SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Borgal v. Fleet, 2014 NSSC 16

Date: 2014 01 24
Docket: SFHMCA-085964
Registry: Halifax

Between:

Christopher Wilson Borgal

Applicant

v.

Nicole Elizabeth Fleet

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	January 8, 2014, in Halifax, Nova Scotia
Counsel:	Brian Bailey, for Christopher Borgal, the Applicant Terrance Sheppard, for Nicole Fleet, the Respondent

By the Court:

[1] Christopher Borgal (the "Applicant") and Nicole Fleet (the "Respondent") both applied for primary care of their son Joseph, born May 6, 2009 (presently aged four). The Respondent also seeks an order for child maintenance. Their respective applications are pursuant to the *Maintenance and Custody* Act, R.S.N.S. 1989, c.160.

BACKGROUND FACTS

[2] The Applicant is 28 years of age. The Respondent is 25. They met in 2008 and from June 15, 2008 until April 20, 2013 lived in a common-law relationship.

[3] Their son, Joseph, was born approximately 11 months after they began to cohabit.

[4] For the most part the Respondent was not employed outside of the home during their relationship. Both parties acknowledged that the Applicant was the "breadwinner". The Respondent's primary responsibility was to care for their son and their home. The Respondent described herself as the primary parent to Joseph prior to the parties' separation. The Applicant disagreed and said he was active in his son's life too.

[5] The Applicant works at the Halifax Shipyards which is approximately a thirty to thirty-five minute drive from his home in Gaetz Brook. Except for when he is on vacation or when he is laid off (which happens from time to time in his line of work) he works long hours. He works Monday to Friday and usually works 48 hours a week plus occasionally on weekends. I accept that prior to the parties' separation when he wasn't at work he was actively involved in the care of their son but the majority of the time it would be fair to say that the Respondent was the primary parent.

[6] The Applicant's parents maintained a close relationship with the parties and Joseph. After Joseph was born the parties and Joseph moved into their home for a few months before moving to their own residence. Even then the Applicant's parents often took care of Joseph on weekends. According to the affidavit evidence of the Applicant's parents (which wasn't disputed), the Applicant's

parents also provided the parties with financial assistance to aid them in the care of Joseph.

[7] During cross-examination the Respondent acknowledged that she often told the Applicant that his parents were her family too and that her own family was not all that supportive.

[8] The Respondent's mother and common-law partner live in Leduc, Alberta. The Respondent's brother apparently moved to Alberta in July, 2013 where he lives with his common-law partner and their child. The Respondent also mentioned having a niece in Alberta. In paragraph 17 of her affidavit sworn January 8, 2014 (Exhibit 12) she said that her sister lived in Alberta. However in her affidavit sworn January 6, 2014 (Exhibit 13) she said in paragraph 13 "I have not claimed that my sister resides in Alberta, but rather it is my niece who lives in Alberta". She clarified in her evidence that her sister lives in Dartmouth, Nova Scotia.

[9] The Respondent's father, grand-parents and aunt live in the Porter's Lake area. I was given the impression that the Respondent is not particularly close to her father.

[10] In April 2013 the parties' relationship changed. On April 5, 2013 the Respondent went on a vacation to visit her mother in Alberta. With the Applicant's consent she took Joseph with her. She said that when she left Nova Scotia on April 5 she and the Applicant were on good terms. It was her intention to return approximately a week later (i.e. around April 13). Once in Alberta she decided that she wanted to extend her visit by another week returning instead on April 20. In her affidavit sworn January 8, 2014 (Exhibit 12) she said at paragraphs 13 and 14:

> "13. On my return to Nova Scotia, I advised the Applicant that I felt our relationship was not working out.
>
> 14. It was not my intention to move to Alberta right away but when the Applicant's parents learned I was considering a move to Alberta with Joseph they were quick to show their displeasure with me."

[11] And then at paragraph 17 she said:

> "17. With no other option, on April 23 I flew back to Alberta where my mother, step-father, brother and sister all live."

[12] During her cross-examination the Respondent admitted that by the time she returned to Nova Scotia on April 20 she had already made the decision to return to Alberta. In fact she booked her flight back to Alberta the same day that she arrived in Nova Scotia. The flight was paid for by her mother. Regardless of how the Applicant's parents may have treated her when they were informed that she was considering moving to Alberta, their treatment did not lead to her decision to return to Alberta. That decision had already been made.

[13] While in Alberta the Respondent met, for the first time, Mr. C.. Mr. C., according to the Respondent, was a friend of her mother. He is 25 years of age. He moved to Alberta from Ontario. He lives in Cold Lake, approximately 340 kilometres from Leduc. The Respondent did not explain the origin or nature of her mother's friendship with Mr. C., nor did her mother.

[14] According to the Respondent and Mr. C., her mother introduced her to Mr. C.. At one time during her cross-examination the Respondent said that they were introduced on April 5 (the day she flew to Alberta) and at another time she said that they met for the first time on April 13. Regardless of when they met the Respondent insisted that she and Mr. C. were not in a relationship by April 20 and had not been intimate until after April 23. I find that by April 20 she either was or wanted to be in a relationship with Mr. C..

[15] Mr. C. provided an affidavit sworn January 6, 2014. Mr. C. did not make himself available for cross-examination but with the consent of the Applicant's counsel his affidavit was entered into evidence. According to paragraph 6 of his affidavit he met the Respondent "in early 2013". He went on to say "Nicole and I had an immediate connection because we are both, (sic) quiet, reserved people, who share the same family values." According to the Respondent she discovered in early May that she was expecting Mr. C.'s twins.

[16] When the Respondent returned to Alberta on April 23 Joseph stayed with his father. The Applicant would not allow the Respondent to take Joseph with her. The Respondent's evidence was that she was willing to leave Joseph with the

Respondent for a number of reasons. She felt that it was only fair since she had Joseph alone with her for a couple of weeks in Alberta earlier in the month. Also, she anticipated that the Applicant would be bringing the issue of custody of Joseph before the Court in Nova Scotia for an early hearing and if they were unable to resolve custody between themselves it would be decided by the Court in relatively short order. She later learned that the trial date assigned was November 27, 2013.

[17] The November 27 Court date had to be postponed until January 8, 2014. The Respondent's twins, who apparently would ordinarily have been due on or about January 9, 2014, were born on November 19, 2013 making it impossible for the Respondent to attend the first scheduled hearing date.

[18] The Respondent testified that her pregnancy was difficult. In the first month or two she had to see her family doctor frequently. There were some complications. By October she was in no condition to fly. She did however admit that there were no medical reasons why she could not have returned to Nova Scotia in the months of June to September inclusive, 2013. From the time she left Nova Scotia on April 23 until she returned to Nova Scotia for the hearing in January she did not spend any time with Joseph. She said that notwithstanding the fact that she could have flown to Nova Scotia between June and September she did not do so because the Applicant insisted that any access that she was going to have with Joseph had to be supervised (because of his fear that she might take Joseph back to Alberta). The Applicant's evidence was that he would have been prepared to allow her unsupervised access as long as she agreed not to take the child to Alberta.

THE POSITIONS OF THE PARTIES

[19] The Applicant proposed that the parties share joint custody of Joseph with Joseph being placed in his primary care.

[20] It is the Applicant's intention to continue living in Gaetz Brook. He has enrolled Joseph in daycare in Porter's Lake which is between his home in Gaetz Brook and his work in downtown Halifax. At least when he is working Joseph goes to daycare four out of the five days during the week (Monday, Tuesday, Wednesday and Friday). Up until a few months ago Joseph spent two days each

week with the Applicant's parents but more recently he spends only Thursday with his grandparents. They pick him up Wednesday before supper and they have him in their care Wednesday overnight and then during the day on Thursday, returning him to his home by the time the Applicant returns from work.

[21] The Applicant described what would be a typical workday. He would have to get himself and Joseph up early in the morning in order to get Joseph to daycare in time for him to drive to work by 7:30. He would then pick Joseph up by approximately 5:50 p.m. on his return trip and then take him home for supper and eventually for bed.

[22] At the present time the Applicant lives with no one other than Joseph. His parents live nearby and as said earlier, they are very supportive of their son and very concerned for the welfare of their grandson. I am satisfied that they help whenever they can and are anxious to do so. Joseph will start school in September of this year.

[23] The Applicant is open to access being exercised by the Respondent in Alberta as well as Nova Scotia provided it is understood that Joseph's primary residence is with him in Nova Scotia.

[24] The Respondent described the Applicant as a good father and had no concerns for Joseph's safety while he is in the care of the Applicant. She emphasized however that notwithstanding the fact that he is a good father, prior to their separation it was she who took care of Joseph the majority of the time and, now that the parties are separated, she emphasized the time that she would have free to spend with Joseph as compared to the Applicant's work schedule which limited his time with Joseph at least during the week.

[25] The Respondent also proposed that the parties share joint custody but she too seeks primary care of Joseph. It is the Respondent's plan to remain living with Mr. C. and their twins in Cold Lake, Alberta. It is not her intention to work outside of the home. She gave evidence that Mr. C. will support her and the children including Joseph if Joseph lives with them. Mr. C. sells drill bits in Alberta and according to his affidavit he has an annual gross income of approximately $120,000.00.

[26] They live in a rented three bedroom home in Cold Lake where Joseph could have his own bedroom. Mr. C. says that he is prepared to support the family (including Joseph) financially.

[27] The Applicant described the Respondent as a good mother but he was not prepared to agree to her having primary care of Joseph if it means taking him to Alberta. He wants Joseph to remain living with him and to remain in Nova Scotia near the Applicant's family members.

[28] In addition to seeking primary care the Respondent also seeks an order for child maintenance.

[29] The Applicant filed a Notice of Application on May 2, 2013. The Respondent's Response to Application was filed on November 12, 2013. The Court received affidavit evidence from the parties, the Applicant's parents, the Respondent, her mother and Mr. C..

[30] Only the parties were cross-examined.

ISSUES

[31] This case raises the following issues:

1. What is the most appropriate parenting arrangement for the parties' son?

2. Should the Applicant pay child maintenance to the Respondent and if so in what amount?

LEGISLATION

[32] The relevant legislation is found in the *Maintenance and Custody Act* (supra). I've considered the entire statute but in particular the following provisions:

> 18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.

(2) The court may, on the application of a parent or guardian or, with leave of the court, a grandparent, other member of the child's family or another person make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

...

(4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the Guardianship Act; or

(b) ordered by a court of competent jurisdiction.

(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 parents' 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.
>
> ...
>
> (8) In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

ANALYSIS

[33] This Court has jurisdiction to hear the parties' applications. The Applicant resides in Gaetz Brook, Nova Scotia which is within the Halifax Regional Municipality. Their son has lived all of his life in Nova Scotia and in particular in the Gaetz Brook area. Until April of last year the Respondent lived in Nova Scotia. If there was any remaining doubt regarding the Court's jurisdiction it should be resolved by the fact that both parties filed their applications with this Court and both accepted this Court's jurisdiction.

[34] I view this case as a "mobility case". Unlike many cases that are heard by the Court where one party or the other is planning to move from the jurisdiction, the Respondent has already made that decision and has already relocated to the province of Alberta. Whether this case is or is not, strictly speaking, a "mobility case", is inconsequential. Ultimately the Court must determine what parenting arrangement is in their son's best interests taking into account the plans each of the parties have for him should they be successful.

[35] The leading case on mobility is *Gordon vs. Goertz, 1996 CANLII 191 (S.C.C.), [1996] 2 S.C.R. 27. Gordon vs. Goertz* (supra) resulted from an application to vary a custody order pursuant to Section 17 of the *Divorce Act*, *R.S.C. 1985, c.3*. With that in mind the Court, in paragraphs 49 and 50 summarized the law as follows:

49 The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parents ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;

> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[36] When considering an original mobility application, as opposed to a variation application, Bateman J.A. in *Burgoyne v. Kenny, 2009 NSCA 37* indicated that the relevant considerations are limited to what is in the child's best interest considering all of the relevant circumstances relating to the child's needs and his parents' ability to meet those needs. According to Justice Bateman the Court is to consider:

> a) the desirability of maximizing contact between the child and both of his parents;
>
> b) the child's views, if appropriate;
>
> c) the Respondent's reasons for moving, only in the exceptional case where it is relevant to her ability to meet the child's needs; and
>
> d) the disruption to the child resulting from his removal from family, school and the community he's come to know.

[37] It is clear that the principles set out in *Burgoyne v. Kenny* (supra) apply to applications made under provincial legislation such as the *Maintenance and Custody Act* (supra) and are not limited just to the *Divorce Act* (supra).

[38] Counsel for both parties also referred the Court to the decision of Goodfellow J. in *Foley v. Foley, [1993] N.S.J. No. 347 (S.C.)* wherein Justice Goodfellow outlined numerous factors intended to assist the Court in assessing a child's best interest. Goodfellow J. wrote:

> Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment;

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists, psychiatrists, etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncle's, aunt's, grandparent's, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);

> 15. The interim and long range plan for the welfare of the children.
>
> 16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
>
> 17. Any other relevant factors.

[39] After considering the factors listed in *Foley* (supra) Bateman J.A. in *Burgoyne* (supra) said the following regarding the determination of a child's best interests:

> **25.** The list does not purport to be exhaustive nor will all factors be relevant in every case. Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent on a generic list of factors. As Abella J.A., as she then was, astutely observed in MacGyver v. Richards 1995 CanLII 8886 (ON CA), (1995), 11 R.F.L. (4th) 432 (Ont. C.A.):
>
> > 27. Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.
> >
> > 28.. . . the only time courts scrutinize whether parental conduct is conducive to a child's best interests is when the parents are involved in the kind of fractious situation that is probably, in the inevitability of its stress and pain and ambiguity, least conducive to the child's or anyone else's best interests.

> 29. Deciding what is best for a child is uniquely delicate. The judge in a custody case is called upon to prognosticate about a child's future, and to speculate about which parenting proposal will turn out to be best for a child. Judges are left to do their best with the evidence, on the understanding that deciding what is best for a child is a judgment the accuracy of which may be unknowable until later events prove or disprove its wisdom.

> **26.** The judge must determine in which parent's custody the children's future will best be served on the basis of the available evidence relevant to the children's emotional and physical well-being. This is a discretionary decision deserving of deference provided it is not premised on material error of fact and is informed by the application of proper legal principles.

[40] In determining what is in Joseph's best interest, I have therefore considered the factors highlighted by Bateman J.A. in *Burgoyne* (supra) and therefore by extension in *Gordon v. Goertz* (supra), as well as the circumstances listed in subsections 18(6) and (8) of the *Maintenance and Custody Act* (supra) and the factors listed in *Foley* (supra). I've also considered all of the evidence that has been presented (excluding evidence which is inadmissible such as hearsay, opinion, speculation, etc.).

[41] There is no legal presumption in favour of either of the parties. Whereas there is no existing order or signed agreement between the parties I view both the Applicant and the Respondent at this time as joint guardians and until decided otherwise equally entitled to the care and custody of their son. I have considered the views of both parents.

[42] There is no reliable evidence of their son's views on where he would prefer to live or with which parent. In any event he is too young for his views to carry much, if any, weight.

[43] I find that the Respondent moved to Alberta not to improve her circumstances or her ability to meet her son's needs, but rather to pursue a relationship with Mr. C.. Her relocation to Alberta has not enhanced her ability to care for Joseph.

[44] I have no way of knowing how stable the Respondent's relationship is with Mr. C. or how long lasting it is likely to be. The Respondent lived with the

Applicant for approximately five years and had a child with him. When she left Nova Scotia to visit her mother in April of 2013 she was on good terms with the Applicant and yet within a span of two weeks she decided that her relationship with the Applicant was not worth maintaining. Instead she chose to live with a man she had known for a week or two at most. She has no means of independently financially supporting herself or her children. For that she must rely entirely on Mr. C. and whatever child maintenance the Applicant may be required to pay. Mr. C. did not present himself to the Court. The Court has been told that he is 25 years of age and that he has never been married. He has no children other than the twins that were born to him and the Respondent in November of 2013. He has lived in Alberta for at least three years but before that lived in Ontario where his family currently resides. In his affidavit he indicated that he earns an annual income of approximately $120,000.00 and that he is willing and able to support the Respondent, their two children and, if the Respondent is successful, Joseph.

[45] Assuming finances are not an issue, I believe that if given the opportunity the Respondent would be able to meet the physical needs of the child. I have no independent means of assessing Mr. C.'s ability to assist in the care of the parties' son. Indeed the Court knows very little about him.

[46] The Respondent may receive some additional family support from her mother and her mother's partner and possibly also from her brother and his common-law partner. Again, it is impossible to say just how much assistance she can expect from them. Her mother and her partner do not live in the same community as the Respondent. When the Respondent lived in Halifax the only physical contact she had with her mother over the past four years was visits of approximately one week each year. It appears the Respondent depended more on the Applicant and his parents for family support.

[47] The Respondent indicated a willingness to facilitate access between Joseph and his father. I believe that once an order is in place the Respondent would honour the terms of that order.

[48] Should Joseph remain living with the Applicant, I have concluded that the Applicant is financially able to support his son and he too is able to meet the physical needs of his son.

[49] The Applicant has the assistance of his parents and the past has shown that he can depend on that assistance if the need arises.

[50] Since last April the Applicant has demonstrated an ability to access community resources to assist him in the care of his son, specifically, daycare.

[51] As busy as the Applicant's week is with work and a young child to care for, he expressed an eagerness to continue with that responsibility and there is no indication that he has faltered in the care of his son since the parties' separation.

[52] In addition to describing the Applicant as a "good father"the Respondent said that she did not have any issue with the care given to Joseph by the Applicant's parents when he is with them.

[53] If Joseph remains in the care of his father it is expected that he will spend at least four days a week in daycare. He is also likely to spend one overnight and one day in the care of his paternal grandparents. As of September 2014 he will likely attend daycare prior to school in the morning and possibly also after school before he is picked up by his father. If he was in the care of his mother, his mother would be available to care for him along with her other children throughout the day.

[54] If Joseph was in the primary care of the Applicant, the only time that he would be able to spend with his siblings would be when he visits his mother. Obviously if he was living primarily with the Respondent he would spend time with his siblings each day other than when he was visiting his father. It would certainly be preferable for Joseph to be able to establish and maintain a relationship with his siblings and that would be more difficult to achieve if he lived primarily with his father.

[55] During the Applicant's cross-examination it was disclosed that until very recently his driver's license had been suspended for a period of three years as a result of a second conviction for driving while under the influence of alcohol. The issue of possible alcohol abuse was not pursued any further and it was not mentioned at all in either of the Respondent's affidavits. I was left with the impression that it was not an issue as far as the Respondent was concerned.

[56] If Joseph was required to move from Nova Scotia to Alberta that, no doubt, would cause him some disruption. He's lived all of his life in Nova Scotia. Before his mother left for Alberta approximately nine months ago, he was in the care of both of his parents and since then he has been in the care of his father with the support of his father's parents. The Court can only speculate on just how unsettling a move to Alberta would be to this child but one could reasonably assume it will require some adjustment on his part. If he was to live in Alberta Joseph would obviously have much less contact with his father than is currently the case and similarly very little contact with his paternal grandparents. I have to believe that he has a strong attachment to all of them and to be separated from them would likely be upsetting to him.

[57] I do not have much evidence of how close an attachment Joseph may have with other family members. The Applicant has a sister in Nova Scotia and Joseph spends time with her. The Applicant also has a grandfather living near him. There is evidence that his grandfather sees Joseph quite often. Being separated from these family members would also require adjustment on Joseph's part.

[58] As for the Respondent's family in Nova Scotia, her father, grandparents, sister and aunt all live in the province and all presumably have had some kind of relationship with Joseph but whatever relationship they have was not emphasized by the Respondent. She did, however, indicate that the Applicant continues to have a relationship with her grandparents (Exhibit 13, paragraph 8).

[59] If Joseph relocated to Alberta he would be in the care of his mother. He would also be living in a home with Mr. C. who he has only met briefly (in April 2013) and who is not known by the Applicant. He would be sharing his mother's attention with two new siblings. His maternal grandmother lives in Leduc and although Joseph is familiar with her his only contact with her has been over the phone and brief yearly visits.

[60] Neither party raised religion or cultural considerations as factors to be considered. Also, there is no evidence of any family violence, abuse or intimidation.

[61] After returning to Alberta in April of 2013 the Respondent made no real effort to return to Nova Scotia to see Joseph. I accept that in May and perhaps early June as well as in October and November her pregnancy prevented her from travelling. However by her own admission there was no medical reason why she could not have returned to Nova Scotia between June and September to visit her son. She claims that she did not do so because the Applicant indicated that he would not give her unfettered access to Joseph. Before April 20, 2013 the Respondent had made up her mind that she was going to return to Alberta. When she left she did so without her son. She made no effort to take her son with her. To my knowledge she made no attempt to file an application with this or any other Court to obtain permission to take Joseph to Alberta or to at least obtain access. She was anxious to get back to Alberta and that is what she chose to do. She was not forced to leave Nova Scotia and for that matter she was not forced to leave the home of the Applicant. To the contrary he wanted her to stay. Whatever discomfort she may have felt from the comments of the Applicant's parents (if there were any such comments) one would think that her love for her son would have trumped her desire to rush back to Alberta. It appears as if the Respondent chose to pursue a relationship with Mr. C. over maintaining her relationship with her son.

[62] It is a concern to me that the Respondent would chose to leave her son in order to be with a man that she barely knew. I note too that when she left Nova Scotia for the final time on April 23, 2013 she did so knowing that her son's fourth birthday was just two weeks away.

[63] Access will be problematic regardless of which of the two parties has primary care. While both parties appear to have the financial means to support their son neither can be said to have a great deal of excess funds to pay for air fair between Nova Scotia and Alberta several times a year. The Applicant has an income between $50,000.00 and $55,000.00 per annum. Mr. C. has an income of approximately $120,000.00 per annum but even without Joseph has a family of four to support.

[64] Because of Joseph's age he will have to be accompanied by an adult when flying between the two provinces. That will make his flights that much more expensive. While the Court can issue an order permitting access numerous times

per year finances will place limits on just how much time he spends with both of his parents.

CONCLUSION

[65] Ultimately the Court's decision must be based on the best interests of the parties' son. That must be the Court's focus. The wishes of the parties and other family members, although important, must take a back seat to what the Court determines is best for Joseph.

[66] Both parties are able to provide the necessary care and supervision for their son. I believe that he would feel comfortable with either of his parents and will miss the parent with whom he does not reside. If placed in the care of his mother she would provide full time care for him until he goes to school in the Fall and he would have the opportunity to build a relationship with his siblings which opportunity would not exist to the same degree if he lived with his father.

[67] A transition to his mother's care would mean separating him from his father. I believe that he would miss his father a great deal and the separation from the Applicant would require Joseph to make significant adjustments. I believe Joseph would also suffer a significant emotional loss by being separated from his paternal grandparents as he has had a relationship with them from the time he was born.

[68] If Joseph remains in the primary care of his father little adjustment would be required on his part. By now I assume that he has adjusted to the absence of his mother. It would also require no significant adjustment on his part to remain separated from his maternal grandmother and her partner. In terms of his home and surroundings, he is used to them and there is no suggestion that they are in any way deficient.

[69] Although Joseph is not yet five years of age I presume that he has created some friendships while in daycare and the Applicant testified that many of the children that attend daycare with him will also be going to school with him in the Fall.

[70] These factors and many others have to be considered but some considerations carry more weight than others. As Bateman J.A. said in *Burgoyne*

(supra), determining what is in Joseph's best interests is not simply an exercise of scoring each parent based on a list of factors. The Court must weigh all considerations and decide which of the parties' plans is best for the child. Both of their plans have advantages and disadvantages.

[71] I have concluded that it would be in Joseph's best interests for him to remain in the primary care of his father. By staying where he is no significant adjustment will be required on his part. While I assume he will miss his mother she has been living in Alberta since last April. Whatever adjustment was required of Joseph by her absence, he has gone through that. It would not be in his best interest to required him to go through a similar adjustment a second time unless there were very good reasons for doing so.

[72] By remaining in his father's care Joseph will be able to maintain a relationship with all family members and friends who are important to him with the only exception being his mother and possibly his maternal grandmother. If I was to grant primary care to the Respondent, I would be risking severing his relationship with all those people only so that he could be with his mother and to live with other people who he does not know in a community that would be new to him.

[73] As stated earlier, the Respondent appears to have chosen a relationship with a man that she barely knew over her son. The Respondent was prepared to leave Joseph with the Applicant in order to be with Mr. C.. She left it to the Applicant to make an application to the Court. Her Response wasn't filed until November 2013 - the month the original hearing was scheduled to take place and seven months after she relocated to Alberta. She made no effort to pursue access last summer.

[74] Before leaving for Alberta last April 5 the Respondent expressed no complaint regarding her relationship with the Applicant yet, after spending two weeks in Alberta, she ended their relationship after five years of cohabitation.

[75] Her behaviour causes me to be concerned about the longevity of her relationship with Mr. C. and the level of stability Joseph would have if he was to relocate to Alberta.

[76] Her rather impulsive decision to leave the Applicant and Joseph to move to Alberta causes me to question the nature of her relationship with Joseph, whether she has bonded with him and where he stands in her list of priorities. I have no reason to question the Applicant's emotional attachment to his son.

[77] I appreciate that Monday through Friday Joseph has a rather busy schedule. He has to rise early in the morning to go to daycare and four of the five days he is at daycare. At the present time he doesn't get to spend very many hours with his father during weekdays but his schedule is not significantly different from many children whose parents work. There is no evidence that he is suffering in any way from this schedule.

[78] Since the parties separated the Applicant has risen to the occasion. While he may not have been the primary parent before April 2013, he is now. He has made the necessary adjustments to care for Joseph as a single parent. He has done so with the help of his parents. Their support is not speculative; it is real.

[79] In conclusion, I find that the Applicant's plan offers Joseph more emotional stability and far less disruption than does the plan of the Respondent and it is in Joseph's best interests to grant the Applicant's application.

ORDER

[80] I therefore order as follows:

1. The parties will share joint custody of Joseph. This will require both of them to consult on all major issues that affect Joseph's life including decisions that may affect his medical care and education. They will share any information that they receive that may impact on any such decisions. The Applicant will provide to the Respondent copies of Joseph's school progress reports once he begins school in September or make arrangements so that the Respondent can receive such information directly from his school. Both parties will be entitled to communicate directly with Joseph's doctors, dentist, teachers, daycare providers, etc.. They will try to agree on major decisions that have to be made but failing an agreement the Applicant will have the final decision making authority. When he is put in a position where he has to make that final decision, he will consider in good faith

the Respondent's input. If he abuses this "final decision making authority", and I have no reason to believe he will, he may run the risk of losing it in the future.

2. Joseph will remain in the primary care of the Applicant.

3. The Respondent will have parenting time with Joseph as follows:

I. In even numbered years, two consecutive weeks each December (including travel days) which two weeks may include Christmas Eve and Christmas Day. In odd numbered years Joseph will spend Christmas with the Applicant;

II. Three consecutive weeks each summer including travel days (for the purpose of this paragraph summer is defined as the months of July and August);

III. Nine consecutive days each March (including travel days). Once Joseph is in school these days will coincide with whatever Spring Break Joseph has from school and will include the weekend prior to the Spring Break as well as the weekend following the Spring Break provided Joseph is returned to the Applicant in time to recommence school on the Monday following the Spring Break;

IV. When the Respondent is able to visit Nova Scotia she may have additional reasonable parenting time with Joseph provided reasonable advance notice is given to the Applicant and provided too such parenting time does not interrupt Joseph's attendance at school;

V. Reasonable and liberal electronic access including phone access, video conferencing, e-mail and so on; and

VI. Such other parenting time as the parties may be able to agree to from time to time.

The parenting time outlined above is subject to the financial resources of the Respondent. If she is unable to exercise any of the parenting time she is to advise the Applicant.

4. The parties shall advise each other immediately of any changes to their address or contact information such as phone numbers, e-mail addresses and the like.

5. The parties may travel with Joseph outside their home province. If either should do so, they are to advise the other party in advance of their travel plans and will provide the other party at the same time with a brief outline of their planned itinerary, where they intend to take Joseph and how they may be contacted in the event of an emergency. They are also to advise the other party of when they intend to return to their residence at the conclusion of their trip.

6. No child maintenance will be paid by the Applicant to the Respondent and given that the Respondent has no income of her own and given that the Applicant has made no application for child maintenance, no child maintenance will be paid at this time by the Respondent to the Applicant.

7. Considering the modest level of the Applicant's income and the fact that he is not going to be receiving any financial assistance with the support of Joseph from the Respondent, the Respondent will be solely responsible for any access costs that she incurs.

[81] I direct that counsel for the Applicant prepare the order but that counsel for the Respondent be given the opportunity to review that order before it is to be issued by the Court.

J.