SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Isnor v Boutilier*, 2024 NSSC 241

Date: 20240816
Docket: HFD *SFH*, No. MCA100989
Registry: Halifax

Between:

Clayton Isnor

Applicant

v.

Emma Boutilier

Respondent

Judge: The Honourable Justice Cindy G. Cormier

Heard: March 21 & 22, 2024, April 24, 2024 in Halifax, Nova Scotia

Counsel: Kelsey Hudson (2022 onward); James Violande (2022); Jennifer Schofield (2018); Meg Green (2016) for Clayton Isenor;

Imogen Phipps-Burton; Zoe Busuttil (2022 / 2023); Margo Fulmer 2019 / 2020; Krista Forbes (2017); David St. C. Bond (2016); for Emma Boutilier

By the Court:

1 The case

[1] The subject of the proceeding, E (the child) was born in July 2015, and he was eight (8) years old when this matter was heard. The parties, Clayton Isnor (the father) and Emma Boutilier (the mother), were involved in two previous court applications (2016 - 2017 / 2018 - 2020) which were resolved by consent. The parties have operated under a shared parenting arrangement since 2016.

2 The parties' positions on decision making and parenting

[2] In October 2022, the father filed a Notice of Variation Application alleging a material change in circumstances and seeking to change the parenting and child support provisions of the parties' last Consent Order issued on September 15, 2020. Specifically, the father sought:

1. Final decision-making authority with respect to education, health care, and extra-curricular activities (with a focus on education and medical decisions);
2. To be granted primary care, with the mother being granted parenting time every second weekend (Friday – Sunday) and "one weeknight" on her "off week;"

3. Specified holiday or special event parenting time such as Halloween; Christmas; Easter; Mother's Day; Father's Day; and the child's birthday;
4. To communicate through an online parenting application; and

[3] The father's "default" position was to request an order placing the child in his primary care throughout the school year and for the parties to share the care of the child in the summer.

[4] The mother sought:

1. To maintain the existing or status quo custody and parenting arrangements, arguing there was no material change in the child's circumstances;
2. However, the mother argued that it was in the child's best interest to change the status quo shared parenting arrangement to a week-on week-off shared parenting schedule to reduce the number of transitions between the parents' homes.

3 Child support

[5] The parties agreed that if I decided it was in the child's best interests to maintain the status quo shared parenting arrangement existing since 2016, that they

would both agree to use the "set off" amount of child support retroactive to 2020 (pre-trial March 24, 2023, case management, and when dealing with preliminary issues at trial). The parties explicitly stated they were not seeking to have the court complete a "Contino analysis."

[6] The father specified that if I granted his request for primary care of the child, he would be seeking an order requiring the mother to pay him the table amount of child support (in his affidavit he suggested the mother pay him $279.74 per month based on an "imputed income" for the mother of $32,667.00) retroactive to September 15, 2020. Based on her own evidence, the mother has suggested her yearly income for child support is: $31,872 ($272.98) for 2020; $30,040 ($258.33) for 2021; $23,487 ($171.75) for 2022; and $22,667 ($161.87) for 2023.

[7] The mother sought to impute income to the father in the amount of $82,064 ($704.54) for 2020; $114,719 ($968.32) for 2021; $111,440 ($942.52) for 2022; and $111,440 ($942.52) for 2023, according to Table 13 of Ms. Boutilier's brief.

[8] The parties confirmed they were not seeking to have the court address the issue of special or extraordinary expenses (despite paragraph 400 in the father's affidavit sworn in October 2023, suggesting then that the father was asking the mother to share all section 7 expenses proportionate to the parties' incomes.)

4 Issues

1. Has there been a material change in the child, E's, circumstances, which would necessitate a change in the existing joint custodial arrangement and / or the existing shared parenting arrangement?
2. If so, what custodial arrangement is in E's best interest?
3. If so, what parenting arrangement is in E's best interest?
4. Has there been a material change with respect to either parties' income?
5. Should income be imputed to either party?
6. What amount of prospective child support should be paid, if any, and by whom? From what date?
7. Should the father or the mother be required to pay retroactive child support? If so, in what amount? And from what date?

5 Preliminary issues at trial

5.1 Child Hearsay

[9] I cannot rely on a child's out of court statements unless I find they are necessary and reliable – I must consider when a child's statement(s) were made in circumstances which raise a reasonable suspicion about the reliability of the child's statements. Courts have often found that when a child's parents have been

engaged in conflict it is not unreasonable to expect and / or to suspect that a child's statement(s) may have been made to one parent or another to appease them and / or to please a parent and / or in an attempt by the child to avoid foreseeable consequences.

[10] Courts have been willing to rely on out of court statements made by children when necessary and when there is a sufficient degree of reliability, including at times but not necessarily limited to the following situations: when children participate in formal interviews with trained police and / or child protection workers and / or therapists / assessors or when a child makes a spontaneous disclosure to a third party who does not have an interest in the matter / outcome of the court proceeding. In all cases, I must consider all the circumstances surrounding out of court statements or disclosures made by a child and / or evidence related to the out of court statement or disclosure.

[11] The parties' evidence included child hearsay, and the parties provided extensive evidence pre-dating the last consent order issued in September 2020. I have focussed on evidence I have found to be relevant and reliable evidence related to the child's circumstances at the time the last Consent Order was issued in September 2020 and relevant and reliable evidence of the child's circumstances since the Consent Order was issued in September 2020.

5.2 Financial disclosure

[12] At the pre-trial held on or about June 1, 2023, the parties agreed that financial documentation disclosed during the proceeding would not be shared outside the Nova Scotia Supreme Court Family Division proceeding. For the sake of clarity, this agreement continues to bind both parties.

[13] The parties advised me they wished to rely on the financial information filed at trial rather than be given a further opportunity to provide financial disclosure.

5.3 Business records exception

[14] Certain business records were produced pursuant to Orders for Production. The parties agreed the business records could be entered as exhibits at trial, including documents obtained from the Royal Canadian Mounted Police (RCMP) and the Department Community Services - Child Protection Services. They agreed those business records could be considered without the need to call a witness(es) to authenticate or speak to the records. Other agreements were reached regarding motions to strike certain documents or requests to define the use of certain documents.

5.4 *Viva voce* evidence

[15] The parties agreed to allow *viva voce* direct testimony from each party limited to changes in each party's personal circumstances between the date of

filing of materials in advance of the original trial dates scheduled in December 2023, and trial in March 2024. I permitted the parties to provide an update with respect to each parties' personal circumstances only (change of address and change of employment and / or change in method of payment through employment.)

5.5 Witnesses

[16] The father and his wife, JI (previously JK), testified for the father.

[17] The mother was her only witness.

6 Background

[18] The father was 25 years old, and the mother was 17 years old, when they met in 2014. The father suggested he was not aware of the mother's age at the time the parties were initially intimate together. The mother says he was.

[19] In 2015, the mother advised the father she was pregnant, she quit high school, and she moved into the father's parent's home. The father had been working in the family business since he was 20 years old, and he continued to do so. The parties' child was born in July 2015.

[20] The parties were in a relationship for approximately one year to eighteen months, but they were never married. They ended their relationship on or about May 4, 2016.

[21] In June 2016, the mother expressed concerns about the father denying her parenting time with their child. Police records reflect that the father had at one point stated to a police officer that he was "given full custody two Mondays ago until the court date." The officer had observed that they were not able to substantiate the father's assertion.

[22] There was no evidence before me that the father was granted care or custody of the child through a court order or a written agreement between the parties. The father subsequently denied or restricted the mother's parenting time with the child for some months, but the mother resumed her parenting time with the child in or around September 2016.

[23] An Interim Consent Order was issued on November 22, 2016. The parties agreed to joint custody and shared parenting of the child, including a two days on / two days off parenting schedule. The parties also agreed the mother would be responsible for the child's medical appointments. I understand that the mother took the child to his first speech language appointment in or around 2017. At that time, the mother had also agreed not leave the child alone with her brother PB.

[24] The parties participated in a settlement conference on November 29, 2017, and a final Consent Order was issued March 16, 2018. The consent order specified

the parties would have joint custody and shared care: the father would have care of the child every Tuesday and Wednesday overnight and every alternating weekend from Thursday to Monday beginning on November 30, 2017; and the mother would have parenting time every Monday overnight and every alternating weekend from Thursday to Tuesday beginning December 7, 2017.

[25] In or around June 2018, the father met his new partner, JI (previously JK). The father and JI moved in together in October 2018, and they were engaged in December 2018. They later married in September 2021.

[26] JI stated that the father had shared with JI that he had kept detailed notes about his concerns about the mother's parenting and about the child since the child's birth. JI indicated that both she and the father had ongoing concerns about the mother's parenting and about the child's behaviour and they had continued to document those concerns.

[27] On October 8, 2018, an incident took place between the mother and her then intimate partner TC, which exposed the child to verbal abuse between the mother and TC. The Department of Community Services - Child Protection Services learned that the mother later ingested a bottle of Tylenol, and she was taken to

hospital. The mother acknowledged she was struggling with depression at that time.

[28] Child Protection Services determined they had substantiated concerns related to family violence, inadequate parenting skills, and concerns regarding the mother's mental health. However, Child Protection Services also determined they did not have sufficient information to substantiate any risk related to substance abuse or risk of emotional harm to the child.

[29] Support services were put in place for the mother. In or around 2018, the mother moved in with her parents and sibling(s). The initial safety plan negotiated between Child Protection Services and the mother required the mother's parenting time with the child to be supervised by her parents until support services had mitigated any risk to the child.

[30] The mother has mostly resided with her parents, TB and GB, (the child's maternal grandparents) and PB (her brother), since that time. The mother's sister, SB, has also at times resided in the maternal grandparent's home. The mother advised that her mother, sister, and brother have always worked outside the home, while her father has been home on long-term disability.

[31] On October 24, 2018, the father applied to the court to vary the joint custody arrangement and the shared parenting arrangement. The father sought primary care of the child.

[32] In or around June 2019, after the mother had participated in services. The Department of Community Services - Child Protection Services approved the mother having periods of fully unsupervised parenting time with the child. While the mother's parenting time was still partially restricted, the father registered the child for pre-primary school without the mother's consent.

[33] Although the mother's parenting restrictions had been reduced, the father advised the school that the mother was not permitted to pick the child up from school. The father's choice to proceed without the mother's consent and involvement created further conflict between the parties. The requirement for the mother to be supervised by her parents with the child was lifted by the Department of Community Services – Child Protection Services entirely in or around November 2019.

[34] The father alleged, but the mother denied, that the mother and TC had resumed a relationship and separated again in or around January 2020. I do not accept the mother was forthright with the father about this issue.

[35] On or about February 20, 2020, after observing unexplained bruising on the child, the father made a referral to Child Protection Services. The child was interviewed but he did not make any disclosure of abuse.

[36] JI suggested that when the child was formally interviewed by Child Protection Services and / or their partners, he could not be understood by the interviewers. The parties have agreed that the child did not reach the "typical speech milestones."

[37] While it is true that at an early age, the child presented with symptoms of a speech delay, Child Protection Services records indicate that when the child was interviewed, they understood he stated in part:

> …he is not allowed to hit people, but that he has never hit someone, and nobody has ever hit him.

When the child was asked about feeling safe, he stated in part:

> … he feels safe at his mothers, his fathers, and with... E stated that he would tell his mother if he did not feel safe.

I accept that the social worker understood the child's statements and reported them accurately. In addition, I find them to be reliable under the circumstances.

[38] In or around February 20, 2020, the mother concluded her counseling service with Katherine Illnitski. Couple's counseling with the mother's intimate

partner, TC, was not completed as the mother once again reported that she and TC had ended their relationship. Once again, I am not prepared to accept that the mother had terminated her involvement with TC at that time.

[39] In July of 2020, when the mother was twenty-three, she was diagnosed with attention deficit hyperactivity disorder (ADHD). The mother reported that she tried a variety of medications and she eventually settled on Concerta to treat her symptoms.

[40] On September 15, 2020, a Consent Variation Order was issued. The parties consented to the following parenting arrangement:=

1. Week 1: *M Monday*; F Tuesday and Wednesday; *M Thursday, Friday, Saturday, Sunday*;
2. Week 2: *M Monday and Tuesday*; F Wednesday, Thursday, Friday, Saturday and Sunday.
3. A right of first refusal was also incorporated into the Order.

[41] At the end of September 2020, the mother raised a concern with the Department Community Services - Child Protection Services, about her own mother, the child's maternal grandmother physically disciplining (spanking) the child. The mother reported the incident to Child Protection Services, and she then

called the father and requested he pick the child up. The mother and the child left the maternal grandparents' home for a short period and returned approximately 10 days later and / or in or around the end of October 2020.

[42] The evidence suggests that the parties, and arguably their immediate and extended families, were concerned about the child's behaviour and had difficulty managing his behaviour. Evidence suggests the parties and other caregivers were struggling to address the child's behaviour well before the last consent order was issued in September 2020. The situation was apparently difficult for everyone, including the child.

[43] As early as 2020, the parties were talking about the possibility that the child may be struggling with symptoms of attention deficit hyperactivity disorder. The child was five (5) years old at that time, and neither party sought a formal assessment of the child due to his age.

[44] In September 2020, the mother advised the father and JI that she would arrange to take the child to get his needles, and she would also ask the child's doctor about referring the child for assessment. In October 2020, the father spoke with Child Protection Services about obtaining counseling services for the child and arrangements were made to engage the services of Dr. Ayala Gorodzinsky.

[45] At paragraph 64 of the father's Affidavit sworn in October 2023, the father indicated that in or around 2020 or 2021:

> I began to think that counseling would be in the child's best interests. The child was having difficulty regulating his emotions, had increasing amounts of temper tantrums, and was often defiant. This behaviour was worse when he would return to JI and I from the mother's home.

[46] It is commonly known that children with attention deficit hyperactivity disorder often struggle with moving from one activity to another. Although I recognize the child's behaviour may have been more difficult during the exchange between caregivers, I am not prepared to attribute blame to either party.

[47] At paragraph 67 of his affidavit, the father suggested there was "great improvement in his home" using the strategies psychologist Dr. Gorodzinsky had recommended and information from books Dr. Gorodzinsky had referenced for the father and JI (involvement with Dr. Gorodzinsky between late 2020 and March 2021). However, the father questioned whether the mother had implemented any of Dr. Gorodzinsky's recommendations or if she had reviewed any of the texts referenced by Dr. Gorodzinsky.

[48] The father stated Dr. Gorodzinsky had suggested to him that some of the child's symptoms might be consistent with symptoms of attention deficit hyperactivity disorder. He stated he was advised by Dr. Gorodzinsky to monitor

the child's symptoms over time and that the child may need to be formally assessed in the future. Evidence suggested the parents were advised the likely age for assessment was more in line with an age of approximately seven (7) or eight (8) years old. The child was five (5) years old.

[49] JI acknowledged that she and the father had agreed she should take the lead in presenting hers and / or the father's concerns about the child and / or the mother in writing or otherwise. Concerns were being expressed by the father and JI, through JI to the child's mother and / or to other service providers including but not necessarily limited to the police and to Child Protection Services and the child's school.

[50] JI explained that the father had asked her if she could be the one to speak on his behalf about his / their concerns. JI stated that from her perspective it was "not because the father didn't want to" but because "he sometimes elaborated (too much) due to his ADHD." JI indicated that the father would ask her to call or write "as I can get it across more concisely, but all the information came from him" she stated, implying she expressed all concerns with his consent and with his knowledge.

[51] JI indicated that in February 2021, the mother expressed concerns to JI about the child's symptoms and about her own symptoms. JI suggested that around that same time, the child's maternal grandmother was concerned about covid transmission, and the mother had asked the father and JI if the child could reside with them primarily, which he did for approximately one month while the mother stayed with her intimate partner TC.

[52] JI indicated that until sometime in 2021, she had a workable relationship with the child's mother, but that the relationship subsequently deteriorated. When asked on cross-examination what had happened, JI suggested the child's mother might have been upset with JI over an issue related to the child's backpack.

[53] About the backpack, JI explained that she had opted not to use the backpack the mother had been sending with the child, and she had not provided the mother with an explanation. JI later alleged in her affidavit that the backpack smelled of cannabis, and she did not want the child to use it.

[54] The mother has stated she was unaware about the circumstances related to the backpack. She also stated that the maternal grandmother, with whom she and the child reside has very strict rules about not smoking in her home and that the child's personal belongings did not and do not smell like smoke of any kind.

[55] JI acknowledged placing various notes about various concerns / requests in the child's backpack for the mother, and that she continued to do so despite the mother's requests for her not to send notes in the child's backpack. JI suggested she did so for about a year or so until they began sending emails instead.

[56] The mother indicated that JI would often send notes or "reach out" about missing items JI and the father believed the mother had in her possession. The mother explained that to minimize conflict she often chose not to respond but she would try to return the item(s) in question at the child's next exchange.

[57] JI acknowledged that on or about May 27, 2021, she made a referral to the Department Community Services - Child Protection Services, expressing concern about the mother reuniting with her previous intimate partner TC. JI explained that she and the father had understood that if TC reunited with the mother, Child Protection Services may wish to be involved.

[58] I find JI's evidence about why the mother might be upset with the father and / or JI (the mother's backpack not being used) to be less likely than the mother being upset that JI was continuing to place unwanted messages in the child's backpack and JI had made a referral to Child Protection Services about the mother's ongoing contact with her intimate partner. Either JI was not being

forthright when giving her testimony or she lacks insight into what most likely contributed to a decline in the relationship which had been established between JI and the mother.

[59] As noted above, the mother had previously left high school when she became pregnant with the parties' child. The mother stated that on June 18, 2021, she received her high school diploma after working toward it for the preceding three years. Approximately a year earlier, the mother had sought a diagnosis for symptoms and treatment for ADHD which undoubtedly contributed to her achievement.

[60] In her evidence, the mother acknowledged she was in and out of her relationship with TC in 2021, until he attacked her and her friend in or around July 9 and 10, 2021. Of note is that when the mother felt threatened, she texted the father about the incident, for example in July 2021 she advised the father that TC was chasing her and her friend and that the police had responded to her complaint.

[61] TC was charged with assaulting the mother by choking and uttering threats. A no-contact order was put in place between the mother and TC. Child Protection Services investigated the matter and determined that concerns of a risk of physical harm and inadequate parenting skills were not substantiated (business records

document an entry error: Child Protection Services records initially indicated they had not investigated the matter, however, they then confirm they investigated, and they had not substantiated concerns of physical harm and inadequate parenting skills).

[62] In July 2021, the mother acknowledged to Child Protection Services that she was back in a relationship with her previous partner, TC (previous conflict in 2018). At that time, the mother also advised Child Protection Services that she had misunderstood the agency's direction about advising them if she reunited with TC. I do not accept that the mother misunderstood the agency's direction.

[63] The mother suggested to them that she believed the requirement to notify Child Protection Services was time limited. I do not believe the mother was being forthright with Child Protection Services at that time, however, the mother has testified that her relationship with TC ended after that incident. At the time of trial, the mother was in an intimate relationship with a man who did not have a criminal record or any known history of violence.

[64] As noted previously, the father and JI were married in September 2021.

[65] Also in September 2021, the mother was charged with impaired driving, but the child was not with her at that time. The mother was observed by a witness

driving on the “wrong side of the highway, with no lights, and at significant speed.” The mother was stopped by police at 1:05 in the morning. Upon responding to the complaint, police reported finding a half empty bottle of tequila in the mother’s car. The mother failed the sobriety test.

[66] The mother plead guilty to the charge, and she has admitted that at that time she was struggling with misuse of alcohol. The mother explained that she subsequently addressed the issue of her alcohol misuse by completing a driving while impaired program, having an interlock system installed in her car, and by engaging in addiction counseling services.

[67] The mother stated that before her driving while under the influence conviction, she had had a driver’s licence, and that her license was reinstated in October 2023. The mother confirmed her family members were able to drive the child as necessary while her license was suspended. The father reported that the mother had also been involved in a previous driving while impaired incident in October 2016, approximately five years earlier.

[68] JI stated that in September 2021, the child’s mother had expressed regret to JI that her relationship with TC had not worked out. JI further reported that the

mother also expressed that she was concerned about TC as he had been in a street bike accident and was in a coma.

[69] JI observed that at that time the mother suggested she was struggling emotionally, and she was not able to properly advise the school about the child's school bus schedule. JI stated that she provided the child's school bus schedule to the school for the mother, and she has continued to provide the child's school bus schedule to the school since that time.

[70] JI suggested that in or around September 2021, the child presented with the following concerns: defiance when asked to do tasks expected of him at school and at home; arguing with adults; engaging in unprovoked physical altercations with peers; inability to focus on schoolwork or homework; disrupting his class; and he presented as impulsive and hyperactive.

[71] In November 2021, the mother contacted the Department of Community Services - Child Protection Services to report that the father and JI were disciplining the child by holding him down and placing soap in his mouth. The father later claimed he had spoken with the mother about his and JI's intention to use the above-noted discipline technique before he and JI used it. He suggested

that the mother did not object – thereby attributing blame to the mother for his and JI's choice of discipline technique.

[72] I do not accept the father's suggestion that the mother condoned the father and JI's choice of discipline technique for the child. The mother acted protectively when she learned from the child that the father and JI were using inappropriate discipline. The mother also acted protectively when her mother spanked the child, and on another occasion, when her partner became violent toward her, and she contacted the father to care for the child.

[73] In November 2021, the child was interviewed by the Department of Community Services - Child Protection Services. During the interview, the child disclosed that things at home with dad were "not so good." The child stated that if he did not listen or if he broke a rule "he gets soap in his mouth." He further stated that his father and JI sometimes hold him down and he is not big enough "to get them off." I accept that the child's disclosure as credible and reliable.

[74] When asked, the child stated that he "feels safe at mom's and at school" and that he would feel safe with his dad if the interviewer would speak to his dad about not disciplining him by holding him down and putting soap in his mouth. I find that the child was clearly able to communicate his fears with the trained

professional interviewer, and he clearly expressed that at that time he felt safe with his mother but not with his father. I accept the evidence as credible and reliable.

[75] I find on a balance of probabilities the discipline method used by the father and by JI was not one recommended by Dr. Gorodzinsky and despite the father attending seven sessions with Dr. Gorodzinsky (2020 / 2021) and being provided with reading material about how to approach the child's challenging behaviour, the father and JI had opted to use a coercive and abusive method of discipline with a child who was already struggling emotionally at that time.

[76] On or about December 6, 2021, following the investigative interview with the child, the father and JI provided the Department of Community Services - Child Protection Services with a list of concerns related to the child's behaviour. They highlighted behaviours such as but not necessarily limited to the following: defiance, lying, and swearing. The child was six (6) years old at that time.

[77] In December 2021, JI disclosed to Child Protection Services that she and the father had been having difficulty completing tasks with the child, that the child often lacked impulse control, and that she observed that the child appeared dysregulated upon transition from his mother's care. JI provided the Department

of Community Services - Child Protection Services with a list of concerns about the mother's behaviour and / or concerns about her parenting.

[78] The Child Protection Services' representative who met with the father and JI at the end of 2021 observed that the father and JI became confrontational during their discussion with the worker. The worker also observed that JI spoke negatively about the child.

[79] JI explained that the child had been struggling and they were trying to do everything they could to help change the child's behaviours. JI suggested the soap was placed on the child's tongue only twice. JI denied holding the child down and she claimed that the child was not physically harmed by this form of discipline. I find it is more likely than not that JI has minimized the father's and her own use of inappropriate discipline with the child.

[80] As an explanation for their choice of an inappropriate discipline technique, JI stated that when she and the father were young, they both had soap put in their mouths by caregivers as punishment. Neither JI nor the father demonstrated any significant insight into how their chosen disciplinary method may negatively impact the child and / or may harm him emotionally if not physically, especially given his emotional struggles.

[81] I find the father and JI most likely minimized / under-reported the father and JI's use of inappropriate discipline with the child in their initial affidavits filed with the court. In addition, at trial, JI did not reference the difficulties they had experienced or the mistakes they had made but focussed on the possible effects of the child witnessing criminal activity when in his mother's care (an acquaintance of the mother's stealing from her parents might be an example). JI suggested she just wanted the child to have positive interactions and structure in his life, and she did not identify how she could help that happen by changing her own behaviour.

[82] As noted previously, between the fall of 2020 and March of 2021, the father and JI had participated in session(s) with Dr. Gorodzinsky, and the father claimed the child's behaviour had improved tremendously as a result. However, the father and JI subsequently used inappropriate discipline with the child – holding the child down and placing soap in his mouth – in or around November 2021, after which the father and JI were the subjects of a child protection investigation.

[83] In the spring of 2022, the father and his partner JI completed family skills programming. Given that the child has not made any further disclosures about any concerns at his father's house, I accept that the father and JI have learned and implemented new disciplinary strategies.

[84] In April 2022, the mother reported the father to the Department of Community Services - Child Protection Services, expressing concern about the father purchasing a "side-by-side" (John Deere machine) for the child, and not supervising the child while he rode the vehicle. The mother suggested the child had an accident with the vehicle the previous week. The father denied the allegations or that there was any risk to the child. He also suggested the child had access to a similar vehicle when in his mother's care.

[85] The mother expressed concern that: the child was too young to drive the "side-by-side;" he was not wearing a helmet; and he was not able to reach the pedals if he was wearing a seatbelt. The father denied the child drove the vehicle without a helmet, seatbelt, and / or supervision. The mother indicated she was not able to address the issue with the father directly as she was not permitted on the father's property, and he was not responding to her calls.

[86] The father and / or JI reported that in May 2022, he learned from the child's school that the child had stolen some small objects from multiple children at his school. The father remarked that "this had never happened before." In an email responding to the school, JI referenced an incident the child had relayed to her which occurred at his mother's home and most likely "inspired" the child to steal – thereby attributing blame to the mother.

[87] The father stated that he and JI did not share the child's comments about the incident at the mother's home with the child's mother, as he was afraid of the mother's negative reaction. In response to the father's claim, the mother attached the email message JI had sent to the child's teacher describing the incident the child had reportedly told the father and / or JI about witnessing at his mother's home. JI had suggested to the child's teacher that the behaviour the child had witnessed in the mother's home had likely inspired the child to steal at school.

[88] I accept the mother's evidence that like his teacher, the mother had also previously observed the child taking things which did not belong to him. I do not accept that, as suggested by JI, the child was inspired to start taking other people's belongings after the mother "became angry at a person who stole from [her] family."

[89] I am not prepared to jump along with JI's conclusion about why the child chose to steal and / or to place blame on the mother or her acquaintances, or the father or JI, for "inspiring" the child's behaviour. In addition, I find it was completely inappropriate of JI to suggest to the child's teacher that his behaviour was inspired by something which had occurred while he was in his mother's care.

[90] In June 2022, after the parties agreed the child would remain with the mother during the father's upcoming parenting time as the mother had reported to him that the child had been exposed to the covid virus, the father learned through social media that the mother had left the child in the care of another. The father took issue with the mother's choice not to stay home to care for the child herself and he asked JI to contact the police to request that the police complete a "wellness check" on the child. The police subsequently attended the mother's home, and they observed the child and reported the child was "perfectly fine…"

[91] I find the father had no valid concern about the child when he asked JI to contact the police to do a wellness check. The father contacted police without just cause, as he was frustrated or angry that the mother had not stayed home to supervise the child herself. On this occasion at least, the father did not appear to be concerned about whether the mother would be angry about his request for a wellness check at her home or how the child might react to police arriving at his mother's home.

[92] Calls to the police or to Child Protection Services for no valid reason are invasive. The mother is not required to care for the child 24/7 when the child is scheduled to be in her care or even when the parties have agreed he will remain in

her care during the father's parenting time. I consider calls to police or Child Protection Services without just cause to be a form of family violence.

[93] The father has stated in part about his struggles to respond to the child's behaviour:

> …
> It is my understanding that both the mother and I were to attend sessions with the child. I attended approximately seven sessions between November 2020 and March 2021. I understand that multiple sessions were made for the mother but were either cancelled or she did not show up.
> In the summer and fall of 2021, the mother repeatedly changed her mind back and forth between thinking it was a good idea for the child to be assessed for ADHD and not for ADHD. It is very hard for the mother to make important decisions that would benefit the child. This leads to delays and results in the child not receiving any treatment he needs in a timely manner.
> …
> In August 2022, the child was diagnosed with ADHD by a pediatrician who specializes in ADHD with children. JI, the child and I attended the appointment…
> At this time, the child was very defiant, hyperactive, was unable to concentrate / focus in school or at home and was impulsive with physical actions towards his peers at school. The child was behind almost a year in his educational curriculum…

[94] In or around October 2, 2022, JI and the father contacted the Department of Community Services regarding a comment and / or threats the child reportedly disclosed to JI which were allegedly made by his paternal grandfather. The child allegedly stated that his maternal grandfather stated to the child that if the child did not stop talking, that he would "knock out his teeth."

[95] JI reported the child's alleged comments to Child Protection Services, and when they asked JI, she acknowledged: that the child did not present with any

marks or bruises; the child did not appear to have been physically harmed; and the child showed no fear of returning to his mother's home (where his maternal grandfather resides) the following day. Given the struggles everyone had experienced with the child's behaviour, if the comment was made by the grandfather to the child, then it was inappropriate, but the issue should have been discussed with the mother or the paternal grandfather first.

[96] Ideally, the mother should have been the one to address the issue with her father. At that point, the mother had a clear track record of acting protectively on behalf of the child. If the father was not satisfied with how the mother approached the issue, then at that point it would have been appropriate to seek further assistance / intervention.

[97] Use of threats of physical harm to manage a child's behaviour is an inappropriate form of child management which may cause emotional harm to a child. Although I do not believe the maternal grandfather had any intention of acting on the threat if in fact made, the maternal grandfather needed to know he could not continue to manage the child in that manner. Based on the mother's past history of acting as a protective parent to the child, I am confident she would address this concern or any other concern with her father.

[98] The mother has advised that when she was young, her father did struggle with mental health challenges. However, she has reported that her father has participated in counseling and has been prescribed medication to manage his symptoms, and he is stable. I am satisfied the mother is an excellent advocate for the child, that she has acted protectively, and she will continue to act protectively.

[99] Both parties must ensure that anyone who cares for the child: family; coaches; teachers; etc. are provided with direction on how to properly address / manage the child's impulsivity and / or behaviours with positive reinforcement. Adults in the child's life must be not only discouraged but prohibited from resorting the threats or abusive parenting / disciplinary practices.

[100] The father and / or JI acknowledged that the mother had previously suggested she would be making inquiries about having the child formally assessed. However, in 2021, the father later advised the mother that he and JI had made a referral for the child to be assessed. The mother indicated she felt hurt and angry when the father and JI advised her that they had proceeded to have the child placed on a wait list for an assessment without her input.

[101] The mother has suggested that subsequently, in the summer of 2022, the father failed to give her adequate notice that the child had been scheduled to

undergo a Psychoeducational Assessment on or about August 23, 2022. I do not accept the father's suggestion that the mother was given sufficient notice that an assessment date had been secured and / or that the mother was invited to participate on an equal basis with the father and JI.

[102] As noted previously, before and after 2020, the father, the mother and JI were concerned about the child's academic development and his emotional regulation. They were all clear that the therapist they had consulted with in the fall of 2020 and / or into March of 2021, Dr. Gorodzinsky, suggested that due to the child's presentation and due his age, they would need to monitor him, and they should consider having him formally assessed in the future. The mother had stated she would make an inquiry, but the father went ahead and did so through his own resources, advising her later and asking her to complete health forms.

[103] In his affidavit sworn in November 2023 the father stated:

> I do believe the child is doing better in many respects than he was in the last consent order, but I believe this is due to the supports JI and I have obtained and implemented into the child's life, such as extracurricular activities, counseling, ADHD assessment and medication and tutoring etc…

[104] As early as 2020, and definitely by the fall of 2021, both the father and the mother stated they were going to make inquiries about having the child assessed. Both parties understood there would be a waiting period before the assessment

could be scheduled and then completed. JI has described herself as the main source of income in the father's home and has confirmed she always had access to health and dental insurance to benefit the child and the father, with the exception of a few months when she changed jobs in or around 2023, including coverage of the child's health needs.

[105] During the summer of 2022, the father registered the child in tutoring to address the child's reading challenges. The father indicated he had been advised that the child was a year behind in his English curriculum and the child's teacher had recommended that the child practice. The father reported that the mother did not speak to him about the private tutoring arrangements he had made until the following year when the mother expressed her agreement / consent for the child to continue in the program.

[106] Given the parties' strained relations, and that the father had already made the arrangements for private tutoring services, it is not surprising that the mother initially refrained from commenting. However, it is indeed encouraging that despite the animosity, the following year the mother was able to acknowledge the child may benefit from the service and / or she was not opposed to him attending, and she consented for the child to continue with those services.

[107] In this case, the father did not provide the court with any documentary evidence to suggest he had provided the mother with updated information once the child's appointment for a private assessment was finally scheduled. As noted, I prefer the mother's testimony on the issue of notice of the child's assessment date, which was scheduled for the child on or about August 23, 2022.

[108] After the assessment was completed, the father and JI notified the mother via email about the child's diagnosis. In addition, they advised the mother that they would be starting the child on medication that day. Further, they directed the mother to "please not start incessantly calling them about the issue" and that they would not be answering any calls from private numbers. The father and / or JI also suggested to the mother that if she did not cooperate, the father would start a court application to force her to cooperate.

[109] The father's and / or JI's approach to advising the mother was not sensitive to the mother's needs as the child's caregiver or to her role as the child's mother. I do understand, given the child's past struggles, that the father and JI were likely anxious and also excited to proceed with the recommendations including any pharmacological intervention, however, part of helping the child should have included ensuring that the mother was provided with an opportunity to meet with

the assessor / treating physician along with the father and JI. As noted, the father filed a Notice of Application in October 2022.

[110] I find that the mother's notice to the father and to JI, on or about September 2, 2022, that she would not administer the medication to the child until she was able to speak with the doctor was a reasonable position to take given the lack of information available / provided to her about the assessment date, particularly due to the lack of opportunity for the mother to speak directly with the assessor / treating physician.

[111] The mother suggested, and I believe, that once the child began taken his prescribed medication for his symptoms of ADHD, she observed that the child was experiencing possible side effects from his medication. The mother indicated that the side effects observed included but were not necessarily limited to the following: uncontrollable eye ticks; difficulty sleeping at her house; and sleepwalking.

[112] The father and JI countered, suggesting the child had exhibited some of these symptoms before he began taking his medication. No medical or other independent evidence was presented suggesting the child had been exhibiting the above noted side effects before he began taking medication. Either way, the

mother had a right to speak with the physician about whether the medication may have exacerbated any previous issues or may have initiated side effects being exhibited by the child or to ask any other questions she may have before the child started his medication.

[113] It is commonly known, and I take judicial notice that, doctors who prescribe medication for symptoms of various conditions such as but not limited to, attention deficit hyperactivity disorder, routinely require families to monitor their children closely for side effects and / or to monitor any worsening of previous concerns. Doctors expect parents to report side effects and changes to / or worsening behaviours / conditions, to allow them to adjust a child's medication as necessary.

[114] I am satisfied that on October 2, 2022, the mother attended the second appointment with the child's doctor, Dr. Susan Webster. I am also satisfied that the mother discussed her concerns about side effects with the child's doctor and / or any other questions she may have had. As noted previously, I understand that the mother, the father and / or JI have attended follow up appointments with Dr. Webster. I accept that the doctor has changed the child's prescription and / or the dose on several occasions to ensure the child is taking the medication at the prescribed dosage which best suits the child's individual needs.

[115] I am satisfied that the mother has acknowledged and accepted the child's diagnosis. As noted previously, the mother participated in her own assessment in July 2020. She was diagnosed with attention deficit hyperactivity disorder, and she is prescribed medication for her symptoms.

[116] The mother has acknowledged that at one point there was some discussion about increasing the child's prescription medication dosage and in response she did give the child some of her prescribed medication rather than the generic brand he was prescribed by his doctor. I am satisfied the mother has since acknowledged that it is best to provide the child with his own prescribed medication. I also understand there is a system in place to address this families' particular circumstances (shared parenting), to ensure the child's prescribed medication is available to the mother and to the father to administer appropriately in their respective homes.

[117] The father has expressed concerns that since the child was prescribed medication in or around the fall of 2022, the mother has at times (beginning in November 2022) had trouble feeding the child in order that she may administer the child's medication and get the child to school on time. The mother has highlighted that the school records reflect that after term 2 and 3 in the child's grade 2 year (2022/2023) the child had missed only 3.5 or less days of school. I am satisfied the

mother has addressed any initial difficulties she may have experienced in relation to feeding the child before giving him his medication before he leaves for his school day.

[118] The mother has indicated that in addition to giving the child his medication, she has attempted to implement various non-medical strategies to help the child regulate his emotions, such as breathing techniques and mindfulness. She indicated that she encourages the child to "reflect." And that if the child appears "hyperactive" she gets him outside to burn off energy. The mother has claimed there are many techniques which assist the child.

[119] The father has stated that more recently that the child's speech pathologist has suggested the child may have symptoms of dyslexia and he should be assessed. The father then arranged for, and the mother consented to, a private assessment which began in or around October 2023.

[120] In addition to presenting with developmental and emotional difficulties, the child has also at times presented with physical health conditions such as: eczema; cold sores; and ear infections. The child also presented with a persistent cough for a period, and he was tested for asthma. The results indicated he does not have asthma.

[121] The father has suggested that the child presents with cold sores after he has experienced significant stress while in his mother's care and / or the child has suffered from stomach aches because his mother has not fed him properly before giving him his medication. I am not prepared to accept the father's opinion evidence about the source or reason for the child's physical health conditions, including cold sores or stomach aches, which is partially based on child hearsay evidence. There is no credible or reliable medical evidence before me linking any of the above-noted health concerns to either parent. I would suggest the father refrain from making such links without medical advice / evidence.

[122] The father suggested the mother has not always sought timely health care treatment for the child and / or she has not always responded effectively and / or appropriately when the child was ill or the child was injured (dog bites). In addition, the father claimed that he and / or JI took the child to all his health appointments. The father also expressed concern about the care / support the mother was providing to the child when brushing his teeth.

[123] When cross-examined at trial, the father acknowledged that the mother may have taken the child to dental appointments on March 15, 2022, and in September 2022, and to the audiologist in May 2023. I find that the mother has had previous and ongoing contact with health professionals involved in the child's health care,

including speech pathology and dental care. I find she has taken the child to dental appointments and regular appointments with his family doctor.

[124] There is no credible or reliable evidence to suggest the child has not been provided with adequate health care for the above noted conditions / illnesses, arranged by either the father, JI, or the mother or their designate or a combination thereof. I have no reliable evidence to suggest that the child's physical health, dental health, and emotional health needs were not being met at the time the last order was granted and that they did not continue to be met after the order was granted in September 2020.

[125] I find that the mother has had previous and ongoing contact with support persons at the child's school, including contact with the following supports: Ms. Clements, literacy supports; Ms. Nelson in the Learning Centre; Ms. Trager, speech and language support; the child's teachers; the guidance officer; and David O'Brien, the principal. Evidence from the child's school reports for grade 1 (2021/ 2022) and grade 2 (2022/2023) demonstrate that the child had made tremendous gains with his academic work and emotional regulation after the last order was granted in September 2020. The child was in grade 3 at the time of trial.

[126] The father and JI have been in a financial position to make the financial arrangements for additional private resources / assessment for the child, including the initial psychoeducational assessment. In addition, as of 2020 / 2021 the father's work situation changed. He was previously in a business partnership with his father. The father then acquired ownership of the company in or around May 2021, and he was in control of his own work schedule.

[127] On the other hand, the mother has mostly lived with her parents and her brother since 2018. She has suggested she has not been in and is not in a financial position to contribute to privately funded services for the child. The mother has claimed that her previous work schedule was difficult to predict, and she did not have the same resources (health care coverage) or flexibility the father had with his work schedule after May 2021. However, I understand based on *viva voce* evidence presented at trial that the mother has since secured a full-time cleaning position with health benefits she may not have had in place previously.

[128] JI has expressed disappointment that (since 2021 arguably) the mother has not shown JI, or the mother has not expressed to JI, the gratitude and the kindness JI would have expected the mother to express in return for the emotional and financial support JI has provided as the child's stepmother. The mother has stated that at times she has felt left out of the process of arranging for private assessments

or services or programs for the child, and at times this has made her feel hurt and / or angry. The mother has indicated that after obtaining legal advice and after considering matters more fully, she has tried to set aside her feelings of hurt and / or her anger to focus on the benefits for the child. I accept the mother's testimony in this regard.

[129] The mother has stated, and I believe, that she is supportive of and is grateful for the child's engagement in various services, both public and private. The mother has consented to and she has expressed her support for: speech language services (through the school and sessions privately funded by the father and JI); initial consultation / counseling sessions 2020 / 2021; the initial private assessment completed in 2022 and paid for by the father and JI; treatment for ADHD (Dr. Webster and the school); tutoring services (through the school and privately funded by the father and JI); a further private assessment in 2023 (privately funded by the father and JI) to determine if there were any concerns about dyslexia; and counseling services (through the school guidance counselor and privately funded).

[130] By October 2022, after the child's initial assessment was complete and recommendations were made for the child, all parties and service providers, whether public or private, had a better idea about how to support the child. The

parties have agreed the child has made gains with respect to his development and his emotional regulation.

[131] Both parties acknowledge the child has benefited from the services being provided, but there is no evidence before me to prove what, if any, services were pivotal for the child, with the exception of the psychoeducational assessment which provided a roadmap for everyone. On balance of probabilities, I would think it was extremely helpful to the family to have the child formally assessed and for them to be able to work toward putting the recommendations from the report in place.

[132] However, the mother has suggested that the child continues to "struggle on exchange days." For his part, the father seems to agree, as he has expressed considerable frustration that the mother has appeared to struggle to arrive with the child completely ready at the exchange location by 7:20 am, and this has been difficult for the child. Both parties agree there is a problem with the arrangements currently in place for the child's exchange between caregivers and that the exchanges are difficult.

[133] The child has experienced significant developmental and behavioural problems from an early age. When children present with behavioural challenges, it is not uncommon for parents to have different ideas about what should be done.

[134] Caregivers often worry about and / or may be reluctant or hesitant to have their child diagnosed and / or prescribed medication and / or they may be confused about what to do. It is often very difficult or challenging to provide care for a child who is neuroatypical and / or to manage their behaviours.

[135] It is not uncommon for parents to question whether a child is intentionally becoming dysregulated and / or for a parent to believe their own approach to caring for the child or other caregivers' approaches to caring for the child is creating the "problem." Professional assessment, advice, and or treatment is often recommended and sought.

[136] It is not uncommon that parents of the same child have different views about a diagnosis and / or a recommendation. Parents often worry about or disagree about pharmacological interventions. In my experience, it is not unusual for parents who present before the court to have different philosophies about medicating children generally.

6.1 Exchanges

[137] The father expressed concern that even after the initial difficulties in later 2022, that subsequently, during the summer of 2023, the mother seemed to struggle to feed and then administer the child's medication before she was scheduled to drop the child off to him at 7:20 am during exchanges. He stated that the mother was late and / or the child was not fed and / or given his medication at exchanges - on July 5; July 11; July 19; August 8; August 15; August 30 and September 5.

[138] The mother explained that on a few occasions the child was not able to settle sufficiently (high activity / low concentration) in the morning to have what she understood was an adequate breakfast and then take his medication before being dropped with his father. And as a result, she asked the father to feed and give the child his medication.

[139] The mother also suggested that the arrangements in place for the child to transition between the homes at 7:20 am are not in the child's best interests. She explained that for her to arrive at the exchange point by 7:20 a.m., she and the child must get up at 6:30 a.m., (rather than for example 7:00 which is when the child gets up during the school year to catch the school bus at 7:50).

[140] The exchange time was set for 7:20 a.m. to accommodate the father's work schedule. I would think that after the issue had been identified the first time, that if the father wished to continue with the exchange time of 7:20 am, he should have perhaps proposed a solution, such as both parties packing healthy snacks for the car or that the father would feed and administer the medication himself on the exchange days.

[141] I accept both the father's and the mother's testimony about the regular and consistent schedule they strive to maintain for the child when he is in their respective homes. However, I agree with the mother that given the parties different schedules and ongoing difficulties negotiating / problem solving, a parenting schedule requiring more than one exchange during the week would not be in the child's best interests.

[142] The mother's plan for the child after school includes the child being cared for primarily by her father, and at times by her brother, as she feels his circumstances have changed since 2016, and sometimes by a babysitter, A. As noted previously, the mother has acted protectively and appropriately when an issue arose with respect to the maternal grandmother spanking the child, with respect to the father and JI using inappropriate discipline, and with respect to the maternal grandfather allegedly using threats to try to control the child's behaviour.

I have also considered the limited evidence with respect to the maternal grandfather getting angry at the father and leaving him a threatening telephone message and note that the father was not successful in obtaining a peace bond.

[143] The mother has explained she can and has at times relied on the school principal or A – who often provides support at the school – when her work schedule had changed, or she needed to get a message to the child about his after-school care. She suggested that at times they have helped her make sure the child knows where to go at the end of the school day.

6.2 The respective plans

[144] The father argued that the mother lacked a consistent, stable, and predictable plan for the child, including a consistent after-school care plan and, that given the child's high needs, the mother's plan needed to be more consistent. The father has referenced the arrangements he and JI have in place during his parenting time for the child's after-school care between 3:15 and 5:30. I am aware that the father and JI recently purchased a new home, and this may have resulted in them having to make alternate arrangements for the child.

[145] The father suggested the child settled better in his home when the child was provided with a consistent babysitter after school. I am unclear what arrangement

the father may have had in place for the child prior to the private babysitter or why the child would not settle in his home without a private babysitter. However, this does not mean that the child does not have a consistent and positive routine at his mother's home with his paternal grandfather, uncle and / or occasionally with his babysitter, A.

[146] The evidence suggests the child has adapted to both the father's and the mother's before and after school arrangements. I am satisfied that the mother has a plan in place which meets the child's needs, allowing the child to be cared for by family members and / or his preferred babysitter, A, when the child expresses a desire to be cared for by A, and his mother can afford it financially. This plan has been in place for years. Support persons have been able to respond to any emergency situations which arose for the mother. There is no reason to believe both parents do not have an adequate plan in place for the child.

[147] In addition, both parties may also be available to assist the other if they were requested to do so. I would note that there was a time when the father had agreed to pay the entire cost of childcare (2018 Order). The term was subsequently removed from the order by consent when the father registered the child in pre-primary in or around 2019, without the mother's consent. At that time, the father

had encouraged school registration, citing the lack of childcare costs and the parties had resolved the issue by consent.

6.3 Private services for the child

[148] The father has highlighted the mother's lack of financial contribution and / or involvement in private services arranged for the child, for instance: counseling; assessments; speech pathology; and tutoring. He has scheduled all private services on his parenting time, and he has suggested the mother has declined to help pay for private services scheduled on his time or to pay for those services scheduled on her own time and / and as a result she has failed to participate in or transport the child to scheduled private services on his time or her own time.

[149] There is little evidence suggesting the child requires additional privately funded services or, in fact, what level of ongoing additional private services he requires. There is evidence suggesting the mother participates in / or follows up with publicly funded services for the child. There is also evidence to suggest that the mother values / prefers to participate in and / or is only able to participate in publicly funded services and / or was only able to engage easily in programs and activities she could engage in with the child without having to transport the child by car, at least up until the mother's license was reinstated in October 2023.

[150] If the mother cannot afford private services, or she does not believe there is an additional benefit added by additional private services, she is not obligated to arrange them. In addition, the mother is not obligated to accept an offer from the father to pay for additional services during the mother's parenting time or to facilitate the child's attendance at those services during the mother's parenting time unless there is a clear direction from a medical professional that the service has added value in addition to the work being done through publicly funded services or at home.

[151] The mother has suggested she values her time with the child, and she does not want to consent to have the father or JI pick the child up on her time and thereby lose valuable in person parenting time with the child. I have no evidence to suggest the mother's position to not "overschedule" the child on her time has had or will have a negative impact on the child.

[152] The father has suggested that the mother is not responsive to JI and his questions / inquiries regarding the child's needs. The mother has stated that she does not respond immediately but prefers to take time to consider the issue and / or get legal advice. The mother explained that she does not respond to the father's emails immediately as she does not want to be reactionary.

[153] As an example, the mother indicated that in or around September 6, 2023, the father asked her about having the child assessed for symptoms of dyslexia. The mother provided evidence indicating she responded to the father with her consent, after she spoke with her lawyer, on or about September 12, 2023.

[154] The father has also been able to obtain the mothers' consent for the child to attend private counseling with Heather Mills, with all appointments scheduled on the father's time. As noted previously, the father had also arranged for the child to attend private tutoring in 2022, which continued in 2023. I am satisfied that mother has been responding adequately to the father's inquiries.

6.4 Additional concerns

[155] On or about December 10, 2023, a report was received that someone had observed the mother "snorting a line of cocaine." When a representative from the Department Community Services - Child Protection Services met with the mother, they were prepared to accept her explanation for what might have transpired.

[156] The mother advised that when she was at the school for the Christmas concern, she was notified by her interlock system that she had to respond to her car's interlock system notification – to blow into it – and she was bending down doing so, as she was embarrassed and trying not to be seen by the other parents.

Given that the mother does not have a proven history of abusing cocaine, I am prepared to accept her explanation of what the referral source may have in fact seen the evening of the school Christmas concert.

[157] In or around December 2023, when an investigation took place, the mother advised the Department of Community Service - Child Protection Services that she suffers from and has been treated for or is being treated for: symptoms of borderline personality disorder (participated in DBT program at Cobequid); attention deficit hyperactivity disorder (prescribed Concerta); anxiety and depression (prescribed Siprolex); and post traumatic stress disorder (takes low blood pressure medication). There is no evidence to suggest the mother has not sought care for her symptoms or that she is unable to care for the child. The mother continues to reside with her parents and her brother and has their support.

[158] The father arranged for a private investigator to determine if the mother and / or her boyfriends had any outstanding criminal charges. The father's investigator suggested to him that the mother may have been the woman who was charged with possession of cocaine and rifles in or around January 27, 2024, or February 15, 2024. The mother provided confirmation from the provincial court that she was not the suspect charged and she had no pending charges. I accept the mother's evidence.

6.5 Extracurricular activities

[159] The mother expressed concern when in the spring of 2023, the father registered the child for soccer for the summer of 2023, when the mother's driver's license was still suspended. However, the mother then reconsidered the issue and later confirmed her consent through her legal counsel on or about May 26, 2023. The mother subsequently relied on the child's maternal grandfather to transport her and the child to his soccer practices / games during her parenting time. She acknowledged they all enjoyed the program.

[160] The mother expressed that she was grateful for the opportunity to see the child participate in the soccer program as she observed that the child truly enjoyed participating in soccer. The mother also noted that she was grateful the father and JI had agreed to only attend soccer practices and matches on their own parenting time. She explained that she experienced less anxiety and enjoyed her time with the reassurance that the father and JI would not be attending the child's soccer events on her parenting time.

[161] The father expressed concern that on several occasions the mother disciplined the child by refusing to take him to his practices and / or games. I would agree with the father, and I would have concerns about either parent relying on negative reinforcement rather than positively reinforcing good behaviour.

[162] However, I also acknowledge a child may be dysregulated and the mother may have truly believed it was not appropriate to take him to his program. Unless the mother was completely unable to manage the child's outburst / behavior, a healthy sporting activity should not be taken away as punishment (just like I would expect parents not to take school, or the dentist, or a doctor's appointment away).

[163] In addition, given the evidence related to the child's energy level, I would think that the last thing a parent should be taking away from the child is an opportunity to use up all his energy in a positive way. Cancelling soccer or hockey practices / games should be avoided if at all possible.

[164] During the summer of 2023, the parties corresponded for some time regarding the father's request to enroll the child in a minor hockey program. The mother did not consent immediately. When the mother did provide her consent, just before the deadline to register the child, the father advised the mother that he had already registered the child.

[165] I am unclear why the father believed he needed to tell the mother he had already registered the child before she gave her consent to him within the time available to register the child. The only reasonable explanation is that he wanted to hold it over her in some way. As an explanation for her delay in advising the

father, the mother suggested she was concerned about: the time commitment; about the need to transport the child to hockey practices, as she had not yet had her license reinstated until October 13, 2023, and she was concerned as the father had specified that he and JI would be attending practices and games regardless of whose parenting time they were on. The mother explained that she preferred to avoid any conflict.

[166] I accept the mother's explanation for the delay, and I find that based on the history of this matter, it is in the child's best interest to avoid having both the mother, and the father / JI present for his practices / informal scrimmages / or games without the express written consent of the other. With respect to the child's games, I would hope the mother would be able to make an extra effort to reconsider providing her consent in writing to all the important people in the child's life to attend, regardless of any discomfort.

[167] The mother and father appear to have had different expectations of how they would spend time with the child. The mother's evidence suggests she was not very knowledgeable about or interested in the expected time commitment when children register for various sports programs including soccer and / or hockey. However, I am satisfied that although the mother may not have had much of an initial interest

in registering the child for sports such as soccer and hockey, that she was, and she is still, prepared to do so for the child's benefit.

[168] It is my expectation that both parents will support the child's expressed interests by ensuring he can participate in at least one of his preferred programs, sports, arts or otherwise, as fully as possible throughout the year: at least one program per summer, winter and spring sessions throughout each year.

6.6 Historical family violence and ongoing violence and / or conflict

[169] The mother has a history of conflictual relationships. The father has suggested that the mother had significant conflict in her past and / or in her ongoing relationships with him, JI, TC, RT, and others. The father has not acknowledged what, if anything, he may have done to contribute to any conflict with the mother.

[170] The father highlighted that there had been a warrant out for the mother's intimate partner's, RT's, arrest (2021/2022 - 2023) and that although the mother was aware of the warrant, she had failed to report RT's whereabouts to the authorities. It did not appear to the father that the mother was concerned about any repercussions. He further stated that in or around 2022, RT was incarcerated, and the mother continued her relationship with RT.

[171] The mother acknowledged she was in a relationship with RT until the end of October 2023. However, she claimed the child had little contact with RT, suggesting the child attended a fair with the mother and RT on one occasion. There is no reliable evidence to contradict the mother's assertion.

[172] The mother acknowledged spending approximately $3,484.85 or more on RT through his "Synergy" account while RT was incarcerated (she also suggested RT's mother gave her some money to forward to RT). The father observed that during that same period, the mother had at times claimed she could not assist him with the child's expenses for extracurricular activities. The mother acknowledged that in retrospect she could have made better choices.

[173] The father expressed concern that after the mother ended her relationship with RT (she suggested in or around October 2023), the mother began a relationship with and introduced the child to her new romantic partner, TD, and to TD's 12-year-old son. The father felt the mother introduced her partner to the child too soon, and he also expressed concern about the child moving back and forth between the mother's home and her new partner's home and his camp.

[174] The mother addressed the father's concerns about exposing the child to a previous abusive intimate partner, TC, and she commented about the child's

contact with RT in her evidence. She stated that after her relationship with TC, she had approached other relationships, including the one with RT, with much more caution and that is why the child had only been in contact with RT on one occasion.

[175] Despite the mother's evidence of her promise to herself to be more cautious for the child's and her own sake, the mother has acknowledged that she began a romantic relationship with TD in or around November 2023 and that she and the child were spending weekend days (possibly nights) with TD in or around December 2023. She also acknowledged that she and the child spent an overnight with TD and his friends on New Year's Eve. She confirmed that TD has a son (12) from a previous relationship who is in TD's primary care.

[176] By the trial date in March 2024, no credible or reliable evidence of any concerns were presented to me about TD and his circumstances and / or the child's contact with TD and his son.

7 Child Support

[177] As noted above, the parties agreed that if I maintained the status quo shared parenting arrangement, they would both agree to use the "set off" retroactive to

2020. The parties indicated they were not seeking to have the court complete a "Contino analysis."

[178] The father indicated that if I granted his request for primary care of the child, he was seeking an order requiring the mother to pay him the table amount of child support.

[179] Both parties sought to impute income to the other party retroactively to September 2020 and prospectively.

[180] The parties confirmed that contribution to special or extraordinary expenses were not being sought.

7.1 Background regarding child support

[181] Paragraph 13 of the Consent Order granted by the honourable J. Beaton and issued November 22, 2016, specified:

> The issue of child support in the appropriate set-off amounts to be paid in the shared custody arrangement will be determined **after full financial disclosure by the Applicant and Respondent** including production of Income Tax Returns, Notices of Assessment and pay stubs. Once the appropriate child support payment is determined in accordance with the Child Support Guidelines, it shall be retroactive to the date of this Interim Consent Order.

I understand the parties came to an agreement without providing full financial disclosure.

[182] In March 2018, the parties agreed they would not pay the table amount of child support, however, the father agreed to pay the "full expenses for the part-time childcare costs."

[183] The Order issued in September 2020 specified that neither party would pay child support to the other. The term requiring the father to pay the full cost of the child's part-time day care was removed.

[184] The father incorporated an excavation business in 2020/ 2021 (until March 2021 he was in a partnership with his father).

[185] The father's counsel argued there was no notice from the mother that she would be seeking retroactive child support and that it was the father who filed the application. The father was suggesting that the mother had been content with the status quo. However, without the father making full and meaningful disclosure, it would be difficult for the mother to determine whether to ask for child support or pursue an application with the court. Nevertheless, for her own reasons, the mother failed to insist on full and meaningful disclosure prior to the Consent Order being granted in September 2020.

[186] The father highlighted that both parties had issues with unreported income and that while he had redacted information from his financial records, the mother

had provided very little information about the adult persons earning income in her home, or about money she earned through OnlyFans, Angie's, or about working at bachelor parties.

[187] However, despite the above-noted arguments at the end of trial, the parties had agreed I could rely on the financial documents / evidence available to me at trial to determine the parties' income and they agreed to use the set-off figure for child support. They had also stated they did not wish the court to direct either party to file additional financial information.

7.2 The father

[188] The father claimed that with respect to past court proceedings, the parties had only shared their income information with each other while before the court in 2017, at settlement conferences. He further claimed that they had agreed to settle and that neither would pay child support.

[189] The father claimed he had been in a partnership with his father and only incorporated his own business in 2021. At trial, the father reported that he and JI had moved to a new address around November 2023 and that he had started taking a salary of $1,500 every two weeks or $39,000 per year for the purposes of child support.

[190] Despite stating that he was not seeking to have this court complete a Contino analysis or address section 7 expenses, the father highlighted that he pays for the child's counseling, speech therapy, and his extracurricular activities. JI claimed she was the primary income earner in the family, earning approximately $74,000 working for the Red Cross, and she had access to health / dental benefits for the child. Although the father acknowledged he redacted several thousand dollars from a personal account to a business account and he made other admissions, he did not contradict JI's claim.

[191] JI originally stated that she had never applied for the child tax benefit, however, on cross-examination she was shown her tax return for 2023, and she admitted that it appeared the person preparing her taxes for her had listed the parties' child as a child in their shared care. She testified that her father prepares her taxes.

[192] The mother argued that the father had unreported income and / or was underemployed, and / or that he had diverted earnings to his family (father / partner JI) or kept in the company.

7.3 The mother

[193] The mother reported she had accepted a full-time job with Premiere Inns and that previously she had worked “seasonal jobs” at the Sou-Wester and Coastal and that her new hours with Premiere Inns were more reliable and consistent.

[194] The mother advised that after she had advised the Canada Revenue Agency (CRA) that she was sharing the care of the child with the father, she was obligated to pay back approximately $8,000.00 to the CRA. The mother confirmed she was receiving half the child tax credit only.

[195] On cross-examination, the mother agreed she has an OnlyFans account. She suggested that the account had been dormant for months. She also acknowledged dancing at approximately five private events. She acknowledged she has used online pseudonyms on Instagram and with her webcam work. She indicated she had considered starting a company and she purchased supplies to make candles, but she was concerned about the associated liability and did not pursue this further.

8 Credibility

[196] In *K.B*. v. *A.T*, 2023 NSSC 125, the Honourable J. Forgeron discussed the issue of credibility determinations. Reminding me, in part, that evidence presented in all civil proceedings must be considered based on the balance of probabilities test. I must consider the impressions which emerge after watching and listening to

witnesses, and I must attempt to reconcile various versions of events. I must rely on evidence, which is clear, convincing and cogent.

[197] I am reminded that when considering the issue of credibility some of the factors I must consider include the following:

- Inconsistencies and weaknesses (internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses (*Novak Estate*, NSSC 283)
- Interest in the outcome/ personally connected to either party
- Motive to deceive
- Ability to observe factual matters
- Sufficient power of recollection
- 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. Chorney*, 1951 BC CA.
- Internal consistency and logical flow.

[198] I must also consider that an assessment of credibility requires the Court to apply the principles set out in *Farnya v. Chorny,* 1951 CanLII 252, [1952] 2 D.L.R. 354 (B.C.C.A.) at para. 10:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[199] In *McBennett* v *Danis***,** 2021 ONSC 3610 the Honourable Madam Justice Deborah L. Chappel stated:

> Dealing first with the law respecting the assessment of credibility and reliability, as I recently discussed in *Kinsella v. Mills,* 2020 ONSC 4785 (S.C.J.), the caselaw has established that this process is not an exact science; rather, it is a challenging and delicate task, the outcome of which is often difficult to explain in precise terms.
>
> As the Supreme Court of Canada stated in *R. v. Gagnon,* 2006 SCC 17 (S.C.C.), at para. 20, 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" (see also *R. v. M.(R.E.),* 2008 SCC 51 (S.C.C.), at para. 49; *Hurst v. Gill,* 2011 NSCA 100 (C.A.), at paras 18-19).
>
> The complexity of the task is heightened by the fact that the **judge is not required by law to believe or disbelieve a witness's testimony in its entirety. On the contrary, they may accept none, part or all of a witness' evidence, and may also attach different weight to different parts of a witness' evidence** (see *R. v. D.R.*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291 (S.C.C.), at paragraph 93; *R. v. Howe,* 2005 CarswellOnt 44 (C.A.), at paragraphs 51-56; *R. v. Boutros,* 2018 ONCA 275 (C.A.); *McIntyre v. Veinot,* 2016 NSSC 8 (S.C.), at para. 22).
>
> [41] Despite the challenges inherent in the task of assessing reliability and credibility, the caselaw has articulated numerous factors that the courts may consider in weighing and assessing the credibility and reliability of witnesses. Drawing from the decisions in *Faryna v. Chorny,* 1951 CanLII 252 (BC CA), 1951

CarswellBC 133 (B.C.C.A.), at para 9; *R. v. Norman*, (1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (C.A.); *R. v. G.(M.)* (1994), 1994 CanLII 8733 (ON CA), 93 C.C.C. (3d) 347 (C.A.), at para. 23; *R. v. Mah*, 2002 NSCA 99 (C.A.), at paragraphs 70-75; *R. v. Jeng*, 2004 BCCA 464 (C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 (S.C.), at para 186, aff'd 2012 BCCA 296 (C.A.); *Brar v. Brar,* 2017 ABQB 792 (Q.B.), at paras. 9-16; *R.v. D.A.,* 2018 ONCA 612 (C.A.), at paras. 11-21 and *B.G.M.S. v. J.E.B.,* 2018 CarswellBC 2538 (S.C.), at paras. 34-40, these considerations include the following:

1. Were there inconsistencies in the witness' evidence at trial, or between what the witness stated at trial and what they said on other occasions, whether under oath or not? Inconsistencies on minor matters of detail are normal and generally do not affect the credibility of the witness, but where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate carelessness with the truth (*R. v. G.(M.); R. v. D.A.*).

2. Was there a logical flow to the evidence?

3. Were there inconsistencies between the witness' testimony and the documentary evidence?

4. Were there inconsistencies between the witness' evidence and that of other credible witnesses?

5. Is there other independent evidence that confirms or contradicts the witness' testimony?

6. Did the witness have an interest in the outcome, or were they personally connected to either party?

7. Did the witness have a motive to deceive?

8. Did the witness have the opportunity and ability to observe the factual matters about which they testified?

9. Did they have a sufficient power of recollection to provide the court with an accurate account?

10. Were there any external suggestions made at any time that may have altered the witness' memory?

11. Did the evidence appear to be inherently improbable and implausible? In this regard, the question to consider is whether the testimony is in harmony with "the preponderance of the probabilities which a practical

and informed person would readily recognize as reasonable in that place and in those conditions?" (*Faryna*, at para. 10).

12. Was the evidence provided in a candid and straightforward manner, or was the witness evasive, strategic, hesitant, or biased?

13. Where appropriate, was the witness capable of making concessions not favourable to their position, or were they self-serving?

14. Consideration may also be given to the demeanor of the witness, including their sincerity and use of language. However, this should be done with caution. As the Ontario Court of Appeal emphasized in *R. v. Norman*, at para. 55, an assessment of credibility based on demeanour alone is insufficient where there are many significant inconsistencies in a witness' evidence (see also *R. v. Mah* at paragraphs 70-75). The courts have also cautioned against preferring the testimony of the better actor in court, and conversely, misinterpreting an honest witness' poor presentation as deceptive (*R. v. Jeng*, at paras. 53-54).

8.1 Child hearsay evidence / out of court statements

[200] Upon review of the child's statements made to child protection personnel, I find the child's statements to be credible and trustworthy. The manner in which they were made, describing that he was too small to get them off of him, were consistent with the child's age and development.

[201] I believe the child when he stated that he felt safe with his mother and if he did not feel safe, he would tell his mother. Based on the evidence as a whole, I find the child has a stronger bond with his mother or that the bond is at least as strong as the one he has with his father. I was also encouraged that the child did not feel afraid to ask professionals to speak with his father about the inappropriate discipline the father was using.

8.2 The mother's testimony

[202] I accept most of the mother's testimony, in particular that she acted protectively when the child was exposed to inappropriate discipline by his father, JI, and his maternal grandmother, and when his maternal grandfather used threats to force the child to comply. I find the mother was forthright in most of her testimony, except some testimony related to her intimate partner relationships and possibly her finances.

[203] The mother was able to admit when she had made bad decisions, when she had acted in a reactionary manner, and that she needed and benefited from the advice of legal counsel throughout the proceeding. The mother accepted responsibility for the bad choices she had made, and she explained what efforts, programs, and services she had sought out to ensure she would not repeat her mistakes, including but not limited to: seeking diagnosis and treatment for symptoms of various mental health challenges; obtaining her high school diploma; and having her driver's license reinstated.

[204] When the parties consented to the last order in 2020, neither the father nor I expected the mother to become involved in another unhealthy intimate relationship and / or be charged and convicted of a further DUI. However, I am prepared to

accept that the mother has sought and benefited from services to assist her to make healthy choices.

[205] If in future there is evidence that the mother has made choices which place the child at risk of harm again, and in particular: she is charged and convicted of a further DUI; or there is credible, reliable and trustworthy evidence of further intimate violence in her relationships, then the issue of the mother's parenting time with the child may need to be reviewed.

[206] The mother showed insight about past intimate partner conflict / violence and stated that she recognized the need to avoid exposing the child to any similar circumstances in the future.

8.3 The father's testimony

[207] There is no question that the father and JI were right to be concerned about the mother driving while impaired in September 2021; the mother continuing to associate with TC until July 2021; and the mother beginning an association with RT in or around 2021/2022 which continued until October 2023. However, other concerns they expressed about the mother were mostly overstated, and / or not relevant to the determinations I need to make.

[208] The father and JI minimized the potential harm to the child from their use of inappropriate discipline with the child. However, they were both quick to focus on, and at times exaggerate, instances when the maternal grandmother and / or grandfather may have used inappropriate discipline or threatened to use it with the child.

[209] Although the father and JI expressed concerns about the child's academic development and his emotional regulation, I am not prepared to accept their claim that the child's considerable progress, especially since 2022, can be attributed to the father and JI primarily. There is no credible or reliable evidence to support their claim regarding such a direct link. The child spends half his time with his mother. The mother does not pay for private services for the child on her time, but she chooses to spend her time with the child differently, and she focusses on the public resources available through the child's school.

[210] The father and the mother may have had and / or they may continue to have somewhat different opinions about the value and / or about the necessity of providing the child with opportunities to participate in different private programs and / or private services, and they may wish to prioritize their time with the child differently, however, at trial, they both agreed the child was thriving. With the exception, of course, of the trouble they have experienced at the exchange times.

[211] With respect to extracurricular activities, again, there are often differences of opinions with respect to whether to register children in organized activities/ sports or to prioritize time with family at home or at the cottage for example. Sometimes the issue is related to either or both parties' financial ability to contribute. In this case, I expect both parties to take the child's lead in terms of choosing at least one extra curricular activity for the child each season (summer / fall / winter-spring), and for both parents to ensure the child can fully participate.

[212] The father has suggested he is willing to continue to pay for the child to participate in extra-curricular activities and for the child's equipment. If that is the case, the equipment must travel between the father's and the mother's homes. In addition, due to the past conflict between the parties, each parent must seek the other parent's permission in writing at least one week ahead (text or email is sufficient) to attend practices or games during the other parent's parenting time. If the parent refuses, then the other parent is prohibited from attending and speaking with the child about their request and the other parent's refusal.

9 Financial disclosure

[213] I have had considerable difficulty determining the credibility of either party with respect to their financial disclosure. Suffice it to say, I find that neither party has presented an entirely clear picture of their respective financial situations.

10 Change of circumstances (parenting)

[214] In *Smith v. Harnish*, 2022 NSSC 19, the Honourable Associate Chief Justice Lawrence O'Neil, (as he then was) stated that when a variation proceeding is brought pursuant to s. 37 of the *Parenting and Support Act*, R.S.N.S. 189 c. 16 the "PSA":

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, **a support order or an order for custody, parenting arrangements, parenting time, contact time or interaction** where there has been a change in circumstances since the making of the order or the last variation order.
>
> (1A) In making a variation order regarding **custody, parenting arrangements, parenting time, contact time or interaction,** the court **may include any provision that could have formed part of the original order that is being varied**.
>
> (2) When making a variation order with respect to child support, the court shall apply Section 10.

[215] Associate Chief Justice O'Neil went on to say:

> [41] Prior to considering the merits of the application to vary the current parenting order, the Court must determine if a change of circumstances exist as required by s. 37(1) of the 'PSA'. It is argued that **failing a change of material circumstances for this child, the Court lacks jurisdiction to consider the variation application**.
>
> [42] In *Irwin v. Irwin*, 2018 NSSC 261 at paragraphs 23-28, I discussed the meaning attributed to 'a material change in circumstances' when a Court is asked to vary a parenting order, in that case a Corollary Relief Order following a divorce. The following is a restatement of the law in this area as summarized in my earlier decision:
>
> > [23] Justice Beaton had occasion to discuss the legal effect of these provisions when the Court is asked to vary the parenting arrangement outlined in a final 'CRO' or a 'CRO' already varied. Her review of the law is a thorough and concise overview of the meaning of s.17(5) and (9) of the Divorce Act. Beginning at paragraph 15 she said in Salah v. Salah, (2013 NSSC 308) [affirmed 2014 NSCA 36]:

> [15] **The Court must be satisfied that there has been a material change in the condition, means, needs, or other circumstances since the making of the May 2011 order. That change must be in relation to the child, not the parents**. And if such a change is found to exist, **any changes I might make to the order must be done only through the lens of what is in the best interests of** (sic) as opposed to what either party might perceive as being in their own best interests.
>
> [16] What does it mean to speak of a material change in circumstances? Guidance about that is found in any number of decisions, including the Supreme Court of Canada's decision in Gordon v. Goertz. Recently in this court, Justice Jollimore provided a helpful summary of Justice McLachlin's instructions in Gordon v. Goertz., found at paragraphs five, six, and seven of Legace v. Mannett, reported at 2012 NSSC 320 (CanLII) wherein Justice Jollimore stated, and I quote:
>
> > (5) In an application to vary a parenting order, I am governed by Gordon v. Goertz., 1996 CanLII 191 (SCC). At paragraph 10 of the majority reasons in Gordon v. Goertz, then Justice McLachlin instructs me that before I can consider the merits of a variation application, **I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.**
> >
> > (6) At paragraph 13, Justice McLaughlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. **The requirements are (1) There must be a change in the condition, means, needs, or circumstances of the child or the ability of the parents to meet the child's needs (2) The change must materially affect the child; and (3) The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.**

[24] Justice Beaton continued:

> [17] The Court's reflection on that observation by Justice Jollimore of course then leads to the next question which is: **what does it mean to talk about the best interests of a child?** The concept of "best interests" was discussed at some length by the Supreme Court of Canada in Young v. Young. In a decision by my colleague, Justice Dellapinna in Tamlyn v. Wilcox, 2010 NSSC 266 (CanLII) he referenced the Young case and said as follows: In Young v. Young, (1993) 4 S.C.R.3 the Supreme Court elaborated on the best interests' test. At paragraph 17, the Court stated: "The test is broad. Parliament

> has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules designed to resolve certain types of disputes in advance may not be useful. Like all legal tests, **the best interests test is to be applied according to the evidence in the case, viewed objectively**. **There is no room for the judge's personal predilections and prejudices.** The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do."

[25] A preliminary question which must be answered is **what is the change following the issuance of the order sought to be varied**? Does the change qualify as a change in circumstances for the purpose of s.17 of the Divorce Act? If the parties contemplated that change when the order sought to be varied issued, can it nevertheless be a material change of circumstances? What if the change was only objectively foreseeable but not considered at the time of the issuance of the order sought to be varied?

[26] In the view of Professor Rollie Thompson, **caselaw dealing with the meaning of 'material change' is described as blurring the distinction between an objective test and a subjective one**. The Court in *Dedes v. Dedes*, 2015 BCCA 194 and *S.A.F. v. M.H.M.*, 2016 BCCA 503 discussed the distinction between whether a claimed material change is actually a material change within the meaning of s.17 of the *Divorce Act*. **The answer often turns on whether the alleged change was actually contemplated as opposed to reasonably foreseeable.**

[27] **The Supreme Court in *L.M.P. v. L.S.*, 2011 SCC 64 described a material change as change that if known, would have likely resulted in different terms.** I am satisfied I must decide if the change(s) identified occurred and were contemplated. The Supreme Court in *L.M.P.* summarized the threshold for variation:

> [32] That "change of circumstances", the majority of the Court concluded in Willick, had to be a **"material" one, meaning a change that, "if known at the time, would likely have resulted in different terms"** (p. 688). G. (L.) confirmed that this threshold also applied to spousal support variations.
>
> [33] **The focus of the analysis is on the prior order and the circumstances in which it was made**. Willick clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the Willick approach to variation applications **requires appropriate deference to the**

> **terms of the prior order, whether or not that order incorporates an agreement.**
>
> [34] The decisions in Willick and G. (L.) also make it clear that **what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.**
>
> [35] In general, a **material change must have some degree of continuity, and not merely be a temporary set of circumstances** (see Marinangeli v. Marinangeli (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40, at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see MacPherson J.A., dissenting in part, in P. (S.) v. P. (R.), 2011 ONCA 336 (CanLII), 332 D.L.R. (4th) 385, at paras. 54 and 63).
>
> > (28) Once a material change is found the Court should determine what if any, change is warranted. **When the order sought to be varied is a parenting order, an assessment of the best interests of the subject child must be undertaken as part of an analysis to determine the impact of a change of circumstances once found to exist.**

[216] In *Gray (Wiegers)* v. *Wiegers* 2008 SKCA 7, the Saskatchewan Court of Appeal commented about the case of *E.L.* v. *L.E.L.*, [1996] O.J. No. 1284, wherein that court stated:

> 55 The needs of any child in relation to each of his or her parents will change over the years from infancy to adulthood. Certainly, those changing needs could be said to have been within the contemplation of the parties, or the court, at the time of the original order. That should not stand in the way of those changing needs amounting to a "material change in circumstances".

[217] The Court of Appeal in *Wiegers*, *supra* went on to say:

> [23] I agree with that comment. It does not suggest, however, that mere passage of time constitutes a *material* change in the needs or circumstances of the child. The Court is still obliged to determine and assess the nature of the changes that time has

wrought in relation to the needs and circumstances of the child. In fact, in that case, extensive attention was given to that very question.

[24] The policy reasons behind the threshold requirement for reopening a custody and access order were helpfully described by Baynton J. in *McLeod v. Impey*, 2003 SKQB 167, 123 A.C.W.S. (3d) 714 and Popescul J. in *Scott v. Higgs*, 2007 SKQB 231, 160 A.C.W.S. (3d) 1024**.** Popescul J. adopted this analysis expressed by Baynton J.:

> 23 …In my respectful view, trial judges too often lower the bar of the threshold that an applicant must meet before they enter into a consideration of the application on its merits. Often no determination is made before trial as to whether the applicant can meet the threshold. The determination is almost always made after the trial judge has heard all the evidence, often from many witnesses over a lengthy period of time. There is an adverse consequence of erring on the side of finding that there has been no material change in circumstances that affect the child. It is significant because the appeal court will not have the benefit of the trial judge's findings of fact on the merits of the second aspect of the case. There is accordingly a tendency to quickly pass over the first aspect of the case and to focus on the second aspect.
>
> 24 There are many good policy reasons however, for paying more than lip service to the threshold requirement. Few parties have the financial resources to be repeatedly in court re-litigating custody and access issues. There are significant benefits to the children and all the parties involved in the stability and predictability that custody and access orders bring by finalizing the issues in dispute. Obviously, custody orders are never final in the absolute sense and must be flexible to ensure that the best interests of the children are being met. But if the variation of custody orders becomes the rule rather than the exception, the best interests of children in general will not be served. **It is accordingly essential to give full consideration to the threshold issue before moving on to the merits of the second aspect of the case**. (*McLeod v. Impey*, quoted and approved in *Scott v. Higgs* at para. 17.)

[25] I, too, agree with these comments. It is my view that mere passage of time and increased maturity of the child does not, in and of itself, constitute a material change of circumstance as is required by s. 17(5) of the *Divorce Act* and the case law that has interpreted that section. Were it otherwise, there would be an automatic right to seek variation of custody orders on a regular basis every few years. This is clearly contrary to the established law. **While the reviewing judge may, of course, take into account that a child's needs may change as he or she matures, <u>it is necessary to go further to determine whether and to what extent those changes have, in the case before the reviewing judge, made the original order inadequate.</u>**

> [26] In contrast with *Elliott v.Lowen*, *supra*, the instant case is not one where the original order was clearly based upon the immaturity of the child or other unusual circumstances that would necessarily require review as the child matured. Although Morgan was not yet four years old when the agreement on which that order was based was made, the order provided for equal sharing of school holidays and summer vacations. These parties separated before Morgan was born and the appellant was always her primary parent. There is no reason to assume that the order sought to be reviewed was one that was intended to be in any way provisional or contingent upon her tender years.
>
> (emphasis is mine throughout)

10.1 Has there been a material change of circumstances?

[218] If the change was known in September 2020, would it likely have resulted in different terms in the Consent Order? Was the change contemplated or reasonably foreseeable? Did the change have some degree of continuity, and it was not merely be a temporary set of circumstances? Has there been a material change in the child's circumstances which would necessitate a change in the custodial or the parenting arrangements?

[219] The requirements are (1) There must be a change in the condition, means, needs, or circumstances of the child or the ability of the parents to meet the child's needs (2) The change must materially affect the child; and (3) The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[220] The child's diagnosis, in and of itself, is not sufficient proof that the parents are not adequately able to continue to meet the child's needs and is not sufficient to

prove a material change of circumstances in this case. The parents were aware their child had some special needs and that he required further assessment.

[221] However, if it had been known to me at the time when the last consent order was issued in September 2020, that: the mother would have ongoing involvement in unhealthy relationships in 2021 and in 2021/2022 – 2023; or the mother would be convicted once again of driving while impaired; or the father and JI would be found by the Department of Community Services to have inappropriately disciplined the child, I may have found those circumstances could materially affect either the father's or the mother's ability to meet the child's needs, and I may have granted a different order. Therefore, there has been a material change requiring me to review the child's circumstances.

10.2 What custodial arrangement is in the child's best interest?

10.2.1 Custody

[222] In *Kaplanis* v. *Kaplanis*, 2005 (ONCA) 1625 Canlii, the court found:

> …
>
> [10] As in any custody case, the sole issue before the trial judge was the best interests of the child. The fact that both parents acknowledged the other to be "fit" did not mean that it was in the best interests of the child for a joint custody order to be made. **The evidence before the trial judge should have revealed what bonds the child had with each of her parents and their ability to parent the child**. In addition to detailing the mother's current arrangements respecting the care of the child, the evidence should also have indicated what practical plan to care for the child the father proposed to make when he had the child with him and the benefits to the child of such an arrangement...

> [11] The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered…There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another…
>
> [12] Insofar as the ability of the parties to set aside their personal differences and to work together in the best interests of the child is concerned, any interim custody order and how that order has worked is a relevant consideration for the trial judge and any reviewing court…

[223] A shared parenting arrangement has been in place since 2016, and the mother wants to continue the shared parenting arrangement. The child has been interviewed by child protection services on at least two occasions and both times he has identified his mother's home as a place where he feels safe and the mother as someone he would go to or speak to if he felt unsafe.

[224] Difficulties between the parties began in 2021. Although the parties may have had legitimate concerns about each other, I find that as of March 2024, the parties had adequately addressed those issues. I also find the parties were able to work together for the benefit of the child later in 2022 and in 2023, and I am persuaded they will be able to do so on an ongoing basis.

[225] The parties shall continue to enjoy joint custody. If there is a disagreement between the parties, they will rely on the advice of a professional person working with the child when possible. Of course, either party shall be entitled to bring the matter of any academic or health related concern back to this court for review.

11 What parenting arrangement is in the child's best interest?

[226] There is insufficient evidence before me to show that as of March 2024, it would be in the best interests of the child to change from a shared parenting arrangement to a primary care arrangement. However, the shared parenting arrangement shall continue with the following changes:

1. The regular parenting time shall be week-on / week-off with an exchange at a neutral location on Sunday afternoon at 6:00 pm;
2. The parties shall not attend the child's activities during the other parents parenting time unless they have express written permission from the parent having care of the child; and
3. Holiday and special day requests from the father are granted.

12 Should income be imputed to either party? Has there been a material change with respect to either parties' income?

[227] In *Aslezova* v. *Khanine*, 2023 ONCA 153 the Ontario Court of Appeal found:

> …
>
> [12] **The obligation to provide financial disclosure in a case such as this does not simply flow from the disclosure order, but also more broadly from fundamental principles of family law**. As this court reiterated in *Roberts*, at para. 11: "**The most basic obligation in family law is the duty to disclose financial information";** and, at para. 13, that "**[f]inancial disclosure is automatic**. **It should not require court orders…to obtain production**."
>
> …

> **…**He concluded that: "**The [appellant's] pattern of litigation behaviour appears tactical, strategic and obstructionist**. He does not appear to be interested in moving this matter to conclusion. Rather, it appears, he is focused on delaying the matter and causing financial difficulty for the [respondent]."
>
> …

[228] Aside from both parties' arguments about the financial disclosure which has been filed in this matter, they have both expressed that they are not seeking additional disclosure. They have asked me to base my decision on the disclosure they have made available to me to determine the parties' income and use the "set-off" if continuing the shared parenting arrangement.

12.1 The parties' incomes

[229] In *J.H.* v. *R.H.*, 2023 NSSC 237, the Honourable Justice Forgeron reviewed the law in relation to the court's determination of income pursuant to section 19 of the *Child Support Guidelines*:

Law

> [46] Section 19 of the *Guidelines* provides me with the discretion to impute income in specified circumstances based on the following principles:
>
> - My discretionary authority must be exercised judicially, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before I can impute income: ***Coadic v Coadic***, 2005 NSSC 291.
> - The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: ***Staples v Callender***, 2010 NSCA 49.
> - The burden rests on the party making the claim, however, the evidentiary burden shifts if the payor asserts that their income has been reduced or that their income earning capacity is compromised

by ill health: ***MacLellan v MacDonald***, 2010 NSCA 34; and ***MacGillivary v Ross***, 2008 NSSC 339.

- I am not restricted to actual income earned, but rather, I may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, and employment history. I must also look to objective factors when assessing what is reasonable and fair in the circumstances: ***Smith v Helppi***, 2011 NSCA 65.
- A party's decision to remain in unremunerative employment; or to adopt an unrealistic or unproductive career; or to create a self induced reduction in income may result in income being imputed: ***Smith v Helppi***, supra.
- The test to be applied when determining whether a person is intentionally under employed is reasonableness, which does not require proof of a specific intention to undermine or avoid a support obligation: ***Smith v Helppi***, supra.

Decision on the Mother's Income

[47] I agree that the mother's November 2022 financial statement is an accurate reflection of her income earning capacity based on the mother's historical employment, skills and work experience, employment opportunities, as well as the mother's obligation to the child. I therefore impute income of $45,000 to the mother for support purposes. The mother is capable of earning $45,000 per annum whether she is exclusively employed as a dental hygienist or in various other part-time positions unrelated to her profession.

[230] Justice Forgeron also considered the income for child support of a self-employed father:

Decision on the Father's Income

[48] The father is self-employed. In the past, the father earned income from the motel business and rental properties, and from the sale of assets. The father's tax returns report the following gross and net business income (rounded):

2019	Gross $194,792	Net $26,917
2020	Gross $42,201	Net $($62,950)
2021	Gross $159,228	Net $11,237
2022	Not provided, but the motel earned $337,353 in sales for the year.	

[49] Section 16 of the *CSG* states that I am to assess child support based on the father's net business income, and, where appropriate, subject to a

s. 19 imputation analysis. In this case, the mother proved that the father's income should be imputed above what he reports as his taxable, net business income. I will now explain my three reasons for reaching this conclusion.

A. Lifestyle

[50] Lifestyle can be used as evidence from which an inference can be drawn that a payor has undisclosed income: ***Bak v Dobell****,* 2007 ONCA 304, paras 40 to 43. Prior to separation, the parties acquired rental properties, a sail boat, various vehicles, a camper, and significant cash savings which were kept in their home - all without mortgages or loans. Further, after purchasing the sailboat, the father lived in the USVI for about five months of every year. The parties would not have been able to afford their lifestyle on the father's net business income, even when combined with the mother's part-time earnings.

[51] The parties' lifestyle was, in part, sustained through the cash economy. Not all rental income, or cash payments, or profits from the sale of assets were reported to CRA. The father's tax returns do not accurately report all of the gross business income which the father earned.

[52] The father blamed the mother for the errors found in his tax returns. The father said that the mother completed and signed his annual tax returns without his consent. The father said he has since discovered that the mother stole from the business and filed inaccurate returns.

[53] I reject the father's allegations. I do not accept that the father had a *laissez-faire* attitude about the business, blindly trusting the mother with that responsibility and being a victim of her theft. To the contrary, the father was very much in charge of the business and its finances. **He was the person who managed and controlled the business**, not the mother. Although the mother did many tasks for the business, she did not exercise control. Further, the father knew, as a Canadian resident and business owner, that he had to file annual income tax returns. To suggest that the father never examined his tax returns for accuracy before or after their filing defies logic, especially given the father's business acumen, and his need to control.

B. Lack of Disclosure

[54] Section 21 of the *CSG* require parents to supply their three most recent income tax returns with all attachments and assessment notices. In addition, for parents who are self-employed, they must also file "the financial statements of the spouse's business or professional practice,

other than a partnership, and ..". The failure do so can result in an adverse inference being drawn against the payor as stated in s. 23 which provides:

> **23** Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

[55] Similar obligations are set out in *Rules* 59. 21 and 59.22

[56] In this case, the father did not produce his 2022 income tax return. In addition, the father did not produce the statement of business or professional activities for the 2021 tax year. Rather, for 2021, he simply stated what his gross and net incomes were, without any breakdown.

[57] I find that the mother is not responsible for the father's failure to produce. I do not accept that the mother has the receipts and the information that the father requires to complete his 2022 tax return or to verify the business expenses stated in his 2019 to 2021 tax returns. Further, the father has his 2021 tax return, the original of which must have included the statement of business or professional activities which he should have produced. He did not.

C. Lack of Proof of Reasonableness of Business Expenses

[58] **The burden of proving that business expenses are reasonable falls on the business owner**. A business owner who seeks to substantially reduce his income because of business expenses must provide full financial disclosure and an explanation of the losses. In ***Wilcox v Snow,*** 1999 NSCA 163, Flinn JA states:

> [26] Where, as here, the respondent is applying to vary an existing child support order, he bears the onus of proof. As a self-employed businessman he cannot, simply, file with the court a copy of his most recent income tax return, and expect that his net business income for tax purposes will be equated with his income for child support purposes. That is what the

> respondent did in this case. It is not enough. **The businessman must demonstrate, among other things, that the deductions which were made from the gross income of the business, in the calculation of his net business income, should, reasonably, be taken into account in the determination of his income for the purpose of calculating his obligation to pay child support**.[Emphasis added]

[59] In this case, the father produced no receipts and provided little by way of explanation to justify the claimed business expenses. Such evidence is necessary to conduct the analysis reviewed in ***Wilcox v Snow***, *supra*:

> [22] In the case of a self-employed businessman, like the respondent, there is **very good reason why** the Court must **look beyond** the **bare tax return to determine** the self-employed businessman's **income** for the purposes of the Guidelines**. The net business income**, for income tax purposes, of a self-employed businessman, **is not necessarily a true reflection of his income,** for the purpose of determining his ability to pay child support. The tax department may **permit the self-employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self-employed businessman, *for the* purpose of assessing his ability to pay child support, those same deductions may not be reasonable.** [Emphasis added]

[60] Further, the Alberta Court of Appeal thoroughly reviewed a business owner's continuing obligation in ***Cunningham v Seveny,*** 2017 ABCA 4:

> [26] Furthermore, a parent challenging the reasonableness of the corporate or business expenses is not legally required to first establish a *prima facie* case that such expenses are *unreasonable* before disclosure becomes

necessary. Simply put, **in matters concerning child support, the required disclosure arises at the outset and continues to be the obligation of the disclosing parent throughout the duration of all child support proceedings.**

[27] The content of required **disclosure must be sufficient to allow meaningful review by the recipient parent, and must be sufficiently complete and comprehensible that, if called upon, a court can readily discharge its duty to decide what amount of the disclosing parent's annual income fairly reflects income for child support purposes**. The issue is whether full deduction of an expense results in a fair representation of the actual disposable income of the party, and the court must balance **the business necessity of an expense against the alternative of using that money for child support**: Julien D Payne, "Some Notable Family Law Decisions from 2014 to 2015" (2015) 44:3 The Advocates' Quarterly 271 at 295.

[28] So as to leave no doubt about the correct principle: **the evidential and persuasive onus** under sections 18-21 of either the federal or provincial *Guidelines* as to the reasonableness of expenses, **rests with the self-employed or corporate parent throughout, and is the most effective means by which to serve the best interests of the child**. "Because this information is required in order to properly assess the amount of child support that is payable, its disclosure is part of the obligation to pay support": ***Roseberry*** at para 86. As provided by Yungwirth J in ***Roseberry*****, information regarding corporate expenses is within the knowledge, possession and control of the shareholder, director or officer parent, not the challenging parent**, and that information is relevant and necessary to determine income for child support guideline purposes. Moreover, **the obligation to provide a reasonable explanation for**

> **expenses fits soundly within the initial onus on the claiming parent under section 21 of the *Guidelines* to provide adequate disclosure of their corporate and personal income and expenses**. As noted in ***Roseberry*** at paras 61 and 67, lack of full disclosure or "[n]on-compliance with disclosure requirements causes great difficulty for litigants, creates a backlog of retro-active support applications, and most importantly, interferes with the ability of the payor, recipient, and the Court to make a timely and proper assessment." That is what has occurred in this matter. [Emphasis added]

D. Summary

[61] The mother proved that income should be imputed to the father in the requested amount of $200,000 for the following reasons:

- The father' income tax returns are not accurate, either with respect to the amount of gross income earned or the amount of business expenses.
- I infer that the father's income was under-reported given the parties' lifestyle, their lack of debt, and their property acquisitions, including storing large quantities of cash in their home.
- The father did not produce his 2022 income tax return, nor a statement of business or professional activities for 2021.
- The father did not produce receipts or provide explanations for the claimed business expenses.
- The motel business likely experienced challenges in 2020 because of the pandemic. 2020 cannot be used to determine income on a prospective basis.
- In 2022, the father earned $337,353 from the motel. I have almost no evidence about the 2022 business expenses. I do know, however, that in 2020 and 2019, the father claimed $113,390 and $103,302 in business expenses.
- Some of the business expenses have a glaring personal element, such as those related to meals and entertainment, travel, motor vehicle, and a portion of the utility expenses (including cell phones and internet).
- It is likely that some personal repair and maintenance expenses, and some of the repair and maintenance expenses associated

with the rental properties, but without the rental income being reported, are included in the claimed business expenses.

- Even without making adjustments for the above factors, and without scrutinizing the other business expenses, the father should have netted more than $200,000 in income for the purpose of calculating reasonable, available income for child support purposes on a go forward basis.

[62] What is the appropriate child support order?

[63] During the interim, the father will pay the table amount of child support in the monthly amount of $1,611. In addition, the father is responsible for 82% of the child's uninsured medical expenses, including physiotherapy, orthodontic and counselling expenses. The father must pay his share within 30 days of being presented with an invoice. The father's share of the orthodontic expense to July 31, 2023 is $2,658.40, plus he is required to make additional monthly payments of $304.20 until the account is paid in full. I do not include the cost of the summer camp as a proper s. 7 expense; it is included within the table amount.

[64] Child support is payable through the Maintenance Enforcement Program once the order is registered. Until it is, the father will e-transfer or deliver the support payments via counsel given the provincial court undertaking.

[65] Child support is payable on the first day of each month commencing February 1, 2023, the month after the mother filed her interim motion. The child is not responsible for court delays. Retroactive support, which is the support obligation arising before the mother's interim motion was filed, will be determined during the divorce trial.

[231] In *MacPherson* v. *MacPherson*, 2017 NSSC 321, the Honourable J. Scaravelli, clarified:

Imputation of Income

[13] Imputation of income is dealt with under section 19 of the *Federal Guidelines*.

[14] As a general rule a parent cannot avoid child support obligations by a self-reduced reduction in income. The court considers the reasonableness of the underemployment and looks at earning capacity while considering all of the

> circumstances including age, education, experience, skills, health, and availability of work.
>
> [15] Imputation may result where a person chooses to remain in a low income earning situation where the person has a greater earning capacity.
>
> [16] The person applying for imputation, has the burden of proving the person is intentionally under-employed. Once established, the respondent has burden of proving the under-employment is justified.
>
> [17] The respondent is 49 years of age. She has a university degree in Business Administration. Prior to starting her own business she worked approximately 16 years in the Antigonish area performing office work including clerical, bookkeeping and accounting duties. She does not report any health issues. The Corollary Relief Judgement Order issued in 2011 was based on the respondent's income of $37,000. Her 2013 income was $39,131 with income of $41,214 in 2014.
>
> [18] In January 2016 the respondent registered a business name in contemplation of setting up a residential and commercial pressure washing business. It was her intention at the time to operate the business as a sideline while employed. After registering the business she began purchasing equipment.

[232] At paragraph 36 in *Pellicer* v. *Williams,* the Honourable Associate Chief Justice Lawrence I. O'Neil (as he then was) quoted from *Staples* v. *Callender*, 2010 NSCA 49, Bateman, J.A who stated:

> [21] The purpose of imputing income, in the absence of proper disclosure, is to arrive at a fair estimate of income where information is not otherwise available, not to arbitrarily punish the payor for lack of disclosure. In this regard each case must be decided in context. There will be circumstances where a judge concludes that the non-disclosure speaks of a payor attempting to avoid his or her obligations by hiding the true income information. In view of Mr. Callender's limited work history, relatively low income, provision of year to date figures and recent pay stubs, and apparently truthful testimony about his 2008 income, the judge could reasonably infer that he was not motivated to hide income.

[233] Associate Chief Justice Lawrence I. O'Neil went on to state:

> [37] I am satisfied on a balance of probabilities that Mr. Williams' lack of an income is a result of his "persistence in unremunerative

employment" and "unrealistic or unproductive career aspirations" (*Smith v. Helppi*, 2011 NSCA 65, Oland, J.A. at paragraph 16).

[38] Having concluded that income should be imputed to Mr. Williams, I must decide what that level of income should be.

[39] The Nova Scotia minimum wage is $10.15 per hour. Based on fifty weeks of work each year and forty hours each week, one would earn slightly more than $20,000 per year at this rate.

[40] Mr. Williams is capable of earning more than the minimum wage given his credentials and personal attributes.

[41] I am satisfied that a fair level of income to impute is $25,000, reflecting an hourly rate of $12.50.

[42] On or before the 7th day of each month, Mr. Williams is directed to provide to Ms. Pellicer or her counsel, a summary of his earnings over the preceding month, whether yet received. On or before this date, he is also directed to provide a summary of his efforts to find employment over the preceding month.

[43] Mr. Williams' child support obligation is set as $363 effective August1, 2012 , based on the child support tables.

[234] In *Reid* v. *Faubert*, 2019 NSCA 42, the Honourable Justice Cindy A. Bourgeois stated:

Analysis

Did the application judge err in concluding Mr. Faubert's annual income was $85,000 for the purpose of calculating child support?

[18] It is helpful to set out the relevant provisions and legal principles that will frame the analysis to follow.

[19] This application was brought pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, as amended, and the "Child Maintenance Guidelines" made thereunder. That statute has now been re-named the *Parenting and Support Act*, with the Guidelines now entitled the "*Provincial Child Support Guidelines*". The substance of the provisions relating to the determination of child support have not changed. I will reference the "*Child Maintenance Guidelines*" as the "Guidelines". It is worthy of note that the provisions relevant to this appeal under both the provincial Guidelines and the *Federal Child Support Guidelines*, SOR/ 97-175, are identical in substance.

[20] The Guidelines set out a comprehensive scheme for determining the appropriate quantum of child support to be paid in a given situation. The objectives of the Guidelines are stated as follows:

Objectives

1 The objectives of these Guidelines are

(a) to establish a fair standard of support for children that ensures that they benefit from the financial means of both parents;

(b) to reduce conflict and tension between parents by making the calculation of child support orders more objective;

(c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of parents and children who are in similar circumstances.

[21] For children under the age of majority, the Guidelines presume that the quantum of child support will be determined by the applicable table, and based on the paying parent's income (s. 3(1)(a)).

[22] Section 3(3) requires that child support be paid based on the table for the province in which the parent against whom support is sought, resides. Here, the parties agree the Ontario tables are applicable.

[23] One way in which the Guidelines strive to meet the above objectives is to provide a method for the determination of a parent's annual income. Sections 15 through 20 set out a mechanism for determining income; however, only 16 through 18 are relevant to the issues before us. They provide:

Calculation of annual income

16 Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III. **Section 16 replaced: O.I.C. 2000-554, N.S. Reg. 187/2000; amended: O.I.C. 2007-321, N.S. Reg. 294/2007.**

Pattern of income

17(1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a nonrecurring amount during those years. **Subsection 17(1) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.**

Non-recurring losses

(2) Where a parent has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the parent's annual income under Section 16 would not provide the fairest determination of the annual income, choose not to apply Sections 6 and 7 of Schedule III, Adjustments to Income, as adopted herein, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18(1) **Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income as determined under Section 16 does not fairly reflect all the money available to the parent for the payment of child support, the court may consider the situations described in Section 17 and determine the parent's annual income to include**

(a) **all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or**

(b) **an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.**

Adjustment to corporation's pre-tax income

(2) **In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's**

length must be added to the pre-tax income, unless the parent establishes that the payments were reasonable in the circumstances.

[24] **The starting point for an income analysis is s. 16, often referenced as a determination of "line 150" income. In *Johnson v. Barker*, 2017 NSCA 53, Justice Hamilton said:**

> [23] **Section 16 of the *Child Support Guidelines* provides the starting point for determining the appellant's income:**
>
> > **16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.**
>
> Schedule III provides for adjustments, **including those to neutralize the favourable tax rates for dividends and capital gains**, as compared to other income, and to take into account non-cash expenses such as capital cost allowance.
>
> [24] Section 17 provides that if the court is of the opinion that s. 16 does not provide the fairest determination of the appellant's income, the court can determine an amount based on the spouse's pattern of income over the last three years.

See also *M.C. v. J.O.*, 2017 NBCA 15 at para. 14; *Gosse v. Sorensen-Gosse*, 2011 NLCA 58 at paras. 90-91; and *Bembridge v. Bembridge*, 2009 NSSC 158 at para. 9.

[25] Failing to start with a consideration of a payor's line 150 income as directed by s. 16 may open a trial judge's income determination to appellate review. This is especially so where the reasons do not illustrate the judge's rationale.

[26] Such was the case in *Wehrhahn v. Murphy*, 2014 ABCA 194. There, the Alberta Court of Appeal set aside a chambers judge's income determination as a result of a failure to start her analysis at the payor's line 150 income. Although the chambers judge identified the father's line 150 income, she did not use it, opting instead to utilize a figure obtained from the operating statement of his business. In finding such an approach constituted an error in principle, the Court of Appeal observed:

[16] The father filed his 2012 income tax return with a total line 150 income of $33,526. In support of that figure, he filed his company's 2012 unaudited operation statement for the taxation year. Rather than rely on the line 150 income as the starting point, the chambers judge referenced two corporate operating statements; one for the six months ending March 31, 2012 and one for the year ending March 31, 2013 and determined his 2012 income to be $42,143.

[17] The *Guidelines* provide a judge with various avenues for increasing or decreasing income for support purposes. (See: sections 17 through 20 of the *Guidelines* as well as Schedule 3 of the *Income Tax Act* as noted in section 16.) Unfortunately, we cannot discern the basis the chambers judge relied upon when she rejected the line 150 income contained in the 2012 return. There is no reference to any of the adjustments permissible under Schedule 3 of the *Income Tax Act.* Nor do the reasons suggest that the chambers judge was exercising her discretion under sections 17 through 20 in arriving at the figure of $42,143. For example, the chambers judge did not say she determined the line 150 income was not appropriate based on a pattern of income, fluctuation of income or receipt of a non-recurring amount during those years in making this determination as allowed by section 17.

[18] It appears the chambers judge simply averaged the year-end statements ending March 31, 2012, and multiplied that average times three, plus the average monthly amount for the period ending March 31, 2013 times nine as a means of calculating the starting point income rather than using line 150. But she does not say so and **she does not explain why and by what authority she was altering the line 150 income which is the starting point for variation under section 16 of the *Guidelines*.**

…

> [20] Departure from the section 16 requirement of line 150 income as the starting point should be done in keeping with the variations contemplated and allowed by the *Guidelines*, and should be supported with logical reasons explaining the rationale for a higher or lower income for support purposes and the authority for the departure. Here, we cannot determine from the reasons why and on what basis the chambers judge rejected the line 150 income figure. We agree with the father that the starting point for support should have been the total line 150 income in the T1 General Form (the line 150 income) contained in his 2012 income tax return. It is then quite proper to look at allowable justification for moving income either up or down. (Emphasis added)

[27] In *Wehrhahn*, the chambers judge's error appears to have been grounded in her premature consideration of s. 18. As set out above, s. 18 contemplates a court considering business income where it has been determined a payor's line 150 (s. 16) income "does not fairly reflect all the money available" for the payment of child maintenance.

[28] In *Goett v. Goett*, 2013 ABCA 216, the Alberta Court of Appeal summarized the principles relating to the application of s. 18:

> [11] In developing the guidelines, the legislators recognized that determination of income (and disclosure of income) by reliance on s 16 alone may be insufficient or unreasonable in fixing a fair amount of income for the purpose of child support. Specifically, the true income of someone who is self employed or operating a business is not necessarily reflected in their personal tax returns for the purpose of determining child support obligations. **Section 18 provides that where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under s 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider, among other things, all or part of the pre-tax income of the corporation for its most recent taxation year or an amount**

> **commensurate with the services that the spouse provides to the corporation provided the amount does not exceed the pre-tax income of the corporation.** In determining the pre-tax income of a corporation for this purpose, all amounts paid by the corporation as salaries, wages or management fees, or other payments to or on behalf of persons with whom the corporation does not deal at arms length must be added, unless the shareholding spouse establishes that the payments were reasonable in the circumstances: *Nesbitt* v. *Nesbitt*, 2001 MBCA 113, [2001] M.J. No. 291; *Kowalewich v. Kowalewich*, 2001 BCCA 450, [2001] B.C.J. No. 1406.

[29] Numerous courts have concluded that in applying s. 18, the onus rests on the payor to adduce clear evidence demonstrating that some or all of the pre-tax corporate income is unavailable for the payment of child support. See *Richards v. Richards*, 2012 NSCA 7 at para. 44; *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-61, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 135; *Cunningham v. Seveny*, 2017 ABCA 4 at para. 28; and *Potzus v. Potzus*, 2017 SKCA 15 at para. 13.

[30] How does a court determine how much of a payor's pre-tax corporate income is available for the payment of child support? Courts have identified a number of factors that are relevant to a s. 18 analysis. In *Bembridge*, *supra*, Justice MacDonald pointed out there are multiple factors that courts should consider, and focusing solely on retained earnings can lead to problematic results. She wrote:

> [36] Other courts examining this issue have commented that decisions made pursuant to section 18 require a court to understand (for example):
>
> – the historical practice of the corporation for retaining earnings;
> – The restrictions on the corporation['s] business including the amount and cost of capital equipment required;
> – The type of industry is involved and the environment in which it operates;
> – The potential for business growth or contraction;
> – The level of debt;
> – How the corporation obtains its financing and whether there are banking or financing restrictions;
> – The control exercised by the parent over the corporation.

> [37] This list is not exhaustive. Failure to understand exactly where the additional money can be found to increase the parent's income can lead to an incorrect result and ultimately, if the parent cannot find the expected additional money, may undermine the operation of the corporation and eventually "kill the goose that lays the golden egg".

[31] A proper s. 18 analysis requires a broad contextual approach. In *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law Inc., 2017), Julien D. Payne and Marilyn A. Payne write at page 165:

> **It is pre-tax net corporate earnings and not retained earnings that should be used in applying section 18 of the Guidelines.** [*Miller v. Joynt,* 2007 ABCA 214; *Johnson v. Barker*, 2017 NSCA 53; *Mayer v. Mayer*, 2013 ONSC 7099] In *Nykiforuk v. Richmond* [2007 SKQB 433; *Johnson v. Barker*, 2017 NSCA 53], Ryan-Froslie J. (as she then was) of the Saskatchewan Court of Queen's Bench (Family Division) observed that, in determining whether to exercise its discretion pursuant to section 18 of the Guidelines, the court must be satisfied that additional money is actually available and that it can be paid to the shareholder without endangering the financial viability of the company. **Merely looking at the retained earnings of the corporation is of limited assistance. Retained earnings are a shareholder's equity in the corporation (its assets less its liabilities). They do not represent cash available for distribution, nor do they reflect the pre-tax income of the corporation.** In making a determination pursuant to section 18 of the Guidelines, a wide range of factors must be considered, including:
>
> 1) the pre-tax income of the corporation;
> 2) The nature of the business involved (Is it capital intensive or service-oriented? Is it subject to seasonal fluctuations or economic cycles?);
> 3) The corporate share structure, including any obligation imposed by shareholders' agreements;
> 4) The financial position and general operations of the company (What are the company's operating requirements, its inventory, accounts receivable and accounts payable? Are there bank covenants which may affect payment out of funds? Is there a necessity to upgrade equipment, etc.?);

5) Is the company a well-established one or merely in its start-up phase?

(Emphasis added)

[32] Hearing judges are well-advised to apply the above approach. Considering retained earnings as the sole factor or starting point of a s. 18 analysis has been found to constitute an error in principle. For example, in *Miller v. Joynt*, 2007 ABCA 214, the Alberta Court of Appeal said:

> 1. Retained Earnings or Pre-tax Income?
>
> [27] In my view the judge erred in utilizing the annual net change in retained earnings as his starting point, rather than the **corporation's pre-tax income.** Retained earnings are the result of subtracting from pre-tax earnings income tax and shareholder dividends, and other changes to the capital accounts.
>
> [28] As the Mother points out, section 18(1)(a) refers to pre-tax earnings. Likewise, Schedule 1 of the *Guidelines* uses pre-tax (Total Income from Line 150 of the T1 General form) income: s. 16. This suggests that Parliament intended **pre-tax earnings to provide the starting** point for determining income under the *Guidelines*, subject to any allowable deductions pursuant to Schedule 3 of the *Guidelines*.
>
> [29] While there are cases where retained earnings have been used as the starting point for determining the amount to attribute to the payor's income (see e.g., *Broumas, Rattenbury v. Rattenbury*, [2000] B.C.J. No. 889, 2000 BCSC 722 and *Cook v. McManus*, 2006 NBQB 138, 301 N.B.R. (2d) 372), there has generally been no explanation given for the use of retained earnings.
>
> [30] The Father's submission that the use of retained earnings by the judge was tantamount to ascribing only part of the pre-tax income to the Father (as permitted by section 18(1)(a)) cannot be accepted. If that was the judge's intention, he should have said so. Absent such an explanation, the judge erred in principle in using the corporation's retained earnings rather than its **pre-**

> **tax income as a starting point for his calculations**.

[33] Recently, this Court in *Johnson*, *supra*, has similarly found that a hearing judge erred "by resting her decision only on retained earnings and failing to consider the whole of the company's financial situation" (at para. 45).

[34] I now turn to the decision under appeal. I am satisfied that given her reasons, it is impossible to determine whether the application judge applied the correct legal principles. Indeed, a review of her reasons, in combination with the record and Order, suggests it is probable she did not. I will explain.

[35] Ms. Reid challenges the application judge's income determination on two primary bases:

- She did not start her analysis with a consideration of Mr. Faub income as required; and
- She misapplied s. 18 by failing to consider the pre-tax incor Faubert's companies and by failing to require him to establish the corporate income ought not to be considered for chil purposes.

[36] In my view, there is merit to the above assertions. A review of the application judge's reasons disclose that she did not reference s. 16 of the Guidelines at all. At no point did **she identify what she considers Mr. Faubert's "line 150" income to be.** She neither looked at the last year (as per s. 16) nor whether she ought to consider **income patterns over the past three years (as per s. 17(1)).**

[37] I agree with Ms. Reid that a failure to identify Mr. Faubert's base line 150 income is problematic. This is not a case where it is obvious from the record what that figure should be. As such, it creates uncertainty as to the foundation for the application judge's analysis. The problem is compounded when one tries to ascertain how much corporate income the application judge later added by virtue of her s. 18 analysis. Ms. Reid asserts, and I agree, that both parties are entitled to understand how the application judge determined Mr. Faubert's global income for child support purposes to be "in the vicinity of $85,000".

[38] To illustrate the difficulty, the record shows that Mr. Faubert's line 150 income for 2015 was $79,544. If the application judge accepted this figure, as contemplated by s. 16, then she must have added the remaining balance of $5,456 (to total $85,000) as a result of her s. 18 analysis. However, if the application judge found it inappropriate to consider only

the 2015 income, and she looked at the past three years (2014 and 2013 line 150 amounts were $67,815 and $60,296 respectively) as permitted by s. 17(1), then her foundation may have been different. It is not uncommon that courts, pursuant to s. 17(1), will apply an averaging approach. In this case, if the application judge did so, it would have created an average line 150 income of $69,218, resulting in the balance of $15,782 presumably being added by virtue of the s. 18 analysis. Perhaps the application judge used some other approach, but if so, it is not ascertainable from her reasons.

[39] It is impossible to know what figure the application judge found as Mr. Faubert's "line 150" income. Further, there is no explanation why she viewed that amount as not being a fair reflection of his income available for child support purposes. The parties are further left uninformed as to what amount from corporate resources was added to the payor's income. In addition to not being able to identify what sum she determined was to be added to Mr. Faubert's personal line 150 income (whatever it may be), the application judge's reasons highlight additional concerns.

[40] Section 18(1)(a) specifically contemplates a court considering "all or part of the pre-tax income of the corporation … for the most recent taxation year". However, in her reasons, the application judge does not reference the pre-tax income of Mr. Faubert's companies at all. The evidence before her demonstrated total pre-tax corporate income of $88,616 for 2015. It does not appear, at least from her reasons, that this was factored into her analysis. Although the authorities noted above endorse a multi-factorial approach to determining the "pre-tax income of the corporation", a failure to consider the reported pre-tax income is, in my view, an error in principle.

[41] What the application judge did make mention of was the corporate retained earnings shown in 2012 and 2015 ($370,918 and $398,032 respectively) as well as cash on hand of $77,198 and $81,498 for the same years. She does not explain why these figures were relevant, or how they resulted in Mr. Faubert's personal income being supplemented from corporate sources to arrive at $85,000 for child support purposes.

[42] I would also note the application judge does not clearly explain how Mr. Faubert met his burden to establish that all or some of the corporate pre-tax income should not be included for child support purposes. In my view, it was incumbent on the application judge to explain not only how that burden was met, but what portion of the pre-tax income was not available for child support purposes. Without doing so, this Court is unable to ascertain whether she appropriately considered the totality of the evidence before her and applied the correct legal principles.

> [43] For the reasons above, I would allow this ground of appeal and set aside the application judge's finding that Mr. Faubert's income was $85,000 for child support purposes… .
>
> My emphasis.

[235] Issues:

1. What is the father's income for purposes of child support?
2. What is the mother's income for purposes of child support?
3. Has there been a change in circumstances?
4. Should there be a retroactive adjustment to child support from 2022 onward?

12.2 Section 7 analysis with primary care arrangement or "Contino" analysis if shared parenting

[236] As noted above, the parties agreed that if I decided to maintain the status quo shared parenting arrangement which has existed since 2016, they would both agree to use the "set off" amount of child support retroactive to 2020. The parties explicitly stated they were not seeking to have the court complete a "Contino analysis."

[237] The parties stated they were not seeking to have the court address the issue of special or extraordinary expenses which would form part of any "Contino analysis."

12.3 Change in circumstances and table amount

[238] The parties agreed or I find there has been a sufficient change of circumstances to allow me to reconsider the parties' incomes, prospective child support, and retroactive child support.

[239] Based on the fluctuations in the father's pre-tax net business income, changes in the dividends the father was receiving, and the changes to the father's source of income / business arrangement: from a partnership to sole proprietorship in 2021, with the father moving from 60% control to 100% complete control over a sole proprietorship, I find there has been a change of circumstances.

12.4 The mother's line 150 income

[240] According to evidence the mother filed prior to the initial trial dates scheduled in November 2023, the mother stated that her annual income for child support is as follows: $31,872 ($272.98) for 2020; $30,040 ($258.33) for 2021; $23,487 ($171.75) for 2022; $22,667 ($161.87) for 2023.

[241] The father argued that I should impute an income of $32,667.00 retroactive to September 15, 2020, attracting a child support payment of $279.74 per month to determine the "set-off". According to the mother, her line 150 income can be represented as follows:

Year	Reported line 150 income	Changes suggested by the mother	Table amount
2019	$20,040.00	None	Not relevant
2020	$31,872.00	$31,872.	$272.98
2021	$28,540.00	$30,040.	$258.33
2022	$22,667.00	$23,487	$171.75
2023	Not provided	$22,667	$161.87

[242] As noted above, the mother left high school because she was pregnant with the parties' child. The mother initially lived with the father and his family while the father had already been working in the family's business for several years. Since the parties separated in or around 2016, and up until 2023, the mother was employed in part-time positions.

[243] The mother and the child have both lived with her parents for extended periods during the mother's parenting time. During the parties two prior court applications, they agreed neither would pay child support to the other and no spousal support was sought by either party.

[244] I note that despite the mother's challenges in 2020 / 2021: completing her high school equivalency degree (2021); struggling with and then seeking treatment for and then addressing her outstanding mental health issues (2020 - 2023), in 2020

and 2021, the mother was able to earn an income approximating full-time minimum wage. I am prepared to accept the mother's yearly income for child support in 2020 as $31,872; and in 2021 it as $30,040.

[245] Although the mother claims she earned $22,487 in 2022, I understand that at the end of 2023 the mother sought out and she secured full-time employment. I find the mother would also have been able to earn close to or the equivalent of a full-time minimum wage income between 2022 and 2024, which in Nova Scotia would equate to approximately $15.20 per hour x 40 hours = $608 x 52 = $31,616, if she has sought full-time employment. The mother is imputed an income of $31,616 for 2022, 2023, and 2024. The mother will provide the father with financial disclosure, including income from all sources, by June 1, 2025 and by June 1 each year thereafter.

12.5 The father's line 150 income / dividend

[246] The father's business' pre-tax net reported incomes from 2014 - 2022 (partnership income, 2021 proprietorship / corporation, 2022 corporation onward) are represented below:

Year	Personal / or Ms. Isnor's 60% share of partnership	**Pre-tax net partnership income** to 2020 /	Pre-tax gross partnership income to 2020 /

	income / **dividend on line 150** to 2020/2021 – then sole proprietorship	2021 sole proprietorship 2021 to 2022	2021 sole proprietorship 2021 - 2022
2014	$3,794.	$6,324.	$28,561
2015	$3,960.	$6,601.	$42,084
2016	$254.	$424.	$49,700
2017	($3,719)	($6,200)	$48,996
2018	$36,673.	$61,121.	$116,426
2019	$26,860.	$44,768.	$134,930
2020	$32,812.	$54,687	$154,207
2021	$11,384	$18,974	$220,010
Partnership	Dissolved March 24, 2021	$18,974	$46,857
Proprietorship	Began March 25, 2021 – owed a debt of no greater than $19,371 – no documentary evidence of additional note(s) payable (father in law).	$1,870	$19,498
Corporation		$31,530	$153,655
		($18,974 + $1,870 + $31,530) = **$52,374** +	

		Excavator sold for $16,671	
2022 - corporation	**$17,422.00** 23% gross up of **($15,150** dividend)	**$66,138**	**$233,303**

12.6 The father's line 150 income / dividend income

[247] Pursuant to section 18(1) of the *Guidelines* I must first consider whether the parent's adjusted line 150 income fairly reflects all the money available to the parent for the payment of child support. In doing so, I must consider the following and any other relevant information: the pre-tax income of the corporation; whether the nature of the business is capital intensive or service oriented; the corporate share structure; the company's operating requirements; and whether the company is well established.

[248] The father began working for the family business when he was 20 years old (2009 or 2010), well before the child was born in 2015. The father has worked in the business for at least thirteen years. He had been "the majority or sole owner of the excavation business for at least 9 years."

[249] The father has stated that he works 45 + hours per week working between 8:00 am and 5:00 or 6:00 or 8:00 pm, or roughly 10 hours per day during the week, and that he "usually" worked weekends when E was staying with his mother. The

father also stated that his business "fluctuates due to the seasons" but also claimed that although he had stopped offering snow removal services, that "this has not affected my income as I have made up for it in other areas."

[250] The mother argued that if prior to 2018 the father's business had previously survived on a gross income of under $50,000, that based on the pre-tax **net income** of the company from 2020 onward, $15,500 did not fairly reflect the total sum available to the father for child support purposes. She further argued that "the business' historical finances showed that very little income was required to continue its operations."

[251] The mother also argued that "if reinvestment had been required to grow the business, that the investment had long since been made." The mother pointed out that the businesses' revenue had "grown from about $50,000 in 2014 - 2015 to about $115,000 - 150,000 in 2018 - 2020, to its current height of about $220,000 to $230,000 annually in 2021 and 2022."

[252] The mother pointed out that:

> despite this rise, the amount of income being withdrawn from the business has dropped precipitously since the father began the present litigation. By 2022, the father's corporation reported receiving an annual gross income of $233,303 but reported paying the father $15,150."

[253] Based on my review of the father's business' pre-tax net incomes between 2014 - 2022, and in particular between 2018 and 2021, and other facts admitted by the father, I do not accept that the father's adjusted line 150 income fairly reflects all the money available to him / or that could be available to him for the payment of child support. I would note that at trial in March 2024, the father offered *viva voce* evidence stating that he had begun paying himself a salary of $1,500 every two weeks x 26 = $39,000 per year. That does not end the inquiry.

[254] The father himself has acknowledged that his adjusted line 150 did not reflect all the money available to him for the payment of child support, and he has acknowledged he began paying himself a salary of $39,000. The burden has shifted to the father to prove what his yearly income available for child support should be based on the financial evidence available to the court, not his choice of salary.

[255] The mother argued that the father was "unreasonably leaving business income in his corporation and diverting income to members of his immediate family without reasonable justification."

12.7 Attribution or Imputation

[256] For 2022, the mother asked the court to consider the following avenues for attributing or imputing income to the father:

> First…a combination of section 18 and 19 of the Guidelines, to impute income to the father to reflect the amounts he and his family have actually received or which have been unreasonably diverted using the corporate structure. The second, but more straightforward route is for this Court to find that the father has been intentionally under-employed since at least the time that the Current Consent Order was issued on September 15, 2020. Based on such a finding, this court would be empowered to impute income to the father pursuant to clause 19(1)(a) of the Guidelines.
>
> …because the father's entire income during 2022 was a dividend, and because the father was in sole control over whether he received the money as a dividend as opposed to as ordinary income, it would also be appropriate to gross this amount back up to the $17,422 that he reports on his tax return, via clause 19(1)(h);
>
> …
>
> to include a total of $94,018 of the corporations' pre-tax income as adjusted by 18(2), to the father, via clause 18(1)(a);
>
> to impute $94,018 in corporate pre-tax income to the father via 18(1)(b), as an amount commensurate with the services he performs for the company… ($38 per hour x 10 hours per day x 5 days per week x 50 weeks per year = $95,000); and
>
> …to impute the grossed-up value of the above payments and the money unreasonably retained in the corporation to the father directly via section 19;
>
> …
>
> As a summary, the mother is requesting that this Honourable Court impute the father's income from $15,150 to **$111,440 via sections 18 and 19**:
>
> …

12.8 Combination of Section 18 and 19

[257] The mother suggested first using a combination of section 18 and 19 of the *Guidelines* to impute income to the father in the following manner for 2022:

12.8.1 Dividend to be grossed up

[258] Gross up the dividend the father received from $15,150 to $17,422 (via 19(1)(h)).

12.8.2 Loan repayments added back

[259] Add back "loan repayments" unreasonably made to the father personally (section 18 with section 19 remaining an alternative argument), as the father admitted he had received $28,703 (2022) and $22,850 (2021), in "loan repayments transferred directly from his corporate bank account to his personal bank account."

[260] The mother argued that:

- the father attempted to conceal to loan repayment amounts;
- the partnership was dissolved in March 2021, and the sole proprietorship began on March 25, 2021, with a debt of **$19,371** which may or may not have been owed to the father;
- the father claimed the partnership owed him either $47,000 or $41,000 after it was dissolved on March 24, 2021;
    - That "the sum of the debt which the father claimed the proprietorship owed the father at its start on March 25, 2021, plus a note payable reportedly issued in 2021 (with no evidence provided by the father) would total $11,606 + $19,371 = $30,977.
    - That in contrast, the total sum of loan repayments during 2022 and during 2021 on or after April 6 … $22,850 + $28,703 = **$51,553**." The mother argued that the father

> admitted to receiving more than $20,000 in "loan repayments" from his corporation over and above the amounts that he himself had stated were owed to him."

- the father contradicted himself and was inconsistent;
- the father did not discharge his burden and the loan repayments should be added back to the corporation's pre-tax income via subsection 18(2) of the *Guidelines* and grossed up by 23%.

12.8.3 Loan repayments to the paternal grandfather added back

[261] Add back "loan repayments" **($6,000 per year)** unreasonably made to the paternal grandfather. The father's corporation was paying the paternal grandfather $500 per month as rent for the home in which the father and his family lived and for his "shop."

[262] The mother argued that because the father's corporation did not deal with the father's father "at arm's length" that the father "had the onus in establishing that the loan payments were reasonable in the circumstances." She went on to argue that the corporation was paying for the father to obtain a personal benefit and the cost of the benefit ought to be captured in the father's yearly income for child support pursuant to section 18(2) of the *Guidelines* and then grossed up by 23%.

12.8.4 Add back personal rent and other cheques unreasonably made to the paternal grandfather

[263] Add back personal rent and other cheques unreasonably made to the paternal grandfather. The mother argued that the dividend paid to the paternal grandfather

of **$600** on December 24, 2022 as "client appreciation" should be added back to the corporation's pre-tax income via subsection 18(2) of the *Guidelines* and grossed up by 23%.

12.8.5 Add back loan repayments made to the father's father-in-law

[264] The father paid his father-in-law **$16,671** as "loan repayments" in 2022, and the mother argued that the payments should be added back pursuant to 18(2) of the *Guidelines* and grossed up by 23%. The mother argued that there was no documentation about the "loan" and that based on her calculations, it was unclear why the father would have needed a loan in that amount to purchase a new construction vehicle as he had sold one for that same amount the same year. She argued that the father did not discharge his burden.

[265] The mother argued that the father:

> Unreasonably diverted a significant amount of income from his corporation to his immediate family members, retained earnings in the corporate body, and has mischaracterized the income he has received, so as to minimize his child support obligations. All these amounts should be included in the father's income.

[266] The mother argued that the father had the onus to "establish that any payments made to persons not at arm's-length were reasonable in the circumstances," that the father did not discharge the burden, and the proposed add backs should be added to his 2022 pre-tax income pursuant to section 18(2):

	Pre-tax net partnership income	23% Grossed up Loan re-payments to the father	Grossed up Rental payments on the father's home ($500 per month)	Grossed up "client appreciation payments to the paternal grandfather (December 24, 2022)	Grossed up "loan repayments to the father's father-in law ($8000 + $8000 + $671 in 2022)	Dividend payment	Capital expenses ($6,870 + $4,880 + $8,797= $20,547
		$28,703	$6000	$600	$16,671		
2022	$66,138	+ 23% $35,304	+ 23% $7,380	+23% $738.	+ 23% $20,505	-$15,150	-20,547
					$130,065	$114,565	$94,018

[267] The mother has argued that the father is the sole shareholder, officer, and employee in the company, and he has stated that the corporation has no debts of any kind, as previously noted:

> …the evidence of the business' historical finances shows that very little income is required to continue its operations… Prior to 2018 the business had been surviving for years on only a gross annual revenue of under $50,000.
>
> If reinvestment had been required to grow the business, that investment has long since been made. The business' revenue has grown form about $50,000 in 2014-2015, to about $115,000 - $150,000 in 2018 – 2020, to its current height of about $220,000 - $230,000 annually in 2021 and 2022…
>
> …
>
> While Mr. Isnor's business requires a certain amount of capital equipment, it otherwise requires relatively little in the way of operating capital. There is also no

> evidence to suggest that any significant expenditures will be required any time in the near future.
>
> …

[268] I have made the following additions to the father's section 16 income in 2022:

$15,150	16	Line 150 adjusted by Schedule III
$94,018	18 (1)(a)	Pre-tax corporate income available to be withdrawn, adjusted to include gross up for unreasonable payments via s. 18(2)
$2,272	19 (1)(h)	Dividend gross-up added back in.
$111,440		

12.9 Imputation of income to the father

[269] In the alternative, using the second route, the mother sought to impute income of $95,000 to the father in 2022. As noted above, she relied on evidence from the father including but not limited to the following statements: that contractors in the local area were paying upwards of $35 - $38 per hour for labourers, and with his skill set he would be paid that much or more; that the father works up to ten hours per day during the work week and mostly every second weekend; that even though he no longer offers snow removal services, other services he offers have made up for that loss in revenue.

[270] The mother argued that based on the father's disclosed dividend income or his stated salary of approximately $39,000, that he was intentionally underemployed. The mother highlighted the following:

> The father has stated in discovery that he pays his 63-year-old father a rate of $27 dollars per hour, but that he knows contractors in the area who pay upwards of $35 - $38 dollars per hour for labourers….
>
> The father has also stated on discovery that his own skill-set when it comes to excavation, setting septic tanks, putting in septic fields, etc., is something which would command an even higher rate of pay…

[271] The mother has quoted the case of *Smith* v *Helppi*, 2011 NSCA 65, which as noted above states, in part, that when imputing income pursuant to section 19:

> I am not restricted to actual income earned, but rather, I may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, and employment history. I must also look to objective factors when assessing what is reasonable and fair in the circumstances: ***Smith v Helppi*****,** *supra,*
>
> A party's decision to remain in unremunerative employment; or to adopt an unrealistic or unproductive career; or to create a self-induced reduction in income may result in income being imputed: ***Smith v Helppi*****,** *supra***.**
>
> The test to be applied when determining whether a person is intentionally under-employed is reasonableness, which does not require proof of a specific intention to undermine or avoid a support obligation: ***Smith v Helppi****, supra*.

[272] The mother has argued:

> …The father has chosen to persist in what is a demonstrably unprofitable business for longer than the entire duration of the child's life. This has not been reasonable.
>
> The father is intentionally underemployed.
>
> There is no evidence that the father's underemployment has been required by any particular need of the child's. He himself has provided no evidence on this point during this proceeding.

> The father's wife, JI, has stated in her affidavit… that she works from about 8:30 am until 4:30 pm, and so it appears that the child's care would not be significantly impacted if the father himself was required to work different hours than he does at present in order to obtain more stable and remunerative employment.
>
> Turning to quantum, if the father was, hypothetically, able to obtain employment with one of the contractors that he has stated he knows who is hiring labourers at the rate of upwards of $38 per hour, then given the father's evidence that he typically works between 9 – 10 hours a day, or very roughly 2250 to 2500 hours per year, then Mr. Isnor would be able to earn an income or roughly $38 x 2250 = $85,000 – to $38 x 2500 = $95,000 per year.
>
> …
>
> In this alternative argument, the mother humbly requests that this Court impute the father to receive an income of at least **$95,000** per year via s. 19(1)(a).

[273] What amount of prospective child support should be paid, if any, and by whom? From what date? I am prepared to impute an income of $111,440 to the father from October 1, 2022, throughout 2023, and 2024 on an ongoing basis.

12.10 Retroactive recalculation of child support

[274] The mother requested that I retroactively recalculate child support, referencing the factors I muss consider under "DBS," including: whether there was any reasonable excuse why support was not sought earlier; the conduct of the payor parent; the circumstances of the child; and any hardship to the father if he is ordered to pay a retroactive award.

[275] Pursuant to a Consent Order issued on September 15, 2020, after the matter was adjourned without date in June 2020, the Order specified that neither party would pay child support, and that Order is presumed to be correct for at least a

year. I have not been asked to, and I am not prepared to, go behind the terms of the Consent Order the parties agreed to back in or around September 2020.

[276] Both parties had legal counsel who negotiated on their behalf. They agreed there would be no child support and there is no ongoing disclosure clause, and they presumably had reasons for agreeing there would be no child support paid. As such, I am not prepared to consider a retroactive recalculation of child support before the Notice of Application was filed on October 24, 2022.

13 Conclusions

[277] Custody will continue to be joint, with the parties deferring to professional advice if there is a disagreement, with an ongoing right to file a Notice of Variation Application if they feel it is necessary and they can prove a material change of circumstances.

[278] The shared parenting arrangement will change to a week-on/week-off shared parenting schedule to reduce the number of transitions between the parents' homes, the exchange time will be at 6:00 pm on Sundays at a neutral location, such as the "Irving in Tantallon," unless the parties agree in writing otherwise.

[279] Specified holiday or special event parenting time such as Halloween; Christmas; Valentines Day; Easter; Mother's Day; Father's Day; and the child's

birthday; will continue based on clause 10 of the previous Consent Variation Order issued in September 2020, with the exception that the parties' shared parenting schedule will continue as a week-on/week-off parenting arrangement throughout the summer months, unless the parties agree in writing otherwise.

[280] The parties are encouraged to communicate through an online parenting application, if possible.

[281] The mother has been imputed an income of $31,616 for 2022, 2023, and 2024, attracting a monthly child support payment of $270.93. The mother is ordered to provide disclosure of her income to the father each year beginning on June 1, 2025, and by June 1 each year thereafter while the child remains a dependent child.

[282] The father has been imputed an income of $111,440 for 2022, 2023 and 2024, attracting a monthly child support payment of $942.52. He is ordered to provide disclosure of his income to the mother each year beginning on June 1, 2025, and by June 1 each year thereafter while the child remains a dependent child.

[283] The parties have agreed to the "set off," and therefore, the father shall pay the mother $671.59 per month in child support starting October 1, 2022, until further agreement of the parties or order of this court

14 Costs

[284] The mother was mostly successful in relation to the custody and parenting issues decided. The mother was also the more successful litigant with respect to the issue of child support, although there was mixed success. If the parties wish to be heard on costs, they should file briefs within a month of receiving this advanced copy of my decision.

Cindy G. Cormier, J.