

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nurse v. Holden*, 2019 NSSC 358

Date: 2019-11-27

Docket: SFHMCA No. 089032

Registry: Halifax

Between:

Laura Nurse

Applicant

v.

Robert Holden

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: February 25 and 26; March 26, 27 and 28; August 14 and 15;
and November 27, 2019, in Halifax, Nova Scotia

Oral Decision: November 27, 2019

Written Release: December 2, 2019

Counsel: Danika Beaulieu for the Applicant, Laura Nurse
Robert Holden, Respondent, Self-Represented

By the Court:

Introduction

[1] This decision concerns Teagan who is the six-year-old child of Laura Nurse and Robert Holden. Ms. Nurse and Mr. Holden have been embroiled in a polarizing parenting dispute since Teagan was an infant. Not surprisingly, their dispute involved many court proceedings.

[2] The last permanent order was granted in 2015; it was based on a joint and shared parenting arrangement. This arrangement itself was predicated on three conditions. First, Ms. Nurse was to secure stable housing. Second, her friend, Craig Layton was to have no contact with Teagan. Third, Ms. Nurse was not permitted to exercise parenting time in Mr. Layton's home, even if he was not present. If Ms. Nurse did not secure stable housing, Tegan was to remain in Mr. Holden's primary care. The order also stipulated that a review could be scheduled once the parties' work schedules and lives stabilized.

[3] Housing continued to be an issue after the order issued. Because Ms. Nurse did not establish a stable residence separate from Mr. Layton, Teagan remained in Mr. Holden's primary care.

[4] Ms. Nurse disagreed with this outcome. She eventually filed a variation and review application to rescind the prohibitions. Ms. Nurse wants Teagan to have contact with Mr. Layton. Ms. Nurse wants to exercise parenting time in the home that she shares with Mr. Layton. In addition, Ms. Nurse wants to vary the shared and joint parenting order. Ms. Nurse seeks primary care and final decision-making authority.

[5] For his part, Mr. Holden strenuously objects to Mr. Layton having contact with Teagan. He wants the prohibitions to remain as currently ordered. In addition, he seeks primary care and final decision-making authority. He wants Ms. Nurse to exercise consistent and regular parenting time according to a set schedule.

[6] Further, Mr. Holden seeks child support on a retroactive and prospective basis, inclusive of a contribution towards childcare expenses. He asks that income be imputed to Ms. Nurse when she was underemployed.

[7] In response, Ms. Nurse objected to income being imputed to her. She also objected to paying retroactive child support. She is willing to pay prospective

maintenance based on her actual income in the event Mr. Holden is granted primary care of Teagan.

Issues

[8] In this decision, I will resolve the following five issues:

- Should the prohibitions against Craig Layton be rescinded?
- Who should have primary care?
- What decision-making protocol is in Teagan's best interests?
- What parenting schedule is in Teagan's best interests?
- What is the appropriate child support order?

Background Information

[9] In the summer of 2012, Mr. Holden hired Ms. Nurse to assist in the care of his seriously ill father. Mr. Holden was living with his father in the family home situate in St. Margaret's Bay. Mr. Holden was single and had no children. He was employed as a bus driver.

[10] When she met Mr. Holden, Ms. Nurse was in a relationship with Mr. Layton. She was also a mother to Adelaide who was five years old. Mr. Layton acted as Adelaide's *defacto* father, although there is no biological connection.

[11] The relationship between Ms. Nurse and Mr. Layton was stormy. Substance abuse and untreated mental health illnesses fueled the chaos in their lives. At one point, Ms. Nurse accused Mr. Layton of sexually assaulting Adelaide based on Adelaide's comments. Ms. Nurse shared her concerns with Mr. Holden and the authorities. After investigating, the police and child protection workers concluded that the abuse allegation was unsubstantiated.

[12] Soon after she began to care for his father, Ms. Nurse became romantically involved with Mr. Holden. They had an "on and off" relationship. During some of this time, Ms. Nurse was also in a relationship with Mr. Layton. The love triangle created significant issues, especially after Ms. Nurse became pregnant.

[13] Ms. Nurse gave birth to Teagan in the fall of 2013. By this time, the parties were living separate lives. Ms. Nurse had reunited with Mr. Layton.

[14] In November 2013, Mr. Holden applied for custody on an interim and final basis. Many contested hearings and motions ensued, culminating in a contested

hearing on March 30 and 31, 2015, a decision on April 15, 2015, and a final order being issued on June 16, 2015.

[15] Unfortunately, the parties' conflict did not end with the 2015 order. The parties were unable to implement the joint and shared parenting arrangement because Ms. Nurse continued her relationship with Mr. Layton, eventually moving in with him. By default, Mr. Holden became the primary care parent.

[16] Teagan's permanent home was established in the community of St. Margaret's Bay. Mr. Holden focused on his role as primary care parent. Faced with a disagreement surrounding day care, Mr. Holden quit his job as a bus driver, and remained at home to care for Teagan. He later established his own business painting the interior and exteriors of homes. He supplemented this income by rental income derived from an apartment he constructed in his home.

[17] In 2017, Ms. Nurse's mother was diagnosed with cancer. Ms. Nurse assisted with her mother's home care. In due course, the mother moved in with Ms. Nurse and Mr. Layton while she underwent cancer treatment. Ms. Nurse did not have frequent contact with Teagan while Ms. Nurse was caring for her mother.

[18] After her treatments finished, Ms. Nurse went on vacation with Mr. Layton and Adelaide. She wanted Teagan to join them; Mr. Holden refused given that Mr. Layton was banned from having contact with Teagan. Ms. Nurse did not visit Teagan while on vacation.

[19] On July 31, 2018, Ms. Nurse filed a variation and review application. Ms. Nurse finally decided that it was time to challenge the prohibitions and parenting provisions. Mr. Holden contested the relief sought.

[20] The contested hearing was assigned to me. It was held over seven days on February 25 and 26; March 26, 27 and 28; and August 14 and 15, 2019. In addition to the evidence from each of the parties, testimony was received from Mary Nurse, Craig Layton, Janet Harrison, Angela Bond and Shannon Helm. Oral and written submissions were provided. The matter returned to court on November 27, 2019 for oral decision.

Analysis

[21] **Should the prohibitions against Craig Layton be rescinded?**

Position of Laura Nurse

[22] Ms. Nurse wants the parenting restrictions that ban contact between Mr. Layton and Teagan rescinded for three reasons. First, Ms. Nurse states that the restrictions are no longer necessary. She submits that Mr. Layton successfully addressed his addiction issues and that his mental health has stabilized. She states that Mr. Layton has been clean and sober for almost four years. She states that because Mr. Layton is receiving treatment for his mental health, his mood and presentation are stable.

[23] Second, Ms. Nurse maintains that she and Mr. Layton have a healthy relationship. Their past conflict resolved. She notes that they participated in couple's counselling.

[24] Third, Ms. Nurse states that Mr. Layton has much to offer Teagan, individually and as part of her family.

[25] Mary Nurse and Mr. Layton gave evidence in support of Ms. Nurse's evidence and submissions.

Position of Robert Holden

[26] Mr. Holden is categorically opposed to changing the prohibitions involving Mr. Layton for reasons which include the following:

- Such a change is not in Teagan's best interests.
- Mr. Layton has a 20+ year history of addictions and mental health challenges.
- In the past, Mr. Layton had homicidal and suicidal ideation. This was confirmed by Shannon Helm, admitted by Mr. Layton, and corroborated in the medical disclosure.
- Ms. Nurse cannot be trusted to protect Teagan. She gives priority to her relationship with Mr. Layton and not to her relationship with Teagan.
- Teagan has no relationship with Mr. Layton and need not form one.
- He is not willing to take chances with Teagan's health and safety.

Law

[27] Clause 29 of the 2015 court order states that Mr. Layton must not have contact with Teagan. Clause 30 confirms that Ms. Nurse must not exercise her parenting time in Mr. Layton's home, even when he is absent.

[28] These clauses are presumed to be in Teagan's best interests at the time the order was crafted. In addition to this presumption, the evidence also confirms that at the time the court order was made, Mr. Layton was experiencing significant mental health challenges and abusing substances. The order thus correctly protected Teagan from the risk of harm associated with Mr. Layton's lifestyle choices and health problems.

[29] The prohibitions involving Mr. Layton were not subject to review under the 2015 order. They are, however, subject to variation. Therefore, in order to succeed with her application, Ms. Nurse must prove a material change in circumstances. According to *Gordon v. Goertz*, [1996] 2 S.C.R 27, a material change in circumstances involves proof of three separate elements, as follows:

- A change in the child's condition, means, needs or circumstances *or* in the ability of the parents to meet the child's needs.
- A change that must materially affect the child.
- A change that was unforeseen or not reasonably contemplated at the time of the last order.

[30] If she proves a material change, Ms. Nurse must then prove that the prohibitions are no longer in Teagan's best interests. The Supreme Court of Canada in *Young v. Young*, [1993] SCJ No 112, reviewed the legal principles to apply when parenting restrictions are in issue, as follows:

- The best interests of the child is the only test; parental preferences and rights play no role: para. 202.
- The best interests test is a positive and flexible test: paras 203 and 206.
- The mandatory maximum contact principle is not absolute, and to the extent it conflicts with a child's best interests, contact may be restricted: para 204.
- Risk of harm is not a condition precedent for imposing parenting restrictions, although risk of harm may be a relevant factor in the overall analysis: paras. 208 and 209.
- Where the proposed parenting restriction affects the quality of parental contact, the court should consider whether the offending conduct poses a

risk of harm that outweighs the benefits of a free and open relationship: para 210.

Decision

[31] I will now rule on the first stage on the analysis. Has Ms. Nurse proved a material change in circumstances? I find that she has done so for three reasons.

[32] First, Ms. Nurse proved a permanent change in her ability to meet Teagan's needs. Ms. Nurse is living with Mr. Layton. Ms. Nurse began to live with Mr. Layton immediately following the March 2015 court hearing, primarily because she had nowhere else to live. I do not believe Ms. Nurse's attempt to distance her relationship with Mr. Layton as commencing at some later time.

[33] Second, the quality of Teagan's relationship with Ms. Nurse and Adelaide is negatively affected because of the prohibitions. Teagan cannot interact with her mother and sister in their own home.

[34] Third, at the time of the last court hearing, Ms. Nurse testified that she was not involved in a relationship with Mr. Layton. Ms. Nurse spoke of living with her mother until she established her own home. Ms. Nurse is now engaged to Mr. Layton. Their relationship is not a casual one. A material change was proved.

[35] I now turn to the second stage of the analysis. Has Ms. Nurse proved that a variation of the contact prohibitions is in Teagan's best interests?

[36] The answer to this question is somewhat complicated because the court lacks jurisdiction to make orders against Mr. Layton as he is not a party. For clarification purposes, I am not ordering Mr. Layton to attend for treatment or services. The decision to do so or not to do so is entirely Mr. Layton's to make. However, if Ms. Nurse wishes to have contact with Teagan in Mr. Layton's presence, then she must provide proof of the conditions which I will shortly review. If Ms. Nurse is unable to provide ongoing proof, then the two prohibitions contained in clauses 29 and 30 of the 2015 court order will not be varied.

[37] In reaching this conclusion, I find, subject to the specified conditions, that the risk of harm arising from contact between Teagan and Mr. Layton no longer outweighs the benefits of a free and open relationship between Teagan and Ms. Nurse, for the following reasons:

- Mr. Layton is being treated for his mental health illnesses, those being borderline personality disorder and depression. Mr. Layton is compliant with his medication.
- Mr. Layton is no longer abusing substances. He sought treatment and continues to abstain. He does not allow alcohol or non-prescription medication in his home. He avoids places where alcohol is served or where non-prescription medication is available.
- Mr. Layton has not been involved with the police in about four years. Mr. Layton has not sought emergency mental health treatment in about four years. The lack of police involvement and the lack of emergency treatment corroborate Mr. Layton's testimony that he is now stable.
- Mr. Layton maintains permanent employment as a full-time technical lead. Maintaining employment is often problematic for people who are abusing substances or who are experiencing untreated mental health challenges.

[38] In summary, Ms. Nurse proved a material change in circumstances such that the prohibitions found in clauses 29 and 30 of the 2015 order can be vacated but subject to the following conditions:

- Mr. Layton must continue to attend for mental health treatment as recommended by his health care professionals.
- Mr. Layton must continue to be compliant with prescribed medication.
- Mr. Layton must continue to maintain contact with an addiction's counsellor or other treatment provider.
- Mr. Layton is not allowed to use alcohol, cannabis, or non-prescription medication.
- Ms. Nurse must provide Mr. Holden with proof of Mr. Layton's compliance with these conditions on a yearly basis, either through a letter from his health care providers or by providing a copy of his file for the prior year.
- Ms. Nurse must immediately advise Mr. Holden should Mr. Layton regress by not being compliant with his mental health treatment or by failing to abstain from alcohol or drugs.
- Mr. Layton's contact with Teagan must be in the presence of Ms. Nurse. Mr. Layton has no independent right of access to Teagan. The court must maximize the relationship between Teagan and Ms. Nurse, not the relationship between Teagan and Mr. Layton. Therefore, if Ms. Nurse is

unable to physically care for Teagan during her parenting time, then Ms. Nurse must forthwith return Teagan to Mr. Holden's care.

[39] Who should have primary care?

[40] Ms. Nurse and Mr. Holden each seek primary care of Teagan. Each party recognizes a material change in circumstances since the last court order. Each party recognizes that a joint and shared parenting arrangement is not workable, albeit for significantly different reasons. Each party states that it is in Teagan's best interests to be placed in their primary care.

Position of Ms. Nurse

[41] Ms. Nurse states that it is in Teagan's best interests to be in her primary care. Five of the most significant of her arguments will now be reviewed.

[42] First, Ms. Nurse confirms that she has a loving relationship with Teagan. Ms. Nurse feels that a primary care order is necessary to preserve and enhance that relationship. Ms. Nurse is adamant that the quality of her relationship was obstructed by the actions of Mr. Holden. She states that Mr. Holden kept Teagan from her and did little to support or encourage their relationship. She maintains that Mr. Holden was rigid when she attempted to schedule parenting time. Ms. Nurse states that Mr. Holden acted unilaterally when registering Teagan in daycare, activities and school. She states that Mr. Holden did not keep her informed about important matters affecting Teagan.

[43] Second, Ms. Nurse maintains that Mr. Holden did not abide by the court order. As an example, Mr. Holden unilaterally enrolled Teagan in daycare without her consent even though she had final decision-making of the daycare facility. In addition, Ms. Nurse states that Mr. Holden acted unilaterally on many issues involving Teagan, including the scheduling of activities and medical appointments, all contrary to the provisions of the court order. Further, Mr. Holden hired babysitters when she was available to provide childcare, again contrary to the court order.

[44] Third, Ms. Nurse states that she will not act in such a fashion if she is granted primary care. She states that she would fully support Mr. Holden's relationship with Teagan because she knows it is important for Teagan. She states that she will keep Mr. Holden advised of matters affecting Teagan's welfare.

[45] Fourth, Ms. Nurse states that she is capable of meeting Teagan's physical needs. She notes that she, Mr. Layton and Adelaide live in a three-bedroom home in Dartmouth. Their home is located on a corner lot on a quiet street, with a generous front and side yard, a back deck and is a five-minute walk from a lake, playground and local schools. She indicates that a bedroom is set up for Teagan's sole use.

[46] In addition, Ms. Nurse states that she can meet Teagan's physical needs given her employment income and the financial assistance of Mr. Layton. Further, transportation is not problematic because she has a car.

[47] Fifth, Ms. Nurse states that she is best positioned to meet Teagan's emotional and social welfare needs. Such needs include the preservation of Teagan's relationship with Adelaide, Mr. Layton, her mother and brother. Ms. Nurse is concerned that Teagan was deprived of ongoing contact with them, which is detrimental to both Teagan and Adelaide. Further, Ms. Nurse indicates that she will ensure Teagan's participation in organized activities.

[48] Ms. Nurse believes that Teagan can be successfully transitioned from Mr. Holden's primary care to her primary care.

Position of Mr. Holden

[49] Mr. Holden vigorously disputes Ms. Nurse's allegations and urges the court to place Teagan in his continued primary care. In support of his position, Mr. Holden states as follows:

- Teagan and he share a strong bond because Ms. Nurse was virtually absent from Teagan's life until the court had Ms. Nurse commit to a set parenting schedule during the 2019 hearing.
- Teagan would be devastated if she was removed from his primary care.
- Teagan is a happy, well-adjusted little girl because of his love, care and direction.
- Teagan adores their family home in the small community of St. Margaret's Bay where she is well-known and loved. Mr. Holden also notes that his home is about 12 minutes from all amenities including a recreational facility with a rink and pool.

- He has always met Teagan's needs with little to no financial assistance from Ms. Nurse, other than the occasional gift of clothing or a toy. Mr. Holden states that he will continue to meet all of Teagan's needs.
- The relationship between Ms. Nurse and Mr. Layton is not healthy and exposure to this relationship will negatively impact Teagan.

[50] In response to Ms. Nurse's allegations, Mr. Holden states that he did not in any way obstruct the relationship between Teagan and Ms. Nurse. To the contrary, Mr. Holden states that he repeatedly requested a set schedule so that Ms. Nurse could see Teagan on a regular and consistent basis. Mr. Holden states that Ms. Nurse was uncooperative, uninterested and unavailable because of other priorities. He is not responsible for the lack of relationship between Ms. Nurse and Teagan. Ms. Nurse is solely responsible for this outcome.

[51] From Mr. Holden's perspective, Teagan's best interests will be served by being placed in his primary care with Ms. Nurse exercising regular and consistent parenting time.

Law and Decision

[52] Each party states that a shared parenting arrangement is not in Teagan's best interests. I agree. My decision is based on the following two reasons:

- Ms. Nurse and Mr. Holden are embroiled in a high conflict parenting dispute. There is little likelihood that communication will improve because neither party has the skills or desire to do so. A shared parenting arrangement will exacerbate the conflict and negatively draw Teagan into the parental dispute. Conflict is not in Teagan's best interests.
- A shared parenting arrangement is fraught with logistical challenges. The parties do not live in the same community. Mr. Holden lives in St. Margaret's Bay. Ms. Nurse lives in Dartmouth. Teagan attends school and both parties work. It is geographically impossible to have a shared parenting schedule that will ensure Teagan's timely attendance at school without significant travel time.

[53] Because a shared parenting plan is not in Teagan's best interests, I must designate a primary care parent. In so doing, I must focus solely on Teagan's best interests. Factors composing the best interests test are stated in s. 18 (6) of the *Parenting and Support Act*, many of which the parties referenced in their evidence and submissions. In addition, the parties also cited the factors stated in *Foley v.*

Foley, (1994)124 NSR (2d) 198 (SC), which are similar to those found in the legislation.

[54] My analysis of these factors must be balanced and comparative: *D.A.M. v. C.J.B.*, 2017 NSCA 91. I will frame my comparative analysis around the factors highlighted by the parties. These factors are as follows:

- Parental Relationships / Facilitation of Contact
- History of Care
- Child's Physical Needs
- Child's Emotional Needs
- Child's Social Needs
- Child's Educational Needs
- Child's Relationship with Other People
- Maximum Contact

Factor 1: Parental Relationships & Facilitation of Contact - ss.18 (6)(b) and (g)

[55] Mr. Holden has a more mature, more stable and stronger relationship with Teagan than does Ms. Nurse. Mr. Holden was Teagan's primary care parent since the last court order. Mr. Holden assumed this role with love, diligence and care as is evident from the following:

- Mr. Holden quit his job as a bus driver so that he would be available to care for Teagan on a full-time basis. His employment schedule as a bus driver was not conducive to his parental role, especially given the daycare disagreement and Ms. Nurse's failure to exercise consistent parenting time. Given these dynamics, Mr. Holden became a stay-at-home father.
- Mr. Holden was able to fund his stay-at-home role by spending some of his inheritance; by selling vehicles, collections and other personal items; and by constructing an apartment in his home so that he could earn rental income.
- Mr. Holden enjoyed raising Teagan. Mr. Holden involved Teagan in activities such as swimming, skating, crafts, reading, play dates and sleep overs with friends. Mr. Holden regularly took Teagan to the local library to read books, to meet other children, and to participate in age-appropriate activities sponsored by the library. Mr. Holden also spent time alone with Teagan. The time, activities and care provided the foundation for the growth of a healthy and happy father-daughter relationship.

- Ms. Harrison, the librarian, confirmed that Mr. Holden usually brought Teagan to the library two to three times a week for two to three hours. Ms. Harrison observed a healthy and loving relationship between Mr. Holden and Teagan noting hand holding, snuggles and affection. Similar supporting comments were noted by Angela Bond, an occasional babysitter and Shannon Helm, an acquaintance. I accept their evidence.

[56] In contrast, Teagan's relationship with Ms. Nurse suffered because of choices made by Ms. Nurse and not due to obstructive conduct by Mr. Holden. I make this finding for the following reasons:

- The court order prohibited contact between Mr. Layton and Teagan. The court order confirmed that Ms. Nurse was not to exercise parenting time in Mr. Layton's home, even if he was absent. Despite these specific prohibitions, Ms. Nurse reconciled with Mr. Layton and moved in with him. Ms. Nurse thereby assigned priority to her relationship with Mr. Layton even though such a relationship would inevitably complicate her ability to parent Teagan. Mr. Holden had nothing whatsoever to do with this decision.
- Mr. Holden permitted Ms. Nurse and her mother to exercise access in his home, including holiday visits. This offer was made because Ms. Nurse said that she had no other place available. I do not accept the evidence of Ms. Nurse and her mother when they stated that Mr. Holden was purposively inappropriate during these visits.
- Ms. Nurse refused to commit to a schedule of consistent and regular parenting time. Indeed, Ms. Nurse only did so after I intervened during the 2019 court hearing and urged her co-operation. Mr. Holden welcomed the schedule because it provided Teagan with consistency.
- Ms. Nurse spent minimal time with Teagan while she was caring for her mother from 2017 until May 2018. Mr. Holden played no role in this decision.
- Ms. Nurse spent little time with Teagan in the summer of 2018 because Ms. Nurse went on vacation to Ontario and Alberta. Ms. Nurse made the decision to travel. Mr. Holden did not.
- Ms. Nurse blames Mr. Holden for not allowing Teagan to have contact with Mr. Layton. This prohibition was court-ordered.

[57] In summary, although Teagan loves her mother, their relationship lacks the stability and maturity found in the relationship between Teagan and Mr. Holden.

The father-daughter relationship is strong because of the time that Mr. Holden spent with Teagan and because of the loving and nurturing activities jointly undertaken and enjoyed.

[58] A comparative analysis of this factor favours Mr. Holden.

Factor 2: History of Care- s.18 (6)(c)

[59] Since the 2015 court order, Ms. Nurse's physical contact with Teagan was inconsistent, irregular and minimal. At one point in 2017 and 2018, Ms. Nurse did not visit Teagan for about five months. Further, Ms. Nurse's emotional and financial contribution towards Teagan was limited.

[60] In contrast, Mr. Holden exercised primary care of Teagan and almost exclusively ensured that her physical, emotional, educational and social welfare needs were met. Mr. Holden was successful in his role of primary care provider. Teagan is repeatedly described as a happy, well-adjusted, loving, polite, kind and intelligent girl. Mr. Holden's influence was positive.

[61] A comparative analysis of this factor favours Mr. Holden.

Factor 3: Physical Needs - s.18(6) (a) & (d)

[62] I find that Mr. Holden's plan is superior to that of Ms. Nurse in respect of Teagan's physical needs. Mr. Holden has a proven record of meeting all of Teagan's physical needs, with minimal contribution from Ms. Nurse.

[63] In addition, although both parties have appropriate homes, Mr. Holden's home is superior because it represents familiarity and continuity for Teagan. Teagan lived most of her life in their family home in St. Margaret's Bay. She is happy there. She is connected to this rural community.

[64] A comparative analysis of this factor favours Mr. Holden.

Factor 4: Emotional Needs -s 18(6)(a) & (d)

[65] Mr. Holden is better suited to meet Teagan's emotional needs than is Ms. Nurse. Mr. Holden successfully met Teagan's emotional needs since the 2015 order. Teagan feels safe, secure and loved in her father's care.

[66] Mr. Holden gave Teagan years of positive and child-focused parenting. He provided Teagan with encouragement and a positive sense of self. Teagan gained

independence; she has an appropriate curiosity about the world. Mr. Holden taught Teagan to problem solve in a healthy manner, including how to manage the bullying incident during this past summer. Teagan and Mr. Holden communicate and share confidences. Mr. Holden, although not perfect, prioritized Teagan's needs. Mr. Holden was and is a positive role model.

[67] In contrast, Ms. Nurse did not prioritize Teagan's emotional needs. Ms. Nurse gave priority to her relationship with Mr. Layton, then to the care of her mother, and then to her own need for vacation. Teagan was not number one. Ms. Nurse spent time with Teagan when it was convenient to Ms. Nurse. In so doing, Ms. Nurse failed to recognize the importance of a consistent, reliable and regular parenting schedule to ensure Teagan's emotional needs.

[68] Further, Ms. Nurse lacks insight. The lack of insight impaired her emotional availability because she was unable to focus and empathize. As an example, Ms. Nurse wrongly but consistently blamed Mr. Holden for her failure to have an ongoing relationship with Teagan. With insight, Ms. Nurse would assume responsibility for her lack of contact. With insight, Ms. Nurse would make the necessary changes so that she would have regular contact with Teagan, thus meeting Teagan's emotional needs.

[69] A comparative analysis of this factor favours Mr. Holden.

Factor 5: Social Needs -s 18(6)(a) & (d)

[70] Since the 2015 court order, Mr. Holden successfully met Teagan's social needs. He ensured that she socialized with friends her own age by attending group activities at the library, local recreation center, parties and afterschool care. He arranged play dates and sleep overs. He registered Teagan in organized and ad hoc activities. They walked, hiked, swam, skated, fished, biked, played, read and enjoyed their time spent together. Mr. Holden also encouraged Teagan's love of animals. They have a dog, a cat and two gerbils.

[71] Ms. Nurse also engaged Teagan in age-appropriate activities including swimming, playing and reading, but such activities were limited because Ms. Nurse did not consistently visit Teagan.

[72] A comparative analysis of this factor favours Mr. Holden.

Factor 6: Educational Needs -s 18(6) (a) & (d)

[73] Although both parties can ensure Teagan's educational needs, Mr. Holden has a better history of so doing. Since the 2015 order, Mr. Holden exposed Teagan to many and varied educational opportunities. Mr. Holden understands the value of education, including early childhood education.

[74] Mr. Holden attempted to enroll Teagan in an organized daycare near his home, but Ms. Nurse refused to consent. Ms. Nurse had final decision-making authority. Ms. Nurse insisted that Teagan attend a daycare in her area. This even though Ms. Nurse was not exercising access on a regular basis, and even though Teagan was in the primary care of Mr. Holden who lived a considerable distance away from Ms. Nurse's home.

[75] Mr. Holden eventually placed Teagan in preschool in the spring of 2018, in anticipation of a fall school registration. His decision, though not in compliance with the 2015 order, was nonetheless in Teagan's best interests given the absence of a shared parenting regime and Ms. Nurse's lack of contact.

[76] I also recognize Ms. Nurse's contribution to Teagan's educational needs. Ms. Nurse exposed Teagan to educational opportunities during her visits with Teagan. Ms. Nurse also paid for the Excel program since October 2018.

[77] A comparative analysis of this factor somewhat favours Mr. Holden.

Factor 7: Relationship with Other Important people – s 18(h)

[78] Mr. Holden has no extended family who has contact with Teagan. Mr. Holden, however, ensured Teagan's ongoing relationship with her friends and with Mr. Holden's friends.

[79] In comparison, Teagan does have a relationship with her maternal grandmother and her sister. These relationships are important to Teagan's sense of self and sense of family. They should be encouraged. Mr. Holden did not attempt to limit these relationships. The relationships were limited because Ms. Nurse did not exercise regular parenting time.

[80] Neither party has a superior plan in respect of this factor.

Factor 9: Maximum Contact- s. 18(8)

[81] Since the 2015 order, Ms. Nurse chose to limit her contact with Teagan. Mr. Holden did not prevent Ms. Nurse from spending more time with Teagan. Mr.

Holden cannot be faulted for Ms. Nurse's lack of meaningful contact. I reject the evidence of Ms. Nurse where she suggests the contrary to be true.

[82] In addition, I reject the allegation that Mr. Holden hired babysitters to prevent Ms. Nurse from providing care. This allegation is a significant distortion of the actual events. After becoming a stay-at-home father, Mr. Holden began to work as a painter. He needed reliable childcare. Ms. Nurse would not agree to a reliable or consistent parenting schedule. Mr. Holden therefore hired a babysitter to ensure quality childcare coverage while he worked. Mr. Holden needed to work to cover his and Teagan's expenses. Employment was not optional. There was no nefarious plot to exclude Ms. Nurse.

[83] In summary, Mr. Holden attempted to have Ms. Nurse commit to a regular schedule of visitation. Ms. Nurse refused. Mr. Holden continues to be in favour of a regular parenting schedule. Ms. Nurse states that she is as well. This factor is thus neutral in the circumstances of this case.

Summary of Primary Care Decision

[84] I find that it is in Teagan's best interests to be placed in the primary care of Mr. Holden based on a comparative analysis of the best interests factors. Mr. Holden proved a successful history of meeting Teagan's needs. In addition his prospective parenting plan is appropriate. Mr. Holden's plan provides Teagan with stability and security. Mr. Holden will continue to prioritize Teagan's needs.

[85] In contrast, Ms. Nurse's plan is untested. Ms. Nurse has a history of prioritizing other interests over Teagan's needs. Ms. Nurse only recently began to spend time with Teagan on a regular and consistent basis.

[86] Further, I find that Teagan would be distressed and devastated should she be forced to change her primary care parent, her home, her community, her school and all that is familiar and stable to her. Such a change is contrary to Teagan's best interests.

[87] **What decision-making protocol is in Teagan's best interests?**

Position of the Parties

[88] Each party testified about the conflict that developed over decisions affecting Teagan. Each party blamed the other for the conflict and the lack of cooperation. Each party seeks final decision-making responsibility.

Legislation

[89] Section 17A (2) of the *Parenting and Support Act* provides the court with the jurisdiction to assign decision-making to one or more parents. Section 17 A(2) states as follows:

(2) A parenting plan may assign to one or more parents or guardians the decision-making authority for any area of the child's care, supervision and development.

[90] Section 17A (3)(k) of the *Act* allows the court to develop communication protocols between parents. This section provides as follows:

17A(3) A parenting plan may cover any areas of the child's care, supervision and development including,
(k) communication between the parents and guardians, as the case may be, regarding the child; and

[91] Section 18A discusses the presumptive rule for decision-making during parenting time. Section 18A states as follows:

18A Unless otherwise provided by court order or agreement, a parent or guardian shall, during parenting time with the child,
(a) be responsible for the child's day-to-day care and supervise the child's daily activities; and
(b) make decisions regarding the child's day-to-day care in a manner consistent with the decisions of the person or persons with custody of the child. 2015, c. 44, s. 20.

[92] When deciding the issue of final decision-maker, I must apply the best interests of the child.

Decision

[93] Clause 3 of the 2015 order states that the parties shall consult and agree on all major decisions affecting Teagan. Clause 24 of the order provides Ms. Nurse with final decision-making authority in respect of the daycare placement. The order also sets out the communication protocol.

[94] I find a material change in the circumstances. The communication and decision-making provisions of the 2015 order were predicated on a shared and joint parenting arrangement which never materialized. The *defacto* parenting arrangement was one of primary care. Further, the parties were unable to successfully navigate and apply the decision-making and communication protocols. To the contrary, their conflict increased.

[95] I therefore find that the communication and decision-making provisions of the order must be varied in Teagan's best interests. New provisions must address the following realities:

- The parties are unable to work cooperatively. They were unable to reach joint decisions on many important matters affecting Teagan since the 2015 court order. This is not likely to change in the near future.
- The parties lack the communication skills necessary to achieve joint and shared decision-making. It is unlikely that the parties will learn such skills in the near future.
- The parties do not respect each other. For example, Ms. Nurse literally turned her back to Mr. Holden while he testified in court. Ms. Nurse's lack of respect was self-evident. Similarly, Mr. Holden does not trust or respect Ms. Nurse. Joint decisions are likely impossible in such circumstances.
- Ms. Nurse has a history of making decisions that prioritized other people rather than Teagan.
- Acrimony and conflict are not in Teagan's best interests.

[96] The new decision-making and communication protocols are as follows:

- Mr. Holden must consult Ms. Nurse, on a timely basis, about important decisions which impact Teagan's health, education and general welfare. Ms. Nurse must respond in a timely fashion. If Ms. Nurse does not respond in a timely fashion, Mr. Holden may proceed in her absence. If the parties are unable to reach agreement, Mr. Holden will have final decision-making authority.
- Mr. Holden must keep Ms. Nurse updated on important matters affecting Teagan's health, education and general welfare. Such updates should generally be provided once a month, unless timely consideration requires a more frequent update. The updates should be transferred via email.
- Each party may attend parent teacher meetings and all major school events, including concerts, programs and activities. Each party is to make arrangements directly with the school to obtain a copy of the child's report cards and to obtain notice about tests, assignments, school concerts, programs and activities. Mr. Holden is not required to provide Ms. Nurse with notice of these matters.

- All communication between the parties must be child focused and respectful and shall occur through e-mail, except in the case of an emergency or urgency. Both parties must exchange e-mail addresses to assist with communication. Text messages, telephone calls and in-person discussions should be avoided unless an emergency or urgent matter needs to be addressed.
- Each party may communicate with professionals involved in the child's care, and each has the right to obtain information and documentation respecting the child from all medical professionals, educators, health professionals and social welfare professionals without the further consent of the other party.
- Neither party will speak disparagingly of the other party, or their family, in the presence or hearing distance of the child.
- Neither party will use the child to relay messages to the other party.

[97] **What parenting schedule is in Teagan's best interests?**

[98] It is in Teagan's best interests to be in Mr. Holden's primary care and to have regular parenting time with Ms. Nurse. In determining Ms. Nurse's parenting time, I must apply the maximum contact principle. The maximum contact principle, however, is not absolute; it is qualified by the child's best interests: *Young v. Young*, supra, para. 204.

[99] My decision will reflect Teagan's age and needs. Teagan is only 6 years old. Teagan has few experiences of overnights with Ms. Nurse. Teagan is accustomed to spending most of her time in her St. Margaret's Bay home and community. She is involved in activities with her friends and Mr. Holden.

[100] Ms. Nurse was not always consistent in the exercise of her parenting time. Since court intervention, Ms. Nurse was able to manage visits every second weekend from 11:00 a.m. to 5:00 p.m. on Saturday and Sunday.

[101] Ms. Nurse and Mr. Holden live in different communities. Teagan is in school during the week and both parties work, thus making weekday visits problematic given Teagan's age. In addition, Teagan needs to have weekend time with both Mr. Holden and with Ms. Nurse.

[102] Given these circumstances, the following parenting schedule is in Teagan's best interests:

Primary Care

A. Teagan's primary residence is with Mr. Holden.

Regular Parenting Schedule

B. Teagan will be in the physical care of Ms. Nurse based on the following two-week rotating schedule:

- *Week One:* During week one, Teagan will be in the physical care of Ms. Nurse from Saturday at 2:00 pm until Sunday at 2:00 pm. At all other times, Teagan will be in the physical care of Mr. Holden.
- *Week Two:* During week two, Teagan will be in the physical care of Ms. Nurse from Friday at 6:00 pm until Saturday at 2:00 pm. At all other times, Teagan will be in the physical care of Mr. Holden.

Special Occasions and Holidays

C. The regular schedule will be suspended for special occasions and holidays, and the following parenting schedule will be followed instead:

- *Mother's Day and Father's Day:* Teagan will spend Mother's Day with Ms. Nurse from 10:00 am until 6:00 pm. Teagan will spend Father's Day with Mr. Holden from 10:00 am until 6:00 pm.
- *Summer Vacation:* Each party will have seven consecutive days with Teagan for summer vacation. During the even numbered years, Mr. Holden must provide notice to Ms. Nurse by May 1st of the seven days he intends to schedule for summer vacation. Ms. Nurse must provide notice by May 15th of her intended vacation dates. During the odd numbered years, Ms. Nurse must provide notice to Mr. Holden by May 1st of the seven days she intends to schedule for summer vacation. Mr. Holden must provide notice by May 15th of his intended vacation dates.
- *Christmas:* Teagan will be in the physical care of Mr. Holden every December 24th until 3:00 pm on December 25th. Teagan will be in the physical care of Ms. Nurse every December 25th from 3:00 pm until December 26th at 6:00 pm.
- *Spring Break:* Teagan will be in the physical care of Ms. Nurse for three days and two overnights of the spring break holiday at times to be agreed upon by the parties in keeping with Ms. Nurse's

schedule. Teagan will be in the physical care of Mr. Holden at all other times.

- *Easter:* Teagan will be in the physical care of Mr. Holden on Easter Saturday until Easter Sunday at 3:00 pm. Teagan will be in the physical care of Ms. Nurse from 3:00 pm on Easter Sunday until 6:00 pm on Easter Monday.

D. *Parenting Time Exchanges:* The parties will meet at the Superstore in Tantallon for the parenting exchanges at the commencement of the visits. The parties will meet at Dartmouth Crossing for the parenting exchanges at the conclusion of the visits.

E. *Travel Notice:* If either party intends to travel with the child, they will provide written and reasonable notice to the other party of the travel itinerary, including contact information where the child can be reached.

[103] What is the appropriate child support order?

Position of the Parties

[104] Mr. Holden seeks child support on a retroactive and prospective basis. He asks that income be imputed to Ms. Nurse. Further, Mr. Holden wants Ms. Nurse to pay 50% of the childcare expenses, such as Excel, summer day camps and childcare fees.

[105] Ms. Nurse objects to having income imputed and objects to paying retroactive child support. She states that her income fell below the threshold for most years. She states that she nonetheless contributed by buying clothes and toys. She is willing to pay child support prospectively.

Decision

[106] From 2015 until 2018, Ms. Nurse did not earn enough income to pay child support according to the *CSGs*. Notwithstanding her reported income, I nonetheless have the jurisdiction to impute or deem income if Ms. Nurse was intentionally underemployed or unemployed except in specified circumstances. Section 19 of the Child Support Guidelines lists one of the exceptions as follows:

The parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;

[107] The discretionary authority found in s. 19 of the CSG must be exercised judicially and in accordance with rules of reason and justice, and not arbitrarily. There must be a rational and solid evidentiary foundation grounded in fairness and reasonableness to support an imputation claim: *Coadic v. Coadic*, 2005 NSSC 291. The factors to be applied to an alleged underemployment case are set out in *Smith v. Helpi*, 2011 NSCA 65. I adopt and apply these factors.

[108] Mr. Holden proved that income should be imputed to Ms. Nurse from June 2018 onward. I will not, however, impute income before that time. In so finding, I note that Ms. Nurse was experiencing significant struggles in her life before June 2018, include instability of housing, instability of work, and instability of relationships. She was also emotionally and physically drained while caring for her mother. Therefore no income is attributed until after May 2018.

[109] Ms. Nurses' circumstances changed in May 2018 when her mother was sufficiently recovered, thus allowing Ms. Nurse and her family to travel to Quebec and then in the summer to Ontario and Alberta.

[110] Ms. Nurse is educated as a CCA. As of June 1, 2018, income is imputed to her in the annual amount of \$27,000 which is based on what she should have earned as a CCA, as confirmed in the trial evidence. Child support is thus payable at a rate of \$221 per month until Ms. Nurse secured a new job as a meter reader earning \$39,461 per annum in September 2019. Ms. Nurse must pay the table amount of child support based on this income in the amount of \$336 per month commencing September 1, 2019. Maintenance will be payable through the MEP.

[111] In addition, Ms. Nurse must pay Mr. Holden 50% of the after-tax costs of the daycare, day camp, childcare and Excel expenses incurred from June 1, 2018 onward. I retain jurisdiction to determine this amount absent the parties' agreement. I suggest they use calculations, from Divorce Mate, ChildView or by any other reliable means to confirm that after tax amount. The parties are to complete their calculations by December 9, 2019.

[112] Further, Ms. Nurse will receive credit for all money, not goods, paid to Mr. Holden, MEP or the Excel program during this period.

[113] This maintenance order technically produces a retroactive claim. I note a review was contemplated in clauses 42 and 43 of the 2015 order. In addition, a retroactive award is appropriate given my **DBS** analysis as follows:

- Mr. Holden offered a reasonable excuse for the delay. He already spent about \$60,000 in legal fees because of previous, related court proceedings. He was financially and emotionally spent. He hoped to avoid more litigation.
- Ms. Nurse engaged in blameworthy conduct. She knew Teagan needed financial support. She knew Mr. Holden was the *de facto* primary care parent. She ignored her legal obligation to financially support Teagan.
- Teagan required the child support. Mr. Holden's financial position was not robust. Mr. Holden will use the retroactive support to meet Teagan's needs.
- Although the retroactive award will likely cause Ms. Nurse to experience some hardship, this hardship can be mitigated by paying the retroactive award over time. Ms. Nurse will pay the retroactive award at a rate of \$50 per month.

Conclusion

[114] The parenting and maintenance provisions of the 2015 court order are vacated and replaced with the provisions stated in this order. The ordered changes are necessary to ensure that Teagan's best interests are maintained. In summary, the following relief is ordered:

- The prohibitions involving Mr. Layton are conditionally vacated.
- Teagan will remain in the primary care of Mr. Holden.
- Mr. Holden is granted final decision-making authority.
- Ms. Nurse will exercise specified parenting time.
- Ms. Nurse must pay child support based on the table amount, together with 50% of the after-tax costs of the childcare related expenses.
- Child support is ordered retroactive to June 2018.

[115] If either party wishes to claim costs, their submissions are to be filed by December 30, 2019 and response submissions by January 15, 2020.

Forgeron, J.