

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *L.N. v. R.H.*, 2019 NSSC 358

Date: 20191127

Docket: *Hfx* SFHMCA No. 089032

Registry: Halifax

Between:

L.N.

Applicant

v.

R.H.

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 November 27, 2019

Decision:

Written December 2, 2019

Release:

Counsel: Danika Beaulieu for the Applicant, L.N.

R.H., Respondent, Self-Represented

By the Court:

Introduction

[1] This decision concerns TH (“the Daughter”) who is the six-year-old child of LN (“the Mother”), and RH. (“the Father”). The Mother and the Father have been embroiled in a polarizing parenting dispute since the Daughter 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, the Mother was to secure stable housing. Second, her friend, Mr. L was to have no contact with the Daughter. Third, the Mother was not permitted to exercise parenting time in Mr. L’s home, even if he was not present. If the Mother did not secure stable housing, the Daughter was to remain in the Father’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 the Mother did not establish a stable residence separate from Mr. L, the Daughter remained in the Father’s primary care.

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

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

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

[7] In response, the Mother 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 the Father is granted primary care of the Daughter.

Issues

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

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 L be rescinded?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

Background Information

[9] In the summer of 2012, the Father hired the Mother to assist in the care of his seriously ill father. The Father was living with his father in the family home situate in * The Father was single and had no children. He was employed as a bus driver.

[10] When she met the Father, the Mother was in a relationship with Mr. L. She was also a mother to A who was five years old. Mr. L acted as A's *defacto* father, although there is no biological connection.

[11] The relationship between the Mother and Mr. L was stormy. Substance abuse and untreated mental health illnesses fueled the chaos in their lives. At one point, the Mother accused Mr. L of sexually assaulting A based on A's comments. The Mother shared her concerns with the Father 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, the Mother became romantically involved with the Father. They had an "on and off" relationship. During some of this time, the Mother was also in a relationship with Mr. L. The love triangle created significant issues, especially after the Mother became pregnant.

[13] The Mother gave birth to the Daughter in the fall of 2013. By this time, the parties were living separate lives. The Mother had reunited with Mr. L.

[14] In November 2013, the Father 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 the Mother continued her relationship with Mr. L, eventually moving in with him. By default, the Father became the primary care parent.

[16] The Daughter's permanent home was established in the community of *. The Father focused on his role as primary care parent. Faced with a disagreement surrounding day care, the Father quit his job as a bus driver, and remained at home to care of the Daughter. . 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, the Daughter's grandmother was diagnosed with cancer. The Mother assisted with her own mother's home care. In due course, the Mother moved in with her own Mother and Mr. L while she underwent cancer treatment. The Mother did not have frequent contact with the Daughter while the Mother was caring for her mother.

[18] After the grandmother's treatments finished, the Mother went on vacation with Mr. L and A. She wanted the Daughter to join them; the Father refused given that Mr. L was banned from having contact with the Daughter. The Mother did not visit the Daughter while she was on vacation.

[19] On July 31, 2018, the Mother filed a variation and review application. The Mother finally decided that it was time to challenge the prohibitions and parenting provisions. The Father 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 MN, Mr. L, JH, AB, and SH.. Oral and written submissions were provided. The matter returned to court on November 27, 2019 for oral decision.

Analysis

[21] **Should the prohibitions against Mr. L be rescinded?**

Position of the Mother

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

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

[24] Third, the Mother states that Mr. L has much to offer the Daughter individually and as part of her family.

[25] Mary Nurse and Mr. L gave evidence in support of the Mother's evidence and submissions.

Position of the Father

[26] The Father is categorically opposed to changing the prohibitions involving Mr. L for reasons which include the following:

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

Law

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

[28] These clauses are presumed to be in the Daughter'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. L was experiencing significant mental health challenges and abusing substances. The order thus correctly protected the Daughter from the risk of harm associated with Mr. L's lifestyle choices and health problems.

[29] The prohibitions involving Mr. L were not subject to review under the 2015 order. They are, however, subject to variation. Therefore, in order to succeed with her application, the Mother 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, the Mother must then prove that the prohibitions are no longer in the Daughter'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 the Mother proved a material change in circumstances? I find that she has done so for three reasons.

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

[33] Second, the quality of the Daughter's relationship with the Mother and A is negatively affected because of the prohibitions. The Daughter cannot interact with her mother and sister in their own home.

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

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

[36] The answer to this question is somewhat complicated because the court lacks jurisdiction to make orders against Mr. L as he is not a party. For clarification purposes, I am not ordering Mr. L to attend for treatment or services. The decision to do so or not to do so is entirely Mr. L's to make. However, if the Mother wishes to have contact with the Daughter in Mr. L's presence, then she must provide proof of the conditions which I will shortly review. If the Mother 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 the Daughter and Mr. L no longer outweighs the benefits of a free and open relationship between the Daughter and the Mother, for the following reasons:

- Mr. L is being treated for his mental health illnesses, those being borderline personality disorder and depression. Mr. L is compliant with his medication.

- Mr. L 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. L has not been involved with the police in about four years. Mr. L has not sought emergency mental health treatment in about four years. The lack of police involvement and the lack of emergency treatment corroborate Mr. L's testimony that he is now stable.
- Mr. L 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, the Mother 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. L must continue to attend for mental health treatment as recommended by his health care professionals.
- Mr. L must continue to be compliant with prescribed medication.
- Mr. L must continue to maintain contact with an addiction's counsellor or other treatment provider.
- Mr. L is not allowed to use alcohol, cannabis, or non-prescription medication.
- The Mother must provide the Father with proof of Mr. L'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.
- The Mother must immediately advise the Father should Mr. L regress by not being compliant with his mental health treatment or by failing to abstain from alcohol or drugs.
- Mr. L's contact with the Daughter must be in the presence of the Mother. Mr. L has no independent right of access to the Daughter. The court must maximize the relationship between the Daughter and the Mother, not the relationship between the Daughter and Mr. L. Therefore, if the Mother is unable to physically care for the Daughter during her

parenting time, then the Mother must forthwith return the Daughter to the Father's care.

[39] Who should have primary care?

[40] The Mother and the Father each seek primary care of the Daughter.. 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 the Daughter's best interests to be placed in their primary care.

Position of the Mother

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

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

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

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

[45] Fourth, the Mother states that she is capable of meeting the Daughter's physical needs. She notes that she, Mr. L and A 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 the Daughter's sole use.

[46] In addition, the Mother states that she can meet the Daughter physical needs given her employment income and the financial assistance of Mr. L. Further, transportation is not problematic because she has a car.

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

[48] The Mother believes that the Daughter can be successfully transitioned from the Father's primary care to her primary care.

Position of the Father

[49] The Father vigorously disputes the Mother's allegations and urges the court to place the Daughter in his continued primary care. In support of his position, the Father states as follows:

- The Daughter and he share a strong bond because the Mother was virtually absent from the Daughter's life until the court had the Mother commit to a set parenting schedule during the 2019 hearing.
- The Daughter would be devastated if she was removed from his primary care.
- The Daughter is a happy, well-adjusted little girl because of his love, care and direction.
- The Daughter adores their family home in the small community of * where she is well-known and loved. The Father 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 the Daughter's needs with little to no financial assistance from the Mother, other than the occasional gift of clothing or a toy. The Father states that he will continue to meet all of the Daughter's needs.
- The relationship between the Mother and Mr. L is not healthy and exposure to this relationship will negatively impact the Daughter.

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

[51] From the Father's perspective, the Daughter best interests will be served by being placed in his primary care with the Mother exercising regular and consistent parenting time.

Law and Decision

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

- The Mother and the Father 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 the Daughter into the parental dispute. Conflict is not in the Daughter's best interests.
- A shared parenting arrangement is fraught with logistical challenges. The parties do not live in the same community. The Father lives in *. The Mother lives in Dartmouth. The Daughter attends school and both parties work. It is geographically impossible to have a shared parenting schedule that will ensure the Daughter's timely attendance at school without significant travel time.

[53] Because a shared parenting plan is not in the Daughter's best interests, I must designate a primary care parent. In so doing, I must focus solely on the

Daughter'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] The Father has a more mature, more stable and stronger relationship with the Daughter than does the Mother. The Father was the Daughter's primary care parent since the last court order. The Father assumed this role with love, diligence and care as is evident from the following:

- The Father quit his job as a bus driver so that he would be available to care for the Daughter 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 the Mother failure to exercise consistent parenting time. Given these dynamics, the Father became a stay-at-home father.
- The Father 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.
- The Father enjoyed raising the Daughter. The Father involved the Daughter in activities such as swimming, skating, crafts, reading, play dates and sleep overs with friends. The Father regularly took the

Daughter to the local library to read books, to meet other children, and to participate in age-appropriate activities sponsored by the library. The Father also spent time alone with the Daughter.. The time, activities and care provided the foundation for the growth of a healthy and happy father-daughter relationship.

- Ms. H, the librarian, confirmed that the Father usually brought the Daughter to the library two to three times a week for two to three hours. Ms. Harrison observed a healthy and loving relationship between the Father and the Daughter noting hand holding, snuggles and affection. Similar supporting comments were noted by AB, an occasional babysitter and SH an acquaintance. I accept their evidence.

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

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

- The Mother spent little time with the Daughter in the summer of 2018 because the Mother went on vacation to Ontario and Alberta. The Mother made the decision to travel. The Father did not.
- The Mother blames the Father for not allowing the Daughter to have contact with Mr. L. This prohibition was court-ordered.

[57] In summary, although the Daughter loves her mother, their relationship lacks the stability and maturity found in the relationship between the Daughter and the Mother.. The father-daughter relationship is strong because of the time that the Father spent with the Daughter and because of the loving and nurturing activities jointly undertaken and enjoyed.

[58] A comparative analysis of this factor favours the Father.

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

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

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

[61] A comparative analysis of this factor favours the Father.

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

[62] I find that the Father's plan is superior to that of the Mother in respect of the Daughter's physical needs. The Father has a proven record of meeting all of the Daughter's physical needs, with minimal contribution from the Mother

[63] In addition, although both parties have appropriate homes, the Father's home is superior because it represents familiarity and continuity for the Daughter. The Daughter lived most of her life in their family home in *. She is happy there. She is connected to this rural community.

[64] A comparative analysis of this factor favours the Father.

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

[65] The Father is better suited to meet the Daughter's emotional needs than is the Mother. The Father successfully met the Daughter's emotional needs since the 2015 order. The Daughter feels safe, secure and loved in her father's care.

[66] The Father gave the Daughter years of positive and child-focused parenting. He provided the Daughter with encouragement and a positive sense of self. The Daughter gained independence; she has an appropriate curiosity about the world. The Father taught the Daughter to problem solve in a healthy manner, including how to manage the bullying incident during this past summer. The Daughter and the Father communicate and share confidences. The Father, although not perfect, prioritized the Daughter's needs. The Father was and is a positive role model.

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

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

[69] A comparative analysis of this factor favours the Father.

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

[70] Since the 2015 court order, the Father successfully met the Daughter'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 the Daughter in organized and ad hoc activities. They walked, hiked, swam, skated, fished, biked, played, read and enjoyed their time spent together. The Father also encouraged the Daughter's love of animals. They have a dog, a cat and two gerbils.

[71] The Mother also engaged the Daughter in age-appropriate activities including swimming, playing and reading, but such activities were limited because the Mother did not consistently visit the Daughter.

[72] A comparative analysis of this factor favours the Father.

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

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

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

[75] The Father eventually placed the Daughter 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 the Daughter's best interests given the absence of a shared parenting regime and the Mother's lack of contact.

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

[77] A comparative analysis of this factor somewhat favours the Father.

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

[78] The Father has no extended family who has contact with the Daughter.. The Father, however, ensured the Daughter's ongoing relationship with her friends and with the Father's friends.

[79] In comparison, the Daughter does have a relationship with her maternal grandmother and her sister. These relationships are important to the Daughter's sense of self and sense of family. They should be encouraged. The Father did not

attempt to limit these relationships. The relationships were limited because the Mother 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, the Mother chose to limit her contact with the Daughter. . The Father did not prevent the Mother from spending more time with the Daughter. The Father cannot be faulted for the Mother's lack of meaningful contact. I reject the evidence of the Mother where she suggests the contrary to be true.

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

[83] In summary, the Father attempted to have the Mother commit to a regular schedule of visitation. The Mother refused. The Father continues to be in favour of a regular parenting schedule. The Mother 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 the Daughter's best interests to be placed in the primary care of the Father based on a comparative analysis of the best interests factors. RH proved a successful history of meeting the Daughter's needs. In addition his prospective parenting plan is appropriate. The Father's plan provides the Daughter with stability and security. The Father will continue to prioritize the Daughter's needs.

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

[86] Further, I find that the Daughter 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 the Daughter's best interests.

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

Position of the Parties

[88] Each party testified about the conflict that developed over decisions affecting the Daughter. 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 the Daughter. Clause 24 of the order provides The Mother 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 the Daughter'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 the Daughter 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, the Mother literally turned her back to the Father while he testified in court. The Mother's lack of respect was self-evident. Similarly, the Father does not trust or respect the Mother Joint decisions are likely impossible in such circumstances.
- The Mother has a history of making decisions that prioritized other people rather than the Daughter.
- Acrimony and conflict are not in the Daughter's best interests.

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

- The Father must consult the Mother , on a timely basis, about important decisions which impact the Daughter's health, education and general welfare. The Mother must respond in a timely fashion. If the Mother does not respond in a timely fashion, the Father may proceed in her

absence. If the parties are unable to reach agreement, the Father will have final decision-making authority.

- The Father must keep the Mother updated on important matters affecting the Daughter'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. The Father is not required to provide the Mother 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 the Daughter's best interests?**

[98] It is in the Daughter's best interests to be in the Father's primary care and to have regular parenting time with the Mother. . In determining the Mother'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 the Daughter's age and needs. The Daughter is only 6 years old. The Daughter has few experiences of overnights with the Mother. The Daughter is accustomed to spending most of her time in her * home and community. She is involved in activities with her friends and the Father.

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

[101] The Mother and the Father live in different communities. The Daughter is in school during the week and both parties work, thus making weekday visits problematic given the Daughter's age. In addition, the Daughter needs to have weekend time with both the Father and with the Mother.

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

Primary Care

A. The Daughter's primary residence is with the Father.

Regular Parenting Schedule

B. The Daughter will be in the physical care of the Mother based on the following two-week rotating schedule:

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

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:* The Daughter will spend Mother's Day with the Mother from 10:00 am until 6:00 pm. The

Daughter will spend Father's Day with the Father from 10:00 am until 6:00 pm.

- *Summer Vacation:* Each party will have seven consecutive days with the Mother for summer vacation. During the even numbered years, the Father must provide notice to The Mother by May 1st of the seven days he intends to schedule for summer vacation. The Mother must provide notice by May 15th of her intended vacation dates. During the odd numbered years, the Mother must provide notice to The Father by May 1st of the seven days she intends to schedule for summer vacation. The Father must provide notice by May 15th of his intended vacation dates.
- *Christmas:* The Daughter will be in the physical care of the Father every December 24th until 3:00 pm on December 25th. The Daughter will be in the physical care of the Mother every December 25th from 3:00 pm until December 26th at 6:00 pm.
- *Spring Break:* The Daughter will be in the physical care of the Mother for three days and two overnights of the spring break holiday at times to be agreed upon by the parties in keeping with The Mother's schedule. The Daughter will be in the physical care of the Father at all other times.
- *Easter:* The Daughter will be in the physical care of the Father on Easter Saturday until Easter Sunday at 3:00 pm. The Daughter will be in the physical care of the Mother 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 * 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] The Father seeks child support on a retroactive and prospective basis. He asks that income be imputed to the Mother. . Further, the Father wants the Mother to pay 50% of the childcare expenses, such as Excel, summer day camps and childcare fees.

[105] The Mother 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, the Mother 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 the Mother 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] The Father proved that income should be imputed to the Mother from June 2018 onward. I will not, however, impute income before that time. In so finding, I note that the Mother 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] The Mother's circumstances changed in May 2018 when her mother was sufficiently recovered, thus allowing the Mother and her family to travel to Quebec and then in the summer to Ontario and Alberta.

[110] The Mother 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 the Mother secured a new job as a meter reader earning \$39,461 per annum in September 2019. The Mother 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, the Mother must pay the Father 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, the Mother will receive credit for all money, not goods, paid to the Father, 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:

- The Father 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.
- The Mother engaged in blameworthy conduct. She knew TH needed financial support. She knew the Father was the *defacto* primary care parent. She ignored her legal obligation to financially support the Daughter.
- The Daughter required the child support. The Father financial position was not robust. The Father will use the retroactive support to meet the Daughter's needs.
- Although the retroactive award will likely cause the Mother to experience some hardship, this hardship can be mitigated by paying the retroactive award over time. The Mother 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 the Daughter's best interests are maintained. In summary, the following relief is ordered:

- The prohibitions involving Mr. L are conditionally vacated.
- The Daughter will remain in the primary care of the Father..
- The Father is granted final decision-making authority.
- The Mother will exercise specified parenting time.
- The Mother 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.