FAMILY COURT OF NOVA SCOTIA
Citation: *M.S. v. S.M.,* 2016 NSFC 27

Date: 2016-08-31
Docket: Pictou No. FPICMCA 94497
Registry: Pictou

Between:

M.S.

Applicant

v.

S.M., T.M. & H.M

Respondent

Judge:	The Honourable Judge Timothy G. Daley
Heard	August 22, 26 & 31, 2016, in Pictou, Nova Scotia
Oral Decision:	August 31, 2016
Written Decision:	November 14, 2016
Counsel:	Mallory Arnott, for the Applicant Amber Snow, for the Respondent, H.M. Hector MacIsaac for the Respondents, S.M. & T.M.

Introduction

[1] This case and decision is solely and exclusively about the child, M.J.S., and what is in his best interests. Specifically, I must decide whether he should remain in the care of his paternal grandparents, S.M. & T.M. who reside in Nova Scotia, or whether he should be returned to the care of his mother, M.S., who resides in Calgary, Alberta.

[2] This case and decision is not about who loves M.J.S. more. It is very clear to me that each adult in his life, including S.M. & T.M., his father H.M., and M.S., love him very deeply and only want the best for him. The same applies to his entire extended family, some of whom have testified in this hearing. The fact that this hearing was required speaks to that love and commitment. Thus it is my hope that, even though this will be a difficult decision for some to hear today, you will remember the history of trust and co-operation you have together in caring for M.J.S. and will work together in the future to ensure he continues to be surrounded by family that love him both in Nova Scotia and Alberta. There are many children who can only wish for such support.

[3] In arriving at a decision in this matter, I must not only consider and carefully examine all of the evidence before me but I must also consider and apply the relevant law to that evidence. Given the significance of this decision both for M.J.S. and his family, I will first set out the legal framework within which I must make a decision. I will then review the evidence placed before me followed by my decision and the reasons for that decision.

Background

[4] M.J.S. was born on 8 October 2006, is now nine years old and will be 10 in about a month. For most of his life he has resided with his mother, M.S., in Alberta but there have been significant periods in his life when he is resided with his paternal grandparents, S.M. & T.M., here in Nova Scotia. Some of this time spent with his grandparents has been for summer vacation. On other occasions, M.J.S. has been in the care of S.M. & T.M. as a result of the mental health and drug addiction struggles of M.S. including the time he spent in the care of his grandparents from January of 2015 until today.

[5] While in his mother's care, M.J.S. has also spent that time in the company of his older siblings, X.S. who is 18 and K.S. who is 14. When in Nova Scotia with his grandparents, M.J.S. has spent time with his biological father, H.M., though he

has not primarily resided with H.M. and has been primarily under the care and residing in the home of S.M. & T.M.

[6] M.S. said that she has now come to understand that she has a mental illness and that she has had substance abuse problems. She maintains that she is now clean and sober, her mental health issue is being properly dealt with and she is otherwise stable and ready to parent M.J.S. again. She has care of her two older children after they had been placed in the temporary care of the child protection services in Alberta. She said that it is in M.J.S.'s best interest that he be returned to her care immediately.

[7] S.M. & T.M. say that, given the history of mental health and substance abuse issues in M.S.'s life, her history of relapse over many years and the fact that M.J.S. is well settled and well cared for in their home and community, there is simply too much risk for M.J.S. to return him to M.S.'s care when balanced against the benefits of him remaining in their care here in Nova Scotia. They say it is in M.J.S.'s best interest that he remain with them in Nova Scotia. H.M. agrees with the grandparents.

[8] I believe this fairly sets out in summary form the positions of the parties and the nature of the dispute. I will now set out the legal framework that I must apply and my analysis of the evidence.

Legal Framework

Material Change

[9] In this case, I must begin the legal analysis with consideration of the existing order. When M.J.S. came to reside with his grandparents in January of 2015, they applied for and were granted an order which granted joint custody of M.J.S. to S.M. & T.M. and H.M., with S.M. & T.M. having primary care and control of M.J.S. Under that same order M.S. was granted supervised telephone access to M.J.S. at the discretion of S.M. & T.M. and H.M. Finally, the order required that none of the parties could relocate M.J.S. from the province of Nova Scotia without an order of this Court.

[10] That order has been in place without variation since it was heard on 23 April 2015 and issued on 21 May 2015. Therefore I must consider whether it should be varied. In order to do so, I would normally have to apply the test of whether the applicant, M.S., has established that there has been a material change in

circumstances to warrant consideration of evidence that might lead to a change in that order in the best interests of M.J.S.

[11] It is been suggested by M.S. that she should not have to establish a material change in circumstances because at the time that the application was brought, she was suffering a mental health and addiction crisis, was hospitalized and was unaware of the proceedings. In fact the record is clear that an order of substituted service was granted by the court and the application and supporting documents were served on a child protection worker in Alberta. It was M.S.'s evidence that she did not become aware of these proceedings or the order until May of 2016 and thereafter brought her application. The respondents do not take issue with that portion of the evidence and are not opposed to M.S.'s position that the court should not have to find a material change in this case.

[12] On review of the evidence, I am in agreement with M.S. that though there is an existing order, given the circumstances under which it was obtained and her personal circumstances at the time, it would be unreasonable to require her to have to establish a material change in circumstance. Therefore, though I find no fault in the process followed by S.M. & T.M. and H.M. in bringing their application, I find that it is not required that M.S. prove a material change in circumstance to bring forward her application.

[13] If I am incorrect in that conclusion, I note that the test to be applied in determining whether a material change in circumstance exists is set out in the Supreme Court of Canada decision of *Gordon v. Goertz*, [1996] 2 SCR 27, 1996 CanLII 191 (SCC). In that decision, the court wrote 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), 1991 CanLII 839 (BC SC), 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.

[14] Applying that test to the present circumstance, I find that if M.S. must establish a material change in circumstance, she has done so. In particular, I find that she has established on the evidence a change in her ability to meet the needs of M.J.S. which materially affects M.J.S. and which was not foreseen and could not have been reasonably contemplated by the judge who made the initial order. I find this based upon the evidence of M.S. that she has gone from a circumstance at the time of the order where she was in a mental health and addictions crisis and completely incapable of caring for any of her children, to the point where she now is mentally stable and under appropriate treatment, has been clean and sober for over a year and is capable of and is in fact parenting her two older children in her home in Calgary. I am satisfied that the evidence makes clear that this circumstance was not foreseen and could not have been reasonably contemplated by the judge who made the initial order in early 2015. As a result, I am satisfied that M.S. has established a material change in circumstance. Having done so I find that I must now embark upon the fresh inquiry into what is in M.J.S.'s best interests.

Maintenance and Custody Act

[15] The governing legislation in this circumstances is the Maintenance and Custody Act, 1989 RSNS c.160 as amended. This act provides direction to the court in determining matters of custody and access arrangements for children. The authority to determine custody and access arrangements is found in section 18(2) through (4).

[16] Any analysis of what is in M.J.S.'s best interest begins with section 18 (5) of the Act which reads as follows:

> (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.

[17] Section 18 (6) provides guidance to the court in what it should consider when determining the best interests of the child. The following portions of that section I find to be relevant in this circumstance which I have edited for brevity

> (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…;
>
> (b) each parent's … willingness to support the development and maintenance of the child's relationship with the other parent …;
>
> (c) the history of care for the child, …;
>
> (d) the plans proposed for the child's care and upbringing, …;
> ….
>
> (f) the child's views and preferences, …;
>
> (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 …;
>
> (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.

[18] Given that there is a history of family violence in this matter, I must consider Section 18(7) in conjunction with Section 18(6)(j) (i) and (ii). Section 18(7) reads, as edited for brevity:

> (7) When determining the impact of any family violence, abuse or intimidation, the court shall consider
>
> (a) the nature of the family violence,…;

> (b) how recently …it…occurred;
>
> (c) the frequency of the family violence…;
>
> (d) the harm caused to the child …;
>
> (e) any steps the person causing the family violence… has taken to prevent further family violence… from occurring; and
>
> (f) all other matters the court considers relevant.

[19] Given that grandparents are involved in the matter, I must consider Section 18(6A) as follows:

> (6A) In determining the best interests of the child on an application for access and visiting privileges by a grandparent, the court shall also consider
>
> (a) when appropriate, the willingness of each parent or guardian to facilitate access by and visiting with the grandparent; and
>
> (b) the necessity of making an order to facilitate access and visiting between the child and the grandparent.

[20] I must also take into account Section 18(8) which reads:

> (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).

Case Law

[21] The analysis of M.J.S.'s best interests, however, does not end with the factors set out under Section 18 of the Act. I must also look to what other courts have said in relation to the determination of a child's best interest. The leading decision in Nova Scotia respecting that analysis is the *Foley the Foley*, 1993 CanLII 3400 (NSSC) decision of Goodfellow, J. I note that this decision predates amendments to the *Act* which set out the factors contained in section 18(6) and I find that the so-called "Foley factors" have been largely subsumed by those amendments. That said, *Foley* supra remains a helpful analysis of the test of best interests. The following are a list of those factors which are relevant to this case:

15 **…** In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.

16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction …;
2. Physical environment:
3. Discipline;
4. Role model;
5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

…

7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;
8. Time availability of a parent for a child;

…

11. The emotional support to assist in a child developing self-esteem and confidence;
12. The financial contribution to the welfare of a child.
13. The support of an extended family, uncles, aunts, grandparents, etcetera;
14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. …;
15. The interim and long range plan for the welfare of the children.
16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
17. Any other relevant factors.

17 The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question.

> With whom would the best interest and welfare of the child be most likely achieved?

18 The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

19 Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.

20 On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

Mobility

[22] Finally, given that M.J.S. has lived in Nova Scotia with his grandparents since January of 2015, I find that I must also consider the case law surrounding so-called “mobility applications”. These applications include circumstances where a party seeks to relocate a child from the home of one custodial party in one province to the care of another custodial party in another province. The leading case on mobility is that of the Supreme Court of Canada in Gordon v. Goertz [1996] 2 SCR 27, 1996 CanLII 191 (SCC) in which the court held as follows:

> 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?

The Evidence

[23] Having set out the legal framework for this decision, I will now review the evidence.

M.S.

[24] M.S. provided her evidence in the matter. She is a single mother of three children. Her daughter X.S. is 18, her son K.S. is 16 and M.J.S., the child who is

the subject of these proceedings, is 9 years old. M.J.S.'s father is the H.M. X.S. and K.S. have a different father. M.S. said that she is received no financial support from either father for many years.

[25] S.M. is M.J.S.'s biological grandfather. T.M. is M.J.S.'s step-grandmother. I will refer to them as the paternal grandparents for convenience in this decision. It is a clear to me that T.M. has been in all respects a very loving and supporting grandmother to M.J.S. and has been treated as his grandmother throughout his life.

[26] M.S. said that the grandparents rarely saw M.J.S. for the first eight years of his life and were not involved in M.J.S.'s life until she sent him to Nova Scotia for a visit in August 2010. She said another year went by before another visit in the summer of 2011 in Nova Scotia with no contact from H.M. Thereafter the grandparents took a much greater role and interest in M.J.S.'s life.

[27] There were three significant mental health and/or drug crises in M.S.'s life. As well, Alberta's Children and Family Services ("the Agency") was involved with her family once prior to M.J.S.'s birth for a period of a few months. She describes entering into a family enhancement agreement. She also indicated there were other times that the family was investigated though no action was taken.

[28] The first crisis for M.S. occurred in 2011 when she travelled to the Dominican Republic for vacation. She suffered a mental health crisis and whether she was incarcerated voluntarily or involuntarily, it is clear that she spent much more time in the Dominican Republic than planned. She said that she was diagnosed with drug-induced psychosis and was not diagnosed with bipolar disorder until March 2013. I infer from this evidence that she was using illegal drugs at the time of her this trip. Ultimately she was returned to Montréal where she spent considerable time in hospital. Again, the circumstances that led to her being in a hospital are less important than the fact that her mental health was in crisis during that time.

[29] As a result of this crisis, M.J.S. was sent to Nova Scotia to live with his paternal grandparents from mid October 2011 until early January 2012 at which time he was returned to M.S.'s care. The paternal grandparents say that M.J.S. was returned to M.S.'s care based on the advice from her physicians that she was capable of looking after him by that time.

[30] M.S.'s evidence is that after M.J.S. was returned to her, she carried on parenting her three children until a second crisis which involved the Agency in

March 2013. M.S. said that she made poor choices in relationships and was the victim of physical and emotional abuse. She admits that this created a lot of stress and chaos for her family.

[31] M.S. said that in 2013 she experienced her second crisis and it appears that she was admitted again to a hospital. All three children initially went to stay with her sister, L.S., but it was simply too much for her. Plans were then made for K.S. to stay with his father and X.S. to a foster home while M.J.S. went to separate foster home. After that, M.J.S. was placed with a friend and his wife in a temporary foster arrangement. Ultimately, the children were all returned to her care.

[32] During that crisis, the paternal grandparents made efforts to have M.J.S. placed with them but were unable to do so due to some delays in obtaining criminal record and Child Abuse Registry checks.

[33] M.J.S. was in foster placement from March 2013 until December 2013 and from December 2013 to April 2014 he was placed at home with her under a family enhancement agreement. X.S. and K.S. were apparently under separate agreements which ultimately had them returned to her care.

[34] It was M.S.'s evidence that even at this time she did not accept that she had a mental health disorder and was therefore in denial respecting the underlying causes of her challenges in parenting the children.

[35] After the return of the children to her in 2014, she experienced continuing stress. She was working too many hours. As family and work responsibilities took their toll, she began to self-medicate with nonprescription drugs while her mental health deteriorated. She now says that she understands that she lacked healthy coping strategies to deal with the stressors. The police and the Agency became involved again in her family's life.

[36] In early January 2015 the crisis hit its peak. M.S. contacted H.M. and the paternal grandparents seeking to have them take M.J.S. into their care rather than have him placed in foster care. H.M. immediately travelled to Alberta and while there is some disagreement as to the precise details of M.J.S. coming into his care and the behaviour of M.S. around that, it is clear that M.J.S. was taken by H.M. to Nova Scotia where he resided with his paternal grandparents from January 2015 until today.

[37] During the same time, X.S. and K.S. were subject to a voluntary agreement and eventually the Agency applied for and received a permanent guardianship order for each. M.S. said that X.S. has had that guardianship order terminated but it is still in place for K.S. She further testified that she expects to have that permanent guardianship order terminated shortly with the cooperation of the agency in Alberta. Both children reside with her.

[38] There is no doubt that M.S. was having a particularly deep crisis in late 2014 into 2015. She described suffering psychotic episodes, spent most days in a manic phase and was connecting ideas that had no real connection. She met people thinking she knew them when she didn't. She said she was hospitalized many times and on two occasions for a month at a time. She was having difficulty distinguishing reality from fantasy and was using drugs throughout this time. Unfortunately, between two hospitalizations there was a fire at her residence and she became homeless.

[39] It is also clear that M.S. began to understand and accept her mental health status at this time. She also accepted that she abused drugs and alcohol in the past. She has expressed regret for the past and how it is affected her family.

[40] M.S. detailed the efforts she has taken to improve her circumstances since early January 2015. She is aware that she suffers from bipolar disorder and is taking the appropriate medications prescribed for her. She has engaged with medical professionals including a psychiatrist, Dr. Milani and the psychologist, Shauna Lacharite. She attended psychological sessions on eight occasions between August 2015 and January 2016 and for psychiatric appointments on six occasions between October 2015 and 1 April 2016 at which time she was discharged from Dr. Milani's care. M.S. said Dr. Milani and Ms. Lacharite are available to her should any further problems arise.

[41] M.S. has engaged with cognitive behavioural therapy, relapse prevention and the SMART recovery program which has provided with her with tools including mindfulness activities, cost-benefit analyses and reaching out to positive people in her life instead of turning to drugs and alcohol to avoid situations.

[42] She completed a program at the Calgary Diversion Services in October 2015, an outpatient mental health program for individuals with mental illness who been charged with a minor or low risk offense. This program allowed her to have charges of uttering death threats removed and she admits these threats were against

the respondents and others. She said these threats were made when she was not well and that she expresses regret for them.

[43] In relapse prevention she learned the effects of drugs and alcohol on the brain, how to recognize urges and cravings and what her triggers are. She also learned about the relationship between drug abuse and mental health and how addictions affect all aspects of her life.

[44] She completed a 10 week CBT program which taught her about disordered thinking, how to see the connection between tasks and feelings and how to focus on mindfulness and acceptance. She does breathing, walking and group mindfulness exercises and maintains contact with the group members.

[45] M.S. also participated in a parenting classes from which she gained insight into appropriate parenting techniques and the problems she had experienced to that point.

[46] A urine test from the government of Alberta for medical examination for a motor vehicle license was conducted on 22 October 2015 and it was negative for drugs at that time.

[47] Without detailing all of the programs in which M.S. participated and what she said she has gained from each, I am satisfied that M.S. has taken any and all reasonable steps to appropriately address both her mental health condition and her addiction issues. There is no suggestion from the respondents that M.S. has failed in any respect to address these concerns. The concern of the respondents is the risk of relapse.

[48] M.S. also testified that she has obtained new accommodations in a different neighbourhood which is significantly better than the one in which M.J.S. resided with his mother and siblings prior to coming to Nova Scotia.

[49] M.S. said that things are going well with her older children and they miss M.J.S. very much. She said the older children are supportive of M.J.S. returning to the home.

[50] M.S. describes a normal family routine with X.S. and K.S. including chores, making supper, shopping together, going to movies, swimming and spending time together. She said the number one rule in the home is to be respectful of each other.

[51] With respect to this application, M.S. said that she was never personally served with the application which gave rise to the current order in May 2016. An order of substituted service was granted and a worker with the Agency was served. At the time those proceedings commenced, M.S. said she was unaware of the proceeding and even if she were aware would not of been in a state where she could have responded though she would have wanted to. The respondents accept that this would have been the circumstance at the time.

[52] Since the commencement of this application by M.S., she has had telephone access with M.J.S. Most important, she is had access in Nova Scotia with M.J.S. on two occasions.

[53] M.S. describes that in February of 2016 she flew to Nova Scotia with her friend N.H. Dr. Susan Hastey observed some of the visits. M.S. describes the visits in some detail and states that overall, consistent with Dr. Hastey's and the paternal grandparent's evidence, the visits went very well for both her and M.J.S.

[54] A second access visit occurred on Easter weekend of 2016. M.S. came to Nova Scotia alone and stayed in the home of the paternal grandparents during the visit. She described this visit as very positive. She said that M.J.S. wanted to spend every minute with her and showed a lot of affection. She was with him from morning to night, brushing their teeth, making breakfast and supper together, going to the mall and to movies alone. She described being given a lot of space by the paternal grandparents.

[55] With respect to the hearsay statements of M.J.S., set out herein further in various affidavits, I place very little weight on these as they are inconsistent and may simply reflect that M.J.S. would say to the person he was with what he thought that person wanted to hear.

[56] M.S. notes that M.J.S. loves his grandparents and said that she will support a positive and loving relationship with him and his father. She said she will facilitate reasonable access. She expressed gratefulness for the care the paternal grandparents have provided to M.J.S.

[57] Despite discussions both privately and in court respecting a summer access visit in Alberta, this did not take place. This is unfortunate because it precluded the court from having any information about how M.J.S. would behave or react in Alberta in the new home with his siblings and mother. It might have provided an

opportunity for observation by Dr. Matsalla and eventually an assessment had to be carried out on M.J.S. with his mother and siblings. This is regrettable.

[58] M.S. describes her future plans involving the children, her employment and maintaining her mental health and stability. She continues to work with her family through the Woods Homes to provide family support in her home. She is connected with her family doctor who can refer her for any mental health or other services. She is laid off from her job in the steel industry but has a new job installing office furniture which began in March 2016. She plans to return to her previous employer when recalled. She plans to reduce her work hours if M.J.S. is returned to her.

[59] She has applied for admission to two Bachelor programs commencing September 2016. She is on a waiting list. In the meantime she is upgrading her math as part of the plan for education.

[60] M.S. describes her relationship with H.M. as abusive. She said that he was physically, verbally and emotionally abusive to her and was physically abusive to K.S. She said he used drugs and alcohol, went on drinking binges and stayed out late. He began using crack cocaine. She described several incidents of physical abuse towards her and K.S.

[61] As I will indicate further in my review of the evidence of H.M., where the evidence conflicts between M.S. and H.M., I accept the evidence of M.S. I found throughout her evidence, both in her affidavits in her *viva voce* testimony, that M.S. was very forthright and forthcoming, did not avoid difficult evidence and was very straightforward in her testimony. Whatever her challenges in the past, I believe her evidence today and where it conflicts with that of H.M., I do not accept his version of events.

N. H.

[62] N.H. is a friend of M.S. and has known her for approximately eight years. The relationship is platonic. They met while working together.

[63] He said that M.S. experienced mental health and addiction problems in the latter part of 2014 into 2015. He was unsure if her behaviour was due to mental health issues, addictions or a combination of both.

[64] He offered M.S. the use of a spare room in his home in 2015 and she resided there with him for one year. She obtained help with her mental health and stopped the use of illegal drugs. She stopped associating with what he described as a "bad crowd" and she stopped partying. She became a more stable individual.

[65] To his knowledge, M.S. had not taken any illegal drugs since May of 2015. He also has not heard from any mutual friends or coworkers that they were concerned that M.S. started using drugs again.

[66] N.H. said that while living with him, M.S. regularly attended parenting classes, Narcotics Anonymous meetings and psychiatric appointments. He said they spent a great deal of time together when she lived with him and that since getting clean, she is a completely different person who is stable and responsible.

[67] After moving out of his home, N.H. said that his visited M.S. at her new home and sees her about once every two weeks. His observation is that the home is pleasant and appropriate and that M.S. and her two older children, who now live with her full-time, appeared to exhibit typical mother/teenager relationships. Things appear to be going well.

[68] N.H. is there to support M.S. and will continue to do so. He travelled to Nova Scotia in 2016 with M.S. to visit with the children so he could provide support to her. He did not visit with M.J.S. at that time. He did not travel with her to Nova Scotia on her second visit during Easter of 2016.

L.S.

[69] L.S.is the sister of M.S. She said that M.S. was in denial about her mental health and addiction issues until 2015 and that she was not taking full responsibility for her actions until then.

[70] L.S. said that she has seen a significant change in her sister's behaviour and that M.S. now accepts her mental health diagnosis and accepts that she must stay away from drugs completely. She said that M.S. no longer denies these realities when they are brought up to her and takes full responsibility for what has happened in the past.

[71] L.S. said that she distanced herself from M.S. during the most recent crisis of the fall of 2014 into 2015. She said they did make up within the last six months and that she will support her sister.

[72] L.S. said that M.S. is doing well and that she has noticed a real change in her. She said M.S. is clean and taking responsibility for her actions. It is her belief that her sisters became clean sometime in May 2015 and has witnessed nothing and heard nothing to lead her to conclude that M.S. has relapsed. L.S. believes the M.S. is treating her mental health issues with medication as prescribed by her psychiatrist.

[73] L.S. randomly drops by M.S.'s home without calling or texting first to check up on M.S. and her children and has observed nothing unusual. She said M.S. has ended a lot of negative relationships in her life, is not in a romantic relationship with anyone and that M.S. has told her that she has no interest in dating.

[74] L.S. said that everyone appears to get along now that the older two children are back home. She told X.S. that if she has any issues, she can speak to L.S.

[75] Regarding K.S., she explains that prior to going in foster care he was always in his room at the door shut and was shutting everyone out. Since going back home that has changed. K.S. is much more talkative. When L.S. comes to visit K.S. usually comes out of his room and talks with her. She has also told him he can call her anytime for any reason.

[76] When asked about M.S.'s drug and alcohol use, I can best describe L.S.as a poor historian as she struggled to identify time frames for the court. I do not find this to be a credibility issue, simply that she has a poor memory of these dates and times.

Dr. Matsalla

[77] Dr. Linda Matsalla gave evidence in this matter. She was retained by M.S. to conduct a parenting and psychological assessment and report. Dr. Matsalla is based in Calgary, Alberta and her work, including any observations, took place in that province.

[78] Dr. Matsalla was qualified as a psychologist with expertise in parenting and psychological assessments, child custody assessment and risk assessments. She was qualified to give expert opinion evidence respecting M.S.’s mental health status, and addictions and the ability of M.S. to parent safely and appropriately.

[79] She testified that she was to assess M.S.'s mental stability, her ability to resist relapse in her addictions, to assess her belief and knowledge of parenting and to assess the relationship with the two older children as well as the stability of her family.

[80] She conducted two psychological tests on M.S. and after reviewing the test data, she concluded that there was no evidence of any active mental disorder or personality disorder and no indication of a substance abuse problem present with M.S. at the time of the assessment.

[81] Dr. Matsalla interviewed M.S. and conducted a home visit during which she observed M.S. and her two older children and interviewed those children X.S. and K.S., separately from M.S. It was her evidence that she has never met M.J.S., did not assess him and did not observe M.S. with M.J.S. at any time.

[82] Dr. Matsalla said that M.S. appropriately parented the two children during the home visit. She directed the children and they cooperated. M.S. presented as a nurturing mother who is adamant in her parenting and was positive in her praising of the children. The children defer to their mother as the authority figure and the children exhibited no anxiety in the presence of their mother.

[83] Respecting substance abuse, Dr. Matsalla said the M.S. informed her that she has been clean and sober since May 2015. She reported that M.S. accepted that she has a substance abuse problem and believes that it was triggered or at least exacerbated by her underlying mental health issue. As noted elsewhere in this decision, M.S. has been diagnosed with bipolar disorder and accepts that diagnosis.

[84] Dr. Matsalla noted the M.S. had taken part in cognitive behavioural therapy which she believes is appropriate and helpful for addictions and mental health issues. She also took part in a relapse prevention program which would be helpful to her.

[85] Dr. Matsalla was clear that the fact that M.S. had been clean and sober for over one year was a positive benchmark well recognized in the addictions community. It was her opinion that M.S. had a low probability of relapse.

[86] Regarding her mental health status, Dr. Matsalla was of the opinion that M.S. is stable with no anxieties presenting. It was her view that M.S. is a normally functioning individual.

[87] When asked if she had reviewed the Voice of the Child Report, she indicated she had but he did not change her opinion. She noted that at the time the report was drafted, M.J.S. had not seen his mother for some considerable period of time. Dr. Matsalla was of the opinion that for the report to have any weight M.J.S. would have to be interviewed after he had spent some time in his mother's home in Alberta.

[88] Dr. Matsalla described the mother and child relationship as essential. She asserted that the relationship between M.S. and M.J.S. was his first attachment relationship and that whatever damage was done could be repaired.

[89] She was also of the opinion that the sibling relationship between M.J.S. and his older siblings would be important for him, that it was a basic human need to belong to a family unit and that these older children could act as mentors and support for him.

[90] When asked about M.S.'s parenting style, she said that it was positive but firm and it was a good or excellent style of parenting which was authoritative but extremely empathetic. Her overall opinion was that M.S. could adequately parent the children.

[91] Dr. Matsalla concludes her report in part as follows:

> The family and M.S. had made an excellent progress and her support services are all very positive about her stability at the present time. She continues to have access to support services in case of difficulties. She is very aware that relapses can be common with addictions and is well prepared to do with any relapse feelings.
>
> …. There is every indication that since she is mentally stable and free from alcohol and drugs, that she will be able to practice her positive beliefs in regard to parenting and child raising. There are no indications that she would present a risk to any of her children, including nine-year-old M.J.S.
>
> It would be very important for M.J.S. to have much more contact with his mother and siblings, as well as his grandparents in Calgary. M.J.S. has been away from his siblings and family for over a year and was in a different house in Calgary when he lived there. He is no recent information to make any judgment as to how his family is functioning at the present time. M.S. is very aware that M.J.S. will need supports when he returns as he is been isolated quite significantly from the Calgary family.

[92] In cross-examination, Dr. Matsalla testified that an attachment between the mother and the child is a biological and essential need of the child and if damaged, must be healed. It was her view that there would have to be some form of attachment disorder present but that she is never assessed M.J.S. for this. That said, it was her opinion that any damage to the attachment relationship can always be healed. She followed this with the qualification that it can always be healed "most of the time". Dr. Matsalla also agreed that that attachment can be formed with other adults but that there must be a primary attachment first.

[93] In cross-examination she reiterated her testimony that one year of sobriety is a positive milestone but admitted there was always a risk of relapse.

H.M.

[94] H.M., the father of M.J.S., testified that M.S. was physically violent with her two older children that she punched her mother in front of the children and that she had violent rages. He does not address in his affidavit the allegations of M.S. respecting his own violent behaviour during the relationship or his drug or alcohol abuse. He did deny these things in his *viva voce* evidence.

[95] It is clear from his evidence and the evidence of his parents and M.S. that he never was and is not a significant parenting figure in M.J.S.'s life. That is not to say that he does not spend time with M.J.S. but it is clear to this Court that M.J.S.'s paternal grandparents and his biological mother are in fact the parenting figures and those responsible for M.J.S.'s upbringing and H.M. is an access parent who defers to the grandparents' authority over M.J.S.

[96] Of significance is H.M.'s long-standing criminal history including violence. He began with drinking offenses as a young person and continued when he was a young man with a driving under influence conviction He describes being placed overnight in cells or a drunk tank when out west.

[97] H.M. was charged with break and enter while intoxicated in Alberta. He spent a couple weeks in remand. He left the jurisdiction and returned to Nova Scotia. Many years later he had the matter transferred to Nova Scotia where he pled guilty and was sentenced to 36 months incarceration. He served nine months, was released on conditions and breached by drinking. He then spent the remaining 18 months incarcerated for a total of 27 months. He was released in February or March 2014.

[98] H.M. was charged with assault last winter and with breaches of probation a couple of times for which he was placed on further probation which continues to this day.

[99] He was convicted of assault in 2016 and sentenced to six months house arrest. In February or March 2016 he was sentenced to 43 days incarceration of which he served approximately 28 days for a breach of probation. He committed an assault in January 2016, pled guilty in April and was sentenced to a 12 month probation order. This assault was on a female cousin. He is also subject to a breach of probation charge for which he appeared in court in August 2016.

[100] He said and that there is no alcohol in his home now but prior to that time he would drink 1 to 2 times per week and he has been warned very clearly by his parents that he cannot drink when in care of M.J.S. or they will not allow M.J.S. to visit with him. He claims that he quit drinking after a DUI conviction and is on a wait list for addiction services. He and his new partner have a daughter born 5 June 2016 and this is focused his attention on these challenges.

[101] I have concerns respecting what I find to be established in the evidence; that is, the history of violence, both domestic with respect to M.S. and her son K.S. and the exposure of the other children to that experience. There is also his current and more recent charges of assault on a cousin, breaches of probation and other indicators that, despite his claim to the contrary, he still does not take responsibility for his behaviours in any serious way. He continues his involvement in a criminal lifestyle notwithstanding the birth of his second child.

[102] As noted earlier, while I have no difficulty with H.M. having time with M.J.S., I cannot find that he is a positive parenting figure or influence on him. So long as he abides by his parents' directives respecting his behaviours including, but not limited to, a prohibition on the consumption of alcohol when in care of M.J.S., I will permit them to continue that relationship. That said, I do not find him to be a particularly credible or trustworthy witness and where his evidence conflicts with that of any of the other witnesses, I do not accept his evidence.

S.M. & T. M.

[103] S.M. and T.M. testified. S.M. is the biological paternal grandfather of M.J.S. and T.M., his wife, is the paternal step grandmother of M.J.S. It is clear that T.M. has been in all other respects a grandmother to this child and has, along with her husband, provided uncommon and commendable support and care for

M.J.S. and support for M.S. for many years. Therefore in this decision and otherwise I will consider her to be a paternal grandmother consistent with her status as a party to these proceedings.

[104] S.M. & T.M. have been married since September 2004. They are fisherpersons and I find that they are stable, reliable, loving and affectionate grandparents for M.J.S. and a supportive family for M.S. throughout her several crises over the years.

[105] They provided care for M.J.S. for many summers. This began in the summer of 2011 when M.J.S. was three years old. It was followed by the crisis experienced by M.S. in the Dominican Republic when M.J.S. lived with them from October 2011 until January 2012.

[106] They describe their efforts to have M.J.S. placed with them in 2013 during M.S.'s second crisis and the difficulties they had in completing the child abuse register and criminal background checks in time. I find no fault with their efforts and in fact commend those efforts as illustrating their long-term commitment to M.J.S. and his care.

[107] M.J.S. lived with them again from January 2015 until today as a result of the third crisis M.S. described. On 14 January 2015 they and H.M. made application for custody of M.J.S., which was granted.

[108] There is no doubt in my mind that during the time M.J.S. has spent with his paternal grandparents he is been well cared for, loved and supported. It is clear that he is doing well in school under their care and they provide for his every need. I am further satisfied that they have indirectly provided excellent support to M.S. during her various crises and now through her period of recovery.

[109] T.M. describes a plan whereby M.J.S. would reside with them, spend summers in Alberta with her mother and siblings and that they would share holidays between the two homes. M.S. and her family would be welcome in Nova Scotia to visit with M.J.S. any time she could.

[110] S.M. & T.M. described their work in the shellfish fishery. They have some flexibility as to their lifestyle and I am satisfied that they can make adjustments in their home and work to accommodate the best interests of M.J.S. and his care.

[111] There has been some dispute respecting the nature and quality of the telephone access for M.J.S. and his mother. It has been on a speakerphone and is supervised by the paternal grandparents. There have been some challenges around what has been said or not said in those calls and the paternal grandparents have intervened from time to time. I do not find fault on either side for what has occurred. I believe it is simply the nature of the artificial environment of a supervised speakerphone call between a parent and a young child which is unnatural at best. This will have to be modified and I make no adverse findings respecting those calls.

[112] Respecting the visit by M.S. in February 2015, T.M. said that M.J.S. was nervous and anxious and didn't quite know what to do but he did enjoy his visits with his mother.

[113] As for the visits during Easter of 2016, T.M. confirmed that M.S. stayed at her home and there was no indication of any drug abuse and no irrational or unstable behaviour. M.J.S. enjoyed the visit and M.S. and the paternal grandparents were able to speak about future plans.

[114] Finally, T.M. described H.M.'s access with M.J.S. as the regular usually every second weekend or an overnight or both but that was no pattern to it.

[115] S.M.'s evidence was largely consistent with that of his wife and I will not repeat those portions of this evidence. He did confirm that on decisions concerning school, medical care and access with the mother, he and his wife make the decisions but that they do consult with the father.

[116] The evidence of both S.M. & T.M. is that their main concern with the possible return of M.J.S. to the care of her mother is the potential for relapse. Despite this, H.M. confirmed that, even though they had information respecting the service providers for M.S. as set out in her affidavit, they do not contact any of them to satisfy themselves regarding the risk of relapse.

Dr. Susan Hastey

[117] Dr. Susan Hastey provided expert opinion evidence in this matter. Dr. Hastey is a psychologist and was retained by the respondents to conduct an interview and assessment with respect to M.J.S. and in doing so, to observe some of the access visits between M.J.S. and M.S. in 2016.

[118] Dr. Hastey was qualified as a counsellor and family consultant and qualified to give expert opinion evidence in the area of child development and needs and general family dynamics.

[119] Dr. Hastey testified that upon being retained, she met with the family was provided with the family history by the paternal grandparents. She then met M.J.S.

[120] In her Report of 21 December 2015 Dr. Hastey described M.J.S. as a bright and articulate child who expresses ideas clearly. M.J.S. described his life in M.S.'s home as being chaotic at times. Emotions appeared to escalate quickly. On quite a few occasions he observed his mother argue with his older siblings and some of these escalated to physical confrontations between his mother and the other children and sometimes to physical aggression between the siblings.

[121] He denied that his mother hit him but indicated he had been threatened that he would be struck by her. He witnessed an argument and subsequent physical fight between his mother and a female friend.

[122] M.J.S. described to Dr. Hastey that he was fearful of his brother, sister and mother at times but believed that they love and care for him. He described knowing from his mother's eyes, voice and walk what was going to happen.

[123] M.J.S. described a safety plan with an escape route in some detail. This indicated he experienced fear and anxiety on a daily basis. This caused him to be hypervigilant on many occasions and concerned for his safety as well as the safety of his siblings and mother.

[124] In her report of 20 July 2016, Dr. Hastey said that consistency and predictability were key to M.J.S.'s well-being and self-esteem. She said that those are occurring in the home of S.M. & T.M., M.J.S. was interacting with extended family and cousins and that M.J.S. was excited and happy to talk about this. He also had frequent visits and short stays overnight with his father who lives close by.

[125] Dr. Hastey emphasized family cohesiveness and support, confirming that the paternal grandparents always supported their son and M.J.S. She confirmed that S.M. & T.M. had taken M.J.S. into their care in response to M.S.'s request, placing his needs first. They had parented him over several periods since approximately age 3. She also confirmed that the paternal grandparents opened their home to M.S. during the past year for access.

[126] Dr. Hastey emphasized in that report that M.J.S.'s social, emotional, cognitive and educational development is on target with his age group. His marks in school were excellent and he was a good student. She also confirmed M.J.S. wished to remain in Nova Scotia with his grandparents.

[127] Dr. Hastey explained on direct examination that M.J.S.'s primary fears regarded safety in his mother's home and anxiety regarding whether he would stay in Nova Scotia or return to Alberta into his mother's home.

[128] Dr. Hastey felt that M.J.S. did not require weekly counselling regarding these concerns but that he needed to get them off his chest, which he did. She was concerned counselling might bring up memories and emotions that would be unhelpful to him. She also felt that he could use help in attaching words to emotions but that he may learn this on his own.

[129] She testified that the paternal grandparents had good and positive interactions with M.J.S. She had no concerns or issues with respect to their parenting of him. There was no indication of child abuse or fear in the home. The paternal grandparents were providing consistent and predictable parenting and an environment which are key to M.J.S.'s development.

[130] She testified regarding her observations of M.S.'s interaction with M.J.S. She observed them for two separate two hour periods and one three hour period.

[131] During the first visit she observed M.J.S. to be hypervigilant initially, standing at the door. This was not unexpected as he had not seen his mother for some time. It was a good interaction. There were no hugs or kisses allowed by M.J.S. during that visit.

[132] Dr. Hastey confirmed that she did not assess M.S. at any time during her work with the family. She therefore cannot speak to the mother's parenting at the time of her observations or today.

[133] Her report indicates that the other access visits went very well and she came to the point where she did not feel the necessity to observe any further. M.S. therefore had unsupervised access with M.J.S. on later visits.

[134] Dr. Hastey testified that she was concerned that M.J.S. might be taken from a stable, consistent environment with the paternal grandparents with whom he was

close. He would lose contact with extended family and with the school and that he was doing well. He had already exhibited some leadership and empathy which she felt was positive for him. Dr. Hastey felt that because the paternal grandparents opened their home to the mother this was the best of all worlds, allowing access in a relationship with the mother and her children within a stable home environment of the paternal grandparents.

[135] Respecting the Voice of the Child Report, Dr. Hastey felt it was clear and consistent with her observations.

[136] In cross-examination, Dr. Hastey confirmed she did not assess M.S. nor did she speak to any of M.S.'s service providers. She therefore could not provide any opinion respecting her parenting, home or home environment in Alberta and confirmed that M.J.S. would not know what the current home environment is in Alberta.

[137] Dr. Hastey confirmed that her observation was that M.S. was clean and sober and did not believe that supervision was required during the last few visits.

[138] When asked by the court what support should be in place for M.J.S. if he were placed with his mother in Alberta, Dr. Hastey provided her opinion that maximizing access with the paternal grandparents and father would be important including holiday access and summer access. She felt that a therapist and/or family support worker in Calgary would be important to provide support and to review the relationships within the home including with his siblings.

[139] If M.J.S. were ordered to stay in Nova Scotia, Dr. Hastey felt that up to one month of access in Alberta with M.S. would be important and that holidays be shared between homes. The mother and the siblings should come to Nova Scotia for access and Skype and texting should be encouraged. She felt some therapeutic support would be important for M.J.S. regarding his sibling relations and that both sides of that family may need this assistance to review and rethink the fears of the past and provide support to M.J.S.

Devin Rankin - Voice of the Child Report

[140] A Voice of the Child Report was ordered in this matter and that report was filed with the consent of the parties as evidence. It was completed by Devin Rankin, who is qualified to conduct such assessments. Ms. Rankin was not called to provide evidence.

[141] Ms. Rankin indicated the limitations of the report including the absence of any parenting statements or parenting plans from the parties and the fact that there was only one interview of the child.

[142] M.J.S. was interviewed for one hour on 11 August 2016 at Ms. Rankin's office. He was transported there by his grandparents and prior to the assessment Ms. Rankin briefed the grandmother as to how to introduce this process to M.J.S.

[143] Ms. Rankin described M.J.S. as normal in all respects. After discussing with M.J.S. his school experience and experience in his grandparents' and father's homes, M.J.S. reported to Ms. Rankin

> My mom wants me to go there to be with her. Nanny T.M. and Grampie S.M. want me to be where I want to be. They would be alright with it if I said I wanted to go to Calgary but they might be a little sad. I think that my dad wants me to be here but he wouldn't be mad if I want to Calgary. I told my mom that I want to be here and she said she's not going to stop fighting for me. I am not sure how she feels though.

[144] When asked about telephone calls, he commented "I don't like having to make the phone calls. I usually called every second or third day … now I have to call every second day. Now, we can't do fun things like camping because I have to call her on the phone."

[145] When asked what he would like to express to the judge, he said "Before, I lived in Calgary and would come here to Nova Scotia in the summer. Now, I want to live here and go to Calgary in the summer. I just feel like I should be her now and I want to be here. I would go to Calgary if I had to, and I wouldn't argue, but I want to stay in Nova Scotia."

[146] Ms. Rankin said that there was minimal evidence to suggest M.J.S. was coached prior to meeting with her, but that there was some evidence to suggest M.J.S. was being exposed to conversations regarding the litigation and the court process.

[147] In assessing the weight to be placed on any Voice of the Child Report, it is critical that the court consider context. The nature of the dispute between the parents can be relevant. So is the age and stage of development of the child. The child's level of maturity, insight and ability to articulate are important factors for the court to consider. As well, the context of the arrangements in place and the

access time available for the child and each parent or significant adult at the time of the assessment is relevant.

[148] In this case, M.S. argued that I should not place much weight on the report because M.J.S. had not spent any time with her and his siblings in Alberta since she had made the drastic changes to her life in 2015. The only time she and M.J.S. had been together was in Nova Scotia when she visited on two occasions. The planned access visit in Alberta in the summer was not permitted and therefore his only recollection of any experience would be based on when M.S. was ill and not since her recovery. This is consistent with the view of Dr. Matsalla.

[149] I do find this to be relevant. While I do take note of M.J.S.'s wishes expressed in this Report, I do not place much weight upon them given the very significant fact that he has not spent any time in Alberta with M.S. and her children since coming into the care of his grandparents in Nova Scotia in 2015. I cannot know what his wishes would be if he did spend such time in Alberta over the summer of 2016. He may have told me the same thing in that circumstance. That said, and consistent with the concerns raised by Dr. Matsalla on the same issue, I do take into account the report but do not give it much weight in this circumstance.

Analysis

[150] In analyzing both the law and the evidence before me, I find that that in this circumstance there are only two options available to the court as presented by the parties. The first option is that M.J.S. remain in Nova Scotia with his grandparents and the second option is that M.J.S. relocate to Calgary, Alberta to reside with his mother and siblings. The nature of this case is somewhat different from many mobility decisions in that there are no other options available and certainly none that have been offered by the parties through counsel.

[151] Looking first at the position of S.M. and T. M., and as supported by H.M., there was ample evidence to support their views. There is no question that M.S. has experienced a long and difficult struggle with her mental health and substance abuse problems. These date back to at least 2011.

[152] All of her children, including M.J.S., have been impacted by this. They have, on different occasions, been placed in foster care, kinship placements and, for M.J.S., in the care of her his grandparents in Nova Scotia. Each of these

experiences has been disruptive for the children and has had an impact on all of them including M.J.S.

[153] Focusing on M.J.S., I note in particular the reports of Dr. Hastey and her evidence that he had created a safety plan in which he had determined two escape routes from his home and expressed his concerns about his experiences in his mother's home . This makes clear the stress that he had experienced over a prolonged period of time.

[154] Dr. Hastey also reported that M.J.S. informed her that though his mother had never struck him, he had been threatened that he would be struck, had witnessed physical violence between his mother and a female friend, physical confrontations between his mother and his older siblings as well as aggression between his siblings.

[155] The effect of this prolonged experience was also evident in M.J.S.'s behaviour with M.S. during their first access visit in Nova Scotia. Dr. Hastey described him as hypervigilant and hesitant and I find that this was not only as a result of the long absence from his mother but also due to his own experiences while in his mother's care. M.J.S. knew from his mother's eyes, voice and walk what was going to happen, making clear to any reasonable person that though he loves his mother, he was left with concern, fear and hesitation around her.

[156] All of this was exacerbated by the prolonged period during which M.S. did not come to accept her own mental health and addiction problems. Her evidence, as confirmed in the reporting of Dr. Matsalla, was that she did not gain full insight into her circumstances until her last crisis in late 2014 into 2015. It was only then that she was prepared to admit that she suffered from bipolar disorder and had been abusing substances for years. It was therefore only at that time that she made serious and meaningful efforts to put her health, and therefore her life, in order.

[157] For many years prior, her lack of insight and unwillingness to engage with services and to regain her health meant that her children suffered. I find that impact was cumulative. While it is true that many children can rebound from one or a few instances of trauma, it is the cumulative effect of stress and trauma on children that can be the most damaging and long-lasting. I find that M.J.S. has experienced prolonged and persistent trauma in the home of his mother entirely as a result of her mental health and addiction issues.

[158] The evidence of T.M. & S.M. is that they have been a shelter for M.J.S. over many years. In 2011 they stepped in at the request of M.S. and took M.J.S. into their home for an extended period of time while she dealt with her crisis. They attempted to do so again in 2013 but could not solve the logistical problems in time. Finally, M.J.S. came into their care in January 2015 and remains there to this day.

[159] I find that T. M. & S.M. have provided a loving, supportive, protective and safe environment that has been entirely appropriate for the care and nurturing of M.J.S. in each instance. I further find that throughout the years they have been willing to care for M.J.S. whenever called upon and have always acted reasonably in doing so.

[160] While there have been difficult challenges around telephone access and physical access in Alberta, I am not critical of T.M. & S.M. for their decisions. They have been reasonably and appropriately cautious about M.J.S.'s access with M.S. given her significant history and challenges.

[161] I also find that S.M. & T.M. have been very reasonable and measured in their support of M.S. throughout the years. They have maintained a good relationship with her throughout. That can be said as well about M.S. towards the grandparents. In fact all three are to be commended for maintaining that relationship, cooperating even in the height of very serious crises over the years.

[162] I have considered the report and evidence of Dr. Hastey and the report and evidence of Dr. Matsalla. Each has been helpful to this court. Unfortunately, there is an obvious gap in both of their opinions.

[163] Dr. Hastey was unable to observe M.J.S. in his mother's home in Alberta and did not conduct an assessment of M.S. Similarly, Dr. Matsalla was unable to observe M.J.S. in the home of T.M. & S.M. and, more importantly, was unable to observe and assess M.J.S. in the home of M.S. As a result, I am left with the challenge of reconciling the evidence, the opinions and the legal test in determining what is in M.J.S.'s best interests.

[164] I generally accept the evidence of both Dr. Matsalla and Dr. Hastey. In the case of Dr. Matsalla, I am satisfied that her assessment is valid and her evidence helpful to this court. I accept her evidence that, despite M.S.'s very significant mental health and substance abuse history, she is now under appropriate treatment, exhibits no active mental health symptoms and that she has passed a significant

milestone in being clean and sober for well over a year. I accept her opinion that M.S. is at a low risk of relapse with respect to her substance abuse and that there are no indications that M.S. presents a risk to any of her children including M.J.S.

[165] I further accept her opinion that it is important for M.J.S. to have much more contact with his mother and siblings as well as his extended family in Calgary. Finally, I accept her view that the Voice of Child Report should be given limited weight.

[166] I also accept much of the evidence and opinion of Dr. Hastey. Even without her professional opinion, I would be very comfortable in finding that M.J.S. has done very well in the care of T.M. & S.M. throughout the entire time he has been with them. I accept that family cohesiveness, support, stability, consistency and safety are extremely important for any child including M.J.S. and that all of these are found in the home of S.M. & T.M.

[167] I also accept her evidence that she observed no issues with the interaction of M.S. and M.J.S. during the visits that she attended. In fact it was her conclusion that she did not need to attend further visits after the first three as no problems were observed.

[168] Finally, both experts provided their views that, whatever the parenting order, therapeutic support for M.J.S. and the surrounding family would be important for his well-being and I accept that.

[169] I accept the evidence of L.S. and N.H. that M.S. had struggled with her mental health and substance abuse problems up until late 2014 and early 2015 but that she has made substantial and significant strides in her recovery. I accept their evidence that she is now stable, exhibits no symptoms of mental health problems, to their knowledge is not abusing any substances and that they each support her in the parenting of all of her children.

[170] The grandparents and biological father properly raise the issue of the history of the parenting of M.S. The Act requires that I take this into consideration in determining the best interests of M.J.S. Even if not directed by the Act to do so, I find that the parenting history is often a good predictor of what one might expect in the future. We are creatures of habit and we all find habits, even destructive ones, hard to change or break.

[171] On the other hand, that generalization may be negated if significant steps are taken to change the behaviours of the past. In other words, a history of difficult or detrimental parenting is relevant but it may be displaced by evidence of changes in behaviour and circumstance. If a parent can break the cycle of bad decisions and problematic parenting by taking steps to change the behaviour, circumstance, health, environment, associations and seek the appropriate assistance to recover his or her health, the history of poor parenting becomes less relevant.

[172] In this particular case I am satisfied that M.S. has taken all reasonable steps to recover her mental and physical health, to deal with her substance abuse issues and to put herself in the best position she can to parent her children. While her history has been difficult, I find that it is been largely based on her untreated bipolar disorder and consequent substance abuse problems. Now that she has acknowledged her disorder, has sought appropriate psychiatric treatment and medication, and has fully engaged with service providers to recover from her substance abuse problems, I am satisfied that she has changed her trajectory and is at low risk of repeating the serious mistakes she has made and problems she has caused in the past.

[173] While one can never be entirely certain that M.S. will maintain good mental health and never abuse substances again, I accept the evidence of Dr. Matsalla that there is a low probability that she will relapse and the evidence before me is that she is now parenting her two older children in an appropriate manner.

[174] In this case there is also evidence of domestic violence which must be considered. First, there is the evidence of the domestic violence circumstances between the biological parents, M.S. and H.M. As noted earlier in this decision, I accept the evidence of M.S. that there was domestic violence by H.M. in the home prior to separation and that the children were at times exposed to this.

[175] I also consider that both of the possible parenting arrangements proposed would minimize the contact between M.S. and H.M. and therefore their need to cooperate. This will minimize or eliminate any threat to the safety or security of M.J.S. I certainly have no concern for his safety in the care of his grandparents. They have been very clear with H.M. respecting his consumption of alcohol in the presence of M.J.S. and he has accepted that authority. Therefore I am not concerned respecting the potential of further domestic violence and I am satisfied that any risk to M.J.S. will be mitigated by the good judgment of T.M. & S.M.

[176] There is also evidence of domestic violence in the home of M.S. while she had care of her three children in Calgary. I find that M.J.S. was exposed to domestic violence between M.S. and a friend, M.S. and the two older siblings and between the older siblings. M.J.S. was affected by domestic violence as evidenced by his safety plan and hypervigilance in the presence of his mother at the first visit.

[177] In considering that circumstance, I am satisfied that because of the significant efforts made by M.S. to regain her mental health and deal with this her substance abuse issues, there is no longer a risk of domestic violence in her home. Consistent with the opinion of Dr. Matsalla, I find that there is a low risk of this occurring in the future.

[178] Respecting the relationships be between M.J.S. and his two families, I am satisfied that there is no concern with maintaining these relationships, whatever the parenting arrangements. M.S. has informed the court both in her testimony and by her behaviour that she has encouraged and will continue to encourage a relationship with M.J.S.'s grandparents. Her proposal is that M.J.S. spent summers and other times with them and I accept that she would carry this through.

[179] As well, I accept that T.M. & S.M. would encourage a relationship with M.S. and M.J.S.'s siblings. They have done so by inviting M.S. into their home for access in Nova Scotia. It is unfortunate that they chose to deny access in Alberta in the summer but I do not find that they would frustrate access going forward. Quite the contrary, they have always exhibited behaviour that suggests they would encourage the relationship in the future.

[180] Turning to the mobility issue, there is no question that a relocation of M.J.S. to Calgary would be a disruption to his life with his grandparents and father, his social life here in Nova Scotia and his school life which will recommence shortly. It would directly impact the time that he spends with his grandparents and father.

[181] On the other hand, he is clearly attached to and bonded with his mother and has a relationship with his siblings that should be encouraged and nurtured. Given that she has made significant strides in her recovery, it is clear that he would do well in her care so long as he had appropriate support if he returned to Calgary.

[182] I must also consider the law respecting a choice between parenting by a biological parent or a grandparent. The decision of *Starratt v. Starratt*, 2013 NSFC 23 (CanLII) of the Nova Scotia Family Court is of assistance to me in that analysis. In that decision, Sparks, J.F.C. dealt with an application made for custody of a

three year old child by her grandparents. The child had resided with the grandparents since birth and the parents had regular contact with the child. In that case, Sparks, J.F.C. ordered that the child be gradually returned to the parents. The court held in part

> [19] Courts must have compelling and cogent reason to separate a child from biological parents, and judicial justification for doing so must be in the overall best interests of the child. Even though, at times grandparents, as is the case here, may not believe a child's best interests are served with a child remaining with biological parents, this alone will not prima facie be sufficient unless their concerns rise to a level where the welfare of the child is seriously compromised. Recognition of this legal principle, the best interests of the child, permeates the law at many levels: internationally, jurisprudentially, and statutorily. While it cannot be said that a child will never be separated from biological parents, the court acknowledges the different parenting styles offered by grandparents as …. Instead, the court must discern whether the parents are able to provide "good enough parenting" consistent with the best interests of the child.
>
> [20] Internationally, the United Nations Convention on the Rights of the Child…recognizes the right of every child to be raised by his or her parents, and state separation should not occur unless there are convincing and sound reasons to do so. There is a recognition of the need to preserve the child's identity and family relations. Separation cannot be based on the assertion that grandparents have a better family environment for a child. …
>
> [21] In the present circumstances, I find the concerns of the applicant grandparents to be genuine, and of course any loving, caring and devoted grandparent would express the same concerns articulated by the applicant grandparents. However, concerns will not be, and cannot be, enough to warrant a removal from parental custody and care.

[183] After carefully considering all of the evidence and the law in this matter, I conclude that it is in M.J.S.'s best interest that he be returned to the care of his mother in Calgary Alberta. She is now capable of parenting him safely and appropriately, there is a low risk of relapse and she has a plan in place to address any challenges that may arise. M.J.S. will gain the benefit of a renewed and healthy relationship with his mother and siblings. He will maintain a relationship with his grandparents and father. He will have the family and therapeutic support to assist him with the transition.

[184] The order will be on the following terms:

1. This will be a joint custodial order between M.S., T.M. & S.M. and H.M. Each of the parties will have direct access to any third party service providers and information respecting M.J.S. They will all meaningfully consult on any major issues concerning the health, education and general well-being of M.J.S. and will keep each other informed of any major issues in M.J.S.'s life. They will attempt to jointly agree on any such major decisions but, if they are unable to do so, final decision-making authority will rest with M.S. Any of the other parties will have the right to have that decision reviewed by a court of competent jurisdiction.

2. M.J.S. will primarily reside with his mother in Alberta.

3. T.M. and S.M. will have access with M.J.S. on the following basis:

    a. M.J.S. will spend at least six weeks of each summer in Nova Scotia in the care of T.M. & S.M.. During that time H.M. will have access with M.J.S. at the absolute discretion of S.M. & T.M. The cost of travel for such access will be shared between M.S. and T.M., S.M. and H.M.

    b. S.M. & T.M. will have reasonable access upon reasonable notice with M.J.S. in Calgary if they are able. They will bear the costs of all such access and M.S. will cooperate in permitting and facilitating such access unless it interferes with school time for M.J.S.

    c. M.S. and S.M. & T.M. will discuss and agree upon an approximate equal sharing of Christmas, Easter and school spring break time for M.J.S. between their homes and M.S. and T.M., S.M. and H.M. shall share in all costs of such access for M.J.S. between Alberta and Nova Scotia.

4. M.J.S. shall have reasonable telephone, Skype/Facetime and/or text access with T. M., S.M. and H.M. when in the care of M.S. and with M.S. when in the care of S.M. & T.M. This access will be unsupervised and will be facilitated, encouraged and supported by the parties who have care of M.J.S. at that time.

5. Each of the parties will cooperate and facilitate the exchange of gifts, messages, cards, letters, social media communication and all other forms of interaction for M.J.S. with each of the other parties.

6. Any of M.S., T. M. or S.M. shall be entitled to travel with M.J.S. from time to time anywhere inside or outside Canada when they have care of M.J.S. The travelling party shall provide the others with a general itinerary and contact information including a telephone number to allow communication with M.J.S. from time to time. M.S. shall obtain a passport for M.J.S. for such travel if required and sufficiently in advance to permit the travel. The parties shall sign any authorizations and cooperate in all respects to permit M.J.S. to travel.

7. M.S. shall immediately take steps to ensure that M.J.S. will have appropriate therapeutic and counselling support on his arrival in Alberta and this will continue so long as M.J.S. requires same. M.S. shall consult with Dr. Matsalla and obtain her advice and follow that advice with respect to any such therapeutic or counselling support for M.J.S.

8. The parties shall discuss and agree upon a transition plan for M.J.S. from Nova Scotia to Alberta that will take place over the next seven days. As part of the transition, S.M. & T.M. shall be entitled to travel with M.J.S. to Alberta for a reasonable period of time to support him in the transition to his mother's home and if possible, they shall reside in M.S.'s home for that time to ensure support for M.J.S.

9. None of the parties shall make any negative comments respecting any of the other parties in the presence of or within hearing distance of M.J.S. at any time. They shall prohibit anyone else from making such comments and if that third party making the comments will not cease immediately, they shall ensure that that party is removed from the vicinity of M.J.S. or shall remove M.J.S. from that circumstance.

10. Within 7 days H.M. will disclose to M.S. his 2015 income tax return and proof of current income and the parties shall agree upon an appropriate amount of child support payable by H.M. to M.S. in accordance with the Child Maintenance Guidelines. If they cannot so agree, each counsel will write to the court with their positions within 7 further days and the court will set the amount of child support payable.

[185] Ms. Arnott will draw the order and it must be submitted to me within 14 days.

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Daley, J.