**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** *Norton v. David*, 2017 NSSC 192

**Date:** 2017-07-12
**Docket:** No. SFHMCA-084450
**Registry:** Halifax

**Between:**

Kenneth Norton

Applicant

v.

Shadona David

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Leslie J. Dellapinna

**Heard:** June 7, 2017 in Halifax, Nova Scotia

**Subject:** Variation of custody, parenting and child support under the Parenting and Support Act

**Summary:** The parties were in an on and off relationship spanning approximately four years during which they had one child, a daughter, aged four and a half at the time of the hearing.
In 2013, they consented to an order that provided that they would have joint custody of their daughter. Primary care was with the mother and specified parenting time with the father including twenty-four hours each weekend and twenty-four hours each Wednesday.
No child support was payable but the parties verbally agreed the father would contribute $200.00 a month to the child's daycare bill.
Subsequent to that order, the parties reconciled then separated again. The mother changed her residence and that of the child on a number of occasions and enrolled the child in school (grade primary) close to her residence but not close to the father's residence.

The father applied to vary the parenting provisions of the order. The mother filed a Response seeking to vary parenting and child support.

**Issues:**

(1) Was there a material change in circumstance since the granting of the previous order?

(2) Is so, what was the most appropriate parenting arrangement for the child?

(3) What was the appropriate child support order?

**Result:**

There were numerous changes in circumstances including the parties' reconciliation and subsequent separation, the mother's relocations including the resulting distance between their respective homes and their parenting arrangement was no longer working in the best interests of their daughter.

Joint and equal shared parenting was ordered on a week on week off basis along with a sharing of special event days during the year.

Considering section 9 of the provincial *Child Support Guidelines* no table amount of child support was ordered and the parties were required to share equally the cost of the child's before and after school care costs.

The father was required to advise the mother of any change in his employment status.

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| Heard: | June 7, 2017, in Halifax, Nova Scotia |
| Counsel: | Cathy Logan for the Applicant<br>Danika Beaulieu for the Respondent |

**By the Court:**

## APPLICATION

[1] The Applicant, Kenneth Norton applied, pursuant to sub-section 37(1) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, to vary the custody and access provisions of an order of this Court issued September 6, 2013 which relates to the parties' daughter, K.D. born October 13, 2012. As a result of amendments that came into effect on May 26, 2017 the legislation is now the *Parenting and Support Act*.

[2] The Respondent, Shadona David, filed a Response to his variation application by which she too sought an order varying the custody/parenting provisions of the September 6, 2013 order, as well as a variation of the child support provisions of that order.

[3] The parties were unable to reach an agreement on the terms of any changes and the matter was heard by me on June 7, 2017.

## BACKGROUND

[4] The parties were involved in an "on and off" relationship spanning January, 2010 to and including October, 2014.

[5] Together they had one child, K.D., who is now a little over 4 1/2 years of age.

[6] Theirs was not a healthy relationship. They frequently argued and sometimes resorted to abusive behaviour. Depending on the occasion both were at times the perpetrator and at other times the victim.

[7] The Respondent accused the Applicant of being physically and emotionally abusive towards her and on one occasion threatening her with a machete. She also accused him of excessive drinking. The Applicant denied many of her accusations and said that he was never charged with assaulting her but she, in fact, had been charged on two occasions with assaulting him. She acknowledged those two charges. He also said that she was unable to control her temper and had a history of violence.

[8] The parties agreed that the police were called to their residence (while they were still together) on at least ten occasions between 2011 and 2014 with most of the calls being in 2014. There was no independent evidence of who made the calls to the police.

[9] The Respondent said that she voluntarily took two anger management courses – not because she was required to but rather to better herself.

[10] After the parties separated in or around January, 2013 (when K.D. was approximately 3 months old) the Applicant filed with this Court a Notice of Application seeking an order for custody under the *Maintenance and Custody Act*.

[11] At the same time he filed a Notice of Motion for Interim Relief. A hearing took place before the Honourable Justice MacDonald of this Court on January 22, 2013. Justice MacDonald granted an order in which primary care of K.D. on an interim basis was given to the Respondent and the Applicant was given specified parenting time each weekend as well as during the week. The matter was put over for a conference before Justice MacDonald to take place in April 2013.

[12] At the conference on April 16, 2013 Justice MacDonald granted a further interim order requiring the Applicant to pay child maintenance to the Respondent in the sum of $161.00 per month. Instructions were given to the parties for the filing of further financial information.

[13] The matter again came before Justice MacDonald in September 2013. By that time the parties had reached an agreement and Justice MacDonald granted a Consent Order which was issued on September 6, 2013. That order provided that the parties would share joint custody of K.D. defined as:

> "…meaning that both parties must, for those decisions that have significant or long lasting implications for the child or that impose responsibilities on a parent, make those decisions together; they must agree – for example, about decisions concerning physical or mental health, dental care, counseling, education, and enrolment in recreational activities."

[14] The order goes on to say that the Respondent would have primary care of K.D. and the Applicant would have the care of K.D.:

(a) every Saturday from 6:30 p.m. until Sunday at 6:30 p.m.;

(b) every Wednesday, from 6:30 p.m. until Thursday at 6:30 p.m. unless the Applicant is working in which case the return time will be 8:00 a.m. on Thursday morning; and

(c) the Applicant shall provide all transportation required to pick up K.D. from the Respondent's residence and to return K.D. to her residence.

[15] The order also says that the parties, by agreement, may change the dates and times, and provide for additional dates and times when K.D. is to be is in the Applicant's care.

[16] There is a further provision stating that the Respondent is not to change the child's residence to a place 30 kilometers or more from her then residence unless she had the Applicant's written consent or an order from a court of competent jurisdiction permitting the move.

[17] With respect to child maintenance the order provides that the Applicant is not required to pay child maintenance "on the request of the parties" because they had apparently made other arrangements with respect to child maintenance. I heard that those "other arrangements" were that the parties verbally agreed the Applicant would contribute $200.00 each month to the cost of K.D.'s daycare and the remaining balance of the monthly bill would be paid by the Respondent.

[18] It is that order that the parties now seek to vary.

[19] Sometime after the Consent Order was granted, the parties resumed their relationship but separated for the final time in October 2014.

[20] The Applicant's Notice of Variation Application was filed with the Court on March 24, 2015 and the Respondent's Response was filed on April 1, 2015.

[21] Prior to the Applicant filing his Notice of Variation Application, he incorrectly filed a Notice of Application. He was not aware that the correct pleading should have been by way of a Notice of Variation Application. Nevertheless, as a result of his Notice of Application the parties appeared before the Honourable Justice Lynch on March 17, 2015 at which time Justice Lynch granted what amounted to an interim variation order which provided for a temporary alteration to the Applicant's parenting time. The first recital of the order says it was granted on a without prejudice basis. The order provides that

the Applicant is to have access to K.D. "at the following times, and according to the following terms:

a) Every Wednesday after daycare until Thursday morning drop off at daycare.

b) Every second weekend from after daycare on Friday to Monday morning drop off at daycare.

c) On alternating weeks, … on Monday after daycare until Tuesday morning drop off at daycare."

[22] Although the order was granted on March 17, 2015 it was not issued until February 8, 2017. That has no bearing on the outcome of this application. The Applicant's parenting time with K.D. under that order amounted to shared parenting.

[23] The order also provided that the above schedule was to continue until September 28, 2015 when the parties were to attend a settlement conference.

[24] The settlement conference was delayed until October 30, 2015 before the Honourable Justice Williams. No agreement on parenting was reached but there was an agreement that the Applicant would pay $200.00 a month to K.D.'s daycare. Based on the Court's running file it is impossible to tell whether that was an agreement to restart the payment (which was agreed upon previously) or simply to continue paying that amount. No new order was issued.

## LEGISLATION

[25] The applicable legislation is the *Parenting and Support Act*.

[26] Section 37 of the *Act* provides:

> "(1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or an order for custody, parenting arrangements, parenting time, contact time or interaction where there has been a change in circumstances since the making of the order or the last variation order.

> (1A) In making a variation order regarding custody, parenting arrangements, parenting time, contact time or interaction, the court may include any provision that could have formed part of the original order that is being varied.
>
> (2) When making a variation order with respect to child support, the court shall apply section 10."

[27] Section 10, among other things, provides that an order for child support shall be in accordance with the Provincial *Child Support Guidelines*.

[28] Other provisions of the *Act* that are relevant to this case include section 2 which defines "custody" as meaning:

> "the responsibility and authority for the care and upbringing of a child and for the making of decisions regarding the care, supervision and development of the child".

[29] Section 2 also defines "parenting time" as:

> "the time when, under an agreement or a court order, a parent or guardian is with the child".

[30] Sub-sections 18 (1) and (5) provide as follows:

> 18 (1) On application by a parent or guardian…, the court may make an order respecting
>
> (a) custody;
>
> (b) parenting time;
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> (c) a parenting arrangement dealing with any of the areas
>
> set out in subsection 17A(3);
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> (d) a parenting plan made under Section 17A; and
>
> (e) any other matter the court considers appropriate.
>
> …
>
> **(5)** In any proceeding under this Act concerning custody, parenting

arrangements, parenting time, contact time or interaction in relation to a child, the court shall give paramount consideration to the best interests of the child.

[31] Sub-section 18 (6) provides a list of circumstances that are to be considered when determining a child's best interests and reads:

"(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 cooperate

> 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.
>
> …

[32] While I have considered all of the circumstances listed, I found the circumstances listed in paragraphs (a), (b), (c), (g), (h), (i) and (j) to be particularly applicable to the circumstances of this case.

[33] Regarding the effect of family violence, sub-section 18(7) provides:

> (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.

[34] And, importantly, sub-paragraph 18(8) provides:

> **(8)** In making an order concerning custody, parenting arrangements or parenting time 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).

## ISSUES

[35] The issues are:

1. Has there been a change in circumstances since the granting of the order issued on September 6, 2013?
2. If there has been a change in circumstances, what custody/parenting order would be most appropriate for K.D. keeping in mind that the paramount consideration is her best interests?
3. If there has been a change in circumstances, what is the appropriate child support order?

## POSITIONS OF THE PARTIES

[36] The Applicant asked for joint custody of K.D. as well as a shared parenting arrangement that mirrors the provisions of the order of Justice Lynch granted in March, 2015. As an alternative, he was open to an arrangement whereby both of the parties would have the care of K.D. on an alternating weekly schedule broken up by one overnight mid-week with the other parent so that K.D. is never away from either parent for more than four or five days.

[37] He also wanted an order that, regardless of the form of the shared parenting arrangement, required K.D. to go to school in Sackville (relatively close to his residence) rather than in Dartmouth where the Respondent enrolled her to begin this coming September. He did not believe the Court should permit K.D. to attend the Dartmouth school. The Respondent moved to Dartmouth after his application was filed and her new residence, he said, is more than 30 kilometers from the location of her residence when the September 6, 2013 order was granted. One difficulty with his request is that the Sackville school is not in his or the Respondent's school district and would require special permission from the Halifax Regional School Board.

[38] The Respondent sought sole custody of K.D.. It was her position that joint custody was not workable because, she said, the parties did not communicate and showed an inability to work together on parenting issues.

[39] She also wanted primary care of K.D. and proposed that during the school year the Applicant would have parenting time every second weekend from Friday after school until Monday morning before school. During the summer months she proposed that the Applicant have parenting time every second weekend from Friday after daycare to Monday morning before daycare and alternate Wednesdays after daycare to Thursday morning before daycare during the week following her weekend with K.D.. The Respondent also provided a proposal for the sharing of holidays and special event days during the year.

[40] The Respondent also wanted retroactive child support in the sum of $4,200.00 which represented 21 months of childcare payments in 2015 and 2016 ($200.00 X 21 = $4,200.00) which, she said, the Applicant failed to pay but which he had agreed to pay during the Settlement Conference with Justice Williams on October 30, 2015. Prospectively she sought the table amount of child support in accordance with the Applicant's reported current income with the support payments to be adjusted on July 1 of each year depending on the Applicant's income in the previous year. She also wanted the parties to share equally any and all section 7 expenses that she might incur for K.D. in the future.

[41] In response, the Applicant said he paid all the childcare payments as the parties had agreed. He proposed that the "set off" table amount of child support be paid and that any section 7 expenses be shared proportionate to the parties' incomes.

## DISCUSSION

### Change in Circumstance

[42] The Court only has the authority to vary an existing order if there has been a change in circumstances since the granting of that order. It is not enough to show a trivial change. The change must be material. The Supreme Court in *Gordon vs. Goertz*, [1996] 2 S.C.R. 27 provided direction. Although that case considered an application under the *Divorce Act*, R.S.C. 1985, c.3 the same principles apply to cases under the *Parenting and Support Act*.

[43] *Gordon*, supra, provides that if an application is made to vary custody, the party seeking the variation must show a material change in the situation of the child. If that is done the judge must enter into a consideration of the merits and make the order that best reflects the interest of the child in the new circumstances (paragraph 9). An application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court is not to retry the case, substituting its decision for that of the original judge. The court must assume the correctness of the original decision and consider only the change in circumstances since that order was issued (paragraph 11). Further, change alone is not enough. The change must has altered the child's needs or the ability of the parents to meet those needs in a fundamental way (paragraph 12).

[44] If the court is satisfied that there has been a material change in the child's circumstances the court should them consider the matter afresh without defaulting to the existing arrangement. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative. The court is to consider the matter anew in the circumstances that then exist (paragraph 17).

[45] Both parents bear the evidentiary burden of demonstrating where the best interest of their daughter lies.

[46] When determining what is in the child's best interest, the Supreme Court directed that I should consider, among other things, the existing custody arrangement and the relationship that exists between the child and both parents. (*Gordon*, supra, at paragraph 49)

[47] I have concluded that there has been a material change in circumstances as described in *Gordon* since the granting of Justice MacDonald's order. Since the granting of the order in September, 2013, the parties got back together and then separated again for the final time. Since then the Respondent moved on several occasions and most recently to Dartmouth. She had good reasons for at least some of her moves. On one occasion there was a fire at her residence and she had to move.

[48] While her most recent move may or may not have been in breach of Justice MacDonald's order limiting how far away she could move, her current residence is still far enough from that of the Applicant to complicate K.D.'s transition from one parent to the other. Further, since the granting of Justice

MacDonald's order, the parties entered into a shared parenting arrangement which, although done on a without prejudice basis, demonstrated that so long as the parties remained apart their level of conflict decreased.

[49] The interim variation order of Justice Lynch was never intended to be long lasting. Further, it was not made in contemplation of the Respondent's move to Dartmouth. Now, with the distance between the parties' two residences, the order of Justice Lynch would be difficult for the parties to follow and possibly disruptive to K.D..

[50] A further significant change is that as of September 2017 K.D. will begin school. School was not a consideration in 2013 or for that matter in 2015.

**Parenting – K.D.'s Best Interests**

[51] Both parties have another child from a previous relationship. The Applicant has an eight year old son who lives primarily with his mother. The Applicant has parenting time with him on alternate weekends. The Respondent also has an eight year old son who is in her primary care. In coming to my decision I have been mindful of K.D.'s relationship with her siblings and the Court's preference to maintain and foster those relationships.

[52] Both parties' made some fairly serious complaints against the other regarding parenting. The Applicant alleged that the Respondent constantly raised her voice to the children and swore at them. He also accused her of driving while appearing to be intoxicated with K.D. in her car and driving with K.D. in the car without K.D. being properly secured in a child seat. His accusations were denied by the Respondent.

[53] The Respondent in turn said that the Applicant drank excessively and that K.D. returned from his care with what appeared to be bug bites, welts and skin irritations that accumulated during her time with the Applicant. She said that during their periods of cohabitation he was violent towards her (but not towards K.D.) and that he made a false accusation against her in a call to the Department of Community Services.

[54] There was no evidence to support the Applicant's claim that the Respondent drove while intoxicated with K.D. in the car or that she drove while K.D. was not properly secured in a car seat. There was also no independent evidence

that the Applicant had a problem with alcohol use or that K.D.'s bug bites and skin irritations were as a result of poor parenting.

[55] There is reason for me to believe that both were abusive to each other – verbally, emotionally and possibly even physically. They are not compatible. It is best that they remain apart. It does appear however that since the parties' last separation, much of their abusive behaviour has stopped. That seems to be as a result of the parties no longer talking to each other and the transitions of their daughter taking place at neutral locations.

[56] The Applicant was of the view that the shared parenting arrangement as ordered by Justice Lynch was workable but would only continue to be workable if K.D. was to attend school in the Sackville area (as opposed to Dartmouth). The Respondent on the other hand felt that the shared parenting arrangement was not working for the benefit of K.D.. She blamed the shared parenting arrangement and the many transitions required by Justice Lynch's order for K.D.'s behavioural issues. She said that K.D. had a problem controlling her temper and tended to act out. She also said that K.D. was overweight and she blamed that on her diet while in the care of the Applicant.

[57] Notwithstanding the complaints each has made against the other I was satisfied that both love their daughter and both have the ability to provide K.D. with the care that she requires and deserves.

[58] The parties' biggest failing is their refusal to work in cooperation with each other even for the sake of their daughter. Their lack of communication is inexcusable. While their abusive history may have made it impossible for them to communicate face-to-face or for that matter even over the phone, they could have easily resorted to text messages, e-mails or even notes that could have been passed along with K.D.. They could have done that without waiting for a court order.

[59] The Respondent's relocation to Dartmouth and the enrolment of K.D. in her neighborhood school without any prior notification or discussion with the Applicant was unacceptable especially given how joint custody was defined in the Consent Order of September 6, 2013.

[60] The Respondent blamed the Applicant for failing to communicate with her regarding K.D. but apparently wasn't able to appreciate that she was equally at fault.

[61] There was no evidence that either party tried to communicate constructively with the other. That is not proof of their inability to communicate. It may be an indication of their unwillingness to try to communicate. They must, for K.D., make the effort to communicate and cooperate with each other in a way that is safe for them both. They are reminded that among the circumstances that the Court is required to consider in deciding any custody/parenting order is each party's willingness to support the development and maintenance of their child's relationship with the other parent and the ability of each parent to communicate and cooperate on issues affecting their child.

[62] Having taken all of the evidence into account, the relationship K.D. has with both of her parents and the circumstances listed in the legislation, I have come to the conclusion that it would be in K.D.'s best interests to order that the parties continue to share joint custody and that they have approximately equal parenting time.

[63] With respect to joint custody, my order will say that both parties will have input into, and will jointly decide, all major decisions that affect their daughter's life including but not necessarily restricted to decisions concerning her physical or mental health, her dental care and her education. Should either party not participate in the decision making process then their acquiescence, after a reasonable period of time, may be interpreted as agreement with the other parent's position. What is a reasonable period of time will depend on the urgency of the decision that must be made. Should either party demonstrate a pattern of uncooperativeness or unreasonableness then that may be seen by the court as a material change in circumstances that may lead to a severance of the joint custody order.

[64] Each will have the ability to authorize emergency medical treatment for K.D. provided that they, as soon as possible, provide notice to the other parent of the nature of the medical emergency.

[65] The following provisions will apply to the administration of their parenting of K.D.:

1. Both parties will keep the other informed of their address and their contact information.

2. Neither party will relocate from their residence without giving to the other party at least 30 days' advance notice provided it is possible to do so.

That notice will include the date of their planned relocation, the location and address of their new place of residence and the particulars of any changes to their contact information.

3. Neither party will relocate outside of the Halifax Regional Municipality without first giving to the other party at least 60 days advance notice or obtaining an order permitting the move from a court of competent jurisdiction.

4. Neither party will relocate outside of the Province of Nova Scotia without giving to the other party at least 90 days advance notice or obtaining an order permitting such a move from a court of competent jurisdiction.

5. Both parties will be entitled to receive directly from any third party service provider information relating to K.D. including information concerning her health, education, recreational activities and the like. Both parties will be entitled to communicate directly with K.D.'s service providers including doctors, dentists, teachers, daycare workers and the like.

6. Should either party receive information concerning K.D. from a service provider, they will make reasonable efforts to inform the other party of such information promptly and, if the information is in writing, to promptly provide them with copies of such material.

7. Both parties will continue to be entitled to attend events relating to K.D. that parents are normally entitled to attend such as school concerts, sporting events and other such recreational activities.

8. Should either party travel outside of the province of Nova Scotia with K.D. during the time that they are permitted to have her in their care, they are to advise the other party in advance of their intention to do so and will provide the other party with a brief summary of their intended itinerary including how they may be contacted in the event of an emergency. The itinerary should also include their expected date of departure and expected date of return.

[66] As for the particulars of the shared parenting arrangement I order as follows:

9. Except for special occasions to which I refer below, the parties will share parenting of K.D. on an alternating weekly basis with the transition from one parent to the other taking place on Friday after school (or after daycare, as the case may be) unless both parties agree in advance on a different day, which agreement must be in writing – which may include an exchange of text messages or e-mails.

10. In addition to the foregoing, during the week in which K.D. is in the Applicant's care, the Respondent will have her in her care from Tuesday after school (or after daycare, as the case may be) until the following Wednesday morning. Again, if the parties are able to agree on a different day, they may do so, provided that agreement is in writing.

During the week that K.D. is in the Respondent's care, the Applicant will have the ability to have K.D. in his care from Tuesday after school or after daycare until the following Wednesday morning subject to the parties' ability to agree in writing on a different day.

11. When the Applicant is commencing his week with K.D., he will pick her up from her school or daycare on Friday afternoon and will return her to her school or daycare the following Friday morning. When he has her in his care on the Tuesday during the Respondent's week with K.D., he will again pick her up at K.D.'s school or daycare on Tuesday afternoon and return her to school or daycare on Wednesday morning.

12. At the commencement of the Respondent's week with K.D., she too will pick her up from school or daycare on Friday afternoon and return her to school or daycare the following Friday morning. Similarly, on her Tuesdays with K.D. during the Applicant's week, she will pick K.D. up from school or daycare on Tuesday afternoon and return her to school or daycare on Wednesday morning.

[67] I appreciate that given the location of K.D.'s school (within minutes of the Respondent's home) and daycare (as of September it will be in the same school), this arrangement puts the Applicant to a greater inconvenience than it does the Respondent. While that is regrettable, I order it in order to minimize the need for face to face contact between the parties which, for now at least, is in K.D.'s best interests. I am not going to compel the Respondent to send K.D. to school or daycare in the Sackville area. Nor am I going to order the Respondent to change her residence yet again. K.D. has been through enough relocations.

[68] This shared parenting arrangement is preferable to the current parenting arrangement under Justice Lynch's interim variation order and is preferable to either of the parties having primary care. It allows for both parties to have input in decisions that affect K.D.'s life. It also allows K.D. to have meaningful time with both parents and to have as much time as is reasonably possible with her brothers provided the commencement of the Applicant's week coincides with his weekend with his son – which I recommend.

[69] This arrangement also requires far fewer transitions than did the previous arrangement and therefore provides more stability, consistency and predictability for K.D.. It also entails very little, if any, physical interaction between the parties.

[70] In addition I order the following:

13. The parties will use a communication journal which will travel with K.D. in which both parties will make notes for the benefit of the other parent of anything of any import relating to K.D.. Such notes may include details of any health concerns that may be afflicting K.D. including any medication she is on, where the medications can be found and when she was last given her medications. It should contain details of her upcoming extracurricular activities or proposed activities and should include details of any appointments that she might have such as doctor and dentist appointments and could also include details of birthday parties and the like to which she is invited. The parties must ensure that the journal travels back and forth between the parties with their daughter.

14. While K.D. is in the care of the Applicant, the Respondent may have reasonable telephone and other electronic communication with K.D. provided it occurs at reasonable times, for reasonable periods of time and at reasonable frequencies. Similarly, the Applicant may have reasonable telephone and other electronic communication with K.D. while she is in the care of the Respondent, provided it occurs at reasonable times, for reasonable periods of time and at reasonable frequencies. Such communication may include access by way of text messages and e-mail if possible.

**Holidays and Special Events**

[71] The Applicant (in counsel's pre-hearing brief) indicated that the parties needed a schedule for holidays. He did not, however, in his evidence or submissions state precisely what it was that he sought. The Respondent did express her wishes and for the most part they were reasonable.

[72] I therefore order as follows:

15. The Applicant will have the care of K.D. on Father's Day regardless of who would otherwise have the care of K.D. on that weekend. Should Father's Day fall on a weekend when K.D. would ordinarily be in the care of the Respondent, the Applicant will have the care of K.D. from 6:00 p.m. on the Saturday before Father's Day until the following Monday morning when she will be returned by the Applicant to school or, if applicable, daycare. Similarly, the Respondent will have the care of K.D. each Mother's Day. Should Mother's Day fall on a weekend when K.D. would ordinarily be in the care of the Applicant, the Respondent will have K.D. from 6:00 p.m. on the Saturday before Mother's Day until the following Monday morning when the Respondent will return her to school or, if applicable, daycare. Whereas K.D. will not be in school or daycare on Saturday the parties may wish to seek the assistance of one of their family members to aid in the transition of K.D. so as to minimize the direct contact between the parties.

16. K.D. will be in the care of the Applicant each Canada Day from 6:00 p.m. on June 30 until 9:00 a.m. on July 2. If it is not possible for her to be transitioned at daycare then, again, the parties may wish to obtain the assistance of a family member to help with the transition.

17. The Respondent will have the care of K.D. each Natal Day from 6:00 p.m. on the day preceding Natal Day to 9:00 a.m. on the day following Natal Day. Again, the parties, if necessary, should ask for the assistance of a family member to help with the transition.

18. The parties will alternate the care of K.D. on the evening of Halloween commencing at 5:00 p.m. on October 31 and continuing until 9:00 a.m. on November 1. K.D. will be with the Respondent on Halloween in 2017 and every odd numbered year thereafter and with the Applicant in 2018 and every even numbered year thereafter.

19. The parties will alternate the care of K.D. on Christmas Eve and Christmas Day such that commencing in December 2017 and in December of each odd numbered year thereafter, K.D. will be in the care of the Applicant from 9:00 a.m. on Christmas Eve to 11:00 a.m. on Christmas Day and in the care of the Respondent from 11:00 a.m. on Christmas Day until 9:00 a.m. on Boxing Day. Commencing in 2018 and in December of each even numbered year thereafter K.D. will be in the care of the Respondent from 9:00 a.m. on Christmas Eve to 11:00 a.m. on Christmas Day and in the care of the Applicant from 11:00 a.m. on Christmas Day until 9:00 a.m. on Boxing Day.

[73] The Respondent sought to have K.D. in her care every Christmas Eve and Christmas morning as well as every Halloween. I do not consider that to be in K.D.'s best interest. She is entitled to have familiarity with both her mother's and her father's traditions during those special times.

[74] With respect to Easter, the Respondent proposed that K.D. be in her father's care each Easter. I make no order with respect to Easter. Rather, by not changing the regular week-on week-off schedule the Easter weekend will ultimately be alternated and shared equally – in the long run –between the parties.

[75] It is open to the parties by mutual agreement to vary any of the above provisions.

**Child Support**

[76] The Applicant seeks the "set off" approach to child support based on the parties' respective incomes and the *Child Support Guidelines* tables.

[77] The Respondent seeks retroactive child support in the sum of $4,200.00. Specifically, she said the Applicant had promised to pay $200.00 a month towards her daycare costs but failed to do so between January, 2015 and October, 2015 as well as between January, 2016 and November, 2016. While the Applicant failed to produce receipts for the payments during those timeframes, it was his evidence that he made all the required payments. The Respondent in turn said that she was forced to pay the daycare what the Applicant failed to pay as well as her own share or, as much as she could. She said there was still a balance owing to her daycare provider. She produced no receipts for her payments.

[78] I was not convinced that the Applicant failed to make all his daycare payments. While there is some reason for me to believe that he may not have made all of his payments I was not convinced on the balance of probabilities that that was the case. In the absence of stronger evidence I decline to order either arrears of child support or make an order for child support with retroactive effect.

[79] The Applicant reported income of $17,498.00 per annum which is what he is receiving now in the form of employment insurance benefits.

[80] The Respondent reported income from her two part-time positions totalling $19,620.00 per annum.

[81] Section 9 of the *Child Support Guidelines* provides that where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account:

(a) the amounts set out in the applicable tables for each of the parents;

(b) the increased cost of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[82] Counsel for the parties concentrated the evidence, cross-examination and submissions on the parenting issues - which is understandable. They did not undertake what I would consider a full analysis as contemplated by *Contino vs. Leonelli-Contino*, 2005 S.C.C. 63. I have however reviewed both parties' Statements of Income, the Respondent's Statement of Expenses and the Respondent's Statement of Special or Extraordinary Expenses. The table amount at the Applicant's income level is $105.00 per month. The table amount at the Respondent's income level is $134.00 per month. A strict application of the set off approach would require the Respondent to pay to the Applicant $29.00 per month.

[83] In any sharing of childcare expenses, tax savings have to be taken into account. Given the Respondent's current income she will have no tax savings as a result of claiming daycare. Whereas the Applicant's income is lower than the Respondent's, there would also be no tax saving if he was to claim the expense on his tax return. According to the Respondent her average monthly daycare cost is $315.50. Her proportionate share would be 52.86 per cent or

$166.77 per month compared to the Applicant's proportionate share, 47.14 per cent or $148.73 per month.

[84] Although the parties' incomes are similar, the Applicant is not working. The Respondent on the other hand is working at two part-time positions. The Applicant will be caring for K.D. half of the time and his son on alternate weekends. The Respondent will be caring for K.D. half of the time and her son on a full-time basis.

[85] Although it was not argued, I believe that an argument could have been made in favour of having income imputed to the Applicant.

[86] Taking the financial and other circumstances of the parties into account, I order that until circumstances change, neither party will pay any table amount to the other and each will pay one half of K.D.'s total daycare costs net of any subsidy received by the Respondent. Daycare costs include the cost of any before and after school care at K.D.'s school.

[87] The parties are to try to reach an agreement on how their daughter is to be claimed by each of them on their respective tax returns in order to legally maximize to them, as a family, any benefit, including the Canada Child Benefit.

[88] The Court's order will require the parties to yearly exchange copies of their tax returns and Notices of Assessment no later than June 1 of the following year.

[89] I decline to order a sharing of new section 7 expenses that may occur in the future without knowing what the expense is or the incomes of the parties at that time. It is hoped the parties will agree on the sharing of such costs but if not a further application can be made to the Court.

[90] Finally, the Applicant is to advise the Respondent immediately upon him obtaining any form of employment. His notification will include full particulars of his compensation package and when it takes effect.

[91] I direct that counsel for the Applicant to prepare the necessary order.

Dellapinna, J.