SUPREME COURT OF NOVA SCOTIA
Citation: O'Brien v. O'Brien, 2010 NSSC 126

Date: 20100407
Docket: 1202-002855
Registry: Pictou

Between:

Sonya Lee O'Brien

Petitioner

v.

Michael James O'Brien

Respondent

Judge:	The Honourable Justice Patrick J Duncan.
Heard:	February 19, 2010, in Pictou, Nova Scotia
Final Written Submissions:	March 5, 2010
Written Decision:	April 7, 2010
Counsel:	Sonya Lee O'Brien, self represented, Petitioner
	Terrance G. Sheppard, for the Respondent

By the Court:

Introduction

[1] The petitioner, Sonya Lee O'Brien, and the respondent, Michael James O'Brien, were married on August 14, 1999. They have a son, Owen William O'Brien, who was born on May 24, 2005.

[2] The parties have family roots in eastern Nova Scotia, but lived in the province of Ontario from 2001 until the time of their separation in August, 2007. The circumstances of the marital breakdown generated acrimony which contributed to the decision of the petitioner to reside in Nova Scotia with their son. Mr. O'Brien continues to reside in Ontario and regularly visits with his son.

[3] In the ensuing years the parties have gradually been able to settle many issues arising from the failed marriage. However, they need a judicial resolution of a parenting plan for their son, as well as determination of the amount payable by the respondent for the support of his son.

Matrimonial property

[4] The parties agree that the division of matrimonial property has been satisfactorily resolved and that they do not require a further court order.

Divorce

[5] I am satisfied that the parties have lived separate and apart for a period in excess of one year immediately preceding the determination of divorce and that there is no possibility of reconciliation. All statutory requirements have been fulfilled and I therefore grant the petition for divorce.

Change of Name

[6] Upon application, the petitioner's name is changed from Sonya Lee O'Brien to Sonya Lee Mahar, effective on the issuance of the Certificate of Divorce. The petitioner was born at New Glasgow, in the province of Nova Scotia on the 13th day of September, 1975. The petitioner's name prior to the marriage was Sonya Lee Mahar. The petitioner's maiden name was Sonya Lee Mahar.

Custody

[7] By consent of the parties, Sonya Lee O'Brien and Michael James O'Brien shall have joint custody of the child of the marriage, Owen William O'Brien, born May 24, 2005.

Primary Care

[8] By consent of the parties, Sonya Lee O'Brien shall have primary care and control of the child of the marriage, Owen William O'Brien.

Access

[9] The court's authority to resolve a dispute in respect of access is set out in the **Divorce Act** S.C 1985, C-3 (2nd supp). The provisions that are relevant to the issue before this court are:

> 16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

...

> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[10] There has been considerable evidence adduced setting out the history of parenting time exercised by Mr. O'Brien to this point. There were strong disagreements in the period following separation, which resolved in the petitioner exercising substantial control over the times and location of the respondent's visits with their son. Notwithstanding these difficulties, there is more now that unites these parents in their view of how best to parent their son, than divides them. Where they diverge however, is what has generated the hearing.

[11] In the period following the separation in August of 2007 there was no contact as between the parties for a period of time. They reached an agreement that allowed Mr. O'Brien to visit with his son between October 4 and 8, 2007.

[12] An interim custody agreement was entered into by the parties on November 1, 2007. It is was to remain in effect until June 1, 2008 and during the term of the agreement it was stipulated that Owen would have his primary residence with his mother in Nova Scotia. Mr. O'Brien was to have:

> ... reasonable access (including overnight visits) to Owen at all reasonable times upon reasonable notice to Sonya, such access to occur in Nova Scotia. Access shall not exceed one week and Owen shall not be removed from the province of Nova Scotia during access. Michael shall provide contact and location information to Sonya when exercising access.

[13] I am advised that Mr. O'Brien had further visits with his son, in Nova Scotia, during the following periods:

> November 1-4, 2007
>
> December 23, 2007- January 3, 2008;
>
> March 7-14, 2008 and

May 15-19, 2008.

[14] The issue next arose in the Family Court for the Province of Nova Scotia at a hearing on July 21, 2008. The order emanating from that proceeding includes the following:

> AND UPON THE COURT finding that given Owen's age and stage of development, it is more appropriate for him to spend no more than one week out of province with his father this summer, but that this could be increased to two weeks or more next summer, when Owen is four years old;
>
> NOW UPON MOTION, the following relief under the *Maintenance and Custody Act* is hereby ordered:
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> ...
>
> 2. Owen shall have reasonable parenting time with Michael James O'Brien, at all reasonable times, upon reasonable notice to Sonya Lee O'Brien including overnight parenting time. Michael James O'Brien shall provide contact and location information to Sonya Lee O'Brien, when Owen is in his care.
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> 3. More specifically, Owen shall have a parenting time with Michael James O'Brien as follows:
>
> > (a) from July 25 until July 31, 2008, and such parenting time may take place in Prince Edward Island;
> >
> > (b) from August 4, until August 10, 2008, with such parenting time taking place in Nova Scotia; and

> (c) one week at the end of August, and such parenting time may take place in the province of Ontario.
>
> 4. Owen shall have liberal and generous telephone contact with Sonya Lee O'Brien while he is in Michael James O'Brien's care and shall have liberal and generous telephone contact with Michael James O'Brien, while he is in Sonya Lee O'Brien's care.
>
> 5. For any travel outside the province of Nova Scotia, Owen shall be accompanied by a parent or other adult.

[15] I am informed that, following the issuance of the Family Court order, Mr. O'Brien had parenting time with his son during the following time frames:

- October, 2008 (five to six days around the Thanksgiving holiday)
- December 26, 2008 for eight days
- eight days at March break in 2009;
- eight days in early July 2009, in the province of Ontario;
- eight days in Nova Scotia in July of 2009;
- six days around Thanksgiving of 2009;

- December 26, 2009 for eight days; and

- eight days starting on February 13, 2010.

[16] As can be seen, his total time with his son in the province of Ontario consists of seven days in the summer of 2008 and eight days in the summer of 2009. This is consistent with the petitioner's position which is that the amount of parenting time spent in Ontario would increase by one day per year, and in the summer vacation only.

[17] As a result of the disposition in Family Court, there was an additional six days of summertime access that was exercised in Prince Edward Island in 2008. That was apparently not repeated in 2009.

[18] Mr. O'Brien has outlined some of the problems that have taken place with respect to the scheduling of phone calls, pickup and drop-off times. It is not necessary to review them in detail as the parties have effectively provided a solution as part of their submissions to address the type of concerns that have existed in the past. It is apparent from the evidence that both understand the importance of predictability for each other and for their son and the importance of

ensuring that he enjoys maximum contact with each of his parents. I am optimistic that the types of problems that exist at this point can be overcome by these two intelligent and seemingly responsible parents. I will incorporate their comments in my final disposition.

[19] Mr. O'Brien now proposes the following parenting schedule:

> (a) *Christmas/New Years Eve* - in odd numbered years, Mr. O'Brien would have Owen with him from Boxing Day until January 2, and in even numbered years he would have Owen in his care from December 19 to December 26;
>
> (b) *March break* - Mr. O'Brien would have Owen in his care each March break;
>
> (c) *Easter* - Mr. O'Brien would have Owen in his care for a week, to include a few days before Easter and after Easter, in alternate years;
>
> (d) *Owen's birthday (May 24)* - a four or five day period on or about Owen's birthday/Victoria Day weekend in alternate years;
>
> (e) *Summer* - Mr. O'Brien would have Owen in his care for a four-week block period of time each summer;
>
> (f) *Thanksgiving* - Mr. O'Brien would have Owen in his care for a one-week block of parenting time each October at the time agreed to by the parties but generally to occur around the Thanksgiving holiday;

[20] He also seeks the following terms:

> (a) parenting time shall take place in Ontario, or where Mr. O'Brien chooses;
>
> (b) unless otherwise agreed, if Owen is flying to Ontario, his flight shall be an early-morning flight and Owen's flight back from Ontario shall be an evening flight;
>
> (c) if Owen is flying to Ontario he shall be accompanied on all flights by Mr. O'Brien or his designate, until Owen is old enough to fly in the Unaccompanied Minor Program.
>
> (d) Mr. O'Brien shall ensure that all of Owen's schoolwork, if any, is completed by Owen while Mr. O'Brien has Owen in Ontario for block parenting time;
>
> (e) Owen shall also have other parenting time with Mr. O'Brien in Nova Scotia, upon seven days notice to the petitioner. During any parenting time that takes place in Nova Scotia, Mr. O'Brien shall ensure that Owen attends school and any extracurricular activities that were scheduled prior to his notice to the petitioner;
>
> (f) Mr. O'Brien be allowed to have contact with day care providers and professionals to provide copies of any and all documents relating to Owen to either parent, including day care contracts, receipts, report cards, etc.
>
> (g) the petitioner, Sonya Lee O'Brien, will transport Owen to and from the Halifax airport for his trips to Ontario.

[21] He submits that less frequent, but longer visits with his son are more cost effective, and assist him in avoiding multiple ticket fees for more frequent trips. It

also will reduce the number of flights that Owen would take to Ontario. For example, if the concept of longer periods of block access is accepted, it would favour an order for a longer summer visit, rather than two or three shorter ones.

[22] Under the current arrangement, which has been the substantial part of access to this point, the father travels to Nova Scotia regularly and essentially lives with his son out of a suitcase, visiting relatives and friends. Mr. O'Brien's own parents are divorced and so he spends time with his son visiting each of their households. As his new partner and her daughter are not welcome in those homes, he is unable to share time with his son with his partner and her daughter at the same time, except in very limited circumstances.

[23] Mr. O'Brien submits that his son is old enough to spend time away from his mother and to be parented at his home in Ontario. It is important to him, and he believes to his son, that Owen have the opportunity to share in Mr. O'Brien's home life. He wants his son to know and be comfortable with Mr. O'Brien's new partner and her 13 year old daughter. He anticipates that he and his partner will have more children and that Owen should get to know his family just as he has the new partner of the petitioner and their new baby.

[24] His affidavit evidence addresses many of the concerns expressed by the petitioner with respect to the advisability of a child of Owen's age travelling to Ontario for extended visits. Any trips would be made with an adult known to Owen and on commercial airlines. He believes his son enjoys the experience of being on the plane and he has not observed Owen exhibit emotional stress during visits with him in Ontario.

[25] Mr. O'Brien offers a stable environment where Owen has his own bedroom and necessary clothing, toys, pets and so on. He suggests that visiting with his father in Ontario provides Owen with more stability than his somewhat nomadic visits among paternal grandparents when his father visits him in Nova Scotia.

[26] The respondent also points out that as his new family begins to grow it will be very expensive to bring all of his family to Nova Scotia to exercise family time with Owen. This creates a disadvantage to Owen as much as to Mr. O'Brien and his new family.

[27] As I will discuss, Mr. O'Brien's proposal includes extended times with his son on major holidays. In his affidavit he addresses the concerns raised by the petitioner with respect to a loss of traditions by taking Owen out of his principal residence during such periods. In my opinion, the respondent correctly observes that traditions changed at the point of separation. Each of the parents have new partners. Owen has a half sibling in his mother's home, and a step-sibling in his father's home. New traditions will have to be embraced.

[28] To the extent that his proposal may cause Owen to miss school, he says that as a school teacher he is very qualified and willing to ensure that his son's lessons are completed and that he is not academically disadvantaged in any way.

[29] The petitioner agrees that clauses 2, 4, and 6 of the order of the Family Court should continue. She also agrees that clause 5 should be continued but amended to allow that once Owen is eligible to fly as an Unaccompanied Minor the requirement for accompaniment on his flights to and from Ontario would be released. She also agrees to be responsible to transport Owen to and from the Halifax airport when he is flying to Ontario to be with his father.

[30] With respect to the plan put forward by the respondent the petitioner submits that Owen should not be out of her care for a period greater than nine days in 2010. In 2011 she says that the longest period he should be away from his primary residence would be 10 days and in 2012 no longer than 12 days.

[31] Ms. O'Brien is a psychologist but recognizes that she is not unbiased in this matter and so she has not sought to adduce opinion evidence. However, she has been encouraged in her view that a child of Owen's age cannot tolerate longer periods away from his primary care parent by an article entitled "Using Child Development Research to Make Appropriate Decisions for Young Children" written by Joan B . Kelly and Michael E. Lamb and reported at *Family and Conciliation Courts Review*, Vol. 38, No. 2, July 2000, at p. 297 *et seq.* The specific paragraph she referred to is found at p. 309 and states:

> When children reach school age, they have significantly more autonomy and greatly increased cognitive, emotional, and timekeeping abilities, so the duration of separations from both parents becomes less critical. Even so, before the age of seven, and often thereafter, most youngsters still enjoy reunions during the week with each parent rather than extended periods without contact. By seven or eight years of age, most youngsters can manage 5 to 7 days separation from parents as part of their regular schedules and two week vacations with each parent. Court orders for young children that reflect children's increasing ability to tolerate lengthier separations by building agent-based and stepwise increases in the vacation schedules are most responsive to children's best interests.

[32] With respect, when read in the context of the entire article, it contemplates that the parents reside in close proximity to each other, and that the child regularly goes back and forth between the two parents. It does not address the circumstances that are before me in this case, and does not provide reliable guidance on how to resolve the issue in this case. It is also an article that is now ten years old and was not supported nor tested before me with properly admissible expert opinion evidence. I am not prepared to place weight on the conclusions in the article which have influenced the petitioner's viewpoint.

[33] I acknowledge, as suggested in the article, that gauging the ability of any child to tolerate separation from a "significant attachment figure" is related to their "... age, temperament, cognitive development, [and] social experience." In the end analysis it is about a consideration of a broad spectrum of factors that ultimately point to a disposition that is "in the best interests of the child".

[34] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27 the court considered an application to vary custody and access provisions where the mother sought to change principal residence and to remove the child to another country. Many of the principles are common to an initial determination of custody and are instructive in a matter such

as before me, where in consequence of the marital breakdown, the petitioner removed the child from Ontario to Nova Scotia. That move underpins the resulting disagreement as to where Mr. O'Brien can enjoy his parenting time with their son.

[35] McLachlin J. (as she then was) writing for the majority noted that parental conduct, including the reasons for removal of a child from the jurisdiction of their primary residence only enters into the analysis where it relates to the ability of the parent to meet the needs of the child. (at paras. 21-22).

[36] In speaking to the principle of maximum parental contact as set out in Section 16(10) of the **Divorce Act** McLachlin J. concluded, at paragraph 24, that:

> The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges a judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact: *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 117-118, per McLachlin J.

[37] At paragraphs 49-50 of *Gordon, supra*, there is a summary of the law, which includes factors which have some general relevance to the proceeding before me:

> 49 The law can be summarized as follows:

...

2. ... the judge 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.

...

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, *inter alia*:

(a) ...

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

> (e) ...
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

> 50 ... 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?

[38] Items 7(f) and (g) contained in paragraph 49 above, when read in the context of this case, speak to the impact on the child of disrupting the child's established routines. For example, certain of Mr. O'Brien's proposals would have his son leave Nova Scotia and travel to Ontario for extended periods that would take him out of school, away from his friends, and also away from any extracurricular activities he might be engaged in.

[39] I have been referred by counsel to the oft quoted, non exclusive factors a court may consider in determining what is in the best interests of a child, as set out by Justice Goodfellow in *Foley v. Foley (1993),* 124 N.S.R (2d) 198 (NSSC) at paragraphs 15-18. To the extent that they can be applied to the facts of this case, it is remarkable that they do not distinguish these parents, one from the other, in their

ability to properly parent their son while he is in their respective care. Of course, Owen is not yet at an age where his views can be considered directly, but I accept the evidence before me that he enjoys his time with each of his parents. I also accept that his father is acutely aware of the potential for anxiety that Owen may demonstrate as a result of being separated from his mother, and that Mr. O' Brien has considered appropriate coping mechanisms to assist his son. If it were to be an acute problem I am sure that he would take whatever steps were necessary to alleviate his son's concerns, even if that meant returning him to his mother's home before the scheduled end of the access period.

[40] I will now turn to the specific response provided by Ms. O'Brien to the proposed schedule put forward by Mr. O'Brien.

[41] Mr. O'Brien's proposal is that for the Christmas/New Years Eve time frame, he would, in odd numbered years, have Owen with him from December 26 until January 2, and in even numbered years he would have Owen in his care from December 19 to December 26. To this point Mr. O'Brien's Christmas access has only been in Nova Scotia.

[42] Ms. O’Brien does not want Owen to spend Christmas away from her care until he is at least age 8 or 9. It is her belief that Owen should enjoy the Santa Claus tradition in his principal residence and that he should wake up on Christmas Day in her home, with her new partner and their new child. She agrees that Mr. O’Brien can visit in that time period but it must be in Nova Scotia and the access cannot result in any lost school days for Owen. She agrees that it is unusual for a child to spend every Christmas with one parent. She also recognizes that this does not allow, at least for the next few years, for Owen to share Christmas with Mr. O’Brien in his home and with his family.

[43] As the history of visitation to this point demonstrates, Ms. O’Brien does not object to access at other times of the year, for periods of similar duration, and in the time frames proposed by Mr. O’Brien, except that Ms. O’Brien rejects any proposal for non summer vacation that would see her son leave Nova Scotia to be with his father.

[44] The petitioner recognizes that the respondent is a loving and responsible father who has a close relationship with their son. However, she feels that their son is too young at this point to spend extended periods of time away from her. Her

position is that Mr. O'Brien's parenting time should be, for the most part, exercised in Nova Scotia. The petitioner acknowledges that the physical arrangements in Ontario are suitable. It is only Owen's age and concerns over separation from his primary residence and his mother that causes her to resist the respondent's proposed parenting plan.

[45] I have concluded that the petitioner has adopted an overly restrictive position by attempting to confine Owen's time with his father to Nova Scotia, and to the exclusion of Mr. O'Brien's new family dynamic. While I am sensitive to her concerns that her son is young and that it is important not to impact negatively on his attachment to his principal residence and his mother, that must be measured against all of the circumstances.

[46] Mr. O'Brien is an obviously loving and responsible parent who offers his son positive opportunities to enjoy periods of time with his father. It is in Owen's interest that he have an opportunity to spend extended periods with his father and in his father's home with his step mother and step sister. I accept Mr. O'Brien's evidence and agree, in general, that he should have more opportunity to enjoy his

son while in his own home in Ontario. Owen should be provided an opportunity to share major holidays with his father.

[47] While a certain amount of access that relies on the support of the paternal grandparents is acceptable it should not be the norm. It is artificial and unrelated to the way in which Mr. O'Brien lives his life. It offers no opportunity to Owen to enjoy the benefits of having his own bedroom and playthings, as he has available to him at his father's home. It is not reasonable that he effectively lives out of a suitcase in order to share time with his father. I cannot envisage Ms. O'Brien being willing to do the same thing if the positions were reversed.

[48] There was some discussion during the course of the hearing that Ms. O'Brien consider visiting her son in Ontario during any extended visits he might enjoy there. There was also discussion about the possibility of online communications employing audio visual technology. These were obviously things that had not been considered previously and the parties demonstrated some interest in the possibilities that they present to creatively deal with Ms. O'Brien's concerns. The key is that both parents were open to explore new avenues to enhance their son's experiences with them. I encourage them to do so.

[49] Owen' s best interests, in my view, are met by enjoying increased periods of access with his father at his father's home in Ontario. I agree with Ms. O'Brien that because of Owen's age it is not advisable to extend that significantly just yet, but I have concluded that a balance can be reached by including some non summer visitation and providing a schedule that should be suitable for at least the next few years, always subject to changing circumstances.

[50] Further, I conclude that Owen should have the opportunity to share major holidays with each parent, and to experience the traditions that each of his parents establish. Intelligent and caring parents, as I find them both to be, can find ways to ensure that Christmas, instead of being seen as a one day event that they must compete for, is a time of two traditions spread over the entire holiday period, and a time in which Owen will enjoy the best of both homes, irrespective of where he wakes up on December 25th.

[51] I am reluctant to direct that Owen be removed from school to have visits in Ontario, but I do accept that Mr. O'Brien is quite willing and able to ensure that his work is kept up to date. It is likely to happen in some years that school will be

missed in the interests of having a long enough access period so as to make the travel time and disruption worth it to Owen. I accept that as a reasonable consequence.

[52] Mr. O'Brien should not have less total access with his son than he has now, and so some periods will remain in Nova Scotia to allow for that.

[53] In the result I direct the following:

1. Owen shall have reasonable parenting time with Michael James O'Brien, at all reasonable times, upon reasonable notice, which is to be not less than seven days in advance, to Sonya Lee O'Brien, and will include overnight parenting time. Michael James O'Brien shall provide contact and location information to Sonya Lee O'Brien, when Owen is in his care.
2. In addition, Owen shall have the following specific parenting time with Michael James O'Brien:

    (a) *Christmas/New Years Eve*

In even numbered years, commencing on December 26, 2010, Mr. O'Brien shall have Owen with him from December 26 until January 2; and in odd numbered years, commencing in 2011, he shall have Owen in his care from December 19 to December 26. This parenting time may be exercised in Ontario at Mr. O'Brien's option;

(b) *March break*

(i) In 2011 and in each odd numbered year thereafter, Mr. O'Brien shall have Owen in his care, in Nova Scotia for a period of not less than 4 days on a schedule to be arranged with Ms. O'Brien.

(ii) In even numbered years, commencing in 2012, Mr. O'Brien shall have Owen in his care for the one week "March Break" period which can be exercised in Ontario at Mr. O'Brien's option.

(c) *Easter*

(i) Commencing in 2011 and in odd numbered years thereafter, Mr. O'Brien shall have Owen in his care for one week, to include a few days before Easter and after Easter, and which may be exercised in Ontario at Mr. O'Brien's option;

(ii) Commencing in 2012, and in each even numbered year thereafter, Mr. O'Brien shall have not less than three days of parenting time with Owen in Nova Scotia, at reasonable times during the Easter holiday period. Such parenting time may include Easter Sunday with the consent of Ms. O'Brien

(d) Owen's birthday (May 24)

(i) In even numbered years, commencing in May 2010, Mr. O'Brien shall have Owen in his care for at least four days in the month of May that shall include Owen's birthday. At Mr. O'Brien's option he may choose four days in May that do not include Owen's birthday and may include the Victoria Day holiday weekend. This parenting time may be exercised in Ontario at Mr. O'Brien's option;

(ii) In odd numbered years, commencing in May 2011, Mr. O'Brien shall have Owen in his care for at least four days in the month of May in Nova Scotia. It may include the Victoria Day holiday excepting Owen's birthday, but may include Owen's birthday, if Ms. O'Brien consents.

(e) *Summer*

(i) Mr. O'Brien shall have Owen in his care for a total of four weeks in July and August of 2010, up to two consecutive weeks of which may be exercised in Ontario at Mr. O'Brien's option. The remaining two weeks will be in Nova Scotia under the same terms and conditions as have been in place between the parties to the time of this order. The non Ontario parenting time that I have provided for may be exercised in some other place with Ms. O'Brien's consent;

(ii) Mr. O'Brien shall have Owen in his care for a total of four weeks in July and August of 2011, up to three consecutive weeks of which may be exercised in Ontario at Mr. O'Brien's option. The remaining week will be in Nova Scotia under the same terms and conditions as have been in place between the parties to the time of this order. The non Ontario parenting time that I have provided for may be exercised in some other place with Ms. O'Brien's consent;

(iii) Beginning in 2012, Mr. O'Brien shall have Owen in his care for a total of four weeks in July and August of each year, all four of which may be consecutive and which may be exercised in Ontario at Mr. O'Brien's option.

(f) *Thanksgiving*

(i) In even numbered years commencing in 2010, Mr. O'Brien shall have Owen in his care for not less than a five day block of parenting time each October at a time agreed to by the parties but generally to occur around the Thanksgiving holiday, which parenting time may be exercised in Ontario at the option of Mr. O'Brien;

(ii) In odd numbered years commencing in 2011, Mr. O'Brien shall have Owen in his care for not less than a five day block of parenting time each October at a time agreed to by the parties but generally to occur around the Thanksgiving holiday, which parenting time will be exercised in Nova Scotia unless Ms. O'Brien otherwise agrees;

(g) *General* - The parties are directed to consult in advance to schedule all parenting times. In the event that they are unable to agree as to specific pick up and drop off times, or the specific dates on which access is to be exercised where this order does not set specific calendar days for access, then they may seek the directions of the court, on application.

Any parenting time granted to Mr. O'Brien in this decision and which is required to be exercised in Nova Scotia may, with the consent of Ms. O'Brien, be exercised in some other place.

3. Owen shall have liberal and generous telephone contact with Sonya Lee O'Brien while he is in Michael James O'Brien's care and shall have liberal and generous telephone contact with Michael James O'Brien, while he is in Sonya Lee O'Brien's care.
4. For any travel outside the province of Nova Scotia, Owen shall be accompanied by a parent or other adult.
5. Unless otherwise agreed, if Owen is flying to Ontario, his flight shall be an early-morning flight and Owen's flight back from Ontario shall be an evening flight;
6. If Owen is flying to Ontario he shall be accompanied on all flights by Mr. O'Brien or his adult designate, until Owen is old enough to fly in the Unaccompanied Minor Program.
7. Mr. O'Brien shall ensure that all of Owen's schoolwork, if any, is completed by Owen while Mr. O'Brien has Owen in Ontario for block parenting time;

8. During any parenting time that takes place in Nova Scotia, Mr. O'Brien shall ensure that Owen attends school and any extracurricular activities that were scheduled prior to his notice to the petitioner;

9. Mr. O'Brien shall have the right to make inquiries of any care givers, educators, service providers, or others, and to be given copies of any relevant documentary information, that pertains to the health, education and welfare of Owen.

10. Sonya Lee O'Brien, or an adult agreed to by both parties, will transport Owen to and from the Halifax airport for his trips to Ontario.

Child Support

[54] The parties agree that the amount of child support that would be payable by Mr. O'Brien pursuant to the **Federal Child Support Guidelines** and in accordance with the Ontario table is $705 per month based on there being one child and upon his annual income for 2010 of $78,172. However, Mr. O'Brien makes application

pursuant to section 10 of the **Federal Child Support Guidelines** for an award of child support that is less than that amount. The petitioner does not agree.

[55] The relevant section of the **Guidelines** says that:

> Undue hardship
>
> 10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
>
> Circumstances that may cause undue hardship
>
> (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
>
> (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
>
> (b) the spouse has unusually high expenses in relation to exercising access to a child;
>
> ...
>
> Standards of living must be considered

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

Standards of living test

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

Reasonable time

(5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

Reasons

(6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

[56] The position of the respondent is that he is experiencing and will continue to suffer undue hardship as a result of the unusually high expense of exercising access with his son. He says that a return trip by air between Ontario and Nova Scotia, for one person, is $500.00. He will accompany his son on his travel to Ontario at a

further cost of $500, which will continue until his son is eligible to travel as an unaccompanied minor, a circumstance which is a few years off.

[57] Therefore, a trip by his son to Ontario generates a total air fare of $1500 - 2 return tickets for the father and one for the son.

[58] He further submits that

1) Based on six parenting times in Ontario per year at $1,500 per trip the cost of access is $9,000 per year;

2) That in those cases where access is to be exercised in Nova Scotia he is entitled to be accompanied by his partner and her daughter. i.e., 3 round trip tickets at $500 each for a total cost of $1,500 per trip.

3) That as a result his cost of access will remain the same irrespective of where access is exercised.

[59] The position of petitioner is that the application must fail as the evidence fails to show that the respondent has “unusually” high costs associated with access and that he is not suffering undue hardship. In the alternative she submits that the respondent has not proven that her household enjoys a higher standard of living.

[60] The petitioner has an annual income, effective in April 2010, of $72,489 plus the taxable Universal Child Care Benefit of $2,400 per year, which will terminate in May 2011. After deducting for taxation and remittances, she is projected to have a net income of $52, 481. To this we can add the table amount of child support payments totalling $8,460 per year bringing her projected net annual income to $60,941 per year.

[61] The respondent has an annual income of $78,172 and is projected to have a net annual income of $57,045. Deducting a child support amount of $8,460 per year leaves him $48, 585. A further reduction of $9,000 per year for access costs leaves Mr. O’Brien with a net projected income of $39, 585.

[62] On this basis Ms. O’Brien has 60% of the total net projected income of the parties.

[63] Mr. O'Brien points to this differential as a significant factor in support of his application.

[64] Ms. O'Brien's partner has an annual income of $58,435 and after deductions is projected to have a net annual income of $42,237.

[65] Mr. O'Brien's partner has a gross income of $66,641 and is projected to have a net income of $49,422. Subsequent to trial I received a submission from the petitioner challenging the filed information on behalf of Mr. O'Brien's partner and seeking updated information. I have not received further information nor have I called upon counsel for the respondent to provide such information.

[66] I have been provided by counsel for the respondent with calculations for the "Standards of Living Test Using Calculated Child Support". Mr. O'Brien's household income ratio is 5.04 and Ms. O'Brien' s is 4.97. He submits that this calculation does not take into account the significantly higher cost of living in Toronto as opposed to that of rural Nova Scotia. He also submits that it fails to take into account the costs of care for Owen during the extended periods in which

he will be with his father. This submission is premised on Owen spending six weeks a year at his father's home. Finally, he reminds me that his monthly expenses include a significant payment on account of legal expenses incurred in addressing the consequences of the marital breakdown and in particular the pursuit of increased parenting time on more liberal terms than Ms. O'Brien has been willing to agree to.

[67] The analysis of undue hardship was considered in *Gaetz v. Gaetz* 2001 NSCA 57 where the Freeman J. A. stated, at paragraph 15:

> The Guidelines authorize the court to depart from awarding child support as calculated in the tables only when the payor spouse or a child, on whose behalf request is made, would suffer undue hardship. This is determined by a two-step test. First, section 10 (2) (a) to (e) of the Guidelines, lists circumstances which must be considered: there must be a determination that the spouse has an unusually high level of debts incurred in the family context, high access expenses, or several instances of legal duties of support to a child or other person other than a child of the marriage. Only when circumstances capable of creating undue hardship are found does the second step become relevant- the comparison of the standards of living of the households of the payor spouse and the custodial spouse.

[68] In *Wainman v. Clairmont*, 2004 NSSC 39, at paragraph 25, Hall J. considered what is meant by the term "unusually high":

> Whether access costs expenses are “unusually high”, in my view, must be determined based on the relative financial means of the parent responsible for the access expenses. For an affluent person, a few hundred dollars a month for access would be a pittance, while for a person dependent on social assistance for his or her living expenses, it would be an impossibility.

[69] I have considered the financial information filed by the parties in addition to the submissions of counsel on behalf of the respondent. I have also reviewed the calculations that counsel has presented and am satisfied that they are accurate and based on the information available.

[70] I accept that the cost of access is substantial and have taken note of the respondent’s concerns with respect to the significant debt he has incurred for legal fees.

[71] Notwithstanding the representations of the respondent, I am not satisfied that the costs of access, when considered in the entirety of the financial circumstances of the parties, supports the conclusion that Mr. O’Brien would suffer undue hardship if he is required to comply with the table amount payable as child support.

[72] I therefore conclude that based on the respondent’s 2010 income of $78,172, and in accordance with the Ontario tables under the **Federal Child Support**

Guidelines, he will pay $705 per month to the petitioner for the support of the child Owen, commencing on April 1, 2010 and thereafter on the first day of each month.

COSTS

[73] As the results have been mixed, I direct that each party shall bear their own costs.

Duncan J.