SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: X.G. v. R. M., 2013 NSSC 206

Date: 20130228
Docket: 069543
Registry: Sydney

Between:

X. G.

Applicant

v.

R. M.

Respondent

Editorial Notice

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

Judge: The Honourable Justice M. Clare MacLellan

Oral Decision: February 28, 2013

Written Decision: June 28, 2013

Counsel: Theresa O'Leary,
Counsel for X. G.

Candee McCarthy
Counsel for R. M.

By the Court:

[1] The matters before the Court are the Applications of X G. and R. M.. They are the parents of C. G. J., born January [...], 2009.

[2] From April 14 2010 to present, four (4) interim orders have been issued on this matter. The parties have proceeded through conciliation and have attended a settlement conference.

[3] During this hearing, which consumed three (3) days, the Court heard from nine (9) witnesses: X. G., the Applicant; B. M., grandmother of the Respondent; J. R. W., former girlfriend of the Respondent; Y. B., boyfriend/fiancé of the Applicant; Doctor S.M., physician for the child, C. G. J.; K. MacNeil, aunt of the Respondent; R. M., the Respondent; D. M., mother of R. M.; G. M., father of R. M.. Written submissions were received on November 30th and December 3, 2012. Oral decision was rendered February 18, 2013.

ISSUES:

l. Which parent should be primary caregiver?

2. Which parent shall have final decision making authority?

3. What is the appropriate access regime?

4. What is the proper amount of child support?

5. Should C.'s last name be changed? If yes what should his surname be?

[4] The parties lived together for a short period of time. C. G. J. was born January [...], 2009. They separated when C. was approximately one (1) year old; March 20. 2010. During their time together, the parties lived with

1. Ms. G.'s mother;

2. In their own apartment;

3. With Mr. M.'s parents;

4. In a rented home in [...];

5. Finally in a rented apartment in [...].

The parents lived the majority of the cohabitation period in [...].

[5] Prior to separation, Mr. M. worked at various sites between Cape Breton and New Brunswick. On the day separation occurred the parties agreed, over the

telephone, that they would separate and exercise physical custody of C. on a week about basis. The parties disagreed as to why this initial arrangement was never followed. Ms. G. maintains Mr. M.'s parents and Mr. M. refused to give her physical custody of C. when it was her week to have custody. Mr. M. stated he refused week about because Ms. G. did not have a suitable place for she and C. to live. Also Mr. M. stated he was concerned Ms. G. would not to keep him advised of her locations.

[6] Ms. G. agrees that Mr. M. offered her access to C., two (2) weeks after separation, during the Easter weekend. He proposed that he would vacate the former family home so that she could exercise access, but she was unwilling to do so. Mr. M. eventually moved from the rented home in [...] to his parents' basement apartment in [...], where he currently resides with C.. C. has been in Mr. M.'s care for the majority of the last 3 years.

[7] Ms. G. left the family home on or about the 18th of March, 2010. She made application for custody to this Court. Her application was signed and filed March 30, 2010. For a time she lived with her grandmother in [...] and then moved in with her mother. Ms. G. eventually relocated in October 2010 to [...], where she rented an apartment with Mr. Y. B., her boyfriend. On September 21, 2010, the fourth Interim

Consent Order was granted. This Order was dated September 21, 2010 and issued by this Court on October 18, 2011. This Order was finally issued through Court's insistence. I note both parties had different counsel at that time. No evidence was provided to explain the delay.

[8] The Applicant's current access regime was set out by agreement in Court on September 21, 2010.

[9] The access regime has been in place from September, 2010 to now: Ms. G. has access every Tuesday from 7:45 am to Wednesday at 6:00 pm and every Friday from 7:45 am to Saturday at 6:00 pm. At the time the consent order was made Ms. G. lived in [...] and worked full time in Sydney. Mr. M. lived in [...] and worked in Sydney.

[10] This matter proceeded through conciliation. Shuttle conciliation was attempted to deal with Ms. G.'s move to [...], access and custody on the long term. The conciliation record of November, 2011 referred the matter back to court for a hearing. The conciliation record outlines Ms. G. wanted sole custody; Mr. M. sought joint custody. The parties sought weekend access for the opposing parent.

[11] Ms. G. classifies her access experience up until her move to [...] as “good”. She and Mr. M. shared access transportation between [...] and [...]. As she was not a licensed driver, Mr. B. assisted in the transportation.

[12] From the date the parties separated until this Court hearing, approximately three years, Mr. M. has been the primary caregiver for C. at his residence in [...]. Ms. G. and her fiancé Mr. B. drive twice a week between [...] and [...].

[13] Mr. M. works full time. His work schedule, is somewhat weather dependent. Ms. G. works during the summer months in [...].

[14] At the onset of this hearing, the parties agreed to a joint custody arrangement with C.. The parents further agreed that the child’s birth registration should be corrected to include the Respondent, R. M., as C.’s father. The parties cannot agree whether C.’s proper last name is G. or M..

LAW:

[15] *King v. Low* [1985] S.C.J No. 7 sets out the test to be applied in custody cases. Justice MacIntyre ruled at paragraph 27.

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

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

> Per L'Heureux-Dubé J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.
>
> Child placement decisions should safeguard the child's need for continuity of relationships, reflect the child's (not the adult's) sense of time, and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions. This need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent. A custody award is a matter of whose decisions to prefer, as opposed to which decisions to prefer. Courts cannot make the necessary day-to-day decisions which affect the best interests of the child. Once a court has determined

who is the appropriate custodial parent, it must presume that that parent will act in the best interests of the child.

Decisions are made according to the best interests of the child without the benefit of a presumption in favour of either parent. The Act envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the child. Maximum contact, however, is not an unbridled objective and must be curtailed wherever the welfare of the child requires it.

[17] The relevant sections in this matter are sections 8, 9, 10 and 18 (5) & (6) of the **Maintenance and Custody Act.**

Duty of parent or guardian
8 Every one

(a) who is a parent of a child that is under the age of majority; or
(b) who is a guardian of a child that is under the age of majority where the child is a member of the guardian's household,

is under a legal duty to provide reasonable needs for the child except where there is lawful excuse for not providing the same. R.S., c. 160, s. 8.

Maintenance order
9 Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s. 4.

Powers of court
10 (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

(2) The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.
(3) A court may award an amount that is different from the amount that would be determined in accordance with the Guidelines if the court is satisfied that

(a) special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses or common-law partners, or the division or transfer of their property, directly or indirectly benefit a child, or special provisions have otherwise been made for the benefit of a child; and
(b) the application of the Guidelines would result in an amount of child maintenance that is inequitable given those special provisions.

(4) Where the court awards, pursuant to subsection (3), an amount that is different from the amount that would be determined in accordance with the Guidelines, the court shall record its reasons for doing so.
(5) Notwithstanding subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the Guidelines on the consent of both spouses or common-law partners or parents if satisfied that reasonable arrangements have been made for the maintenance of the child to whom the order relates.

(6) For the purpose of subsection (5), in determining whether reasonable arrangements have been made for the maintenance of a child, the court shall have regard to the Guidelines, but the court shall not consider the arrangements to be unreasonable solely because the amount of maintenance agreed to is not the same as the amount that would otherwise have been determined in accordance with the Guidelines. 1997 (2nd Sess.), c. 3, s. 4; 2000, c. 29, s. 8

18 (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.

(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including

> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> > (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
> > (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[18] I find the following are the relevant factors to examine in reaching a conclusion as to which plan will provide for C.'s best interests. These factors are:

l) physical environment;

2) discipline;

3) role model;

4) religion;

5) financial contribution to the welfare of the child;

6) emotional support for child;

7) willingness of the parent to facilitate contact with the other parent;

8) support of the extended family;

9) physical character development of the child;

10) cultural development of the child;

11) time availability of parent to child ; and

12) the interim and long range plan for the welfare of C..

Evidence and Preliminary Findings:

[19] According to all parties, access did not pose any serious difficulties until Ms. G. moved to [...] in September or October, 2011. From the time of separation until Ms. G. began living with Mr. B. in [...], Mr. M. provided all the access transportation to and from [...] to [...]. Ms. G. did not have a driver's license. Once

Ms. G. began to cohabit with Mr. B. in [...], Mr. M. drove C. one way to access and Mr. B. returned C. to [...] at the end of the access visit. I find this arrangement worked.

[20] Mr. B. moved to [...] in May of 2011. Ms. G. joined him in the fall of 2011. From the spring 2011 to the fall of 2011 Mr. M. provided all the transportation for access twice a week from [...] to [...], in accordance with the time periods set out in the Court Order.

[21] When Ms. G. moved to [...] in October, 2011, no prior arrangement was made for access transportation to and from [...] to [...]. Serious parenting difficulties arose since October, 2011. The problems arose from following a Court Order designed for the travel from [...] to [...]. The order did not contemplate the subsequent move to [...] by Ms. G.; which necessitated two round trips a week between [...] and [...]. The travel time, I estimate, from [...] to [...] one way is about ½ hour. Travel time to [...] from [...] one way is approximately 2 and ½ hours and covers different weather zones.

[22] In relation to her move to [...], Ms. G. was unable to explain, when questioned, as to why she did not make an arrangement with Mr. M. to reflect this geographic difference. From the time Ms. G. moved to [...] to present, Mr. B. has been responsible for all drives to and from [...], which constitutes four (4) one way trips a week. On only one occasion, the parties were able to reach an agreement to change one access visit. Where Mr. M. drove, due to a death in Mr. B.'s family.

[23] There were numerous occasions when the police were called by Mr. M. to assist him in retrieving the child. Most of these occasions centred around Ms. G.'s belief that the winter roads were too dangerous for the child to be returned to Mr. M.. She requested that Mr. M. wait until the next day until the roads were better, at which time she would return the child. On every occasion, Mr. M. rejected her view of driving conditions and drove to [...]. On numerous occasions; he solicited the assistance of the RCMP to secure C.'s return in accordance with the time table set out in the court order. Mr. M. believed the roads were passable. He admits that on one occasion when he sought order compliance the traffic authority advised caution when driving to the Highlands. In relation to the numerous interventions by the RCMP no evidence was provided to indicate there was any risk or a pressing need to involve the police. While police involvement maybe set out for in a Court

order; this involvement must be based on a need that cannot be met using a less intrusive measure.

[24] On other occasions, both parties have attempted to secure the assistance of Children's Aid to intervene and examine the conduct of the other parent. I have reviewed the Children's Aid referrals and the request for police intervention throughout the access difficulties and allegations of child abuse. I find the RCMP granted assistance as opposed to an official intervention in trying to iron out the parties expectations when access was compromised due to weather and distance; and unsubstantiated allegations of abuse made by Ms. G. and Mr. M..
While I do not confine parental requests for police intervention to cases of potential risk. Children of C.'s age remember police, police uniforms, squad cars and emergency lights. A responsible parent must question whether or not this intervention was necessary or whether a less intrusive avenue is available.

[25] I find as well, based on the evidence, that there are no substantiated risks found by Children's Aid. Ms. G. made the first referral to Children's Aid because she did not like the way C. reacted when she dropped C. off and his father took C. to the bathroom. She was concerned when C. turned cried and gave her a

concerning look. Due to C.'s behaviour Ms. G. referred the matter to CAS. The referral was not substantiated.

[26] Mr. M. attempted to have Children's Aid investigate bruising on C.'s body. Mr. M. observed the bruising after C. returned from an access visit. When CSA staff would not support his concerns; Mr. M. took C. to the family physician, Doctor M., for an examination. Doctor M. gave evidence that after examining the child he did not see any cause for concern. He made a referral to Children's Aid because he believed that Mr. M. and Mr. M.'s mother were "reasonable people" and if they were concerned, he was prepared to make a referral, which he did. This referral was not substantiated by the Children's Aid Society.

[27] It is significant to note that the Children's Aid referrals and numerous police intervention occurred after Ms. G. moved to [...].

[28] On one occasion, Ms. G. did not return C. at the appointed time because she nor Mr. B. had sufficient funds to pay for the gas necessary for this transport. When she explained her situation to Mr. M., Ms. G. expected to be able to return C.

the next day. He was unwilling to wait until Ms. G.'s Employment Insurance cheque was received to allow her to buy gas. Mr. M. drove to [...] to retrieve C..

[29] As a result of these disagreements both parents experienced brief disruptions in the court ordered access schedule; that is time periods when either ought to have been with C..

[30] In relation to the cross-referrals by both parties to Children's Aid, I find that neither party had any basis to refer the other to Children's Aid, with the following two (2) exceptions. According to Mr. M., C. had bruises on his forehead and bruises on his arm that resembled a hand print; these injuries are visible (Exhibit #1 Tab 7). It is Mr. M.'s evidence that he never received a satisfactory explanation for these two incidents. I find, based on the pictures themselves, that a reasonable and prompt explanation should have been provided by Ms. G., who had C. in her care at the time of these two injuries. I make this finding acknowledging that first time parents may be overly cautious. However, each parent must take sufficient care that if the child is injured during their access time period, that a prompt and complete explanation be provided when the child is returned to the other parent. I find Mr. M. was entitled to make inquiries in relation to the two injuries exhibited.

[31] I am satisfied, based on the evidence, that Mr. M. did ask numerous questions in relation to marks on C.'s body and that he often did not receive a satisfactory explanation. In relation to the noticeable bumps on C.'s head Mr. M. had to contact Mr. B. to assist in obtaining full information on this injury. I am satisfied that Mr. M. or his father advised Ms. G. when C. was injured while in the father's care. This disclosure took place without Ms. G.'s questioning. I find Ms. G. was not forthcoming in explaining C.'s injuries when he was in her care.

[32] Mr. M.'s allegations that Ms. G. did not properly cloth C.; that she used excessive amounts of Tylenol and that she did not know how to administer prescription drugs to C. have not been proven on a balance of probabilities. Similarly, despite the pictures showing that C. had diaper rash, I am not satisfied on a balance of probabilities that the rash was a result of Ms. G.'s lack of attention to his physical care.

[33] Another issue that caused disharmony through this case were the facts that C.'s MSI was changed. The name of C.'s doctor and C.'s address were change without Mr. M. knowledge or input. When asked whether or not Ms. G. had

effected the change of address on C.'s MSI card, she responded that she was unable to remember but didn't think that she had made this change. I accept Mr. M.'s evidence that on one occasion when he took C. to the Regional Hospital in Sydney with symptoms of flu and a high temperature. At the hospital Mr. M. was made aware his son's MSI card reflected [...] as C.'s home and a different doctor was cited as his physician. Although Mr M. was able to secure prompt medical help at that time he was required to provide the September 2010 court order before he could have the MSI information corrected to reflect the identity of C.'s physician and C.'s [...] residence.

[34] A number of other issues were needlessly complicated by Ms. G.'s failure to communicate and disclose. I find that Ms. G. did not comply with requests to: a) provide C.'s birth certificate; and 2) did not provide the hours of her work at [...] and babysitting despite numerous requests; 3) did not provide material particulars as to her place of employment, 4) disclosure of her income and particulars of employment. When reminded by Ms. McCarthy that this information had been sought over the previous year, Ms. G. advised that she believed that information had been provided. Also, Ms. G. was not able to advise why she did not provide Mr. M. with her updated [...] address when she moved from her former address six

(6) months earlier. This address was provided just before this hearing. Ms. G.'s only explanation was she found it difficult to talk to Mr. M.. Also, Ms. G. was court ordered to provide this information. Parents in a joint custody arrangement must know the address of the other parent.

[35] Ms. G. may relocate to [...]. She is unsure if or when this will take place. However, this potential change arose her approximately two (2) weeks before she gave evidence, yet she has not alerted Mr. M. to this possibility. Mr. M. learned of this possibility during the course of this hearing.

[36] Mr. M. post separation personal activities are also troublesome. Since separation from Ms. G., Mr. M. met and became engaged to Ms. J. W.. They have a child A.. Ms. W. moved in with Mr. M. shortly after they met. She moved out when A. was 1.5 months old. Custody and access in relation to A. is in dispute and is presently before the court.

[37] Mr. M. also admits to using marijuana once a week, he denies he is a heavy user. He does not use marijuana if C. is in his care. Ms. G. reported his marijuana use to CAS. Mr. M. requested Children's Aid to investigate him and to conduct a

toxicology screening. Eventually Mr. M. was investigated and no concerns were noted. I was advised the toxicology screening was never preformed.

[38] There was significant evidence surrounding the registration of C.'s birth. I find this complication became a large issue which increased Mr. M.'s distrust of Ms. G.. There are three (3) issues:

l) the absence of Mr. R. M.'s name as the birth father;

2) C.'s proper last name, M. or G..

3) C.'s status with the [...] band.

[39] In relation to status, Ms. G. advised that she has status with the [...] Band. The Court heard evidence from Ms. G., which indicated C., as Ms. G.'s son had status. An exhibited document dated September 9, 2012 enabled Ms. G. to obtain social assistance, from the [...] Band references her son as having status. This document is signed by the officer of administrative authority with the [...] Band.

[40] The evidence relating to C.'s last name reveals that Ms. G. herself believed, throughout C.'s lifetime; until September or October 2012; when his birth

certificate was finally produced for this hearing, that C.'s last name was M.. Ms. G. signed an authorization to Vital Statistics, (**Exhibit #1, Tab 7**) which reads:

> I X. G. hereby authorize you to provide R. M. with information concerning the registration of the child, C. G. J. M., born January [...] 2009. Dated at Sydney, Nova Scotia on the 15th day of June 2012.

This authorization was provided to Vital Statistics in order to secure a birth certificate for the child. Also C.'s Baptism certificate dated August 8, 2012, indicated the date of baptism in [...] was June 14, 2009 and that C.'s last name was M.. Evidence was heard and accepted that Ms. G. signed C.'s Baptism Certificate. C.'s MSI card, recorded that he was born on January [...], 2009, and the his last name was M.. However when C.'s birth certificate was obtained his last name was G. not M..

[41] During the course of the hearing, the question was raised whether or not C.'s native status would be negatively impacted if his name was changed from G. as set out on his birth registration to M.. Both parties agree that they signed a birth registration. Neither party has a firm recall of the initial signing of the birth registration. Mr. M. stated he and she had agreed C.'s last name would be M. prior to the birth. According to Exhibit #1, tab 22, C.'s birth registration, he C. was

registered as C. G. J. G., on March 10, 2010. Ms. G. advised that she had nothing to do with the March, 2010 birth registration. It was her belief that C. was registered as M.. She only learned the difference shortly before this hearing commenced in October 2012. Ms. G. agrees that through the course of preparation for this hearing, she was asked on a number of occasions to obtain the child's birth certificate but did not respond to these requests. The parties, Mr. M.'s parents and Ms. G.'s fiancé, Y. B., agree that prior to receiving the registration of Birth shortly before this hearing, C. was referred to by everyone in his family, including the parties, as C. M..

[42] Ironically, Ms. G.'s closing submissions, after the evidence was heard in relation to the child's proper last name, counsel raised the concern as to the effect the father's name on the birth registration may have on the child's native status. The Court was advised by Ms. G.'s counsel as follows:

> With respect to the issue of change of name, it is submitted that this is a matter that has not been dealt with by way of the original application and sufficient evidence has not been produced. As well, sufficient time was not allowed to the Respondent to fully investigate the repercussion (example: possible effect on native status for C.) of an order directing the change of the last name of C. from G. to M.. It is submitted that the Court should do nothing at this point to interfere with that state on a without prejudice basis for Mr. M. to take an appropriate application to do so in the future.

[43] I accept from the evidence of all parties that everyone believed the child's name was M. until the birth certificate was finally provided on September 20, 2012, three (3) weeks before this trial commenced.

[44] By way of a jurisdictional ruling, I find that the Court has the authority to require that C.'s father, R. M., be registered on the birth certificate as the biological father. I understand this issue is agreed to by the parties.

[45] I find further that the Applicant has had more than sufficient time to examine the effect a change of name may have on C.'s native status. The Court record in relation to the question of birth certificate was requested in Court on August 1, 2012. The hearing commenced October 16, 2012. The response, which came in the form of Registration of Birth, was issued September 12, 2012. Ms. G. by her own evidence advised C. has native status. The Applicant has not provided a factual basis to show, on a balance of probabilities, that she was granted insufficient time to examine the effect a name change would have on C.'s status, if any. I conclude the parties were given sufficient time to address this issue.

Decision:

[46] The parties have agreed to a joint custody arrangement. While their relationship is strained, Mr. G., during her evidence, considered the communication to be good but not as good as it could be. Mr. M. advised that if he cannot find or secure satisfactory information from Ms. G. that he is able to do so through communication with Mr. B.. While this form of communication is not optimum, I find their difficulties are not sufficiently grave to preclude a joint custodial award. There is considerable work to be done to improve their communication. Their problems in communicating is complicated by their very different parenting styles. Mr. M. is rigid in his interpretation and application of a court order. Ms. G. is casual in her interpretation of the court order.

[47] The facts in this case are analysed using some of the factors outlined in the new section 18 of *The Maintenance and Custody Act* and in **Foley and Foley** [1993] N.S.J. No. 347, in order to achieve a clear picture of what custodial arrangement is in C.'s best interests, which is the only test applicable in custody cases. These factors are also applicable in analysing the evidence when deciding

primary care giver, principle residence and final decision making authority in a joint custody arrangement.

[48] 1. **Physical Environment**. I have examined both physical environments offered by Ms. G. and Mr. M.. Ms. G. is offering housing in an residence recently inherited by her fiancé Mr. B., which certainly contains all the amenities necessary for a safe and pleasant child rearing experience. The community is a bilingual community, one in which soccer and hockey are readily available, as well as church, school and hospital.

[49] Mr. M. resides in a basement apartment in his parents' home in [...] overlooking [...]. He and C. also have access and use of his parents home on the main floor. The pictures provided of this physical structure exhibit a home and property capable of meeting all of C.'s needs. I accept the evidence that [...] provides an active community to permit sufficient interaction. This community provides activities for children such as hockey, swimming and fishing. [...] is not a bilingual community. This difference will be discussed under the education/cultural heading. On this one factor, physical environment I find that both parents are able to provide a very suitable environment for C.. I do

acknowledge that both parents have secured their current accommodation through their association with family. That is, Ms. G.'s current residence is as a result of an inheritance recently received by her fiancé, Mr. B.. Mr. M.'s residence is in the basement of his family's home, although he and C. have the use of the entire house and yard. Mr. M.'s current location is dependent upon maintaining a solid relationship with his family. Ms. G.'s current location is dependent upon her relationship with Mr. B.. On this factor, I find that both parents, in their current physical environment, are equally able to meet the C.'s needs.

[50] **Discipline:** From the evidence, I accept that C. appears to be a child who does not require much correction. Both parents agree that he is not a disciplinary problem and both parents utilize "time out" as a corrective measure. I find the parents are equal on this factor, which is not a major factor in my assessment.

[51] **Role Model:** In assessing a parental role model, a sub factor I examine is the employment history and work ethic of the parties. Mr. M. has shown the ability to obtain and maintain work consistently in the years prior to, during and after his association with Ms. G.. During their time together, he was the sole financial

provider. Ms. G. has grade 12 education, she advises she has never been totally self sufficient.

[52] At the time of separation, Mr. M. was working between Cape Breton and New Brunswick. When the relationship between Ms. G. and Mr. M. ended, Mr. M. changed his employment so that he would no longer work far from [...] and would be more available for C.. Ms. G. moved to [...], leaving behind a full time position in Sydney, a position with a health plan; so that she could cohabit with Mr. B., Mr. B. had secured full time employment with an insurance company in [...]. Ms. G. left the [...] area, which was a 30 minute drive to [...], and moved to [...], a 2 ½ hour drive away from Mr. M.'s residence. Ms. G. did this without arranging a plan with Mr. M..

[53] Ms. G. moved to [...] in the fall of 2011 where she had no employment. What is of greater concern to me is her statement that this move would entitle her to more time with C.. She planned to work the summer months and receive Employment Insurance in the winter and have the child with her during the winter months. Ms. G. also discusses a possible move to [...] and work for her current fiancé as his assistant. Also, she would like a job in sales. Ms. G. advises she has not ruled out

returning to school in order to secure a better position. I find Ms. G. has demonstrated a propensity to take a course of action without thoroughly examining the consequences on her relationship with C..

[54] Ms. G. has never been self sufficient. She has always been dependent on someone for her material needs. Her long range plan is to work 10 weeks out of 52 and go on employment insurance. Employment insurance is a form of financial help between jobs it is not a career plan.

[55] I find Mr. M. is more stable in his appreciation of what a young child needs in providing a routine and showing the child that, most parents must work outside the home in order to maintain the family unit. Under the category of work ethic, Mr. M. is a superior role model.

[56] Mr. M. shows poor judgement when he enters into an intimate relationship with a woman on the day they met and move her into his home with C. shortly after the deterioration of his relationship with Ms. G..Mr. M. then fathered a child with her. C. then has to adjust to his step mother leaving the home and taking the new baby with her.

[57] Secondly Mr. M. shows poor judgement in his use of marijuana. While he advises he does not use marijuana in C.'s presence and that there is always a responsible adult to watch over C. only marginally mitigates this conduct. Both parents have exhibited lapses in judgement. As these lapses relate to C. on the short and long term I find Mr. M. overall provides the more positive role model. Both parents have areas to work on to provide mature parenting for C..

[58] **Religious or Spiritual Guidance:** The parents belong to the Catholic church. Mr. M. goes to church each Sunday, after which he and C. have breakfast in the community hall where the grown ups and children meet after Sunday mass. Ms. G. is not a practising Catholic, but it is her wish that C. would choose a faith, which she would prefer to be Catholic. Insofar as Ms. G. appears to have no organized view or religious practice, I find that Mr. M. has a more stable plan for C.'s religious upbringing.

[59] **Financial Contribution:** Mr. M. has always been employed full time and has always supported his family. Ms. G. has only worked full time once for a seven (7) to eight (8) month period. She was employed in a sales position with a

service company, before she moved to [...]. Other than that; Ms. G., since she left high school, has been on social assistance, lived with her mother, then lived with Mr. M. during which time she was supported by him. Then after they separated she returned to her mother's home, from there she relocated to an apartment with Mr. B. where they shared expenses until he moved to [...]. She followed him to [...] in the fall, where she not employed until the following spring. Exhibit #1 Tab 16 represents that Ms. G. applied and received financial assistance from the [...] Band for herself and C. in October 2012. She is now a seasonal employee, working ten (10) weeks a summer as a waitress/cook at a restaurant in [...] and babysitting one (1) child two (2) days a week before school and after school. Her annual income is approximately $16,644.00 a year from all sources, excluding gratituties, including Employment Insurance.

[60] Mr. M. generally works from 7:00 or 8:00 am to 5:00 pm at a rate of $14.00 per hour. His income, including Employment Insurance, is $l,545.00 gross per month or $18,546.00 per year and he expects to do better this year. If he works full time in 2013 his income will be $36,000.00 gross. Ms. G. is unsure of her income but expects that it is some where around $15,000.00 exclusive of gratuity. Ms. G.'s statement of income stated that she earned 16,644.00 last year. Mr. B.'s income is

$48,000.00. He anticipates that if he moves from [...] to [...], if he accepts that position his income will raise to the “six figures”. Mr. M. has a more stable employment history and appreciates that he must be able to provide for C., which he has done for the entirety of the child’s life. While it appears that both parties are able to meet C.’s financial needs currently; it is less clear whether Ms. G. will be able to do so in the future without Mr. B.’s assistance.

[61] I note that Ms. G. received and retained for a number of months the government subsidies for C. while C. was in his father’s care. Mr. M. ultimately did receive these monies through application to the responsible government bodies. He was required to provide copies of the court orders in order to reroute and receive these benefits. It would have been preferable if Ms. G. simply had of simply endorsed the check over to Mr. M. until formal alteration could be effected. Ms. G. has not provided any monies for C.’s support to Mr. M.. Mr. M. has had the defacto care of the child from age 14 months to age 3.75 years.

EMOTIONAL SUPPORT:

[62] I have little evidence directly on this point. From all reports C. appears to be a happy, cute child who is reaching all his milestones appropriately. Both parents appreciate that the current access schedule is not serving anyone's best interest. Specifically C. has too much time travelling between the two homes. While this interim order was meant to be for a short duration in a situation where the parties lived about thirty kilometres apart it is clearly not workable where the parties live so far apart and have for approximately a 12 month period. Despite the shifting of access back and forth frequently C. appears to be thriving in the care of both parents.

[63] It is positive fact that Mr. M. sought professional advise from a psychiatrist on how to help C. deal with the breakup of the union. Both parents appear able to meet C.'s emotional needs.

WILLINGNESS TO FACILITATE ACCESS BETWEEN PARENTS:

[64] I find that a clear view on this point is somewhat over shadowed by the frequent reliance on RCMP and Children's Aid to solve problems that the parties ought to have been able to maturely settle between themselves as adult parents. Immediately after the parties separated, access was an issue. Ms. G. made a court application within 2 weeks of having her access frustrated. I find, as well, prior to attending court on the first occasion Mr. M. was willing to facilitate access over Easter weekend and to leave the apartment with she and C. there to have a quality time together; an opportunity she refused. I accept that Ms. G. was between residences at that time and had no firm place or no firm plan that she wished to disclose to Mr. M. so that he could with some level of comfort set up access shortly after the couple parted.

[65] After the initial court appearance and by all accounts access proceeded smoothly until Ms. G. moved to [...]. Ms. G. moved to [...] without any preparation or agreement in place. She had no employment in [...] when she moved. The parties at that time didn't trust each other. After a short period of time following

Ms. G.'s move to [...] Mr. M. required that she and Mr. B. to do all of the driving to and from [...] twice a week. As Ms. G. had not obtained a valid drivers licence this responsibility rested with Mr. B.; who was attempting to solidify his full-time employment in [...]. After Ms. G. re-located to [...] she again moved to a house inherited by Mr. B.. At no time did she provide her address to Mr. M. despite the fact that the current court order required her to provide information in relation to her address, her job schedule, her phone, cell contact number.

[66] I find as well that Ms. G. was not willing to responsibly teach C. that Mr. B. was not to be referred to as Dada or Daddy. This name change caused great insecurity to Mr. M.. Ms. G. I find permitted C. to continue to call Mr. B. "Daddy" despite the M.s' correcting her on this point.

[67] I place reliance on the fact that Mr. M. was willing to share the driving responsibilities when Ms. G. lived in [...] and continued to drive exclusively when Mr. B. moved to [...] a during a 5-6 month period before Ms. G. joined Mr. B. in [...]. Mr. M. was willing to facilitate access when the expectations were realistic. However Ms. G. has been resistant to negotiating any change even when she was responsible for this change. Further I find that it is unacceptable that she and Mr. B.

were considering a move to [...] where Mr. B. may secure a better employment position. Mr. M. learned of this potential move only during the trial.

[68] Mr. M. was clearly wrong to require Ms. G. to sign a form he drafted to ensure return of C. after access (Exhibit #1, Tab 19). In that form he attempted to tighten up the terms of the existing consent order. This resulted in Ms. G. missing almost 3 weeks of access when she properly refused to sign the form.

[69] Mr. M. gives Ms. G. information regarding C. when C. is in his care. Ms. G. is less willing to share important information and at times is not reachable when she should be to discuss concerns relating to C.. I find that Mr. M. is too rigid in his application of the court order. He has been too quick to call the RCMP instead of problem solving. However, I find that he has, overall, attempted to work with Ms. G. while she appears to be less willing to work through obvious necessary changes and difficulties relating to C.. Ms. G.'s answer is to ignore Mr. M.'s calls and queries. She does so without reason. I find Mr. M. is more willing to facilitate access, provide information and to respect Ms. G. position as a mother.

SUPPORT OF EXTEND FAMILY:

[70] Mr. M. provided evidence from his aunt and his parents to indicate that he has a supportive family network. I find the evidence of his parents to be clear and un-contradicted. I accept that they saw their role as supportive grandparents only. There is no evidence to indicate that they had any other agenda except to assist C. in anyway that they can and to assist their son as a single parent. I find that Ms. G. has discussed that she has extended family however I find she has not provided any evidence that family support is there for her, except for Mr. B.. Mr. B., Ms. G.'s fiancé has been very helpful in facilitating access and sensible in his approach in organizing a smooth-operating blended family. Mr. B. provides a calming influence between the parents. I am unsure whether or not Mr. M. views Mr. B. as helpful. I find he is. He has no wish to usurp Mr. M.'s role as Father. Mr. B. and Ms. G. are engaged and have been a couple for approximately 2 years. I find both parents have equal support from their families.

PHYSICAL AND CHARACTER DEVELOPMENT OF THE CHILD:

[71] Both parents appear to be interested in involving C. in sports, organized and otherwise. To date his father is teaching C. how to fish on the [...]. His mother has enrolled him in soccer and has completed his first season prior to this hearing. Both parents appreciate the role organized sports, and community activities can have on a child and I am satisfied that both parties are willing to fulfill that need in their communities.

CULTURAL DEVELOPMENT:

[72] Ms. G. wishes that C. that will have involvement in the Mi'Kmaw community. According to post trial submissions Ms. G.'s counsel advised that C. is one eighth Mi'Kmaw and one quarter Acadian. Ms. G. was not raised on the reserve and has not attended a pow wow in a number of years. She does not speak Mi'Kmaw but does understand the language. Mr. M. appreciates C.'s cultural diversity and has taken C. to [...] to visit with his maternal great grandmother. Mr. M.'s grandmother is Acadian she was born in [...]. Neither parent speaks french.

[73] Mr. B. is Acadian he understands French but advised the court his ability to speak French is limited. Mr. M. has expressed a willingness to enter C. in French emersion which commences in Junior High if C. remains in [...]. Ms. G. through her counsels post trial brief elaborates on the amenities of the french speaking school located in the community of [...]. The post submissions are more extensive then the evidence heard from Ms. G. on this point. If I accept the post trial submission as accurate C. would be eligible for french emersion at a pre-school level as opposed to Mr. M.'s intention to enroll C. at the Junior High level. Whether or not a primary education in french would provide him "with a constitutionally protected right to be educated in French in the future" as represented in Ms. G.'s pre-trial submissions; the court has no evidence on this point. Given that C. could enter a french speaking program earlier if he is placed with his mother this would make her educational plan superior to that of Mr. M.. I am also impressed with Mr. B.'s evidence as to the ratio as to the teacher to student in the [...] area. Upon examination of the educational proposals from both parents I am satisfied that C. would be able to communicate in french more quickly in [...] then in [...]. I am satisfied both parents appreciate and will incorporate Acadian and Mi'Kmaw culture in C.'s education.

[74] Ms. G. will be more able to provide the Mi'kmaw cultural experience than Mr. M.. The degree to which C. becomes exposed will depend upon Ms. G. connecting to her native community to a greater degree than she has to date.

[75] I am concerned that Ms. G. wishes to change C.'s last name at this time. She believes this is important however she was only aware that the a registration of birth erroneously contained the last name of G. and not M. by September or October of 2012. Only then did she wish that C. become known as G. which she believes is a "strong" name in the community. Overall however I am satisfied both parents will expose C. to his Native and Acadian communities and customs.

TIME AVAILABILITY OF PARENTS LONG TERM PLAN:

[76] When the parties were together they both cared for C.. Both parents agree Mr. M. did his share of parenting after work.

[77] Ms. G. maintains that she moved to [...] so that she would be able to be seasonally employed for 10 weeks in the summer, babysit in the morning and the occasional evening in the during the summer and she would secure unemployment

insurance the rest of the year enabling her to spend more time with C.. Her counsel in post trial submissions indicates that Ms. G.'s employment will extend from the middle or end of June until the end of August at these two jobs. While at work Ms. G. works 6 out of 7 days, 7 out of the 10 weeks. Her submissions indicated that Ms. G. would be eligible for Employment Insurance benefits from September to April of each year.

[78] Mr. M. in his evidence indicates that he works between 7 or 8 until 5, 5 days a week and he does not work outside the local area. His work is dependant on the securing contracts for his trade, which is [...]. Safety on his job site is compromised in warm weather. Mr. M. works less during the months of July and August.

[79] Mr. M. in his post trial submission by counsel seeks to have C. reside with him as the primary residence, with him as final decision maker after consultation with Ms. G.. The exact schedule until C. can begin school in September 2014 is that the mother will have C. in her care is: week one on Sunday at 5:30 pm to Wednesday at 2:00 pm, week two Saturday at 5:30 pm to Tuesday at 2:00 pm. Week three is the same as week one, week four is the same as week two and so on. Holidays are to be shared Christmas, Easter, Thanksgiving and Halloween on a

rotating basis. Summer access was not specified in the post trial submissions for the summer of 2014 except that it shall be generous. From the commencement of school in September 2014 Mr. M. requests access every second weekend for Ms. G. plus shared holidays and extended access in the summer. In his viva voce evidence Mr. M. provided a very different schedule indicating that he would have C. in his care every weekday and Ms. G. would have C. on all weekends. Mr. M. elaborated when questioned by the court that the split week was his proposal only until C. commenced school and after which he wanted the child in his care Monday to Friday. He advised that this is what he proposed earlier the plan was rejected. In viva voce however Mr. M. was inexplicably willing to leave C. with his mother for the entire two months of the summer. I was unable to reconcile his concern with Ms. G.'s parenting skills with his willingness to leave C. with Ms. G. during the entire summer months, which were historically his slower period of employment.

[80] Mr. M.'s deviation from his plan are difficult to understand. He was questioned directly by the court to explain his deviation. The exchange was:

> **THE COURT:** See at the end of the day I have to take everything that they have said and what you have said and I have to figure out which of you is a better more realistic parent to do a good job of raising C. and I can't understand, I'm being quite open with you I can't understand why you would want her to have him in the summer when that's your general down time and you would have a really good time with him?

A: Yes I can see that yes.

Q: So why?

A: I really don't know.

It is also confusing as to Mr. M.'s suggestion that Ms. G. have the child every weekend when he is the only parent who goes to church and takes in the community breakfast after church. When cross examined on this point he indicated that he hoped that she would start going to church. Mr. M.'s evidence on these 2 points is hard to comprehend.

CONCLUSION:

[81] In weighing the evidence the court has placed no weight on the evidence of J. W.. Ms. W. has referenced Mr. M. as a fine father on one occasion and a poor father subjecting him to CAS referrals on other occasions. Ms. W. and Mr. M. are involved in litigation at the current time, Mr. M. sees his son from that union every second weekend.

[82] As well I have given Mr. M.'s Aunt K. (K. M.'s) evidence little weight given that she's had limited exposure to the couple as they interact with C..

[83] Similarly I have not assigned probative value to the evidence of B. M. given that her evidence is not relevant to the issues before the court.

[84] Unlike Ms. O'Leary's suggestion in cross examination of Mr. M.; I do not accept that a parent who sees his child some mornings of the work week and all evenings of the work week; that these time periods do not constitute quality time with the child. Evidence from Mr. M.'s mother that he is responsible when he comes from work for C.'s dinner, bath and bedtime preparation. I accept Mr. M. spends his before and after work time with C..

[85] I have assessed the evidence of both the parties, their pre-trial and post trial submissions, and I examined of section 18 of *The Maintenance and Custody* Act and the Foley factors relevant to C.'s best interest. I have concluded that despite Mr. M.'s confusing evidence on his proposed plan for access, separate and apart from that evidence, he has been practical, and dedicated to C. and C.'s well being. Mr. M. has made mistakes along the way. Ms. G. has made mistakes as well over the past two and a half years. I acknowledge that both parties were making counter accusations against each other. On occasion Ms. G. refused to return C. due to

concerns she had relating to Mr. M.'s treatment of C.. She employed a self help remedy. In response to her conduct Mr. M. embarked on re-writing the court order in the form of a consent. He embarked on a form of self help. Mr. M. was not entitled to do this. Nor was he entitled to preclude Ms. G. from her court ordered access. I am satisfied while both parties course of conduct was not appropriate both parties were operating out of concerns for C.'s safety as opposed to their wish to frustrate C.'s time with the other parent.

[86] Similarly Mr. M. must be more understanding when Ms. G. is cautious if the roads are slippery. She did not with the exception of two occasions, ever proposed to keep C. longer then one more day until the driving conditions improved. On the one occasion she kept C. from his father for a number of days she stated that conduct was on the advise of Children's Aid; and that her concerns were only for C.'s safety and not to frustrate the existing access regime. Ms. G.'s other failure to return C. was due to her insufficient funds for gas.

[87] It is clear at the end of the day that the parties do not trust each other. As I indicated earlier Mr. M. reacts to quickly to involve the authorities. On one occasion however when Ms. G. involved Children's Aid Society, the RCMP intervention was

in fact helpful and the constables were able to mediate that dispute. However C. was never at risk at any time when Mr. M. called the RCMP. Yet C. will probably have the memory(ies) of Mom and Dad arguing; squad cars and RCMP members in uniform. The remedy sought was not warranted in the situations presented by Mr. M..

[88] Mr. M. has been C.'s principal care giver since Ms. G. left the family home, that is from age 14 months to 44 months of age. After the first few months post separation the parties access was reasonably smooth until Ms. G. moved to [...]. Prior to the [...] move Mr. M. was consistent and insistent that he know where Ms. G. was when she exercise access with C.. He was entitled to know her address, and where she was employed. M. was obliging in assisting in transport for access. Then Ms. G. moved to [...], I am satisfied she made this move without thinking through a plan just as she left the family home in March 2010 without thinking her plan through. She was not at risk when she left the [...] residence in March 2010. Similarly there was no urgency for her to move from [...] to [...] in September / October 2011. Ms. G. left her first full time employment which she had in Sydney prior to her move to [...]. In Sydney she had employment, a health plan and a certain amount of security. When she moved to [...] in the fall of 2011 she has no

employment. She secured 10 weeks employment the following June, Ms. G.'s primary residence claim is compromised by her failure to make a plan prior to embarking on a very important course.

[89] I accept that she did not provide Mr. M. with the address of her place of residence in a timely manner. She failed to supply Mr. M. with information regarding her employment. She has not discussed with him the possibility of the move to [...], which Mr. M. discovered during the course of the trial. She has failed to respond to his calls at requesting legitimate information regarding C.'s health. Ms. G. refused to provide important information to Mr. M. in relation to C.'s head injury and suspicious bruising. On one occasion when Mr. M. could not reach Ms. G. he had to contact Mr. B. at Mr. B.'s place of work to secure fundamental information that a mature parent ought to have shared. Ms. G. was obligated by the Court to keep Mr. M. advised on these issues. Ms. G. has not been consistent in identifying Mr. M. as C.'s father, well past the time when C. is able to distinguish between Mr. M. as dad and Mr. B. as Y..

[90] Ms. G. requests the Court to respect C.'s cultural diversity, while at the same time taking no involvement in the cultural activities of her native community. She

wishes that C. would have a religious affiliation but she does not intend to supply this training. Once she realized that the birth certificate had C. registered with a surname as G., she, according to Y. B., commenced using G. as C.'s surname. M. was the only last name C. knew. This was done without consultation with the father or without consideration as to how C. would relate to having two last names without an age appropriate explanation.

(a) Ms. G.'s interest in having C. known as G. arose one month before this trial.

(b) No basis was given for this newly found interest. Ms. G. left fixed employment for employment that is seasonal and subject to tourism demands.

(c) Ms. G. has exhibited an absence of respect for Mr. M.'s role as C.'s de facto custodial parent.

(d) She has not contributed financially to C.'s needs nor has she facilitated the re-routing of government assistance to Mr. M. in a timely manner.

[91] While the Court has concerns in relation to Mr. M.'s lapses of judgment, he has been able to stay the course. He has provided fixed and stable environment for

C.. I am unsure that Ms. G. can provide the same security. She has not exhibited her commitment to a stable parenting course from March 2010 to present. Unlike Mr. M., Ms. G. has exhibited an unfortunate tendency of minimizing Mr. M., his contributions, and his legitimate concerns to the day to day rearing of the child.

[92] Mr. M. has also had serious lapses in judgement exhibited by his frequent use of RCMP to enforce the Order. As indicated, one of these interventions was necessary. However, his rigidity in not recognizing the real risk to C. of travelling in Cape Breton weather in the winter, is unfortunate. His involvement pf the police to secure C.'s return on most occasions was not necessary Mr. M. has to become more flexible.

[93] Secondly, while Mr. M. does not have any convictions for drinking under the influence, he has been investigated on two occasions and charged on two occasions. He has had his license suspended. If he is drinking and driving, this is a serious lapse in judgment. And he agrees that this is so. Given that he was not convicted nor did he admit to drinking and driving, the Court has no independent evidence that this is an proven concern. Mr. M. did admit to using marijuana on a weekly basis; but not when he has C. in his care. He relies on his belief Children's Aid told

him that was okay, as long as he did not have a child in his care. If that was the message, he received from the Children's Aid Society, that message is wrong. However Mr. M. ought to know this fact.

[94] I have concerns given Mr. M. moved into and out of a relationship with Ms. W. very quickly. No doubt this has had an effect on C..

[95] It is apparent that both parties have areas that they need to work on to improve so that they can achieve their full potential as responsible parents. I find they both have the potential to become good, nurturing parents.

[96] At the end of the hearing and having reviewed the post trial submissions I'm satisfied that Mr. M. believed that he with help from his parents can do a better job of raising C. than having C. in the care of his mother with help from Mr. B. as principal care giver.

[97] Mr. M. has shown a consistent ability to meet C.'s needs. I am satisfied he has and will find the time to be with C.. I am less satisfied the Ms. G. will prioritise

time with C.. While she has been consistent in exercising access her actions do not show that C.'s need for time with her is her first priority.

[98] Ms. G.'s areas of concern are such that I find on clear and cogent evidence, that on a balance of probabilities, it is not in C.'s best interest that she be primary caregiver with final decision making authority. Despite his lapses in judgment, Mr. M. with the assistance of his family has been able to raise and care for C. in a manner that is appropriate to meet all of C.'s needs. While the Court is interested in securing cultural advancement for C., this is only one consideration. At age 3 almost 4, C.'s needs are that he be raised in a safe and tranquil environment and that his material needs are met. Mr. M. is more capable of providing this environment than is Ms. G. at this time. When parties separated Mr. M. changed his work situation to be closer to C.. Ms G. moved away to be closer to her fiance.

[99] It is important to look at what C. has seen and experienced since March 2010. Neither parent discussed this very important issue. Perhaps C.'s view of the past three and a half years was:

1) he saw Mom leave Dad and him

2) then he and Dad move to Grandma and Grandpa's house

3) Mom comes to visit there

4) then C. visits Mom at maternal great grandmother's house in [...]

5) then he visits with Mom who is in an apartment with Y. B., a new person

6) there he can call Y. "Dad"

7) during this same time period then Dad brings home a new wife J. W. who lives with them

8) she has a new baby boy

9) when that baby is 1.5 months old, J. and baby leave

10) C. then he sees Mom and Y. B. in an apartment in [...]

11) then he sees Mom and Y. B. move to a house in [...]

12) then Mom starts calling him G.

13) during this time he sees RCMP involved in returning him to Dad

14) all of these events took place over a 30 month period

[100] Given all these changes in C.'s young life it is important that he stay in one consistent stable home environment. Both parties must work to ensure that happens. The stable predictable environment is the <u>most</u> important factor in this case.

[101] I have concerns in relation to Ms. G.'s naivety as to her responsibility to financially support C.. This is not Mr. B.'s responsibility, Mr. B. has certainly has been willing to step into assist with communication and transportation problems between Ms. G. and Mr. M.. For so long as Mr. B. is in a relationship with Ms. G., he has provided much of the transportation so that Ms. G. could have time with C.. It was never explained to the Court why Ms. G. who is educated and healthy, was tardy in securing a driver's license, so that she could be an active part of the transporting of her child. At the end of the day, the Court is concerned that Ms. G., if her home was the primary residence and she was given final decision making authority, she would minimize Mr. M. and his family, and that such a minimizing is not clearly in C.'s best interests. C. has attachment to his paternal grandparents that has been there from his birth, they remain a positive constant in his life.

[102] Mr. M. has not exhibited conduct that he would try to minimize Ms. G.'s role as C.'s mother.

[103] Obviously, the push and pull between the parents has to end. These parents must analyse the events of the past two and a half years. I'm sure they do not want to continue on the same track for the next two and half years, this would clearly not

be in C.'s best interests. I find on a balance of probabilities that the following plan is in C.'s best interest:

1) The parties shall be joint custodial parents.

2) The father shall provide the primary residence for C. and after consultation shall have final decision making authority on all decisions relating to C.'s care and upbringing, both in the short and long term.

3) from today's date until school starts in September 2014, the access will not be as either parent wished in their final comments to the Court, but rather as the Court concludes to be in C.'s best interests. The mother shall have C. in her care from Sunday at 3 p.m. to Wednesday at 3p.m. If this is not possible during the summer, she shall provide Mr. M. with a list of her days off in writing by the middle of June 2014. If that day is a Sunday, she shall have custody of C. from Saturday evening at 5 p.m. to Sunday at 7p.m. This schedule shall be followed at a four week rotation, such that the mother shall have C. on week one, week two and week three at the times set out above that is Sunday to Wednesday. Week four there shall be no visitation. The parties shall alternate Christmas, Easter, Thanksgiving and Halloween on a rotating basis. The Christmas of 2013 shall be with the father, Easter with the mother,

Thanksgiving with the father, and Halloween with the father for this year, alternating the following year.

[104] After C. commences school in September 2014, the mother shall have access to C. every second weekend, and if that weekend ends on a long weekend, the child shall remain in her care for the holiday. This shall also be the situation if it is a teaching day such that there is no school planned for the child the mother shall have C. on that Friday or Monday. The child shall be picked up on Friday at 4 p.m., and returned on Sunday at 6 p.m., unless it is a holiday, at which time he shall be returned at 6 p.m on Monday.

[105] The mother shall be entitled to extended access in the summer, if she is unemployed during that time period. She shall be entitled to every March break. I have not outlined the hours and times for special occasion access, but I will if it is necessary. I will leave that to Counsel to advise me within 30 days. If so, I will then set the exact times for Christmas, Easter, Thanksgiving and Halloween, as well as summertime access.

1) The mother shall be responsible to transport the child to and from access. She now has a driver's licence and she has agreed to do all the driving.

2) Ms. G. shall be entitled to have Mr. B. or some responsible driver in her stead to pick up C. at the drop off and pick up point.

3) The mother shall be entitled to timely notification of all events concerning: medical, dental, educational, and sporting. She shall be entitled to all report cards and school pictures.

4) The mother shall exercise great caution that she is not tardy in picking up or dropping off the child. It has been my experience that tardy access pick up and drop offs can cause unnecessary stress.

[106] The parties must endeavour to attempt to respect each other or at least appear to do so in the presence of the child, so that this order will have an opportunity to work. The parties are able eventually to make any changes that they jointly agree to this order to better suit their evolving schedules. I suggest any changes be in writing unless and until the parents begin to relate better to each other. They are to follow the order until they experience a period of tranquillity and learn, either by reading or counselling, to respect the contribution of the other party. If they fail to establish a workable relationship, the parent who provides the nicer clothes or the nicer home, for the child will become irrelevant. C. will not flourish as he deserves

if the parents use this order as a springing-off point for continued disharmony. The result will be negative. It always is.

[107] The parties are to obtain and use skype. Both shall be able to contact C. every second day he is not in their care. I will set the times out if required. Both are to have operating cell phones available for contact without any delay. Both are to be prompt in responding to queries from the other.

CHILD SUPPORT:

[108] Ms. G. has never paid child support. She and Mr. B. have spent a great deal of money in the past year making trips twice a week to and from [...]. I do not accept the cost is $900.00 a month as claimed by the Respondent. However I do accept it is, at least, the amount of money Ms. G. would pay on Child Support Guidelines which is $92.00 per month fixed at an income of $16,600.00. In addition to access costs Ms. G. will have C. with her for substantial periods of time. On these facts I order no Child Support is payable by Ms. G.. While she is earning under $ 17, 000.00 gross, she will be required to complete and file her income tax return on time each year. She is to provide Mr. M. with her tax return and notice of assessment.

Failure by her to do so may result in a retroactive award that does not consider her shelter costs and maybe payable immediately.

[109] In relation to the child's name, it is clear that the father is entitled to be registered on the birth registration. The parties agree on this point. I find as a fact that both parties believed this was done at the time the child was born, and they also believed the father's name was entered on the birth registry; and that C.'s last name was M.. I find the registration of C. as G. was an error. Neither party are at fault on this issue. The parties continued to use M. as C.'s last name. The evidence indicates that the Baptismal Certificate also tendered to the Court outlined that the child's last name was M.. The child's MSI card, which was effective on January 1, 2009 until December 31, 2012, uses M. as C.'s last name. Ms. G. knew this. In her authorization to Vital Statistics she refers to C. as C. M.. In all court orders C. was called M.. Within the families the child's last name was always M.. I accept "G." was never an issue until October 2012, when the parties first learned that the child's surname on the birth registration was G. and not M..

[110] During closing written submissions, it was requested that I not decide the issue of what the child's last name should be as this determination may affect C.'s

status. Secondly post trial submission notes this issue was not made as an application form to the court. I do not agree with these submissions. This issue was squarely before this court. I do have enough evidence to come to a conclusion as to what the child's last name should be. I had considered that perhaps I would wait and leave that issue for the parties to work out between themselves. I did consider whether or not the parties would feel more secure once they had a final order, and not a collection of interim orders they could perhaps resolve the last name matter themselves. However, upon subsequent reviews of the viva voce evidence. I conclude this issue must be decided by the court. While I considered a more tentative course including counselling to work towards establishing some trust between parents. I have concluded prolonging this process is not in C.'s best interest.

C.'S LAST NAME:

[111] I reviewed the case law on the opposing positions of the parents relating to C.'s last name. Based on the evidence of Mr. M. and Ms. G. they believed C.'s last name was M.. All official documents refer to C. as M.. The parties agree that until C.'s registered birth certificate was received just before this proceeding both parties

believed he was registered as C. G. J. M.. Both parties believed that the respondent R. M. was also registered as the biological parent. When Mr. M. attempted to clarify difficulties in the receipt of the child tax benefit only then did he become aware he was not registered as father on the birth certificate. At the beginning of this hearing, both parties agreed that Mr. M. should be registered on the birth certificate, this amendment should be made immediately. Ms. G. and Mr. M. are is to sign any documents necessary to effect this change. This is to be completed within 30 days of the date of this written decision.

[112] As stated both parties believed that the registration of birth had been filed shortly after C. was born representing Mr. M. as the biological father and C.'s last name as M.. Once the parties learned C.'s last name was in fact registered as "G." this became a new issue to be decided by the Court.

[113] The relevant section of the *Vital Statistics Act* N.S.R.S. 1989 ss. 4(6), 4(7), 4(8), 4 (9).

> (6) Except as provided in subsections (7) and (8), the registration of the birth of a child of an unmarried woman shall show the surname of the mother as the surname of the child, and no particulars as to the father shall be given.
>
> (7) Where an unmarried woman who is the mother of a child and a person acknowledging himself to be the father file with the Registrar or the division registrar a statutory declaration to that effect, the

> particulars of the person so acknowledging may be given as the particulars of the father, and, if the request is made after the registration of the birth, the Registrar may amend the registration in accordance with the request by making the necessary notation thereon.
>
> (8) The birth of a child shall be registered showing as the surname of the child the surname chosen by both the mother of the child and the person shown on the registration, in accordance with subsections (4) to (7), of the birth of the child as the father of the child, and where the mother and such person cannot agree on the surname of the child, the surname shall be the hyphenated combination of the surnames of the mother and that person, in alphabetical order.
>
> (9) Notwithstanding subsection (8), where, in accordance with subsection (5) or (7), the birth of a child is registered without giving particulars as to the father of the child, the birth of the child shall be registered showing the surname of the mother of the child as the surname of the child.

[114] Upon realizing that C.'s last name is G.; according to her fiancé Y. B., Ms. G. began to call C. G.. Ms. X. G. wishes C.'s last name to be G. as she believes that is a proud name. Mr. M. wishes C.'s last name to be M. as that is the name that both parties intended prior to his birth and that is the name that C. has been known by until October 2012. At the time this hearing commenced C. was three years and nine months old.

[115] Justice Glube then of the Supreme Court Trial Division in 1987 discussed the issue of changing names in the case of *Hubley v. Hubley*, [1987] N.S.J. No.424. During that discussion the Justice confirmed that the key question is not the view of the parents but what is in the best interest of the child. In the Hubley case the parents were married. Justice Glube was addressing the issue of a change in the decreed nisi. The Justice was impacted by the fact that 1) the applicant was the

custodial parent 2)had re-married and 3) had changed her last name to Boyd. Mr. Boyd had active involvement in the children's lives as was Mr. Hubley. Justice Glube considered the fact that Ms. Hubley-Boyd was the custodial parent and Mr. Hubley the access parent. Secondly the Justice considered that *The Change of Name Act* did not apply where a name was altered and not in fact changed. She held:

> Both counsel recognize that a common law in Nova Scotia one need not apply under *The Change of Name Act* to alter ones name. *The Change of Name Act* would prevent a divorced parent from changing the name of an infant child without the consent of the other party, unless the consent is dispensed with by the court. Counsel recognized that common usage of a new name is an excepted method of name change.

Justice Glube was also influenced by the fact that the children were starting a new community with Mr. Boyd and their mother, so the hyphenated name would pose no embarrassment given that their name would not be different then that of their mother in their new community.

[116] Justice Glube's decision was upheld in the Court of Appeal in (*Hubley v. Hubley* [1988] N.S.J. No. 166.

[117] *The Change of Name Act* [1989] R.S.N.S c.66 sets out the applications relevant to a child's name where the parents name are not married.

> Application by illegitimate infants mother
> 8 (1) The mother of an unmarried infant child born out of wedlock and not adopted or legitimated may make an application to change the child's name.
>
> Consent of father
> (2) Where such a child has been registered with the surname of a person acknowledging himself to be the father, that persons consent is required to change the child's name.
>
> Application by father on record
> (3) A person, shown on the registration of the birth of an unmarried infant child, born out of wedlock and not adopted or whose parents have not married each other subsequent to the birth of the child, as the father of the child, may make an application to change the name of the child, with the consent of the mother.
>
> Application by father not on record
> (4) A person, not shown on the registration of the birth of an unmarried infant child, born out of wedlock and not adopted or legitimated, as the father of the child, may, with the consent of the mother, make an application to change the child's name where the person furnishes the Registrar with a true copy of an order of a court of competent jurisdiction determining that person to be the father of the child. R.S., c. 66, s. 8.
>
> Dispensing with consent
> 10 (1) Where a judge is satisfied that a person whose consent is required under this Act
> (h) is a person whose consent in all the circumstances of the case ought to be dispensed with, the judge may order that the persons consent be dispensed with, if it is in the interest of the person whose name is to be changed to do so.
>
> Dispensing with consent of parent
> (2) Notwithstanding subsection (1), a judge may dispense with the consent of a parent of an unmarried infant child on whose behalf an application is being made where the child has been known by the proposed name for a period of at least three years immediately preceding the application. R.S., c. 66, s. 10.

While the issue before me is not dispensing with consent however the judicial directions are relevant because Ms. G. is attempting to dispense with consent

through her reliance on a Birth Registration which both parties agree was made in error and did not reflect their intentions.

[118] Justice Gass dealt with this issue, but on a different factual situation in the case *Webb v. Cyr* [1999] N.S.J. No. 505 in that situation the parties were not married. The parties separated when the child was one year old. The father moved to the States and had very little contact with the child. The mother used her maiden name as the child's surname for the preceding three years and the child was registered in school under the mother's maiden name. At the time this decision was made the child was four and half years of age. Justice Gass concluded the fathers consent could be dispensed with given that the name was how the child was known by for 3 years at preschool; and the father has minimum contact.

[119] In Halsbury's Laws of Canada (2009), the following factors were listed as relevant in making this determination:

1) The short and longer term effects of any change in the child's surname

2) Embarrassment that the child may feel in having a different surname then that of the custodial parent.

3) Confusion of identity that may arise if the name is changed or not changed.

4) The effect of the change of name on the relationship with the parent who's name the child bore during the marriage.

5) The effect of frequent or random changes of name.

[120] The parent who bears the onus for a change of name is the parent asserting that the name ought to be changed. This was established by the Court of Appeal in the Hubley decision where Justice Jones stated:

> It was opened to the respondent as the custodial parent to effect a change in name of her children provided she could show that it was in the best interest of the children to do so, by the same token it was open to the applicant (father) to apply to the court to prohibit the change without his consent.

The onus on the particular facts in this case is more difficult to decide. Both parties believed that their child's last name was M. until shortly before this hearing. I accept that the child's birth registration with the surname G. occurred by accident and was not the intention of either parent. I accept that until shortly before this hearing both parents used M. as C.'s last name. I can not assign the onus on either party on these facts. Rather I have examined all the evidence in deciding where it is in C.'s best interest to be known as G. or M..

[121] In the *Bromley v. Furlong* [2012] N.L.C.A. 56, the Newfoundland Labrador Court of Appeal discussed the relevant factors in determining best interest in a change of name application. The parties in that matter were married for seven years, separating when the child was one year old. A joint custody order with a detailed two week access schedule providing for equal parenting time. In 2011 when the child was four and a half the mother applied to change the child's name to a hyphenated name containing both parties last names. The mother had resumed her maiden name. The trial judge denied the mothers application to hyphenate the child's surname. The Court of Appeal found the trial judge focussed erroneously on 1)the bad faith motivation by the mother and 2) that any unnecessary changes could effect the child. The Court of Appeal provided an extensive cross country review of the case law on this topic. The court differentiated between situations where parents have a joint custody order and the mother seeks to add her maiden name to the child's existing surname. There the father's surname remains part of the child's name. The court held that to hyphenate the child's surname was distinguishable from a situation where the applicant seeks to remove the other parents name entirely. Court held (at page 8 para 19) animosity between parents and parental name preference are not factors that ought to be paramount considerations in determining the best interests of the child.

[122] Justice Welsh speaking for the Newfoundland Court of Appeal in *Bromley v. Furlong* approved (at paragraph 13) the decision in *L.M.D. v. J.R.S.* [2010] N.B.Q.B. 188 decision of Justice French. The Court of Appeal in Newfoundland approved of a surname change in name to hyphenate both parties surname.

[123] Justice French in *L.M.D. v. J.R.S.* [2010] N.B.Q.B. 188 dealt with a similar situation to the case before me. 1) common law situation; 2) child had the father's last name; 3) parties separated when the child was one; 4) mother applied to hyphenate child's last name to contain the last name of both parties 5) father refused consent 6) registrar refused the mother's application

[124] Justice French in *L.M.D. v. J.R.S.* endorses the Supreme Court of Canada case *Trociuk v. British Columbia Attorney General,* [2003] 1 S.C.R. 835. In that case the mother and father were estranged. They were never married. The mother of the triplets registered the children in her name indicating that the father was unknown. While *Trocivk* also involved a charter challenge, the surname findings are relevant in this case at para 16, 17, 18, 19 and 31.

> 16 Including one's particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the

biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life.....

17 Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance. As Prowse J.A. notes, naming is often the occasion for celebration and the surname itself symbolizes, for many, familial bonds across generations (paras. 138-39).

18 The significance of choosing a surname is particularly evident if viewed in light of the rationales for reforms which extended to mothers the ability to transmit their surnames to their children. As Professor Castelli wrote on this subject, in a comment on the (Quebec) Civil Code Revision Office's [page844] Report on the Name and Physical Identity of Human Persons:

> [TRANSLATION] ... one of the most serious and most fundamental inequalities is indeed for women not to be able to pass on their surnames; for that matter, this is how that impossibility has always been viewed: a sign of the inferiority of women and their incapacity to perpetuate a line by filiation; was it not regarded ... as a misfortune not to have a son, precisely because the "line", the "name", died out with girls, who were unable to perpetuate them. People in our time have admittedly become relatively indifferent to those sorts of considerations; nevertheless, transmission of the surname remains the symbol of filiation, and it is not normal to deny to women any possibility of seeing their surnames passed on to their children or to some of them.
> (M. D. Castelli, "Rapport de l'O.R.C.C. sur le nom et l'identité physique de la personne humaine" (1976), 17 C. de D. 373, at p. 374)

Although the activity of naming may not hold the same significance for all, it is clearly important to many in our society. A father who is arbitrarily excluded from this activity would reasonably perceive that a significant interest has been affected.

19 The conclusion flowing from the above is that a father's ability to include his particulars on a child's birth registration and to contribute to the process of determining the child's surname can reasonably be perceived to be modes of meaningful participation in a child's life. As a further consequence, arbitrary exclusion from such means of participation negatively affects an interest that is significant to a father.....

31 Since the above discussion has revealed that including his particulars on a child's birth registration and participating in choosing the surname are means by which a father participates in his child's life, arbitrarily leaving him out of these activities is to exclude him from meaningful involvement. Such exclusion cannot be presumed to be in the best interests of the child, and therefore is not an ameliorative purpose that would justify excluding a father from a mode of meaningful participation in his children's lives.

[125] I put weight on the conclusion of the court in that decision at para 35. *L.M.D. v. J.R.S.* [2010] N.B.B.R. 188

> 35 There is little evidence of the awkwardness or difficulties alleged by L.M.D. However, Dr. S's argument that there is no reason to change C.H.S.'s surname, without more, does not weigh heavily when measured against a name that would demonstratively recognize C.H.S.'s relationship with both parents and the continuity with their families. The Supreme Court of Canada in Trouciuk and other reported decisions referred to above, recognize the significance of a child's surname and its importance to the connection between a child and the child's parents. These authorities make it clear that including the name of both parents is consistent with a child's best interests. This is not a random change of name. Nor is it a request without a purpose. In the absence of any evidence to suggest that C.H.S.'s existing surname -- the name of only one parent -- is in his best interest or otherwise preferable in the circumstances, a surname that includes the names of both parents cannot be rejected simply on the basis that the status quo should prevail. Not only is there no reason why the name should not change but also, in the circumstances of C.H.S., given his young age (he was still three when the initial application was filed) and close relationship with both parents, he will benefit from a name that reflects his connection to two separate families. (Application was granted)

[126] In the case before the court I was initially impacted by Ms. G.'s motivation. Ms. G. was never concerned about the child's name until she saw the error on the birth certificate at which time she began to refer to C. as G.. I was negatively impacted by her unilateral change of the child's name to G. while C. was in the midst of so many changes in his young life. I find it was inappropriate of Ms. G. to commence using a different name for C. without consult with the father. I note that I have no formal application for change of name brought by Ms. G. even though the parties have been separated for almost three years. I do not accept her argument that changing his name from G. to M. would effect his status belonging to the [...] band. I have no evidence that his name change would in any way effect his status within the Band. I was negatively impacted by Ms. G.'s evasive answers on several

occasions on pertinent questions. I must weigh as well the fact that this child has been known by M. for almost four years and that is how he knows himself. Children of this age are already establishing their own identity in relation to those around them. Changes in factors comprising this identity can be made; but these changes are to be properly made. Against this negative back factual drop I must examine C.'s culture and heritage cultural makeup. These factors are referenced in the decision, *Foley v. Foley* [1993] N.S.J. No. 347 by Justice Goodfellow and is also referenced under s. 3 (2) of *The Children and Family Services Act.* Recently the *Maintenance and Custody Act*, s. 18 the relevant legislation in the case was amended to include cultural and heritage factors. I have considered the numerous changes as outlined in C.'s life, Ms. G.'s focus on self before her focus on C. and C.'s age at the present time. I have considered, as well, the fact that Ms. G. did not correct C. when C. referred to her boyfriend as Daddy. Ms. G. was reluctant to provide Mr. M. with her current address, as well as her reluctance to comply with production directions given by this court during the hearing. I accept she called C., G. in his presence without any preparation and against Mr. M.'s wishes. I find Ms. G. has and may continue to put her needs ahead of C.'s. I find that Mr. M. while acting unwisely on a number of occasions in the relation to the police, marijuana, does put C.'s best interest first. However I cannot recognize the importance of C.'s

Mi'Kmaw heritage and at the same time preclude an actual change of name. Ms. G. mis-judgements as outlined do not preclude a surname change. C. is just 4 years old at present. I have considered the issue from all aspects. Frankly my first inclination was to order his name be changed to what the parties intended, M.. While I view Ms. G.'s last minute interest in the change of name to be somewhat opportunistic. However, upon reflection, Ms. G. has exercised access over a long distance for over 1 year. On the surname issue I have to minimize my concern over her lapses in judgement. I have concluded that it is in C.'s best interest to be known as G.-M. upon the following events occurring:

1) the parties commence parent counselling;

2) the parties seek out professional advise as to how to introduce C. to his new last name. Once these steps are taken by both parties, together, are to sit down and tell C. of his name change. Then I will sign the order allowing for C.'s last name to be G.-M..

[127] In relation to whether or not C.'s native status may be effected by a name change, I have no evidence in support of this concern. Counsel had time and opportunity to provide such evidence. I do have evidence from Ms. G. that negates

this concern. Accordingly to her evidence C. has status. Nor does she believe this will change if Mr. M. is on the Birth Certificate.

[128] I order that the registration of birth be amended to reflect that Mr. M. is the father of the child.

_____

M. Clare MacLellan

J.