FAMILY COURT OF NOVA SCOTIA
Citation: *J.D.C. v. J.C.A.C.*, 2016 NSFC 34

Date: 20160506
Docket: FAMMCA-080341
Registry: Amherst

Between:

J.D.C.

Applicant

v.

J.C.A.C.

Respondent

DECISION

Judge:	The Honourable Associate Chief Judge S. Raymond Morse
Heard:	May 3 and 5, 2016, in Amherst, Nova Scotia
Oral Decision:	May 6, 2016
Counsel:	Catherine Hirbour, for the Applicant
	Meghan Brown, for the Respondent

By The Court:

INTRODUCTION

[1] This is the matter between J.D.C., as applicant, and J.C.A.C., as respondent. The trial concluded yesterday and at the conclusion of argument I confirmed that I would take yesterday afternoon to review the evidence and the material as submitted by counsel and provide an oral decision this afternoon.

[2] The parties are the parents of R.J.D.C., date of birth, June *, 2010. Both parties are originally from Nova Scotia and have extended family who reside in Cumberland County. They were married on March *, 2010 and resided in Grande Cache, Alberta. The relationship ended on March 29, 2012, when the mother, J.C.A.C., and the child returned to Nova Scotia. The father, J.D.C., has continued to reside in Alberta.

[3] R.C. is five years old. He has been diagnosed with cerebral palsy, however, a medical report from a pediatric neurologist dated July 9, 2015, confirms that R.C. is in good health - he's doing extremely well - and indicates that the physician is extremely pleased as to how well R.C. was doing as of July 9, 2015. The report confirms that he has level one cerebral palsy. It will never go away but it is also never going to get worse. The report indicates that the child is unlikely to have any significant difficulties with his cerebral palsy.

[4] Pursuant to Notice of Variation Application dated November 4, 2015, J.D.C. requests variation of the Consent Order dated May 6, 2015. His application is supported by a Parenting Statement which confirms that J.D.C. is requesting that he have primary care of R.C. The May 6 Consent Order confirms that a prior Consent Variation Order dated March 12, 2014, issued April 24, 2014, continues in force and effect.

[5] The Order issued April 24, 2014 confirmed joint custody with J.C.A.C. having primary care and J.D.C. having reasonable parenting time including overnight, subject to reasonable notice. The Order also confirmed that J.D.C. would have weekly telephone contact with R.C. and required that J.C.A.C. keep J.D.C. informed of all major matters affecting R.C. The Order also required J.D.C. to pay $734 per month child maintenance based upon an income of $85,000. J.C.A.C. is opposed to J.D.C.'s variation application and wishes the existing Order, whereby she has primary care and custody of R.C., to remain in force and effect.

PROCEEDINGS

[6] In reviewing the proceedings, I noted that the original application to the Family Court in Nova Scotia was filed by the father on April 12, 2012, and supported by an Affidavit sworn on that date. J.D.C.'s application confirmed a request for an Interim Order returning the child, R.C., to Alberta so that he could bring a custody application before the Court in Alberta. A counter-application was filed by the respondent, J.C.A.C., confirming her request for an Order for sole custody pursuant to the Nova Scotia **Maintenance and Custody Act**. An initial Interim Order was granted April 18, 2012, confirming joint custody between the parties with primary care to the mother, J.C.A.C. At that point she was ordered to provide weekly updates respecting the child to a third party who would then pass this information along to J.D.C.

[7] A further Interim Order was made May 30, 2012, authorizing supervised access for J.D.C. and such other access as the parties might agree to. The Order confirmed that the weekly updates by a third party were to continue.

[8] A third Interim Order was made with the consent of the parties on July 4, 2012. This Order authorized a psychologist to complete an appropriate home study assessment. The proceeding was adjourned without date on the understanding that either party could ask to have the matter returned to the docket.

[9] A Psychological Custody/Access Assessment Report was subsequently submitted by Elaine Boyd-Wilcox, Psychologist, dated August 28, 2013. The matter was then returned to the docket at the request of the father, and a further Interim Consent Order was granted on October 9, 2013. That Order confirmed joint custody, with J.C.A.C. having primary care, and included terms relating to J.D.C.'s parenting time and confirmed that he would enjoy weekly telephone contact.

[10] A fourth Interim Order was granted January 15, 2014, confirming that J.D.C. would be permitted reasonable parenting time with the child to be exercised in Cumberland County, Nova Scotia, subject to reasonable notice. Weekly telephone contact was to continue.

[11] A further Consent Order was granted March 12, 2014, which removed a condition whereby the father was not to remove R.C. from Cumberland County during his parenting time without the mother's permission or authorization and also included a provision confirming that his parenting time was to include overnight.

[12] On December 8, 2014, J.D.C. filed a further variation application requesting parenting time during the Christmas holidays. That application was supported by an affidavit sworn December 18, 2014. That application was resolved by a Consent Order dated December 23, 2014, confirming the schedule for the father's 2014 Christmas parenting time and indicating that the Consent Order of March 12, 2014, was otherwise to remain in effect.

[13] Subsequent to the Notice of Variation Application filed November 4, 2015, in December 2015 counsel for J.D.C. asked that the matter be placed on the docket to once again determine the father’s request for parenting time with R.C. for Christmas 2015. Once again the schedule of Christmas parenting time was subsequently resolved by way of a Consent Variation Order dated December 16, 2015, which confirmed the parties’ agreement respecting J.D.C.'s parenting time for Christmas.

[14] The first Interim Order granted in relation to J.D.C.'s Variation Application of November 4, 2015, was made January 6, 2016. The Order confirmed parenting time for J.D.C. during the month of January and directed that the mother, J.C.A.C., provide her current home address, confirm the child's school registration, and provide the name of the child's current counsellor, as well as an update respecting the child's medical issues. At time of a docket review on January 27, 2016, the Court authorized an updated psychological assessment by Elaine Boyd-Wilcox, to be paid for by J.D.C. At that same appearance the Court also scheduled the matter for contested hearing commencing May 3, 2016, and confirmed filing deadlines.

[15] At time of a pre-trial on April 13, 2016, the Court was informed that the father could not afford to cover the costs, the estimated cost, for the updated assessment report from Ms. Boyd-Wilcox. The Court was informed that Ms. Boyd-Wilcox had indicated that it would cost approximately $20,000 to prepare an updated assessment report. Counsel for the respondent mother agreed that, in light of the estimated costs it would be unreasonable to expect J.D.C. to pay for an updated report. The Court confirmed that the case would proceed to trial as scheduled on May 3 and continue on May 5 and May 6.

[16] At the outset of trial on May 3 a joint Exhibit Book was filed by counsel and marked as Exhibit 1. The Exhibit Book included all of the Affidavits filed by the applicant, J.D.C., since the commencement of the proceeding, as well as a copy of his unsworn Supplementary Affidavit together with copies of the unsworn Affidavits of his partner, S.H., as well as S.H.'s daughter. Also included within the exhibit was a copy of the Affidavit of E.G., sworn March 9, 2016, as well as the Affidavit of the respondent, J.C.A.C., sworn April 22, 2016, and the Affidavit of her mother, D.R., also sworn April 22, 2016. The exhibit brochure included other documents, including a copy of the original report submitted by Elaine Boyd-Wilcox dated August 28, 2013.

[17] Fourteen other exhibits were tendered during the course of trial, including sworn copies of the applicant's affidavit, as well as the affidavits of S.H. and D.E.

Exhibit 4, entered by consent, was a copy of what I'll refer to as Department of Community Service records obtained pursuant to an Order For Production.

[18] J.D.C. was the first witness to testify at trial. Three other witnesses testified on his behalf, including his partner, her daughter, and J.D.C.'s friend. The witnesses for the respondent included the respondent and her mother, D.R.

[19] The evidence was reviewed in some detail by counsel for the parties during their submissions at the conclusion of trial on May 5. I am satisfied that the evidence is fresh in everyone's mind and I do not propose to review the evidence in detail for purposes of this decision. I do, however, want to assure the parties that I have carefully considered all of the evidence, both documentary and *viva voce*, or oral, for purposes of this decision. Since I am proceeding by way of oral decision I reserve the right to file more detailed written reasons if required.

SUBMISSIONS OF COUNSEL

[20] In her submissions on behalf of the respondent, Ms. Brown emphasized that J.D.C. has never been R.C.'s primary caregiver for any extended timeframe. She referred to the close relationship between J.C.A.C. and the child. She noted that R.C. had several health issues, including cerebral palsy, constipation, and recently a possible problem with blackouts. Ms. Brown submitted that the respondent mother acknowledged the difficulties that J.D.C. has encountered with respect to his access contact with R.C. and that she has accepted responsibility for the difficulties even though she could not explain why the difficulties had arisen.

[21] Ms. Brown noted that J.C.A.C. had indicated a willingness for R.C. to travel to Alberta in July of this year with his father. She was also accepting of the fact that there should be Christmas parenting time for J.D.C. but maintained that this contact should happen in Nova Scotia. She indicated that J.C.A.C. was also suggesting weekly contact between R.C. and J.D.C. In addition, she was also acknowledging a willingness to share the March school break on an alternating-year basis.

[22] Ms. Brown submitted that R.C. should remain in his mother's care because this is the only home he has ever known. She noted that he has adjusted well to school and his friends and playmates. She noted his involvement with several health providers in Nova Scotia and indicated that J.C.A.C. would prefer that the child not travel to Alberta until the blackout issue has been sorted out. Accordingly, J.C.A.C. maintains that it would be in R.C.'s best interests to remain in her care.

[23] In her submissions on behalf of J.D.C., Ms. Hirbour indicated that the current application reflects the fact that J.D.C. wants a relationship with R.C. He has had to resort to lawyers and court applications in order to attempt to have a relationship with the child. Ms. Hirbour suggested that J.D.C. has been patient with J.C.A.C. but submitted that the degree of alienation is staggering, involving a continuing denial of access. Ms. Hirbour maintained that the history of denial of access would constitute a material change in circumstance sufficient to justify variation. She noted that, to date, 11 court Orders have been granted. She emphasized the lack of communication between the parents and the nondisclosure of information relating to R.C. by J.C.A.C.

[24] In referring to the assessment report submitted by Elaine Boyd-Wilcox, she suggested that the report was dated but informative. Ms. Hirbour also suggested that there were credibility issues with respect to J.C.A.C.'s testimony. She noted that the DCS records confirm that the risk of sexual abuse vis-a-vis J.D.C. had not been substantiated. Ms. Hirbour reviewed J.D.C.'s parenting plan based upon J.D.C. having primary care and confirmed that J.D.C. was going to pay for J.C.A.C. to visit R.C. in Alberta and he was also willing to pay for R.C. to travel to Nova Scotia. She maintained that the father’s parenting proposal was based upon a strong support network. She suggested that the mother's plan was lacking in detail and based upon a limited support system. Ms. Hirbour referred to and reviewed several case decisions in support of J.D.C.'s position that it would be in R.C.'s best interests that he be placed in J.D.C.'s primary care. I would also note that counsel for the parties also submitted pre-hearing briefs prior to trial.

ISSUES FOR DETERMINATION

[25] The first issue would be, has there been a material change in circumstance since the Consent Variation Order of May 6, 2015? Secondly, if a material change in circumstance has occurred would it be in the best interests of the child to vary the Order? And then thirdly, if the Order is to be varied what is the nature of the variation that again would be in the best interests of the child?

THE LAW

[26] With respect to the law as it relates to change in circumstance, the Family Court's jurisdiction to make a Variation Order is set forth in s. 37(1) of the **Maintenance and Custody Act**, which provides that:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[27] In *G.S. v. C.H.*, 2011 NSFC 19, His Honour Judge Dyer considered an application for variation under the **Maintenance and Custody Act**. In the discussion portion of his decision His Honour indicated as follows, commencing at paragraph 77:

> [77] Under the **MCA**, the child's best interests are paramount when the court has to make decisions regarding custody, access and related issues.

[28] And then he noted that s. 37 of the statute was relevant and then Judge Dyer went on to indicate as follows, and this is found at paragraph 82:

> [82] **MCA** variation applications, when contested, usually have two steps. Firstly, the applicant must prove a change in circumstances. (The statute does not specify the change must be "material"; but the case law supports the proposition that trivial, fleeting, and frivolous, etcetera changes will not meet the threshold.) Secondly, she/he must establish that as a result of the change(s), the last order no longer reflects the best interests of the child.
>
> [83] The requisite steps need not be dramatic . . . .
>
> [84] The requirements are not assessed in a vacuum. All the circumstances surrounding the order sought to be varied and the prevailing circumstances must be considered. . . .

[29] In *Burgoyne v. Kenny*, 2009 NSCA 34 Justice Bateman, in rendering the decision of the Court, indicated as follows with respect to proof of material change of circumstance under the **MCA**:

> [20] Like the **Divorce Act**, the **MCA**, s. 37(1), requires a material change in circumstances as a pre-condition to variation of an existing order . . . .

[30] What does it mean to speak of a material change in circumstance? In *Lagace v. Mannett*, 2012 NSSC 320 Justice Jollimore of the Nova Scotia Supreme Court Family Division indicated as follows:

> [5] In an application to vary a parenting order, I'm governed by *Gordon v. Goertz*. At paragraph 10 of the majority reasons in *Gordon v. Goertz*, then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.
>
> [6] At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:

> 1. there must be a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the child's needs;
>
> 2. the change must materially affect the child; and
>
> 3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[31] Then Justice Jollimore goes on to indicate as follows:

> [7] Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of the child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests and must be changed to do so. Identifying the change which has occurred informs how the new order should be formulated to reflect the child's best interests in the new circumstances.

[32] With respect to best interests, case authorities provide some guidance with respect to what it means when we talk about best interests. In the case of *Yonis v. Garado*, Justice Beaton considered the meaning of "best interests". The cite is 2011 NSSC 454. Justice Beaton considered the meaning of "best interests" and indicated as follows:

> [30] What does it mean to refer to a child's "best interests"? The concept of best interests was discussed at length by the Supreme Court of Canada in *Young v. Young*, 1993 4 S.C.R. 3. I am mindful of the discussion of the best interests test therein and also of a caution provided therein as reiterated by Justice Dellapinna, J. in *Tamlyn v. Wilcox* (supra) at paragraph 37:

[33] And then she goes on to set forth that excerpt from Justice Dellapinna's decision wherein he indicated as follows:

> [37] In *Young v. Young*, the Supreme Court elaborated on the "best interests" test. At paragraph 17 the Court stated:

> "...the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful....Like all legal tests, [the "best interests" test] is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do."

> [31] In *Burgoyne v. Kenny* 2009 N.S.C.A. 34, Bateman, J. considered *Gordon v. Goertz (supra)*, and the often cited case in this province in *Foley v. Foley*, 124 NSR (2d) 198. At paragraph 25 of *Burgoyne v. Kenny (supra)*, Justice Bateman ....

[34] I am just going to stop there with that part of it, counsel. All right. Again, the hazards of an oral decision.

[35] *Foley* was a decision of His Lordship Justice Goodfellow of the Nova Scotia Supreme Court, and Justice Goodfellow in the *Foley* case actually listed 17 factors or things that he felt judges should consider in determining custody cases. And it's become a benchmark decision and remains a benchmark decision at this point in time and is really referred to in almost every case involving determination of custody or access issues. However, to a great extent, s. 18(6) of the **Maintenance and Custody Act** now constitutes statutory recognition of the *Foley* factors.

[36] In *Burgoyne*, Justice Bateman of our Court of Appeal went on to indicate as follows:

> [25] The list does not purport to be exhaustive nor will all factors be relevant in every case. Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent . . . .

[37] The Court is mandated pursuant to s. 18(5) of the **Act** to give paramount consideration to the best interests of the child, and in s. 18(8), to give effect to the maximum-contact principle within the context of the child's best interests. The determination of a child's best interests requires consideration of all relevant circumstances, including those enumerated in s. 18(6), as may be applicable.

[38] Now I am not going to review all of the factors or circumstances in 18(6). I will be discussing them in the context of my review of the evidence but counsel, I know, are familiar with those provisions and so I am not going to read them into the record again. I am, however, going to read in s. 18(8), because I think it's particularly appropriate and applicable in this particular case.

> 18 (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).

LEGAL ANALYSIS

[39] As applicant, J.D.C. bears the onus of proof with respect to his variation application. He must therefore establish, on balance of probabilities, that there has been a material change in circumstance since the Consent Variation Order was filed and that it would be in the best interests of R.C. to vary the Order in the manner that he has requested.

Material Change in Circumstance

[40] I am satisfied that the evidence supports and justifies the conclusion that there has been a material change in circumstance in this case. The Consent Variation Order dated May 6, 2015, confirmed that the Consent Order issued April 24, 2014, was to remain in force and effect. That Order confirmed joint custody,

with J.C.A.C. having primary care and J.D.C. having reasonable parenting time with R.C., including overnight parenting time as well as weekly telephone contact. The Order also required J.C.A.C. to keep J.D.C. informed of all major matters affecting R.C.

[41] Unfortunately, J.D.C. has not been able to enjoy reasonable parenting time despite providing reasonable notice. He has encountered considerable difficulty in attempting to arrange for weekly telephone contact. He has not been kept informed of all major matters affecting R.C., in particular major health issues.

[42] I find that the absence or lack of regular contact between J.D.C. and R.C. has impacted negatively on the child insofar as it has denied R.C. and J.D.C. the opportunity of having a meaningful relationship. I am satisfied that the impact or effect on the child has certainly been material. What has actually happened or transpired is clearly inconsistent with the terms of the Consent Order and is obviously a result or outcome that would not have been reasonably contemplated by the parties or the Court at the time of the Order.

[43] Accordingly, I am satisfied that the current Order is no longer in R.C.'s best interests and must be changed to reflect the child's best interests. I am therefore satisfied that J.D.C. has adequately discharged the burden of proof with respect to establishment of material change in circumstance.

Determination of Best Interests

[44] With respect to determination of best interests, I have considered the factors as referred to in s. 18(6) of the **Maintenance and Custody Act** that are applicable to determination of this matter and I would confirm the following findings.

[45] With respect to (a), I would confirm that R.C.'s needs are, for the most part, similar to the needs of any child his age. He needs to be raised in a safe, secure, and loving home environment where his physical, emotional, social, and educational needs will be adequately met on a consistent basis. R.C.'s caregiver also has to be attentive to his health issues and ensure that he receives all necessary

and appropriate treatment relating to his cerebral palsy and any other medical issue. Based upon the evidence before me, I find that both parents are capable of adequately meeting the child's needs.

[46] With respect to (b), I find that J.C.A.C. has, to date, been reluctant to adequately recognize and support the development and maintenance of R.C.'s relationship with his father. Her reluctance appears to be based upon her perception of the historical problems in their relationship that led to the separation, as well as an unsubstantiated concern that J.D.C. may have, at some point in time, abused R.C. J.D.C. has consistently and unequivocally denied any allegation of abuse with respect to either J.C.A.C. or R.C.

[47] J.C.A.C.'s perception, may, to some extent, possibly be explained based upon her psychological testing results as set forth in Ms. Boyd-Wilcox's assessment report of August 28, 2013. The testing undertaken by Ms. Boyd-Wilcox confirmed that J.C.A.C. functions on the low to low-average range of intelligence and that she has significant deficits in the area of long-term retrieval and working memory. That means she has difficulty performing mental operations on information in short-term memory, difficulty recalling relevant information, and difficulty in learning and retrieving previously-stored information.

[48] Ms. Boyd-Wilcox also indicated that these deficits may also mean that J.C.A.C. has difficulty modifying her behaviour when she has learned a routine and that she may fill in the gaps left by her poor memory with conjecture, and this is taken from Ms. Wilcox's assessment report at page 34. Ms. Boyd-Wilcox considered the concerns relating to possible sexual abuse of R.C. and concluded that the concerns appear to be based on behaviour from R.C. that is not necessarily unusual or predictive of sexual abuse. She noted the allegations were impossible to substantiate and her conclusion is consistent with the conclusions of the DCS investigation as referred to in Exhibit 4.

[49] During her direct evidence J.C.A.C. confirmed her willingness to allow R.C. to have an extended visit with J.D.C. in Alberta during the month of July, parenting time with R.C. in Nova Scotia during the Christmas holidays, as well as

a willingness to agree to parenting time for J.D.C. during March Breaks on an alternating-year basis. She has also indicated her willingness to agree to weekly telephone contact.

[50] During her cross-examination J.C.A.C. indicated that she could not explain why she did not tell J.D.C. about the fact that R.C. needed glasses. She candidly acknowledged that she had not provided information the way she could. Similarly, she couldn't explain why she didn't tell J.D.C. about the need for hernia surgery except to indicate that she was upset at the time. However, she also testified that she respects J.D.C.'s desire to know about R.C.'s medical issues.

[51] I am certainly satisfied that the evidence indicates and confirms that J.D.C. would facilitate meaningful contact between J.C.A.C. and R.C. if he were responsible for the child's day-to-day care.

[52] I believe that it is important to note that this is the first contested hearing since J.D.C.'s original application. All previous applications have been resolved on a consent basis.

[53] Based upon my review of the evidence, I have concluded that J.C.A.C. has had difficulty understanding and appreciating the importance of compliance with the pre-existing Orders. She appears not to have adequately appreciated or understood her responsibility to ensure and facilitate meaningful contact between R.C. and J.D.C. I believe at this point in time that she has a better understanding of this issue and is aware that she has a responsibility to make sure that R.C. has the opportunity for a meaningful and positive relationship with his father. She has to do her part to facilitate contact between R.C. and J.D.C. in accordance with or compliance with any Order that may be made by the Court.

[54] I do not accept the argument or assertion that the degree of alienation involved in this particular case, involving unilateral denial of access, is staggering. There is no evidence before me to support a finding of parental alienation on the part of J.C.A.C. Indeed, the evidence of J.D.C. is that when he's had the opportunity for parenting time with R.C. - and there have been several such

opportunities, albeit not nearly as many as J.D.C. would want - the visits, according to J.D.C., have always been positive. The interaction between himself and R.C. has occurred without any difficulty or problem. The visits are always consistently reported by J.D.C. to have been thoroughly enjoyable.

[55] I also note that the investigation notes set forth in Exhibit 4 confirm that the investigators noted that when R.C.'s father was mentioned to the child, R.C. did not display behaviour to suggest fear of J.D.C. This is again evidence of lack of alienation. Accordingly, I believe the evidence does not support or justify the conclusion that J.C.A.C.'s concerns with respect to J.D.C. had been communicated or conveyed to R.C. in a way that would impact negatively upon R.C.'s attitude or his relationship with J.D.C.

[56] I agree that there has been a lack of access contact, and if we want to take the term "alienation" to apply to lack of access or denial of access, then I would agree that that has taken place. But alienation is normally used in the context of a parent actually, through interaction with the child, creating the result that the child does not wish to have contact with a parent or does not enjoy having contact with the parent. And again, I want to make it clear, then, in reviewing the evidence I am satisfied that that sort of alienation has not occurred in this particular case.

[57] I believe, once again, that J.C.A.C. now has a better appreciation and understanding that a failure to comply with the access provisions of a court Order may trigger very serious consequences, including a potential change in primary care. It is important that J.C.A.C. accept, as her evidence suggests she now does, that R.C. needs more and regular contact with his father because such contact is consistent with R.C.'s best interests.

[58] With respect to (c) of 18(6), I find that J.C.A.C. has been R.C.'s primary caregiver since birth. There is no evidence suggesting that she has not adequately attended to his physical, emotional, social, and educational needs, with a possible exception of dental care. She appears to have been diligent in following up with medical specialists as necessary in relation to his cerebral palsy issues, and that appears to be the most significant medical issue to date. She has sought out second

opinions with respect to medical issues as they arise. She has arranged for an appointment with a specialist at the IWK in order to clarify the situation with respect to possible blackouts and she is following up once again with physiotherapy in relation to the cerebral palsy.

[59] With respect to (d), I would confirm once again that both parents are capable of providing appropriate care and upbringing in regards to the child's physical, emotional, social, and educational needs. The parenting plans or proposals of each of the parties I find to be appropriate.

[60] With respect to (e), neither party has provided any evidence with respect to the child's cultural, linguistic, religious, and spiritual upbringing and heritage.

[61] With respect to (f), I find that this is a case where (f) is not applicable, given the age and level of development of the child.

[62] With respect to (g), the evidence supports and justifies the conclusion that R.C. enjoys a close and loving relationship with his mother. The evidence would also suggest that R.C. enjoys a positive relationship with his father, but obviously, the nature and strength of that relationship has been adversely affected by the limited opportunity for contact between R.C. and J.D.C. However, the evidence also clearly establishes and confirms that J.D.C. has been both consistent and persistent in his efforts to maintain a relationship with his son.

[63] The Court finds that the nature and strength of the relationship between J.D.C. and his son has been adversely impacted by J.D.C.'s unfortunate resistance or reluctance to recognize the importance of a relationship or encourage the relationship based upon her inability to recognize that it would be in R.C.'s best interests for her to encourage the relationship.

[64] With respect to (h), the evidence also supports and justifies a conclusion that R.C. enjoys a positive and close relationship with his grandmother, his maternal grandmother, with whom he has contact on a daily basis and who has played a significant role in the child's life to date.

[65] With respect to (i), I find that the evidence supports and justifies the conclusion that J.C.A.C. may have more difficulty than J.D.C. to communicate and cooperate on issues affecting R.C. However, I also believe it is reasonable to query, in light of J.C.A.C.'s cognitive limitations, whether or not J.C.A.C., until recently, has really appreciated or understood that she has an obligation to communicate and cooperate with J.D.C. on issues affecting R.C. Her evidence suggests that she now appears to understand and even respect J.D.C.'s desire to be kept up to date and informed on any significant issues relating to R.C.

[66] I find this is not a case where the Court is required to consider the impact of family violence, abuse, or intimidation. J.C.A.C. has expressed concern in the past that J.D.C. may have abused the child. Based upon the evidence presented, the Court is unable to conclude that there is any justification for J.C.A.C.'s concerns. Indeed, the Court finds that those concerns are based upon speculation or conjecture. Similarly, J.C.A.C. has expressed concern that J.D.C. was emotionally and physically abusive prior to their separation. J.D.C. vehemently denies her allegations. On balance, I find that the evidence in this case does not support and justify the conclusion that the impact of family violence, abuse, or intimidation is a factor that needs to be considered in determining the best interests of the child.

[67] Ms. Boyd-Wilcox's assessment report dated August 28, 2013, was undertaken to assess and determine the parenting abilities of both parties and to assist the Court and the parties to make appropriate decisions regarding custody and access consistent with the best interests of the child. In the Summary, Conclusions and Recommendations portions of her report, Ms. Boyd-Wilcox confirmed that J.C.A.C. had clearly been the primary caregiver for R.C. since birth, and while noting concerns about her ability to cope with the demands of parenting more independently, she did not conclude that it would be in R.C.'s best interests to remove him from his mother's day-to-day care.

[68] She did make several recommendations or suggestions that she felt would be helpful to J.C.A.C. Ms. Boyd-Wilcox emphasized that, in her opinion, "R.C.'s relationship with J.D.C. should be supported and encouraged and J.C.A.C. must be able to do that." Finally, Ms. Boyd-Wilcox indicated that if J.C.A.C. was not able to support the child's relationship with his father, then consideration should be given to changing the child's primary residence, and what she means by that is changing the fact that J.C.A.C. is responsible for the child's day-to-day care.

[69] This application constitutes J.D.C.'s request that consideration should be given to changing the child's primary residence or day-to-day care based upon the difficulties that he has encountered with respect to communication with J.C.A.C. and his efforts to maintain contact with his son.

[70] The applicant has referred to several case authorities in support of his request that R.C. be placed in his primary care. As counsel for the applicant acknowledged during closing argument, the result or outcome in any given case is very much dependent upon the particular facts or circumstances established by the evidence. However, case authorities can certainly provide appropriate guidance and assistance in many instances.

[71] I would like to comment on several of the case authorities referred to or relied upon by the applicant. In *Genereux v. Elrick*, 2005 NSSC 251 Justice Dellapinna referred at some length to the original divorce decision made by Justice Gass. In that decision, Justice Gass had concluded that the best interests of the children would be met by the children remaining in the mother's primary care based upon the history of primary care with the mother and subject to a clear caution that there could be a change if the mother persisted in resisting court-ordered parenting time with the father. In particular, Justice Gass cautioned the mother about the necessity of adhering to the parenting regime and that failure to

do so could create a change in circumstances that could result in a change in primary care.

[72] The matter subsequently came before Justice Dellapinna when the father applied for variation based upon the respondent mother's denial of access, apparently premised upon her unsubstantiated belief that the father had sexually molested the children. Justice Dellapinna granted the father's application based upon his conclusion that the father would be more likely to follow the Court's direction regarding access and that, therefore, the children were more likely to have a meaningful relationship with both of their parents if they resided primarily with their father. In addition, His Lordship found that the children would be exposed to a significant risk of emotional harm and that the relationship with their father would be irreparably damaged if they remained in the primary care of their mother.

[73] I believe that that case can be readily distinguished on the basis of the evidence indicating a significant risk of emotional harm associated with the mother's denial of access premised upon her unsubstantiated belief with respect to sexual abuse. There is no evidence before me in this case indicating that R.C. has been adversely or negatively affected emotionally by J.C.A.C.'s concern about the possibility of sexual abuse.

[74] Further, I believe another important distinguishing feature is the fact that the earlier decision by Justice Gass had conveyed a very clear warning and caution to the respondent mother that her failure to comply with a court-ordered access could result in a change in custody. This is the first time that the parties have been before me in a contested hearing in which the Court has had the opportunity to comment upon the issue of access based upon evidence presented during the course of the hearing. In noting this distinction, I want to make it clear that I am not suggesting that a two-stage process is required in every instance in order to justify a change in primary care. In each and every case, ultimately, the outcome is dependent upon the Court's determination as to the child's best interests.

[75] In *Ross-Johnson v. Johnson*, 2009 NSCA 83, the father was granted custody of the parties' two children. The mother appealed and requested a stay of proceedings. Her application for a stay was denied by Justice Hamilton. Justice Hamilton's decision sets forth excerpts from the custody/access assessment report that was submitted at trial. The assessment confirmed that the mother's anger towards the father, and jealousy of his relationship with his new partner, was palpable. The trial judge concluded that the mother had acted in an abusive

manner in front of the child in obstructing the father's access. The trial judge also found that the mother was clearly engaging in emotional abuse of the child.

[76] I believe that these circumstances distinguish the *Johnson* case from the case at Bar. There is no evidence that the respondent, J.C.A.C., has acted in an abusive manner in front of R.C. in obstructing J.D.C.'s access, nor is there any evidence justifying or supporting the conclusion of J.C.A.C. has engaged in emotional abuse of R.C.

[77] In *B.(T.D.) v. T.(M.T.)*, 2014 MBQB 194, again, I believe is readily distinguishable on its facts. Firstly, in that case, there was a serious deficiency in the evidence presented, as the mother called no witnesses and filed no documentary evidence to assist her case. Secondly, the mother had a lengthy history of child protection agency involvement which raised several concerns. Additionally, the Court had a serious concern about the mother's mental health status based upon her presentation at trial, as well as concerns based upon evidence indicating recent drug use on the part of the mother. I believe it is clear that these circumstances played a significant part in determining the outcome of that case and also provide an appropriate basis for distinguishing that case from the case at Bar.

[78] And then finally on the ... and I am not sure how to say it... *Ostafichuk v. Croiter*, 2007 ABPC 314 - it's a case from the Alberta Provincial Court as referred to by Ms. Hirbour in her brief and included in her booklet of case authorities - the Court was concerned that in pursuing her own psychological and emotional needs the child's mother had put the child's psychological and emotional functioning at risk.

[79] The Court expressed concern about the mother's ability to protect and provide for the child's psychological and emotional needs, given her inability to accept the child's relationship with the father's new partner. The evidence also confirmed that the child was familiar with the father's home and justified the conclusion that allowing the child to be in the day-to-day care of the father would actually allow the child to remain in the community he knew and where he had grown up his entire life. There was also evidence that if the child were to move from Alberta, as requested by the mother, he would be deprived of an active personal relationship with his paternal grandparents with whom he had regular contact. These factors played an important part in the Court's determination to grant the father's request for primary care.

[80] In the case at Bar, it is important to note that R.C. is familiar with his mother's home, that he has grown up his entire life in the care of his mother. R.C. has a very positive relationship with his maternal grandmother and that relationship would certainly be diminished, if not severed, if he were to relocate to Alberta.

CONCLUSION

[81] While I've concluded that it would be in R.C.'s best interests to vary the existing Order, I have also concluded that it would not be in his best interests to change his primary or day-to-day care at this point in time. R.C. has always been in his mother's primary care. He has a close and loving relationship with his mother, as well as his grandmother. He has contact with his grandmother on a daily basis. His mother is available as a full-time parent. The evidence indicates that R.C. is doing well at school. He has regular contact with his classmates and friends. He appears to be a happy child who enjoys outside activities.

[82] I have considered the credibility of both parties. I found J.D.C. to be a credible witness. While I have some reservations with respect to J.C.A.C.'s credibility, those reservations are, in large measure, based upon the information in the Boyd-Wilcox assessment report and the results of psychological testing for J.C.A.C. However, on balance, I felt that J.C.A.C. answered some very difficult questions frankly and to the best of her ability. On more than one occasion, rather than offering excuses, she frankly admitted that she could not offer explanations. She was neither evasive nor argumentative during her cross-examination. She admitted during cross-examination that she had, on at least two occasions, ignored J.D.C.'s telephone calls. So in the end result, for the most part, I also found J.C.A.C. to be a credible witness.

[83] The change in primary care and the move to Alberta as proposed by J.D.C. would constitute a drastic change that would see R.C. move to a new and unfamiliar home, a new and unfamiliar community, and attend a new and unfamiliar school. It would also involve disruption of his relationships with his mother, his grandmother, and his existing school mates and friends. The impact of such a change upon R.C. would be significant. While the evidence justifies the conclusion that J.D.C. enjoys a positive relationship with R.C., there was little evidence indicating the nature and extent of any contact or relationship between the child and J.D.C.'s partner, S.H.

[84] Indeed, S.H.'s affidavit does not indicate or confirm any contact between S.H. and R.C. except to indicate that she's had the opportunity to observe the

interaction between J.D.C. and R.C., and during her *viva voce* testimony she indicated she was present for some of the pickups at the YMCA and observed that R.C. appeared to be happy. However, again, she did not offer much by way of specifics or details with respect to her relationship or interaction with R.C. I think this is important because J.D.C.'s parenting plan would see S.H. regularly involved in day-to-day care of the child.

[85] Based upon the evidence before me, I am unable to conclude that a change in primary care in accordance with J.D.C.'s parenting plan would be in R.C.'s best interests at this point in time. However, while I have concluded that J.C.A.C. should continue to have primary or day-to-day care of R.C., I have no hesitation in finding that it would be in R.C.'s best interests to vary the existing Order so as to ensure meaningful contact between R.C. and his father consistent with s. 18(8) of the **Maintenance and Custody Act**.

[86] I want to make sure that J.C.A.C. appreciates and understands that failure on her part to comply with the Order may well constitute a further change in circumstance that could result in a change in day-to-day care.

[87] R.C. needs more regular contact with his father. I want to make it totally clear that a decision on primary care is not to be seen as a punishment or reward based on conduct. Instead, it is a decision based upon the Court's determination of the child's best interests. I find it is in R.C.'s best interests that he have regular meaningful contact with J.D.C. It is R.C.'s right to enjoy a positive and meaningful relationship with his father. J.C.A.C. needs to accept and respect that right. She needs to do what she can do to encourage and facilitate an appropriate relationship between R.C. and his father.

[88] I am going to take the somewhat unusual step of specifically asking Ms. Brown, as counsel for J.C.A.C., to do her best to make sure that J.C.A.C. understands and appreciates the Court's decision and the importance of her compliance with this Order, as well as the possible consequences of noncompliance.

TERMS OF THE ORDER

[89] Would confirm the following. R.C. will continue to be in the joint custody of the parties. R.C.'s primary residence will continue to be with J.C.A.C., and J.C.A.C. will continue to be responsible for his day-to-day care.

[90] J.D.C. shall be permitted to have reasonable and regular contact and parenting time with R.C. on the following basis. J.D.C. shall be permitted to have weekly contact with R.C. by telephone - alternatively, by FaceTime or Skype or other electronic communication means, if available - to occur on a week day and at the time as agreed to by the parties. J.C.A.C. shall ensure that R.C. is available for the weekly contact. The parties, by mutual agreement, may change the day or time for weekly contact or agree to additional contact during any given week. Again, J.C.A.C. shall ensure that R.C. is available for contact with J.D.C. on the day and at the time agreed to.

[91] J.D.C. shall enjoy parenting time with R.C. in Alberta during the entire month of July each and every year. J.D.C. shall be responsible for making the necessary travel arrangements and shall cover all costs associated with R.C.'s transportation to and from Alberta. There will be no child maintenance payable to J.C.A.C. by J.D.C. during the month of July each year, given that he will be responsible for the child's care during that entire month, as well as the cost of transportation to and from Alberta.

[92] While R.C. is in Alberta, J.C.A.C. shall be permitted to have weekly telephone contact with R.C., to occur on a week day and at the time as agreed to by the parties. The parties may agree to more frequent telephone contact. J.C.A.C. shall provide any documentation that may be required to facilitate R.C.'s visit, such as his Nova Scotia health card. J.D.C. shall confirm the arrangements for the July visit on or before June 15 each year, and by arrangements, I mean the itinerary, the departure date, the return date, and information such as flight, airline, things like that. J.D.C. shall ensure the child is returned to the day-to-day care of J.C.A.C. in Nova Scotia at the conclusion of each and every visit.

[93] The parties will split parenting time during the Christmas holidays each year on an alternating basis. In even years, starting with Christmas 2016, J.D.C. shall have parenting time with R.C. from the first Friday of the Christmas school vacation until noon on December 26. J.C.A.C. shall have parenting time with R.C. from 12 noon on Boxing Day, December 26, until the conclusion of the school Christmas holidays. In odd years, starting with 2017, the schedule of Christmas parenting time will reverse and J.C.A.C. will enjoy parenting time with R.C. from the commencement of the school Christmas holiday break until noon on Boxing Day, at which point J.D.C. will enjoy parenting time with R.C. from noon on Boxing Day until noon of the Sunday preceding the start of school. J.D.C.'s Christmas parenting time shall occur in the Province of Nova Scotia unless the

parties agree otherwise. The parties, by mutual agreement, may change the schedule of holiday parenting time.

[94] In odd years, starting in 2017, J.D.C. shall be permitted to have parenting time with R.C. throughout the March school break. In even-numbered years, starting 2018, J.C.A.C. shall enjoy parenting time with R.C. throughout the March school break. J.D.C.'s parenting time during the March school break during the odd years may be exercised or enjoyed in either Nova Scotia or Alberta, his choice. If J.D.C. decides to exercise his parenting time in Alberta J.D.C. will again be responsible for making the appropriate travel arrangements and payment of any of the associated transportation costs. Again, if he decides to exercise his March break parenting time in odd years in Alberta he is to advise J.C.A.C. on or before February 15 whether or not he intends to exercise his parenting time in Alberta and confirm the travel arrangements. J.D.C. shall be required to return R.C. to the day-to-day care of J.C.A.C. in Nova Scotia at the conclusion of his March Break parenting time. This schedule of March Break parenting time may be changed by agreement of the parties.

[95] J.D.C. shall also be permitted to have contact with R.C. on his birthday. J.D.C. shall also be permitted to have contact with R.C. on Father's Day. If J.D.C. should happen to be in Nova Scotia on either the child's birthday or Father's Day he shall be permitted to have a visit with R.C.

[96] J.D.C. may, of course, be permitted to have additional parenting time as agreed to by the parties.

[97] J.C.A.C. shall notify J.D.C. of any significant medical issues relating to R.C. as soon as possible. She shall provide J.D.C. with the name of any involved physician or healthcare provider. J.D.C. will have the right to make direct contact with or inquiry to any physician or healthcare provider responsible for R.C.'s care or treatment. J.C.A.C. shall provide J.D.C. with a copy of any medical report received from any physician or healthcare provider responsible for R.C.'s care or treatment as soon as practicable.

[98] J.C.A.C. shall provide J.D.C. with the name of any counsellor or therapist who may be involved with R.C. J.D.C. shall have the right to make direct contact with, or inquiry to, any involved counsellor or therapist. J.C.A.C. shall provide J.D.C. with a copy of any report received from any counsellor or therapist as soon as practicable.

[99] J.D.C. shall have the right to contact R.C.'s school to inquire as to his academic programs and progress. J.D.C. shall be permitted to speak directly with R.C.'s teachers or the vice-principal or principal at R.C.'s school. J.D.C. shall have the right to request copies of school progress reports or report cards.

[100] Any and all communications between the parties shall at all times be appropriate and child-focussed. Neither party shall say anything negative or derogatory about the other to the child, or allow anyone else to say anything negative or derogatory about the other parent in the presence of the child. Neither party shall discuss any Family Court proceedings with R.C.

[101] Based upon his 2015 income of $78,000, J.D.C. shall pay monthly child maintenance in the amount of $670 per month, commencing June 1, 2016, and continuing on the first day of each and every month thereafter, with the exception of the month of July each year, unless and until otherwise ordered by the Court. J.D.C. shall provide a copy of his prior year's tax return and Notice of Assessment to J.C.A.C. on or before June 1 each year. Unless the parties agree otherwise, all maintenance payments shall be payable through the Nova Scotia Maintenance Enforcement Program.

[102] I would like to thank counsel for their cooperation and assistance. Ms. Hirbour, you've had limited success on the matter, but I would appreciate it if you would prepare the Order in accordance with the decision.

Morse, ACJFC