**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** Walsh v. Musolino, 2011 NSSC289

**Date:** 20110721
**Docket:** SFHMCA059813
**Registry:** Halifax

**Between:**

Jason Walsh

Applicant

v.

Teri Musolino

Respondent

**Judge:** The Honourable Justice Moira C. Legere Sers

**Heard:** June 2 and 3, 2011 in Halifax, Nova Scotia

**Counsel:** Spencer Dellapinna for the applicant Jason Walsh
Terrance Sheppard for the respondent Teri Musolino

**By the Court:**

[1] This application has been preceded by two interim hearings: one contested resulting in an order dated July 30, 2008 and one resulting in a consent order dated April 1, 2009.

[2] This hearing involves a motion for contempt filed August 25, 2010 and a subsequently filed application to vary dated October 21, 2010.

[3] The application to vary relates to custody and parenting time, retroactive and prospective child support.

## REMEDIES SOUGHT

[4] *Primarily*, the father seeks the return of his three-year-old daughter to the Halifax Regional Municipality area (hereinafter "HRM"). He alleges the mother moved without his consent and contrary to court order.

[5] *Alternatively*, the father is seeking a shared parenting arrangement or primary care. The father lives in the HRM and is employed with the Canadian Forces.

[6] The mother seeks to retain primary care with specified access and wishes to continue to live in Clarenceville, Nova Scotia, near Bridgetown. She seeks an adjustment to child support.

### Precipitating events

[7] The father returned from Afghanistan in the early morning hours of May 28, 2010.

[8] On June 4, 2010, the mother first advised the father of her intent to move. In late June or early July 2010, the mother moved herself and her two children approximately two hours from HRM to Clarenceville, Nova Scotia.

[9] This has significantly interfered with the father’s ability to exercise his weekday access, thereby minimizing his time with his child.

[10] The order requires the mother to obtain the consent of the father or the court. The mother indicates she believed she had the father's consent. The father denies he gave consent.

**Previous urgent interim hearing July 28, 2008**

[11] Concerned that the mother would leave the jurisdiction in his absence, on July 23, 2008 the father began an interim application for an order under the *Maintenance and Custody Act* seeking to restrict the mother from moving the child outside of the HRM.

[12] He sought interim access as he was about to deploy for training.

[13] Before filing the application, he had not been able to obtain the mother's consent for overnight access. Between the time of this application and the interim urgent hearing, the mother had allowed some visitation.

[14] The mother filed a response on July 25, 2008. She sought interim sole custody, interim specified access, interim child support and the right to change the child's last name to her own last name.

[15] An emergency hearing resulted in a court order dated July 30, 2008. This order imposed the following findings and conditions:

> The applicant earned an annual income of $71,000.00. He was ordered to pay $616.00 per month for child support, maintain the child on his medical/dental and drug coverage and provide annual disclosure.
>
> The mother was prohibited from changing the child's primary residence without a court order.
>
> Her request to change the child's last name from her birth certificate to the mother's name was denied.

[16] All other matters were deferred for an interim hearing.

**Second Order - April 2009**

[17] A consent order on April 1, 2009 resolved the remaining issues.

The child was placed in the joint custody of both parents with primary care with the mother; the father's parenting time was to be every second weekend from Friday at 4:00 p.m. until Sunday at 4:00 p.m. and every second Wednesday and Thursday from 4:00 p.m. to 7:00 a.m. the following morning. Weekday access was to be held immediately before the mother's weekend with the child.

The father was responsible for pick up and drop offs and was responsible on his overnight weekday access to deliver the child to the babysitter the next morning before work.

When the father was deployed for a period greater than six weeks, on his return, transitional access was to occur with the first two hours of his first visit with his child to take place in the presence of the mother.

If there was an interruption of six weeks or more, the father was not to exercise overnight on the first visit.

Alternate Christmases were ordered.

The usual terms with respect to Father's Day, Mother's Day and the child's birthday.

During the summer, the father was to exercise access in two block periods, each of seven days, both commencing on the Friday of his weekend and ending on the following Thursday.

Due to the child's age, the child was to be kept in contact with the mother on each day and if the child requested to go home, the father was to bring her back to the mother. The parties were to confirm block access one month in advance.

The parties had the authority to travel outside of the province with the child once written notice was given to either party, three weeks in advance. Until the child was three years old, the father was not to travel further than Newfoundland where his extended family resides.

The usual financial disclosure clause was included.

Again, in this order by consent, the mother was not to change the primary residence of the child outside of the HRM without the consent of the father or a court order.

[18] By consent variation order on December 10, 2010 the parties acknowledged there was no longer any need for payment of any special or extraordinary expenses by way of child care. The parties reserved the right to address potential maintenance arrears and overpayment of section 7 expenses.

[19] Child support was varied to $779.00 per month retroactive to November 1, 2010.

**Procedural matters - Two Affidavits Withdrawn by Court Direction**

The Affidavit of Wendi Graham

[20] The affidavit of Wendi Irene Joanne Graham was filed with this court on May 27, 2011; well after the deadline. It was filed in response to a clause in the father's affidavit referring to his belief that the mother "constantly states to ( her older child) that she could be dead at any time." This was apparently placed in the affidavit to challenge the parenting judgement of the mother.

[21] The responding affidavit of Wendi Graham was filed to provide contrary evidence from a friend who has been close to the mother and had the opportunity to see how the mother has dealt with her oldest child's heart difficulties over the course of her lengthy knowledge of the mother.

[22] The affidavit included seventeen other paragraphs in support of and as a character witness for the mother. This could have been provided by this witness in accordance with the deadlines directed by the court.

[23] Due to the late filing of the affidavit, I have disallowed all paragraphs except paragraph 16. That is allowed to address any notion that the mother has inadequately cared for her oldest child who is not the subject of this proceeding.

[24] The remainder is irrelevant to this proceeding. I place no weight on this evidence or the evidence that triggered the response.

The Affidavit of Jill Webb

[25] The affidavit of Jill Webb was withdrawn. This witness could not be located despite the diligent efforts of counsel and was thus unavailable for cross examination.

**Relationship History**

[26] The mother has been employed as a personal care worker for 13 years largely and lately in the HRM.

[27] The father is a Captain employed in the Canadian Armed Forces, currently posted to a ship. He has been a member for 13 years.

[28] The parties met online in January 2007 and in person in April 2007. They had a very short-lived "relationship" fraught with conflict. They did not cohabit.

The Father's Deployment Schedule

Pre child's Birth

[29] In November 2007, the father was posted at sea for five weeks. He returned to port in January 2008 after spending Christmas with his parents. He returned to sea the second week of January when in February he was contacted by the mother who believed she was about to give birth prematurely. He was flown from Norfolk, Virginia, to be there for the birth.

Post Birth

[30] The birth did not occur until March 13, 2008, by C-section. The father was present for the C-section and a second night and returned to his post thereafter.

[31] Since March 13, 2008, the father has been deployed for a considerable period of time. In May 2008, he had two one-week trips at sea; in August 2008 two months after which he returned in October. In January of 2009 he was deployed for nine months for training in Manitoba and thereafter deployed to Afghanistan.

[32] The father returned from Afghanistan on May 28, 2010 in the early morning hours. He has been at sea for a significant period of this child's early life.

[33] In November of 2010 he was away for approximately thirty days and March 21 to April 29, 2011 he was away for approximately five weeks. His ship is currently at sea now for a three-week period, although he has obtained special permission to appear for the purposes of this proceeding.

[34] The father has been informed that he will be flying to St. John's immediately after this proceeding is completed and he will be leaving from August 4 to October 15, 2011, after which time he will be back to Halifax where his ship is to be in port for one year. He does not keep the mother informed of his schedule.

[35] The child of this relationship was born on March 13, 2008. She is now three years and four months old. Her six-year-old sister is the mother's child from another relationship. The older sister has had serious medical needs requiring two heart surgeries and one more to come.

[36] In July 2008 it took the threat of a court order for the father to obtain overnight access to his child before he deployed. In the fall 2008 he went to Haiti for six months.

[37] The father has been home on March 19 to 24; May 21 to 25; July 5 to August 3; and September 11 to October 19. On each of these occasions he tried to have as much contact with his daughter as allowed. He took his daughter to Newfoundland during extended periods of leave during July and September 2009 (para. 15 of Ex. #4). He had the child in his care for Christmas access on December 26, 2010 (para. 69 of Ex. #4).

[38] Although physically away for a considerable period of time, the father has voluntarily and consistently provided financial support from the birth of his child forward. The parties initially agreed that he would pay child support at $500.00 per month and he immediately began voluntary allotments.

[39] When in port, the father is able to care for the children overnight and has taken his daughter to Newfoundland on at least three occasions to visit with his family. The child no longer needs to overcome any strangeness associated with his absence for duty.

[40] While in Afghanistan, the father had contact with his daughter by Skype and telephone.

[41] Obviously the mother did not have had serious concerns about the father's ability to care for these young children. At the initial hearing, the mother insisted that he take both children when he visited his child.

[42] The mother raised minor issues regarding the father's supervision of two young children. On one occasion he left the older child sitting at a table in a restaurant when he took his daughter to the bathroom. The waitress at the restaurant, a friend of the mother, promptly called the mother to report this incident. The second incident also occurred in a restaurant. He had both children in the washroom; the oldest became impatient at the length of time the youngest was taking and the father gave in to her request to go and play in the children's corner.

[43] These are certainly not recommended practices but they are clearly related to inexperience rather than neglect.

[44] The mother also advises that the father has been generous in providing financial support to her on an ongoing basis. When she advised him in January of 2010 she was taking a medical leave as a result of instructions from her physician, the father offered to continue to pay for child care as he wanted to sustain his child's standard of living.

[45] The mother also advises that the father offered to provide additional funds but that she refused these funds. He denies this.

[46] On one recent occasion, during the winter, the mother told the father that she was storm stuck in Clarenceville. He drove to her new location, shovelled her driveway and picked up the children himself.

Father's Future Career

[47] The father's career plans now hinge on what decision he makes as the result of this hearing and in part whether he will continue his upward climb. To advance

to the next rank of Lieutenant Commander, he would need six months' training and another one year to 18 months posted on a different ship in order to qualify.

[48] The father was initially of the belief that he would fulfill his at-sea requirements within the early years of his child's life in order to put him in a place where he could be in attendance as she grew older.

[49] Thus, in these significant early years of the child's life, while the father has not been a constant presence, he has been financially supportive in his child's life.

[50] While the father questions some of the mother's actions, he does not take issue with the fact that she has been the primary parent and is competent at caring for their child.

[51] The mother describes the father as an "awesome father" very connected to his daughter and her to him.

The Mother’s Medical Leave

[52] In 2010 the mother worked evenings at a senior citizen's residence. This allowed her to be with the children during the day.

[53] The mother had difficulty with babysitters and on occasion had to absent herself from work when the hired babysitter had difficulty managing her oldest child’s health issues. She took stress leave starting February 2, 2010 and eventually quit her job.

[54] In February 2, 2010, the mother commenced 15 weeks' medical leave. She and her doctor confirmed the stress was due to the circumstances in her life, due to the demands of her job, difficulties getting appropriate babysitters, her oldest daughter's health and her need to be onsite when trouble occurs. There were obvious stresses relating to being a single parent.

[55] One month later, by March 2010, the doctor reported the mother experienced improved mood, improved energy and enhanced motivation. The mother felt this was due to leaving work.

[56] In June 2010, the mother officially left her work. She remained unemployed and living in the HRM.

[57] In August 2010, the doctor observed the mother was in full remission and did not see her again until October 2010 when the mother contacted her respecting this report for court. Certainly at least by March 2010, the doctor concluded the mother was doing quite well.

[58] The mother remained out of work until she applied for funding to take a course and prepare a business plan to use her personal care worker skills by offering assistance to clients in Annapolis Valley and Halifax. She admits she is employable almost anywhere in Nova Scotia.

[59] Her doctor referred the mother to a psychiatrist in the same clinic in Halifax where she was treated for stress. She continued to live in her Halifax apartment while on sick leave up until June 2011.

[60] When sick benefits were exhausted, the mother went on EI benefits. She never returned to her work site.

[61] Her doctor reports by letter dated April 26, 2011 that she saw the mother on eight occasions since February 13, 2010. She determined the most accurate diagnosis was adjustment disorder with depressed mood. There were also family of origin difficulties.

[62] There was never any mention that the father was the cause of this stress.

**Events Precipitating the Crises**

[63] The father was scheduled to return home in the afternoon of **May 27, 2010**.

[64] The parents had arranged to meet at the airport. They both agreed both children would attend the airport to greet the father.

[65] Delays occurred. The father called the mother from Toronto in the afternoon to advise of further delays for an arrival time of 1:30 a.m. May 28th. His return to Canada turned into a 40-hour trip.

[66] The father testified he informed the mother this was too late at night to have the children come out to greet him. He says she insisted on having the children there on his arrival. She says he insisted on having them there.

[67] On arrival his daughter ran to him. He gave the girls presents he had bought for them. The immediate reunion was very positive.

[68] The father made previous arrangements to have his friend pick him up at the airport. The mother learned of this while talking to his friend at the airport.

[69] The mother wanted the father to spend more time to come home with her and the children. It became apparent he did not intend to go home with the mother.

[70] The father testified the mother became very agitated, stopped the reunion and left the airport visibly distressed. He watched as she drove erratically, repeatedly called him on his friend's cell phone, screaming at him. She called three times to express her anger "for and on behalf of the children."

[71] The children were upset. The father believes it was the mother's behaviour that terminated the reunion and upset the children. The mother believes it was when the airport reunion ended abruptly because of the father's previous plans to leave for his friend's home.

[72] The mother acknowledges the father promised to call by 11:00 the next morning. He actually called at 5:30 p.m., having slept through the morning.

[73] When the father awoke and called, he was unable to reach the mother to arrange for a meeting. She testified she tired of waiting and trying to placate their three-year-old daughter, left the residence, becoming unavailable for calls.

[74] The father advises he did not see his daughter until the following day, May 29th, when he was permitted to have an overnight with her. He was allowed another visit from June 2 to June 3.

[75] Later that week, the father planned a trip to Newfoundland to reunite with his family. He asked for permission to take his daughter to visit with his parents

and family. He testified the mother refused him permission until the day before, making the purchase of a ticket for her impossible.

[76] The mother advises she asked him to take their child to Newfoundland with him and he refused.

[77] The father left for Newfoundland without his daughter. He later scheduled another trip to Newfoundland July 7 to 15, 2010. Scheduling did not go smoothly but it eventually was confirmed.

**The Move - June 2010**

[78] The mother testified she simply came to a decision in June 2010 that she was fed up with life in Halifax, fed up with her apartment and her landlord and could not continue to live in Halifax. She decided in early June 2010 to move and immediately began an online search for homes.

[79] The mother found a house online in Clarenceville, near Bridgetown, approximately two hours from Halifax in rural Nova Scotia. It was her dream home and affordable. She went to see the home and on the spot paid a deposit to retain the home on a rent-to-own basis.

[80] On June 4, 2010 during his reunification with his family while in Newfoundland, the father called his daughter in Halifax. During this supper-time conversation, the mother advised the father she was moving to Clarenceville. She testified she asked his permission and she asserts he reluctantly gave her permission to move.

[81] By the time this phone call was made on June 4, 2010, the mother had already contracted with the owner of the home and paid the deposit to rent in order to buy this home. As it relates to the mother, the move was a done deal before the call between the mother and father.

[82] The father denies he gave consent. He believes this move was a direct breach of court order. He returned from Newfoundland, retained counsel on July 22, 2010 and made a Motion for Contempt August 25, 2010 and subsequently filed an application to vary.

[83] The father bought a home in the HRM in August of 2010.

**Current issues**

[84] The father's recurrent difficulty arises out of the significant unpredictable conflict he continues to experience with the mother. This impedes his ability to have structured time with his child when he is available and physically present in Halifax.

[85] The father's time to be present with his child is limited by his employment. It is further limited by the unpredictability, and in a sense rigidity, in negotiating block parenting time or time not prescribed by the order. When coupled with the volatility of his relationship with the mother, his contact is effectively sabotaged.

[86] At the first interim hearing the learned trial judge questioned the mother's ability to be consistently flexible. She noted that the mother tended to display an attitude that she would allow access/parenting time at her will. However, if there was disagreement it was, in the words of the court . . . "her way or the highway."

**THE LAW**

[87] The legal issues include:

- whether there has been a material change in circumstances under Federal and Provincial legislation.
- whether there was consent to the move or whether it was in breach of a court order.
- if a breach what test and factors are to be considered when evaluating the evidence.
- residential restrictions.
- unilateral action and self-help remedies.
- remedy for breach.

[88] In addressing the application to vary, I am mindful of the law as summarized by McLachlin, J. in **Gordon v. Goertz**, 134 D.L.R. (4th) 321 (S.C.C.) starting at para 47:

> 47 For these reasons, I would reject the submission that there should be a presumption in favour of the custodial parent in applications to vary custody and access resulting from relocation of the custodial parent. The parent seeking the change bears the initial burden of demonstrating a material change of

circumstances. Once that burden has been discharged, the judge must embark on a fresh inquiry in light of the change and all other relevant factors to determine the best interests of the child. There is neither need nor place to begin this inquiry with a general rule that one of the parties will be unsuccessful if he or she fails to satisfy a specified burden of proof.

48 While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

C. Summary:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

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

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

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

> **(a) the existing custody arrangement and relationship between the child and the custodial parent;**
> **(b) the existing access arrangement and the relationship between the child and the access parent;**
> **(c) the desirability of maximizing contact between the child and both parents;**

> (d) the views of the child;
> **(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;**
> **(f) disruption to the child of a change in custody;**
> **(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.**

[89] I have highlighted those considerations relevant to this proceeding.

[90] In **Young v. Young, 1993 CanLII 34**, McLachlin, J. summarized the law relating to best interests. In considering what test is to be applied, she said as follows:

> 8 The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), provides that a court shall abide by the following matters in deciding questions of custody and access.
>
> 16 (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.
>
> ...
>
> (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. [Emphasis added.]**
>
> **The Wording of the Act**
>
> Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.
>
> **First, the "best interests of the child" test is the only test**. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. **This means that parental preferences and "rights" play no role.**

> Second, **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. Rather, it has been left to the judge to decide what is in the "best interests of the child," by reference to the **"condition, means, needs and other circumstances"** of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests**, it 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.

[91] In discussing the relevance and value to be attributed to the child's connection to both parents, she noted:

> Third, s. 16(10) provides that in making an order, 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." This is significant**. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. **By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized**. The modifying phrase **"as is consistent with the best interests of the child**" means that the goal of maximum contact of each parent with the child is not absolute. **To the extent that contact conflicts with the best interests of the child, it may be restricted.** But ***only*** to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access: Michael Rutter, *Maternal Deprivation Reassessed* (1981), Benians, "Preserving Parental Contact," in *Fostering Parental Contact* (1982).
>
> Wood J.A., in the Court of Appeal, put the matter as follows at p. 93:
>
> > It seems to me that at the very least, by enacting this subsection [s. 16(10) of the *Divorce Act*], Parliament intended to facilitate a meaningful, as well as a continuing, post-divorce relationship between the children of the marriage and the access parent.
> >
> > Without limiting the generality of the adjective "meaningful," such a relationship would surely include **the opportunity on the part of the child to know that parent well and to enjoy the benefit of those attributes of parenthood which such person has to share.**

> **It most cases that would clearly be in the best interests of the child, and the best interests of the child, not parental rights, are the focus of the whole of s. 16 of the *Act.***

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 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.**

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.**

I conclude that ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child...

## Federal and Provincial Authority

[92] The authority for imposing conditions and restrictions on custody orders is found in Section 16 of the *Divorce Act* (R.S.C., 1985, c. 3 (2nd Supp.)). Section 16(6) provides for the following:

> (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**.

[93] Additionally, section 16(7) states as follows:

> (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

[94] In **Blois v. Blois** (1988), 83 N.S.R. (2d) 328, 1988 Carswell NS 42, the Court of Appeal held that s. 18(2) of the *Family Maintenance Act* (now the *Maintenance and Custody Act* R. S. N. S., 1989, c. 160) conferred upon judges of the Family Court jurisdiction to impose residence ***requirements*** on a custody order. According to Section 18(2):

> (2) The court may, on the application of a parent or guardian or other person with leave of the court, 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.

[95] Jones, J.A. writing for the Court of Appeal gave section 18(2) a broad interpretation:

> Dealing with the first question I am satisfied that s. 18(2) of the *Family Maintenance Act* empowers the Family Court to impose conditions in custody orders including ***residence requirements***. I see no need to give that provision a narrow interpretation. Section 18(5) provides that in any custody proceeding the court must apply the principle that the welfare of the child is the paramount consideration. Accordingly if it is necessary to impose conditions on custody orders for the welfare of the child that is the test.

[96] It was noted in **Reeves v. Reeves**, 2010 NSCA 35, that the court in **Blois** chose to use the term "residence requirements," which invites a broader interpretation than the term "residence restrictions."

[97] "Residence requirements" encompass not only conditions that prohibit a custodial parent from moving the child out of a certain geographical area but also conditions that require a custodial parent to move to a particular geographical area.

**Case Law and Mobility Restrictions Generally**

[98] The authority of the court to impose such a restriction or the appropriateness of such a restriction is not seriously challenged in the case law. (**Card v. Card** (1984), 43 RFL (2nd) 74 Clarke, J., up to and including **Reeves**.)

[99] Mobility restrictions are imposed for a variety of reasons when it is found to be in the best interests of the child(ren).

[100] The 2010 decision in **Reeves** does not change the court's approach for determining the appropriateness of a proposed move by a custodial parent under the *Divorce Act* or **Gordon v. Goertz**, 1996 CanLII 191.

[101] With the increasing mobility of Canadian families, non removal clauses have become fashionable in separation agreements and court orders regulating the custody of and access to children.

[102] They are particularly found in situations of joint custody or where the access of a very involved, non custodial parent would likely be significantly impacted by a future move. The court must consider the desirability of maximizing contact between the child and both parents.

[103] In **Cameron v. Cameron**, 2006 NSCA 76, the court upheld a joint custody order conditioning shared custody on the mother not moving from Pictou County because the foundation of the joint custody order - maximum contact - remained valid despite the need to adjust the day-to-day care arrangement.

[104] The mother herein relies on the language in **Reeves** that suggests that the court's directions regarding mobility is "highly unusual and should only be used in rare circumstances." The language appears in the opinion in the following context:

> ...Under this rationale, [referring to the best interests of the child being the only relevant consideration] and as noted above, if the trial judge finds that restricting the geographical area in which a child may live is in the best interests of the child, that restriction is appropriate.
>
> Although a condition requiring the custodial parent, as a condition of granting custody - such as the one issued in this case - is highly unusual and should only be used in rare circumstances; there is no restriction on a trial judge's jurisdiction to grant the order in the best interests of the children. (Emphasis mine)

[105] In **MacRae v. Hubley,** 2011 NSCA 25 it was argued that the lower court judge erred in finding that he had no jurisdiction to require the mother to move back to the Halifax area as a condition of granting her primary care of the children. The court dismissed this ground noting that the trial judge, having accepted that the mother's plan to have primary care of the children was in their best interests, was not required to go further and create a plan imposing the rare and unusual condition of requiring the mother to relocate to a particular community in order to continue to have primary care of the children. The judge distinguished the case as follows:

> In Reeves, *supra*, the trial judge rejected the custody plans of both parents as not being in the best interests of the children. He then crafted a custody order imposing restrictions on where the mother who had to relocate anyway because of the severe financial circumstances of the parties, could live if she wanted custody of the children. It was not necessary for the judge in this case to take that additional step as he was satisfied that the mother's plan to have primary care of the children in Glace Bay was in their best interests.

[106] The case at hand contains a typical "non removal clause" restriction which *prevents a parent from moving the child(ren)* from a geographic area as part of a custody order rather than *requiring the parent to move* to a specified geographic area as a condition of granting custody.

[107] The relocation ordered in **Reeves** is a precondition to the granting of custody.

[108] The order at hand is first and foremost a consent order within which an order for custody was first determined by the court, with a mobility restriction imposed

by the court at the interim stage and then adopted by consent of the parties at the final stage.

[109] The judge in **MacRae** reiterated the language in **Reeves** that it is *rare and highly unusual* to impose a condition *requiring the parent to relocate to a particular community* in order to continue having custody.

[110] The trial judge's decision in **Reeves** was unanimously upheld.

**Motivation behind the move**

[111] **Gordon v. Goertz** dictates that a parent's motivation for moving is relevant only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.

[112] It is equally clear that courts have insisted that parents should be discouraged from using self-help and unilaterally removing a child from a jurisdiction against court orders or without the consent of the access parent except in extreme circumstances.

**Self-help**

[113] The court must be concerned about maintaining the integrity of the law and orders of the court.

[114] Procedures are in place to vary existing custody orders and address a custodial parent's need or desire to move and relocate with the children at issue.

[115] Courts tend to discourage surreptitious or hasty moves.

[116] It is hard to envision the courts having any significant influence in these troublesome situations without imposing a consequence to a unilateral removal (i.e., an order requiring the parent to move back). Such must always be done having regard to the primary if not sole consideration of best interests as underscored by the Supreme Court of Canada in **Young.**

[117] The Nova Scotia Court of Appeal considered this issue in **Hjorleifson v. Gooch** (N.S.C.A.), [1986] N.S.J. No. 209, a case involving a surreptitious removal of a child from the father's care.

[118] The court concluded that parents should be discouraged from resorting to self-help and encouraged to use the established channels within the court system to vary existing court orders and approve a proposed move by a parent.

[119] The court noted that the case had a striking factual similarity to the case of Re **T.** (infants), [1968] 3 All E.R. 411, a judgment of the English Court of Appeal and adopted by this Court in **Burgess v. Burgess** (1977), 19 N.S.R. (2d) 689. Harman, L.J., in delivering his reasons for judgment in the English Court of Appeal said at p. 413:

> This court sets itself against these unilateral movements of children which have been far too frequent in the last few years. The right view is that the court should, other things being equal, set its face against such conduct, and I am supported in that by the observations of Willmer, L.J., in Re E. (an infant) [[1967] 2 All E.R. 881 at p. 885; [1967] Ch. 76 at p. 768] where, discussing Cross, J.'s judgment [[1967] 1 All E.R. 329 Ch. 287], he said:
>
> > At the outset of his judgment, after expressing his concern at what he described as the growing tendency, which has recently been apparent, of kidnapping children in this way and removing them from the jurisdiction of a foreign court, the judge proceeded as follows [[1967] 1 All E.R. at p. 330; [1967] Ch. at p. 289]:
> >
> > The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. The substitution of self help for due process of law in this field can only harm the interests of wards generally, and a judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. First of all, I would like to say, by way of comment on that passage, that I wholly agree with, and would wish to support, everything that the judge said about the duty of all courts not to countenance behaviour of the kind there referred to.

## ANALYSIS

### Mobility concerns

[120] The mother contacted the father on one occasion in 2009 and asked for his signature on a passport so she could go to visit her then current boyfriend in Paris and on another occasion she mentioned she would like to visit a boyfriend in Alberta.

[121] The mother, when stressed at the cost of this litigation, recently suggested to the father that she would be forced to live with her then current boyfriend on base in Greenwood. She is now estranged from this boyfriend and they are both charged with assaulting one another. Trial dates have been set.

[122] It appears that when the mother and father are arguing, the mother raises the issue of moving out of province and country.

[123] The father argues the recent move has effectively frustrated his weekday contact. The mother denies it makes his weekday contact difficult. She advises that the drive of two hours each way is not problematic for their child, that winter driving does not concern her and has proposed options to alleviate his concerns.

[124] I conclude the father's mobility concerns are not unreasonable.

**Access concerns**

[125] The father alleges that the mother grants or denies him access depending on whether she is angry with him. Contact with his daughter is a tool used to punish him rather than to promote a father and daughter relationship. The interim application in 2008 is an example of his difficulty establishing parenting times without significant conflict. This state of affairs continues to date.

[126] The mother testified that she never denies him court-ordered contact. She does not admit that the move frustrates his contact. She does admit that both engage in conflict and very abusive conversations. If these conversations do not go well, any voluntary access can be denied.

**Variation Order**

[127] There is a clear change in circumstances in the case before me. The mother has moved; the father's access is significantly impaired. The father is asserting his right to have meaningful contact with his child and has put custody in issue.

[128] This change was clearly not contemplated in the original order.

[129] The court must then consider whether the father consented to the move and, if not, whether the parenting plan inclusive of the move was in the best interests of the child considering all the circumstances identified in legislation and case law on this subject.

**Was there consent?**

[130] The mother suggests she received consent. The father did not know about her intentions and had no input regarding her move to the valley. The June 4th phone call was his first notice. By that time, she had already decided to move, secured the home, negotiated with the landlord and paid a deposit, all likely within the first week of June.

[131] The father had just returned from Afghanistan. He was getting his bearings, reuniting with his family in Newfoundland and with his child. During the first two weeks he was home, the parents had experienced significant conflict negotiating time between the father and his child in the first weeks of his return.

[132] I do not believe the circumstance show that he would, should or could fully put his mind to the consequences of the move to the valley on June 4, 2010.

[133] I have insufficient information on the contents of the dialogue between the parties and no collateral information to satisfy myself on the balance of probabilities that she obtained his consent.

[134] The mother suggests the father said he was not pleased about the move but he did not want to be the "bad guy" and consented.

[135] The father made his position very clear. There was no discussion about this move, he had no input into it and he knew little about the logistics. His consent, if in fact he did reluctantly agree, was not informed or sustained.

[136] I am not satisfied there was informed consent. Further, I am not convinced that the mother truly believed she had voluntary consent.

**The Mother's Reasoning Supporting the Move**

[137] The mother suggests her oldest daughter's medical condition was a part of her motivation for the move.

[138] There is no evidence to support she made this decision to address any particular medical need, nor is there evidence this move addresses this issue. The child's lifelong and current doctor is in Halifax; the mother has not changed this. The IWK is familiar with the child and, while it is a hospital that administers services to all children in Nova Scotia, certainly proximity to this hospital could be considered a positive. I have no evidence to compare the environmental factors between urban and rural life as it relates to the child's health.

[139] The mother testified that she and children have a nicer residence. I have no evidence before me that would allow me to draw that conclusion.

[140] Further I cannot determine how long this residence will last. The mother admits to a series of at least six moves since 2007, trying to find suitable accommodation to address the children and her needs.

[141] In June 2010 she was living in an apartment she considered substandard.

[142] Considering this mother struggles with raising two children with neither father physically present and her oldest child's medical difficulties, it is reasonable to conclude that finding the right residence is not a simple task.

[143] The mother said this was not a permanent move. She intends to move eventually to Mount Uniacke where she finds support as a granddaughter, mother and friend.

[144] The mother is happier.

[145] The mother has a childhood memory of how idyllic life in the valley can be. I have no evidence that would allow me to weigh or compare one to the other or to conclude what she needs cannot be obtained in the HRM where she would, without difficulty, be able to comply with the court order and continue to keep their child in reasonably close proximity with her father when he is not at sea.

[146] The mother's advises her current business plan requires her to remain there. She is in receipt of $1,600 a month until September 2011 to start her business. On line she advertises her services are available in Annapolis and Halifax. She testified she could find a job anywhere.

[147] There is no evidence to suggest she is unable to move if she intends to provide services to clients in the HRM. Those funds end in September 2011. There is no guarantee that she will be able to sustain herself financially as a self-employed personal care worker.

[148] Her financial stability was lost when she became unemployed. She does advise, however, that she is employable almost anywhere.

[149] After all testimony was in, significant questions arose about the viability of this move and how this move could address the child best interests.

[150] If living in Halifax was a burden to her as a single parent and her apartment was unliveable, why not move to Mount Uniacke where she spends many if not most of her weekends?

[151] The mother testified that this is the place she will ultimately reside once her 75-year-old grandmother needs her to remain living in the home.

[152] Her grandmother lives alone in her own home. The mother says they have talked about adding an in-law suite in the future where she can live in the home and care for her grandmother. When she is not visiting her grandmother on weekends, she advises her grandmother is visiting her.

[153] Every weekend she takes the children to church in Mount Uniacke. There is usually a family gathering there every weekend. Her established support network and the friends she relies on in this proceeding live in Halifax, Mount Uniacke and Timberlea.

[154] Since the balance of her family reside in the HRM, why not other options in Halifax?

[155] The only reason the mother offered was she found her dream home. However, she previously testified due to her financial circumstances she may have

to move in with her then current boyfriend, which would result in leaving this home.

[156] The father will consent to a move to Mount Uniacke because it makes continuing his contact possible. The HRM and Mount Uniacke would be a location where he could exercise his parenting time while in port and give the mother some flexibility in mobility which would keep her connected to her support system. However, he believes the move to the valley is an attempt to sabotage his contact.

**CONCLUSION ON MOBILITY**

[157] The evidence supports this move as an impulsive act. The mother went online, found a spot two hours away, liked what she saw and decided to move, without much if anything by the way of forethought. Once there, she settled for at least the year.

[158] Considering the totality of the evidence, the most probable reason for the move was that the mother was incensed at the father's refusal to return with her and the children to her home. This latest episode of conflict triggered retaliation to make contact between the father and child more difficult for the father. This is troubling because these parties never lived together and the mother acknowledged the importance of the father in the child’s life.

[159] It is likely that the father's return to Halifax from Afghanistan and his demands to be more significantly involved with his child were an underlying consideration.

[160] There was no evidence of forethought or reflection on the child’s best interests. It was not for legitimate work purposes. Her current location will likely make commuting to find work more difficult.

[161] According to her doctor’s letter, the stress in the mother's life was addressed well before the move while she continued to live by choice in Halifax.

[162] This move has many disadvantages for this single parent who was initially without transportation and somewhat isolated. She now has transportation that is not always reliable.

[163] The mother is not around family or her historical friends, nor her doctor, nor the children's doctor. She has been snowed in during the winter and, by her own admission to the father, isolated.

[164] The mother attends a medical clinic in the HRM and has continued with the same doctor since her youth. She credits this doctor with the early detection of her oldest child's illness. Both children and she continue with this doctor.

[165] The father of her first child pays support and bought her a car recently. The father here also pays support regularly. To the extent she is able, the balance must come from the mother.

[166] While it is important to support the mother's efforts to be self-sufficient, the child's needs come first.

[167] I am not convinced by the mother testimony that this is indeed as rosy a picture as she paints. I have insufficient evidence from her to conclude this move addresses her needs at all.

[168] If the mother removes herself from her principle support systems and cannot address the best interests of the child, then the move cannot be said to be in the best interests of the child.

**OTHER CONCERNS**

[169] I am conscious of the fact that this is a joint custody order with all the rights and responsibilities that envisions.

[170] If the father becomes less involved due to travel, employment and conflict with the mother, this leaves the children with one parent with almost unfettered discretion.

[171] There is evidence that caused me to conclude that the child's best interests are better served having two parents making the decisions regarding her welfare rather than one parent with unfettered discretion.

[172] The mother admits past difficulties with babysitters. There are also concerns related to her choice of partners.

[173] The applicant herself has indicated that she has had bad luck with babysitters. The first babysitter in the Halifax area was caught smoking around her older child who has a heart condition. The second, while the father was in Manitoba training, was caught sleeping while the children were playing around her. The third bit the youngest child as a form of discipline.

[174] I have no doubt, given that she has night shifts, that the mother was struggling as a single parent. She has one medically challenged child and another infant. She suffered from stress such that she required respite from her job in Halifax. Whether that reasonably resulted in the current move to Clarenceville is questionable.

[175] I am also concerned about the mother's judgement about choice of partners with whom the children are exposed.

[176] The mother is currently estranged from the boyfriend she dated while in the valley. They are mutually charged with assault as a result of an altercation between them. The mother alleges the boyfriend had her pinned to the floor and was assaulting her. She testified that she responded in self-defence and is currently also facing assault charges. She is under an undertaking not to leave the jurisdiction and to refrain from the use of alcohol pending trial. This matter has not yet been resolved before the court.

[177] The father warned the mother that her then current boyfriend had a reputation of violence against women. She questioned the father's opinion and continued in this relationship. Shortly thereafter, the physical altercation took place. She denies alcohol use and I have no evidence on this point.

[178] The mother admits that when they were having difficulties, her boyfriend wanted to start trouble between her and the father. He sent the father a most disturbing sexually explicit email with the intention of leading the father to believe it was the mother writing to him about a sadomasochistic sexual encounter she had with another high-ranking military officer.

[179] The mother admits the email originated from her address and acknowledges it was sent by her boyfriend. While she may have no control over the actions of another person, the question remains relevant how and to what extent this boyfriend was exposed to the children. Clearly, this evidences a serious lack of judgement.

[180] Not only was there violence in that relationship, the mother admitted violence against the applicant father in their brief relationship.

**Birth Certificate**

[181] When the mother left work, she no longer had access to a medical plan for either child. The July 30, 2008 order gave directions regarding this and again in April 1, 2009. Neither parent followed up on this. In January 2010, the mother no longer had coverage for her daughter.

[182] In August 2010, the father asked the mother for the child's birth certificate in order to have the child registered on his medical plan in compliance with the original order.

[183] The mother refused to give him the certificate suggesting he apply for one himself. Until shortly before the proceedings, the certificate had not been provided and the child remained without coverage.

[184] The father made no independent inquiries to obtain a birth certificate.

**Exchange of residential information**

[185] Both parents were slow to advise the other of their actual change of residence with particulars as to location and number. The father ultimately learned of the mother's new location when he drove there to see his child.

[186] The father bought a house in August and he asked the mother for an extra night in order for the child to have a sleep over with him. He promised to return her by the next day at 9:30 a.m..

[187] The father did not advise the mother where he lived and he did not return the children until 12:30 the next day. He failed to contact the mother to indicate that he would be late.

[188] When the mother called, the father would not reply to her as to his whereabouts for fear that the police would attend at his home. He subsequently provided the address through his counsel.

[189] Keeping each other informed of the location of the children, ensuring that phone calls are answered and that communication is open is an essential ingredient to a mature and responsible parental role.

**Abusive communication**

[190] Each parent presents as a capable, caring parent in relation to their child. By self-report and unchallenged evidence, both have appeared to have achieved some success through hard work and commitment.

[191] It is hard to believe these are the same people when engaged in conflict with each other. The verbal and written exchanges between the two parents is disturbing.

[192] **Each** engaged in sexually explicit written and verbal language clearly intended to demean the other and further escalate their hostility toward each other. Their verbal conduct toward each other could only be described as vicious. One behaves no better than the other.

[193] This is in stark contrast to the image they portrayed as a mother, a personal care worker responsible for caring for elderly and a father responsible to his family and dedicated as he is to his country.

[194] The text messages are by virtue of their nature, abrupt, curt and limited. Many misunderstandings arise between these two individuals. Interpretations are given to messages that start fires, create conflict and facilitate misunderstandings,

all of which occur on a regular basis and all of which trickle down to the children and, in particular, their child who has to be a frequent witness to these eruptions and emotional war games.

**The Father**

[195] The father's decision to absent himself initially and intensely for the first five years of the child's life is a career decision that has had consequences to the child. That is not to say it cannot be overcome, but it has put him in a position where his involvement in the very important first five years is minimal. He may have had no control over his assignment to Afghanistan, but there are other ways in which his absence could have been addressed. However, this requires the willing participation of the mother.

[196] The difficult relationship between the mother and the father compounds the difficulty his employment requirements presents to his contact with his child further limiting his ability to maintain a connection.

[197] The father has failed to inform the mother on a timely basis of his future deployments in order to allow her to plan in advance.

[198] On two of the earlier occasions the father took the child to Newfoundland, when the child was four months old and later at seventeen months old, the parents had difficulties communicating. He advises that he was unaware that the mother was trying to contact him while in Newfoundland. For the first two days they were at a cottage without cell phone coverage; thereafter, he called twice to allow the child to talk to the mother. The mother’s ability to contact her child was frustrated.

[199] In spite of the fact that the court order directed that he take responsibility, he did not do so and when asked he indicated, "If I saw that it would make her lonesome I did not do it as I did not see any need to do it."

**Failure to file financial information**

[200] The parties were given a schedule for filing which was contained in the Pre-Trial Memorandum. The father was to provide his updated financial information on a timely basis in accordance with the directions.

[201] The father had difficulty filing the documentation, although he did file two affidavits, albeit slightly late. Some of the difficulty arises from the fact that he is offshore.

[202] It is difficult to understand why he could not make arrangements for his financial information and his pay stubs to be sent to his lawyer in order to comply with the court direction.

[203] Neither the parties nor the court was aware of the father's financial circumstances until he filed his income tax information on Tuesday, two days before the hearing. The day before the hearing he filed his pay stubs.

**Access Following the Move**

[204] The parents do not agree on the reasons weekday access has not flowed smoothly since the move. The mother blames the father; the father blames the move.

[205] The mother advises she frequently meets the father in Mount Uniacke where she visits family and friends and where they transfer the child.

[206] The mother outlined times when she has facilitated, cooperated and modified visitation arrangements to suit the father's requests/demands.

[207] Despite the mother’s protestations, there is no doubt that this four-hour return trip simply for transportation in winter conditions is difficult, if not prohibitive, for the father, if he is to sustain his ongoing weekday involvement with the children.

[208] On one occasion, the mother did advise the father she was snowed in and had no transportation. The father came to her home, cleared her driveway and got the child, apparently with no difficulty.

**Conflict**

[209] The father and mother do not appear to take seriously their duty to abide by court orders. They need to gain insight, education, information and abide by court orders.

[210] If one continues to be verbally abusive, demeaning and sexually explicit in their conversation with the other, progress will be limited.

**Does the father have legitimate concerns about mobility and the mother's judgement?**

[211] The *de facto* situation for the last three years demands that one recognize that the mother was required and did exercise all of the functions of primary, almost sole parent. She absorbed the day-to-day responsibilities and the long-term decisions.

[212] By virtue of the father's absence, albeit for his job, and recognizing and crediting him for maintaining his financial contributions, he had been largely absent. That is not to diminish the importance of his child’s connection to him and her need to be connected to him. The relationship between the two is invaluable and must be encouraged, maintained, enhanced and supported.

[213] As the evidence unfolded, it is clear that the father has legitimate concerns about the mother's judgement, both in selecting babysitters, in selecting partners for herself and in decision making.

[214] The father's concerns about mobility are validated by the fact that the mother's moves tend to reflect and meet her own needs, primarily, and as they relate to her current partners or associates. This move in particular was impulsive.

[215] While the current move to Clarenceville may appear to be, by the mother’s report, significantly better for the children, there is no evidence that allows me to conclude this and no guarantee that this will be the resting place for the mother and the children for any significant period of time. Effectively she has moved away from her primary support network.

[216] Indeed, her evidence suggests that at some point in time within the next five years, she will find herself in Mount Uniacke where she will have the extended

support of her family, her friends and possibly even a secure residence that will give to her everything that she has in Bridgetown.

[217] The real question relates to whether the mother should be forced to return to Halifax with the child.

[218] In the event the court does not believe the father consented, the mother argues that **Reeves** limits the court's authority to require a parent to "move back" to a jurisdiction to "rare and unusual circumstances".

[219] Both parties reference **Reeves** to support their positions.

[220] The trial judge in **Reeves** decided that the mother had to move from her Porter's Lake community to either Bedford, Eastern Passage, Cole Harbour or Dartmouth as a condition of granting her custody of the children.

[221] The restriction required the mother to relocate in order to be on a bus route. This would help relieve financial hardship on both parties, facilitate access by the father and aid the mother in reentering the workforce.

[222] The father's counsel relied on paragraph 36 of **Reeves** where in Farrar, J.A. states:

> In balancing those interests, both the **Act** and the jurisprudence state that the only relevant consideration is the best interests of the child in all the circumstances. All other factors are relevant only to the extent that they have a place in the best interests of the child analysis. Under this rationale, and as noted above, if the trial judge finds that restricting the geographical area in which a child may live is in the best interests of the child, that restriction is appropriate.

[223] However, mother's counsel relies on the wording in paragraph 37 of ***Reeves*** as follows:

> Although a condition requiring the custodial parent, as a condition of granting custody - such as the one issued in this case - is highly unusual and should only be used in rare circumstances; there is no restriction on a trial judge's jurisdiction to grant the order if it is in the best interests of the children.

[224] The Court of Appeal in **Hubley** identified the distinguishing factor when noting that the trial judge in **Reeves** had rejected both parental plans, finding neither in the child's best interest. He then crafted a plan that involved relocation; a relocation that was imminent without judicial interference because the mother was in severe financial circumstances. In the context of where she would move, he limited her choice of locations in order to address the best interests of the child.

[225] In **Hubley**, the trial judge did not have to go that extra step to create a parenting plan inclusive of residence requirements due to the fact that he found the mother plan, including her choice of residence, was in the best interests of the children.

[226] To adopt an interpretation that **Reeves** was intended to limit the authority of the court to restrict mobility only in "highly unusual or rare circumstances" would not accord with the clear instructions of the Supreme Court of Canada.

**CONCLUSION**

[227] I find that the mother did not obtain the consent of the father to this move.

[228] There has been a significant change in circumstances making the current order unworkable.

[229] The best interests of the children are not reflected in the current order with the move. Changing custody at this stage would be premature. Sharing custody until the father is stationed somewhat permanently is not viable. It is certainly a future consideration.

[230] The child herein needs both parents to maximize her possibilities and support network. This child's best interests are best served by maintaining maximum contact with her father and making that possible. Fairly frequent mobility, the abrupt change of their current residential arrangements, removing them from their safety net of support and the mother's control over parenting times all call for securing the father's contact as a financial and developmental support for this child short-term and long-term.

[231] Currently the move is impairing the father's visitation. When one looks at the short and long term best interests of the child, there is little concrete evidence

that this move is beneficial. Not only does it effectively remove the child from workable contact with her father, it removes the mother and the children from their main support systems in Mount Uniacke and Halifax. With the gift of a car of unknown reliability the mother is isolated, distant from the family doctor and all other family supports.

[232] I direct both parents obtain professional intervention to address communication skills and their verbally aggressive and demeaning behaviour toward the other to assist them to better communicate in a civil, appropriate and respectful fashion.

[233] The order prohibits a move without consent or court order. The court must encourage respect for court orders and discourage self help remedies. If the father is removed, the child will not have the benefit of his presence in her life in the short and long-term.

[234] Given the mother's current recent past, her oldest child's medical difficulties and the stress she experienced being a single parent even with the financial assistance of both fathers, it is imperative that the child's connection with her father be not only preserved for future but encouraged.

[235] If this relationship is constantly under the threat of the mother's moves, the child loses one aspect of her safety net and the present ability to build on her relationship with her father to provide her both short and long-term emotional support.

[236] It is understandable that the mother has not shown herself to be self-sufficient or able to maintain herself and the two children without strong financial and emotional support. Maintaining and facilitating the relationship between the child and the father is desirable and necessary.

[237] I am also satisfied that these two parents can learn how to communicate respectfully as they must do in their respective work lives.

[238] I am also satisfied that this move will likely be followed by others because of the mother's isolation, distance from family on whom she relies, financial circumstances, and need to place herself within a reasonable distance of viable employment.

[239] I am mindful of the instructions in **Gordon v. Goertz** against using the mother's reasons for the move to influence a decision. I am also aware that the reasons must only be explored when the court examines the plans in the context of the best interests of the child.

## ORDER

[240] **By September 15, 2011** the mother shall return the child to the HRM area or Mount Uniacke. The alternate (Mount Uniacke) is an option because the father has consented to that location.

[241] In the meantime, until the child is located closer to this area, the mother shall provide the father with equal alternate time to make up for any weekdays missed by the father during his shore leave.

[242] **By August 15, 2011** the mother shall provide the father with details of her move, address, location and phone number as soon as one is available.

## Other Provisions

Block Parenting time

[243] When the father is on shore for periods limited to a month or less, the mother shall facilitate block contact including overnights. Block time at a minimum shall include a combination of at least 2 weekends and at least 6 other day/night combinations.

[244] Given the history as established by the interim court order and the comments of the court in April 2008 and my findings in this proceeding, the mother’s continued failure to facilitate this contact may result in a court taking a closer look at the viability of a shared parenting arrangement should the father be posted to shore.

[245] Likewise, the father shall have unlimited telephone and video link communication with the child while he is away to maintain and enhance the child's opportunities to be in contact with her father.

[246] Should the father be posted to shore, he shall be entitled to a regular schedule of parenting times to include two weekends per month (or equivalent) with at least two weekday evenings, one of which may be adjusted to an overnight if transportation is reasonable.

[247] The father shall also be entitled to share long weekends, snow days and other holidays.

Parental absence

[248] Should either parent be unable to parent for a significant period of time for illness or other reasons, the other parent should have first option to care for their child during this period.

Christmas

[249] While the father is subject to lengthy periods away from home, the Christmas schedule in the consent order of April 1, 2009 shall apply except that if the father is available, the balance of the Christmas holiday shall be shared.

[250] Once the father is posted to shore and a more regular parenting schedule is in effect, alternate Christmas's Eve and Day shall be in effect to allow the child to experience Christmas Eve on alternate years with her father.

Easter

[251] Again, while the father is posted away for lengthy periods of time, he shall be entitled to have their child with him from Easter morning at 8:00 a.m. to Easter Monday at 4:00 p.m.. Once the father is posted ashore, on the years when the mother has Christmas Eve/Day, he shall be entitled to have Easter Eve, and likewise when he has Christmas Eve/Day, the mother shall be entitled to have Easter Eve.

Halloween

[252] The parents shall alternate this special occasion starting in 2011 with the father having their child from noon or after school until work the next day. If the father is unavailable in 2011 he shall have the option of 2012, alternating thereafter.

[253] Father's Day and Mother's Day and the child's birthday shall remain as stated in the interim April order.

Summer/vacation

[254] The parties agreed in the interim order as to a schedule of summer parenting time.

[255] In the year 2011, the father shall advise the mother **by August 1st** if he has vacation time and arrange for two, one-week periods, one of which to accommodate travel which may include 12 days absence from the mother.

[256] In the year 2012, the father may have one two-week period of vacation and he shall advise the mother of his preference **by May 15th**.

[257] Once the father is posted ashore and establishes a more consistent presence in his child's life, he shall be entitled to two, two-week periods, not consecutive unless otherwise agreed by the parties.

[258] As the child ages, the block summertime is expected to change to allow for consecutive summer parenting time.

[259] In 2013, the mother shall have her first choice and she shall advise the father **by May 15th** in writing and thereafter the parents shall alternate years, advising the other by May 15th each year in writing.

[260] Should one parent fail to so advise, the other parent may select and advise in writing. The schedule of choosing remains the same.

Information Exchange

[261] Each party will keep the other informed of their whereabouts, the phone number where they can be reached, the time of departure and return.

[262] Each is to keep the other current as to their phone numbers and addresses.

[263] Each parent shall advise the other of doctor and dental appointments and keep each other current as to the child's state of health.

[264] The parents shall have access to all third-party service providers including but not limited to doctors and educators.

Travel

[265] The parties have agreed on out-of-province travel.

[266] The parties may agree to such other access.

Mobility

[267] The mother shall not remove the child from her geographical residence without written consent or court order once she re-establishes herself in accordance with this court order.

**Child Support**

Child Care Expenses

[268] In January 2010, the mother informed the father she was on sick leave. She did not advise him she did not intend to return to work. Out of concern that his child's daycare would be disrupted, he continued the payments until October 2010 when he learned there were no ongoing child care expenses.

[269] The father claimed a retroactive adjustment and repayment for the eight months of child care expenses he continued to pay after the mother left the workforce.

[270] The mother returned the September cheque leaving $2,000 owing, according to the father's written submissions. The submissions may have over counted by one month, leaving approximately $1,750 owing.

Base Amount (Guideline)

[271] The mother suggests that if the court is inclined to adjust this figure retroactively, she wishes the court to retroactively adjust the child support to reflect the *Canadian Forces Personnel and Police Deduction* of $33,510.61 included in line 150 but deducted on line 244. A retroactive adjustment would equal $1,704.

[272] Essentially these two are a write off.

[273] However, the parties raise the issue as to whether this deduction is to be grossed up and included in income. In fact, it is included in line 150 and simply deducted later making it essentially tax free income.

[274] The Nova Scotia case authority of **Snelgrove v. Snelgrove**, 2011 NSSC 77 discusses the law as we know it in Nova Scotia. While it does not specifically deal with this type of deduction, **Reynolds v. Andrew**, 2008 SKQB 352 reflects the same perspective as it relates to this very sort of deduction.

[275] However, this deduction is time-specific and not necessarily recurring.

[276] The mother argues that the court ought not to consider a retroactive award at all given the little benefit that will accrue to either party. I accept that argument.

[277] However, the mother would like to include that allowance going forward. Having essentially received the benefit of the write off and therefore owing no money on retroactive child support, the mother would have the court include the allowance by using 2010 to make the 2011 July adjustment. I decline to do that.

[278] The parties are before the court and shall effect a recalculation on current incomes reflecting current circumstances including current taxable and non-taxable allowances appropriately grossed up.

[279] If they are unable to do so, once the father **immediately establishes** his current pay by way of written confirmation from his employer together with pay stubs and pay guide (and those from 2011 that reflect any benefits), the matter shall be referred to the Maintenance Enforcement Program for recalculations in accordance with the Regulations.

[280] The father shall provide within **two weeks of this decision** a statement from his employer setting out any and all income earned for the 2011 to date.

[281] The father has also been very reluctant to provide proper and full disclosure as required by the court or on an annual basis.

[282] **Both parties** shall exchange **full and complete copies** of their income tax returns complete with schedules and notices of assessment and reassessment **on or before May 15th** of each year.

[283] Should the father fail to provide this on an annual basis, the mother shall be entitled to her costs of obtaining this disclosure, including any legal fees associated with obtaining annual disclosure.

[284] Finally, I must deal with the contempt application.

[285] The burden of proof in that application has not been met. The discussions between the parties is so hostile that I could not conclude in favor of the applicant and impose a quasi criminal penalty.

[286] My findings in this decision as to motivation are based on conclusions on the totality of the evidence on the balance of probabilities.

[287] Counsel for the father shall draft the order.

Legere Sers, J.