FAMILY COURT OF NOVA SCOTIA
Citation: *Gavel v. Risser*, 2014 NSFC 21

Date: 2014 07 24
Docket: FLPMCA No. 070075
Registry: Bridgewater

Between:

Dominique Gavel

Applicant

v.

Kyle Laverne Risser

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard	July 3, 2014, in Bridgewater, Nova Scotia
Written release:	June 4, 2015
Counsel:	Michael K. Power, Q.C, for the Applicant Shawn D'Arcy, for the Respondent

By the Court (orally):

Background

[1] Dominique Gavel ("Gavel") and Kyle Risser ("Risser") are the parents of a three year old daughter, Nevada. In late June, 2010, when both were represented by lawyers, they presented a Consent Order for court approval. In the order [which I will call "the last order"], Risser acknowledged that he was the biological father, that he was then working at a local restaurant, and that his 2009 income had been about $13,000.

[2] It was ordered that Nevada would be in the day to day care of the mother, and that Risser and the paternal grandmother would have reasonable access, at reasonable times, upon reasonable notice. However, there were specific provisions that access was to take place at Gavel's residence, and that the father would give notice of any intended telephone access or contact. The order side-stepped any reference to joint or sole custody.

[3] Child maintenance under the **Child Maintenance Guidelines "(CMG")** was established at $85 monthly starting June 1st, 2010. There was a requirement that the parties annually exchange their personal Income Tax Returns and Notices of Assessment from the Canada Revenue Agency; and there was a clause prohibiting the mother from removing the child from the Province except for vacation purposes.

[4] As discussed later, the parents resumed their relationship not long after the last order was approved. Indeed, in time, they decided to live together again. And then they separated, again; and after the passage of more time, the relationship itself (or what was left of it) ended.

[5] In early December, 2013 Risser started an application under the **Maintenance and Custody Act ("MCA")** to vary the parenting arrangements. Gavel filed a Reply and Counter-Application in which she too sought to establish parenting arrangements and to have child maintenance reviewed and recalculated, if need be.

[6] During the final submissions, counsel conceded that in light of the evidence of lengthy cohabitation following the last order that (from a process point of view) the appropriate course of action should have been an originating application by one of the parties with a reply and counter-application, as need be. Through counsel, the parties expressed a wish to have the parenting and child support issues dealt with on their merits, and that the process or procedural formalities could be dispensed with. With that in mind, this decision addresses the parenting and child maintenance issues as "fresh ones" – thereby rendering moot any need to consider section 37 of the **MCA** and the threshold requirements in variation cases.

Risser's Case

[7] In his first affidavit, Risser wrote that he had agreed to "restrictive parenting time" as captured by the last order because his daughter was very young at the time. However, he said both parents intended his access would eventually evolve into expanded parenting time, including time away from the mother's residence – for example, on weekends, holidays, during the summer, etcetera.

[8] Without intending any disrespect, Risser (like Gavel) repeatedly mentioned periods of "reconciliation", times when they were "together", times when they were "reunited", etcetera which occurred after the last order when (I find) he, and she, meant to say the parties resumed (or were trying to resume) their relationship. With one notable exception, I find he did not mean the parties actually lived together as a couple when he used those words. (This, of course, is relevant to his support obligations.)

[9] As mentioned elsewhere, shortly after the 2010 court order was approved, he claimed that they "got back together". However, I find that the reference was not to cohabitation. He stated they eventually did live together for a period of seven to eight months – which is somewhat less than Gavel's version which points to closer to twelve months. In any event, he said that they had an apartment for many months during which time the mother was often away from it – frequently with her father, sometimes taking the child, but often leaving her with him. During the times that he was left alone with his daughter, Risser said that he took care of all the child's immediate needs and that there were no problems.

[10] He also wrote that after they stopped living together they "again reunited in the fall of 2012" and that "we remained together until January, 2013". With respect, as already alluded to, this was a poor choice of words because the

evidence was that there was only one period of extended cohabitation coupled with multiple attempts to resume or restore their personal relationship.

[11] Risser wrote that he and Gavel had frequent disagreements and that there was conflict regarding Gavel's non-prescription drug use. He said the latter was the main reason the relationship was in constant turmoil and that it effectively ended the relationship.

[12] Risser also alleged that there was an incident during which Gavel's father assaulted him with a metal axe. He said the maternal grandfather was charged with assault with a weapon. In testimony, Risser reiterated that he was assaulted by the maternal grandfather, but was unclear about whether a guilty plea was entered or whether a Peace Bond settled the case. For her part, Gavel glossed over the topic.

[13] Because Gavel was living with her parents much of the time, Risser said access became very difficult. He said that he feared for his personal safety should the maternal grandfather be around. I note that the grandfather did not testify and that Gavel did not refute these serious allegation – so, they remain uncontradicted.

[14] Risser complained that his parenting time has not expanded as originally contemplated and that the mother has deliberately restricted and controlled his access. As at the time of his first affidavit, Risser said that he was having his daughter in his care only once weekly for a few hours and that overnight visits were not being allowed.

[15] When he authored his first affidavit, Risser was residing in the Liverpool area. When he authored a second affidavit, he had relocated to Kentville – a considerable distance away - and had re-partnered with Makayla Langley ("Langley"). Langley works shifts at a local nursing home; he is now employed at a local restaurant. Risser started work very recently and anticipates working five days per week for six hours daily at the minimum wage. Weekend work is only occasional. Risser and Langley live alone.

[16] Risser's evidence was that he and Gavel discussed the $680 which he appears to owe (as arrears of support) according to Maintenance Enforcement Program ("MEP") records. He said they went as far discussing "paperwork" to extinguish the balance, but they never did advance the matter. He did not produce any draft documents to support this contention and was vague in terms of when he contacted MEP about the parties' reconciliation. Risser also gave some evidence of

direct cash payments to Gavel - outside of the MEP program. By agreement, he is to be credited for any amounts for which he can produce receipts.

[17] Risser chronicled his employment history which included work at a local forestry mill in May, 2014. Most recently, he was laid off due to work shortage. Previously, he had been seasonally employed with a farm operation in the Kentville area. Before that, he was a carpenter's helper at one time but that work ended in December, 2013 due to seasonal work shortage. During testimony, he provided additional historical employment information which I will not repeat. However, I accept his recapitulation as credible.

[18] Risser was carefully cross-examined on all of this. I am satisfied that Risser for most, if not all, of the time made his best efforts to obtain and to maintain employment – given his limited education and training.

[19] During testimony, 24 year old Risser rounded out his evidence by saying that a couple of years ago he enrolled in a mechanics program but did not complete it because he had no transportation to the local community college. However, he said that he more recently has taken an "on-line" mechanics course which could span anywhere from six months to two years for completion. He expressed hope to complete the program in about one year. Admittedly, the course offers no practical experience and he would have to gain that in the workplace. Eventually, he hopes he will get work in the Annapolis Valley at an hourly rate of somewhere between $17 and $18, to start. As of early July, 2014 Risser's income was approximately $5,200. He hopes that he will earn approximately $8,000 from his current employment, thereby bringing his total projected 2014 income up to about $16,200.

[20] Risser said he will pay the Nova Scotia Table amount based on his estimated or projected income. He did not ask for respite or relief to take into account travel expenses incidental to parenting times.

[21] I am mindful that the last support order was consensual and that there was no challenge to his work ethic or **CMG** income. His background, his employment history, education and training, health, age, etcetera, were certainly known; and the mother had a lawyer. In the circumstances, I find that it is no coincidence that Gavel's current complaints about his income earning capacity only surfaced when Risser started his application.

[22] By early July, 2014 Risser was writing that his parenting time continued to be problematic. The highlights of the second document follow. With rare exceptions, he said Gavel was still resisting more frequent and longer parenting times. He admitted that some visiting was permitted at his father's home after transition or drop-off by Gavel's mother or Gavel herself. Even then, however, he stated the visits have only been for a few hours.

[23] Risser reiterated that during their period of cohabitation that he and the mother jointly parented their daughter without any restrictions or serious concerns – with the exception of his concerns about her drug use. According to him, the mother identified no issues about his parenting skills or capacity until the litigation commenced.

[24] As mentioned, MEP records indicate that Risser was $680 in arrears of child support when the agency received notice that the last order was not to be enforced. However, according to Risser, neither parent knew or believed that there was any money due and outstanding by him and, in any event, there was a tacit understanding that no support was due and payable - if only because they had reconciled and were struggling financially. Risser confirmed he did not pay any child support during the period of admitted cohabitation because it was his understanding that there was no requirement to pay.

[25] When cohabitation occurred, neither Risser nor Gavel made an application to vary the last order. In the final analysis, I find that he did not give a credible explanation for not applying. After hearing the mother's evidence, the same may be said for her.

[26] One has to keep in mind they both had lawyers. I find he and she knew, or ought to have known, that a variation application was needed to stop child support and recognize the revamped parenting arrangements. Indeed, Risser volunteered that the lawyers knew the parties may be trying to get back together. However, to repeat, neither he nor Gavel took any steps to vary their order.

[27] Risser flatly denied allegations levelled by Gavel to the effect that he had emotionally or physically abused her during their relationship. Risser stated that in the final stages of the relationship, it was agreed that Gavel would reside with their daughter at her parents' residence while they each struggled to establish some sort of financial and residential stability. During this time, he said they agreed to work on their personal relationship while he, in particular, looked for work to sustain the family.

[28] His version of the final events are that Gavel was alleging infidelity on his part and that he was very concerned about her drug use. Risser wrote that he does not believe in drug use and that he has never used non-prescription drugs. Risser went on to allege that the mother has used drugs as long as he has known her and alleged that her father does likewise. According to Risser, both Gavel and her father have told him directly that they see nothing wrong with recreational drug use. As noted already, there was no countervailing evidence from the maternal grandfather.

[29] Risser's written evidence was that he has never noticed any unusual behaviours or conduct on the part of his daughter during his relatively limited parenting times; and he denied that any unusual behaviours that the mother may be observing are in any way connected to his contact with the child. While in his presence, the father wrote that she always appears to be happy and excited to be with him.

[30] Risser expressed his personal views and speculated as to Gavel's conduct in the wake of their broken relationship, peripheral involvement by police, etcetera. There is no value added to discussing this further for the purposes of the issues at hand. Affidavit evidence must be confined to direct observation and knowledge. Speculation, personal views, and argument should not be imported into affidavits.

[31] Finally, in addition to specified parenting times already discussed, Risser wrote that he would like to see an award of joint custody. He added that his mother is the one who usually contacts Gavel or her mother to arrange for access because he and Gavel are unable to communicate and cooperate civilly, most of the time.

[32] At this juncture, I will say my assessment of the evidence was not helped by the fact that no extended paternal and maternal family members testified. Nor did I hear from Risser's current partner. No explanation was offered for their absence.

[33] When confronted with a list of complaints by Gavel about his parenting and his conduct (generally speaking), Risser firmly denied her allegations or minimized their import. He did concede that the couple argued an awful lot before they separated but he denied that he has ever physically assaulted Gavel or threatened to do so.

[34] Up until July, 2013 Risser did not have access to a motor vehicle. However, since then, he has secured a license and now has the use of a car. Notwithstanding his relocation to Kentville, Risser would like to see access that is longer in duration

and more frequent. He said that he has a suitable car seat. His proposal is that he would be responsible for transporting the child to and from his residence. Should weather or road conditions be unfavourable, he would be prepared to exercise parenting time in the local area.

MEP Record of Payments

[35] An official with the Department of Justice, Maintenance Enforcement Program, confirmed that the July 27th, 2010 Order was registered with MEP but that the file had been closed because MEP was advised that the parties had reconciled in 2011. According to MEP, the parties were informed that they must return to court for another court order "once that reconciliation was no longer effective". Allowing that the language used was cumbersome, I am satisfied that the intent of the letter was to suspend enforcement and to inform the parties they should return to court to deal with the last order.

[36] A Record of Payments provided by MEP demonstrates that $680 was processed by MEP from July 1st, 2010 until mid-January, 2011. As at February 1st, 2011 the account was showing a zero dollar balance due and outstanding but Risser's account continued to be charged under the last order at the rate of $85 per month until October 1st 2011. No credits are shown after February 2011. By October 1st, 2011 the outstanding arrears were $680.

[37] I hasten to add that there is no indication as to who contacted the MEP office or precisely when. However, what is clear is that neither parent sought review and/or variation of the 2010 court-sanctioned support payments. And, to repeat yet again, neither offered any coherent explanation for their inactivity - despite MEP's direction at the time and the fact that both had the benefit of legal representation in the past.

Gavel's Case

[38] In her affidavit, Gavel confirmed that she continues to have primary care of Nevada and that Risser and/or his mother, Lynn Risser, have access at her home.

[39] She wrote that she and Risser reconciled "for a time in July, 2010 and then were off and on from 2011 to 2013". More to the point, she wrote that from about September, 2011 to August, 2012 she lived with Risser in an apartment. She added that during this time, she and the child were with her parents at their home almost daily and most weekends. Additionally, she said that Risser did not contribute to

child support as required by the previous court order. She wrote that in August, 2012 she had left Risser and returned to her parents' home for a variety of reasons including "mental and physical abuse" that she attributed to Risser and also due to her belief that he had been unfaithful to her.

[40] At one stage, she said that "I decided" that it would be better for access to take place at a Family Resource Centre in Liverpool because, according to her, "access being exercised in my home was very awkward for myself and my parents". She wrote that for a brief period of time in August, 2013 she did permit Risser to take Nevada twice weekly for four to five hours at a time provided he promise not to take her out of town and to only have their child with his immediate family. But, according to her, she noticed some unusual behaviours such as acting out, chewing of finger and toenails, frequently urination on the floor, etcetera. She said that those developments caused her to be concerned as they only started after the frequency and duration of access increased. She wrote, "At any rate, it soon became apparent to me that Mr. Risser would not abide by my rules."

[41] Gavel provided a short list of other complaints which she says were met with "aggression and verbal abuse" when she confronted Risser. Accordingly, in October, 2013 "I decided" to go back to supervised access. Thereafter, she said that Risser's access was confined to parenting under his mother's supervision at a park for two to three hours at a time on Saturdays. According to her, once supervised access was reinstated, the child's behaviour improved and her aggression lessened.

[42] As of the hearing, Gavel was still residing with her parents (neither of whom testified). She described the home as a five bedroom home and that Nevada sleeps in her own room which includes the usual amenities.

[43] Gavel is currently unemployed. She has a grade 12 education. She said that she has enrolled in a long distance education program in accounting and that she graduated in October, 2013. However, she said that she has had difficulty finding a job related to her education in the local area. I observe that Risser did not criticize or belittle her efforts to improve her circumstances. This is in stark contrast to her stance on his efforts.

[44] As noted elsewhere, she said the father paid no child support from "September of 2011 to December, 2012". This is not of great import because her current application is confined to 2013 and 2014. She vaguely allowed that he paid some support to her in 2013 but was imprecise in the amounts, timing, etc. This

aspect of the case has been resolved by receipts she signed and which are now in evidence by agreement.

[45] Gavel said that she continues to want to have primary care and custody of the child and that the father's parenting time only occur during the day in the presence of his family and only in the Liverpool area.

[46] During her testimony, Gavel elaborated that after the 2010 order was approved that they resumed speaking to each other and otherwise trying to re-establish their relationship. However, she insisted they did not immediately cohabit. She admits that she did see the father almost daily while she was then living at her parents and while he was living with his parents and others. As noted elsewhere, MEP records show that no child support was received by the program after January 2011.

[47] Gavel's evidence about actual cohabitation dates does not line up with his. Frankly, the evidence by both parents was confusing and vague. But again this is largely resolved by the 2013 – 2014 time frame the case has boiled down to.

[48] In any event, her version of events is that she and the child left the father and that she went back to live with her parents. She conceded that the father saw the child regularly, and that the father and child engaged in normal or routine activities. There were no reported problems or issues at the time. Indeed, she hesitantly acknowledged that the parties actually resumed dating. That said, she said that the "final breakup" occurred in or about January, 2013.

[49] In testimony, the mother reiterated claims that she was verbally and physically abused by the father and she provided some elaboration. She claimed that she went to the police once but that no charges were laid. There was no evidence from any police officers at the hearing or any attempt to introduce so-called incident reports to corroborate her version of events.

[50] After January, 2013 she said the parties made some efforts to improve their communications and to regularize the father's access. There is no question that they were physically separate during 2013 and that generally communications remained poor and conflicted. It seems they resorted to the respective grandparents to help with arrangements, etcetera. After saying that, the mother asserted that she and the father's mother (Lynn Malone) do not get along well and she characterized the paternal grandmother as "downright ignorant".

[51] The mother knows the father's current girlfriend but she has not visited their residence (or asked to visit) and she knows little about their current circumstances. The mother continues to object to extended or overnight visits with the father. She repeatedly said that the father has no parenting capacity or skills, despite his countervailing evidence. In spite of a long list of complaints about the father's parenting, she admitted that she did nothing to work with him to improve what she perceived to be deficient skills.

[52] According to the mother, their daughter is a normal and happy child although she does not have a lot of friends. She will start school in the fall and hopefully extend her friendships and contacts.

[53] As already discussed, the father provided extensive affidavit evidence. When asked directly if she had read the documents and considered the father's version of past events and his proposals for the future, the mother stated that she had barely read them because "it's not that important to me". When pressed regarding her complaints about the father's parenting skills, she admitted that her own affidavit and testimony hearkened back several years and that she could not provide any specific examples of current deficiencies.

[54] By contrast, the mother does not think that she has any shortcomings when it comes to parenting. For reasons best known to the mother, she did not disclose until cross-examination that she had been charged with, and entered a guilty plea to a drug trafficking offence under the **Controlled Drugs and Substances Act** and that her sentencing was pending for July 15th. She referred to a plea bargain which would see another charge dropped and she was anticipating a non-custodial sentence – namely, house arrest on terms and conditions she did not disclose. She reluctantly conceded that she had a history of smoking marijuana and that she "had a problem" with pills – mainly valium, she claimed. In the run-up to sentencing, she said she was referred to Addictions Services for assessment and counselling. She did not elaborate on the circumstances surrounding the charge which goes back to events in March 2013 and her conviction in April 2014. She did not disclose copies of any of the relevant provincial court documents. Nor did she submit any reports from Addictions Services or other service providers.

[55] The mother's counter-offensive on the issue of drug use was that the father had "snorted drugs" in her presence in the past. However, she provided no particulars and there is no evidence of the father's involvement with the criminal justice system.

[56] The mother continues to insist that access be confined to the father and his immediate family in controlled circumstances. She did not provide any proposals as to how the father's parenting time might develop as their daughter gets older.

[57] Returning to the child support arrears issue, the mother said that it was not she who called MEP to suspend collection. Her position is that MEP should be enforcing the amount that was outstanding before the brief reconciliation. She could not recall the parties discussing the topic but admitted she did not expect collection or enforcement efforts by MEP while they were living together.

Submissions

[58] Counsel for Risser submitted that Gavel's resistance to improved parenting time by the father is grounded in her wish to have "control" and that she is effectively treating the child as a chattel. Keeping in mind the age and stage of the child, and that the litigation has been ongoing for many months, without any significant change in the mother's underlying position, it was submitted that she is unlikely to budge unless ordered by the court. It was also submitted that it is hypocritical of the mother to challenge and criticize the father's parenting abilities when there were no such complaints while they cohabited.

[59] Given that the father has relocated to the Annapolis Valley, there is no opposition by him to a transition in the parenting arrangements but he strongly resists empowering the mother with micromanagement authority or control while the child is visiting him. In brief, it was submitted that the parenting arrangements should not be on terms and conditions satisfactory only to the mother. And, the court was reminded that the child is a child of both parents and entitled to have meaningful parenting time with each. Risser also requested joint custody but, with respect, I do not understand why - given the palpable lack of communication and ongoing personal conflict between the parents.

[60] Regarding child support, Risser invites the court to rely on his income tax returns and the related **CMG** Tables. It was argued that the mother has not made out a case to sustain the argument that the court should impute higher or additional income. On behalf of the father, it was submitted that he has been employed at all material times and doing the best that he can. Moreover, his current employment is not inconsistent with his past employment record. Keeping in mind that he is trying to improve his education and training, it was submitted that this is not a case for imputing any higher income.

[61] The father is prepared to pay the Table amount for support in the year 2014. In the same vein, he acknowledges responsibility for 2013 provided he gets credit for any amounts paid informally to the mother. Based on copies of receipts provided by him after the hearing, he should be credited with $625 for 2013; and $485 for 2014.

[62] Lastly, Risser invited the court to retroactively vary (in effect) the last order so as to extinguish any amount shown due and payable by him according to MEP.

[63] On behalf of the mother, it was submitted that income should be imputed to the father over and above that which was declared in his returns. Additionally, the mother wants the father to pay the $680 shown outstanding by MEP.

[64] With regard to the father's parenting time, it was submitted that she is concerned about the unknowns, i.e. the new girlfriend, the new residence, etcetera. I note that Risser's girlfriend did not testify and did not provide an affidavit. However, by the same token, several key personalities – including the maternal grandfather - also did not give any evidence.

[65] The thrust of the submissions on behalf of the mother was that it is "premature" to award overnight or other extended access. And, it was submitted that the father could and should obtain a cell phone and perhaps a computer so that the child can have additional access by those means. It was also suggested that both parents may need some counselling and education to improve their potential resumption of communication and cooperation in the child's best interests.

[66] On behalf of the mother, it was argued that a gradual or graduated access regime in the local area might be advisable before the court endorses full blown access at the father's Annapolis Valley residence or elsewhere.

Discussion/Decision

[67] Under the **MCA,** the father and the mother of the child are joint guardians and equally entitled to the care and custody of the child unless otherwise provided by statute or ordered by a court. In any proceeding under the **MCA** concerning the care and custody or access and visiting privileges in relation to a child, the court must give paramount consideration to the best interests of the child. In determining the best interests of the child, the court must consider all relevant circumstances, including but not limited to those set out in section 18(6)(a) to (j).

[68] The mother has alleged family violence within the relationship. For our purposes, section 2(da) defines family violence, abuse or intimidation. The impact of any family violence, etcetera, is a relevant consideration regardless of whether the child has been directly exposed to it or not. Moreover, under section 18(7) when determining the impact of any family violence, etcetera, the court is given a list of additional factors to consider.

[69] I am mindful that under section 18(8), that the court must 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, including consideration of the impact of any family violence, etcetera, just mentioned.

[70] With respect, I find the mother has not established on a balance of probabilities that the father deliberately and purposefully inflicted violence, abuse or intimidation upon the mother or any member of her family as contemplated by the definition. And her generalized and vague assertions of inappropriate conduct fall short of the standard of proof required by the legislation and by case law.

[71] Even putting the best spin on the mother's case, keeping in mind section 18(7), I find that the allegations do not disclose recent or frequent misconduct, and that there is an absence of evidence of any harm caused to the child or of any risk of harm. Additionally, the so-called final separation of the parties many months ago - in and of itself - has put to rest any potential for future direct conflict.

[72] It therefore bears repeating that the court must by statute give effect to the principle that the child should have as much contact with each parent as is consistent with the best interests of the child.

[73] Despite the volley of complaints and criticisms of his parenting by the mother, and despite the mother's own shortcomings (including but not limited to her involvement with the criminal justice system) the father has largely refrained from similarly denigrating the mother. He does not seek to wrestle primary care, custody and control of the child from her.

[74] Allowing that a court may limit or impose supervised access if necessary to protect a child, or where a parent has parenting problems, such is the exception and not the norm.

[75] Importantly, the onus is on the person who seeks to limit access to prove that a proposed restriction is in the best interests of the child and promotes the child's interests.

[76] While a child's age and stage in life is relevant, there is no general rule or direction that non-custodial parents must wait many years before enjoying full parental rights. For example, Justice Forgeron in *T. (M.) v. G (M.)*, 2010 NSSC 89, granted unsupervised access to a father of a seven month old child. In that particular case, the father had a history of substance abuse but had changed his lifestyle and the court determined that the child would benefit from the father being involved in all facets of the child's life. The court held that supervised access was inappropriate when the sole or only purpose was to provide some comfort to the parent with primary care – especially when supervised access to date had increased the animosity between the parties instead of improving their relationship for the child's benefit.

[77] Gavel has not persuaded me on the balance of probabilities that the father's parenting needs to be supervised, constrained, or controlled in the way that she would like. As just noted, the test is not what makes the mother feel comfortable or what she would prefer. Rather, the test in an objective one and must be evidence-based.

[78] There is no doubt that the father's relocation to Kentville introduces geography issues which should be addressed. However, and with respect, the challenges are certainly not unusual and certainly not insurmountable in a relatively small Province.

[79] Regrettably, the quality and level of communication and cooperation between the parents is poor. Although there were general submissions about the benefits of education and counselling for both parents, there was no evidence about the availability of such services, the cost, etcetera. In the circumstances, it would be inappropriate to order the parents to do anything along these lines. However, I would strongly encourage them to seek out and to engage in appropriate counselling and other services as soon as possible – if not in their own interests, then in the best interests of their child.

[80] Against this background, I also find that it would be inappropriate at this time to impose an order for joint custody of the child. Joint custody requires a high degree of communication and cooperation, and an ability to set aside personal animosity in order to allow the parents to jointly make decisions on major issues

such as schooling, religious faith, nonemergency medical care, community and school involvements, etcetera. By the same token, at this time, I am not prepared to award sole custody to the mother who already enjoys *de facto* primary care and custody. To do so at this time would only reinforce in her mind her strongly held opinion that she ultimately is in control of most, if not everything, that pertains to the child. As mentioned already, this is contrary to section 18 of the **MCA**.

[81] In the circumstances of this case, my opinion is that the best approach is to address the parenting arrangements without resort to either joint or sole custody.

[82] I order that the mother shall have primary care, custody and control of the child, subject to unsupervised reasonable parenting time ("access") by the father at reasonable times, upon reasonable notice. This will include, but shall not be limited to the following:

(a) Alternate weekends from Friday at 5:00 p.m. until Sunday at 5:00 p.m.

(b) For 2014 only, one week of block access to be exercised before the 1st of September, 2014.

(c) For the months of July and August, **2014** the father's parenting time (including block summer access) shall be exercised in the local area.

(d) Commencing in September, 2014 the father's parenting times may be exercised away from the local area and, for the purposes of clarity may include parenting at his residence in Kentville.

(e) Reasonable telephone and computer access (e.g. Skype, e-mail, etcetera) at reasonable times, upon reasonable notice.

(f) The father shall be responsible for all transportation arrangements incidental to his parenting times. An approved car seat appropriate to the child's size/weight etc. must be used.

(g) The father shall be entitled to obtain, and the mother shall provide (or authorize release) timely information and reports regarding the child's education, health, activities and schedules, and general well-being.

(h) Each parent shall provide the other with her/his current address and contact information for emergency and non-emergency/routine purposes.

(i) The mother shall not relocate with the child outside of Queens County without first obtaining the prior written consent of the father or, alternatively, court approval. The mother may leave the County with the child for vacation purposes, provided such does not interrupt Risser's scheduled access. On reasonable notice, the mother may request access rescheduling for vacation purposes; and Risser shall not unreasonably withhold his consent to rescheduling.

[83] The parties did not focus much attention on possible arrangements for parenting during statutory holidays, special occasions, and longer scenarios such as Christmastime, Eastertime, school breaks, etcetera. Accordingly, my order shall be interim and subject to review and further refinement.

[84] In the meantime, the parties are directed to regroup and to turn their focus on those arrangements. With the help of counsel, they are encouraged to find common ground and agreement, failing which I will specify the arrangements after hearing further submissions from counsel.

[85] Counsel are directed to secure from a Family Court Officer a date and time before the end of September for the purpose of a brief review hearing, if needed. I would suggest that no more than an hour be allocated. Before mid-September, 2014 counsel should submit any additional affidavit evidence intended for consideration. In the circumstances, and in order to expedite matters, the review will be conducted on the basis of affidavits with no oral testimony.

[86] The parents are reminded through counsel of conciliation services available at the court to potentially assist them achieve a positive outcome in lieu of ongoing litigation.

[87] The objectives of the **CMG** are to establish a fair standard of maintenance for children that ensures they benefit from the financial means of both parents, to reduce conflict and tension between parents by making the calculation of child maintenance orders more objective, to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement, and lastly to ensure consistent treatment of parents and children who are in similar circumstances.

[88] The presumptive rule is that the amount of child maintenance for children under the age of majority is the amount set out in the applicable table and the

income of the parent against whom the order is sought plus the amount, if any, determined under section 7. In the present case there is no section 7 claim.

[89] Regarding what I will refer to a "past" child support, I conclude that Risser has not established by evidence or by law a foundation to retroactively vary the last order to a date preceding reconciliation and cohabitation. That Gavel did not insist on or pursue collection before now is no defence. Support speaks to the child's right - not the rights or preferences of the parents. Moreover, even if there had been some sort of loose understanding about support arrears, under section 31 of the **MCA**, the court is not bound by it if the terms are not in the best interests of a child. While the child's entitlement to support from the father may have lapsed with cohabitation, in my opinion, the pre-existing right was not extinguished.

[90] Making the best of the evidence, I find Risser's support duty continued up until actual cohabitation/reconciliation, and it did not stop before then – that is, when the parties resumed dating or otherwise were thinking about or trying to get back together (to use their words). I find the amount due and payable was (and remains) $680. Risser's retroactive variation request is dismissed.

[91] Under section 16 of the **Guidelines**, a parent's annual income is usually determined by using the sources of income set out under the heading "Total Income" in the T-1 General Form issued by the Canada Revenue Agency, subject to adjustments set out in Schedule III. It is commonly called Line 150 income.

[92] As revealed by his Income Tax Summaries, Risser's annual income history is as follows: 2011 - $8,306; 2012 - $3,892; 2013 - $7,848. At incomes below the payment threshold of $10,820 in 2011, 2012 and 2013, the **CMG** Table amount for basic support for one child was $0 monthly in those years. At an income level of $16,200 for 2014, it is $87 monthly.

[93] However, in some circumstances, under section 19, the court may impute an amount of income to a parent as it considers appropriate in the circumstances. There is a non-exhaustive list of circumstances which may be relevant. In the present case, Gavel relies on section 19(1) (a) which refers to the circumstances in which a parent is intentionally underemployed or unemployed, except where the underemployment or unemployment is required by the child's needs or by the reasonable educational or health needs of a parent.

[94] I have previously written about the section. In *V.A. v. R.A.*, 2011 NSFC 23, I canvassed many of the relevant decisions including those by the Nova Scotia Court

of Appeal. I incorporate my earlier analysis by reference. In the *V.A.* case, I referred to a series of decisions on the subject by Justice Forgeron of the Supreme Court, Family Division. She re-visited the subject area in *MacDonald v. Pink*, 2011 NSSC 421. Her exhaustive analysis commences at paragraph 18 of the report. Justice Forgeron conveniently distilled a number of principles which I will further refine and reduce to include the following:

1. The discretion under section 19 must be exercised judicially – not arbitrarily.

2. A rational and solid foundation in evidence, grounded in fairness and reasonableness, must be shown before a court can impute income.

3. The goal is to arrive at a fair estimate of income – not to arbitrarily punish the payor.

4. The burden of establishing what income should be imputed rests on the party making the claim. However, the burden shifts if the payor asserts that her or his income has been reduced or her or his income earning capacity is compromised by ill health, etcetera.

5. The court is not restricted to actual income earned but may look to income earning capacity having regard to subjective factors such as age, health, education, skills, employment, history and other relevant factors.

6. The parties' decision to remain in un-remunerative work may entitle a court to impute income where the party has a greater income earning capacity

[95] Applying the prevailing case law to the facts of the present case, I find that Gavel has not established on a balance of probabilities that Risser is deliberately underemployed or otherwise not meeting his child maintenance obligations. With respect, broad rhetoric that the father could and should be doing more to maximize his income potential is insufficient. The case law is clear that the court's decision must be evidence-based. The court cannot judicially notice job opportunities (or the lack) for full or part-time work in various communities, employment rates or trends, wage scales, etc.

[96] I find that Risser was candid and forthcoming about his employment and income history. There is nothing within his evidence or any countervailing evidence from the mother to support the proposition that he could achieve a higher

or other income than he has experienced, given his education, training etc. or his background and other circumstances.

[97] It should be remembered that under the **MCA** both parents have a duty to financially support their child, but Risser elected not to criticize Gavel's inability to find work despite her efforts.

[98] In my opinion, the presumptive rule should be sustained in the present case. Accordingly, I determine that no maintenance was payable by the father to the mother for the child's benefit in 2013.

[99] I find that Risser made payments of $675 in 2013 directly to the mother for which he should receive credit. By operation of law, that amount should be first credited to the child support arrears which I have fixed.

[100] That said, I order that commencing effective January 1st , 2014 Risser shall pay to Gavel for the child's benefit the sum of $87 monthly, due and payable on the first day of each month thereafter until otherwise ordered.

[101] Risser shall receive a credit of $85 against his 2014 obligations because there is a receipt for it.

[102] Starting in 2015, Risser shall provide Gavel with true copies of his personal income tax returns by June 1st and with true copies of his Notices of Assessment from the Canada Revenue Agency when received.

[103] All payments pursuant to this decision shall be made through the MEP. A repayment schedule can be negotiated by the parties through MEP. Otherwise, MEP will take whatever enforcement measures it deems appropriate. (His total credits pursuant to this decision are $760.)

[104] Mr. D'Arcy shall prepare and submit an order that captures the result.

Dyer, J.F.C.