FAMILY COURT OF NOVA SCOTIA
Citation: *L.B. v. K.S.*, 2016 NSFC 36

Date: 20160713
Docket: FAMMCA-076382
Registry: Amherst

Between:

L.B.

Applicant

v.

K.S.

Respondent

DECISION

Judge:	The Honourable Associate Chief Judge S. Raymond Morse
Heard	July 5 and July 7, 2016, in Amherst, Nova Scotia
Oral Decision:	July 13, 2016
Counsel:	Jim O'Neil, for the Applicant
	Michel DesNeiges, for the Respondent

By the Court:

INTRODUCTION

[1] All right, this is the matter between K.S. and L.B. It was scheduled for oral decision this afternoon. Because this is an oral decision it is not going to be necessarily as coherent or even cohesive as if I'd taken time to reserve and file a formal written decision but my practice in these sorts of situations is to recognize that the parties really need to have a decision fairly quickly and so I attempt to provide oral decisions if I can.

[2] So in this particular case, L.B. and K.S. are the parents of seven-year old T.B., date of birth October *, 2008. The parties separated in 2010. Following separation the parties agreed to shared custody whereby T.B. would be with K.S. approximately 55 percent of the time and 45 percent of the time with L.B. In light of the shared parenting arrangement the parties agreed to a non-guideline amount of child support being payable by L.B. in the amount of $100 per month, together with a contribution to childcare expenses and equal sharing of other Section 7 expenses.

[3] This case is somewhat unusual. The shared parenting arrangement that has been in place since separation has been working. The parties have been able to communicate appropriately on parenting issues. The child enjoys a positive and loving relationship with both parents. T.B. appears to have thrived under the shared parenting arrangement as agreed to by the parties. Both parents have demonstrated the commitment to parenting that is required in order to make a shared parenting arrangement effective and consistent with the best interests of the child. Both parents acknowledge that each is a good parent. Neither party has said anything negative or derogatory about the other.

[4] Their dispute stems from the mother's desire to relocate herself and T.B. to Lower Sackville in order to pursue a job opportunity as well as a common-law relationship with her current boyfriend. The proposed relocation would obviously mean that the current shared parenting arrangement would no longer be possible and that K.S. would become the primary caregiver for T.B. Given the implications of the move L.B. opposes the relocation request and wishes to either maintain the existing shared parenting arrangement or, alternatively, he requests primary care.

PROCEEDINGS

[5] Pursuant to notice of variation application dated August 28, 2015, L.B. requested review and variation of a Consent Order dated August 24, 2011. His affidavit in support, sworn August 28, 2015, confirmed L.B.'s request that he be given primary care so that T.B. would continue to reside in Cumberland County.

[6] The application as filed by L.B. does not include a request for child maintenance. He also filed a parenting statement which confirmed his willingness to maintain the existing shared parenting arrangement so long as the child's residence was not changed from Cumberland County.

[7] The parties participated in a settlement conference on March 9, 2016, but, unfortunately, the conference was not successful.

[8] On January 19, 2016, the respondent filed an affidavit in which she confirmed that she wished to move to Lower Sackville to pursue a better life for herself and T.B. On February 24, 2016, the respondent filed a parenting statement, again indicating that she wished T.B. to live with her in Halifax and requesting that she have primary care. In her statement she proposed that the applicant, L.B., would enjoy parenting time three weekends a month.

[9] At the conclusion of a docket appearance on March 30, 2016, the matter was scheduled for a contested hearing on July 5 and 7.

ISSUES FOR DETERMINATION

[10] 1. Has there been a material change in circumstance since the Consent Order of August 24, 2011?

[11] 2. If a material change in circumstance has occurred, would it be in the best interests of the child to vary the Order?

[12] 3. If the Order is to be varied, what is the nature of the variation that would again be in the best interests of the child?

EVIDENCE

[13] I am not going to review the evidence in great detail since it is relatively fresh in everyone's mind.

[14] Seven exhibits were tendered during the trial. One document originally marked as Exhibit 6 was not tendered. Exhibit 1 was the parenting statement of the applicant, L.B. Exhibit 2 was his affidavit of August 28, 2015, and Exhibit 3 was his affidavit sworn June 7, 2016. Exhibit 4 was L.B.'s affidavit sworn June 28, 2016, and the affidavit in error . . . the affidavit itself in error indicates the year as 2015, that's an obvious error with . . . and that affidavit has attached school records and the student agenda.

[15] Exhibit 5 was the schedule showing use of babysitters during the months of May and June by L.B. Exhibit 7 was the affidavit of K.S. sworn January 18, 2016. Exhibit 8 was the supplementary affidavit of the respondent sworn July 5, 2016.

[16] Three witnesses were called by L.B.: R.L., K.W. and K.A. L.B. also testified on his own behalf.

[17] Two witnesses were called on behalf of K.S.: M.B., S.A. and K.S. testified on her own behalf.

[18] K.W. is L.B.'s current common-law partner. She has two children, ages 9 and 3. L.B. is the three-year old's father. K.W. testified that her nine-year old son and T.B. get along well for the most part. She's employed at Wal-Mart. During her testimony, she indicated that until recently she and L.B. did not use babysitters to provide childcare, however L.B.'s hours of employment changed in May of this year and, as a result, they now have to use a babysitter on an infrequent basis due to their work schedules.

[19] During cross-examination K.W. confirmed that she and L.B. have been in a common-law relationship for approximately four years. They purchased their current home in September of 2015. It's about ten minutes from Amherst and she confirmed that T.B. had no difficulty making new friends each time she and L.B. moved. During her cross-examination, she also confirmed that T.B.'s into competitive sports and he loves hockey. She goes to all his games and confirmed that he played novice this past winter.

[20] K.A. confirmed that he is the father of K.S.'s youngest child, T. She is three years old. He confirmed that he and K.S. have agreed to shared parenting. His relationship with K.S. is good. T.B. and T. generally get along well and spend time together. He described their sibling relationship as close. When asked about the impact of K.S.'s proposed move to Lower Sackville he indicated that he thought it would mean that the two children would have greater time apart overall.

[21] During his cross-examination K.A. testified that he's not okay with K.S.'s plan to move and he was not happy about the proposed change. He indicated that he told K.S. that if the move was forced upon him he would be okay with a week-about shared parenting but stated that when T. starts school the situation will change. He noted that her family and support system are all in the Amherst area, just like T.B.'s, and when it was suggested to K.A. that he had changed his position he again indicated that he has said he would do week on and week off if he absolutely had to but again noted that the arrangement will only work until T. starts school and indicated his intention to ... at that point, seek primary care.

[22] Again, he reiterated that he had told K.S. that he would agree to a week-about shared parenting if he has to, but he is not 100 percent happy and commented, "I want to be there for my daughter."

[23] During his direct testimony the applicant father, L.B., identified Exhibits 1 through 4.

[24] During cross-examination, he acknowledged that the child's mother, K.S., has had a strong bond with T.B. since birth, however, he would not agree that she was the principal caregiver since birth. At one point he commented, "My life has been T.B. since he was born."

[25] He confirmed that when he and K.S. were a couple he would be working, however, he indicated that when he was at home he shared childcare responsibilities. He acknowledged that K.S. would be spending most of the time parenting T.B. when they were together as a couple. He did not agree with the suggestion that he was responsible for the parenting of T.B. 40 percent of the time and that K.S. was responsible 60 percent of the time after separation. He said it might have been that way for the first year and a half but not after they separated. Following separation he indicated that he and K.S. got along for the most part, noting that for the sake of T.B. everything stays civil.

[26] When questioned about his opposition to K.S.'s plan to move, L.B. indicated that one of the reasons was due to T.B.'s participation in sports. He suggested that T.B. has already made a bit of a name for himself and that the coaches know him. He expressed his belief that it was important for T.B. to participate in sports and expressed concern that if he relocated to Lower Sackville he would not be able to play at the level he wants to and would not have opportunities similar to those which he now enjoys.

[27] L.B. also indicated that he's opposed to the move because “T.B. loves it here”, has contact with members of his extended family, loves the school and the program he is participating in at school and the teachers know him and his habits. He expressed concern that if T.B. moved to Lower Sackville his new school would not understand his needs as well and they would require time to get to know him.

[28] At one point he acknowledged that he has family in Halifax but explained that he grew up in group homes and has seen his family infrequently because of this background.

[29] At another point during his cross-examination L.B. expressed his belief that his role was important as far as T.B.'s education is concerned. He indicated his belief that T.B. has done well at school this past year and noted that he received extra help for math, reading and writing. He did, however, note that T.B.'s attitude could be better, acknowledging that he sometimes speaks out in class.

[30] M.B. is corporate sales manager with a communications company in Amherst. He confirmed that K.S. is presently a sales associate. He referred to K.S. as being the best salesperson in the store and confirmed that she has been with the company for one and a half years. She is ranked at four percent nationally and he commented that she destroys her targets every month and referred to her as being extremely aggressive indicating that her skills as a sales associate are flawless.

[31] He indicated that the Amherst store is a low volume store and confirmed his understanding that K.S. wanted the opportunity for advancement with the company. He said that there was no real potential for progression in Amherst and, therefore, they are looking at the possibility of K.S. becoming a sales associate with either the Mic Mac Mall store, Spring Garden Road store or Halifax Shopping Centre store in Metro. He suggested that the transfer to Metro would be easy and when she confirmed her availability date then he and the area manager would consult.

[32] When asked about the company’s policy regarding family accommodation he indicated there was no such policy. When asked about the possible future work schedule for K.S. if she was working in Metro he indicated that he could not speak to specifics. During cross-examination he confirmed that there is a sales associate position available for K.S. in Metro but again he couldn't say where she will be working.

[33] S.A. confirmed that he and K.S. have been in a relationship for one and a half years. He resides in Lower Sackville and owns a home there. He confirmed that presently he travels to Amherst every second weekend to see K.S. and the children. He suggested that he and K.S. get along very well and that he also gets along with T.B. When asked about the proposed move he indicated that it would mean that K.S. would be living with him in his home in Lower Sackville. He indicated the move would benefit their relationship and certainly benefit her jobwise. He also suggested that it would be beneficial for T.B. from an educational perspective.

[34] He confirmed that the closest elementary school is Sycamore Lane Elementary. He confirmed his willingness to assist with picking T.B. up after he completes work on school days. He indicated that from his perspective, K.S. and T.B. have a great relationship and a great bond. During his cross-examination he acknowledged that he and K.S. have not as yet been living in a common-law relationship.

[35] K.S. testified on her own behalf and at the outset of her testimony she identified Exhibits 7 and 8. When asked about percentages of parenting for herself and L.B. under the shared parenting agreement she indicated she had never actually calculated the percentages. She confirmed that she was a stay-at- home mom when she was on maternity leave before starting back to work part-time. When the parties separated, she became a single mom and had to pick up extra shifts at work and had to utilize day-care depending upon her work schedule.

[36] She confirmed that prior to the parties' separation she would have been the primary caregiver and that L.B. would have been working in order to provide for the family, and she was at home. When asked about her employment she stated that she has good standing with the company and she is ranked 203 out of 6,000 employees. She described herself as being aggressive in pursuing sales indicating that she doesn't like to take "no" for an answer. When asked about her move she testified that she was seeking a better opportunity based upon the chance for advancement with the company. She indicated that salary was a huge issue for her, noting that it was hard as a single mother living from pay cheque to pay cheque. She also indicated that the move would allow her to further her relationship with her boyfriend and suggested that it would allow more opportunity for sports for T.B.

[37] She also indicated that the move might offer some benefit education wise for T.B. noting that he has trouble focusing in school. She talked about some resources that she understood would be available for T.B. that she had never heard about in the Amherst area. She indicated at one point that she didn't agree that the move would be harmful to T.B., suggesting that it would be an opportunity for T.B. to spend more time with his parents based upon the fact that if L.B. was given primary care T.B. would be spending significant time with L.B.'s partner due to L.B.'s work schedule.

[38] K.S. suggested that she has built up a strong bond and positive relationship with T.B., noting that she had breastfed him as a child. She also confirmed that he has a positive relationship with his sister, T. She noted that T.B. is very good at making friends and she believes he is very adaptable.

[39] At one point she testified as to her understanding that T.B.'s school records would go with him to the new school and, therefore, the new school would be aware of his records suggesting that everything they have available for T.B. in his current school would and could be offered and available at his new school.

[40] She testified that the relationship between herself and S.A. is a good relationship and that it is stable.

[41] In the event, she can relocate with T.B., K.S. testified that she would be willing to agree to L.B. having access three weekends per month and week on and week off during the summer. At one point she commented that she wants L.B. to continue to have a strong relationship with T.B. and as much access as she's able to allow. She also confirmed her willingness to facilitate his access by driving T.B. to Truro in order to undertake an exchange for purposes of access.

[42] During cross-examination she acknowledged that she and S.A. have not yet lived together and agreed that living together was different than spending time on weekends but suggested that she and he had taken time to build their relationship.

[43] During cross-examination, she acknowledged that there was lots of extended family in Cumberland County but suggested that L.B. had extended family in Metro that he has started to have a relationship with. She suggested that he gets along with everyone in his family except his mother and father. She expressed her belief that her family would continue to have a strong bond with T.B. and would continue to be part of his life if he moved to Lower Sackville.

[44] I want the parties to appreciate and understand that I have carefully considered all of the affidavit and *viva voce* evidence for purposes of this decision.

SUBMISSIONS

[45] Dealing with submissions, counsel filed pre-hearing briefs on behalf of their respective clients. The applicant's pre-hearing brief suggested that the question for determination by the Court was whether the proposed relocation of T.B. to Lower Sackville would improve or enhance his welfare. Counsel for L.B. argued or maintained that the only way that the Court should approve a move is if it is established on a balance of probabilities that the child would be better off based the principles set forth in *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

[46] The respondent's pre-hearing brief argued that the respondent's proposed move would be beneficial for the child and intended to meet the needs of the child. The respondent maintained that the best interests of the child would best be served if the child was in the primary care of the respondent and confirmed the respondent's willingness to provide generous access for the applicant.

[47] During oral submissions on July 7th, both counsel agreed that the law relating to determination of mobility applications was clear. Both counsel acknowledged *Gordon v. Goertz* as the leading case authority, being a decision of the Supreme Court of Canada. Mr. DesNeiges acknowledged that the parties had cooperated with each other under the shared parenting arrangement, that both parties are able to meet the child's physical and emotional needs and that both parties have good parenting skills. However, he suggested that the respondent and T.B. have a very strong bond. He suggested that the relocation would not result in T.B. losing connection with his father and that they would continue to have a stable relationship. He conceded that the views of T.B. were not applicable in the circumstances. He submitted that the move would be beneficial for T.B. emphasizing that the rationale for the move was not based upon any improper or ulterior motive or purpose. He maintained that the move would offer T.B. better opportunities. He suggested that the move would not result in any meaningful disruption for the child. He emphasized T.B.'s ability to develop new relationships in his new community and he pointed out that T.B. would continue to have the opportunity for a relationship with his sister, T., because she would be with K.S. every second week and that his contact with other siblings could also continue.

[48] Mr. DesNeiges argued that K.S. should be considered as the psychological parent for T.B. He relied upon the Saskatchewan Court of Appeal decision in the case of *H.S. v. C.S.*, 2006 SKCA 45 in support of this submission.

[49] For his part, Mr. O'Neil suggested that the Saskatchewan Court of Appeal decision could be understood and distinguished based on its unique or particular facts. He acknowledged that there was no question that T.B. would survive a relocation but indicated that the issue for consideration or determination was whether or not the relocation would mean that T.B. would be better off than he is presently.

[50] Mr. O'Neil emphasized that no one had disagreed that T.B. presently has a wonderful life in Amherst. He acknowledged that T.B. may have some issues at school but suggested that there is a good support structure in place. Mr. O'Neil emphasized there was some risk associated with the respondent's proposed relocation. There is uncertainty with respect to where she will be working and what her work hours will be. He went so far as to suggest that if L.B. had primary care the respondent would have more quality parenting time with T.B. because L.B. was prepared to agree that K.S. would have parenting time or access with T.B. three weekends a month when she would usually not be working. Mr. O'Neil maintained that there was no evidence suggesting that the child, T.B., would benefit from the proposed relocation.

APPLICABLE LAW

Change in Circumstance Pursuant to Section 37

[51] The Family Court's jurisdiction to make a Variation Order is set forth in Section 37(1) of the **Maintenance and Custody Act** which provides that "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".

[52] What does it mean to speak of a material change in circumstance? In *Lagace v. Mannett*, 2012 NSSC 320, Justice Jollimore indicated as follows:

> [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*, 1996 CanLII 191 (S.C.C.), 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 could 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.

Determination of Best Interests

[53] 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 the child's best interests.

[54] Case authorities provide some guidance with respect to what it means when we talk about best interests. In the case of *Yonis v. Garado***,** Justice Beaton ... I can provide the cite for counsel ... 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 3. 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:

[55] And then she sets forth this excerpt from *Young v. Young*:

> > ". . . 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."

> [31] In *Burgoyne v. Kenny* 2009 N.S.C.A. 34, Bateman, J. considered *Gordon v. Goertz (supra)*, and the often cited case in this province in *Foley v. Foley*, 124 NSR (2d) 198. . . .

[56] At paragraph 25 of *Burgoyne v. Kenny* (supra), Justice Bateman actually referred to the 17 factors that were identified by Justice Goodfellow in the *Foley* decision.

[57] *Foley* was, in fact, a decision in which Justice Goodfellow listed the 17 factors that he felt judges should consider in determining custody cases and it's regarded as a benchmark decision in this province and referred to in almost every case involving determination of custody or access issues. However, I think it's relevant and important to note that to a great extent Section 18(6) of the **Maintenance and Custody Act** constitutes statutory recognition of the *Foley* factors.

[58] In the *Burgoyne* case, Justice Bateman went on to indicate as follows in referring to the *Foley* list of factors.

> [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. . . .

[59] Then she went on to refer to an Ontario Court of Appeal decision, the case of *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.) in a decision of Justice Abella of the Ontario Court of Appeal wherein Justice Abella indicated as follows:

> 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.

[60] I have considered the factors as referred to in Section 18(6) of the **Maintenance and Custody Act** in determining this matter and I am not going to review the section itself. I have also taken into consideration Section 18(8). Again, I am not going to read that in. I am sure counsel are familiar with it.

RELOCATION

[61] I would like to refer to a case authority on the issue of relocation. That's the *Clark v. Saberi*, 2012 NSSC 310 case, a decision of Justice MacDonald of the Nova Scotia Supreme Court, Family Division, in which Justice MacDonald considered an application for relocation and indicated as follows with respect to the relevant factors to be considered by the Court in determining such an application. Justice MacDonald stated:

> [17] In the decision *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the Supreme Court of Canada provided guidance about the approach to be used and the factors to be considered when deciding whether a parent can move to another residential location with a child. The inquiry has two steps. First the Court must decide whether there has been a material change in circumstances. In every case when a parent has indicated an intent to move a child's residence a significant geographic distance away from a previous residence this threshold requirement has been fulfilled unless there is evidence to satisfy a court that the move was contemplated at the time the original order was made. In this case the intended move ...

[62] This is continuing her quote:

> . . . In this case the intended move does constitute a material change in circumstances.
>
> [18] The second step in a relocation proceeding, as contemplated by *Gordon v. Goertz*, is a fresh inquiry to determine what parenting arrangement in which residential location is in the best interest of the child having regard to all of the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy those needs. The Supreme Court directed (and I summarize):

[63] And this is still from Justice MacDonald's decision:

> 1. The inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
>
> 2. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's decision to live and work where she or he chooses is entitled to great respect and consideration.
>
> 3. The past conduct of a parent is not to be taken into consideration unless the conduct is relevant to the parent's ability to act as a parent of the child.
>
> 4. The parent's reasons for the move are irrelevant absent a connection to parenting ability, as may be the case of a move the sole purpose of which would be to frustrate or interfere with access.

> 5. The focus is on the best interests of the child or children and not the interests or rights of the parents.

[19] More particularly, the judge should consider, amongst other factors:

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) disruption to the child of a change in custody;
>
> (f) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[64] Finally she goes on to indicate as follows:

> [20] As the Supreme Court has said in *Gordon v. Goertz*:
>
> > 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

ANALYSIS

Proof of Material Change in Circumstance

[65] Given that both parties are asking the Court to vary the existing Order it is clear that both parties accept that there has been a material change in circumstance since the Consent Order was put in place sufficient to justify a variation and that the change is essentially founded on the respondent mother's desire to relocate herself and the child to Lower Sackville. Accordingly, there is no contest with respect to the threshold requirement of material change in circumstance in this case.

Determination of Best Interests

[66] When undertaking a determination as to best interests I am to consider the circumstances as referred to in Section 18(6) of the **Maintenance and Custody Act**, which may be applicable. And in this particular case I would confirm the following findings based upon consideration of the evidence.

[67] T.B.'s physical, emotional, social and educational needs are similar to those of most seven-year-olds. He requires appropriate parenting in order to ensure that his physical, emotional, social and educational needs are consistently and adequately met. The evidence in this case clearly supports and justifies the conclusion that both parents are able to ensure that T.B.'s physical, emotional, social and educational needs, as well as the need for stability and safety, are adequately met.

[68] Both parents appear to support and recognize the importance of maintaining T.B.'s relationship with the other parent.

[69] Both parties agree that prior to separation K.S. would have been primarily responsible for T.B.'s care as a stay-at-home mom while L.B. worked to support his family. However, L.B. made it clear that when not at work he was very much involved with T.B.'s parenting and there was no evidence contradicting L.B.'s statement that "his life has been T.B. since T.B. was born."

[70] The parties separated approximately two years after T.B. was born. Following separation the parties agreed to shared parenting and the subsequent Consent Order confirmed the agreement based upon K.S. parenting the child 55 percent of the time and L.B. being responsible for parenting 45 percent of the time. K.S. acknowledged during her testimony that she's never actually attempted to calculate the percentages. L.B. expressed his belief that his parenting time exceeded 45 percent at different times for various reasons. The evidence supports the conclusion that both parents have clearly evidenced a commitment to parenting consistent with shared parenting.

[71] The evidence also supports and justifies the conclusion that the parenting plan or proposals by both parties, while based upon different scenarios are certainly appropriate and would ensure again that T.B.'s physical, emotional, social and educational needs would be adequately met.

[72] Neither party offered any evidence with respect to the child's cultural, linguistic, religious or spiritual upbringing and heritage.

[73] Both parties agreed that it was not necessary or appropriate in the circumstances of this case to ascertain or consider the child's views and preferences.

[74] I am satisfied on balance that both parents enjoy a positive and loving relationship and a strong bond with T.B.

[75] Mr. DesNeiges urged the Court to conclude or find that K.S. was the primary or psychological parent. He emphasized the primary parent role that she had undertaken for the approximately two-year period prior to the parties' separation and he relied upon the Saskatchewan Court of Appeal decision in *H.S. v. C.S.* (supra), in support of his submission.

[76] I believe the facts underlying the Saskatchewan Court of Appeal's decision in *H.S. v. C.S.* are distinguishable from the case at Bar. In *H.S. v. C.S.* the parties had agreed to joint custody and that the primary residence of the children would be with the appellant mother. The appellant was, in essence, a stay-at-home mom because she could not find employment in the small town where the parties lived. The mother had also been the primary caregiver prior to separation. After a shared parenting arrangement had been place for three years, the mother sought permission to move to Alberta. The trial judge declined the mother's request. That decision was reversed on appeal when the Saskatchewan Court of Appeal concluded that the trial judge did not adequately consider the role of the primary parent, that is the mother, in the lives of the children, the bonding between the children and their mother, the importance of maintaining a relationship with the psychological parent and the importance of maintaining stability in the relationship between the primary parent and the children.

[77] The *H.S. v. C.S.* decision was considered by Justice Layh of the Saskatchewan Court of Queen's Bench in the more recent case of *Harvey v. Armbruster*, 2014 SKQB 363. In *Harvey v. Armbruster* the Court acknowledged *H.S. v. C.S.* but found that it was distinguishable based on the facts. Justice Layh was "cognizant that maintaining a child's relationship with a psychological parent is of primary significance to a child's best interests and may offset the inconveniences and upheavals caused by a change in geography." However, Justice Layh also indicated the ultimate decision in every case is what is in the best interests of the child.

[78] While acknowledging that the mother's counsel had suggested that the mother should be considered the psychological parent, Justice Layh indicated as follows at paragraph 70:

> 70. Measuring the strength of a child's emotional bond may be easy when one parent has been the primary or sole caregiver of young children, but measuring the strength of L. and E.'s emotional bonds at a later age, when they have been in the primary care of both parents, but most recently in their father's care, is less exact.

[79] In the end result, Justice Layh concluded that the children enjoyed a strong emotional bond with both parents.

[80] I was unable to find any reported Nova Scotia case authority which considered *H.S. v. C.S.*, however, in the case of *G.(L.) v. S.(T.)*, 2011 NBQB 223, Justice Walsh of the New Brunswick Court of Queen's Bench referred to *H.S. v. C.S.* indicating as follows at paragraph 30:

> …Principally, continuity is found in minimization of the disruption between the child and his primary caregiver. A child not only needs routine, a child needs consistency of care. This the mother provides. Her evidence as to her concerns regarding a schedule for the child is but a small window into what is important for a child. The Saskatchewan Court of Appeal noted in *Swenson v. Swenson*, 2006 CarswellSask 306 (Sask.C.A.), 27 R.F.L.(6th) 265 at para 24: "the importance of maintaining stability in the relationships between the primary parent and the child."

[81] Based upon the evidence presented, I am unable to conclude that K.S. should be considered to be the psychological parent of the child at this point in time. While this may have been the case at the time of the parties' separation, for the last five years the parties ... approximately five years ... the parties have been involved in a shared parenting arrangement in which both parents have been actively and consistently involved in the parenting of the child. I find the evidence supports and justifies the conclusion that at this point in time both parents obviously enjoy a positive and strong psychological bond with T.B.

[82] T.B. enjoys a positive and close relationship with his younger sister, T. He also has regular contact with T.'s father, K.A., and it appears that they have a positive relationship. He also has a positive relationship with his older and younger step-siblings. The evidence supports and justifies the conclusion that T.B. enjoys a positive relationship with members of his extended family including, in particular, members of the respondent's extended family who reside in Cumberland

County. There is no evidence suggesting that T.B. at this point in time has enjoyed a significant relationship with members of the father's extended family who reside in the Metro area.

[83] I find that both parties have the ability to co-operate and communicate appropriately on issues affecting T.B.

[84] Case authorities have established certain legal principles applicable to the determination of a mobility case. These include recognition that there is no legal presumption in favour of either parent in attempting to determine which parenting arrangement in which location is in the best interests of the child. Case authorities establish and emphasize that the focus of the Court must be on the best interests of the child and not the interests or rights of the parents. In this particular instance I have attempted to undertake a child-focused or child-centered approach to the determination of this application.

[85] I have considered the factors as referred to in *Gordon v. Goertz*. As previously noted, the existing custody arrangement is shared parenting. The shared parenting arrangement has worked well for the parties as well as T.B. Both parties are to be commended for the manner in which they have interacted and co-operated under the shared parenting regime. It is important to keep in mind that shared parenting is not the normal custody arrangement. It is generally accepted that shared parenting will only work in limited or exceptional situations involving exceptional parents and exceptional child or children. The fact that the shared parenting arrangement in this case has worked so well to date speaks volumes about the parties' commitment to T.B.

[86] In stating this I want to acknowledge that the situation has not been perfect nor without its challenges or difficulties but overall the arrangement has worked quite well and has clearly been consistent with T.B.'s best interests to date.

[87] Case authorities emphasize the importance of maximizing contact between the child and both parents. Based upon the evidence I am satisfied that K.S.'s parenting plan based upon relocation to Lower Sackville would impact negatively upon L.B.'s parenting time and contact with T.B. While the respondent is suggesting that if she were allowed to relocate with T.B. she would be willing to agree to L.B. having parenting time or access three weekends a month, the evidence indicates and confirms that L.B.'s work schedule would likely have some negative impact or would interfere with his weekend parenting time. The end

result would not be equivalent to the parenting time or contact that L.B. currently enjoys.

[88] It is difficult for the Court to assess how T.B. would react to a move to Lower Sackville. K.S. suggests that T.B. is very adaptable and very good at making new friends. The applicant also conceded that T.B. is good at making new friends and has no difficulty adjusting or adapting to changes associated with several moves in the local area. However, there is a significant difference between a move within the same community and a move to an entirely new or different community. While the respondent's optimism regarding T.B.'s adaptability is understandable it can only be proven to be well founded or correct if her request for permission to relocate is granted.

[89] Relocation would necessarily involve a disruption of T.B.'s current educational program. There have been some issues at school, however the evidence before the Court indicates that those issues have been recognized and dealt with appropriately and T.B. has, with appropriate support and assistance, made progress. He will be going into Grade 3 in September.

[90] The respondent has testified that she believes T.B. would benefit from participating in an educational program in Lower Sackville, however, there was a concerning absence of detail or specifics with respect to what benefits might be available that would not be available in his current school other than the items that were referred to by K.S. in her evidence.

[91] T.B. has not been assessed as having any special needs at this point in time, nor has he been diagnosed with a condition that might impact upon his schooling such as a learning disability or ADHD. However, the evidence of L.B. is that T.B. loves his current school, has made progress and has a positive relationship with his teachers who know and understand his needs. A move would certainly disrupt those relationships and, therefore, might impact negatively on his academic progress.

[92] Relocation would obviously impact upon T.B.'s current sporting activities. Both parties acknowledge the importance of T.B.'s participation in sports including, in particular, hockey. Both parents agree that T.B. has already demonstrated obvious potential in his participation in hockey. L.B. emphasizes the fact that T.B., even at age seven, has made a name for himself in the local hockey community and is known by the coaches. While relocation to Lower Sackville wouldn't mean that T.B. would not be able to play hockey, it would certainly mean

he would have to adjust to playing hockey in a different community, a different program with a different team and different coaches.

[93] More importantly, the evidence supports and justifies the conclusion that the relocation to Lower Sackville would have negative impact upon T.B.'s contact with his brother, as well as his step-sibling. It would also lessen his contact with his sister, T., since she would be spending every second week with her father in the Amherst area and T.B. would be spending three weekends a month with his father under K.S.'s proposal and so, therefore, during at least one of those weekends T. would be presumably with K.S. The end result would be a reduction in the contact between T.B. and T.

[94] The relocation would also mean a lessening or reduction in the opportunity of contact between T.B. and the members of his extended family who reside in Cumberland County. Again, the evidence does not support and justify the conclusion that T.B. has, at this point in time, as meaningful a relationship with members of L.B.'s family who reside in Metro.

DECISION

[95] K.S.'s desire to pursue the opportunity for career advancement by relocating to Lower Sackville is totally understandable. The Court recognizes the challenges associated with being a single parent, particularly the financial challenges. K.S. has done extremely well as a sales representative or associate. Her current manager was effusive in praise of her performance to date. The Court also accepts that the opportunity for increased income would obviously enhance K.S.'s ability to provide for her children in the manner that she would like.

[96] In the current economic climate the opportunity for career advancement is often limited and, again, the Court has little hesitation in recognizing the proposed relocation would be in K.S.'s best interests.

[97] However, the evidence does not support or justify the conclusion that T.B. has been negatively impacted by K.S.'s current employment situation. The Court acknowledges that K.S. feels that she has been living from cheque to cheque, however, she also testified that she's been able and willing to contribute to expenses such as costs of sporting activities, she simply has to have advance notice so that she can budget accordingly. There is no evidence that T.B. has gone without under the existing shared parenting arrangement.

[98] There is some uncertainty associated with her potential job change. While she spoke about the possibility of working at the company's store in Lower Sackville, M.B. in his evidence, did not refer to the Lower Sackville store but instead referenced three possible job locations some distance from Lower Sackville.

[99] In addition to the uncertainty with respect to where the respondent may be working there is also uncertainty as to her potential hours of employment. While K.S. feels that she will have some say in where and what hours she will be working, it was clear from M.B.'s evidence that in the end result those decisions will be made by management not by K.S. The location of her job and the hours of her employment will, of course, impact upon her parenting time with T.B.

[100] When asked during direct examination why she wanted to relocate or move she responded initially by indicating that she was seeking a better opportunity for chance of advancement. She testified that "salary is huge for me". She also indicated that she wanted to further her relationship with her boyfriend. The move will allow them to begin living common-law in her boyfriend's home in Lower Sackville. She then added that she felt it would also create opportunities for sports for T.B. and also be beneficial with respect to his education or school programming.

[101] Again, the desire on the part of K.S. to further her relationship with her current partner is totally understandable, however, they have never lived in a common-law relationship to date. The proposed move or relocation will involve a significant change for both of them. It is difficult to predict how the relationship will progress. It introduces yet another element of uncertainty or unpredictability that has to be acknowledged. K.S.'s personal circumstances are to be contrasted with L.B.'s given the fact that L.B. has been involved in a stable relationship with his current partner for several years.

[102] Based upon careful consideration of the evidence and applicable principles, I have concluded, albeit with some reluctance, that it would not be in T.B.'s best interests to relocate to Lower Sackville. It is a difficult decision for the Court.

[103] I would confirm that the existing shared parenting arrangement in accordance with the Order of August 24, 2011, is to continue in force and effect.

[104] In the event that K.S. decides to relocate to Lower Sackville, I am satisfied that her relocation would constitute a material change in circumstance sufficient to

justify the conclusion that it would be in T.B.'s best interests to vary the existing Order as follows:

TERMS OF THE VARIATION ORDER

[105] T.B. shall continue to be in the joint care and custody of the parties.

[106] T.B.'s primary residence shall be with L.B. and L.B. shall be primarily responsible for T.B.'s day-to-day care and custody.

[107] K.S. shall be permitted to have parenting time with T.B. three weekends per month from Friday evening to Sunday evening with the parenting time to commence and to end at the times agreed to by the parties. The weekends will occur the first, second and third weekend each month unless the parties agree otherwise. In the event that K.S.'s weekend parenting time coincides with either a statutory holiday or an in-service day, K.S.'s parenting time may be extended to include either the in-service day or the statutory holiday by agreement of the parties. The parties shall endeavour to reach an appropriate understanding or agreement with respect to adjusting the schedule of parenting time to allow for or recognize T.B.'s participation in extracurricular or sporting activities.

[108] L.B. will facilitate K.S.'s parenting time by transporting T.B. to Truro on Fridays for pick up or exchange at a location to be agreed upon by the parties. Similarly, L.B. will travel to Truro on Sundays for the return exchange, which will occur at an agreed upon location.

[109] During the months of July and August, the summer months when T.B. is not in school, K.S. will enjoy parenting time on a week-about basis. The parties shall agree to the schedule of shared parenting for the months of July and August no later than June 15th each year. Once again the exchanges for purposes of the scheduled shared parenting shall take place at Truro at the time and locations agreed to by the parties. The parties may, by mutual agreement agree to a different schedule of summer parenting and the exchange again, L.B. is to facilitate the exchanges by traveling to Truro, to and from Truro is I guess the way I'd put that, Counsel, but once again it's an equal sharing of the transportation for the exchange.

[110] The parties shall agree to an appropriate schedule of parenting time for Christmas holidays and March Break on the basis that the parenting time during Christmas holidays and March Break should be equal or shared unless the parties agree otherwise. Once again, the exchanges for purposes of Christmas and March

Break parenting schedule shall take place at Truro at the time and locations agreed to by the parties, unless the parties agree otherwise.

[111] In addition, K.S. shall be permitted to have regular contact with T.B. by way of telephone or internet.

[112] Both parties shall be permitted to have contact or parenting time with T.B. on special occasions such as his birthday, Father's Day or Mother's Day.

[113] Both parties shall be able to directly access information from involved third party professionals such as physicians, health care providers, teachers or other school officials. L.B. shall, as soon as practicable, inform K.S. of any significant health or educational issues related to T.B.

[114] The parties will continue to share equally the costs of any Section 7 expenses, including costs associated with T.B.'s participation in sporting and recreational activities providing both parties agree in advance that the sporting or recreational activities are appropriate.

[115] On or before June 1st each year K.S. will be obligated to provide L.B. with a copy of her prior year's tax return as well as any notice of assessment or reassessment as received from the Canada Revenue Agency and L.B. will be under the same obligation. So there is to be an exchange of financial information on or before June 1st each year.

[116] Given the Court's decision I will be asking Mr. O'Neil to prepare the appropriate Order and I would like to thank counsel for their participation and their able representation on behalf of their respective clients.

[117] Thank you very much.

Morse, ACJFC