FAMILY COURT OF NOVA SCOTIA
Citation: *M.K. v. E.M.*, 2016 NSFC 31

Date: 20161209
Docket: Antigonish **No.** 101298
Registry: Antigonish

Between:

M.K.

Applicant

v.

E.M.

Respondent

Editorial Notice**:**	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Timothy G. Daley
Heard	August 23, 2016 in Antigonish, Nova Scotia
Counsel:	Tammy MacKenzie, for the Applicant Adam Rodgers, for the Respondent

By the Court:

[1] This decision is about a child, J.K., born June […], 2015 and what is in his best interests. Specifically, I must determine whether J.K. should reside primarily with his mother, E.M., in Prince Edward Island, or whether J.K. should be returned to Nova Scotia. If I order his return, I must determine what parenting arrangements should be put in place for him and whether the parties should parent J.K. in a shared parenting arrangement between provinces.

Positions of the Parties

[2] J.K.'s father, M.K., said that E.M. moved with J.K. to Prince Edward Island without his consent and he seeks an order of shared parenting, regardless of whether E.M. returns to Nova Scotia. In the alternative, M.K. seeks an order that J.K. be returned to Nova Scotia and placed in his primary care. He said that he is a loving and involved parent, that E.M. has unilaterally taken J.K. from their home, that she has frustrated access since the separation and that she has misled the court in her evidence such that her credibility should be brought into serious question.

[3] E.M. said that she has been J.K.'s primary care parent since his birth, that M.K. is not an involved parent and that M.K. has been violent toward her. She said that the court should award her primary care of J.K., in Prince Edward Island, where he will have the full support of E.M. and her extended family. She proposes that M.K. have access on a biweekly basis.

Procedural History

[4] M.K. filed a notice of application, parenting statement and an affidavit on June 21, 2016 in which he sought custody (without specifying joint or sole custody), the return of J.K. to Nova Scotia, a shared parenting arrangement or, in the alternative, primary care of J.K. with him and access with E.M. and child maintenance.

[5] The parties first appeared before the court on July 19. Each was represented by counsel. I granted an interim order providing for joint custody with primary care of the child with the mother in Prince Edward Island and daytime access with the father each weekend. The details of that appearance and the representations of the mother concerning breastfeeding of the child will be the subject of further discussion below.

[6] The matter was heard on August 23, 2016 and at the completion of the evidence, I reserved my decision. Counsel were directed to provide written submissions which have been completed and this written decision follows.

Issues

[7] The issues for determination by me are as follows:

1. Should E.M. be permitted to permanently relocate J.K. to Prince Edward Island with her or should I order that he be returned to Nova Scotia to reside here?

2. Should the parties parent J.K. in a shared parenting arrangement and if so, what should that parenting arrangement be?

3. If not a shared parenting arrangement, what is the appropriate custody and access arrangements for J.K.?

4. What amount of child support, if any, should be paid by one party to the other?

Legal Framework

Legislation

[8] Any decision I make must be based solely and exclusively on what I find to be in the best interests of J.K. The analysis of his best interests begins with the relevant provisions of the governing legislation, the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160 as amended, starting with Section 18 (5) which reads:

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

[9] Section 18 (6) provides guidance regarding what I must consider when determining the best interests of J.K. The following provisions I find to be relevant in this circumstance:

> (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> > (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
> >
> > (b) each parent's …willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
> >
> > (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;

> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) …
>
> (f) the nature, strength and stability of the relationship between the child and each parent…;
>
> (g) the nature, strength and stability of the relationship between the child and each … grandparent and other significant person in the child's life;
>
> (h) the ability of each parent…to communicate and co-operate on issues affecting the child;

[10] In this matter, there are allegations of family violence and as a result, I must consider section 18(6)(j) as follows:

> (i) 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.

[11] Family violence is defined in Section 2(da) as follows:

> (da) "family violence, abuse or intimidation" means deliberate and purposeful violence, abuse or intimidation perpetrated by a person against another member of that person's family in a single act or a series of acts forming a pattern of abuse, and includes
>
> > (i) causing or attempting to cause physical or sexual abuse, including forced confinement or deprivation of the necessities of life, or
> >
> > (ii) causing or attempting to cause psychological or emotional abuse that constitutes a pattern of coercive or controlling behaviour including, but not limited to,
> >
> > > A. engaging in intimidation, harassment or threats, including threats to harm a family member, other persons, pets or property,
> > >
> > > B. placing unreasonable restrictions on, or preventing the exercise of, a family member's financial or personal autonomy,

C. stalking, or

D. intentionally damaging property, but does not include acts of self-protection or protection of another person;

[12] Finally, I must take into consideration Section 8 of the *Act* as follows:

> (8) In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6) (j).

Case Law

[13] The analysis of J.K.'s best interests does not end with the factors set out under Section 18 of the *Act*. I must also look to what other courts have said in relation to the determination of a child's best interest. The leading decision in Nova Scotia respecting that analysis is *Foley v. Foley* 1993 CanLII 3400 (NSSC), a decision of Goodfellow J. I note that this decision predates amendments to the *Act* which set out the factors contained in section 18(6) and I find that the so-called "Foley factors" have been largely subsumed by those amendments. That said, *Foley* remains a helpful analysis of the test of best interests. The following are a list of those factors which are relevant to this case:

> **15 …** In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.
>
> **16** Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
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> 1. Statutory direction …;
> 2. Physical environment:
> 3. Discipline;
> 4. Role model;
>
> …
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> 8. Time availability of a parent for a child;
>
> …
>
> 11. The emotional support to assist in a child developing self-esteem and confidence;
>
> 12. The financial contribution to the welfare of a child.

> 13. The support of an extended family, uncles, aunts, grandparents, etcetera;
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> 14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. …;
>
> 15. The interim and long range plan for the welfare of the children.
>
> 16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
>
> 17. Any other relevant factors.
>
> **17** The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question.
>
> With whom would the best interest and welfare of the child be most likely achieved?
>
> **18** The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.
>
> **19** Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.
>
> **20** On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[14] In this case, there also arises the question of whether J.K. should be permitted to relocate with his mother to Prince Edward Island or whether he should be ordered to return to Nova Scotia to reside here. Therefore, this decision also involves a so-called "mobility application" by E.M. seeking the relocation to

Prince Edward Island. As there is no direct reference to mobility in the *Act*, I must turn to the case law for guidance.

[15] The leading case on mobility is that of the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 SCR 27, 1996 CanLII 191 (SCC). In that decision, the court was dealing with an application to vary an existing custody order. In this matter, there is no such existing order. I will, therefore, not consider those portions of the *Gordon* decision which are relevant to such original applications and I will only set out below those factors which I find relevant in this case. In *Gordon* the court held, in part, as follows:

> 49. The law can be summarized as follows:
>
> …
>
> 2. … the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> …
>
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
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> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> 7. More particularly the judge should consider, *inter alia*:
>
> > (a) the existing custody arrangement and relationship between the child and the custodial parent
> >
> > (b) the existing access arrangement and the relationship between the child and the access parent;
> >
> > (c) the desirability of maximizing contact between the child and both parents;
> >
> > …
> >
> > (e) the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child;
> >
> > (f) disruption to the child of a change in custody;

> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[16] Given that this is an original application respecting custody, I must also consider the interplay between the custody application and the mobility application in this matter. Put simply, should I consider the issue of custody before turning my mind to the issue of mobility, should the opposite apply or can I consider the issues together? This can have a significant impact on the analysis.

[17] This is particularly relevant as E.M. told the court in her evidence that, regardless of the parenting arrangements, she will remain in Prince Edward Island. In taking that position, which she is well entitled to do, E.M. has limited the court's options. I find that it is therefore important to determine the appropriate sequence for the analysis in this matter.

[18] There appears to be some disagreement in the cases on this issue. In the decision of *Bjornson v Creighton*, 2002 CanLII 45125, the Ontario Court of Appeal was dealing with an original application respecting custody combined with a mobility application. The court reviewed the factors set out in *Gordon* supra and indicated that the court must conduct the custodial analysis first, followed by the mobility analysis when it said:

> [19] In applying the guidelines provided by *Gordon* to the instant case, two matters require consideration. The first is that at the outset of the trial, the parents were "equally entitled to custody". As a result, for analysis purposes, the parents could not be divided into "custodial parent" and "access parent". The second is that the organization of his reasons is such that the trial judge appears to have decided the question of mobility first and the question of custody second. With respect, that strikes me as putting the cart before the horse.

[19] In the decision of *Blennerhassett v. MacGregor* 2013 NSCA 77, the Nova Scotia Court of Appeal held that there was no order in place, but where the parties had a de facto parenting arrangement with the mother having primary care of the child for several years, that de facto arrangement meant that the mother's views were to be treated as the views of the custodial parent under *Gordon* supra. As the court noted:

> 37 I also agree that the judge is to greatly respect the views of the *de facto* custodial parent. But this is not because that parent enjoys a legal

> presumption. Rather, it is because, in the child-centered balance, "the importance of the child remaining with the parent to whose custody it has become accustomed" (McLachlin, J. - *Gordon v. Goertz*, para 50) carries weight. But the ultimate question remains - "What is in the child's best interest?", not "What does the custodial parent want?"

[20] In the decision of *Burgoyne v. Kenny*, 2009 NSCA 34 the Nova Scotia Court of Appeal was dealing with a similar circumstance of an original custody application and a mobility application. In addressing the *Gordon* mobility analysis, the court held as follows:

> 19 *Gordon v. Goertz*, supra involved an application to vary an existing custody order granted under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). … In dismissing a further appeal…, the Supreme Court of Canada observed that such an application requires a two-stage inquiry. The threshold issue is whether there has been a material change in the circumstances of the child since the last custody order was made …. If a material change is demonstrated the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances (*Gordon v. Goertz*, supra, para. 9).
>
> 20 Like the *Divorce Act*, the "*MCA*", s. 37(1) requires a material change in circumstances as a pre-condition to variation of an existing order. Obviously, in the case of an original custody order, as is sought here, it is not necessary to demonstrate a material change in circumstances because there is no prior order. (I make no comment on whether a material change must be established where, although there is no prior order, a custody agreement is in place.)
>
> 21 The factors relevant to the second stage of the inquiry, as enumerated in *Gordon v. Goertz*, supra, are nonetheless applicable to the determination of the children's best interests. (*D.P. v. R.B.*, 2007 PESCAD 25, P.E.I.J. No. 53 (Q.L.) (A.D.) at para. 41 and the cases cited therein).
>
> 22 Where there is no prior order or custody agreement, as is the case here, the parents are "equally entitled to custody" with neither being considered the "custodial" or "access" parent (*MCA*, s.18(4)). The interim orders, which permitted the children to reside with the mother in Quebec pending the custody hearing, do not bestow the status of custodial parent. Thus, to the extent that *Gordon v. Goertz* references, as relevant, the status, interests or wishes of the custodial parent, the factors must be modified.

[21] In the present case, as will be set out in the review of the evidence below, this is a circumstance of a recent separation and relocation of the mother with the child to Prince Edward Island without the father's consent. Thus, unlike *Blennerhassett* supra, there was no existing de facto custodial arrangement. I adopt the reasoning of the Court of Appeal in *Burgoyne* supra which suggests that where there is no existing custodial arrangement or an order, the court must enter upon an

analysis which blends the factors set out in the *Act*, *Foley* supra and *Gordon* supra. This blended analysis, which is essentially a structure for determining the best interests of the child, is the method I will employ in this case.

[22] That being said, in certain cases there is merit in the view of the Ontario Court of Appeal in *Bjornson* supra in circumstances where, as in *Blennerhassett* supra, there has been established a de facto custodial arrangement. In that circumstance, determining the custodial parent would be then important given that *Gordon* supra confirms that "the custodial parent's views are entitled to great respect". Again, in the present case, there is no custodial parent, both because the separation was immediately followed by the relocation and because there is no existing custodial order.

[23] It is within this legal framework that I must review and analyze the evidence and in making my decision, take into account all of the evidence in all of the factors that are relevant to these parties and to J.K.

The Evidence

Background

[24] The parties met in 2009 when E.M. was 17 years old. The relationship began at that time and continued until July 2012 when M.K. left the relationship. They recommenced the relationship in April 2013 and remained together until their separation in May 2016.

[25] E.M. described the separation as occurring in May 2016. M.K. said it took place on May 7, 2016, concurrent with an email he received from E.M. ending the relationship.

[26] Their son, J.K., was born June 17, 2015 and was therefore almost one year old at the time of separation. The parties agree that E.M. took J.K. to Prince Edward Island in May 2016 and she has resided with him there ever since, in the home of her maternal grandmother.

[27] Since that move, there have been some challenges for M.K. in exercising access with J.K. These will be discussed further in this decision. The interim order granted in this court set out provisions for interim access and M.K. has had access with J.K. since then.

[28] In his two affidavits filed in this matter, M.K. set out the difficulties between him and E.M., from his perspective. He described her as being demanding of him,

unreasonable in her requests for assistance given his work schedule and described her as a mother who is emotionally volatile.

[29] E.M. described a relationship that was troubled. She said in her affidavit that she and J.K. spent considerable time away from M.K., with her family in Prince Edward Island, on six different occasions between July 2015 and December 2015. These trips lasted from one week to one month. She attributed the time away to needing relief from the stress of her relationship with M.K. and there was evidence that some of the trips may have been related to M.K.'s need to work and study.

Family Violence

[30] Each parent described two incidents of violence between them. E.M. said that M.K. shoved her through a solid wood bed frame in December 2015. After the incident, she said M.K.'s father arrived and she felt emotionally ganged up on and felt it was a hostile environment. After this, on December 15, 2015 she packed up her and J.K.'s belongings and left to go to Prince Edward Island for good. Ultimately, she did return to Nova Scotia to continue residing with M.K.

[31] M.K. said this incident occurred in early November 2015 when E.M. started an argument with him about money. He said that despite his attempts to defuse the situation, E.M. assaulted him by grabbing him on the underside of his left bicep and pinching extremely hard. He tried to leave the room, grabbing her hand and arm and pushing her away. He said she stumbled backward and hit a queen-sized bed that was made of particleboard.

[32] M.K. described a second incident which occurred in April 2016. He said that he, E.M. and J.K. were quite ill and J.K. was unsettled throughout the night. The parents argued and fought about M.K.'s work schedule and his availability to assist her with care of J.K. that night and the next day.

[33] He said he went to work the next day and was told to go home, as E.M. had called his employer to request this. He said that when he came home E.M. yelled at him, demanding he do more. He said E.M.'s anger escalated, she was verbally abusive and when he tried to lay down with J.K. and was walking down the hall, E.M. ran in front of him and put her hands on him to stop him from going further. He told her to take her hands off him and that she started to taunt him.

[34] He said he decided to leave the house and as he was walking to the door, E.M. ran in front of him and started pushing him backward. He said he reached around her to open the screen door, she pushed again and they stumbled onto the deck. He said he got up to go to the car.

[35] He said when he got into the car and was about to leave, E.M. lunged through the door to wrest of the keys from his hand. He said they engaged in a struggle and he eventually got the keys from her. He said E.M. went into the house and was in hysterics. He contacted the police and was concerned for her safety and the safety of J.K. When the police arrived, they spoke to both parties, contacted the paramedics and E.M. was transported to the hospital for assessment. After she was released, roughly four hours later, she began texting and calling him. The following morning it was decided they would separate. He said the plan was that she would go to Prince Edward Island with her family and spend some time there in the first week of June.

[36] E.M. said that M.K. attacked her in that incident, she was injured in her left shoulder, which has been painful ever since. She said that he was verbally abusive to her at that time. She said that he accused her of being mentally unfit to care for J.K. E.M. explained that she was going to call 911 on that day and ask for EMS to attend at the home because she was very afraid.

[37] When the police arrived, E.M. said that the police officer did not appear to believe her when she said she had been assaulted by M.K. She believed her only option was to go to the hospital. She said there was no assessment of her mental health and that the only intervention offered was to help her with her lack of sleep. She explained that she had a very bad case of mastitis. This, combined with the stress of being with M.K., contributed to her not sleeping for four days. She said she was in a constant state of fear living with M.K. and she left the home for Prince Edward Island for those reasons.

[38] While I will make further comment respecting the allegations of family violence at a later stage of this decision, I note that there is little to corroborate either party's version of the violence allegations on either occasion. Neither called the police officer nor the EMT who attended at the home in the latter incident. There were no other witnesses to the incidents. Neither called any of the hospital staff, including the physician who examined E.M., to provide evidence regarding her state of mind, circumstances, or any statements made by the parties at the time.

[39] What I can determine is that there had been at least two incidents of family violence. I also find that neither directly involved J.K. But I must take these into account as required under the *Act* in determining the appropriate parenting arrangements and in assessing the best interests of J.K. What is clear from the evidence is that the parties had a dysfunctional and sometimes violent relationship and I must carefully account for this in determining an appropriate parenting arrangement for J.K.

Prior Parenting

[40] As to the prior parenting arrangements for J.K., not surprisingly, each party sees things very differently. E.M. maintained that she was primarily responsible for J.K.'s well-being. She was breastfeeding him. She said that M.K. was not an involved parent, was often distracted by his phone or computer and would only parent J.K. when all of M.K.'s needs had been met. Put simply, E.M. said that she did the overwhelming majority of the parenting of J.K. and that M.K. was virtually uninvolved in his care prior to separation.

[41] M.K. described a very different circumstance. He said that he was an equally involved parent, though he acknowledges that J.K. was breastfed. He said that after J.K.'s birth, E.M. was not working and does not work at this time. M.K. was working, and continues to work, in the IT department of St. Francis Xavier University. His evidence was that he will be returning to further his education this fall at the same university while working some hours for income. His work schedule was full-time prior to separation and he said that when he was home he was completely involved in J.K.'s care.

[42] It is clear to this court that each party believes their version of the parenting arrangements prior to separation and it is also clear that each parent does wish to be fully involved in J.K.'s life. That is to their credit. J.K. obviously has two very loving parents who want the best for him and there is very little in the evidence to suggest that either parent is incapable of meeting his needs, if required. It may well be that M.K. deferred to E.M. on parenting issues when they were together and relied upon her. However, I find that he was involved, is capable of parenting J.K. now and into the future.

Interim Relocation

[43] With respect to E.M.'s relocation with J.K. to Prince Edward Island, E.M. said this was done with the knowledge and acquiescence of M.K. M.K. said this was done without his consent to it being permanent and he expected her to return to Nova Scotia after some time with family. I have reviewed the email correspondence from E.M. to M.K. of May 7, 2016 respecting her move to Prince Edward Island and I am satisfied that on any reasonable reading of that email, it was clear that E.M.'s intent was to remain on Prince Edward Island with J.K. I do, however, accept that M.K.'s believed, or perhaps hoped, was that she would return to Nova Scotia with him. I do not find that he agreed to her or J.K.'s permanent relocation or acquiesced in it but was, perhaps, more optimistic about her return than he should have been.

[44] I also find that the exchange of emails attached to M.K.'s first affidavit make clear a pattern of communication that was unhealthy and not focused on the best interests of J.K. Specifically, I have concerns that E.M. was using her circumstance of having care of J.K. and the physical distances between the parties as leverage to dictate terms of access that were unreasonable. This gives me concern for her ability to cooperate in parenting in the future.

[45] There is also evidence that E.M. was not abiding by this court's interim order respecting access, specifically, that the exchange of J.K. would occur at the ferry.

[46] I also find that her position in dictating who could have access with M.K. was unreasonable in all the circumstances. While she may have been experiencing the emotional stress of separation and physical relocation, concerns respecting family violence and trying to find her feet as a single parent, her behaviour, at least at that time, does not demonstrate to this court that she was acting in the best interests of J.K. Instead, the behaviors demonstrate a somewhat self-centered and high-handed approach to parenting.

[47] Respecting the issue of breastfeeding, I am very mindful of the importance of this form of feeding, not only for nourishment but also for attachment and bonding. Breastfeeding provides many direct and indirect beneficial effects for health and well-being of a child and should be supported whenever possible.

[48] That said, J.K. is now over 14 months old and the evidence is that he is weaned. This will provide some flexibility in parenting arrangements which will be incorporated into an order of this court.

D.M.

[49] D.M. gave evidence in this matter. She is the grandmother of E.M. E.M. and J.K. reside with her in Prince Edward Island. Her affidavit indicated that she and E.M. are very close and the relationship is of a "mother-daughter quality".

[50] It was D.M.'s evidence that she had spent extended periods of time in the home of E.M. and M.K. starting in late April 2016 when E.M. asked her to come to help. It was her understanding that E.M. and J.K. were ill and that M.K. was not supporting them.

[51] She said that when J.K. became more ill and needed to go to the hospital two days in a row for testing, a physician told her that he may have meningitis. She says that M.K. left the home for the days and evenings and did not call to check on J.K.'s condition. In cross-examination, D.M. conceded that there may have been

communication between E.M. and M.K. of which she was unaware and possibly communication between M.K. and the hospital.

[52] In her affidavit D.M. says that even though she and E.M. were up through the night to care for J.K., M.K. stayed on the couch where he was sleeping. She found it troubling that M.K. required more sleep than either her or E.M. She said that he lay on the couch with his computer in his lap and ignored them.

[53] D.M. said that the tension in the home was very high when she was present and that this was the fault of M.K. because he would not leave E.M. alone. She said that M.K. refused to allow E.M. to leave the home with J.K. for short break. She said that M.K. showed very little emotion or appreciation for the gravity of the circumstances and their impact on J.K.

[54] In describing M.K.'s demeanour, she said it was indifferent, arrogant, flat and aloof. She interpreted this demeanor as threatening and abusive. She said his whole person was arrogant, as if he were in charge.

[55] In cross-examination, it became clear that D.M. was supportive of E.M.'s wish to relocate with J.K. to Prince Edward Island. It was clear that she was allied with E.M. in all respects in this separation.

[56] D.M. agreed that she joined with E.M. in proposing the relocation to Prince Edward Island and that this was the only option on the table. She felt that M.K. should have agreed to see how things would work. Despite claiming that she and E.M. were trying to come up with solutions that would work for everyone, it was clear that there was only one solution in her mind and the mind of E.M. – a relocation of J.K. to Prince Edward Island.

Credibility

[57] Witness credibility is always an important issue for the court to consider. In this case, I have carefully examined all the evidence as well as representations made by the parties in their appearance with counsel before this court on July 19, 2016.

[58] In assessing credibility, I keep in mind the very helpful comments of Forgeron, J. in the decision of *Baker-Warren v. Denault*, 2009 NSSC 59 where she wrote:

> **18** For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge

after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.* 2008 SCC 51, para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

a. What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate,* 2008 NSSC 283 (S.C.);

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;

e. Did the witness have a sufficient power of recollection to provide the court with an accurate account;

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* [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?

20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate, supra,* at para 37:

> There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, *supra*).

> **21** Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[59] In assessing credibility in this case I begin with the representations made by E.M. to the court through counsel on July 19, 2016 as compared to the evidence given by her and her mother, T.M..

[60] On July 19, 2016, E.M. appeared with and was represented by counsel. In the course of discussion with the court, the matter of interim access of M.K. was reviewed and an interim order was put in place.

[61] In setting the interim relief of access, the court relied in large part on the representations of E.M. that she was working day shifts from 8 a.m. to 4 p.m. each workday and that she was breastfeeding J.K. morning and night. She represented that she was not pumping breast milk. It was clear based on all of the representations made by counsel on her behalf that breastfeeding was a daily activity for her and J.K. This is particularly important given that the court inquired as to the possibility of overnight visits with the father in the interim. I decided not to order such overnight visits and instead ordered two daytime visits each weekend based on the representations of E.M. through counsel.

[62] At the hearing of the matter, which took place on August 23, 2016, E.M. provided evidence in direct that at the time of the court appearance on July 19, 2016 she was feeding J.K. both mornings and evenings each day. She said that J.K. had weaned himself in the following few weeks and had finished breastfeeding the Friday prior to the hearing.

[63] E.M. said that J.K. had been away on a camping trip without her and with his maternal grandparents after the July 19, 2016 appearance and he was bottle-fed for three nights. She said that she breast-fed fed him twice on his return and then she went to Halifax for one overnight to obtain some clothing for her nursing position.

[64] In cross-examination, it was put to her that the camping trip with the paternal grandparents in fact occurred from July 11 through to July 14, prior to the July 19 court appearance. It was also put to her that she travelled overnight to Halifax on July 15, returning July 16. Initially she acknowledged these dates but then said she was unsure. She also indicated that during the camping trip, she sent some breastmilk with the paternal grandparents for J.K. When pressed, she then denied that J.K. had been away from her for any overnights prior to July 19, 2016.

[65] When it was put to her that her mother, T.M., was present at the courthouse to provide rebuttal evidence on this issue if necessary, E.M. denied knowing that her parents were present that day.

[66] Following the completion of E.M.'s evidence, her mother, T.M., was called to provide rebuttal evidence. T.M.'s evidence was that she is the mother of E.M. and that she is the daughter of D.M. She confirmed that she has no relationship with E.M..

[67] It was T.M.'s evidence that she has never had J.K. in her care alone but has had J.K. in her care when she is with S.K., J.K.'s paternal grandmother.

[68] It was T.M.'s evidence that J.K. had been with her and S.K. from July 7 through to and including July 11, 2016 and that E.M. was not present during that time. J.K. was, therefore, not breastfed. She testified that she was confident of these dates because, as part of her own employment, she travelled to Manitoba on July 18 and 19, 2016.

[69] The second issue on which T.M. testified in rebuttal concerned E.M.'s knowledge of her presence at court that same day. E.M. testified in the afternoon. T.M. said that E.M. confronted her and her husband outside the courthouse at the beginning of lunch. T.M. went on to say that the RCMP had been called by E.M. who claimed that T.M. was harassing her.

[70] It is important to note that despite these very serious contradictions, E.M. did not take the opportunity to retake the stand at the completion of T.M.'s evidence and to refute those allegations.

[71] In assessing the credibility of E.M. on these the key issues, I am mindful of the factors set out in *Baker-Warren* supra. In particular, I note the difficulties E.M. had in her own testimony when challenged respecting the dates that J.K. was away camping. In her direct evidence, she appeared clear and definitive that the camping had not taken place until after the July 19, 2016 appearance and that she had breast-fed J.K. each day prior to that date. In cross-examination, she wavered significantly and was quite uncertain. She then firmed up her evidence to indicate that J.K. had not been away from her prior to July 19.

[72] This stands in stark contrast to the evidence of her mother. I am mindful in assessing her evidence that T.M. concedes she does not have a relationship with E.M. That said, she was able to articulate the dates J.K. was in her and S.K.'s care prior to July 19, 2016 based on her own work dates in the west.

[73] I am also mindful of the contradictory evidence respecting the knowledge of E.M. that her parents were present at the courthouse on the day of the hearing. E.M. said she was unaware of their presence when she gave her evidence in the afternoon. It was T.M.'s clear evidence that E.M. was aware of her presence and had called the RCMP over the lunch break.

[74] I am mindful that each of E.M. and T.M. have an interest in the outcome of these proceedings. E.M. has an interest in the access time and circumstances of parenting for J.K. with his father. T.M. has an interest given her relationship to E.M. and J.K.

[75] Moreover, each could have a motive to deceive the court. E.M. might have mislead the court on the timing of her absence from J.K. and breastfeeding in order to gain advantage on the interim proceeding in denying overnight visits to M.K. T.M. might have motive to deceive simply to cause mischief for her daughter with whom she has no relationship and to favour the interests of M.K. with whom she appears to be allied.

[76] I have also considered the manner in which the evidence was provided. I find that T.M. gave her evidence in a candid and straightforward manner while E.M.'s evidence on the issue of breastfeeding was, at times, hesitant and uncertain where I would have expected her to have recall given the relative recency of the events.

[77] I note that I put no weight on the demeanour of either witness and have not considered this in my assessment of credibility.

[78] I also acknowledge that the representations made by E.M. on July 19, 2016 through counsel were not sworn evidence but it is material to my consideration of credibility that I take into account those representations. Both she and her counsel were well aware of the importance of the discussion on that date with respect to interim relief and the effect it would have on M.K.'s access with J.K. Moreover, the thrust of that evidence regarding breastfeeding was confirmed by her in her direct evidence under oath at the hearing.

[79] In considering the totality of their evidence, I find that there is serious credibility concerns with respect to the evidence of E.M. on both the issue of breastfeeding and the presence of her parents at court on the day of the hearing. Moreover, I find these concerns to be so significant that it calls into question her credibility throughout the hearing.

[80] On the other hand, I've carefully reviewed and assessed the credibility of M.K. I find that his evidence was given in a straightforward, candid and clear way. No doubt he, too, has motive to deceive but there was no internal inconsistencies in his evidence and cross-examination did not reveal any such issues. Overall, I found M.K.'s evidence to be credible and trustworthy.

[81] As a result, where the evidence of E.M. and M.K. differs or contradicts, I accept the evidence of M.K. over that of E.M.

[82] As a result, I further find that while there was family violence in this relationship, I accept the evidence of M.K. of how that violence occurred on two occasions. In doing so, I find that E.M. was the cause of each incident. Having said that, I do not find that there is evidence that this family violence has caused any impact on J.K. even though he was present for one of the incidents. I also find that there is no evidence that the family violence has impacted the ability of either parent to provide for J.K. and meet his needs nor will it prevent an arrangement that will allow the parties to parent J.K. co-operatively.

[83] Family violence of any sort is never acceptable and can impact a child regardless of whether that child has been directly exposed to the violence. Fortunately, in this case there is no evidence before me to suggest, nor was it argued by counsel, that there has been such an impact on J.K. While E.M. says she is uncomfortable around M.K., she agreed that M.K. should have access with J.K. and thereby implies that she can parent with him and co-operate to some degree.

[84] I now turn to an assessment of credibility of the evidence of D.M. D.M. paints a very critical picture of M.K. from her observations in the family's home. M.K. denies these allegations in large part.

[85] I first turn to the allegations D.M. made regarding the threatening demeanour of M.K. Put simply, D.M. says that M.K. was threatening because he was aloof, had a flat affect and was not emotionally engaged when she was present.

[86] On the other hand, she was clearly allied with E.M.'s position and interests, was seeking the relocation of J.K. with E.M. in Prince Edward Island to live with her and agreed in her evidence that no other option was presented to M.K. She never suggested that M.K. was physically or verbally threatening to her or to anyone else in the home.

[87] I find that, given that M.K. was faced with both E.M. and D.M. in the home, that they were allied in their common interest to relocate J.K. to Prince Edward

Island and, I find, had taken over the care of J.K. in the home, it is hardly surprising that M.K. would be aloof, have a flat affect and be somewhat detached. Despite her statements to the contrary, I find that D.M. was not interested in discussing options to address J.K.'s best interests but rather was engaged in discussions to attempt to pressure M.K. to agree to the relocation to Prince Edward Island. I find M.K.'s behaviour was in fact reasonable in that he did not engage in arguments or emotional reaction as many might.

[88] As well, I find that, given D.M.'s alliance of interest with E.M., her description of M.K.'s lack of involvement in J.K.'s care are not reliable. Where her evidence differs from that of M.K., I accept the evidence of M.K. I have already made findings with respect to his credibility which apply in this circumstance.

Analysis and Decision

[89] As noted earlier in this decision, I must undertake a blended analysis of the best interests of J.K. considering the various factors under the *Act*, *Foley* supra and *Gordon* supra. In doing so, I have already made certain findings that are relevant, including that each of the parents are competent and loving parents who are equally capable of parenting J.K.

[90] The history of parenting of J.K. is in dispute. It is clear that J.K. was breastfed and did spend significant time with E.M.. It is very clear to the court that she is a good and loving mother to J.K.

[91] On the other hand, the evidence is also clear that M.K. provided good parenting to J.K. and is capable of continuing that role. Their parenting roles were, no doubt, different in part due to the fact that J.K. breastfed. J.K. is now weaned and spends time with each parent under the interim parenting arrangement and I am satisfied that they are equally able to provide appropriate, safe, loving and supportive parenting to him.

[92] I also find that E.M.'s grandmother, D.M., has become a significant person in J.K.'s life. He and E.M. reside with D.M. and will continue to do so when he is in Prince Edward Island. While I have made findings regarding her evidence, I do find that she is generally a positive support for E.M. and J.K. and any parenting arrangement must take into account that relationship.

[93] Regarding the issues of physical, emotional, social and educational needs and stability and safety for J.K., and combining that with the principle of maximum contact, I am satisfied that each parent can provide all the requisite necessities for J.K. I am further satisfied that, though J.K. has resided in two

provinces, the proximity of M.K. to the ferry and therefore to Prince Edward Island for most of the year means of that J.K. can enjoy a great deal of time with each of his parents in an appropriate parenting arrangement. That said, the time of the year that the ferry is not running between Prince Edward Island and Nova Scotia must be taken into careful account.

> [94] Respecting the willingness of each parent to support the development and maintenance of J.K.'s relationship with the other parent, I do have some concerns respecting E.M. As noted earlier, I have made findings regarding her credibility and find that there is some risk that she will not actively and fully support J.K.'s relationship with M.K. She has, for example, misled the court with respect to breastfeeding in order to gain advantage on the interim order for parenting time. As well, despite the requirement that the parties share the costs of the ferry for access in the summer, the evidence makes clear that E.M. did not do so and was not mindful of this requirement.

[95] As a result, any order must take into account the risk that E.M. may not be fully supportive of the relationship between J.K. and M.K. This will require a detailed order that provides for ample parenting time for M.K. with J.K.

[96] Similar concerns regarding communication and cooperation arise in this matter. Given the distance and logistics involved in access, it will be important that the parties fully cooperate and communicate, particularly during the times that the ferry is not running between provinces, to ensure that access takes place and that each parent is fully involved in J.K.'s care.

[97] I am satisfied that both parents will have adequate time available for J.K. E.M. is currently employed in Prince Edward Island. She makes clear that she will not return to Nova Scotia under any circumstance. Given her hours, she will require substantial support from her grandmother in caring for J.K. but will also be available to parent him when not working. There is nothing unusual about her employment or parenting circumstance that is not already faced by many Nova Scotians in their everyday lives.

[98] The same applies to M.K. He is both working and in school and there will be limits on his time with J.K. He will have the support of family, including his mother and I am satisfied that he has appropriate time available to him to spend with J.K.

[99] I am also satisfied that both parents have appropriate plans in place for the care of J.K. Each has a supportive family, has sufficient income and living circumstances and will be able to provide for J.K.

[100] Considering the issue of mobility, I have already made a finding that there is no custodial parent in this case and I must look to the other factors set out in *Gordon* supra.

[101] There is no question that a move to Prince Edward Island would disrupt J.K.'s relationship with his father. On the other hand, J.K. is very young and has no significant social network in the form of schools and community. His circle of support is within his families.

[102] As noted earlier, the unique circumstances of physical proximity between the two provinces presents an opportunity that is lost at greater distances. If J.K. is permitted to move, I am satisfied that he can enjoy significant parenting time with each of his parents notwithstanding the change of residence.

[103] I note that *Gordon* supra makes clear that I am not to take into account the reasons for a parent's proposed relocation unless it is an exceptional case where it is relevant to that parent's ability to meet the needs of the child. In this circumstance, E.M. was employed in Nova Scotia in her profession, quit that work and has obtained new work in Prince Edward Island. Her income has increased as a result.

[104] Her income in 2015 was $25,852 from employment, employment insurance and other sources. In 2014, her income was $32,657 from employment. She now reports in her statement of income that she will have earnings in 2016 of $54,178. While not determinative, this increase in income is material and can form part of my analysis in such circumstances. (See *Woodhouse v. Woodhouse* 29 O.R. (3d) 417).

[105] The reasons given for the relocation are also driven by family and support issues for E.M.. She will live with her grandmother and will have extensive family available to her for support on the island.

[106] E.M. also says that she relocated out of fear of M.K. I have already made findings with respect to family violence and further find that this does not form a basis to justify the relocation.

[107] With all of that in mind, I am prepared to approve the relocation of J.K. with E.M. to Prince Edward Island on a permanent basis. I find that it is in his best interests and that he have benefit of his mother's increased earnings, that he and his mother have the support of her family, particularly D.M., and that appropriate parenting arrangements can be a put in place to address J.K.'s need for maximum contact with his father and support of his family in this matter.

[108] M.K. has requested a shared parenting arrangement. I am prepared to order such an arrangement. In doing so, I recognize that this is an exceptional circumstance of a shared parenting arrangement which will involve travel for a child between two provinces. I am prepared to do so in light of my findings that it is in J.K.'s best interests to spend maximum time with each of his parents and that this can be accomplished appropriately and safely for him.

[109] There will be an order as follows:

1. The parties will enjoy joint custody of J.K. in a shared parenting arrangement. They will jointly make decisions regarding major matters affecting J.K.'s well-being, including matters of health and education.

2. The parties will have equal access to and be entitled to communication with all service providers for J.K. including, but not limited to, doctors, dentists, daycare and childcare providers and each will have full access to any information, records or materials from any such service providers.

3. The parties will communicate in a child focused, businesslike and polite manner at all times.

4. During the time of year that the ferry is in operation between Nova Scotia and Prince Edward Island, each parent shall have J.K. for one week at a time. The first period of such week about access shall begin with the father having J.K. with him when the ferry comes into operation.

5. During the time of the year when the ferry between Prince Edward Island and Nova Scotia is not in operation, the father shall have access with J.K. for one week and the mother shall have J.K. with her for access for two weeks and that schedule shall continue throughout that time. In each year the father will have his access first when the ferry ceases operation.

6. The parties may adapt and adjust the schedule from time to time by agreement. The schedule will be subject to the schedule of the ferry and to weather conditions including whether the Confederation Bridge is open and operating during the time the ferry is not in operation.

7. The parents will reasonably accommodate each other for any lost parenting time due to circumstances beyond their control, including the ferry schedule, the bridge conditions and the weather and will exercise reasonable judgment to ensure the safety of J.K. in all such circumstances.

8. When the ferry is operating, the father will travel on ferry to Prince Edward Island to pick up J.K. at the beginning of his access week and the mother will travel on the ferry to Nova Scotia to pick up J.K. at the beginning of her access week. The parties will equally share the cost of the ferry for each access period and will bear their own costs in travelling to and from the exchange location.

9. When the ferry is not running, the parties shall meet for exchange of J.K. at a mutually acceptable location on the Nova Scotia side of the Confederation Bridge. The parties will share equally in the cost of the shuttle and tolls for the Confederation Bridge and will bear their own costs in travelling to and from the exchange location.

10. Unless otherwise agreed, all exchanges will take place on Sunday at noon or the closest time in accordance with the ferry schedule.

11. Notwithstanding this access schedule, the parties will have the following special access schedule, applicable for special occasions:

a. Christmas - J.K. will spend Christmas Eve and Christmas Day with whichever parent he is with in accordance with his normal access schedule on December 24. The other parent will have J.K. with him or her from noon on December 26 until noon on January 2 of the following year. Thereafter, the normal access schedule will apply.

b. Easter - Whoever has J.K. on the normal access schedule for the Easter weekend will keep J.K. for that time. The other parent will have J.K. from Easter Sunday at noon in accordance with the normal access schedule and exchange.

c. Mother's Day and Father's Day- Each of the parties will have J.K. with him or her for their respective day by adjusting the pickup or drop-off time as necessary to an earlier morning sailing or a later afternoon sailing

12. The parties are prohibited from making any derogatory comments respecting each other at any time that they have care of J.K. Further, each party shall ensure that no one else makes such derogatory comments about either party in such circumstances and if the other person does not immediately cease such comments, the party in care of J.K. shall remove him from that circumstance or ensure that the other person is removed.

13. This order will be subject to review in the year J.K. is to begin school.

14. Nova Scotia shall retain jurisdiction over this matter, including the review of parenting arrangements when J.K. commences school.

[110] This court acknowledges that the parenting arrangement put in place is temporary only. When J.K. commences school, it will have to be adjusted and a decision made as to where he will primarily reside. In the meantime, I believe that this is the best arrangement for J.K. and will address his needs appropriately. It will make the subsequent decision in a few years difficult for the parents but it is hoped that over that time with they will develop a sufficient ability to communicate and to take into account J.K.'s best interests such that they can arrive at a resolution to that issue. If not, the court will review the matter at that time.

Child Maintenance

[111] Respecting child maintenance, section 9 of the *Child Maintenance Guidelines* sets out how child maintenance is to be determined in a shared parenting arrangement. That section reads as follows:

> **9** Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child maintenance order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the parents;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[112] As this section makes clear, there is a three-part test to be applied. The leading decision on the application of that test is from the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63. The court made clear in that decision that I must look for evidence of the increased costs of shared parenting, if any, and evidence of the conditions, means, needs and other circumstances of each parent. If such evidence is not before the court, I must decide whether to adjourn the matter and direct that such evidence be brought before the court or otherwise decide the matter.

[113] Without entering into a detailed analysis of the *Contino* supra decision, and taking into account the evidence before me, I am satisfied that there is no evidence available to me in this matter of any increased costs of shared parenting nor is there any evidence of the conditions, means, needs and other circumstances of the parents which would materially affect my analysis under section 9 of the

Guidelines. I do not find that it is necessary to seek further evidence from the parties nor has such evidence been provided to date. Therefore, in the interest of moving the matter forward without further delay, I am prepared to find that it is appropriate to apply the first step of the test and will apply the set off calculation only in this circumstance.

[114] The parties filed statements of income which have not been challenged. M.K.'s income for 2016 is estimated to be $24,990.40. E.M.'s 2016 income is estimated to be $54,178.

[115] Based on these incomes I order that M.K. pay to E.M. child maintenance in the amount of $197. E.M. shall pay child maintenance to M.K. in the amount of $450.50 per month. The parties may choose to set off these amounts and if so, E.M. would pay M.K. the net amount of $253.50. This child maintenance will be paid on the first of each month and is retroactive to July 1, 2016, the first day of the month following the filing of the application.

[116] M.K.'s counsel will draw the order and have it presented to the court within two weeks.

[117] If the parties wish to be heard on costs counsel must make written submission within the two weeks and a further decision will be rendered.

Timothy G. Daley, JFC