FAMILY COURT OF NOVA SCOTIA
Citation: C.M. v. R.L., 2013 NSFC 29

Date: 20131122
Docket: FAMMCA-070043
Registry: Amherst

Between:

C.M.

Applicant

v.

R.L.

Respondent

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge S. Raymond Morse
Heard:	November 12, 14 and 15, 2013 in Amherst, Nova Scotia
Oral Decision:	November 22, 2013
Written Decision:	January 28, 2014
Counsel:	Stephanie Hillson, for the Applicant Michel DesNeiges, for the Respondent

By the Court:

INTRODUCTION

[1] Pursuant to application dated October 4, 2011 C.M., as applicant, requests an order for sole custody of the child R.M.L. (DOB November *, 2009).

[2] The application is opposed by the respondent, R.L. The respondent maintains that the child should be in his care and custody.

[3] The parties are the parents of the child. The parties on again, off again relationship ended in September 2011.

[4] C.M. maintains that if the child is placed in her sole custody R.L.'s access should be subject to supervision.

[5] The primary issue for determination is, therefore, which custody disposition or parenting plan is consistent with the best interests of the child.

[6] In September 2013 the applicant decided to relocate to Ontario. This change in circumstance meant that the determination of the applicant's custody application would necessarily also involve determination of a mobility issue, given that the applicant was requesting that she and the child be permitted to relocate to Ontario if the court granted her custody application. It should also be noted that C.M. has two other children from an earlier relationship, C. and J.

[7] Pursuant to application to vary dated July 17, 2013, R.L. applies for review of an Agreement to Pay Maintenance registered with the Family Court on April 30, 2010. R.L. requests that child maintenance payments be reduced, that child maintenance be varied retroactive to 2010 and that arrears be forgiven or vacated. R.L. represented himself in relation to his variation application given that Mr. DesNeige's retainer was limited to representation of R.L. only in relation to the custody dispute.

[8] The Agreement to Pay Maintenance dated April 26, 2010 was registered with the Family Court on April 30, 2010. In accordance with that Agreement, R.L. agreed to pay the sum of $268 per month child maintenance to C.M. commencing June 1, 2010, payable on the first day of every month thereafter, based upon annual income of $30,000.

PROCEEDINGS

[9] On September 22, 2011, the Minister of Community Services filed a protection application based upon the Minister's belief that the child R.M.L. and her two siblings, were in need of protective services pursuant to the provisions of the **Children and Family Services Act**.

[10] C.M.'s application for sole custody was therefore filed subsequent to the commencement of the protection proceeding. Her application was held in abeyance pending the outcome of the protection proceeding. At the disposition stage of the protection proceeding a supervisory order was confirmed in favour of C.M., whereby R.M.L. and her two brothers remained in C.M.'s care and custody subject to supervision by the Minister.

[11] At time of a status review hearing on November 27, 2012 the Minister confirmed a request for termination of the protection proceeding relating to R.M.L.'s two older siblings on the basis that the Minister no longer had any protection concerns in relation to those children. With respect to R.M.L., the Minister indicated that the Minister would like to see an appropriate **Maintenance and Custody Act** order in place. The Minister expressed support for an order for sole custody in favor of C.M. which would provide for supervised access for R.L. Pending the outcome of the parties' efforts to reach an agreement on the terms of an appropriate **Maintenance and Custody Act** order, the supervisory order with respect to R.M.L. was extended and the Minister maintained responsibility for supervision of R.L.'s access.

[12] At the conclusion of a review hearing held February 13, 2013, before His Honour Judge Hubley, the court granted the Minister's request for termination of

the protection proceeding relating to R.M.L., subject to the condition that the Minister would continue to be responsible for supervision of R.L.'s access until February 22, 2013, the outside time limit for the protection proceeding. The court also granted an interim order under the **Maintenance and Custody Act** confirming that C.M. would have interim sole custody of the child pending the determination of C.M.'s custody application. The application was scheduled for contested hearing on March 12.

[13] On March 6, 2013 Judge Hubley granted the Minister's application to intervene in the **Maintenance and Custody Act** proceeding as a friend of the court.

[14] When the matter came forward for hearing before myself on March 12, the respondent R.L. requested an adjournment in order to allow him further opportunity to arrange for legal counsel. At time of that appearance R.L. confirmed that he was contesting C.M.'s request for sole custody and also contesting her request for his access to be supervised. The respondent's request for adjournment was granted and the court extended the interim order in favor of C.M. pending the hearing and determination of her application. The court made an order referring supervised access to the [...] YMCA's supervised access and exchange program so that the program could arrange for and schedule supervised access for R.L. on an interim basis. The matter was assigned new dates for trial on April 23 and May 7.

[15] On April 17 Mr. Bastarache, newly retained counsel for R.L., appeared before the court and advised that he would not be in a position to proceed with the contested hearing on the dates that had been assigned. The case was then rescheduled to Thursday, May 30 and Friday, May 31.

[16] On May 15 Mr. Bastarache made application to withdraw as counsel for the respondent based on the fact that he had received confirmation of a position that would result in closure of his legal practice. R.L. was present and the court encouraged R.L. to make arrangements for alternate counsel as quickly as possible. The matter was scheduled for a docket appearance on June 12 and the May 30 and 31 trial dates were removed from the docket.

[17] On June 12 R.L. confirmed that he was having difficulty retaining new counsel. The court agreed to provide R.L. with further opportunity to retain counsel however the court explained to R.L. that if he had not been able to retain counsel by the time of the next appearance the court was nevertheless going to have to assign dates for contested hearing and move the matter forward.

[18] On August 28 Mr. DesNeiges appeared as counsel for R.L. The application was then scheduled to be heard on November 12 and November 14. A pre-hearing was scheduled for Wednesday, October 23. Filing deadlines were also assigned.

[19] On October 23 counsel for the applicant advised that C.M. was now residing in Ontario and had relocated to Ontario approximately 6 weeks previous. C.M. was in attendance at time of the pre-hearing. Counsel for the respondent advised that his client had just learned of these developments and had not been informed about the move to Ontario. Counsel for the respondent suggested that the applicant had refused to comply with the existing interim order and maintained that the order should be enforced. The court expressed concern about C.M.'s unilateral decision to relocate to Ontario and noted that this had precluded supervised access for the respondent as authorized by the court. At the conclusion of the pre-hearing, the court confirmed that C.M. would continue to have care of the child but subject to the condition that the child was to remain in the province Nova Scotia until the application could be heard and determined. The court confirmed that the matter would proceed to trial on November 12 and 14 and confirmed November 15 as an additional day if required. The court confirmed that R.L. was to be permitted to have supervised parenting time with the child in accordance with the existing interim order.

[20] The trial commenced on November 12, continued on November 14 and concluded on November 15.

[21] The role of the Minister as amicus curiae was quite limited. In essence the Minister arranged for filing of an affidavit on behalf of the responsible caseworker and arranged for the worker's attendance at trial. Counsel for the Minister did not take any active role during the trial and withdrew with leave of the court after the caseworker's testimony had been completed. Before withdrawing, counsel for the Minister requested that the Minister be notified as to the outcome of the trial and, in the event C.M.'s application was successful, asked that the order include a

provision requiring that notice be given to the Minister in the event of any future variation application.

REVIEW OF EVIDENCE

[22] Long-term child protection worker Jillian Martin was called as a witness on behalf of the applicant. Ms. Martin's affidavit sworn February 22, 2013 was entered as Exhibit 1.

[23] The applicant C.M. testified on her own behalf. C.M.'s affidavit sworn March 8, 2013 was entered as Exhibit 2. Her supplementary affidavit sworn November 12, 2013 was entered as Exhibit 3. To facilitate presentation of the applicant's evidence the respondent's affidavit sworn October 23, 2013 was entered as Exhibit 4. R.L.'s supplementary affidavit sworn November 12, 2013 was entered as Exhibit 5.

[24] The respondent's mother E.L. testified on behalf of the respondent. Charles Hawco, manager of membership and administration at the [...] YMCA, was called as a witness by the respondent. The respondent R.L. testified on his own behalf.

[25] I have carefully considered the evidence of the parties and their respective witnesses. I have reviewed the exhibits. While I have considered all the evidence I do not propose to undertake a detailed review of all the evidence. In the paragraphs that follow I have attempted to summarize some of the evidence.

[26] Jillian Martin testified that she assumed responsibility for the child protection file relating to the respondents in September 2012. She confirmed that there were child protection concerns relating to the respondent as of November 27, 2012. These concerns in part related to information indicating that one of the child's siblings had been assaulted by the respondent. She confirmed that the agency had concerns with respect to domestic violence and that R.L. was considered by the agency to be the perpetrator. She indicated that this was the prevalent issue throughout the protection proceeding. She referred to an incident which occurred October 22, 2011 as an altercation between the parties that the

child R.M.L. had witnessed. She confirmed that from the agency's perspective R.L. was the dominant aggressor.

[27] She confirmed that the last referral received from R.L. was January 28, 2013 at which time he called to report concerns with respect to the condition of the applicant's home. As a result she did a home visit to the applicant's residence and found no safety concerns. She testified that R.L. would not have been allowed to be in the home as of January 28, 2013. She testified that there was a referral from R.L. on December 31, 2012, at which time he reported seeing a van parked at the applicant's home and indicated that he wanted to know who it belonged to and was concerned about who was hanging around the child R.M.L. This referral was not investigated. On December 15, 2012, the agency received a referral via the RCMP who reported that they had received information that in 2011 the applicant had slapped R.M.L. in the face. The source of the information was identified as the respondent.

[28] Ms. Martin was asked if she had any concerns regarding physical risk for the child if R.L. had custody and she indicated that she did based upon the protection concerns relating to R.L. and the fact that R.L. did not participate in programming as requested by the agency. She indicated her belief that there were still issues between R.L. and C.M. that had not been addressed.

[29] Ms. Martin confirmed that the Minister remained supportive of C.M., noting that C.M. had engaged in services as requested by the Minister and that the feedback received from service providers was positive. She also testified that she had had the opportunity to observe C.M. with all three children and noted that all the children seemed very attached to C.M., expressed their love for her and that it appeared to be a normal relationship. She confirmed she had observed that R.M.L. was very affectionate with her mother and seemed to enjoy spending time with her two older brothers. Ms. Martin testified that she would have no concerns if R.M.L. remained in her mother's care. She indicated that there would be huge concerns if R.M.L. were placed in R.L.'s care due to his anger and domestic violence. She commented that the protection file had been deemed a high risk file based on the history and the protection concerns. At one point she indicated that she considered C.M. to have been very open and honest with the agency.

[30] C.M. testified on her own behalf. She confirmed that she was presently staying in [...] but wished to live in [...] noting that that was where her sons currently were. She identified her affidavit sworn March 8, 2013, as Exhibit 2. She identified her supplementary affidavit as Exhibit 3.

[31] The applicant testified that the respondent had led her to believe that he had split up from his wife a year or so before they started their relationship. She indicated that she observed constant fighting on the phone between R.L. and his wife. She testified that she witnessed R.L. call children services in Ontario and make allegations against his wife that she was an unfit mother. She said that he called Ontario children services as well as the O.P.P. and any agency that would listen to his attempts to discredit his wife as part of R.L.'s effort to obtain custody of his son, A.. She recalled one instance where R.L. called his wife 39 times in one evening. She said he would call every day. She said she tried to discuss the situation with R.L. but that R.L. said that this was what he had to do. She said that R.L. was not successful in obtaining custody of his son.

[32] The applicant was referred to Exhibit 3 paragraph 12 and indicated that she started to see the respondent picking on her son J. She said that he tried to make it seem like a joke however the concerns included referring to J. as "a mama's boy" and "little fag". She said she would tell R.L. not to do it but he would say he was just kidding around.

[33] The applicant spent some time describing how she attempted to end the relationship with the respondent on more than one occasion. In May 2010 after the respondent had gone to Ontario to seek work she told him the relationship was over but he had said that it couldn't be over and he continued to phone or text or and eventually convinced her to stay. She commented "there was no getting away from the man".

[34] She testified that she and the children moved to Ontario to be with R.L. in November 2010. Again she said that prior to that she had tried to move on but that R.L. had responded with constant threats. The threats included a threat that he was going to take her children from her and that he was going to ruin her life and that he would be her worst nightmare. Again she testified that she gave in and moved to Ontario. She indicated that before she relented he had made a call to children and family services in Nova Scotia.

[35] Things did not go well in Ontario. There were problems with accommodations. She and R.L. and the children had to move into a hotel in December 2010. Following that move the applicant indicated that there was an incident where R.L. grabbed her and spat on her while the children were in the bedroom of their hotel efficiency unit. She said that R.L. had been drinking all evening. She confirmed that the children would have heard the altercation.

[36] The applicant related how subsequent to this incident she had to arrange for police assistance to help her leave R.L. Again she testified she had to call the police for assistance as she couldn't cope with his attitude and drinking any longer. She was referred to paragraph 23 of her affidavit and testified that by the time she had driven for approximately one hour she had received over 100 text messages and phone calls from R.L. and that he had threatened to contact the police and request an Amber alert if she didn't return.

[37] When C.M. and the children returned to Nova Scotia in 2011 they resided initially at [...]. She said she was receiving numerous texts per day from the respondent. The tone of the texts was aggressive. R.L. began to call the RCMP and children services. She said that the police would contact her or show up at her residence or pull her vehicle over to make sure that everything was okay. She believed that R.L. had everyone believing that she was suicidal but she indicated she was not. She said that this was an invasion of her privacy and she felt powerless. Child protection workers also visited her residence saying that they had received allegations. They would not identify the source but she confirmed her belief that it was R.L. For a period of time it seemed that she heard from child welfare authorities at least once per week. She explained that while she understood that the agency workers were just doing their job nevertheless she found the situation unnerving and was very frustrated and again suggested that it was an invasion of her privacy and that she felt powerless.

[38] In referring to Exhibit 1 paragraph 6 she confirmed that the protection proceeding started September 22, 2011 and that at that point she and R.L. were no longer to see each other. She said that the incident with J. was just prior to commencement of the protection proceeding. After the commencement of the protection proceeding R.L. had no access contact with her sons. She testified that R.L.'s mother, E.L., was to be the third party responsible for facilitation and

supervision of R.L.'s access with R.M.L. E.L. was to be responsible for pick-up and drop-off so as to avoid contact between the parties. There was only one access visit where this occurred. The exchange for this visit was to take place at the Tim Hortons in [...] (also referred to as [...]) however both E.L. and the respondent showed up for the exchange on Sunday.

[39] The applicant also testified that she received a number of text messages from the respondent during that access weekend indicating that he was not going to allow R.M.L. to come home and he was going to cut the child's hair. She indicated that there were over 250 text messages received that weekend. She said she did not speak with R.L. because he was sounding so irate and she had also received a warning from the agency prior to that weekend about having contact with R.L. She did however admit that she responded to some of R.L.'s texts. She testified that the [...] RCMP had taken pictures of the text messages she had received from R.L.

[40] The applicant described in some detail the incident that occurred when she went to pick the child up on Sunday at the end of the access weekend. She said that she arrived first and then R.L. arrived in his vehicle. R.L.'s mother then showed up in her vehicle with R.M.L. C.M. went to get the child and put the car seat in her vehicle. She then went back to get the child's overnight bag and said that at that point R.L. was swearing at her and waving his arms and she felt threatened. She indicated that she pulled a baseball bat out of her vehicle and proceeded to strike the bat on the ground and tell the respondent to get away from her. She said she did this three times. She again said that the respondent was irate and that she had at one point told him to get up on the curb or she would run over his toes. She testified that when she proceeded out onto the highway, that R.L. followed in his truck and passed her vehicle and then swerved in front of her trying to cause an accident. She proceeded to [...] and called the RCMP. She said that R.L. called the [...] police and that they tried to arrest her for assault. She said those charges were dropped because she agreed to a six-month peace bond.

[41] The applicant testified that R.L. was subject to a peace bond as a result of the incident with respect to J., as well as the conditions of a probation order relating to a conviction for harassment. She testified that R.L. did not respect the conditions of the probation order and that he texted her, called her and did drive-bys of her residence. She testified she saw R.L. drive by her home in his [...] truck two to three times a week and noted that she lived at the time 258 kilometers from his

home in [...] . She said she would notify the police but that things reached the point that she had to leave her home as the police couldn't provide the protection she needed.

[42] The applicant also testified that in one instance R.L. tried to have a peace bond placed on her on behalf of her daughter R.M.L. R.L. apparently maintained that the child was in need of protection from the applicant. This application was not successful and she identified that the transcript from that hearing was attached as Exhibit A to her affidavit.

[43] The applicant testified that R.L. made yet another peace bond application in February 2013 against her based upon fear for his safety. That application also was not successful.

[44] When referred to paragraph 10 of Exhibit 4, R.L.'s affidavit, C.M. took the position that the information in that paragraph was untrue and maintained that R.L. had an alcohol problem. She said that on more than 50 occasions he wet the bed due to excessive drinking.

[45] C.M. testified that she doesn't drink a lot herself but she does smoke marijuana estimating that she might smoke a joint a day. She doesn't smoke around the children. She uses it for pain but also acknowledged using marijuana for recreational purposes.

[46] C.M. talked about the child tax benefit issue and noted that the payment was reduced to $100 a month where it had previously been $1156 per month. She said that as a result of the reduction in the amount of child tax benefit she had to go on social assistance for four to five months and also received financial assistance from her mother. C.M. testified that she didn't think that R.L.'s actions in communicating with Canada Revenue Agency were in the best interests of the children. In her affidavit, Exhibit 2 at paragraph 32, she indicates her belief that R.L. falsely reported to Canada Revenue Agency that they had been living in a common-law relationship from 2007 to present. During her testimony she noted that the reduction was confirmed 13 days before Christmas 2012. It was May 2013 before the full child tax credit was reinstated and she said that the loss of the money took a toll on her family. The two boys couldn't participate in after school activities because she couldn't afford the cost. She couldn't take the children on

fun activities or outings. She said that the situation put a lot of emotional and mental strain on her.

[47] C.M. said that she had a visit from children and family services in March 2013 advising her that her file had been re-flagged as high risk for lethality and that she should go to [...] . After moving to [...] she said that she then applied for subsidized housing which became available in April in [...] . She moved to [...] and was there from April to September 2013.

[48] C.M. was asked about her decision to move to Ontario. She testified that she has no supports in [...]. She has family in [...]. Her older sister and her two adult children and C. and J.'s father, who wants to be actively involved with the boys, all reside in [...]. She feels she has more family and professional support in [...]. [...] provides more opportunities for the children. She testified that she's been wanting to move to Ontario for some time. She also testified that she had developed concerns about the boys' schoolmates or friends in [...] and that the boys also had problems with a neighbour in [...], as referred to in paragraphs 29 through 34 of her affidavit, Exhibit 3.

[49] The applicant testified that initially the visit to [...] in September was intended to permit the boys to see their father. She said however that after she arrived her sister began to attempt to persuade her to move to Ontario. She said the trip to [...] was funded by the sale of her home in [...]which allowed her to buy a vehicle.

[50] The applicant testified that she has found a two bedroom apartment in [...]. The two boys have been enrolled in school. R.M.L. is eligible for a pre- school program. She said that her two sons have settled in well. They are attending separate schools. She spoke about her hope to be able to find full-time employment in [...].

[51] The applicant testified about the close relationship between her sons and R.M.L. She said that R.M.L. gets along extremely well with her brothers and that they play together all the time.

[52] She described her daughter R.M.L. as being a very energetic child who likes to help out, is very sharing and very intelligent. She confirmed that R.M.L. has

never been out of her primary care except for the one access visit in [...] the weekend of October 23. R.M.L. has never been separated from her brothers until now.

[53] The applicant confirmed that she was requesting sole custody and permission for she and her daughter to move to Ontario.

[54] When asked about her position with respect to access for R.L. the applicant said she would be supportive of phone calls and would be willing to bring R.M.L. down during vacation times that don't interfere with school, in order to facilitate his access. She said that phone calls would be permitted provided R.L. could conduct himself in a positive manner and acknowledged that she would have to acquire a landline to facilitate phone contact. She suggested that the phone calls could be on weekends or after school before bedtime. She said that if she was working she could afford to cover the costs of bringing R.M.L. to Nova Scotia for R.L.'s access. She felt she could handle it if she had income from employment, the child tax credit and was receiving child maintenance. She also indicated her willingness to allow E.L., the paternal grandmother, to supervise R.L.'s access and expressed her belief that E.L. wouldn't let anything happen to R.M.L. She indicated that there would have to be a condition that R.L. was not to consume alcohol during any access visits. She confirmed her willingness to work out the details for the access with R.L.'s mother.

[55] She was cross-examined about the incident in September 2011 where she pushed the respondent away from her son J. She confirmed that led to a call to children services. She said she had been in the washroom and heard yelling between J. and the respondent. She came out and saw J. slap the respondent's hand away which she said had a soother in it. The respondent raised his fist and at that point she pushed him away. She acknowledged that the respondent was a big man but indicated that he had been drinking. The respondent then started screaming and she had to tell him to leave. She confirmed that she had been physical with R.L. in the past and that he had been physical towards her.

[56] The respondent R.L. testified on his own behalf. He is 45 years old and employed as a union bricklayer. He has worked at various locations in Nova Scotia and in southwestern Ontario. He was born and raised in [...]. He has family in [...]

consisting of his mother, older brother and two younger sisters and also aunts, uncles and cousins.

[57] The respondent was married in Ontario and that marriage lasted 13½ years. As a result of that relationship he has a son A., soon to be 17.

[58] The respondent identified Exhibits 4 and 5 as his affidavits and confirmed that the affidavits were true and accurate.

[59] He currently resides in [...]. He described this home as a three bedroom mini-home owned by his mother. He testified that he and his mother live there. R.L. considers himself to have been single since September 17, 2011. Prior to that he was involved in a relationship with C.M.

[60] In reviewing the history of the relationship he indicated that for the first 11 months there were no problems and stated that the relationship started in August 2007.

[61] He went to Ontario in May 2010 to work and qualify for EI. He returned to Nova Scotia November 2010 to attend a wedding. In early November 2010 the applicant and the three children came to Ontario to live with him. He hadn't realized that they were coming and didn't have appropriate accommodations. He found a kitchenette unit in a motel and that was where they stayed. He was working at the time. He identified the motel as [...].

[62] The respondent testified that the relationship with the oldest child J. changed. He said he felt it was due to jealousy issues on J.'s part. He felt that J. was offended by not being allowed to participate in adult discussions.

[63] He confirmed that in January 2011 he and the applicant got into an argument while they were still staying at [...]. He testified that the applicant spit at him and chased him into the washroom, called 911 and then hit herself with her left hand to make it look like he had hit her. Four O.P.P. officers attended and he went to stay with a friend. He returned to the motel the next day and parked his truck where she usually parked. He said she assumed that he was trying to block the door but that was not the case. He said that the applicant and the children were in no danger from him. The applicant left the motel that day with the children to return to Nova

Scotia . He identified the date as January 16 and indicated he left on January 23. At that point in time he considered that they had broken up. He testified that around first of May 2011 they decided to attempt to reconcile.

[64] The respondent testified that circumstances changed on the 9th of September 2011. He described an incident where the baby, R.M.L., had been down for a nap and then had woken up. He went to check on the child and discovered a severe diaper rash. He didn't feel there was any need for the baby to be in that condition. He asked the respondent to find some clean clothes but she took her time to do so because she was playing a game on her phone. He stated that the respondent came and grabbed him from behind and swung him around and told him to leave. She grabbed him again and ripped his tank top and he then proceeded to his truck. She came out and banged on the driver side window with her fists. She also gave him the finger and J. did the same thing. He went to [...] and when he told his mother and brother what happened they told him to report it so he reported it to the RCMP. He also called the after-hours number for child welfare and reported it to child welfare as well. When asked why the incident had occurred he said it was because the applicant didn't like the fact that he had expressed concern about the baby's condition. He said that he spoke in a normal tone to the applicant but that she screamed at him. He testified he said to J. "see what your mother's doing, she's assaulting me" and that J. said he didn't care.

[65] He confirmed that as a result of the child welfare investigation a decision was made to put a child protection order in place with conditions. He resided at his mother's in [...] after that incident.

[66] He was asked about his alcohol use and he indicated that the number of times the applicant had suggested he had urinated in the bed was an exaggeration. He acknowledged that he regularly drank. He testified that he could sit down and consume two, three, four or a dozen beer but wouldn't do so every night. He said it was always beer and that he doesn't drink alcohol or wine or use marijuana. He however said that he doesn't consume alcohol at this point in time and when asked why, he advised that he is under a two-year probation order and that it is a condition of his probation that he not consume alcohol.

[67] He was referred during his direct examination to the applicant's affidavits, Exhibits 2 and 3. With respect to Exhibit 2 paragraph 9 he said he recalled making

a lot of calls at one point in time to his ex-wife with respect to access to his son, but stated that 39 times as referred to in the affidavit was an exaggeration.

[68] The respondent was asked about the incident with the baseball bat on October 23. He confirmed that his mother had left to take R.M.L. back and meet with the applicant for the access visit exchange. He said that his mother left a half hour before he did. He received a couple of text messages from the applicant before [...] asking where R.M.L. was and he responded by indicating that she should be there soon. He proceeded to the spot where the exchange was to take place at the Tim Hortons at [...] indicating that he intended to use the washroom and get a couple of coffees. When he arrived the applicant was there. She put her head out of her car and asked, "where's R.M.L.?" and he told her she should be here soon. The applicant then pulled out of the parking lot. Five minutes later his mother showed up and then a few minutes later the applicant returned. He got out of his vehicle to give a hand with transferring stuff from his mother's vehicle to the applicant's vehicle. As he was doing this, he asked the applicant about $105 he felt he was owed for a cell phone that he had provided. He said the applicant told him to get it from the agency. She then reached in and pulled out a miniature Louisville slugger baseball bat and began beating on the pavement and swinging it in the air at him. He testified that this scared him and that he got away from her. He testified he said nothing while this was happening. The applicant was screaming telling him to get away from her. After she calmed down he testified that he went to kiss R.M.L. goodbye and at that point the applicant threatened to run him over. He testified that the applicant then headed up the highway at a high rate of speed. He followed and passed her and pulled in and pumped his brakes a couple of times. He passed her going 125 km an hour. As he went by she made a sudden turn onto the [...] ramp. He testified he was a couple of car lengths in front when he pumped his brakes. Later that evening he reported the incident to the police.

[69] The respondent denied ever threatening to ruin the applicant's life. He said he made no such threats.

[70] He conceded that there was a considerable amount of texting but denied any threatening texts were sent to the applicant.

[71] The respondent's counsel was not retained to assist the respondent with his application for review of child maintenance. Accordingly the court assisted with

R.L.'s direct examination during this part of his testimony. Several exhibits were introduced. The respondent testified that he was in receipt of income assistance for the months of January, February and March 2013. Exhibit 10 was a copy of an Ontario Superior Court of Justice order dated April 23, 2013 confirming the provisional order of Justice Kevin Coady of the Nova Scotia Supreme Court, dated October 22, 2012, which confirmed a child maintenance payment for R.L.'s son Andrew in the amount of $150 per month effective November 1, 2012, based on income of $19,000. The order also confirmed forgiveness of arrears and termination of any garnishee. Exhibit 11 was R.L.'s statement of financial information sworn July 17, 2013, as well as attached income tax documentation. His notice of assessment for 2012 confirmed line 150 income in 2012 of $32,172.

[72] When R.L.'s counsel resumed his direct examination he asked R.L. about the child tax credit issue. R.L. testified he had no personal knowledge that there was going to be a change in the child tax credit payable to the applicant. He testified that when he had his income tax done and was intending to file as a single individual the individual assisting him with his tax return suggested that he should indicate his status as common law. He couldn't recall the exact date this occurred. He said that he therefore filed on the basis of common law status based upon the instructions of this individual.

[73] R.L. was questioned about his plan for care of the child. He confirmed that his mother's home is a three-bedroom mini home, furnished and safe. There is a double bed for R.M.L. It has a good sized yard and there is a playground on the street. There's at least three day care centres in the area. He also made reference to [...]. He said he would do his responsibilities as a parent and raise her on a proper track and see that she was not around people who use drugs. He confirmed that he'd be okay with the applicant having access to the child. Access would depend upon her availability but he wouldn't be supportive of the child being taken to Ontario for access.

[74] During cross examination R.L. acknowledged that he was charged with assaulting J. following the September 2011 incident. However he testified that he disagreed with the applicant's version of events and stated that he did not raise his fist to J. He also denied trying to put a soother in his mouth. He denied calling J. names.

[75] He was asked if he did anything to contribute to the negative relationship with J. and he said not intentionally. He was then asked what he did unintentionally and he said he did nothing and that the change in relationship had nothing to do with his actions. Again he denied calling J. names and said he never laid a finger on him but acknowledged that he agreed to enter into a peace bond with a no contact provision respecting J.

[76] During his cross-examination he was asked about the incident in [...] in Ontario in January 2011. He agreed that the police drove him to his friend's place because he was too drunk to drive himself. He didn't agree that the next day C.M. appeared to be afraid and said it was her choice to call the police and that there was no need for her to do it. He indicated that her plan to return to Nova Scotia with R.M.L. upset him but even though upset he was not speaking in a threatening voice. He said he wasn't happy because after all he was the father of the little girl and she needed him.

[77] He was asked if he sent approximately 100 text messages to the applicant before she had reached London, Ontario and he disagreed with that. He said he did send her some texts. He didn't believe it was 100 but had no idea how many but then said that the applicant was exaggerating. He said it would be more than 10 but less than 20 but then indicated that he didn't really know because he didn't count.

[78] The respondent denied saying to the applicant that she would regret that she was leaving him and he didn't recall texting her about requesting an Amber alert but then indicated that he did not say that. He suggested that the applicant left him high and dry.

[79] The respondent acknowledged that he understood that there was a prohibition against contact with C.M. after the agency became involved. He confirmed that he showed up at the access exchange in October despite his understanding of the prohibition against contact. Again he confirmed he understood that it was expressly against the order and when asked why he nevertheless attended he said it was because "I love my daughter". R.L. disagreed with the suggestion that there would be potential for conflict if he showed up and said that he didn't show up to start an argument. When asked why he attended again he said it was because he loved his daughter.

[80] He was asked why he sent hundreds of text messages to C.M. that weekend when his daughter was with him. He couldn't remember how many texts he sent but denied that it was hundreds. He agreed that perhaps he sent her 20 texts but not more than 50. He acknowledged that he was subsequently charged for criminal harassment but said that the charge was not just related to that weekend. He acknowledged that the charge was laid after the incident at [...]. Again when talking about the text messages that he sent over the weekend he said he wanted to try to bring the condition of his daughter to the applicant's attention.

[81] In testifying about the altercation which ensued between he and the applicant on October 23, he said he stopped to use the washroom at [...]. He stated this was a regular place for him to stop because it was easy to get on and off the highway. He acknowledged that he knew that the access drop-off was going to take place at [...]. Again he acknowledged that there was a no contact direction in place. He confirmed he pulled into [...] anyway. He said he was just being a good guy and trying to be helpful when he started carrying items from his mother's vehicle to the applicant's vehicle. He testified that the applicant told him to get away from her after he asked her about money for the cell phone. He wasn't sure how close he was to her, perhaps two or three feet and again he acknowledged that he was aware that he was not to have any contact with the applicant at this point. He testified that when the applicant told him to get away he continued to help transfer items between the two vehicles. He said that the applicant picked up a baseball bat and swung it in the air and that's when he got away.

[82] The respondent was asked how close he was to her vehicle when she began to leave the parking lot. It was suggested that he was again close to her vehicle and the respondent indicated that he wanted to say goodbye to his daughter and that he went back to the vehicle to say goodbye. After the applicant left he said goodbye to his mother and aunt and then he left. He testified that he had no intention of driving fast and that he wasn't chasing the applicant. He was heading to the city for work. He said his speed was 120 -125 km/h and that he was travelling in the outside lane. He said that when he got up alongside the applicant's vehicle she sped up some more and therefore he couldn't change lanes. He testified that he now believed that he never successfully passed her vehicle. He testified that he had made a mistake in his testimony earlier during his direct examination. He had thought about it further and felt that she didn't give him a chance to move into the middle lane.

[83] The respondent acknowledged that as a result of this incident the agency assumed responsibility for supervision of his access. Again he conceded that some of his actions weren't appropriate but again stated that he loved his daughter. He also stated that he wasn't the one who became violent or pulled out the bat. He viewed the situation as C.M.'s fault because he wasn't violent. He acknowledged that his mother might have tried to convince him to leave [...] that Sunday but agreed that if she did so, he ignored her.

[84] The respondent acknowledged that he pled guilty to the charge of criminal harassment. He said he couldn't remember if this was his first conviction for harassment. He acknowledged that there were criminal convictions relating to conflict with his ex-wife in Ontario.

[85] He acknowledged that he stopped drinking April 15, 2013 due to the terms of his probation order that was put in place in February 2012. He acknowledged that he hadn't followed the order on April 15, 2013 but has followed it ever since. He didn't agree that C.M. had legitimate concerns regarding his drinking. He couldn't answer whether or not he would return to drinking after his probation order expires but then stated that he didn't plan on it.

[86] The respondent denied ever driving by the applicant's residence. He was referred to an agency case note from December 31, 2012 which noted that he had contacted the agency to express concern about a strange van in the vicinity of the applicant's residence. The respondent testified that he didn't agree that he had said he had seen the vehicle. He couldn't recall if he reported the concern to the police but he did acknowledge that he called the police to do wellness checks on the applicant. He said he did this because he feared for his daughter's safety and it was all about his daughter not about C.M. At a later point he acknowledged that he had spoken to a member of the RCMP about the strange van after being denied an access visit. However again he testified he didn't say that he'd seen the vehicle.

[87] The respondent acknowledged that he called the agency on more than one occasion to complain about the state of the applicant's home. Again he acknowledged requesting wellness checks by the RCMP and when asked why, he said it was because of the environment his daughter was living in. He was then asked what he was trying to accomplish with constant calls to the agency and the police and his response was to indicate that he felt the agency never supported him

in any way and yet he was the victim of the assault. He stated that the agency was trying to make him out to be a bad person.

[88] During her cross examination the respondent's mother, E.L., confirmed that her daughter-in-law was also living with her and R.L. in the three-bedroom mini-home. She suggested that she herself could sleep anywhere. She suggested that R.M.L. could have her bedroom. She also suggested that her son R.L. didn't need to work and that her pension would be adequate to support herself as well as her son and R.M.L.

[89] In discussing the access exchange incident of October 2011 she indicated she understood that her son R.L. was not to be there but insisted that he was no danger. Again she confirmed she was aware that R.L. was not supposed to be at [...] for the exchange on Sunday and that she didn't ask him to be present but that he stopped for supplies. She then testified that she told her son that he shouldn't stop and that he was not supposed to be there. She told him that he shouldn't be there and that his presence was going to cause trouble. She agreed that he didn't listen to her. However she also said that he just wanted to say goodbye to his daughter but then acknowledged that he had said goodbye at her home earlier. She also agreed that her sister and her boyfriend were with her so she didn't need R.L.'s help in transferring items from her vehicle to the applicant's.

[90] Again E.L. testified that on October 23 she understood R.L. was not to be present for the exchange. She then commented that it was the agency's problem not hers and she didn't feel that his presence should have impacted on his future access. She maintained that the agency had a false case against her son based upon C.M.'s lies. At one point she testified that she had reviewed the agency's affidavit and that it was totally false in general. She expressed her belief that the criminal harassment conviction was based on lies. She said that if her son had texted C.M. it was for good reason.

[91] When asked about her son's drinking she indicated she was aware that he would drink several cans of beer but said it wasn't illegal to do so in your own home. She then commented "I don't drink, smoke, or do drugs, honey".

[92] Charles Hawco, manager of membership and administration at the YMCA in [...], testified on behalf of the respondent. He confirmed that a court order required

the YMCA to supervise access for R.L. He undertook initial intake interviews and then arranged for visits. Visits occurred June 22, July 21, July 28, August 4 and November 10. The access visits happened in the YMCA childcare facility on Saturday or Sundays. He confirmed that he was present for R.L.'s visits. He described the interaction between R.L. and R.M.L. indicating that there were no issues of concern. He described R.M.L. as being very talkative. Usually R.L. provided a lunch or snack. Then they played. Greetings involved a hug.

SUBMISSIONS BY COUNSEL

[93] During closing submissions counsel for the respondent maintained that the applicant's decision to move to Ontario was a spur of the moment decision, made without proper planning and did not have the child R.M.L.'s best interests at heart. Counsel for the respondent submitted that the evidence would not justify or support a finding that the criteria for allowing relocation to Ontario had been met. Counsel for the respondent relied upon the case authorities as referred to in the respondent's pre-hearing brief in making this submission.

[94] Counsel for the respondent emphasized that the respondent had shown poor judgment such as through her use of marijuana. It was submitted that the court should focus on the child's well-being in making its decision. Counsel suggested that the court should award joint custody with primary care to R.L. In the alternative it was suggested that it would be joint custody with primary care to C.M. but that she not be permitted to relocate with the child to Ontario. In the further alternative, if the court granted C.M.'s application, then counsel submitted that R.L. should be granted generous access rights to the child. It was also suggested that child support should be reduced to recognize the costs of access contact. Counsel also maintained that the child support should be varied retroactively consistent with R.L.'s change in income. Counsel for the respondent conceded that there had been inappropriate behaviours between the parties and therefore a need to "tone down" the relationship and suggested that that could occur best if the respondent's request for primary care was granted.

[95] Counsel for the applicant emphasized that the court had to focus on the child's best interests and the factors as referred to in section 18 subsection 6 of the **Maintenance and Custody Act**.

[96] Counsel for the applicant submitted that the fact that R.L. sees himself as a victim indicates a lack of insight. Counsel noted that both the respondent and his mother place all the blame on the applicant for the incident that occurred October 23 despite their knowledge that the respondent was not to be present.

[97] Counsel for the applicant noted that the respondent's initial version of the incident involving the vehicles on October 23 was consistent with the applicant's testimony but that he had subsequently backtracked and changed his testimony during cross examination. Counsel for the applicant submitted that the respondent's evidence was not reliable.

[98] Counsel for the applicant submitted that the respondent has perpetrated domestic violence on the applicant. It was submitted that when the applicant became physical with the respondent she was either defending her children or acting in self-defence. It was submitted that the applicant had a reason to be fearful on October 23, 2011. Counsel submitted that the court should consider the definition of "family violence" as set forth in the **Maintenance and Custody Act**.

[99] Counsel for the applicant conceded that the applicant should be responsible for more than one-half of the transportation costs for R.L.'s access and that the applicant recognizes that it's not reasonable to require R.L. to bear the full costs of access. It was suggested that the access could consist of summer access and then Christmas access every alternate year and March break every other year, weather permitting, and that if weather interfered with the Christmas or March break access in any given year additional summer access could be provided. It was suggested that the transfers for access occur either utilizing the YMCA exchange program or alternatively at an RCMP detachment.

[100] Counsel for the respondent maintained that joint custody was not appropriate in light of the evidence. It was also submitted that the court ought not to ignore the agency's position.

ISSUES

[101] The primary issue for determination in this case is what parenting plan or proposal is most consistent with the best interests of the child.

[102] There is a secondary issue relating to the respondent's request for review of child maintenance.

THE LAW

RE: **Maintenance and Custody Act**

[103] The jurisdiction of the Family Court to grant an order respecting custody and/or access is found in section 18(2) which reads as follows:

> 18 (2) The court may, on the application of a parent or guardian or, with leave of the court, a grandparent, other member of the child's family or another person make an order
>
> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
>
> (b) respecting access and visiting privileges of a parent or guardian or authorized person.

[104] The **Maintenance and Custody Act** was recently amended. The amending legislation was proclaimed February 19, 2013. The amendments confirm that the former section 18(5) has been repealed and the following substituted:

> 18(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.

[105] The amendments also include sections 18(6), (7) and (8) which read as follows:

> 18 (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
>
> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
>
> (d) the plans proposed for the child's care and upbringing, have regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
>
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
>
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
>
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> > (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
> >
> > (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether

requiring such co-operation would threaten the safety or security of the child or of any other person.

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

(a) the nature of the family violence, abuse or intimidation;

(b) how recently the family violence, abuse or intimidation occurred;

(c) the frequency of the family violence, abuse or intimidation;

(d) the harm caused to the child by the family violence, abuse or intimidation;

(e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and

(f) all other matters the court considers relevant.

(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).

[106] "Family violence" is defined as follows in section 2 (da) of the act:

2 (da) "family violence, abuse or intimidation" means deliberate and purposeful violence, abuse or intimidation perpetrated by a person against another member of that person's family in a single act or a series of acts forming a pattern of abuse, and includes

(i) causing or attempting to cause physical or sexual abuse, including forced confinement or deprivation of the necessities of life, or

(ii) causing or attempting to cause psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour including, but not limited to,

> (A) engaging in intimidation, harassment or threats, including threats to harm a family member, other persons, pets or property,
>
> (B) placing unreasonable restrictions on, or preventing the exercise of, a family member's financial or personal autonomy,
>
> (C) stalking, or
>
> (D) intentionally damaging property,
>
> but does not include acts of self-protection or protection of another person;

DETERMINATION OF BEST INTERESTS

[107] The legislation clearly indicates that in determining a custody application the court is to give paramount consideration to the "best interests" of the child. Case authorities provide guidance with respect to the meaning of "best interests".

[108] In *Yonis v. Garado*, 2011 NSSC 454, Justice Beaton considered the meaning of "best interests" indicating 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 SCR 31. 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:
>
> > [37] In Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, 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 said this about the list of 17 factors enumerated in Foley (supra):

> [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 on a generic list of factors. As Abella J.A., as she then was, astutely observed in MacGyver v. Richards (1995), 11 R.F.L. (4th) 432 (Ont. C.A.):
>
> > 27 Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.
> >
> > 28 … the only time courts scrutinize whether parental conduct is conducive to a child's best interests is when the parents are involved in the kind of fractious situation that is probably, in the inevitability of its stress and pain and ambiguity, least conducive to the child's or anyone else's best interests.

> 29 Deciding what is best for a child is uniquely delicate. The judge in a custody case is called upon to prognosticate about a child's future, and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence, on the understanding that deciding what is best for a child is a judgment the accuracy of which may be unknowable until later events prove – or disprove – its wisdom.

[109] The oft cited decision of Justice Goodfellow in *Foley v. Foley* (1993) 124 NSR (2d) 198 is seen as one of the leading Nova Scotian case authorities providing considerable guidance as to the factors to be considered in determining a custody dispute based upon consideration of the child's best interests. I think it is fair to suggest that section 18(6) effectively incorporates a number of the "Foley Factors" within the **Maintenance and Custody Act**.

[110] In *Boutilier-Robar v. Robar*, 2012 NSSC 279, Justice Forgeron determined competing custody claims between a mother and the paternal grandparents. Justice Forgeron commented as follows at paragraph 36:

> [36] The best interests' principle has been described as one with an inherent indeterminacy and elasticity: MacGyver v. Richards (1995), 22 O.R. (3d) 481(Ont. C.A.), paras. 27-29. The test is a fluid concept that encompasses all aspects of a child, including the child's physical, emotional, intellectual, and social well-being. The court must review the plans of rival claimants and choose the course which will best provide for the healthy development of the child. In Foley v. Foley (1993) 124 N.S.R. (2d) 198 (N.S.S.C.), Goodfellow, J. provided a series of factors for courts to consider and balance in determining the child's best interests. Courts typically examine such factors when assessing competing parenting plans. (My emphasis.)

[111] In *MacNutt v. MacNutt*, 2013 NSSC 267, O'Neil, A.C.J. , determined custody in a divorce proceeding where the parties had parented the child in a shared parenting arrangement but had agreed that shared parenting was no longer appropriate. Even though the proceeding was to be determined pursuant to the relevant provisions of the **Divorce Act** Justice O'Neil referred to the recent amendments to the **Maintenance and Custody Act** on the basis of his conclusion that section 18(6) of the **Maintenance and Custody Act** is of persuasive value when interpreting section 16(8) of the **Divorce Act**. In his decision he referred to

Justice Goodfellow's decision in *Foley v. Foley*, [1993] N.S.J. No. 347 and set forth the factors as identified by Justice Goodfellow relevant to determination of a child's best interests in a custody proceeding. Justice O'Neil concluded that there is a significant overlap when comparing the new provisions of the **Maintenance and Custody Act** and the checklist as developed by Justice Goodfellow. Justice O'Neil then went on to refer to a decision of Justice Forgeron indicating as follows at paragraphs 11 and 12 of his decision:

> [11] In a more recent "mobility" decision, Justice Forgeron ordered that a parallel parenting arrangement be established, notwithstanding a conflicted situation. In Baker-Warren v. Denault, 2009 NSSC 59 (CanLII), 2009 NSSC 59, at paragraph 42, she wrote:
>
> > 42 In addition, the factors set out in the second part of the test in Gordon v. Goertz 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27 must likewise be addressed in any parenting dispute. These factors are noted at para. 23 of Burgoyne v. Kenny, 2009 NSCA 34 (CanLII), 2009 NSCA 34, wherein Bateman J.A. states as follows:
> >
> > > In para. 49 of Gordon v. Goertz, supra McLachlin J., as she then was, for the majority, summarized the applicable principles. An original custody determination is informed by the following considerations:
> > >
> > > 1. The judge must embark on an inquiry into what is in the best interest 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.
> > >
> > > 2. 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.
> > >
> > > 3. The focus is on the best interests of the child, not the interests and rights of the parents.
> > >
> > > 4. The judge should consider, inter alia:

> a) the desirability of maximizing contact between the child and both parents;
>
> b) the views of the child, if appropriate;
>
> c) the applicant parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> d) the disruption to the child consequent on removal from family, schools and the community he has come to know.

[12] Justice Forgeron went on and analysed the child's best interests by reference to (1) the allegation of parental misconduct: violence; (2) the allegation of parental misconduct : substance abuse; (3) the allegation of child alienation; (4) the maximum contact principle; (5) the impact of a possible move by a parent; (6) the state of the parent-child relationship; (7) the physical environment and financial circumstances of the child; (8) the child's educational, cultural, spiritual and general welfare needs; (9) the parent's approach to discipline; (10) the child's health needs; (11) the availability of family support; (12) each parent's time availability; and (13) the child's views, if ascertainable.

JOINT CUSTODY

[112] With respect to joint custody I am mindful of the following excerpt from Justice Forgeron's decision in *Mo v Ma,* 2012 NSCC 159, at paragraph 96:

> [96] Joint custody is usually not appropriate where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that the situation will change: **Roy v. Roy**, 2006 Carswell Ont 2898, (C.A.). This

> lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith** (1997), 165 N.S.R. (2d) 245 (S.C.)

ACCESS

[113] With respect to access and limitations on a parent's access I would refer to the following excerpt from Justice McLachlin's decision in *Young v Young*, 1993 4 SCR 3 at paragraphs 20 - 22:

> 20 I would summarize the effect of the provisions of the Divorce Act on matters of access as follows. The ultimate test in all cases is the best interest of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of the child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child.
>
> 21 It follows from this that the proposition, put to us in argument, that the custodial parent should have the right to forbid certain types of contact between the access parent and the child, must fail. The custodial parent's wishes are not the ultimate criterion for limitations on access: see *K.(K.) v. L.(G.)*, [1985] 1 S.C.R. 87, at p. 101 [[1985] 3 W.W.R. 1, [1985] N.W.T.R. 101]. The only circumstance in which contact with either parent can be limited is where the contact is shown to conflict with the best interests of the child.
>
> 22 Risk of harm to the child is not a condition precedent for limitations on access. The ultimate determinant in every case must be the best interests of the child. Many decisions on access may involve no reference to harm. For example, a judge might conclude that it is not in the best interest of a child that he or she see her access parent every day on the ground that this would result in undue disruption to the child's schedule of activities. Again, a judge might conclude that it is in the best interests of the child that he or she move with the custodial parent to a distant location, notwithstanding that this will limit the access of the other parent. Optimum access may simply not be in the best interests of the child for a variety of circumstances.

MOBILITY ISSUE

[114] In *Blennerhassett v MacGregor*, 2013 NSCA 77, the Nova Scotia Court of Appeal considered and determined an appeal in a case involving determination of custody where mobility was a factor. In confirming dismissal of the appeal, Fichaud, J.A. reviewed the principles that govern variation of custody and access resulting from a change of residence on the part of a custodial parent as set forth by the Supreme Court of Canada in *Gordon v. Goertz* [1996] 2 SCR 27. Justice Fichaud clearly indicated that the principles set forth in *Gordon v. Goertz* are not confined to variation applications but also apply to initial custody applications involving a change of residence. His Lordship confirmed that in such cases a blended analysis will be appropriate. Justice Fichaud stated as follows at paragraphs 29 and 30:

> [29] I respectfully disagree with Ms. Blennerhassett's submission. This is not a case where *Foley*'s factors collide with those of *Gordon v. Goertz*, and the judge chose a lower court's ruling over a binding precedent from the Supreme Court of Canada. The judge blended her analysis of the principles from both decisions, and addressed all *Gordon v. Goertz*'s criteria. She attributed weight, as each criterion applied to Chloe's circumstances in a child-centered analysis, and not because of any precedential ranking between the two decisions.
>
> [30] I agree with Ms. Blennerhassett that *Gordon v. Goertz*'s approach is not confined to variations, and applies to an initial custody application, such as this one, which involves a change of residence: *Burgoyne v. Kenny*, 2009 NSCA 34, para 21; *Handspiker v. Rafuse*, 2001 NSCA 1, paras 11-12. But Justice Gass did not ignore *Gordon v. Goertz*. She repeatedly described Justice McLachlin's criteria as significant:
>
> > There has been a lot of emphasis placed on the mobility aspect of this, and that is certainly a very significant factor for the court to take into consideration here, ...
> >
> > ...
> >
> > As I've indicated, the principles in *Gordon and Goertz* have some significance, in that mobility is part of this application, ...

...

> As I've indicated, those are some of the factors in *Gordon and Goertz*, which, in my view, take -- are secondary to the factors in *Foley* in a situation such as this. But they are, nevertheless, significant considerations as well for the court, in coming to a difficult decision like this.

The judge's reasons addressed each criterion from *Gordon v. Goertz*.

[115] In *Clark v. Saberi*, 2012 NSSC 310, Justice MacDonald of the Supreme Court of Nova Scotia, Family Division, determined a mobility issue. In that case there was an issue as to whether the move proposed by the mother was intended to interfere with or frustrate the father's access. Justice MacDonald commented as follows at paragraphs 23 - 26:

> [23] There are circumstances that may lead to a finding that a move is solely for the purpose of frustrating access, for example:
>
> - A move to seek alternative employment with no definite job offer in place;
>
> - A move to follow a partner who has made no commitment to the moving parent;
>
> - A move to follow a partner who would be able to join the parent in the present location.
>
> [24] As a result, while the reasons for a move may ultimately be irrelevant to the decision to be made, evidence about those reasons must be provided, as will evidence about job opportunities for the custodial parent and, if a partner or intended partner is involved, whether that person can move to the custodial parent's present location.
>
> [25] Of course the reasons for a move may also require analysis when the court is attempting to balance the benefits of a move against the detriments. In order to understand the benefits the court must understand whether a parent will, in the new location, have the ability to provide financial security for the children, provide a home situation which will be nurturing and free from conflicts with other persons,

whether there will be persons living in the new community who can provide financial, personal and emotional support to the parents and the children. The answers to these questions often involve understanding why a parent is relocating. No doubt for these and other reasons parents do provide the court with information about why they intend to move.

[26] Once a court has decided the reasons for the move should not result in a finding that the move is solely for the purpose of frustrating access it must then analyze two situations. The first is the situation of the children living with the custodial parent in the new location and the second is the children living with the non custodial parent in the former location. It is not for the court to analyze these requests based upon what the custodial parent's situation would be if he or she did not move. Courts have considered it inappropriate to ask the moving parent whether he or she would remain at the previous location if the children are not permitted to move with them. Professor Rollie Thompson, in **Ten Years After Gordon: No Law, No Where** (2007) 35 RFL (6th) 307, wrote the following under the subheading "The Irrelevant Question: Will You Move Without Your Child?":

> In the recent *Spencer* appeal, [2005 ABCA 262] the Alberta Court of Appeal broached an important issue, the perennial question asked of the moving parent: "will you move without your child?" For the court, Paperny J.A. pointed out the problems with this question:
>
> > In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with [the] children, he or she raises the prospect of being regarded as self interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children", the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

> The Quebec Court of Appeal has gone further and described this question as "irrelevant" in ***F.H.*** **v.** ***V.J.*** [2003 JQ 671]. . . . .
>
> It is just as inappropriate to consider what the parent's situation would likely be if he or she remained at the previous residence. The parent is asking the court to analyze the situation based on an intended move. If the court decides the best interest of the children is to remain in their previous residential location in the care of the non custodial parent it will be up to the moving parent to decide whether he or she will in fact move as originally intended.

LEGAL ANALYSIS

[116] The evidence presented on behalf of both parties in this case, both viva voce and by way of affidavit, supports and justifies the conclusion that the relationship of the parties deteriorated over time to the point where the toxicity of the relationship exposed the child R.M.L. to an obvious risk of harm. This was the basis upon which the Minister of Community Services determined that it was necessary to commence a protection proceeding in order to ensure the safety and welfare of the applicant's three children. That proceeding was concluded earlier this year at the request of the Minister. The Minister's request for termination of the proceeding was based upon the Minister's conclusion that any protection concerns had been adequately addressed and that C.M. was capable of providing adequate parenting for all of her children. Indeed the protection proceeding had reached the point prior to termination where it only related to the child R.M.L. and the order respecting her two older half-siblings had already been terminated. The Minister continued the proceeding respecting R.M.L. in order to be able to continue to facilitate and supervise R.L.'s access contact with his daughter, in light of the inability on the part of the parties to agree to an appropriate access supervisor and to ensure the safety and welfare of the child. (There was no access contact between R.L. and the two older children.) The Minister also expressed support for C.M.'s request for custody of the child based upon the Minister's continuing concerns with respect to R.L. and confirmed the Minister's request that any future access contact by R.L. be subject to appropriate supervision.

[117] The Minister remained involved in the **Maintenance and Custody Act** proceeding after a termination order was granted but on a much more limited basis, as an amicus curiae or friend of the court. In this capacity the Minister made the responsible social worker, Jillian Martin, available as a witness to assist the court in the determination of the application by ensuring all relevant evidence was available. At time of the hearing Ms. Martin was called as a witness on behalf of the applicant. Counsel for the Minister was present during Ms. Martin's testimony but did not take an active role at the hearing. Indeed upon completion of Ms. Martin's testimony counsel for the Minister was granted leave to withdraw on the understanding that the Minister would be advised as to the outcome of the application. Counsel for the Minister requested that any order in favour of the applicant should include an appropriate provision requiring that notice be given to the Minister of any future variation application respecting custody or access. In light of the limited role played by the Minister as amicus curiae it is reasonable to question whether or not it was actually necessary for the Minister to be designated as amicus curiae.

[118] I have carefully considered all of the evidence as presented on behalf of both parties. I have considered the submissions of legal counsel. I have considered the relevant sections of the **Maintenance and Custody Act** and relevant case authorities.

[119] I have significant concerns with respect to R.L.'s credibility. During his direct examination he appeared to have little difficulty answering questions posed to him by his legal counsel and seemed to have excellent recall of the specific dates when incidents occurred. During cross examination he was often vague or uncertain in answering questions. On several occasions he would give an initial response and then contradict himself when responding to follow-up questions. This happened on more than one occasion when he was cross-examined about text communications with the applicant at different points in time.

[120] During his direct testimony in explaining what happened on Sunday, October 23, 2011 following the access exchange at [...], [...] County, R.L. testified that he caught up with the applicant's vehicle and then pulled in front of the vehicle and pumped his brakes. During cross examination he changed his evidence suggesting that he had given the matter further thought. During cross examination he denied ever pulling in front of the applicant's vehicle or pumping his brakes. During her

testimony the applicant testified that the respondent had pulled in front of her vehicle and applied his brakes. I find the applicant's evidence as to this incident to be more reliable then the respondent's.

[121] On more than one occasion during his testimony R.L. attempted to minimize his role or involvement in any incident of domestic violence and sought to portray himself as the victim. He appeared generally reluctant to accept any responsibility for these incidents. At one point during his cross examination he was asked if he had done anything to contribute to the negative relationship between himself and J. and his initial response was to suggest not intentionally. He was then asked what he might have done unintentionally and he said nothing and maintained that the change in relationship had nothing to do with his actions. He denied calling J. names and denied ever laying a finger on the child but then acknowledged that he had agreed to enter into a peace bond with a no contact provision. Again I accept the applicant's evidence with respect to negative interaction between R.L. and J. in preference to the respondent's testimony.

[122] While I have some reservations with respect to the applicant's evidence I find in general her testimony to be more credible and reliable than that of the respondent. The applicant was more willing to acknowledge her role in some of the incidents that occurred between the parties and did not deny that she had on occasion been physical with R.L. The applicant in some instances had difficulty recalling specific dates. However, on balance, I find that she gave her evidence in a straightforward and honest fashion. She did demonstrate some frustration during her cross examination but again I do not find her demeanor during cross examination to be such that it would merit or justify an adverse credibility finding.

[123] I would confirm that in determining this application I've given paramount consideration to the best interests of the child R.M.L. I have attempted to undertake what I considered to be a child-centered analysis in reaching a decision. I have also utilized or adopted the blended analysis approach as approved by the Nova Scotia Court of Appeal in the *MacGregor* decision, supra. Similar to *MacGregor,* this case does not involve a variation application where one party seeks to vary an existing order. There was no order in place prior to the commencement of the protection proceeding. Accordingly there is no onus on the applicant to establish a change in circumstance as a threshold to triggering the fresh best interests inquiry as mandated by *Gordon v. Goertz*.

[124] The factors relevant to the best interests inquiry as referred to by the Supreme Court of Canada in *Gordon v. Goertz* are applicable in determining best interests, but in addition the court is required to consider the best interests criteria or circumstances as set forth and referred to in section 18 of the **Maintenance and Custody Act.**

[125] I am satisfied based upon the evidence that C.M. should be viewed as the custodial parent for purposes of the court's inquiry. C.M. has been primarily responsible for the child's care since the birth of the child. During any period of separation between the parties, and there were several separations, the child always remained in C.M.'s day-to-day care. Even after commencement of the protection proceeding C.M. continued to maintain care and custody of the child under the auspices of an appropriate supervisory order. In addition, any interim orders in relation to the **Maintenance and Custody Act** application have confirmed that the child remain in C.M.'s care and custody. Custodial status quo is a factor to be considered in determining the child's best interests and the views of C.M. as the de facto custodial parent, while not determinative, are entitled to great respect.

[126] I would confirm the following findings with respect to section 18(6) of the **Maintenance and Custody Act**.

[127] (6)(a): I find that the child R.M.L. needs to be raised by a loving parent in a safe and secure home environment where her physical, emotional, social and educational needs can be adequately met on a consistent basis. R.M.L. has been repeatedly exposed to domestic violence as a result of the toxic relationship between her parents. It is essential that R.M.L. be protected from any risks associated with further exposure to domestic violence in order to ensure her safety and welfare given her current age and stage of development.

[128] (6)(b): I find that each parent has indicated a willingness to support the development and maintenance of the child's relationship with the other parent. I find that C.M. seems more willing to recognize the importance of her daughter having a positive relationship and contact with the respondent. While C.M. did confirm her belief that R.L.'s access should be subject to reasonable supervision and reasonable conditions she also confirmed her willingness to facilitate his access by assuming responsibility for transportation of the child to Nova Scotia or by

assuming responsibility for the majority of the expenses associated with transportation for access. C.M. was also open to telephone contact. R.L.'s approach was somewhat more rigid. He was not open to C.M. having any access in Ontario and took the position that C.M.'s access in Nova Scotia should be supervised by a third party. The evidence does not support or justify the respondent's position that C.M.'s access should be supervised by a third party.

[129] (6)(c): As previously noted C.M. has been the primary caregiver for the child since birth. R.M.L. is presently four years old. Throughout the protection proceeding the Minister never expressed any concern about C.M.'s parenting of her daughter. R.M.L. is described as a bright and happy child. She appears to be quite a conversationalist. There are no health issues or concerns that the court is aware of. C.M. is intending to enroll her daughter in a pre-kindergarten program in Ontario if the court approves her application. I therefore find that C.M. has provided care to date for the child that has been consistent with her physical, emotional, social and educational needs.

[130] (6)(d): Both parties have confirmed parenting plans or proposals that appear to be adequate having regards to the child's physical, emotional, social and educational needs. However the respondent's plan, if approved by the court, would result in a significant disruption in the child's positive relationship with her older half-brothers. I find that it would not be in the best interests of the child to disrupt that positive relationship. Similarly, the evidence indicates and confirms a positive relationship and bond between C.M. and the child, which is not surprising given C.M.'s role of primary caregiver. I find that R.L.'s plan, which would involve termination of C.M.'s role of primary caregiver, to be inconsistent with the best interests of the child. R.L. has never been responsible for the primary care of the child for any extended period of time. Indeed the evidence would suggest the only time that he would have been primarily responsible for his daughter's care would have been during the one weekend access visit in October 2011. During that weekend he would have been assisted by his mother. It is concerning to the court that R.L., despite having opportunity to enjoy unsupervised access with his daughter that weekend, chose to persistently text the applicant throughout the weekend, contrary to the terms of an existing order. It is clear that R.L.'s focus was not on the child during that weekend as it should have been. Furthermore his actions and conduct on October 23 during the Sunday access exchange clearly demonstrates serious lack of insight and an inability to give priority to the child's best interests.

His conduct exposed the child to a predictable risk of further exposure to domestic violence when the access exchange occurred at [...]. His subsequent conduct in pursuing the applicant in his motor vehicle at high speeds, knowing that the child was a passenger in her vehicle, showed a significant lack of judgment and exposed the child to an obvious risk of physical harm. His actions also demonstrated his willingness to ignore the directions of the Agency and the no contact provisions of an existing court order, intended to avoid exposing the child to any further incidents of domestic violence. R.L. repeatedly explained or justified his actions on the basis that he loves his daughter. To justify such conduct on that basis only serves to underscore R.L.'s lack of understanding and insight and poor judgment. I have concluded that approval of C.M.'s parenting proposal in the circumstances of this case would be more consistent with the child's physical, emotional, social and educational needs and best ensure that those needs will be adequately met.

[131] (6)(e): No evidence was presented with respect to the child's cultural, linguistic, religious and spiritual upbringing and heritage by either party.

[132] (6)(f): R.M.L. is four years old. It is not reasonable or appropriate to attempt to ascertain her views or preferences given her age and stage of development.

[133] (6)(g): I find that the child appears to have a positive relationship with each of her parents. The child also has what appears to be a positive relationship with both her paternal and maternal grandmother. I find that the nature, strength and stability of the relationship between C.M. and the child is stronger than the relationship between R.L. and R.M.L. I also find that the child enjoys a positive and close relationship with her two siblings.

[134] (6)(i): I find that there is no meaningful ability on the part of the parties to communicate and cooperate on issues affecting the child without the intervention or assistance of a third party. The parties' inability to communicate and cooperate has been amply established by the evidence confirming the volatile nature of their relationship, which was designated at one point in time as high risk of lethality due to domestic violence concerns.

[135] (6)(j): I find that the child has been directly or indirectly exposed to family violence, abuse and intimidation. The child was present during the altercation in January 2011 at Johnson's Motel in Ontario and the subsequent altercations in

September and October 2011 in Nova Scotia. I find that exposure to family violence, abuse or intimidation has placed the child at obvious risk of emotional or physical harm. The pattern of negative interaction and behaviour between the parties has placed the child's physical and emotional health at risk. While I believe that both parties have been physically or verbally aggressive with the other at different times and in different circumstances, on balance the evidence supports and justifies the conclusion that R.L. should be viewed as primarily responsible for any family violence, abuse or intimidation. I find that the evidence supports and justifies the conclusion that R.L. has much less ability than C.M. to care for and meet the needs of the child, especially her emotional needs, and need for physical safety, on a consistent basis. R.L. demonstrated an obvious lack of insight as to the impact of his behaviours on the child or how his behaviours have placed the child at risk. R.L. has even gone so far as to justify or explain his inappropriate behaviours as being based upon his love for his daughter. I find that there is a substantial inability on the part of the parties to cooperate on issues affecting the child and that requiring such cooperation without clear limits or conditions is likely to threaten the safety or security of the child or C.M.

[136] I would confirm that in determining the impact of family violence, abuse or intimidation I have considered the nature of the family violence, abuse or intimidation as confirmed by the evidence. The evidence confirms a persistent pattern of abuse or intimidation by R.L. both prior to and since the parties' separation in September 2011. There have been incidents of direct physical violence but in addition the evidence establishes a persistent pattern of abuse or intimidation of C.M. by R.L. Indeed it appears that this pattern of negative behaviour on the part of R.L. is well entrenched given the evidence indicating similar behaviours between R.L. and his ex-wife. The abusive and intimidating behaviours towards the applicant included persistent texts, many of which were threatening, drive-bys of the applicant's home, persistent referrals to children services requiring repeated follow-ups by the agency and repeated referrals to the RCMP requesting frequent wellness checks. R.L.'s behaviours resulted in a conviction for criminal harassment. Again the abuse or intimidation occurred on a consistent or persistent basis since September 2011 and continued until early 2013 despite existing court orders. There is no evidence before the court as to any actual harm sustained by the child as a result of the family violence, abuse or intimidation. However it is clear that the abuse or intimidation took a significant emotional toll on the applicant. The court acknowledges that R.L. has participated in programs as

required by his probation order arising from the criminal harassment charge. While the court certainly hopes that the information or education that R.L. has acquired as a result will assist R.L. in understanding the inappropriateness of his behaviours and help him desist from any such behaviours in future, it is difficult for the court to be optimistic.

[137] I find that the evidence supports and justifies my conclusion that there is a history of "family violence, abuse or intimidation" in this particular case as defined in the **Maintenance and Custody Act**. I find that the abuse or intimidation perpetrated by R.L. was deliberate and purposeful. It was not comprised of a single act but a series of acts over an extended period of time that demonstrates and confirms a pattern of abuse. I find that the evidence supports and justifies the conclusion that R.L. was causing or attempting to cause psychological or emotional abuse, that constituted a pattern of coercive or controlling behaviour, which included engaging in intimidation, harassments or threats.

[138] With respect to subsection 8 of section18, I recognize the principle that a child should have as much contact with each parent as is consistent with the best interests of the child but the section also confirms that the determination or consideration of this principle includes consideration of the impact of any family violence, abuse or intimidation. In this particular case I find that the evidence satisfies me that I must determine the issue of future access contact between R.L. and the child having regards to the impact of family violence, abuse or intimidation.

[139] I acknowledge the Supreme Court of Canada's indication in *Gordon v. Goertz*, supra, that a parent's reasons for relocation are irrelevant unless connected to parenting ability. In this case I find that the applicant's reasons for moving do have a connection with her parenting ability. I accept the applicant's evidence that the relocation to Ontario will result in her having significantly enhanced opportunity for family support from her older sister and her adult children. I find that enhanced family support will have a positive impact upon C.M.'s parenting. I also accept and agree that C.M. will have a better chance of securing employment in [...] than in Nova Scotia. I believe that securing employment will also have a positive impact upon C.M.'s parenting ability. While I acknowledge that the decision to move to Ontario was in some respects a last minute or spur of the moment decision, I also believe it is important to acknowledge that C.M. had been considering such a move for some time and that her final decision to relocate was only made after discussion

with her sister and considerable reflection. I accept that her decision was in many respects based upon her consideration of what she believed to be her children's best interests. I also believe that perhaps the most significant rationale for approving C.M.'s relocation is that it will provide her with the opportunity to provide a home environment which will be hopefully free from conflict and domestic violence, minimize the risk of continued abuse or intimidation, and allow her the benefit of positive personal and emotional support from her extended family in [...]. Based upon my consideration of the evidence I find that C.M.'s request for authorization to relocate to [...] is not intended for the sole purpose of frustrating or interfering with R.L.'s access.

[140] In reaching this conclusion I want to make it clear that I do not condone or approve of C.M.'s decision to implement her plan for relocation without prior court authorization or her failure to comply with the court's interim order for access. C.M. knew that her custody application was scheduled for contested hearing when she decided to go to Ontario with the children. She was aware that she was not complying with the court's interim order for access. Her unilateral action was therefore ill-advised and demonstrated a lack of understanding or appreciation for how such conduct might potentially impact upon the determination of her application. It also resulted in the court making a further interim order confirming that the child was not to be removed from Nova Scotia until C.M.'s application was heard and determined. C.M. complied with that order. I suspect that the court's interim decision was upsetting to C.M. and may have created some hardship for her. It certainly has meant that she and R.M.L. have been away from her two sons for a fairly significant period of time and I'm sure that that has been difficult for her, as well as for R.M.L. I believe that C.M. simply didn't appreciate and understand the potential significance of her decision, the need for permission or approval in light of the **Maintenance and Custody Act** application, or its possible impact upon the court's decision. However again the court notes that C.M. has complied with the most recent order and that during the period that she and the child have remained in Nova Scotia she has also complied with the prior order for access for R.L.

[141] Similarly the court cannot condone or approve C.M.'s use of marijuana. While there is no evidence that marijuana use has impacted adversely upon the applicant's parenting of her children it is the position of the court that it would be in the best interests of not only the children, but C.M. herself, if she were to discontinue her use of marijuana. The court is not prepared to encourage or

condone any conduct that might impact negatively upon C.M.'s ability to parent or lesson or limit the availability of a parent to respond to or meet the needs of her children as necessary and appropriate. It is reasonable to suggest that being under the influence of marijuana even to the degree suggested by C.M. might have some negative impact upon her ability to meet R.M.L.'s needs adequately in certain circumstances. C.M. testified that she could stop her marijuana usage at any point in time and therefore the court encourages her to do so. Finally I would confirm that from the court's perspective the evidence with respect to the respondent's excessive consumption of alcohol was much more concerning than the evidence with respect to the applicant's marijuana usage. Indeed it is clear from the evidence that the respondent's excessive alcohol consumption played a significant role in the deterioration of the parties' relationship and was a catalyst for domestic violence.

[142] With reference to the factors as referred to by the Supreme Court of Canada in *Gordon v. Goertz*, supra, I have concluded that there is some overlap or duplication between those factors and the circumstances as referred to in section 18, subsection 6 of the **Maintenance and Custody Act**. I do, however, find that it is important to recognize once again that C.M. has had primary care of the child since the child was born and has a very positive relationship with the child. I have concluded that disruption in C.M.'s care or custody would be inconsistent with the best interests of the child. I find that any disruption to the child as a result of the relocation to [...] to be relatively minimal although I acknowledge that it will obviously have some negative impact upon the child's relationship with R.L., his extended family, as well as the child's maternal grandparent.

CONCLUSION

[143] I have concluded based upon consideration of the evidence and all the relevant circumstances and factors that it would be in the best interests of the child to allow C.M.'s application.

[144] I have concluded that an order for joint custody would <u>not</u> be appropriate in this case. The relationship between the parties is such that joint custody is simply

neither appropriate, feasible or consistent with the best interests of the child. Accordingly I would confirm an order for sole custody in favour of the applicant.

[145] With respect to access for the respondent R.L., I confirm firstly that R.L.'s access shall be subject to continued supervision. I acknowledge that supervision is not normally to be indeterminate or long term. However in light of my findings with respect to section 18, subsection 6(j), and having regard to the requirement under section 18(8) that when making an order for access in relation to a child the court is to consider the impact of any family violence, abuse or intimidation, I find continued supervision to be in the best interests of the child and necessary to ensure the safety and welfare of the child.

[146] I designate the paternal grandmother, E.L., as the individual to be responsible for supervision of R.L.'s access contact, both direct and indirect. It shall be E.L.'s responsibility to ensure that R.L, when responsible for care of the child, is at all times providing adequate parenting and is compliant with any stipulated conditions for access. E.L. shall also be responsible for ensuring that any communications as authorized by the court between R.L. and the child are at all times appropriate and child-centered or focused. R.L. shall refrain from engaging the child in adult conversations or making any negative or derogatory comments about the applicant to the child. While I have some reservations based upon E.L.'s unwavering support for her son, I accept C.M.'s assessment that E.L. would never permit any harm to come to her granddaughter and will be prepared to intervene as necessary to ensure the child's welfare and safety during any visit.

[147] All communications respecting access and arrangements for access are to be made by way of communication between E.L. and C.M. Under no circumstances is there to be any direct communication between R.L. and C.M., including by way of telephone, text or internet.

[148] R.L. shall be entitled to one week of access with the child each summer, during either July or August, in Nova Scotia. E.L. and C.M. shall agree to the timing of the week long access visit on or before June 1 each year. The applicant C.M. shall be responsible for transportation of the child to and from Nova Scotia for purposes of the summer access and shall bear all the costs associated with such transportation. The exchanges (pick up and return) for purposes of the summer access shall be arranged with the assistance of the YMCA supervised access and

exchange program in [...], Nova Scotia if possible. In the event the YMCA is unable to facilitate the exchange, E.L. and C.M. shall arrange for the exchange to occur at an RCMP detachment or other appropriate public location. Under no circumstances is the respondent R.L. to be present or have any contact with the applicant during any access exchange. Violation of this condition by the respondent shall result in termination of his access.

[149] During the summer access week, E.L. shall contact the applicant midweek to provide a status report with respect to the access visit. The child shall also be permitted to contact her mother by phone during any such access visit and any such phone contact shall be arranged by E.L. and shall not involve the respondent.

[150] Under no circumstances is the child to be removed from the province of Nova Scotia during any access visit.

[151] The respondent R.L. is to refrain from consumption of alcohol during any access visit while personally responsible for the care of the child.

[152] In addition to summer access the respondent R.L. shall be permitted to have direct access contact in Nova Scotia during the Christmas holidays every second year commencing Christmas 2014. The duration of the Christmas access shall be five days and the scheduling of the visit shall be as agreed to by E.L. and the applicant. The visit shall be scheduled during the Christmas school break so as to not interfere with the child's educational program. In the event that weather precludes the Christmas access visit in any given year the respondent shall be entitled to an additional five days access during the summer to be arranged between E.L. and C.M. Costs of transportation of the child to and from Nova Scotia for any Christmas access visit shall be shared equally between the applicant and the respondent, with the respondent's share to be paid via E.L. at time of the initial exchange for the access visit.

[153] During alternate years commencing 2015 the respondent R.L. shall be permitted to have access contact with the child for five days during the March school break. In the event that weather precludes the March break visit in any given year the respondent shall be entitled to an additional five days access during the summer to be arranged between E.L. and C.M. Costs of transportation of the child to and from Nova Scotia for any March break access visit shall be shared equally

between the applicant and the respondent, with the respondent's share to be paid via E.L. at time of the initial exchange for the access visit.

[154] Access visit exchanges for purposes of either Christmas or March break access shall be arranged on the same basis, in the same manner and subject to the same conditions as summer access exchanges.

[155] In addition the respondent R.L. shall be permitted to have weekly telephone contact with the child to occur on one weeknight as agreed to by E.L. and C.M. and at such time as may be agreed to by E.L. and C.M. The duration of such call shall not exceed 10 minutes unless agreed to by C.M. Each and every call shall be initiated by E.L. who shall remain on the line until the child is available at which point in time E.L. shall transfer the call to R.L.

[156] The respondent R.L. shall be permitted to have telephone contact with the child on the child's birthday as well as Father's Day. This telephone contact shall also be arranged as agreed to by E.L. and C.M. and subject to the same conditions as R.L.'s weekly telephone contact.

[157] With respect to R.L.'s application requesting a review of child maintenance, I find that R.L.'s annual income for purposes of child maintenance in 2012 was $32,172. Under the guidelines, the amount of child support payable based upon that income would be $272 per month. The actual amount payable in accordance with the Agreement to Pay Maintenance registered with the Family Court on April 30, 2010 was $268 per month based upon income of $30,000. At this point in time it appears that R.L.'s income in 2013 from all sources, including income assistance, employment, and EI will total approximately $19,150. The amount of child support payable under the guidelines based upon that income would be $127 per month.

[158] The evidence confirms that any child maintenance payments made by R.L. commencing in 2012 were the result of garnishee and not as a result of voluntary payments. The evidence also confirms that the applicant has not received any child maintenance payments from the Director of Maintenance Enforcement since July of this year. C.M. testified that she assigned the maintenance payments to Department of Community Services because she had been receiving income assistance.

[159] Granting of retroactive relief as requested by R.L. is at the court's discretion. In determining whether or not to exercise discretion in favor of R.L. the court has to attempt to be fair to both parties and to avoid a result that would lead to undue hardship for either. The evidence indicates that C.M. struggled to make ends meet after Canada Revenue Agency decided to reduce the amount of her child tax credit payment in December 2012. This decision on the part of Canada Revenue Agency followed the filing of information or a tax return by R.L., apparently on the advice of a third party, in which he asserted or claimed that he and C.M. were involved in a common-law relationship. As a result of receipt and review of this information Canada Revenue Agency decided to significantly reduce the child tax credit payment payable to C.M. Consequently C.M. experienced considerable financial hardship at Christmas 2012 and for several months thereafter. C.M. has not received any payments from Maintenance Enforcement Program since July 2013. C.M. is currently unemployed. Given these circumstances I find that the granting of R.L.'s request for retroactive variation of child maintenance based upon reduced income since January 2013 would potentially cause financial hardship for C.M. and accordingly I decline to grant R.L.'s request for retroactive adjustment of child maintenance.

[160] In reaching this conclusion I have also taken into consideration the fact that there are only limited arrears outstanding at this point in time. Exhibit 6 confirms an outstanding balance as at November 13 of $208.17. I am however satisfied that R.L. has established that there has been a material and negative change in his financial circumstances sufficient to justify variation of the existing order.

[161] I find that R.L.'s current annual income from all sources in 2013 to be approximately $19,150 and I therefore confirm a reduced child maintenance payment in the amount of $127 per month commencing December 1, 2013 and continuing on the first day of each and every month thereafter until otherwise ordered. I also confirm that any arrears of child maintenance owing as of December 1, 2013 be and hereby are vacated. All maintenance payments are to be made payable through the Maintenance Enforcement Program. On or before June 1 of each year R.L. shall provide the Director of Maintenance Enforcement with a copy of his prior year's tax return and any notice of assessment or reassessment and copies of these documents shall be forwarded to C.M. by the Director of Maintenance Enforcement.

[162] In addition R.L. shall in writing notify the Director of the Maintenance Enforcement Program if and when he resumes employment within two weeks of resuming employment and a copy of any such written notice shall be provided to C.M. Employment shall include self-employment. The written notice shall confirm the name of R.L.'s employer as well as R.L.'s hourly pay rate or salary or anticipated income from self-employment. A copy of any such written notification shall be forwarded to C.M. by the Director of Maintenance Enforcement.

[163] The order shall include a provision confirming that there shall be no formal or informal variation of the custody or access provisions of the order without prior notice to the Minister of Community Services.

[164] Counsel for the applicant shall prepare the appropriate order in accordance with the court's decision. The order shall include an appropriate enforcement clause.

[165] I thank both counsel for their cooperation and assistance.

Morse, J.F.C.