SUPREME COURT OF NOVA SCOTIA
Citation: *JR v. IR*, 2015 NSSC 282

Date: 20151001
Docket: SKD-096628: 1204-006238
Registry: Kentville

Between:

JR

Petitioner

v.

IR

Respondent

Editorial Notice: Identifying information has been removed in this electronic copy of the judgment.

Judge:	The Honourable Justice A. David MacAdam
Heard:	September 1, 16, 18, 22 and 23, 2015, in Kentville, Nova Scotia
Release of Written Decision:	October 7, 2015 **(Orally: October 1, 2015)**
Counsel:	Deborah E. Bowes, for the petitioner Lynn Marie Connor, for the respondent

By the Court:

Introduction

[1] This decision concerns the determination of where the parties' son will attend school and, consequently, which parent will have primary care. The child, AR was born on January […], 2010. He is now five years old and is about to start school. The Applicant, AR's mother JR, lives in W.. The Respondent, his father IR, lives in […].

[2] Since January 2014 the parties have been subject to a shared parenting arrangement pursuant to an Interim Consent Order of the Family Court (the Interim Order).

Issue

[3] As noted earlier, the issue is to be determined is where AR will attend school, and, consequently, which parent will have primary care.

Arguments

[4] The parties were married on August 14, 2010, and separated in late 2012. During the relationship the Applicant was the primary caregiver. The Respondent suffered from depression and Post-Traumatic Stress Disorder. His anger and

irritability often erupted, causing AR to be exposed to domestic violence and causing the Applicant to frequently leave the home with AR. She ultimately stopped working to help IR recover and to better care for AR.

[5] At the time of the separation in the Fall of 2012, the Applicant had moved to W. and was attending […] University. The Respondent stayed in D.. He was AR's primary caregiver at various times, until the parties entered into the Interim Order of the Family Court, dated January 13, 2014. The shared parenting arrangement has been in place since then.

[6] If the Applicant has primary care, AR would start school at […] Elementary School. The Applicant says she provides AR with direction and structure, and sees to his health, educational and developmental needs. Low percentile scores for AR suggest he struggles developmentally in some areas, and she has sought professional input for focus and cognition problems. The Applicant says she is a full-time mother, raising E, AR's sister, who is ten months old. Other than occasional time in day care, she says, she alone cares for AR when he is with her. By contrast, she says, the Respondent relies heavily on his mother and a day care run by […] (which he has attended since he was eleven months old), while running a fishing business and building houses. The Applicant says she is the more "child-focused" parent. She agrees that the Respondent loves AR, but she says he has a

history of lacking emotional regulation, inattention to AR's health care, and resistance to meeting AR's developmental needs. The Applicant also says she would be more likely to facilitate increased parenting time with the Respondent.

[7] The Respondent argues that it would be in AR's best interests to live primarily in […] with him. He says [...] is the community where AR has been raised, and where he is most comfortable. Both his maternal and paternal grandparents live in the area, and he has a circle of friends from day care, who have started at [...] Elementary School with him. The maternal grandmother and the Applicant dispute the suggestion that the maternal grandparents live in the [...] area, saying that they live about forty minutes away.

[8] The 2013 Family Court application that led to the Interim Order was initially contested. The Applicant made allegations of verbal and physical abuse and claimed that the Respondent's PTSD affected his parenting ability. She has made further allegations of domestic violence occurring after the Interim Order, most recently on June 3, 2014, and has contacted the RCMP and made repeated allegations to the Department of Community Services. These complaints have either not been investigated, or have been investigated and found to be unsubstantiated. Community Services has closed its file in relation to the Respondent and has no parenting or protection concerns with him.

[9] The Respondent says the evidence establishes that all of the allegations have either been deemed not to warrant investigation, or have been investigated and found unsubstantiated. He says the unfounded allegations by the Applicant show how far she will go to frustrate his relationship with AR. In addition to his own evidence, the Respondent points to the redacted Community Services file and the evidence of Cynthia Jobes, the child protection worker assigned to his file. He says the best way to ensure AR has a relationship with both parents is to place him in his primary care.

[10] The Respondent claims that since the Interim Order the Applicant has harassed him with allegations of his inability to safeguard his son's physical health. He says these allegations are not supported by the medical evidence, which demonstrates that AR has suffered from normal childhood illnesses, to which the Respondent has properly responded. He maintains that the Applicant's harassment and unfounded allegations raise a reasonable concern that if she has primary care, his relationship with AR would suffer.

[11] Under the shared parenting arrangement, the Respondent says, AR has frequently resisted transitioning to his mother's care. The Respondent says AR has said things to C.M., and to him, which point to inappropriate use of physical discipline in the Applicant's home.

Law

[12] The application requires a determination of whether the current custody arrangement should be varied. Variations of custody orders are governed by s.17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), the relevant part of which states:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> ...
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> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
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> ...
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[13] A variation application involves a two-step process: the court must be satisfied that there has been a material change in circumstances, and, if so, the court must determine whether a variation to the custody order would be in the child's best interests in light of the change in circumstances. In *Talbot v Henry*, [1990] 5 W.W.R. 251, 1990 CarswellSask 161, the Saskatchewan Court of Appeal said, at para. 49:

> Thus there is a two-stage inquiry: (1) The reviewing judge must determine whether there has been a change in the condition, means, needs or other circumstances of the children. In determining whether there has been a change,

> substantially different considerations apply. The parties are not in pari passu, and the person seeking to vary the order bears the onus as described above of demonstrating a material change which will adversely affect the needs of the children. If there has been no material change, the inquiry ends there and the order remains. (2) If the applicant has demonstrated a material change in the conditions, means, needs or other circumstances of the child, the court must decide whether the material change is such that the best interests of the child require a variation of the order. In other words, if there has been a material change, then the only consideration with reference to that change is the best interests of the child.

[14] In this case, the Interim Order permits either party to apply for a different custody arrangement without demonstrating a material change in circumstances. In any event, if a change in circumstances is required, I am satisfied that AR starting school is a sufficient change to satisfy the first stage.

[15] The crucial question is where AR will live while attending school. This will determine who will be responsible for his primary care. In effect this is an application to relocate AR to his mother's residence in W.. As such, the factors noted by the Supreme Court in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, [1996] S.C.J. No. 52, are relevant in determining the issue of primary care. The majority of the Supreme Court of Canada listed the following factors to be applied in relocation applications, at paras 49 and 50:

> 49 The law can be summarized as follows:
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> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
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> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to

> all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
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> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
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> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
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> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
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> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
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> 7. More particularly the judge should consider, *inter alia*:
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> > (a) the existing custody arrangement and relationship between the child and the custodial parent;
> >
> > (b) the existing access arrangement and the relationship between the child and the access parent;
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> > (c) the desirability of maximizing contact between the child and both parents;
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> > (d) the views of the child;
> >
> > (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
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> > (f) disruption to the child of a change in custody;
> >
> > (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
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> 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

Evidence

[16] The Applicant lives in a three-bedroom home with her common-law spouse, NL, a […] who typically works two weeks out of the province and then has two

weeks off. They have a daughter under a year old, and NL has a son by a prior marriage who lives with them half the time. At the time of the hearing, the Applicant was on maternity leave, ending in October 2015. She indicated that she and NL have decided that she would not return to work, but will remain at home to care for the children.

[17] In her affidavit the Applicant stated that she met the Respondent after he had completed two tours of duty in […]. He was diagnosed with PTSD, Occupational Stress Injury, and Anxiety. She said there were incidents of verbal, psychological and physical abuse. She said the parties agreed that she would stop working as a licensed practical nurse at [...] General Hospital in order to provide more support for the Respondent and to provide a more stable environment for AR. Around this time, the Respondent, who owns […], had […]. This had caused him further stress in dealing with the […] and his feeling a sense of responsibility.

[18] The parties also decided that the Applicant would upgrade her education. In 2012 she began a bachelor of science course at […] University. The Respondent supported her educational plan and paid for her education until (and following) the separation. She said the Respondent agreed to take care of AR while she completed the semester. Initially she was reassured that his mother, JC, would be at the house supporting the Respondent. She developed misgivings, she said, because his

mother's presence did not resolve what she considered to be the neglect of AR's medical care, diet, structure, routine and sleep habits. She stated that from December 2012 until the Interim Order, although they shared custody, AR was with her most of the time. It is clear, however, that she made no objection to the Respondent having primary care of AR at times during these periods.

[19] The Applicant claimed that in the summer of 2012 she feared for her life and was formulating an "exit strategy." As previously noted, she left the Respondent in late 2012, when she was attending […] University. From February to June 2013 she was employed in […]. She stopped working in June, she said, due to emotional distress on account of the Respondent's alleged intimidation after she mentioned possible legal action. She said he threatened her repeatedly in 2012 and 2013, saying that if she pursued custody of AR he would "destroy my life."

[20] As earlier referenced the Applicant made referrals to the Kings District office of the Department of Community Services on multiple occasions between 2012 and 2014. Typically the referrals were noted but no investigation was conducted by the Department. In respect to a referral dated March 29, 2014, the caseworker wrote that the Applicant said she would keep calling "until someone becomes aware of how serious this matter is." The caseworker noted that she encouraged the Applicant to speak with her lawyer about the issue she was raising.

A referral in May 2014 resulted in a home visit by the caseworker to the Applicant's home, and a telephone call and meeting with the Respondent. The Applicant apparently also suggested that the Respondent's mother "has mental health issues."

[21] In one referral the Applicant claimed the Respondent had refused to take AR to the doctor for a cough. Subsequently the caseworker conducted a visit at which both the Respondent and his mother were present. In addition, the caseworker interviewed AR in private. He apparently said he liked living in [...] and wanted to stay there until "the judge decides", that he was not happy with his mother because NL "isn't the coolest guy", and that NL and his mother fought a lot. He also indicated that he is sick a lot but he did not want to keep going to the doctor. This comment was apparently in reference to the fact that the Applicant takes him to the doctor for any medical issue, including things that the Respondent sees as normal child difficulties and not cause for a doctor visit.

[22] The caseworker recommended the file be closed at intake. The last note in the Community Services file is dated December 4, 2014. The file indicated that there had been contact with the Applicant, the Respondent, AR, his grandmother JC, and his day care worker in [...], Ms. M.. According to the caseworker's notes, AR was interviewed and was confused about why his parents were not together,

why his mother had a new baby and why his parents didn't like each other. He appeared to be well bonded to his father, and did not disclose any fear of him. He said he wanted to live in [...] with his father and that he did not like NL. The caseworker's notes conclude with the statement that claims of risk of physical harm, physical abuse and parent mental emotional health were not substantiated, and that the Respondent's PTSD was not impacting his ability to parent and provide a safe environment. He had good supports in place and there was no evidence of physical harm to AR.

[23] In September 2014 the Applicant alleged that while AR was present the Respondent threatened to kill NL. She said the RCMP advised her to seek a peace bond. However she withdrew her application when the Respondent obtained a lawyer, while she had none. The Applicant said she had contacted the RCMP several times to provide protection and safety during exchanges of AR, most recently in October 2013. However, in a text exchange with the Respondent in September 2015, concerning an alleged failure to return AR on time, she again made reference to the possibility of contacting the police.

[24] Although some of the allegations predate the Interim Order, this court is not restricted to matters arising since that Order. There is no indication that the Family Court judge was required to delve into the various allegations made by the

Applicant (although the Order does recite that the court had reviewed the materials filed). In any event, this court is not precluded from hearing all the evidence in determining who should have primary care of AR between now and the hearing of the divorce.

[25] In her affidavit the Applicant stated that she had already registered AR at […] Elementary for pre-primary 2015, that he is on the soccer and baseball teams, and that they have regular outings. Regular activities include swimming, skating, going to museums, the […], and playgrounds, and nearly daily bike rides or walks. She said they have "a very active family lifestyle" and that the three children have a good sibling relationship.

[26] The Applicant stated that AR is regularly in a regressed state the first day or two after returning from his father, is tired, with a decline in speech and focus. She also claimed, based on things AR said, that the Respondent is not often home during the day. She said this is consistent with when they were together in [...], as he was an "absentee parent, frequently finding things to do outside the house and seldom engaging [AR]." In testifying, the Respondent took exception to this, denying the label of "absentee parent."

[27] The Applicant maintains that she is the more child-focused parent. She seeks primary care with access every other weekend for the Respondent as well as sharing of holidays equally. For summer vacation she suggests that AR's visits be shorter. On cross-examination, referring to the Interim Order, the Applicant indicated that she was influenced by her then-counsel to agree to a week-on, week-off, arrangement as a way to provide time to build a case for sole custody of AR. Counsel for the Respondent suggests that she has proceeded to supplement her case by the calls to police and child protection authorities.

[28] The Applicant filed an affidavit of her partner, NL, which was previously filed in the Family Court proceeding. NL described the incident where the Respondent allegedly threatened to kill him. He also said he overheard telephone conversations in which the Respondent was aggressive and threatening to the Applicant. He says that AR is comfortable and secure in his mother's care. The Applicant also filed an affidavit of J.F., who indicated that she has known the Applicant since September 2012, when they attended […] University together. She said she was impressed with how the Applicant interacts with AR and has observed AR to be a very busy, happy, rambunctious five-year-old who does well with clear boundaries and rules. She said the Applicant is very patient and that she puts AR's and her daughter's needs before her own. Finally, the Applicant filed an affidavit of

her mother, BM, who said that when the parties were together she observed that her daughter took care of AR and did all the household chores.

[29] The Respondent filed affidavits of five people: himself, his mother, his friends S.L. and R.D., and C.M., AR's child care provider. The Respondent also called as a witness Cynthia Jobes, the child protection worker with the Kings District office of the Department of Community Services. In addition, he attached several affidavits from the Family Court proceeding.

[30] Ms. M. said that prior to the separation she believed she had a good relationship with both parents. She received a phone call from the Applicant after providing a will-say statement on behalf of the Respondent for use in the Family Court proceeding; the Applicant made allegations of abuse by the Respondent. She said she told the Applicant that her focus was on AR rather than on the reasons for his parents' separation.

[31] In her affidavit Ms. M. stated that she had observed AR to become upset on days before he was to transition to his mother's care. She said he appeared to worry about how many days he could stay with his father before having to return to his mother, and that he often said he wanted to stay with his father and not go to his mother's. She described AR as becoming "tense and fretful when having to

transition to his mother's care", and she felt this might have impacted his appetite. She said he often upsets very easily, asking if he's in trouble. She also said he becomes upset if voices are raised. She linked some incidents where he was in a bad mood and did not eat well to having come back from his mother's. She said he used to be a hearty eater, but his eating habits had changed drastically since the change to week-about parenting. She said that in recent months AR had stopped talking about his life at his mother's house, but continued to talk about his life with the Respondent and his grandmother, JC. She also described incidents of rudeness and lying by AR that she regarded as being out of character. Effectively Ms. M.'s evidence supported the Respondent in respect to his interaction with AR, to the extent that she would be aware of it. AR had indicated to her his preference to remain with his father rather than transitioning to his mother's home, particularly when NL was present.

[32] S.L.stated in his affidavit that he had known the Respondent since high school and worked with him over several months in 2014. He described the Respondent as a hard-working, devoted and attentive father. They have gone fishing with their sons. Each of them has spent time at the other's house. His affidavit indicated that he had witnessed nothing other than an "attentive loving father" and that he would feel safe to leave his son with the Respondent. R. D.

stated that the Respondent and AR had "visited us at our family cottage" several times over the previous three summers, commenting that AR interacted well with other children present and that the Respondent was an attentive father who "ensures that [AR] is comfortable in varied social situations" and who "uses reasonable discipline when necessary."

[33] In his own affidavit, the Respondent disputes much of the content of the Applicant's affidavit. He notes that he has in fact taken AR to medical and dental appointments. In response to the Applicant's description of him as an "absentee parent", he stated that this was not true. He said, AR "is always with either myself or my mother during the day if he is not at daycare. He does attend daycare … twice per week because he has many friends there..."

[34] With respect to his PTSD, the Respondent said he takes the prescribed medication regularly and attends at his scheduled therapist appointments. He says his mental health situation has improved significantly.

[35] In discussing the week-on, week-off parenting arrangement under the Interim Order, the Respondent stated in his affidavit that it takes AR several days to settle into his routine when he arrives. He also stated that AR gets uneasy a day or two before going back to his mother's care, and does not want to go.

[36] The Respondent also referenced text messages from the Applicant (attached to his affidavit) in which she claimed that he had not properly cared for AR. There were also messages suggesting that the Applicant did not keep him informed when AR was admitted to hospital, and that she instructed him not to come. In her own evidence the Applicant suggested that this was because she was afraid AR would want to leave with him, causing complications.

[37] The Respondent's affidavit also refers to occasions when NL allegedly pushed AR or singled him out for discipline. He referred to an occasion in May 2015 when he and AR were out on his boat and AR said that he had a good week and that NL "didn't hurt me." He also alleged that he received a phone call from NL, who said, "we are getting you for everything you have" and "I am [AR]'s father now." He says there was a further incident when NL called him and became so extreme that he called the RCMP. He said the phone calls from NL then stopped.

[38] In his affidavit the Respondent also notes that Community Services closed their file on the various allegations by the Applicant, including allegations relating to disputes during access exchanges, that he had struck AR in the face, that he had screamed at her in front of AR, that he had physically neglected AR and that he had refused to take AR to the doctor when he was coughing. The Respondent

observes that Ms. Jobes came to his home and interviewed AR privately, and then decided to close the file, indicating that there were no protection concerns.

[39] The Respondent concluded his affidavit with a proposed parenting schedule. He proposes that he have primary care and that AR attend [...] Elementary School, where he is enrolled in the French immersion. He would take a school bus in the morning and return in the early afternoon. His mother, JC, lives close by and would be available to care for AR when he is unavailable due to work.

[40] The Respondent indicated that he has a good relationship with AR's maternal grandparents. BM did not concede that the relationship was good. She suggested it was because AR was present that she is hospitable to the Respondent.

[41] The Respondent described various activities he and AR have done together, including fishing, going to the cottage, swimming, and going out on his boat. They go for walks and have visited friends who have cabins on different lakes. AR plays on his trampoline, rides his bike and plays with his cars and trucks in the sandbox at their house, as well as playing with friends.

[42] Despite the parties' inability to communicate, the Respondent seeks continuation of joint custody, with himself being designated as responsible for primary care. He would have AR in his care every week from Sunday evening until

Friday at suppertime during the school year. He proposes that AR be in his mother's care three weekends out of four. Holidays would be split equally and alternated, with equal division of the Christmas holidays.

Analysis

[43] Credibility is a significant issue in this case, particularly in respect to contradictory evidence respecting the verbal altercations between the parties, including the alleged threats by the Respondent against the Applicant and her partner. In assessing credibility I have considered all the evidence in the context of the law surrounding credibility, as set out by Forgeron J. in *Baker-Warren v. Denault*, 2009 NSSC 59:

> 18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.* 2008 SCC 51, para. 49.
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> 19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
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> a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (S.C.);
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> b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
>
> c) Did the witness have a motive to deceive;

> d) Did the witness have the ability to observe the factual matters about which he/she testified;
>
> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
>
> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
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> g) Was there an internal consistency and logical flow to the evidence;
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> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
>
> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?
>
> 20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate, supra*, at para 37:
>
> There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, supra).
>
> 21 Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the viva voce and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[44] In oral submissions counsel for the Respondent suggested that the truth was somewhere between the versions of the two parties. Undoubtedly that is correct. The Respondent was evasive at times in his testimony, particularly where questions related to allegations of verbal abuse and intimidation of the Applicant. On the other hand, it is clear that the Applicant was not hesitant to note events that would assist her in building her case. She said she had recorded conversations

(although these recordings were not entered in evidence), thereby indicating a desire to advance her position rather than attempting to seek an accommodation.

[45] As an example, in respect to a dialogue with the Respondent's mother, JC, in which she made a disparaging reference to the Applicant in the car with AR present, there was a suggestion that the Applicant had recorded the exchange, though no recording was entered into evidence. Such a threat, however, suggests an agenda to gather evidence that would allow her to obtain sole custody and limit access by the Respondent. JC acknowledged that she was wrong in saying what she said with AR present, and that she was not proud of it. The threat of a recording of this outburst by the Respondent's mother, even if it did not actually exist, is disturbing in determining whether, if given sole custody, she would be accommodating in ensuring a healthy relationship between AR and his father.

[46] Although I am satisfied that, of the two parents, the Applicant is the more child-focused, the evidence of Ms. M., which the Applicant effectively acknowledged as accurate, was that since the separation she has never contacted Ms. M. to inquire as to how AR was doing. Her only contact was shortly before the Family Court hearing, when she contacted Ms. M. to tell her about the abuse and intimidation by the Respondent that had caused her to leave the family home. In view of the difficulties she described when AR returned from the Respondent's

care, it is difficult to understand why she would not have made inquiries with Ms. M.. Her response was that the Respondent would have been in contact with Ms. M. and thereby be aware of how AR was doing; however, this is less than satisfactory having regard to her lack of trust and confidence in what IR was doing or saying about AR.

[47] In this case neither party is entitled to throw the first stone. They have each thrown far too many already. The Applicant must seek, however difficult it may be, to work out an accommodation with the Respondent. The Respondent must ensure than when AR is present he desists from angry or threatening outbursts.

[48] From the evidence of Ms. M., as well as the caseworker Ms. Jobes, it is clear that AR is aware of events taking place in his presence. From the written and oral evidence, it is clear that he is more aware than his parents credit him.

[49] The support persons, such as JC, BM, and NL, have attempted to be supportive, but must be encouraged by their respective child or partner to resist the temptation to disparage the other parent. Apparently AR has, on more than one occasion, asked BM, the Applicant's mother, if she likes his father. No doubt there can be many reasons why a child might ask such a question. However, the evidence of BM that she was hospitable to the Respondent because of the presence

of AR, suggests at least the speculative possibility that AR was concerned about how his maternal grandparents viewed his father. If the parties truly have AR's best interests at heart, they will ensure that when he is present neither they nor their family members will speak disparagingly about the other parent.

[50] There was a great deal of examination of the affiants about the allegations of physical, emotional, and psychological abuse, as well as discord in general between the parties. As was made clear in *Gordon v. Goertz*, the focus is on the best interests of the child, not the interests and rights of the parents. The evidence of conflict is relevant only to the extent that it relates to AR's best interests. As such, it is principally limited to occurrences in his presence. I am satisfied that the parties, and to some extent their support persons, engaged in these altercations in AR's presence. This has to stop. If it occurs the parties should document it between themselves. However, if criminal activity is involved, then the police should be involved. Otherwise, it may be the basis for future adjustments to the Order arising from this application. For now it is sufficient to note that the Order will provide that the parties, in speaking to each other at any time when AR is present, shall not engage in complaints or criticism of each other or of any support person. They will conduct communications necessary to effect exchanges outside AR's presence,

and, if necessary involve a mutually agreeable third party to assist in the exchanges.

[51] Despite the many allegations by the parties against each other, I am satisfied that both parties love AR and have his best interests at heart. Each of them is in a position to provide for his education and other activities. Similarly, I am satisfied that the Respondent's support persons, as well as the Applicant's mother, have AR's interests at heart and to the extent required are able to provide him with support and nurture. At present, the Applicant intends to be a stay-at-home mother. She is therefore in a better position to provide parental care. The Respondent, although apparently no longer […] actively himself, manages […] and is required at times to travel to […]. The difference in availability is likely to be less significant now that AR will be attending school during the day.

[52] I am mindful of the various allegations about AR's perceived emotional and psychological state, as well as his own statements. It is uncertain, however, to what extent his statements can be relied upon in view of the clear evidence that he has on occasion misinformed and in fact has admitted lying. Also, at five years of age, his preferences and wishes are less of a factor than if he were older.

[53] There is no evidence that the available educational or medical facilities, or children's activities, are superior in one community over the other. Although both parties are equipped to handle the responsibilities of this five-year-old, it is clear that in addition to having, at least at present, more available time the Applicant is the more child-focused of the two. This does not mean that the Respondent is unable to meet AR's needs or to ensure that he receives the educational, medical and other support he may require. I am also satisfied that AR has bonded with his father, and that he has expressed his own preference to live with his father to various people.

[54] Both parties, in their affidavits and legal submissions, have paid lip service to ensuring maximum access by the other parent if they have primary care. The Applicant has proposed that the Respondent have alternate weekend access as well as sharing holidays, while the Respondent proposes that the Applicant have three out of four weekend access and they share access during holidays. No mention is made of telephone or web contact between the non-access parent and the child, communication in respect to issues involving the child, or weekday access by the non-primary care parent. Nor is there any reference to consultation on major issues concerning AR, such as medical, educational, and recreational issues.

[55] The factors to be considered on an application for custody, including an application to vary, have essentially been developed by the courts around the overall determination of the best interests of the child. However, the *Divorce Act* has provided a statutory consideration as well. As Warner J. said in *Anderson v. Anderson*, 2005 NSSC 94, at para. 27, "[t]he sole duty of the Court is to determine the best interests of the children. There are no rigid formulas as to the implementation of the goals and factors" except those set out in s. 16(10) and 17(9) of the *Divorce Act*. The latter section reads:

> In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[56] On the evidence, the Respondent has shown a greater willingness to provide the Applicant with either access extension or additional access when there are legitimate reasons. In one instance, for example, the Applicant requested an access extension to take AR on a family trip to […]. The Respondent consented, receiving additional time with AR upon their return. On another occasion, he consented to the extension of access to enable AR to be present when the Applicant's two brothers were visiting. There were other examples referenced during the hearing.

The Applicant's mother acknowledged this willingness when she stated that the Respondent had been accommodating in adjusting access when requested to do so

[57] Also relevant in considering which parent is most likely to foster contact with the non-primary care parent is the evidence relating to the complaints to Community Services and the RCMP concerning the Respondent. In view of the decision by the child protection authorities to close the file, and the fact that the RCMP do not appear to have taken any action, the Respondent's claim that the allegations were part of a case-building by the Applicant may indeed have some merit. In any event they indicate a lack of trust justifying a concern about the willingness of the Applicant to allow the Respondent to participate in AR's life if she has primary care.

[58] In the circumstances, and notwithstanding many positive aspects of the Applicant as a parent, including her extreme child-focus and her availability as an at-home parent, the concerns about her willingness to foster the parental relationship between AR and the Respondent, in the context of all the other relevant considerations, lead me to conclude that primary care should be with the Respondent.

[59] However, I am not satisfied that the arrangement proposed by the Respondent provides the Applicant with fair and reasonable access. The parties live a little more than an hour's drive apart. Weekday access after school is clearly called for if sought by the Applicant. In addition, access by phone and internet (such as Skype) should be available to the party not having care of AR at the time, with privacy between him and the parent to whom he is speaking.

[60] Holidays will be shared equally, alternating March Break and Christmas.

[61] I would add that AR shall not be driven on the highway when there is an Environment Canada or police weather warning to the effect that the roads are unsafe.

Conclusion

[62] I am satisfied that both parents love and care for AR. The Respondent is now more active in involving himself with AR than he had been previously. On his evidence, his work commitments do not now necessitate involvement by JC or Ms. M. in caring for AR to the extent that was necessary previously, as he is now more available. In addition, AR is now in school during a good part of the day. Further, as has been the case in the past, when AR's father is working, there is support available from JC and Ms. M..

[63] The parties have wildly different attitudes to AR's medical requirements. The Applicant appears to be very focussed on any symptom that appears, while the Respondent and his support people are more likely to regard medical issues as normal childhood illnesses. It is necessary to strike some sort of balance between these extremes, and in my view it is likely preferable to err on the side of "more concern" rather than "less." The parties will be required to consult on all health and medical issues (as with all other issues concerning AR), but in the event they are unable to agree on a course of action (or inaction) with respect to medical issues, the Applicant will have the final say.

MacAdam, J.