

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *D.D. v M.P.*, 2023 NSSC 192

Date: 20230619

Docket: *Port Hawkesbury* No. SFPAPSA-124254

Registry: Port Hawkesbury

Between:

D.D.

Applicant

v.

M.P.

Respondent

Judge: The Honourable Justice Lorne J. MacDowell

Heard: January 12, 2023 and January 20, 2023 in Port Hawkesbury,
Nova Scotia

Written Release: June 19, 2023

Counsel: Stephen Jamael for the Applicant
Robyn Fougere for the Respondent

Introduction

[1] This matter involves the five-year-old child, D.D. Jr. (the child). The child is vulnerable not only because of his age, but also because he has special needs, having been diagnosed with autism.

[2] D.D. (the father) and M.P. (the mother), are the parents of the child. The mother has other children, including 17 year old V.D.

[3] The mother and father each seek primary care of their son.

[4] The father says that the child should be in his primary care for a number of reasons. First, the father claims that the child is not safe in the care of the mother should she have primary care. The father claims the child was sexually abused by V.D. and that it is of the utmost importance to protect the child from V.D. Second, the father also argues that his plan puts an emphasis on the child's learning and education, and that he has taken the initiative to address these issues, within the context of the child's autism diagnosis. Third, the father says that he is better able to focus on nutrition, proper eating and a proper sleep routine for the child. Fourth the father's plan is to have the child attend school outside the mother's community, which he believes will result in a broader range of experiences for the child, although, he remains committed to maintaining cultural ties. Fifth, the father says that he has a strong support network willing to assist him, and that his plan is better and in the best interests of the child. Sixth, the father also argues he has a strong relationship with the child, as he has been the child's primary caregiver since late summer 2020 and that the child has been residing in his community since August 2020. Seventh, the father also argues that he has a seasonal work schedule which provides him with the time and ability to provide primary care.

[5] In contrast, the mother categorically denies the allegations against V.D. and states that it is in the child's best interests to be in her care. She claims that she was in an abusive and controlling relationship with the father. The mother believes she has the ability and will to follow all the recommendations necessary to deal with the child's autism diagnosis. She argues that her plan will provide the child with greater interaction with family, friends and peers in the community which she resides.

Issues

In this decision, I will decide two issues:

- Did V.D. sexually abuse the child?
- What parenting plan is in the child's best interests?

Background and Proceedings

[6] The father filed an Application on December 3, 2021, seeking primary care and custody. He also, on December 3, 2021, filed an *Ex Parte* Application on an emergency basis seeking interim custody and decision making. The mother was not served with the application and emergency motion until about two months later.

[7] In support of the *Ex Parte* Interim Application the father alleged that the child was sexually abused and assaulted by the mother's older son, V.D. on a "continuous basis", so much so that the child had not been allowed in V.D.'s presence for over a year. It was alleged the mother acknowledged and agreed to this arrangement due to safety concerns.

[8] The father claimed he had "noticed" V.D. looking at the child's private parts, multiple times; that V.D. would continuously take the child into the bedroom alone and shut the door. The father alleged there was an incident where V.D. was "humping" the child "aggressively".

[9] The father alleged another incident where the child's diaper was tampered with, and that the child appeared in distress in the presence of V.D., when the father arrived on the scene. The father was worried about the child being left unattended and subjected to "further sexual abuse from V.D."

[10] The father also alleged that the mother lacked structure in her life, was consistently smoking marijuana and drinking alcohol.

[11] The affidavit states that the father was about to break up with the mother and that he had "grave concern" that she would allow the child around V.D. The application sought primary care and custody of the child to "protect him from the aforementioned and to get him checked by a professional".

[12] On December 8, 2021, the *Ex Parte* Application was heard by Associate Chief Justice L. O'Neil who refused to hear the matter on a *Ex Parte* basis, but rather indicated that a referral should be made to the relevant child protection agency.

[13] The mother was provided notice of the father's application on January 28, 2022. She filed a response on April 28, 2022, seeking primary care of the child. Her affidavit, filed at that time, denied any inappropriate conduct between V.D. and the child.

[14] Between the *Ex Parte* appearance and the service of the father's application on the mother, a referral was made to the Mi'kmaw Family and Children's Services. That referral was not substantiated.

[15] In March 2022, the parties filed a without prejudice interim consent order which provides as follows:

- The parties will share parenting time on a two-week schedule as follows:
 - The mother shall have parenting time from 9:30 am Monday during week one, and from 9:30 am Saturday in week two.
- Exchanges will take place at the hotel in Iona unless otherwise agreed to by the parties.
- The mother's son, V.D. shall not be permitted to see the child nor allowed in the mother's residence when the child is in her care.
- Neither party is to consume alcohol or drugs when the child is in their care.
- Both parties shall facilitate responsible and consistent bedtimes for the child when he is in their care.
- Both parties shall ensure the child has adequate nutrition and a healthy diet while in their care.

[16] The mother said that she felt under pressure to consent to the without prejudice interim order because the father had not permitted her to see or have direct communication with the child for 46 days.

[17] Since March 15, 2022, the without prejudice interim consent order has remained in effect. The interim order, however, does not create any advantage for either party as it is not a final order, and the Court is not bound by its terms. Instead, I must examine the totality of the evidence to determine what parenting plan is in the child's best interests.

[18] The parties agreed that the sole issue before me is the primary care of the child and parenting arrangements. I was not asked to address child support.

[19] The hearing took place over two days, January 12, 2023, and January 20, 2023, in Port Hawkesbury, Nova Scotia. The hearing proceeded on affidavit evidence. No motions to strike or objections were made to the content of the affidavits. I note that there were numerous instances of hearsay and opinion contained in the affidavits filed by both parties. In making the decision in this matter, I have only considered admissible evidence and cross examination.

[20] An Agreed Statement of Facts was entered into evidence by consent of the parties which states:

- The father made a referral to Mi'kmaw Family and Children's Services alleging that V.D., the son of the mother, was inappropriate with the child.
- The referral was investigated and was not substantiated.
- There are no conditions in place by Mi'kmaw Family and Children's Services preventing the child from having contact with his brother, V.D.

[21] Further, the parties agreed a Mental Health and Addictions Choice Client Summary with respect to the child form part of the evidence without the necessity of calling the author. An autism assessment was also conducted with respect to the child. The report, dated November 30, 2022, was likewise entered by consent without the necessity of calling the author, Stacy Juurlink, who the parties agreed, was qualified as a psychologist and was capable of giving the opinion evidence and making the recommendations that she had produced in the assessment.

[22] The opinion, which I accept, finds that the child meets the criteria for a diagnosis of Autism Spectrum Disorder.

[23] Both the father and the mother participated in the assessment by providing their observations. The father initiated the assessment. The father scheduled the first two parts of the autism assessment without notifying the mother of the appointments. Upon discovering that the assessment was being conducted, the mother sought to be involved and her input is noted in the report.

[24] The Child Welfare record was not produced as evidence in the hearing. No child welfare witnesses were called.

[25] The father testified and called three (3) witnesses S.J., M.Y., J.Y. The affidavit of R.S. was also tendered and cross examination was waived.

[26] The mother testified and called five (5) witnesses J.S., A.J., V.D., H.P., N.D. In an oral decision given on January 5, 2023, I allowed the mother's motion to issue a subpoena for V.D. and have him give oral evidence subject to cross examination. A written decision on this motion has been issued and is reported separately.

[27] The post-trial submission of the father was received on February 6, 2023. The post-trial submission of the mother was received on February 21, 2023.

Decisions and Analysis

Issue One: Did V.D. sexually abuse the child?

[28] The father states that the child was abused by V.D. The mother and V.D. dispute the father's allegations of sexual abuse. Given the inconsistency of the mother and father's evidence, I must make credibility determinations.

[29] In making my decision, I applied the law as stated in **Paulin v Pennell**, 2022 NSSC 297 (CanLII). In that decision, Forgeron, J., sets out the evidentiary principles as follows:

24. Further and for the parties' benefit, I will review three evidentiary principles that I applied to my analysis. First, this is a civil proceeding which requires proof on the balance of probabilities. There is no presumption of innocence in civil cases: **FH. v McDougall**, 2008 SCC 53, para 42. To reach a factual conclusion, I must scrutinize the evidence to decide whether it is more likely than not that an event occurred. I must determine whether the evidence is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test: **FH v McDougall**, paras 44 to 46. There is no heightened burden on any party.

25. Second, Mr. Paulin does not have a legal or strategic advantage because of the interim agreement in favour of shared parenting. An interim shared parenting agreement is not determinative of the final parenting plan; an interim shared parenting plan does not provide Mr. Paulin with a tactical advantage at trial: **Marshall v Marshall (1998)**, 168 NSR (2d) 48. Proof of a change in circumstances is not required

26. Third, given the conflict in the evidence, I must make credibility determinations. When so doing, I applied the law reviewed in *Baker-Warren v Denault*, 2009 NSSC 59, as approved in *Gill v Hurst*, 2011 NSCA 100. In addition, I made inferences in keeping with the comments of Saunders, JA in *Jacques Home Town Dry Cleaners v Nova Scotia (Attorney General)*, 2013 NSCA 4. (emphasis added)

[30] I have further reviewed and applied the law as set forth in **Peters v. Reginato**, 2016 NSSC 345, wherein Forgeron, J., notes as follows with respect to credibility and reliability:

30. In order to resolve this issue, I must make a determination about credibility and reliability. When assessing credibility and reliability in the civil context, I must apply the civil standard of proof, which is proof on a balance of probabilities. The evidence, in its totality, must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test: **C. (R.) v. McDougall**, 2008 SCC 53 (S.C.C.).

31. Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:

- Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R.v. Gagnon**, 2006 SCC 17 (S.C.C.), para.20. ... "[Assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. M. (R.E.)**, 2008 SCC 51 (S.C.C.), para. 49.
- There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: **Novak Estate, Re**, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re*, supra.
- Demeanor is not a good indicator of credibility: **R. v. Norman** (1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
- Questions which should be addressed when assessing credibility include:
 - a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: **Novak Estate, Re**, supra;

- b) Did the witness have an interest in the outcome or were they personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which they testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorny**, [1952] 2 D.L.R. 354 (B.C.C.A.);
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[31] I have reviewed and considered all of the evidence put before me, I find the father did not prove, on a balance of probabilities, that V.D. sexually abused the child. In making this finding, I accept the evidence of the mother and V.D. where it conflicts with the father's evidence. I reach this conclusion for a number of reasons.

[32] First, I find many weaknesses in the father's evidence, for example:

1. The father's testimony of his attempted reports to the police and Mi'kmaw Family and Children's Services in March of 2020 are inconsistent with his affidavit evidence, were offered for the first time in cross examination and are not consistent with his narrative.
 - i. In his affidavit, the father said that he did not report anything to either police or child welfare authorities in the summer of 2020. His explanation for the delay in reporting is not believable. He swore in his affidavit that his concerns regarding V.D. were real and in the summer of 2020, he had enough but that he did not report to Mi'kmaw Family and Children's Services and the police because he and the mother were still in a relationship, and he was not sure how to handle it. In contrast, during cross examination, the father said that he had in fact attempted to report concerns regarding V.D. to the police and child protection in March of 2020.

- ii. The father's affidavit evidence and his oral evidence differed significantly in details. For example, the father's oral evidence about the March 2020 incident were explicit and concerning, including a description of one of the mother's daughters sneaking up on him with a baseball bat while the child watched in the window. Notably, none of these details are found in the father's affidavits.
- iii. The father's claim that he did not report to the authorities because he was in a relationship and did not know how to proceed is not credible because the evidence shows that the father was familiar with the reporting process. In the past, the father had previously called Mi'kmaw Family and Children's Services regarding a former partner.
- iv. The evidence confirms that the father had previously called Mi'kmaw Family and Children's Services regarding a former partner as a result of alleged inappropriate behaviour between another of his children and another person. He clearly was aware of the existence of child protective services and how to involve them.
- v. The father overstated and exaggerated his evidence. For example, even if the father's evidence was accepted, it fell well short of the "continuous "sexual abuse and assault, he testified to in his affidavit sworn September 14, 2020, and filed with the Court on December 3, 2021, and confirmed in his affidavit of July 5, 2022.
- vi. The father made gratuitous comments during cross examination regarding others including a former partner, accusing her of having children to get money from the fathers and on the mistakes of Mi'kmaw Family and Children's Services.

[33] Second, the father admitted that he had difficulties in his recollection based on the passage of time, the amount of time the matter had taken to get to Court and the fact that he was not anticipating going to Court and did not take notes. Further when pressed on occasion, the father indicated he did not recall certain events.

[34] Third, in contrast, the mother's evidence was more compelling because she firmly tied her recollections to specific events such as vacations, March Break, the maternal grandmother's birthday, and the maternal grandmother's death.

[35] In comparison, the father was less consistent and vague.

[36] Fourth, the father was evasive, and reluctant to make admissions against interest. He was reluctant to admit his part in what both parties saw was a combative, and toxic relationship. When questioned as to his evidence that he had been emotionally abused by the mother, he noted that they had been in a bad relationship and that he tried to get the mother to get help. The father refused to acknowledge his contribution and involvement in the creation of the toxic relationship. When asked whether he agreed that he was emotionally abusive to the mother, the father noted that the only thing that he would agree with was that it was a very combative relationship. When pressed, the father reiterated that at times he had to defend himself because of the mother's nature. The mother admitted that she had acted inappropriately at times, in the relationship.

[37] In contrast, the mother made admissions against interest. For example, in her evidence, she testified that she was going through a difficult time due to, among other things, self described post-partum depression and the loss of her mother, the fact that she did not like his living situation and that she had a lot on her plate.

[38] The mother also confirmed, in her affidavit evidence, that she was not easy to deal with. Under cross examination she indicated that it was "pretty much yes, that there was consistent back and forth in the relationship to an equal degree." There were other examples, but in short, she was more prepared to admit shortcomings than the father.

[39] Overall, I find that the mother's recollections clearer and more consistent with the overall evidence.

[40] I have also scrutinized the evidence of V.D. I find V.D. was honest and truthful when he testified. His evidence was clear.

[41] He indicated any allegation that he has been sexually inappropriate with the child was false. He was not evasive in his answers. V.D. maintained, unequivocally in his affidavit evidence that he did not do anything of a sexual nature with the child. I am satisfied that V.D. was clear and direct in his responses to cross examination

and did not waiver in his denial. V.D.'s evidence is credible. I find both the mother and V.D. gave reliable and credible evidence regarding the events and allegations.

[42] Because of these findings of credibility, I accept the evidence of the mother, that the father's concerns, as reported to her regarding the child and V.D., were narrower in scope and content than as set out in his affidavits, and that his concerns were raised many months after the initial concerns were alleged to have arisen in the summer of 2019.

[43] I accept the evidence of the mother that detailed additional allegations were not disclosed to her, until she received the father's affidavit served upon her January 28, 2022.

[44] Thus, not only did the father delay informing the mother about his concerns until some five months after the alleged events were to have occurred, he did not share additional concerns nor his observation regarding the "aggressive" humping by V.D. of the child, alleged to have occurred in the mother's presence when she was not watching, until after having engaged the litigation, sought an *Ex Parte* order, which was not granted, and subsequent to the determination by Mi'kmaw Family and Children's Services that his referral was "unsubstantiated".

[45] Given the circumstances and the adamant assertions by the father, with respect to what he observed, it is difficult to reconcile why the father did not advise the mother of these circumstances in detail immediately nor why he swore an affidavit in September and did not proceed with the application until after the determination of the referral to Mi'kmaw Family and Children's Services and his failure to obtain an *Ex Parte* order. In 2019, he waited five (5) months to make any comment to the mother regarding his August 2019 concerns. His testimony that he was afraid that he would be cut off from his son are not accepted. By his testimony, he alleged he was the lone primary caregiver of the child for periods of time leading up to the separation, and that the mother was away for weeks at a time. During this period, he could have pursued the referral and police report he alleged he attempted in March of 2020.

Summary Issue One

[46] The father did not prove that V.D. sexually abused the child. The father's claims do not make logical sense. He was familiar with the process of reporting to child welfare authorities. He had previously called Mi'kmaw Family and Children's Services regarding alleged inappropriate behaviour between one of his children and

another person. He clearly was aware of the existence of child protective services and how to involve them. He was able to navigate the process of the referral in the past and would have been able to do so in respect to the allegations against V.D.

[47] The father's evidence is that he never confronted V.D. regarding these instances. He merely, when observing an alleged sexual assault of the child, by V.D., occurring in the presence of the mother, simply said "give me my child" and collected the child. In cross examination, the father raised new events not in his affidavits, alleging he attempted to go to the police and had attempted to call Mi'kmaw Family and Children's Services regarding his concerns. The police would not let him in and MMFCS did not get back to him. He then failed to follow up with either until approximately 21 months later. He makes no mention, in his affidavit evidence, of these attempted reports or the mother's daughter sneaking up on him with a baseball bat.

[48] In summary I accept the evidence of the mother and V.D. that V.D did not, at any time, sexually assault the child. Because of my findings, I do not believe the father.

Issue Two: What parenting plan is in the child's best interests.

[49] The *Parenting and Support Act*, R.S.N.S. 1989, c. 160 (the Act) provides me with a list of factors I must consider when making a parenting plan for the child. Section 18(5) confirms that I must give paramount consideration to the child's best interests. I must analyze parenting issues through the lens of a child's perspective.

[50] The Nova Scotia Court of Appeal in **D.A.M. v. C.J.B.**, 2017 NSCA 91 (CanLII), confirms that when reviewing the legislative factors, I must apply a comparative and child centric approach. (see also **Titus v. Kynock**, 2022 NSCA 35 (CanLII)).

[51] I have reviewed all of the factors set out in Section 18(6). I comment on those I consider most relevant to the determination of the parenting plan that is in the child's best interests.

Physical, Emotional, Social and Educational Needs, Including the Need for Stability and Safety vs the Plans Proposed for the Child's Care and Upbringing, Having Regard to the Child's Physical Emotional, Social and Educational Needs

[52] The evidence establishes that both the father and mother are aware of this child's particular needs. It is clear he requires dedicated parents aware of his autism diagnosis and required follow-up. I am satisfied that they can and will follow up with the necessary support services as recommended.

[53] Both the father and the mother have homes and neither have offered any significant concerns or arguments regarding the other's physical home or financial abilities to provide for the child. The child has been going between the care of the parties since the interim without prejudice consent order. Since that order, I am satisfied that both parties have been able to provide and/or support the child's physical and educational needs.

[54] The father has taken steps to pursue an assessment of the child and his enrollment in pre-primary, albeit the former without advising the mother of the initial appointments. The period of pre-primary for the child has been positive for the child's continued involvement in support systems designed to assist him and is consistent with the autism assessment recommendations. These services are available to either parent.

[55] The evidence establishes that the mother has made inquiry as to the availability of necessary supports for the child in her area and at the school he would be attending should her plan be accepted. I accept the special needs of this particular child can be met by the mother, should primary care be granted to her.

[56] I find that both parties are capable of meeting the child's physical and educational needs and can safely care for the child taking into consideration the child's age and stage of development.

[57] However, I have significant concerns regarding the father's ability to provide for the child's social and emotional needs, and as a result, the child's stability.

The Nature, Strength and Stability of the Relationships Between the Child and the Parents.

[58] The parties have had a problematic and volatile relationship.

[59] The mother acknowledges she had a role in the creation of these difficulties. Her evidence was that she suffered emotional post-partum difficulties but that she has pursued help. Her evidence, which is largely uncontradicted and supported by her witnesses, is that she has been doing very well since the separation.

[60] I find the child was at times caught in the dynamic of the parties' toxic relationship.

[61] The mother admitted to what was a recent, inappropriate, and vulgar text exchange between the parties authored by the mother's daughter at her direction. There is evidence before me that the father has used vulgar language directed to the mother in the past.

[62] These exchanges are not acceptable and will be dealt with by my direction respecting communication between the parties in this decision.

[63] I find the child has a strong relationship with both parents however, my concerns regarding the father's plan as it pertains to the child's emotional, social, cultural and other needs, and the impact that it will have on his stability are explained in my considerations later in my decision.

History of the Child's Care

[64] I find that the mother has been the primary caregiver for the child for the majority of the child's life up to the separation. The father lived with the mother at various times, also attending his community to work on his house for periods of time. The parties were separated between November 2018 and August 2019, when the father and the mother reunited on a family vacation in PEI. The mother was primary caregiver during this period. I find on the evidence of the mother and her witnesses, specifically H.P., that the father did have contact with the child during this period, including special occasions. The relationship was problematic, but the child was not withheld from the father. There continued to be periods of break ups and reconciliations between the parties between August of 2019 (the PEI trip) up to the father residing with the mother and her family in the mother's community some time in March 2020. I find that the mother remained the primary caregiver from August of 2019 to late August/September of 2020. The father lived in the mother's community with the mother's family including V.D. for a period during the initial months of the pandemic. This included periods after his alleged attempts to contact the RCMP and Mi'kmaw Family and Children's Services in March of 2020.

[65] I accept the evidence of the mother that the move to the father's community in late August /early September of 2020, was for the purposes of avoiding Covid 19, not to prevent contact with V.D.

[66] From August 2020 forward to the separation in January of 2022, it is clear that the parties shared child caring responsibilities, but I accept on the totality of the evidence that she was the primary care giver during periods when both parties were in the father's residence. The mother did attend in her community to deal with her other children, sometimes for up to two weeks at a time. The father provided the care during these periods. The circumstances leading up to the separation in January of 2022 have been detailed earlier in this decision. The father did not allow the mother contact with the child for some 46 days. The without prejudice interim consent order was issued and since then the parties essentially shared parenting. The mother had periods of parenting time greater than the order directed during certain periods since its issuance as alleged in her affidavit and the father's evidence.

[67] On the whole of the evidence I find the mother was the primary caregiver for the majority of the child's life prior to the separation in January of 2022. I accept the mother agreed to the interim consent order to facilitate reconnecting with her son as soon as possible.

Willingness to Facilitate a Relationship with the Other Parent, Stability and Facilitating Family and Significant Relationships: The Ability of Each Parent to Communicate and Co-parent in Issues Regarding the Child

[68] I will deal with these considerations together.

[69] It is admitted by the father that he withheld the child from the mother for 46 days in 2022 until the without prejudice interim consent order was issued. The evidence establishes, for a period from November 2018 to August 2019 and at other times, there were periods of broken contact between the father and the child as a result of the separation of the parties. I find the father facilitated the autism assessment without consultation and claimed credit for the actions regarding the dietitian and when in fact both the mother and Dr. Brodie were also involved.

[70] I find the father proceeded with the Autism assessment and did not advise the mother of the scheduled appointments. The autism assessment has been to the child's benefit, but the results do not justify the lack of consultation.

[71] The father has demonstrated a failure to consult with the mother since the issuance of the interim consent order and has overstated his involvement in certain aspects of his evidence.

[72] Further, the father clearly withheld the child allowing no contact with the mother for some 46 days. He indicated he did this to protect the child and to prevent him from being withheld from him. I have already rejected his testimony and find he is not credible regarding that rationale.

[73] The father's plan is to have the child live with him in his home with the assistance of neighbours and makes some reference to assistance from family. Under the father's plan, the child will go to school in a nearby community.

[74] The mother's plan is to have the child live in her residence in her community with family members and for the child to attend school there.

[75] The evidence establishes that the child has a significant relationship with his half siblings and extended maternal family. They are significant persons in his life. V.D. was a part of the child's life but V.D. has not seen the child as a result of the allegations for many months. Given the father's firm views regarding V.D., I have significant concern that the father will not accept my decision regarding the allegations against V.D. and will not foster a relationship with this half brother of the child should he be granted primary care.

[76] The mother testified that she resides in a community setting and lives with other family members. Under her plan, the child would be residing with half-siblings and would have access to extended family. The evidence of the mother and her witnesses confirms that the child would have the benefit of extended family.

[77] The evidence establishes that the father has limited contact with his own children and mother. Recently his children have begun to attend at his home. He has neighbors who are willing to help him. I accept that his support network is well meaning, however, it consists of neighbors in an isolated community.

[78] The evidence establishes an extreme level of caution by the parties to avoid contracting Covid, but the father's evidence was that he was social distancing before the pandemic. He testified that in 2018, before Covid, he was social distancing and trying to keep from getting sick. He testified that the mother was not monitoring the children as to whether they were washing their hands properly and he said that he told the mother to teach her children on how to wash their hands.

[79] He presentation is one of extreme caution regarding illness and contact with others. The father testified that he tried to keep them both germ free, even before Covid and that he was concentrating on being germ free.

[80] I accept the evidence of the mother, which was not contradicted by the father in redirect, that at the time of the birth of their child, he erected a sign indicating there were no visitors wanted.

[81] I find the father has a dim view of mother's community. He testified that the mother's community is a very tight knit community where "not everyone" practices hygiene. It was his view that there were a lot of "viruses" there.

[82] I am satisfied on the evidence that in September of 2018, at the time of the maternal grandmother's birthday party, the father was isolating the child from the mother's family. The rest of the family was observed to be close. This is confirmed by the evidence of A.S. and J.S., which I accept. The evidence of H.P. confirms that when extended family were present, the father isolated the child from the family.

[83] On the totality of the evidence, I find that the father is heavily focused on germs and has isolated the child from the mother's family, at least in part, because of these concerns.

[84] The father's plan is problematic. He testified that he did his best to accommodate everyone and that he was reasonable and fair as he could be through the whole relationship. He was, as noted earlier, reluctant to admit his role in what was clearly a relationship filled with discord.

[85] I accept that the father made efforts to exclude family members and restrict access by the mother's family with the child. This occurred before the threat of Covid and thereafter.

[86] The child has a right to develop a relationship with his extended family members and with the distinct community which he was born into. Exposure to germs is a fact of life.

[87] The evidence of the mother and her witnesses paint a picture of an extended family with half-siblings, aunts, and others who can be of benefit to the child.

[88] Because of the evidence, the father's view of the mother's community and the history of isolating behaviour, it is my view that the mother is more likely to facilitate extended family relationships than the father is. I find that the mother's plan is a significant benefit for the child. From the child's perspective, given his need for interaction with peers, the mother's plan provides greater opportunity in a community setting to advance his social and emotional needs.

Cultural, Linguistic, Religious and Spiritual Upbringing and Heritage; Including the Child's Aboriginal Upbringing and Heritage

[89] This child is Indigenous as are the mother and the father. I must consider this cultural context.

[90] The father testified to his own experiences and argued, in his post trial submissions that it his plan for the child to attend school and pre-primary outside of the mother's First Nations Community so he is exposed to a broader range of experiences, in the child's educational journey. The father claims he still believes in the importance of maintaining the child's close ties to his culture.

[91] The father's evidence did not address this goal. There is no evidence from the father on how he would maintain the child's cultural ties, heritage, and upbringing.

[92] The father has little positive to say about the mother's community. He testified there was a lot of "stuff" that goes on there which was not appropriate, including poverty. The father testified that there were a lot of sick people in the mother's community "in more ways than one". The father testified that the education in the mother's community was not as good as in other schools he experienced.

[93] The father called no evidence to support his views regarding the mother's community and education other than his personal experience and opinion. The father did not specify how he would foster the cultural, linguistic heritage of the child, rather, his evidence raised significant concerns about his negative views of the mother's community in which the child would be residing, at least for a portion of his life, regardless of my order.

[94] The father's plan, with respect to this aspect of the child's life, is largely unknown.

[95] The mother has been employed as a substitute teacher in her community school system. Her evidence is that she wants the child to attend a culturally appropriate school.

[96] The school is minutes from the mother's home. The evidence of her witnesses which I accept, is that she has a significant support system in that community.

[97] I find that the mother has a better plan to support the child's cultural upbringing and heritage and that living in the mother's community will be more

likely beneficial for the child's exposure to that culture and heritage than the plan of the father.

Family Violence, Abuse, and Intimidation

[98] The mother claims she is a victim of emotional abuse. The father testified that it was he who was emotionally abused. He testified that if he was emotionally abusive, he was only defending himself. The mother alleges a manipulative and controlling relationship. Physical abuse has not been established by either party.

[99] The evidence of H.P. confirms that, on numerous occasions, she heard the father threaten to call Mi'kmaw Family and Children's Services. This is consistent with the evidence of the mother.

[100] The father confirmed, on cross-examination, that he may have used threats of referral to Mi'kmaw Family and Children's Services as a "figure of speech" to "motivate her". He testified he was working 10 hour days and would have to come back home to cook supper on top of that.

[101] The father had made a referral to child welfare authorities as previously noted. I accept that he made threats to contact Mi'kmaw Family and Children's Services for reasons other than child protection concerns and as part of an atmosphere of control and intimidation.

[102] When questioned as to whether he had advised the mother that she was "a waste of time and space and the lowest of the low", the father indicated that maybe he said it. He did not recall and noted she [the mother] had put "a lot of low stuff on me" and did not really have to.

[103] I find the father was controlling of the mother's time and referred to her by derogatory names. I accept that the mother was affected by his words and actions.

[104] I find the father told the mother that she was being watched in the community.

[105] I acknowledge the mother played a role in the problematic relationship. I accept, however, her evidence that she was struggling with some emotional and mental health difficulties and that she has now addressed these such that they are no longer relevant factors in my decision.

[106] I accept the mother's evidence and that of her witnesses and find the father was, in fact, controlling and isolating in the relationship with the mother and with

the child. I find that this behaviour was emotionally abusive and intimidating. The mother was negatively impacted by the father's conduct.

[107] These findings mitigate against the father having primary care of the child, as he has demonstrated controlling and intimidating behaviour to the mother during their relationship and in the child's presence.

Summary of Issue Two

[108] I find that it is in the child's best interests to be placed in the mother's primary care. She is better capable of ensuring that the child's physical, medical, emotional, cultural, and social welfare needs are met. The mother was the child's primary care provider the majority of the time before separation. Although both parties will ensure the child's special needs are accommodated, the mother's plan is superior because she will ensure the child has the support of his extended and loving family and she will not isolate the child. Further, the father engaged in emotionally abusive conduct, and demeaned the mother and her community. The father also made false and unfounded allegations against the mother and her son. I am concerned that the father's negative views about the mother will be communicated to the child. Finally, the father acted unilaterally about the important matter of obtaining an assessment as noted earlier.

[109] I have considered the factors listed in Section 18(6) of the *Parenting and Support Act*, R.S.N.S. 1989, c. 160. I also note that I am guided by Section 18(5) of the *Parenting and Support Act*, R.S.N.S. 1989, c. 160 and in this proceeding, I must give paramount considerations to the best interests of the child.

[110] In all the circumstances before me and based on all the findings made, it is my determination that it is the best interests of the child to be placed in the primary care of the mother.

Conclusion

[111] In all the circumstances, I order the following:

1. The mother shall have primary care, and day to day decision making responsibility for the child.
2. With respect to major decisions regarding the child's wellbeing, including but not limited to the child's treatment for Autism Spectrum Disorder, the child's health, education, culture and religion, the mother

will meaningfully consult with the father on these decisions. In the event that parties are unable to agree, they shall consult with a third-party professional who provides care for the child and obtain the advice of the professional(s) involved. If they are still unable to agree, the mother shall have final decision making authority.

3. The father, shall have the following parenting time:
 - i. The father shall have parenting time every second weekend from Friday after school until Sunday at 5:00 pm. This parenting time will be extended to Monday at 5:00 pm in the event there is no school scheduled on Monday because of a holiday or in-service or other weather related event.
 - ii. The father will have a third weekend with the child every second month.
 - iii. The father may have additional time with the child as agreed between the parties.
 - iv. The father, shall have FaceTime with the child for ½ hour on Tuesday and Thursday during the weeks in which he does have scheduled parenting time; and Monday, Wednesday, and Friday when he does not have scheduled parenting time. The FaceTime contact will be initiated by the father at times agreed to with the mother.
 - v. The parties shall share holidays equally. In all even years, the father shall have the child from December 20th at 4:00 pm until December 25th at 2:00 pm and the mother shall have the child from December 25th at 2:00 pm until January 1st at 2:00 pm in all even years. For all odd years, the schedule shall be reversed such that the mother will have the child from December 20th at 4:00 pm until December 25th at 2:00 pm and the father shall have the child from December 25th and 2:00 pm until January 1st at 2:00 pm.
 - vi. The party who does not have the child in his/her care on the child's birthday will be entitled to have parenting time with the child for a three-hour period on the child's birthday.
 - vii. Each party shall have four (4) weeks of parenting time with the child each summer. Summer is described as commencing July

1 of each year and ending August 30 of each year. These weeks need not be consecutive but in no summer period will they exceed three consecutive weeks in any single block. A week is defined as a seven (7) day block of time commencing on Sunday at 10:00 am and concluding the following Sunday at 10:00 am.

- viii. The father shall have his first choice of summer vacation weeks in even numbered years; the mother in the odd numbered years. The parents shall advise each other of the choice of weeks by April 30 of each year. For 2023, the mother will advise the father of her preferred weeks by June 30, 2023. Any weeks not scheduled in the summer block will be the mother's.
 - ix. That mother shall have the child each Mother's Day from 10:00 am to 6:00pm if the child is not regularly scheduled to be in her care that day.
 - x. The father shall have the child each Father's Day from 10:00 am until 6:00 p.m. if the child is not regularly scheduled to be in his care that day.
 - xi. Transportation will be the responsibility of the father. Exchanges are to occur at the same location as set out in the Interim Order namely at the times noted in Iona, unless otherwise agreed upon by the parties.
- 4. Each party shall be entitled to make inquiries and receive information from third party care providers for the child. Such third-party care providers shall include the child's daycare, school, health professionals (i.e. doctor, dentist), religious, cultural and or religious leaders.
 - 5. Each party shall be entitled to receive information relating to the child, such as school report cards, medical reports, information regarding their recreational activities and the like.
 - 6. Each party shall be entitled to attend any functions and meetings relating to the child that parents are normally entitled to attend, such as school related events, medical and dental appointments, recreational activities, concerts and the like.

7. The parties agree to inform one another of any changes in his or her home address, home phone number, work address, work phone number, or any other means of contact such as fax numbers or e-mail addresses.
8. Neither party shall speak negatively to, or about, the other party in the presence of the child(ren) nor allow any other person to do so.
9. Neither party shall discuss adult matters with the child(ren).
10. The parties will communicate civilly and will only discuss the child.
11. At all times, the parties will engage the child to have a positive and respectful relationship with the other party and the members of the other party's family and household.
12. Unless there is an emergency or in circumstances where they are present for exchanges of the child, the parties will communicate through a software program such as Our Family Wizard. They will immediately sign up for such software and each shall each bear their own cost of said software.

Order

[112] Ms. Fougere will draft the order.

Costs

[113] If either party wishes to be heard further on costs, submissions are to be provided by July 14, 2023 by the mother and response submissions by the father, August 14, 2023. I will issue a separate decision on costs.

MacDowell, J.