visits and Sunday school. The shared residency arrangement was not an issue and was not discussed.

71 Dr. McLean testified there was absolute disagreement on virtually all issues: what school I. should attend, daycare arrangements, Sunday school and in particular, makeup time when Mr. R. was travelling. Dr. McLean indicated that the parties could not even agree on the name of the child. In fact, there was no agreement reached on any issue. Dr. McLean indicated it was like "walking through tar". His frustration arose, in particular, due to the fact that Ms. A. would appear to agree on issues and then later backtrack. Finally, on March 30, 2000 he wrote a letter to Ms. A.'s counsel indicating that he was ending the open mediation. He states,

> I found progress over even minor issues quite slow and am of the opinion that a timely resolution or order is more important than some of the minor disagreements that have not been worked out. While I am sensitive to Ms. A. language difficulties, I nevertheless find that she in particular seems to get caught up over small issues and also tends to reverse her opinion on issues I thought we had already reached agreement on.

72 Dr. McLean stated that, when he terminated the mediation, shared decision-making or co-parenting was not going to work and was not in the child's best interests due to the lack of cooperation and communication.

73 Since the termination of mediation, the parties have implemented some of the recommendations of Dr. McLean in terms of the use of a communication book and e-mail. Ms. A. indicates that this method of communication is working well. Mr. R. is less optimistic as to the use of these techniques.

74 There is no question that there have been significant difficulties with decision-making. As indicated above, Dr. McLean had no success during five mediation sessions in achieving a consensus on any issue. There is evidence that Ms. A. remained unable to communicate, cooperate, or compromise in any meaningful way. These difficulties go beyond merely a different approach to negotiating or language difficulties. Ms. A.'s attitude and inability or unwillingness to compromise on even the most minor issues is significant. On major issues such as health, education and religion, therefore, it is unlikely that Ms. A. would be able to reach a reasonable compromise. This is not to say that she should not be consulted on major decisions affecting I. and that I. will not benefit from her input and suggestions. However, at the end of the day, it is in I.'s best interests that Mr. R. make the decisions.

Order

75 Given that I. is now five years old and the fact that her father will be the decision maker, it is in the child's best interests to make some adjustments to the existing arrangement to allow her slightly more time with her father while preserving a shared, physical custody arrangement. Further, given the inability of the parties to agree on any issues as reflected by the failed attempt at mediation with Dr. McLean, it is necessary for the order to be as detailed and specific as reasonably possible.

Physical Custody

1. The parents, C. R. and I. A., shall share physical custody of their daughter, I. R., born December 18, 1995. In Week 1, Ms. A. shall have I. in her care from Wednesday morning when the child arrives at school/daycare, until the following Monday morning when she leaves the child at school/daycare. In Week 2, Mr. R. shall have I. in his care from Monday morning, until Thursday morning when he leaves the child at school/daycare. Ms. A. shall have I. in her care from Thursday morning, until Friday morning when she leaves the child at school/daycare. Mr. R. shall have I. in his care from Friday morning until the following Wednesday morning when he leaves the child at school/daycare. Week 1 and Week 2 will continue to alternate. This arrangement ensures that five year old I. will never go for more than five days without spending time with each parent.

2. As stated above, the transfer of the child shall take place at the child's school, day care or other neutral location, if the child is not attending school or daycare.

3. During her time with one parent, the other parent may have some lunch time visits with I. as agreed upon between the parties. If there is no agreement, lunchtime visits shall be with the parent who has care of the child at the time.

4. If the first full week of summer holidays is Week 1, then Ms. A. shall have care of the child for the first two weeks of summer holidays followed by Mr. R. having care of I. for the next two weeks. If the first week of summer holidays is Week 2, then Mr. R. shall have care of the child for the first two weeks of the holidays, followed by Ms. A. having care of I. for the next two weeks. The parenting arrangement will then return to the usual Week 1/Week 2 schedule.

5. For the Christmas/New Year's holiday, the child shall spend the first week including Christmas with her father and the second week, which includes the Russian Christmas, with her mother.

6. Mr. R. and Ms. A. shall alternate having the child in his/her care annually during the week long, school spring break commencing with Mr. R. in 2001. If the parent who has care of the child during the spring break is unable to take holiday time, then the week shall be offered to the other parent, if that parent can arrange holiday time.

7. Mother's Day and Father's Day shall be spent with the appropriate parent from 9 a.m. until 7 p.m.

8. The parent who is not caring for I. on her birthday may request to take her out for lunch, which request should be granted unless this interferes with the child's planned birthday party.

9. The home base of the child shall be Ottawa-Carleton. Neither party shall remove the child from Canada without 90 days written notice and the written approval of the other party or a court order.

10. If either parent has to miss regularly scheduled time with Ingira due to job related travel of more than four consecutive days, the other parent shall be given three weeks notice and shall have the right to assume care of I. during the time that the regularly scheduled parent is away. Make-up time shall be scheduled only if it can be agreed upon between the parties.

11. There may be any other access to I. as negotiated between the parties.

Decision Making

1. Mr. R. shall have "legal custody" of I. and shall make all major decisions including but not limited to those affecting I.'s education, physical or mental health, safety, religion, third party childcare and extra-curricular activities.

2. Ms. A. is to be consulted on any major decisions affecting I. and is to have input into those decisions.

3. I. should continue to be exposed to both her mother's and her father's unique cultures. During her time with her mother, Ms. A. may take I. to or register her in cultural activities. I. shall attend any cultural event or activity with her mother during her father's parenting time on at least six occasions per year, except on Sunday mornings, upon Ms. A. providing two weeks notice. I. shall attend Mennonite Sunday School and church on at least six occasions per year during her mother's parenting time, upon Mr. R. providing two weeks notice.

4. Information from any professionals or organizations involved with I. including teachers, school personnel, doctors, dentists, counsellors, and caregivers is to be released directly to Ms. A. Releases of information are to be signed by Mr. R. as required.

5. The parents shall continue to communicate regarding I. by way of a communication book and e-mail.

Child Support

Income

76 Based on the evidence of Ms. A. and her sworn financial statement, dated September 15, 2000, it is undisputed that Ms. A. currently works for the Inuit Circumpolar Conference earning an annual income of $20,500.

Imputing Income

77 It is argued by Ms. A. that the court should impute income to Mr. R. on the grounds outlined in s. 19(1)(a),(f) and (g), of the *Federal Child Support Guidelines* which read as follows:

Imputing income.--The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the underemployment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;...

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;...

Intentional Underemployment

78 It is Mr. R.'s position that, although he may be intentionally underemployed at the present time, this underemployment is necessary in order for him to properly care for I. Mr. R. made it clear that he does not wish to accept employment which would require travel out of the country as he does not feel comfortable leaving I. in the care of her mother during those time periods, particularly without a provision for some makeup time. Therefore, he has refused at least one recent contract involving travel, which, according to his evidence, would have paid him $52,000 to $54,000 per year in Canadian dollars, plus expenses. The custody order outlined above will permit Mr. R. to make any arrangements which he feels are in I.'s best interests while he travels for work related purposes, for any trips of four days or less. The contract, offered to Mr. R. in May 2000, did require travel for four days, four times per year and some longer trips as well. There is no reason, in considering I.'s current needs, for Mr. R. not to accept such a contract.

79 By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C. C.A.)).

80 In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (B.C. S.C.), Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:

> 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (*Van Gool* at para.30.)
>
> 2. When imputing income on the basis on intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
>
> 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

81 Based on Mr. R.'s evidence, I am able to make the following findings of fact relevant to the above principles.

82 Mr. R. is a healthy, well-educated, intelligent and articulate 43 year old man. He has a Bachelor of Engineering as well as a Masters of Environmental Studies. After obtaining his Masters degree, he was employed from January to December 1995 as the research director for the Inuit Circumpolar Conference of Canada. At the end of his employment with them, he was earning approximately $80,000 per year.

83 From January to July 1996, Mr. R. was self-employed doing some lobbying and advocacy for Indigenous People's Organizations. It is to be noted that in February 1996, he was offered a position as the executive director of the Indigenous People's Secretariat in Copenhagen, Denmark. This job commenced July 1996 and he remained in Denmark until April 1997. It was Mr. R.'s estimate that his annual income was between $130,000 and $140,000 Canadian. In addition, there were tax advantages available to him in Denmark. As indicated above, it was in April 1997 that Mr. R. terminated his employment and left Denmark to return to Ottawa given his concerns regarding the care I. was receiving from her mother.

84 From April 1997 until the present time, Mr. R. has been self-employed, operating his own business known as C. R. Consulting. Again, he has been providing policy advice to Indigenous People's Organizations. His 1997 income tax return discloses an income of $31,149, which included $5,000 from an RSP. In June 1998, Mr. R. declared personal bankruptcy. It was his evidence that this was necessary partially due to the numerous debts he had incurred both before and shortly after I.'s birth, particularly for medical expenses. In addition, in October 1997, Mr. R. had surgery and complications resulted in his being unable to travel for a number of months. Therefore, his income was reduced. After his bankruptcy, his 1998 income tax

return reflects an income of $28,866. It is to be noted that despite declaring personal bankruptcy, Mr. R. retained his property in Lost River, Quebec valued at between $125,000 and $150,000. In addition, he still had $55,000 in RSPs which he testified he used to pay his legal bills.

85 In 1999 and 2000, Mr. R. continued his consulting business. His financial statement, dated November 18, 1999, indicated an annual income of $29,340. At that time, he still owned the Lost River farm and property and had approximately $4,000 in savings. Since that time, Mr. R. has sold the Lost River, Quebec property, but still owns 120 acres in Harrington, Quebec valued at $48,000. As of May 2, 2000, Mr. R.'s savings were $43,469 and his debts were reduced to $5,000 for legal fees and disbursements. Mr. R. now estimates an annual income for the year 2000 of $30,060. He still owns the Harrington Lake property and it is to be noted that his savings have increased by approximately $2,000 since his May 2000 financial statement.

86 Mr. R. acknowledged that he has the potential to earn a substantially higher income. He had estimated on his return from Denmark that he would make $60,000 to $70,000 per year and he still hopes to reach that level of income. This is Mr. R.'s own assessment of his capacity. Nevertheless, he indicates that parenting his daughter comes first. There is no question that, given Mr. R.'s education, experience and skills, he is able to obtain contract employment which, at the present time, would provide him with an income of $52,000 to $54,000 as outlined in the May 29, 2000 letter offering him a contract position. I cannot find, at the present time, that I's needs necessitate Mr. R. remaining in Ottawa and foregoing the travel which would be necessary for him to fulfill potential contracts with Indigenous People's Organizations.

87 In comparing Mr. R.'s current income earning situation with what he is capable of earning, I am satisfied that he is capable of earning substantially more than his predicted $30,060 per year. As stated above, if Mr. R. had accepted the contract offered to him in May 2000, he would have earned $52,000 to $54,000.

Failure to Provide Income Information

88 Pursuant to s. 21(1)(d), Mr. R. had an obligation to provide full income disclosure as follows:

> **Obligation of applicant**.--A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:
>
> . . . . .
>
> (d) where the spouse is self-employed, for the three most recent taxation years
>
> (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
>
> (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;...

89 Mr. R. did not provide such disclosure. He provided only a single page financial statement for January to September 2000. This financial statement did not provide any detail as to specific income or expenses.

Unreasonable Deduction of Expenses From Income

90 In his 2000 financial statement, Mr. R. included an expense deduction for rent, heat, phone, etc. in the amount of $4,637.03 for January through mid September 2000 (8 $1/_2$ months). Section 19(2) of the *Child Support Guidelines* indicates that

> the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

91 This deduction, in my view, is not reasonable as Mr. R. would be required to incur those expenses in any event, with or without his business. Therefore, $545.53 per month should be added to his income, an amount of $6,546.36 for the year 2000.

92 Given the lack of detail with respect to travel and accommodation costs, and given Mr. R.'s evidence that he did not wish to travel outside the country, I find the travel and accommodation costs listed as expenses to be excessive.

93 Based on the above, I find that Mr. R.'s actual income for the year 2000, was closer to $40,000 and not the $30,060 which he estimated.

Conclusion

94 Mr. R. has clearly been intentionally underemployed over the last four years. In addition, he failed to provide adequate income information and has unreasonably deducted some expenses from his income outlined on his 2000 business financial statement. At the present time, I impute income to Mr. R. of $40,000 per year.

95 Mr. R. has the potential and expects to earn a higher income. This should not be difficult for Mr. R. in the reasonably foreseeable future now that the custody matter has been resolved and given his skills, experience and apparent good health. I find that he should be capable of earning not less than $55,000 within a further three months. If, in fact, he finds employment which is more remunerative than $55,000 per year, a retroactive adjustment can be made. This is the approach taken by Justice Aston in *Quintal v. Quintal*, [1997] O.J. No. 3444 (Ont. Gen. Div.) . I find such an approach appropriate under the circumstances of this case. Therefore, for the months of November 2000, after the conclusion of the trial, through May 2001, three months from the delivery of this judgment, I impute an annual income to Mr. R. of $40,000. Commencing June 2001, I impute to Mr. R. an annual income of $55,000.

Shared Custody

96 This is a situation of shared physical custody and therefore it is necessary to apply s. 9 of the *Child Support Guidelines* when exercising discretion as to the quantum of child support. Section 9 states as follows:

> **Shared custody**.--where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

97 On the basis of Ms. A.'s $20,500 per year income, the amount payable pursuant to the *Child Support Guidelines* would be $170 per month. I have imputed income of $40,000 to Mr. R. for the months of November 2000 to May 2001. Commencing June 2001, I have imputed a $55,000 annual income. Therefore, Mr. R.'s child support payments pursuant to the *Federal Child Support Guidelines* would be $345 per month until June 1, 2001 at which point they would be $468 per month.

98 In general where a child spends an approximately equal time in two different households, greater costs are involved than if the child had one primary residence. See *Herbert-Jardine v. Jardine* (1997), 39 R.F.L. (4th) 13 (Ont. Gen. Div.). However, there was no evidence provided by either party as to any increased costs.

99 Mr. R. has a comfortable residence in an affluent residential neighbourhood of Ottawa. He has significant savings and owns property in Quebec. As previously indicated, it is anticipated that his income will increase substantially over the next three months and may continue to increase. He also owns a motor vehicle. Ms. A. has a minimal income and lives in a less affluent area of Ottawa some distance from I.'s school. She is required to take public transportation to transport I. to and from school as she does not own a motor vehicle. It is clear that Mr. R. is more affluent and can afford to provide I. with more

extras or luxuries. Given his assets, he has had no difficulty paying $199 per month child support based on an estimated annual income of $22,600, despite the shared parenting arrangement in effect since October 1999. In my view, this is a case where there should be a grossing up of the child support payable by Mr. R. to reflect the relative conditions, means and circumstances of the parties.

100 Taking into consideration the *Federal Child Support Guidelines* table amounts for both parties and doing a set off, Mr. R. should pay $175 from November 2000 to May 2001 and $298 from June 1, 2001 and thereafter. It is my view that these amounts should be grossed up by 50% to reflect the relative condition, means and needs of the parties. Therefore, Mr. R. should pay to Ms. A. child support in the amount of $265 per month retroactive to November 1, 2000 up to and including May 1, 2001. Thereafter, he should pay $450 per month. However, before making a final order for child support, childcare costs must be considered.

Child Care Costs

101 Pursuant to s. 7 of the *Child Support Guidelines*, the court may order payment of special or extraordinary expenses as follows:

> **7**.(1) **Special or extraordinary expenses**.--In a child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;...

102 According to Mr. R.'s Financial Statement dated September 14, 2000, he currently pays $500 per month in childcare costs. He has always paid the childcare costs and continued to pay them plus $199 child support since the October 1999 shared parenting order.

103 Although, s. 7(2) of the *Child Support Guidelines* states the guiding principle is to share the expense in proportion to the spouses' respective incomes, this is not absolute. The court has considerable discretion as to the determination of what payment should be made by the parties towards any extraordinary expenses. The relative means of the parties must be considered. Although this is a necessary and reasonable expense for I. for the next few months, she will be in school full time as of September 2001 and childcare costs should be reduced.

104 Given Ms. A.'s limited means and, as previously stated, Mr. R.'s lifestyle and assets, I will order that she pay 20% of the childcare costs per month, at present an amount of $100, and reduce Mr. R.'s child support accordingly.

Order

105 Mr. R. is ordered to pay to Ms. A. child support for I. R. in the amount of $165 per month retroactive to November 1, 2000 up to and including May 1, 2001, payable on the first of each month, based on an imputed income of $40,000.

106 Commencing June 1, 2001, and on the first of each month thereafter, Mr. R. is to pay to Ms. A. child support in the amount of $350 per month, based on an imputed income of $55,000.

107 If Mr. R., in fact, finds employment which is more remunerative a retroactive adjustment in child support can be made.

108 This order is to be registered with and enforceable by the Family Responsibility Office.

109 Finally, I order that Mr. R. obtain life insurance in the amount of $100,000 with I. R. as the designated, irrevocable beneficiary.

Costs

110 Counsel may forward written submissions to me within 10 days as to costs. These should not exceed two pages in length and should be sufficient so that costs can be fixed, if awarded. Submissions should be exchanged between counsel with right of reply within three further days.

Order accordingly.