FAMILY COURT OF NOVA SCOTIA
Citation: *K.G. v. J.V.*, 2016 NSFC 35

Date: 20160607
Docket: FAMMCA-096552
Registry: Amherst

Between:

K.G.

Applicant

v.

J.V.

Respondent

DECISION

Judge:	The Honourable Associate Chief Judge S. Raymond Morse
Heard	May 31, 2016 and June 2, 2016, in Amherst, Nova Scotia
Oral Decision:	June 7, 2016
Counsel:	Michel DesNeiges, for the Applicant
	Marie-Andrée Mallet, for the Respondent

By the Court:

INTRODUCTION

[1] This is the matter between K.G. and J.V. The matter was before the Court for a contested hearing on Tuesday and Thursday of last week and at the conclusion of submissions by counsel on Thursday I confirmed that I would be preparing an oral decision and providing that this morning.

[2] K.G. and J.V. are the parents of A.L.V., date of birth, September *, 2012. The parties reside in Amherst, Nova Scotia, and they were in a common-law relationship for approximately two years. The parties separated in the summer of 2014, however they continued to attempt to co-parent A.V. and it appears that they had what might be, and actually was referred to I think in the evidence, as an on-and-off-again relationship until they separated permanently.

[3] The parties have been unable to reach agreement with respect to the most appropriate parenting plan for A.V.

PROCEEDINGS

[4] Pursuant to Notice of Application dated June 23, 2015, K.G., the child's mother, made application under the **Maintenance and Custody Act** for an Order dealing with custody, access and child maintenance. In her initial application, the applicant requested an Order for joint custody with the applicant having primary care and the respondent father enjoying access every second weekend.

[5] A Parenting Statement was filed by the respondent, J.V., on July 28, 2015, confirming his request that he have primary care of the child.

[6] An Amended Parenting Statement was filed by the applicant dated August 20, 2015, in which she indicated that since July 27, 2015, she had not allowed any visitation and that she had offered supervised visits for the respondent, J.V.

[7] The initial docket appearance was September 9, 2015. The applicant requested an Interim Order that would see her responsible for the day-to-day care of the child and asked that J.V.'s access be subject to supervision and occur at a neutral site. The applicant expressed concern that the child had been exposed to violent behaviour and indicated that she had been in touch with Child Welfare

authorities as well as the police. The respondent, J.V., denied any allegations of violent behaviour.

[8] At the conclusion of that initial appearance, the Court granted an Interim Order, subject to a reservation of rights in favour of both parties, confirming that the applicant would have primary care of the child and that the respondent, J.V., would be entitled to reasonable supervised access.

[9] At the time of a docket review held October 21, 2015, the Court was advised that there was a no-contact Order in place pursuant to a peace bond application which precluded direct communication between the parties. The Court confirmed an amendment to the initial Order whereby any communication between the parties relating to the child would be undertaken with the assistance of a third party.

[10] The parties participated in a settlement conference in January of 2016 which did not result in a settlement.

[11] At the time of docket appearance on March 10, 2016, counsel for the parties requested that the Court assign dates for trial. At that time counsel for the applicant confirmed that the applicant was now requesting an Order for sole custody. Counsel for the respondent advised that the respondent was requesting joint custody with the respondent having primary care. The matter was then scheduled for contested hearing on May 31 and June 2, and filing deadlines were assigned by the Court.

[12] At the outset of the hearing on May 31, the Court granted a motion for exclusion of witnesses.

[13] Counsel for the applicant mother then proceeded to make a motion to strike certain provisions within two of the affidavits as filed on behalf of the respondent, specifically the affidavit of H.R., sworn May 30, 2016, as well as the affidavit of S.G., sworn May 18, 2016. The Court spent some time reviewing each affidavit with counsel and various portions of each affidavit were struck or redacted with the consent of counsel for the respondent. Similarly, a redaction was made to the affidavit of the applicant sworn December 16, 2015, with consent of counsel for the applicant.

[14] Eight exhibits were tendered during the course of the hearing. Exhibit 1 was the affidavit of the applicant sworn December 16, 2015. Exhibit 2 was the supplementary affidavit of the applicant. Exhibit 3 was the affidavit of H.R. sworn

May 30, 2016. Exhibit 4 was the affidavit of S.G., paternal grandmother, sworn May 18, 2016. Exhibit 5 was the respondent, J.V.'s original affidavit sworn December 15, 2015, and Exhibit 6 was J.V.'s supplementary affidavit. Exhibit 7 was a statement of earnings and deductions from J.V.'s current employment. And Exhibit 8 consisted of Department of Community Services records produced pursuant to an Order for Production.

[15] K.G. testified on her own behalf. Michelle Morris, social worker with Department of Community Services, H.R. and S.G. testified on behalf of the respondent, and J.V., himself, also testified.

[16] Since this is an oral decision I reserve my right to file written reasons if required.

[17] I do not propose to provide a detailed review or summary of the evidence. The evidence is relatively fresh in everyone's mind I would think given that the two-day hearing was completed Thursday of last week. I will, however, comment on certain portions of the testimony during the course of this oral decision.

[18] I do want to assure the parties that I have carefully considered all of the evidence presented during the course of the trial for purposes of this decision.

POSITION OF THE PARTIES

[19] In closing argument, counsel for the respondent briefly reviewed the evidence as presented on behalf of the father, J.V. Ms. Mallet argued that the allegations of possible sexual abuse on the part of the respondent were not supported by the evidence. She expressed concern about the strong possibility that the applicant, K.G., will continue to make such allegations in future and, as a result, continue to deny the respondent access. Ms. Mallet argued that the applicant wanted to keep control and that based upon the evidence there was no justification for J.V.'s access to continue to be supervised. I would note that Ms. Mallet has filed a pre-trial brief on behalf of the respondent in support of his request that there be an Order of joint custody with the respondent having primary care or, alternatively, an Order for shared custody.

[20] In his submissions, on behalf of the mother, K.G., Mr. DesNeiges confirmed that he was relying upon the pre-trial brief as submitted on behalf of the applicant. He maintained that the Court's assessment of the respondent's credibility should support the need for continued supervision of J.V.'s access. He noted that the

applicant was fearful of the respondent and that her fear was impacting upon her parenting. He referred the Court to paragraph 30 of the applicant's brief and, in particular, to the case of *Lewis v. Lewis*, 2005 NSSC 256, in support of his position that supervised access should continue.

ISSUES

The following issues require determination:

i) The appropriate parenting plan for A.V

ii) The need for continued supervised access

iii) Child maintenance

APPLICABLE PROVISIONS OF THE **MAINTENANCE AND CUSTODY ACT**

[21] With respect to the review of the relevant statutory and case authorities I would confirm, of course, that the provisions of the **Maintenance and Custody Act** apply to this proceeding. The Court's jurisdiction to make a custody/access Order is found in Section 18(2) of the **Maintenance and Custody Act** which indicates the Court may, and I am paraphrasing this: the Court, may on the application of a parent make an Order that a child shall be in or under the care and custody of the parent, or respecting access or visiting privileges of a parent.

[22] Section 18(4) is also noteworthy. It provides that:

> (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
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> …
>
> (b) ordered by a court of competent jurisdiction.

[23] Section 18(5) stipulates that:

> (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.

[24] Section 18(6) reads as follows: "In determining the best interests of the child, the Court shall consider all relevant circumstances, including . . ." and then there is a listing of circumstances that are to be considered by the Court as applicable in any given case when making the determination as to best interests and I would confirm that I have considered sub-paragraphs (a) through (j) as set forth in 18(6) and I'll say more about the relevant provisions in a moment.

[25] And, of course, Section 18(7) is also relevant, which is the provision relating to determining the impact of any family violence, abuse or intimidation.

[26] And, of course, sub-paragraph (8) is also noteworthy because it stipulates that:

> (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 . . ..

[27] And that determination, of course, also involves consideration of family violence, if and when applicable.

CASE AUTHORITIES - DETERMINATION OF BEST INTERESTS

[28] As far as case authorities are concerned with respect to determination of best interests, in *Yonis v. Garado*, 2011 NSSC 454, Justice Beaton considered the meaning of "best interests", indicating as follows:

> [30] What does it mean to refer to a child's "best interests"? The concept of best interests was discussed at length by the Supreme Court of Canada in *Young v. Young*, 1993 4 SCR 31. I am mindful of the discussion of the best interests test therein and also of a caution provided therein as reiterated by Justice Dellapinna, J. in *Tamlyn v. Wilcox (supra)* at paragraph 37:

[29] She then sets forth a quote from Justice Dellapinna's decision. I am going to read a portion of that:

> [37] In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court elaborated on the "best interests" test. 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.

[30] In *Burgoyne v. Kenny*, a decision of our Court of Appeal, 2009 NSCA 34, Justice Bateman considered the often-cited case of *Foley v. Foley*, 124 NSR (2d) 198. In *Burgoyne* (supra), Justice Bateman said this about the list of 17 factors enumerated in *Foley* (supra), at paragraph 25:

> [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), 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. . . .
> >
> > 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.

[31] The Court must consider the applicable best interests factors or circumstances when determining whether or not joint custody or sole custody would be in the best interests of the child.

[32] In *R.N. v. L.M.*, 2014 NSSC 396, Justice Jollimore considered a case where the father of the child was seeking an Order for joint custody with provision for access and the mother was taking the position that the father should either have no access or that it be supervised. In commenting upon the custody issue Justice Jollimore stated as follows:

> [61] In *Rivers*, 1994 CanLII 4318 (NS SC) at paragraphs 50 to 53, Justice Stewart identified a series of questions to be considered in determining whether joint custody is in a child's best interests. Her decision was in the context of a corollary relief proceeding under the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, but I believe that the same considerations are relevant to a determination under the Maintenance and Custody Act. I've re-stated Justice Stewart's questions below.
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> (a) Has each parent maintained a meaningful relationship with the child?
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> (b) Does each parent have parenting capabilities that are adequate to meet the child's needs?
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> (c) Will the parents be able to make decisions together about the child?
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> (d) Are the parents able to co-parent despite any conflict between them, isolating their feelings about each other as former partners from their relationship as parents and their child's needs?
>
> (e) Will the child be involved in conflict between the adults?
>
> (f) Will a joint custody arrangement cause disruption and discontinuity to the child's developmental needs?

[33] In *Mo v. Ma*, 2012 NSSC 159, Justice Forgeron noted that there were three custodial designations available as options including sole custody, joint custody, and parallel parenting. In referring to *Gill v. Hurst*, 2010 NSCA 98, Justice Forgeron acknowledged that in that case the Court of Appeal held that the trial judge made no reversible error when recognizing that the starting point was to determine if joint custody was appropriate. Justice Forgeron then indicated as follows at paragraph 96:

> [96] Joint custody is usually not appropriate where parental relationships are rife with mistrust, disrespect and poor communication and where there is little hope that the situation will change: . . . .

[34] In *Hammond v. Nelson*, 2012 NSSC 27, Justice Dellapinna considered and reviewed various case authorities involving shared custody and then summarized some of the considerations relevant to determination of whether a shared parenting arrangement should be ordered. The considerations he noted included the following:

> . . .
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> 7. The communication level between the parents and their ability to cooperate with each other and make decisions together. It is easy to say that parents should put aside their differences and do what is necessary to serve the best interests of their children but the Court must recognize human nature for what it is. Many couples are able to set aside their personal differences for the sake of their children and frequently are able to agree upon a shared parenting arrangement that works for them and their children. The Court sees it in agreements that accompany consent orders. However, frequently parents whose relationships have broken down are unable to achieve the necessary degree of cooperation in spite of their best efforts. A shared custody arrangement requires an unusual level of cooperation between the parents on a day in and day out basis. As Justice Coady said in Bryden (supra), it is "the rare case, the rare parents and the rare children" who can make shared parenting work.
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> It is essential that the parties communicate with each other, keep each other informed of matters relating to their child and make decisions together….
>
> 8. Ultimately the Court must consider what is in the best interests of the particular child who is the focus of the inquiry. It is difficult to argue against the fairness of shared parenting. If a parent truly loves his/her child and wants and is prepared to parent them, then it would seem completely unjust to them to have to accept anything less than an equal opportunity to do so. The Court's focus however is on the child. The wishes of the parents, although important and require serious consideration, come second to what the Court believes is best for the child.

CASE AUTHORITIES – SUPERVISED ACCESS

[35] Regarding supervised access, in *G.S. v. C.H.*, 2011 NSFC 19, His Honour Judge Dyer considered an application relating to variation of access. With respect to supervised access Judge Dyer commented as follows at paragraph 93:

> [93] Restricted and/or supervised parenting regimes are supposed to be exceptional - not the norm. They may be imposed, by agreement or by court decision, if necessary to protect a child or where there are concerns about capacity

> or ability to parent. However, long-term or indefinite "restrictive" court orders are anything but routine, in my experience. The onus remains on the parent who wants to impose limits to prove, on a balance of probabilities, that what is proposed is in the child's best interests.

[36] In *J.M. v. A.L.*, 2013 NSFC 1, His Honour Judge Comeau considered an application for custody and access where the respondent wanted the applicant's access to be supervised. In his decision Judge Comeau referred to the Nova Scotia Court of Appeal decision in *Slawter v. Bellefontaine*, 2012 NSCA 48, indicating that the burden is on the parent requesting supervised access to demonstrate that restrictions are in the best interests of the children. He then went on to review the decision in *Slawter v. Bellefontaine* at some length and, in particular, the passages that the Court of Appeal referred to from the Supreme Court of Canada decision in *Young v. Young*, [1993] 4 S.C.R. 3, which I believe I referred to earlier in the quotes from one of the other cases.

[37] I would also refer to the Court of Appeal's decision in *Slawter* (supra) and in particular the following excerpts from the decision of Justice Beveridge wherein he refers to the Supreme Court of Canada decision in *Young v. Young* (supra) and sets forth the following excerpt from Justice McLachlin's decision:

> [41] McLachlin, J., as she then was expressed the same overall approach:
>
> > . . .
> >
> > 210 I conclude that the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access -- what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or per personal views, but on the evidence.
> >
> > . . .

> [47] In *Lewis v. Lewis*, 2005 NSSC 256 the mother wanted the father's access to be supervised. Forgeron, J. wrote of the nature of such a request:
>
> > [23] Supervised access is an exceptional remedy. A child is entitled to share in the daily life of his/her parents unless such is not in the child's best interests to do so. Access is the right of the child and not the right of the parent. There is no presumption that contact with both parents is in the best interests of the child, although such contact generally is: **Young v. Young** (1993) 160 N.R. 1 (S.C.C.) and **Abdo v. Abdo** (1993)126 N.S.R. (2d) 1 (C.A.).
> >
> > . . .
> >
> > [25] Supervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent. Access is for the benefit of the child and each application is to be determined on its own merits.

[38] Then in the case of *R.N. v. L.M*, supra, Justice Jollimore stated:

> [74] Like every other aspect of custody and access, whether access is to be supervised must be determined on the basis of the child's best interests. In *L.A.M.G. v. C.S.*, 2014 BCPC 172 at paragraph 35(c), Judge Woods provided an excellent review of considerations which he felt could "legitimately arise" when entertaining the possibility of a supervision order. Among these, I note some which must be acknowledged in these circumstances: the need to protect the child from physical, sexual or emotional abuse, whether the child is being re-introduced to a parent after a significant absence, a history of domestic violence between the access and primary care parent and a history of parental alienation.

[39] And then she goes on to refer to the *Abdo* decision which is a decision of our Court of Appeal, 1993 CanLII 3124:

> [75] . . . Justice Pugsley wrote the Court of Appeal's unanimous reasons and made clear that the burden of proof is on the parent seeking to restrict access to show that this is in the child's best interests. . . .

[40] I have considered the case authorities referred to by counsel in preparing and writing this oral decision, including in particular *Lewis v. Lewis* (supra), a decision of Madame Justice Forgeron.

[41] Again, I acknowledge that supervised access is to be the exception, not the norm. Similarly, the applicant, K.G., bears the burden of proof in requesting continued supervised access for J.V. and, of course, it is important to recognize that the applicant has no right to restrict the respondent's contact. Ultimately, the decision in any case comes down to the Court's determination as to whether or not supervised access is consistent with the best interests of the child.

[42] The Court must have regards to the best interests circumstances as referred to in the legislation and, in particular, Section 18(8) which requires that the Court give effect to the principle that each parent is entitled to as much contact as is consistent with the best interests of the child.

[43] Clearly in many instances a request for supervised access is based upon the belief that supervised access is necessary in order to address or alleviate risk of harm and I believe the case authorities clearly identify risk of harm as a potential factor relevant to the determination of best interests.

LEGAL ANALYSIS

[44] Ultimately this case must be determined not based upon the wishes of the parents, but based upon the Court's conclusion as to what disposition would be in A.V.'s best interests.

[45] The Court is extremely concerned by the evidence indicating a significant and serious deterioration in the relationship and interaction between the parents since permanent separation, and particularly, since the commencement of this Court proceeding.

[46] At this point in time it is clear based upon the evidence that these two parents are not able to communicate or interact appropriately or co-operatively on parenting issues. From the Court's perspective, the parents have become enmeshed in this custody dispute and each has made allegations against the other in an effort to support their respective positions. The Court is left with the distinct impression that both parents have become so preoccupied with the outcome of the proceeding or custody battle that the best interests of the child have become secondary. It is a sad and unfortunate state of affairs.

[47] In determining A.V.'s best interests I have considered the circumstances or factors as referred to in Section 18(6) of the **Maintenance and Custody Act** as may be relevant and applicable. I make the following findings.

[48] With respect to (a), as a three-year-old child, A.V., needs to live and be raised in a safe and secure environment where her physical, emotional, social and educational needs will be adequately and consistently met both now and in the future. Based upon the review of the evidence I find that both parents have the capacity to adequately meet the child's needs.

[49] With respect to (b), I find that both parents, albeit with some hesitation, seem willing to concede the importance of maintaining the child's relationship with the other parent, however the applicant's willingness to recognize that the respondent should have a relationship with A.V. was tempered by her concerns regarding his drug use, anger management issues and a continuing concern that the respondent may have sexually abused the child.

[50] J.V. is prepared to acknowledge that K.G. is a good mother to the child but worried about the mother's mental health or emotional state and its impact on A.V. The evidence would suggest that the respondent, J.V., might be more willing than the applicant to support the child's relationship with the other parent at this point in time.

[51] Based upon the evidence I find that the applicant has been the primary caregiver for the child since birth. In reaching this conclusion I want to make it clear that the respondent, J.V., has also been very actively involved in the life of the child and that at different points in time, for certain periods of time, he has been responsible for the child's care approximately 50 percent of the time. However, the evidence also indicates that J.V. is a hard worker and by his own admission the fact that he was willing to work extremely long hours became a source of friction between himself and the applicant.

[52] SHERIFF: I'm sorry, Your Honour. Mr. DesNeiges' client just walked out.

[53] THE COURT: I'm sorry, I missed that.

[54] MR. DESNEIGES: I can check on her.

[55] THE COURT: All right. We'll just recess for four or five minutes and perhaps you can come back and report to the Court.

[56] MR. DESNEIGES: Yes.

[57] COURT RECESSED (TIME - 11:59 AM)

[58] COURT RESUMED (TIME - 12:01 PM)

[59] THE COURT: Can I continue?

[60] MR. DESNEIGES: Yes, I don't think we'll have to take another break, Your Honour.

[61] THE COURT: All right, thank you.

[62] I am just going to pick up, I think I might just repeat a little bit of this.

[63] So, I was talking about the circumstance (c) in Section 18(6) and would note as follows . . . . the evidence also indicates that the respondent, J.V., is a hard worker and by his own admission the fact that he was going to work extremely long hours became a source of friction between himself and the applicant. The fact that he was working long hours would have obviously limited his parenting time with A.V. The applicant has, of course, been responsible for primary care of the child under the auspices of the Interim Order made September 9, 2015. The respondent's parenting time has been limited by the applicant's refusal to allow contact prior to the Interim Order as well as the restrictions arising from Court-ordered supervised access. Indeed the evidence confirms that K.G. denied the applicant's supervised access when she felt it was appropriate to do so, oftentimes after she had concluded that supervision had not been provided in accordance with the Order. For his part, the respondent, J.V., candidly admitted that the terms of the Order had been ignored on several occasions.

[64] Circumstance (d), the parties' respective parenting plans or proposals appear to be adequate having regards to A.V.'s physical, emotional, social and educational needs. Again, the evidence supports and justifies the conclusion that both parents have the capacity to parent this child.

[65] Circumstance (e), there was no evidence with respect to the child's cultural, linguistic, religious and spiritual upbringing or heritage. There was limited evidence with respect to the child's participation in French Immersion. The parties have different views with respect to French Immersion. The applicant was opposed to French Immersion whereas the respondent was open to it as a possibility and thought that it might be helpful. The applicant's opposition is premised upon her concern that the child may have a learning disability and might find ... might find French Immersion confusing. For his part, J.V. believes that

A.V. is very smart, and he has seen no signs of a learning disability and, therefore, he believes that she would do well in a French Immersion program.

[66] I find circumstance (f) is not applicable.

[67] Circumstance (g), the evidence supports and justifies the conclusion that A.V. has a positive and loving relationship with each of her parents. The applicant admitted during her testimony that she has found her parenting role somewhat challenging on occasion because she finds it hard to give A.V. as much time as she may need especially when she was working and going to school. Both parents provided very positive descriptions of the child referring to her as happy, energetic and healthy. The applicant, K.G., referred to A.V. as being the most important thing in her life and the reason why she is trying to better her life. For his part, J.V. indicated that A.V., and having the opportunity to have parenting time with A.V., was a priority in his life.

[68] Circumstance (h), the evidence confirms that A.V. has a positive relationship with members of J.V.'s extended family including his mother, father and grandmother as well as other family members. The applicant's mother has limited contact with A.V. due to the fact that she lives and works in Truro. Her biggest family support at this point is her aunt who lives in Amherst.

[69] Circumstance (i), the evidence supports and justifies the conclusion that the parties have either no or extremely limited ability to communicate or co-operate on issues affecting the child at this point in time. I believe that the paternal grandmother, S.G., showed excellent insight into the current circumstances when she testified that "it is sad when you see a child torn between two grown-ups and they do not understand the impact" and she also commented that "because they can't have a relationship does not mean that the child cannot have a relationship with both."

[70] Circumstance (j), both parties have made allegations of violence or physical abuse against the other. J.V. denied that he had been physically violent toward the applicant. The applicant admitted that on one occasion she had punched J.V. and to another incident when she had clawed his eye. J.V. admitted to violation of the peace bond during his testimony but attempted to justify his action on the basis that he was being denied supervised access. He also acknowledged to an outburst when he responded to the allegation that he had sexually abused the child by posting placards on the applicant's street alleging that her step-father was a child molester.

[71] Fortunately, there is no evidence suggesting that A.V. has been negatively affected by family violence. By all accounts she appears to be a healthy, happy, little girl who loves both her parents, however K.G. has made it clear that she remains fearful of J.V. The history of negative interaction and violence between the parents as well as their ability to communicate and co-operate on parenting issues must be taken into account in determining what parenting arrangement would be in A.V.'s best interests.

CREDIBILITY

[72] I have carefully considered the credibility of both parties. I observed that both parties gave their evidence in a straight-forward manner. Neither party was evasive during cross-examination or argumentative during cross-examination. Both parties admitted past incidents or behaviours that do not reflect positively on them. For the most part I believe that both parties gave their testimony in a fairly honest fashion. For the most part they both presented as believable witnesses.

[73] Clearly there are inconsistencies and contradictions between the evidence of the parties. Both parties have failed to comply with the existing Interim Order. K.G. has repeatedly denied supervised access when she thought that the circumstances warranted or justified. J.V. has admitted that he, as well as members of his family, have failed to comply with the terms of the Order that required his access to be supervised. However, after having the opportunity to carefully observe both parents, listen to their evidence on direct and cross-examination, and review the affidavits, I am unable to conclude that either of the parties is significantly lacking in credibility such that their evidence should be rejected or found to be unreliable, in whole or in part. I find myself in the unusual position of being unable to resolve the evidentiary contradictions by way of a credibility finding in this case.

[74] However, I do not believe that the inability to resolve the contradictions in the evidence of the parties limits or restricts my ability to determine this matter based upon consideration of the child's best interests as is required.

DECISION - JOINT OR SHARED CUSTODY

[75] Based upon the evidence I am unable to conclude that joint or shared custody would be appropriate and consistent with A.V.'s best interests.

[76] While each parent has a meaningful relationship with A.V. and has adequate parenting capabilities, the evidence clearly supports and justifies the conclusion that the parents do not have the ability at present to be able to make decisions together about the child. They do not have the ability at present to co-operate without conflict. Joint or shared custody would obviously expose A.V. to conflict between her parents and likely cause disruption inconsistent with her developmental needs. The evidence confirms that the parties' relationship at present is indeed "rife with mistrust, disrespect and poor communication" with little hope that the situation will change. Given these findings, it is clear that neither joint nor shared custody would be in A.V.'s best interests at this time.

DECISION - SUPERVISED ACCESS

[77] I have given careful consideration to the applicant's request that supervised access be maintained. The applicant bears the onus of proof in establishing that supervised access is required or appropriate having regards to A.V.'s best interests. I find that the applicant has not discharged the burden of proof. There is no medical evidence supporting or justifying a finding that the child was sexually abused by the respondent or even indicating a possibility of sexual abuse.

[78] K.G.: She got a UTI the day after she was ...

[79] THE COURT: All right. Mr. DesNeiges, speak with your client, please.

[80] K.G.: ... and that is ... that is a sign. Look it up ...

[81] THE COURT: Speak with your client.

[82] K.G. ... you're not professional, you're not trained in sexual abuse.

[83] THE COURT: If your client cannot control herself she will be excused from the Courtroom. I'll offer you the opportunity to speak with her and then I will continue. I am going to recess for a few minutes. Thank you.

[84] COURT RECESSED (TIME - 12:11 PM)

[85] COURT RESUMED (TIME - 12:12 PM)

[86] THE COURT: Mr. DesNeiges?

[87] MR. DESNEIGES: Your Honour . . . I apologize, Your Honour, for that comment that came from my client. On my instructions, she will not be returning for the remainder of this session.

[88] THE COURT: I have no diffi- ... I mean I would like her to be present to hear what the Court has to say but she needs to understand that this is not an opportunity for debate or discussion. She can have a discussion with you after the decision is made.

[89] MR. DESNEIGES: Yes.

[90] THE COURT: But she needs to be able to control herself. So, I mean I don't want to create the impression that you were forced to ask your client to wait outside.

[91] MR. DESNEIGES: Yes.

[92] THE COURT: I mean she needs to understand that she's entitled to be here. I would like her to be here but she has to understand that at this point in time I am making a decision based upon what's before me. It's not a time for argument. She can discuss with you the merits of any appeal that she may want to ...

[93] MR. DESNEIGES: Yes.

[94] THE COURT: ... think about and that's fine. But today it's just my decision and she has to listen and not react to it. Do you want to just check with her because I, you know, I am going ... I am happy to have her remain ... I would like her to remain ...

[95] MR. DESNEIGES: Yes.

[96] THE COURT: ... but she just needs to know that she can't debate what I am saying right now. We can't have a discussion about it. I am making my decision and she's entitled to be here to receive it and to hear what's being said.

[97] MR. DESNEIGES: I can articulate that to her for a brief moment.

[98] THE COURT: If you just wouldn't mind because I ... actually there are things that I am coming to that I really would like her to hear. She may not like some of it.

[99] MR. DESNEIGES: Yes.

[100] THE COURT: And she needs to know that she can't really ... or she shouldn't react. On the other hand, if she's ... you know, if she's made a decision for herself that she'd prefer not to be here, I would rather have her make that decision rather than have you tell me: I instructed her to wait outside.

[101] MR. DESNEIGES: Yes.

[102] THE COURT: Okay.

[103] MR. DESNEIGES: I'll certainly have that specific discussion with her.

[104] THE COURT: Okay. Why don't you check with her and I'll just sit tight for a moment here, okay?

[105] MR. DESNEIGES EXITS COURTROOM (12:14 PM)

[106] MR. DESNEIGES ENTERS COURTROOM (12:15 PM)

[107] MR. DESNEIGES: Your Honour, without getting into too many details, unfortunately I believe she's left the building ...

[108] THE COURT: Okay.

[109] MR. DESNEIGES: ... and I ... when I spoke with her she did seem as though she was having difficulty containing her emotions and I think that she needed some time at least to ...

[110] THE COURT: Okay.

[111] MR. DESNEIGES: ... but I have no problem with continuation of your oral decision.

[112] THE COURT: Well, I think we have to because I don't think there's much we can do about it at this point in time. It's unfortunate but I'll just carry on then. All right. Thank you. All right . . .

[113] . . . so I was dealing with the issue of supervised access, and I believe once again I may be repeating this part, but I'll just start at this point in my decision.

[114] There is no medical evidence before the Court supporting or justifying a finding that the child was sexually abused by the respondent or even indicating a possibility of sexual abuse. The joint police/child welfare interview did not result in any information suggesting or indicating sexual abuse or risk of sexual abuse. Indeed, Michelle Morris, confirmed that an Agency worker observed that the child, A.V., was very comfortable with J.V. A similar observation was made during the course of the joint investigation interview. The Agency record confirmed that when J.V. was brought up during the interview A.V. did not display behaviour to indicate that she was fearful. There was, of course, no disclosure made by the child during the interview. Exhibit 8 also confirms that a medical exam was undertaken and confirmed that there was no evidence of trauma to the child's genital area. On August 11, Ms. Morris contacted the applicant and advised her that the Agency had no evidence to support her denial of access to J.V. The entry for August 11 indicates that K.G. was not pleased. As a result, the decision was made to close the investigation and a file was not opened.

[115] There is no evidence indicating or confirming any current concerns relating to J.V.'s use of drugs or alcohol. During his testimony J.V. confirmed that he participated in a detox program in 2014 on his own initiative because he felt it would be helpful and he wanted to avoid further drug use. He candidly admitted to a slip since the detox program was completed. He explained what happened in his testimony and indicated that he dealt with the situation by terminating his employment and thereby limiting the opportunity for further contact with a fellow employee who J.V. felt had contributed to his slip.

[116] J.V. testified that he is currently drug free and that he no longer drinks alcohol to excess. In addition, he confirmed that in his current employment, he is subject to random drug testing. No evidence to the contrary was presented by the applicant.

[117] Similarly, the Court is unable to conclude that J.V.'s anger management issues are such as to require his contact with A.V. to be supervised. J.V. denied the applicant's allegations of physical violence. He did indicate that he could not recall the incident where the applicant reported that he pushed her and she fell onto a concrete floor. He explained the incident where he was alleged to have smacked A.V. in the face. He testified that what actually happened was that he had held the child's head in order to prevent the child from harming herself by banging her head repeatedly on the child car seat while she was having a tantrum and out of control. The applicant confirmed that there were no marks on the child's face following this

incident. Based upon the evidence the Court does not conclude that J.V. was physically violent with or physically abusive of A.V.

[118] Accordingly, the Court concludes that the evidence does not support or justify a finding of past physical harm or a risk of future physical harm sufficient to justify supervision. Based upon the evidence the Court is unable to conclude that continued supervised access would be in A.V.'s best interests.

[119] The Court acknowledges that K.G. appears still to be somewhat fearful or apprehensive of contact with J.V. This is based on the history of violence in their relationship but the Court is unable to conclude, based upon the evidence before the Court, who would be primarily at fault or responsible for instigation of physical violence in that relationship. It appears from the evidence, for lack of better wording, to have been a two-way street in the relationship and, again, having regards to the evidence, I am unable to conclude that the history of violence between the parties is such as to require or justify continued supervision of J.V.'s contact with the child.

[120] In reaching this conclusion it is, of course, important to keep in mind that access is for the benefit of, and the right of, the child. I am also mindful of Section 18(8) of the **Maintenance and Custody Act** and that I am required to "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." In reaching the conclusion that it would be in A.V.'s best interests that her contact with her father not be subject to supervision, I have considered the history of family violence and the negative interaction between the parties. Again, I am satisfied based upon consideration of that history as referred to in the evidence that it would be in A.V.'s best interests that her contact with her father not continue to be subject to supervision.

[121] It is also important to bear in mind that the right to access, and the circumstances in which it takes place, must be perceived from the vantage point of A.V. I find that supervised access would be an impediment to the continuation and fostering of a positive and significant relationship between A.V. and J.V.

[122] The applicant, K.G., has not established a risk of harm to the child which outweighs the benefits of a free and open relationship with her father. In reaching this conclusion I, again, acknowledge that K.G. will be uncomfortable with the prospect of unsupervised access. However, I hope that K.G. appreciates and understands that supervised access is not to be imposed as a comfort or reassurance for the custodial parent.

[123] I believe in the circumstances of this case it is appropriate for me to emphasize to both parties the importance of compliance with any existing Court Order. Both parties need to appreciate and understand that there are consequences for non-compliance. Consequences for non-compliance with the terms and conditions of an Order relating to care and custody could involve reconsideration of the Court's decision on custody. And similarly, non-compliance with the terms and conditions relating to access could result in a decision to terminate access entirely. So, both parties have a track record in this particular case which is concerning to the Court when it comes to compliance with Court Orders.

CONCLUSION

[124] In conclusion, I am satisfied that it would be in A.V.'s best interests that she remain in the day-to-day care and custody of K.G. She has been the primary parent. K.G. has ensured that A.V.'s needs are adequately met on a consistent basis. In confirming this conclusion I want to make it clear that I am not ignoring the fact that J.V. has been actively involved in parenting A.V., however, the evidence confirms that J.V. is, as his mother put it, just getting back on track. He has recently obtained employment and he's hoping that his hours of employment will increase. He made it clear that if he has the chance to work overtime he will do so. He's in the process of renovating a trailer located on his mother's property so that that will provide suitable accommodations for both himself and A.V. at some point in the near future.

[125] I have commented upon J.V.'s work ethic already and, again, I would note that this is an admirable trait but one which is not always compatible with the obligation of caregiver or parent. I am satisfied that K.G. is more likely than J.V. to be consistently available to parent A.V., given her employment circumstances.

TERMS OF THE ORDER

[126] Accordingly, I would confirm the following Order. The applicant, K.G., shall have primary care and custody of the child, A.V., and the child's primary residence shall be with K.G.

[127] The respondent, J.V., shall have parenting time with A.V. on the following basis, every second weekend from Saturday at 9 a.m. until 6 p.m. and then Sunday from 9 a.m. to 6 p.m. commencing Saturday, June 11th, 2016, this coming Saturday.

[128] After two alternating weekends of daytime parenting time, J.V.'s parenting time shall progress to be from Saturday at 9 a.m. to Sunday at 6 p.m.

[129] SHERIFF (to Mr. DesNeiges): Your client is out there.

[130] MR. DESNEIGES: Sorry, Your Honour.

[131] THE COURT: Do you wish to speak with her?

[132] MR. DESNEIGES: No, we'll just continue as we are.

[133] THE COURT: Are you sure you don't want to check with her?

[134] MR. DESNEIGES: At this point I am thinking that the information that's being provided is mostly for the lawyers perhaps to prepare the final Order, but I will review everything that she missed since she left the Courtroom, Your Honour. I will have that discussion with her.

[135] THE COURT: Okay.

[136] MR. DESNEIGES: I could invite her in but I think she's indicated to the sheriff that she actually does . . . prefers not to come in at this time.

[137] THE COURT: Is that correct? That she indicated she . . .

[138] SHERIFF: She did. And I told her that there was a discussion and the lawyer could come speak to her . . .

[139] THE COURT: Yes.

[140] SHERIFF: . . . about her coming back into the Courtroom.

[141] THE COURT: Okay.

SHERIFF: But she did express a couple of times that she's not able to control . . .

[142] THE COURT: Would you just . . . I would like you to take an opportunity to speak with your client to make sure she stays so that you'll have this opportunity to discuss the decision with her.

[143] MR. DESNEIGES: That . . . that I will do, Your Honour.

[144] THE COURT: Okay. Especially in light of the timing of what I am talking about.

[145] MR. DESNEIGES: Yes.

[146] THE COURT: Okay.

[147] MR. DESNEIGES EXITS COURTROOM (12:26 PM)

[148] MR. DESNEIGES ENTERS COURTROOM (12:26 PM)

[149] MR. DESNEIGES: Your Honour, K.G. expressed that she will remain here and that I will have that opportunity . . .

[150] THE COURT: Okay.

[151] MR. DESNEIGES: . . . to discuss with her.

[152] THE COURT: All right, that's excellent, thank you. All right.

[153] So, just carrying on with J.V.'s parenting time. So, after two alternate weekends of daytime parenting time on a Saturday and Sunday, J.V.'s parenting time shall progress to be from Saturday at 9 a.m. to Sunday at 6 p.m., again on alternate weekends with the overnight to occur at the residence of his mother, S.G.

[154] After three Saturday to Sunday overnight parenting weekends, J.V.'s parenting time shall progress to be from Friday at 6 p.m. until Sunday at 6 p.m. on alternate weekends.

[155] The overnight parenting time at that point shall be either at the residence of S.G. or the respondent's residence providing all necessary renovations have been completed to that residence and the residence is suitable and safe for overnight visits. Confirmation of the suitability of the respondent's residence for overnight visits shall be provided by J.V.'s grandmother prior to commencement of any overnight visits at J.V.'s residence. So long as J.V.'s residence is not ready for overnights, the child shall spend overnights at the residence of S.G. during J.V.'s parenting weekend.

[156] In the event that J.V.'s parenting weekend coincides with a Monday statutory holiday long weekend and providing J.V. is not working on the holiday,

J.V.'s parenting weekend shall be extended to include the holiday Monday such that the child would be returned to K.G. at 6 p.m. on the Monday.

[157] J.V. shall be responsible for pick-up and drop-off of the child for purposes of his parenting time. However, in light of the current relationship between the parents J.V. shall ensure that another individual is with him for every pick-up and drop-off and that individual will have responsibility for escorting the child from and to K.G.'s residence for purposes of pick-up and drop-off. There is to be no direct contact between the parties at time of pick-up and drop-off unless the parties mutually agree.

[158] During his parenting time with A.V., J.V. shall not remove the child from Cumberland County without the prior permission and agreement of K.G. J.V. shall be required to return the child to the day-to-day care of K.G. at the conclusion of each and every scheduled parenting weekend.

[159] J.V.'s parenting time shall be subject to the condition that when he is enjoying parenting time with A.V. he is not to be under the influence of illicit drugs, abusing prescription drugs or abusing alcohol.

[160] To minimize the potential for conflict between the parties, communications are to be restricted to matters pertaining to A.V. and shall be undertaken with the assistance of a third party acceptable to both parties. Again, I would have in mind J.V.'s grandmother but I won't name her, I will simply confirm that it will be undertaken with the assistance of a third party acceptable to both parties. Any and all such communications are to be child-focused. There is to be no direct communication between the parties with respect to A.V. unless both parties agree.

[161] Any and all communications between the parties and the third party utilized for purposes of communications, and I am going to refer to them as "parenting communications", shall at all times, again, be child-focused and at all times involve appropriate language. Neither party, neither parent, is to say anything negative or derogatory about the other in the presence of the child nor to allow any other individual to do so in the presence of the child.

[162] The parties may, by mutual agreement, change or alter the schedule of J.V.'s parenting time or agree to additional parenting time.

[163] The applicant, K.G., shall be responsible for all significant parenting decisions for the child. The applicant shall, however, advise the respondent, J.V., of any significant parenting issues as soon as practicable.

[164] J.V. shall have the right to contact and make direct inquiry of any health care provider responsible for the diagnosis, assessment or treatment of A.V., including any physician or therapist. The applicant, K.G., shall provide J.V. with a copy of any report relating to A.V. received from any health care provider. The applicant, K.G., shall ensure that J.V. is provided with the name of any involved health care provider for A.V. on a timely basis.

[165] J.V. shall have the right to contact and make direct inquiry to those individuals responsible for the child's educational program, including the right of direct contact with school staff such as teachers and principals. J.V. shall be entitled to receive a copy of any school records for the child such as progress reports or psycho-educational assessments.

[166] J.V. shall be permitted to have parenting time with the child at Christmas in odd-numbered years starting 2017, next year, on the following basis. J.V. shall have parenting time with A.V. on Christmas Eve starting from 6 p.m. until 1 p.m. on Christmas Day. In even-numbered years starting this year, 2016, the applicant, K.G., shall have care of the child until 1 p.m. on Christmas Day and then J.V. shall have parenting time with A.V. from 1 p.m. on Christmas Day until 7 p.m. on Boxing Day. The parties may agree upon a different schedule of Christmas parenting time. The schedule of Christmas parenting time shall have priority over J.V.'s regularly scheduled weekend parenting time.

[167] J.V. shall be permitted to have parenting time with A.V. on Father's Day from 1 p.m. to 7 p.m. in the event that Father's Day does not fall on or coincide with J.V.'s regularly scheduled parenting weekend.

[168] J.V. shall also be permitted to have contact with A.V. on her birthday by way of telephone contact if the child's birthday does not fall on the respondent's regularly scheduled parenting weekend. In the event the child's birthday falls on J.V.'s scheduled parenting weekend, K.G. shall be permitted to have telephone contact with A.V. on her birthday.

[169] J.V. shall be permitted to have regular telephone contact with A.V. on Tuesday and Thursday of each and every week at a time to be agreed upon by the parties. The telephone call may be of approximately 10 minutes' duration. The

parties may by agreement change the schedule for telephone contact as well as the duration of telephone calls. The applicant, K.G., shall ensure that the child is available to participate in scheduled telephone contact with J.V.

[170] The parties shall endeavour to reach an appropriate agreement with respect to the schedule of parenting time for J.V. during the summer months of July and August having regards to their respective work schedules commencing summer of 2017. However, in the absence of any agreement respecting summer parenting time for J.V. the regularly scheduled weekend parenting time shall remain in force and effect for July and August.

[171] Any agreement respecting summer parenting time for J.V. shall be confirmed by June 15 each year and, again, just to be clear, in the absence of such an agreement the regularly-scheduled weekend parenting time will continue for July and August.

[172] Based upon estimated annual income from current employment in the amount of $23,478, and that's based upon $12.90 an hour, 35 hours a week times 52 weeks, J.V. shall pay monthly child maintenance to the applicant, K.G., for the support of the child, A.V., in the amount of $180, that's a rounded figure, per month, commencing the 1st day of July 2016 and continuing on the 1st day of each and every month until otherwise ordered. All maintenance payments shall be payable through Maintenance Enforcement Program.

[173] On or before June 1st each year, J.V. shall provide K.G. with a copy of his prior year's tax return and any notice of assessment or reassessment.

[174] Counsel may wish to discuss with their clients whether or not the Order should include recalculation provisions. If the parties agree to recalculation then those recalculation provisions can be included within the Order and I would ... in that event I would ask that Ms. Mallet make it very clear to J.V. that he understands the need to make sure he provides the recalculation clerk with his current address, if he changes his address, they need to be able to get in touch with him and he needs to understand the importance of providing his annual disclosure, otherwise he's deemed ... his income will be deemed to have been increased by 10 percent and he'll be met with an Order that says his child maintenance will be going up. All right? So, again, that just depends upon what counsel ... what the discussions indicate. It may not be a bad thing in this case to have recalculation because it would avoid bringing the matter back to Court repeatedly so I just mention that.

[175] It's unfortunate that K.G. is not here, but on the other hand J.V. is not here due to his employment. I just want to indicate to counsel that I am concerned about the parties' ability to comply with this Order. I am concerned about the issue raised by Ms. Mallet on behalf of her client that K.G. is just going to have difficulty with this situation and I hope that the decision makes it clear that a continuation of the current negative interaction, toxic relationship, whatever label you want to put on it, is only going to make life not only complicated and difficult for both parents but A.V. is going to be the one suffering as a result and I can see from K.G.'s reaction today that, you know, I mean this is an emotional situation and it's an emotional response, an emotional reaction. I am hopeful that both parties will take time to reflect on the decision, to recognize that what I have tried to do is focus on what I think is really in A.V.'s best interests, all right, and that that involved having to look at it from a somewhat different perspective than both parents are focusing on. All right?

[176] Enough said. I am concerned, I guess, that this is obviously a high conflict case right now and the nature of high conflict cases are that they come back again and again and again and that's not a good thing, so I am hoping that perhaps with some time and some recognition of what's really important is A.V., that perhaps this decision will help the parties move forward and move forward in a positive way as opposed to a negative way.

[177] All right, thank you very much, Counsel. I'll have to ask Ms. Mallet to take a stab at the Order, I think. I guess success is divided. Maybe Mr. DesNeiges if you could take first stab at it and then run it by Ms. Mallet and then once counsel have signed off on the wording of the Order then it can be submitted to the Court. All right? Thank you very much, Counsel.

Morse, ACJFC