Case Name: M v. S

Between E M, Applicant, and M S, Respondent

[2011] O.J. No. 2768

2011 ONSC 3399

Court File No. FS-08-FD337850-FISO

Ontario Superior Court of Justice

H.E. Sachs J.

Heard: May 9-13, 2011. Judgment: June 2, 2011.

(66 paras.)

Family law -- Custody and access -- Considerations -- Best interests of child -- Maximum contact principle -- Status quo or maintenance of stable environment -- Custody -- Joint custody -- Primary residence -- Application by mother to vary consent joint custody order dismissed -- Parties were parents of five-year-old child who was to start school in September -- Parties resided in different provinces and since separation child travelled between their homes -- Parents to continue to share joint custody -- While both parents equally able to meet child's needs, played equally important role in child's life and child equally bonded to both, in child's best interests to spend school year with mother as would provide continuity and less risk of disruption and would maximize contact -- Parties to contribute to costs of access.

Application by the mother to vary a consent joint custody order. The parties were the parents of a five-year-old child. The mother was born in Nova Scotia and met the father when she attended university in Ontario. They began living together in 2002 and they married in 2006. After the parties relocated to Newfoundland, where the father had accepted a teaching position, the mother became pregnant. In 2007, the parties returned to Ontario. The mother found employment, while the father completed his doctoral thesis

and cared for the child. Shortly after returning to Ontario, the parties separated. While they remained living together for another six months, the mother eventually decided to return to Nova Scotia and wished to take the child with her. Thereafter, the parties entered into a consent order whereby they agreed to have joint custody of the child. In addition, they agreed that the child would live with the mother from September to April, with the father to have access 10 days per month, and that he would live with the father from May to August, with the mother to have access 10 days per month. While in Nova Scotia, the child lived with the mother and his material grandparents. He attended daycare as the mother was employed as a supply teacher. The father was also employed as an instructor. While he remained in Ontario, his place of residence had varied with his teaching appointments. He had since remarried and was expecting a child. Since separation the child had been travelling back and forth between his parents as per the consent order. However, the child was scheduled to start school in September, but the parents had been unable to agree as to where he would spend his school year.

HELD: Application dismissed. There was no issue that the parents were to continue to share joint custody or that the parent with whom the child did not reside during the school year was to have the child for most of the summer holiday period. While both parents were equally able to meet the child's needs, had played an equally important role in the child's life and the child was equally bonded to both, it was in the child's best interests that he spend the school year with his mother. Such an arrangement would provide the child with continuity and less risk of disruption and would provide the child with the best chance to have contact with both parents during the school year. The mother was to continue to contribute to the costs of financing the father's access to the child and, therefore, when the father came to visit the child, the mother was to contribute the child support she would otherwise receive to defray the father's costs.

# Statutes, Regulations and Rules Cited:

Child Support Guidelines, s. 7, s. 10

Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 4(a), s. 24 Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 16(10)

#### Counsel:

Steven Benmor, for the Applicant.

Herschel Fogelman and Eve Schwarz, for the Respondent.

### H.E. SACHS J.

#### Introduction

1 This case concerns two parents who have one child together and live in different provinces. The mother lives in Liverpool, Nova Scotia and the father lives in Toronto, Ontario. Their son, is five years old. In the three years following their separation, son has

been travelling back and forth between his parents. During the months of September to April, inclusive, he spends twenty days a month with his mother in Nova Scotia and ten days a month with his father in Ontario. In the months of May through August the arrangement is reversed.

- **2** Son is scheduled to start school in September of this year. Thus, a choice must be made as to where he will spend his school year. The parties have been unable to agree on this choice. Therefore, the matter was tried before me.
- **3** If son resides with the mother during the school year, she is seeking child support from the father for the months that son is with her. She is prepared to pay the father child support when son is with him and she is prepared to allow a portion of the child support to be used towards travel costs if the father travels to Nova Scotia to visit son. The father does not seek child support from the mother if son resides with him during the school year.

## **Background**

## Details of the Relationship Between the Parties

- **4** The applicant mother was born and raised in Liverpool, Nova Scotia. She is now 31 years old. When she finished high school in 1997 she decided to attend York University in Toronto, Ontario. While there she completed a double degree a Bachelor of Arts in English and a Bachelor of Education.
- **5** In July of 2001 she met the respondent father, who is now 38 years old. The Respondent was a PhD candidate at the same university. They started dating and, in May of 2002, they decided to live together.
- **6** They lived together in Toronto until August of 2004. At that time, the Respondent accepted a teaching position at an University in St. John's, Newfoundland. The Applicant joined him there a year later.
- **7** The Applicant had been told that she could never have children but, while they were in Newfoundland, she became pregnant. The son was born in Newfoundland on and the parties married in Toronto.
- **8** After their marriage they continued to live in St. John's, Newfoundland until June of 2007, when they made the decision to return to Ontario. When they returned, neither of them had employment. Thus, they decided to live with the Respondent's parents in Buckhorn, Ontario until the Applicant could obtain a job. The plan was for her to support the family while the Respondent completed his doctoral thesis.
- **9** During the summer of 2007, the Applicant looked for a job in Toronto and commuted between Toronto and Buckhorn. The Respondent and Son remained with his parents in Buckhorn. The Applicant eventually found employment at a retail store in Toronto. In August of 2007 the family took up residence together in the area of Toronto.

- **10** Once they arrived in Toronto, the Applicant worked outside the home approximately 32 hours a week at her retail job. The Respondent remained at home caring for Son and working on his thesis.
- **11** In November of 2007 the parties decided to separate. They remained together under the same roof until April of 2008 while they made plans about their future. The Applicant decided to return to Liverpool, Nova Scotia to live with her parents. She wished to take Son with her.
- **12** The Respondent objected. He wanted Son to remain with him and his parents in Buckhorn, Ontario. Both parties brought applications before this court seeking custody of Son.

## The Court Proceedings in 2008

- 13 On April 24, 2008, the parties appeared before Czutrin J. As a result of that appearance they consented to an order adjourning the proceedings to a trial management conference at the end of August (with a trial date in September). They also agreed that pending the next appearance Son would spend May and July of 2008 with his mother in Liverpool, Nova Scotia and the months of June and August of 2008 with his father in Buckhorn, Ontario. The order directed that a custody and access assessment be conducted by Howard Hurwitz. The parties undertook to make "immediate and serious efforts" to secure full time employment in a jurisdiction that would allow both of them to reside in close proximity to each other.
- **14** Over the ensuing four months Mr. Hurwitz conducted his assessment. The Applicant found work as a supply teacher in Liverpool, Nova Scotia. The Respondent remained in Buckhorn with his parents. They did not find full time jobs in the same jurisdiction.
- **15** Mr. Hurwitz completed his assessment. Instead of incurring the costs of a written report the parties agreed that he would meet with them and give them his recommendations orally. He did so and, as a result of those recommendations, the parties entered into another consent order when they appeared before Czutrin J. on August 28, 2008.
- **16** The August 28, 2008 order contained the following provisions:
  - (a) The parties were to have joint legal and physical custody of son.
  - (b) Son was to reside with his mother from September to April, with access to be provided to the father ten days a month.
  - (c) Son was to reside with his father from May to August, with access to be provided to the mother ten days a month.
  - (d) Transportation costs were to be shared.
  - (e) If the father moved to Halifax, Dartmouth or Liverpool, Nova Scotia then son was to reside with each parent on a half time basis.
  - (f) Each parent was to have the right to communicate with son by telephone, email, letter or videocam at least 4 times a week.

- (g) The parties agreed to consult with respect to all major decisions and to share information.
- (h) The parties agreed to resolve all disputes through a parenting coordinator.
- (i) The parties agreed that the matter would remain within the jurisdiction of Ontario.
- (j) Both parties agreed to take the steps necessary to address their mental and emotional health. The Respondent agreed to continue his ongoing therapy and medication for symptoms of depression. Both parties agreed to provide each other with medical reports of their health from their family doctors on April 1 and October 1 of each year.
- (k) The order was subject to variation based on a material change of circumstances. It was agreed that a "material change in circumstances" could include the child beginning senior kindergarten.
- 17 The parties were divorced on February 5, 2009.
- **18** In these proceedings both parties are seeking to vary the August 28, 2008 order based on the fact that the son will be starting senior kindergarten in September of 2011.

## The Circumstances of the Parties since the 2008 Proceedings

- 19 Over the past three years the parties have continued to abide by the terms of Czutrin J.'s order. They arranged that the Respondent's access each month would occur back to back, so that son has been spending twenty day periods with the Respondent in Ontario. To facilitate this access the Applicant has brought son to Ontario at the beginning of the access, and the Respondent returns with son to Nova Scotia at the end of the visit. In the summer months the routine is reversed. Over the past three years, son has spent approximately 45% of his time with his father and the rest with his mother. Both parties have facilitated son contact with the parent he is not living with through "Skype."
- 20 The Applicant has continued to reside in Liverpool, Nova Scotia with her parents. Her parents are in their sixties and play an active part in son care. The Applicant's father is a retired teacher and her mother is a retired nurse. Liverpool is a small town with 3000 people that is situated near the ocean, approximately an hour and a half by car from Halifax. The home that the Applicant resides in is the one that she grew up in. She lives on the first floor with son and her parents have their bedroom in the basement. The family shares meals together and functions very much as an integrated unit.
- 21 When in Liverpool son attends a daycare. The Applicant has been working as a teacher. Until the last school year she has had steady and continuous work as a supply teacher. During the last school year she has been replacing a teacher who is on maternity leave. The Applicant's current employment is in Chester, Nova Scotia, which is about an hour's drive from Liverpool. Her father takes son to daycare in the morning and, if the Applicant is not home yet, he also picks son up from daycare. The Applicant is home for dinner.

- **22** After the August 2008 order, the Respondent remained in Buckhorn with his parents until August of 2009 when he moved to Thunder Bay to teach at L. University. In September of 2008 he obtained his doctorate degree and, in the spring of 2009, he taught a couple of courses at Y University.
- 23 The Respondent lived in Thunder Bay until the summer of 2010 when he returned to Toronto to teach at R University. The Respondent has a two year contract as an Assistant Professor at R University, which runs until July of 2012. After that, he is eligible for one two-year renewal of his contract. The maximum period of time he can work as a contract professor at R University is four years. To remain employed with them beyond that period of time, he would have to obtain a tenure track position.
- **24** In January of 2009, the Respondent started going out with another woman, Ms. T. They moved in together a year later and married on July 24, 2010. They are expecting a child, a girl, in July of this year. Ms. T was a teacher, but currently does not work outside the home. The parties reside together in an apartment building in the area of Toronto.

## The Legal Framework

## Custody

**25** In 1996 the Supreme Court of Canada addressed the question of the test to be applied in cases where the circumstance that has caused the court to address the question of custody involves the relocation of a parent. In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the Supreme Court rejected an approach that revolves around presumptions and burdens. It mandated that each case turns on its own facts and that the only issue is the best interests of the child in all of the circumstances.

**26** In that case, the Supreme Court does set out a list of factors for a court to consider in deciding best interests. They include, at para. 49:

- (a) The existing arrangements and relationships between the child and each of his or her parents.
- (b) The desirability of maximizing contact between the child and both parents.
- (c) The views of the child.
- (d) The reasons of the parent for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.
- (e) Any disruption to the child that would be caused by the change in custody or by his or her "removal from family, schools, and the community he or she has come to know."

**27** Section 24 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 also articulates a set of factors to consider in deciding best interests. They include: the relationship between the child and each parent and other members of the child's family who reside with the child or are involved with his or her care; the plan proposed by each parent for the child's care and upbringing; the ability and willingness of each parent to meet the needs of the child,

including guidance, education and any special needs; and "the permanence and stability of the family unit with which it is proposed that the child will live."

**28** Both section 4(a) of the *Children's Law Reform Act* and section 16(10) of the *Divorce Act*, R.S.C. 1985, c. 3, as amended, make it clear that it is important to take into account the willingness of each parent to foster contact with the other parent.

# **Child Support**

- **29** Section 10 of the *Child Support Guidelines* provides that if a spouse has unusually high expenses in relation to the exercising access to a child, child support may be reduced due to undue hardship if the parent requesting the reduction does not have a higher standard of living than the household of the other parent, after determining child support.
- **30** In *Ellis v. Ellis*, [1998] N.S.J. No. 84 (S.C.), varied on other grounds [1999] N.S.J. No. 78, the costs of exercising access between Winnipeg and Nova Scotia did not meet the threshold for an undue hardship claim for a father who earned \$51,400.00 per year. Similarly, in *Williams v. Williams*, [1997] N.W.T.J. No. 49 (S.C.), Vertes J. denied a claim for an undue hardship reduction in child support that was based on a mother's need to travel from Nova Scotia to the Northwest Territories to exercise access to her child. In that case the mother earned considerably less than the father. In both cases the courts found that there was nothing "unusual" about the costs of travelling between different parts of Canada to exercise access.
- 31 In *Morrone v. Morrone*, [2007] O.J. No. 5341 (S.C.), Quigley J. denied a claim to reduce child support based on undue hardship when access was being exercised to children who were moving to Florida from Ontario. However, he did order that the mother contribute to the father's costs of exercising access to the children. In doing so he found that both the provisions of the *Children's Law Reform Act* and the *Divorce Act* permit the court to make such an order as an incident of a custody order where a child is permitted to relocate with a parent.

### **Analysis**

### Custody

**32** In this case there is no issue as to the fact that the parents are to continue to share joint custody of the child. Nor is there an issue that the parent with whom the child does not reside during the school year is to have the child with him or her for almost all of the school holiday periods. The only issue concerns the residence of the child during the school year. I will consider this issue in relation to each of the factors that has a bearing on the question of the best interests of son in the circumstances of this case.

### The Relationship Between son and His Parents

**33** In this regard, son is a fortunate little boy. He has two parents who love him and with whom he enjoys a secure, open and loving relationship. I reject the assertion that either parent has been son's primary or psychological parent. This is a situation where

both parents have played an equally important role in son's life to date and where, on the evidence, he appears to be equally bonded to both of them.

The Relationship Between son and the Other People who Will be Involved in His Care

- **34** Again, son has the good fortune to have many people who love him, and who are willing and anxious to participate in his care.
- **35** The Applicant resides with her parents, both of whom are devoted to their grandson. The Applicant's father, Mr. M, testified, and it is clear, that he has played and wants to continue to play a very active role in son's life. Mr. M has made son his priority and he is a man who has a lot to offer son in terms of an enriched life. While the Applicant's mother did not testify because of financial constraints that made it difficult to make the trip from Nova Scotia, there was no evidence to suggest that she is anything other than a positive influence in son's life. According to the evidence that I heard, neither of the Applicant's parents have any health concerns.
- **36** The Respondent resides with his wife, Ms. T. She testified before me and I was very impressed both with her clear love for son, and with her demonstrated understanding and ability to meet his needs. The Applicant testified that she had no concerns about Ms. Tor her ability to play an important role in son's life.
- **37** The Respondent and Ms. T have family who also play an active role in son's life. Again, the evidence satisfied me that this contact was a positive one for son.

Ability of Each Parent to Meet the Child's Needs, Including any Special Needs

- **38** Both parents have received treatment for depression. The Applicant had been taking medication for depression when she became pregnant with son. Once she discovered that she was pregnant she discontinued her medication. After son's birth she suffered from post partum depression. Again she sought treatment, which consisted of both medication and counseling. In April of 2007 she discontinued her medication and has not had a depressive episode since then. According to the Applicant, her depression was linked to her relationship with the Respondent, which she realized in counseling was not a healthy one.
- **39** The Respondent testified that in the summer of 2006, while he was staying with his parents, he had an anxiety attack. He attributed this attack to the stresses associated with the tensions in his marriage, the uncertainty surrounding his employment situation and the fact that he was a first time father of a new baby.
- **40** According to the Respondent, the anxiety attack scared him. With the Applicant's encouragement, he sought help. He too has been treated through a combination of talk therapy and medication. He has not taken any medication since January of this year. The Respondent testified that through his treatment he has become more conscious of the need to express his feelings and has become better at dealing with his stress.

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- **41** I am satisfied on the basis of the evidence that I heard that both parents are completely able, both emotionally and physically, to meet son's needs. They have both suffered from situational depression and, when they did so, they took appropriate steps to control that depression. At present they are both stable emotionally, in spite of the stress that they must be feeling because of these court proceedings. I have no doubt that, should they need to seek help again, they will do so. They are both insightful, intelligent people with good family supports. I am confident that they are able to deal with their emotional conditions in a manner that does not adversely affect son.
- **42** With respect to son, when the Applicant returned to Liverpool she was concerned about certain aspects of son's behaviour. She took him to a "Well-Child Screening" run by the Early Childhood Association. The person who conducted the screening had some concerns. As a result further assessment was conducted but, by the spring of 2010, it became clear that son was fine. The Applicant kept the Respondent advised about what was going on and the Respondent took appropriate steps to become involved in the process.
- **43** Son is not a child with "special needs," if that term is meant to describe a child with a condition that requires some form of special treatment (son does appear to have childhood asthma, which both parents control through the use of a puffer). Both parents have demonstrated that, in spite of their differences, they are able to operate cooperatively when it comes to insuring that any concerns regarding son's behaviour or health are dealt with appropriately.

## Permanence and Stability of the Family Unit of Each Parent

**44** Again, this is an area where the evidence raises no concerns about either family unit. The Applicant and her parents are very bonded, and have a healthy and loving relationship. The Respondent and Ms. T are also clearly very connected and committed to each other. They testified about their relationship in a manner that suggested a mature understanding of what it takes to make a marriage successful.

# Reasons for Moving

- **45** The Applicant moved to Liverpool at a time when her marriage was ending, and her employment situation was unsatisfactory and not conducive to parenting a young child. Liverpool represented an opportunity to return to the community she grew up in and to receive support from her parents in parenting her child. She had no family in Ontario.
- **46** When the parties separated, the Respondent also moved back to his family in Buckhorn, for reasons that mirrored the Applicant's reasons for her move. He was not in a place, financially or otherwise, to parent his child on his own.
- **47** Thus, after the separation, both parties moved back to their family homes in order to put themselves in a better position to meet son's needs. Unfortunately, the two families did not live in the same province.

- **48** Both parents intend to remain in their current homes and to enroll son in schools located near their homes. In the Applicant's case, the school is one that a number of son's friends from daycare will also be attending. According to Ms. T, the school near the Respondent's home is attended by a number of children who reside in their apartment building. Because of the makeup of the local neighbourhood, the school has a high percentage of children for whom English is not their first language.
- **49** If son spends his school year with his mother, his routine will be much the same as it has been over the three years since the separation. The only difference is that instead of attending a local daycare, he will be attending a local school. The Applicant proposes to continue teaching in the area. She also proposes to continue living in her parents' home.
- **50** If son spends his school year with his father, he will be attending a new school with a new group of children. The Respondent teaches two days a week and otherwise has a flexible schedule when it comes to his professional responsibilities. His plan is to remain at Ryerson for as long as he can and to continue his search for a tenure track position. Ms. T does not plan to return to the workforce for the next few years. Thus, she would be available in the home to help care for son when he is not in school.

## Disruption/Continuity

- 51 The mother's plan for son will provide son with more continuity and less disruption than the father's plan. Over the past three years, son has spent more of the school year months with his mother. This has meant that he has formed a cohort of friends at daycare who will continue to be part of his community if he attends school in Liverpool as proposed by the mother. From son's point of view, transitioning to school from his mother's home is a more natural progression from what he has known than transitioning to a school from his father's home. While I make no finding that the father's neighbourhood is a less "desirable" or safe one than the mother's, it is a neighbourhood that is less familiar to son than the one he resides in with his mother. His mother's community is a small one, where everyone knows everyone else, and son has become a part of that community.
- 52 Through no fault of his own, the Respondent has had three homes since his separation from the Applicant Buckhorn, Thunder Bay and Toronto. The Applicant has had one Liverpool. The Applicant's plans are to remain in Liverpool and there was no evidence before me to suggest otherwise. The Respondent, on the other hand, may have to move to obtain employment. While I accept that there is a good chance that his contract with R University will be renewed for another two years, the fact remains that the Respondent cannot remain at R University for more than another three years unless he obtains a tenure track position there. Furthermore, it is clear that if, in the meantime the Respondent finds a tenure track position in another part of Canada, his long term financial security would dictate that he move there to accept it. The Respondent testified that he is continuing to seek such employment and is prepared to move for an appropriate tenure track position. Therefore, there is a real possibility that if son were to spend his school year with his father, he would end up relocating to another community before his schooling is finished.

- **53** The Respondent's employment gives him more flexibility in terms of time than the mother's. At present the mother teaches full days, five days a week. This is likely to continue. The father, on the other hand, teaches two days a week. While his schedule may vary, the amount of time that he must be in a classroom will remain much less than the amount of time that the mother must be present at her employment.
- **54** This flexibility on the father's part puts him in a better position to take the time during the school year to make a trip to visit son if son is in Nova Scotia. Therefore, if son resides with his mother during the school year, he is more likely to have the benefit of seeing his father during the school year. If he resides with his father, contact with his mother is far less likely.
- **55** The father asserts that this situation could be alleviated if the mother made more effort to find employment as a teacher in Ontario. I accept that teaching positions in Ontario are hard to obtain and that to do so often requires being a supply teacher, with all of the uncertainty that that entails. The mother does not have the resources to move to a city with uncertain employment prospects and where she has no family support to help her in caring for son. To suggest that the mother should leave teaching, a profession she loves, to obtain a position in retail is unfair, just as it would be unfair to ask the father to do the same.

## Willingness to Maximize Contact

- **56** Over the past three years both parents have done an excellent job of ensuring that son maintains regular contact with the parent that he is not residing with. There is one concern that arose during the trial about this factor, which is an important one. That concern revolves around the Applicant's father. Mr. M's hostility towards the Respondent was very evident during his testimony. In his view, the breakdown of the marriage was the Respondent's fault and the Respondent is not nearly as good a parent as the Applicant is.
- **57** The Respondent submitted that given Mr. M's attitude and his central role in son's upbringing, there was every reason to believe that Mr. M would influence the Applicant's willingness to foster contact between him and son.
- **58** Mr. M's hostility towards the Respondent appears to originate from an unfortunate incident that occurred when the parties were in the midst of separating from each other. The Respondent testified as to the details of that incident. The Applicant was planning to move with son to Nova Scotia and the Respondent was very upset about this possibility. The Applicant asked the Respondent what he would do if she just took son. He replied to the effect that he would hunt her down and kill her. The Applicant became very upset and called her parents crying. The Respondent admits that he should not have said what he did and has apologized to the Applicant for his actions. The Applicant's father is still very angry with the Respondent for having threatened his daughter.

- **59** The incident in question occurred in the early part of 2008 over three years ago. Since then, with one exception, there is no evidence that Mr. M's anger towards the Respondent has affected the Respondent's interactions with son. The Respondent was clear that the Applicant had been very forthcoming when it had come to promoting his contact with son during the times that son was not with him.
- **60** Shortly before the trial, there was a confrontation at the airport between the Respondent and Mr. M where Mr. M called the Respondent a "jackass" while Mr. M had son in his arms. Mr. M did not try to defend his conduct on this occasion and, when it occurred, the Applicant immediately intervened and told her father that his behaviour was inappropriate.
- **61** On the basis of this evidence I am satisfied that Mr. M's feelings towards the Respondent has not and will not impact on the Applicant's willingness to promote and foster positive contact between son and his father. I am also satisfied that Mr. M has demonstrated an ability to control his feelings in front of son. In saying this, I am not condoning his conduct at the airport. However, the situation was a stressful one because of the upcoming court proceedings. Good people do things in times of stress that they later regret and that does not represent their usual behaviour. The Respondent's threat to the Applicant during the stress of their separation is another example of the same phenomenon.

Conclusion re: Residence During the School Year

**62** Taking all of the relevant factors into account I have concluded that it is son 's best interests that he spend the school year with his mother. I have reached this conclusion for two reasons. First, this schedule will provide son with more continuity and less risk of disruption. Second, this schedule will provide son with the best chance of having contact with both his parents during his school year. His fathers work schedule permits him to travel to visit him in the way that his mother's does not.

## Child Support

63 I do not accept that the father has met the high threshold for a claim to reduce child support based on undue hardship. However, I do find that it is appropriate, as an incident of the custody order that I am making, to provide that the mother is to continue to contribute to the costs of financing the father's ability to visit son. Thus, in the months when the father comes to Nova Scotia to visit son, the mother shall contribute the child support that she would otherwise receive from the father to help defray the costs of that visit. Similarly, if the mother comes to Ontario to visit son during the summer when he is with his father, the father shall contribute the child support that he would ordinarily receive from the mother to the costs of that visit. The mother shall also continue to pay to transport Isaac to visit his father in Ontario, and the father shall pay the cost of returning son to Nova Scotia at the end of those visits.

### **Terms of the New Order**

- **64** Paragraphs 1, 7-17 and 19 of the Order of Czutrin J. dated August 28, 2008 (the "Order") shall not be varied.
- **65** The remaining paragraphs of the Order shall be replaced by the following:
  - (a) The child shall reside with the Applicant in Liverpool, Nova Scotia for the school term from September to June, and with the Respondent in Toronto, Ontario for the school summer vacation period, for March Break and for the Christmas school vacation, except as set out below:
    - Each party is free to arrange visitation times with the child in his community so long as the child is not removed from school.
    - (ii) If the father travels to Liverpool, Nova Scotia or to a place within one hour's drive from Liverpool, Nova Scotia during the school term, then son will stay with him during that visit. The father will give the mother at least seven days' notice of any such visit and the father will be able to keep son with him for up to a week a month during the school term.
    - (iii) If the mother travels to Ontario during the summer school vacation period then she shall be entitled to spend up to 3 days (4 nights) in July and 3 days (4 nights) in August with son.
    - (iv) If the first day of the school vacation period falls within a day of Christmas Eve then son shall spend Christmas Eve and Christmas Day with his mother. If not, then son shall spend the whole of the Christmas school break period with his father, including Christmas Eve and Christmas Day. If the mother travels to Ontario during the Christmas school vacation period then she shall be entitled to have son with her part of Christmas Eve and Christmas Day.
    - (v) In the summer of 2011, the father shall return son to his mother a week before school is scheduled to start.
- (b) The cost of transporting the child shall be shared equally. Each party will require the advance consent of the other party to incur such cost so as to ensure that it is reasonable. While the child needs to be accompanied, the mother shall accompany him from Nova Scotia to Ontario and the father shall accompany him from Ontario to Nova Scotia.
- (c) If the Respondent resides in or around Halifax, Dartmouth or Liverpool, Nova Scotia, then the parties shall negotiate a schedule that allows son to remain in school

and to spend as close to equal time as possible with each parent. If the parties are unable to agree on a schedule they shall first attempt to mediate the issue through the services of a Parenting Coordinator or other professional. If they are still unable to agree, the matter shall be determined by a court of competent jurisdiction in Nova Scotia.

- (d) The child's health cards, SIN card and passport shall remain with (and travel with) the child. Each party shall have a notarized copy of the child's health cards and SIN card.
- (e) Commencing September 1, 2011 the Respondent shall pay Table child support to the Applicant for the months of September, October, November, January, February, April, May and June. Since the child will be residing with both parents in March, no child support will be payable by either parent for the month of March. In any month where the Respondent travels to the child's residence to visit the child, the Applicant shall contribute the child support to which she would otherwise be entitled towards the costs of that visit.
- (f) Commencing December 1, 2011 the Applicant shall pay Table child support to the Respondent for the months of December, July and August. In any month where the Applicant travels to Ontario to see the child, the Respondent shall contribute the child support to which he would otherwise be entitled towards the costs of that visit.
- (g) Table child support shall be based on the party's "Total Income" as stated on his/her T1 General Income Tax Return and Notice of Assessment for the previous year and be based on the Province of Ontario. On or before July 1st in each year, commencing July 1, 2011, each party shall deliver to the other his/her T1 General Income Tax Return and Notice of Assessment for the previous year.
- (h) The father shall pay for any activities that the child is involved in while he is with him. The mother shall pay for any activities that the child is involved in while he is with her. Any extraordinary expenses for the child, such as private schooling or special medical treatment shall not be incurred by either party without the consent in writing of the other, such consent not to be unreasonably withheld. If such an extraordinary expense is necessary it shall be shared by the parties in accordance with section 7 of the Child Support Guidelines.
- (i) Each party may seek a variation to this order based on a "material change in circumstances." For the purposes of this matter, the parties agree that a "material change in circumstances" may include, but is not limited to, the Applicant changing her permanent residence from the province of Nova Scotia or the Respondent relocating to Nova Scotia. In this regard, the party seeking such variation shall first communicate such intention to the other party in writing and the parties shall attempt to resolve such issue through discussion, negotiation and then mediation. If the parties are unable to resolve such issue, then either party is at liberty to commence a proceeding on notice to the other party in a court of competent jurisdiction in Nova Scotia.

**66** If the parties cannot agree on the question of costs, they are free to address me in writing respecting same. Any such written submissions should be made within 14 days of the release of these reasons.

H.E. SACHS J.