

**FAMILY COURT OF NOVA SCOTIA**

**Citation:** *TY v. AK*, 2023 NSFC 4

**Date:** 20231106

**Docket:** SFTPSA-122232

**Registry:** Truro

Between:

TY

*Applicant*

-and-

AK

*Respondent*

**DECISION**

**Judge:** The Honourable Judge Timothy Daley

**Heard:** June 5, 2023

**Decision Reserved:** June 26, 2023

**Written Decision:** November 6, 2023

**Counsel:** Tara Smith, counsel for TY  
Allison Avery, counsel for AK

## **Introduction**

[1] This decision concerns two children, CK (five years old) and JK (3 years old) and what is in their best interests. Specifically, their mother, TY, requests that the court grant an Order that she have primary care of the children in Economy, Nova Scotia where she moved after separation. The parties had lived in Cole Harbour at the time of separation.

[2] She says this is not a relocation matter as the father, AK, moved from their home community of Cole Harbour to Lower Sackville, Nova Scotia after separation.

[3] She asks the court to order that the father have a schedule of parenting time different from that which she and the children have enjoyed prior to the commencement of this Application. That parenting arrangement was agreed to by the parents without a court order. It was reflected in an Interim Order of this court on September 7, 2021.

[4] Though the mother seeks child support in her pleadings she does not address this in her affidavits or counsel submissions.

[5] The father says this is clearly a relocation matter and asks the court to deny the application. He seeks an order that either (1) the children reside primarily with him during the school year and primarily with the mother during the summer school break, or (2) the children enjoy a shared parenting arrangement.

[6] The father also seeks child support should his primary parenting plan be accepted, and a set-off amount of child support should shared parenting be ordered.

## **Summary of Positions**

[7] The mother says that she has provided most of the care for the children throughout their lives. This included the time that the parents were together from approximately the summer of 2017 until the relationship ended in the latter part of 2020. She says the father worked outside the home in the construction business they jointly own and she remained at home to care for the children while doing the paperwork for the company and pursuing her education towards a master's degree.

[8] In the latter stages of the party's relationship, the health of the mother's

father began to deteriorate severely, and he passed away on February 1, 2021. The mother, at times with the children and at times without, had been back and forth to Economy to spend time with her father until his passing.

[9] She said she discussed repeatedly with the father her plans to relocate with the children to Economy into her father's home on a farm owned by the family. She says the father refused to move out of their home in Cole Harbour, and she had no choice, given housing shortages in Halifax Regional Municipality (HRM), but to relocate to the family home in Economy.

[10] After making the move, the mother filed an application for this court on June 7, 2021, seeking decision-making responsibility and parenting arrangements to be determined along with child support.

[11] The father says that, though he was aware that the mother was travelling back and forth to Economy and had a desire to move there with the children, he did not, at any time, agree to that plan. He says he was never given formal notification as required pursuant to the *Parenting and Support Act* ("the Act") and filed his own Response Application on July 29, 2021, seeking similar relief to the mother, including him having primary care of the children.

[12] The father says he was a very involved parent throughout their lives when he was not working and continues to be so.

[13] Though neither parent has pled specifically the issue of relocation or denial of same, it is clear from the record of conferencing with the parties and counsel that this is an issue before the court to at least determine whether this amounts to a relocation case or not. If it is, it must be considered within the context of the provisions of the Act governing relocation.

[14] The mother says generally that it is in the children's best interest to relocate with her to Economy. She says she has been their primary caregiver since their births. She says the home where they will reside is available, will avoid any housing challenges for her and the children in HRM and will provide them with a good and stable lifestyle there.

[15] The father says that the relocation to Economy will take the children at least 90 minutes away from him, preventing a shared parenting arrangement and limiting his parenting time with them contrary to their established pattern. He says both parents have a good and loving relationship with the children and that he has

been significantly involved in their parenting throughout their lives. He says his mother relocated from Ontario to ensure that she could support the family and the children and is close with them, having spent a great deal of time with them in Nova Scotia. These relationships would be diminished if relocation is approved.

### **Is This a Relocation Circumstance**

[16] Before delving more deeply into the evidence and the applicable law in this matter, I find it necessary to answer the initial question of whether the mother's move to Economy and the father's move to Lower Sackville amount to relocations, such that the applicable provisions of the Act must be considered.

[17] Having reviewed the applicable evidence and law on this narrow issue, I find that this is clearly a case of relocation at least arising from the mother's decision to move to Economy with the children.

[18] Section 18E (1) of the Act defines a person planning to relocate and relocation as follows:

**18E (1)** In this Section and Sections 18F to 18H,

(a) “person planning to relocate” means

(i) a person who is planning a change of that person’s place of residence and is a parent or guardian or a person who has an order for contact time with the child,

(ii) a parent or guardian who is planning a change of both that person’s and the child’s place of residence, and

(iii) a parent or guardian who is planning a change of the child’s place of residence;

(b) “relocation” means a change to the place of residence of

(i) a parent or guardian,

...

(iii) a child,

that can reasonably be expected to significantly impact the child’s relationship with a parent....

[19] It is clear from the evidence of both parties that, from the time of their separation until the mother moved to Economy, they had established by agreement,

a parenting arrangement whereby the mother would have the children in her care from Monday through Friday and the father Friday through Monday morning each week. I find that the mother's proposal that the children now reside in Economy, Nova Scotia, constitutes a relocation as it could reasonably be expected to significantly impact the children's relationship with her father.

[20] This is simply because of the distance. The interim parenting agreement arrived at by the parents provided for a shared parenting arrangement. Had the mother remained in the HRM, such a shared parenting arrangement may have been feasible, even after the oldest of their two children began attending school. The distance between the homes, however, prevents this in any practical way and would certainly significantly impact the father's ability to interact with the children through the week when he does not have them, and to participate in any of their activities.

[21] Given this, I find it qualifies as a relocation matter and the applicable sections of the Act must be considered.

[22] I have also considered the fact that the father had moved as well. His move took place after the mothers, and he remains within the HRM. I find that his move does not constitute a relocation as it would not be reasonably expected to significantly impact the children's relationship with the mother. Her current location in Economy, where she proposes to live with the children, is not significantly more distant from either the original location of the parents in HRM or the father's new residence in Lower Sackville. If anything, his move brought him closer to Economy, not farther away.

[23] I note that neither parent provided the written notification at least 60 days before the expected date of the relocation to the other as required under section 18E (2) and (3) of the Act. Given each parent has now made Application and Response Application to deal with the issues of the parenting arrangements and location of the residence of the children, I will deal with it on that basis.

[24] The next consideration is burden of proof. This is dealt with in section 18H, and I find, given that there was not a pre-existing court order or written agreement between the parents, that subsections (C), (D) and (E) are applicable in this circumstance. Those subsections read as follows.

(c) where there is no order or agreement as referred to in clause (a) or (b) but there is an informal or tacit arrangement between the parties in relation to the care of

the child establishing a pattern of care in which the child spends substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child;

(d) where there is no order or agreement as referred to in clause (a) or (b) but there is an informal or tacit arrangement between the parties in relation to the care of the child establishing a pattern of care in which the child spends the vast majority of the child's time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child;

(e) for situations other than those set out in clauses (a) to (d), all parties to the application have the burden of showing what is in the best interests of the child.

[25] It is the mother's evidence in her first affidavit that, after the parties separated, she chose to move to the home of her now-deceased father in Economy. She felt there were no alternatives. It is her evidence that the father refused to agree to move out of the home they occupied together with the children, and she could not find a suitable home for them in the local area given the housing crisis in Nova Scotia at the time.

[26] Upon moving to Economy, she says the parents arrived at a shared parenting arrangement for the children. Initially, she resisted JK being overnight with his father because he was still breast-feeding. That said, it is clear from her evidence that CK was spending a significant amount of time, which she describes a 4/3 and 3/4 parenting arrangement, with her father in Halifax. There was less time agreed to by the mother for JK to be with his father based upon the issue of breast-feeding.

[27] It is clear there is no court order or formal agreement. It is also clear that, after separation, there evolved an informal or tacit agreement between the parents in relation to the children. CK was spending approximately equal time between the homes. I find this amounts to, in the context of all the evidence before me, substantially equal time in the care of either party.

[28] The same cannot be said of JK. He was spending more time with his mother than his father, largely by her unilateral decision. This was ultimately addressed by the interim order on September 7, 2021. That said, I find I must consider what was the informal or tacit agreement between the parties prior to the imposition of the interim order and for JK it was that he spent most of his time with his mother. That said, I do not conclude that this amounts to the vast majority of JK's time in the care of the mother. He was spending one overnight with his father each week.

[29] In this unusual circumstance where a different parenting arrangement for the children based on their ages and circumstance existed, I find that subsection (c) applies with respect to the child CK in that I find that she, by informal or tacit arrangement, spent substantially equal time in the care of each of the parents. This finding means that the mother bears the burden of proof that the relocation would be what's in the best interests of CK.

[30] With respect to JK, I find that subsection (d) does not apply and that he did not spend the vast majority of his time in the care of his mother, but rather a substantial amount of his time, spending at least one overnight per week in the care of his father. Therefore, I find that subsection (e) applies, and that with respect to JK, both parents would normally bear the burden of proof to show what is in his best interest.

[31] When considering the burden of proof applicable, I find that it would be entirely inappropriate to apply a different burden of proof for each child given that there is no proposal that they be separated. That is to say, the mother proposes that both children live with her, and the father proposes both children live with him.

[32] The burden of proof with respect to CK rests with the mother. I am therefore prepared to consider the evidence in the context of that burden of proof, finding that whatever decision is made with respect to CK should apply to JK as representing his best interests. To conduct a bifurcated analysis, in my mind, would not represent the best interests of both children as it could easily result in a different finding with respect to CK and JK which is neither what is proposed by either parent nor, I find, in either child's best interest.

[33] I now must turn to the relevant factors to be considered when determining what is in the best interests of the children. In a relocation circumstance such as this, I must consider section 18 H (4) which reads as follows.

- (4) In determining the best interests of the child under this Section, the court shall consider all relevant circumstances, including
- (a) the circumstances listed in subsection 18(6);
  - (b) the reasons for the relocation;
  - (c) the effect on the child of changed parenting time and contact time due to the relocation;

- (d) the effect on the child of the child's removal from family school and community due to the relocation;
- (e) the appropriateness of changing the parenting arrangements;
- (f) compliance with previous court orders and agreements by the parties to the application;
- (g) any restrictions placed on relocation in previous court orders and agreements;
- (h) any additional expenses that may be incurred by the parties due to the relocation;
- (i) the transportation options available to reach the new location; and
- (j) whether the person planning to relocate has given notice as required under this Act and has proposed new decisionmaking responsibility, parenting time and contact time schedules, as applicable, for the child following relocation.

[34] I confirm that subsections (f) and (g) are not applicable in this matter.

[35] It is always important to note that any assessment of a child's best interest begins with section 18 (8) as follows.

**(8)** In making an order concerning decision-making responsibility, parenting arrangements or parenting time in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

[36] This section, often known as the "maximum contact principle", is qualified by the requirement that such contact be consistent with the best interests of the child. I do find, additionally, that there is little to no evidence of family violence, abuse, or intimidation in this matter.

[37] With that general principle in mind, I now turn to the factors set out under section 18 (6). When considering these factors, I note that not all will apply to every case, and I will only note those that are applicable in this circumstance. As well, my consideration of the children's best interests is not limited to these factors, as confirmed by the use of the phrase "the court shall consider all relevant circumstances, **including**..." (emphasis added)

**Physical, Emotional, Social, And Educational Needs, Including The Child's Need For Stability And Safety.**



[38] When considering the children's physical, emotional, social, and educational needs, including the need for stability and safety, I find that there is little distinction between the parent's ability to meet these needs when they have care of the children.

[39] These are both young children. They require significant direct parenting at this stage in their lives to support them, and to ensure that they are stable and secure. Based on the evidence before me, it is clear both parents, to the extent that they are available, have been very involved in the care of their children and there is no suggestion by either of them that the other parent has been inadequate in any way in providing for the children's needs. The mother's description of her caregiving and focus on the children is credible and accepted. Likewise, the father's description of his involvement with the children, when he is not working, is credible and accepted by the court.

#### **The Parents' Willingness To Support The Development And Maintenance Of The Child's Relationship With The Other Parent.**

[40] When considering each parent's willingness to support the development and maintenance of the children's relationship with the other parent, there are some slight difficulties here. For example, the father accuses the mother of limiting his contact with the children by the relocation and, in particular, his contact with the younger child, JK. The mother has provided evidence as to the reason for relocation and it was not intended to interfere with the father's parenting time, which I accept. Likewise, her explanation of the need to keep JK close to her on a regular basis for breast-feeding is likewise accepted by the court as credible and necessary for his well-being.

[41] There is also some dispute about an activity that CK has been registered for in the father's time rather than during the day of exchange and other evidence respecting some disagreements, but I find these are minor disagreements about the parenting arrangements.

[42] What is also clear is that each parent has demonstrated a willingness to support the development and maintenance of the children's relationship with the other. Though there were clearly some rough patches trying to work out a parenting arrangement after the separation, the move of the mother to Economy and the father's move to Lower Sackville, they have been able to work through these difficulties. It is my finding, from review of the affidavits and viva voce

evidence of the parents, that they in fact respect one another as parents, though they do not wish to reside together, and they are struggling, at times, to work out an appropriate parenting arrangement.

[43] Therefore, I find that each of them is willing to support the development and maintenance of the children's relationship with the other.

### **The History of Care For The Child**

[44] When considering the history of care for the children, it is somewhat fluid based on the circumstances of this family. For example, it is clear that the mother provided the majority of care for the children when they were infants. This was in part because she was working from home. At one time she was taking classes in person and then quickly converted over to online classes during the COVID pandemic.

[45] At a later stage she also took on some responsibility for administrative work for the company she and the father own jointly. All of this allowed her to stay at home with the children, but from time to time she found it overwhelming, which is not unusual. It is not lost on the court that she also has another child, older than the two in question here, that she has care of as well. Attempting to care for all three, while studying and working from home, I find, was a significant challenge that she was able to meet with occasional breaks.

[46] As to the father's involvement, I also accept that he was a good father and involved father. He is a roofer by trade, working for a company before forming his own with his wife during the pandemic. He describes his work hours as varying by season, sometimes working six hours a day, four days a week and during the busiest seasons of spring to fall, working up to 12 hours a day. There is nothing unusual or unexpected in that description.

[47] He also says that when he is not working, he is very involved with the children, both since birth and currently. He describes his close relationship with them, including the activities in which they engage and their bedtime routine, particularly with CK. All of this is credible and confirms to the court that he is a committed father.

[48] There was a significant change when the mother's father was diagnosed with a brain tumor. She spent more time with him at his home in Economy, as would be reasonable in this circumstance. She says that she usually took the children with

her, and the father says there were times when she did not. I accept that that is likely true in both cases. This would no doubt have been an extremely stressful time for both parents in balancing the father's work obligations, the mother's study and work obligations, the parenting of all the children and the need for the mother to spend time with her father as he approached his passing.

[49] I find, based on the evidence before me that, during this time, the father was more involved, though, again, I find the mother had primary responsibility for the children since the father had to be working to support the family. I further find, based on the evidence before me, that they did a good job parenting the children throughout this time despite their disagreements, challenges in the relationship and ultimate separation.

### **The Plans Proposed For The Child's Care And Upbringing**

[50] The mother has a clear plan for the children if she is permitted to relocate with them permanently to Economy. She plans to enroll the children at the local elementary school. They will reside with her on a five-acre hobby farm in Economy, formerly owned by her father. There are a small number of pet farm animals, and they grow their own fruits and vegetables.

[51] The school the older two children, CK and JK, attend is a short distance from the home, and she already picks up and drops them off each day.

[52] She continues to plan to work from home until JK is at least of age to attend school and she believes she can maintain her work arrangement until that time. If so, she will be available to care for the children at all times they are not in school.

[53] There is some concern raised by the father respecting the use of temporary farmworkers, on the farm and in providing some childcare for the children. Having heard the evidence of the mother that she vets them in the normal process, most are women who assist her, there been no difficulties, and she doesn't use them very often, I am satisfied that this is not an issue of concern to the court.

[54] What is absent from the mother's plan is any indication of medical care for the children. They have a family doctor in HRM, but she does not confirm a plan to continue to use that doctor, though it is reasonable to assume she will.

[55] With respect to dental care, it seems clear from the evidence of both parents that they will maintain the current dental care provider in HRM and will ensure the

children attend. There is some disagreement between them as to who would be primarily responsible for scheduling the appointments, but I am satisfied that this has worked well for the children, and they will be able to work that through together.

[56] What is also unclear is her work prospects. She is unable to say whether she will be able to work from home long term and, if not, what the plan for the children will be.

[57] As to the father's plan, he is currently residing in a suitable home in Lower Sackville. He had to move to that location because the prior home that the parents jointly rented had to be vacated when the landlord passed, and the father was given a notice of eviction.

[58] He also describes that there are times when contracts do not work out in his work, and he may be home for anywhere from a few days to a few weeks. He never works when it rains. Because of this, he is available, though somewhat unpredictably, from time to time through the week to provide care for the children during the day and after school. He says he can adjust his work schedule to pick the children up after school, activities, or daycare. He also indicates his mother is available to provide assistance as needed.

[59] I am satisfied that he has made inquiries about schooling for CK. That school also provides the opportunity for a French immersion program for her. The school is a very short distance from his residence, and, while CK could take the bus, he plans to drive her to school every morning.

[60] There are many benefits to this school including the school psychologist, parent navigator and speech language pathologist. That said, there is no indication that these children require any of the services at this time, though it is important to note they are available. The same can be said of most schools in the province, whether they are full-time in the school or available as needed.

[61] In cross examination, he does admit he is not aware if the afterschool care program for CK has a wait list or the cost of same.

[62] He also describes his plan to enroll JK in pre-primary or early childhood education next year. He notes that Sackville High School is immediately behind his property and the children will be steps away from that school.

[63] The father has made some inquiries respecting preschool and he has placed JK on a waitlist at two. Unfortunately, he was unable to say when JK might be able to start or the cost of same.

[64] He confirms that the continuation of dental care, and the children's family physician is in Halifax.

[65] The father describes the care and help that his mother, MK, can provide for him and the children. She provided evidence in the matter as well. She says that she has a very close relationship with the children, and she had relocated to Nova Scotia a few years ago to be closer to them and her son. She is a registered nurse and intends to work from home with the 811 service at some point in 2023.

[66] I accept her evidence that she has a close relationship with both of her grandchildren and has been a support to both parents, particularly when the mother's father was coping with his illness.

[67] In her affidavit she describes some conversations between the parents that she overheard or was directly involved in, including a dispute as to how much time JK would spend with his father, as referred to earlier. I do not find these discussions to be particularly concerning, they have been sorted out and are to be expected, in my view, at the early stages of the separation with a very young child involved.

[68] In cross-examination, she agreed that she did not know what her new hours would be with her new job. When asked what her role would be if the children were to live primarily with their father, she did not know what role she would fulfill but she would support him and the children.

### **Nature Strength And Stability Of The Relationship Between The Child and Each Parent**

[69] As stated earlier, the evidence before me is very clear that these children have a strong, stable, and healthy relationship with each of the parents. Without repeating all the evidence, I find that the mother has provided excellent care for the children since their birth including nurturing them, breast-feeding them and spending most of her days with them at home through most of their young lives. There is no indication that the children are struggling in any way, and they seem to be thriving. The evidence suggests that the children are healthy, happy, satisfied in their lives and properly supported by their mother.

[70] I find the same to be true of their father. I accept his evidence that, when he is not working, he has a very close relationship with his children and spends all his time with them that he can, nurturing and caring for them. I find that his relationship with the children is very strong and stable, appropriate, and supportive in all respects.

### **Nature, Strength And Stability Of The Relationship Between The Children And Each Sibling, Grandparent Or Other Significant Person In The Child's Life**

[71] I will first note that these two children have an older sibling, S. She resides primarily with her mother and is a half-sibling to CK and JK.

[72] There is little to no evidence of the nature of the relationship between the two younger children with their older sibling. I can reasonably assume it is good relationship but there is little to suggest one way or the other. What is clear is that if primary care were ordered with the father, the siblings would spend less time with each other.

[73] Respecting the grandparent or other significant person in the children's lives, the only evidence I have is in respects to two other family members. The first is the father's mother, MK, who I have already discussed earlier in this decision. To repeat, I find that she has a very good relationship with her grandchildren and is close with them, providing support to them and their father.

[74] The other person who gave evidence is RY, the brother of the children's mother. His evidence is that he lives in Yellowknife in the Northwest Territories and is unable to spend much time in Nova Scotia, seeming to visit maybe once to twice per year for a few weeks at a time. He agreed in cross-examination he had limited opportunity to observe the parenting of the mother and the father.

[75] While he is supportive of the mother's position, he is not available to support the mother and the children in any parenting arrangement ordered.

### **The Ability Of Each Parent To Communicate And Cooperate On Issues Affecting The Children**

[76] In this matter, there is evidence of some disputes between the parents. For example, the mother says she wished to register CK for an activity that took place

on the day when the father was picking her up and he refused. She then says the father registered CK for an activity on his time in Halifax. He agrees that this is what occurred.

[77] That is regrettable as the parents should be able to communicate appropriately about such activities to at least discuss how they can both attend and participate to a certain extent in those activities.

[78] There have also been disputes about the parenting arrangements for JK, as described earlier.

[79] There are obvious disagreements about where the children should reside resulting in these applications.

[80] That said, there is little evidence before me of any major disputes or inability to communicate. To the contrary, I find that these parents seem to be able to communicate well and cooperate on issues affecting the children. There is some blame being thrown towards each by the other, but I find this to be quite modest and not concerning.

[81] For example, the father says CK had some cavities that he dealt with because, he says, the mother forgot an appointment. The mother acknowledges that the father has been helpful with respect to dental issues as the dentist resides in Halifax, but this allegation goes no further.

[82] I therefore find that they can communicate and cooperate on issues affecting the children both after separation to today. There is no question that there is some tension around the separation and the mother's move to Economy with the children. I would expect nothing else. I find that the parents will be able to cooperate and communicate effectively and there is nothing to distinguish between their ability to do so.

[83] I find there are no civil or criminal proceedings to consider in this matter, and there is little to no suggestion of family violence, abuse, or intimidation. There is some reference by the father in one of his affidavits to the mother throwing things and being very loud and yelling, but little has come of that in terms of any further evidence, submission, or argument.

## **Reasons For Relocation**

[84] The mother's explanation of the reason for the relocation is simple. She says that when she decided to separate from the father, they discussed him leaving the home they occupied in Halifax, and he refused to leave. He says that they did discuss this, but he was not refusing to leave only uncertain as to what the plan would be going forward.

[85] Coupled with this, the mother's father was diagnosed with a brain tumor around that time, and she was spending a great deal of her time with the children at her father's home in Economy. When he ultimately passed, she was, she says, already looking for a new home for her and the children, she could not find anything in HRM given the housing crisis at that time and ongoing today. The obvious answer, in agreement with her siblings, was that she would take over the farm owned by her father in Economy and have the children reside there with her. In essence, she says it was for lack of any other option and that the Economy farm was a good place for her and the children to reside after separation.

[86] Although I have found that the father has not formally relocated as defined in the Act, it is worth noting that he did have to move after separation when the landlord of the home that the parents occupied together with the children passed away and he was given notice to vacate. He ultimately found a home in Lower Sackville.

### **The Effect On The Children Of Having Changed Parenting Time And Contact Time Due To The Relocation**

[87] When considering the effects on the children of the change of parenting time and contact time due to relocation, there is no question that whatever arrangement is ordered, it will affect the children. If they reside with the mother in Economy, they will be a significant distance away from their father, over an hour's drive, and vice versa, if they reside with their father in Lower Sackville.

[88] That said, there is very little evidence from the parents or others on the effect on the children in this context. I find that the children will do well no matter what the parenting arrangement is largely because the parents are addressing their best interests as best they can and are able to communicate and cooperate on those parenting decisions, despite some challenges along the way.

[89] I also, as noted earlier, take into consideration the effect of the change, if the father has primary care, on the children's relationship with their older sibling which will be impacted as well.



### **The Effect On The Child Of The Child's Removal From Family, School And Community Due To The Relocation**

[90] The evidence of any effect on these children of removal from school and community is very limited due to their age. There is no evidence of any community involvement of the children at their prior home and each was too young to attend school at that time.

[91] What is clear is that there will be an effect on the children by their removal from either parent's care whatever relocation decision is permitted. As well, the children will have less contact with their paternal grandmother who has been a significant support to them and their father since their birth.

### **The Appropriateness Of Changing The Parenting Arrangements**

[92] When I reflect on the evidence before me, I find that there is no evidence of any attempt by either parent to use relocation or opposition to same to affect the relationships of the children with each parent or an attempt to act contrary to the children's best interest as that parent sees it.

[93] From the mother's perspective, it seems an appropriate request for her to make given the separation, the unavailability of the original home to either parent and the necessity of finding a home for the children and herself to live. The same applies to the father.

[94] The mother has an opportunity to live in a home in Economy and the father in Lower Sackville. I find the changing of the parenting arrangements is necessary given their two plans and I see no difficulty in that finding.

### **Any Additional Expenses That May Be Incurred By The Parties Due To The Relocation**

[95] Whichever parenting plan is ordered by the court, there will be additional expenses incurred for parenting time. The father submits that the travel time is approximately 1 1/2 hours from his home to the mothers in Economy. There will be expenses for gas and other related costs for vehicles that will be incurred by both parents because of this relocation. Either plan does not solve that circumstance.

## **The Transportation Options Available To Reach The New Location**

[96] Transportation by vehicle is available and, I understand from the evidence, is available to both parties.

## **Whether The Person Planning To Relocate Has Given Notice**

[97] I've already dealt with this previously and find that neither the mother nor the father provided notice. Only the mother was required to do so pursuant to the act and she did not do so. The matter is being resolved through this hearing and decision.

## **Analysis And Decision**

[98] In considering the respective plans, and all the factors required for review by the court, I have also reviewed the case law provided by counsel in the matter. I adopt the comments of the Saskatchewan Court of Appeal in *Mantyka v. Dueck*, 2012 SKCA 109 as follows:

[34] The difficult business of adjudicating mobility issues can be made even more challenging when a custodial parent relocates *before* the propriety of the relocation is raised in court. This is because the custodial parent may have already quit a job, sold a house or otherwise given up accommodation in his or her original place of residence and taken up work or made living arrangements in the new place of residence. The children too may have left a school and their established patterns and settled into a new school, made new friends and developed new routines. There can be, as a result, a significant measure of disruption involved in reversing or rolling back a relocation which has already taken place. This is not a part of the equation when a custodial parent seeks leave to relocate in advance of a planned or anticipated move.

[35] That said, a family law culture of “move first and ask questions later” is self-evidently not something that can be either approved or encouraged. Neither parents nor their counsel should see relocations of children as a means of obtaining tactical advantages in custody or access disputes. Among other things, that is why there is a distinct reluctance to give any credit to a custodial parent who moves unilaterally, knowing that the move will be controversial, and then attempts to resist an application to reverse the move by arguing that he or she has quit a job, sold a house or otherwise made decisions which will be difficult to roll back. Problems of this sort are generally seen as being self-imposed.

[99] I am also mindful of resisting any temptation to indirectly credit the mother in her decision to relocate without notice or consent. That concern arises around any argument to be advanced, directly or indirectly, that since the move, the children are doing well and “why reverse things now?” That runs contrary to the intention of the Act, the provisions respecting relocation and the comments of the Saskatchewan Court of Appeal and many other courts.

[100] With respect to the other decisions referred to by counsel for the father, I have reviewed each very carefully and can only conclude that, though they deal with similar issues, each of these cases, and the present matter before the court, are distinct and unique as to their particular facts.

[101] Within this context, I must then analyze the evidence and provide a decision. In doing so, I reiterate that each parent has demonstrated that they are a close, responsible, involved, and loving parent for each of their children.

[102] As a result of the circumstances of their lives together, I also find that the mother spent more time with the children because she was at home, either working or studying, for much of their lives. The father, due to his obligation for work, was not at home as much as the mother, working four or so days a week for between 6 and 12 hours per day, depending on the season for his roofing business. This was done to support his family and continues to this day.

[103] I am also cognizant of the evidence, which I accept, that when he was available to the children, the father spent time with them, caring for them either jointly with the mother or alone in her absence. He participated in play and activities with them, provided for them in every way, including putting them to bed, and demonstrated his love and commitment to his children throughout their lives.

[104] There is no question that during times the mother was occupied with spending time with her father, the father stepped up. That said, I accept the evidence of the mother that, on many occasions, when she went to Economy, she took the children with her. I also accept there were other times when she could not, and the father cared for the children in her absence.

[105] I also consider that the paternal grandmother has been involved in the care and support of the children since their birth and is committed to continuing to do so

whatever the parenting arrangement, particularly if the father has primary care. I have already found they have a good and loving relationship with her which will benefit them.

[106] I consider that the mother believes that her reasons for relocation are sensible in all the circumstances faced by the parents at the time. There was disagreement about who would retain the home shared by the parents and the children at separation. Whatever the circumstance, that home was ultimately lost a short time later when the landlord died and notice of eviction was given to the father.

[107] The mother says that, due to the housing crisis in Nova Scotia, she was unable to find suitable housing, and when her father passed, it was an appropriate decision to consider relocating with the children to Economy to live in his home. This would provide an appropriate home for the children.

[108] The challenge with this position is she has provided no evidence of any such attempts to obtain housing in HRM. While I am certainly cognizant of the housing crisis, it is not lost on the court that the father was able to find a suitable home after the eviction notice was served on him. I find it is incumbent on a parent who claims a relocation is due to such housing issues to provide some evidence of efforts made to find a home. If not, it would invite abuse of the circumstances faced by Nova Scotians in that crisis to justify a relocation without supporting evidence.

[109] I have also considered that the father has a suitable home in Lower Sackville, though it is not the original home the children were born into and brought up in before the changes in homes took place. Therefore, the children would not be returning to their familiar neighbourhood if they were primarily in the care of the father. At this young age, I do not believe this to be a significant factor and would have far more weight if the children were older and had friends and family in either of the neighbourhoods or communities where it is proposed that they will reside.

[110] I also have some concern about the relationship between the older child S and her younger siblings, yet there is little evidence before me of their relationship other than they both reside in the home with her. I have some concern that, if CK and JK reside with their father, this will diminish the relationship with their sister. That said, they will spend time with their sister, regardless of the parenting arrangement based on each of the proposals put forward by the parents.

[111] I am also mindful that the father has provided two alternatives for parenting arrangements. First, he proposes the children reside with him and the mother have parenting time three of four weekends, and other times through the year.

[112] As an alternative, he proposes that if relocation is denied, the parents could have a shared parenting arrangement.

[113] The mother has only put forward the plan of primary care with her in Economy.

[114] Having considered this evidence in various issues, I now return to the burden of proof. I have found that it is the mother who bears the burden of proof to establish that the relocation to Economy is in the children's best interests. I find that she has not met the burden of proof.

[115] Each of the parties has demonstrated that they are very good parents to these children. There is little to choose between them, other than the amount of time each has been able to spend with them due to the father's work schedule. They each have provided all their needs throughout their lives. This is reiterated by the fact that neither criticizes the other in any substantial way respecting their parenting.

[116] To allow the children to relocate to Economy will mean that they will lose significant time with their father. This also applies to their paternal grandmother who has been a close and meaningful support to them throughout their lives. She is part of the father's plan for care of the children, and I find that to be very appropriate.

[117] The mother's plan for the move to Economy does not demonstrate any particular advantages to the children other than housing. There is no evidence from her family, other than a brother who resides in the Northwest Territories, as to relationships that will be reinforced or renewed. There are no services available at the schools proposed that are required for the children. The father has a suitable home in Lower Sackville, and a plan for their schooling there. There is simply nothing to choose between the locations on those factors.

[118] The plan for medical and dental care is slightly vague for the mother, but I assume she will continue taking the children to the family physician in HRM and the dentist there as well. That is the plan of the father. Again, little or nothing to choose between these plans.

[119] In terms of care for the children, I am satisfied that the father has a suitable plan for them with the support of his mother. I accept his evidence as to his work hours, that they vary throughout the year and there are times when he does not work at all. In addition, I accept his evidence that he can craft his hours to ensure he or his mother get the children to and from daycare and school as required. I accept that his mother will play a significant role in the care of the children when he is working.

[120] As well, I accept the mother has a sensible plan in Economy. But it does not materially improve the circumstance of the children.

[121] I have already found that there is some concern that this decision will have an impact on the relationship between the children and their older sibling. That said, there's no evidence of the nature of that relationship and I can do no more than assume that it will have some impact, which can be mitigated by the visits between the children and their mother.

[122] I am also mindful that there is no evidence that the parents struggle to communicate either before separation or after respecting the best interests of the children other than the normal tension and isolated incidents described in their evidence. I find that they are able to communicate and cooperate regarding the children's best interests and will continue to be able to do so.

[123] I am also very mindful that if the mother does not relocate back to HRM, this will impact the children's parenting time with her. That is regrettable. Nonetheless, the burden of proof rests with her and the impact on the father's relationship with the children would have been similarly concerning had her plan been successful.

[124] Therefore, the mother's application to relocate the children with her to Economy, Nova Scotia is denied. The father will have primary care of the children.

### **Child Support**

[125] Given that I have ordered that the children will be in the primary care of the father, the issue of child support payable by the mother to the father arises. The mother has failed to provide any meaningful disclosure respecting her income. The father therefore requests the court exercises jurisdiction pursuant to section 19(1)(a) of the Provincial Child Support Guidelines, which states:

**19 (1)** The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:

(a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;

[126] I adopt the review of case law by Justice Forgeron in the decision of *McDonald v. Pink*, 2011 NSSC 421, at paragraph 24 where she distills the following principles when dealing with imputed income:

[24] Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:

a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: *Coadic v. Coadic* 2005 NSSC 291.

b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: *Staples v. Callender*, 2010 NSCA 49.

c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: *MacDonald v. MacDonald*, 2010 NSCA 34; *MacGillivray v. Ross*, 2008 NSSC 339.

d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: *Smith v. Helppi* 2011 NSCA 65; *Van Gool v. Van Gool*, 1998 CanLII 5650 (BC CA), [1998] 113 B.C.A.C. 200; *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532 (S.C.); *Saunders-Roberts v. Roberts*, 2002 NWTSC 11; and *Duffy v. Duffy*, 2009 NLCA 48.

e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: *Duffy v. Duffy*, supra; and *Marshall v. Marshall*, 2008 NSSC 11.

[127] There is no evidence before me that the mother cannot work because of

disability or education. She recently obtained a master's degree. The children are no longer infants and will either be attending school or can attend daycare. I find there is no barrier to her obtaining full-time employment.

[128] I am prepared to impute to her income of minimum wage in Nova Scotia, which currently is \$15 per hour. Using 40 hours per week for a full-time employee, I imputed to her an annual income of \$31,200. She shall therefore pay child support in the amount of \$473.60 per month commencing the first day of December 2023 and each month thereafter.

[129] Neither party has pursued with any vigour the issue of any arrears in child support, and I will set those at \$0 as of today's date.

### **Order**

[130] There will be an order issued as follows:

1. The parents shall have joint decision-making responsibility for the children regarding major decisions concerning the children's health, education, spiritual or religious upbringing or general well-being.
2. Each parent will have full and unfettered access to any third-party service provider or records, including schools and teachers, hospitals and doctors. A separate order with the usual provisions will be issued with this order.
3. If either parent becomes aware of a major issue for the children, they will immediately inform the other parent of such issue and contact information for any involved professional or expert.
4. The parent receiving the information will be entitled to make direct contact with the expert or professional involved to inform themselves of the circumstance.
5. The parents will meaningfully consult on such issues and make their best efforts to arrive at a joint decision. If the parents cannot arrive at a joint decision, they will defer to the recommendation of any involved expert or professional.
6. Each parent shall be entitled to authorize emergency medical care for



the children when in their care and will inform the other parent as soon as practicable of such emergency, at which time the joint decision-making provisions of this order will be reengaged.

7. The father will have primary care and residence of the children, so long as the mother does not reside within the Halifax Regional Municipality.
8. The mother shall have reasonable parenting time which shall include parenting time during the school year consisting of three out of every four weekends from Friday after school until Sunday evening. The mother's weekend shall be expanded if any of these weekends include an in-service or statutory holiday on either Friday or Monday.
9. For all parenting time, unless otherwise noted, the mother shall pick the children up at the commencement of her parenting time and the father shall pick the children up at the mother's residence at the end of the parenting time.
10. The mother shall have regular video conferencing contact with the children as agreed between the parties considering the children's ages and their best interests.
11. The following special parenting time shall apply, and the school year schedule shall be suspended during these time as follows:
12. Christmas - One parent shall have the children from after school commencing the first day of Christmas break until Christmas Day at 1 PM. The other parent shall have the children from Christmas Day at 1 PM until 6 PM the day before school commences. The father shall have the children for the first half of the Christmas break in odd numbered years, and the mother in even numbered years.
13. Easter - One parent shall have the children from the end of school on Thursday until 6 PM on Holy Saturday. The other parent shall have the children from 6 PM on Holy Saturday until 6 PM on Easter Monday. In even numbered years, the mother shall have the children for the first half of the Easter break, and the father will have them at the first half of the Easter break in odd numbered years.

14. Summer - During the summer school break, the parents shall have week about parenting commencing on the Friday after the end of school. The school year parenting time will recommence on the day before school begins in the fall.
15. Each parent is prohibited from making any negative or derogatory comments about the other parent or the other parent's family at any time they have parenting time with the children. They shall also ensure that no one else makes such comments and if that person will not cease making the comments, they shall remove that person from the children's vicinity or remove the children from that person's vicinity.
16. All communication between the parents shall be polite, respectful, child focused and businesslike.
17. The mother shall pay monthly child support to the father in the amount of \$473.60 based on an imputed income of \$31,200 commencing December 1, 2023.
18. The usual enforcement provisions shall be included in the order.
19. If the mother relocates to HRM, either parent may apply to have the issue of parenting arrangements reviewed without having to prove a material change in circumstances.

[131] Counsel for the father shall draw the order.

Timothy G. Daley, JFC