

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *N.N.L. v. N.L.M.*, 2015 NSSC 327

**Date:** 2015/12/16

**Docket:** *Halifax* No. SFHMCA-071751

**Registry:** Halifax

**Between:**

N. N. L.

Applicant

v.

N. L. M.

Respondent

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

Judge: The Honourable Justice Moira Legere Sers

Heard: September 1<sup>st</sup>, 2015, in Halifax, Nova Scotia

Oral Decision: September 2<sup>nd</sup>, 2015, in Halifax, Nova Scotia

Written Release: December 16<sup>th</sup>, 2015

Counsel: N. M., Self-Represented Applicant  
N. L., Self-Represented Respondent

[1] This is an oral decision that I am going to deliver in the matter between N. N. L. and N. L. M..

[2] I have edited this decision for grammar and flow.

[3] *Where I have added comments on the recalculation based on subsequently filed documentation they appear in italics.*

[4] *Due to inadequate financial disclosure I directed the parties, particularly the Respondent, to complete disclosure. This required recalculation of the arrears.*

[5] *Post hearing the court directed Mr. M. to complete his 2015 income information before a decisions could be made.*

[6] *I am satisfied that Mr. M. was aware of the proceedings and the direction to disclose.*

[7] *Mr. M. did not respond to the written and oral request from the court to supply verification of his income from January to May 2015 and did not respond to the summons to appear issued subsequent to the hearing .*

[8] *The Court finally received a pay statement for his previous employment to April 10 2015 on December 14<sup>th</sup> 2015 well after the hearing, the post-trial conference and post- trial directions to disclose.*

[9] *The calculations completed at the time of the decision have been deleted in this decision because they were based on incomplete information provided by the Respondent that was not fully accurate. Despite numerous efforts to obtain the full verification of the Respondent's 2015 income, I based the calculations on the updated records of Maintenance Enforcement and verified income information.*

[10] I want to cover all of the issues raised and cover the law.

[11] I will not edit the substance of this decision.

[12] Essentially there are two applications before me.

[13] First I have two questions arising concerning matters that I didn't quite understand from your evidence.

[14] One, where did you get the figure you have in paragraph 15 of your affidavit? You've indicated there was an overpayment of \$897.62.

[15] In your affidavit the adjustment arose from the calculations made in September of 2013. It looks to me like the adjustment they made representing the overpayment was \$1,897.84.

“MS. L.: The adjustments, the figure came from the amount that was overpaid less the ... the amount owed or the overpayment.

THE COURT: Where did you get that figure? If you assume that the calculations in the 2013 order were correct, there was a suggested amount owing of \$10,000, in that order, \$10,000 plus.

What Justice Beaton said, which is what you agreed upon, is that all of the payments made would be deducted and when you do that calculation, it ends up with a negative ... it ends up with a difference of \$1,897.84 if you assume the figures are right.

MS. L.: That sounds, \$1,897 ... I ... I came up with \$897 so I don't know.

THE COURT: Okay. I just wanted to verify where you got that figure that you were using because I couldn't find that figure anywhere.

MS. L.: Yes, I had taken the amount that Justice Beaton had ... like the amount that was paid.

THE COURT: The \$10,000.

MS. L.: ... less or the difference between what was paid and ... and the credit owing.

THE COURT: Did you use the documents to come to that?

MS. L.: I did but I was a little off.

THE COURT: What is your understanding of the amount that was overpaid?

MR. M.: Exactly ... exactly that. When we went in front of Justice Beaton we didn't have the exact amount that had been paid in terms of child support, what was left owing. We were working under a rough idea that there was about a \$2,000 amount still owing to Ms. L. at that point because the original amount at \$418, through that whole period, would have equaled about \$14,000 that needed to be paid.

We couldn't give her any final numbers. We didn't have the final numbers with us at the time that we had the hearing.

I came to the number of \$2,000 based on while N. was thinking it was \$2,000 that was owed to her which would indicate that I paid roughly 12 and her ... Justice Beaton's math said that I had paid 10 so when I communicated with Ms. L.

several months later, that's how I was at the \$2,000 number in my communications with her.

THE COURT: I need to deal with the facts. It would be fair to conclude that neither one of you knew what was paid. Is that a fair conclusion?

MS. L.: It is. We did not have the ... all of the numbers.

THE COURT: Okay. So I'm just going to make sure I get my notes here just to verify. The adjustment, as I understood they made was \$1,897.84 and I think you've pointed that out.

MR. M.: That would be correct, yes.

THE COURT: And you were dealing without having the actual figures in front of you?

MS. L.: Yes, I may have missed the one at the front.

THE COURT: Okay. I just wanted to correct that. I thought that was the case but I wanted to clarify it.

THE COURT: Two, the second question I have, the latest Maintenance Enforcement record is only current to the end of July of 2015. It appears that in each month, from May forward, they are taking out two payments of \$240 each, is that correct? Are you receiving any money?

MS. L.: Yes, I am and I had called (inaudible) from Maintenance Enforcement because there was an overpayment and I asked why they were paying money and they advised that they couldn't tell me where the source was coming from but on the pay statement there is no garnishment so.

THE COURT: What amount are you receiving?

MS. L.: \$240 bi-weekly.

THE COURT: Bi-weekly. And have you received all of July's?

MS. L.: Yes.

THE COURT: So you would have received two months in July?

MS. L.: Two payments in July.

THE COURT: And August?

MS. L.: And August.

THE COURT: And September?

MS. L.: Not yet.

THE COURT: You haven't received the last payment in September?

MS. L.: Not ...

THE COURT: Is that what you're ... they're taking out of your ...?

MR. M.: That's what I'm ... I'm doing that, Your Honour. I set it up with my bank account to have a direct payment to Maintenance Enforcement.

THE COURT: Okay.

MR. M.: The garnishment's been suspended so I just continued paying what I was paying at my last employer at \$240 every two weeks...

THE COURT: Okay.

MR. M.: ... to keep it seamless.

THE COURT: I understand. All right. So I've made my calculations assuming that's correct and you verified it.

[16] There are two issues that I have to decide today. Both parties ask the Court to look at the consequences of the actions of Maintenance Enforcement as a result of the order of September, 2013.

[17] Both of you have asked the Court to revisit that issue concerning the consequences of the recalculation. If he's successful in his application (for custody) Mr. M. has asked the Court to consider the whole issue of child support and determine what, if any, arrears exist and determine where we go on a go-forward basis.

[18] That order was arrived at as a result of a judicial settlement conference. The parties intended to appear for a hearing. The hearing was converted into a judicial settlement conference and the parties arrived at a formula but were not aware of the exact income figures at that time.

[19] The consequences of that (recalculation) apparently resulted in an overpayment.

[20] Subsequently, as a result of the recalculations by Maintenance Enforcement, they took action which was not contemplated by the order.

[21] They ceased the flow of monthly child support and Section 7 expenses to the mother's household until the credit that they had calculated had been absorbed fully. *The parties discussed the Applicant's plight and from late 2013 to March 2014, the Applicant paid the child support of \$450 directly.*

[22] The Applicant was without child support from the Respondent or through Maintenance Enforcement for a period of seven months until October 2014. (in evidence)

[23] That was not contemplated by the order, was not in the order, and in fact, has worked a hardship on the custodial parent while this credit has been exhausted.

[24] I have reviewed the tape recording of your appearance at the settlement conference.

[25] Obviously the portion that related to your settlement conference was not on the record but the Court was very clear in explaining the process to you.

[26] It was something you both embarked on willingly. When the Court brought you back into the courtroom there was a very careful discussion on the record of what your consent was comprised of as it related to each element: access; custody; and, child support. She then asked each one of you whether this is what you agreed upon and you confirmed that.

[27] Two points I would like to note.

[28] One, although at first, Mr. M., you advised that you did come equipped with your 2012 T4's, you acknowledged that you had not filed your Income Tax return at the time. As the discussion unfolded, you admitted that, in fact, you didn't have the T4's and you were going on memory.

[29] And two, child care expenses were not dealt with in the order.

[30] The record indicates the parties entered this settlement conference believing that there were arrears based on Maintenance Enforcement records.

[31] When Mr. M. presented his income figures, Ms. L. accepted and relied on those income figures and agreed to a retroactive recalculation from January 1<sup>st</sup> of 2011, to September 2013, the date of the hearing.

[32] They did not know that using the figures provided by Mr. M. would put him in a position of credit.

[33] After that was determined, according to the formula, Maintenance Enforcement ceased regular child support payments until the credit was absorbed. That action put Ms. L. in a very onerous, difficult financial position. There is a young child in a household.

[34] The mother, in making this current application, was motivated by the consequences of the actions taken by Maintenance Enforcement which arose as a result of the order but were clearly not contemplated in the order.

[35] In particular, there's a second stage to the process that would be considered if there were a deficit.

[36] As outlined by the Supreme Court of Canada in *D.B.S. v. S.R.G.: L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* [2006]2 S.C.R.231, 2006 SCC 37 ; one of the four elements the Court must consider if there are arrears is: what effect, what hardship would result to the payor parent if he was found in the position where he owed a lump sum in addition to having to keep on with monthly payments.

[37] The Court, in those circumstances, does an inquiry into that hardship issue and determines whether it's appropriate to ensure that that lump sum is paid back immediately or are there other options for repayment.

[38] In this case, there was no inquiry into the hardship it might cause the custodial parent *if a credit was calculated*.

[39] Absent that, Maintenance Enforcement simply stopped payment. I am not faulting them for doing this, but it was an issue that you didn't address in your conference.

[40] On that basis, I undertook a review of the actual information and how you got yourself in this position.

[41] I've reviewed the record. In approaching the application, Ms. L. wants Mr. M. to contribute to retroactive childcare expenses from November of 2011, as stated in your application.

[42] The calculation as to Mr. M.'s overpayment is based on information provided in 2013.

[43] I have just determined that I believe the mother is incorrect in suggesting that the overpayment as calculated was \$897.62. It appears on the record that that overpayment was larger than that. (*The Maintenance Enforcement records for September show an entry of \$1,897.84*)

[44] The mother believes that any overpayment would be applied to unpaid child care expenses.

[45] Mr. M., in the past, has stopped paying childcare expenses in addition to what would be normally required as a base payment.

[46] For various reasons, Ms. L. has agreed or not pursued childcare expenses because of discussions between them in which she heard that Mr. M. was in difficult circumstances, et cetera.

[47] Maintenance Enforcement took the overpayment and applied it to prospective child maintenance, leaving the mother without monthly support or a contribution to childcare until the credit was depleted.

[48] This was not part of the deal that you entered into where Mr. M. paid Ms. L. directly. It is my understanding, and you have confirmed to me, that you have been credited by Maintenance Enforcement with every payment that you made directly to Ms. L..

[49] It is clear to me on reading the information, reading the terminology of the order, that you approached the hearing with a belief that Mr. M. was in arrears \$3,010.51, not inclusive of any child care. (see affidavit of September 4<sup>th</sup> of 2013.)

[50] Preceding this Court application, you advised that Maintenance Enforcement indicated this fact. In your affidavit you set out the amount coming into that application and I may refer to that later. ... I did not have access to the September 2013 Maintenance Enforcement Statement.

[51] It was anticipated in the beginning that there would possibly be arrears. The Court indicated that after the calculation was done, according to the formula that she set out, Maintenance Enforcement was to continue to enforce the arrears as they had previously.

[52] To your surprise, there was a considerable credit.

[53] I say considerable in light of your circumstances, not considerable in light of the amount.

[54] Certainly Mr. M.'s arrears, in the past, have exceeded this amount. There was a credit – this was not contemplated.



[55] Had it been contemplated that there would be a credit, in all likelihood the Court would have likely embarked on a weighing of one of the principle factors to be determined the hardship to the person paying the arrears or credit before the Court is going to put somebody in the position of a repayment.

[56] Certainly it would not likely have been the option that Maintenance Enforcement chose, but they chose that in the absence of consent between the parties.

[57] I'm going to try to be as clear as I can to help you understand how I've reached my decision in this but obviously it may take me some time to do that so I'd ask you to bear with me.

[58] Absent correct up-to-date information, some of which has been provided at this hearing except for an accurate account of your 2015 income, neither of you had accurate financial information.

[59] Neither did the judge because the father failed to bring or disclose his T4's.

[60] The recalculation that happened was based on figures provided by Mr. M..

[61] These figures were in error.

[62] I have reviewed all of the Notices of Assessment and gone back to what the settlement conference Judge used and I've also looked at the previous orders, which are many.

[63] It appears that in most cases the clause that refers to your income is not correct. Mr. M. provided guesstimates.

[64] Neither party at the time could calculate what had actually been paid because aside from what Mr. M. paid, Maintenance Enforcement was enforcing the order and collecting arrears as well as monthly support.

[65] It was not clear how much was held in trust, how much they had been successfully garnishing and for that reason, the parties came to the conclusion in their calculations that between January 1<sup>st</sup> of 2011, to and including September of 2013, based on the incorrect information provided, Mr. M. should have paid \$10,824.

[66] That would be a figure that you would see if you referred to in the order. That would be contained in paragraph 10(d).

[67] The order goes on to say at subsection (e) and I stress this was your agreement:

“That the parties acknowledge that he has been overpaying since January of 2011 and that, of course, is based on *the fact that it’s his information the order was based on* and his circumstances changed so he suffered a reduction in income due to his personal difficult circumstances, in part possibly because of addiction and where that brought him.”

[68] When the recalculation had been done, the judge ... the parties agreed that the arrears owing effective the date of this order, may be properly calculated by subtracting from the fixed sum of \$10,824 and any monies collected by the Director of Maintenance Enforcement for the period between January 1<sup>st</sup>, 2011, and September 20<sup>th</sup>, 2013.

[69] The difference between \$10,824 and the total of the payments made or collected shall be the amount fixed as the arrears owing effective the date of this order.

[70] It was contemplated there would be a balance owing and not contemplated that there would be a credit. You agreed and the Judge incorporated it into the court order that the **Director of Maintenance Enforcement should continue to enforce the arrears as has been done to date.**

[71] Paragraph 11 states that Mr. M. was to make a payment of \$340 monthly. That was based on an erroneous income, continuing on the first day of each and every month thereafter until otherwise ordered.

[72] On June 1<sup>st</sup> of each year, it’s a mandatory provision that you shall file with each other and with Maintenance Enforcement, a copy of the previous year’s Income Tax and Notice of Assessment intended to permit the Maintenance Enforcement to make the adjustments necessary.

[73] Effective October 1<sup>st</sup>, 2013, Mr. M. was to bear 50% of the \$300 cost per month for child care expenses and the parties agreed, that should have continued until September of 2014, when the child was enrolled in school.

## **Disclosure**

[74] So we start with late disclosure, non-disclosure, and a failure to disclose on a regular basis.

[75] At the time of the hearing in 2013, the parties did not have information as to Mr. M.'s 2012 income. In calculating the actual income, both the judge and the mother relied on the father's income figures.

## **Recalculation**

[76] Arrears as of February 24<sup>th</sup>, 2011, were \$1,003.50 (see MEP Records).

## **2011**

[77] *For January 1<sup>st</sup> of 2011 to December 1<sup>st</sup> of 2011, Mr. M.'s Notice of Assessment indicates his correct annual salary was \$34,174. This yielded a monthly table amount of \$302.*

[78] *In effecting a recalculation it appears that for the 2011 year starting February 26<sup>th</sup> to December he should have paid \$3,020 in child support. (The January and February payments are already included in the arrears as of February 24<sup>th</sup>.)*

[79] *According to Maintenance Enforcement records you actually paid \$2647 leaving an **underpayment of \$373.***

## **2012**

[80] For 2012 you used a figure of \$41,000 as an annual income, yielding a payment of \$345.

[81] The actual income was \$42,024.81. That should have yielded a monthly payment of \$353.21.

[82] You should have paid \$4238.52. The records show you actually paid \$5280.07 for an **overpayment of \$1041.55**

## 2013

[83] In 2013 you used an income figure of \$40,781.88, and derived a payment of \$340.

[84] The actual income figure taken from your Notice of Assessment was \$44,863. That would have yielded a monthly payment of \$376.08.

[85] At the time of your last conference the Court only used the nine-month figure. What's new that we have to deal with is what's happened after September of 2013.

[86] *For the 2013 year you should have paid \$4,512.96. You actually paid \$6463.35 for an overpayment of \$1950.39.*

## 2014

[87] The 2014 estimated income was \$33,088.10 (for a monthly payment of \$278.72). Your T4 from your employer was \$45,095.06. *Your monthly payments should have been \$377.76. You should have paid \$4,533.12; you actually paid \$2979.60 for an underpayment of \$1553.52.*

## 2015

[88] *In 2015 Mr M. changed jobs.*

THE COURT: That should continue to the month you started your new job and you weren't clear on that so, Mr. M., what was the month that you started your new job?

MR. M.: March of 2015.

THE COURT: March. So my figures are going to have to be redone. In March, what date in March?

MR. M.: March 23rd, I believe.

THE COURT: So we'll consider **April your first full month of income** or did you get paid a full ... full month of income in April?

MR. M.: Yes, I had a full month of ...

THE COURT: Was that training?

MR. M.: Yeah, I was in training for the month of April so I started hitting the phones on April the 15th.

THE COURT: All right.

MR. M.: That Monday.

THE COURT: So when did you start earning your income?

MR. M.: The second I started working there. Like I made my \$12 an hour base wage the second I started. I just didn't start making commissions until I got on the phones.

THE COURT: When did you start making commissions?

MR. M.: I would have received my first commission cheque May.

THE COURT: May?

MR. M.: Yeah.

THE COURT: Okay. So I have operated on the assumption because I ... I looked at your pay stubs and that's all I have for the significant change in your income is ... is July so it may be that **I have to consider recalculating for the current year. (see above)**

[89] I will use the 2014 income from his previous employer to calculate from January to and including April 2015.

[90] For January to April he should have paid \$1511.04.

[91] Mr. M. has advised that his currently employment will yield an income of \$70,621.20. Payments from May to ,and including, October 2015, should have been \$597.47 per month or \$3584.82 for the period of six months.

[92] The total payable from January to ,and including, October 2015, should have been \$5095.86. You paid \$5621.46 for an overpayment of **\$525.60**.

[93] Mr. M. came into the 2011 year with **arrears owing of \$1033.50**.

[94] He was also responsible to pay \$150 per month effective October 1<sup>st</sup>, 2013, for childcare up to September 2014. That is a period of 11 months for a total of **\$1650**.

[95] From 2011 to October 2015, the following should have been paid:

- *Arrears as of February 22, 2011, of \$1003.50; plus child support of \$3020 for 2011; \$4238.52 for 2012; \$4512.96 for 2013; \$4533.12 for 2014;*

*\$5095.86 for 2015 up to ,and including, October 2015. He also owed \$1650 towards childcare costs. The total that should have been paid was \$24,053.96;*

- *He paid in total, from 2011 to October 2015, \$22,991.48;*
- *This leaves a balance owing by Mr. M. to Ms. L. of \$1062.48 as of October 31<sup>st</sup>, 2015, which shall be paid forthwith.*

[96] Mr. M. established in his evidence, and I admit, its sparse evidence, that his current job will yield a salary of \$70,621.20. This yields a payment of \$597.47.

[97] On a prospective basis the monthly payment continuing November 2015 should be \$597.47 per month until a recalculation occurs on June 1<sup>st</sup>, 2016, based on your financial information ,verified, by your income tax returns.

[98] Maintenance Enforcement will change their records to show that the arrears as of October 31<sup>st</sup>, 2015 are \$1062.48, payable forthwith.

[99] I can't emphasize how important it is for you to give accurate figures. If you give accurate figures that are too high, you create an order that puts an onus on you that is too great. Parties then have to catch up and do this kind of back calculation over and over again.

[100] It ends up in being unjust for both parties. It causes people to rely on an expectation that a certain amount of money is coming in a month and that expectation is not reliable if it's not based on reliable figures.

[101] If you guess too low, then your child is not getting the support that your child deserves as a result of the income that you're earning.

[102] You really benefitted from this retroactive adjustment. Consideration was given to your circumstances which, as you know, were a result of your own illness, your own addiction. You got the benefit of that from the Court, but the mother didn't get the benefit of actual salaries historically.

[103] I urge you to ensure that you use accurate figures with Maintenance Enforcement, verified at source.

### **Prospective Section 7 expenses**

[104] For the purposes of calculating the proportionate share of sharable expenses the Applicant's income is \$41,600 and the Respondent's is \$70,621.20.

[105] You shall pay 50% of the cost of the camps and for the March Break for 2015. The costs was \$885 and your share \$428. This shall be paid forthwith.

[106] From July 2015 forward, in light of the increase in your income as declared by you, you shall pay 63% as your proportionate share of those expenses associated with enrolling the child in any camps or daycare required for the purposes of allowing the mother to work or you to work.

[107] In other words, the child care camps are in these circumstances legitimate Section 7 expenses incurred to allow the mother to work.

THE COURT: Do you have any questions on that part of the decision? Do you understand it?

MR. M.: No, Your Honour.

THE COURT: Do you understand it?

MR. M.: Yeah, I understand. If I may recap it to make sure I have it firmly. You're going to go back, recalculate Justice Beaton's original figures using the correct figures at the time. From that you will also go back and use the correct up-to-date figures from 2014. You will apply the correct amount accordingly and make sure that that is the way that it's ... it's handled, correct?

THE COURT: On a go-forward basis.

MR. M.: Exactly.

THE COURT: Okay. And if there's a credit, there'll be a moratorium until that can be discussed.

[108] You will be given credit for any overpayments and payments and that's why I asked my question about your July payments, were they coming out, because there's always a period of time when money gets caught with Maintenance Enforcement. Some may not see it on the record so the best way to do it is to ensure that you get credit for what you've paid.

[109] On a go-forward basis the recalculation clauses will be inserted in the order.

[110] Maintenance Enforcement will be doing your recalculations unless it becomes complicated and they decide that they don't have enough information to do the recalculations.

[111] That's likely to happen with your day camps but it's not likely to happen if maintenance is based on actual income.

[112] The one thing you should know when we add the recalculation clause is that if you fail to provide, if you do not provide your documentation to Maintenance Enforcement on or before June 1<sup>st</sup>, they have the power to assume a 10% increase in your income.

[113] Provide on or before June 1<sup>st</sup> to Maintenance Enforcement, and to each other, full and complete particulars of your Income Tax return, whether or not you file with Revenue Canada, you must file it with Maintenance Enforcement together with your income slips, T4's, T4E's or anything of that sort. They will automatically do the recalculation up or down.

[114] Where you don't have an exact amount for camps, they're not likely to touch that but you will be required by court order to do that yourselves.

[115] You can consider that incentive to make sure that your disclosure is on time and it's absolutely accurate.

[116] If it's not accurate, you give them the best accurate information you have or automatically they will add 10% to your income and they will determine an amount to be paid. And as you can appreciate, you've been before this Court many, many times, you don't want to appear when you don't need to do it.

[117] You're not the only people that find yourself in this situation but you need to understand this is a court order and you must abide by the terms of the order.

## **Custody**

[118] The next issue that I have to decide is the issue of custody of the child.

[119] For your purposes, I'm just going to briefly review what a Court has to do when they're looking at a change in custody.



[120] Under *the Maintenance and Custody Act*, the Court is obliged under S.18 (6) to focus primarily on the best interests of the child and to consider all relevant circumstances.

[121] Some of factors that the Court must consider in determining best interests includes the physical, social, educational needs of the child, the need for stability and safety, each party's willingness to facilitate or support the development of a relationship with the other parent, the history of the care of the child having regard to the child's physical, emotional, social and educational needs, the plans each of you propose for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs.

[122] I'm going to skip over what I don't think I have evidence on or that which is not relevant to your case. I have no information about the child's views. The child is six and it's not likely that it would be appropriate to obtain a child's views at that stage of development in any event.

[123] I'm to consider the nature, strength and stability of the relationship between the child and each parent, the relationship between the child and siblings, grandparents and other significant persons in the child's life, the ability of each parent to communicate and cooperate on issues affecting the child. Those are the principle elements that relate to your case.

[124] We have various case and statutory law that speaks to all of the elements the Court must consider and balance. It's obviously important that the Court remember that the primary and the paramount interest is the best interests of the child.

[125] This is not a situation where you're starting anew. This is a situation where there are many court orders on file. There have been previous considerations regarding custody. This is what is called a variation application and thus, I must look for a material change in circumstances in order to move to the second level of inquiry.

### **Change in circumstances**

[126] This is a relationship between parties that occurred between February of 2007, and June of 2011.

[127] There is one child born of the union, July \*, 2009.

[128] The parties separated when this child was 11 months old.

[129] Starting on October 4<sup>th</sup> of 2010, there was a shared parenting arrangement with week on and week off parenting times.

[130] On November 16<sup>th</sup> of 2010, due to personal difficulties inclusive of alcohol addiction, the shared parenting arrangement was significantly changed requiring supervision of the father's parenting time with four hour visits in the father's home Saturday and Sunday.

[131] There was another order updated February 13<sup>th</sup>, 2011, regarding visitation and limitations.

[132] On May 2<sup>nd</sup> of 2011, there was increased parenting time, Wednesday and Friday overnight and there was information concerning your income situations.

[133] On October 11<sup>th</sup>, 2012, there was a Veith House order for supervision.

[134] On January 4<sup>th</sup> of 2013, supervision continued until February of 2013, and after that, every Saturday from 10 a.m. to 1 p.m.

[135] On September 13<sup>th</sup> of 2013, there was another Consent Order, increasing the hours gradually effective March 1<sup>st</sup>, 2014, to a 24 hour period, always with the strict prohibition that if there was a relapse or alcohol was present that the order would be terminated and the matter would be renegotiated.

[136] Out of that history, on October 8<sup>th</sup>, 2014, Mr. M. seeks to have primary parent status. The material change he relies on is really twofold.

### **Residential Instability**

[137] He alleges that there is residential instability with the mother. She has moved several times in the last number of years .This triggered this application.

### **Improved financial circumstances**

[138] Secondly, he has an improved financial situation and relationship stability which brings with that residential stability, a new family, an extended family, a fiancée and another child.

[139] Historically, throughout the Respondent's relapse and recovery program, the mother has borne a great deal of the responsibility for child rearing, including addressing the special needs of this child through various medical health authorities.

[140] This child has special needs. I have had them described to me in the reports which are attached to the affidavit of the mother.

[141] Those special needs include speech and language difficulties and fine motor skills difficulties. She has been assessed and recommendations been made. I have read her school reports and her French immersion reports.

[142] I don't have evidence that the father has participated in addressing these needs other than when the child is in his home and with his partner. The reports refer to the mother and child and the effort of the language therapists and schools addressing these issues.

[143] The child has lived with the mother since birth.

[144] Her family and extended family are the child's support system. They have provided her with what safety she has come to know, particularly when the father was absent due to his own issues.

[145] I do understand that there was a period of time that you felt that you needed to put the matter before the Court in order to gain more appropriate contact. That was successful and lately you have confirmed that the mother has been offering additional time.

[146] You advised that you have personal and employment responsibilities that do not always allow you to take extra time that has been offered to you.

[147] The father is now criticizing **the mother's family support system**, identifying certain historical weaknesses in each individual.

[148] I have limited evidence other than the father's opinion and a letter he tendered written by the mother when she was approximately 22 years old, before their relationship solidified.

[149] I have no objective proof that there are some difficulties with circumstances of the extended family.

[150] I have not been informed that the father has been sufficiently concerned to contact police or Child Protection Services.

[151] I am aware that this evidence that he submits is a letter from the mother that stems from 2007. The mother is now 30 and the father is 37 years old.

[152] It seems curious to me the supports were good enough when the father was not able himself to provide support and they're not good enough now.

[153] The **continuity of care** that has been provided historically largely came through the efforts of the mother and her family.

### **Plans of care**

[154] Both parties have submitted plans of how they would address their child's need.

[155] The mother's is in effect. The father's is more an expression of a willingness and intent to give to his daughter that which he has now accumulated. He advises what he will do to help her address her needs if she lives with him.

[156] This has always been a joint custody situation and both parties have always been responsible for consulting on major decisions relating to the child.

[157] Much of what the father describes can be done now and could have been done in the past during the father's parenting time to enhance what this child already has.

[158] There is an **attachment** to the mother, as the primary caregiver, that has developed over a six year period.

[159] Other than the father's criticism of her frequent moves, there is no evidence regarding her current living situation that diminishes her ability to provide a residence for the child. It may not be a residence that equals that which the father can provide but there is no evidence that would cause me to conclude that the residence is wanting.

[160] The relationship between the father and the child has not been fully described to me.

[161] It appears the child is welcome, loved and cared for in his home. However, it is notable that when she is ill, the father takes her home to her mother because he admits the child would be comfortable in the home of her primary caretaker and to protect his fiancée's child and the household in which he lives from catching the virus. So there's some reliance on the competency of the mother here.

[162] A parent who wishes to be a primary parent learns how to adapt their life to address the current needs of their children including illness.

[163] To break the connection at this time between the extended family of the mother would be disruptive.

[164] The father proposes in his plan to place the child in the Excel Program and admits that this would facilitate the social development of his child. It would also cause the child to be in the school setting for a longer period of time.

[165] The mother's work schedule is geared around the child so that the child does not have to be in after school care.

[166] I'm conscious of this child with special needs that have been described and the difficulties that she has encountered and apparently is ... is working well. Having a longer day to 5:00 or 6:00 p.m., 6:00 p.m. was the first period of time suggested - that is a stress on the child that may not be worth it unless it was absolutely necessary.

[167] I have been asked to look at the ability of the parties to cooperate and communicate.

[168] It's acknowledged by the parties that you have successfully rehabilitated yourself and there is no current issue. However, the Respondent had a very serious drinking problem which put him in a very difficult position.

[169] All the evidence, including the mother's evidence, supports that the father has made a very difficult recovery and supports his sobriety for a considerable period of time. He is to be commended for that struggle.

[170] The mother's own situation was jeopardized with the intervention of Child Protection when someone contacted Child Protection while the child was in his care. The mother too, was given a serious wake-up warning by Child Protection. She was told it's her responsibility to protect this child and she left this child with the father, in a precarious position. They reminded her of her responsibility.

[171] Notwithstanding that, all the way through this, she has continued to agree to joint custody. She did not diminish in any way his rights and responsibilities as a co-parent, as a joint parent under the Maintenance and Custody Act. There is a presumption of joint parenting and joint responsibility. She has continued. She has not said I want to change this from joint custody to sole custody because I don't... want to diminish the father's participation. That's an example of a willingness to communicate and not to take away from your role as father.

[172] The mother has also given uncontested evidence of her attempts to have you absorb more summer vacation time, more future development time when this child can be with you.

[173] Specifically, she invited you to have your child with you during your vacation this summer, in part because if the child is not with either of you, daycare has to be purchased in some way, shape or form.

[174] She took her vacation and the balance of this summer the child went to various camps.

[175] You saved your vacation, understandably for your upcoming wedding, and you indicated you couldn't have the child with you. I don't know what other options you had available to you but that was a lost opportunity.

[176] In changing an existing consent order you, the father in this case, bear the burden of proof to provide the evidence to show that there's been a material change of circumstances and, as a result of that, that it would be in the best interests of the child to uproot her and move her with you.

[177] If you achieve that level of proof then I am not bound by the pre-existing orders. I make my inquiry anew.

[178] I am not bound by the rights of the parents because the rights of the parents are secondary to the rights and best interests of the child. The Supreme Court of Canada has already indicated this is not a rights-based inquiry, that is, parental rights are not more compelling than the child's best interests.

[179] On the totality of the evidence put forward by the father, I am not satisfied that you have met the burden of showing that there is a material change in circumstances affecting the child such that the Court can enter into the second stage, the broader consideration of the child's best interests.

[180] Aside from your impending marriage, your change of employment and your improved financial circumstances, there is little new affecting the child.

[181] Your improved circumstances will certainly enhance this child's prospects and help to address the mother's residential issues.

[182] My goal is to look at preserving for the child what the child has and if at all possible, minimizing her losses and enhancing her life as a result of improvements before effecting a major change in her life.

[183] If I err in concluding that there is simply not enough proof, not enough evidence to convince me on the totality of the evidence, on the balance of probabilities, that it is in her best interests to move her, I have, for your purposes, included the consideration of the elements outlined above and I am satisfied that the best interests of the child rests with a continuation of the current joint custody situation with the mother as primary parent.

[184] I am aware of the father's improved stability and the fact that with his new family and the mother is satisfied that he is maintaining sobriety, it may be appropriate to enhance his parenting options.

[185] While I am prepared to do this, I recognize that you have been offered extra time; you've confirmed the mother has not impeded your contact, and that, in fact, she urges you to take more time and that you are limited sometimes by your personal and your employment circumstances.

[186] I am also aware that by enhancing this, you already had the ability in your first order to access third party information about her school, medical records and her health care.

[187] I don't have evidence that you have been involved in all of the health care decisions. Now, you might indicate that's because you aren't consulted and you should be consulted but what about school appointments, what about attending at the school for parent/teacher day, what about attending medical appointments, what about making medical appointments?

[188] I'm also aware that in the original order, you agreed to share transportation and you are ... you don't have a vehicle and you cannot drive your fiancée's vehicle so you're asking the mother to be responsible for all the transportation. You're telling me two messages, one you can and one you can't.

[189] I'm aware of the special needs of this child, the language delays, her difficult oral communication skills and your concern about French immersion. It's a valid concern to be considered when you have a child with these issues.

[190] I do note that the teacher says however, your child has successfully integrated in the grade primary French immersion program. Her speech therapist spoke well of her. She was assessed for speech difficulties. There is a report on file. Her report card is not problematic as much as anyone can understand these report cards.

[191] So you have, right now, the ability under the current order, given your admission there is no obstacle to you being more involved. You already have the ability to be involved in her school, to help her with these speech difficulties, to take her to some of these medical appointments, to follow up if Mom can't follow up on all of the ... the appointments that she's required to attend.

[192] I'm aware that, in some part because of your mobility and your moves, you've lost touch with some of the recommendations that have been made.

[193] You both need to make sure that she has access to your time, both of you, so that you can push her to a point where she can succeed.

[194] I acknowledge that of the extra-curricular activities she's involved in, you've enrolled her in activities that help her socialize and that increase her confidence and create a discipline for her and those are activities that you have the ability to help her out with now. That part of the order has never been varied.

[195] I understand the father's concern that you keep moving; it's destabilizing for a child to move that frequently; but it's not uncommon when your finances are strapped that you have to move to what you can afford or live in debt. That's the reality here.

[196] The Father's circumstances have had a corresponding financial and emotional burden on the mother because during periods of time you were not available to take the child or relieve her or pay extra costs.

[197] You have admitted that you did not pay childcare expenses for the greater part of her early life and you do not believe that if parents or grandparents or family members are caring for a child that they should be paid for their services.



[198] That's not realistic in this day and age. There are costs to having a child in a grandparent's home.

[199] There was never an order for childcare costs.

[200] The mother was under the impression your circumstances were poor. She was aware you lost your job and you had difficulty maintaining your home so she did not apply.

[201] She moved to [...] to be closer to her job and daycare and you were to pay ½ the costs directly to the daycare and after August, she could no longer receive a contribution from you and so she had to remove the child from daycare, which you now both agree, is good for your child sometimes and she was responsible to make-up the outstanding payments to daycare.

[202] When you suffered a relapse, she had to deal with Child Protection. She had to look to extended family to assist her with the care of her child. The child was placed with the mother's sister at the end of August. She paid \$300 plus bus passes for a four month period from August 2013 with her step-father until she went to school in September of 2014 and that was \$300 a month. That's a small amount of money for daycare.

[203] The parties have agreed that there is no current child care costs due to the fact that the mother has flexible employment and is able to provide before and after school child care.

[204] The parties agree to a **proportionate sharing of expenses of March Break and summer camps** in which the child is enrolled. The camp fees for 2015 are **\$885** and I will address that once I change the proportion based on the change in your income. I will not repeat the financial information that I have indicated to you before.

[205] In effect, the decline in the mother's circumstances was partly as a result of the fact that she was carrying the financial burden and the burden of being the custodial parent alone.

[206] So I've reviewed your request and **I am going to continue a joint custody arrangement that requires consultation with the father on all major issues.** I'm concerned about the fact that there is no communication between the parties.

[207] I'm going to increase the father's parenting time to access every second weekend from Friday after school to Sunday at 6:00 p.m. and I will further allow for a supper mid-week, every week, with return ... what's the child's bedtime?

MS. L.: Eight o'clock.

THE COURT: Return to the mother's home at seven.

[208] The parties will split the responsibility for transportation.

[209] The parties will also **divide March Break equally** unless one party ... unless they agree in writing to alternate the March Break in the event that either have vacation time during the March Break and they agree in advance if one party wishes to have one March Break this year, the other party would have the full March Break next year and unless agreed upon, it would return to a split March Break situation **commencing Friday to Wednesday, Wednesday to Friday.**

[210] The parties agreed that they would alternate annually the holidays of Christmas consisting of Christmas Eve overnight to Christmas morning)

[211] The mother has enrolled the child in a number of activities that enhance her socialization and discipline. She can continue in these activities as long as the child is willing.

[212] The father can choose **one extra activity** that does not conflict with the schedule and that the parents can agree upon. **He shall pay for that activity** and advise the mother.

[213] That portion of the old order that related parenting time depending on your schedule is no longer necessary. You have a much more regular schedule and there'll be set hours, as I've indicated, for the contact.

[214] On the written consent, in advance, of both parents, the times may be altered and expanded as agreed upon by both parents.

[215] The parties have agreed on a structured schedule for parenting time on holidays and special occasions. They have agreed that they will alternate annually the holidays of Christmas, consisting of Christmas Eve overnight to Christmas morning, Easter Sunday consisting of the evening of Holy Saturday overnight to Easter Sunday morning, Canada Day and Halloween. The parties agree that the

child will spend Mother's Day with Ms. L. and Father's Day with Mr. M.. They will each have parenting time with the child on her birthday. The child will be with Ms. L. for her birthday and the birthdays of her immediate family members and the child will be with Mr. M. for his birthday and the birthday of his immediately family members.

[216] The parties have agreed that either of them **could travel** with the child outside the Province of Nova Scotia for the purpose of a vacation with the permission of the other party ... of the other parent.

[217] Both parties shall keep each other informed of any health concerns, medical issues or current treatment, recommendations of the physician relating to the child.

[218] Should there be an **emergency**, the child's needs shall be addressed immediately by the parent with care and control. The parent with care and control of the child shall notify the other parent as soon as possible. Both parents shall collaborate and consult with each other on all major issues relating to the child's educational, spiritual, physical and medical welfare. Both parents shall have access to all third-party service providers. Is the father listed on the registration form at school?

MS. L.: I would have to double check but I believe so.

THE COURT: Make sure that the child is listed on the ... with the doctor and also with the school. Okay.

[219] Now, in terms of the financial aspect, this order of child support shall be reviewed annually and where necessary, recalculated.

[220] The parties shall exchange their Income Tax returns with all attachments and all Notices of Assessment received from Revenue Canada on an annual basis on or before June 1<sup>st</sup> of each year.

[221] All **support payments shall be made payable to N. L.** but shall be paid through the offices of Maintenance Enforcement.

[222] The ordinary **recalculation clauses** shall be included. All sheriffs ... and I will include the police clause in that and Ms. Goudey, that police clause is on page three, paragraph 14, of the order issued on the 4<sup>th</sup> of October, 2010.

[223] The parenting schedule for the father shall continue.

[224] There is an absolute prohibition against the use of alcohol and/or non-prescription drugs by Mr. M. during access visits. The visits may be terminated if there is sufficient evidence that that is not the case.

[225] The child shall be entitled to **liberal telephone contact** with each parent while in the home of the other.

[226] **Each summer**, beginning with the summer of 2016, and every even year thereafter, Mr. M. shall have first option to have two non-consecutive weeks of vacation during which time the child may be with him. He shall advise Ms. L. in writing by no later than May 1<sup>st</sup> of each year of those two non-consecutive weeks he chooses. Thereafter, you shall advise Mr. M. by May 15<sup>th</sup> of your choice of two non-consecutive weeks thereafter. Aside from those two weeks non-consecutive, the ordinary schedule will continue. In the 2017 year and every odd year thereafter, the mother shall have first option and will follow the same formula, advising the father in writing on or before May 1<sup>st</sup> and his response shall be by May 15<sup>th</sup> of his chosen non-consecutive. Do you understand what I've just said there?

[227] Obviously **the blanket clause** that I've included such other contact as may be agreed upon between the parties is a clause that allows you the freedom to expand your roles as parents in accordance with your ability and the needs of the child as she progresses throughout different ages and stages of development.

Legere Sers, J.