**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**

**Citation:** *Kennedy v. McNiven*, 2014 NSSC 162

**Date:** 2014-05-13
**Docket:** No. SFHMCA-23192
**Registry:** Halifax

**Between:**

Blake F. Kennedy

Applicant

v.

C. Michelle McNiven

Respondent

**Judge:** The Honourable Justice Carole A. Beaton

**Heard:** January 27 & February 27, 2014, in Halifax, Nova Scotia

**Written Decision:** May 13, 2014

**Counsel:** Kim Johnson, for the Applicant
C. Michelle McNiven, self-represented

[3]

**By the Court:**

**Background:**

[1] Mr. Kennedy ("the Applicant") filed a Notice of Variation Application on February 6, 2013 pursuant to section 37 of the *Maintenance and Custody Act, RSNS 1989, c. 160*, seeking to modify the current parenting arrangement found in the joint custody order of September 8, 2003. Specifically, the Applicant requested that primary residence designated for the parties' fourteen year old son D. be switched from the home of the Respondent, as is presently required, to the home of the Applicant. The Applicant also sought payment of child support by the Respondent.

[2] Ms. McNiven ("the Respondent") filed a Response to Variation Application on April 10, 2013 opposing the application and seeking to reduce the Applicant's parenting time, seeking to adjust child support retroactive to January 2012, seeking retroactive special expenses, seeking medical coverage for the child by the Applicant, and removal of the mobility restriction clause in the current order. During the hearing the Respondent also gave oral notice she wished to modify the current summer-time parenting schedule.

[3] The matter came before me for hearing on January 27th and February 27th, 2014. A Child's Preferences Assessment (Exhibit 2) had previously been ordered by MacDonald, J. of this Court in July 2013 and was filed in August 2013. Prepared by social worker M. Craig, the assessment was entered into evidence at the hearing and without cross-examination upon with the prior consent of both parties. The Assessment revealed that D. "…feels he would be happier living with his father and attending school in Mount Uniacke." Also before the Court by consent and without cross examination was an October 2013 letter from Ms. McAvoy, the community outreach worker at D.'s school identifying D. as being "settled" in the school but having discussed with the worker his preference regarding his primary residence.

[4] The current Order governing the parties is a Consent Order of September 8, 2003 providing for the parties' joint custody of D., with primary care to the

Respondent. The Applicant was to have parenting time with the child every second weekend and part of one day each week. The Order also provided a detailed arrangement regarding the sharing of holidays and summer access. The Order required the Applicant to pay child support pursuant to the provincial *Child Maintenance Guidelines*, NS Reg 53/89 based on his then salary, along with a fixed monthly contribution to "additional child expenses" and a fixed monthly contribution to recreational activities and/or childcare. The parties agreed to share the cost of prescription medications for the child on a pro rata basis, contingent on a comparison of their respective incomes. At the time the Order was made both parties lived in Lower Sackville. Since then the Applicant has re-partnered and now resides in Mount Uniacke; the Respondent has married and now resides in Dartmouth.

[5] The evidence of both parties was that they have, in the almost eleven years since the Order was made, implemented various adjustments to the parenting schedule, such that their son continues to spend alternate weekends with each parent, albeit at different times than set out in the order, and in addition the child now spends two weekday overnights with the Applicant. The evidence of both parties was that the parenting schedule is such that their son now spends approximately an equal amount of time in the home of each party and has done so for several years.

[6] With the exception of only a few questions put to each party regarding financial matters and/or the mobility issue, the majority of the evidence in the hearing related to the parenting arrangement for D. as proposed by the Applicant. The Applicant's position is that his son has been asking for several years to relocate to the Applicant's residence. The Applicant feels his son is unhappy in his present school placement and is at an age (fourteen) where he could benefit from spending more time with his father.

[7] The Respondent's position is that while D. had some social difficulties adjusting to his new junior high in the 2012-2013 academic year, those have been resolved and he now enjoys his school. The Applicant is very concerned that a change in D.'s primary residence will have a negative impact on D.'s moral development and will not provide the level of structure, discipline and supervision that D. requires during his teenage years. The Respondent also asserts the Applicant's ongoing failure to engage in meaningful communication with her

concerning D. will become more problematic should the Court permit the change in primary residence to occur.

**Issue**s:

[8] The filings and evidence raised the following issues:

(1) Has there been a change in circumstances?

(2) What parenting arrangement is in the child's best interests regarding primary residence, parenting time for each parent and block summer access?

(3) What are the appropriate financial arrangements for the child regarding prospective and retroactive support and special expenses?

(4) Should the mobility clause in the current Order be removed?

[9] Each party called a number of witnesses in the hearing. A summary of the evidence of each witness follows. While each witness included in their evidence discussion of conversations they have had with D., the child did not testify. To the extent that witnesses purported to give hearsay evidence about such conversations I did not receive the evidence for its truthfulness, but only for the limited purpose of understanding that D. was making representations to people other than the Child's Wishes Assessment author at various times, both before and after the preparation of the Assessment.

**Evidence on Behalf of the Applicant**

<u>The Applicant</u>

[10] The Applicant lives in Mt. Uniacke and works each day in Datmouth, not far from the Respondent's home. He has D. in his care roughly seven out of every fourteen days. D. has been asking him repeatedly over several years to change the parenting arrangement by reversing the schedule so that D. would live with him and spend time with the Respondent every second weekend and at such other times during the week that D. and his mother might arrange. D. has threatened more

than once that he would "run away" to the Applicant's home. Both parents and their respective partners met approximately three and a half years ago regarding D.'s request to move, at which time the Respondent and her husband were of the view that D. was not making that same request to them and the matter should be left to the end of that school year, at which time they then refused to entertain the idea.

[11] The Applicant reported D. and the Applicant's partner of five years enjoy a very positive relationship. The family spends every summer at the same campground with family and friends, where D. is always supervised. The Applicant acknowledged the consumption of alcohol while camping but denied otherwise drinking regularly or to excess, or that his son would have had many opportunities to see him intoxicated, as asserted by the Respondent.

[12] The Applicant testified that whenever D. makes requests of him that affect the Respondent's parenting time, he instructs D. to check with the Respondent first, and he denied ever having discussed a past disagreement on that topic in front of D. The Applicant denied the Respondent's suggestion that he has told D. he can do whatever he wants to do; rather the Applicant maintained he has instructed D. he must live by the rules in both parents' homes. The Applicant reported that sometimes D. calls him when upset about the rules at the Applicant's home and he explains why D. must abide by them. The Applicant denied the Respondent's suggestion he tells D. not to listen to his mother, noting that would only serve to get D. "in trouble".

[13] Contrary to the evidence given by the Respondent and her husband, the Applicant maintained that D. is always supervised at his home and is not permitted to be alone around vehicles or when working on or using his dirt bike or other machinery. He denied that D. was unsupervised when driving a vehicle in the driveway on an occasion several years ago when the Respondent and her husband arrived at the home.

[14] The Applicant testified he has assured D. that if the parenting arrangement changes he will ensure that D. continues to attend his Thursday evening Dartmouth church youth group because it is important to D.

[15] The Applicant asserted that he does not receive information from the Respondent about D.'s health care; the only thing he receives are report cards. The Applicant was challenged that the previous order provided he could have direct

contact with health and education providers but has not done so. The Applicant countered he does not learn about D.'s appointments until after they occur.

[16] In response to criticism from the Respondent, the Applicant maintained he does not force D. to do anything D. does not want to do. He pointed out that if D. refused to do something important such as, for example, refusing to go to school, then the Applicant would ground him and make the consequences very clear as to what D. might lose because of that behaviour. The Applicant stated that because D. is fourteen years old, he is unable to physically force D. to do anything, but there are consequences for misbehaviour.

Robert Carey

[17] Mr. Carey, a close friend of the Applicant, has known D. since birth, and with his sons he sees D. regularly at the Applicant's home, his home and at the campground. He has had many opportunities to observe D. under the supervision of the Applicant, whom he described as a positive role model who is diligent and consistent in parenting and disciplining D.; the Applicant has taught D. the importance of working for things such as when D. earned money to fund the purchase of a dirt bike. Mr. Carey reported that D. has confided in him about not wanting to attend his present school and has been discussing for about five years a desire to live with the Applicant. Mr. Carey described D. as "a very mature kid".

[18] Mr. Carey was adamant that the Applicant is not "an alcoholic" as asserted by the Respondent; he has observed the Applicant drink socially but never to the point where it impaired the Applicant's judgement or parenting skills and he has never hesitated to permit his own children to be overnight at the Applicant's home.

[19] On cross-examination Mr. Carey was challenged that as friends he and the Applicant have the same morals to which Mr. Carey replied that he parents the way he chooses. He reported he has heard the Applicant defend the Respondent to their son or correct D. "many times". He denied ever hearing the Applicant call the Respondent names. He was asked whether D. was consistent in his views, and he responded that D. was like any fourteen year old, who changes their mind every day.

Jamie Hubbard

[20] Mr. Hubbard is a friend and co-worker of the Applicant, working with and living in the Applicant's home weekdays for approximately the last year and a half. Mr. Hubbard sees D. interact with the family every Monday and Wednesday night and described that the Applicant and D. get along well. He has observed D. to be a "responsible, good young man" and "his parents should be very proud of him". He described D. as listening very well, although the Applicant talks to him when he does not listen and if D. does not correct his behaviour then the Applicant will take things away from him. He described that D. is very fond of and spends a lot of time outdoors with his father. Mr. Hubbard reported D. interacts well with the Applicant's partner and her daughter and they engage in many family activities together. D. has his own bedroom and has various chores to do in the home. The Applicant spends time with D. doing activities and teaching him to be responsible. Mr. Hubbard reported witnessing the Applicant having "the occasional drink", but never "drunk".

[21] D. has reported to Mr. Hubbard that he does not like his school and does not feel safe there; Mr. Hubbard has encouraged him to "keep his head up" and stay in school and "everything will work out." Mr. Hubbard was unable to explain why D. doesn't feel safe at school and acknowledged D. does love school sports. When D. expressed a desire to run away in the last few months Mr. Hubbard told him it was not safe to do so and then reported the conversation to the Applicant. He reported D. as "always saying he can't wait to move to his Dad's".

[22] On cross-examination Mr. Hubbard confirmed he picks D. up at school on the Applicant's parenting days when the Applicant has to work late. He said he was unable to comment on whether he thought the Applicant should let the Respondent know when someone else was going to transport D. Mr. Hubbard was asked whether he would have a problem with a stranger picking up his own children at school if he didn't know about it and he replied he would not. This led me to conclude Mr. Hubbard was unwilling to give an answer he perceived as unflattering to the Applicant, as common sense would dictate that no parent would want their child transported by a stranger, unbeknownst to the parent.

Lisa Jane Turnbull

[23] Ms. Turnbull, the Applicant's partner of five years, resides with the Applicant and her daughter. She described that her daughter and D. enjoy outdoor

activities and assisting with household chores, and they do argue on occasion like any siblings, but overall get along well. Ms. Turnbull described having "a great relationship" with D., who has his own room, clothing and toys in the home. She reported the Applicant is responsible for disciplining D.

[24] Ms. Turnbull described she and the Applicant teach their children that education is important and that they should to try to do their best at all tasks and to respect others; they spend time with the children (four-wheeling, camping, watching movies) and instill life values and skills. She described D. as being active and enjoying the outdoors, a "mature young man" who has a lot in common with and wants to spend more time with his father.

[25] Ms. Turnbull testified D. "always says" he "can't wait" to live with the family and attend school in Mount Uniacke. She described that D. has spoken to her and the Applicant about not wanting to attend his current school, and they encourage him to stay focused on his grades because school is very important. She reported having heard the Applicant tell D. not to argue with the Respondent when D. complains about her rules. She had heard D. say unpleasant things about his mother on many occasions and the Applicant will not permit those discussions and does not allow D. to disrespect his mother.

[26] On cross-examination Ms. Turnbull indicated that she is unaware that D. might be saying different things to others than he says to her about his school and his friends. Ms. Turnbull was asked whether it was valuable or relevant to teach D. shooting and four-wheeling to which she replied that any life skills D. would learn could be of benefit to him. Ms. Turnbull was asked whether she thought life values would include D. seeing his father hung over or drinking to which she replied she didn't believe D. had seen such things.

**Evidence on Behalf of the Respondent**

Carman Crockett

[27] Pastor Crocket has known the family for four years. He described D. as pleasant and well-mannered in all their interactions, both at church and, on three other occasions, in the Respondent's home. On cross-examination Pastor Crockett

confirmed he does not know the Applicant and is unable to compare the households of the Applicant and the Respondent.

Jonathan Curtz

[28] Associate Pastor Curtz has known the Respondent and her family for six years and has had opportunities to observe their interactions as a family unit; he described D. as "respectful and very polite" and a "well-adjusted young man".

[29] On cross-examination the witness discussed in some detail a conversation he had with D. in the Respondent's home approximately eighteen months ago regarding the parenting arrangement. The evidence persuades me the conversation was intended by the witness to subtly influence D.'s views on the matter.

[30] Pastor Curtz also agreed that if both parents have made an equal contribution by way of shared parenting of D. then both would have contributed to D. being a "fine young man".

Kurt Arnold

[31] Mr. Arnold, a close friend of the Respondent and her family for six years, socializes with them at least five to six times a month. He has never heard D. complain about living with the Respondent. He described D. as a "fine young man" with a willingness to work and learn and in the home of the Respondent he has witnessed "loving and firm discipline providing a healthy family environment". He would never hesitate to have the Respondent and her family take care of his children.

[32] On cross examination he reported he has supervised D. approximately once every two months for a half day to a day in duration during activities with his own sons. D. speaks positively to him about activities D. shares with the Applicant. He has on occasion witnessed D. return early to the Respondent's home from the Applicant's and described for the first fifteen minutes to an hour D. would not listen and be disrespectful, showing a bit of attitude and saying no. He agreed it was possible there were occasions when D. had returned early from the Applicant's or returned from somewhere else and was simply giving the Respondent "attitude".

Gail Parks

[33] Ms. Parks has known the Respondent over sixteen years and their families spend time together at least every second weekend. She understood that D. is enjoying school and the activities there. She reported the Respondent and her husband provide a great family environment and have raised "two great young teens". She reported that on many occasions D. had told her about the excessive consumption of alcohol at the Applicant's home and when camping. She reported D. previously complained to her about wanting his father to spend more time doing things with him and not drinking.

[34] On cross examination Ms. Parks described she is often in the Respondent's home for hours at a time; sometimes D. is there and sometimes he is not and sometimes D. visits at her home. She reported that D. was very proud when he made the school football team. She agreed she had never witnessed the Applicant's parenting style nor had any interaction with him for many years. She agreed that if D. is a "great young man" then the Applicant probably had something to do with that.

[35] On cross-examination Ms. Parks also agreed it was possible D. sometimes provides information to her to ensure she passes it along to his mother. She reported that in her conversations with D. he has not told her about any difficulties he has had in school. She agreed that if D told his Community Outreach Worker something different, that would be another example of D. saying something to her in hopes it would be passed along to his mother and it would be difficult to know which version was the truth because she believed D. could be untruthful.

[36] Ms. Parks' evidence made it clear that her criticisms about the Applicant's parenting style were very dated, relating to incidents that happened prior to the making of the last order; furthermore, many of the incidents she spoke of were not based on her personal knowledge.

Paul Melville

[37] Mr. Melville is the husband of the Respondent and they have lived as a family with her two children for nine years. Both parties have the same employer and arrange their work schedules around the children so one or both of them can be home for the children at all times; both are non-drinkers and they spend family time engaging in activities, sports and church attendance.

[38] Like the Respondent, Mr. Melville worries that if D. lives with the Applicant he will not be properly supervised and will lose his connection with their family, his youth group and his church family. He worries the Respondent will not know anything that is going on in D.'s life owing to the Applicant's present failure to communicate sufficiently with the Respondent. He worries about separating D. from his sister because they have always lived in the same home.

[39] Mr. Melville expressed concern over D. returning from the Applicant's home in the past with knowledge of parties and drinking. On cross-examination he was not prepared to agree that D. could have learned about hangovers from television or at school. He believed such information would, given the nature of it, have to have been acquired at the Applicant's home. With respect, that assumption is purely speculative.

[40] Like other witnesses, Mr. Melville reported D. had spoken more than once in his presence about changing the schedule to spend more time with the Applicant and at least six months ago D. indicated he wanted to live with his father. Unlike the Respondent herself, he agreed the current schedule, which allows D. to be half of the time with the Applicant, works well. However, he maintained that if the schedule was reversed the Respondent would not see D. on weekdays because (a) it would be unfair to D. to get him up at 4:00 a.m. to return him from Dartmouth to Mt. Uniacke in time for school on weekdays, and (b) the lone family vehicle might be needed for another purpose, including work early in the morning or in the evenings, which would prevent picking up D. in Mount Uniacke or returning him from Dartmouth the next morning in time for school.

[41] Mr. Melville agreed he has never observed the parenting of D. in the Applicant's home, but he had seen D. moving the car in the Applicant's driveway without supervision at age ten or eleven and he was certain D. was the only person outside at the time.

The Respondent

[42] The Respondent testified that although the Applicant has texted her many times over the last couple of years asking if D. could live with him, she feels it is not the best choice for D., who is influenced by other people who do not understand his needs or what it is like to raise him. The Respondent testified D. needs the structure, rules and consequences which she teaches. She never refuses D.'s requests to spend additional time with his father on her parenting time unless

she has specific plans or unless D. has been grounded or not done his assigned chores. She related that D. tried to "run away" to his father's once in the past to avoid doing his chores and when she sent the Applicant a message about it she received only a rude reply.

[43] The Respondent reported that since the court process began, D. has made "rude and hateful" comments to the Respondent and her husband. As a result, she had a long talk with D. and learned there had been discussions between D. and the Applicant about this litigation, and she told D. there was to be "no more talk about court in our home"; after that D. began acting better and was more respectful and cheerful.

[44] She reported D. does well in school (which contradicted her own evidence on this same point made later relating to the issue of reducing the Applicant's parenting time). The Respondent stated Ms. McAvoy's October 2013 report said D. was communicating he wanted to move to Dad's, however she felt D. had "changed a lot" since October 2013 and "done a 360" at school. The Respondent also disagrees with the Child's Wishes Assessment put before the Court because in sharp contrast to the various observations made in it by the assessor, D. has told her the opposite of many of the items recorded by the assessor.

[45] On cross-examination the Respondent stated D. "loves to stretch the truth" and make things "sound great to suit his purpose". Despite this she believes everything he says about the Applicant's drinking, about which she has no direct knowledge. She was asked if this meant that what D. tells others about wanting to be at the Applicant's home was untrue to which she replied "I didn't say that". The Respondent was then asked if she believed D. when he said negative things about the Applicant to which she replied "why wouldn't I?" The flaw in the Respondent's circular reasoning is obvious.

[46] The Respondent agreed with the Applicant's evidence that there had been a meeting at the Applicant's home several years ago, however she maintained the purpose of it was to talk about the Applicant wanting more time with D. and D. not getting along with the Applicant's partner. She described feeling ambushed because in the end the meeting was all about the Applicant wanting D. to live with him when she thought the existing schedule of every second weekend and two nights during the week was fair.

[47] The Respondent believes D. does not have rules or supervision while at the campground with his father and D. has discussed with her many times the Applicant drinking, partying and being hung-over. She understands why D. would want to live with his father because there are four-wheelers, his dirt bike, no rules and he is left home alone with freedom to do as he pleases. She is concerned that the Applicant has told her a number of times he does not make D. do anything D. doesn't want to do.

[48] D. has a firearms permit which the Applicant took him to get against her wishes. Earlier this year the Applicant texted to say he was taking D. out of school early for an "appointment", and later she learned it was to go shooting.

[49] On the Applicant's parenting days, D. has left her home many times during rush hour to walk to his father's workplace approximately four kilometers away. She does not feel this is safe and has asked the Applicant to make the five minute drive, but he ignores her. She queried how she can be reassured by the Applicant's claim D. would be transported from Mount Uniacke to Dartmouth for Thursday night church youth group or special events if the Applicant cannot manage the present transportation requirements.

[50] Currently on weekdays D. travels with his father at the end of the Applicant's workday and is returned the next morning when the Applicant is en route to work. Like her husband, the Respondent is concerned about having to return D. to Mount Uniacke weekday mornings as it will mean having to get him up at 4:00 a.m. Presently the Applicant returns D. to her home between 7:00 to 7:30 a.m. on his way to work. The Respondent reported she does not always have the lone family vehicle available to her if she needed to pick up D. in Mount Uniacke at the end of the workday and then return him early the next morning.

[51] The Respondent agreed none of her witnesses described D. as the sometimes "hateful", "cranky" or "rude" boy she has seen, asserting this is because they do not live with him. She was unable to comment on why none of the Applicant's witnesses said they see any bad behaviour from D. In her view, because D. is a "cranky kid" when he comes home from the Applicant's in the past few years, "something is missing" at the Applicant's home.

[52] She agreed that she and the Applicant have had roughly equal parenting time with D. over the last few years, and she has known for over a year and a half that D. wants to live with the Applicant; she asserted D. has been asked to change

under a lot of influence and coercion. The Respondent described there are "toys and fun" at the Applicant's home but D. still needs to learn morals and values and emphasize education; he is who he is because *she* taught him those. Her view is that it would not be good for D. to live with the Applicant due to the Applicant's lifestyle and the lack of rules and discipline in that home, whereas she can provide discipline, consistent guidelines, reassurance and stability to D.

[53] The Respondent seeks to reduce the Applicant's weekday time by varying the Order to allow for "reasonable access" for the Applicant because D. returns from the Applicant's home on weekdays too tired and with his homework not done. It is never clear to her who will pick up D. and when, and "sometimes" on return from the Applicant's D. is late is for school although she could not recall specific dates.

[54] Overall, the evidence of all witnesses consistently and repeatedly established that:

(i) D. has consistently been making his wishes about changing the current parenting arrangement known to a number of people, who play different roles in his life, including both parents, for several years. Each witnesses' understanding of D.'s wishes corroborates the findings of the independent Assessment.

(ii) None of the witnesses has substantive knowledge of the household or parenting style of the opposite party.

(iii) D. is well regarded by others and well brought up and both parents have had a meaningful role to play in that regard.

[55] The evidence supported that the Respondent's parenting style provides structure, guidance and rules for, along with having expectations, of D. However, this was not in any way challenged or contested by the Applicant; rather, he bases his application on his understanding that the child wishes to spend more time with him. This is not to suggest that the Applicant too does not provide properly for D., although I can be satisfied he does so with a different approach or style.

[56] The amount of time D. spends in each home leads to the conclusion that while both parents have differing parenting styles they have been actively involved in raising him. While the previous order provides for joint custody, I have

concluded that most of the time each party parents D. during their respective time to the exclusion of any real or meaningful consultation with the other parent

[57] The Respondent's concrete or specific claim about a lack of supervision of D. by the Applicant goes back several years, to the incident when she and her husband arrived at the Applicant's home and observed D. driving a vehicle in the driveway. The Applicant did not deny the event occurred but maintained he was watching and supervising D. from his position on the step. While the Respondent and her husband may not have seen the Applicant that day as they testified to, I am satisfied he was supervising D. at that time. The wisdom of permitting the child to drive at age eleven is certainly questionable, but not of such gravity that it presently impacts the question of the child's best interests. Similarly, the Respondent is entitled to disapprove of the Applicant's drinking habits but there is no evidence to persuade me that alcohol consumption by the Applicant, which he acknowledges, is excessive or affects his parenting of or the best interests of D. Just as it would be naive of the Court to expect that there would never be excessive consumption of alcohol at a campground, so too it is, with respect, naive of the Respondent to think that all of her son's information and/or knowledge about excessive alcohol consumption could come only from one source- his father.

[58] The Respondent stressed that regardless of the outcome of this matter she would like to see greatly improved communication between her and the Applicant and not have it conducted through D. She cited a recent example of the parties having committed in the fall of 2013 to a schedule for summer 2014, and yet more recent texts have made it obvious that the Applicant did not keep track of and/or forgot those dates, and he is now proposing a different schedule. She expressed her frustration with the routine non-responsive, monosyllabic answers she gets from the Applicant regarding matters concerning their son and/or their parenting that require more information from him. I accept the communication problems described by the Respondent exist.

[59] Communication between the parties is sometimes negative, and it is not substantive or frequent. I am satisfied on the evidence the Respondent has been much more diligent in her efforts at effective communication. The Applicant's approach, particularly now that D. is of an age where they can talk/text between themselves, seems to have been to largely ignore or dismiss the Respondent. The Applicant is going to have to make a much greater effort in this regard. D. is of an age where he can participate much more in the day-to-day arrangements made for

him, however he is not in charge of the communication *between* his parents *about* him, which is a separate matter.

[60] Also regarding communication, the Applicant raised his concern that he does not get information from the Respondent as generated by third party providers. I note that clause 3 of the current Order already provides for this:

> BK and MM shall discuss any major development decision relating to the child's education, medical welfare and general wellbeing. Blake Kennedy shall be entitled to contact directly any medical or educational professional to obtain information relating to the child.

To give meaning or effect to that clause, *each parent* needs to tell the other when events (e.g. report cards; medical appointments) are going to occur. This has not been happening according to the evidence, but must start immediately in the best interests of the child.

**Issue No. 1 – Has there been a chance in circumstances?**

[61] The *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 provides for variation of orders upon establishing a change in circumstances:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[62] What does it mean to speak of a material change in circumstances? Guidance is found in any number of decisions, including the Supreme Court of Canada's decision in *Gordon v. Goertz*, (1996) S.C.J. No. 52. A helpful summary of the instructions therein is found in *Legace v. Mannett*, 2012 NSSC 320 wherein Jollimore, J. stated:

> (5) In an application to vary a parenting order, I'm governed by *Gordon v. Goertz*., 1996 CanLII 191 (S.C.C). At paragraph 10 of the majority reasons in *Gordon v. Goertz*, then Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.

(6) At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:

(1) There must be a change in the condition, means, needs, or circumstances of the child or the ability of the parents to meet the child's needs;

(2) The change must materially affect the child; and

(3) The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

(7) Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of the child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests and must be changed to do so. Identifying the change which has occurred informs how the new order should be formulated to reflect the child's best interests in the new circumstances.

[63] The Applicant argues that the change in circumstances in this case is found in the modifications the parents have made to the parenting schedule since 2003. With respect, I cannot agree. The joint custody arrangement remains intact; the sharing of parenting time remains intact. What has changed is that the specifics of the weekday schedule, not the weekend schedule, have been modified over time to accommodate the parties and their son. That, in my view, does not reflect any significant or material change in circumstances so much as it does the kind of flexibility that the Court should reasonably expect the parties to the Order to be able to demonstrate over time.

[64] Nonetheless, the evidence does support the alternate argument advanced by the Applicant that there is a change in circumstances rooted in the maturation of the child since the making of the last Order in 2003 when D. was 3.5 years old. In *W.R.V. v S.L.V.*, 2007 NSSC 251 the Court determined the maturation of the child from age 10 to age 14 warranted an examination of whether the order should be varied. The Court had before it the evidence of a psychologist regarding the wishes of the child for a change in primary residence and the report of a counsellor retained by the Respondent (who feared coercion of the child) who concluded the wishes of the child should be dominant. The evidence supported that the child was "…a bright, intelligent young lady, who has shown maturity beyond her age"

(paragraph 12). In accepting that a period of less than four years of maturation could establish the requisite change in circumstances the MacAdam, J. noted:

> [19]…In similar circumstances, M-E. Wright, J. of the Saskatchewan Court of Queen's Bench, in *Wiegers v. Gray* (2007) S.J. N. 43… considered whether a young child's development from toddler to young girl amounted to a change in circumstances that would warrant a successful application for a change in access. After referencing Justice Vancise in *Talbot v. Henry* (1990), *supra*, at para. 16, she commented:
>
> > "…A material change has been described as a change of "such an extent that it directly affects both the short and the long-term best interests of the child": P. (B.) v. C. (C.) (1999), 90 A.C.W.S. (3d) 425 (N.B. Q.B.) at para. 17. Mere change alone is not sufficient."
>
> [20] She continued, at para. 20:
>
> > "I do not need social science literature, nor any expert opinion, to conclude that in five years, as Morgan has developed and matured from a toddler to a young girl, that there has been a change in her circumstances that may warrant a change in the way that her parents share the parenting of her. This is simply common sense. A baby needs different things from his or her parents, as does an adolescent, a teenager, or a young adult. To suggest that the maturing of a child does not constitute a change in the circumstances of that child belies rational explanation. I say this in the context that in this application, the petitioner is seeking increased parenting time -- not necessarily a change in the fundamental custody arrangement that has existed since Morgan was a baby. This common sense approach is supported by the jurisprudence…"
>
> [21] In respect to J.V., it is equally clear that the maturing of J.V. from age 10 to almost 14 is, in itself, such a change in circumstance as to warrant an examination as to whether the arrangements for her "day-to-day care, custody and control" are now appropriate.

[65] Permitting the wishes of a fourteen year old as expressed to an independent assessor to alter the parenting schedule to allow the child to spend more time with his father was also approved in *DiLiberatore v. Fabrizi*, 2005 NSSC 321, where Ferguson, A.C.J. was persuaded the child had not been unduly influenced by the father and despite a change meaning the child would be separated from his sister.

[66] I am satisfied on the evidence of every witness who testified on behalf of either party, and on the contents of the Assessment filed with the Court, that D. is

now of an age and level of maturity that is vastly different from his circumstances at the time the last order was made, which could not have been reasonably contemplated by the parties and the judge approving the parties' consent order in 2003. This supports a finding that there has been a material change in circumstances affecting the child since the making of the last order, over eleven years ago.

**Issue No. 2 – What parenting arrangement is in D.'s best interests?**

[67] The court is mandated pursuant to section 18(5) of the *Act* to give paramount consideration to the best interests of the child and in section 18(8) to give effect to the maximum contact principle within the context of those best interests. The determination of a child's best interests requires consideration of all relevant circumstances, including those enumerated in s. 18(6):

> (6) (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.

[68] The concept of "best interests" was discussed by the Supreme Court of Canada in *Young v. Young*, (1993) 4 S.C.R. 3. In *Tamlyn v. Wilcox*, 2010 NSSC 266, Dellapinna, J. referenced the *Young* (supra) case and said as follows:

> 37. In Young v. Young, (1993) 4 S.C.R.3 the Supreme Court elaborated on the best interests test. At paragraph 17, the Court stated:
>
> > "…the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance may not be useful… Like all legal tests, [the "best interests" test] is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do."

[69] *In Burgoyne v. Kenny*, 2009 NSCA 34, Bateman, J. repeated the commentary of Abella, J. in *MacGyver v. Richards*, (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), noting that in assessing best interests each case has to be decided on the evidence that is presented, and there is no matter of scoring each parent on a generic list of factors. Bateman, J. quoted (at para. 25 of her decision) from *McGyver* (supra):

> 27. Clearly, there is an inherent indeterminacy and elasticity to the "best interests" test 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.
>
> ...
>
> 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 judgement the accuracy of which may be unknowable until later events prove -or disprove- its wisdom.

[70] As noted earlier, there is no doubt the parties have differing parenting styles, examples of which could be found throughout the evidence and included matters such as their respective methods of discipline, expectations of the child, and their approach to communication with one another. This does not make either style "right" or "wrong". Neither style appears to have been in any way detrimental to the child, despite his parents' differing views about what he should learn about the world. On the contrary, all collateral witnesses spoke of D.'s fine character. Living in a family dynamic where the parents are in separate households will, not surprisingly, expose D. to differing parenting styles, but that is not necessarily any different than the reality in our society of differing parenting styles within the *same* household in intact family units.

[71] It was abundantly clear on the evidence the Respondent does not approve of or agree with what she perceives to be the Applicant's wanting parenting style. However, each example of a specific incident offered by the Respondent to support her concerns and intended to illustrate the Applicant's deficient parenting, with the exception of communication problems, was dated not by weeks or months but by several years. Therefore I conclude the Respondent has, despite her views of the Applicant's parenting style, acquiesced to it until the Applicant filed this application with the court. Surely if the Respondent felt the health and/or welfare and/or best interests of her child were being unreasonably compromised by the Applicant she would not have waited until he filed the application now before the Court. The Respondent's concerns about certain past incidents are just that - in the

past – and are not of a significance that they cause the Court present concern for the Applicant's parenting style such that it could be said to compromise D.'s best interests.

[72] While there was no evidence provided about the school D. would attend if living with him, the Applicant's evidence does clearly establish he is able to provide D. with suitable living accommodations in a family oriented setting. In short, there is nothing in the evidence or in the Respondent's criticisms of the Applicant's past parenting, to suggest the Applicant is unable to provide for D. or cannot do so as well as, albeit differently than, the Respondent. The dispute here is between the Applicant's position he is trying to facilitate D.'s wishes and the Respondent's position only she can provide a sound moral upbringing for her son. The Court must assess what plan will be in D.'s best interests going forward.

[73] In *Foley v. Foley* [1993] N.S.J. No. 347 Goodfellow, J. provided a helpful list of factors the court may look to in determining the best interests of a child at paragraph 16 of the decision:

> 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 on 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 a s 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 the child;

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is 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

[74] In this case, the statutory direction is found in section 18 of *the Maintenance and Custody Act* (supra) and I am satisfied that the criteria set out in s. 18(4)-(6) are applicable and have been respected in the changes the Applicant seeks to make. The evidence before me supports both parents provide an appropriate physical environment and discipline, and act as role models (factors 2, 3 and 4). The Respondent has a more defined adherence to a program of religious and spiritual guidance, but the Applicant's evidence, which I accept on the point, is that he will continue to foster the child's participation in church activities (factor 6). Both parents are supportive of professional assistance for the child; any challenge to date has been in the appropriate exchange of communication between the parties (factor 7). Each parent is equally available for the child within the confines of their respective work scheduled (factor 8). Each parent spoke to their contributions to the cultural, physical and character development of the child (factors 9 and 10).

Each parent contributes to the emotional and financial support of the child (factors 11 and 12). Each parent provides the support of extended family (factor 13) and facilitates contact with the other parent (factor 14). Each parent has an interim and long range plan for the welfare of the child (factor 15); there was evidence that both parents emphasize to the child the importance of school and securing an education as a stepping stone to adulthood. As to the financial consequences of custody (factor 16) both parents have the financial capacity to provide a home for the child.

[75] Regarding consideration of the remaining factor, the matter of the wishes of the child (factor 5), the evidence of every witness save Pastor Kurtz was that they had been aware for varying lengths of time of D.'s views on where he prefers to have a primary residence, and their understanding of D.'s wishes are consistent with the information about D.'s views supplied in the Assessment.

[76] These parents, while having different parenting styles, are essentially "equal" in terms of their ability to provide or respond to what is in the best interests of the child. Their biggest stumbling block is communication, which appears to be more problematic on the part of the Applicant than the Respondent. That the Applicant and Respondent disagree about parenting styles is not sufficient to persuade me that his style, while it might not be what she employs, is contrary to D.'s best interests. The evidence supports that both parents guide, supervise and teach their child, and provide consequences for behaviours. This case cannot be merely a contest about which parent's style is "better".

[77] Under the circumstances, I am prepared to place considerable weight on the Assessment before the Court as an expression of the child's wishes, all other "*Foley* factors" being, as discussed above, essentially "equal", and having been persuaded that the child demonstrates a level of maturity and thoughtfulness in expressing his wishes that the Court can be comfortable in relying upon.

[78] There is no evidentiary basis upon which to reject the independent Assessment as to D's wishes despite the Respondent's assertions as to its flaws. I can be satisfied it is an objective and realistic report. The Assessment echoes what every witness, whether testifying on behalf of the Applicant or the Respondent, had to say about D.'s level of maturity and expression of his preferences. In the "Conclusion and Opinion" section of the Assessment Mr. Craig stated in part:

> D. is a thirteen year old boy who has had a fairly broad and varied life experience.
>
> ...
>
> His reported generally acceptable behaviour in his reaction to what he now considers to be an undesirable living arrangement and school placement appears to be indicators of maturity in expressing his wishes.
>
> In my meeting with D. alone I was favorably impressed with his thoughtful and calm responses.
>
> ...
>
> D. presented a logical, unemotional dialogue giving the reasons for his wish to take residence with his father but still wishing to maintain a relationship with his mother.
>
> ...
>
> I believe that D has expressed his wishes without coercion and done so independently.
>
> Finally, it is my opinion that D. has a mature perspective on his life experiences being able to describe his apprehension about his school and on the other hand his wish to continue this [sic] church affiliation.
>
> He clarified that he feels he would be happier living with his father and attending school in Mount Uniacke.
>
> By the same token he said that he hoped his mother would not be angry with him for expressing this wishes.

[79] I do not accept that a Court must always follow a path of reasoning which has the appearance of being seen to simply endorse the child's expressed wishes as a "fait accompli". It is always conceivable that a court, having assessed the evidence and considered all of the relevant factors in determining the child's best interests, might well come to a different conclusion about what is best for the child. In *Poole v Poole*, 2005 NSSF 7, Smith, A.C.J. cautioned:

> 36. In coming to my conclusion, I have taken into account the fact that both Nicholas and Bradley have expressed a desire to live with their father. This desire is one of a number of factors that the Court must take into account when considering the issue of where the children should live. <u>While a child's wishes must be given due weight</u> (particularly when the child reaches the teenage years) <u>such wishes must not be confused with the child's best interests</u> which must be determined by the Court after considering the evidence as a whole. (emphasis added).

In this case, the child's wishes and the child's best interests lead me to the same result.

[80] I am persuaded it is in D.'s best interests that the custodial arrangement be varied to permit him to maintain a primary residence with the Applicant and continue to have time with each parent on alternating weekends, from Friday after school until Sunday evening. This change will come into effect on September 1, 2014 so that the balance of what little is left in D.'s current academic year at his present school is not interrupted. There was no evidence or argument before me as to specific times for the two weekdays the Respondent should have D. in her care overnight; therefore the parties should have the opportunity to consider what new schedule will work best for them in light of this decision, mindful that they have been able to make adjustments to the schedule as needed in the past. If the parties are unable to agree upon the two specific week days within fourteen days of this decision, by default the schedule will be that D. is with his mother overnight on Monday and Wednesday evenings.

[81] The new arrangement will require sacrifices on the part of both parents, as it likely creates a logistical challenge regarding transportation, and D. may have to be out of bed extra early some mornings, but none of this is justification for not doing what I am satisfied is in the child's best interests at this point in his development. Reversing the parenting schedule, as the Applicant has advocated be permitted, also means that the Court is endorsing a variation to the parenting plan that not only reflects the child's wishes, but puts an additional burden on the Applicant, both to make much more effort in terms of his communication with the Respondent and to follow through with a schedule for parenting that is undoubtedly going to require extra effort on his part with respect to transportation of his son, as the new parenting schedule will not nicely dovetail with his work schedule in the way the pervious one did. It is also important for the Applicant to provide the transportation on Thursday evenings to facilitate D.'s attendance at his church youth group, which should be identified in the new order.

[82] During the hearing, the Respondent raised for the first time that as part of the varied parenting schedule she advocated she would also like to adjust the provisions for block summer access. As to holidays, the current Order contains detailed provisions for specific holiday periods, but a reading of it reveals summer is not specifically addressed other than as captured by sections 5(k) and (l):

> (k) both Blake Kennedy and Michelle McNiven shall be entitled to have two weeks of block access with the child, to be exercised at any time throughout the year, upon providing the other party with one month's notice of when he or she intends to exercise such block access;
>
> (l) any other additional times as may be agreed upon by the parties;

[83] During the hearing, the Respondent requested a maximum of three consecutive weeks of block access during the summer to facilitate a one week extension of her family's annual travel to Newfoundland and suggested the same amount of block time was also appropriate for the Applicant. The Applicant took no position on the request. Such a change is reasonable under the circumstances to promote D.'s exposure to extended family. Clause 5(k) of the previous Order shall be deleted and replaced with a provision that each party shall be entitled to a maximum period of three weeks block parenting time in summer, provided the Respondent shall give notice to the Applicant by May 1st in each year of her intention to do so and the dates, and the Applicant shall give the same notice to the Applicant by May 15th in each year. When or if the block access is not being exercised and for the balance of the summer, the parties shall have parenting time on a week on, week off basis to reflect the status quo pattern of summer parenting time which the evidence revealed has been in place for some time.

**Issue No. 3- What are the appropriate financial arrangements for the child regarding prospective and retrospective child support and special expenses?**

[84] The present order requires the Applicant to provide to the Respondent the table amount of child support in each month, plus a contribution to recreation and/or childcare costs in each month, and a sharing of the cost of prescription medication proportionate to the parties' respective incomes. The Order is silent as to any ongoing or annual exchange of income information between the parties, or any mechanism for adjustments to quantum. The Respondent asserted the quantum of child support has never been adjusted beyond the 2003 level of $271.00 per month.

[85] Each party filed various documentation about their income in the course of preparing for the hearing, although the most current information tendered as evidence at the hearing was the Applicant's 2013 income of $55,475.77 (Exhibit 6)

and the Respondent's present status as a modified duties employee who is not receiving full time remuneration (Exhibit 13), along with her April, 2013 Statement of Income (Exhibit 15) showing annual income at that time of $30,720.00.

[86] On the question of prospective child support, the effect of this decision is that the parties will continue to share a fifty-fifty parenting schedule as has been the case for several years. This arrangement attracts consideration of section 9 of the *Guidelines* (supra) potentially leading to a set-off calculation of the child support obligation. However, I do not have up-to-date evidence as to the amount of the Respondent's 2013 total income, which could affect the calculation of the appropriate set-off amount. Therefore, the Respondent is required to file with the Court and counsel for the Applicant within seven days of the date of this decision a copy of her 2013 income tax return to allow the proper calculation to be made (which could potentially require the Applicant to continue paying support to the Respondent if he remains the higher wage earner). That calculation will then be reflected in the new order with the first payment to be due on June 1, 2014 and continuing on the first day of each month thereafter. The parties will be required to exchange income tax returns by June 1 of each year to make any necessary adjustments to the calculation.

[87] There is no evidence whatsoever before the Court as to what section 7 expenses it is that the Respondent has incurred for which she would say the Applicant has not met his obligation under the present order. In the same vein, there is no evidence whatsoever as to the amount(s) of retroactive child support that might be owing. There is no evidence that could permit an analysis on the question of retroactivity pursuant to the test set out in *D.B.S. v. S.R.G.*; *T.A.R. v. L.G.W; Henry v. Henry; Hiemstra v. Hiemstra,* 2006 S.C.C. 37. Absent that critical evidence, there is no determination to be made as to the relief claimed, but not adequately explained, by the Respondent in relation to retroactive section 7 expenses or retroactive child support.

[88] The Respondent also sought a requirement that the Applicant provide medical coverage through his/his partner's employment. There was no evidence before me whether such coverage exists or is possible. As the parent now providing the child's primary residence, it is appropriate that the Applicant provide such coverage for the child forthwith if it is accessible by him. If not, and should the Respondent request it, the Applicant will have to provide written

documentation to the Respondent in support of any assertion that he and/or his partner do not have such coverage available to be accessed on behalf of D.

**Issue No. 4- Should the mobility clause in the current Order be removed?**

[89] The current order speaks to mobility in paragraph 4:

> Michelle McNiven shall not relocate outside the province of Nova Scotia with the child without having provided 90 days' notice in writing to Blake Kennedy of any such intention

[90] The Respondent submitted the mobility clause should be removed because she would not want it "standing over her shoulder" should she decide in the future to relocate. The Applicant offered no evidence and took no position regarding the matter. The very sparse evidence of the Respondent leads me to conclude the request is based on speculation only – there was nothing more offered as the basis for deletion of the clause. I am not persuaded it is in D.'s best interests at this time to make such a change to the order, particularly given the long standing requirement that notice be provided. Having said that, given the joint custody and equal parenting arrangement, it only seems appropriate that the Applicant be bound by the same requirement and the new order should reflect the same.

[91] The Varied Order, to be prepared by counsel for the Applicant and consented to as to form only by the Respondent, shall adjust those provisions of the current Order as required to give effect to this decision; in all other respects the 2003 Order is unchanged.

[92] Neither party claimed costs as relief sought in the Application or the Response to Application. Accordingly, there shall be no order with respect to costs.

J.