SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *P.W. v. C.M.*, 2017 NSSC 91

Date: April 4, 2017
Docket: SFSNMCA 96620
Registry: Sydney

Between:

P.W.

Applicant

v.

C.M.

Respondent

Judge:	The Honourable Justice Robert M. Gregan
Heard:	5 and 7 December 2016; 16, 17, 18 and 30 January, 2017; 2, 3, 16, 17 and 27 February, 2017
Oral Decision:	March 2, 2017
Release:	April 4, 2017
Counsel:	Darlene MacRury, for P.W. Theresa O'Leary, for C.M.

By the Court:

1. Geographically, [ ] and [ ] are approximately a one hour drive in apart. In the context of these family proceedings however, they are vast differences apart in terms of what the parties propose for a parenting regime and decision making. This court must decide how much time the child will spend in each part of his parent's worlds.

2. C.M. says that most of the child's time should be spent with her under an order that provides for sole custody. She says that P.W. should have limited contact, which does not include overnight parenting time and that there should be strict conditions on P.W. when the child is in his care.

3. P.W. says that there should be equal parenting time under a shared custody order with the child spending time with each parent, eventually on a 4 day rotating schedule. P.W. says that there should be no conditions or restrictions on parenting time.

4. The court must also, after deciding the issue of custody, address the appropriate level of child support.

HISTORY OF THE PROCEEDING

5. An application was made by P.W. on June 4, 2015, seeking shared custody and specific access of the child born [ ]. There was a response that was filed by C.M. seeking sole custody, child support on an ongoing basis, retroactive child support and costs.

6. Justice Haley issued an Interim Order on December 16, 2015, which granted interim custody, primary care and primary residence of the child with C.M.

7. Access to the child was provided to P.W. on Mondays, Tuesdays and Thursdays, from 9:00 am to 1:00 pm, and one day on each weekend, alternating Saturdays and Sundays and other access as agreed. That was eventually varied to increase to a full day.

8. There was a no smoking or drinking provision. There were also provisions that the necessary food and breast milk was to be supplied by C.M. and no other third party breast milk was to be given to the child.

9. There was extra time given for access at Christmas. There was a provision that the parties were to be civil to one another. Pick-ups and drop- offs were at the Superstore parking lot in Sydney River.

10. P.W. was ordered to pay child support of $1,200 a month starting November 1, 2015. The issue of retroactive support was deferred to a final hearing.

11. That is briefly the history of this matter.

POSITION OF THE PARTIES RE: CHILD SUPPORT

12. C.M. says that child support should be paid by P.W. based upon Child Support Guidelines and on income imputed to P.W. based upon previous year's employment and income from rental properties. C.M. acknowledges receiving $8,000 from P.W. prior to the child's birth, but she says that it should not be credited towards child support. C.M. takes the position that child support was payable since May 1, 2015, and that P.W. should only receive credit for those payments towards arrears, which were made after the Interim Order of Justice Haley on December 16, 2015.

13. C.M. also said that P.W. underpaid his child support obligations when he unilaterally decreased his amounts paid under the Interim Order to $600 and then to $300.

14. P.W. takes the position that if awarded shared custody, there should not be an obligation to pay child support. P.W. said he should be credited the $8,000 he provided to C.M. as child support. P.W. says there should be no award of retroactive support and no arrears

because the $8,000 should be credited towards retroactive child support. His decision to unilaterally reduce the court ordered support from $1,200 was based upon:

- the $8,000 that he had paid going towards those obligations;
- he says that the Interim Order from December 16th does not reflect his present income; and
- his corresponding reduction in child support payments reflected his income and the $600 and $300 payments that he did make met his child support obligations based upon his income for guideline purposes.

CUSTODY

15. I turn now to the issue of custody. These proceedings are governed by the **Maintenance and Custody Act**. The factors that the court must consider are set out in s. 18 of that Act. They are essentially a codification of what has become known as the Foley factors in the reasoning of Justice Goodfellow in **Foley v. Foley,** 124 NSR (2d) 198. Included in those factors is the principle that a child is to have maximum contact with each parent and that is set out in s. 18(8).

16. Section 18(8) reads as follows:

> *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).*

17. If the principle is to be set aside the burden of proving why maximum contact should not occur, is on the party seeking to curtail the parenting time. In this case, C.M. says that parenting time by P.W. should be limited because of (1) safety concerns, and (2) the tender years doctrine.

18. Under the heading of safety concerns, C.M.'s concerns can be listed under two headings (1) concerns of domestic violence by P.W. and (2) concerns of alcohol abuse or substance abuse by P.W.

19. Domestic violence is also a factor I must consider under s. 18(6) of the **MCA**, which states as follows:

> *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.*

20. As mentioned, the burden is on C.M. to satisfy domestic violence and substance abuse by P.W. exists. The test in family civil law causes is well known. I will refer to case authority with respect to that. The test was set out in the case of MacDougall, which is often quoted as a Supreme Court of Canada decision and Novak Estates as well. Both MacDougall and Novak Estates referred to the decision of Justice Forgeron in **Baker-Warren v. Denault**, 2009 NSSC 59, provided in the case authorities by counsel. Such factors, when looking at the civil burden, also requires the court to look at making findings of credibility and in order to do that in this case, I must make findings of credibility with respect to the evidence of C.M. and P.W., as well as findings of credibility for other witnesses who testified on these issues.

21. In the case of **Baker-Warren v. Denault**, supra, after citing **MacDougall** said as follows:

> *The court must assess the impact of inconsistencies on questions of credibility and reliability which relate to the core issues. It is not necessary for a judge to deal with every inconsistency, but rather a judge must address in a general way the arguments advanced by the parties.*

22. Justice Forgeron in **Baker-Warren v. Denault**, supra, relying on Novak Estates, formulated the following factors to be considered:

> …
>
> *b) Did the witness have an interest in the outcome or was he/she personally connected to either party;*
>
> *c) Did the witness have a motive to deceive;*
>
> *d) Did the witness have the ability to observe the factual matters about which he/she testified;*
>
> …
>
> *f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: Faryna v. Chorney 1951 CanLII 252 (BC CA), [1952] 2 D.L.R 354;*
>
> *g) Was there an internal consistency and logical flow to the evidence;*
>
> *h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and*
>
> *i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?*

23. The appropriate test as indicated in **MacDougall**, is that the burden must be met on the balance of probabilities based on clear, cogent and convincing evidence. I do not intend to review all the evidence, but will highlight the relevant evidence to give effect to my decision.

DOMESTIC VIOLENCE

24. In dealing with the issue of domestic violence, there was evidence about a phone call from Fort McMurray. C.M. says that there was a phone call in October of 2014 by P.W. to her, at her residence. She said the call came in the evening after several heated calls with P.W. Her sister J.M., was at her home when the last call was made. The telephone call was made shortly after C.M. had disclosed to P.W. that she was contemplating having an abortion. C.M. says P.W. was:

- drunk and slurring his words;
- he was angry and the M's were no match for the W's;
- he was a solider; and
- that he would kill her, her family and their unborn son.

25. P.W. acknowledges that conversation in its entirety. He stated that he should not have said those things. He acknowledged that was not an excuse, but he became extremely upset on hearing C.M. was contemplating an abortion and consumed a large amount of alcohol and made the telephone call.

26. There is also evidence about a conversation about a man from Port Morien. C.M. said there was an incident in which P.W. discussed with her a conversation about a man from Port Morien who had found his wife and mother of his children had been having an affair on the Internet and was going to leave him and take the children and the result was a murder of his wife and her alleged partner by the husband. C.M.'s response was that these poor children would be left with no mother. C.M. said in discussing this incident with P.W., that he said that he could see how that could happen. P.W. denied that conversation. There was a similar conversation that C.M. asserts about a news article about a similar event in Saskatchewan, and again P.W. denies occurred.

27. C.M. also testified about an incident when leaving a campground near Enfield. Mr. W. struck her in the face with a pillow. P.W. acknowledges hitting C.M. with the pillow, but

he said that he did so unintentionally when removing the pillow from the passenger side seat. C.M. cites other incidents that suggest that P.W. had anger issues:

- such as driving out of the parking lot from her employment quickly in frustration after having been denied access in May 2014;
- driving or being in places from her home route in [ ] to her employment in [ ];
- becoming agitated when the parties separated and when he took his belongings and left C.M.'s home for the final time; and
- being agitated at both her home and her parent's home and again to S.B.T. before obtaining his belongings.

28. To determine this issue I must make findings of credibility. I will start with the parties themselves.

29. P.W. in his testimony acknowledged the incident of October 2014, when he telephoned C.M.'s home from Fort McMurray. He acknowledged saying the things that he was alleged to have said and gave his explanation. He made this admission against self-interest, which in my view bolstered his credibility. I accept his evidence and explanation as to what occurred with the pillow when leaving the campground in that both parties were upset and that the striking of the pillow was unintentional. I also accept the evidence of P.W. wherein he denied the conversation regarding the man from Port Morien and conversation about the man from Saskatchewan. Where his evidence differs from that of C.M., I accept the evidence of P.W.

30. The following are examples of difficulties I had with respect to the credibility of C.M. in a number of areas.

TELEPHONE CONVERSATIONS WITH FATHER BOUDREAU

31. C.M. testified to a telephone conversation she had with Father Boudreau in December 2016. She said she called Father Boudreau to discuss a letter that was being submitted to the court by Father Boudreau supporting the parties' son being baptized.

32. C.M. says that in response to the request for a meeting, Father Boudreau stated that if a meeting were to take place that Father Boudreau would wish to have a witness present. C.M. said that she responded that if Father Boudreau was requesting a witness, that she would also bring a witness to the meeting. She was adamant that it was Father Boudreau who first raised the issue of witnesses being present for the meeting.

33. C.M. also said in her evidence that she did not, during the December telephone conversation with Father Boudreau, state that P.W. was involved in satanic rituals and practices. She said that she told Father Boudreau that P.W. believed in God and the Devil, but was adamant that she did not use the words satanic or satanic practices in her conversations with Father Boudreau.

34. C.M. also testified that Father Boudreau said he called off the meeting on the advice of a Church lawyer and concerns regarding hearsay.

35. I have reviewed the evidence of Father Boudreau.

36. Father Boudreau was very clear in his evidence that C.M. wished to have the meeting to try and change his mind on the Baptismal letter. He said that it was C.M. who first insisted that she be permitted to have a witness present. Father Boudreau also responded that if that were the case, he would have his secretary present. Father Boudreau during cross-examination by Ms. MacRury also stated that C.M. told him that P.W. was involved in satanic practices and that after consulting with another Priest, he determined it would not be proper to meet without P.W. being present if the purpose was to talk down about P.W. and suggest that P.W. was involved in satanic cults and practices.

37. On redirect from Ms. O'Leary, Father Boudreau was again pressed on whether or not the word "satanic" was used or implied, that P.W. engaged in satanic rituals and practices and Father Boudreau was clear that it was more than implied and it was clear that the word "satanic" was used. Father Boudreau was also clear that it was on the advice of another Priest that he cancel the meeting, not as reported by C.M., that it was on the advice of a lawyer.

38. There were other arears concerning C.M.'s credibility.

DR. REGINALD LANDRY, PHD

39. Dr. Landry was retained to prepare a Parental Capacity Assessment and make recommendations regarding custody and parenting in this matter.

40. Dr. Landry prepared two reports marked as Exhibits 8 and 13 in these proceedings.

41. In his initial report Dr. Landry recommended joint custody to the parties. In his follow-up report Dr. Landry citing lack of communication and high conflict, changed his recommendation of joint custody.

42. Dr. Landry, in his *viva voce* evidence, also expanded his opinions on the issues of custody, parenting, decision-making, and the transition to overnight parenting time for P.W. with the child.

43. C.M. testified that Dr. Landry told her in his office that overnight visits should not occur because of the tender years doctrine and that overnight visits should not occur until:

- both parties were on the same page;

- night time routines were established;
- The child sees the fact that Mom and Dad care for one another; and
- that both parents work together for what is in the child's best interest. C.M. said Dr. Landry apologized for not making that abundantly clear.

44. Evidence of Dr. Landry was again contrary to C.M.'s assertions. Dr. Landry's report, which I will go into later in greater detail, was that his initial assessment recommended joint custody. He, after additional consultations with both parties, concluded that joint custody would not work because P.W. and C.M. would never be able to communicate. Dr. Landry confirmed this in his supplemental report at Exhibit 13, and in his testimony. Dr. Landry's additional report did not contemplate many of the recommendations that C.M. testified were said during their meeting. I also did not hear Dr. Landry testify or confirm what Mr. Murphy said occurred. In other words, there is no evidence that Dr. Landry said (a) that the child must see the fact that his Mother and Father cared for one another; and (b) that both parents were on same page. In fact, Dr. Landry changed his report because he identified this as a "high conflict case". It was precisely because the parties could not communicate that he recommended a specified schedule of parenting i.e. parallel parenting. I therefore do not find C.M. credible on this point, which she attributed to her meeting with Dr. Landry. I also do not accept her testimony that Dr. Landry apologized for not making those points abundantly clear.

45. I find that C.M. suggested the comments in her testimony to justify continuing the denial of overnight access.

46. There were other areas in the evidence of C.M. that were problematic. Her evidence relied on hearsay by way of comments from other third parties in an attempt to bolster her credibility. For example, a conversation she had with a cousin of P. W.'s regarding his addictions. This was not properly put before the court.

47. She also testified to conversations with police officers regarding the actions by P.W. alleging following her. She also testified to conversations with the child's doctors and recommendations regarding postponing vaccinations. Again, all of which is not properly before the court.

48. Finally in cross-examination C.M. was asked whether she ever discussed the topic of an affair that S.B.T. was having with D.C., directly with S.B.T. C.M. responded that they had never discussed the topic. I do not accept this is the case. Clearly, P.W. learned of the affair through association with C.M. It would defy logic that C.M. would not be aware of this issue. S.B.T. was described as her best friend and was in court with her every day during these proceedings. I note in cross-examination when S.B.T. was asked by Ms. MacRury about the affair with D.C., that her response was "yes, we were hanging around".

49. The court is not being asked to determine whether or not an affair occurred. The issue is therefore not whether or not it occurred, but whether or not it was a topic of discussion between C.M. and S.B.T. I do not find C.M. credible when she said that it was never discussed.

50. With respect to other incidents raised by C.M., I find that the evidence of P.W. driving out of the parking lot of C.M.'s place of employment in May 2015 was contradictory. C.M.'s sister said that there was squealing tires, whereas C.M. said there were flying rocks. All agreed, including P.W. that in his haste to leave the parking lot, he hit a switch which caused the hatch of the rear of the vehicle to open. I find nothing turned on this incident to support C.M.'s claim that P.W. had an anger issues.

51. With respect to the driving of P.W. to the [ ] and following her, it would appear once again that C.M. in her evidence relied heavily on what was told to her by police officers. Once again this evidence was not properly before the court. I also note from the evidence that there were times that C.M. or her family, were following P.W., or others to the parking lot at the furniture store. Again, nothing turns on this issue.

52. Regarding the assertion that P.W. was upset leaving [ ] for the final time when getting his belongings, while I have no doubt that P.W. was upset, I find nothing turns on this point.

53. Regarding the issue of P.W.'s anger management and C.M.'s safety concerns, I would make two further observations.

54. Dr. Landry considered all the events I have listed in preparing his Parental Capacity Assessment. While he found this case to be a high conflict case, he concluded there were no safety concerns or risks by P.W. that would warrant constraints being placed on P.W.'s parenting time as a result of domestic violence.

55. I agree with this conclusion.

56. P.W. completed substantial programming which included dealing with healthy relationships and there were a number of certificates which were introduced as Exhibits. There is absolutely no criminal record for P.W. and no record for domestic violence and/or substance abuse.

SUBSTANCE ABUSE

57. I turn now to the evidence of substance abuse. C.M. says that P.W. continues to have a problem with substance abuse. She relies on:

- the fact that she grew up in a home with an alcoholic mother and knows the signs of alcoholism;
- she says that P.W. told her mother, B.M., that he had an alcohol problem;
- P.W. told her father L.M. he had a problem with alcohol;
- that S.B.T. saw P.W. driving after drinking when leaving a bar;
- that P.W.'s mother told C.M. that P.W. had a problem with alcohol;
- that P.W.'s brother, D.W. had recounted an incident where P.W. was drinking on a boat with his children;

- that P.W. drank to a point of impairment daily at an all-inclusive trip to Jamaica;
- that C.M. could tell when P.W. was drinking on a number of occasions when employed West;
- that there was drinking at the [ ] campground referred to earlier; and
- P.W. was drinking when he drove to [ ] and there was an incident with a hose and squirt guns.

58. Finally, C.M. says that P.W. had been drunk on two separate at a New Year's Eve occasions. The first was at a New Year's Eve dance and the second was at a New Year's Eve gathering that she was having at her home and that P.W. had been drinking at a friend's house before coming to the party. She also says that on one other occasion P.W. was impaired during a memorial golf tournament […].

59. I accept that C.M. would certainly be sensitive to alcohol given that she grew up with what she termed as "an alcoholic mother". Many families and family members deal with the effects of alcohol and living with alcoholic family members. V.W. told C.M. that P.W. "takes a social drink, whereas you (C.M.), do not drink at all, which will be an issue". I take took that to mean an issue in the relationship, not an issue with respect to P.W.'s ability to parent. I find as well, after reviewing the evidence of what P.W. told B.M. was that he did not tell her that he had a drinking problem. B.M. told P.W. that C.M. thought he had a drinking problem. P.W.'s response to B.M. was "I do not have a problem and I do not need to deal with it". With respect to what C.M. reports that L.M. said, I have reviewed again the evidence of L.M. and he did not say that P.W. told him he had a drinking problem. He recounted a conversation where P.W. told him that P.W. had a problem with buddies drinking at his home and L.M. suggested the solution was to "kick them out".

60. I turn now to the evidence of D.W. who also described his brother as a social drinker. He did acknowledge in cross-examination that there was an incident where D.W.'s children were on a boat and there was an argument following the boat trip. D.W. however, was uncertain as to whether or not the argument involved alcohol, when the argument occurred, or how long ago it had occurred. He also said that the argument was not significant. He has since allowed P.W. to be with his children on an unsupervised basis on many occasions, including overnight and has had no concerns.

61. With respect to the trip to Jamaica, C.M. testified it was her first trip to an all-inclusive resort. It is not surprising that a person at an all-inclusive resort could be drinking each day. Clearly, C.M. was uncomfortable in that environment given her sensitivity to alcohol, but went along in any event.

62. Nothing turns on this point in any event, since P.W. was not in a child caring role.

63. Similarly, I find with respect to the campground incident that nothing turns on that event. As I understand it, C.M. was upset because P.W. had promised not to drink. He drank one or two beer from the evidence and refused a third beer. Again, it was not in a child caring role. No evidence was led as to the time period that the two beers were consumed. There is no evidence as to P.W.'s tolerance for alcohol or evidence of impairment when he offered to drive, and when ultimately C.M. became upset because she had to drive. As already stated, where her version of those events differs from those of P.W. I accept the evidence of P.W.

64. I turn to the evidence of S.B.T. She described evidence on one occasion seeing P.W. intoxicated at the [ ] Club. There was no evidence as to how much P.W. had consumed. There was no evidence of level of impairment. There was evidence that she offered to drive him home or to take his keys, but he declined. She said she did not see him leave the parking lot or actually observe him drinking and driving. All of this occurred before the parties were in a relationship and before obviously C.M. was pregnant. There is also some issue with the timing of the disclosure about S.B.T.'s concerns about drinking. It was after the parties separated and after the court proceedings. One would question why S.B.T. would attempt to mediate and to salvage a relationship if she was concerned about someone who had substance abuse and was prone to drinking and driving. It would appear that the timing of the disclosure of these concerns was after there were text message sent by P.W. to S.B.T. about an affair occurring.

65. As well, the only time she said that she observed P.W. intoxicated after he and C.M. were in a relationship was on a New Year's Eve, and again it was not in the context of drinking and driving.

66. S.B.T., in her evidence, also expressed concerns about texts sent by P.W. She also agreed in her evidence that she had sent texts to P.W. with attachments "sending love" P.W.'s way. Nowhere in any of these texts did she raise concerns about his alcohol consumption, nor was there evidence that these concerns were expressed during mediation between P.W. and C.M. She also, prior to taking the stand, raised no concerns about the tone of the texts by P.W., or the time of day that the texts were sent.

67. With respect to the squirt gun incident and the drinking, there was no evidence that P.W. was impaired. C.M. testified she could smell alcohol on his breath, but nothing over and above that. With respect to New Year's Eve incident, there was an incident where she was having a house party and P.W. went to a friend's house prior to the party to watch the Canada/US Jr Hockey game and P.W. testified that he had one full beer and one-third of a second beer, ordered some pizza and then went to C.M.'s home. Again, I find nothing turned on that point. Similarly, with respect to the golf tournament, there was evidence from B.M. that she was the designated driver, and picked P.W. up after the tournament.

68. Nothing turns on this point.

69. With respect to again, the incident relayed by D.W., I decline to draw the reasonable inferences as suggested by C.M.'s counsel that P.W. was drinking in a boat when looking after his brother's children. I decline to do so because while clearly something occurred, it may or may not have involved drinking and it was not clear as to the specifics, context, or timeline.

70. With respect to the telephone face-time evidence by C.M. about West, again I am asked to draw an adverse inference. From the evidence, C.M. did not say that she observed paraphernalia such as bottles lying around during these face-time telephone calls. There is nothing to refute P.W.'s assertion that he was tested for employment purposes. In reaching her conclusions, C.M. was relying on P.W.'s appearance only via face-time, or what she heard on the telephone. She said he was slurring his words and seemed agitated, but she did not say for instance, that he appeared to be in the same state during those face-time calls or telephone calls as he was when she observed him impaired, for

example, during the New Year's Eve dance or in Jamaica. I cannot rule out work, fatigue or stress, and since C.M.'s observations were visual only, there was no smell of alcohol or other indicia of intoxication to draw the adverse inference that she has asked me to make.

71. Counsel for C.M. in submissions, requested objective testing be completed on P.W. I decline to do so because Justice Haley, as a result of the interim hearing, ordered that an assessment be completed. There were in fact two assessments completed; one by Addiction Services and the other by Dr. Reginald Landry. These two independent assessments concluded that P.W. did not have an alcohol addiction. Although C.M. has suggested testing, there was no concrete formulation as to what type of test should be ordered; what the test would look like; what particular type of test would provide conclusive evidence; the accuracy or reliability of the test; or who would bear the cost of such testing.

72. In addition, I am concerned about the precedent that would be set if ordering testing in circumstances, such as here, where P.W. has no criminal record involving alcohol. For these reasons, I decline to order objective testing for P.W.

73. I therefore conclude C.M. has not satisfied beyond a balance of probabilities that there are safety concerns either by way of domestic violence or alcohol consumption that would require constraints being placed upon the child spending parenting time with P.W.

74. I now return to the factors as set out in s. 18 of the **Maintenance and Custody Act** as well as appropriate case authority to determine the appropriate order for custody. I must also consider the recommendations of Dr. Landry. His recommendations are just that – recommendations. The court must consider what is in best interest of the child applying the principles as well as the evidence in this case.

75. I will start with a quote from an often cited case, **King v. Low**, [1985] 1 SCR 87, 1985, where Justice Macintyre stated at paragraph 27 as follows:

> *I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult.* ***Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside*** *[emphasis added]*.

76. I cite the above passage because the court is very concerned about the position the parties have taken regarding parenting time with the child. Both have been entrenched and inflexible in their positions. Dr. Landry is a very experienced assessor. He has been doing this work for decades and has prepared approximately 150 Parental Capacity Assessments a year. So doing that over a decade, he has prepared thousands of Parental Capacity Assessments. Dr. Landry determined this case was a high conflict case and that the nature of the conflict has not changed and is in fact, becoming exasperated over time. He described it as an avalanche. Such conclusions in my view, speaks volumes of the degree of acrimony and inability of the parties to communicate and the level of dysfunction. As Dr. Landry has indicated there is inability to deal with their own sense of loss from their breakdown of the relationship and get past their own needs and interests. In short, they are putting their own interests ahead of the child.

77. I will now go through Exhibit 13, which is Dr. Landry's report. I am not going to read the entire report but will highlight it. The 1st paragraph, his report of November 30th, Exhibit 13, he indicated:

> *The recommendation I made for joint custody on August 30th, 2016, depended on some improvement in the parties ability to communicate and, consequently, to make decisions jointly regarding the care of the child … the current climate between the parties is one of very high conflict categorized by disparate views on the situation and a significant level of acrimony that continues to build … Consequently, a recommendation for joint custody would*

> *likely only exacerbate the existing conflict …*
>
> *… a significant level of acrimony and mistrust …. These feelings of anxiety, acrimony, and unresolved feelings of grief, will likely affect their perception of the situation.*
>
> *… the recommendation for sole custody impacts only the idea of final decision-making and does not necessarily impact the issue of parenting time for each of the parents. In the report, a shared parenting time arrangement was recommended to ensure that the child would have equitable time with each parent and that each parent would have the opportunity to play a responsible role in his life. The child would benefit from the involvement of both of his loving parents.*

78. Finally, Dr. Landry concludes the report that:

> *One of the specific goals that may be of benefit to the participants in their therapy would be a goal of "forgiveness" where each party has felt aggrieved. Forgiveness, (i.e., used in a non-secular sense), may be one of the only mechanisms to heal and to help resolve these issues.*

79. When asked on the stand about the type of order that should be put in place, the suggestion of a parallel parenting arrangement was made. Dr. Landry did not disagree. He was clear that he child would benefit from equal time with both parents. He was asked specifically about the issue of overnight access. When asked by Ms. O'Leary whether or not there was a pre-requisite to overnight access to improve communication, Dr. Landry's response was that it did not have to be a pre-requisite but it certainly would be a positive thing to facilitate transition. He acknowledged as well, the challenge would be decisions in terms of daycare, schooling, and he noted there was nothing to preclude P.W. from playing a substantial part or a 50-50 role in terms of time. He was asked whether or not he provided any time line with respect to his recommendations and how those time lines would change and he said he did not provide any time lines with respect to his recommendations because the situation was so conflictual. He was asked about whether or not to proceed cautiously with respect to extending to overnight access until communication became better, and he indicated to proceed cautiously to overnight. He was asked about final decision-making and again, he believes that apart from day to day

decisions, some of the more fundamental decisions that were contested would have to be made by the court.

80. P.W.'s counsel, Ms. MacRury, questioned Dr. Landry whether or not there was there anything to suggest that the child was uncomfortable in his father's home to spend an overnight visit. Dr. Landry's response was that one of the challenges is that developmentally a child can change, even over a number of months in terms of the time of things, like bedtime routines. Ms. MacRury suggested this is an issue that arises regularly with young children and that properly addressed, would not be problematic.

81. Dr. Landry agreed.

82. When pressed as to whether or not there is anything in these circumstances that would suggest to anybody that the child would have a difficulty with overnight access and Dr. Landry's response was "I don't know".

83. In keeping with Dr. Landry's comments of a child changing developmentally from one month to the next, the court cannot help but observe that Dr. Landry's report was completed on November 30, 2016, and here we are at the conclusion of the hearing in March 2017, many months later.

84. Dr. Landry overall indicated that he did not have a time table in terms of the transition to overnight. In other words, it is left for the court to determine when overnight is in the child's best interest.

85. Having reviewed the evidence of the parties and Dr. Landry, I find an order for parallel parenting is required. As recommended by Dr. Landry, it will contain as much detail as possible. It will be specific as to decision making, communication, and it will contain some limited review provisions.

86. Authority for parallel parenting regime was reviewed in **Baker-Warren v. Denault**, supra, and I will refer briefly to paragraph 6 of that decision:

> *The adoption of a parallel parenting regime is not a solution for the vast majority of the cases before the courts. It is reserved for those few cases where neither sole custody, nor cooperative parenting meets the best interests of the child s. This is one such case.*

87. I would for the reasons I have set out and also for the reasons stated by Dr. Landry, agree that this is such a case where parallel parenting is appropriate.

88. I note as well, the court also said in **Baker-Warren v. Denault**, supra, at paragraph 6, that:

> *Courts have increasingly embraced the concept of parallel parenting in circumstances similar to the case at bar. A parallel parenting regime is a mechanism which can be employed where there is high parental conflict, and where a sole custody order is not in the child's best interests. A parallel parenting regime permits each parent to be primarily responsible for the care of the child and routine decision-making during the period of time when the child is with him/her. Significant decision-making can either be allocated between parents, or entrusted to one parent. Parallel parenting ensures that both parents play an active and fruitful role in the life of their child while removing sources of conflict through a structured and comprehensive parenting plan.*

89. I find for those reasons it is important that that regime be put in place here.

90. I find that it would not be appropriate to put in place sole custody for several reasons.

91. There were a number of occasions when C.M. unilaterally cancelled the child's visits with P.W. contrary to the court order. To award sole custody to C.M. would empower her to continue in this unacceptable behavior and risk further alienation of the child from P.W.

92. Although the court put in place an interim order that C.M. was to provide all of the food for access visits, it would appear that C.M. has used this term in the order to spring board the argument that she should be granted sole custody on the basis that the child should be eating food based solely upon her lifestyle. There are several concerns with this approach:

- There is no scientific evidence that a diet is proposed for the child exclusive to C.M.'s regime is in his best interest. To the contrary, it is the potential to a source of further conflict and to be used as a basis for denying parenting time;
- C.M. says that P.W. strayed from the regime of food that she provided to the child and that the child became ill. She used that as a basis to deny access. Again, there was no medical evidence that this was the case. C.M. said that the child is lactose intolerant, yet there is no medical evidence confirming this, other than C.M.'s suggestion that she is of the opinion that he is lactose intolerant because she is; and
- While C.M. has a fairly extensive amount of education, she is not a medical doctor. As such, she must, as do most parents, rely on medical doctors who care for the child.

93. With the exception of an email shortly after the child's birth, there was then very little medical information provided to P.W. The child, at present, is without a family doctor as C.M.'s family doctor has just retired and another doctor assigned. As I understand it. P.W. attempted several times to get information from the child's previous doctor without success. He did eventually get that information. C.M. seemed to have been aware of those requests and testified that Dr. Bisson had told her that P.W. was calling "relentlessly" attempting to get medical information. The court is concerned that this may have been another attempt by C.M. to influence Dr. Bisson's communications with P.W., as had been done with Father Boudreau regarding the baptismal records.

94. It is also concerning that the court did not hear from Dr. Bisson confirming the medical diagnosis of the child being lactose intolerant. This of course would have confirmed C.M.'s view that the diet and regime she is proposing is in his best interest. Similarly, we did not hear from Dr. Bisson on the important issue of vaccination of the child. C.M. gave extensive reasons why she does not agree with vaccinations. C.M. says that she explained these reasons to Dr. Bisson and also said that Dr. Bisson told her that she was

not in agreement with postponing the child's vaccines. According to C.M. however, the doctor understood her concerns and agreed that it would be in the child's "highest best interest" and said they agreed that it could be postponed.

95. C.M. then testified that she intended to use the present food regime which provided 80% of the immune system which is the best diet to make sure the child had immunization. It would therefore appear from the court's perspective that C.M. argues that the child should not be immunized and this is against medical advice of her own doctor. Instead she suggested a dietary regime which would she believes, provide 80% of the child's immune system instead of relying on vaccines. Of course such a plan, if accepted, would guarantee C.M.'s complete parenting control over the child.

VACCINATIONS

96. I turn now to the issue of vaccinations. I had prior to submissions; provided counsel with a copy of the case of **C.M.G. v D.W.S.,** 2015 ONSC 2201**.** The facts in **C.M.G. v. D.W.S.**, supra, were somewhat different than the present case. There, the court was dealing with an older child and the parties agreed when the child was born, that the child would not be vaccinated until the age of 12. When the child turned 10, there was a trip planned, which necessitated reviewing the issue of vaccinations. The father indicated that he would not agree to a trip to Germany until the child was vaccinated. There are a lot of procedural issues that that do not apply with respect to this case, but there are, in my view, some important points to highlight. The court stated at paragraph 10 that:

> *This case brings to the forefront multiple issues that include: when is it appropriate to enter into a joint custody arrangement; if such arrangement is entered into, what impact should that agreement have on a court who subsequently is asked to make a decision the parties are unable to make; and what degree of input should a child have in medical decisions affecting him/her. It also highlights the polar opposite positions of those who refuse to vaccinate their children under any circumstances with those who feel that vaccination is a necessary preventative measure in preventing a serious infectious disease being contracted by or spread by an unvaccinated child.*

97. At paragraph 38 the court indicated as follows:

> *The parents' absolute prohibition on vaccinations for the child prior to age 12, in my view, is not in the best interests of the child. That agreement of the parents does not reflect any reasoned analysis that is required in order to make a decision to vaccinate or not vaccinate the child …*

98. The court also observed at paragraph 44 that:

> *… The tragedy in such circumstances is that the child is placed in the middle of parents who she deeply loves. The parents have discussed the issues with the child and it is my view that no 10 year old child should be put in a position such as the child in this case.*

99. In paragraph 61 it noted:

> *The mother claims that she has researched this vaccination issue for over 15 years. She states that she has a Bachelors and Master's Degree in Human Biology and Nutritional Sciences. She also states that she has worked in the health care industry for the last 5 years and she is well versed in research technique and analyzing medical studies.*

100. Some of the objections that the mother had in C.M.G., was at paragraph 63:

> …
>
> *f. Vaccines containing highly toxic ingredients, including mercury, aluminum, and formaldehyde as well as infected animal cells*
>
> *g. There are unmistakable links between vaccines and severe reactions, including SIFS, autism, meningitis, joint pain and fibromyalgia*
>
> *h. Other common reactions to vaccines include; convulsions, encephalopathy, high-pitched screaming, seizures, shock, permanent neurological damage, anaphylactic reactions*
>
> *i. There have been no long terms studies on the safety of vaccines*
>
> *j. S G-S is of an age where vaccine is NOT recommended; in addition, S G-S's history of eczema is another contradiction to the vaccination*

k. The vaccines are ineffective and diseases and epidemics continue to occur in highly vaccinated populations

l. The risk of vaccination do NOT outweigh the benefits

101. I note that "h" was one of the concerns voiced by C.M. in her evidence.

102. At paragraph 64 the court continued:

The above list of "indisputable facts" that are set out by the mother, in my view, demonstrates her lack of objectivity and thoroughness of research. She offered no evidence that the claims set out above are "indisputable facts supporting her decision not to vaccinate." Far from being indisputable facts, I find that they are rigidly held beliefs of the mother and others who support her that are not supported in scientific community.

103. At paragraph 65 the court noted that:

I find that the mother and her supporting witnesses are locked in a never ending spiral of blind acceptance of statements by individuals who claim to be experts in the field in which they are not …

104. The court noted at paragraphs 94 and 95 that:

It is important for my determination that the Canadian Health Policy and the Ontario Health Policy with respect to vaccinations be considered … Canada has a public policy in favour of the vaccination of children and youth. Vaccination is the best way for individuals and families to avoid contracting very serious diseases … including cervical cancer, diphtheria, hepatitis B, measles, mumps, pertussis, pneumonia, polio, rotavirus diarrhoea, rubella, and tetanus.

… that the Public Health Agency of Canada provides "credible, science-based advice about vaccines." They work with national and international

> *public health experts to ensure the safest and most effective vaccine programs for Canadians. According to Dr. Salvadori, vaccines are constantly being monitored and improved by world experts in the field of infectious diseases.*

105. In ordering the child to be vaccinated, it C.M.G., the court said at paragraph 105 that:

> *I find the there is sufficient evidence on the balance of probabilities that the child in this case should be vaccinated in her best interests. Public policy as expressed by the Ontario and Canadian governments supports vaccinations as essential to the health of children and the public in general. The World Health Organization promotes vaccinations for the same purposes as a matter of public health and safety.*

106. And finally, at paragraph 107:

> *As a result of the above reasons, there shall be an order that the father shall have the decision making ability with respect to the child getting vaccinations. Prior to the child being taken on the trip to Germany, she shall receive a vaccination …*

107. I have spent some time on C.M.G. because I believe C.M.G. is helpful in the context of this case for several reasons:

- It confirms that whatever the positions of the parties on vaccinations, the courts must make a decision in the best interest of the child.
- C.M.G. confirms that the Public Health Agency of Canada and World Health Organization as a matter of public policy, promotes vaccinations as a matter of public health and safety.
- C.M.G. is a cautionary tale on the dangers of placing children in the middle of conflict of such a major decision.

108. C.M. is advocating to put off the decision to have the child immunized.

109. As was the case with the mother in C.M.G., supra, I find that C.M. professes to be well versed in research techniques and analyzing medical studies however, she is not qualified to do so. C.M.'s evidence to use the terminology in C.M.G., "demonstrates her lack of objectivity and thoroughness of research." I also find that as per C.M.G. that C.M.'s rigid held beliefs are not supported in the scientific community. Unlike in C.M.G., where there was opinion evidence, which was brought forward to support the mother's position, C.M. provided absolutely no expert evidence to support her position and as I have indicated the Public Health Agency of Canada and World Health Organization promotes public safety and promote vaccinations and there has been no evidence provided to the contrary by C.M..

110. Ms. O'Leary, counsel for C.M., urges that C.M.G. is not binding on the court and I agree that it is not binding. It is however, instructive. Ms. O'Leary differentiates the facts and I do acknowledge there is an age difference but as I have indicted in my view it is a cautionary tale about putting off the decision of vaccines and placing children in the middle of such an important decision.

111. As I stated, the burden of proof is on C.M. to provide expert evidence that shows it is not in the best interest to vaccinate the child. It has been suggested that C.M. is not anti-vaccination and is not steadfast against vaccine but has taken a wait and see approach. In my view it is clear that in the direct evidence of C.M. she was against the child being vaccinated and that her decision to not vaccinate was by her own admission against doctors' advice. It is clear from C.M.'s opinion that she felt that the harm and risk of harm outweighed what she termed as possible benefits from vaccines. She had strong opinions about the makeup of vaccines and the fact that it contained formaldehyde and aborted fetus tissue.

112. As well as her direct evidence, I note as well, in Exhibit 3, which was a series of emails that an email from June 14, 2015, with respect to health decisions and the vaccine issue. In particular C.M. emailed P.W. wherein she states:

> *Furthermore it is quite apparent that we will fighting for the duration of his life. Again you are ill equipped to communicate in any meaningful way. You know that I know health care and I am his mother. I know what is best for this child. I have been connected to him since last July. Good fathers allow for good decisions … even if it means putting their egos aside. Good parenting is about what doing what is best … so, if you are going to make decisions that go against me where his health and safety are concerned, you better be doing a truck load of research! Remember one thing, this is the HEALTH and WELFARE of the child , not you! You know breast milk is the best thing for the child, yet you were prepared to change that without regard. Now we have the vaccine issue. Until you have dealt with a sick child, you have NO clue! Are you prepared to be accountable for your actions to put him in harms way by choice ???? Really ???? There will be things that are important to you, that I will not know much about and will have to trust that you are working in is best highest interest … and I would trust that. This is one of those situations where I am in the know, and you are not. You can pretend, but until you do 20 yrs of research, it's just non-sense. If you want a lifetime of battle, that is your choice!*

113. That, in my view is not the views of somebody who is taking a wait and see approach, but is someone who is steadfast in their position on vaccinations.

114. I note that the same approach was evidenced with respect to C.M.'s views of Dr. Landry's assessment. She questioned not only what she thought were inconsistencies in the report, but she also confronted Dr. Landry with 20 pages of typed information wherein she also questioned Dr. Landry's sources and methodology. C.M., at trial, did not accept Dr. Landry's recommendations despite not having evidence called to the contrary. Such a rigid and inflexible approach, in my view, demonstrates an inability to make medical decisions that are in the child's best interests.

115. I will not order the child to be vaccinated however; clearly it is not in the child's best interest that C.M. make medical decisions for him.

116. I do not accept that P.W. acquiesces to vaccines. Evidence of that is given in the email above. Also, in his evidence, P.W. said he discussed with C.M., whether or not the child should have a tetanus shot and C.M. would not agree. P.W. also indicated he had no input on vaccines or any of the medical decisions such as appointments or access to

medical information until he had the consent by C.M. allowing him to access that information.

117. As well, there was no follow through on medical advice as alluded to already.

CUSTODY

118. I will put in place the following parenting regime.

119. I will place the child in the shared parallel parenting of C.M. and P.W., with primary care to C.M. on the following schedule, which will consist of a two week schedule.

120. The first two weeks of this rotation will not include overnight access. It will be from 11:00 am to 5:00 pm during the day for the first two weeks and then it will go to overnight rotation, which will be Saturday, Sunday, Monday and Tuesday, from 2:00 pm until 2:00 pm the first week and on the second week, Saturday, Sunday and Monday again, from 2:00 pm until 2:00 pm.

121. I am not making the first visits overnight because in my view, a full two week transition of week-day visits from 11:00 am until 5:00 pm will allow for a transition to overnight access as was referenced by Dr. Landry. So the daytime only visits will start this coming Saturday, March 4, 2017.

122. The first rotation will be Saturday, Sunday, Monday and Tuesday, from 11:00 am to 5:00 pm. The following week, which is the week of March 11th, it will be Saturday, Sunday and Monday, also again from 11:00 am to 5:00 pm.

123. The pick-ups and drop-offs of the child for all visits will be at the [library]. That pickup location would be for the pickup for Week 1. For Week 2, they will also be at the [library]for the drop-off but the pick-up will be at the [YMCA]. I am doing that because the library is closed on Sundays and Mondays.

124. In the event the library or the YMCA are closed because of weather or statutory holidays, it will be the default, at the Superstore…. That is the last resort however.

125. There is to be no more pick-ups and drop-offs outside buildings. All exchanges will take place in the children's area of the library, located on the right inside of the building. The child will be brought into the children's section where the exchange will take place. It will require the parties to be civil to one another. There will be no more standing in bad weather with the child in the party's arms, and no more stand offs. This will require the exchanges to be civil and face-to-face.

126. The YMCA exchanges are also to take place inside the building as well. I am further putting the parties on notice that I expect compliance with this order and that exchanges will go without incident. If the exchanges fall though and the parties are not able to conduct themselves accordingly, which results in either the library or YMCA being no longer available as options for the exchange then the court will have no choice but to put in place a provision enrolling the child in a daycare program such as the toddlers program at the YMCA for a couple of hours for pick-ups and drop-offs. This would put physical space and time between the pick-ups and drop-offs. One party would drop off the child at the daycare and the other party would pick up the child when daycare is over. I have not done so as, in my view, would be an added expense to the parties. It would be a section 7 expense, which would have to be borne between the parties and it would also require notice and submissions to the parties, which had not been done.

127. During the pick-ups and drop-offs neither of the parties will be present. There will be designates who will be indicated by email prior to the exchange occurring. This does not mean that C.M. or P.W. cannot be in the vicinity, but they are not to be present during the exchange. In my view there has to be a cooling off period.

128. I would say as well, it appears that both of these parties have good support. There was a lot of evidence about what B.M. or L.M. or V.W. or P.W.'s tenant did or did not do, but in my view from the evidence, these are good people who are trying to do the right thing and facilitate access. I would hope the message is relayed that these persons should be able to get along without either P.W. or C.M. being present so that things do not escalate. Things that happened in the past should be put aside and hopefully the parties will be able to have this transfer take place. As I said, the library setting is appropriate, as there are children's books and games there, so that it can be done in a way where the child really does not notice during the exchange that there is any controversy or tension between the parties.

129. I am going to put in a provision that the location and manner of the pick-ups and drop-offs will be reviewed in 3 months' time. Despite my having indicated that these are good people trying to do good things, I am putting the parties on notice that I expect compliance with this order and that the exchanges will go without incident. As mentioned, if required after review, the court will order enrollment of the child in a daycare to provide a measure of separation during the exchanges.

130. I would interject at this point as well I have declined to order shared custody on the basis requested by P.W. Shared custody and equal time would not be appropriate for the following reasons:

- I agree with the submissions of Ms. O'Leary that the majority of the time, the child has been in the primary care of C.M. and it has provided stability and she is self-employed and has caregiver arrangements with B.M. in place, which the child is very comfortable and stable.
- In contrast, P.W. is going to be returning to work in the foreseeable future, and at this time there are a number of unknowns such as the timing of his return to work, the location of his employment, and his child care arrangements. In his evidence, he testified that his mother or possibly a caregiver would be hired to care for the child.

131. In my view, there are too many uncertainties and I will not award shared custody at the present time given the need for routine and consistent short intervals of time P.W.

has spent with the child. I decline to put in place a shared custody arrangement on a shared basis of a 4 day rotation suggested by P.W.

132. Shared custody would also suggest that P.W. should not pay support, which is not appropriate given his earning potential. As well I find that the parties did discuss P.W. continuing to work after the child's birth and it would not be appropriate to put in place a shared custody only to have that and equal parenting time changed when P.W. returns to work.

133. The parallel parenting that I have put in place puts time allotted which allows maximum contact with the parents while balancing the child 's needs to have a routine and stability.

134. Given the 2 week schedule I have ordered, I will also put in place a provision that if P.W. is going to be working outside of [ ] for a period of greater than 7 days consecutive, he will notify C.M. immediately. The two week schedule will then be revised to allow parenting time; taking into consideration P.W.'s working out of [ ] for the 7 consecutive days. In the event the parties cannot agree, either party may apply to have this narrow issue reviewed.

135. I will now turn to the issue of holidays and special occasions. The regular parenting schedule and parenting time will be suspended and the parenting time will have the following schedule:

- For March break, I recognize that the child is not yet in school, but children grow very quickly and it will be a matter in fairly short order before you know it, he will be going to school. So commencing in March of 2018, I am not putting the March break schedule in this year because we are in March now and we are starting a routine and it is important to keep that going. So commencing in March of 2018, for the period of the 9 days coinciding with the public school March break, on the last Friday of public school, from 6:00 pm that day to Sunday at 12:00 pm, prior to the recommencement of classes, odd years will be with C.M. and even years with P.W..

- For the Easter period, Good Friday at 9:00 am until Easter Monday at 12:00 pm. Odd years with P.W. and even years with C.M.

- For summer vacations, each party will be entitled to two weeks' uninterrupted parenting time, not consecutive. There will be one week in July and one week in August, until the child turns 5 years of age, at which time it can be two weeks consecutive. During each of the week's visits in July and August, the child would have 15 minutes of face-time on each Wednesday from 7:00 pm to 7:15 pm with the non- vacationing parent.

- P.W. will provide notice of his intended vacation schedule for July and August, by June 1st of each year. C.M. by June 15th of each year.

- The child's birthday, if one party is not scheduled to have the child in their care on a portion of [the day], that party will have the child from 3:00 pm to 6:00 pm, with the exception if the child 's birthday falls on a scheduled Easter parenting time. In which case, the Easter schedule will apply and supersedes the birthday schedule.

- For the May long weekend, from Friday 9:00 am prior to Victoria Day, to the Monday of Victoria Day, at 12:00 noon, odd years with C.M. and even years with P.W.

- For Labor Day weekend from Friday at 9:00 am to prior to Labor Day, to 12:00 pm Sunday Labor Day, even years with C.M. and odd years with P.W.

- For Thanksgiving, from 9:00 am the Friday before Thanksgiving Monday, 12:00 pm on Thanksgiving Monday. Odd years with C.M. and even years with P.W.

- For Halloween, from 2:00 pm to 8:00 pm each year. Odd years with C.M. and even years with P.W.

- For the Christmas period, this period will be defined from December 23 at 9:00 am to December 27th at 3:00 pm. In the odd years it will be with P.W. and even years with C.M. I recognize that is a longer stretch that may occur in some cases, where it would be Christmas Eve and Christmas Day, but given the fiasco that occurred for Christmas of 2016, I have picked those times from December 23rd to December 27th to recognize the fact that the library and the YMCA are open and that is where the exchanges will take place and if it does not work out at the library and YMCA, then it will be as I have indicated to the parties, it would be changed to take place within a daycare, so that is why I have picked dates of December 23rd and December 27th, which are dates when those facilities are open.

- On Father's Day the child will be with P.W. from 10:00 am to 5:00 pm.

- On Mother's Day the child will be with C.M. from 10:00 am to 5:00 pm.

- For C.M.'s birthday from 10:00 am to 5:00 pm and for P.W.'s birthday, from 10:00 am to 5:00 pm.

136. With respect to makeup parenting time, in the event the child is too ill to be moved between the households, makeup time will be supplied to the other parent at times decided by the parent who lost the parenting time. It is not to include being made up over holidays or special occasions. In other words, if a day is missed through the week, you cannot ask to have it made up during the holiday schedule.

TRAVEL

137. Each party will be required to provide notice to the other party if they are planning to travel with the child to spend overnight 150 km or more from his residence of either parent. Notice will include dates for travel, location, address, and phone numbers where the child can be reached as well as flight information. Written consent of the other party may be required for a passport or travel outside of Canada.

DECISION MAKING

138. Each party will have routine day to day decision making authority and control when the child is in his/her physical care, including food choices.

MEDICAL DECISIONS

139. P.W. will have sole decision making with respect to medical decisions for the child without requiring C.M.'s consent, including vaccinations and doctors' appointments and medical treatment. P.W. will keep C.M. informed by email as to the results of any medical visits. P.W. will also sign a consent which will allow C.M. to have access to medical records.

RELIGION

140. P.W. will have final decision making on the child's religious formation, including baptism and religious ceremonies and C.M.'s consent will not be required.

EDUCATION

141. Given the child's young age, and the fact that he is not enrolled in daycare or school, and also given the lack of evidence which was provided to me by either party, I decline to make an order regarding decision making as it pertains to education at this time. I will order a review of this very narrow issue by September 1, 2017. If agreement is not reached, a hearing date will be set and evidence heard by the court to make a determination on the issue of educational decisions. Neither party is to enroll the child in an organized daycare or educational program without written consent of the other party or approval by the court.

EXTRA-CIRRICULAR ACTIVITIES

142. In addition to religious activities; each party may enroll the child in one extra-curricular activity, which he may attend while in each party's care. The party that enrolls the child shall be responsible for transporting The child to and from that activity.

COMMUNICATION

143. All communication between the parties will be by email with the exception of medical emergencies, which shall be by telephone. There will be no more texting. All communication will be respectful and child focused and each party will keep the other party updated as to their current email address. Each party will maintain internet access and each party will review their emails once a day and respond within 24 hours of receipt of an email from the other party. All email communication shall be compellable for court purposes.

THERAPY FOR P.W. AND C.M.

144. In light of Dr. Landry's recommendation regarding therapy:

a) P.W. will enroll in therapy with a psychologist or other professional acceptable to both parties to:

- learn techniques to ensure the child is not placed in the middle of parental conflict;
- to learn to assist in effective communication with C.M.; and
- to understand and learn better the importance of the mother/son relationship.

b) C.M. will attend therapeutic interventions from a psychologist for professional comparable to a psychologist and acceptable to both parties that will provide treatment to C.M. with respect to, in a therapeutic setting for the following:

- to teach C.M. skills so she can critically assess her behaviors and to ensure maximum contact between the child and P.W.;
- to understand the effects of alienating behaviors can have on the child now and potential future effects and to learn skills to ensure that he child will not be placed in the middle of parental conflict;
- to understand the importance of a father/son relationship; and
- to learn and become more effective in communication with P.W.

145. Professionals conducting these interventions will be provided with a copy of this court order. Each party will be responsible for the costs of their therapeutic sessions. There will be a review of this issue at the same time the review takes place with respect to the child's education on or before September 1, 2017. Each party will have information on the details of the professional that he or she has engaged or plans to engage and provide confirmation of that professional engagement in therapy. In the event of disagreement, a hearing will be scheduled to determine this issue. I caution the parties that failure to comply with this court order could result in a change in the primary care or parenting time with the child.

CHILD SUPPORT

146. Although I have ordered a shared parallel and custody arrangement, the amount of parenting time exercised by P.W. falls under 40%. P.W. must therefore pay child support in accordance with Child Support Guidelines. As mentioned at the beginning of my decision, this requires me to consider the retroactive child support and a go forward basis.

147. When considering retroactive support, I must consider the $8,000.00 that was provided by P.W. to C.M. I will deal first deal with the issue of retroactive child support and whether or not the $8,000.00 should be considered as support.

148. The parties agree that there was $8,000.00 provided by P.W. to C.M. in January 2015. This transaction occurred shortly before the child was born. P.W. says that it was provided to purchase items for the child in that he and C.M. were going to go on a shopping trip to Halifax to purchase items. P.W. said that since the relationship was not good, he returned to work and gave C.M. the money to do so on her own. C.M. said that the money was not to purchase items for the child, but rather was given to her to offset the reduction in her income due to missed time at work throughout her pregnancy and as well as money for represented P.W.'s contribution to maintaining her home in [ ] during the time the parties lived common law.

149. On the evidence before me, there is only the assertion of C.M. that P.W. should pay expenses to cover costs during the pregnancy. While it was very clear in her evidence that she received little financial support from P.W. during the pregnancy and after the child's birth, until the interim order was put in place, there is no evidence before me that the parties discussed the issue in great length. I also note that there is no claim by C.M. before the court under s. 11 of the MCA which allows for lying in expenses.

150. Similarly, with respect to agreement that the $8,000 was to cover household expenses for [ ] there is nothing before me to support this contention and as I understand it, the parties lived very briefly in a common law relationship when P.W. moved his belongings into her home in [ ] following a trip to Jamaica in late January or early February 2014 and although living common law, there were large periods of time

when P.W. was either working West or he would return home during the Summer and Christmas time. The evidence was that during those times when he was home in Nova Scotia, on his hiatus from work, such as holidays or summer, P.W. would split his time between [ ] and [ ]. As indicated by C.M., one of her frustrations was that P.W. would be gone days at a time.

151. I note as well, there are no claims before the court for spousal support.

152. I therefore dismiss the assertion that the $8,000 was used to contribute to the home at [ ] while common law.

153. The next question is how much of the $8,000 should be attributed to child support. In my view, it would not be appropriate to attribute the entire $8,000 towards P.W. arrears. I accept the evidence that the money was used for a trip to Halifax to purchase those items and from the evidence it would appear that is exactly what C.M. did.

154. P.W. could anticipate costs of travelling to Halifax to purchase the items, stay overnight would not be cheap. There would also be the cost of the items such as furniture, cribs, car seats and in my view, there would have been an expectation by P.W. that a reasonable portion of the $8,000 would be spent going to Halifax and purchasing those items. A reasonable amount in my view would be $2,000.

155. P.W. will therefore be given a credit of $6,000 towards arrears owed to C.M.

156. The next question I must decide is when the obligation for child support started. Although the parties disagree as to the content of the conversation, they both agree that there was a discussion about child support obligations in the vehicle on the way home from the hospital when the child was born. I therefore find P.W. was on notice that he had obligation to pay child support, and I find that his obligation commenced on May 1, 2015.

157. What is the appropriate quantum of child support? P.W. was steadily employed up until shortly before the child's birth, when he voluntarily took a layoff to be there for the child's birth. In November of 2015 Justice Haley ordered $1,200.00 per month. The Interim Order does not state the amount attributed to P.W. in setting the amount of $1,200.00. It is my understanding that the Interim Order which was made in November, when it was made P.W. was on E.I., and his circumstances were the same as they would have been in May of 2015. Twelve hundred dollars translates under the child Support Guideline Table for Nova Scotia to $147,400.00 in income. From the evidence I see no reason to deviate from that amount, and find arrears from May 1 to October 31, 2015 in the amount of $1,200.00 times 6 which is $7,200.00, less a credit of the $6,000.00 that I had mentioned earlier for the $8,000.00 lump sum, for total arrears of $1,200.00.

158. I must next consider the issue of child support on a go-forward basis. P.W. asserts, as mentioned earlier in my decision that he was justified in unilaterally reducing his obligation from $1,200.00 in Justice Haley's Order, to $600.00 every month, and then $300.00 based upon his 2015 income of $59,461.00. He says the guideline amount for 2015, based on $59,461.00, would translate into an obligation to pay $505.00 a month. P.W. also points out through his counsel that his E.I. claim ran out in August of 2015, and his last E.I. payment was received in August of 2016. C.M. says that the income of $150,000.00 to $200,000.00 should be attributed to P.W. C.M., through her counsel, says $150,000.00 should be imputed for employment income, based upon past work experience and income, as well as the Court should consider income from rental properties.

159. What is the appropriate level of income to be attributed to P.W. from the making of the Interim Order on a go forward basis? At the time of making the Order in 2015, Justice Haley as mentioned imputed an income to P.W. of $147,400.00. That Order is deemed to be correct. The burden is on P.W. to show that it's not appropriate to continue. Justice Haley relied on the earning capacity of P.W., based upon previous years' experience. Of course, it is always difficult to project what someone will earn, particularly in cases such as this, where there is a fluctuation of income. Maintenance Orders are premised on the previous year's income. I'm not persuaded I should go behind Justice Haley's Order for the months of November and December 2015, and the Order for $1,200.00 for those months will continue. The Order for those two months will remain. It wasn't paid through Maintenance Enforcement as I understand it, having

heard from the evidence, he paid $400.00 for the month of November, so there was an $800.00 shortfall, so $800.00 plus $1,200.00 equals $2,000.00 in arrears. That would be $1,200.00 for the month of December, plus $800.00 shortfall for November.

160. I must now take into account, P. W.'s income for 2016, 2017. It would appear that income for those two years, 2016, 2017, come from three sources. One is P. W.'s E.I. claim which is contained in Exhibit 1, at Tab 5. Two is the income of the month of October; income from [ ], Exhibit 8, and three is income from P. W.'s real estate. The period of January 1, 2016 to August 2016, I find P.W.'s income is as follows:

- $524.00 gross from E.I. x 4.33 x 12 translates into $27,227.04. In addition, P.W. had two pays for October of $1,502.53, and $4,860.20, for a total of $6,362.73 for the month of October. I therefore find his income level from employment purposes, other than rental income, for 2016 was $33,589.77.

161. I next must consider P.W.'s rental income. P.W.'s evidence on expenses for rental income was scant, other than testifying to a consolidation mortgage, I believe, on two properties. The remaining properties are owned free and clear. P.W. also built a new home in [ ] that was paid for mostly out of a line of credit and cash. The figure of $137,500.00 was quoted as the amount owing on one property, and total amounts of the mortgage is in excess of approximately $300,000.00. It is unclear as to the amount of the line of credit. Guidance with respect to this issue for the Court and the assignment of rental income can be found in the case of **Murphy v. Bert** (2007) N.S.J. 543.

162. With respect to expenses at paragraph 34, the Court stated as follows: P.W. bears the civil burden as it relates to deductible expenses in determining his net rental income which is available to P.W., I find as follows:

- Any interest portion of the mortgage is deductible as an expense; but the principal portion is not. If P.W. were permitted to deduct both principal and interest, the children would, in effect, be paying for P.W.'s acquisition of capital assets, and once paid it will be fully owned by P.W. and not the children.

- I will not permit deduction for capital costs allowance. Little evidence was provided on this issue, and there was no breakdown proven between personal and real property. There was no evidence to suggest the real property was depreciating in value, and no evidence provided in relation to the depreciation of personal property.

- I will permit fixed expenses relating to insurance, water, taxes, and some of the repair expenses.

163. In applying those principals there was very little evidence, as I've indicated, produced by P.W.? He says he does all of the maintenance on the properties. I will allow for the following deductions for rental expenses:

- Interest only on the mortgage for the two rental properties, insurance, water, and taxes.

164. I decline to allow a deduction for capital costs allowance. I do so for the reasons as set out in **Murphy v. Bert**, supra, and the lack of evidence provided by P.W. While he filed corporate documents on this point, they are far from clear, and I find they were not clear, cogent, and convincing, and he has not met the burden as set out in **MacDougall**. There were no insurance, water or tax bills entered, the Court is therefore left with making an estimate as the expense to P.W. It may be low, or it may be high, considering there are four properties, and are applicable taxes, insurance, water, and interest on the mortgage. I will permit a deduction of approximately $20,000.00 a year.

165. With respect to the income on those properties I find as follows:

1. Units paid in cash were as follows:

- Unit 329 – Income of $850.00
- Unit 335 - Income of $825.00
- Unit 355B – Income of $685.00
- The total income from that would be $2,360.00 + $885.00 ($3,245.00 x 12), for a total of $38,940.00.

2. Units not paid in cash were as follows:

- Unit 337 – Income of $825.00
- Unit 333 – Income of $675.00
- Unit 331 – Income of $675.00
- Unit 358 – Income of $675.00
- Unit 360 – Income of $640.00

- The total income for all units would equate to $41,880.00, giving P.W. a total income of **$70,200.00**.

166. I have grossed up the portion of the cash that was received using 37.5 percent for the cash that was received for income, which translates into a total income of $80,820.00. As indicated I will deduct $20,000.00 to round it off. I will allow for deductions for mortgage interest, which was $303,300.00 at 3.5 percent, which is $10,965.00. I will allow $9,855.00 for property taxes, water and insurance, which is a total of $20,820.00. Deducted from the $80,820.00 I find rental income for P.W. to be $60,000.00. This additional income of $60,000.00 is for 2016 and 2017.

167. Given Justice Haley's decision I decline to make the rental portions of the maintenance retroactive to the interim hearing. I find based upon the combined incomes from January 1st, 2016 to April 30th, 2016, income of $93,589.77 [$33,589.00 E.I. + $60,000 Rental Income]. Under the Guidelines for an income of $93,600.00, P.W.'s obligation to pay is $787.00 per month for 8 months from January 1st, 2016 to August 31st, 2016.

168. I will now look at the period from September 1st, 2016 to present. P.W. paid for the month of December, 2015, $1,200.00. He paid $7,200.00 from January to June, 2016. He paid $1,200.00 times six, which is $7,200.00. For July he paid $600.00; for August he paid $600.00; and from September to February he paid $300.00 times six for a total of $1,800.00, which is $11,400.00. As indicated, his obligation that I set previously and the amount of arrears was $787.00 times eight, which is $6,296.00, plus the $2,000.00 arrears which was the $1,200.00 plus the $800.00 I referred to earlier, left a total of $8,296.00, which at that point would have left P.W. with a credit of $3,104.00; however, that $3,104.00 does not include rental income. The figure that I came up with of his obligation of $8,296.00 was his obligation from November of 2015 to August 30th, 2016, based on his employment income. Considering rental income of $60,000.00 translates into $507.00 a month times six, which would mean that the amount from

September 2016 to March 2017 would be $3,549.00 plus $1,200.00, which is $4,749.00, minus the $3,104.00 credit I mentioned earlier, means that there's a deficiency and the amount owed by P.W. is $1,645.00. That includes his payments up to March 1, 2017, so I have taken into account March's payment already. That deals with the issue of child support to date. I'll order that the $1,645.00 be payable by March 15th, 2017.

169. I just want to briefly outline the reasons why I've relied on rental income for the period of August 31st, 2016 to present, and I have imputed an income at this point to P.W., and my reasons for declining to impute employment income. As I say, I find that he should have continued to have been paying child support based on rental income during that period after his E.I. was finished in August, but I did not impute an employment income or Order that he pay child support for income based on other than rental income, for the following reasons:

- There are court proceedings ongoing.
- There was a Court Order by Justice Haley which included counselling, which meant that he had to complete that counselling as part of this process, in order to put forward his plan for parenting, which would impede his ability his work.
- He transferred his union membership from out west to the east here; and
- He has been attempting to find work at [ ], and also in [ ], which also required him to take some other training to bring it up to date.

170. This leaves me with the final determination that I must make, and that is what the Court should attribute to employment income, in addition to rental income from April 1st, 2017 onward for P.W. There are a couple of cases which I am going to refer to which I think are helpful to the Court.

171. The first case is a decision of **Landry v. McArthur** (2014) NSJ 141, a decision of Justice Wilson. The applicant had been working at the Syncrude Plant in Fort McMurray, Alberta. He continued to work there until September 27, 2012, at which time he took a leave of absence to seek employment in Cape Breton. He earned $181,560.00. He decided to relocate to Louisdale, Richmond County, to be closer to his daughter, and

to play a more active role in her life. He was 48 years old, unmarried at the time, and had no other children. He had support in the Louisdale area. He found employment with Port Hawkesbury Paper in Point Tupper, and earned an annual income of $66,251.28. His base salary was $62,400.00. The Respondent in that case had urged that the amount continue to be payable at the rate of $181,000.00, which was the amount he had been able to earn out west. The Court found that employment at the Port Hawkesbury Mill is secure, fulltime employment, and the highest paid employment he would be able to obtain in Cape Breton. In rejected the Respondent's argument to impute higher income, the set the amount of child support obligation based upon an income of $62,400.00 and recognized that moving to be closer to his child and parental obligations by paying a lessor amount of child support base upon income was appropriate.

172. More recently in the case of **Locke v. Bramwell** (2016) NSSC 300, Justice MacLeod-Archer dealt with the issue of again, someone relocating from Alberta. There the Court declined to take judicial notice of the fact that there had been a downturn in the economy in Alberta as a basis for having no income to pay. Mr. Locke, in that case, was employed as a welder in Alberta, and had collected E.I. benefits. The Court there reviewed the various provisions in **Kodiak v. Kodiak**, as well as **Hanson v. Hanson**, and **Gould v. Julian**. The Court commented that persistence in unremunitive employment may entitle the Court to impute income. Also that a parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations, and as a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income [paragraph 34].

173. As well, in determining the amount of income, imputed income must be based on a solid evidentiary basis guarded in fairness and reasonableness. In that case the Court ordered an imputed amount of income to Mr. Locke of $36,000.00 to reflect his qualifications, skills, experience, age and health, and note it was in the range of what a welder could earn in $36,000.00. The Court there noted as well that Mr. Locke had made a similar income working at a fishery plant.

174. The final case I'll refer to is a recent decision of the Nova Scotia Court of Appeal on **White v. White** (2016) NSCA 82. In the context of spousal support the court dealt with the issue of imputing income to the payor. Again the payor worked in the gas industry and the trial judge assessed income for the payor as follows:

As per his Statement of Income, Mr. White began working for RDIS on October 1, 2013. In 2013, he earned $501,422, through his old company and $82,550 USD thru RDIS. In 2014, he earned $594,482 USD. Per his March 23, 2014 expense statement, besides accounting for payments of $7,000 per month spousal support, some $11,000 surplus per month was allotted to retirement savings, savings and extra cash flow while the company continued to deduct pension payments. In 2015, he worked until August 31 and earned $295,232.42 USD; basically, monthly earnings, of $23,150 ($185, 201.12) with incentive payment, home leave, statutory holidays and stock dividends making up the rest. The Canadian bonus payments ended December 31, 2014. His August 2015 pay statement also reflects that he was in receipt of restricted stock valued at $86,836 USD. Company pension deductions for 2014 and 2015 total $16,660 USD.

175. The Court found there that Mr. White had enjoyed an annual salary of over $500,000.00. The Court then referred to examination that had taken place with respect to efforts for Mr. White to work at paragraphs 17 and 18:

As to Mr. White's efforts to find work, he offered this evidence:

Q. Are there any companies in particular that you've been in contact with?

A. Yeah, I'v been in contact with Ensco, Noble Drilling, Diamond Offshore Limited and a Norwegian firm called Sea Drill.

As to his prospects, Mr. White remained hopeful:

Ms. Power: *Do you have…you have the capacity to work, correct?*

…

A. *I hope to get a job if that's what you mean, yes.*

176. The trial Court in **White,** supra, went on to impute an income of $350,000.00. The Court of Appeal commented that having reviewed the above exchange and having found the $350,000.00 in imputed income did not result in an error in law. I note as well in **White,** supra, there was a large amount of savings and accounts that Mr. White had. I note similarities here and I raise **White,** supra, because of the similarities in relation to P.W. One of the similarities is that the court in relation to P.W. will have to determine

what the appropriate income is for P.W. in Cape Breton, and also recognizing as in **White**, supra, that there are monies available to P.W. to meet his child support obligations.

177. Obviously I mentioned that P.W. was able to pay for a substantial portion of his new home using savings. As well, P.W. did not disclose his savings accounts.

178. Finally, **White**, supra, gives broad discretion to the court to impute income based upon circumstances. I accept the evidence of P.W. that he will soon find work, and that he is going to have to find work in order to support his child, and to continue to support himself. I do find, and agree that there are a number of trades that he's involved in, scaffolding, carpentry, and heavy equipment operator. I have not been provided any statistical information as to how much a person can earn, but in my view, and a reasonable income for employment income for P.W. would be $60,000.00 a year, so I will impute income of $60,000.00 a year for employment income for P.W., and $60,000.00 for rental income for a total of $120,000.00, which translates into a child support obligation of $994.00 per month, which will start April 1st, 2017. P.W. had best follow up on his efforts for employment. Those payments shall be payable to Maintenance Enforcement, not directly to C.M.

179. I will also put in a provision in the order that P.W. is to put in place a life insurance policy. I am not going to order that he designate C.M. as the trustee, but that he shall provide proof of a term life insurance policy in amount of $100,000.00 with he child designated as beneficiary and indicate those monies are held "in trust" and set out the designated trustee for the child .

180. In addition, there shall be the general provision that all police officers, constables, sheriffs, and deputies shall do what is required to give effect to this order.

181. There will also be an additional term in the order that there shall be such other access as agreed upon by the parties, with the hopes that P.W. and C.M. may be able to agree on further access and that counseling and therapy which has been ordered, will assist the parties in being able to reach consensus on issues. Hope springs eternal.

182. As stated above, I have also ordered two review dates:

- **May 29, 2017 at 10:00 am** – Review issue of pick-ups and drop-offs for the child. At that time, the court will wish to hear how the pick-ups and drop-offs have been going at the library and/or YMCA. The parties shall file two weeks in advance of this date, an affidavit of no longer than 2 pages in length, setting out a summary of what has transpired at the pick-ups and drop-offs and identifying any issues. I again caution counsel that if there have been problems with respect to the conduct of the parties, which has made either of those exchange sites no longer an option, that the court will contemplate a change in the pickups and drop offs through a designated daycare program.
- **September 25, 2017, at 10:00 am** – Review designated to determine whether or not the parties have reached an agreement with respect to either daycare arrangements for the child, if the parties are contemplating enrolling the child in a daycare program, or agreement with respect to a formal education for the child. If the parties have not reached agreement regarding the issue of daycare, than a hearing date can be set, and again, counsel are to file two weeks prior to this date, affidavits setting out their positions with respect to daycare. With respect to the issue of formal education, a hearing will not be set until the child is 48 months of age, at which time either party may apply to the court for a hearing to deal with that issue. It may also require, depending on the plan of the parties, an application to vary the parenting time ordered by the court, setting out a change in circumstances.

183. Regarding the issue of costs, if the parties wish to make submissions on costs, I would ask that written submissions be provided to the court by **March 30, 2017**.

Gregan, J.