Considering Kaplanis: Who's Your (Sole) Daddy?[1]

On January 31, 2005 the Ontario Court of Appeal released its decisions in *Kaplanis v. Kaplanis*[2] and *Ladisa v. Ladisa*[3]. Although each is less than six pages, both have had an immediate impact on the bar and various interest groups, which have both praised and criticized the rulings.[4]

This paper summarizes all of the Ontario cases that have considered either *Kaplanis* or *Ladisa* up to November 10, 2005 with a view to answering the two questions:

1. Are Ontario courts continuing to make joint custody orders?

2. Are the cases consistent with the principles laid down by the Ontario Court of Appeal?

My hope is that by analyzing the caselaw, we can identify some fact patterns and principles that practitioners can use in assessing whether their cases are destined for joint or sole custody in the event a trial is required.

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[1] Brahm D. Siegel of Nathens, Siegel LLP, November 2005.

[2] *Kaplanis v. Kaplanis* (2005), 194 O.A.C. 106, (2005) 10 R.F.L. (6th) 373, [2005] O.J. No. 275, (2005), 249 D.L.R. (4th) 620, 2005 CarswellOnt 266 (Ont. C.A.) (hereinafter "*Kaplanis*").

[3] *Ladisa v. Ladisa* (2005) 193 O.A.C. 336, (2005) 11 R.F.L. (6th) 50, [2005] O.J. No. 276, 2005 CarswellOnt 268 (Ont. C.A.) (hereinafter "*Ladisa*").

[4] See, for example, News Release, "Fathers Are Capable Too: Parenting Association" (February 1, 2005) which states "The decision flies in the face of social research over the last decades" and an article by Pamela Cross entitled "Ontario Court of Appeal Decision Sets Limits on Joint Custody", Ontario Women's Justice Network (March 18, 2005) which calls the case "positive".

BACKGROUND

Kaplanis

The parties separated after a tumultuous three and a half year marriage. Their daughter was three months old at the time. Although the father was charged with uttering a death threat at separation, it was later withdrawn after the wife swore an affidavit stating she was not a victim of violence and it would be best for the child if the father were allowed to return home. The father never did, however, and attempts at counseling were unsuccessful.

At trial the father sought joint custody, the mother sole. Neither had any expert evidence or assessment report on which to rely.

The trial judge was not impressed with the wife's evidence, which was essentially that the parties could not communicate without screaming at each other. MacDonald J. found it to be nothing more than an attempt to buttress her claim for sole custody and said that it was not in her interests to try to communicate and cooperate with the husband as this would only weaken her case for sole custody.[5] Citing her own acknowledgment that the father was "a good father" and concluding that awarding the mother sole custody would likely minimize his influence and contact in the child's life, she ordered joint custody, emphasizing both parties' "long-standing obligation and responsibility to enhance

[5] Para. 7.

[the child's] relationship with both parents".[6] She also ordered them to attend counseling to improve their communication skills and imbued such counselor with the power to decide any manner about which they could not agree.

On behalf of the Court of Appeal, Weiler J.A. found the trial judge erred in making the joint custody order and the order for counseling. In regards to joint custody, she acknowledged that while family law cases are "fact-based and discretionary"[7] there must be "evidence of historical co-operation and appropriate communication"[8] between the parents before joint custody is ordered. She further held it was an error for the trial judge to order joint custody "in the hope" that it would improve the parties' communication skills. In an already much-quoted passage, she wrote:

> "The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental needs, communication is even more important. In

[6] *Ibid*.

[7] Para. 9.

[8] Para. 2.

> this case there was no evidence of effective communication. The evidence was to the contrary."[9]

The Court allowed the mother's appeal and awarded her sole custody of the child.

Ladisa

The facts in *Ladisa* were very different. In this case, the parties were married for sixteen years and had three children, 16, 13 and 9. From separation to trial, the eldest moved back and forth between her parents. At the time of the trial she was living with the father. The other two remained in the mother's primary care and the father had regular access.

After mediation failed, an assessment by the Office of the Children's Lawyer ("OCL") recommended joint custody which the trial judge ordered. The mother appealed but lost. Weiler J.A. again wrote the decision. This time she deferred to the trial judge and rejected the mother's position that joint custody was not appropriate because the parties were repeatedly in conflict. She upheld the trial judge's finding that the parties could and did communicate effectively and put the children's interests before their own. As proof, she referred to the following passage from the trial decision:

[9] Para. 11. It is interesting the court wrote it was "unnecessary to address this court's prior jurisprudence regarding the issue of joint custody to resolve the issue of custody in this appeal" as *Baker v. Baker* (1979), 8 R.F.L. (2d) 236, 23 O.R. (2d) 391 (C.A.) and *Kruger v. Kruger* (1979), 25 O.R. (2d) 673, 11 R.F.L. (2d) 52 (C.A.) have long stood for the proposition that joint custody should only be ordered in cases where the parties can and will cooperate to promote the children's best interests.

> "Despite the intense conflict between these parents, in emergencies and when the parents have had an opportunity to consider the real interests of their children, they have behaved appropriately, even in each other's presence. Some examples of this are the following. When Alana had her emergency treatment for her fall, the parents were able to work out their differences, although with some sadness on the part of Mr. Ladisa, as to who would stay with Alana and who would care for the other children. When Jordan was adamant that he needed the assistance of his father with his go-car project, the parents were able to agree on a resolution in the interests of their son. When the parents have been forced together because of their children, such as at parent-teacher meetings, school functions and sports activities, they seem, with perhaps one or two exceptions, to have been able to behave appropriately. According to the testimony of third parties, including teachers, a former hockey coach, other hockey parents and neighbours, the parents have always acted appropriately when together towards each other and towards their children. Their conflict has not been obvious to the observation of these third parties. When the children have forgotten some item at the house of the other parent, arrangements to fetch the item or sports equipment have been worked out. This accommodation even includes the question of the children's confirmation last year. The disagreement was not whether the children should be confirmed but when they should be confirmed that seemed to have some financial consequences."[10]

The Court therefore upheld the trial judge's decision with respect to joint custody, dismissing the mother's appeal on this point.

Summary of Principles

Kaplanis and *Ladisa* are important because they confirm there is no automatic fall-back or default position in favour of joint custody in Ontario. We now have clear direction that judges, assessors and arbitrators must no longer base their decisions on how they think the parties should or can act. Instead, orders for joint custody must be based on evidence that the parties do in fact

[10] Para. 12.

communicate effectively. Because, as the Court of Appeal says, each case is fact-based and discretionary, the evidence may come in the form of a custody/access assessor, teachers, co-workers, friends or any other service provider or coach of the child and should point to the parents' ability (or lack thereof) to parent the child, work together, and history of putting the child's interests ahead of their own.

What is also clear is that acknowledging that the other parent is competent does not mean that the acknowledging parent is consenting to joint custody or that it should be ordered on that basis. On the other hand, alleging there is repeated conflict in regards to the children does not guarantee that a sole custody order will follow. Rather, past parenting, both during and after cohabitation, is far more important. If there is evidence of historical cooperation and appropriate communication between the parents, joint custody may be appropriate. If not, sole custody may be more appropriate.

With this guidance from the Court of Appeal, how then have the post-*Kaplanis/Ladisa* cases handled disputes over joint versus sole custody? Is joint custody even still being ordered? Under what circumstances? Assuming our lower courts are taking heed of the Court of Appeal's need to base their decisions on hard evidence as opposed to idealized versions of how well the parents can behave, what kind of evidence is being proffered and accepted as sufficient to either make or break a request for joint custody?

In the first ten and a half months from the time they were delivered, no less than fifteen cases have considered *Kaplanis* and/or *Ladisa*. Instead of discussing them in chronological order, I thought it would be more useful to group them into three categories: consistent, inconsistent and neither consistent nor inconsistent. Consistent cases are those in which the facts and decision dovetail easily with the principles in *Kaplanis* or *Ladisa*. Inconsistent cases consist of judgments that I could not, in good conscience, reconcile with the spirit and essence of *Kaplanis/Ladisa*. Finally, cases in the third category may contain elements of consistency and inconsistency or which neither add nor detract from the debate and would not be ones on which a litigant would rely in seeking or opposing joint custody.

All told there are twelve consistent cases, one inconsistent case and two that are neither one or the other. Below I have tried to provide a flavour of each, in chronological order, along with some comments.

THE CONSISTENT CASES

1. *Griffiths v. Griffiths*[11]

Released one month after *Kaplanis* and *Ladisa*, this decision by D. Di Giuseppe J. of the Ontario Court of Justice in Fort Frances involved a six-year marriage with two children, age six and four. As the mother had been the primary caregiver, the only issue was whether the parties would have joint

[11] *Griffiths v. Griffiths*, [2005] O.J. No. 3090, 2005 ONCJ 235 (Ont. C.J.) (hereinafter "*Griffiths*").

custody or the mother would have sole. There was no assessment. In this first post-*Kaplanis* case, Di Giuseppe J. ordered joint custody.

The flashpoint for the parties' dispute was the mother's separation to go and live with in a same-sex relationship. The father was very upset although the court noted his anger "abated" over time. The court also found substantial evidence that since the separation the parties were able to communicate and work together in the children's best interests. Specifically, the judge highlighted that access had proceeded without incident, that they were able to work out the initial living arrangements post-separation without incident and that agreements regarding extended access had occurred without problem. The judge also noted that the husband had not interfered with the wife's day-to-day decision-making, that the parties had agreed counseling would benefit the children and that the wife had listened to and dealt with his concerns when one of the children came home with bite marks on his arm. The court concluded that the above were all "positive interactions" which showed, in the absence of any significant conflict, that the parents can, could and did communicate and subordinate their interests to do what is best for their children.

Two interesting points emerge from this decision. First, the judge referred to the fact that the husband assumed some of the family debt as a "positive interaction" justifying joint custody. While neither *Kaplanis* nor *Ladisa* specify what kind of cooperation the parties need to show to justify joint custody, one

would have thought it would be evidence limited to cooperation in regards to parenting. This case, however, seems to make the link that cooperation in regards to financial matters is relevant to an analysis of whether the parties can and do effectively communicate in regards to parenting issues.

The second point is the court concluded that the filing of temporary Minutes of Settlement was also a "positive interaction". I strongly disagree with this statement and suggest it be approached with caution. The simple filing of temporary Minutes, in and of itself, does not indicate the presence or lack of cooperation with respect to joint custody. Litigants settle their cases on a temporary basis for numerous reasons and therefore before an inference is made like this, the context in which the Consent was signed should be examined. For example, a motion for an order that is unreasonably opposed until the last minute by a stubborn litigant bent on making life hard for the moving party is very different from a motion that is settled after substantial give and take and compromise from both sides.

Nonetheless, this case is helpful. The court carefully examined all the facts, found not only a lack of evidence of disagreement but many facts on which to base there has been evidence of communication and concluded that the "hallmarks of deeply imbedded conflict were not present"[12]. It also shows that while some measure of conflict will always be present (in this case, in relation to

[12] Para. 23.

the husband's anger at the wife's leaving him for another woman), this does not, in and of itself, mean that joint custody cannot and will not be ordered.

2. *Malcolm v. Vassell*[13]

On March 10, 2005, Mr. Justice Spence of the Ontario Court of Justice in Scarborough released this decision which is helpful primarily because it shows how little evidence is required in order to dispense with a request for joint custody when the requesting party has been out of the child's life for a lengthy period of time – in this case three years.

In *Malcolm*, the child was born shortly after the parties ceased living together following two years of cohabitation. Other than one day at the hospital at the time of birth, the father chose not to see his son who was now three. Spence J. concluded that the father's inaction and past hostile behaviour towards the mother were sufficient to deny him access until he produced further and better evidence. Sole custody was ordered to the mother.

Interestingly, in finding the presence of "hostility, anger and non-communication", the presence of which suggested that a joint custody order would only be "a recipe for further and serious acrimony"[14], the evidence was rather slim. The mother testified that during telephone conversations the father

[13] *Malcolm v. Vassell*, [2005] O.J. No. 1034, 2005 ONCJ 77 (Ont. C.J.) (hereinafter "*Malcolm*").

[14] Para. 7.

would speak to her with "considerable hostility"[15]. She also said that when he was in the presence of her family and discussions did not go his way, he would become angry "very quickly"[16]. With respect, one would hope that more and better evidence would be necessary to support a conclusion of a hostility, anger and non-communication. However, perhaps given the father's choice to not be a part of the child's life for so long, there was a paucity of evidence dealing with the parties' interactions.

Another interesting point is in the court's finding that the father acted in a hostile and inappropriate way, Spence J. pointed to behaviour he exhibited in exercising access to a *previous* child which occurred at a supervised access center a few years earlier. He also referred to an anger management course that another court in a *separate* proceeding ordered him to take. It is hard to see how these examples constitute evidence of the parties' inability to parent cooperatively since they did not even involve the mother.

3. *Barry v. Morgan*[17]

In this second case from Mr. Justice Spence, both parties sought sole custody of their two children, age seven and five. In the alternative, the father sought joint custody.

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[15] Para. 5.

[16] *Ibid*.

[17] *Barry v. Morgan*, [2005] O.J. No. 1796, 2005 ONCJ 146 (Ont. C.J.) (hereinafter "*Barry*").

The parties had an on-again, off-again relationship until May 2000 when they separated for the final time. The mother brought a motion for sole custody on a summary judgment basis. The father argued there was a genuine issue for trial and that the mother's motion should be dismissed.

Spence J. found for the mother and ordered sole custody on a summary judgment basis. He relied on the father's own testimony which consisted of his having nothing good to say about the mother's parenting, his calling the children's aid society and falsely alleging that the mother's father beat up the children. In light of the father's dim view of the mother's parenting, the court wondered why he would want to co-parent with her in the first place:

> "And yet, in spite of all the foregoing, Mr. Barry makes an alternate claim for joint custody. How am I able to reconcile that claim with these facts? How am I able accept as meritorious his assertions of bad parenting and abusive behaviour by the mother when, at the same time, Mr. Barry argues that there is a genuine claim to be made at trial for joint custody? In my view, those two positions are not reconcilable, for joint custody necessarily implies competent parenting by both spouses. However, Mr. Barry argues that not only is Ms. Morgan not a competent parent, but that she is a terrible one, plain and simple".[18]

The decision is helpful because it shows the care one must take in raising allegations about bad parenting by the other side. As this case shows, the court may conclude the allegations themselves establish no basis for effective communication or co-parenting and create a "poisoned environment"[19] in which

[18] Para. 15.

joint custody is not possible. Thus, since by default one party must be awarded sole custody, it is possible that the "winning" parent may not be the same person who made the complaints about the bad parenting.

4. *Wood v. Wood*[20]

In this decision released by Mr. Justice Glass on April 8, 2005, the mother was the primary caregiver of the parties' two children, age 7 and 4, since the separation. The father wanted equal access and joint custody. While the mother initially agreed to joint custody she changed her claim in the middle of the case to sole custody. An assessor wrote a report recommending joint custody but changed his testimony at trial, recommending sole custody to the mother. The mother was awarded sole custody. The father received alternate weekend access, one overnight a week and holiday/summer access.

The case is helpful because it involved evidence of cooperative and non-cooperative behaviour by and between the parents and thus reflects the struggle courts are going to be faced with in determining whether joint custody is appropriate. On the whole, in this situation the evidence pointed more towards a non-cooperative relationship. Despite the fact the father was actively involved in the children's primary care prior to separation and the couple did not have a volatile marriage with extreme conflict, the court found he was less focused on

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[19] Para. 17.

[20] *Wood v. Wood*, [2005] O.J. No. 3691 (Ont. S.C.J.) (hereinafter "*Wood #1*").

the children than the mother when there were disagreements. He also tended to blame her more for the separation and refused to accept blame himself.[21] In particular, the judge was influenced by dozens of emails between the parties which established that both parents were uncooperative with each other when it came to any difference of opinion regarding the children.[22]

> "I do not take [the] observations [in the assessment report] to mean that these parents are not fit persons for the children; rather, the observations of stubbornness between the parents are simply obvious recognitions of circumstances that have existed. It is evident to me in reading the e-mail exhibits that have been filed that at times one could conclude that if one parent recommended one thing the other parent would recommend something else…I am concerned that this couple would continue to struggle to make joint decisions on a day-to-day upbringing of the children. If that is the case, then joint custody could only be ordered in an exceptional circumstance. I do not find this to be an exceptional circumstance."

This case is consistent with the principles in *Kaplanis* and *Ladisa*. Although both parents were competent, there was more than enough evidence showing they regularly battled in regards to children's issues. This was rightly regarded as more important than what the assessor recommended (assuming his opinion carried any weight given his change of recommendation in the middle of the trial) and the fact that the wife initially agreed to joint custody. The judge focused on the heart of the inquiry, namely, whether the parties had in fact worked cooperatively together and concluded that they had not.

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[21] It probably also did not hurt that although she was not the primary parent at the time of separation, after separation the mother was the primary caregiver until the father unilaterally kept them, resulting in an emergency motion at which time Magda J. ordered temporary joint custody with primary care to the mother and alternate weekends to the father: para. 16.

[22] Para. 18.

5. *St. Pierre v. St. Pierre*[23]

In this motion to vary, the mother tried to change the parties' 2002 joint custody order to sole custody. The 2002 order provided that the two children, two girls now 4 and 6, shall spend three days a week with their father and four days with their mother. The mother genuinely believed there was a power imbalance between them and that she was a victim of verbal and emotional abuse during cohabitation. She asked for sole custody and a change to the schedule.

Mr. Justice Aston agreed with the father and dismissed the motion. He found the children were thriving, there was no evidence of friction involving either child and a history of more than three years from which to conclude this was not a case of ordering joint custody "in the hope it will work".[24] He acknowledged the mother's anger and sense of victimization but found her reactions and feelings to be more a reflection of her own insecurities, lack of self-esteem and inability to assert herself, traits that went back a time long before she met Mr. St. Pierre.

This case is helpful because it provides a blueprint for how a joint custodial parent can successfully defend a motion to vary. Aston J. found the

[23] *St. Pierre v. St. Pierre*, [2005] O.J. No. 1736 (Ont. S.C.J.) (hereinafter "*St. Pierre*").

[24] Paras 18 & 59.

father's testimony to be more "rational, reasonable and believable"[25] whereas the mother's anger "burst like a dam during cross-examination".[26] The father never yelled at the mother nor made any disparaging remarks about her, even when she would jab in the chest with her finger. In mediation he responded calmly when provoked and sought an amicable resolution even after starting court proceedings. He was contrite about the separation and arranged to see a counselor about his past behaviour. He provided an enormous amount of detail about his involvement with the children and refused to display hostility even when egged on by his in-laws. He even voluntarily increased his child support when his income increased!

On the other hand, the case is somewhat unhelpful in terms of the result. While Aston J. retained the joint custody label, he ordered the mother shall be entitled to make decisions regarding the health, education or general well-being of the children in the event the parties cannot agree, which of course is contrary to the essence of joint custody. However, in the parties' 2002 Minutes of Settlement, the father agreed the mother would always have final say and confirmed in this proceeding that he consented to it being included again. It would have been interesting to see how this case would have played out if the father had challenged the mother's authority on a few issues since it is clear the court favoured his demeanour, personality and attitude towards cooperative parenting.

[25] Para. 29.

[26] Para 20.

6. *Rockefeller v. Rockefeller*[27]

This is another case where a trial judge awarded joint custody on a final basis over the objection of one parent. Both parties agreed the mother would continue to have primary residence of the parties' eight-year old child. The father, however, wanted joint custody while the mother wanted sole.

In a relatively short decision, Rady J. was not persuaded that there was a lack of cooperation between the parents that would make joint custody inappropriate. Very little detail about the parents' relationship or the parenting history was provided which may, at first blush, make one wonder why this case is helpful. However, it is precisely for that reason that it is helpful. Simply put, it is not sufficient to merely allege lack of cooperation. One must prove to the court that such failure to cooperate exists and do so in meaningful ways relevant to the parties' relationship or parenting history. The mother's failure to do so in this case meant the court was free to conclude there was no reason why joint custody should not be ordered. The simple citing of various "concerns" did not convince the court joint custody was not appropriate; instead, the court labeled her alleged concerns as "tactical rather than substantive"[28].

[27] *Rockefeller v. Rockefeller*, [2005] O.J. 1736 (Ont. S.C.J.) (hereinafter "*Rockefeller*").

[28] Para. 11.

7. *Sidky v. Sidky*[29]

Released on May 9, 2005, this second decision by Rady J. involved a four and a half year marriage, two children, age 5 and 3, and, as in *Griffiths* and *St. Pierre,* a father successfully obtaining joint custody over the objection of a mother seeking sole custody.

As was the case in *Wood*, there were elements of cooperation and non-cooperation. In terms of the latter, the mother took the children to a shelter while the father was out of town and did not let him see them until a temporary order was in place. She alleged that during the marriage he belittled her, called her names, controlled her and refused to speak to her for long periods of time, all of which he denied.

The court concluded that the marriage was an unhappy one, that the father was "unpleasant and unkind" and that the mother's perception of her treatment by the father causes her to "react negatively, so much so that she cannot accept that he is a good parent"[30]. This, however, did not stop the judge from focusing on the positive aspects of the parties' interactions and ordering joint custody accordingly. The court noted they joined forces to refute allegations by the children's aid society that the children had been abused, spoke often about the children's schedules, shared their car seats and agreed their daughter would attend French immersion school. As in *St. Pierre*, the judge found the children

[29] *Sidky v. Sidky*, [2005] O.J. No. 1844 (Ont. S.C.J) (hereinafter "*Sidky*").

[30] Para. 19.

were "thriving" and minimized the mother's allegations that the father was controlling, finding instead that his behaviour would reasonably be construed by many as "helpful".[31]

This case illustrates that joint custody will continue to be ordered in the post-*Kaplanis* era and that it can be ordered even in cases where one party complains of abusive and controlling behaviour at the hands of the other. It also shows the amount of evidence required to conclude that a foundation of cooperation exists does not have to consist of the kind of superhuman behaviour exhibited by the father in *St. Pierre.* Finally, it reflects that post-separation conflict is more relevant to the analysis than conflict that occurred before separation. To put it mildly, although it sounds like there was a substantial amount of conflict during the marriage there was no evidence of any serious conflict post-separation and the parties worked well enough together to allow the judge to conclude there was a history of an arrangement that approximated joint custody.[32]

8. *Lalonde v. Lalonde*[33]

Released on May 11, 2005 by the Honourable Mr. Justice Di Tomaso, this case is consistent with *Kaplanis* and *Ladisa* in that it ordered sole custody to the

[31] Para 18.

[32] Para 42.

[33] *Lalonde v. Lalonde*, [2005] O.J. No. 2008 (Ont. S.C.J.) (hereinafter "*Lalonde*").

mother where there was no history of meaningful cooperation between the parties.

The father lived in British Columbia and wanted joint custody and increased access. The mother lived in Ontario and had been the primary caregiver of the parties' twelve-year old child since birth. The parties separated when the child was one year old.

In 1997, the father was charged for uttering death threats against the mother. He was found not guilty at trial. The mother later moved to Barrie without informing the father. During 1998 and 1999 the father had no access to the child because he refused to disclose where he was living. In 2000, he moved to British Columbia and had not seen the child much since. He also failed to pay any child support from 1997 to 2003, citing his inability to know where the mother was living.

Even though the parties re-established contact in 2003 and produced some positive steps in regards to access, Di Tomaso J. found this was insufficient to justify joint custody. Pointing to the lack of historical cooperation, he noted the parties had not been able to communicate effectively with each other until recently and then only regarding access which still remained outstanding. He observed that the father had no parenting plan and his evidence consisted only of his own needs. In awarding the mother sole custody, he described the father's

approach "self-centered and ill-conceived"[34] and emphasized the quintessential aspect of joint custody:

> "Joint custody is born out of a willingness by the parties to set aside their personal differences and work together in the best interests of the child. Joint custody contemplates genuine communication between the parties in the spirit of co-operation. Real and sincere dialogue is necessary to achieve a clear understanding of the role each party is to play in raising the child with that child's best interests at heart."[35]

9. *Sterling v. Sterling*[36]

The facts in this case are those we used to see result in an order for joint custody but which, it is submitted, we will be seeing far less of in the future. Three children, age 7, 9 and 11, were born to the Sterlings, who, in 2002 agreed to an order for joint custody with rotating alternating weeks for each parent. One year later the father brought a motion seeking to change not only the custodial label but the visitation so that the mother received alternate weekends and one night a week. While at the commencement of the trial the mother simply sought the status quo to continue, in the middle she too asked for sole custody.

The Sterlings argued about anything and everything: the transfer of the children's items from one home to another, what clothes they could take to each home, the location of their busing, who could claim the primary residence for tax purposes, the choice of doctor, medical testing, communicating medical

[34] Para. 37.
[35] Para. 24.

[36] *Sterling v. Sterling*, [2005] O.J. No. 1936 (Ont. S.C.J.) (hereinafter "*Sterling*").

information, exchange of their medical cards, activities that fell on the other parent's time, overholding of time, how holiday time was shared, telephone contact and whether the children should have counseling.

The assessor saw both parties as equal contributors to the problem, finding that neither appeared to take real responsibility for the strain their children were under:

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

Despite these conclusions, he recommended joint custody. The court rejected this recommendation and ruled that the father should have sole custody for various reasons. First, he had a far greater respect for the mother's parenting capacity than she had for his. Second, as between the two parents he was the one more likely to support the children's relationship with the other. Third, the mother demonstrated worse judgment in her conduct relating to the children and showed less insight into how her conduct negatively impacted on the children.

This case shows that where both parents suffer from insight, good judgment and/or stellar parenting skills, if the evidence clearly shows a high level of conflict one parent will get decision-making authority in order to halt the conflict and ensure there is little left to fight about in the future. I submit it also reflects the

beginning of the end for assessments that recommend joint custody in high-conflict cases as these will most certainly now come under attack as being inconsistent with the principles in *Kaplanis* and *Ladisa*.

10. *Testa v. Basi*[37]

Released on July 13, 2005 by Justice Aitken, this case involved the not uncommon situation where both parents agree the child will live primarily with the mother but disagree as to whether they should have joint custody.

The mother acknowledged that the father was competent and there were no problems with access. Her concern was that based on their history she would not be able to co-parent with him when issues would arise. The court agreed and ruled that the mother should have sole custody.

The result is consistent with *Kaplanis/Ladisa* given the court found that the parties' relationship was characterized by the court as "tumultuous from the beginning"[38]. Disagreements and arguments were the "normal fare", resulting in "heated fights" and "abruptly terminated visits". No pattern of civil, constructive communication ever got established.[39]

[37] *Testa v. Basi*, [2005] O.J. No. 3054 (Ont. S.C.J.) (hereinafter "*Testa*").

[38] Para. 71.

[39] *Ibid*.

Aitken J. focused on various aspects of the father's personality. First, she did not appreciate that he portrayed himself in a "glowing light" as the person who always acted reasonably, beyond reproach and even victimized. She found his evidence lacking in balance and carefully crafted to justify a particular outcome in the litigation as opposed to an accurate reflection of reality.[40]

The court honed in on the way he spoke of the mother in his testimony. She found his language "negative" and "derogatory" and that he was inclined to see difficulties in his life as caused by others. He tended to react angrily when things did not work out as he would like and had difficulty understanding and accepting the valid needs of others. He also had difficulty accepting responsibility for helping to create the current circumstances and showed a lack of insight into the role his attitudes and behaviour played in fostering the ongoing dispute.[41] In light of the above, the court found that joint custody would only create a forum for "on-going bickering, arguments and tension"[42] and that the only sensible option was for the mother to have sole custody.

The father, who acknowledged the parties did not get along, sought an order for joint custody based on a parallel parenting model, wherein decision-making responsibility on major matters affecting a child's welfare is divided between the

[40] Paras. 2 & 3.

[41] Para. 56.

[42] Para 71.

parents. This model was rejected by the Court of Appeal in *Hildinger v. Carroll*[43] for similar reasons, namely, the parties also had a tumultuous relationship, the father's hostility towards the mother infected almost every aspect of the child's upbringing and since there were no competency issues with the mother there was no reason to carve up decision-making. Aitken J. had little trouble adopting this reasoning to *Testa v. Basi*, making it the first post-*Kaplanis* case to reject a request for joint custody based on parallel parenting. My own view is that while it is still a viable option where the parties are uncooperative, if they are *extremely* uncooperative and one party is competent, the chances of a joint custody order being imposed are similarly extremely slim.

A second and final note is that the father retained a psychologist on his own to observe and report on his interactions with the child. The court found this report be of very limited weight due to its one-sidedness and the fact that there was no dispute regarding the father's ability to care for the child and the child's comfort level with the father.[44]

11. *Habel v. Hagedorn*[45]

As in *Testa v. Basi*, the court in this case found that despite positive access visits between father and child, the mother should have sole custody. The court

[43] *Hildinger v. Carroll*, [2004] O.J. 291 (Ont. C.A.).

[44] *Testa*, supra, para. 47.

[45] *Habel v. Hagedorn*, [2005] O.J. No. 3556 (Ont. C.J.) (hereinafter "*Habel*").

found the father's method of communication to be "abusive, sarcastic, accusatory and bullying."[46] He also took the child to the hospital emergency ward without justification and reported her to the children's aid society, two things McSorley J. noted that parents who are able to communicate effectively and work together cooperatively for the benefit of their children do not do.[47] He had no interest in sharing information with the mother although he acted as though he was entitled to every bit of information from her.[48] In addition, the court pointed to several disagreements the parties had had since the child was born, including whether the mother should have the child or not, whether she should have a midwife and what the child's name should be. The father even went so far as to call the child one name (Jonathan) while the mother called him another (Nathan)!

One helpful item in this case is the following succinct summary of the principles in *Kaplanis* and *Ladisa* as to when joint custody may be appropriate:

> "According to the principles in *Kaplanis v. Kaplanis* and *Ladisa v. Ladisa*, joint custody may be appropriate in three main types of cases:
>
> - An order for joint custody works best when the parents agree to it, although such agreement is not a prerequisite to ordering joint custody
>
> - Joint custody may also be appropriate where neither parent has disentitled himself or herself to custody and where there is a positive history of co-operative parenting and effective,

[46] Para. 33.

[47] Para. 33.

[48] Para. 29.

appropriate communication between the parents with respect to their child or children.

- Finally, joint custody may also be ordered to preserve a parent's relationship with the child or children in cases where the parent who is the primary caregiver objects to joint custody without just cause, particularly where there is a risk that the objecting parent will try to marginalize and limit the other parent's involvement with the child."[49]

Based on the cases thus far, a parent seeking joint custody seems to have best chance of success by arguing point #2, namely that there is a sufficient basis for co-operative parenting and effective, appropriate communication with respect to the children. In fact, in all three cases where joint custody was ordered over the mother's objection (*Griffiths*, *St. Pierre* and *Sidky*), the judge found for joint custody on these grounds.

12. *Wood v. Wood*[50]

This case, released by Mr. Justice Quinn in St. Catharines on September 6, 2005, is helpful in that it reflects that even where the animosity between the parents is high, joint custody can be and still is being awarded provided there is no substantial disagreement in regards to the children's issues.

The parties settled their first case in 2003 on the basis of joint custody and primary residence of the children, then 11, 9 and 7, with the mother. One year later, the father brought a motion seeking a change of the children's residence

[49] Para. 7.

[50] *Wood v. Wood*, [2005] O.J. No. 3691 (Ont. S.C.J.) (hereinafter "*Wood #2*").

and for sole custody. The Office of the Children's Lawyer, who in their 2002 report noted a high level of animosity, declined to get involved a second time.

At trial the judge found the level of animosity had not abated. In particular, he singled out the mother for "living with unresolved issues" and being "intense, sarcastic, strong-willed, short-tempered and aggressive".[51] However, despite the intense acrimony, which was mostly attributed to the mother, neither party complained about problems communicating in respect of matters involving the children. The continued animosity, therefore, was not a change in circumstances. Quinn J. therefore continued the joint custody regime but moved the children's residence to the father's home based on their strong wishes (including attempts to run away from the mother) and declining academic performance.

THE INCONSISTENT CASE

As mentioned above, I found one case where the result is almost impossible to reconcile with the principles of *Ladisa/Kaplanis*: *Krasniewski v. Krasniewski.*

1. *Krasniewski v. Krasniewski*[52]

This case is difficult to read and even harder to stomach given the result. Released less than two months after *Kaplanis*, it totally flies in the face of the

[51] Paras. 34 & 36.

[52] *Krasniewski v. Krasniewski*, [2005] O.J. No. 1029, (2005) 13 R.F.L. (6th) 387 (Ont. S.C.J.) (hereinafter "*Krasniewski*").

Ontario Court of Appeal's warning not to order joint custody in the hopes that the parties will suddenly start getting along after the gavel has come down. Yet this is exactly what Belleghem J. appears to have done in ordering joint custody in the face of overwhelming evidence justifying sole custody.

Each parent claimed custody of their seven-year old daughter. There was no temporary order in place although the child lived primarily with the father in the matrimonial home post-separation.

The separation itself was traumatic. The father locked the mother out of the house, changed the locks and would not allow her to re-enter. The police were called and ordered him to change back the locks, which he did a few days later. The mother then returned but the situation continued to deteriorate and she left. The father was extremely angry that the mother left the marriage.

The Office of the Children's Lawyer recommended joint custody with the child residing with the mother. The father opposed the recommendation, arguing the present regime should continue indefinitely under the label "shared custody".

That there was no basis for cooperation, mutual respect or any evidence on which to form a conclusion that the parents could and did make agreements together for their child was clear. The OCL expressed concern about the father's refusal to cooperate with the mother and his reluctance to facilitate access, but

nonetheless recommended joint custody.[53] The court noted the father's "intransigence", his "over-assertiveness respecting his rights" and concluded his efforts appeared to be motivated more by financial gain that the child's best interests.[54] The court even concluded that this was a case where he wanted the mother to have nothing more than visiting rights at his own whim.[55] He refused to acknowledge the child had as much right to her mother's care and guidance as she did to her father's, was described as "overbearing"[56] and suffered from an ability to move on from his perceived role as victim of his wife's alleged infidelity:

> "More importantly he was unable to place Caroline's interests above his own when making decisions respecting the day-to-day transfer of parental responsibility back and forth between himself and Caroline's mother. The transfers were invariably imbued with overtones of efforts to control Caroline's mother. In the end, father's rigidity and mother's compliance, which was evidence from the outset, and which gave rise to the consent order giving the father the house so that Caroline would primarily reside with him, provides the key to determining what, on the evidence adduced before me, is in Caroline's best interests."[57]

The father also "sabotaged" the child's birthday party, reported the mother to the children's aid society with no basis to do so, refused to permit the child to bring her bicycle, dog or videotapes to her mother for visits and got very upset when the mother obtained a second job without consulting him, feeling her

[53] Paras. 66 & 67.

[54] Para. 14.

[55] Para. 12.

[56] Para. 70.

[57] Paras. 18 & 19.

having two jobs would adversely affect the child. The court neatly captured the essence of the father's attitude in the following observation:

> "Mr. Krasniewski's perception of joint custody appears to contemplate a micromanaged joint custody situation with no meaningful cooperation between the parties. He wants the custody arrangement laid out in fine detail by the court, and engraved in granite. He fails to accept the need for each parent who, at any given time, is responsible for Caroline's care, to be free to exercise individual custodial discretion."[58]

Against such a backdrop, one would expect that an order for sole custody would easily issue in favour of the mother. Not so. Distinguishing the case at bar from *Kaplanis*, Belleghem J. found that the child was older than the child in *Kaplanis* and noted that the father in this case was more involved in the child's care. While "sympathetic" to the mother's claim for sole custody, he found the parties "are quite capable of sublimating their own personal interests to those of their daughter, and effectively carrying out a joint custody regime."[59] Rejecting this as a case where the court was simply hoping for future cooperation, the judge noted that since the parties had acted "reasonably cooperatively" prior to separation, he was satisfied they were capable of "continuing to act cooperatively" in the future.[60]

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[58] Para. 77.

[59] Para. 138.

[60] *Ibid*.

The flaw in the court's reasoning is glaring. First, the evidence clearly showed the parties had not acted cooperatively in the least since the separation. The father engaged in conduct motivated by his inability to accept that his relationship with the mother had ended. The court ruled that he "must, therefore, move on."[61] But he didn't. He was unable to. He was found by the court to have "coached"[62] the child, used the child as a "courier", and left it to the child to tell her mother she had changed schools. The court even found that until he could accept the separation, he was "seriously jeopardizing" the child's relationship with both parents.[63]

It is submitted that there is no room for a joint custody order in a case such as this. Why the court was as influenced as it apparently was with the testimony and report of the OCL and did not pay closer attention to the principles set out in *Kaplanis/Ladisa* is puzzling. The case sets a dangerous precedent. If others follow, the entire essence of the *Kaplanis/Ladisa* decisions will have been gutted. Rewarding parents with joint custody orders when they regularly take advantage of, and exploit, their child for the purpose of harming the other parent in the hopes of "winning" a battle is not in a child's best interests, nor is it justice. It also makes no sense and cannot be reconciled with the Court of Appeal's principles designed to frame the joint custody debate.

[61] Para. 123.

[63] Para. 129.

NEITHER CONSISTENT OR INCONSISTENT

1. *Stefureak v. Chambers*[64]

In this short decision by Quinn J. released May 6, 2005, he allowed a father in the middle of trial to amend his pleadings so he could include a claim for sole custody. Up to that point, the father was content to defend the mother's claim to change the joint custody order which had been in place since 2002. In his affidavit, the father relied on *Kaplanis* and *Ladisa* in deposing that the mother had become "increasingly controlling in respect of custody and access despite the joint custody order".[65] The court allowed the motion on the grounds there was no evidence of bad faith and the amendment would not add to the length or expense of the trial.[66]

2. *B.A.C. v. C.A.C.*[67]

It was a challenge to decide which category to place this case in. In the end, while I knew it was definitely not consistent with *Kaplanis/Ladisa*, for reasons noted below I could not in good conscience conclude it was totally contrary to its principles.

Up to trial, both parents sought sole custody of their five-year old twins. At trial, the father changed his request to joint custody, primary residence with him.

[64] *Stefureak v. Chambers*, [2005] O.J. No. 1949 (Ont. S.C.J.) (hereinafter "*Stefureak*").

[65] Para. 9.

[66] Paras. 19 & 20.

[67] *B.A.C. v. C.A.C.*, [2005] O.J. No. 2606 (Ont. S.C.J.) (hereinafter "*B.A.C.*").

An interim interim order had been in place for three years whereby the children were living primarily with the mother under a joint custody regime.

On a final basis Flynn J. finalized the interim interim order, ordering joint custody with primary residence to mother. It is hard to tell from the facts whether the children were really better off with her or not. I suspect the judge had an equally hard time because in the end, there is scant evidence in the reasons justifying his decision. Instead, he ruled that since the burden was on the father to show a positive impact on the children from a change in the status quo, his failure to do that meant the children should remain where they were. To use his words, "it cannot be in the children's best interests to change a certain situation for an uncertain one".[68]

Once the judge made the decision that the children were going to continue to live primarily with the mother, there was no way the father was going to get sole custody. The court's only options, therefore, were to order sole custody to mother or joint custody.

Although the decision is far from clear as to why joint custody was ordered, the evidence points to the fact that giving the mother sole custody would have been an invitation for her to run rough-shod over the father's rights and entitlements. Although not framed as an incident where joint custody was

[68] Para. 38.

appropriate to preserve a parent's attachment to a child, the court made various references to her poor conduct, including her reporting false sexual abuse by the father one year before trial and falling victim to her parents' "vitriol and contempt" which had the effect of denying or severely limiting the father's involvement with his daughters.[69] Concluding that the father "is not and has not been not the aggressor"[70] in the conflict and that the in-laws had "circled the wagons"[71] in an attempt to simply discredit him at trial without any basis for doing so, the judge was so concerned about the mother and her family's attempts to deliberately restrict access that he said he was "tempted" to make an order for sole custody in his favour but decided not to due to the "children's best interests".[72]

With respect to Flynn J., the term "best interests of the children" incorporates, and in the author's view necessitates, an examination of more than simply with which parent the children are living at the time of trial and whether their lives will be disrupted by a change in residence. Since both parents were capable and the father had far more child-appropriate skills including being the parent more likely to foster communication and respect between the children and the other parent and doing his best to avoid and minimize conflict, it seems that basing the test on the status quo, as the court did here, was insufficient and lacked insight in terms of what the children really needed: for their mother and their grandparents

[69] Para. 21.

[70] Para. 27.

[71] Para. 28.

[72] Para. 34.

to stop running their father down and keep their comments and angry feelings to themselves. Even though the mother did not get sole custody, considering her actions and those of her family, the fact she received primary residence amounted to nothing more than condonation of her conduct. However, once the decision was made that it was in the children's best interests to remain with the mother however, the judge made the correct decision in awarding joint custody because, given the mother and her family's conduct, doing so was necessary to preserve the children's relationship with the father.

ANALYSIS

1. Joint custody is alive and well in Ontario even after *Kaplanis* and *Ladisa*. Not including *Stefureak,* which was simply a motion to amend pleadings, seven of the remaining fourteen cases resulted in a joint custody order (*Griffiths*, *St. Pierre*, *Rockefeller*, *Sidky*, *Krasniewski*, *B.A.C.* and *Wood #2*), two of which (*St. Pierre*, *Sidky*) contained allegations of abuse.

2. Thirteen of the fourteen cases have been consistent with the essential principles of *Kaplanis* and *Ladisa*. Cases where there was insufficient conflict to prevent effective communication regarding the children or where one parent risked being minimized by the other resulted in orders for joint custody (*Griffiths*, *St. Pierre*, *Rockefeller*, *Sidky*, *B.A.C.*, *Wood #2*) while cases involving severe, deep-rooted conflict led to sole

custody orders (*Malcolm*, *Barry*, *Wood #1*, *Lalonde*, *Sterling*, *Testa*, *Habel*). Hopefully cases like *Krasniewski,* which order joint custody when one parent is out to destroy the other and are inconsistent with the principles in *Kaplanis* and *Ladisa*, are an aberration.

3. It is no longer appropriate for courts to simply throw their hands up when both parties are in conflict and order joint custody in the hopes things will work out. In such cases, it is now more likely that one parent will receive sole custody. (*Sterling, Wood #1*)

4. While no case has yet defined what "historical cooperation" means and whether it entails pre- and post-separation conflict, the latter seems to be more relevant in convincing a judge whether joint custody is appropriate or not, especially conflict occurring after a temporary order (*Wood #1*, *Sidky, Kaplanis*). Overall, however, the issue is less whether there is conflict at all but rather whether it relates to communications affecting the children, why it is occurring and who is primarily responsible for its cause. (*St. Pierre, B.A.C.*)

5. Joint custody may be appropriate in cases where there is some conflict. A modicum of animosity is to be expected. It is when the conflict is "deeply embedded" that it may be inappropriate. (*Griffiths*)

6. At a minimum, a litigant seeking sole custody must present evidence of the inability to communicate with the other party in regards to the children. Failure to provide such evidence will usually not result in a sole custody order and may lead to inferences of one party engaging in tactics rather than expressing substantive concerns. (*Rockefeller, Wood #2)*

7. Many cases are being decided without custody/access assessments. While a favourable assessment is always preferred, in two cases they were not predictors of whether sole or joint custody was ordered (*Wood #1*, *Sterling*). In two other cases the court followed the assessor's recommendation (of joint custody) (*Sidky, Krasniewski*). One-sided, unilateral assessments or "expert" opinions carry very little weight. (*Testa*)

8. There do not seem to be any limits on the kind of evidence a litigant can use to justify there is sufficient or a dearth of effective communication between the parties. It can include financial considerations (*Griffiths*), conduct by a party towards a child or party not associated with the litigation (*Malcolm, Testa*) or emails between the parties (*Wood #1*).

9. It remains relatively easy to obtain sole custody when the access parent has been out of a child's life for a long period of time. (*Malcolm*)

10. When seeking joint custody, it is best to avoid hyperbole, exaggerations and statements which tend to portray yourself constantly in a glowing light or as a victim. Courts tend not to believe such evidence is credible. (*St. Pierre*, *Testa*)

11. When seeking joint custody, it is best to avoid trying to tear down the other side personally or his/her parenting. It runs the risk of pointing to a "poisoned environment" devoid of effective communication (*Testa*, *Barry*). The better course of action is to not retaliate and instead, put forth evidence showing how good a parent you are and the efforts you've made to be cooperative with the other side in regards to the children. (*St. Pierre, B.A.C.*)

12. When seeking joint custody, evidence that you are a competent or fit parent or even that access is positive for the child is not a predictor of whether joint custody will be ordered. (*Testa, Wood #1, Habel*)

13. Joint custody involves both parties being able to set aside their differences and work together in the child's best interests. It

contemplates genuine communication and real, sincere dialogue. (*Lalonde*)

14. In motions to change an existing order, the same level of animosity, even if high, will not lead to a change in circumstances where the animosity does not affect decisions relating to the children. (*Wood #2*)

15. While there is still room for parallel parenting orders given the right circumstances, in cases of high-conflict the preferred approach is for one parent to be awarded sole custody in order to avoid future disputes. (*Testa*)

FACTORS TENDING TO JOINT CUSTODY

1. Parties joining forces against the children's aid society. (*Sidky*, *Griffiths*)
2. Parties speaking a lot about the children's schedules. (*Sidky*)
3. Parties sharing children's car seats. (*Sidky*)
4. Parties agreeing child would attend French Immersion. (*Sidky*)
5. Parties jointly dealing with child's hospitalization. (*Sidky*)
6. Post-separation conflict lower than pre-separation conflict. (*Sidky*)
7. Access proceeding without incident. (*Griffiths*)
8. Parties agreeing on initial post-separation living arrangements. (*Griffiths*)
9. Parties agreeing on extended access. (*Griffiths*)
10. One parent assuming joint debts. (*Griffiths*)
11. No interference in day-to-day decisions. (*Griffiths*)
12. Cooperation in regards to discipline issues. (*Griffiths*)
13. Agreement on counseling for children. (*Griffiths*).
14. Parties filing temporary agreement in court. (*Griffiths*)
15. Parties using communication book. (*St. Pierre*)
16. Children are thriving. (*St. Pierre*)
17. No retaliation by one party when provoked by other party or other party's family. (*St. Pierre*)
18. See counselor re: past abusive behaviour. (*St. Pierre*)
19. Voluntarily agree to increase child support. (*St. Pierre*)

20. No change in level of animosity between initial order and motion to change (*Wood #2*)

21. No disputes in respect of decision-making about the children. (*Wood #2*)

22. Interim or interim interim order for joint custody. (*B.A.C.)*

FACTORS TENDING TO SOLE CUSTODY

1. Disputes over the child's busing location. (*Sterling*)
2. Disputes over transferring the children's items from one home to another. (*Sterling*)
3. Disputes over sharing medical information. (*Sterling*)
4. Disputes over telephone access. (*Sterling*)
5. Disputes over whether the child should have counseling. (*Sterling*)
6. Disputes over activities that fall on other parent's time. (*Sterling*)
7. One-sided assessment involving only one parent. (*Testa*)
8. Poor language by one parent in speaking about other. (*Testa*)
9. Recognizing the positive factors the other parent brings to the child and willing to compromise in order to facilitate his/her involvement in the child's life. (*Testa*)
10. One party has taken anger management course. (*Malcolm*)
11. One party acting hostile to the other. (*Malcolm*)
12. Denigrating the other party's parenting. (*Barry*)
13. One party calling the children's aid society. (*Barry*, *Habel*)
14. One party making false allegations of the other. (*Barry*)
15. Dozens of emails showing uncooperative behaviour. (*Wood #1*)
16. One party tending to blame the other. (*Wood #1*)
17. One party tending not to accept any blame/responsibility. (*Wood #1*)
18. One party not prepared to negotiate or cooperate with other. (*Wood #1*)

19. One party says “white”, the other says “black” all the time. (*Wood #1*)

20. Disputes over the child’s name. (*Habel*)

21. Disputes over whether the parties should use a midwife. (*Habel*)

22. Little evidence of cooperative parenting post-separation. (*Habel*)

23. One party not participating in any meaningful way in physically parenting child during cohabitation. (*Habel*)

24. No history of co-parenting during cohabitation. (*Habel*)

25. One party taking child to hospital on false emergency. (*Habel*)