

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Spence v. Stillwell*, 2017 NSSC 152

Date: 05/31/2017
Docket: SFHMCA-104986
Registry: Halifax

Between:

Nadine Elizabeth Spence

Applicant

v.

Kristan Brittany Stillwell and Scott David Rawn

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Cindy G. Cormier

Heard: May 2, 8, and 9, 2017

Summary: Family Law – Grandparent application for leave to apply for care and custody (if the mother intends to move with the child to Ontario or if the mother reconcile’s with her previous partner), or access and visiting privileges.

Key words: Grandparent leave for care and cusotdy, grandparent access and visitation privileges.

Legislation: Maintenance and Custody Act and Nova Scotia Civil Procedure Rules.

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Oral Submissions:

May 9, 2017

Counsel:

Bernard Thibault for Nadine Spence
Morgan Manzer for Kristan Stillwell

By the Court:

Introduction

Taralynn (child)

- [1] Taralynn Elizabeth Rawn was born on October 19, 2012, and is approximately four years and 7 months old. Taralynn's caregivers have reported that she has presented with several physical health issues. Concerns have also been raised regarding Taralynn's overall emotional, physical and intellectual development.
- [2] Taralynn has been followed by several health professionals including Dr. Paul Hong, Dr. Debbie Smith and Dr. Kitamura. Comments made to child protection services and police by various health professionals have been recorded in child protection services business records and entered as evidence by consent of the parties.

Kristan Stillwell (mother)

- [3] Kristan Brittney Stillwell is Taralynn's biological mother. Ms. Stillwell takes the position that she is, and always has been Taralynn's primary caregiver.
- [4] In 2015 Ms. Stillwell graduated from the Maritime Business College and she is now qualified to work as a home care worker. Ms. Stillwell has worked outside the home in various positions and Taralynn has been cared for by a number of persons, including the Applicant who is Ms. Stillwell's mother, Nadine Spence. Ms. Stillwell is currently employed as a home care worker and has asked her current employer for a transfer to a similar position in Ontario.

Previous application under the *Maintenance and Custody Act, Stillwell v. Rawn.*

Scott David Rawn (possible biological father)

- [5] On April 16, 2015 Ms. Stillwell filed a Notice of Application pursuant to *section 18* of the *Maintenance and Custody Act*, for custody, access and child maintenance in relation to Taralynn. Scott David Rawn was named by Ms. Stillwell as the child's father and was a party to that proceeding (SFHMCA 95673).
- [6] Mr. Rawn lived with Ms. Stillwell and with the child until the parties separated in or around August 2014. Mr. Rawn may have had some ongoing contact, including physical access after the parties separated.
- [7] The parties participated in the court conciliation process through the Nova Scotia Supreme Court (Family Division), in Halifax, Nova Scotia in or around September 2015.

- [8] A question was raised by Mr. Rawn about paternity based on information he indicated he received from members of Ms. Stillwell's family. The court record reflects that Mr. Rawn expressed an interest in having ongoing access with Taralynn if she was his biological child.
- [9] Ms. Stillwell advised the court that Mr. Rawn left the jurisdiction and she did not have contact information for him. No resolution was achieved. Ms. Stillwell's application was dismissed by the court on January 18, 2017.

Recent information regarding the child's contact with Mr. Rawn

- [10] Direct testimony and agency business records suggest Ms. Stillwell has stated that Mr. Rawn reconnected with her in January 2016 and he expressed a desire to have contact with Taralynn. Mr. Rawn subsequently had some telephone contact with Taralynn and then stopped calling Taralynn in July 2016. Ms. Stillwell observed that Taralynn has shown signs of being negatively affected by the lack of contact or by inconsistent contact with Mr. Rawn.
- [11] Although Ms. Stillwell stated in her direct testimony that she is open to and has encouraged Mr. Rawn's involvement with Taralynn, the agency business records indicate Ms. Stillwell has expressed concern about her mother, Nadine Spence allowing Taralynn to have telephone contact with Mr. Rawn. In addition, Ms. Stillwell has stated to investigators that Mr. Rawn was physically abusive toward her and he used drugs.
- [12] Mr. Rawn currently resides in Ontario and was not present for the motion hearings on April 19, 2017 or May 2, 2017.

Nadine Elizabeth Spence (maternal grandmother)

- [13] Nadine Spence is Taralynn's maternal grandmother, and she resides with Stephen Spence.
- [14] Ms. Spence has argued, and Ms. Stillwell has acknowledged that Ms. Spence has been very involved in Taralynn's life and has often cared for Taralynn, at times up to two or three days per week or more.
- [15] Ms. Spence's time with Taralynn has been less frequent since November 2016 due to an increasingly strained relationship between Ms. Stillwell and Ms. Spence.
- [16] Ms. Spence has expressed concerns about Taralynn's safety and wellbeing while in the care of Ms. Stillwell and has sought relief from the court in an effort to address those concerns.

Notice of Application and Notice of Motion for Interim Relief

- [17] On April 10, 2017 Nadine Spence, the Applicant in this proceeding, filed a Notice of Application for custody (including leave to apply), and access with regard to Taralynn.
- [18] Ms. Spence also filed a Notice of Motion for Interim Relief (Family Proceeding) to address interim access. This matter was scheduled to be heard on May 2, 2017.
- [19] The interim relief sought by Ms. Spence was outlined in Ms. Spence's Affidavit sworn April 7, 2017 and included:
- a. Primary care of Taralynn to Ms. Stillwell;
 - b. Visitation between Ms. Spence and Taralynn every Friday afternoon at 3:00 p.m., until Sunday evening at 6:00 p.m.
 - c. Visitation at any other time as may be required by Kristan's work schedule, which shall be communicated to Ms. Spence.
 - d. Any other visitation as may be arranged between the parties.
 - e. A prohibition that Taralynn be removed from the province of Nova Scotia.
 - f. That Taralynn be immediately placed in the care of Ms. Spence in the event that Ms. Stillwell moves to Ontario, or if it is proven that Ms. Stillwell has reunited with Mr. Keith.
- [20] Ms. Spence relied on the *Maintenance and Custody Act*, section 18, and on *Civil Procedure Rules* 23 (Motions), 28 (Emergency Motions), and 59 (Family Division Rules).

***Ex Parte* Motion**

- [21] On April 13, 2017 Nadine Spence, filed an *Ex Parte* Motion (Family Proceeding), pursuant to CPR – 22.03(1)(e), 22.03(2)(a)-(d) requesting the court grant an order as follows:
- “that the child, Taralynn Elizabeth Rawn, born October 19, 2012 not be removed from the province of Nova Scotia, and in particular, not before this matter is heard on May 2, 2017 at 11:30 a.m.”
- [22] The *Ex Parte* Motion was supported by Nadine Spence's Affidavit sworn on April 13, 2017, where she sought an emergency order, prohibiting Taralynn's removal from the Province until the interim hearing was heard on May 2, 2017.

- [23] Ms. Spence alleged Kristan Stillwell had very recently physically disciplined the child and that Ms. Stillwell was planning to leave the jurisdiction with the child to avoid the interim hearing which was scheduled to be heard on May 2, 2017.
- [24] The motions judge denied the request for the matter to be heard on an *Ex Parte* basis and directed the matter be heard on notice to the parties. On April 18, 2017 Ms. Stillwell and Mr. Rawn were served with notice of the motion hearing to be heard April 19, 2017.

Motion hearing (April 19, 2017)

- [25] Nadine Spence appeared at the motion hearing with her legal counsel to address the issue of relocation to Ontario. Kristan Stillwell appeared at the motion hearing without legal counsel and requested the matter be adjourned to allow her the opportunity to fully respond and to have her legal counsel present with her. Mr. Rawn did not appear. Ms. Stillwell advised the court she planned to leave Nova Scotia on June 1, 2017 and would not consent to the relief sought by Ms. Spence.
- [26] Based on the representations of both parties, and in particular Ms. Stillwell's representation that she did not intend to leave Nova Scotia before June 1, 2017, the motions judge granted an interim order as follows:

WHEREAS an interim motion under the Maintenance and Custody Act, R.S.N.S. 1989, c.16 is scheduled to be heard on May 2, 2017 from 11:30 – 12:30 when the terms of this Interim Order shall be reviewed;

WHEREAS Kristan Stillwell has requested an adjournment of this motion until May 2, 2017;

IT IS HEREBY ORDERED THAT no party may remove Taralynn Elizabeth Rawn (born on October 19, 2012) from Nova Scotia without the written consent of the others or a court order.

The matter of interim mobility was adjourned to May 2, 2017.

Interim issues to be determined by the court

Should Taralynn's maternal grandmother, Nadine Spence be granted leave to apply for care and custody of Taralynn?

If yes, should Ms. Spence be granted care and custody of Taralynn if Ms. Stillwell moves to Ontario?

If yes, should Ms. Spence be granted care and custody of Taralyn if Ms. Stillwell reunites with Mr. Keith?

If Nadine Spence is not granted leave to apply for care and custody of Taralynn should Ms. Spence be granted interim access and visiting privileges with Taralynn?

If Ms. Spence is granted interim access and visiting privileges with Taralynn should Ms. Stillwell be permitted to relocate to another jurisdiction with the child pending a final hearing regarding access?

What if any direct or indirect contact should Kyle Keith have with the child?

Interim Motion hearing May 2, 2017

Evidence

Child protection agency records entered as business records by consent of the parties who were present at the hearing on May 2, 2017

- [27] Sarah Thomas, agent of the Minister of Community Services, child protection services, was served with a subpoena by Ms. Spence to appear at the hearing and to provide relevant direct and documentary evidence to the court. The subpoena directed Ms. Thomas bring a copy of the child protection services' recordings created during their investigation of concerns expressed about Taralynn's safety and wellbeing while in the care of Ms. Stillwell. Ms. Thomas testified and both Ms. Spence and Ms. Stillwell consented to the agency recordings being treated as business records and entered as evidence in the proceeding.
- [28] The parties agreed to adjourn the interim hearing to allow the parties to review the agency case recordings.
- [29] An order was granted allowing Ms. Spence to file a Supplementary Affidavit. In her Supplementary Affidavit Ms. Spence requested the following:
- a. That Kyle (Keith) not be permitted to be in the presence of Taralynn under any circumstances, until further order of this Court;
 - b. Costs in relation to the motions heard April 19, 2017, and on May 2, 2017.
- [30] The matter was adjourned to May 8, 2017.

Kyle Keith (Ms. Stillwell's most recent intimate partner)

- [31] On May 3, 2017 Ms. Spence requested permission to serve Kyle Keith, Ms. Stillwell's intimate partner, with a subpoena. Nadine Spence alleged Mr. Keith had been charged with assaulting both Ms. Stillwell and Taralynn. Ms. Spence further alleged that despite release provisions prohibiting Mr. Keith from having any "direct or indirect contact with Kristan Stillwell or Taralynn except as arranged and approved by child protective

services”, that Ms. Stillwell and the child were continuing to have contact with Mr. Keith and Ms. Stillwell and the couple planned to move to Ontario with the child. Permission to subpoena Mr. Keith was granted by the court.

- [32] On May 9, 2017 Nadine Spence filed an Amended Notice of Motion for Interim Relief (Family Proceeding) specifying Ms. Spence was seeking leave to apply for custody and asking the court to deal with the issue of interim mobility. Evidence concluded and submissions were made. I reserved my decision.

The Evidence

Agency business records

- [33] Review of the Minister of Community Services, child protection services’ business records reflect the following:
- a. On November 22, 2016 Elizabeth Durnan, parole officer, Cambridge Ontario reported that her client, Mr. Rawn (who was serving a sentence requiring him to report to her and be detained in a secure facility on weekends), advised her that his “x-mother in law”, Nadine Spence had observed his daughter, Taralynn was demonstrating behaviours which may indicate she was being sexually abused by Ms. Stillwell’s intimate partner, Kyle Keith.
 - b. Ms. Spence reported to Mr. Rawn that she observed the following: the child’s “vagina and groin area were swollen and red”, the child’s eating and sleeping habits changed, and the child was presenting to Ms. Spence as increasingly angry.
 - c. Based on what Ms. Spence had indicated, Mr. Rawn also expressed concern about whether Taralynn was receiving speech-pathology as needed, and about Ms. Stillwell possibly hiring inappropriate caregivers for Taralynn (off Kijiji).
 - d. Mr. Rawn alleged that Ms. Stillwell had forged his name in order to change Taralynn’s last name.
- [34] Upon reviewing the information from Ms. Durnan, the agency determined the information was “too vague to proceed with an investigation”. However, the Halifax Regional Police received similar information and requested child protection services assist them with an investigation regarding the allegation of possible sexual abuse.
- [35] Child protection services’ business records indicate:
- a. On November 22, 2016 Constable Jen Lake contacted child protection services regarding a report police received from Elizabeth Durnan (parole officer).

- b. Constable Jen Lake indicated that after receiving information from Ms Durnan she had spoken directly with Mr. Rawn, and Constable Ayers had spoken with Ms. Spence.
- c. Ms. Spence reported to police that Taralynn had visited her three weeks previously and Ms. Spence observed the child's vagina and groin area were red.
- d. Ms. Spence indicated to police that she asked Ms. Stillwell to take Taralynn to be examined by a doctor. Ms. Stillwell subsequently advised Ms. Spence that she had taken Taralynn to see a doctor but Ms. Spence advised police she did not believe Ms. Stillwell. Ms. Spence indicated to police she was not aware of any disclosure of sexual abuse from Taralynn.
- e. Ms. Spence advised police that she had previously had her granddaughter over at her home "all the time", but she felt Ms. Stillwell had been withholding access. Ms. Spence indicated to the police that her daughter had "serious issues", explaining that Ms. Stillwell had been "into drugs" in the past, and suffers from mental health issues.

Investigation

- [36] On November 22, 2016 Ms. Stillwell was interviewed by a child protection services provincial emergency duty social worker and by Constable Lake. Ms. Stillwell indicated that she and her mother had been experiencing relationship difficulties related to Ms. Stillwell's perception that her mother "wants to control how she parents and is always telling her what to do and inquiring about things".
- [37] Ms. Stillwell participated in an audiotaped interview and was asked by investigators if she recalled an incident which resulted in her taking Taralynn to the doctor three weeks previously. Ms. Stillwell could not immediately recall taking Taralynn to the doctor.
- [38] Ms. Stillwell did indicate to investigators that one and a half weeks previously her mother had told her she would be calling child protection services to report Ms. Stillwell. According to Ms. Stillwell, her mother threatened to make a report following an argument they had. Ms. Stillwell stated that Ms. Spence responded in a negative manner to Taralynn's aggressive behaviour directed at Ms. Spence's cats. Ms. Stillwell alleged Ms. Spence grabbed Taralynn .
- [39] Ms. Stillwell acknowledged that Taralynn "torments their cat" and Ms. Spences' cats. Ms. Stillwell indicated she had made inquiries about referring Taralynn to see a psychologist.
- [40] Later in the interview Ms. Stillwell recalled that several months previously she had taken Taralynn to see Dr. Kitamura at a walk in clinic on Spring Garden Road. Ms. Stillwell advised she had asked the doctor about redness observed around Taralynn's vaginal area

(in May or June 2016). Ms. Stillwell indicated the doctor attributed any redness she observed to irritation Taralynn had from the pull ups she was wearing at that time.

- [41] Ms. Stillwell reported the child was subsequently fully toilet trained with no observable irritation. Ms. Stillwell agreed to allow investigators to contact Dr. Kitamura to make inquiries about Taralynn. Ms. Stillwell noted that Ms. Spence had previously attributed Taralynn's "problem behaviours" to possible sexual abuse by Ms. Stillwell's previous boyfriend (relationship between July 2015 and January 2016).
- [42] Investigators requested, and Ms. Stillwell consented to allow Taralynn to participate in a StepWise interview conducted by police and child protection services.
- [43] On November 25, 2016 Constable Shelley Mews, and a child protection worker spoke with Ms. Stillwell to obtain background information about the child prior to interviewing the child. An electronic copy of FTR Interrogator notes from the interview indicated Ms. Stillwell advised investigators that her step-father, Stephen Spence, her father Mark Stillwell, the child's previous babysitter, Dave Lewis (March – August 2016), her previous boyfriend, Trevor Arnold (summer of 2015 through to January 2016), and her current boyfriend, Kyle Keith did have varying degrees of personal contact with the child during certain periods.
- [44] During her discussion with investigators Ms. Stillwell also talked about having difficulty consistently taking medication prescribed to her for identified mental health issues. Ms. Stillwell advised she had attended the Victoria General Hospital and was scheduled to attend a follow up appointment at Community Mental Health Services in January 2017.

Joint Police and Child Protection Services StepWise interview with the child November 25, 2016

- [45] Taralynn was interviewed by police and child protection services and did not disclose sufficiently clear information to establish the likelihood any specific incidents of sexual abuse had taken place.
- [46] I reviewed the FTR Interrogator notes from the interview with the child on November 25, 2016. These were included as part of the child protection services' business records and indicate Taralynn spoke about "daddy fighting with mommy", "nanna yelling" and not wanting to go back to her grandmother's home.

Videotaped interview with the child

- [47] I was able to review only a portion of the videotaped interview of the child which was also entered as evidence with the child protection services' business records. Technical difficulties with the disk prevented a full view of the videotaped interview.

- [48] When interviewing children I understand the expectation is for interviewers to use open ended questions. I observed the child had some difficulty responding to the interviewers questions. I also observed that when the child did respond or speak generally, her speech was difficult to understand.

Videotaped interview

- [49] Based on my review of a portion of the videotaped interview, Taralynn did state the following at various points during the interview:
- a. “daddy been touching me when living with mommy”, “daddy fight with mommy”, “daddy not been here for a long time”, “daddy fighting with mommy”, “nanna said get out of my house”, “nanna yell at me”, nanna yells at me and I don’t like it and I don’t want to go there anymore”, “nanna yells at me and I don’t want to be there”, “nanna called me (word unintelligible), and “it made me upset”, “I nap with mommy and daddy”, “I terrorize them” (in reference to Ms. Spence’s cats).
- [50] I note from a review of the evidence that Taralynn has resided with Ms. Stillwell and with at least two of Ms. Stillwell’s intimate partners, Scott Rawn and Kyle Keith. There is evidence that Taralynn has referred to both Scott Rawn (whom she lived with from birth until approximately August 2014), and Kyle Keith (who began a relationship with Ms. Stillwell in February or March 2016, and moved in with Ms. Stillwell and Taralynn on July 1, 2016), as “daddy”.
- [51] The allegation being investigated by police and child protection services in November 2016 was whether Taralynn had been sexually abused by Kyle Keith. Although the child referred to “daddy” several times during the interview the investigators did not (or were not able), to establish who Taralynn was talking about when she referred to “daddy”.
- [52] In general the child was not able to provide sufficiently clear evidence to determine what if anything may have happened to her of a sexual nature and if anything did happen, who may have been involved. I do find the child was clear when she stated she was aware of “fighting” between “daddy and mommy”, and she did express concern about her grandmother yelling at her and calling her a name which “upset her”.

Mark Stillwell (Ms. Stillwell’s father)

- [53] Investigators interviewed Mark Stillwell, Ms. Stillwell’s father. Mr. Stillwell expressed concern about the relationship between Ms. Stillwell and Ms. Spence. Mr. Stillwell also expressed that he hoped Ms. Stillwell would follow up with mental health services.
- [54] Based on the information obtained during the joint investigation with police, child protection services advised Ms. Stillwell that they were not taking a position with respect to Kyle Keith’s continued contact with Taralynn.

Other concerns raised

- [55] In Ms. Spence's Affidavit sworn April 7, 2017 Ms. Spence alleges the Department of Community Services, child protection services was investigating allegations regarding Kyle physically harming Taralynn and the child having bruises on her arms in November 2016.
- [56] The Department Community Services, child protection services' business record filed with the court does not contain any record of Ms. Spence reporting concerns about Taralynn having bruises on her arms (in November 2016 or at any other time), and there is no reference in the business records to any investigation of bruises on the child.

Agency business records go on to indicate collateral contacts were made with health professionals:

- [57] On December 5, 2016 an agency worker contacted Dr. Kitamura to inquire about any concerns she may have regarding Ms. Stillwell's care of the child. Dr. Kitamura indicated she had not personally observed any concerns of a child protection nature. However, Dr. Kitamura confirmed Ms. Stillwell had presented with mental health issues and to her knowledge was not being followed by a psychiatrist. Child protection services records reflect Dr. Kitamura indicated that Ms. Stillwell has "been suicidal on and off since she has known her, but reported that Ms. Stillwell never made an attempt, nor does not (sic) have a plan to her knowledge".
- [58] On December 14, 2016 an agency worker visited Ms. Stillwell at her home. No concerns were noted. Ms. Stillwell indicated she had an appointment scheduled with Community Mental Health Services on January 17, 2017.
- [59] On December 15, 2016 Constable Shelley Mews reported that the police would be closing their file.
- [60] On December 16, 2016 Dr. Debbie Smith, Taralynn's pediatrician confirmed she had seen Taralynn in response to several concerns raised including but not limited to: a growth on Taralynn's head, constipation, ear infections, and a query about her growth. Dr. Smith indicated that Ms. Stillwell had spoken with her about ongoing conflict with Ms. Spence. Dr. Smith explained she was not aware of any mental health concerns Ms. Stillwell may have or any child protection concerns.

Additional referral information provided to child protection services by Ms. Spence

- [61] On January 17, 2017 Ms. Spence contacted the agency to report the following:
- a. On December 17, 2016 Ms. Stillwell attended Ms. Spences' home, dropped Taralynn off and indicated she was going to end her own life. Ms. Spence

indicated she did not hear from Ms. Stillwell for three days. Ms. Spence advised she had contacted police who were unable to locate Ms. Stillwell;

- b. On December 20, 2016 Ms. Stillwell told Ms. Spence that she and Kyle Keith “got into a big fight”. He reportedly tried to strangle her and pushed her up against a wall in Taralynn’s presence;
- c. On December 21, 2016 Ms. Stillwell advised Ms. Spence that Taralynn had broken her collarbone accidentally; and
- d. On January 13, 2017 Ms. Stillwell advised Ms. Spence that Kyle Keith had assaulted her (pushing her to the ground, punching her in the face, and placing her in a head lock). Ms. Spence indicated she observed bruising on Ms. Stillwell’s face, neck and arms. Ms. Spence further reported that the child had remained in her care until Ms. Stillwell came to Ms. Spence’s home to get her on January 17, 2017.

[62] Ms. Spence filed text messages dated in January 2017 with the court which were entered as evidence in the proceeding. I do find the text messages between Ms. Spence and Ms. Stillwell confirm the following:

- a. Ms. Stillwell reported to Ms. Spence that was afraid of Mr. Keith. Ms. Stillwell stated to Ms. Spence that Kyle Keith had “thrown her on the ground, put her in a choke hold, “head butted” her in the face, grabbed her arm”. Ms. Stillwell advised Ms. Spence that she wanted to move into a home of her own, wanted him (Kyle Keith) charged but not before she moved out as she “didn’t’ want her “head bashed in”.
- b. Ms. Stillwell advised Ms. Spence that Mr. Keith was upset as Ms. Stillwell started a new job and Mr. Keith didn’t want her to work or to leave their apartment or talk to her friends.
- c. Ms. Spence advised Ms. Stillwell that Taralynn hadn’t eaten much as she was upset and that she (Ms. Spence) had told Taralynn Mr. Keith was “not her daddy”.

[63] Child protection services’ business records indicate Ms. Spence has stated she has had knowledge of physical altercations between Ms. Stillwell and Mr. Keith since the summer of 2016.

[64] On January 17, 2017 Sargeant Stephanie Carlisle reported to child protection services indicating she could not locate any reports from Ms. Spence to the police about domestic violence, mental health concerns, or any report of a missing person.

Interviews

[65] On January 18, 2017 Ms. Stillwell, Mr. Keith and Taralynn met with child protection services in response to new referral information.

- a. Ms. Stillwell was interviewed and indicated as follows:
 - i. Ms. Stillwell denied threatening to end her own life.
 - ii. Ms. Stillwell expressed concern about Ms. Spence trying to “destroy her life”.
 - iii. Ms. Stillwell indicated she had sought counselling previously and that Elaine Aucoin (counselor at the IWK), would be aware of the struggles she has had with her mother, Ms. Spence.
 - iv. Ms. Stillwell believes Ms. Spence contacted the mother of Mr. Keith’s biological child to report her concerns that Mr. Keith sexually assaulted Taralynn;
 - v. Ms. Stillwell acknowledged she has suffered through periods of depression, has been prescribed antidepressant medication and takes it “regularly”;
 - vi. Ms. Stillwell denied any violence occurred with Mr. Keith on December 20, 2016;
 - vii. Ms. Stillwell denied Mr. Keith hurt Taralynn and advised that Taralynn broke her collarbone accidentally on December 21, 2016;
 - viii. Ms. Stillwell denied anything physical happened between she and Mr. Keith on January 13, 2017. Ms. Stillwell indicated she and Mr. Keith had a verbal argument and the child was present. Ms. Stillwell acknowledged they should not argue in Taralynn’s presence;
 - ix. Ms. Stillwell indicated that Mr. Keith was a “father figure” to Taralynn and Taralynn calls him “daddy”. Ms. Stillwell reported that Ms. Spence has told Taralynn that she does not need to listen to Mr. Keith and “that he is a bad person”; and
 - x. Ms. Stillwell stated that Taralynn’s biological father was living in Ontario and reported he was “not a safe person”, he was “not involved in Taralynn’s life”, and had never been involved with Taralynn and she did not want him contacted.
- b. The child was interviewed by child protection services on January 18, 2017 and disclosed the following:

- i. Her “mom and dad fight with their words” and sometimes “they fight with their hands”.
 - ii. Taralynn stated “daddy is doing bad things”. When investigators inquired about what the child meant by “bad things” the child indicated “he’s not being polite”.
 - iii. Taralynn confirmed the fighting was sometimes with their hands and sometimes not with their hands, sometimes they use “bad words” and sometimes there is “pushing and hitting”.
- c. Mr. Keith met with child protection services to discuss referral information and stated the following:
- i. Ms. Spence does not like him because he suggested Ms. Stillman distance herself from Ms. Spence. Then he queried why Ms. Spence would buy him Christmas presents if he allegedly abused Taralynn;
 - ii. He denied any incidents of family violence; and
 - iii. He indicated Ms. Spence had contacted the mother of his biological child and subsequently his access was being supervised with that child.

Child protection services business record documents ongoing investigation by child protection services and the police

[66] On January 19, 2017 Ms. Spence reported to child protection services her concerns about Taralynn having lice and bug bites on her. Ms. Spence also advised that Ms. Stillwell was calling her and was cursing and screaming at her. On January 19, 2017 Ms. Stillwell advised that Taralynn did not have bug bites on her but had an infestation of lice which had been treated.

Police involvement

[67] On February 2, 2017 Constable Mews reported to child protection services that the Halifax Regional Police Major Crimes Section would be closing their investigation regarding concerns of sexual abuse. Police confirmed they had received Taralynn’s health records and Ms. Stillwell had taken her to the doctor to inquire about redness on her “hum (sic “bum”), perianal and itching and redness to her labia” (not clear when). In addition, police advised Ms. Stillwell had made a report alleging Ms. Spence was harrassing her and making false allegations.

Report to police of altercation between Ms. Stillwell and Ms. Spence

- [68] On February 4, 2017 Constable Green of the Halifax Regional Police reported to child protection services a physical dispute or struggle between Ms. Spence and Ms. Stillwell over the child, Taralynn. Police indicated Ms. Stillwell attended Ms. Spence's home to retrieve Taralynn and Ms. Spence attempted to prevent Ms. Stillwell from coming into her home. Both parties agreed to proceed by way of a peace bond at that time. Ms. Spence alleged the child had been staying with her for several days after Ms. Stillwell asked Ms. Spence to care for the child as she and Mr. Keith were fighting.
- [69] On February 6, 2017 an agency worker recommended to Ms. Stillwell, that Ms. Stillwell and her mother, Ms. Spence not have contact while in the presence of the child.
- [70] Ms. Stillwell advised that Ms. Spence had contacted Mr. Rawn in Ontario and he had subsequently advised Ms. Stillwell he would be seeking custody of Taralynn. Ms. Stillwell alleged Mr. Rawn uses drugs and that he was physically abusive toward her in the past.

Mental health services involvement

- [71] On February 6, 2017 an agency worker spoke with Scott Craine, counselor at Cobequid Community Mental Health Services. Mr. Craine reported seeing Ms. Stillwell on one occasion. Mr. Craine stated that Ms. Stillwell did not present with a mental illness. He noted that he had not assessed Ms. Stillwell's parental capacity but had recommended she seek assistance from Family Services, a social worker or a private psychologist.

Collateral contact by child protection services

- [72] On February 7, 2017 Mark Stillwell, confirmed Ms. Stillwell had spoken to him about the conflict between Ms. Stillwell and Mr. Keith. He acknowledged that Ms. Stillwell had stated there "has been hands on pushing etc in their fights previously". Mr. Stillwell indicated that he believed the physical aspect of their arguments had stopped as both he and Mr. Keith's father had "knocked some sense into them".
- [73] Mark Stillwell stated that Taralynn had not disclosed any information about physical conflicts in the home. He stated the last physical conflict he was aware of occurred approximately one month earlier, that there had been pushing but he understood Taralynn was in her bedroom and she did not witness it. Mr. Stillwell indicated he was not concerned about Taralynn's injury to her collarbone as he believed it was accidental.

Police involvement

- [74] On February 7, 2017 correspondence was received by the agency from the police.
- a. Police confirmed they had received Dr. Kitamura's file and that Taralynn had been seen on January 9, 2016 and on October 8, 2016 for "behavioural issues", and February 2016 for Dermatitis.

- b. Dr. Kitamura's file indicated Taralynn was seen in relation to concerns about her "perianal and genital areas (vulva and anus)" noted "dry skin on her labia majora", and recommended barrier cream to prevent irritation from pull ups.
- c. When interviewed Taralynn "did speak of Nanna hollering at her and not wanting to go back there".
- d. Child was interviewed previously (November 2016), and no new information was provided since that time.
- e. File would be closed with no charges laid.

Report to police of intimate partner violence between Ms. Stillwell and Mr. Keith

[75] On March 31, 2017 the agency received referral information from the Halifax Regional Police regarding an incident of intimate partner violence and assault on Taralynn "grabbing her backpack from her" the previous evening. Mr. Keith was charged with assault as a result of his alleged behaviour toward Ms. Stillwell and Taralynn. Police advised the agency that Ms. Stillwell admitted to another recent incident when Mr. Keith grabbed her by the feet and pulled her into the hall and then punched a fish tank.

Child protection services

[76] On March 31, 2017 Ms. Stillwell reported she had been assaulted by Mr. Keith on March 30, 2017 and Taralynn was present. Ms. Stillwell stated there had been another incident "a couple of weeks" previously when Mr. Keith "smashed the fish tank". Ms. Stillwell indicated that she and Taralynn were living with her father, Mark Stillwell. Ms. Stillwell indicated she would abide by the no contact order and would not be reuniting with Mr. Keith.

[77] On April 3, 2017 Ms. Stillwell indicated she would be accessing counseling services through Victim Services for both Taralynn and herself. Ms. Stillwell noted that she had reviewed court documents related to Mr. Keith's involvement with his previous spouse and there had been physical violence in his previous relationship.

[78] Ms. Stillwell reported that during the most recent violent incident with Mr. Keith, Taralynn had been screaming as she was afraid. Ms. Stillwell stated that Mr. Keith told Taralynn to "shut the fuck up". Ms. Stillwell explained that prior to the violent incident she had been trying to pack her belongings as she'd just learned they were being evicted from their home. Ms. Stillwell explained she was having difficulty packing as Mr. Keith was following her around their home and he was screaming at her.

[79] Ms. Stillwell indicated to child protection services that she wanted to move to Ontario as many of her extended family members lived there. Ms. Stillwell spoke about her plan to move. She inquired about services available through child protection services and

requested the local agency transfer her file to Ontario to allow her to continue with child protection services in that jurisdiction.

Ms. Spence's concerns about Ms. Stillwell's plan to move to Ontario

- [80] On April 3, 2017 Ms. Spence contacted child protection services to inquire about whether the agency was aware Ms. Stillwell may be moving to Ontario in a "couple of weeks". She asked if the agency could prevent Ms. Stillwell from leaving with Taralynn. Ms. Spence also reported that Ms. Stillwell had been in contact with Mr. Keith and had indicated to Mr. Keith that she "wanted to work things out".
- [81] On April 13, 2017 Ms. Spence indicated that Taralynn had made comments indicating she had been in the presence of both Mr. Keith and her mother. Child protection services and police attended Ms. Stillwell's last known address in an attempt to determine if Ms. Stillwell and Mr. Keith were together in the presence of the child. Ms. Stillwell's landlord confirmed Ms. Stillwell had received an eviction notice and was no longer residing at her previous address with Mr. Keith. As noted above, Ms. Spence filed an *Ex Parte* motion in an effort to prevent Ms. Stillwell from moving with the child to Ontario.
- [82] On April 26 2017 Ms. Stillwell indicated she was pregnant with Mr. Keith's child and wanted to have the Provincial Court Order preventing contact varied. The order was varied to allow Ms. Stillwell and Mr. Keith to have contact but Ms. Stillwell stated they would not have contact with one another in Taralynn's presence.
- [83] The Minister of Community Services, child protection services assessed Taralynn to be in need of protective services pursuant to section 22(2)(b), (g) and (i) of the *Child and Family Services Act*.
- a. The agency has taken the position that Ms. Stillwell and Mr. Keith should not be together in the presence of the child, Taralynn until they have both completed services and adequately addressed the agency's concerns regarding domestic violence.
- [84] The Minister of Community Services has opened a long term protection file in relation to Ms. Stillwell, Mr. Keith and the child for ongoing services and support.
- a. Should Ms. Stillwell move to Ontario, the Minister of Community Services has indicated a referral will be made to the appropriate child welfare agency in that jurisdiction.

Testimony

- [85] In her testimony given on May 2, 2017 Ms. Stillwell indicated to the court that she and Mr. Keith had "conflicts" but that Mr. Keith did not "intentionally" hurt her. As an

example, Ms. Stillwell explained that Mr. Keith did “headbutt” her but she indicated he did so while he was “pulling in for a hug” and she did not want to be hugged. Ms. Stillwell also stated that during an argument “she tripped over her own two feet”.

- [86] Ms. Stillwell stated that on at least one occasion she and Mr. Keith were having a dispute because she wanted to return to work but Mr. Keith wanted to be “the man of the house”. Ms. Stillwell explained that Mr. Keith wanted Ms. Stillwell to be a mother to Taralynn, have supper ready, and do the dishes.
- [87] Ms. Stillwell acknowledged that Mr. Keith’s behaviour was “sometimes” controlling. As an example Ms. Stillwell explained that Mr. Keith did not want her to talk or associate with certain friends, but only the friends Mr. Keith believed to be “real friends”, and that he preferred they make new friends together.
- [88] Ms. Stillwell indicated she was not afraid of Mr. Keith, she indicated she wanted him to get help. Ms. Stillwell stated that she believed Mr. Keith had potential, that he was a good person, but that he would need to get help if they were going to be a family. Ms. Stillwell indicated she believed Mr. Keith could change. Ms. Stillwell further stated that Mr. Keith would not be around her daughter unless Mr. Keith did change.

Conclusions:

Custody

- [89] Nadine Spence is denied leave to apply for custody of the child.
- [90] The child will be placed in the interim primary care and custody of Kristan Stillwell.
- a. Kristan Stillwell is encouraged to make or ask her legal counsel to make inquiries with respect to Scott Rawn’s current situation and his present position with respect to Taralynn’s right to access with Mr. Rawn.
 - b. Kristan Stillwell is encouraged to take advantage of any counseling services or mediation services available to her to assist her in determining what level of contact, between the child and Scott Rawn would be in the child’s best interests.
 - c. On an interim basis, Ms. Stillwell will determine what form of access for the child with Scott Rawn would be in the child’s best interests.
 - d. Kristan Stillwell shall ensure Kyle Keith does not have any direct or indirect contact with Taralynn unless approved by a child protection agency in writing in advance of any such access or visitation. This direction is given in support of and in addition to the direction provided by way of the Provincial Court Undertaking Given to a Justice or a Judge dated April 18, 2017 and certified true on April 24, 2017, which was filed as evidence in this proceeding.

- e. Kristan Stillwell shall report to child protection services any attempt by Kyle Keith to have contact with the child before a child protection agency has granted approval for such contact.

Access

- [91] Nadine Spence will be granted limited interim access with the child. Age appropriate letters, cards and gifts which make no reference to the conflict between the parties may be sent by Ms. Spence to Taralynn and Ms. Stillwell shall ensure these items are passed on to Taralynn. Ms. Stillwell may allow Ms. Spence any further access or visiting privileges she feels are in Taralynn's best interests.
- [92] The matter will be adjourned to a final hearing to determine if it is in the child's best interests to have a right of access and visiting privileges with her grandmother (Ms. Spence), and her biological father (Mr. Rawn). Efforts should be made to have this matter heard no later than nine or ten months from the date this decision is known to all the parties. A pre-trial shall be scheduled with me within two months.
- [93] Ms. Stillwell will be required to appear at any final hearing scheduled in Nova Scotia to address the issue of access for the child with Ms. Spence, and or with Mr. Rawn.
- [94] Mr. Rawn shall be notified of every step in the proceeding and he is directed to let the court know and Ms. Stillwell know what form of access, (if any) he is seeking with the child.
- [95] This file should be cross referenced with SFHMCA 95673. It should be noted that contact was made with Mr. Rawn a Court Officer/ Conciliator as recently as March 2016.
- [96] Ms. Stilwell will be permitted to move to Ontario with the child if she chooses to do so.
- [97] Both files should travel together SFHMCA 95673 and SFHMCA 104986.

REASONS

ISSUES

Leave to apply for custody

Should Taralynn's maternal grandmother, Nadine Spence be granted leave to apply for care and custody of Taralynn, and specifically?

- a. If yes, should Ms. Spence be granted care and custody of Taralynn if Ms. Stillwell moves to Ontario?

- b. If yes, should Ms. Spence be granted care and custody of Taralyn if Ms. Stillwell reunites with Mr. Keith?

Law

[98] All applications in this matter were brought pursuant to the [Maintenance and Custody Act](#). Section 18 of the *Act* sets out the authority for such applications, and the issues and factors to be considered on an application by a grandparent for care and custody or access and visiting privileges with a grandchild.

[99] Despite legislative amendments regarding grandparent access and visiting privileges, grandparents are still required to obtain leave of the court to apply for care and custody of a grandchild:

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

(2) The court may, on the application of a parent or guardian or **with leave or permission of the court, a grandparent**, another member of the child’s family or another person, make an order that a child shall be in or under the **care and custody** of the parent or guardian or authorized person. (emphasis is mine)

[100] The Nova Scotia Court of Appeal in *MacLeod v. Theriault*, (2008) 2008 NSCA 16 (CanLII), 262 N.S.R. (2d) 184, 50 R.F.L. (6th) 33, has stated:

[15] The best interests of the child is the paramount consideration in any proceeding concerning children. Parents are the presumptive custodians of their children (MCA s. 18(4)). As such they make decisions about the best interests of their children. The courts will interfere with that decision making only for substantial reasons.

[101] The case of *Brooks v. Joudrey*, 2011 NSFC, was decided by Justice Gabriel and he provides a review of factors which may be considered when determining the question of grandparent leave, he stated:

[47] All individuals falling under the auspices of “other persons” noted in 18(2), **must apply for and obtain leave**, as a precondition to an application for either **custody** or access under subsections (a) and (b). There is **no guidance set forth in the legislation itself as to the circumstances under which such leave shall be granted**. Rather, the **test has evolved over time**. In developing the test, Courts have necessarily wrestled with the idea of **when it is appropriate for the state to interfere with the right of a parent (or parents) to decide with whom their child shall have contact**. It is trite to observe that cases such as this always come before the Court because the parent(s) or guardian(s) of the child are opposed to the Applicant(s) having contact as of right. (my emphasis)

[48] One of the earliest “grandparent leave” cases was *Daley v. Daley* (1992), 124 N.S.R. (2d) 273 (F.C.). In that case the mother and father were separated and the father had access which took place at his parents’ home. These paternal grandparents wanted more time and did not wish to encroach upon their son’s access. Gass, JFC (as she was then) stated:

“I’m of the view that unless there are **grave and extenuating circumstances** children can benefit from the involvement of the extended family **as long as that involvement is**

not destructive or divisive in nature. However I'm not convinced that the court ordered access is necessarily in the best interest of the child, even where access is a good thing unless there are extenuating circumstances. If this were the case, the potential is there to have a child's entire life scheduled by court order to be with those to whom the child's interactiveness is considered appropriate and important. (emphasis mine)

[49] In *Daley (supra)* the Court observed that the paternal grandparents had another venue through which contact with the child could be achieved. They were on good terms with their son, and could see the child when he exercised access. On that basis, the application for leave was denied.

[50] As Sparks JFC noted in *Stewart v. MacDonnell (1992) 113 N.S.R. (2d) 41 et al.* (although the Applicant in that case was not a grandparent):

While a person may indeed be interested in the overall welfare of the child in a purely general sense, this does not mean that the court should permit them to enter or re-enter the life of a child without the approbation of the custodial parent. If the interest is a fleeting one or one which is more directed toward the mother, as suggested here, the court should not intervene. However, I do not suggest that there will not be cases when the best interest of the child would force the court to intervene in regard to family and non family contacts, which are ordinarily in the sole and private pervue of the custodial parent. In effect, **if a standing is granted, the court is agreeing that a legal stranger to the child should be given the right to challenge the authority of a custodial parent.** It seems to me that there **must be a strong and cogent reason asserted before the court will question the wisdom of a custodial parent respecting contacts with family and non-family persons.** It is my view that the evidentiary burden is heightened when a non-family individual claims standing. (my emphasis)

[51] Without exhaustively listing all of the authorities, it suffices to note that two different types of approach began to emerge early on in response to leave applications. Broadly speaking, the first type or group of cases was characterized by a presumptive deference to parental autonomy unless there were grave and extenuating reasons for not doing so. The second evidenced a greater inclination towards contact with non-parent third parties, particularly grandparents.

[52] Following Justice Goodfellow's decision in *Gray v. Gray (1995)*, 147 N.S.R. (2d) 369 confirming 137 N.S.R. (2d) 161, the correct approach appears to be one which **requires a weighing of all extrinsic factors in an individual case prior to a determination of the issue.** Factors considered important in one situation may not be as significant (or even relevant) in another. (my emphasis).

[53] Indeed, as noted in paragraphs 19-21 of *Gray (supra)*:

19 It seems to me that when you examine *section 18*, it is clear that *18(5)* mandates that in any proceeding relating to care, custody, access and visiting privileges in relation to a child, the Court shall 'apply the principle that the **welfare of the child is of paramount consideration**' (my emphasis)

20 The purpose of the Legislation is to promote the welfare of the child, and the Legislation specifically mandates that this is the paramount consideration.

21 It follows that on an application for leave the person who is applying must meet a threshold test showing that the granting of leave is likely to be of benefit to the welfare of the child. This is the threshold or test that must be met by an applicant, and I agree with Judge Legere's review of many of the factors that constitute important considerations depending on the particular facts of the case where she concluded at Page 38: 'Any one of these factors in and of itself is not the test'

The existence or absence of sufficient interest, existing relationship, **etc. etc.** are all important considerations to be taken into account in determining whether or not the threshold has been met. In some cases the particular factor will be weighed more heavily, i.e. if the applicant were a stranger to the child, normally the result would follow with the applicant not having an existing relationship or sufficient interest and would be hard pressed to convince a court that there is likely to be a benefit to the child.

[54] (Emphasis added)

[55] The Court of Appeal has commented favourably on the approach in *Gray (Supra)*. In *MacLeod v. Theriault*, (2008) 2008 NSCA 16 (CanLII), 262 N.S.R. (2d) 184, 50 R.F.L. (6th) 33, at paragraphs 17 to 21 Bateman JA stated as follows:

[17] There is **no single test to be applied on such leave applications**. The court must balance a number of factors. The applicability and significance of a particular factor will depend upon the circumstances of the case. The relevant factors must be gleaned from the context of a particular situation. (my emphasis)

[56] Many individual factors have been considered over the course of time. An exhaustive list can never be developed, since each case is determined on its own facts. Some relevant factors have included (see, for example, Gray v Gray, (supra) and MacLeod v. Theriault (supra):

- 1) Is there a sufficient interest and/or connection between the child and the Leave Applicant and is there an obvious benefit to the child?
- 2) Is the child emotionally attached or bonded to the leave Applicant, or is the connection one of which the child is aware?
- 3) Does the Leave Applicant have a familial relationship she/he want to foster?
- 4) Is the application frivolous and vexatious?
- 5) Are there other appropriate means to resolve the issue? (For example, mediation (especially under C.F.S.C.), or access in conjunction with the other parent (if this is a grandparent application).
- 6) Are there risk factors apparent on the evidence that would preclude the Applicant from having contact with the child if the leave application were granted?
- 7) Will the granting of a leave application place the child in more risk of litigation and uncertainty?
- 8) Are there extenuating circumstances? (Such as the death of a parent, or a parent not exercising parenting time due to being in jail, or out of the province for extended periods of time)
- 9) Is, or would, the involvement of the third party be destructive or divisive in nature?
- 10) Would leave put undue stress on the custodial parent, if the Leave Applicant were successful in the application for access?
- 11) Would granting leave, and the possibility thereafter, granting access, threaten the stability of the Family unit?
- 12) Would a Court Order preserve a positive relationship between the child and the leave-applicant?

- 13) To what extent does the custodial parent's decision effect the child and is it a reasonable decision in the particular circumstances of each case?
- 14) In a case under the C.F.S.A., would the granting of a leave application provide the child with potentially feasible plan to reintegrate into the child's own family that would be in the best interests of the child?
- 15) Considering all of the above, is the granting of leave, in the best interests of the child?

Analysis

[102] Ms. Spence has asked the Court for leave to apply for care and custody of Taralynn based on certain conditions precedent. Specifically, placement of the child with Ms. Spence if Ms. Stillwell leaves Nova Scotia with the child to reside in Ontario, or if Mr. Keith has any contact with the child.

- a. Ms. Stillwell has indicated she intends to move to Ontario on June 1, 2017 and she intends to reconcile with Mr. Keith when he addresses outstanding concerns related to intimate partner violence.
- b. Ms. Stillwell has indicated she is willing to engage in services and she is willing to involve Taralynn in services offered by child protection services or other appropriate service providers. She has requested her child protection services' file be transferred to Ontario if she is permitted to move to Ontario with Taralynn.

[103] I find there is a connection which exists between Ms. Spence and Taralynn, and I recognize there is a familial relationship between them. However, given the evidence presented to me I do not see how granting leave to apply for care and custody of Taralynn to Ms. Spence has any obvious benefit for the child.

[104] I am particularly concerned about various decisions made by Ms. Spence in her attempts to assist Taralynn given the difficulties Ms. Stillwell and Taralynn were experiencing as victims of intimate partner violence. Based on my review of the evidence including the child protection agency business records, police reports referred to in those records, Ms. Stillwell's representations, and results of interviews with the child and others, I find Taralynn may be at risk of emotional harm and would be at risk of being alienated from her mother and from Mr. Keith if she was placed with Ms. Spence.

[105] I do find there are real and very serious concerns related to Taralynn remaining in the care and custody of Ms. Stillwell. Specifically, I find that based on a balance of probabilities Taralynn has been exposed to repeated incidences of intimate partner violence between Ms. Stillwell and Kyle Keith dating back to at least January 2017 if not before that time. I am concerned that any issues raised regarding Taralynn's behaviour (toward cats or others), may be the result of witnessing recent and past intimate partner violence while residing with Ms. Stillwell, in addition to other factors that may be identified.

- [106] In addition to my concerns about Ms. Stillwell's relationship with Kyle Keith, Kristan Stillwell has stated that in the past Scott Rawn was abusive toward her and that she recently learned that her current partner, Kyle Keith also has a history of intimate partner violence in his previous relationship with the mother of his biological child.
- [107] There is a significant amount of work to be done by both Ms. Stillwell and by Mr. Keith to address factors that may be contributing to incidents of repeated intimate partner violence in their present relationship, this conclusion is further supported by evidence of intimate partner violence in previous relationships. This work must be completed before Mr. Keith has any form of contact with Taralynn and before Ms. Stillwell and Mr. Keith live together with Taralynn as a family, if that is what Ms. Stillwell chooses to do.
- [108] While child protection services continues to assess that there is a risk of harm to Taralynn, they will continue to be involved. Child protection services is mandated to assess and to act more intrusively in the matter if they assess it is necessary. Child protection services has opened a file to assist Ms. Stillwell, Mr. Keith and Taralynn with services to alleviate the assessed risk. Ms. Stillwell and Mr. Keith have indicated their intention to participate in those services.
- [109] Scott Rawn is a party to this proceeding. He is the child's biological father. Ms. Spence has been in contact with Mr. Rawn regarding Taralynn and his access with her. It appears Ms. Spence has contacted Mr. Rawn without Ms. Stillwell's permission or her involvement. I find it is in Taralynn's best interest for the conflict between the parties in this proceeding to be addressed through services being offered by child protection services, through appropriate counseling services, and through an inquiry regarding access and visiting privileges at a final hearing.

Access

If Nadine Spence is not granted leave to apply for care and custody of Taralynn should Ms. Spence be granted interim access and visiting privileges with Taralynn?

If Ms. Spence is granted interim access and visiting privileges with Taralynn should Ms. Stillwell be permitted to relocate to another jurisdiction with the child pending a final hearing regarding access?

Should Kyle Keith be permitted to have access with Taralynn through Ms. Stillwell?

- [110] In 2014 the *Maintenance and Custody Act, R.S.N.S. 1989, c. 160*, was amended. Unlike other family members and third parties, grandparents are now able to apply for access without first obtaining leave of the court:

18(2A) The court may, **on the application of a parent, grandparent** or guardian or, with leave or permission of the court, another member of the child's family or

another person, make an order respecting access and visiting privileges of a parent, grandparent, guardian or authorized person. (my emphasis).

[111] The relevant portions of [section 18](#) are set out below:

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

(2) The court may, on the application of a parent or guardian or **with leave or permission of the court, a grandparent**, another member of the child’s family or another person, make an order that a child shall be in or under the care and custody of the parent or guardian or authorized person.

(2A) The court may, **on the application of a parent, grandparent** or guardian or, with leave or permission of the court, another member of the child’s family or another person, make an order respecting access and visiting privileges of a parent, grandparent, guardian or authorized person.

(3) This Section does not apply

(a) where there is an adoption agreement respecting the child pursuant to the [Children and Family Services Act](#), that has not expired or been terminated except with leave of the court upon application of a parent who is not a party to the adoption agreement.

(b) where the child has been placed for adoption and adoption proceedings under the [Children and Family Services Act](#) have not been dismissed, discontinued or unduly delayed; or

(c) where there is an order respecting custody of or access to the child made pursuant to the [Divorce Act](#) (Canada) or by the Supreme Court or the county court or a judge thereof.

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

(a) provided by the [Guardianship Act](#); or

(b) ordered by a court of competent jurisdiction

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall give paramount consideration to the best interests of the child.

(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including

(a) the child’s physical, emotional, social and educational needs, including the child’s need for stability and safety, taking into account the child’s age and stage of development;

(b) each parent’s or guardian’s willingness to support the development and maintenance of the child’s relationship with the other parent or guardian;

(c) the history of care for the child, having regard to the child’s physical, emotional, social and educational needs;

- (d) the plans proposed for the child's care and upbringing having regard to the child's physical, emotional, social and educational needs;
- (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
- (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
- (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
- (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
- (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
 - (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
 - (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

(6A) In determining the best interests of the child on an application for access and visiting privileges by a grandparent, the court shall also consider

- (a) when appropriate, the willingness of each parent or guardian to facilitate access by and visiting with the grandparent; and
- (b) the necessity of making an order to facilitate access and visiting between the child and the grandparent.

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

- (a) the nature of the family violence, abuse or intimidation;
- (b) how recently the family violence, abuse or intimidation occurred;
- (c) the frequency of the family violence, abuse or intimidation;
- (d) the harm caused to the child by the family violence, abuse or intimidation;
- (e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and
- (f) all other matters the court considers relevant.

(8) In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater

certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j). R.S., c. 160, s. 18; 1990, c. 5, s. 107; 2012, c. 7, s. 2; 2012, c. 25, s. 2; 2014,

- [112] The burden of proof in this matter rests with the grandparents and the standard is on the balance of probabilities. This was confirmed in the decision of **F.H. v. McDougall**, [2008 SCC 53 \(CanLII\)](#) when the Supreme Court of Canada found as follows:

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected the reasons that follow.

...

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases that, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

- [113] There is no preferred judicial approach to determining whether grandparent access is in the best interests of the child, which approach is appropriate depends on context. *MacLeod v. Theriault*, (2008), 2008 NSCA 16 (Can LII), 262.

- [114] In *Simmons v. Simmons*, 2016 NSCA 86, Justice Linda Lee Oland stated at paragraph 36:

[36] I begin by observing that nothing in the *Maintenance and Custody Act* or the case law of this Province stipulates or establishes that the parental autonomy paradigm is the only acceptable approach in determining the best interests of the child when grandparents apply for access. For example, the appellant had drawn our attention to *M.O. v. S.O.*, [2015 NSFC 12 \(CanLII\)](#) at ¶ 94 where, after summarizing the law respecting grandparent access, Judge Daley stated:

[94] I also conclude that it is appropriate to give significant deference to parents who have primary care of a child in making such decisions. Given the burden of proof on the grandparents, it still remains available to them to persuade the court that the decision to deny or restrict access is unreasonable in all the circumstances and is not based upon the best interests of the child.

However, parental deference was only one of the considerations and it was not determinative. At ¶ 93, he had also emphasized:

2. The paramount consideration and only test to be applied in such applications is what is in the best interests of the child. Consideration of the views and wishes of the parents and grandparents is only relevant if it informs the court on the best interests of the child.

...

6. The court is not bound by any particular paradigm of grandparent access in its analysis of the best interests of the child. The court may consider parental autonomy, pro-contact or other paradigms, portions of any of them or none of them in its analysis so long as it takes into consideration the particular circumstance of the child.

At paragraph 41 in *Simmons* Justice Oland went on to say:

[41] In addition, judicial deference to parental authority can be tempered by the court's willingness to recognize benefits that extended family bring to a child whose life has been marked by the loss of a parent, such as love, support, and stability. These cases sometimes present best interest factors not apparent in cases with two living parents, including the fact that a child can know his or her deceased parent, including his or her personality, heritage, and culture, through his or her grandparents. See, for example, *White v. Matthews*, [1997] N.S.J. No. 604 (N.S. Fam. Ct.) and *Brooks v. Joudrey*, [2011 NSFC 5 \(CanLII\)](#)

[115] The cases reflect the following:

- a. The paramount consideration in determining whether to grant grandparent access is the best interests of the child.¹
- b. Parental decisions and views are entitled to a level of deference. However, the level of deference depends on the context. *Simmons v. Simmons*, 2016 NSCA 86.
- c. There is no preferred judicial approach to determining whether grandparent access is in the best interests of the child, which approach is appropriate depends on context. *MacLeod v. Theriault*, (2008), 2008 NSCA 16 (Can LII), 262.
- d. Under the Act the onus is on the applicant grandparent to prove that access is in the child's best interest. *M.O v. S.O.*, 2015 NSFC 12, *B. v. R.*, 2015 PESC 20 (CanLII).

[116] I find that given the significant conflict between Ms. Spence and Ms. Stillwell, it is in Taralynn's best interests to maintain limited court ordered access with Ms. Spence while Ms. Stillwell is attempting to address outstanding issues with Mr. Keith and with Mr. Rawn. Ms. Spence shall be permitted to send to Taralynn age appropriate letters, cards and gifts which make no reference to the conflict between the parties. Ms. Stillwell shall ensure these items are passed on to Taralynn. Ms. Stillwell may allow Ms. Spence to exercise any further access or visiting privileges she feels are in Taralynn's best interests.

[117] I find it is in the child's best interests that Ms. Stillwell be given an opportunity to attend appropriate services in an attempt to address outstanding issues and then determine what her position will be at a final hearing regarding Taralynn's access and visiting privileges with Ms. Spence and Mr. Rawn.

[118] I do find it is in Taralynn's best interests to revisit the issue of Taralynn's access or visiting privileges with Ms. Spence and with Mr. Rawn at a full hearing of the matter.

[119] The full hearing shall take place no later than nine or ten months from the date this decision is communicated to the parties. A pre-trial shall be set with me within the next

two months. Ms. Stillwell will need to arrange for legal counsel to attend the pre-trial on her behalf or to participate in the pre-trial by telephone if she is no longer present in this jurisdiction. Ms. Stillwell must attend the final hearing in person.

Summary:

Custody

[120] Nadine Spence is denied leave to apply for custody of the child.

[121] The child will be placed in the interim primary care and custody of Kristan Stillwell.

- a. Kristan Stillwell is encouraged to make or ask her legal counsel to make inquiries with respect to Scott Rawn's current situation and his present position with respect to Taralynn's right to access or visiting privileges with Mr. Rawn.
- b. Kristan Stillwell is encouraged to take advantage of any counseling services or mediation services available to her to assist her in determining what level of access or visiting privileges, between the child and Scott Rawn would be in the child's best interests.
- c. Kristan Stillwell shall ensure Kyle Keith does not have any direct or indirect contact with Taralynn unless approved by a child protection agency in writing in advance of any such access or visitation. This direction is given in support of and in addition to the direction provided by way of the Provincial Court Undertaking Given to a Justice or a Judge dated April 18, 2017 and certified true on April 24, 2017, which was filed as evidence in this proceeding.
- d. Kristan Stillwell shall report to child protection services any attempt by Kyle Keith to have contact with the child before a child protection agency has granted approval for such contact.
- e. On an interim basis, Ms. Stillwell will determine what form of access, if any with Scott Rawn would be in the child's best interests.

Access

[122] Nadine Spence will be granted limited interim access with the child. Ms. Spence shall be permitted to send to Taralynn age appropriate letters, cards and gifts which make no reference to the conflict between the parties. Ms. Stillwell shall ensure these items are passed on to Taralynn. Ms. Stillwell may allow Ms. Spence any further access or visiting privileges she feels are in Taralynn's best interests.

[123] The matter will be adjourned to a final hearing to determine if it is in the child's best interests to have a right of access and visiting privileges with her grandmother (Ms.

Spence), and her biological father (Mr. Rawn). Efforts should be made to have this matter heard no later than nine or ten months from the date this decision is known to all the parties.

[124] Ms. Stillwell will be required to appear at any final hearing scheduled in Nova Scotia to address the issue of access for the child with Ms. Spence, and or with Mr. Rawn. A pre-trial shall be set with me within the next two months.

[125] Mr. Rawn shall be notified of every step in the proceeding and he is directed to let the court know and Ms. Stillwell know what form of access, (if any) he is seeking with the child.

[126] This file should be cross referenced with SFHMCA 95673. It should be noted that contact was made with Mr. Rawn by Pam Johnstone, Court Officer/ Conciliator as recently as March 2016.

[127] Ms. Stillwell will be permitted to move to Ontario with the child if she chooses to do so.

[128] Both files should travel together SFHMCA 95673 and SFHMCA 104986.

Directions:

[129] Mr. Thibault shall prepare the order for review by Mr. Manzer. The Order shall be provided to me for endorsement no later than June 1, 2017.

[130] Ms. Spence shall personally serve a copy of this decision and the Interim Order on Mr. Rawn.

Costs:

[131] I decline to order costs in this matter.

Cindy G. Cormier, J.