

FAMILY COURT OF NOVA SCOTIA

Citation: *T.H. v. E.H.*, 2017 NSFC 9

Date: 2017-04-27

Docket: Antigonish No. FATMCA101331

Registry: Antigonish

Between:

T.H.

Applicant

v.

E.H.

Respondents

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Timothy G. Daley

Heard: September 29, September 30 and November 25, 2016 in Antigonish, Nova Scotia

Counsel: Nicole Rovers, for the Applicant
Peter Crowther, for the Respondent

Introduction and Summary of Positions

[1] This case and my decision requires that I determine what parenting arrangement and resulting child support order is in the best interests of two children, K.H., who is 12 years old, and M.H. who is eight years old. More specifically, I must determine whether it is in the children's best interest that they be permitted to relocate with their mother, E.H., to Westville in Pictou County or whether they should remain in Antigonish, in the care of their father, T.H.

[2] The mother seeks primary care of the children on the basis that during the relationship with the father, she provided the bulk of the care for the children. She has concerns respecting the ability of the father to adequately parent the children if they were placed in his primary care. She seeks to relocate with the children to Westville in Pictou County to significantly reduce or eliminate her travel for work along the highway between Antigonish and Pictou County and in doing so to take advantage of the support network that she has available to her in Westville.

[3] The father opposes the relocation and seeks primary care of the children with him in Antigonish. He says that he has been a fully involved and committed parent and that the move to Westville would be disruptive and unnecessary for the children. He says he is disabled, but maintains that he can parent the children fulltime. In this circumstance, he says that the children would benefit by maximum contact with him and access with their mother.

Issues for Determination

[4] The issues that I must determine in this case are as follows:

1. Is it in the children's best interest that they be permitted to relocate with their mother to reside in Westville, Pictou County?
2. If so, what are the appropriate parenting arrangements for the children, including parenting time with their father?
3. If not, what are the appropriate parenting arrangements for the children in Antigonish, in the care of their father, including parenting time with their mother?

4. Depending on the parenting arrangement ordered, what is the appropriate amount of child support, if any, that should be paid?

Issues Not In Dispute

[5] In a decision such as this, it is helpful to note what is not in dispute between the parents. It is amply clear, based on the evidence, that both the mother and the father love their children deeply. This case is not a contest about who loves the children more.

[6] It is also not in dispute that the father suffered a near-catastrophic health crisis which almost took his life and from which he has recovered to a certain extent. He is left with residual effects as set out below, including neuropathy, fatigue and some challenges with his memory. It is also not in dispute that the father is currently disabled from working. The question of, among others, is what impact his health circumstance has on his ability to parent the children.

[7] It is also important to note that there is no pre-existing order in place with respect to the parenting arrangements for the children. The evidence is that the parties separated on June 5, 2016. An interim order was granted on July 5, 2016. This order granted the parties joint custody of the children in a shared parenting arrangement on a “week about” basis. As the school year approached, that interim order was varied on August 16, 2016 such that the children were to be in their father’s care in Antigonish throughout the school week and the mother having the children on the weekends.

Evidence in First Hearing

[8] For convenience, I will divide my summary of the evidence into two parts. The first will consist of the evidence in the original two-day hearing. The second will consist of the evidence taken in the subsequent one day hearing when I opened the matter again after an incident between the parties.

[9] The parties were in a common-law relationship for approximately 12 years. They are blessed with two children from that relationship, K.H and M.H. The parties separated on June 2, 2016.

[10] At the time of both hearings, the mother was employed as a nurse. She worked, and she continues to do so, in a nursing home in Pictou County, Nova

Scotia, approximately 30 to 45 minutes travel time from the family home in Antigonish.

[11] The mother obtained this position after pursuing her education as a licensed practical nurse and then as a registered nurse. To obtain her RN license, the mother moved to Antigonish to study at St. Francis Xavier University. This occurred prior to commencing a common-law relationship with the father and that he joined her in Antigonish approximately 18 months after she moved.

[12] After arriving in Antigonish the father worked as a kitchen supervisor at a local restaurant, having previously worked at a restaurant in Halifax. Unfortunately, he was laid off but eventually found work with a local forestry company. He worked with the company for seven years as a cutter and two years as a foreman. This work was seasonal and he was typically laid off during the winter including the winter of 2013.

[13] The mother's evidence was that she was primarily responsible for the care of the children throughout their lives. She acknowledges that she worked full time, as did the father on a seasonal basis. She says that the father was present when he was not working but contributed little to the household chores or to the care of the children. She says that the father also contributed minimally to the finances of the family.

[14] Unsurprisingly, the father disagrees and says that he was an involved parent. Certainly, there were times during each year that the father was more available than the mother because of his seasonal work and each of them took time away from their employment, the father taking paternity leave and the mother maternity leave at different times.

[15] In her evidence the mother asserts that the father was distracted and less involved than she was in the care of the children. She says, for example, that when she was at home on maternity leave and the father was laid off from December 2008 until May 2009, he focused his energies on working out a local gym while she took care of the children.

[16] The mother also said that after the birth of K.H she took him with her to her mother's home for a few weeks to recover from her C-section. The father stayed at home. She said that the maternal grandmother also looked after K.H while the mother completed her third year in her nursing program. K.H stayed with his

grandmother though the week and the mother went to her home to be with K.H. on the weekends. She said the father did not join her.

[17] Things changed dramatically for the family beginning in 2013. At that time, father was still working for the forestry company and had been laid off for the winter of 2013. The mother said that the father was called by his employer in January 2014 to advise them that someone else was taking over his foreman job but that he could return as a cutter. She said he declined the offer.

[18] The father said he was experiencing extreme back pain and was very sick during 2013.

[19] In August 2014, the father was diagnosed with third stage testicular cancer which metastasized to his internal organs. He immediately began an aggressive treatment that included several rounds of chemotherapy and two surgeries in November 2014 and May 2015. He was informed following the second surgery that he had 15 percent function in one kidney and 85 percent function in the other.

[20] There is common ground between the parties that this was not only a life-threatening circumstance for the father but an extreme stressor on the family. The father was not working during his treatments and recuperation. It was therefore left to the mother to bear the burden of providing for the family, both financially and in terms of parenting. For significant periods of time, the parties agree that the father was simply unable to do much in the way of parenting due to his illness, treatment and recovery.

[21] The father is in receipt of Canada Pension Plan disability benefits and has an income of \$1400 per month. Some of this income is for the children.

[22] As of the date of the first hearing in the matter, the father maintained that he cannot work due to neuropathy, lethargy and back pain. His evidence in cross-examination was that he had not yet considered part-time work but was instead focused on his recovery. He felt he was not strong enough to take part in any part-time employment and did not even consider the matter.

[23] Despite the neuropathy, discomfort in his feet and legs and his lethargy, the father maintained that could care for the children full time in his home.

[24] He did confirm that he sometimes struggles with his memory and in tracking dates and times. To compensate he uses lists, plans his days carefully and is very

intentional about time management. He acknowledged that the children's mother has played an active role in reminding them of dates and times, but he claims to have other strategies including the use of calendars, lists and notes to keep him focused and on track.

[25] The mother described not only caring for the children, but also for the father during his recovery. She says, for example, that her mother travelled from Ottawa to care for the children so she could focus on the father's well-being. The grandmother was there for an extended period. She even took the children with her to Ottawa for approximately six weeks during the father's recovery from his last surgery in May 2015.

[26] The father said that despite this tremendous challenge, he can care for the children when they are home with him. It is no small irony that the nature of his illness and ongoing health challenges result in him being more available for the children than when he was working.

[27] The mother provided her evidence of concerns regarding the father's ability to care for the children given his current medical circumstance. She did not contest his description of neuropathy, lethargy and challenges around memory. In fact, she said these are part of what causes a concern regarding the father's ability to parent the children on a full-time basis.

[28] The mother also expressed concern regarding the father's kidney function and how it may affect his general health and his ability to care for the children. The father acknowledged in cross-examination that it is crucial that he keep track of his blood pressure as it can significantly impact his kidney function. Yet he also testified that he does not have a blood pressure monitor at home and does not even check his pressure at a local drugstore. He demonstrated a poor understanding of his responsibility for monitoring of his kidney function through blood pressure checks.

[29] Regarding the father's health, a report letter dated September 13, 2016 from Dr. Lori Wood, the father's oncologist was entered as evidence. She described ongoing hypertension due to renal injury and that the father will always be on antihypertensive medication. She described his renal dysfunction as well as the residual effects of chemotherapy including neuropathy in his toes and fingers as well as fatigue. As she says in part, "one of the biggest issues is the easy fatigability and his lack of stamina with significant physical exertion."

[30] She went on to say:

In terms of his ongoing symptoms of fatigue and neuropathy, these have been present and stable for about a year and are unlikely to get better or get worse. Obviously, fatigue is a subjective symptom and, thus, one cannot quantify it. It will fluctuate over time and can be influenced by such things as exercise, other unrelated illnesses, times of the year, etc. At today's assessment, his energy level seemed better than normal and there were no new concerning findings.

[31] While the doctor does offer an opinion respecting the father's ability to parent, I will not consider that opinion. Though she is well qualified to provide all the information and other opinions, she was not qualified to provide opinion evidence respecting parental capacity.

[32] The mother also pointed to the history of parenting and says that she was primarily responsible for the care of children. She says the father was less interested at various times and distracted by work, working out at the gym and showed less than complete commitment to parenting when they were together.

[33] The mother's evidence was that the way they discussed the separation with the children is indicative of their parenting styles and roles in the past. She said that they agreed to meet with the children and discussed what would be told to them in advance. When the meeting took place, the mother explained things to the children, answered their questions and the father simply encouraged the children to listen to their mother. It was her evidence that this reflects their parenting throughout their relationship. The father says that this is not indicative of his parenting style and he sets out his involvement, both before and after the separation, as a parent.

[34] The mother also points to concerns regarding the father's judgment. In the first hearing an issue arose regarding the purchase of a motorcycle. It was common ground between the parties that the father always wished to own a motorcycle.

[35] The mother said that during the period of the father's illness and recovery the family was under extreme financial strain. She said her sister set up a Go Fund Me page which raised approximately \$10,000 to assist the family. The father's family held a benefit dance which raised an additional \$1,600 for the family. She said that these funds went to the father and were never used to pay for household expenses or family expenses, except for a few hundred dollars.

[36] The mother said that the father has two safes in the home and she does not know the contents. She suspects that he held significant cash in those safes over time. Under cross-examination the father was very evasive respecting the amounts of money he held in those safes.

[37] The mother's evidence was that on June 2, 2017 she discovered that the father had purchased a brand-new Kawasaki motorcycle which was stored in their shed. Normally she did not go to the shed and it is a place the father frequented on his own. She said that it is usually kept locked and that he has the only key.

[38] The mother said that when she confronted the father about the purchase of the motorcycle he initially said he had it "for a while" but later admitted he had bought it prior to his surgery in May 2015. The mother was unable to say where the money came from for the purchase. The father testified that he always wanted a motorcycle and because he didn't know if he was going to live or die he decided to purchase one. The evidence is that the purchase price was approximately \$5,500.

[39] The father's evidence was that he purchased a motorcycle at an extremely stressful time in his life. He described in some detail his diagnosis, surgeries, chemotherapy and subsequent recovery. He explained that he was weak, thin and short tempered. He lost his employment, was not able to attend school and his career prospects were damaged. He was riddled with cancer and suffering through extreme physical pain. He was struggling with emotional pain by not being able to provide for his family and was preparing for his own death.

[40] All of this was the context in which he made the decision to buy the motorcycle. He said that he had saved money for five years. He said that he discussed it with the mother in advance (which she denied), the bike was purchased and delivered to the home, put in the shed and that the mother was present at home during all of that (which she again denied).

[41] The mother said that when she discovered the motorcycle and had a conversation with the father she realized that even the serious health crisis would not change the father's priority. Her concern is that he places himself ahead of the children. To her, the purchase of motorcycle is a perfect example. When the father found himself facing death, he chose to purchase an expensive item for himself rather than ease the financial strain on his family.

[42] The father said that he has no concerns about the mother's ability to care for the children. He did express concern about the mother's ability to communicate and co-operate in co-parenting the children.

[43] As noted earlier, the mother's plan is to relocate with the children to Pictou County from Antigonish County and provide the father with access. She said that she and the father had discussed such a move over several years and that the major reason for such relocation would be to reduce the amount of travel time of the mother, particularly in the winter, to and from work. The father's illness put those plans on hold.

[44] The mother works in a nursing home. Her employment is permanent. She has four regular shifts every two weeks and additional shifts when available. She says that she has the flexibility to choose shifts around the children's schedules. It was the mother's evidence that she does take extra shifts when possible and hopes to have 3 to 4 extra shifts per week to pay her various expenses.

[45] Now that she lives in Westville, the mother's travel time is significantly reduced as the distance to and from work is a few kilometers instead of the 56 kilometers one way when she commuted from Antigonish. Further, I addressed with counsel that I could take judicial notice, which I do so, that the highway between Antigonish County and Pictou County is a two-lane road. During the winter, road conditions can be quite hazardous, increasing travel time significantly. There is also significant risk on that road from other motorists and deer and there is a long history of accidents occurring along that stretch of highway.

[46] The mother said that she had secured an apartment in Westville, had planned for school and extracurricular activities for the children. She had done some preparation with the children for the possibility of move with her to Westville.

[47] The mother said she has a support system in Pictou County. Her evidence was that for the times that she requires child care, she made arrangements for Shelby Mahoney to provide primary babysitting for the children when the mother is working.

[48] Ms. Mahoney's evidence was that she is 21 years old and lives with her parents. She said that she has cared for children for several years, including babysitting as a teenager.

[49] At the time she swore her affidavit in September 2016, she had known the mother for approximately one month. She had provided overnight babysitting. She came to the mother's home, the children were asleep and she stayed with them overnight. She said she checked in on them a few times a night. She woke around seven to get them breakfast and ready for the day. She says she is available at other times as well.

[50] Under cross-examination, Ms. Mahoney confirmed she pays rent to her parents in the amount of \$220 per month. She says her current child care income of \$80 per week is adequate as her parents help her financially.

[51] Ms. Mahoney said she is currently looking for other work. She is also considering returning for further education at the community college. She has an existing student loan on which she has made no payments and must begin paying shortly. Again, she maintained her parents will assist her.

[52] Evidence was also given by Krista Davis. She is a coworker of the mother. Her evidence was that she can and will aid in child care for the mother. She has known the mother for approximately ten years and works some shifts with her and other shifts apart from her.

[53] Ms. Davis said that the mother and children were temporarily living in an apartment her family owns until she moved to a newly purchased mini home. She lives close to the mother and will act as a backup child care provider in the event Ms. Mahoney is unavailable. She said she will not charge for the care she provides.

[54] She also provided evidence of her observations of the children coming from and going to access with their father. She described the children as high strung and anxious, as well as withdrawn when they return from access and that it takes a few days for them to settle. She describes them as "clingy" with the mother and there is bickering between them on their return from the father's though they do settle.

[55] It is her evidence that the children were sullen, angry, anxious and withdrawn before going to their father's home for access.

[56] She speaks very favorably of the mother's parenting and that the children are well supported by her.

[57] In cross-examination, Ms. Davis confirmed that she had never met the father. She also agreed that the description of the children being high strung, anxious and withdrawn had changed over time and since a shared parenting arrangement had been ordered on an interim basis.

[58] The father described a very active life with the children when they are in his care. He described taking the children, on Saturdays, to swimming lessons and to football games and soccer games. He said that he and the children are active and enjoy being outdoors, engaging in many activities and in the home watching movies, cooking, baking and sewing. He described the trips to the beach, fishing trips, camping and family reunions.

[59] It was his evidence that he did the cooking at home and taught the children how to participate. He described a very healthy and appropriate home life and community involvement of the children with neighbours, friends and family.

[60] Regarding his support network, the father identified his mother, an aunt and his grandfather. He acknowledged that all reside some distance away. He also acknowledged that his "go to person" would be the mother if his health or the well-being of the children were at issue.

[61] When asked about his attendance for parent-teacher meetings over the years, the father said that he did attend if he was not working. Despite this, in cross-examination the father confirmed that the first time he had met the children's teacher was at a "meet the teacher" event in September 2016. He maintained that prior to this he was either working or too ill to attend. Likewise, the father confirmed the first field trip he had attended with the children took place in June 2016.

[62] What is apparent through the evidence from both parties is that there have been struggles, particularly after the initial separation, in determining appropriate arrangements for the children. This included some refusal of access by the mother and significant disputes regarding exchange of the children's belongings and the sharing and division of the household contents.

[63] When asked in cross examination the reasons for her move, the mother's evidence was that her decision was centred on the children and the fact that she would be more available to spend time with them. She would be able to take the children to the bus in the morning and travel to work would be a short distance.

[64] It was the mother's evidence that, regardless of the outcome of this decision, she will not be returning to reside in Antigonish and that she will remain living in Westville and working in New Glasgow.

[65] It was her proposal that the father have the children with him every second weekend and extra time during the week and that he could attend their activities. They would share special occasions and vacation time.

[66] The mother's plan is to keep the children with their current physician and dentist in Antigonish and take them to and from any appointments.

[67] The mother expresses concern regarding the multiple weapons that the father has in his possession. The father maintains they are all removed from the home and stored elsewhere.

[68] Confirm interim hearing of July 5, 2016.

[69] The father expected to be able to care for the children when they are not in school and for so long as he remains unable to work. His evidence was that he has assistance for the rare occasions when he is unable to provide such care. Those care providers include his grandfather, whom the children know well, and also the father's cousin and a family friend.

[70] C.H. also provided evidence. He is the maternal great-grandfather referred to as a support for the father. He described the father as very kind and that he has observed the father's parenting of the children in a very positive light.

[71] His evidence of his observations of the family during the father's battle with cancer are consistent with the evidence provided by the parents. That included his observations that the family suffered financially.

[72] He confirmed that, though he is not young and lives 180 kilometers away from the father, he is retired and able to provide support for the father as required. He knows the children well and was even at the hospital when the children were born. He described each child and their personality and characteristics.

[73] The grandfather expressed no concern regarding the parenting of the mother. He did provide evidence that the father parented the children appropriately, including his use of discipline, though he said that this was rarely required. He said the children are happy and comfortable in their father's care.

[74] The paternal grandmother, Heather Coles, also gave evidence in the matter. She testified as to her observations of the father and his parenting of the children prior to and after the separation. She said that he is a loving and caring father who does well with the children. She described the many activities in which they were involved. She offered her support to her son and his parenting.

[75] She also confirms that she has no concerns about the mother's parenting.

Evidence in The Second Hearing

[76] After the completion of the first two-day hearing, I reserved my decision. Counsel then contacted me, by written correspondence, indicating that an incident had occurred between the parties and that further evidence may need to be brought forward. By telephone pretrial conference, on October 17, 2016, I discussed the matter with counsel and decided to reopen the matter for further evidence. A hearing took place on November 25, 2016 with further affidavit evidence in cross-examination of the parties. I also issued production orders for the Department of Community Services records and police records arising from the incident.

[77] The evidence concerned an incident which occurred between the parties in the presence of the children on October 9, 2016 as well as some preceding matters which led up to this incident.

[78] A series of unfortunate and regrettable events began on September 25, 2016 when the mother and maternal grandmother arrived at a local restaurant in New Glasgow to exchange the children with the father for access. The father said that the mother came to the driver's side of his vehicle with something in a bag and when he refused to take it she opened the back door of the vehicle and threw it in.

[79] The mother said that the bag contained the children's bike helmets and some clothing for the children. She said that the helmets were going back and forth between homes for some time. She tried to explain this to the father but he didn't want to listen and she said she placed the bag between the children in the back seat.

[80] The next incident occurred on October 2, 2016. On that occasion the parties met in Westville for the exchange. The mother said a few days prior to the exchange she sent the father a text regarding the pickup and drop-off, suggesting a neutral location, but the father refused and went to a different local restaurant. In the confusion, the father went to the local police station in New Glasgow and an

officer spoke with the mother, who agreed to meet the father at the Westville police station for the exchange.

[81] The mother said that when the father arrived with his girlfriend he began recording the mother with his phone and did not leave his vehicle. The mother said she assisted the children in getting into the father's vehicle.

[82] The mother then said that she had found a DVD inside of a DVD player the father had dropped off at her home a week or so earlier. She tried to hand the DVD to the father but he would not accept it. She said she then tossed it into the vehicle but not in view of the children. The DVD had a pornographic image on the DVD or case and the father denied it was his.

[83] The father's evidence was that there was confusion regarding the exchange location on October 2, 2016, but ultimately they agreed to meet at the Westville Police Department. He described the mother's behaviour, as well as that of her sister who accompanied her, as aggressive and that the mother leaned into his vehicle. He felt threatened by their aggressive behaviour, asked them to stop and told them that he would record them with the camera on his phone.

[84] He said that the mother left his vehicle, went to hers and returned with the package. It contained a DVD that she threw into his vehicle and he realized it was pornography. He said it was not his. The children were in the backseat of his vehicle at the time.

[85] This series of events all led up to the incident on October 9, 2016. The parties were to meet at the Westville Police Department parking lot for the exchange of the children. The father, his girlfriend and her two children, ages 7 and 9, were in the vehicle. On the way, the father received a text from the mother in which she told him she would have the children for Halloween. It was not a request or a suggestion, but a statement of fact.

[86] The father arrived at the police department first and checked the office door which was locked. It was closed as it was after hours on a Sunday. He had hoped that someone would monitor the exchange of the children.

[87] The father says the mother arrived in the company of the maternal grandmother with the children in the vehicle. The maternal grandmother was driving and parked the vehicle so close to the father's girlfriend's vehicle that it

was difficult to open the doors of the two vehicles. He says this raised his concern level and he began to prepare to record the exchange again with this phone.

[88] He says the mother got out of the passenger side of the maternal grandmother's vehicle. The father says the mother held her arms around both children, holding them back from going to his vehicle.

[89] He says that the mother swore at him and he put his phone back in his pocket. He said the maternal grandmother then exited the vehicle and swore at him as well. The father says he walked backwards away from the mother and maternal grandmother. He told maternal grandmother to watch her language, to get back in the car and mind her own business. He says he did not yell, but his voice was raised and he did not use profanity.

[90] The father said he then took his phone out of his pocket to record the mother, believing her behaviour to be aggressive and inappropriate and he said the mother ripped the phone from his hand and put it behind her. When he asked for it to be returned, she refused. The father said the mother continued to swear at him and they argued about whether he was entitled to record anything during the exchange.

[91] The father denied any physical contact with the mother to retrieve the phone. He says that the mother went to his vehicle and began yelling very negative and profane comments about him at his girlfriend. He said the maternal grandmother held the children back and would not allow them to go with him. Ultimately, the children were released, he put his arms around them and walked away from the vehicles. He denies ever making contact with the maternal grandmother or the mother.

[92] He said at this point he was hit in the back of the head by his right ear either by a fist or the heel of a hand. He believed it was the maternal grandmother who struck him. He stumbled forward, knocking into M.H. She fell to the ground, he scooped her up, put her over his left shoulder and continued to walk away.

[93] He says the mother then came forward and struck him in the right shoulder, collarbone area and upper arm twice. She began to pull M.H. from him. He released the child and at that time the mother grabbed him on his arm which caused a bruise.

[94] He took K.H. to the steps of a nearby monument and asked him to stay there while he got M.H. He says the mother and maternal grandmother were at the driver's side of his girlfriend's vehicle and were yelling at her. He was concerned for his partner's safety. He went to the vehicle, asked her for her phone and called 911.

[95] He spoke to the 911 operator while, he said, the mother and maternal grandmother continued to advance on him and were yelling at him.

[96] At that time an officer came out of the Westville police detachment and the father said he expressed a wish to press charges against the mother and maternal grandmother. They were taken into the police detachment and video statements were taken from the mother and maternal grandmother. The father said he was asked if he wanted to call a lawyer and he was detained. He offered to provide a statement and was told to come back to the next day to give such statement. In the end, the father was charged with assault.

[97] After this incident the Department of Community Services investigated the matter and spoke to the father. When the father was charged, a "no contact" order was put in place prohibiting him from having any contact with the mother.

[98] The mother's evidence was that the parties did agree to meet at the Westville police detachment and that her mother and the children were with her. The maternal grandmother was driving.

[99] The mother said that when they pulled into the parking he father jumped out of his vehicle and started to record the exchange on his phone. She said she asked him what he was doing, given that her lawyer had asked his lawyer to tell him to stop doing this. She believed that such behaviour created more tension for the children.

[100] She says that when he refused to stop recording she did, in frustration, take the phone from him. Her mother got out of the vehicle and came over to see what was happening. She said that the father said some insulting things to the maternal grandmother in the presence of the children.

[101] The mother said she demanded the father stop insulting her mother. She said the father was about ten feet away from her and he charged toward her and "body bumped" her and did the same to her mother. She said the children were beside him when this occurred. She was afraid what he might do next and took the

children by the hand, walking to the front door of the police station for help. The doors were locked.

[102] She then walked to the father's partner's vehicle and gave her the father's cell phone. When the mother turned around she said that she saw M.H. over the father's shoulder with her arms outstretched towards her, crying for help. When M.H. called for her grandmother's help, the maternal grandmother reached up and took M.H. from the father and took her back to her vehicle.

[103] She saw the father walk K.H. to the corner of Drummond Road, leaving him there and returning to the police station parking lot. He asked his girlfriend for the phone. The father said he was calling the police.

[104] The mother says she retrieved K.H., consoled him and brought him back to the parking lot. She says he was visibly upset and crying.

[105] By then a police officer had come out of the detachment and was talking with the father. He motioned for all of them to go inside.

[106] The mother and maternal grandmother gave written and video statements. M.H. was complaining about pain in her back and side and the mother observed that there were several bruises on her right side. The father was charged with assault on the mother and maternal grandmother.

[107] The mother denied that she had assaulted the father or that she pulled M.H. from him. She says the maternal grandmother took M.H. from the father. She says she was not near the father, did not hit him and was standing next to the father's girlfriend's vehicle when M.H. was taken by the maternal grandmother.

[108] B.F., girlfriend of the father, gave evidence that she and her two children, ages six and nine, accompanied the father to the exchange at the Westville police detachment. She said that the father received a text about Halloween along the way and that he was concerned about what he might encounter at the exchange.

[109] She confirmed the father's evidence that he went to the door of the detachment and when the maternal grandmother came and parked, she was quite close to her vehicle making it difficult for the children to exit. She noted there were many empty parking spaces in the lot in which the maternal grandmother could park.

[110] Her testimony was that she could see the father recording the exchange with his phone outside of her vehicle. Her windows were up and she was trying to distract her own children from what was happening. She did testify that it was clear the exchange was not going smoothly. It appeared there was a disagreement between the parents.

[111] She testified that she could see the mother holding the children back and not letting them come to her vehicle. She also testified she could hear the mother being verbally abusive to the father.

[112] B.F. rolled down her window and heard the father tell the maternal grandmother to go back to Ontario, that his voice was raised but he did not yell. She heard the mother yelling obscenities at the father. She said she did not see everything that happened after this as she was trying to distract her children.

[113] B.F. did testify that she could see the mother take the phone from the father's hand and says there was no other physical contact.

[114] She said the mother came to her window making disparaging comments about the father, passed his phone to her and repeatedly denigrated the father to B.F.

[115] B.F. said that she tried to get everyone to calm down. The father asked her to drive to the other side of the lot to pick up the children and the mother said that she should not move. She said the maternal grandmother also came to the window and used foul language about the father.

[116] B.F. says she saw the father walking with the children and it appeared the father stumbled. She saw M.H. on the ground and the father reaching down to pick her up. She observed that the mother turned to run across the parking lot with her fists towards the father yelling vulgarities at him. She says she observed the mother striking the father more than once and that the mother pulled M.H. from his shoulder.

[117] B.F. maintained that the mother and maternal grandmother were the aggressors, she did not hear the father use any profanity and did not witness any "chest bump" against the mother or maternal grandmother. She provided a statement to the police at that time.

[118] The maternal grandmother, B.L., give evidence about this incident. She said that she drove the mother and the children to the Westville police detachment and that she pulled in beside B.F.'s vehicle. She did park too close but that this was unintentional.

[119] She said that the father was out of the vehicle and recording their arrival with his phone. She said the recording began as he exited B.F.'s vehicle.

[120] She says the father had a hateful and angry look on his face when the mother took the children to the back of the vehicle to say goodbye.

[121] After a few minutes, B.L. got out of her vehicle and went to the back of the vehicles. When she arrived, she saw that the mother had the father's phone. She said that the mother was telling the father he did not have to be like this and the recording made everyone uncomfortable.

[122] She says that when the father saw her, his body language and face changed, he shouted at her to get back in the vehicle, he extended an arm and pointed his finger in the direction of her vehicle asking why she didn't go back to Ontario and that nobody wanted her here. She says the father was about ten feet away and began to taunt her with verbal insults and she replied with a vulgarity.

[123] B.L.'s evidence was that she regretted her statement and she turned to see the children. She heard her daughter yell and when she turned back she saw the father charging towards the mother and herself. She says he used his body to bump the mother and her.

[124] B.L., the mother and the children went to the police station door which was locked so they turned to go back. She saw her daughter go to B.F.'s vehicle window and she followed. She then heard M.H. crying out to her for help, when she turned, she observed the father had M.H. over his right shoulder. M.H. was crying and calling for her with her arms outstretched and was hysterical.

[125] B.L. went to the father's right side, reached up and managed to take M.H. from him. M.H. asked to be put in the car and B.L. placed her in her vehicle. After a few minutes M.H. calmed and they got out of the vehicle. She saw K.A. was by the monument with the father and he was motioning for B.F. to bring her vehicle closer. The father left K.H. by the monument to retrieve the phone from B.F. and he called the police. She says the mother went to K.H. and they all went to the police station where an officer directed them inside.

[126] B.L. flatly denies assaulting the father and alleges the father assaulted her and her daughter. She provided a written and videotaped statement to the police that date.

[127] The records of the Department of Community Services concerning the parties and the children were entered in to evidence by consent. In those records are recordings of interviews of the two children conducted by social workers with the Department. One such interview it was of M.H. and occurred in the father's home on October 10, 2016.

[128] In part, M.H. told the worker that she fell down on that day could not say if it was a result of her father pushing her. She went on to say that her maternal grandmother or mother hit her father over the head.

[129] An interview of K.H. took place at the agency's office on October 14, 2016. In that interview, conducted by a social worker, K.H. said that the maternal grandmother "smacked" his father in the back of his head with an open hand. He says that after being struck, the father fell into M.H. and knocked her over. He said the father immediately picked her up and then call the RCMP.

[130] K.H. told the worker he knew about the DVD the mother tossed in the father's car. He described it as "porn". He said he discovered it in the DVD player and gave it to his mother. He did not know which of his parents owned the DVD.

[131] In an interview of M.H. at the agency office on the same day, she told the worker her maternal grandmother was holding her by the shoulders at one point. Her father attempted to grab her and K.H. by the hand and that the maternal grandmother elbowed her father twice.

[132] M.H. went on to say that her father tried to get her and someone slapped him on the head. She said that her father was carrying her and that he almost fell. She said she was not dropped and she was not hurt. She said that her father kept walking with her while telling the maternal grandmother to go to the car. She said she did not feel hurt and any point during this fight among the adults. Later her back was sore but she didn't know why. She had bruises on her back and her hips but wasn't sure how they got there.

[133] M.H. describing "worried" and "scared" during this fight. She explained that she was crying because "they were fighting pretty bad".

Legal Framework

Legislation

[134] In order to properly assess the evidence in this matter, it is important to review the applicable law, including the applicable legislation and case law.

Maintenance and Custody Act

[135] The governing legislation in this circumstance is the Maintenance and Custody Act 1989 RSNS c.160 as amended. The beginning point in any analysis under that Act is Section 18 (5) which directs that:

In any proceeding under this act concerning the 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.

[136] Section 18 (8) further directs that:

In making an order concerning the 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.

[137] In determining what I should consider in assessing what is in the children's best interests, Section 18 (6) sets out some of the relevant considerations to be taken into account, though this list is not exhaustive. The relevant considerations under this subsection include the following:

Powers of court

...

18 (2) The court may, on the application of a parent ... make an order that a child shall be in or under the care and custody of the parent

(2A) The court may, on the application of a parent, ... make an order respecting access and visiting privileges of a parent....

...

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

- (a) provided by the *Guardianship Act*; or
- (b) ordered by a court of competent jurisdiction.

...

(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 ...;

(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;

...

(g) the nature, strength and stability of the relationship between the child and each parent ...;

(h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;

(i) the ability of each parent... to communicate and co-operate on issues affecting the child; and

(j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on

(i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

(ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

...

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

(a) the nature of the family violence, abuse or intimidation;

(b) how recently the family violence, abuse or intimidation occurred;

(c) the frequency of the family violence, abuse or intimidation;

(d) the harm caused to the child by the family violence, abuse or intimidation;

- (e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and
- (f) all other matters the court considers relevant.

[138] There are other factors listed in this subsection, which reference cultural, linguistic, religious and spiritual upbringing, heritage and the views and preferences of the child, all of which I find inapplicable in this circumstance and I will not consider them.

Case Law

[139] The analysis of the children’s best interests, however, 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* supra 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:

16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction ...;
2. Physical environment;
3. Discipline;
4. Role model;
- ...
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;
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.

Mobility

[140] In this case, there is also the specific issue of mobility, that is, the mother's request to relocate the children from Antigonish to Westville that requires consideration of the case law applicable to such matters. The leading decision on mobility is the Supreme Court of Canada decision in *Gordon v. Goertz*, [1996] 2

SCR 27, 1996 CanLII 191 (SCC). In paragraph 49 of that decision the court sets out the factors which must be considered when the parent has applied to relocate a child. Many of these factors, which I set out below, are very similar or identical to the provisions of Section 18 (6) of the Act though there are some that are unique to a mobility decision such as this.

[141] The Supreme Court said at paragraph 49 the following:

The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, 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.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
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.
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;
 - (d) the views of the child;

(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.

8. 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 interest of the child in all the circumstances, old as well as new?

Preliminary Issues

[142] It is helpful to also set out some preliminary issues of importance in the analysis of this matter. These issues clarify the approach I must take to the various factors I must consider in this case.

[143] The first preliminary issue is that *Gordon v Goertz* supra presumed that there is an existing order of custody in place and, as set out in the first factor listed at paragraph 14 of that decision, I must consider whether there has been a material change in circumstances. In this case there is no existing order and I find, therefore, that I must conduct the analysis based solely on the test of the children's best interests.

[144] The second preliminary issue is that this is an original application respecting custody and I must 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.

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

[146] 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.

[147] 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?"

[148] 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.

[149] In the present case, this is a circumstance of a recent separation. 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.

[150] That 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, because the separation was recent and only an interim order was granted.

[151] The third preliminary issue is the direction in *Gordon v Goertz* that I should consider the custodial parent's reasons for moving only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child. On first reading, this appears to restrict my consideration of any evidence brought forward by the mother as to why she is moving as a factor in considering the child's best interests. The Supreme Court, however, did leave the door open for me to consider such reasons in exceptional cases. I find that such exceptional cases can include those in which a parent proposes a move to reduce risk to the parent, and possibly the child. This can include risk of injury or death from travel.

[152] The fourth preliminary issue is that the *Gordon v Goertz* decision contemplates two options available to the court on the unique circumstances of that

decision. The court had the option of permitting the relocation of the child with the mother to Australia or, given that the mother was already residing in Australia and would remain no matter what, the court had the second option of a change in custody and primary care with the child remaining with the father in Canada.

[153] Though there is usually a third option available to this court of ordering the children to remain in Antigonish in the care of their mother, that option is not available in this matter based on the position of the mother that she will remain in Westville in any event. Thus, on the facts of this case, I am left with two options: First, I could permit the children to move with their mother to Westville; Second I could refuse to permit the children to move and order that they remain in Antigonish in the primary care of their father. Therefore, it will be these two options that I will consider in my decision.

Credibility

[154] In assessing the evidence of the parties in this matter, credibility comes into play. The leading decision respecting assessment of credibility in civil matters is that of *Baker-Warren v. Denault* 2009 NSSC 5 in which Justice Forgeron provided the following helpful comments:

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*).

...

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

Analysis and Decision

[156] As noted earlier, I must first determine the appropriate custodial arrangements for the children before determining whether they should be permitted to relocate with the mother to Westville. In doing so, I consider several factors, beginning with the history of the parenting of the children.

[157] I find that the evidence is clear that, from the birth of each child until the illness of the father, the mother had provided the bulk of the care for the children. I find that even during the period of her education, she spent time with K.H. in her mother's home, arranged her classes and clinics to maximize her time with the children. I accept her evidence that she provided the bulk of the care for each child.

[158] I do accept that the father was involved as a parent and contributed to their care. For example, he took a paternity leave and when he was laid off in the winter he had time to care for the children along with the mother. He certainly was involved with outdoor activities and was, no doubt, in support of the children and their mother throughout this time. But, I find that his evidence is not persuasive on a balance of probabilities that he provided the bulk of the care for the children. I do find that the mother's evidence is consistent with respect to the father's parenting and behaviours both during and after the relationship ended.

[159] I accept the evidence of the mother that the father was, at times, distracted with his own activities, including working out at the gym and focusing on his own interests. This is not to suggest the father did any of this to the exclusion of his children but that on balance, I was persuaded on the evidence that the mother was more focused than the father on the needs of the children on a daily basis.

[160] In part, this finding is influenced by the behaviours of the parents after the father fell ill. Through no fault of his own, the father was unable to provide much parenting throughout his illness and through much of his recovery. Neither party disputes this.

[161] The inevitable result of this is that the mother had, out of necessity, to provide the bulk of the parenting for the children, support for the father, as well as providing for all the financial needs of the family once the father's employment insurance expired and he had no income to provide. To her credit, she was able to manage all of this, work full time hours and ensure that the family remained intact and was provided for. Again, this is not to criticize the father as he had to deal with a life-threatening disease, surgery, chemotherapy and recovery.

[162] I do find, however, that the father's focus, even during this time when he was facing a real prospect of death, was more on himself than his family. Some may argue that this is natural and to be expected but I find that it is indicative of the father who, though he loves his children, often abdicated his parenting role to focus on his own wants.

[163] Specifically, I find that the father did not share all the proceeds of the fundraising done during his illness with his family. I accept the evidence of the mother that she only received minimal amounts from the father, to whom all the funds were paid. He has not accounted, in his evidence, for what happened to those funds and provided no evidence that he used that money to support the family at a time of extreme financial crisis.

[164] Moreover, I accept the evidence of the mother that the father purchased a motorcycle for \$5500 without her knowledge or consent. Wherever he obtained the funds, either through years of savings or from the fundraising campaigns for the family, I find that this, more than any other fact in this case, demonstrates that the father, at the time of maximum crisis and financial strain, chose to focus on himself and not his children. I do not accept his evidence that he discussed this purchase with the mother and that she was witness to its delivery. This is entirely inconsistent with the fact that the family was in financial crisis at the time and that the mother was responsible for providing for the needs of the family. I simply do not accept that the mother would have condoned this purchase as described.

[165] I have also considered the evidence of the incident on October 9 and the two preceding incidents between the parties. As I stated at the completion of the evidence in that second hearing, neither parent should take any solace in their behaviour throughout those incidents.

[166] All three of these incidents provide clear evidence that the parties have significant challenges with communication and cooperation in co-parenting. The fact that they could not even agree on the location for exchange of the children and that ultimately they had to meet at a police station indicates to me that, at least up to that point, they were lost in their own emotions and were not able to fully appreciate what was in the children's best interests.

[167] The behaviours of the mother, for example, in texting about Halloween and throwing the DVD of pornographic material into the car at the father while the children were present are evidence that she, from time to time, cannot appropriately appreciate what is in the best interests of children. Her behaviour created unnecessary stress and confrontation in front of the children.

[168] Likewise, the behaviour of the father in recording the access exchanges was ill-considered and not focused on the best interests of the children. While there may be circumstances where such recordings are appropriate, I find that neither of these incidents fall into that category. Where there is dispute about when the father began recording, I accept the evidence of the mother as more credible. It is my view that, because of the continuing escalation between the parties regarding access, communication and parenting, each was acting in a way that was consciously or unconsciously intended to vex the other parent.

[169] Further, I find that on the balance of probabilities there was extremely poor behaviour and violence carried out by both parties on October 9, 2016. I find, on the civil standard, that the father did indeed "belly bump" the maternal mother and the grandmother and was verbally abusive toward the maternal grandmother. Further, I find that the mother and maternal grandmother were physically violent toward the father and struck him. Likewise, they were verbally abusive to both the father and to the father's girlfriend. This is particularly troubling given that the children of the father's girlfriend were in the vehicle and were innocent bystanders to all of this.

[170] I do not find it necessary to conduct a detailed review of each allegation made by a party or witness on that date. I find it sufficient, on review of the totality of the evidence, to conclude that each of the parents engaged in family violence on that occasion as well as abuse and intimidation of the other on that date and on the two preceding dates by their behaviours.

[171] In considering these incidents, I am mindful of the comments made by the children respecting that day, and while this evidence is clearly hearsay, I am prepared to admit it on the basis that it was obtained in interviews with qualified social workers in the employ of the Minister of Community Services in the course of a child welfare investigation. I find that this satisfies the requirements of necessity and reliability regarding its admissibility as evidence in this matter.

[172] Each of the children described their own experiences, including the effects it had on them. I find that both parents were responsible for the impact on the children. I further find that the impact on the children predates the October 9 incident in that each parent is responsible for causing stress and some level of emotional harm to their children.

[173] That said, the evidence is clear that when each parent has the children, they can care for the children for periods of time. It is only when the family violence, abuse or intimidation rears its ugly head with confrontation between the parents that they lose sight of the needs of the children.

[174] Of course, the circumstances of these incidents leading up to October 9, 2016 do not represent the totality of the evidence which I must consider. I have also considered the ability of each parent to meet the children's needs going forward.

[175] The father and his father and the paternal grandmother raised no issues with her parenting. The father did, however, raise concerns about their communication and ability to co-parent as evidenced by the various confrontations between them. The evidence before me makes clear that the mother can meet the needs of the children if they are permitted to move to Westville to reside with her. When she has care of them, she has demonstrated an ability to meet their needs.

[176] On the other hand, I do have concerns respecting the father's ability to care for the children on a full-time basis. His oncologist identifies fatigue as an issue. In his own evidence, the father identified fatigue, neuropathy and memory challenges. Though I accept his evidence that he has done well to manage these various conditions, I remain concerned that he can provide parenting on a full-time basis to two busy children who are growing and who will become more challenging to parent over time.

[177] I am also concerned by the father's evidence that though he is aware of the danger of kidney failure, he has taken few steps to manage or monitor his blood pressure, a critical element in preventing further renal damage. I find that this illustrates the father's lack of appreciation and understanding of the long-term impact of his current condition and how it might impact his ability to care for the children.

[178] Further, the father's memory challenges, though managed, cause significant concern. If he has primary care of the children, he will be responsible for managing their health, education and general welfare. While I am always reluctant to suggest that someone with a disability, whether mental or physical, is incapable of caring for children on a full-time basis, I have such a concern here based, not only on his general health, fatigue, neuropathy and memory issues, but also on the evidence described earlier respecting his judgment concerning finances and the general well-being of the family

[179] I find, therefore, after review of all the evidence, that it is in the best interests of the children that the mother be identified as the custodial parent for them. Though she also has deficits respecting her insight into the effect some of her behaviors have on the children, she has evidenced an ability to put the children's interests ahead of her own.

[180] Given that finding, I must now consider the issue of mobility. In doing so, as noted earlier, I must conduct a blended analysis of the children's best

interests. In doing so, I am of mindful of the fact that the proposed relocation of the children will separate them from their school, friends and local community. Most importantly, they will move from their family home and from the care of their father into the care of their mother in Westville.

[181] Having said that, I also take into consideration the factors identified in determining custody, including the ability of each parent to provide for the children, the history of parenting, the physical and emotional circumstances of the parties as well as the history of their judgment and parenting.

[182] I am also mindful that the distances involved for access are between 30 and 45 minutes each way. I have already taken judicial notice of the conditions of such travel and I consider that whatever parenting arrangement I order, the children will be travelling along that highway.

[183] I also consider and find that this is an extraordinary circumstance in which the reasons for the mother's proposed move of the children from Antigonish to Pictou is appropriate to consider. Her position is clear. She has moved to Westville to minimize the risk to her of daily travel along a dangerous highway. The move would allow her to provide while reducing the risk to her in travel. I find this to be relevant and I have considered it.

[184] I have also considered that neither parent has what could be described as a robust support system in either community. The father does have family but, for example, the paternal grandfather lives 180 km away. In fact, none of his immediate family resides in the community, though I do accept that they will support him as best they can from a distance. His "go to" person is the mother who is working full time and lives in a community some distance away. I therefore find that there are concerns respecting the father's plan to have the children remain in Antigonish.

[185] Similarly, I have concerns about the mother's plan. She works shift work. Her proposed childcare provider presents challenges. I find that Ms. Mahoney is not a long-term solution for child care. She has plans to find other employment or return to school and has significant financial obligations currently and pending, with which she must deal. The income from babysitting is clearly inadequate and I would not expect her to be viable long-term.

[186] The mother's friend, Ms. Davis, I do accept as a reasonable backup childcare provider but she cannot address the on-going childcare issue.

[187] That said, the mother has arranged an appropriate residence for the children, has made at least interim arrangements for child care and has taken steps to address the appropriate issues, including the identification of a school, doctor and dentist. I am satisfied that, given the attention paid to the other elements of her plan for relocation and her history of care of the children, she will arrive at a suitable childcare solution, if required.

[188] I also find that it is not incumbent on any parent to provide a perfect plan for the care of their children. Single parents have challenges not faced by two-parent families, including challenges of childcare. To hold either parent to a standard of perfection is not appropriate or necessary. There is no doubt that the mother will face challenges but she has proven resilient in the past and I am confident she will address the issues as they arise.

[189] I am also mindful of the fact that, having found that the mother is the custodial parent, I should give great respect to her views. This does not create a presumption in her favour nor does it create a burden of proof that the father must meet. I have considered her views and have accorded them great respect in my analysis of what is in the best interests of the children.

[190] I am satisfied that whatever parenting arrangement is made, each parent should have regular parenting time. This is a challenge given the distance involved, but is one that, I find, is manageable. Unlike a relocation from Antigonish to Yarmouth, this proposed move would find the children within half hour to 45 minutes of each parent. I find that this would not put either parent's relationship with the children at risk.

[191] In the end, I am satisfied that it is in the best interests of the children that they be permitted to relocate from Antigonish to Westville to reside with their mother. In doing so, I have considered the disruption to the lives of the children and I believe the order that I grant will be able to satisfy those issues. No doubt they will have a period of adjustment to a new community, school and friends, but I am satisfied that the children are well loved by each parent and, if handled properly, they will be well supported during the transition and will thrive in their new environment. They will have a continuing relationship with their father and will gain the advantages of their mother's parenting and stability.

[192] I will grant an order of joint custody with primary care of the children with the mother. Each parent will have full access to all information and third-party service providers and records concerning the children and will keep each

other informed of all major matters concerning the education, health and general well-being of the children.

[193] The transition to the care of the mother will take place after the end of the current school year. Until then, the current parenting arrangement will continue. The change of primary residence will occur on the first weekend after the final day of school in 2017. The parents will discuss this with the children and will support one another and the children in this transition.

[194] Though I will not order it based on the limited financial means of the father, I strongly suggest the parties consider using Our Family Wizard as a means of scheduling and communication. I believe this will facilitate better co-parenting and would likely resolve or reduce many conflicts in the future.

[195] The father will have reasonable parenting time at reasonable times as agreed between the parties including, but not limited to, every second weekend from Friday after school until Sunday at 6 PM. He will also have a mid-week visit every second week after his weekend parenting time on Thursday from after school until 8 PM. The parties will share the responsibility of transporting the children for parenting time.

[196] During the school year, if there is no school on Friday or Monday of the father's parenting weekend, his parenting time shall be extended to include either or both days. As applicable, he shall pick up the children on Thursday morning at a time to be agreed between the parties and return the children to the mother on Monday evening at a time to be agreed between the parties.

[197] The father will be responsible for all transportation for his parenting time. To reduce conflict, when one parent picks up or drops off the children at the home of the other parent, they will remain in their respective vehicle or home and the children will exit the vehicle and walk to the door. Neither party will approach or attempt to communicate with the other during the exchange, except in circumstances of emergency.

[198] The father shall have the following special parenting times and during such times the access set out above will be suspended:

Christmas - The parents will share the school Christmas break such that one parent will have the children from the end of the last day of school until Christmas Day at 1 PM. The other parent will have the children from

Christmas Day at 1 PM until 6 PM on the day prior to the commencement of school. In odd-numbered years, the mother will have the children for the first part of the Christmas school break and the father for the second part. In even numbered years, the father will have the children for the first part of the Christmas school break and the mother for the second part.

Easter – For Easter weekend, one parent will have the children from the end of school on Thursday until 1 PM on Easter Sunday and the other parent will have the children from 1PM Easter Sunday until 6 PM on Easter Monday. In even numbered years the father will have the children from Thursday to Sunday and the mother from Sunday to Monday and in odd numbered years the mother will have the children from Thursday to Sunday and the father from Sunday to Monday.

Summer School Break – During the summer school break, each parent shall be entitled to up to two nonconsecutive weeks of block access time with the children for vacation. On or before May 1 each year, or on an alternate date as agreed between the parties, the parents shall exchange, in writing, their proposed summer vacation schedule. If there is no conflict in the dates proposed, those vacation dates will apply. If there is a conflict, the mother's proposed scheduled will take priority in even numbered years and the father will adjust his schedule and in odd-numbered years the father's proposed schedule will take priority and the mother will adjust her schedule.

Birthdays - There will be no special parenting time for either the children's or the parent's birthdays.

Mother's and Father's Day - The mother will have the children on Mother's Day from 9 AM to 5 PM. The father will have the children on Father's Day from 9 AM to 5 PM.

[199] The children shall be entitled to reasonable telephone (or Skype or FaceTime access if available) with each parent. Each parent will to support and encourage such contact on a reasonable basis.

[200] Each parent is prohibited from making any derogatory remarks about the other parent at any time when the children are in that parent's care. Each parent has a positive obligation, such that, if any other person is making derogatory comments about the other parent while the children are in that parent's care, that parent must immediately require the third party to cease such comments. If the

third party will not cease making such comments, the parent will either have the third-party removed from the vicinity of the children or remove the children from that vicinity.

[201] The primary means of communication between the parties shall be by email or text. Direct contact by phone or other similar means is permitted only in emergency circumstances. This shall continue until the parties otherwise agree.

[202] All communication between the parents shall be conducted in a civil, polite, businesslike and child focused manner.

Child Maintenance

[203] I must now consider whether child maintenance should be ordered. The uncontroverted evidence before me is that Mr. H. is in receipt of Canada Pension Plan disability benefits totaling \$1400 per month, some of which may be attributable to and paid on behalf of his children.

[204] I note the child maintenance guidelines permit the court discretion to order an amount less than would be payable under the guidelines. The mother takes the position that, given the travel costs of the father for access with the children and his limited income, she is not seeking child support. I am satisfied, in all of the circumstances, that the father should not be ordered to pay child support and none will be ordered at this time.

[205] The father is required to provide to the mother a full copy of his income tax return and any notices of assessment by June 1st of each year.

[206] The father must notify the mother immediately of any change to his income whatsoever including any change to his Canada Pension Plan Benefits, any other income that he receives or any income he may receive from employment in the future.

Costs

[207] Considering all the circumstances, there will be no costs ordered.

[208] Counsel for the mother will draw the order and provide it for review by counsel for the father. The order is to be provided to the court within two weeks.

If there is any dispute respecting the order, counsel will submit their respective drafts and I will settle the order.

Timothy G. Daley, JFC