<u>FAMILY COURT OF NOVA SCOTIA</u>

Citation: *B.M. v. F.P.*, 2015 NSFC 6

Date: 20150723
Docket: FNGMCA-067429
Registry: Pictou

Between:

B.M.

Applicant

v.

F.P.

Respondent

Revised Decision:	**The text of the original decision has been corrected on September 10, 2015. This decision replaces the previously released decision.**
Judge:	The Honourable Judge Timothy G. Daley
Heard	June 23, 2015 and June 29, 2015, in Pictou, Nova Scotia
Written Decision:	July 23, 2015
Counsel:	Shawn MacLaughlin, for B.M. Roseanne M. Skoke, for F.P.

INTRODUCTION

[1] This case is about the child R.P., where and with whom should he live and what should the parenting arrangements be for him. He is five years old and will turn six shortly.

[2] The child's father, B.M., has asked the court to vary the current Consent Variation Order issued July 29, 2014. That order provided the mother F.P. with sole custody of the child, prohibited either parent from permanently moving the child out of the County of Pictou without the prior written consent of the other party or without an order of a court of competent jurisdiction and set out terms of access for the father with the child.

[3] The father seeks to have the order changed such that he would have sole custody of the child and primary care of him. He further seeks forgiveness of arrears of child support that he currently owes and seeks child support from the mother for the child.

[4] The mother makes application by way of an amendment to the pleadings (with the consent of the parties) seeking permission of the court to relocate the child to Halifax on a permanent basis so that she can continue her education plan. She seeks to continue the sole custody arrangement and to provide the father with

access every second weekend with the child. She seeks child support from the father for the child and that the arrears be paid.

[5] In the alternative, the mother says that if she is denied permission of the court to relocate the child to Halifax, she wishes to maintain sole custody and primary care of the child. She says that she will commute to and from Halifax to continue her education and proposes that the father can continue to have access every second weekend.

[6] The father opposes any relocation of the child out of Pictou County.

EVIDENCE

[7] It is important to note in this proceeding that an application had been brought by the father respecting the child at an earlier date. In the course of that application, several affidavits were filed by both parties. That application was resolved by consent and a Consent Variation Order was issued on July 29, 2014.

[8] In this application, counsel has requested that the court consider the affidavits filed in the prior application. The court has admitted those affidavits as part of the evidence but it was agreed, with counsel, that the court would only

consider those affidavits in providing some historical context for the relationship and circumstances of the child and they would not form a significant part of the argument being advanced in the current application. The court has therefore placed little weight on the contents of the affidavits and has not looked behind the Consent Variation Order issued in July of 2014. The court has only used the affidavits filed in that earlier application to provide context in the current matter.

[9] Evidence in the matter was provided by several witnesses in addition to the parties themselves.

[10] The father first called evidence from Nadine LeBlanc, a teacher at the Pictou Landing First Nation School where the child attends for classes. It is helpful to note that both parties agree that the child's heritage includes First Nation heritage on his mother's side although he has not yet achieved formal status.

[11] Ms. LeBlanc confirmed that she has taught at the school for seven years and that the child has been a student at the school since September of 2014. He had just completed Grade Primary.

[12] Ms. LeBlanc explained that the child had the benefit of being in a very small class of six students. In fact the school itself, which runs from grades primary to six, has approximately 50 students total.

[13] In addition to the small class size, the child also has benefit of education respecting his Mi'Kmaw heritage and language at that school. Ms. LeBlanc explained that each afternoon a Mi'Kmaw teacher spends time with the class instructing them on basic conversation in the Mi'Kmaw language, simple phrases and assisting them to develop competency in the language. She also confirmed in her evidence that the child is exposed to other educational opportunities respecting his heritage and should he remain in the school, he would participate in events celebrating his community's history and traditions. This includes some involvement of Elders in the community with the children. The children also attend at sites and events to highlight and explain their heritage. The classroom contains materials written in Mi'Kmaw for the children to read and explore.

[14] Ms. LeBlanc confirmed that she had written a letter dated January 20, 2015 in which she confirmed that the child attends regularly and is doing well in school. Her evidence was that the child gets along well with the other students and shows great enthusiasm in class.

[15] Ms. LeBlanc also confirmed that if the child is upset, he does take some time to calm down. He also has experienced some speech issues but these have been worked on with a speech pathologist in the school and they have been resolved. She described him as thriving within the small classroom experience.

[16] Ms. LeBlanc sees the maternal great-grandmother, F.F., more frequently for pickup and drop off of the child than she does the mother. She does confirm that the mother attended the parent/teacher meetings and was the only parent present. She has no concerns respecting the child at the school.

[17] The next witness was C.M., the father's mother. She explained that she works full time from 2:00 to 8:00 p.m. or 10:00 p.m. during the week and 9:00 a.m. to 1:00 or 2:00 p.m. on the weekends. She lives approximately 15 minutes from the father.

[18] C.M. indicated that she will be able to provide emotional support and guidance as well as advice to the father in his parenting of the child and can assist somewhat in transportation and child care.

[19] In cross-examination C.M. agreed that the father was living with his uncle. It was clear from her evidence that she has a busy life and, while she would be willing to assist the father, she has limited involvement in his life at this time. Her affidavit indicates, for example, that she typically sees the father and the child about once a month.

[20] Based on her ability to observe the father as a parent, she has no concerns and finds him to be a good father. She therefore supports the father's application for sole custody and primary care of the child.

[21] The next witness was F.M., the father's maternal grandmother and the great-grandmother of the child. In addition to providing evidence at the hearing, F.M. filed three affidavits in the matter.

[22] F.M. is 71 years old and is married to L.M. who is 79 years old. She indicates she and her husband are in good health and she has been part of the father's life since he was an infant. She likewise says she has been part of the child's life since his birth.

[23] F.M. says that she spends a great deal of time with the father and the child when they are together. She says that based on her observations, the father is a very good parent to the child and the child is well-behaved with his father.

[24] In explaining her involvement with the father and the child, she says that she often provides assistance via transportation.

[25] F.M. provides evidence, as do others in this matter, of statements made by the child to her or to the child's father. In this case, the out-of-court utterances by the child have been admitted by agreement. It was further agreed that the issue

will be one of weight to be ascribed to such statements. For reasons set out in this decision, I have attached no weight to the statements alleged to be made by the child to various persons in these proceedings.

[26] There is no doubt that F.M. confirms that she has been a significant support to the father in the past and thereby to the child in the father's parenting of him. There is also no doubt F.M. intends to provide significant support to the father into the future during his time with the child. This support will include transportation, as the father does not currently drive, as well as advice, emotional support, support in parenting the child and some financial assistance if needed.

[27] F.M. does confirm, based on her significant opportunity to observe the father's parenting, that he is a good parent to the child and she has no concerns whatsoever respecting that relationship.

[28] F.M. also notes that the father resides with his uncle, W.C. and W.C.'s wife, V.C.. She knows them well and they form part of the father's support system within his extended family.

[29] In cross-examination F.M. was somewhat evasive and vague when questioned about issues she has experienced with the father and the differences they have had in the past. For example, she recalled that they had argued and that

the father had moved out of their home at one time. She could not remember why they had argued, the topic at that time, the tone of the argument or the issue they were dealing with, or any other detail. This may be, of course, due to the passage of time. She simply says that "the two didn't click". She did confirm that the father resided with her and her husband on and off in the past.

[30] When asked why the father was not living independently, she was able to confirm that he lives with W.C. and his wife because W.C. is not well and the father is providing assistance. She does expect he will move out of the home of W.C. and V.C. and become independent at some point.

[31] The father also provided affidavit and *viva voce* evidence at the hearing. The father says that there have been significant changes in his circumstances and those of the child since the Consent Variation Order was entered into in July 2014. In particular, he says that he is now working on a full-time permanent basis whereas he was not working at the time of the earlier order. He indicates in his evidence that he is employed working full-time hours on a seasonal basis to September of 2015 with Central Supplies but "it looks good" that this will convert into full-time permanent employment. He currently is paid at minimum wage but expects to receive a raise in the near future. He works a mix of morning and afternoon shifts and is off most weekends when he has access with the child.

[32] He does speculate that if he were not able to obtain full-time employment with Central Supplies he may have the option of working full time at Canadian Tire. He says he has been offered such a job in the past and has been told by a person in authority at that Canadian Tire that if he wants a job he can have it. There is nothing to confirm this from Canadian Tire.

[33] He further states that he has updated and upgraded his various certificates which will assist him in obtaining employment now and in the future.

[34] The father says that his new employment will allow him to obtain a two-bedroom apartment in the future, though he continues to reside with his uncle and aunt at this time. He says that this arrangement will allow the child to have his own bedroom in that apartment and he can provide a clean, safe and loving home for him there.

[35] He initially said that he would continue the child's education at the Pictou Landing First Nation School until the end of the school year and then transfer him to another school closer to his home. But, in his evidence at the hearing, he confirmed that he had changed his view and intends to keep the child at the Pictou Landing School. He says that he believes it is important that the child maintain

and enhance his connection with his Native heritage and that his remaining in the Pictou Landing First Nation School would remain part of that plan.

[36] The father says that there have been other changes since July of 2014. He maintains there were difficulties with respect to access at Halloween and Easter and that the mother is to blame for that confusion and the difficulties surrounding access on those two occasions.

[37] He says that the child has said certain things to him indicating that the mother is making inappropriate comments to the child about him and his parenting. The court has already made comment with respect to the use the court intends to make of those alleged statements by the child.

[38] The father also says that it concerns him that the child may relocate to Halifax as this would remove him from his extended family and friends in Pictou County. It would also, he says, be a significant change and stressor on the child to relocate the child from a rural Nova Scotia setting to Halifax.

[39] The father expresses concern that the mother's relationship with her partner, R.C., is relatively young and not stable enough. He is concerned that a move by the mother into the home of R.C. at this stage would not be in the child's best interest. He states that the mother has a history of multiple relationships of short

duration and he implies that this may well be another circumstance where her relationship with R.C. would be short lived, and any such change in that relationship would not be in the child's interest if he was living in Halifax with the mother and R.C. at the time.

[40] The father says that communication with the mother is poor to non-existent. For example, he says the mother did not tell him that the child was in hockey although the child did and she refuses to talk to him about that. He also says that although the existing order permits access other than the times scheduled, the mother has refused his requests for additional access times.

[41] More substantially, he alleges that the mother appears to have relocated to Halifax without the child and that the child was, in fact, in the care of his maternal grandmother F.F.. He believed that she was in Halifax for educational purposes. He therefore maintains that it is in the child's best interests that he have sole custody of the child, primary care of him and he remain in Pictou County as opposed to relocating to Halifax with his mother.

[42] The father confirmed that his living arrangements were with his aunt and uncle and that he assists with his uncle's health issues. He does pay rent to them and they do provide transportation for him, as well as advice and support in his

personal life and parenting of the child. He does some outside work for them and assists them in their home. This is where the child spends time with him when the father has him overnight and the child is comfortable in their home. The father has been with his aunt and uncle for approximately two years.

[43] The father is similarly vague on why his relationship with his grandmother broke down except to say they are very much alike and they "butted heads". That said, he and his grandmother confirmed that they have a good relationship now.

[44] When asked about the fact that he does not have a driver's licence, the father indicates it was suspended about four years prior because he was in arrears with the Maintenance Enforcement Program regarding child support. He says that he can now obtain his licence back and hopes to have it reinstated by the end of 2015. In the meantime, he has transportation available through his uncle, his mother and his grandmother. On cross-examination he agreed that he had extinguished his arrears some time ago but had not paid any child support since despite being employed as described. His explanation for why he was not currently paying any support was that he was awaiting an order to do so from this court.

[45] When asked why he had completed a program known as Options to Anger, the father indicated that he had been convicted of an assault in or around 2012 and

was ordered to take part in that program as a result. He says he now has options, including counting to ten, when he feels angry and that his anger was largely present when he was younger. He describes having conflicts in the past with F.F., the mother's grandmother, and that his grandmother now does most of the pickups and drop offs. He does say he never raised his voice or expressed anger to F.F. during those times.

[46] He does confirm that he contacted the RCMP with complaints about access on two occasions since the order of 2014. He explained that he felt he was denied access on both Halloween and Easter and chose to involve the police.

[47] As to his future plan, in cross-examination he confirmed he had been seeking an apartment or a house with little to no success. He also confirmed that he had been unemployed for approximately two years prior to obtaining a job at Central Supplies.

[48] R.C. provided evidence in the matter. R.C. is in a relationship with the mother. He provided an affidavit and testified at the hearing. It was his evidence that he and the mother had been in a relationship for approximately one year although they had known of each other for many years prior as he is originally from Pictou County.

[49] R.C. confirmed he is employed as a supervisor/foreman with Envirobate for almost five years on a full-time basis. He manages jobs with two to ten labourers, and is described as a most-valuable supervisor in a letter from his employer attached to his affidavit. He has earnings in the rage of $50,000 per year from that employment.

[50] He provided evidence that although he works long hours, he never has to work outside of the Halifax Regional Municipality and has control over his work hours to a large extent.

[51] His evidence is that he has rented a home with other borders for approximately three years and that his plan with the mother is that if she is permitted to move with the child to Halifax, either the borders will move out and they will occupy the home exclusively or they will move to a new home in Halifax together. Once this court makes a decision respecting whether the child can relocate, the plan for the living arrangements will be solidified quickly by September of 2015.

[52] R.C. was clear in his evidence that he believes he and the mother are in a long-term, committed relationship and that they intend to reside together on a long-term basis. He says that he has a good relationship with the child and they get

along well. He says that he is committed to ensuring that the child is involved in community sports and other activities and if the mother relocated to Halifax it would make the child's involvement in such activities, and his ability to make sure the child is kept busy, much easier.

[53] In his evidence at hearing he made clear that he intends to support the mother in decisions respecting schooling, travel and the move to Halifax, if permitted.

[54] R.C. says that if he and the mother reside in his current home, it is five minutes to school for the child and five minutes to the hospital, if necessary. It is located on a cul-de-sac with many children to play with in the area.

[55] R.C. indicated that because of his work arrangements he can leave during the day if it is required to assist with the child and he can provide financial assistance as needed.

[56] In cross-examination R.C. agreed that he works up to 72 hours per work although 50 to 60 hours per week is normal.

[57] He confirms that the mother has been travelling to and from Halifax during the week throughout the school year 2014 into 2015 to continue her education. He says that she also obtained a job at a local Esso station in Halifax on a part-time

basis, to assist with the transportation costs. The only time she stayed overnight was when there was bad weather during the week. She did travel to stay with him in Halifax on weekends when she had the child. He says that he travelled to Pictou County twice each month.

[58] R.C. acknowledges that the child's Mi'Kmaw culture and heritage are important as is his support of the mother's efforts to have the child learn more about that culture and heritage.

[59] F.F. testified. She is the grandmother of the mother and has acted in the role of mother to her for most of her life. She is often referred to as "Momma" by the mother and by the child.

[60] It was her evidence that she is a Mi'Kmaw Elder in her community and has been involved in the child's life and upbringing since his birth. She says it is traditional in the Mi'Kmaw culture to have the grandmother involved as she is with the mother and the child. She says she is able to provide the child and the mother with an education in the Mi'Kmaw culture and traditions, and encourages them to participate in that tradition including attendance at Pow Wows.

[61] F.F. confirms that the mother and the child reside with her and continue to do so as of the date of this hearing. She confirms that the mother has been

commuting for educational purposes to the Nova Scotia Community College in Halifax since enrolling in September 2014. She completed that program in May 2015. F.F. testified that the mother travels back and forth from Pictou County to Halifax each school day during the week. She also confirms her knowledge of the mother having a part-time job at an Esso garage in Halifax to provide funds for the costs of transportation.

[62] F.F. confirms the involvement of the RCMP, at the request of the father, on two occasions including Easter. She provides evidence that the police attended at her home on the Easter weekend.

[63] F.F. indicates that while she got along well with the father early on in the separation, she does not get along well with him now. She believes he takes her granddaughter to court too often, involves the police unnecessarily, and he makes her nervous. She says that she is afraid of him.

[64] Despite the fact the mother and the child will relocate to Halifax if the court permits, F.F. says she is fully supportive of this. She has no concerns respecting the mother's ability to look after the child in Halifax with R.C. or on her own. She acknowledges that her granddaughter is 24-years-old and wants to be independent, is pursuing an education and occupation, and she supports this.

[65] F.F. has also gotten to know R.C. and has no concerns respecting his involvement with the child. She has known him for about a year and describes him as a "hard-working guy". He has come to her home for visits on weekends and says that he is welcome to stay there.

[66] In cross-examination F.F. confirmed that the child does not currently have Native status but that the mother had been applying and will continue to apply until it is granted.

[67] When asked about the change from a rural setting to the busy Halifax environment, F.F. indicated that she was comfortable the child would be fine as he would be with his mother.

[68] To the suggestion that the mother had been involved in many short relationships prior to her relationship with R.C., F.F. denied this, confirming only two prior relationships over many years. She did confirm that the mother had not been in any long-term relationship in the past.

[69] Regarding the child's participation in hockey, she confirms that he was placed in a hockey league through the Band Office but, as far as she knows, his father was not told. The father became aware of the hockey activity but never

asked about it to her knowledge. The child began playing hockey in September 2014 but she had never seen the father at the rink since then.

[70] Regarding the mother's schedule, she indicates that around six o'clock every morning the mother is up and out of the home and returns around five o'clock each afternoon. She confirms that she is back at home every day unless road conditions are bad. As well, when the mother was working in Halifax she may have been later than five o'clock, perhaps as late as nine o'clock or eleven o'clock.

[71] Returning to the issue of Native culture, F.F. indicates that it is important for the child to continue learning about his culture and language and that it is her belief that he could continue to do so by participating in Pow Wows and other events even if he lived in Halifax.

[72] The final witness was the mother. She is formally known as A.P. and commonly uses the name F.P.

[73] With respect to the father's application, and whether there has been a material change in his circumstance since the making of the order in July 2014, the mother says there has not been a material change. The only significant change is that the father is now employed. The mother otherwise maintains that the father still resides with family as he did at the time of the previous order, still does not

have a driver's licence, relies on others for transportation, continues to treat her with disrespect in the presence of the child, and has not paid any child support to the date of the hearing.

[74] The mother explains she undertook a program of education in September of 2014 at the NSCC in Halifax. She confirms that she could have begun the same program at the Stellarton Campus in Pictou County but would have had to wait until January of 2015 to begin and did not want to waste any time.

[75] The program she just completed was to upgrade her education by taking the Adult Learning Program. She has completed that program in May of 2015, graduating with honours.

[76] The mother testified that she is now enrolled to attend at Success College in September 2015 and continuing until November of 2016 in the Correction Worker and Police Foundations Program. She provided a letter from Success College confirming this. The campus is located in the Halifax Regional Municipality. She indicates that the Pictou Landing First Nation is paying for her education and that her ultimate plan is to return to work in Pictou County if possible, perhaps at the local jail. If not, she may seek further education at Law School someday but that remains in the future.

[77] In obtaining her education, the mother explained that she travelled each school day from Pictou County to Halifax to attend school and kept the child in the Pictou Landing First Nation School. She left early in the morning, returned generally at suppertime. If weather was bad, she stayed in Halifax or she may have been unable to travel to Halifax. She says that throughout September of 2014 to May of 2015 she travelled from approximately 6:00 a.m. in the morning to Halifax, attended school until 3:30 p.m. and returned home after 3:30 p.m. unless the weather prohibited this. In the evenings and on weekends she spent her time with the child in Pictou County or Halifax. She indicates that she has her own vehicle for transportation.

[78] To defray the costs of gas, she took a part-time job a local gas station in Halifax as a cashier in January or February of 2015. She worked six hours per shift when available which could delay her return home to Pictou County in the evenings. When she worked shifts at Esso she was home in Pictou County between 7:30 p.m. and 8:00 p.m.

[79] The mother confirmed her relationship with R.C. and that she sees the relationship as long-term. She says that the child gets along well with R.C. and that she wishes to relocate to Halifax both to continue her educational pursuit and to continue her relationship with R.C..

[80] She acknowledges that the move to Halifax will mean that the child will no longer attend the Pictou Landing First Nation School. She maintains that there is more benefit to the child in relocating to Halifax as it will allow her to complete her education, allow them to spend more time together, allow she and R.C. to evolve their relationship, and will still allow the child to spend significant time with the father.

[81] Specifically, in her first affidavit in this matter the mother had proposed access (on relocation) for the child with his father one weekend per month. At the hearing she modified that to propose that the current access schedule of every second weekend could continue.

[82] As to her plan for the child, she indicates that the living arrangement would either be at the home where R.C. resides now should the borders relocate in September, or they will find another home nearby. She plans on enrolling the child in school in September and is ready to move forward with that plan.

[83] Respecting the child's First Nation heritage, she acknowledges that he is not currently recognized as Native but she has made an application, will continue to apply and expects to have him recognized eventually. She is unsure as to why it was not granted yet.

[84] She says that although the child will move from Pictou County and away from his current school, she will ensure that he continues to have contact with his culture through his great grandmother and through his activities in Pictou County. She says that the child's first language is English but wants him to have Mi'Kmaw as his second language and she will work with him on that.

[85] She does say that she wants the father to continue his relationship with the child and has proposed the access schedule of every second weekend. She does, however, say that her relationship with the father has been difficult including the father's involvement of the RCMP over access issues and their poor communication. She says that the father argues with her in front of the child when they are together. When she tries to explain her views on access or other issues she says he overpowers her verbally, she becomes very uncomfortable and the communication breaks down.

[86] She denies having multiple relationships but agrees that she has not had a long-term relationship in the past.

[87] It is very clear that her primary support is her grandmother F.F., who has been very important throughout her life.

[88] She confirms she and the child have not lived full time with R.C. yet.

[89] When challenged in cross-examination about whether or not she might not be able to complete her educational program, the mother said with great confidence "I will complete it". She points to her success thus far in support of that view.

RELEVANT LEGISLATION

[90] The governing legislation in both of these applications is the *Maintenance and Custody Act*, 1989 R.S.N.S., c. 160 as amended. The relevant provisions of that Act, which will be discussed below, are as follows:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.
>
> (2) When making a variation order with respect to child maintenance, the court shall apply Section 10.
>
> …………
>
> 18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.
>
> (2) The court may, on the application of a parent or guardian or, with leave or permission of the court, a grandparent, another member of the child's family or another person, make an order that a child shall be in or under the care and custody of the parent or guardian or authorized person.
>
> (2A) The court may, on the application of a parent, grandparent or guardian or, with leave or permission of the court, another member of the child's family or another person, make an order respecting access and visiting privileges of a parent, grandparent, guardian or authorized person.
>
> …
>
> (4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

…

(b) ordered by a court of competent jurisdiction.

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child the court shall give paramount consideration to the best interests of the child.

(6) In determining the best interests of the child the court shall consider all relevant circumstances, including

(a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;

(b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;

(c) the history of care for the child having regard to the child's physical, emotional, social and educational needs;

(d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;

(e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

(g) the nature, strength and stability of the relationship between the child and each parent or guardian;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child and

> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child including whether requiring such co-operation would threaten the safety or security of the child or of any other person.
>
> …
>
> (8) In making an order concerning care and custody or access and visiting privileges in relation to a child the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).
>
> …………..
>
> 9 Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child.
>
> 10 (1) When determining the amount of maintenance to be paid for a dependent child or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.
>
> (2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.

LEGAL ANALYSIS

[91] Given that both applications before the court are applications to vary brought pursuant to Section 37 of the *Maintenance and Custody Act*, the court must first be satisfied that there has been a change in circumstance since the making of the previous order of July 2014. The court will undertake that analysis with respect to each separate application brought by the parties.

[92] In doing so, the court has considered the leading decision in interpreting the meaning of a change in circumstance, *Gordon v. Goertz,* [1996] 2 S.C.R. 27. The relevant portion of that decision is as follows:

> 12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
>
> 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[93] The father brought his application before the mother brought her application respecting mobility. He maintains that the change in circumstance upon which the court could make a variation is the evidence that he is now employed when he was unemployed at the time of the previous order. He further alleges there have been at least two incidents where access has been denied, specifically at Halloween and Easter. He says there has a denial of additional access as provided for in the order. He maintains that he has a plan to obtain his licence back to provide an opportunity

for him to gain mobility, and has a plan to obtain an apartment so he and the child can reside independent of his family.

[94] It is the father's evidence, and that of others on his behalf, that the support he had at the time of the last hearing is still in place with respect to his immediate and extended family. On the court's interpretation of the evidence, the father is not claiming that any of the support is new or a change from that which existed at the time of the 2014 order.

[95] While the court acknowledges there has been a change in the father's circumstance, and in particular his obtaining gainful employment, the court is not satisfied that any of these changes, taken individually or collectively, amount to a material change in his circumstance such that it would alter his ability to meet the needs of the child, nor does it amount to a material change in the child's circumstances.

[96] While certainly commendable, obtaining gainful employment in this circumstance is not, in the court's mind, sufficient basis for a claim of material change. It certainly does represent an opportunity for the father to contribute child support for the child.

[97] Moreover, the court find the circumstance of the father obtaining employment was surely reasonably anticipated by the parties when they entered into the order by consent of July 2014. There is no evidence before the court that the father was disabled or otherwise unable to work in July of 2014. The court therefore finds it reasonable to infer that there was an expectation that the father would eventually find work and begin paying child support.

[98] With respect to the other evidence provided of difficulty in access, denial of additional access and related issues, the court finds that these are not material changes in circumstance. They arise out of unclear language in the existing order of July 2014 and can be rectified simply by an amendment to the order which will be incorporated into the new order for the parties.

[99] That said, with respect to the mother's application, hers is a so-called mobility application. In determining whether there has been a material change in circumstances, the court must first look to the July 2014 order and the provision that neither parent can relocate the child out of Pictou County with the other parent's consent, or an order of the court. While this might seem to imply that any such move wold automatically constitute a material change, the court does not find that to be necessarily so. For example, a move just over the border into a neighboring county might be a change that invokes this section of the order but it

may not be a material change. In fact, such a move might result in the child residing closer to the other parent if that parent also lived near the border of the county. As always, it is the particular facts at play at the time of such a move that must be considered. So the court must look further than this provision.

[100] The Supreme Court of Canada in *Gordon v. Goertz (supra)* at paragraph 14 provides guidance on whether the proposal to relocate with a child amounts to material change as follows:

> 14 These are the principles which determine whether a move by the custodial parent is a material change in the "condition, means, needs or other circumstances of the child". Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them. A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way. Similarly, if the child lacks a positive relationship with the access parent or extended family in the area, a move might not affect the child sufficiently to constitute a material change in its situation. Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child.

[101] Based on this, the court finds that the proposed relocation from Pictou County to Halifax amounts to a change. The court further finds that this change is material taking into account the distance that would result between the child and his father and the likely elimination of anything other than scheduled access for the child with the father. In other words, the opportunity for spontaneous access or unscheduled access as contemplated in the July 2014 order would not be realistic if

the child is permitted to relocate with the mother to Halifax. This would affect the father's contact with the child and the court therefore finds that this amounts to a material change in circumstance.

[102] Once a material change in circumstance has been found, *Gordon v. Goertz (supra)* provides further guidance at paragraph 17 as follows:

> 17 The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement: *Francis v. Francis* (1972), 8 R.F.L. 209 (Sask. C.A.), at p. 217. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time. (*Willick v. Willick*, *supra*, at p. 688, *per* Sopinka J.) The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances (*Wesson v. Wesson*, *supra*, at p. 194) to decide what custody arrangement now accords with the best interests of the child. The threshold of material change met, it is error for the judge on a variation application simply to defer to the views of the judge who made the earlier order. The judge on the variation application must consider the matter anew, in the circumstances that presently exist.

[103] Based upon this, the court must look to the *Maintenance and Custody Act* for the applicable principles in this fresh analysis. It is worthy of note that the *Act* does not yet provide specific direction with respect to mobility matters. Thus the court must look to the provisions of the *Act* to determine the appropriate parenting arrangement for the child. The paramount consideration is the child's best interests and in its analysis the court must give effect to the principle that the child should

have as much contact with each of his parents "as is consistent with the best interests of the child".

[104] Section 18(6) of the *Act* provides guidance in determining the best interests of the child though the list of factors is not exhaustive.

[105] The Supreme Court of Canada in *Gordon v. Goertz (supra)* also provided guidance with respect to such mobility applications and its findings were summarized at paragraph 49 as set out below:

> 49 The law can be summarized as follows:
>
> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
> 6. The focus is on the best interests of the child not the interests and rights of the parents.
> 7. More particularly the judge should consider, *inter alia*:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;

> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[106] On review of the evidence and in applying the factors and principles set out in the *Act* and the decision of *Gordon v. Goertz (supra)* the court must first start fresh and determine the appropriate custody arrangements for the child. In examining the evidence now before the court the court notes first that the existing order of July 2014 is one of sole custody with the mother, and was consented to by the parties. There is no evidence of a prior court's findings given that the matter proceeded by way of consent. But it is clear from that consent that in July of 2014 the parties felt that a sole custody arrangement was in the child's best interests.

[107] The court further finds that the fresh evidence brought in these applications would not have changed the outcome in July of 2014. The father's employment change and the challenges the parties faced n sorting out some access issues do not

persuade me that sole custody is inappropriate or contrary to the child's best interests at this time. Indeed, the current evidence of difficulties in communication, the involvement of the police on two occasions by the father, and the lack of trust between the parents supports a sole custody order and the court so finds.

[108] The court now turns to the issue of the mother's mobility application. As the Supreme Court of Canada has indicated, the court must not begin with the legal presumption in favour of the custodial parent but must give great respect to the views of the sole custodial parent, which the court interprets to mean in this circumstance the sole custodial parent, the mother.

[109] The court finds that the father has a good relationship with the child and has no doubt that they love each other very much. The court also has no doubt that the father is a good father to the child and wants the very best for him.

[110] The court finds, however, that the father's relationship with the child is not unusually close nor is his access with the child unusual in any respect. He sees the child every second weekend. The mother is proposing that the father's access remain essentially the same, every second weekend from Friday to Sunday, if she and the child move to Halifax. The additional provisions in the existing order with

respect to special occasion access can be addressed within the confines of the mother's proposal but what will be challenging, of course, is any additional unscheduled access for the child and his father.

[111] The father maintains that the move to Halifax will be a significant disruption to the child with respect to his removal from family on both sides, his school at Pictou Landing and his Mi'Kmaw and extended family community. The evidence is clear that the child enjoys his time at the Pictou Landing First Nation School. He has obtained benefit from the small class and school size, and has enjoyed and benefited from education which includes opportunities to learn the Mi'Kmaw language and about his Mi'Kmaw heritage within that community. These are important for the child's development and it would certainly be preferable if he could continue in that type of environment with cultural and language education.

[112] The mother and her grandmother, F.F., indicate that they will take steps to continue the child's education in the Mi'Kmaw language and to make sure he has opportunity to learn about his culture, history and current community. Each will work with him on the Mi'Kmaw language and each of them will ensure that he participates in cultural and educational activities when he is in Pictou County. The court is persuaded by the commitment of F.F. with respect to the child's cultural and language education, her status as an Elder in her community, her involvement

as the child's grandmother in accordance with Mi'Kmaw tradition and her commitment to involve him in Pow Wows and cultural activities. The fact that she is supportive of the move of her granddaughter from the community with her great-grandson, despite her obvious connection with her own culture and community, is also persuasive in analyzing the proposal put forward by the mother.

[113] The court is satisfied that the child's best interests with respect to his cultural and language education can be met within the plan proposed by the mother and supported by her grandmother. The court finds there will be a benefit to the child in the move to Halifax in that he will be exposed to the other culture into which he was born and will maintain a connection with his Mi'Kmaw culture and heritage through his immediate and extended family.

[114] While it is true the disruption will include the removal from his existing school and friendships at that school, the child is very young and, as with children of his age, should be able to adapt quickly to a new school and environment in Halifax. The father has argued that such a move would also include one from a rural to an urban environment and though this is quite correct, there is no evidence before the court that suggests that the child is not able to adapt to such a move. He appears, from the evidence, to have a supportive and loving family on both sides

and the court is persuaded that they will ensure that he is well-supported in this transition.

[115] The father properly notes that the child has the advantage of contact with the father's immediate and extended family in Pictou County. This contact is experienced by the child when he is with the father during his access. Given the proposal of the mother that his access continue much as it has been, the child will lose little of this interaction and will continue to enjoy time with his father's family even if he relocates to Halifax.

[116] The court has carefully considered the factors to be taken into account under the *Maintenance and Custody Act* when assessing the child's best interests. The court has taken into account the history of the child's care and who has been able to meet his emotional, physical, social and educational needs. This is a sole custody arrangement whereby the child has resided with his mother for a considerable period of his life. The court is satisfied that she will be able to continue to care for him and ensure that his needs are met in all regards.

[117] While the court does some concern regarding the difficulties surrounding access and additional access being granted, the court believes an appropriately-

worded order will be able to satisfy the child's needs to spend time with his father and avoid the involvement of police authorities.

[118] The court wishes to note that the involvement of police in such matters when there is confusion or disagreement respecting access is never encouraged and demonstrates a lack of judgment on the part of the father. That said, the court certainly understands his frustration given his expectation of access on the two occasions in question.

[119] The court has taken into careful consideration the factors including the nature, strength and stability of the child's relationship with each of his parents, his extended family and community and the court is satisfied that the child's needs respecting these relationships can be met if he relocates to Halifax in the care of his mother with the support of R.C., his great grandmother and his extended family and communities.

[120] Respecting communication, this has never been a strength of either parent and will no doubt be a challenge into the future. The court finds this would be an issue regardless of the parenting arrangements for the child and will be a factor for the parties to consider as they move forward. Poor or ineffective communication has been the cause of much of the difficulties experienced to date and both parents

bear some of the blame in this. If they can find a way to communicate in a respectful, business-like fashion about the child, his access, health, education and other matters concerning his welfare, they will do much to improve his life and eliminate the damaging stress that can come from poor parental communications.

[121] The court has taken into account the proposed plan for the relocation provided by the mother. It is not entirely complete. For example, she has indicated that she will register the child for school but has no specific evidence to provide respecting which school that will be and where. Her living arrangements are somewhat uncertain depending on whether the borders move out of the house in which R.C. resides.

[122] That said, the court is satisfied that given all of the circumstances, and the ongoing support of R.C., F.F. and her extended family and community, the mother has a reasonable plan for the relocation of the child to Halifax.

[123] The court is persuaded in part by the relationship she has with R.C.. Though they have not been together for a long time yet, both indicate that they are committed to one another and they have been in their relationship for over a year. The court does not accept the suggestion of the father that because they have not lived together this is a risk factor with respect to that relationship. The court finds

that they have spent enough time together that there is a reasonable prospect the relationship was to continue to grow. R.C. has indicated his commitment to assist in the care of the child and support the mother in the move, her education plan and in meeting the needs of the child. The court accepts that this relationship has a reasonable chance of success.

[124] The court does take into account the reasons for the mother's proposed move to Halifax as the court feels that this is one of those exceptional circumstances where the reasons for the move are relevant to the mother's ability to meet the child's needs now and in the future.

[125] The court is impressed by the efforts made by the mother to date. She has spent the last year pursuing her education in Halifax. It is remarkable that she has commuted each school day round trip from Pictou County to Halifax, leaving very early in the morning and arriving back late in the afternoon to ensure that the child remains in the county. Even when she began working at the Esso station part time, she made sure that she came home in the evenings unless weather would not permit this. That is a level of commitment that persuades the court that the mother is taking the right steps to ensure her financial future. She not only is taking steps to provide a better life for the child but she is, in my view, providing an excellent role model for the child by demonstrating the commitment of a parent to providing

for a child in extraordinary circumstances. The court is reminded of her comment respecting whether she can complete the next stage of her education when she was quite adamant in stating, “I will complete it”. The court believes she will. The significant effort she has made to date is a good predictor of her ability not only complete her education but also a good indication that she is prepared to take the child’s best interests into account.

[126] Respecting the statements alleged to have been made by the child to his parents or others, it was agreed that they would be admitted into evidence and the court would be left to decide what weight, if any, they are to be given. The court has carefully considered each as contained in the various affidavits. The court will not repeat each statement here but it is sufficient to say that each tended to favor the position of the party tendering the statement, and consisted of the child saying that the other parent had said something negative about that parent or the child expressing a preference for his living arrangements. To be admissible at all, such statements, which are clearly hearsay, must meet the criteria of necessity and reliability as set out in case law beginning with *R. v Khan* [1990] S.C.J. No.81 (S.C.C.).

[127] While it may be argued that such statements meet the test of necessity, the court finds their reliability wanting. Each was reported by one of the parents or someone in support of their position. This raises serious questions of reliability.

[128] As well, the child is 5 years old and was younger at the time some of these alleged statements were made. Even if the court accept they were made as described, the court places no reliance on them. Little evidence was introduced as to the circumstances of the hearing of such utterances. There are serious questions in the court's mind as to whether the child could accurately recall and articulate any statement made by another at his age. The court places no weight on his utterances respecting his preferred living arrangements given his age. The court infers that the parties themselves do not place much weight in these alleged statements given that neither requested a Voice of the Child Report or other similar report to bring the child's voice to the proceedings.

[129] The court notes that counsel provided several cases for review in this matter. On review of each, the court concludes that, with the exception of any noted in this decision, each only served to emphasize that the issues in mobility cases are quite fact-specific.

CONCLUSION

[130] The court is prepared to permit the mother to relocate the child with her to Halifax. She will be permitted to begin that relocation immediately.

[131] The mother will have sole custody of the child. The father will have access to any information respecting the child from any third-party service provider, including, but not limited to, schools, teachers, physicians, dentists, daycare facilities, or daycare workers. The father will not have authority over any third-party service provider.

[132] Either parent may authorize emergency medical treatment for the child while in that parent's care and shall notify the other parent of such circumstance as soon as possible.

[133] The mother will keep the father informed of any significant events in the child's life or circumstances. The father will be entitled to obtain directly from the school the child attends any information with respect to him including a copy of any report cards or any other information. The mother will cooperate in providing any required authorization to the school respecting this.

[134] The father will have access with the child every second weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. The parents will meet at a mutually

acceptable location in Truro, Nova Scotia, for exchange of the child. Each parent will bear their own costs for such transportation. In doing so, the parents will share roughly equally in the cost and inconvenience of travel for the access visits.

[135] If either parent is unavailable for access or transportation, will be late or any change in the access exchange in anticipated, that parent will communicate with the other via text or telephone as soon as possible once they are aware of the requirement for change. The parents will make alternate arrangements for the child's transportation for that access visit or arrange additional access time to make up for any time lost. If the change is due to inclement weather, there will be no additional access to make up for access lost. If the alternate arrangement includes having a parent travel the entire distance between the parents' homes, the other parent will be responsible for similar transportation distance and time at the next access visit.

[136] The father's weekend access will be extended if a statutory holiday or a school in-service day falls on his access weekend, such that the weekend will be extended to Thursday at 5:00 p.m. and/or Monday at 5:00 p.m. as the case may be.

[137] For Christmas, one parent will have the child with that parent from Christmas Eve at 9:00 a.m. until Christmas Day at 2:00 p.m. and the other parent

will have the child with that parent from Christmas Day at 2:00 p.m. until Boxing Day at 5:00 p.m. This access arrangement will rotate each year between the parents. The mother will have the child for Christmas Eve and Christmas Day in 2015.

[138] For the balance of the child's Christmas school vacation, the parents will share the child's time on an approximately equal basis to be worked out between them.

[139] For Easter, the child will spend Good Friday through to Easter Sunday at 6:00 p.m. with the mother. The child shall spend Easter Sunday at 6:00 p.m. until Easter Monday at 6:00 p.m. with the father.

[140] If the child's birthday falls on a day when the child is with the mother, and if the father is available to travel to Halifax, the child will spend three hours with the father at times to be agreed between the parties. If the child is with the father on his birthday and the mother is able to travel to Pictou County, the child will spend three hours with the mother at times to be agreed between the parties.

[141] If Father's Day falls on a day when the child is with the mother, and if the father is available to travel to Halifax, the child will spend three hours with the father at times to be agreed between the parties. If Mother's Day falls on a day

when the child is with the father, and if the mother is available to travel to Pictou County, the child will spend three hours with the mother at times to be agreed between the parties.

[142] To encourage and support the child's connection with his Mi'Kmaw culture and heritage, the mother will be entitled to have the child with her for the purpose of attending at cultural events including, but not limited to, Pow Wows even if those events take place during the father's access time. If such occurs, the parents will make reasonable arrangements for the child to attend such events or ceremonies and the mother shall be responsible for the transportation of the child to and from such events or ceremonies if they should occur during the father's access times. The father may attend any such events if permitted.

[143] Each party will have reasonable daily telephone access with the child when he is in the care of the other parent. This may include, if the parties have access to such technology, daily contact by Skype or other video conferencing tools.

[144] During the summer school break, the normal access provisions will apply with the exception that each parent will be entitled to have the child for up to two weeks of block access for vacation. Each parent will notify the other by May 1st of each year of the block access time they wish to have the child in the summer. Such

communication shall be by e-mail or text as the parents agree. If there is no conflict between the proposed schedules, those block access periods shall apply. If there is a conflict between the proposed schedules, the mother's block access times will have priority in even numbered years and the father's block access times will have priority in odd numbered years. If either parent does not provide such notice by May 1st in any year, that parent shall lose any priority they may have in the selection of block access time for that summer.

[145] Each parent shall be entitled to travel for vacation with the child out of the Province of Nova Scotia upon providing notice to the other parent of such travel. If either parent wishes to travel outside of Canada with the child, they will provide notice in writing of the proposed trip dates, contact information and location for such travel including a working cell phone number and flight information if applicable. The non-travelling parent will provide the appropriate written consents. The mother will obtain a passport for the child when she or the father plan such travel and the father will co-operate in this process. The parents will share equally in the costs of obtaining the passport. The mother will keep the passport in her possession and will provide it to the father upon his request for such travel conditional upon him providing the required notice and itinerary information to her.

[146] Neither parent will make any negative or derogatory comments about the other parent at any time while in the presence of or within hearing distance of the child. Each parent shall prohibit any other person from making such comments about the other parent in the presence of the child or within hearing distance of him and if that other person will not comply, that parent shall take steps to remove the child from that circumstance.

CHILD MAINTENANCE

[147] Respecting child maintenance, the father confirms in his second supplemental affidavit sworn May 22, 2015 that he has income from his employment with Central Supplies. This was confirmed in his evidence at the hearing. He indicates that he works full-time hours in a seasonal capacity but expects that that will convert to a full-time, permanent position in the fall.

[148] His paystubs attached to his affidavit indicate a rate of pay of $10.60 per hour and his hours appear to be consistent with that of a full-time employee. Equating that to full-time employment for a year, the court finds he has an annualized income of $22,048 per year based on a 40-hour work week.

[149] Child maintenance will be in accordance with the *Child Maintenance Guidelines*, Nova Scotia table, in the amount of $162.00 per month, payable on the 1st day of each month.

[150] As to the commencement date of child maintenance, the father indicates in his evidence that he began his employment with Central Supplies in February of 2015. Both parties indicate no child maintenance has been paid since that time. Therefore child maintenance will be retroactive to the 1st day of February, 2015 and payable on the 1st day of each month thereafter.

[151] The order will include the normal provisions respecting disclosure of incomes and annual disclosure of tax returns and notices of assessment as well as the normal enforcement provisions.

[152] A separate recalculation order will be issued if the mother wishes to have such an order.

[153] As to relief from child maintenance arrears, though pled by the father, the court has little evidence on this issue and therefore will not grant any waiver of any arrears that may exist. Now that the father is working, he can work out an arrangement with the Maintenance Enforcement Program for payment of any arrears.

[154] As the mother's application was successful, her counsel will draw the order for review by the father's counsel before submission to the court.

[155] The court began this decision by stating that this case is about the child. It is about his best interests and not that of the parents. The court hopes that this decision will provide a framework for the parents to work together to parent the child. He deserves that from each of his parents and all of his extended family. It is apparent from the evidence that the child is loved by all of the family. The challenge will be in finding a way to communicate and co-operate in his best interests.

J.