FAMILY COURT OF NOVA SCOTIA
Citation: *K.C. v. V.A.*, 2016 NSFC 37

Date: 20161014
Docket: FAMMCA-086396
Registry: Amherst

Between:

K.C.

Applicant

v.

V.A., M.A. and K.D.

Respondents

DECISION

Judge:	The Honourable Associate Chief Judge S. Raymond Morse
Heard	October 13 and 14, 2016, in Amherst, Nova Scotia
Oral Decision:	October 14, 2016
Counsel:	Robert Moores, for the Applicant
	Christine Drapeau, for the Respondent, K.D.

By the Court:

INTRODUCTION

[1] All right. This is the decision in the matter between K.C. and M.A. and V.A. and K.D. K.C. and M.A. are the parents of four-year old J.C.; date of birth, June *, 2012. K.D. is the maternal grandmother and V.A. is the paternal grandmother. J.C. has cerebral palsy and, as a result, regularly attends physiotherapy as well as the IWK Hospital for follow-up. M.A. and V.A. appeared on their own behalf and were not represented by counsel.

[2] Both parents have a past history involving criminal activity and/or use of narcotics. As a result, both parents have had periods of time where they have been incarcerated and, therefore, unavailable to parent their daughter, J.C. When the parents were unavailable to parent, the grandmothers assumed the parenting role.

[3] By Order dated March 4, 2015, the Court confirmed that the child, J.C., would be in the joint custody of K.C., M.A., K.D. and V.A. K.D. was confirmed as having primary care of the child. The parents were permitted to have supervised access contact with the responsibility for supervision of K.C.'s access falling to her mother and the responsibility for supervision of M.A.'s access falling to his mother. The Order contemplated that the parents' access would progress to unsupervised providing that unsupervised access would be exercised or could be exercised in a stable environment.

[4] Pursuant to notice of variation application dated December 17, 2015, K.C. requested variation of the March 4, 2015 Order. The associated parenting statement confirmed a request that the child, J.C., be in the primary care of K.C. K.C. also requested that the Order be varied to confirm joint custody between herself and M.A. with provision for access for V.A. and K.D. K.C.'s application was supported by a handwritten affidavit.

[5] By way of response to variation application dated March 22, 2016, V.A. also requested a variation of the Order. She asked that the child be placed in her primary care and she submitted an affidavit in support of her response.

[6] The parties participated in a settlement conference; however, the parties were unable to arrive at a settlement agreement. At the conclusion of a review hearing held August 19, the Court granted an Interim Order authorizing K.C. to

reside with her mother during the week so that the child would be able to participate in an educational program offered at the school's Early Years Centre. The Court confirmed that the existing schedule of parenting time for M.A. and V.A. would continue and the matter was scheduled for trial on October 13 and 14.

[7] On September 16th, K.D. filed an affidavit in response, sworn September 16, 2016. On September 21st, a supplementary parenting statement was filed on behalf of K.C., as well as a supplementary affidavit. M.A. filed an affidavit on September 30 and on October 4, V.A. filed a second parenting statement as well as a supplementary affidavit.

REVIEW OF THE EVIDENCE

[8] The applicant mother maintains that she has made significant progress in effecting some positive lifestyle changes. She is presently enrolled in a Methadone Maintenance Treatment Program intended to help her address her past history of illicit drug use. She has been in the program for more than a year and maintains that she has consistently tested negative for street drugs on urinalysis.

[9] She has been abstinent from use of illicit drugs for the past year. She has been actively involved in the parenting of her daughter, J.C. She attends with her daughter at all medical appointments and is an active participant in her daughter's physiotherapy program. She is also involved with Early Childhood Development Intervention Services. She has also taken an Anger Management Program as well as a Positive Parenting Program.

[10] The evidence supports and justifies the conclusion that K.C. has made significant progress in effecting positive lifestyle changes that should not only benefit her personally but also enhance her ability to provide appropriate parenting for her children.

[11] During her direct examination, K.C. testified that she believes that J.C. at present is doing well in her current educational program. She has contact with J.C.'s teacher or an EA on a daily basis during the school week. She confirmed that she does the child's exercises as prescribed by physiotherapy three times a day, in the morning, after school, and before bed. She believes that J.C. is making progress but suggested that it would be easier if everyone was on the same page.

[12] She indicated that M.A. does not attend physiotherapy appointments even though she has asked him to do so on numerous occasions. Again, she expressed

her belief that if everyone was working on the same physiotherapy program, she believes that things would move much more quickly as far as J.C.'s progress is concerned.

[13] In her affidavit, K.C. confirms that's J.C.'s cerebral palsy affects her ability to attain her developmental milestones in the area of mobility and language skills. She has been working with the developmental interventionist with Nova Scotia Early Childhood Development Intervention Services since August 2015. At this point in time, J.C. sits up independently, is able to use a walker for mobility, and is also toilet trained.

[14] K.C. acknowledged problems in the current relationship between herself and M.A. She suggested that, at first, the relationship between the parents was pretty good and attributed the worsening or deterioration in the relationship to the fact that M.A.'s mother, V.A., was overbearing. She indicated that, at present, the parents do not communicate and often argue and fight.

[15] K.C. testified at some length about the services she has been involved with and continues to be involved with. She has participated in programming at Maggie's Place. She is also participating in the Parenting Journey Program, which is another program sponsored by Maggie's Place. She attends Addiction Services once per month. She is on the Methadone Treatment Program. And, again, she has tested clean on random drug testing throughout her participation in the program.

[16] K.C. confirmed during her evidence that she doesn't feel that shared parenting would be appropriate because she and M.A. do not get along and cannot communicate. She suggested that a starting point for better communication would be M.A.'s regular participation in physiotherapy.

[17] She indicated support for continued contact between the child and M.A. as well as his mother, V.A. She confirmed her willingness to consider additional contact between the child and V.A. over and above the opportunity she would have for contact during M.A.'s proposed parenting weekend. She stated she was not opposed to contact on special occasions such as Father's Day.

[18] During cross-examination, K.C. acknowledged poor communication between herself and V.A., suggesting that she felt that nothing she does is right or good enough as far as V.A. is concerned. Their communication usually deteriorates to a screaming match. At one point, she talked about other services for

J.C., including Botox treatment at Halifax and the fact that the child also has a pediatrician in Truro that the child visits regularly and K.C. also attends regularly at hearing and speech appointments.

[19] K.C. suggested, at one point, that she felt that J.C. was getting tired with the current access schedule from Thursday to Monday. Again, her concern is that the child does not do her prescribed stretching exercises when she is in the care of M.A. As a result, when she has to restart the exercises on Monday, she believes that it is painful or difficult for J.C.

[20] K.D. testified on her K.C.'s behalf. K.D. is extremely encouraged by her daughter's progress and is supportive of her efforts to maintain a more appropriate lifestyle. She believes that she has seen significant positive change in her daughter. Her daughter currently has primary care of her other child, J.R., date of birth, June *, 2011.

[21] Given her daughter's progress, K.D. has allowed her daughter to assume the responsibility for the majority of J.C.'s parenting. K.D. also indicates in her affidavit that she would not hesitate to report her daughter if she had concerns for the safety of her two children. K.D. testified as to the importance of her daughter getting herself clean and expressed her belief that her daughter has straightened out a lot. She stated there was a positive bond between K.C. and J.C.

[22] At one point during her testimony, she indicated that initially M.A. did not have a strong bond with the child, but she felt that more recently he and J.C. have developed more of a bond. She acknowledged that M.A. was capable of looking after J.C. but emphasized the importance of doing the physiotherapy exercises. She indicated that she would have no concerns for J.C.'s safety if M.A. was responsible for parenting of the child every second weekend.

[23] She indicated that her main concern was her granddaughter and again expressed concern that M.A. has admitted to her that he doesn't do the stretching exercises but does other exercises instead. She indicated that V.A. does do the stretches. At a later point, she indicated she felt the current access schedule was hard on J.C. because on Monday they struggle to get J.C. back to her regular routine.

[24] During cross-examination by M.A., K.D. acknowledged paragraph 23 of her affidavit but again indicated that she now feels there is a better bond between M.A. and the child, based upon what she has seen and what the child has told her.

During cross-examination by V.A., K.D. acknowledged that she had not provided information to V.A. when requested. In later cross-examination, she acknowledged tension in the relationship between herself and V.A. and M.A. While indicating she has a lot on her plate, she could not offer an explanation for why she has not provided information as requested by V.A.

[25] K.D. also testified again that the bond between M.A. and the child has improved and she certainly didn't deny that there was a strong bond between the child and V.A. She was asked about the relationship between her grandson, J.R., and J.C. and indicated that J.R. loves J.C. to death and teases her. J.C. loves J.R. but on occasion gets angry with him. The children do attend the same school.

[26] M.A. maintained, during his testimony, that he has also made significant lifestyle changes and is committed to bettering his life. After being released from prison, while on parole, he was able to maintain a full-time job and also attend community college. He is currently enrolled in the carpentry program at the Nova Scotia Community College in Springhill. His current partner has a four-year-old daughter. They reside together in an apartment in Amherst. His partner is the building manager for that apartment building.

[27] During his direct evidence, M.A. confirmed that he wants J.C. to be raised by her mother and father and that the parenting of the child should be a joint effort by all the parties. M.A. acknowledged that he did not have a relationship with the child due to his incarceration and that, as a result, he missed the child's early years. However, he indicated that at this point in time he believes that they have developed a strong bond. He feels positive that the bond between he and his daughter, J.C., will continue to grow and develop as she grows and develops.

[28] M.A. acknowledged his daughter's cerebral palsy and confirmed that it creates challenges with respect to the child's use of her lower limbs. He acknowledged the importance of the stretching exercises prescribed by physiotherapy but suggested that he felt she needed a variety of exercises. This is the reason why he has purchased a tricycle for the child as well as a child elliptical trainer. During cross-examination, he confirmed that the physiotherapist was supportive of the use of a bicycle and did not oppose the use of the elliptical, but acknowledged again that the elliptical was his idea.

[29] During cross-examination by Mr. Moores, M.A. confirmed his belief that he and K.C. should raise J.C. He indicated that he has no objection to K.C.'s parenting. He confirmed that he did not accept K.D.'s invitation to visit her and

J.C. during lunch hours because he was concerned about the potential for arguments between himself, K.C., and K.D. His affidavit contains a similar explanation for his non-participation in some of J.C.'s appointments.

[30] At one point during his cross-examination, M.A. indicated that his mother and K.D. had a great bond until he and K.C. arrived. He indicated that it appeared to him that sometimes everyone has their own side and no one wants to listen. During cross-examination by V.A., he indicated that he didn't feel comfortable doing the stretches with J.C., but he does do them but commented that he's not a physiotherapist. He suggested that he does the stretches more lightly than would be done by physiotherapists.

[31] During her direct examination, V.A. testified that she believes J.C. needs both parents and that the parents need to step up and take their parenting responsibility seriously. She suggested that if the grandmothers were to step back, the parents could then come to terms better with shared parenting. V.A. testified that she would like all parties to stay involved in physiotherapy so that everyone would be up to date. She testified that she felt her son, M.A., was prepared to take on his responsibilities as a father whether by way of shared custody or participation in access. She did, however, suggest that both parents have some growing up still to do.

[32] She indicated that there always seemed to be an argument about her son's participation in the child's appointments and there appeared to be an inability or unwillingness to compromise. She indicated that she would like everyone to get along for the best interests of the child. She also suggested that joint custody should be maintained for herself and K.D. in order to monitor the situation. However, at another point in her direct evidence, she also indicated she believes that both parents have the best interests of the child in mind.

[33] V.A. spoke approvingly about her son's progress, noting that he has attempted to disassociate himself from individuals involved with criminal activity. She believes that her son has demonstrated great responsibility, making positive changes in his life. She feels comfortable with respect to his ability to assume a parenting role.

[34] She also acknowledged that K.C. can provide good care but indicated that her concern with respect to K.C. is her lifestyle and the people she hangs out with. She did, however, indicate that she and K.C. are on the same page as far as J.C.'s use of a wheelchair is concerned. She acknowledged that she and K.C. argue about

K.C.'s lifestyle choices and she indicated that she wants K.C. to better herself; however, suggesting that K.C., on occasion, can be overbearing.

[35] During cross-examination by Mr. Moores, V.A. testified that she believes that the parents should raise J.C. and that she wanted the opportunity to monitor their parenting. At one point, she agreed that she and K.C. have a similar personality which leads to confrontation. She hoped that the two parents would get along better without K.D. and herself in the picture.

[36] During cross-examination by Ms. Drapeau, V.A. confirmed that Thursday was her opportunity for time with J.C. and still is. She has the child on Thursdays and then her son has J.C. from Friday to Monday morning. Again, she confirmed that her concern with respect to K.C. is her lifestyle and the risk of her making bad lifestyle choices that will impact negatively upon her ability to parent. She expressed concern about K.C.'s former partner, who is currently incarcerated, and the fact that she believes K.C. has not ruled out the prospect or potential for resumption of that relationship.

[37] During the second day of the hearing, today, Ms. Drapeau called K.D. to give rebuttal testimony. During her evidence, K.D. explained how J.C.'s finger had been injured. She testified that J.R. and J.C. were playing and that J.C.'s finger was injured when J.R., who was running and jumping, accidentally jumped on J.C.'s hand. She thought that J.C. might have mentioned that her finger was sore at the Christmas concert but, otherwise, she seemed okay and so K.D. dropped her off at V.A.'s after the concert. V.A. and M.A. subsequently took the child to the hospital where she received treatment for the finger injury.

CLOSING SUBMISSIONS

[38] During his submissions, M.A. acknowledged with obvious regret that he had missed out on the child's early years. He spoke about the steps that he has undertaken to try and improve his life even while in prison. He expressed his desire to have the opportunity to be a father to J.C. He acknowledged the challenges arising from her cerebral palsy. He confirmed his request for shared custody but again emphasized that his main concern was having the opportunity to parent his daughter.

[39] V.A. indicated that she agreed with her son's submissions. She acknowledged that J.C. has two parents and two grandmothers. She said that she would like to see the two parents raise their children as mature adults. She

emphasized the importance of the two parents being on the same page as far as parenting was concerned. She expressed her belief that the parents needed to be able to voice their opinions and concerns to each other without getting into a heated argument. She felt that both parents needed to be mature.

[40] She indicated that while shared custody might be difficult, she felt it would be in the child's best interests. She acknowledged that the situation involving J.C. has been an emotional rollercoaster for all parties. She also indicated that she missed having the opportunity to spend time with J.C.'s sibling J.R. She suggested that, at the end of the day, everyone wants the same thing; namely, what is best for J.C.

[41] In her closing submissions, Ms. Drapeau acknowledged that all parties obviously love J.C. She acknowledged the paramount consideration is the child's best interests. She maintained that shared custody would not be appropriate. She indicated that shared custody would not be in J.C.'s best interests since it would create potential for health issues or concerns because the physiotherapy exercises may not be utilized or followed by M.A. She also emphasized that shared parenting would not be appropriate because of the poor communication between the parents. She confirmed that K.D. supports K.C.'s request for primary care but, in the alternative, believes that the status quo should be maintained.

[42] In his closing submissions on behalf of K.C., Mr. Moores acknowledged the position of the various parties with respect to custody. He expressed some concern with respect to M.A.'s credibility. He suggested that all parties had agreed that the parents can parent the child but that all parties also agreed that when the parties are together they argue.

[43] Mr. Moores maintained that in the year and a half that K.C. has been involved or responsible for parenting of the child, she has consistently participated in physio, speech services, and early intervention, and that K.C. recognizes the importance of the stretching exercises as recommended by physiotherapy.

[44] He contrasted K.C.’s approach to the physiotherapy exercises with M.A.'s, suggesting that M.A.'s approach leads to difficulty because he does not use the stretches, which leads to tightness of the muscles on Mondays when the child, J.C., is returned to K.D. and K.C. He expressed concern about the need for someone to make the parenting decisions. He submitted that K.C. was committed to providing the best care possible for J.C. He suggested that the Court should consider joint

custody in favour of the parents with primary care and final decision-making authority resting with K.C.

[45] He expressed his belief that if there was any negative change in circumstance, either or both V.A. or K.D. would intervene and take appropriate action to ensure the safety and welfare of the child. He strongly submitted that final decision-making authority was required in order to minimize or avoid conflict.

[46] I would also like to acknowledge that I have reviewed the prehearing briefs as submitted by Ms. Drapeau and Mr. Moores and I appreciate the fact that prehearing briefs were submitted.

LEGAL ANALYSIS

[47] Firstly, I am going to deal with the change in circumstance. The Family Court's jurisdiction to make a Variation Order is set forth in s. 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 circumstance since the making of the order."

[48] In the case of *S.G. v. H.C.*, 2011 NSFC 19, Judge Dyer considered an application for variation under the **Maintenance and Custody Act**. In his decision, he indicated as follows:

> [77] Under the **MCA**, the child's best interests are paramount when the court has to make decisions regarding custody, access, and related issues.
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> [78] Section 37 of the statute is relevant. It authorizes the court to 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'.
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> [82] **MCA** variation applications, when contested, usually have two steps. Firstly, the applicant must prove a change in circumstances. (The statute does *not* specify the change must be 'material'; but the case law supports the proposition that trivial, fleeting, and frivolous, etcetera changes will not meet the threshold.) Secondly, she/he must establish that as a result of the change(s), the last order no longer reflects the best interests of the child.

> [84] The requirements are not assessed in a vacuum. All the circumstances surrounding the order sought to be varied and the prevailing circumstances must be considered.

[49] What does it mean to speak of material change in circumstance? In *Lagace v. Mannett***,** 2012 NSSC 320, Justice Jollimore articulated the test as found in Section 17 of the **Divorce Act**, indicating as follows:

> [5] In an application to vary a parenting order, I am governed by *Gordon v. Goertz*. At paragraph 10 of the majority reasons in *Gordon v. Goertz*, then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.
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> [6] At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:
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> 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;
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> 2. The change must materially affect the child, and;
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> 3. The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
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> [7] Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of the child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests and must be changed to do so. Identifying the change which has occurred informs how the new order should be formulated to reflect the child's best interests in the new circumstances.
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> . . .
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> [9] Not every change is a material one: the change must be one which materially affects the child or a parent's ability to meet the child's needs.

[50] Section 18 of the **Maintenance and Custody Act** mandates the Court to give paramount consideration to the best interests of the child and Section 18(8)

confirms that the Court is to give effect to the maximum contact principle with respect to within the context of determining best interests. Case authorities provide some guidance with respect to what it means when we talk about best interests.

[51] And I am going to stop at this point. When I give a decision, I usually will refer to case authorities, other case decisions, because those decisions establish the principles that I have to apply in the context of this case. So it's a little boring but, nevertheless, it is an important part of the process and an important part of decision making. And that's why I am taking the time to go through some of these other decisions which identify the general principles that I have to apply.

[52] So in the case of *Yonis v. Garado*, 2011 NSSC 454, Justice Beaton considered the meaning of best interests and indicated 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, in *Tamlyn v. Wilcox (supra)* at paragraph 37.
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> > [37] In *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, the Supreme Court elaborated on the "best interests" test. At paragraph 17, the Court stated:
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> > > "…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."

[53] In the *Burgoyne* case, this is a decision of our Court of Appeal, 2009 NSCA 34, Justice Bateman indicated as follows:

> [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. Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.
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> 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.

[54] Our legislation, the **Maintenance and Custody Act**, has provided some specific guidance to the Courts when determining best interests of a child. There are a number of circumstances listed and referred to in Section 18(6). I am not going to go through the entire list, but I want to assure counsel and the parties that I have considered those circumstances. And, in addition, Section 18(8) is also important. I will read 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, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse, or intimidation . . . .

[55] This is not a case where I have to consider any family violence, abuse, or intimidation.

[56] So, firstly, dealing with proof of material change. The party requesting or seeking a variation in an existing Order bears the onus of proof with respect to establishment of a material change in circumstance sufficient to justify variation.

[57] In this case, K.C. is the primary applicant. She is requesting that the existing Order be varied so as to confirm joint custody between herself and M.A. with K.C. having responsibility for primary or day-to-day care. Her mother, K.D., is supportive of her application but, in the alternative, she takes the position that the Court should maintain the status quo. M.A. is also requesting a variation. He maintains that shared parenting would be appropriate. V.A. is supportive of her son's request for shared parenting but, in the alternative, she suggests that she should assume responsibility for the child's primary care if the Court is not prepared to confirm shared parenting.

[58] It appears, therefore, that all parties are willing to agree or concede that there has been a material change in circumstance sufficient to justify variation of the existing Order. On balance, I am also satisfied, based upon the evidence that a material change in circumstance has been established sufficient to justify variation of the existing Order.

[59] In particular, the evidence indicates and confirms that both parents have made significant progress in effecting lifestyle changes that impact positively upon their parenting abilities. Both K.C. and M.A. are to be commended for the progress that they have made in attempting to distance or disconnect themselves from prior lifestyles that were obviously incompatible with parenting.

[60] I am satisfied that the positive changes and progress on the part of each parent constitutes a change in the ability of the parents to meet the child's needs which materially affects J.C.

[61] Having been satisfied that there has been a material change in circumstance, the Court must now undertake the difficult task of determining what variation or change in the existing Order, if any, would be in J.C.'s best interests.

[62] The **Maintenance and Custody Act** confirms that the best interests of the child is the paramount consideration in determining custody. The **Act**, as I have already indicated, in Section 18(6) provides a listing of relevant circumstances to be considered by the Court when determining best interests. I, again, confirm that I have considered the circumstances as referred to in Section 18(6) and I would confirm the following findings:

[63] J.C.'s physical, emotional, social and educational needs are similar to those of most four-year old children. She requires appropriate parenting in order to ensure that her needs are consistently and adequately met. In J.C.'s case, she has

particular needs related to her cerebral palsy. Both parents, as well as the grandparents, need to be informed and aware of the special parenting required in order to effectively deal with J.C.'s cerebral palsy. Based upon the evidence presented, I am satisfied that both parents have the ability to ensure J.C.'s physical, emotional, social, and educational needs, as well as the need for safety and stability are adequately met, providing they do not return to their previous lifestyles which, as I have already indicated, are obviously incompatible with parenting.

[64] Both parents appear to have a basic understanding of the need to support and recognize the importance of maintaining the child's relationship with the other parent. Both parents need to appreciate and understand that it is the right of the child, it is J.C.'s right, to have a meaningful relationship with each parent. Any conduct or action on the part of either parent that unreasonably interferes with the child's ability to have a meaningful relationship with the other parent is inconsistent with the child's best interests.

[65] The past lifestyle of both parents have interfered with their ability to care for J.C. In essence, their negative lifestyles limited or restricted their availability to their child and their ability and opportunity for parenting. Fortunately, the child's grandmothers were willing and available to assume and share responsibility for parenting when neither parent was in a position to do so.

[66] The applicant K.C. has been much more involved in the day-to-day care of the child since approximately September of 2015. M.A. has also enjoyed regular parenting time since his release from custody. K.C. has been consistent in taking the child to medical and physiotherapy appointments and has been an active participant in Early Childhood Intervention Services. Both K.D. and V.A. have facilitated these appointments by assisting with transportation and, in many instances, they've also participated in the actual appointment.

[67] M.A. has also acquired some understanding of how to deal with the child's cerebral palsy, even though he has not been a consistent participant in physiotherapy. When he is responsible for parenting, he encourages and facilitates the child's participation in exercise activity which includes the use of a tricycle and, to a lesser extent, a child's elliptical machine. He does attempt the stretching exercises recommended by physiotherapy; however, he admitted that he is somewhat uncomfortable with the stretches. For more than a year he has enjoyed regular parenting time. Since moving in with his current partner, he has assumed responsibility for J.C.'s parenting during his parenting weekends.

[68] Over a similar timeframe, K.C. has assumed responsibility for the day-to-day care of the child with the continuing support of her mother. K.C.'s parenting plan is premised upon having primary day-to-day care. M.A.'s parenting plan is premised upon shared parenting. Both parents feel that their respective parenting plans are consistent with the best interests of the child.

[69] K.D. supports her daughter's plan. V.A. supports her son's request for shared parenting. But, in the alternative, V.A. indicates that she would like to have primary care. I will have more to say about the merits of the proposed parenting plans as they relate to the best interests of the child later in my decision.

[70] There was no evidence presented with respect to the child's cultural, linguistic, religious, or spiritual upbringing and heritage.

[71] The child is obviously not of an age where it would be necessary or appropriate to ascertain or consider the child's views and preferences.

[72] I am satisfied, based upon the evidence, that both parents at this point in time enjoy a positive and loving relationship with the child. I am also satisfied that both grandmothers also enjoy a positive and loving relationship with the child. Both grandmothers have been actively involved in the upbringing and care of the child. It is important that their relationships with the child be maintained.

[73] The parents, at this point in time, do not exhibit an ability to communicate on issues affecting the child. All parties acknowledge significant difficulties with communication at this point in time. Communications frequently deteriorate into conflict or arguments. It has had a negative impact upon M.A.'s participation in J.C.'s appointments, including physiotherapy. He has avoided participation in appointments in order to avoid conflict with K.C.

[74] For the past year or so, V.A. has also encountered difficulty communicating with K.C. on matters pertaining to J.C. and has also encountered difficulty in communicating with K.D. The current difficulties in communications between V.A. and K.D. are to be contrasted to the positive relationship and ability to communicate they enjoyed prior to September 2015.

[75] As indicated earlier, this is not a case where the Court is required to consider the impact of any family violence, abuse, or intimidation, as referred to and defined in the **Maintenance and Custody Act** for purposes of determining J.C.'s best interests.

[76] I am going to firstly deal with the request for shared parenting. And, again, I am going to touch upon some case authorities that identify some principles applicable to shared parenting. Justice Dellapinna of the Nova Scotia Supreme Court in *Hammond v. Nelson*, 2012 NSSC 27, confirmed a listing of factors relevant to determination of shared parenting, indicating as follows at paragraph 68. Now this ... I am not going to review all of the factors, but I am going to touch upon a portion of his comments. One of the items listed ... they were numbered. I am going to refer to item number 7.

> 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.
>
> It is essential that parties communicate with each other, keep each other informed of matters relating to their child, and make decisions together. If the Court is not satisfied that they can, then imposing a shared custody arrangement over the objections of one of them may lead to a deterioration of an otherwise good relationship and subject the child to conflict and instability….

[77] And then in number 8 ... paragraph number 8, he indicates as follows:

> 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 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.

[78] Then there's another decision, *Conrad v. Skerry*. This is 2012 NSSC 77, a decision of Justice Jollimore. And in that decision, Justice Jollimore noted as follows, at paragraph 41:

> [41] Shared parenting arrangements require a high level of cooperation and communication between parents. Such a level of communication isn't present between Ms. Conrad and Mr. Skerry. To provide stability for a child, the rules and expectations in each household must be consistent. Ms. Conrad and Mr. Skerry don't demonstrate this level of communication.

[79] And then, finally, in the case of *Wilman v. Sutton*, 2015 NSSC 172, Justice MacDonald also reviewed the factors relevant to assessment of the merits of shared parenting, indicating as follows at paragraph 18:

> [18] Parents in a shared parenting arrangement must exhibit an ability to cooperate and jointly plan for their children. They must be able to do so on a continuous basis, far more frequently than is expected from parents who have other parenting arrangements. Conflict and the potential for conflict must be at a minimum. Each parent must respect the other and their value systems. Methods of discipline should not be substantially dissimilar.
>
> [19] Parents must be able to communicate face to face. They must respond quickly to inquiries from the other parent about issues involving the child, focusing on the child's need not on the parent's issues. Routines in each household should be similar to ensure the child is not confused by or encouraged to become oppositional because of different standards and expectations in each home.

[80] I would like to acknowledge that these excerpts are similar to the excerpts from the case authorities that were referred to by Ms. Drapeau in her prehearing brief. Based upon consideration of the evidence ... careful consideration of the evidence, I am satisfied that K.C. and M.A. do not have an existing ability to cooperate and jointly plan for J.C. sufficient to justify shared parenting.

[81] Based upon the evidence, I am satisfied that the potential for conflict in a shared parenting arrangement would be significant. They have not been able to communicate face-to-face regularly or on a consistent basis without difficulty. I find that a shared parenting arrangement in this case would clearly expose the child, J.C., to parental conflict and the associated potential for emotional harm. The evidence does not support and justify the conclusion that K.C. and M.A. have the ability to communicate and cooperate appropriately on parenting issues so as to justify shared parenting.

[82] These conclusions are also supported by the evidence of V.A. who has testified to the difficulty she, herself, has encountered in communicating with K.C. and similar difficulties or problems experienced by her son. Indeed, V.A.'s affidavit reviews at some length and documents the ... attempts to document the

deterioration in the relationship between herself and K.D. and the communication problems that she has experienced in trying to communicate with K.D. on matters pertaining to J.C.

[83] Given the extent to which V.A. and K.D. had been involved with J.C. and their obvious desire to continue that involvement, the fact that they are now having difficulty communicating on issues relating to the child is another aspect of this situation that suggests that shared parenting would be problematic.

CONCLUSION

[84] Accordingly, I find that any shared parenting arrangement between the parents at this point in time would be inconsistent with the best interests of the child.

[85] I am, however, satisfied that it would be in J.C.'s best interests to vary the existing Order so as to confirm that J.C. will be in the joint custody of K.C. and M.A., with K.C. being responsible for day-to-day care and M.A. having the opportunity for regular parenting time.

[86] In addition, I am satisfied that it would be in the best interests of the child to confirm that both K.D. and V.A. shall continue to have a right-of-contact with the child.

[87] I have considered V.A.'s alternative request that she be considered for primary care. This, of course, is also a best interests determination. Based upon consideration of the evidence presented and having regards to the circumstances again referred to in s. 18(6), I am unable to conclude that it would be in J.C.'s best interests to place her in V.A.'s primary care.

[88] I believe it is in J.C.'s best interests to recognize the importance of her relationship with her parents and, in particular, the fact that K.C. is currently, and has been for some time, essentially responsible for her day-to-day care. K.C. has demonstrated an appropriate commitment to the child's care, including, in particular, the special needs associated with her cerebral palsy.

[89] K.C., at this point in time, is available to parent as a stay-at-home parent. From the best interests of the child perspective, I am unable to conclude, based upon the evidence presented, that it would be in J.C.'s best interests to place her in the primary care of V.A.

[90] In reaching this conclusion, I want to make it clear that I recognize the important role V.A. has played in the life of the child to date and confirm that I believe it is obviously in the best interests of J.C. that V.A. continue to play an appropriate role in the life of J.C., but as a loving and supportive grandmother rather than as a primary caregiver.

[91] I also have to consider the evidence indicating a conflictual relationship between V.A. and K.C. and the difficulty that has arisen with respect to communications between V.A. and K.D. Based upon the evidence, I believe it is reasonable to conclude that a decision confirming primary care to V.A. has obvious potential to make the existing difficulties in interaction and communication between the parties even worse. Such a result is obviously inconsistent with the best interests of the child. If V.A. were to have primary care, I believe the child, again, would be exposed to increased risk of family conflict.

[92] Similarly, I have been unable to conclude that maintaining an existing Order for joint custody in favour of the parents as well as V.A. and K.D. would be consistent with the best interests of J.C. at this point in time.

[93] V.A. suggested at one point that maintaining the existing Order would allow herself and K.D. to continue to have oversight over the child's parents in case either has difficulty maintaining their positive lifestyle changes. V.A.'s position is totally understandable, given the history and background of both parents. However, I do not believe that continuation of the existing Order for joint custody, as suggested by K.D., is required or necessary.

[94] Both V.A. and K.D. shall continue to enjoy contact with J.C. It is the expectation of the Court that if either V.A. or K.D. observe any negative change in circumstance that would impact negatively on the ability of either parent to parent the child or create a potential risk of harm for J.C., then either or both grandmothers will take appropriate action to ensure J.C.'s safety and welfare.

[95] As V.A. herself, conceded at one point during her testimony, it is time for the parents to step up and assume their parenting responsibility and it is time for she and K.D. to take a step back to allow this to happen.

TERMS OF THE ORDER

[96] I would, therefore, confirm the following Order. And I am going to ask the Clerk to transcribe this portion of the decision to assist counsel and the parties.

[97] The applicant, K.C., and the respondent, M.A., are granted joint custody of their daughter, J.C. The primary responsibility for day-to-day care and the child's primary residence shall be with K.C.

[98] The respondent, M.A., shall be responsible for parenting of the child every second weekend from Friday, after completion of the child's school program, until Monday morning. M.A. shall be responsible for the pick up of the child on Fridays after school and transportation of the child to the school program ... or to school on Monday mornings.

[99] In the event M.A.'s weekend parenting time corresponds with a holiday Monday, M.A.'s parenting time shall be extended to include the holiday Monday and he would then be responsible for transportation of the child to school on Tuesday morning. In the event M.A.'s weekend parenting time corresponds with an in-service Friday, M.A.'s parenting weekend shall be extended to include the Friday such that M.A. will be responsible to pick the child up after school on Thursday. This schedule of parenting time may be varied or changed by agreement of the parents.

[100] With respect to the Christmas holidays, the schedule of parenting time for Christmas is to be as follows. In even-numbered years, commencing this year, 2016, K.C. shall be entitled to parenting time from the commencement of the Christmas school vacation until 2 p.m. December 25. From 2 p.m. on December 25 until the end of the Christmas school vacation, M.A. shall be entitled to parenting time.

[101] In odd-numbered years commencing 2017, the schedule shall reverse and M.A. shall be entitled to parenting time from the commencement of the Christmas school vacation until 2 p.m. on December 25. From 2 p.m. on December 25 until the end of the Christmas school vacation, K.C. would then be entitled to parenting time.

[102] The parenting schedule for Christmas holidays may be varied by agreement of the parents. The schedule of parenting time for Christmas shall have priority over the regular schedule of weekend parenting time for M.A. such that the regular alternate weekend parenting time schedule is to be suspended during the Christmas holidays.

[103] During the summer school holiday, the schedule of parenting time shall be based upon shared parenting week-about. The parents on or before June 15 each

year shall identify when the schedule of week-about parenting is to commence. The parents may, by mutual agreement, vary or change the summer parenting time schedule.

[104] The parents shall have equal parenting time during March Break. The schedule of parenting time for March Break may consist of each parent having the opportunity for parenting time throughout the March Break on an alternating year basis or, alternatively, the parents may agree to a schedule of parenting that would see each parent have the opportunity for parenting for one-half of each March Break. Again, the schedule of parenting for March Break is to supersede the schedule of alternate weekend parenting time for M.A. And, again, the parents may, by mutual agreement, vary or change the March Break parenting schedule.

[105] The child shall spend Mother's Day with K.C. even if Mother's Day coincides with M.A.'s regularly scheduled weekend parenting time. The child shall spend Father's Day with M.A. Both parents shall have the opportunity for direct contact with J.C. on her birthday.

[106] The applicant, K.C., and the respondent, M.A., shall both ensure that the child has reasonable contact and the opportunity for a continued positive relationship with K.D., the maternal grandmother. The respondent, M.A., and the applicant, K.C., shall ensure that the child has reasonable contact and the opportunity for a continued positive relationship with V.A., the paternal grandmother.

[107] V.A.'s contact time with the child shall include every Thursday in accordance with the existing schedule. This schedule of contact time for V.A. may, of course, be changed or varied by agreement.

[108] The parents are to consult on all substantial questions relating to the child, included but not limited to education and healthcare. In the event that the parents are unable to agree on any significant parenting decision, following reasonable consultation between the parents, K.C. shall have the ultimate decision-making authority.

[109] Each parent shall exert every reasonable effort to foster a feeling of affection between the child and the other parent. Neither parent will do anything which will estrange the child from the other, injure the child's opinion of either parent or family member, or impair the natural development of the child's love and respect for either parent and members of their families.

[110] Both K.C. and M.A. will be entitled to attend all the child's activities and will be entitled to participate in all medical appointments and meetings scheduled by daycare or school which relates to the child's healthcare, health, or education. All parties shall be entitled to participate in the child's physiotherapy appointments.

[111] When responsible for parenting of the child, each parent shall ensure that any scheduled medical appointment is kept and shall be responsible for following through appropriately on any prescribed treatment for the child, including, in particular, any recommended physiotherapy treatment.

[112] The parents will make reasonable efforts to share information regarding the child, including information as to health, education, recreational activities, and the like, and may request and obtain information directly from third parties regarding the health, education, and general well-being of the child. Each parent shall have the right to obtain copies of the child's medical and educational records, including medical reports and school reports. The parents shall keep each other reasonably informed as to the date, time, and location of any scheduled medical appointment for the child. In the event of communication difficulties, the parents may utilize the assistance of a third party to facilitate their communications relating to the child.

[113] The residence of the child will not be changed from Amherst, Cumberland County, without agreement of the parents or in the absence of agreement ... I am sorry, without agreement of the parties or in the absence of agreement between the parties, appropriate court authorization. Each parent will have the right to authorize emergency medical care and treatment for the child. Neither parent will say anything negative or derogatory about the other in the presence of the child or allow any other adult to do so in the presence of the child.

[114] When responsible for parenting the child, neither parent is to abuse alcohol or use illicit drugs.

[115] The application as filed by K.C. did not include a request for child support. The Order will include a provision requiring M.A. to provide annual financial disclosure consisting of his prior year's tax return, any notice of assessment or reassessment on or before June 1 of each year. If M.A. is earning income sufficient to justify a child support payment in accordance with the Child Support Guidelines, he will be required to pay the appropriate monthly child support through Maintenance Enforcement Program.

[116] All right. That concludes the decision. I am going to, again, ask Ms. Archibald to prepare a transcript of the operative provisions of the Order. I would like to thank counsel as well as M.A. and V.A. for their submissions. And I thank all parties for their participation and I wish everyone all the best.

Morse, ACJFC