

ONTARIO  
SUPERIOR COURT OF JUSTICE  
FAMILY COURT

**B E T W E E N:** )  
)  
SUZETTE NATALIE KHAN AND ) Sunny Chhabra for the Applicant  
RICHARD KHAN )  
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Applicant )  
- and - ))  
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)  
TONY (CHEE MUN) KONG ) Judith Holzman for the Respondent  
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Respondent )  
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**HEARD:** April 13, 16, 17, 18, 19,  
23, 24, May 9, 10, 11, 2007  
Written submissions concluded on  
June 8, 2007

**Justice C. Nelson**

**J U D G M E N T**

**Opening**

[1] Rayanne is a ten-year old girl who is loved by many people in her life. Notwithstanding all this love, Rayanne is anxious and, at times, very quiet and sad. She suffers from bedwetting (enuresis). Those who love her want the best for her. They are being prevented from realizing this goal because they are in considerable conflict.

## Issues

[2] This is an application to change a custody order. The issues to be decided are Rayanne's custody and living arrangements. The original order awarded joint custody and shared parenting to Richard and Suzette Khan and to Tony Kong. It was made on consent.

## Background

[3] As both the applicants and the respondent have last names that sound similar, counsel throughout, have referred to them by their first names. I shall continue to do so where appropriate.

[4] Suzette was married to Tony in 1993 and separated from him in 1999. Rayanne was born in 1997. Suzette and Tony were divorced in 2000. Tony met Alice after his separation from Suzette and married her in 2002.

[5] Suzette, who is 42 years old, works as an office administrator. She is Chinese, born in Jamaica. Richard will be 66 this month. He has his own business, providing toners and other materials for printers and photocopies. Tony, who is 45 years old, works as a bank manager. Alice, who is 40 years old, is employed by the City of Mississauga.

[6] Suzette had a number of complaints about Tony during their marriage. She confided in Richard whom she had met through her work. Richard and Suzette began an affair. Rayanne is the biological child of Richard and Suzette. After a period of cohabitation Richard and Suzette married in 2003.

[7] Tony was unaware of the affair. When Rayanne was born, he assumed that she was his biological child. Suzanne became pregnant with a second child. When this child, Phillip, was born on March 21, 1999, Suzette confessed to Tony that neither child was his and that Richard Khan was the biological father. Suzette and Tony separated at that time. DNA testing has confirmed that Richard is the biological father of Rayanne.

[8] Tony and Alice have a child named Ryan who was born in 2006.

[9] Richard and Suzette now want sole custody of Rayanne with access to Tony on alternating Saturdays and Sundays, but no overnight visits.

[10] Tony's position with respect to both custody and access has changed during this litigation. Initially, Tony proposed joint custody in accordance with the regime that has been followed since Spiegel J.'s order dated August 10, 2000. However, after receiving the assessment report of Dr. Fidler and Ms. Schloss, Tony now proposes that he be granted sole custody. His position on access is vague but he would like to see some restrictions placed on Richard's access to Rayanne.

### Litigation history

[11] Shortly after Tony and Suzette separated in 1999, litigation over Rayanne's custody was initiated by Tony by way of counter petition in a divorce. Richard was, initially, not a party to this litigation but was joined as a party later.

[12] At Richard and Suzette's counsel's suggestion, the issues in the litigation were referred to an assessor, namely, Dr. Michael Benjamin. Dr. Benjamin provided the parties with a recommendation which followed a detailed assessment report dated July 20, 2000.

[13] Rayanne was three years old at the time of the Benjamin report. Dr. Benjamin recommended joint custody with a four-day, three-day alternating schedule until Rayanne turned four. At that time, Rayanne's custody was to be shared on a week-by-week schedule, with the exchange taking place each Wednesday. Joint custody was to continue. These recommendations, with minor variations, were incorporated in a divorce order granted by Speigel, J. on August 10, 2000.

[14] That is the schedule and legal regime that has remained in force until this day. To say that it has not proven to be successful would be an understatement

[15] Notwithstanding this, and quite remarkably, the schedule has been adhered to most of the time. However, it has also been marred from time to time due to the conflict that continues to rage between the parties. Most decisions regarding Rayanne's education, religious upbringing and medical treatment (the cornerstones of joint custody) have simply happened without any discussions, as these issues did not and do not give rise to the conflict. There is almost no communication between the parties.

[16] The central conflict is that Richard and Suzette feel very strongly that Tony, as the non-biological parent of Rayanne, should play a limited and peripheral role in the child's life. They feel that he should be involved in a minor role, not as a parent, but as an uncle or friend. They do not understand why Tony seeks a custodial role in Rayanne's life. They think that he does so only as a reaction to the separation or, perhaps, because he wants to save face. Richard, especially, is very angry with Tony about the position Tony has taken. Suzette supports Richard and is depressed about the situation.

[17] While conflicts have developed over various incidents in Rayanne's life, the central issue that has given rise to this application by Richard and Suzette is that of parentage. All other problems are really secondary to this overarching issue. The catalyst for this application to change custody occurred over conflict about a passport for the child for a trip.

### Dr. Benjamin's report and Richard's response

[18] To understand how deeply rooted the conflict is in this case one need only look to Dr. Benjamin's report and Richard's detailed response to it. It is somewhat mystifying as to why the matter settled along the lines of the Benjamin report given Richard's

response. I can only infer that there were many reasons, legal, tactical, emotional, and financial that led to what was, in effect, a consent order before Spiegel J.

[19] Dr. Benjamin's assessment, which details the history and background of the parties, is appended as schedule "A" to this judgment. The recommendations flowing from Dr. Benjamin's report formed the basis of Spiegel J's order. It is important, in my view, to start from that base in order to determine whether there has been a material change in circumstances that would justify changing the order of Spiegel J.

[20] I am mindful of the fact that, as the case was settled, there was no cross-examination on the assessment report. Nonetheless, because the case settled based upon the recommendations of Dr. Benjamin, the facts, as set out by Dr. Benjamin, form an important window into the dynamics of the situation.

[21] At trial, there was little disagreement with the facts as set out by Dr. Benjamin. Rather, Richard and Suzette disagreed with his conclusion. As Dr. Benjamin had passed away by the time this matter came to trial, there was, of course, no opportunity to hear from him.

#### Dr. Benjamin's summary and conclusion

It is important to highlight Dr. Benjamin's conclusion:

*Richard's suggestion that there is something wrong, bad improper or abnormal about a child with two fathers, while well intended, is simply inconsistent with family life in 21st century Canada . . . to take Tony away from Rayanne would be to deliberately inflict terrible harm on her and for no better reason than Richard's sense of Christian propriety. This is not to suggest his motives are foolish or irresponsible; he wishes to pass on to her his values and beliefs, as is true of all parents. Rather his arguments are simply inadequate in terms of the best interests of Rayanne Kong. Support for this perspective is only too apparent in listing what Rayanne would lose were Tony's involvement with her to end.*

[22] Dr. Benjamin found that losing Tony's would have a profoundly negative effect on Rayanne including loss of friends, connection to the Chinese Community and Chinese language. As a result, Dr. Benjamin set out a parenting plan consisting of seven recommendations, the most important being shared custody and an equal division of time.

#### Richard's response

[23] Shortly after the release of the Benjamin report, by way of an undated letter, six single-spaced pages in length, Richard Khan responded. At this trial Richard indicated that, although the letter was sent on behalf of both Suzette and him, he was the author of the letter. Richard indicated to Dr. Benjamin that he was unable to accept his report for some of the following reasons:

*Firstly, the matter of selecting an assessor was left to the experience of our lawyers and their recommendation. As Christians we should have opted for someone who believed in God and whose source of reference for right or wrong or moral standards was the Bible. As an atheist you have no given standard or higher source of reference for the judgments you make other than men as yourself, who accordingly can change the rules of conduct when the presenters do not suit their purpose . . .*

*You have made reference to “my old fashion [sic] vision of a proper family” which is inconsistent with family life in the 21<sup>st</sup> century” but our God is the same yesterday, today and tomorrow and His laws do not change, so my values will stay the same. As an atheist you are unable to understand this philosophy for to you God is a fictional character, hence your “21<sup>st</sup> CENTURY” condone rules of conduct and moral standards where a child can have two fathers or multiples thereof: or parents (mother and father) of the same sex. I shudder at the thought that there might come a time in your 21<sup>st</sup> century where the rules of conduct and moral values will permit incest and bestiality.*

[24] Richard then goes on to disagree with certain facts in the Benjamin report relating mainly to the issue of whether Tony helped Suzette with child rearing. Richard’s position was that Tony did not particularly care for, or help Suzette, and, that Dr. Benjamin should have placed more emphasis on this. Richard placed great stock in the fact that Tony was not a good husband and that it was the influence of others, such as Suzette’s parents, who kept her in the marriage.

[25] Richard also complained about Tony’s family relationships and felt that Dr. Benjamin was overly critical of Suzette. In fact, Richard indicated that Dr. Benjamin was “demonizing” Suzette. Richard also criticized Dr. Benjamin for discrediting his father. Richard commented, as well, that Dr. Benjamin made incorrect references about that fact that Rayanne never speaks of Tony in Richard’s presence and that he (Richard) would get upset if Tony was ever mentioned. Richard continues,

*Writing about Rayanne, you are at great pains to align her with Tony and his friends indicating that Rayanne’s intelligence is and [sic] extension of Cantonese. I cannot help but feel that all Tony and his friends have to say to you is “**jump**” for you to respond “**how high**”. You totally ignore the fact that Rayanne’s intelligence comes from her parentage and her parents are from the Caribbean. **Suzette is Jamaican Chinese and I am of Guyanese and of Portuguese and East Indian parents. None of Tony’s genes are in her. Again you are twisting facts to create effects for Tony’s benefit and I am beginning to feel disgusted at having been in your presence [emphasis in original].***

[26] Richard goes on to mention other points and concludes by stating that Dr. Benjamin's report is flawed and biased. He states that the recommendations punish his family.

Richard concludes:

*As for myself, [emphasis in original] I make no excuses. Being the wiser of the two I should not have gotten involved but as St.Paul put it (Romans 7:18,19) "For I know that in me (that is, my flesh) dwelleth no good thing: for to will is present with me: but how to perform that which is good I find not. For the good that I would do not: but the evil which I would not, that I do." So being human, I fell. Besides it was difficult to turn away from Suzette knowing I was the only source of her comfort. Rayanne is my daughter and Suzette and I both love her and are capable of providing for her. She does not need another "father" in her life to confuse her. If Tony truly loves Rayanne he would "let go" as I was prepared to do so that she would know one set of loving parents; one loving family.*

#### The divorce judgment

[27] As stated above, notwithstanding this response, the parties on August 10, 2000 entered into a consent judgment that implemented the recommendations of Dr. Benjamin.

[28] Spiegel J.'s judgment granted a divorce and then went on to specifically state that Dr. Benjamin's report, dated July 20, 2000, was to be implemented with a list of amendments touching on such issues as relocation, daycare, babysitting, pick-up and drop-off, school enrolment, Christmas and Chinese New Year, two weeks of time with each party, health and insurance plans. All the amendments were on consent.

#### The current application

[29] This litigation to change the judgment of Spiegel J. was commenced by Richard and Suzette by way of application on August 3, 2005. Very little turns on why the process did not start by way of motion to change. This was not explained by counsel. It is, however, obvious that, had the matter been before the court as a motion to change, a trial of the issue would likely have been ordered as the matter could not have been appropriately decided based on affidavits alone. I intend to treat the legal framework as though the matter was started as a motion to change that then had to be decided by a trial.

#### Change in circumstances

[30] In order to change the terms of Spiegel J.'s order, the court must first determine whether there exists a material change in circumstances.

[31] I find that there has been the required material change in circumstances based mainly on the fact that the co-operation envisaged by Dr. Benjamin, co-operation that should have allowed Rayanne to live with some peace and harmony in her life, never materialized. Instead of being nurtured in a calm and understanding environment, Rayanne has become sad, depressed and, according to the expert testimony of Dr. Fidler, Ms. Schloss and Dr. Berman, is now a child at risk. In addition, all parties at the trial agree that there should be changes made to Speigel J.'s order. The child, herself, wants the access arrangements changed as she is troubled by them. I am satisfied, that if the present arrangement of week on/week off with each side continues, this will be detrimental to Rayanne and not in her best interests.

[32] The second issue to be resolved at trial is what should occur as a result of the material change in circumstances.

#### The Applicants' position

[33] In his closing submissions, counsel for the applicant, in seeking an order giving custody to Richard and Suzette and limiting access to Tony and Alice to alternating Saturdays and Sundays (no overnights) raises the following points:

- 1) Even though this application is brought under the *Divorce Act*, the approach to determining what is in the child's best interests should permit the court to consider relevant criteria under the *Children's Law Reform Act*.
- 2) The fact that Richard and Suzette's relationship began while Suzette was still married to Tony should be irrelevant to their ability to parent.
- 3) The threshold test for variation of the Divorce judgment has been met because,
  - a) Rayanne is suffering as a result of the current alternating residential arrangement;
  - b) Tony has been uncooperative with Richard and Suzette since the divorce judgment;
  - c) Tony has been manipulative, deceitful and selfish in his behaviour;
  - d) Tony has attempted to alienate Rayanne from Richard and Suzette; and,
  - e) Tony has misled third parties with a view to benefiting himself while prejudicing Richard and Suzette.

[34] The applicants have raised the above points not only to demonstrate the fact that there has been a material change in circumstances justifying a change to the divorce judgment but also to demonstrate that they should have sole custody of Rayanne.

[35] As I have already determined that there has been a material change justifying variation, I shall, in reviewing the evidence, deal with the points raised by the respondent.

### The Respondent's position

[36] The respondent's position is far simpler than that of the applicants'. Tony says that the applicants perceive him as immoral and unfit and want him essentially removed from Rayanne's life. He agrees with Richard and Suzette about the fact that Rayanne is suffering but disagrees with the reasons. As far as Tony is concerned, it is Richard and Suzette's rigid, unyielding and inflexible attitude towards him, coupled with anger, that is causing Rayanne so much difficulty.

### The Evidence

#### Expert evidence

[37] During this trial I have had the benefit of reading three expert's reports and also hearing the testimony of Dr. Fidler, Ms. Schloss and Dr. Berman.

#### Dr. Fidler and Ms. Schloss

[38] The parties were referred to Dr. Fidler and Ms. Schloss for a Section 30 (*Children's Law Reform Act*) assessment on January 27, 2006. The assessment was consented to by both parties. The assessment was conducted and prepared by both Dr. Fidler and Ms. Schloss. Their methodology is set out in their report dated October 30, 2006. They spent upwards of 50 hours conducting interviews with the parties, Rayanne and others. They spoke to collaterals. Dr. Fidler conducted psychological testing. They reviewed the previous report of Dr. Benjamin and many of the court-related documents. The assessment they conducted was thorough.

[39] During the assessment they learned that Rayanne, when she was 3 or 4 years old, made an allegation of inappropriate sexual behaviour by Richard Khan's son. As required by law, they (Ms. Schloss) reported the allegation to the Durham Children's Aid Society. I shall have more to say about this later.

[40] As often happens towards the conclusion of the process, the assessors met with the parties and presented them with their recommendations. It is the hope of most, if not all, assessors that in so proceeding, an agreement can be reached resolving issues and obviating the necessity of preparing a report. Obviously, this did not occur.

[41] The parties were presented with the assessor's recommendations in a 17-page document dated June 29, 2006. Many recommendations were made on the issues of parenting guidelines and principles, parental communication, scheduling, Rayanne's clothing and belongings, decision-making, telephone and e-mail communication, residential and jurisdictional moves, and dispute resolution.

[42] For trial purposes, the pivotal recommendations were as follows:

- 1) Rayanne's family is comprised of her biological parents, her psychological parent and her stepparent;
- 2) It is in Rayanne's best interest to maintain meaningful relationships with all four parents;
- 3) To assist the parties in conflict management, a parenting coordinator should be retained;
- 4) Severing Rayanne's ties with Tony is likely to pose significant emotional risks for Rayanne;
- 5) It is in Rayanne's best interests on an interim basis to reside equally with her parents on a week on, week off basis with transitions occurring on Fridays at the end of school;
- 6) The interim arrangement is valid only if the following substantive changes are implemented in the Khan home:
  - (i) Participation of Richard, Suzette, Tony, Rayanne and Phillip in family intervention therapy. This therapy is for Rayanne's sake, and is to begin right away;
  - (ii) An updated assessment is to commence within four months of the intervention and this updated assessment would then determine whether or not the interim arrangement should be changed;
  - (iii) Richard Khan is to complete an anger-management program.

The recommendation document then goes on to say,

*. . . . in the event the recommended family intervention is not accepted and implemented in a manner consistent with achieving the desired objectives (i.e. if Richard and Suzette Khan are unwilling to participate in the intervention, continue a campaign to instill and support the need for one family, and they clearly remain unable to accept and honour the child's reality and her truth, including her attachments with and need for both her biological parents (Richard and Suzette Khan) on the one hand and her psychological parent (Tony Kong) on the other hand and the assessment does not occur, the least detrimental option for 9-year old Rayanne would be for her to reside primarily with Tony Kong and for him to have sole legal custody.*

[43] As well, the assessors recommended that Rayanne attend individual counselling and that Richard, Suzette and Tony enroll in, and participate in, a seminar/workshop on the effects of high conflict divorce on children and a general parent education course.

[44] The recommendations were accepted by Tony Kong but not by Richard and Suzette Khan. The evidence indicates that Richard and Suzette would not even stay in the room with the assessors when they learned that Tony was to continue to play a role in

Rayanne's life. They left the disclosure meeting and had to be coaxed by their lawyer into returning to it (which they did).

[45] As a result of Richard and Suzette's refusal to accept the recommendations, a complete and detailed report was prepared. It is dated October 30, 2006.  
Assessment report of Dr. Fidler and Ms. Schloss dated October 20, 2006

[46] The report of Dr. Fidler and Ms. Schloss is appended to this judgment as appendix "B".

[47] Mr. Chhabra raised no concerns about the professional expertise of Dr. Fidler and Ms. Schloss. Their resumes confirm that they are experts in the field and are accepted by this court as such.

#### Richard and Suzette

[48] During the assessment Richard and Suzette proposed that they have sole legal custody of Rayanne and that Tony's access be supervised and gradually decreased to no contact. This position was taken because of their categorical belief that Rayanne has the right to one father and one family. They also claim that Tony had no right to parent, as he is "immoral and unfit". Richard stated that Rayanne would soon forget about Tony "as if he were shot and died". Neither Richard nor Suzette expressed any concern about the negative impact on Rayanne of severing ties with Tony.

[49] The Khans also believed that Rayanne should carry their last name. They explained that the Ontario government (after an administrative hearing) has recognized the Khan name in conjunction with Rayanne and so should the rest of the world. They expressed frustration over the name issue. As a result of the "name" dispute, Rayanne has been compelled to use the letter "K" as her last name in school.

[50] Richard and Suzette have been clear with Rayanne about her "real" father. They also told Rayanne that Tony lies to her about her parentage. They have shown her various legal documents to prove their point. Notwithstanding this, they do not think it is yet appropriate for Rayanne to know the entire truth about her background.

[51] As examples of Tony's immorality, Richard and Suzette point to the fact that he has not told his family in Malaysia the truth about Rayanne's parentage. Richard threatened to send the DNA report, pictures and birth certificate to Tony's family in the hope they (his family) would get Tony to drop what they see as his relentless pursuit of Rayanne.

[52] Richard and Suzette complained about many things including,

- Tony's unwillingness to allow Rayanne to speak with them at school during the time Rayanne resides with Tony
- limited telephone contact

- receiving information from Rayanne while she was residing with Tony
- Tony's refusal to make temporary changes in scheduling
- Tony's bribery of Rayanne with gifts, trips, etc.
- Tony's non-compliance with court orders
- possible neglect by Tony and Alice of Rayanne in favour of Ryan
- bullying of Rayanne by Alice
- neglect of proper Christian upbringing by not saying prayers
- not sharing appropriate Chinese heritage with Rayanne.

### Tony and Alice

[53] Tony proposed that the status quo continue. Any change, he feared, would cause more conflict that would negatively impact on Rayanne. He feels that Rayanne is very sensitive to both conflict and change.

[54] It is Tony's view that the Khan's and, particularly, Richard, are on a campaign to eradicate him from Rayanne's life. He notes that, in addition to the name issue, Richard has tried elicit support of third parties such as school and daycare personnel by telling them Tony is not Rayanne's biological father.

[55] Tony perceives Richard as verbally abusive, intimidating and domineering. He has described incidents of raised voices in front of Rayanne and an episode involving a threat to limit contact, which upset Rayanne to the point of tears.

### Background of the two families

[56] A substantial part of the assessment was taken up with setting out the background of both families. Given the information in the Benjamin report, there is little need to delve into this history except to point out the fact that Suzette still appears depressed and, clearly, Richard is still very angry with Tony. Richard told the assessors that he feels God is testing him.

### Clinical impressions and observations of Suzette Khan

[57] Suzette often had difficulty providing examples of what she was trying to convey. She was not always able to explain her reasons and the basis for what she was stating. This raised questions in the assessors' minds about whether her opinions were her own or whether she simply adopted Richard's views.

[58] Suzette stated she had no close friends and was under stress because of the assessment. She reported that she was losing weight and had been for some time. She has not sought therapy or taken any medication for depression. She thought of ending her life as recently as January, 2005 but Richard was able to console her by pointing out they had one another. No suicide ideation was reported during the assessment.

[59] She is very sad about Rayanne's situation. On change-over day, the Khans say goodbye to Rayanne and then grieve for her for a week. Rayanne clings to her mother. In the mornings when Suzette takes Phillip to school, they seek Rayanne out and there are further goodbyes. This causes Suzette's eyes to well with tears. Rayanne tries to comfort her. Suzette reports that Phillip is less joyous when Rayanne is not around. Suzette's worst thought is that they might not get full custody.

[60] Suzette also reported that Richard tapes conversations with Tony because the tapes will prove some of Tony's lies.

[61] The assessors indicate that Suzette is a devoted mother who is genuinely concerned about the welfare of both her children. Suzette cannot understand Tony and Alice's pursuit of Rayanne because she feels they cannot love her as she does.

[62] The assessors state that it is very difficult to provide any ideas about parenting given Suzette's reticence and "tendencies to say little and to defer to her husband". She indicated that she shared his ideas on parenting and that he (Richard) could speak for her. She described her greatest strength is "to be strong for Rayanne and to put it in God's hands that she will be with them".

#### Clinical impression and observations of Richard Khan

[63] On occasion Richard would become agitated and critical about the process although he was generally co-operative.

[64] He refused to sign the daycare consent to release information saying Tony was responsible for enrolling Rayanne. When reminded about the retainer agreement and court order he said he felt threatened. When asked for a release of medical information he became agitated and suggested that he should be taken at his word.

[65] Prior to starting the assessment Richard asked Ms. Schloss whether Dr. Fidler believed in God. He explained that this was important to him given his disappointment with the previous assessor's religious beliefs. Throughout the assessment Richard often quoted from the New Testament or elaborated on his religious beliefs such as "God is looking for us" and "He will watch how truth and lies manipulate things."

[66] The assessors found that Richard presented his views dogmatically with little room for other points of view. When he felt misunderstood he became even more forceful. He became frustrated and would say such things as "you must pay attention". During an interview he stated, "I get very upset and have to remind myself that I am a Christian". He would go off on tangents and would tell the assessor (Ms. Schloss) that his "proof" would lead to the Khans having full custody.

[67] The assessors state that Richard presents as a devoted father. Family unity and cohesiveness are very important to him. He takes pride in values such as equality, service, honesty and integrity.

[68] Richard expressed strong and unyielding devotion and love for Rayanne. He is not prepared to share his daughter's life with Tony because Tony is not Rayanne's real father. He said he would not compromise on this issue and "will fight to the end". He is prepared, if necessary, to go to the Supreme Court. He told the assessor that "God has given his son and died on the cross and I will do the same."

[69] In terms of parenting he said that "parents must know what is right for a child". He teaches his children about "values, truth and what is right". He instructed Rayanne to ask Tony about whether he is her real father and told her that if Tony said, "yes" that he is lying. He also asked Rayanne where she wanted to live. When she told him she wanted to live with both families, he told her that she must have not been telling the truth all along when she prayed to stay with "the Khans forever and ever". He instructed her to change the wording of her prayers.

[70] The assessors state that Richard provided his ideas on parenting and discipline in a strong and, at times, inflexible manner. He left the distinct impression that, in his view, there was one right way to do things and that any other way was wrong and inconsistent with God's teachings and expectations. He is reported to have said, "I will stand before my God and He will say I did the right thing".

[71] In reporting on joint interviews with the Khans, the assessors report that Suzette provided her opinion on rare occasions only and spoke so softly she could hardly be heard. Richard, at times, interrupted Suzette and told the assessor he could answer better than she could.

[72] With respect to some parenting issues, the assessors reported the following:

"Rayanne told Tony that she is made to wear pull-ups at night because the Khans did not want to wash the sheets in the morning. The Khans stated Rayanne wears pull-ups because she is a heavy sleeper and doesn't feel the psychological urge to get up at night. They told the assessor that they did not think bed-wetting was any of Tony's business.

Tony had expressed concern that the Khans did not comply with Dr. Benjamin's recommendation that Rayanne have her own room and that it was only recently, during the CAS investigation, that they finally agreed. Richard and Suzette said that they saw no reason for Rayanne to have a separate bedroom and had planned to allow this when she was 11 or 12. They finally complied as the CAS required this and would not otherwise have closed their file."

### Home visit

[73] Ms. Schloss conducted a home visit. On her arrival, Phillip stated, "You are here because you are deciding where Rayanne should live." Rayanne agreed with this explanation. When the assessor explained that she was not there to decide Rayanne's living arrangement that day, the children appeared relieved.

[74] Ms. Schloss asked the family to draw a picture of the family doing something together. Richard made it known that he thought this was a useless activity. During this activity there was no positive encouragement or interaction between Richard and the children. The assessor found that Rayanne and Suzette interacted in a light-hearted way and had an easy and loving relationship. Rayanne and Phillip interacted more with their parents than with one another.

#### Office observation

[75] Ms. Schloss administered three structured tasks during this visit. During the teaching task Richard, Suzette and Rayanne all interacted well and enjoyed the task. During the co-operation task, Richard took over and Suzette sat quietly. It was noticed that Richard vetoed many of the children's suggestions. He was assertive and controlling. Ideas from the children were met with expressions of disappointment.

[76] During the problem-solving task, Rayanne and her parents were asked to discuss the issue about Rayanne having her own bedroom. Suzette was silent. Richard took the lead and Rayanne became increasingly upset. Richard interrogated Rayanne about why she did not want to share a room with Phillip. Richard told Rayanne that this meant she didn't love Phillip and that she was not considerate of her family's circumstances. Her request was considered selfish. Richard then tried to stop that conversation and chided Rayanne for disclosing her feelings to the assessor. Richard then admonished Rayanne to the point that she was reduced to tears. Suzette remained silent. Finally, Rayanne, through her tears, conceded that Richard was right. Richard did concede that Rayanne could switch to the lower bunk.

#### Tony Kong

[77] The assessor states that Tony was optimistic about the process. He is a person who sees the glass as half-full, at times to the exclusion of obvious difficulties. He bears no ill-will towards Suzette although he was very upset about the separation. His concern is about Rayanne and the negative effects on her as a result of the conflict with Richard and Suzette.

[78] Tony states he loves Rayanne. He says they are very attached. Even though he recognizes that he is not Rayanne's biological father and even though he admits he provided minimal childcare input after Rayanne's birth up to the separation, he did parent her continuously for the first 21 months of her life and has continued to be involved in her life as a parent up to the present. He and his wife, Alice, make no distinction between Rayanne being his biological child or not. Tony says this does not diminish his love for Rayanne. Tony told the assessor that he hopes that his new child, Ryan, will share many of Rayanne's qualities as they see her as a special individual.

[79] During the assessment an issue about Alice's pregnancy was raised. Worried about Richard and Suzette's reaction to this, Tony and Alice asked Rayanne not to share

the news of the pregnancy with the Khans. They reported that Rayanne was thrilled about the news and was very attentive to Alice. The Khans were furious about not being told and about the fact that Rayanne was exposed to news about reproduction.

[80] Tony admits that he has not told his family in Malaysia about Rayanne's biology, as they wouldn't understand. He added that it was "none of their business". He has, however, shared the information with his good friends in the Toronto area.

[81] Tony responded to allegations about the "mobility issue". I shall address this separately when I address the specific factual issues that were raised by Mr. Chhabra.

[82] Tony acknowledged that it was unfortunate that he has had to take the position that the Khans not see Rayanne at school during the time she resides with him. He has taken this position because of what he perceives as Richard and Suzette's behaviour and its negative impact on Rayanne. He also acknowledged that telephone calls are discouraged for the same reason. Tony says that he has abruptly ended conversations with Richard when Richard becomes argumentative or abusive.

[83] Tony told the assessor that Rayanne eats well and is not losing weight. She watches Chinese cartoons to maintain her language skills. She also participates, along with the rest of the Kongs, in Chinese cultural heritage activities.

[84] Tony disagrees that Rayanne doesn't receive a good Christian upbringing. She attends Sunday School weekly, and both Tony and Alice participate as teachers. They encourage Rayanne to say her prayers.

[85] The assessors describe Tony as a devoted parent who expresses a realistic view of parenting.

### Alice Kong

[86] Alice was co-operative with the assessors.

[87] One complaint made against Alice was that she often yelled at Rayanne. Alice stated she is prone to headaches and, therefore, yelled at Rayanne to speak in an indoor voice. She feels it important that Rayanne use proper manners.

[88] Alice was a primary school teacher in Malaysia. As a teacher she has recognized that Rayanne is skilled in certain activities, such as playing piano. It appears Alice has pushed Rayanne with the piano. By the end of the assessment, however, a professional teacher had been found.

[89] Alice asked Rayanne to call her "auntie"; however, Rayanne preferred to call her "mommy" because she was married to her father. Alice trimmed Rayanne's hair on two occasions not realizing this would cause problems with the Khans.

[90] Alice is described as devoted to Rayanne and genuinely concerned about her welfare. According to the assessors, Alice demonstrated a sound understanding of the pressure Rayanne is under.

[91] The assessors also report that Alice expressed concern about an incident that occurred when Rayanne was about three years old with her then caregiver. She said that the caregiver informed Tony about redness and swelling around Rayanne's genital area. Rayanne allegedly told the caregiver that Richard's son (from his previous marriage) did something to her. Alice stated that Tony told her that he had discussed the issue with Suzette and would call the Children's Aid Society if anything else happened. Alice said she remained concerned because Rayanne expressed discomfort about having her bottom washed.

### Tony and Alice

[92] No problems are reported. They present as positive co-parents. They listen to one another and accept the other's suggestions.

### Home and office observations

[93] Both visits disclosed no problems. Tony, Alice and Rayanne presented well as a family.

### Rayanne

[94] Rayanne was seen four times by the assessors. She presented as quiet, gentle and "sometimes" happy. At times, she appeared tentative, sad and emotional when talking about family. Her eyes would fill with tears. Rayanne has attempted to appease her parents.

[95] Rayanne was asked for her three wishes. She responded by naming two. She wished that there be . . . . "no switching. I want to be just like other kids. They don't have two names and I just want to live in one home. I don't know which home that would be". When she is with one family she misses the other. "If only everyone would get along it would be easier".

[96] Her second wish was that Alice stop yelling when she makes mistakes at the piano. During a later interview she said the issue of yelling didn't bother her much.

[97] Rayanne also stated that she did not want to share a bedroom with Phillip because she was uncomfortable about the lack of privacy. She complained that Phillip's friends messed her bed. She didn't like the upper bunk. After it was decided she could change bunks with Phillip she reported that Richard told her she would have to go back to the upper bunk because Phillip didn't like it. She said "They asked me if I care about Phillip? Doesn't Phillip care about me?" She expressed frustration about Phillip hitting and pushing her.

### Phillip

[98] Phillip is described as an energetic child. He is also described as a child who parrots the views of Richard and Suzette. He said, "Tony and Alice are fighting to get Rayanne. He is a banker and buys her lots of stuff and she likes both places". He asked the assessor to tell Rayanne that she is not Tony's daughter. The assessors state that Phillip is actively engaged in the campaign against Tony.

### Psychological testing

[99] In addition to the interviews, reading, and dealing with collateral sources, the assessor, Dr. Fidler, conducted psychological testing. The results are set out as attachment C to their assessment report.

I shall briefly set out the findings:

### Richard Khan

[100] Richard attempts to present an overly positive picture of himself. These unrealistic claims of virtue are common in custody litigants. Richard genuinely believes that he is without difficulties or common foibles. He does not consciously distort or attempt to present favourably. People with strong religious convictions often exhibit these findings. Such individuals tend to have strong and unyielding views. They are likely to be socially conforming and moralistic. They may be overly self-confident and have insufficient personal insight.

[101] Richard is likely to make good efforts to conform to the expectations of others especially those in authority. He is likely to take comfort within an institution or church.

[102] Richard shows no significant discomfort, sadness or depression.

[103] The results for Richard that measure "parental support", "satisfaction with parenting", "involvement", "communication", "limit setting", "autonomy", "role orientation" and "parenting stress are normal."

### Suzette Khan

[104] Results indicate genuinely held but unrealistic claims of personal virtue. Such individuals tend to hold strong and unyielding views. They are likely to be socially conforming and moralistic. Suzette was extremely frank about having significant adjustment difficulties. She is unhappy, indifferent and experiencing little enjoyment from things she once used to enjoy. She reports as having low energy, extreme fatigue and is functioning poorly. She exhibits significant anxiety and worry. She is moderately depressed. She is easily hurt and sensitive to criticism. She avoids confrontation and keeps her feelings bottled up. She is unassertive, passive and dependent in her relationships. Her test results, coupled with all of the other obtained information, raise

concerns about Suzette's parenting. She has little insight into the psychological nature of her difficulties nor much drive to obtain appropriate help.

[105] Suzette tends to present in an overly positive light, denying personal difficulties and emotional problems. She conforms to the expectations of others, especially those in authority. She is likely to take comfort in associating her actions and beliefs with an institution or a church.

[106] Suzette reports discomfort, dissatisfaction and/or sadness at the upper range.

[107] The scores measuring the parent-child relationship are within normal range.

[108] Suzette is not perceiving stress relating to parenting beyond what is to be expected in the circumstances.

### Tony Kong

[109] The results/testing indicate that Tony is managing effectively without significant difficulties. Taken together with other information obtained in the assessment, Tony attempts to deny problems, preferring to remain positive or even overly positive in the face of obvious difficulty.

[110] Tony tries to present himself in a positive light (not uncommon for custody litigants) but may also be an overly confident person. He may harbour resentment. The over confidence may be a defence against feelings of humiliation.

[111] Tony demonstrates no significant discomfort, dissatisfaction, and/or sadness.

[112] Tony tends to respond in an unrealistically positive manner. His scores indicate good parenting. This result is also corroborated by other information obtained during the assessment.

[113] Tony is not perceiving stress relating to parenting in terms of his own and Rayanne's behaviour beyond what would be considered normal in the circumstances.

### Alice Kong

[114] Alice tends to present in a positive light and to resist admitting personal shortcomings but not at significant levels. Her results are consistent with those involved in custody litigation. Alice is sociable but reserved. She has some low self-esteem issues and some anxiety issues.

[115] Alice does not demonstrate significant discomfort, dissatisfaction and/or sadness.

[116] Alice's attitudes are congruent with good parenting.

[117] Alice is not perceiving stress relating to parenting in terms of her own and Rayanne's behaviour beyond what would be considered normal in the circumstances.

Dr. Graham Berman's evidence

[118] Dr. Berman is a psychiatrist who was retained by Richard and Suzette to comment on the Parenting Plan recommendations dated June 29, 2006 and the assessment dated October 30, 2006.

Dr. Berman's report dated November 21, 2006

[119] Dr. Berman's report is appended to this judgment as Appendix "C".

[120] Dr. Berman points out that his report is not a custody/access assessment. He did not speak to either Tony or Alice. He states that his report is intended "solely to discuss the value and the deficiencies of the assessors' (Dr. Fidler and Ms. Schloss's) reports with a view to avoiding certain difficulties which are likely to arise should the report be accepted in its present form".

[121] Dr. Berman read the reports of Dr. Fidler and Ms. Schloss as well as the report of Dr. Michael Benjamin dated July 10, 2000. He met with and had telephone discussions with Richard and Suzette. He met with Rayanne alone and together with Phillip, Richard and Suzette. He listened to tapes of telephone conversations between Richard and Tony.

[122] At the outset, Dr. Berman states that the recommendations of Dr. Fidler and Ms. Schloss "would construct for Rayanne a life of excessive regulation, lacking emotional and rational coherence and inevitably distorting the child's development".

[123] Dr. Berman finds no difficulty with the reports as far as the information gathering process is concerned but disagrees with the "false conclusion drawn from information and the resulting inappropriate recommendations which are likely to exacerbate the problems already present".

[124] In addition, Dr. Berman states:

*"I will also present evidence from reports indicating that the assessors have developed a bias in favour of Mr. Kong's position and that this has affected their conclusions and recommendations".*

[125] Dr. Berman finds that the assessors have tried to design a system that will reduce animosity but that their recommendations will not succeed in doing so. He states that they are confused about conflicting goals and recommendations. He states:

*"As I will demonstrate . . . it is not possible to be fair to all the adults involved, and at the same time protect the welfare of the child".*

[126] Dr. Berman finds that the Khans are blamed for most of the animosity without assigning blame to Tony for his animosity. He points out that it is Tony who objects to contact between the Khans and Rayanne. He states that Tony's actions ignore evidence of Rayanne's attachment to Richard, Suzette and Phillip.

[127] Dr. Berman says,

*"The attempt to force these warring factions into peaceful co-existence . . . is an impossible dream". Dr. Berman points out that, "a long enough trial of co-existence has demonstrated that it is a failing strategy in the present case and that a different means must be found for managing the child's life".*

[128] Dr. Berman finds fault with the assessors for referring to the Khans as biological parents when they are also psychological parents to Rayanne. Accordingly, to him, this shows obvious bias.

[129] Dr. Berman also finds fault with the original recommendations of Dr. Benjamin and states,

*"unwisely, in my view, he recommended a childcare regime in which Rayanne would spend equal time with each family".*

[130] Dr. Berman says that the available scientific evidence indicates that young children required to spend their time between two homes have a greater probability of developing emotional problems than those who have a primary residence. Dr. Berman sees Rayanne as a child at risk.

[131] He says that Rayanne's living conditions should be normalized. He feels that the assessors, in trying to be fair to Tony, have regarded the Khan's actions as showing a lack of co-operation indicating hostility to the assessment process.

[132] While it would be unwise for Rayanne to sever her ties with Tony, Dr. Berman feels that there is no reason to bias the recommendation away from the Khan's who are both the biological and psychological parents of Rayanne.

[133] Dr. Berman perceives Richard as someone who is attempting to defend his family against what he (Richard) sees as unwarranted interference. Although somewhat controlling, he is supportive of his family. This should not be seen as a fault.

[134] Dr. Berman feels the assessors erred in describing Suzette as submissive as there was evidence to suggest she demonstrated a high standard of parenting.

[135] Dr. Berman says that the assessor's antipathy towards Richard is made clear by their suggestion that he complete an anger management course. He describes Richard as a man adhering to his principles.

[136] Dr. Berman points out that the attitude of the assessors suggests a caricature of Richard. He accuses the assessors of mocking the Khans.

[137] In his report Dr. Berman agrees with the assessors that the switching of homes prevents Rayanne from being herself anywhere. Dr. Berman tends to blame Tony because he has prevented “greeting” or “acknowledgment” between Rayanne and the Khans (including Phillip) on his time.

[138] Dr. Berman is quite dismissive of the assessor’s report as he states,

*“They propose an intervention that will attempt to force their views on the Khans. They equate this with having the Khans learn “to honour their daughter for all that she is, and to nurture her right to be who she is and love who she loves”. Wonderful prose, but translated into practical terms it involves ignoring the child’s wishes for an integrated family, contriving to deny her the knowledge of who she is and dictating to her who she will be and who she will love on which day of the bureaucratic maze of her custodial timetable”.*

[139] Dr. Berman concludes that Rayanne is happy with her “real” parents. He says the Khans are being demonized for insisting on having custody of their own child. While not defining the term “real” parents, Dr. Berman’s report makes it very clear that Rayanne’s “real” parents are the Khans and that she should be living primarily with them. He says, “the child’s wish is to have her biological parents identified and to live with them”.

#### The assessor’s reports and evidence

[140] In attempting to choose which report and opinion I will rely upon, I have been assisted by hearing testimony from each of Dr. Fidler, Ms. Schloss and Dr. Berman.

[141] As stated previously, Dr. Fidler and Ms. Schloss’s report was very thorough. Their opinions, conclusions and recommendations relied not only upon interviews but also upon psychological testing and follow-up with collaterals. They each presented their evidence with appropriate professionalism. By way of example, they discussed various protocols for assessments that are generally followed in the field. As conceded by Dr. Berman, I find that their fact investigation process was appropriate. If anything, contrary to what Dr. Berman stated, they bent over backwards in order to deal sensitively with Richard and his viewpoint. They were solicitous of his concerns and explored each of them thoroughly. Most importantly, they did not demonstrate bias but went to pains to point out that Richard harbours views that are genuine and that he does not engage in manipulation.

[142] Richard felt that once the DNA testing determined that he was the biological father the matter should end. He has been more than frustrated that Tony and others do not share his views. While pointing out that Rayanne is not alienated from Tony, the assessors express concern that the behaviour Richard exhibits could be alienating, and,

wonder, in light of Dr. Berman's comments, whether alienation has not already begun. To accuse Fidler/Schloss of bias against Richard and Suzette when they have gone to some length to point out that Richard, with all his flaws, is a person of integrity, is without merit. This is especially so when Ms. Schloss testified that Tony is not a perfect parent and has made errors, i.e. committing Rayanne to secrecy about Alice's pregnancy and the way in which he dealt with the child abuse allegation.

[143] There is also a complaint that Dr. Fidler and Ms. Schloss demonstrated bias by relying on Dr. Benjamin's report. The facts, however, do not bear this out. Dr. Fidler and Ms. Schloss conducted their own independent assessment. That they read Dr. Benjamin's report is certainly true (as set out in the information reviewed) and, in my view, essential. Had they not read Dr. Benjamin's report, they could have been justifiably criticized for not taking this important information into account. That many of their findings and opinions coincided with the findings of Dr. Benjamin is not bias.

[144] Dr. Berman's report, in many ways, did not assist the court. He was retained to prepare a critique. He, unfortunately, did much more: in fact, he offered an opinion as to Rayanne's placement without performing any of the work one would expect from a professional conducting work in this field.

[145] Preparing a critique is a fair approach. When coupled, however, with an ineffective, incomplete assessment, it loses its effectiveness.

[146] Ms. Holzman, by way of motion, asked the court not to accept Dr. Berman's credentials as an expert. However, given his extensive experience and writing in the field, I qualified Dr. Berman so that he could state his opinion and be cross-examined on it. I note, that later, in Ms. Holzman's written submissions, she concedes that Dr. Berman is an expert.

[147] Notwithstanding his credentials, I do not consider Dr. Berman's report and his evidence as containing much helpful information for the following reasons:

- 1) In the face of a joint custody order, he interviewed Rayanne without Tony's consent;
- 2) He prepared an assessment opinion, in addition to a critique. He could not recall how much time he spent on the case. He read very little background material. He did not discuss the matter with either Dr. Fidler or Ms. Schloss. He followed no recognized protocol for the preparation of assessment. He contacted no collaterals;
- 3) He paid no attention to the fact that Richard (a strong-willed person) brought Rayanne to his office and the effect that this might have had on the dynamic of the interview;
- 4) He admitted in cross-examination that the assessment portion of his report was influenced by the fact that he was retained by the Khans.

[148] As a result, I find that Dr. Berman's methodology, his report and his opinion in this case are seriously flawed.

[149] While I do not believe that Dr. Berman's assistance to his adult patients spurred this litigation, I do think that his report did little to dissuade the Khans in their pursuit of Rayanne's custody. His opinion gave them some support that they relied on in order to pursue the litigation. I think that this was most unfortunate for everyone concerned.

#### Specific issues

1) The two-week on 30 days notice issue

[150] Paragraph 2(h) of Speigel J.'s judgment reads as follows:

Tony to have access to Rayanne for two weeks in October 2000 for [sic] trip to and from Malaysia. Richard and Suzette to have two weeks on 30 days notice.

[151] Shortly after entering into the consent judgment, Richard and Suzette consented to Tony's taking two weeks to travel to Malaysia with Rayanne.

[152] For reasons not explained at trial, Richard and Suzette did not request their two weeks until September 2005. Tony refused to give Richard and Suzette the two weeks. In fact, Tony removed Rayanne from school early one day in October 2005 when Richard wanted to pick the child up for his two weeks. Tony also advised the school principal to disregard a notice they had sent her.

[153] As well, a second 30 days notice was given to Tony so that Richard and Suzette could have Rayanne for two weeks in April 2007. Once again, Tony refused.

[154] Richard and Suzette interpret Tony's refusal, not only as wrong in law and a breach of the judgment, but also dishonourable. Along with other evidence that will be reviewed later, they say this demonstrates that Tony is immoral.

[155] Tony's position is that, while paragraph 2(h) of the Judgment does not specify that the two weeks were to be vacation time that that was the clear and reasonable inference to be drawn. As well, he points out that Richard and Suzette's plans might well have interfered with Rayanne's schooling if the Khans were planning a trip. That, according to Tony, was not contemplated. In addition, the weeks requested were not continuous.

[156] As far as the second request was concerned, the same objection was raised. This time, the two weeks would have resulted in Tony's not seeing Rayanne for five weeks. In addition, Tony was highly suspicious of the timing, coming as it did during this trial.

[157] Richard and Suzette have taken an overly strict and technical approach to the interpretation of paragraph 2(h). I agree with Tony that the paragraph contemplated that the two weeks was to be vacation time, as the entire regime contemplated by Dr. Benjamin was one of parallel parenting. The paragraph was poorly drafted. No explanation was forthcoming as to why Richard and Suzette waited so long to request their two weeks. Rather than demonstrating the fact that Tony behaved dishonourably, I find that the actions of Richard and Suzette were consistent with a rigid and inflexible manner of dealing with issues. I disagree with counsel's submissions that the technical breach of the paragraph indicated a lack of commitment to co-operate on Tony's behalf. In my view, Tony had valid reasons for interpreting the paragraph the way he did. However, as the parties do not communicate with one another, the issue became far more important than it should have.

[158] Counsel for the applicants submits that nowhere in Spiegel J.'s judgment was it provided that Tony had the right to refuse Richard and Suzette their two weeks time. As I have found that paragraph 2(h) of the judgment limits the request to vacation time, a specific right of refusal was not required.

## 2) Other refusals

[159] Other examples of Tony's non-co-operation include a refusal to grant a request on Tony's time to take Rayanne to the circus and another request for "a couple of days" to take Rayanne to the United States. In the overall scheme of this case, I find this evidence to be inconsequential. The long weekend request to take Rayanne to the United States fell during the only long weekend Tony would enjoy with Rayanne during the time that the parties were on a 3/4, 4/3 schedule.

## 3) Passport

[160] In his submissions, the applicant's counsel submits that the court find that Richard and Suzette were able to co-operate with Tony about a trip to Disneyland for Rayanne. While it is true that Richard and Suzette did sign a consent to travel form, the form itself was drafted by Richard. It was labouriously obtained, as Richard took great umbrage about having Tony's name placed on a passport form. In addition, the form itself expressly stated that Richard and Suzette Khan were the biological parents of Rayanne, limiting Tony Kong to the status of ex-husband. This is yet another example of Richard and Suzette's refusal to recognize that Tony plays an important role in Rayanne's life. To rely on the form as an example of co-operation is ironic.

## 4) Mobility

[161] Mr. Chhabra, in an effort to demonstrate co-operation, submits that Richard and Suzette consented to Tony's unilateral change of heart in relation to the mobility issue. During the Benjamin process, Tony had apparently indicated he would move to Pickering, as that was where the Khans were living. Taken along with all of Dr. Benjamin's other recommendations, the recommendation about Tony's move to

Pickering made some sense in that transitions would have been easier. Prior to Spiegel J.'s consent judgment, however, the parties agreed to remove the restriction on mobility. While this may have indicated some co-operation on Richard and Suzette's part at that time, I am hard pressed to understand Richard and Suzette's position at this trial.

[162] Richard's evidence indicated he was most displeased with Tony and Alice's move to Markham when they eventually moved. Notwithstanding the fact that the mobility restriction was waived, and the fact that Richard and Suzette could not tolerate Dr. Benjamin's central recommendations, some of the evidence at this trial revolved around the move of Tony and Alice to Markham. Richard went to considerable lengths to demonstrate that Tony and Alice's move to Markham was farther away than Tony's original residence in Scarborough. In much the same way as he interpreted paragraph 2(h) of the divorce judgment, Richard displayed an inability to show flexibility about this issue. As Ms. Holzman pointed out, the move was no more than a few kilometers distance farther than that which Richard thought was agreed to in the first place. More disturbing and, perhaps, more telling, was Richard and Suzette's insistence that this "breach" was yet another example of Tony's immorality and lying. After all this time, they still harboured considerable anger about Tony's move to Markham. They thought it an example that Tony was fundamentally deceitful during the Benjamin process. They failed to grasp that:

- 1) the mobility restriction had been waived;
- 2) the distance between the Markham residence and theirs was just a few kilometers longer than a move to Pickering would have been;
- 3) Alice, who was now married to Tony, worked in Mississauga and travel arrangements to her place of employment were easier from Markham;
- 4) the issue itself was relatively unimportant as the vast majority of pick-up and drop-offs occurred at Rayanne's school.

#### 5) Open therapy

[163] The assessors (Dr. Fidler and Ms. Schloss) recommended that Richard, Suzette, Tony, Alice, Rayanne and Phillip engage in family therapy. Ms. Schloss indicated that therapy would benefit Rayanne and Phillip to better understand matters. Therapy was not to be mediation.

[164] Mr. Chhabra submits that the court should find that Tony refused to consent to this therapy and that this refusal should label Tony as non-co-operative and, therefore, not deserving of custody.

[165] I do not follow Mr. Chhabra's logic for the following reasons:

- 1) It is Richard and Suzette who utterly rejected the assessors' recommendations and their report. To cherry-pick one of the recommendations while ignoring the others makes little sense.
- 2) There was no response from Richard and Suzette to the request for open therapy in June 2006 when the recommendations were made.

Tony was initially agreeable to all recommendations. Months went by with no response from Richard and Suzette. There was an incident between Richard and Tony in January 2007, which was fraught with conflict. It wasn't until some time in February 2007, just two months prior to trial, that Richard and Suzette said they would attend therapy. In my view, Richard and Suzette decided to try to position themselves for this trial. It smacks of too little; too late. Tony cannot be faulted for declining to participate in therapy under these circumstances. The exercise would have been a waste of time.

- 3) The evidence indicates that Richard finally agreed to go to therapy only so that the therapist could explain to Rayanne who her biological parents were. Richard's view of the therapy suggested was anything but therapeutic.

#### 6) The sexual abuse allegation

[166] Mr. Chhabra submits that Tony's actions surrounding this issue were yet another indication of misleading third parties in order to benefit himself. In this case, Mr. Chhabra submits that Tony misled the assessors to gain an advantage. The facts, however, do not bear this out.

[167] During the assessment, towards the end of the process, Alice, when asked by Ms. Schloss whether there was anything else she wished to say, indicated that Rayanne had made an allegation that Richard's son possibly abused her when she was about 3 or 4 years old.

[168] When Ms. Schloss learned of this, she immediately reported this allegation to the Durham Children's Aid Society. The Society conducted an investigation, which, ultimately, was inconclusive.

[169] There are two complaints about Tony's conduct with respect to this incident. The first is that only an irresponsible father would not have reported the incident himself to the Society when it occurred. Secondly, as Alice learned about the complaint from a former caregiver of Rayanne, there is criticism directed at Tony for not confiding in his wife about something as important as this issue.

[170] Tony's evidence is that very soon after learning of the incident, he contacted Suzette and told her about it. He says that he told Suzette that if anything like this ever occurred again, he would report the incident.

[171] Tony also took Rayanne to see her doctor, who told Tony that redness in the vaginal area looked like a rash. Tony was relieved by this news and stated that over the years he put the incident out of his mind. This is why, he says, he never mentioned it to Alice.

[172] Mr. Chhabra is also critical of the fact that Tony did not discuss the issue with the assessors. He also submits that Tony and Alice, by not discussing the issue directly with the assessors, cast some doubt about whether it was Richard's son or Richard himself who was the perpetrator.

[173] There was also criticism of Ms. Schloss's role in the matter for not following up her report of the incident with the Society.

[174] Based on the evidence, I heard, I cannot conclude that Tony discussed the incident with Suzette as he indicates. I do, however, accept his evidence about failure to report, as he was concerned that the Society might take Rayanne from him. I also accept his evidence that, after the doctor's visit, he chose to believe the incident never occurred.

[175] Mr. Chhabra submits that this issue was raised during the assessment in order to gain advantage and portray Richard and Suzette in a bad light. He also submits, in the alternative, that if Tony believed the incident occurred, then Tony should never have left Rayanne in an environment where she was at risk. Finally, Mr. Chhabra says that this evidence may demonstrate that Alice will assist Tony in his manipulation and deceit.

[176] Had Tony spoken to Suzette about the incident when it had occurred, Suzette too, could have been faulted for taking no action. As Suzette denied hearing from Tony, I cannot, however, conclude that she was aware of the alleged incident until after Ms. Schloss made her report.

[177] I do, however, accept Tony's evidence that he dealt with the incident in a reasonable fashion. His actions around the time of the incident did not indicate a lack of concern about Rayanne or her care. The fact that he immediately sought medical advice indicates that he was concerned.

[178] It may well be that when Alice raised the issue with Ms. Schloss, she was hoping to gain some advantage in the custody case by raising some negative facts about the Khan household. What this demonstrates is that Alice may not handle every situation perfectly. It does not demonstrate deceit or manipulation or improper parenting.

[179] This issue, as I pointed out near the beginning of the judgment, is not the primary concern in the case.

[180] A word about Ms. Schloss's actions with respect to the abuse allegation, which came under some criticism during her cross-examination, is necessary. She was correct in reporting the incident to the Society when she learned of it. She was legally required to do so. Secondly, there was criticism about the fact that she did not follow up matters with the Society investigator. She testified that to do so might taint the investigation. I agree with her and find no fault with her actions.

[181] An interesting side-line of the Society's report, which was filed as an exhibit, was that the Society found that Richard engaged in inappropriate discipline of his children by

using physical force. The Society also found fault with Richard and Suzette in not providing Rayanne with her own bedroom as recommended by Dr. Benjamin years earlier. In addition, the Society indicated that Rayanne called Tony “Dad” and Richard “Step-Dad”. The investigator also confirmed that Rayanne did not like going back and forth between the two families, but that she loved both families.

#### 7) School and daycare

[182] Much time was spent at trial on this issue. Rayanne and Phillip attend the same school. During Tony’s week, Rayanne, after class, attends daycare at the school. Richard, on a regular basis, meets Rayanne after class but before daycare. Suzette works and is not available. Tony does not approve of this as it occurs during his residential time. More importantly, Tony objects to the fact that Richard has, from time to time, discussed the court issues with teachers in front of Rayanne. He never interferes with Rayanne when she is in Richard and Suzette’s care. He feels his time should be respected as well.

[183] Richard insists on speaking to Rayanne when he sees her. There have been times when Phillip’s class ends, close to the time at which Rayanne’s class ends (but not always). Richard feels it is normal for a father to speak to his daughter whenever he sees her.

[184] The problem is that Rayanne seems to be upset by these visits. Diane Knighton, Rayanne’s daycare teacher, testified that Richard and Suzette place pressure on the child about Tony not being her father and about the fact that she should not have to be in daycare. Mrs. Knighton paints a picture of a child who is unhappy as a result of these meetings with Richard.

[185] Richard was eventually banned by daycare staff from coming to the classroom.

[186] Richard, during his testimony on this issue, said that someone would have to kill him first to prevent him from speaking with Rayanne at school.

[187] Even in the face of considerable distress to Rayanne, Richard insists on seeing her. He doesn’t appreciate or understand (as others do) that Rayanne is upset. Even if he does understand, he does not see himself as having any role in causing this upset.

[188] The school principal, Ms. Sherwin-Hamer, testified about some of the problems at school. She said that the Khans fail to obey the rules about pick-ups and drop offs at the school and especially about not going to classrooms. Richard also breaches rules about walking between bus lanes at the school.

[189] While not directly on the point of daycare Suzette takes Rayanne to school and on (Wednesdays), the changeover day, there are tearful episodes between mother and daughter. Neither Suzette nor Richard seem to have any appreciation of how upsetting these actions are to Rayanne.

#### 8) The court order

[190] Richard and Suzette state that Tony has lied about having a court order preventing them (and especially Richard) from attending at daycare.

[191] Again, much time was spent by Mr. Chhabra attempting to demonstrate that Tony lied to school authorities about having a court order banning Richard from the school. Richard was adamant that there was no order in effect specifically banning him from daycare. However, in much the same way as the “two-week vacation issue”, Richard has failed to understand that there are certain reasonable inferences that should be drawn from a court order to make it workable.

[192] Spiegel J.’s divorce order, dated August 10, 2000, clearly delineates the time each parent is to spend with Rayanne. It even makes explicit reference to daycare provisions. While it does not specifically state that each parent is to have Rayanne exclusively during their residential time that is the clear and reasonable inference. To make an issue of this, as Richard and Suzette have, is an indication of their inflexibility and rigidity. It is quite understandable, in the circumstances of this case, that Tony would want to preserve what is his exclusive time with Rayanne.

#### 9) Rayanne’s school attendance

[193] Rayanne has often been late for school when in Suzette’s care. During the school year 2004-2005 she was late approximately 31 times. Tony sent a note to Suzette and Richard pointing out the problem and suggesting that they work together to deal with it. He heard nothing from them. Rayanne was late approximately 28 more times after the letter was sent. Mr. Chhabra attempts to prove that Tony is uncooperative but incidents such as these tend to show the contrary.

#### 10) The daycare school graduation issue

[194] The incident of Rayanne’s daycare graduation, Mr. Chhabra submits, is an indication that Tony tries to prevent contact between Rayanne and the Khan family.

[195] As there had been considerable animosity between Richard and Tony, Tony, being aware of the fact that contact between them would likely be unpleasant, told Richard that the Khans, including Phillip, should not attend Rayanne’s daycare graduation. Tony testified that he did this because he did not want Rayanne to be placed in a difficult situation. Richard was adamant that he, Suzette and Phillip would attend the event. It should be pointed out that the event fell during Tony’s residential time.

[196] At the graduation, the scene unfolded as Tony predicted. There was an emotional, if not somewhat physical, tug-of-war for the child. Rayanne was upset, and in tears. She pleaded with Tony to take her home. Diane Knighton had to intervene to calm Rayanne down and to comfort her. Diane Knighton testified that Tony was relatively subdued and

quiet during the confrontation with Richard but that Richard was swearing and yelling at Tony.

[197] While I appreciate that a graduation of any sort is an important life-cycle event for a family, I am of the opinion that Richard should have been attuned to the fact that a conflict was almost certain to develop. As the graduation exercise occurred on Tony's time, Richard should have absented himself and his family. It is clear that, on this occasion, Richard put his adult needs ahead of Rayanne's needs. This turned what should have been a joyous occasion for Rayanne into a miserable one.

#### 11) Rayanne's report card

[198] Ms. Sherwin-Hamer was involved in an incident in which Richard removed Rayanne's report card from her backpack at the school. Once again, this occurred during Tony's time. Rayanne was quite upset. Ms. Sherwin-Hamer had to obtain a second report card for Rayanne. Richard, of course, should not have involved Rayanne but should have asked Ms. Sherwin-Hamer for a copy without making a scene and involving the child. Once again, Richard, without thinking, placed Rayanne in the middle of the adult conflict.

#### 12) Rayanne's family portrait

[199] Diane Knighton observed Richard remove, crumple and tear-up a family portrait that Rayanne had made in class. This occurred at school in front of a number of people including Diane Knighton and Rayanne. Apparently, Richard was displeased that the father figure in the portrait was painted with a tie. As Richard almost never wears ties, he assumed that the father figure was Tony. Once again, the effect on Rayanne was, at best, not considered or at worst, calculated to publicly embarrass and punish her. As with many of the daycare/school-related issues raised at trial, this one was played out in public, and, in front of the child. Richard and Suzette seem incapable of shielding the child from these difficult moments.

#### 13) Alice's pregnancy

[200] When Alice became pregnant with Ryan, Tony asked Rayanne to keep this fact from the Khans. Some evidence suggested that this may have been prudent during the first trimester, just to be cautious. However, it seems to me that Tony was worried that Richard would somehow turn this against him. There was a suggestion raised by the assessors that Tony was worried that Richard would tell Rayanne that Tony would love her less after Alice gave birth.

[201] Whatever Tony's reservation was, Ms. Schloss made it clear that it is wrong for a parent to ask a child to keep a secret under these circumstances. When asked about this incident and its relationship to overall parenting skills, Ms. Schloss stated that Tony is not a perfect parent. He has made mistakes. As far as the incident relates to the totality of all the parenting issues, this incident would not change Dr. Fidler's and Ms. Schloss's

recommendations. I agree that this conduct does not impact in a material way on Tony's overall parenting ability.

#### 14) Relationship with Phillip

[202] Richard and Suzette indicate that Phillip seems very sad and withdrawn when Rayanne is with Tony. While there is no independent evidence of this, it is clear from the evidence of each of Dr. Fidler, Ms. Schloss and Dr. Berman that the relationship between Phillip and Rayanne, whatever its strength or weakness, should not stand in the way of a change in the custodial and/or access regime, if change is in Rayanne's best interests. In other words, as I understand it, Rayanne's relationship with Phillip is not an overriding factor to be taken into account. I am, in any event, satisfied that a change in custody and/or access will not affect the relationship between the siblings in a material fashion.

#### Other Witnesses

[203] Both parties filed affidavits from various friends and neighbours setting out what the court often expects from these kinds of witnesses. The affidavits supported each party's quest for custody, aligning with the party that sought the evidence. Overall, I found the evidence presented by the experts, the schoolteachers and parties themselves of more assistance.

[204] Three of the witnesses who filed their affidavits on Richard and Suzette's behalf were cross-examined. I shall comment briefly on their evidence.

#### Craig Henry

[205] While supportive of Richard and Suzette, Mr. Henry, a long-standing friend of Richard's and a father himself, described Richard as a focused individual who "keeps going like the energizer bunny". Mr. Henry also stated that Richard "loves a challenge and does not like to fail". I raise these statements, as they are consistent with the characterization of Richard by Dr. Fidler and Ms. Schloss.

#### Schaheba Abu-Khan

[206] Ms. Abu-Khan is Richard's daughter. She is, as one would expect, very supportive of Richard and Suzette. She praised her father for his courage and wisdom. She testified that her father taught her to be a leader and not a follower. She said that "we are fighting for what is ours" and, also, that her father was "fighting for his biology". Once again, her evidence of her father's character was in line with what I heard from Dr. Fidler and Ms. Schloss.

#### Nicole Cheung

[207] Nicole Cheung is Suzette's sister. She is supportive of Suzette and Richard finding no fault in either of them with respect to their parenting ability. She suggests that

Suzette has her own opinions about parenting. While she is to be commended for supporting her sister, the weight of the evidence that I heard at trial indicates that her view of Suzette is not supported by most others.

#### Observations of the parties

[208] I had ample opportunity to listen to and observe the parties during their examinations and cross-examinations.

#### Richard Khan

[209] Richard is, as described, frustrated, angry and quite inflexible. He is a very intelligent man who, no doubt, holds to his position very firmly. Compromise does not come easily to him nor does moderation. He appears to approach the issue of Rayanne's custody from an adult and ego-centered point of view. He has very little understanding of the effect of the conflict on Rayanne. The only real emotion, other than anger, that I saw from Richard during his testimony came when he complained about how much the trial was costing him and the financial sacrifice involved.

[210] Richard is, undoubtedly, a difficult man. Mr. Chhabra is his eighth lawyer. While no evidence was led to suggest why he had retained eight lawyers, a reasonable inference to make, in addition to cost concerns, would be that he did not like some of the advice he was getting.

[211] The assessors' report says that Richard believed that if he were awarded custody of Rayanne, she would soon forget about Tony "as if he were shot and died". He denied saying this but did allow that Rayanne would get over Tony "as one gets over the taste of bad medicine". I accept the fact that Richard said what Ms. Schloss reported. Ms. Schloss is an assessor of considerable experience. Assessors, as part of their mandate, take notes and report what is said if they feel the comment is relevant. It is highly unlikely that, having heard such an inflammatory statement, Ms. Schloss would either make it up or misinterpret it. The statement is also consistent with other statements Richard has uttered in anger.

[212] Finally, Richards's cross-examination was informative as to his character. He was opinionated, pedantic, discursive and off-topic much of the time. On at least one occasion, he refused to answer a relevant question (as did his daughter during her cross-examination). Often, when answering questions, he would veer-off on a tangent and would have to be reined in by Ms. Holzman or, on occasion, by the court. He often testified about what he wanted to talk about. He tried to control the agenda even from the witness box.

[213] It is interesting to note that, even in the face of Richard's utter rejection of Dr. Benjamin's report, he described Dr. Benjamin as a "saint" when compared to Dr. Fidler and Ms. Schloss. Dr. Berman, his own witness, called his response to Dr. Benjamin's

report “over the top”. I raise these points as confirmation of much other evidence that was received about Richard’s character.

Suzette Khan

[214] Suzette was difficult to follow. She testified in a very quiet voice and had difficulty projecting her point of view. I found her to be somewhat depressed or sad and very uncomfortable on the stand. That she loves Rayanne there is no doubt. There is also little doubt that her love is returned. I do, however, agree with the opinion of Dr. Fidler and Ms. Schloss that Suzette follows Richards’s lead. Richard describes them as a team but he is the clear leader. She would not be able to stand up to Richard if they had a significant difference of opinion. Around the time of Dr. Benjamin’s involvement, it seems that Suzette was far more accepting of Tony’s place in Rayanne’s life as a parent. She now has no independent opinion on this issue.

Tony Kong

[215] I was impressed with Tony and his evidence. He delivered his evidence in a straightforward manner. I was left with the clear impression that he has a strong bond with Rayanne that he feels is being imperiled by Richard and Suzette. He is able to focus on the needs of Rayanne and put them ahead of his own. Tony is considerate of Rayanne and thinks about the effects of his actions on the child.

Alice Kong

[216] Alice has involved herself in Rayanne’s life to the point that Rayanne looks to her as a parent. I was impressed by her efforts to connect with Rayanne. They share numerous activities together. Alice is a very positive influence in Rayanne’s life.

[217] She also gave her evidence in a straightforward manner. She is emotionally intelligent and was clearly able to understand the fact that some of her conduct needed to be changed because it was causing a problem for Rayanne. That she immediately changed it, so that it became a non-issue, was impressive.

[218] It is also clear that Rayanne was very excited about Ryan’s birth and regards the child as a member of her family.

Change in position of the parties

[219] At the conclusion of the assessment process, Tony wanted to terminate the litigation by accepting the interim joint custody recommendation. By the time he got to trial, however, his position had changed; he sought sole custody. In doing so, he was following the recommendation of the assessors.

[220] At the conclusion of the assessment, Richard and Suzette wanted sole custody. It is clear that during the assessment they saw an extremely limited role for Tony and Alice. They really wanted Tony out of Rayanne’s life. During the trial it was Richard who

allowed that Tony might be able to see Rayanne from time-to-time, like a “friend” or favoured “uncle”.

[221] In his closing submissions, Mr. Chhabra seeks sole custody for Richard and Suzette with access to Tony on alternate weekends from Saturday 8:00 a.m. to 6:00 p.m., and Sunday from 8:00 a.m. to 6:00 p.m. with no overnights.

[222] Ms. Holzman is somewhat vague about the terms and nature of access Tony proposes but she speaks of allowing unrestricted access to Suzette with restricted or supervised access to Richard.

### **The law**

[223] Counsel agree that this case is governed by the variation provisions of the *Divorce Act R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.)*. Spiegel J’s August 10, 2000 order was made in the context of a divorce proceeding. Rayanne was considered to be a child of the marriage at that time.

[224] The provisions governing the variation of an order are found in [section 17](#) of the *Divorce Act*. The relevant provisions are as follows:

S.17 ORDER FOR VARIATION RESCISSION OR SUSPENSION - (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

...

b) a custody order or any provision thereof on application by either or both former spouses or by any other person

(5) FACTORS FOR CUSTODY ORDER – Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

(9) MAXIMUM CONTACT - In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[225] Mr. Chhabra, on behalf of the applicants, submits that, even though the current application is under the *Divorce Act*, the approach to determining what is in the child's best interests should permit the court to consider relevant criteria under the *Children's Law Reform Act, R.S.O. 1990, c. C12*. I agree with this submission. I also agree with Mr. Chhabra's submission that Richard and Suzette's affair is an irrelevant factor in deciding upon such issues as ability to parent.

[226] As stated earlier in this judgment, a case for a change in circumstances justifying a change or variation to Spiegel J.'s order has been met. There is no need to review the evidence here. The sad fact is that all three experts, and even the parties, agree that there has to be a change to the order as Rayanne is a child at risk because of parental conflict.

[227] The matter now to be determined is disposition. What change or variation, taking into account the relevant factors involving Rayanne's best interest, should be made?

[228] Section 24(2) of the provincial legislation (CLRA) sets out useful criteria to be followed in a case such as this. That section directs the court to consider the following:

- (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 be ascertained;
- (c) the length of time the child has lived in a stable home environment;
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education and the necessities of life and any special needs of the child;
- (e) any plans proposed for the care and upbringing of the child;
- (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
- (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

[229] Section 24(2) also indicates that the court is to have regard, not only to the above factors, but to all of the needs and circumstances of the child.

[230] In reviewing the evidence, I have already commented on a number of factors I believe that the law requires that I take into account. I shall briefly review them in relation to the factors set out in Section 24(2) of the CLRA.

- a) Both sides are attached to Rayanne as she is to them. There is little question that all of the parties and Alice love the child and are strongly bonded to her. That love is returned. I accept the expert opinions (including Dr. Berman's) that Rayanne's ties to Phillip are insufficient to act as a determinative factor in this case.

- b) Neither the parties nor any of the three experts involved have been able to determine Rayanne's wishes and preferences. In fact, the evidence indicates that Rayanne has been very clear in stating she does not want to, or at least, will not state a preference.
- c) Rayanne's life has not been stable for years. She has been subjected to the conflict; she has been drawn into the conflict; she has witnessed the conflict. She has witnessed Suzette's depression and Richard's anger. In their quest to minimize Tony's involvement in Rayanne's life, both Suzette and Richard have given very little heed to the effect that their own conduct has had on their daughter. Tony and Alice have been far more conscious about trying to shield Rayanne from the storm. Suzette and Richard have interpreted this, wrongly in my view, as an effort to prevent them from having contact with their daughter. They have been unable and unwilling to take a hard look at their own actions. They are a couple without much introspection.
- d) Either side would be able to provide for the child, at least, in a physical way.
- e) Suzette and Richard's plan for the care and upbringing of Rayanne was not fully developed through the evidence but I am certain that, from a physical point of view, they would care for Rayanne adequately. It is on the emotional side that I have grave concerns. Suzette and Richard, notwithstanding the fact that they offer some limited access to Tony, really want him out of Rayanne's life. They dislike him intensely and feel that he can offer very little to their daughter. Even if Tony has some limited access, it is my view that Suzette and Richard will do their utmost to continue their campaign to oust Tony from Rayanne's life. I find that their conduct towards Tony has been alienating. The only reason that their campaign has not been successful is because Tony has had substantial (equal) time with Rayanne. Without that, I am certain that Rayanne would not have been able to withstand Richard's forceful character. By now, he would have been successful in alienating the child from Tony. Suzette would have gone along with this. Suzette and Richard's plan to minimize contact with Tony, who is important to Rayanne, runs counter to the provision of the *Divorce Act* which states that maximizing contact is a very important factor to be taken into account in deciding custody. Suzette and Richard will not maximize contact. They will alienate the child from Tony, notwithstanding the harmful effect that their conduct is likely to have on her. Suzette, despite the bond she has with Rayanne, is incapable of shielding or protecting the child from parental conflict and pressure.
- f) I am concerned about the stability of the Khan family unit. Suzette seems to be depressed. She does not appear to be an emotionally strong person. She has had suicide ideation. No evidence was presented to indicate that even if Rayanne were to spend more time with her, her emotional health would improve. She is not taking any steps to obtain assistance with her emotional issues.

- g) The last factor enumerated in the CLRA indicated is that of the blood relationship. In this case it is very clear that Suzette and Richard are the biological parents of Rayanne. Tony and Alice are not. Both sides, however, are “psychological parents” to whom Rayanne is bonded. Mr. Chhabra, in his submissions, proposes that the court adopt the blood relationship as the most important factor in the case. At least, he argues, the blood tie factor should be pre-eminent. Based on the law set out below, I disagree with this submission.

### Importance of Biology is Question of Fact in the Best Interests Test

[231] The parental preference doctrine advanced in the Supreme Court trilogy of *Martin v. Duffel*, 1950 CanLII 11 (SCC), [1950] 4 D.L.R. 1, *Hepton v. Maat*, 1957 CanLII 18 (SCC), [1957] S.C.R. 606 and *McNeilly v. Agar*, 1957 CanLII 22 (SCC), [1958] S.C.R. 52 has been replaced by the Court of Appeal decision in *Moore v. Feldstein* (1973), 1973 CanLII 535 (ON CA), 12 R.F.L. 273d.

[232] There is no presumption of law respecting parental rights in custody disputes. The welfare of the child, which is to be considered in its broadest aspect, is the paramount consideration in determining custody. The benefit of a child’s bond to a biological parent is a question of fact to be determined in each case and is encompassed as a factor in the best interest test. The right of a biological parent is thus a secondary consideration to the best interests of the child.

[233] The Court of Appeal in *Moore v. Feldstein*, *supra*, stated it thus at para 48:

“[It] is the duty of the court to view all the circumstances relevant to what is in the interest of the child, including a consideration as to whether the evidence disclosed that the child would benefit from the tie of a child to its mother.”

[234] Ms. Holzman relies on *Moore v. Feldstein*, *supra* to support Tony’s claim for custody. Mr. Chhabra, however, cites cases which review the principles enumerated in the Supreme Court trilogy.

### Analysis

#### Biological Parents’ Status in Custody Applications

[235] The issue of parental rights in custody disputes has undergone a significant change over the years. I shall first describe the movement from the parental preference doctrine to the best interests of the child doctrine. I will then describe each party’s position by summarizing the specific cases on which they rely.

## Parental Rights Doctrine – the Trilogy

[236] Traditionally, in cases involving a custody dispute between biological parents and non-biological parents, the courts were guided by the 1950's Supreme Court trilogy of *Martin v. Duffell*, 1950 CanLII 11 (SCC), [1950] 4 D.L.R. 1, [1950] S.C.R. 737; *Hepton v. Maat* (1957), 1957 CanLII 18 (SCC), 10 D.L.R. (2d) 1, [1957] S.C.R. 606, and *McNeilly v. Agar* (1958), 1957 CanLII 22 (SCC), 11 D.L.R. (2d) 721, [1958] S.C.R. 52 (“the trilogy”). The trilogy emphasized parental rights and held that biological parents were prima facie entitled to custody unless by reason of some act, condition or circumstance affecting them, they were deemed “unfit”.

[237] Mr. Chhabra, for the most part, relies on the parental preference doctrine advanced in the Supreme Court trilogy.

## Departure from Parental Rights

[238] Since the landmark decision of *Re Moores and Feldstein* (1973), 1973 CanLII 535 (ON CA), 12 R.F.L. 273 there has been a discernable movement away from the common law rule as enunciated in the trilogy. The Ontario Court of Appeal in *Moores* regarded the child's welfare as the paramount consideration in a custody dispute between a parent and non-parent. The Supreme Court decision of *Racine v. Woods* 1983 CanLII 27 (SCC), [1983] 2 S.C.R. 173 definitively demonstrates this shift in the law. In that case, a custody award to the foster parents by the trial judge, based on his consideration of the best interest of the child, was upheld. Wilson J., delivering the judgment of the court, did not apply the parental preference doctrine:

This appeal emphasizes once more . . . that the law no longer treats children as property of those who gave them birth but focuses on what is in their best interest (p.174).

[239] The love and care which may be provided by biological parents, however, has become an important factor to be considered in assessing the child's best interests. As Wilson J. further stated in *Racine v. Woods, supra*:

It (the child's tie with its natural parent) is obviously very relevant in a determination as to what is in the child's best interests. But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about (p. 185).

## The respondent's position

[240] The respondent, Tony Kong, who is a psychological parent of Rayanne, relies on the decision of *Moores v. Feldstein* 1973 CanLII 535 (ON CA), 1973 CarswellOnt 156 (Dubin, J.A. – ONCA) to support his claim for custody. In that case the plaintiff mother delivered her daughter to the care of others a few days after the child's birth in the

hopes of reconciling with her husband who did not want the baby. Four years later the mother brought an action for return of the child from the non-parents.

[241] The Court of Appeal found that the trial judge erred in assuming that the child would benefit by being returned to her mother by virtue of their blood relationship, without fully considering the likely effect of such a return on the child. Dubin J.A., writing for the court, held that the best interest of a child is the primary concern in determining custody. The wishes of biological parents must give way to a consideration of the child's welfare. The positive impact of the biological relationship is a question of fact that must be decided in every case and a court is not bound to assume the importance of biological ties of affection.

[242] The court concluded that the welfare of this child would best be served by leaving her in her present happy surroundings with the psychological parents with whom she had lived for four years. The tie of affection of a mother to her child was not the overbalancing consideration in this case. This judgment specifically deviated from the existing case law, which considered the custodial right of biological parents as paramount to all other considerations. The Court of Appeal adopted the equitable approach advocated by the court of Chancery.

[243] *Moore v. Feldstein*, supra, has been consistently cited as the decision marking the movement away from the parental preference doctrine.

#### *Distinguishing Facts*

[244] While the Ontario Court of Appeal viewed "all the circumstances relevant to what is in the interest of the child" (para. 48) and ultimately recognized the custodial right of the psychological parents, the case presents an important distinguishing fact. The court found that giving the child to her biological mother would be placing her in the custody of someone "who would likely be quite a stranger to her (para. 51)." In this case, despite Richard's distance from Rayanne very early in her life, Rayanne has developed a strong relationship with both sets of parents. Neither the biological parents nor the psychological parents would be strangers to Rayanne.

[245] Mr. Chhabra argues in para. 61(b) of his Reply to Respondent's closing statement that Mrs. Moore was a person who "may not have wanted a child" and it was only after separation from her husband that she took vigorous steps to recover her daughter (para. 61f). The Court also found that Mrs. Moore did not have a stable family unit and the child would be a reminder of her marital stress. Contrarily, Mr. Chhabra submits that "there is no evidence to support any position that Richard or Suzette are parents who 'may not have wanted' Rayanne. They believe they would provide Rayanne with a stable and loving home. For reasons set out earlier, this fact alone is not sufficient.

[246] The abolition of the parental rights doctrine was also discussed in the following two Supreme Court cases, cited by Ms. Holzman. These cases also reference *Moore v. Feldstein*, supra.

*K.(K.) v. L.(G)* 1985 CarswellNWT 58 (McIntyre J. – SCC)

[247] The appellant, an unwed mother, gave her infant son up for adoption to a carefully chosen couple a few days after his birth. Approximately two and half months later she sought the return of the child.

[248] The Supreme Court dismissed the biological mother’s appeal holding that the court:

In exercising its *parens patriae* jurisdiction in questions of contested custody, including contests between a natural parent and adoptive parents, must consider the welfare of the child the predominant factor and give it effect in reaching its determination.

[249] The court further stated that while “parental claims must be seriously considered” they must be set aside “where the welfare of the child requires it.” In that instance, the benefits to the child of maintaining ties with his biological mother were outweighed by the maintenance of his present home stability and his existing parental bonds to his adoptive parents.

#### Distinguishing facts

[250] Mr. Chhabra submits that the facts of this case are “so far removed” from the facts of *K.(K.)* that no consideration whatsoever should be had to said case”. In *K.(K.)* the court was influenced by the biological mother’s heedlessness of her parental duties as evidenced by her surrender of the child to adoptive parents. *K.(K.)* is different, in that, the biological mother was a stranger to the child whereas Rayanne’s biological parents are not strangers to her.

*Frame v. Smith* (1987) CarswellOnt 347 (La Forest J. – SCC)

[251] A father brought a civil action against his wife for interference with his access rights. The father based his claim for damages on his common law “parental right” to access.

[252] The Supreme Court at para. 32 stated that in light of developments since the *Children’s Law Reform Act*, “it can be said with some assurance that the concept of ‘parental rights’ has fallen into disfavour.”

#### The Applicant’s position

*Foster v. Allison* [2003] O.J. No. 3691 (Ont.S.C.J.)

[253] The court considered the appropriate custodial party as between a child’s biological/custodial mother, biological father and paternal grandparents.

[254] The court held that the ultimate test in awarding custody is the best interest of the child test. Aston J. reasoned that while “any person” may apply for custody under [section 21](#) of the *Children’s Law Reform Act*, Section 20 of the *Act* and case law both supported the proposition that parents have a preferred status or preferential claim over others.

[255] The court awarded custody to the biological mother finding that the best interests of the child would best be served by this custodial arrangement. While the child had thrived in his past arrangement with the paternal grandparents, a continuation of the stable status quo did not trump the mother’s prima facie right to custody.

### *Distinguishing Facts*

[256] Ms. Holzman submits at page 70 of her closing statement that *Foster* is a parent versus grandparent case and not a case of competing parents. The court also found that the grandparents marginalized the mother’s role and excluded her whereas Tony and Alice were always prepared to share Rayanne with Richard and Suzette (while the reverse is not so).

[257] It is also interesting to note that *Foster* still supports Ms. Holzman’s characterization of the law as it still advances the best interests of the child test. The court in *Foster* relies on [section 20](#) of the *Children’s Law Reform Act* as providing a statutory preference for parents:

Except as otherwise provided in this Part, the father and mother of a child are equally entitled to custody of the child.

[258] This section, however, does not weaken Tony’s claim to Rayanne. The provision states that preference shall be given to the father and mother of a child – it does not state that this preference must only be given to *biological* parents. This section may include psychological parents as well. As stated above, the *Foster* contest for custody was primarily between the biological mother and the paternal grandparents who provided daily care. In the instant case, all parties may be granted preferential treatment within the parameters of section 20.

*Vanderhoek v. Stark*, [1999] O.J. No. 4479 (Aston J. – Ont. Sup Ct.)

[259] A father and maternal grandparents both claimed custody over two young boys whose mother had died. The father was the biological father of one of the children and began living with the mother when the non-biological child was six weeks old. The father demonstrated a desire to assume responsibility for the care of the boys immediately following the mother’s death.

[260] The court found that the father was a parent to both boys, within the meaning of [section 1](#) of the *Family Law Act*, and granted him custody with specific access to the grandparents. Aston J. found that with regard to the specific factors enumerated in [section 24\(2\)](#) of the *Children’s Law Reform Act*, there was no basis to prefer one party over the

other. This equivalency was offset by the fact that Mr. Vanderhoek was a parent (though this factor is not specifically enumerated in [Section 24\(2\)](#)).

I do not accept the proposition that there is any legal presumption in favour of the parent or any heavier onus or burden of proof on the grandparents. Notions of onus or presumption in custody cases have been expressly rejected in cases such as *Carter v. Brooks* (1990), 30 R.F.O. (3d) 53 (Ont.C.A.) and *Gordon v. Goertz* (1996), [1996 CanLII 191 \(SCC\)](#), 19 R.F.L. (4<sup>th</sup>) 177 (S.C.C.).

[261] Aston J. does go on to say that the fact that parents are a degree closer to children than grandparents in the family constellation may be taken into account under the rubric of the “best interests of the child”, even if it is not specifically listed as a factor under [section 24\(2\)](#) of the *Children’s Law Reform Act* (para.7). He notes that parents and grandparents are regarded differently when it comes to responsibilities for raising children. Such is the case with this family. While grandparents played a supportive role, in the minds of all concerned they remained “grandparents”. By stating that parents are one degree closer to children than grandparents, the court does not exclude non-biological parents who may also be as close or closer to children psychologically.

[262] Ms. Holzman submits at page 70 of her closing statement that this case is also distinguishable from the relationships presented by Richard and Suzette and Tony. Not only was this case decided under the *Children’s Law Reform Act* but it was, again, a contest between a biological/psychological parent and grandparents. The case discussed how differing parenting styles did not allow for joint custody. The court also noted the fact that the father who obtained custody wanted to involve the grandparents in the children’s life (para. 16).

*Clapp v. Morin* (1991) [1991 CanLII 8329 \(ON SC\)](#), 82 D.L.R. (4<sup>th</sup>) 353 (Conant, J. – Ont. Ct.)

[263] The biological father and the maternal aunt of an eight-year-old girl each sought custody of the child. The child had lived the first half of her life with her biological parents until she moved with her mother to Belize. The aunt brought the child back to Canada and received an order for interim custody and the child lived with the aunt and maternal grandmother for 21 months. The father had extensive visitation with the child.

[264] The court awarded custody to the biological father, holding that the paramount consideration in a custody dispute is the best interest of the child, an important element of which is the child’s ties to his natural parent. The court further reasoned that the weight placed on these ties and all other factors enumerated in [section 24\(2\)](#) of the *Children’s Law Reform Act* depends on the needs and circumstances of the particular child.

### *Distinguishing Facts*

[265] Mr. Chhabra relies on the court's assertion that "very serious consideration" must be given to blood ties in determining the best interest of a child in the "total sense of that phrase," and courts must thus "exercise caution and prudence in severing the blood tie". However, it is important to note that the court also provided that parental claims, while entitled to serious consideration, must still be set aside if the welfare of the child requires it. Conant J. specifically noted that courts have been prepared to set aside parental claims when it believed the child would not benefit from a blood tie.

[266] Conant J. initially considered the best interests of the child and found that both the father and aunt would provide an equally suitable home to the child. It was only after such equivalency was reached that the biological connection tipped the scale in the biological father's favour.

[267] Ms. Holzman argues at page 70 of her closing statement that this was a *Children's Law Reform Act* decision in which the contest was between a biological father and a maternal aunt. This is distinguishable from the instant case where the court is dealing with variation of a court order whereby two sets of parents were given joint custody/parallel parenting.

*K.E.J. v. D.L.J.*, [2002] A.J. No. 240 (Burrows J.– Alta. Court of Queen's Bench)

[268] The biological father of two young boys had interim custody of the children and now sought permanent custody. The boys' aunt and uncle also sought custody. This custody dispute arose in the context of a divorce application and was thus decided under the *Divorce Act*.

[269] The court awarded custody to the biological father. The court provides, at para. 86, that in the context of a best interests of the child analysis, the authorities indicate that natural parenthood is an important factor. Therefore, in a contest between a natural parent and a legal stranger, the best interests assessment requires that consideration be given to the importance to the child of maintaining the relationship between the child and the natural parent. The court cites *Racine v. Woods* 1983 CanLII 27 (SCC), [1983] 2 S.C.R. 173 which provides that it is the parental tie "as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about."

[270] Burrows J. states that in a non-divorce contest, the natural parent has a priority over a legal stranger and there is a presumption that the child should be in the custody of the natural parent unless the legal stranger can show that the natural parent is unfit.

### *Distinguishing Facts*

[271] This case, however, may have jurisdictional limits. The court notes at para. 85 that the Alberta Legislature has not followed the "significant move away from reliance upon the parental preference of the common law" that has been observed and endorsed by

the Supreme Court (*King v. Low* 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87 at para. 20). Ontario has specifically moved away from the parental rights doctrine.

[272] In addition, even if Burrows J. comments are accepted by this court, Tony is by no means a legal stranger to Rayanne but is a psychological parent. Even if Tony is seen as a legal stranger, Burrows J. noted at para. 90 that where a bond does exist between the child and the legal stranger, the “parental claim” to custody may be outweighed if it can be clearly shown that the welfare of the child requires it.

*Gow v. Woolley* [1984] O.J. No. 758 (Wang Prov. Ct. J.)

[273] A biological mother and non-biological father each sought custody of a three-year-old boy. The parties moved in together when the mother was five months pregnant with the child. The couple also had a biological daughter together. When the parties separated, the boy remained with his mother and the girl with her father. After being informed by the Children’s Aid Society that they were planning to put the boy in foster care, the boy was moved into his aunt’s home with his father and stepmother. The mother sought the boy’s return and planned to move him into her employer’s home with her until she was let go. The gainfully employed father was found to be in “loco parentis” to the boy having shared in the care and support of the child since its birth.

[274] The court cites the Supreme Court parental doctrine trilogy but ultimately awards custody to the non-biological father. The court found that it would be in the child’s best interest to remain in his father’s home “where he can continue to live within a settled and well adjusted family unit” (para. 40).

### *Distinguishing Features*

[275] Ms. Holzman submits that this decision “does not appear to have taken full cognizance of *Moore v. Feldstein*” as it refers back to the outdated trilogy cases that have clearly been distinguished by the Court of Appeal. Wang J. discusses a number of decisions which provide a preference to the biological parents, such as *Martin v. Duffell* 1950 CanLII 11 (SCC), [1950] S.C.R. 737 and *Hepton v. Maat*, 1957 CanLII 18 (SCC), [1957] S.C.R. 606. The court notes at para. 18 that there are a number of cases which do not support this principle and “rely entirely on a determining of what is in the best interests of the child” keeping in mind that biological affection is an important factor in the best interests test.

[276] Ms. Holzman further argues that the case deals with a prejudicial view of the right of custody to an illegitimate child.

### Synthesis

[277] It seems that the cases provided by both parties ultimately conclude that the merits of a custody application must be determined by the best interests of the child and that biological affection is a factor in this test. While there are cases where biology has

factored in more heavily, these were factual determinations based on the specific relationship between parent and child and did not represent the primary factor for determining custody. Mr. Chhabra, for the most part, has provided cases where both the parent and the non-parent would provide an equally suitable home and the court then considered a blood tie to tip the scale in favour of the biological parent. That is not the case here. The blood parents' antipathy towards Tony, in the case at bar, prevents the scale from being tipped in their direction. To remove Tony as a significant person in Rayanne's life would not be in Rayanne's best interest.

### **Decision**

[278] Spiegel J.'s judgment dated August 10, 2000 shall be varied as follows:

- 1) Tony shall have sole custody of Rayanne.
- 2) If Rayanne is residing with Suzette and Richard today, her physical custody shall be transferred to Tony forthwith. Should Tony require the assistance of the police, then the Durham Regional Police or any other police force having jurisdiction shall assist him in the transfer.
- 3) If Rayanne is attending school today, Tony is to notify forthwith the school authorities that he is Rayanne's custodial parent effective forthwith. Tony shall make appropriate arrangements to pick Rayanne up from school today. Should Tony require the assistance of the police, then the Durham Regional Police or any other police force having jurisdiction shall assist him.
- 4) Suzette and Richard shall have access to Rayanne on alternating weekends from Friday after daycare to Sunday evening at 6:00 p.m. when Rayanne is to be returned to Tony's home. This alternating weekend access shall begin on Friday, November 16, 2007.
- 5) Suzette and Richard shall have access to Rayanne for alternating two-week periods during Rayanne's summer holidays. The access shall begin on the first Friday of summer school vacation at 5:00 p.m. and continue on an alternating basis. Rayanne, however, shall be residing in her principal residence with Tony (and Alice) five days prior to the beginning of school. If this requires a change in the alternating two-week schedule in any summer period, then it must be taken into account. The changeover shall occur on Fridays at 5:00 p.m.
- 6) With respect to other special periods of access, they shall continue as they have been pursuant to the order of Spiegel J. and the recommendation of Dr. Benjamin. By special periods I refer to Christmas, Thanksgiving, Easter, Mother's Day, Father's Day and Rayanne's birthday. I do not include either

Phillip's birthday or Ryan's birthday in the list of special days. They can be celebrated with Rayanne either prior to or after the event itself.

7) Access and residential time is exclusive. Unless invited, in writing, there shall be no interference in Rayanne's time with each set of parents by the other.

8) Richard and Suzette may telephone Rayanne or, Rayanne may telephone them, once a week on a Wednesday evening between the hours of 7:00 p.m. – 7:30 p.m.

9) Each set of parents shall keep the other set informed about major events in Rayanne's life. This may be by e-mail or letter.

10) Suzette and Richard shall be entitled to receive copies of Rayanne's school reports. If the reports are not sent directly by the school, Tony shall mail a copy to Suzette and Richard.

11) Suzette and Richard may attend a school function such as Parents' Night but only if they can arrange an appointment time different from Tony and Alice's time.

12) Suzette and Richard are prohibited from discussing any aspect of this legal case with Rayanne. They are also enjoined from showing Rayanne any portion of this decision.

[279] Before coming to the above decision, I considered the idea of limiting Richard's access and having it supervised unless and until he and Suzette attended counselling and unless Richard took an anger management course. However, upon considerable reflection, I am of the view that neither counselling nor courses such as anger management will have much effect. In addition, supervised access for Richard alone would be cumbersome, if not unworkable, given the fact that Suzette's access would not be supervised.

[280] I am most concerned that, even after all the expert intervention and, now, court intervention in this case, Rayanne may continue to be subject to the pressure she has lived with for most of her life. By changing the custody order and giving Rayanne the assurance that she has one principal home, I can only hope that, as she grows older, she will find the strength to deal with some of this pressure. Access to Suzette and Richard has been allowed as the evidence indicates that Rayanne has a strong bond with them and would suffer some emotional harm if access were terminated. Suzette and Richard must, however, understand that, should their campaign to alienate Rayanne from Tony (and Alice) continue, they run the risk of having a court sever all of their ties to Rayanne.

[281] It is the hope of this court that Rayanne will now have a more peaceful existence than she has had during her young life. Counselling for her, in order to help her deal with the parental situation, should be strongly considered.

[282] If counsel have any questions about access as set out in this judgment, I may be spoken to by arranging an appointment through the trial co-ordinator.

[283] Costs submissions may be made in writing. They should be no longer than 5 double spaced pages each and contain any bills of costs and offers to settle. Ms. Holzman should deliver her submissions by no later than November 16, 2007. Mr. Chhabra shall deliver his submissions by November 23, 2007. Reply, if any, by November 28, 2007.

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Justice C. Nelson

**Released: November 5, 2007**