

[2] The petitioner is 37 years of age and the respondent is 33. They were married August 26, 1995 and separated in July, 2001. The respondent moved out of the house on Labour Day of that year.

[3] There are two children. Alyssa was born on October 28, 1997 and is currently five years of age. Stephanie was born March 13, 1999 and will turn four later this month.

[4] Both parties are employed on a full time basis. For each of them their employment has been on a long term basis, and both of them continue to work for the same employer, in the same positions, that they have for several years. The employment of each commenced before the marriage.

[5] This year Alyssa is attending senior kindergarten on a half-day basis at a school which is located close to the homes of each parent. The petitioner has remained in the matrimonial home. In July, 2001, the petitioner's mother moved in to the matrimonial home and it is clear from the evidence of both parties that this created tension within the home. The respondent initially moved out to an apartment, and has since moved into his parents' home in which he has a bedroom in the basement, and another upstairs bedroom is used by the two children when they are with their father.

[6] On October 4, 2001 I made an interim order that the parties would have joint custody of the children, with their primary residence to be with the petitioner, and the respondent was to have access in accordance with a highlighted calendar setting forth his work schedule. The respondent was ordered to pay interim child support in accordance with his income and the

guidelines. That order also provided that “during access periods, the respondent shall not, nor permit anyone else, to smoke indoors in the presence of the children”.

[7] The respondent’s work schedule revolves every 28 days. He either works from 7:00 a.m. to 7:00 p.m., or from 7:00 p.m. to 7:00 a.m. On occasions when he finishes work at 7:00 a.m., and is to have an access visit with the children, he picks them up at noon. On occasions when his work is completed at 7:00 p.m. he picks them up at 7:30 p.m. He returns the children to the petitioner’s home at 6:00 p.m. His work schedule is such that he is available to have the children approximately fifty percent of the time, including alternate weekends. His schedule is set ahead of time, for the entire year, and is available late in the preceding year.

[8] The petitioner has worked steady day shifts from 7:00 a.m. to 3:00 p.m. She has sufficient seniority to be entitled to change her shift. Near the commencement of this trial she initially changed her shift to an afternoon shift so that she would have more time during the day with the children, but this led to them being in the care of the petitioner’s mother after the petitioner left for work. During the trial she also arranged another change of shift which allowed her to be in attendance at Alyssa’s school on Fridays.

[9] These parties have found a number of areas in respect of which they fight and disagree. On the other hand, in respect of custody and access, there is actually a reasonable amount of agreement between them. The petitioner’s position is that she wants custody, but is content that the respondent have access whenever he is off work, which amounts to approximately fifty percent of the time. She qualifies this by further requesting that when he has access, during the school week, it should not be on an overnight basis. The respondent’s position is that the current

regime should stay in place, failing which, he feels he should have the primary residence of the children. Although each party finds fault with some aspects of the other's behaviour, neither party alleges the opposite to be an unfit parent.

The Smoking Issue

[10] The plaintiff does not smoke and takes strong exception to anyone who does. As she suspected that the respondent smoked in the presence of the children, it was at her request that the interim order I made prohibited him from smoking indoors with the children or permitting anyone else to do so. The petitioner remained convinced that the respondent was smoking in violation of the order. In early January, 2003, days before the scheduled commencement of the trial, she retained the services of a private investigator to conduct surveillance on the respondent. After many hours of surveillance, using videotape, over a period of five days, the private investigator captured the respondent smoking a cigarette in his pickup truck, with the window partially open, and with the youngest daughter present in the truck. This was only observed to occur on one occasion.

[11] On being confronted with this tape, the respondent admitted that he had smoked on rare occasions in the vehicle with one or both of the children present. He quit smoking for a few months at the end of 2001 and beginning of 2002 but started again, in his view, because of the pressure of the litigation. Although the videotaped evidence only shows him smoking on the one occasion in the presence of the children, it is further useful in that it portrays many instances where the respondent leaves his parents home and goes outside to have a cigarette out of doors, without the children.

[12] The respondent's parents, with whom he lives, both smoke, albeit on a minimal basis in the case of his father. The respondent's new girlfriend also smokes. The sworn evidence of all four persons is that none of the smoke in the presence of the children indoors, at either the home in which the respondent lives or in his girlfriend's home. There is no evidence to contradict the sworn assertions.

[13] There can be no doubt that second hand smoke creates a danger or a potential danger to which no child should be exposed. The respondent accepts this proposition.

[14] The evidence showing the respondent to have smoked in the pickup truck with one child present is the genesis of the contempt motion made returnable at the outset of trial. The petitioner places great reliance on the smoking issue as being relevance to the fitness of the respondent to have custody of the children. Inherent in her position, however, is a recognition that it can be controlled, in that she volunteered in her evidence in-chief, and admitted on cross-examination, that it would be appropriate that the respondent have access to the children whenever he is not at work, which amounts to approximately half the time.

[15] I will deal with the contempt motion at the conclusion of these reasons. At this point I express the view that the respondent's smoking habit, and in particular his having smoked on a few occasions in his vehicle with a child present, does not count in his favour. In my view, however, it should not become a decisive factor in deciding the custody/access issue. It remains as one of many factors to take into account.

The Taping Issue

[16] For the past several months the petitioner has developed a practice of taping telephone conversations with the respondent. She has also taped the occasions when the respondent attends to pick up or to bring back the girls to the petitioner's house, using a hand held digital audio recorder. On one occasion she also has left in the home a voice activated audio recorder which captured the voices of the respondent and members of his family and friends when they attended at the home on Labour Day weekend, 2001, while he moved out certain of the possessions.

[17] The petitioner admits that her use of the audio recorder is known to the children, both because they see her utilizing the tape machine during these pick up and delivery sessions, and because she also admits that the children have heard, on occasion, portions of the audiotapes when the petitioner has chosen to play them.

[18] I am unimpressed with her resort to these taping procedures and the circumstances in which they have occurred. It has to be obvious to the children that these tapes are being made in furtherance of the dispute between their parents. While the petitioner and her mother both went out of their way in their evidence to point out that they do not discuss the marital dispute with the children, or criticize the respondent, the use of these taping procedures in my view are not in the best interest of the children as it is surely obvious to them that the tapes are made because of the dispute between the parents, and to protect or further the petitioner's stance in that litigation.

The Health Issue

[19] The petitioner stresses health problems that Stephanie has experienced, and the response of the petitioner and of the respondent to those issues, in support of her claim for custody. Stephanie was diagnosed as having encopresis, a condition involving inappropriate soiling when

she was four. It involved a rash. The medical evidence before me indicates that the rash was quickly and easily treated, using a cream. The evidence is also that Stephanie did not want to have bowel movements because of the discomfort. It is also clear however from the evidence that she suffered constipation problems when a baby and long before problems within the marriage. While the family doctor saw fit to make a referral to a pediatrician in respect of these problems, it is clear from that doctor's evidence that she wasn't particularly concerned about the rash or the condition as she observe it, but rather made the reference because she was told the parents wanted her to do so. The report of the specialist diagnosis the problem as "toddler withholding" and resulted in a prescription for a laxative product.

[20] The other medical condition about which much was said in the evidence again relates to Stephanie and an allegation of croup. The evidence indicates that she was taken to the hospital on four or five occasions so that she could have access to a breathing mask for a short period of time. The evidence also indicates that she would improve upon being taken outside. There is no medical evidence indicating the extent or seriousness of the problem.

[21] Both parents have been involved in the medical care. More often, the petitioner has been involved, taking Stephanie to a doctor or to the hospital. On occasion the respondent has done so. Sometimes they have gone together. There is no medical evidence before me that either of these conditions is particularly serious, or that it will pose any ongoing problem. The petitioner in particular suggests within her evidence that these problems are often noticed by her after the children have had an access visit with the respondent. There is however no medical evidence before me indicating what would cause a flare up of these conditions, nor any evidence indicating the period of time during which any precipitating conditions would have to persist in

order to bring about a manifestation of the problems. There is no evidence before me on which I can determine that it was the actions of one parent or another that caused the manifestations of these medical problems. There is no evidence before me upon which I could determine that it was the failure of either parent to take certain care measures which caused these conditions to surface.

[22] It is clear from the evidence that the petitioner sees these medical matters as being more serious than does the respondent. With respect, given the evidence I have, including the observations of the respondent's parents, who I think to be credible and caring people, that the petitioner has made much of these problems and perhaps made more of them than ought to have been the case.

[23] While invited to by the petitioner's evidence, I am not prepared to find that the respondent in any way failed to react properly to any medical condition. Part of any problem which existed may well be the result of the fact that the parties did not communicate properly with each other as to the steps each had taken, and hence each was operating somewhat in the dark as to what steps had been taken by the other.

The Present Condition of the Children

[24] There is no evidence before me of any ongoing medical conditions of concern with respect to either child. Indeed, they are reported to me by all witnesses as being happy children.

The Access Visit Transfers

[25] It is clear from the evidence that the most frequent occasions of conflict between the parties occur when the respondent is picking the children up from or returning them to the home.

He does all the transportation. I have also referred to the fact that the petitioner records these transfers. Several of her recorded conversations were played in evidence before the court.

[26] Having listened to these recordings, it is my clear impression that the petitioner was using these occasions to “play to the tape” in an effort to try and create evidence helpful to her at this trial.

[27] There are occasions when the petitioner’s mother interjects into the discussions between the parties, which has no salutary effect. For the most part, the respondent projects a calm and quiet approach.

[28] There is one distressing tape in which the children are crying and obviously upset. The petitioner suggests this is because they do not want to leave her to go with their father. I am not at all satisfied this is the case. I think it likely the children are upset by the obvious discord between their parents, which is all the more heightened by the use of the taping procedure by the petitioner.

[29] It is significant that these problematic episodes during the exchanges increased in frequency and intensity as the trial got closer, or as the parties were scheduled for appearances in court on motions. The respondent has specifically testified that normally the access exchanges create no problems, and that the problems occur when court is imminent. Two neighbours living close to the matrimonial home, Rose Ungar and Karen Dreher, both testified that they frequently observed access changes during the period since separation, and that they have never seen anything occur during the exchanges that caused them any concern. It is the evidence of the respondent, his parents and his girlfriend that of late the exchanges have been problematic in that

the petitioner and occasionally her mother have created a big fuss as the children are about to go to the respondent and demand further kisses and hugs, all of which prolongs the transfer and upsets the children. The petitioner denies that the children have been in any way coached to make these displays of affection prior to being handed over.

[30] In my view it is inappropriate and unfortunate that these developments have occurred. Surely it is in the best interests of the children that the transfer of them be done in the least distressing way.

[31] While the petitioner says she should not be criticized for openly displaying emotion towards her children, surely she can see that it not only operates unfairly towards the respondent, who is picking the children up, but more importantly, it is unfair to the children to create situations which heighten the emotional nature of what is an unhappy event at the best of times.

[32] There are many other topics or sub-issues in respect of which considerable time and evidence was devoted during the course of this seven-day trial. Many of them are, in my view, quite unimportant to the primary issue of what is in the best interests of the children. The spats between the parents over some of these relatively minor matters in my view demonstrates an inadequate level of maturity on the part of both.

[33] The petitioner, in particular, in my view projects as a party who is bent on creating situations which she believes will inure to her benefit in the lawsuit. During her evidence she was argumentative with counsel and prone to adding favourable information to her answers, even when not called for by the question posed. Being satisfied as I am that she loves both children tremendously and believes in the validity of her claim for custody, nevertheless, when it comes

to evaluate her evidence and to resolve conflicts between the parties as to various evidentiary issues, her willingness to exaggerate and to try and colour the facts does not assist her.

[34] By way of example, the petitioner stressed that the respondent had told her to remove money from the children's piggy bank, and that he had never replaced it. It became clear that that money was used to pay for a pizza that all members of the family wanted. During the petitioner's evidence she went through a number of bank statements and purported to separate expenditures that she said the respondent made for his own benefit. By way of example, one was a withdrawal of money by the respondent which was then used to pay for the expenses of all members of the family during a visit to Niagara Falls. The petitioner's insistence that this was money taken by the respondent for his own benefit is simply not borne out. While swearing that her income is \$33,000, she then expressed resentment or indignation when forced to admit that her employer's records showed her income to be \$36,865. She seemed indignant that that material had been placed before the court as she had not authorized the employer to release it, whereas the important point was that the information was obtained by subpoena and showed her evidence to be in error.

[35] By way of illustrating some of the minor matters that occupied this trial, there is disagreement between the parties as to how the children are dressed. When the respondent picks the children up they come only with the clothes that they are wearing, which clothes he feels to be often too small, of poor condition or quality, and inappropriate to weather conditions. He changes the girls when he gets them home. When his access visits, which often run for several days in a row, are over, he will return the children to their mother in the clothes in which the mother sent them. In the interim they have worn clothing that he has provided for them. He

thinks the clothing provided by the mother is inadequate and inappropriate. The petitioner thinks he is being too judgmental and that his actions have an adverse impact on the girls by embarrassing them as to their clothing. It is clear that the girls simply cannot be left in the same clothing they wear when handed by the petitioner over to the respondent, as during the course of his access visit they are going to be doing many different activities which will require different types of clothing. If delivered to him in a party dress, he cannot be faulted in having them change into other clothes to play outside in cool weather. On the other hand, by insisting that the girls change as soon as they get to his house, it would seem that it has also become a point of principle on the part of the respondent, regardless of what they come over in and what the prevailing weather and activity conditions are. I attach particular importance to the evidence of Alyssa's teacher, Linda Drescher, who I thought to be a very fair minded and sensible witness. She testified that Alyssa is always appropriately dressed for school. As Stephanie is brought to school when Alyssa is dropped off or picked up, she frequently sees Stephanie as well. She saw nothing untoward in the way in which the girls were dressed. I think her evidence to be unbiased. It indicates to me that the dress issue is really one of style and one created by the two parties. It is not an issue that is going to turn the tide in this case.

[36] The petitioner makes much of the fact that when the respondent comes to either pick the children up or drop them off, he often has one of his other family members either come with him in his vehicle, or come in a separate vehicle and simply remain in it to observe what is going on. The respondent of course counters that he feels it necessary for him to do so because the petitioner is there with her mother and taping proceedings to boot, all of which he feels is done to further the petitioner's case against him. I take the view that the children are the main concern,

and that that concern trumps the desire of either or both parents to advance their position in the litigation. I do not think it helpful to the girls or appropriate that they see their mother taping these exchanges, or that they see their father coming to get them while accompanied by others in additional vehicles.

[37] As previously indicated, the petitioner changed her work schedule recently so that she is able to be at the school on Fridays. On those Fridays when the respondent has the children, it leads to a situation where he is bringing them to the school to drop Alyssa off, or that he comes to the school with Stephanie to pick Alyssa up, and the petitioner is present. This leads to additional stress on the children. This additional stress was obvious to the teacher, Ms. Drescher, who made a point of phoning both parents to point it out and to suggest that it was inadvisable for the petitioner to be present in the school on days when the respondent would be there with the children. The respondent agreed with the teacher's suggestion. The petitioner did not agree and insisted on being there when she wanted to be, regardless of whether it was the respondent's day to have the children and to be bringing them to her from school, as she felt it was more important that she had this additional quality time with the children. In my view, that stance reflects a willingness on her part to put her litigation prospects and interests above the best interests of the children.

[38] The petitioner's dog also became a minor source of evidentiary conflict during this case. It is apparently a Rottweiler cross. On some of the occasions when the respondent has attended to pick the girls up, the dog has come out of the house and either tries to get into the respondent's truck, follow the respondent's truck when it leaves and drives away, to the dismay of the girls, or the dog has run off in the direction of a nearby school, which is a matter of concern to the

respondent and members of his family. The petitioner's position is that the dog accidentally gets out of the house. The respondent's suspicion is that the dog is deliberately released so as to further disturb the peace during these access transfers. Again, this is a matter that is not going to tilt the balance one way or the other. Suffice it to say that it is an additional source of conflict which ought not to be permitted to persist in what is an already sufficiently tense situation within this family.

Custody and Access Discussion

[39] In making a determination I take into account the "best interests of the child" consideration as enunciated in both s. 16(a) of the *Divorce Act* and as contained in s. 24(1) of the *Children's Law Reform Act*, together with the additional enunciation of relevant factors contained in s. 24(2).

[40] In my opinion both parents love these children dearly. In my opinion the children have substantial and, as far as I see, equal ties to each parent. Each parent has had the children for essentially half the time since the marital breakup. Both of their home environments seem stable and both parents seem genuinely desirous of providing for these children. Neither spouse has any plans to remarry, although both have new romantic involvement with other persons. They do not cohabit. The petitioner's plan is to remain in the matrimonial home as long as possible. The respondent's plan will be that he remains in the home of his parents for the foreseeable future. Neither parent directly alleges the other to be unfit. While the petitioner leads evidence indirectly inviting inferences that the respondent is in some way unfit, I bear in mind the unsolicited admission by the petitioner that she is agreeable to him having access whenever he is not working, which amounts to approximately half the time. I also take into account the

uncontradicted evidence that the children appear happy in the present arrangement. I further take into account the videotaped evidence clearly demonstrating the respondent to have affection for the children and they for him. Without knowing they were being videotaped, the respondent can be seen taking the children with him frequently, tobogganing with them, taking Stephanie with him when he delivers Alyssa to the school or picks her up. The children can be seen displaying affection towards him. I see absolutely no sign of uneasiness on their part when they are with their father and none of them know they are being observed. I was impressed with the evidence of Patricia Stumpf, a neighbour of the respondents, who testifies to seeing the respondent out playing with the children once or twice a week. No one claims that the children are unhappy or that they are not doing well.

[41] The uncontradicted evidence is that the respondent has attended monthly at Alyssa's school, whenever she has a "helper day". I was impressed by the respondent's parents and I am satisfied that they primarily leave the childcare task to the respondent, as he needs no help in that respect. I am further satisfied that they contribute to a positive atmosphere for the children.

[42] While I am usually skeptical about making an order for joint custody in situations where the parties are antagonistic, in this case I accept the evidence of the respondent and think it most likely that most of the antagonism between the parties is a result of the litigation process. Neither claims the other to be unfit.

[43] The current regime seems to be working well for the children. It is of benefit for both of the parties in that they each maximize the time available with the children, and their schedules are such that each party can often be with the children at a time when the other cannot. The

petitioner is able to change her schedule when she wishes, and were it not for this litigation, and I suspect once the litigation is over, will probably change her schedule back to straight days.

[44] In my opinion it is in the best interest of these children that they maximize the contact with each of these loving and capable parents. It is to be hoped that an end to this litigation will also bring with it an end to what, for the most part, has been reasonably petty bickering, resulting, I suspect, largely from the involvement in the litigation process and the desire to “one up” the opposite party.

[45] In so far as the petitioner’s request that the respondent’s access not include overnight access on school days, I see no evidence that the best interests of the children are in any way diminished by allowing him to have them overnight during these periods. I have the evidence as to his involvement in Alyssa’s homework. The evidence I have from the teacher in no way reflects badly on the respondent’s interest and involvement in Alyssa’s schooling. There is no evidence suggesting that his ability to care for these two children is in any way diminished or lessened when they have overnight access with him.

[46] Despite my belief and hope that the antagonism between these two parties will end with the conclusion of the litigation, at least in respect of what is in the best interests of their children, provision has to be made for instances where they may not be able to agree. In my opinion, this is a case where it is appropriate to order that there be joint custody, and that the residence of the children will continue to alternate in accordance with the respondent’s work schedule, as has been the case for the past many months. The parties should be required to discuss with one another issues relating to schooling, medical, dental and related matters pertaining to the well

being of the children. There is no reason why the two parties cannot sensibly discuss these issues. If for any reason it proves unworkable, both have access to computers and in this day and age e-mail exchanges can suffice.

[47] In the event of disagreement after such issues are discussed, someone must be given the final say. In my opinion that should be the respondent. He has shown a much greater willingness to be reasonable and flexible in respect of matters pertaining to the well being of the children. He has, for instance, volunteered to give up some access time at the request of the petitioner so as to accommodate her wishes to be with the children for part of each of the last two Halloweens, for part of Alyssa's birthday, to have the children for a longer period of time on one of the Christmas days, and he has generally shown a willingness to be more prepared to resolve matters of dispute by consultation and negotiation. He made a written proposal at the time of separation dealing with the issues in dispute between the parties which appeared reasonable, both then and now. His offer was never responded to directly by the petitioner. Instead she commenced an Ontario Court proceeding in which she advanced a position on these various issues which was much more unilaterally favourable to her than any of the positions she advances during this trial.

[48] The petitioner, on the other hand, has shown herself to be inflexible and somewhat unreasonable on earlier occasions. At the end of January, 2002 she denied the respondent access to the children for a period of five days because she believed it to be warranted by Stephanie's encopresis. As it turns out, on one of those five days she and her mother had the children out of the house and were so observed. On two of those five days the petitioner was working and accordingly the children were left in the care of the petitioner's mother. On another of those five

days Alyssa was in school. The five-day deprivation was not warranted. In an affidavit sworn in March, 2002 in support of her application to try and terminate the respondent's overnight access, the petitioner swore that the family doctor had recommended a variation in the access when in fact the doctor had made no such recommendation. He also swore that the family doctor had referred Stephanie to a specialist when in fact the family doctor had not seen Stephanie yet in respect of the matter. In May and June, 2002 the petitioner's mother was incapacitated because of surgery. Instead of consulting and working with the respondent, the petitioner hired a babysitter to look after the children while she was at work. She did not even make this known to the respondent until it was necessary to do so, so that the respondent would know to pick the children up at the sitter's, rather than at the matrimonial home.

Property Issues – Respondent's Bankruptcy

[49] While the petitioner claims an equalization of net family property, as evidenced by Exhibit 16, the respondent made an assignment in bankruptcy in July, 2001. He has been required to pay \$274 per month on that bankruptcy, and by notice recently received and marked as Exhibit 44, is now required to pay \$400 per month.

[50] Pursuant to s. 71(2) of the *Bankruptcy and Insolvency Act*, the respondent's property interests passed to and vested in his trustee. While certain comments made by the petitioner during her evidence demonstrate that she doubts that the respondent was required to enter into bankruptcy, no steps have been taken to annul the bankruptcy pursuant to s. 181 of the *Bankruptcy and Insolvency Act*. No application for an order to continue has been made pursuant to Rule 11.01 of the *Rules of Civil Procedure*. No steps have been taken to add the trustee in bankruptcy as a party to these proceedings. Under those circumstances I am of the view that I

have no authority to deal with the property interests of the respondent. In my opinion the appropriate course of action is to say the proceedings in respect of the net family property.

[51] While my ability to deal with the respondent's property interests is hampered by the bankruptcy, there remains the issue of exclusive possession of the matrimonial home as claimed in the petition. Section 24(1) of the *Family Law Act* requires that amongst other considerations a court must consider the best interests of the children as well as the financial position of the parties and the availability of other accommodation. Taking these matters into account, I order that the petitioner shall have exclusive possession of the matrimonial home until further order of the court, or until some other agreement is reached between the petitioner and the trustee.

Child Support

[52] Under the joint custody and residency regime referred to above, each party will have the two girls approximately fifty percent of the time. I find the annual income of the petitioner to be \$36,865, as indicated in the records obtained by the respondent from the petitioner's employer, rather than the \$33,000 sworn to in her December 31, 2002 financial statement.

[53] I find the respondent's annual income to be \$53,308, as reflected in the pay information marked as Exhibit 43.

[54] Given that each has the children approximately fifty percent of the time, I accept the submission of counsel for the respondent that an appropriate case in this case is to order the respondent to pay monthly child support in the amount of \$244, representing the difference in the Child Support Guideline Amount for two children as applied to the petitioner's income and to the respondent's.

[55] Special expenses reasonably incurred for the benefit of the children, pursuant to s. 7 should be shared by the parties in accordance with the ratio of their incomes. The only such expense incurred to date relates to one session of dance lessons in which the petitioner enrolled the children. The respondent is ordered to pay to the petitioner his proportional share of that expense, determined in accordance with their incomes.

Claim For Spousal Support

[56] Each of the spouses continue to work in the same job that they held prior to the marriage. Within the petitioner's evidence there are admissions that the respondent contributed to the care of the children and the upkeep of the house during the marriage. I have no evidence to indicate that the petitioner has been economically disadvantaged by the marriage or by the requirement of caring for the children, in the sense of any evidence that she would have done any other type of work or progressed to any higher level of employment had the marriage and child care not been a factor.

[57] The petitioner's counsel submits that I ought to make an award of spousal support to offset the financial burdens which have devolved on the petitioner, given the respondent's bankruptcy. The largest of these are those relating to paying off the line of credit and the petitioner's car loan. The petitioner's car loan will be paid off in May of this year. The line of credit was in good standing when the respondent left the matrimonial home. The evidence indicates that the petitioner is not making payments on that line of credit, and that she has been sued to enforce payment and is defending that claim.

[58] The issue is whether the assignment in bankruptcy by the respondent can be short circuited by in effect requiring him to keep honouring those financial obligations via an order for spousal support to offset the fact that the petitioner has been left with the responsibility, it appears, for those debts.

[59] I accept the line of authority that indicates it to be inappropriate for a trial judge to circumvent the bankruptcy legislation by requiring a bankrupt to make support payments as a means of requiring him to pay debts which he is not otherwise obligated to pay because of the bankruptcy: *Lywood v. Lywood* (1994) Carswell Ont. 1186; *Taite v. Taite* (1986) Carswell Ont. 192; *Mancini v. Mancini* (1982) Carswell Ont. 353. I do not think the reasoning contained in *Gough v. Gough* [1996] O.J. No. 2988 to be applicable to the facts in this case.

Life Insurance and Health Benefits

[60] Both parties agree, and I order, that each party shall maintain health coverage for the children as is available through their employment. Also, each party is ordered to maintain any existing life insurance policies with the children named as beneficiaries.

Divorce

[61] As it is clear that these parties have been living separate and apart for more than a year, and that the other conditions for a divorce have been satisfied, a divorce judgment shall issue.

Result

[62] For these reasons, a judgment shall issue providing as follows:

- (a) that the parties be divorced;

- (b) that the parties have joint custody of the children Alyssa and Stephanie;
- (c) that the residence of the children shall continue to alternate between the parties in accordance with the work schedule of the respondent in the same manner that has been followed for the past several months, based on the respondent's 2003 work schedule and his work schedules for following years;
- (d) the respondent shall neither smoke in the presence of the children, nor permit anyone else to do so, in any building or vehicle or other enclosed space;
- (e) the exchange of the children shall take place at the home of whichever parent is picking the children up. Such exchanges shall not be taped. The parent with whom the children have been shall say their farewells inside the home, and there shall be no emotional farewells in the presence of the other parent;
- (f) the parties shall discuss between themselves issues relating to schooling, medical, dental and related issues important to the well-being of the children and shall genuinely attempt to agree on what is in the children's best interests. In the event of disagreement, the respondent shall make the decision subject to intervention by the court on proper application.
- (g) each party shall have the children for one-half of the Christmas school vacation period. Unless the parties otherwise agree, for 2003 the petitioner shall have the children from 7:00 p.m. on Christmas Eve until 2:00 p.m. on Christmas day as part of her Christmas access, and the respondent shall have that period as part of his Christmas access in even numbered years;
- (h) each party shall have the children for two weeks of summer access. The respondent will notify the petitioner in writing by January 1, 2003 of his choice of weeks. For the year 2003, in the event that there is an overlap or conflict as between presently set vacations for the parties, each party will have the children for one-half of such period of overlap unless they otherwise agree;
- (i) regardless of the normal access schedule, the petitioner shall have access to the children for at least five hours on Mother's Day, and the respondent shall have access to the children for at least five hours on father's day, unless they otherwise agree ;
- (j) the respondent shall pay child support to the petitioner in the amount of \$244 per month commencing April 1, 2003. Each party shall contribute to any s. 7 expenses in proportion to their incomes, in respect of such expenses agreed to by the parties or determined by the respondent to be appropriate;

- (k) each party shall maintain health coverage for the children as is available through their employment, and each party is ordered to maintain any existing life insurance policies with the children named as beneficiaries;
- (l) the petitioner shall continue to have exclusive possession of the matrimonial home until further agreement with the trustee in bankruptcy or further order of the court.

Contempt Motion

[63] As previously indicated, the petitioner brought motion on the eve of trial, returnable at trial, to have the respondent held in contempt of court for alleged violation of the non-smoking clause in the existing interim order. Rather than dealing with that motion at the outset of trial, as witnesses were present, I adjourned it to be dealt with at the conclusion of the trial. When the evidence concluded I heard submissions from the petitioner. I offered the respondent the opportunity to have the contempt motion further adjourned to permit the respondent to call any additional evidence on that issue. I also offered the respondent the opportunity to have the contempt motion heard solely on the basis of evidence called in respect of that discrete issue if he so wished. The respondent chose to have the contempt motion decided on the basis of the evidence heard at the trial.

[64] It must be remembered that contempt proceedings are criminal or quasi-criminal in nature and the alleged misconduct must be proven beyond a reasonable doubt.

[65] While I would have thought it clear that the import of the earlier order was to prohibit smoking in the presence of the children inside a vehicle, as well as inside a building, the wording is not as clear as it could have been. I am not satisfied that the respondent's conduct of smoking on the occasion in the truck with a child present and a window opened constitutes a violation of the prohibition against smoking "indoors in the presence of the children". The contempt motion

is dismissed without costs. I trust the respondent will understand that the wider wording of the prohibition found earlier in these reasons is intended to cover such situation.

Costs

[66] The parties did not make submissions on the issue of costs at the conclusion of the trial, and I am unaware of any offers of settlement which may impact on that issue. The parties may make brief written submissions on costs, in writing, within three weeks of the release of these reasons.

Released: March 10, 2003

C. S. GLITHERO J.