SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: S.B. v. T.O., 2013 NSSC 243

Date: 2013-07-25
Docket: 78461
Registry: Sydney

Between:

S.B.

Petitioner

v.

T. O.

Respondent

Editorial Notice

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

Judge:	The Honourable Justice Kenneth C. Haley
Heard:	July 8th and 9th, 2013, in Sydney, Nova Scotia
Written Decision:	July 25th, 2013
Counsel:	Candee McCarthy for the Applicant Darren Morgan for the Respondent

By the Court:

BACKGROUND

[1] This is the Application of S.B., hereinafter called the "Applicant", who seeks joint custody with primary care and control of her daughter, E., born on August *, 2008. In this Application dated December 1, 2011, the Applicant also seeks child maintenance, including retroactive child maintenance, and s. 7 expenses.

[2] T.O., hereinafter called the "Respondent" opposes the application, and similarly requests joint custody with primary care and control of his daughter, along with a further claim for child maintenance and s. 7 expenses.

[3] The parties were in a relationship for approximately six years which resulted in the birth of their daughter, E. The parties had an older daughter R., who unfortunately passed away due to kidney complications. It would appear that the grief associated with the loss of their first child was a contributing factor to the ultimate breakup of this couple, and the conflict that currently exists between them.

[4] The parties formally separated in early 2010, at which time they agreed upon an ad hoc shared custody arrangement. This arrangement was later changed to better address their respective schedules. The parties then finally agreed to an Interim Consent Order issued by this Court May 30, 2013 as follows:

> This proceeding came before the court on March 25, 2013 by motion of the Applicant by which she requested an interim custody arrangement pending the final hearing of this matter.
>
> Whereas the parties are in agreement regarding a shared custody arrangement as set out herein;

Whereas the parties have agreed to this shared custody arrangement on a Without Prejudice basis pending the final hearing of this matter.

The parties have the following child:

Name of Child	Date of Birth
E.	August *, 2008

The Applicant was represented by Jennie Donnelly McDonald;

The Respondent was represented by Darren Morgan;

On motion of counsel the following interim relief is ordered under the Maintenance and Custody Act.

CUSTODY

1. S.B. and Respondent shall share the physical custody of E., born August *, 2008 as follows:

    a) E. shall be in the custody of S.B. from Monday mornings at 10:00 a.m. until Friday mornings at 10:00 a.m. of each week commencing on Monday, April 1, 2013.

    b) E. shall be in the custody of Respondent from Friday mornings at 10:00 a.m. until Monday mornings at 10:00 a.m.

2. The interim shared custody arrangement as set out herein is agreed to and ordered on a without prejudice basis. Without limiting the generality of the foregoing, the same interim shared custody arrangement shall not be in any way considered the status quo when a final determination regarding custody and access is made by this Honourable Court during the final hearing of the present proceeding.

EASTER ACCESS

3. The parties are in agreement that E. will spend Easter morning on March 31, 2013 until 10:00 a.m. with Respondent and that E. will be returned to the care of S.B. for the balance of March 31, 2013. E. will be in the care of S.B. from March 31, 2013 through to April 1, when by the regular weekly schedule E. will be in the care of S.B. from 10:00 a.m. on Monday, April 1 until 10:00 a.m. on Friday, April 5, 2013.

ENFORCEMENT

4. A requirement to pay money under this order, that is not enforced under the Maintenance Enforcement Act, may be enforced by execution order, or periodic execution order.

The Sheriff may do such things as are necessary to enforce this order and, to do so, may exercise any power of a sheriff permitted in a recovery order or an execution order.

All constables and peace officers are to do all such acts as may be necessary to enforce the terms of this order and they have full power and authority to enter upon any lands and premises to enforce this order.

[5] Both parties maintained separate residences in Sydney, Nova Scotia, during the currency of the present Consent Order; but the Applicant has since moved to [...] with her boyfriend of two years, G.D., who works full time with [...].

[6] With the child, E., ready to commence school in the fall of 2013, final decision making is at issue in terms of whether the child should attend [...] Elementary in [...], Nova Scotia or [...] Elementary in Sydney, Nova Scotia. Each party also seeks final decision making for E.'s medical needs, noting that she has a severe kidney ailment.

[7] The Applicant is presently employed with [...]. She is "on-call" during the week, with two dedicated shifts on Saturday and Sunday from 7:00 a.m. to 3:00 p.m. In 2012 her total income was $17,167.00. The Applicant's boyfriend earns $73,000.00 per year.

[8] The Respondent is employed with [...] as an "on call" seasonal truck driver. In 2012 his total income was $34,228.76.

[9] This proceeding was conducted on July 8th and 9th, 2013. The Court heard from the following witnesses:

(1) S. B., the Applicant

(2) G.D.

(3) T. O., the Respondent

(4) J. M.

(5) B. L.

(6) J. M.

[10] Exhibits admitted into evidence are as follows:

(1) Medical Records of E

(2) Applicant's Book of Exhibits which includes:

- (I) Resume of Applicant

- (ii) High School Graduation Diploma

- Cadet Certificate of Service

- International Career School Canada Diploma

- Nova Scotia Community College Certificate

- Mental Health/First Aid Certificate

- St. John's Ambulance Certificate

- Food Safety Training Certificate

- Cadet Certificate of Qualification for Basic Course - 404A

- Cadet Certificate of Qualification for Life Saver Challenge Course

- Driver Improvement Program

- (iii) Mission Statement of Applicant

- Career Goals of Applicant

- (iv) Photographs of Applicant's Family and Home

- (v) Applicant's income tax information for the years 2012, 2011, 2010

- (vi) Copy of Interim Consent Order issued May 30, 2013.

- (vii) Email confirming I.W.K. appointment dates for E.

(3) Book of Documents of the Respondent

- (I) 2012 Income Tax Return

- (ii) 2011 Income Tax Return

- (iii) 2010 Income Tax Return

- (iv) Copies of Receipts with respect to payments made by Respondent for day care.

- (v) Copies of Receipts with respect to payments made by Respondent for E's prescription

- (vi) Not admitted into evidence.

- (vii) Not admitted into evidence

- (viii) Not admitted into evidence

- (ix) Photographs.

(4) Applicant's Parenting Statement

(5) Dental payment by Respondent

(6) Various receipts (3) from Respondent

(7) Applicant's Statement of Income

(8) Emails exchanged by the parties

(9) Emails exchanged by the parties

(10) Emails exchanged by the parties

(11) Emails exchanged by the parties

(12) Emails exchanged by the parties

(13) Warranty Deed regarding conveyance of property on [...]Street, Sydney, NS to the parties dated July 10, 2009

(14) Quit Claim Deed regarding the Applicant's conveyance of her interest in property on [...] Street to the Respondent dated March 17, 2010.

ISSUES

(1) Which parenting plan is in the best interests of the child, E.?

(2) Subject to the determination or issue (1), what, if any, is the appropriate quantum for child support and s. 7 extraordinary expenses?

(3) Should retroactive child support be awarded?

APPLICANT'S EVIDENCE

[11] The Applicant testified that after E. was born, the Applicant "did everything" for the baby. She testified:

> I did everything...he didn't bathe her until she was 6 months old...he would feed her sometimes, but I did the personal care.

[12] The Applicant returned to work when the child was a few months old, and testified she still did most of the parenting.

[13] The Applicant arranged to work back shifts at [...] so she could spend the days with E.

[14] The Applicant testified the Respondent did some parenting tasks, but mostly played his "X-Box".

[15] After the older daughter, R. passed away from kidney irregularities, the relationship began to fall apart. The parties separated in 2009 when the child was just a year old.

[16] The parties worked out a parenting schedule, and would alternate weeks. This worked for a while, but they moved to a cluster of days on a 3/4 split basis, and continued to alternate weeks.

[17] When the Applicant obtained work at [...] she was required to work Saturday and Sunday. Both parties agreed to the schedule outlined in the Interim Consent Order issued May 30, 2013, on a without prejudice basis (Exhibit#2, Tab #6).

[18] The parties had initially agreed to provide the other the first opportunity to look after E., in the event either party was unable to do so. This arrangement ultimately was disregarded by both parties.

[19] E. has serious medical issues, having been born with only one kidney. Both parties have been involved in taking E. to the I.W.K. Hospital in Halifax; however Respondent did miss some appointments due to work commitments, or alleged lack of notice from the Applicant.

[20] E.'s condition means that she can't play very rough, and is prone to infection if she gets sick. The Applicant testified:

> "She can't do the same things as other kids"

[21] The Applicant testified she always watched E. if she got a fever, and was extra diligent in involving medical assistance, if for no other reason than to exercise caution.

[22] The Applicant testified that she would notify the Respondent of all the medical appointments, but he did not attend all of them.

[23] The Applicant testified she received no financial assistance with regard to costs she incurred travelling to the I.W.K. in Halifax.

[24] The Applicant testified she wishes to have final decision making authority with respect to E's medical decisions. She testified:

> I consult him, but I make the decision.

[25] She does not believe the Respondent takes E.'s medical condition serious enough. She testified about the incident of October 22, 2011 when E. was sick. The Respondent had a wedding in Halifax, and felt E. was well enough to travel with him.

[26] The parties disagree about this event, as they do about most reported events involving E. Both, nonetheless, agree the Applicant took E. to the hospital, while the Respondent had left for Halifax to attend a relative's wedding.

[27] E. was diagnosed with pneumonia, and spent a few days in the hospital. Once this information was made known to the Respondent, he immediately left the wedding ceremony, and drove back home to attend at the hospital.

[28] The Applicant testified it was never okay for her that the Respondent attended the wedding.

[29] The Applicant testified she had changed her cellphone to avoid getting calls from the Respondent, which resulted in them arguing. She testified she did this on the advice of a worker at Children's Aid, who recommended she have third party contact with the Respondent.

[30] The couple usually argued about finances, and the Applicant recounted an incident in 2010 where the Respondent called her a "slut and a whore" in the presence of the child E.

LONG TERM PLAN - PHYSICAL ENVIRONMENT

[31] The Applicant has been living common law with G.D. for the last two years. The relationship is serious, and they plan to be married. G.D. is very supportive of the Applicant, and has visitation with his 11 year old daughter, K. every second weekend. E. & K. have become close. During cross-examination the Applicant testified:

> E. & K. are jointed at the hip.

[32] The Applicant's long term plan is to live in the 5 bedroom, 2 bath home with G.D., and his daughter K. (every second weekend) in [...].

[33] Exhibit #2, Tab #4 are photographs showing the family playing in the pool in the backyard, along with other family pictures.

EDUCATION

[34] The Applicant's school of choice for E. is [...]Elementary, which is a five minute walk from the residence.

[35] This has been a major source of conflict for the parties. The Applicant testified:

> A decision had to be made so I made it.

Stating that consultation was made via email. She further testified:

> I'm her mother, and I made the choice.

[36] When suggested on cross-examination that she demanded to get her way in this regard, the Applicant responded:

> Yeah, sure. I put my foot down. I made the choice. He let this happen.

DISCIPLINE

[37] The Applicant's disciplines E. by the use of time outs, which are infrequent. She testified if a time out was given it would be justified.

ROLE MODEL

[38] The Applicant testified she works hard and is a good role model for E. She testified women can do anything they want, and should not be limited in the "big world".

[39] The Applicant fully acknowledges the Respondent is a role model as E.'s father, and supports the relationship fully. She testifies:

> He is the man in her life...that's her daddy...E. loves her father very much.

RELIGION

[40] The Applicant is not religious, and may attend church to celebrate Christmas.

SCHEDULE

[41] The Applicant works shift work on Saturday and Sunday. If her schedule was subject to change, or in the event her job changed, she testified she would work while E. was in school so as to be available to her daughter as much as possible.

[42] When faced with the suggestion on cross-examination that the Respondent could refuse a shift at work to care for E. she responded:

> Yes, I can do that as well.

[43] The Applicant has enrolled E. in dance and karate, and noted the Respondent paid for one month of dance class, and one-half the cost of one outfit.

CULTURAL DEVELOPMENT

[44] E. would have access to the playground, has friend days, spend time with K., enjoys going to G.D.'s mother's house referred to as the "art house", where E. is encouraged to paint; attend the library, and has completed the 100+ Books Program.

PHYSICAL DEVELOPMENT

[45] In addition to dance, E. has just started in karate classes which is taught by G.D.. She testified E. does not spar, but it affords E. the opportunity to interact with the other kids.

SELF-ESTEEM/SELF-CONFIDENCE

[46] The Applicant testified she wants E. to explore and experiment, and have no limitations in terms of achieving success and happiness in her life.

FINANCIAL

[47] The Applicant testified she has supported E. with "little to no" assistance from the Respondent. She testified the I.W.K. trips were expensive, and it was difficult to pay for those trips on her own.

[48] The Applicant testified she does not rely upon G.D. for financial support.

EXTENDED FAMILY

[49] The Applicant testified she has support from her parents, G.D.'s mother (L.), and "Uncle M.". She testified:

> If I am stuck my mother or L. takes her.

[50] The Applicant acknowledged that the Respondent also has reliable extended family that he can rely upon if requested.

[51] The Applicant concluded her direct testimony stating she believes vesting primary care of E. with her is the "healthiest choice" for E.

[52] On cross-examination the Applicant testified during E.'s first six months that she did mostly everything, and found that Respondent "played video games a little too much".

[53] The Applicant confirmed that E.'s godfather, J.M., was around a lot, and he assisted with E.'s care. She testified:

> J. would be the first one to step up to feed E....that was his personality...

[54] The Applicant testified she was working shifts from 9:30 p.m. to 4:30 a.m., and was faced with providing most of the care for E. She testified about the Respondent:

> He did very little.

[55] The Applicant moved out in 2010, and the parties were splitting equal time as best they could.

[56] The issue of the Applicant claiming the Universal Tax Credit arose. She testified she used the tax credit to pay on bills they had accumulated as a couple. She testified:

> That is why I claimed it...I was the final decision maker.

[57] She testified she left her job at the [...] to work at [...] because "advancement was more likely", and she wanted to pursue her LPN Diploma. She testified:

> I had to decide to take a chance to advance through [...].

[58] The Applicant is now wait-listed for the LPN course. She applied in February 2012. The Applicant provided no evidence about her possible LPN schedule, but testified she would continue with her current job if she is not accepted to the program.

[59] The Applicant testified that the home in [...] is in G.D.'s name. They have a "cohabitation agreement" which affords the Applicant a buy-out option should the parties separate.

[60] The Applicant acknowledged she got drunk one night a number of years ago, and showed up at Respondent's house. She did not have the care of E. at that time. The Applicant testified she no longer drinks to excess, and would not drink if E. was around. When referred to Exhibit #3, Tab #9, pictures of the Applicant with beer in her hand, the Applicant testified it was a family summer barbeque in 2012, and the photographs are from the same night.

[61] The Applicant testified she is a safe driver, although had been ticketed for texting, and was involved in a motor vehicle accident on a second unrelated occasion.

[62] The Applicant confirmed that Respondent would take E. whenever she worked or had an emergency. She testified:

> He always complied.

[63] The Applicant was cross-examined about the broken pane of glass as seen in Exhibit #3, Tab #3 in 2010. The Applicant testified:

> The glass pane broke when I slammed the door...I got upset.

G. D.

[64] G. D. is the boyfriend of the Applicant He earns $73,000 per year at [...]. He testified his relationship with the Applicant is long term, and that they plan to remain together.

[65] G. D. testified E. and his daughter, K., are both part of his family, and that he acts as the Applicant's "support person". He testified:

> S.B. is the mother...if asked I will give my opinion...it is ultimately her choice.

[66] G. D. testified E. and his daughter K. refer to each other as "sisters". He testified:

> They cling together.

[67] He described his relationship with the Respondent as "civil", and that they interact to exchange information. Mr. D. did express concern about E. being exposed to adult conversations when with the Respondent, and referenced an incident where there was some confusion about pick up arrangements for E.

[68] The Respondent had gone to the drag races with E., when Mr. D.'s mother was expecting to pick up E. at the Respondent's residence. Mr. D. called the Respondent on his cellphone, and cursed at the Respondent stating:

> What is you f'ing problem?...this is S.B.'s day.

[69] The Respondent had his phone on speaker, and E. apparently was in a position to hear the exchange.

[70] Mr. D. was bothered by the fact the Respondent had his cellphone on speaker.

[71] Mr. D. agreed on cross-examination that he said to the Respondent "we're going to have a problem". The Respondent felt threatened by Mr. D..

[72] Mr. D. testified that he had apologized to E. for the incident, and that it was not a wise course of conduct on his part.

RESPONDENT'S EVIDENCE

[73] The Respondent testified that his relationship with the Applicant got "bumpy" when their first daughter R., passed away.

[74] After E. was born their relationship was on and off until 2010 when the Applicant left the relationship for good.

[75] The Respondent works seasonally for [...], and is guaranteed 40 hours per week up to 14 weeks. He has no set schedule, and is on the "on call" list.

[76] The Respondent testified he did not attend all of E.'s medical appointments at the I.W.K. in Halifax due to prior work commitments. He testified:

> S.B. was ok with that.

[77] The Respondent testified he would always make himself available to assist with E.'s care and testified:

> If she called I always answered.

[78] The Respondent disagreed with the Applicant's evidence regarding his involvement with and care for E. In relation to undertaking parental tasks the Respondent testified:

> It was fairly even.

[79] He did not agree the Applicant did more. The Respondent disagreed with the Applicant's suggestion that J. M. was more involved with E.'s care than he was. He testified:

> I didn't know why she would ask J. over me.

[80] The Respondent did not agree that Applicant did all the cooking, and further disputed the suggestion that he did very little but play video games. He testified:

> That's not true.

[81] He further testified that when he was off work, E. was permanently with him. He testified:

> S.B. came as she pleased...I had her (E.) 5-6 days a week.

[82] The Respondent testified he did not agree that the Applicant had the authority to make all final decisions. He testified:

> Basically I had no choice.

[83] The Respondent testified he never had a problem caring for E.

[84] Ultimately the sharing schedule was breaking down even to the point the parties would not offer the other to care for E. when the other was unable to do so. The Respondent testified:

> I did not stick to it.

[85] And further testified it was "kiddish" and an immature decision. He testified:

> My days were my days, her days were her days.

[86] Regarding the Respondent's medical coverage he testified the employer would cancel it in the event he went 150 days without working. He testified:

> It was not in my control.

[87] The Respondent disputed the Applicant's suggestion that he was delinquent in not attending medical appointments. He testified that he would try to make the medical appointment "if he was made aware of them".

[88] The Respondent insisted that if he did receive notice of some medical appointments from the Applicant, it was done so by untimely emails. He testified that Applicant would tell him "I'm her mother...I'll handle it".

[89] The Respondent testified at no time did he not want to attend E.'s medical appointments. He said "if I had to work I could not go". He testified:

> She said she could not reschedule...My hands were tied...I could not make it.

[90] The Respondent does not agree with the Applicant's evidence regarding the pneumonia/wedding incident. He did agree E. was too sick to travel to Halifax, and he asked simply to be advised if Applicant took E. to the hospital. He testified:

> When I was in Halifax, that is when I was told E. was admitted...once I was told...I came right back.

[91] The Respondent acknowledged the incident when he called the Applicant a whore, although he qualified the comment and testified he called the Applicant a "hoe". He testified it "slipped out" and it was said in a negative way. He has not since said anything of such a nature in front of E.

[92] Regarding the broken pane of glass incident, the Respondent testified there was a "heated argument", the Applicant closed the door, and the glass broke. The Respondent acknowledged that he had his back turned and did not see how the window was broken, although he assumed the Applicant broke it.

[93] The Respondent confirmed his 2012 annual income as $34,228.76 (Exhibit #3, Tab #1), and acknowledged the Applicant's 2012 income as $17,167.00. He testified he was never asked for child support, but is willing to pay a retroactive adjustment if required.

[94] The Respondent disagreed with the Applicant's decision to unilaterally claim the Universal Child Tax Credit on her income tax return. He testified the Applicant told him that "she is the mother and that she deserves the money". He testified:

> It is not fair that she claimed it.

[95] The Respondent disagreed with G. D.'s description of the "drag race" incident. The Respondent testified he had confirmed with the Applicant that he would meet Mr. D.'s mother at the gate of the drag races. He testified:

> S.B. was ok with that.

[96] The Respondent testified he was shocked, and felt threatened by the call he received from Mr. D.. He essentially confirmed the conversation as described by Mr. D..

PHYSICAL ENVIRONMENT

[97] The residence on [...] Street is a well-kept "smaller house" with two bedrooms, kitchen, play area, fenced in backyard, swing set, slide, and a finished basement where his friend, J. M., resides.

DISCIPLINE

[98] The Respondent agrees with the time out method.

RELIGION

[99] The Respondent is not very religious. He will take E. to church when she gets older. He does believe, and has spoken to E. about the topic.

ROLE MODEL

[100] The Respondent wants E. to look up to him as a great father. He believes he can provide E. stability, and will always be there for her.

ACTIVITIES

[101] The Respondent supports E. being in dance, but testified he was not contacted regarding the decision, nor were the cost implications discussed.

[102] Regarding karate class, the Respondent testified he was just told that E. was enrolled in the class. There was no consultation, but he is willing to have E. continue in the class.

[103] The Respondent would like to enroll E. in swimming, noting that the Kiwanis Pool is a five minute walk from his home on [...] Street.

[104] The Respondent testifies that he has not formally enrolled E. in any activity because he wants the issue of primary care to be decided by the Court before

venturing down that path. In the meantime he entertains E. by walking, reading, colouring, watching Disney movies, going to the park, going to the mall and/or visiting family, which includes the Respondent's niece, J., age 7.

FINANCIAL

[105] The Respondent testified he has an adequate home, and can provide for E. financially.

EXTENDED FAMILY

[106] The Respondent's parents live close by, along with his sister and uncle and aunt. His family get together every Thursday and Sunday night for supper.

EDUCATION

[107] Prior to the Applicant moving to [...] the parties were discussing which school E. should attend. At that time the Applicant's preference was [...] Elementary, while the Respondent maintained his position regarding [...] Elementary.

[108] The Respondent registered E. at [...], but was unable to have her birth certificate provided by the Applicant The Respondent testified the Applicant registered E. at [...] without his knowledge and/or consent.

[109] The Respondent testified this decision is typical of the present decision making process. He testified:

> S.B. just takes charge...one sided.

[110] The Respondent testified he always tries to cooperate, but the Applicant puts her foot down, and says she is the primary care giver. He testified:

> I felt like I had my hands tied.

PROPOSED PLAN

[111] The Respondent disagrees with the Applicant's proposed plan of care. In particular he objects to the suggestion he only have custody of E., every second weekend to address the Applicant's wish that E. be able to spend time with Mr. D.'s daughter, K.

[112] The Respondent seeks primary care with the authority to make all final decisions. He would recognize the Applicant as E.'s mother, and he is fully supportive of her in that regard. He testified he would have no difficulty in attending all medical appointments if given the responsibility to schedule same in accordance with his schedule.

[113] The Respondent testified his employer would accommodate his need to be home with his daughter when required and further he is readily available to his daughter when not working and collecting E.I.

[114] If awarded primary care he would be satisfied to have E. with her mother every weekend, including Professional Development Days.

[115] During cross-examination the Respondent agreed that a friend, J. M., was living at his house in the basement, and he was not paying rent. The Respondent testified he was simply trying to help a friend out, and that Mr. M. paid for his share of consumables, such as groceries, electricity, and oil. The Respondent testified Mr. M. did not incur extra cost for him, but agreed that Mr. M.'s presence also did not afford him any extra income.

[116] The Respondent also acknowledged that Mr. M. used marijuana "fairly regularly". When asked if Mr. M. smoked marijuana in his barn, the Respondent testified:

> I personally don't know.

[117] The Respondent was nonetheless satisfied that Mr. M. did not smoke marijuana in his home, or presented a risk to E.

[118] Respondent testified he was not aware of the Applicant's annual income(s), and did not recall reviewing same in documents filed with the Applicant's initial Application dated December 1, 2011.

[119] The Respondent agreed he was aware the Applicant had been on sick leave for a time, and that he was making more money than the Applicant who was also working extra jobs to supplement her income.

[120] The Respondent testified any extra money the Applicant was earning was for her own personal bills. He testified:

> I paid all the major bills.

[121] The Respondent agreed that the Applicant had signed her interest in the home at [...] Street over to him in consideration of him paying the Applicant $3,000. The Respondent agreed the Applicant undertook payment of a $15,000 debt which he insisted was for her personal bills, and not household bills.

[122] When asked why he did not pay or offer to pay child support, the Respondent testified:

> She did not ask...I did not ask.

[123] He acknowledged that he has paid no support since separation, and agrees he earned approximately twice the income the Applicant did since 2010. He also testified that the Applicant did not ask for child support.

[124] The Respondent testified he paid for anything the Applicant needed and referenced receipts in Exhibit #3, Tab #'s 4 and 5, which total approximately $2,200 or $3,000 depending upon whether or not the day care receipt for $825.00 was counted twice.

[125] When questioned about the I.W.K. costs for travel, the Respondent testified:

> She said she would deal with it.

[126] The Respondent testified:

> I paid my own way when I went up.

[127] The Respondent agreed that he has not looked for alternate and/or additional employment. He testified:

> I financially support E. any way I can.

[128] When asked whether or not he was aware of the child support guidelines, even where the parents are sharing custody, the Respondent testified:

> Yes.

[129] The Respondent was cross-examined regarding his insistence to place E. in day care, and his decision not to register E. for swimming. The Respondent testified he felt day care was good for E.'s social development, and disregarded the Applicant's concern about E.'s sensitivity to infections.

[130] Although the Respondent testified he wanted the court proceeding finished before enrolling E. in activities, he agreed he was unaware that the Kiwanis Pool offered an open swim on Saturdays for $2.00. He testified:

> I did not know that.

[131] Counsel for the Applicant suggested to the Respondent that it did not make sense to place E. in all day daycare, and not enroll her in swimming. The Respondent testified:

> I guess not.

J. M.

[132] J. M. resides with the Respondent at [...] Street. He has been employed as a [...] at a local [...] for the past three years.

[133] Mr. M. has known the Respondent since they both worked at [...] 13 years ago. He has known the Applicant since she started dating the Respondent. He referred to the Respondent as his "best friend".

[134] Mr. M. was in a position to observe both parents interact with their daughter E., and testified:

> They both took very good care of E.

[135] Since the separation Mr. M. testified that the Respondent "has really stepped up as a single parent" He testified:

> E. is always on his mind...they spend all their time together.

[136] Mr. M. had no concern about the ability of either parent to parent.

[137] There was no cross-examination.

B. L.

[138] B. L. went to school with the Respondent, and they have been friends since 1997 or 1998.

[139] Mr. L. also knew the Applicant through their association in Air Cadets.

[140] Currently he considers the Respondent to be a "good friend", but does not presently communicate with the Applicant.

[141] Mr. L. had worked with the Applicant at a local [...] on two occasions. On both occasions the Applicant left shortly after being trained, even after he had put a word in for her the second time with management, at her request. He testified:

> It is not for some people.

[142] Mr. L. described the Respondent as a "caring, alert and present" parent. He described the Applicant as "caring, sometimes present, sometimes not" parent.

[143] In Mr. L.'s opinion the Respondent would always give priority to E.'s needs, and had often changed or cancelled his plans to look after E., when requested to do so by the Applicant.

[144] Mr. L. acknowledged he had no contact with the Applicant since E.'s birthday party last year at the Respondent's home.

J. M.

[145] J. M. is a good friend of the Respondent, and testified that he and the Applicant "were friends". Mr. M. is E.'s godfather, and had lived with the parties for a period of six months to a year prior to their breakup.

[146] Mr. M. described the Respondent as an "average dad...a good father". He observed the Respondent care for E. quite a bit of the time, as the Respondent was laid off from work during the winter months.

[147] Mr. M. testified that both parents "contributed", but the Respondent was home more.

[148] Mr. M. described them as "good parents", but at times described the Applicant as "being all over the place"; that she was "up and down"; "focused and then not"...."not wanting to be tied down".

[149] Mr. M. testified that he has not observed the Applicant with E. since the final breakup in 2010.

[150] During the time Mr. M. was associated with the Applicant he testified that he had observed her "drink quite heavily" quite a few times. He described it as "bad intoxication", but acknowledged this was three years ago. Mr. M. testified that during the midst of the breakup, the Applicant arrived at the Respondent's home "drunk", and she wanted to see E.

[151] Mr. M. testified the couple argued quite a bit, and both were angry in front of E. During the course of the breakup he testified both parties had said "heated things" to each other.

[152] Regarding the window pane incident, Mr. M. testified that the Respondent shut the door in the Applicant's face, and "in frustration" she smashed the window with her fist.

[153] During cross-examination Mr. M. acknowledge that issues arose between the parties after their daughter, R., died. He testified:

> Things got chaotic after the loss of their child.

[154] Mr. M. confirmed he has not had a relationship with the Applicant for three years. He also confirmed he never saw the Applicant intoxicated when she had care of E.

APPLICANT'S SUBMISSIONS

[155] Counsel for the Applicant submits as follows:

- That joint custody is agreed upon by the parties.
- That the evidence is clear, that since E. was born, the Applicant has been acting as the primary care parent for the child.
- That the Respondent was informed, involved, and overall satisfied with the parenting of E.
- That there hasn't always been agreement, but there has always been decisions made that resulted in a happy, well-adjusted 5 year old who has a good relationship with both of her parents.
- That E. needs someone who can made medical decisions for her in a timely fashion, and it is in E.'s best interests that this responsibility be vested in the Applicant.
- That the evidence is clear that the Applicant has a better understanding of E.'s medical needs, having had made significant historical involvement with respect to E.'s medical care.

- That the Applicant as a primary caregiver does recognize and would encourage the important relationship between E. and her father.

- That the overall preferred environment for E. is with the Applicant in her home in [...].

- That the Applicant's plan for E. provides a more structured environment which is more amenable to being a primary home.

- That the Respondent lead evidence regarding the door smashing incident which occurred over three years ago as an isolated incident. It should not be relied upon to establish a pattern of conduct by the Applicant.

- That since the separation the Applicant has upgraded her education, and attended counselling to help her move ahead in a healthy way.

- That the Applicant is now in a stable relationship, has stable employment, and has a clear plan for her and E.'s future.

- That the Respondent has good, but misguided intentions when consideration is given to the possibility of J. M. living in the home with E.

- That the Respondent has not maximized his earning potential which affects his ability to properly support his child.

- That the Respondent's plan, as compared to the Applicant's plan, does not afford E. the best opportunity to excel in her life.

- That the Applicant's work history is reflective of a hard working parent, who seeks improvement, and does not portray an unstable person as the Respondent would suggest.

- That despite the evidence of the Respondent, the overall evidence is clear that the Applicant openly and regularly communicated with, and shared information with the Respondent regarding E.'s medical appointments and school enrollment.

- That the Respondent did not make reasonable efforts to pay child support to the Applicant.

- That the Applicant requests an Order for the following in E.'s best interests:

  a) primary care and residence of the child.

  b) final decision making authority in the event of a disagreement between the parties, and in particular with respect to health and education related concerns.

  c) liberal access to the Respondent to include every second weekend, from Friday after school to Monday morning when the child begins school; every Thursday from after school to Friday morning when school begins (the weeks the child is not with the Respondent), and until 7:30 p.m. when the Respondent does have the child on the weekend.

  d) access will be agreed to be extended on professional development days and school holidays when these days fall on the Respondent's weekend. (Friday and/or Monday).

  e) Sharing of holidays.

  f) extended summer access.

  g) any other reasonable access as may be agreed upon by the parties.

  h) child support and retroactive child support in accordance with the child support guidelines, as well as proportional contribution toward the child's s. 7 expenses.

  I) child support is calculated to be $288.00 per month based upon the Respondent's annual income of $34,228.76.

  j) retroactive child support is calculated to be $5,456.00 as of the date of separation.

RESPONDENT'S SUBMISSIONS

[156] Counsel for the Respondent submits as follows:;

- That the parties agree an Order for joint custody is in the best interests of E.

- That the parties shared custody pursuant to the Interim Court Order dated March 25, 2013, which said Order did not designate a primary care giver.

- That the Respondent's evidence regarding the Applicant's personal work history describes a person who has demonstrated a pattern of erratic behaviour.

- That the Applicant's employment record should be a red flag in assessing whether or not she is in a stable place currently.

- That the parties essentially shared equal time with E., but the Applicant took it upon herself to make final decisions, often without consulting with the Respondent.

- That the Applicant took control of making medical decisions to the exclusion of the Respondent.

- That the Respondent did not resist or challenge the Applicant on decision making issues, simply to avoid confrontation.

- That the Applicant had an obligation to inform the Respondent of scheduled medical appointments unilaterally made by her.

- That the Applicant did not consult with the Respondent before unilaterally registering E., in [...] Elementary.

- That the Applicant's propensity to take control of the decision making process, and dictate to the Respondent is highly inappropriate, and not in E.'s best interest.

- That the Respondent has steady, flexible, secure employment, and is financially capable of caring for E.

- That the Respondent is a responsible, involved, caring, parent who has the ability to provide primary care to E.

- That the Respondent has no concerns about J. M. being around E., but he is prepared to request Mr. M. to leave the residence in the event he is awarded primary care of E.

- That the Applicant's parenting plan is unreasonable, in that it would reduce the Respondent's time with E. by two weekends so E. can spend time with Mr. D.'s daughter, K.

- That the Respondent's parenting plan is certain and specific as compared to the Applicant's plan, which is speculative and uncertain, given there is no evidence as to if or when she will be accepted to a LPN program.

- That the Respondent acknowledges that a retroactive adjustment for child support is warranted dating back to the date of the Application.

- The Respondent requests an Order for the following in E.'s best interests:

    a) joint custody with primary day to day care of E. to the Respondent, along with final decision making authority with respect to significant issues in E.'s life, should the parties be unable to agree, and in particular, medical and educational decisions.

    b) access to the Applicant from Friday at 3:00 p.m. to Sunday at 5:00 p.m on a weekly basis.

c) access to be extended to include professional development days and other non-school days which fall on a Friday or a Monday.

d) the parties will share and alternate holidays.

e) the Applicant would receive a block of additional access during the summer months.

f) such other access as can be reasonably agreed to by the parties.

g) child support payable by the Applicant based upon the applicable child support guidelines ($101.00), including the proportional sharing of s. 7 expenses.

h) a retroactive child support payment in the amount of $3,375.00 payable to the Applicant.

LAW AND ANALYSIS

ISSUE I - Which parenting plan is in the best interests of the child, E.?

[157] The provisions of s. 18(5) and s. 18(6) of the *Maintenance & Custody Act* are relevant to deciding this issue.

> 18(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.
>
> (6) In determining the best interests of the child, the court shall consider all relevant circumstances including:

(a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;

(b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;

(c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;

(d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and education needs;

(e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;

(g) the nature, strength and stability of the relationship between the child and each parent or guardian;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(I) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child;; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

> (I) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
>
> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[158] In looking at the "best interests" of the child, Justice McIntyre, speaking on behalf of the Court in *King v. Low* [1985] 1 S.C.R. 87 stated at paragraph 27 as follows:

> 27 - I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and the material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of the child, to choose which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

[159] In **Young v. Young** [1993] 4 S.C.R. 3, Justice Dube sets out what rights a dependent child has, and the parental duty to protect and fulfil this right:

> Per L'Huereux-Dube J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to

> education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.
>
> Child placement decisions should safeguard the child's need for continuity or relationships, reflect the child's (not the adult's) sense of time, and take into account for law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions. This need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent. A custody award is a matter of whose decisions to prefer, as opposed to which decisions to prefer. Courts cannot make the necessary day-to-day decisions which affect the best interests of the child. Once a court has determined who is the appropriate custodial parent, it must presume that the parent will act in the best interests of the child.
>
> Decisions are made according to the best interests of the child without the benefit of a presumption in favour of either parent. The Act envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the child. Maximum contact, however, is not an unbridled objective and must be curtailed wherever the welfare of the child requires it.

[160] Justice Goodfellow, in his often quoted decision **Foley v. Foley** [1993] N.S.J. No. 347, outlined factors generally relevant to an assessment of what parenting arrangement is in a child's best interest. At paras. 16 to 20, he wrote:

> 16. Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
>
> 1. Statutory direction *Divorce Act* 16(8) and 16(9), 17(5) and 17(6);
>
> 2. Physical environment;
>
> 3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference.

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists-psychiatrists-etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self-esteem and confidence;

12. The financial contribution to the welfare of a child;

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The *Divorce Act* s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

17. The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question. With whom would the best interest and welfare of the child be most likely achieved?

18. The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

19. Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.

> 20. On the other hand, underlying many of the other relevant factors is the parent making herself, or himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[161] In **N.D.L. v. M.S.L.** [2010] 289 N.S.R. (2d) 8 (NSSC) Justice MacDonald stated as follows:

> What parenting arrangement is in the best interest of this child? Many courts have attempted to describe what is meant by "best interests". Judge Daley in **Roberts v. Roberts**, 2000 Carswell NS 372 (Fam.Ct.) said:
>
> > These interests include basic physical needs such as food, clothing and shelter, emotional, psychological and educational development, stable and positive role modelling, all of which are expected to lead to a mature, responsible adult living in the community...

[162] In reviewing the parties submissions and supporting cases I think it is appropriate to stipulate from the onset my agreement with the remarks of A.C.J. O'Neil in **Murphy v. Hancock,** 2011 NSSC,197 at paragraph 49:

> Jurisprudence of the issue of whether shared parenting should be ordered is very fact specific. I agree with the comments of Justice Wright in **Hackett v. Hackett** [2009] N.S.J. at paragraph 13:
>
> > 13. It is all well and good to look at other cases to see how these principles have been applied but the outcome in other cases is really of little guidance. Every case must be decided on a fact specific basis and nowhere is this to be more emphasized than in custody/access/parenting plan cases. To state the obvious, no two family situations are ever the same.

[163] There is no doubt that the Applicant and the Respondent love their daughter very much. To date they have provided E. excellent care, but their ability to continue to do so has been compromised by the conflict which has arisen regarding E.'s medical condition, and more recently by the pending decision as to which school E. should attend in September, 2013.

[164] E. is a five year old girl who wants and needs the love and support of both her parents. The parties' relationship has become conflicted, which unfortunately has impacted on their ability to cooperate and co-parent in E.'s best interest.

[165] The time has come to designate one parent or the other as the primary care giver with the authority to make final decision in E.'s best interests. A very important decision must be made with some immediacy in relation to which school E. will attend in September. This decision will be obvious once the decision of this Court is made in terms of primary care.

[166] The primary issue before the Court is very narrow in that the parties differ only as to whom should be vested with primary care and final decision making. Each party acknowledges the other is a good parent and capable of caring for E. They just can't or won't cooperate with one another to successfully co-parent.

[167] To decide this issue the Court need only assess the go forward parenting plan of both parties in the child's best interests. The historical differences of the parties as exampled by information sharing, or lack thereof, about medical appointments; who did or did not take control over the decision making process; reasons for job movement; reasons for not seeking additional/alternate employment; school registration; who did or did not provide care when the child was an infant; incidents of intoxication; disagreement over pickup locations, and the broken pane of glass incident, with respect, do not assist in this analysis.

[168] The reality is the majority of evidence reviewed by this Court regarding each party's perspective of the other's parenting abilities, was dated and of little relevance to the present circumstances of the parties, although I do find and accept

that the Respondent was more involved in E.'s care than testified to by the Applicant.

[169] The evidence from both parties confirm, that in spite of past events, both accept that each is a good and capable parent, which is reflected in the agreement that the Court should order joint custody.

[170] As a result, it is not the Court's intention to unduly focus on historical events which are unproven, dated, or of little or no consequence. The Court prefers to weigh and to assess the respective merits of each party's current parenting plan as they pertain to E.'s best interests.

[171] The present Interim Consent Order must be changed to reflect the fact that the parties no longer live in the same geographical location. The decision as to which school E. will attend has also been impacted by this geographical change.

[172] I find that the applicable factors outlined by Goodfellow, J. in **Foley v. Foley** for the court to consider are as follows:

2. Physical Environment

[173] Both parties can provide an adequate physical environment for E. In this regard I find that the Applicant's home is very suitable for E.'s long term interests, in that it provides the structure and stability of two mature and hard working adults, who can assist and support one another in providing care to E. The Applicant's relationship with Mr. D. appears to be solid and long lasting, which would be of great benefit to E.

[174] The Respondent's home is also suitable, but there is a concern. Problematic is the presence of J. M.. His presence and the circumstances of his regular drug use concern the Court, in terms of being associated with E. I

understand that the Respondent is prepared to request Mr. M. to leave the home in the event he is awarded primary care. He is nonetheless convinced Mr. M. presents no risk to E. The court does not hold a similar view, and questions the Respondent's judgment in this regard.

3. Discipline

[175] Both parties utilize the "time out" system for discipline. I find that both parties can and do reinforce positive behaviour and address negative behaviour when and if required.

4. Role Model

[176] The Applicant impressed the Court with her work ethic, and plans to pursue training in the nursing field. She is goal directed, and is motivated to improve her life.

[177] The Respondent has maintained a steady income over 6 years, and his work schedule has allowed him to focus his life around E. and her needs. The Respondent appears quite content with his current work situation, being employed on a seasonal basis.

8. Time availability of parent for E.

[178] The Applicant works every Saturday and Sunday from 7:00 a.m. to 3:00 p.m., and is "on call" during the week. She has her schedule one month in advance.

[179] The Applicant has also applied to the LPN Program, and if accepted, there is uncertainty as to what her proposed schedule would be.

[180] The Respondent is employed as a [...] on a seasonal and "on call" basis. Although he testified his work schedule was flexible, it would appear he does require some notice of E.'s appointments and/or events, because work commitments in the past have prevented him from attending.

9. The cultural development of a child;

10. The physical character development of the child by such things as participation in sports.

[181] In addition to activities of general interest, the Applicant has E. in dance and karate. There is access to musical instruments in the Applicant's household, along with an opportunity for E. to become involvement in arts and crafts. E. is well read, and regularly attends the library. E. has access to a swimming pool in the backyard.

[182] The Respondent supports E. being in dance and karate. He would like to enroll E. in swimming, but has elected not to do so until these proceedings are concluded.

[183] The Respondent is equally active with E. in activities of general interest, including the library.

11. Emotional Support...

[184] The Applicant has been consistent in ensuring good mental, as well as physical support for both herself and E.

[185] There is no evidence to suggest the Respondent is not supportive of E. in this regard, however, it is clear from the evidence that the Applicant has purposely taken a more controlling role in terms of E.'s emotional and physical well being.

12. Financial Contribution...

[186] Both parties have the financial ability to care for E.

13. Extended family...

[187] Both parties have extended family who play an important part in E.'s life, including K., Mr. D.'s daughter, and J., the Respondent's niece.

14. Facilitation of contact with the other parent...

[188] Although the parties have experienced some past bumps in this regard, there is no current evidence to suggest either party would not actively encourage the involvement of the other parent in E.'s life.

15. Interim and long range plan...

[189] The Applicant is involved in a serious long term relationship. She intends to remain in [...] and raise E. there, with easy access to family, friends and school.

[190] The Applicant intends to continue her position with [...], as she sees this as the best place for her advancement upon completion of her LPN Program.

[191] The Respondent has the ability to care for E., both in the interim and long term. He has a steady source of income, and also lives proximate to family, friends, and school.

16. Financial consequences...

[192] Both parties have the means to support E., and agree to pay guideline child support to the parent awarded primary care. In this regard the Respondent has acknowledged his obligation to pay arrears, since he did not pay child support since separation.

17. Other relevant factors...

[193] The Applicant has made no apologies for taking control of the decision making process for E., without formally being vested with primary care.

DECISION

[194] In consideration of the above factors, I have weighed the evidence in accordance with the balance of probabilities best, as outlined by the Supreme Court of Canada. **C.(R.) v. MacDougall** 2008, SCC, 53 at paragraph 40:

> Like the House of Lords, I think it is time to say, once and for all in Canada there is only one civil standard of proof at common law and that is proof on a balance of probabilities...

And further at paragraph 46 of the Supreme Court of Canada stated:

> ...evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[195] Both the Applicant and the Respondent have strong ties to E. Each has been generally included in E.'s life, although I am prepared to find on the evidence that the Respondent's involvement never reached the involvement of the Applicant, especially in recent months since the issuance of the present Interim Consent Order.

[196] Both parents present with parenting strengths and weaknesses, but their cumulative strengths outweigh their weaknesses. Both parties are competent, loving parents, who can meet E.'s needs in a joint custody arrangement.

[197] Applying the **Foley** criteria, I am satisfied that both parents can provide an adequate physical environment , absent the presence of J. M. in the Respondent's home. They are both prepared to deal with disciplinary issues, and both are good role models. Each is sensitive to E.'s emotional, physical, and medical needs. Both parents are available to their child, and have the involvement of extended family.

[198] The parties do not live as proximate to one another as they once did, which has caused disagreement about primary care and final decision making. The distance is not so far that it impacts the ability of the parties to effectively co-parent. It does impact however, the choice of school and the primary residence for E. A decision regarding school must be made in E.'s overall best interests, and must not reflect either parent's best interests or preferences.

[199] Although the Respondent did not agree with the unilateral actions of the Applicant, taking control in the manner that she did, the Court is nonetheless not prepared to find that the Applicant acted contrary to E.'s best interest in so doing.

[200] In the result I am satisfied on the balance of probabilities that the best environment for E. at this time is with her mother, the Applicant. The Applicant is hereby authorized to make all final decisions on behalf of E. when there is disagreement with the Respondent. E. will thus be attending [...] Elementary in the fall of 2013. The Applicant's plan and overall environment provides the better opportunities for E.'s growth, development and advancement. The Applicant is thus vested with the primary day-to-day care of E., effective September 3, 2013. The parties will continue a shared custody arrangement until the effective date of September 3, 2013, at which time the day-to-day care of E. will be with the Applicant.

[201] The Respondent is granted liberal access to E. Presently the Respondent has access every weekend. The Applicant proposes this be changed to allow E. to spend every second weekend with Mr. D.'s daughter, K. The Court views this proposal as unreasonable, and not in E.'s best interests.

[202] The Respondent shall have access to E. three weekends a month, from Friday after school until Sunday at 7:30 p.m. The fourth weekend will be arranged to accommodate time for E. to spend with K. This will be accomplished by the Respondent having E. on the fourth weekend from Sunday at noon to Monday morning before school. The parties will have to schedule same in accordance with K.'s visiting schedule.

[203] In addition, the Respondent will have weekly access to E. on every Thursday after school until 8:00 p.m. The Thursday access will be an overnight visit in advance of the modified weekend access to accommodate E. spending time with K.

[204] The above arrangement will ensure E. will be present for the Respondent's family dinners every Thursday and Sunday.

[205] In terms of arranging transportation, I urge the parties to share equally in this responsibility. It is important for the parties to openly consult and

communicate about arrangements for transporting E. This is critical to E.'s best interests. They may wish to consider a reasonable halfway point for pick up and/or drop off, such as [...].

ISSUE #2 - What, if any, is the appropriate quantum for child support and s. 7 extraordinary expenses?

[206] Pursuant to the Child Support Guidelines, the Respondent will pay child support in the amount of $288.00 per month, based upon his annual salary of $34,228.76. This payment will commence on September 3, 2013, and will be payable each and every month thereafter, until otherwise ordered by a court of competent jurisdiction. Payment will be made through the Maintenance Enforcement Program. The Respondent is also ordered to file with Maintenance Enforcement Program, on or before June 30th in any given year, a copy of his income tax information, including T4 and Notice of Assessment. A copy of this information will thus be made available to the Applicant on an annual basis.

[207] The Respondent is ordered to share in the payment of all reasonable and necessary S. 7 expenses, based upon the proportionate amount of his and the Applicant's income. In this regard the Respondent has acknowledged his share of same is 67% with the Applicant paying 33%.

ISSUE #13 - Should retroactive support be awarded?

[208] The leading case on retroactive child support is **DBS v. S.R.G.** [2006] 2 S.C.R. 231 (S.C.C.), Bastarache, J., writing for himself, McLauchlin D.J. LeBel and Deschamp J.S. summarized his thoughts at paragraphs 131-135 as follows:

> 131. Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to

support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.

132. In the contest of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.

133. In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balance with the need for fairness and for flexibility. In doing so a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.

135. The question of **retroactive child support** awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payment his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payment (s)he was due at the time when (s)he was entitled to them. Thus, while **retroactive child support** awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[209] Generally, the potential award can be made retroactive to the date when the recipient parent gave the payor effective notice of her intention to seek child support, however a retroactive support order should seek to strike a balance between fairness to the child who is entitled to support and fairness to the payor parent.

[210] In assessing the propriety of a retroactive order, a judge's discretion is guided by the following factors:

1. The reasons for the custodial parent's delay in seeking child support.

2. Blameworthy conduct by the payor parent;

3. The child's circumstances.

4. Hardship caused to the payor parent by a retroactive award.

[211] In **Staples v. Callender** [2010] NSCA 49, Justice Bateman commented upon hardship in the awarding of retroactive child support, at paragraph 36 as follows:

> 36. In **DBS** the Court opined that, while retroactive orders are not "exceptional", circumstances may be such that a retroactive order not be made.
>
> > 95. It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime, this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In

> short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

[212] Justice Bateman's comments at paragraph 41 are also relevant and instructional.

> 41. In L.S. v. E.P., cited in DBS, above, Rowles J.A. writing for the Court, undertakes an insightful and thorough discussion of the analysis relevant to a retroactive award of child support. On the question of hardship, she observes that a Court is less likely to award retroactive maintenance where it believes that such an award would prejudice the non-custodial parent's ability to make ongoing support payments as they become due.
>
> At para. 76, Rowles, J.S. quoted with approval the reasons of Esson, J.A. in E.T.v. K.H.T., [1996] B.C.J. No. 2208 (Q.L.) (C.A.), the full court concurring on this issue, where she said:
>
> > 22. In deciding whether to exercise the discretion to order payment of maintenance for a period prior to the hearing, a judge should consider whether such an order will have an impact on the defendant which will make it less likely that the order for future payments can or will be complied with. Where the defendant's means are limited, it will often be right to not create "instant arrears". Other considerations no doubt could justify the refusal to make a retroactive order.

[213] The Respondent has conceded retroactive support payable by him is appropriate, given that he did not pay child support since the date of separation. The Respondent proposes the amount should be $3,375.00 calculated as of the date of the application, which initiated this proceeding. The Applicant seeks $5,456.00 calculated as of the date of separation.

[214] In an effort to strike a balance of fairness between E., who was entitled to support, and fairness to the Respondent who has now undertaken additional costs in terms of go forward child support; s. 7 expenses, and additional access costs in terms of transportation due to the Applicant's relocation to [...], I find the appropriate quantum for retroactive child support is $3,375.00. This amount will be payable by the Respondent at the rate of $50.00 per month commencing on September 3, 2013, until the debt is satisfied in full.

CONCLUSION

[215] I have scrutinized the evidence with care. I have relied upon clear, convincing, and cogent evidence in reaching this decision. I have considered the totality of the evidence, including the Exhibits, Submissions of counsel, and relevant case law.

[216] Despite some past difficulties in respecting the role of co-parenting, the Court is of the view that the Applicant and Respondent can, and will now move forward in a productive and cooperative manner to the benefit of all; most importantly in the best interests of their daughter, E.

[217] In ordering joint custody the Court directs that each parent will have a full and active role in providing a sound, moral, social, economic, and educational environment for E. The parties should thus consult each other on all substantial questions relating to E.'s general welfare. Neither party should make a major decision regarding E. without the consent or concurrence of the other, except on an emergency basis. In the event the parties are unable to agree, final decision ultimately shall be vested with the Applicant.

[218] It is thus ordered:

> (1) - The Applicant shall have primary care and control of E., with the primary residence being with the Applicant, which will commence on

September 3, 2013. The parties will continue with a shared and equal custody arrangement until that date.

(2)(a) - The Respondent shall have reasonable access at reasonable times on reasonable notice, specifically to include 3 weekends per month from Friday after school until Sunday at 7:30 p.m.

(b) To accommodate time to be spent with K., on the 4th weekend access for the Respondent will commence on Sunday at noon until Monday morning before the commencement of school.

(c) The Respondent will have access every Thursday from after school until 8:00 p.m. In advance of the weekend of K.'s visit. The Thursday visit shall be overnight with the Respondent, returning E. to school on Friday morning.

(d) Any professional development days and/or holidays which fall on a Friday or a Monday will be provided to the Respondent to extend his weekend access.

(e) Such other and further access as may be agreed upon by the parties to include:

- extended and/or block access for both parties during the summer vacation period.
- shared Christmas, Easter, and March break.
- quality time for birthdays and special occasions such as Mother's Day and Father's Day.

(3)(a) - The Respondent will pay child support in the amount of $288.00 per month commencing September 3, 2013, and continuing on each and every month thereafter until otherwise ordered by a court of competent jurisdiction.

(b) All maintenance payments must be made payable to the Applicant, and forwarded to the Office of the Director of Maintenance Enforcement, P.O. Box 803, Halifax, Nova Scotia, B3J 2V2, while the order is filed for enforcement with the Director. A copy of the Order

is to be forwarded to the Office of the Director of Maintenance Enforcement in accordance with Section 9 of the *Maintenance Enforcement Act*.

(c) The parties will provide each other with a copy of their previous year's income tax return with all attachments, as well as the Notice of Assessment by June 1st of each year, commencing on June 1st, 2014.

(4) - Retroactive child support is set at $3,375.00, payable at the rate of $50.00 per month. Payments are to commence on September 3, 2013, and are to continue on a monthly basis until the outstanding sum is paid in full.

(5) - The parties will share s. 7 expenses with the Respondent paying 67%, and the Applicant paying 33% for all reasonable and necessary expenses.

(6) - Each party will bear their respective costs of this proceeding.

[219] This Order will take effect on Tuesday, September 3, 2013 prior to the commencement of school on September 5, 2013. In preparation for E.'s first day of school, I order that the Respondent return E. to the Applicant not later than 7:30 p.m. on September 3, 2013. I encourage both parents to attend with E. on her first day of school.

[220] During the transition I encourage the parties to maximize their respective contact with E. for the remaining summer months. I encourage the parties to agree to a reasonable, equal and fair block access schedule so E. can enjoy both parents and respective extended families before the final order of primary care, custody, and residence goes into effect on September 3, 2013.

Order According,

J.