ONTARIO COURT OF JUSTICE

CITATION: *Hussein v. Dirie*, 2018 ONCJ 781
DATE: November 7, 2018
COURT FILE No.: Toronto D10790/17

B E T W E E N :

AMINA MOHAMED HUSSEIN
Applicant

— AND —

AHMED DIRIE
Respondent

Before Justice Roselyn Zisman
Heard on October 22, 23, 24, and 27, 2018
Reasons for Judgment released on November 7, 2018

Gary Gottlieb .....counsel for the applicant
Gary S. Joseph and Serena Lein ..... counsel for the respondent

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Zisman J.:

INTRODUCTION

[1] The primary issue in this trial was with respect to the issue of custody and whether or not the Applicant (mother) should be permitted to move to Ottawa with the child Hamza Ahmed Dirie who is 6 years old. There were also ancillary issues of travel and obtaining passports and life insurance to secure child support payments.

[2] At the outset of the trial counsel advised that the issue of retroactive child support and retroactive section 7 expenses had been resolved. The issue of ongoing child support and the section 7 expenses was also to be determined at trial.

[3] The mother seeks an order of sole custody. It is the mother's position that she is the child's primary parent, he has resided in her primary residence and it is in his best interests to reside with her and her husband in Ottawa. The mother proposed the father continue his alternate week-end access with one week-end in Toronto and one in Ottawa and a sharing of the holidays.

[4] The Respondent (father) seeks an order dismissing the mother's application. He is opposed to any move as it will impact on his and his large family's relationship with their son. It was his position at the outset of the trial that the status quo parenting arrangements continue but if the mother moved to Ottawa that he be granted custody and primary residence. He proposed that the mother have alternate week-end access with one week-end being spent in Toronto and the mother able to take the child to Ottawa on the other week-end and a sharing of the holidays.

[5] However, in closing submissions based on the fact that the mother testified that if the court did not permit her to move with Hamza to Ottawa that she would remain in Toronto, the father then submitted that the parties should have joint custody and that the present status quo continue with a slight increase in his parenting time. It was also submitted [1]that if the parties could not agree on decisions with respect to the child that the father have final decision making with respect to medical decisions and the mother with respect to educational decisions.

BRIEF BACKGROUND AND HISTORY OF PROCEEDINGS

[6] The mother and father were married in a religious Muslim ceremony on December 23, 2011.They were never married in accordance with the law of Ontario.

[7] Their child Hamza Ahmed Dirie was born on October 1, 2012 (Hamza or the child).

[8] The parties separated on August 9, 2013. The mother left the family apartment with Hamza and went to live with her mother and sister. Since that time the child has remained in the mother's primary care. The father has exercised his parenting time on an ad hoc basis. The primary source of conflict between the parties has been the lack of a fixed and consistent access schedule.

[9] The father is 33 years old and is employed by the Ministry of Labour as an occupational public health inspector. He has a Bachelor of Applied Science in Occupational Public Health and Safety from Ryerson University and earns about $90,000.

[10] The mother is 30 years old. At the time of the separation the mother was in the fourth year of her placement and subsequently completed her degree as a Child and Youth worker from Ryerson University. She was employed for about 5 years by the Geneva Centre for Autism working with autistic children. She left that employment in August 2018 and at the time was earning about $48,000.00.

[11] The father remarried his current wife Laila Kayieh on May 23, 2015 and they have a daughter who is 2 years old. Ms Kayieh is a stay at home mother and volunteers as a teacher's assistant. In January 2019 she will be attending Humber College in the Early Childhood Education program. In her testimony she clarified that she will only be attending night classes and remaining home with her daughter.

[1] This provision is in the Draft order submitted by father's counsel although not specifically referred to in oral or written submissions.

[12] The mother has also remarried. She met her current husband Lennart Eisentraeger in June 2015. Mr. Eisentraeger is a German citizen and a member of the diplomatic service and at the time was stationed in Angola. The mother advised the father of her engagement to Mr. Eisentraeger on January 2, 2017 and sought his consent to take Hamza to her wedding in Germany on May 16, 2017. The mother also advised the father that she wished to take Hamza to Angola as her fiancé would be placed there for 2 more years.

[13] The inability of the parties to negotiate a resolution with respect to the child attending the mother's wedding in Germany, a proposed move to Angola and a heated argument in front of the child in March 2017 precipitated the mother commencing this Application in April 2017.

[14] At the case conference on August 14, 2017 the parties agreed that the father pay child support of $805.00 per month based on an income of $90,561 as of September 1, 2-017. No order was made with respect to custody of access. But the father continued to spend time with the child on an alternate week-end schedule.

[15] At the court attendance on August 30th, a date was set for trial for November 3, 2017 as mother wished to move to Angola with the child. On September 23, 2017, on consent, the trial was vacated as the mother was proposing a new plan for a move to Ottawa.

[16] It was not until October or December 2017 [2] that the father sought to increase his alternate week-end access to include alternate Tuesdays from after school to 7:00 p.m.

[17] On April 19, 2018 the mother was permitted to amend her Application to seek permission to move the child to Ottawa rather than Angola and the father was permitted to amend his Answer to respond to this new plan. A trial was set for the week of July 23 to 25, 2018.

[18] On July 19, 2018, father's counsel sought an adjournment as he had been late served with an affidavit and 2 large volumes of productions by mother's counsel. Mother's counsel was required to prepare a key to coordinate the reference in the mother's affidavit with the productions, which he did. Costs were reserved due to the late service of the productions. A new trial were set before myself for October 23 to 26, 2018.

[19] Both parties testified and relied on their affidavits as their evidence in chief and counsel were permitted to examine their respective clients to update and clarify their affidavits. Both parties were subject to cross-examination. The mother filed affidavits of her sister, her mother and her husband who also testified and were subject to cross-examination. The father filed affidavits of his mother, his wife and his older brother who also testified and were subject to cross-examination.

[2] It appears that counsel and/or the parties agreed to this arrangement as there is no endorsement or court order with respect to Tuesday alternate week-day access.

[20] The child's primary physician Dr. Harrington filed an affidavit that was attached as an exhibit to the father's affidavit. Mother's counsel did not object to the filing of the affidavit in this manner and did not require that the doctor attend to be cross-examined.

[21] It was agreed that any of the child's statements in the affidavits were not being admitted for their truth or for the child's state of mind. In other words, that the court would disregard all such statements.

[22] It was also agreed that the counsel would refer the court to any of the productions, which numbered about 800 pages[3] that they were relying upon or that had been referred to by any of the witnesses. At the outset of the trial I expressed concern over the volume of these productions but it became clear during the trial that these productions were relevant to the issues the court needed to determine.

[23] The issues to be determined by the court are:

1) What custody order is in the best interests of the child?

2) Should the mother be permitted to change the child's residence to Ottawa?

3) What access order is the child's best interests?

4) Should either parent be permitted to travel to a Hague Convention country without obtaining the prior consent of the other parent?

5) What amount of child support including section 7 expenses should be ordered?

6) Should there be an order that any child support order be secured by life insurance?

CREDIBILITY ASSESSMENT

[24] I found the mother is be calm, straightforward, organized and even handed in her testimony. Although at times she attempted to add information to her answers I found that she did not do this with the intent to mislead but merely with the intention of making sure that she was understood. Almost all of the allegations made by the mother were corroborated by numerous text messages and emails between the parties and by the evidence of other witnesses.

[25] I found the father to be histrionic, prone to exaggeration and at times evasive. In answer to simple questions he would say he did not understand. For example, when asked if he had life insurance he stated he was not sure what that was or if he had it but it was clearly a regular deduction on his pay slip and he attached information about his life insurance and other benefits to his affidavit. As detailed in this decision, he consistently blamed others and offered explanations that were contradicted by documentary evidence, other witnesses or simply were not believable.

[3] Exhibit 1 (a) and (b)

[26] Where there is a conflict between the evidence of the parties, I prefer the evidence of the mother. Where there is a conflict between the father's evidence and the evidence of his mother and his brother I prefer their evidence as well.

Legal considerations with respect to custody and mobility

[27] I have considered that the Ontario Court of Appeal, in *Bjornson and Creighton*[4] emphasized the need for trial judges to determine the issue of custody before mobility and that at the outset of any proceeding both parents are equally entitled to custody.

[28] It is trite law that any decision regarding a child, including the issue of mobility, must be determined in the child's best interests and not in a parent's best interests.[5]

[29] In making any parenting decision, the court must consider the child's best interests and the relevant of factors set out in subsection 24 (2) of the *Children's Law Reform Act.* Subsection 24 (2) provides as follows:

> Best interests of child
>
> (2) The court shall consider all the child's needs and circumstances, including,
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> (a) the love, affection and emotional ties between the child and,
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> (i) each person entitled to or claiming custody of or access to the child,
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> (ii) other members of the child's family who reside with the child, and
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> (iii) persons involved in the child's care and upbringing;
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> (b) the child's views and preferences, if they can reasonably be ascertained;
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> (c) the length of time the child has lived in a stable home environment;
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> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
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> (e) any plans proposed for the child's care and upbringing;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
>
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and

[4] (2002) 31 R.F.L. (5th) 242 at para.19
[5] *Gordon v. Goertz,* [1996] 2 S.C.R. 27 (S.C.C.)

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

[30] As the father is claiming joint custody, the decision in the well-known case of *Kaplanis v. Kaplanis* [6] sets out the principles the court should consider in determining whether an order for joint custody is appropriate as follows:

1. There must be evidence of historical communication between the parents and appropriate communication between them.
2. It cannot be ordered in the hope that it will improve their communication.
3. Just because both parents are fit does not mean that joint custody should be ordered.
4. The fact that one parent professes an inability to communicate does not preclude an order for joint custody.
5. No matter how detailed the custody order, there will always be gaps and unexpected situations and, when they arise, they must be able to be addressed on an ongoing basis.
6. The younger the child, the more important communication is.

[31] Joint custody should not be ordered where there is a history of poor communication and the parties fundamentally disagree on too many issues that affect the child's best interests.[7]

[32] Although courts do not expect communication between separated parties to be easy or comfortable or free of conflict, the issue is whether a reasonable measure of communication and cooperation is in place and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis. [8]

[33] Joint custody with parallel parenting orders, as is being requested by the father, have been made in high conflict cases especially where one parent has been unjustifiably excluding the other parent from a child's life and cannot be trusted to exercise sole custody and where the court has found that both parents are equally competent and agree on major issues.[9]

[34] The decision in *Gordon and Goertz ("Gordon")*[10] is the guiding authority on the issue of mobility. Although that decision was with respect to a motion to vary an existing order, the principles in *Gordon* are applicable on original applications where there is no existing formal custody and access order. [11]

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[6] [2005] O.J. No. 275 (OCA)
[7] *Graham v. Butto,* 2008 ONCA 260, *Roy v. Roy,* [2006] O.J. No. 18972 (OCA)
[8] *J.T.R. v. L.L.M.,* 2017 ONCJ 455 at para. 48 and cases cited therein
[9] For a thorough review of the cases with respect to parallel parenting see *K.H. v. T.K.R.,* 2013 ONCJ 418 at paras. 45 to 55.
[10] ibid
[11] *Bjornson v. Creighton,* [2002] O.J. No. 4364 (OCA) at para. 18

[35] The applicable principles in *Gordon* as they relate to an original application as set in paragraph 49 as follows:

> 1. The judge must embark on a fresh inquiry into what is in the best interest of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
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> 2. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect and the most serious consideration.
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> 3. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
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> 4. The focus is on the best interests of the child, not the interest and rights of the parents.
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> 5. More particularly, the judge should consider, inter alia:
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> (a) the existing custody arrangement and relationship between the child and the custodial parent;
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> (b) the existing access arrangement and the relationship between the child and the access parent;
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> c) the desirability of maximizing contact between the child and both parents;
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> d) the views of the child;
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> e) the custodial parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
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> (f) the disruption to the child of a change in custody; and
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> (g) the disruption to the child consequent on removal from family, schools and the community he has come to know.

[36] As stated at paragraph 50 of *Gordon*:

> In the end, the importance of the child’s remaining with the parent whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child’s access parent, its extended family and community. The ultimate question in every case is this: what is in the best interests of the child in all of the circumstances, old as well as new?

[37] In *Sferruzzi v. Allan*[12] the Ontario Court of Appeal clarified that both parties bear the evidentiary onus of proof at the second stage of the inquiry in a variation proceeding

[12] 2013 ONCA 496 at para. 46

demonstrating where the best interests of the child. It was held that it was an error to place the burden of proof on the party seeking to relocate to prove that the proposed move is the best interests of the child.

[38] Accordingly, in a proceeding where there is no pre-existing order, both parties have the evidentiary burden of demonstrating what parenting plan is in the child's best interests.

[39] Although the court in *Gordon* rejected a legal presumption of favour of the custodial parent, nevertheless the court held the views of the custodial parent are "entitled to great respect and the most serious consideration." At paragraphs 48, 36 and 46, McLachlin, J. (as she then was) stated;

> …the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parenting ability.
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> …The judge will normally place great weight on the views of the custodial parent, who may be expected to have the most intimate and perceptive knowledge of what is in the child's best interests. The judge's ultimate task, however, is to determine where, in light of the material change [not applicable in the present situation], the best interests of the child lie.
>
> …The child's best interests must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation.

[40] In majority decision in *Gordon,* emphasizes that the court is mandated to apply the "maximum contact" principle as set out in sections 16 (10) and 17 (9) of the *Divorce Act.* This principle has been held to apply to cases pursuant to provincial legislation. Although this is an important factor it is not the governing factor and it remains one factor in the whole of the analysis.[13] As stated in *Gordon* at paragraph 24:

> The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact.

[41] Hundreds of cases and academic writings have considered these general principles. Both counsel presented the court with over 30 cases from all levels of court that have considered the general principles in *Gordon* and either permitted or disallowed a move.

[13] *Bjornson v. Creighton, ibid, at para. 34*

[42] Although these general principles guide all of the decisions it is the best interests of the particular child before the court that must be determined. The court must consider and balance all of the benefits and detriments of the proposed move and conduct a full and sensitive enquiry into the best interests.

ANALYSIS

Custody

[43] Based on the legal principles and the serious consideration placed on the views of the custodial parent, it is essential that the court make a finding as to the appropriate custody arrangement in the child's best interests before considering the issue of mobility. In making this decision, the court has taken into consideration and applied the factors in section 24(2) of the *Children's Law Reform Act.*

[44] I find that the evidence clearly established that the child has been in the primary care and in the primary residence of the mother since the separation. The child has spent the majority of time in the physical care of the mother.

[45] I find that the child has always lived in a stable home with the mother. He has also lived in a stable home with the father although that has generally only occurred on alternate week-ends.

[46] It was the father's position that the parents had a shared and co-parenting arrangement. The father's evidence on where the child has resided wavered and contradicted his affidavit and even his own testimony. He admitted in cross-examination that the child had been in the mother's care a majority of the time. He either agreed with the mother's evidence or stated he could not remember. Although the father deposed that the child had been in his care at least 40% of the time and on every week-end, in his testimony he corrected various paragraphs in his affidavit to state that the child had only been in his care "almost" every week-end. He also corrected his affidavit to exclude the 8 months from January to August 2015 that he had resided in Alberta when he flew back and only saw the child for 5 week-ends during these 8 months. His evidence lacked specific dates when he claims he had the child in his care and he changed or corrected his evidence several times with respect to this issue.

[47] In cross-examination the father agreed that he never sought a court order as he was comfortable with the child being in the care of the mother for the majority of the time. He also agreed that Hamza loves being with his mother, maternal aunt and maternal grandmother and that he has lived with his mother in a stable home since birth.

[48] I prefer and accept the mother's evidence with respect to the times the child spent with the father. It is corroborated by hundreds of pages of text messages. The father exercised access on ad hoc basis whenever it suited him for at least the first few years following the separation. The mother tried to establish a regular schedule initially for 3 times a week for day access due to the young age of the child and then an every week schedule as the father stated he could not arrange to see the child during the week. The father would agree for a few months and then revert to an ad hoc

arrangement. The father's response to the mother's ongoing requests for a regular and consistent schedule was that if the mother could not care for the child, then the paternal grandmother should have full-time care. It was not until about March of 2016 that the father more or less followed an alternate week-end schedule that has continued to the present time.

[49] It was not until October or December 2017 that the father requested had any week-day access and not until 2017 that the father requested any extended holiday access. The mother's evidence that I accept is that the father demanded this time and then during the winter break although he was to have the child for one week he returned the child 2 days early. In 2017 father exercised access during the March break and for 2 weeks in the summer. In 2018, he also had the child in his care for one week in July and one week in August.

[50] Neither parent disputed that the child loves and has a close relationship with both of his parents and that he is loved by both of them. He has a close and loving relationship with all of his extended family.

[51] Since the separation the mother has lived in North York in the home of the maternal grandmother. The maternal aunt who is just completing her university degree also presently lives there. They have both been involved in assisting the mother with caring for the child such as assisting with transportation and occasional babysitting. However, they were clear in their evidence that it is the mother who has been the parent who primarily cared for the child that is, she is the parent who cooks for him, gets him up, prepares him for school, takes him to daycare or school, helps with his homework, puts him to bed and arranges for his activities.

[52] The father has a large extended family. He has 5 brothers, once of whom is married and he has many cousins and other relatives.

[53] Shortly after the separation the father moved back to the home of the paternal grandmother in Etobicoke where 4 his brothers also resided. Up until his marriage he exercised all of his access at the paternal grandmother's home and even when he moved with his wife to their own residence, which is across the road from paternal grandmother's home, Hamza still sleeps overnights at the paternal grandmother's home. The father testified that while in his care, the child slept about 40% of the time at his home but the paternal grandmother testified that the child spends most of the time at her home and sleeps there but that the father also slept there.

[54] Although not much turns on how often the child sleeps at the father's home, I accept the paternal grandmother's evidence where it differs from the father's as I found her to be a sincere witness who tried to be truthful whereas the father was prone to exaggeration on many other aspects of his testimony that were contradicted by her. I find that the child spends almost all of the time that he is on the father's care at the home of the paternal grandmother and sleeps there a majority of the time.

[55] The father provided many photos of the child with his relatives and with the father's friends and their children. It is clear that this is a close knit family and they enjoy and celebrate many family and religious functions together.

[56] I find that the child has developed a close and loving relationship with the mother's husband. They have spent week-ends together in Ottawa and some holidays and the photos show the child having fun with him. He went to a great deal of effort to change his posting from Angola to Ottawa in order to be closer to the mother and Hamza. He has been involved in obtaining suitable housing and an appropriate school for the child in Ottawa. I find that he is prepared to do whatever he can to assist the mother with caring for Hamza. The father has met him and testified that he had no concerns about him and agreed that he would be a good step-father.

[57] It is not clear from the evidence the nature of the relationship the child has with the father's new wife although I have no reason to doubt that she loves him and is appropriate with him. In her affidavit she states that she considers him to be her son and part of her family and I accept that evidence. However, most of the time the child is with the father is spent at the home of the paternal grandmother and when he sleeps at the paternal grandmother's home, the father's wife and their daughter sleep at their own home. The father's wife also deposed that their daughter suffers from social anxiety and is not comfortable around a lot of people. So it is not clear how much time they all spend together. The paternal grandmother testified that the father's wife only sometimes is at her home.

[58] The father's wife supportive of the father's position and I found tailored her evidence to support what she assumed to be his evidence. For example, although the father corrected his affidavit to confirm that the child was not with him every week-end, his wife did not change her affidavit wherein she deposed that the father saw the child every week-end from September 2014 to 2016 except for the 8 months they were in Alberta. When asked if she would assist the father in driving to Ottawa, she replied, "I have no interest in driving to Ottawa."

[59] When she was asked to confirm that the father and child had a strong bond, she agreed but stated that if follows that such a bond could disappear just as easily.

[60] The father has never introduced his wife to the mother and she has not taken any initiative on her own to reach out to the mother. The father also testified that he is not speaking to the mother due to the present "hostilities".

[61] I find that the mother is the best parent to meet the overall needs of this child. She has met the day to day needs of the child and she is the parent who has been the parent responsible for making the decisions with respect to the child's well-being and although she has involved the father, she is the parent who has been in charge.

[62] At the time of the separation the child was only 10 months old and still breastfeeding. The mother proposed that the father see the child 3 times a week as this would be a schedule that was consistent with the child's age and stage of development. She emphasized the need for a fixed schedule not just so that she could organize her school and work schedule but to meet the developmental needs of the child.

[63] It is evident from the numerous text messages that the father simply did not understand the developmental needs of a young child or chose not to arrange his life to meet those needs.

[64] There is an exchange between the parties on June 18, 2014 that illustrates the father's lack of appreciation of the need for a child to have a regular schedule. When father is asking for access at the last minute, the mother again requests a set schedule on whatever schedule the father can manage. His response to her is, "What type of white mentality is this". Although the father testified that this must have been an auto correct ion he did not explain what he mean to say.

[65] The father admitted in his testimony that he was under a great deal of stress in the months following the separation as an explanation as to why he could not arrange a schedule but that does not explain why in the months and years following he chose to constantly change the schedule.

[66] It is further evident from the text messages in the months following the separation that it was the mother advising and directing the father with respect to what the child ate, how to prepare his food, when he slept and generally what he needed. The mother researched and implemented a sleeping routine and a toilet training routine and then instructed the father as to what he should do.

[67] Although I agree that it was appropriate for the father to ask the mother questions as he put it, "she was the mother" nevertheless it indicates that he looked to the mother as the parent who understood the needs of the child. However, the lack of the father's understanding of the child's needs and his challenges in caring for the child are clear from the text messages where he asks the mother if the child drinks water, what to feed a sick child and tells her that the child would not eat with him or would not sleep. On the first overnight visit, the child cried so uncontrollably that he broke out in hives and the father took the child to the hospital as he was unable to soothe the child. The father's dependence on the mother continued well past the first few months of the separation and he continually asked her for guidance and wanted her to send clothes and supplies for the child.

[68] The mother researched and chose the child's daycare provider and the child's school. The mother sought out the father's input but he deferred to her to make the decision. It was the mother who decided that the child should attend Kumon and she arranged for all of the child's activities such as soccer, swimming and karate. The father and members of his family have attended the child's activities but the father did not contribute to the cost.

[69] The father placed a great deal of emphasis on the fact that he has been "in charge" of the child's medical care. The mother does not dispute that the father took the child to his almost all of his medical appointments. Dr. Harrington has been the child's primary doctor since shortly after his birth and her clinic is across the road from the father's residence. After the separation the mother made some overtures to change the doctor but then appears to have acquiesced to continuing with Dr. Harrington but then expected that the father would take him to his appointments. Even though the father took the child to medical appointments, I accept the mother's evidence, as corroborated by various text messages, that she told the father when to take the child to the doctor's and she told the father what to ask the doctor.

[70] The affidavit of Dr. Harrington confirms that the father sought care for the child and was appropriate and willing to follow through with medical instructions. She further deposes that the child is "a lovely boy and is thriving under the supervision of his father." I put no weight on her comments or inference that it is a result of the father's supervision that the child is thriving for the obvious reason that there is no indication if the doctor is aware of the time the father spends with the child or the role of the mother. There is no mention of any medical concerns or diagnosis with respect to the child.

[71] The father testified in quite a dramatic manner that the child has asthma and that he had to teach the mother how to use the inhalers. The father was the parent who obtained the medication as it was covered on his employment medical plan. I note that there was no medical report to confirm that the child suffered from asthma. The mother deposes that in April and May 2017 the child was prescribed inhalers as a preventive measure to help him avoid pneumonia. If the father was so concerned about the child's health it is difficult to understand why he did not ensure that the child's inhaler always travelled with the child and was given to the mother.

[72] The mother requested the inhaler before she was taking the child to her wedding in Germany in May however, the father never provided the inhaler to her.

[73] After returning from Germany the child had a bad cold and the mother again requested the inhaler. I accept the mother and the maternal aunt's version of the events namely, that the father refused to give her the inhaler unless she arranged to pick it up. The maternal aunt agreed to pick up the inhaler and the father told her that he would be available after evening prayers at midnight and he would meet her at his apartment building. When the aunt arrived he was not there, she sent him a text message and he then said he was at Tim Horton's and she attended to pick up the inhaler. The father could not explain why he has not previously given the mother the inhaler as it was her understanding that the prescription had been filled in April and he was aware the child was ill. The father minimized the incident when cross-examined, he did not consider the inconvenience to the aunt to drive at midnight to pick up the inhaler and instead he blamed the aunt who he testified was rude to him. Also it appeared that the father had not even filled the prescription until June so that he never had the inhaler for the trip to Germany in May despite agreeing to get the inhaler and knowing it was needed and thereby possible placing the child's health in jeopardy.

[74] On another occasion on January 19, 2014, 7 days after an access visit, the father sent the mother a text to advise her that he was concerned that the child may have swallowed something at his home. But instead of advising the mother immediately after this happened or instead of the father taking the child to the doctor's or for an x-ray, he told the mother to do so. It is clear from the text messages that the mother made the appropriate inquires to determine if she should take the child for an x-ray.

[75] I find that regardless of the fact that the father was the parent who took the child to his medical appointments, this was simply a matter of convenience. The mother on occasion would take the child as needed to a walk-in clinic or the hospital. There is not a shred of evidence that the mother is incapable of meeting the medical needs of the child and on at least two incidents I find that the father disregarded the medical needs of his son.

[76] The child in in Grade 1 at Gateway Public School and has attended that school for both Junior kindergarten and Senior kindergarten. He appears to be well-adjusted and doing well both academically and socially. The father deferred to the mother choosing the school. The father did not attend the initial orientation at the school and did not attend parent-teacher meetings until after the commencement of this litigation.

[77] The child's report cards from kindergarten indicate quite a few absences due to illnesses and quite a few late attendances. The mother explained that after Hamza was ill he had some trouble getting up in the mornings. Further, when he was dropped off at daycare, it was the daycare provider who took him to school. There was no evidence clarifying who was primarily responsible for the late attendances although the father raised this as a concern with respect to the mother's care of the child.

[78] I find that the mother has met all of the child's educational needs and arranged some enhanced educational through Kumon tutoring. Both parents have assisted the child with his homework, with reading and with exposing him to many learning opportunities. Both parents have been involved with attending the school events. The father's involvement has increased since the litigation commenced.

[79] Both parents are Muslim and are committed to raising the child in the Islam faith and keep halal in their homes. The father takes the child with him to the Mosque on the Fridays he has access. The paternal family traditionally celebrates the July long week-end that coincides with the date of Somali Independence Day.

[80] The mother's husband is white[14] and converted to Islam in 2016 after much contemplation. He testified that he attends prayer services on Fridays at Carlton University Prayer Centre. He testified that his parents and brother reside in Germany. His mother is Christian and his father and brother are not religious.

[81] The father's wife testified that she is Muslim. In the father's affidavit he deposed that his wife's father is French Canadian and the paternal side of her family is Christian.

[82] The father appeared to be inferring in his testimony and based on the cross-examination of both the mother and her husband that his family was more observant than the mother and her husband. He testified that he did not know how the mother and her husband would raise the child and when asked if the mother's husband was Muslin, he paused for a long time before responding.

[83] I find that both parents are committing to raising the child in the Islam religion and both will ensure that he is exposed to his culture.

[84] The mother and her husband are newly married and have not lived together except for week-ends and holidays due to this litigation. It is submitted that this is a new relationship and therefore not stable or permanent. There is of course no guarantee

[14] The reference to nationality and the colour of skin arose as the father was accused in cross-examination of being a racist and the reason he opposed the child attending the mother's wedding was due to her husband being white and his family being Christian. The father denied the accusation and volunteered that his wife was white. The father also called the daycare provider Grace, "the Indian lady" and again denied that he was racist but referred in that manner as he did not know her name.

about the permanence of any relationship but based on the concerted efforts by the mother's husband to change his work placement and his commitment to both the mother and Hamza, there is no reason to suggest this is anything but a stable and permanent relationship.

[85] The parents' respective plans are relevant to both a determination of custody and the mother's plan to move to Ottawa.

[86] The mother's plan if she is not permitted to move to Ottawa with the child would be to continue to be his primary caregiver and continue the current parenting arrangements. She will look for another residence in the neighborhood in which she currently lives or close by. Presently she is sharing a bedroom with Hamza in her mother's 3 bedroom low income townhouse. The maternal grandmother has made an application to move to a 2 bedroom apartment that is closer to the school she works at as a lunchtime supervisor. Therefore, the child will have to change residences and possibly schools even if the mother and child continue to reside in Toronto.

[87] The mother will have to obtain new employment but is confident that she will be able to do so. She would travel to Ottawa on week-ends when Hamza is not in her care. She would have the financial assistance of her husband.

[88] If the mother is permitted to move to Ottawa with the child, they will live with her husband as a family. Her husband earns a salary of $85,000 but also obtains significant subsidies for housing and free tuition for Hamza's schooling costs.

[89] The mother's husband has signed a 4 year lease for a 3 storey home in a residential neighbourhood. The child would attend St. Laurent Academy and a deposit of about $16,000 has already been paid to secure his admission.

[90] The mother and her husband would continue to raise the child in the Islam religion. They would maintain the child's contact with the paternal family by bringing him to Toronto on alternate week-ends and the child would spend half of all of the holidays with his father and his family in Toronto. The father would also be able to travel to Ottawa for one week-end a month and enjoy one on one time with the child or bring relatives with him. The father would have generous telephone access, FaceTime and other electronic contact with the child. The connection to the maternal family would be maintained as both the maternal aunt and grandmother testified that they have already been to Ottawa and would continue to visit there frequently.

[91] The father's plan is a bit confusing. In his affidavit he deposed that if the mother moved to Ottawa, he sought an order of custody, that the child would reside with him and his wife and daughter in their 2 bedroom apartment and he would change the child's school in January to the school in his own neighbourhood. Even after he heard the mother's testimony that if Hamza was not permitted to move with her that she would remain in Toronto, he did not withdraw his custody claim or propose joint custody with parallel parenting decision-making. Accordingly, there was no opportunity for mother's counsel to cross-examine the father on this plan.

[92] It was only in the father's counsel's submissions at the end of the trial, that it was submitted that the father's plan now is one of joint custody with a parallel parenting decision-making regime. With respect to parenting time, the father proposed that the same parenting time as he currently enjoys, namely, alternate week-ends from Friday to Sundays continue with a sharing the holidays but with an increase to every Tuesday evening from after school to 7:00 p.m. No further details were provided but I assume that he and his family would continue to be closely involved with the child and attend his school and extracurricular activities.

[93] I find that the nature of the parents' historic communication does not indicate that they have a history of co-parenting or an ability to do so in the future. Although it is correct as submitted by father's counsel that there is not the level of hostility between the parents frequently seen by the courts nevertheless there is an element of the father attempting to control the mother for example, refusing to give her the child's original birth certificate and health card as he had paid for them, refusing to ensure the mother had the child's medications and making her sister come to pick them up and threatening to cancel the child's passport application.

[94] However, there were two incidents of conflict in the presence of the child. In March 2017, the father began to engage in heated discussions about the mother's pending marriage and proposed move to Angola. According to the mother, during an access exchange, the father returned to her home on multiple occasions, banging on her door and loudly threatening to take steps to suspend the child's passport application. The father does not deny this incident but blames the mother.

[95] There was another incident on March 8, 2018. The father advised the mother the day before that he had scheduled a parent teacher interview. The mother had previously advised the father that as the child was doing well the teacher stated that an interview was not necessary. Nevertheless the father scheduled the interview and as indicated only gave the mother one days' notice. The mother immediately replied to the father's email and advised the father that he will have to attend the interview without the child as they had scheduled a family dinner as her husband was returning to Angola. Both the mother and her sister testified that when they attended the school to pick up the child, the father held onto the child's jacket hood and would not let him let him go. The father was angry and voiced his voice and rather than cause a further scene and upset to the child, the mother and sister remained. The father never explained why he had not rearranged the meeting or why it was necessary for the child to be present. This is another example of the father imposing his unilaterally will on a situation.

[96] The father went behind the mother's back to convince the maternal grandmother to agree to share the transportation without telling the mother. The maternal grandmother deposed that she now realizes that the father used her.

[97] The father took the child to see the maternal grandfather even though he alleged that the mother was estranged from him and in her text message to the father the mother tells him that it is family business that is, that he should not get involved and yet he did so and he even helped the maternal grandfather financially.

[98] The most astounding example of the parties' lack of communication is the fact that the father never discussed or advised the mother of his plan to move to Alberta. There is one text message wherein he tells the mother that he is probably moving to Alberta. The father did provide any details regarding the date of the proposed move, the length of the move or discuss a visiting arrangement. The mother testified that she was astounded by the move as the father had made such a fuss about where the child was attending daycare.

[99] The father never advised the mother that he was taking the child to Mosque on Friday nights or that he was taking the child to see the maternal grandfather.

[100] The number of emails exchanged for over 4 years with respect to attempts to simply agree on a regular consistent schedule shows the lack of an ability to co-parent. The mother would ask for a schedule, agree to what the father proposed and then the father shortly after would either change the schedule or consistently come late or return the child late.

[101] The father was critical of the mother and took the position that she did not have time to care for the child when she asked for his help to care for the child when she was ill, the child was ill or she had to study or work. The father blamed the mother for not helping him with the transportation as she has access to a car and it was a 2 ½ hour round trip to exercise access to the child. This request for help should be seen on the context of the father only paying the mother $400 per month when his income in 2014 was $86,000 and the mother's was $13,000 and not paying his share of any of the child's activities.

[102] The father blamed the mother for neglecting the child's health by not properly feeding the child as he felt he was too thin. He denied that he was angry at the mother as she had deposed, but then testified that is was "all a blur" as there were a lot of emotions. He admitted that he had acted out of anger when he refused to give the mother the child's document but then repeated that he was "in charge" of the medical decisions, he paid for the documents and he had the right to keep them. He was also critical of the music the child listened to while in the mother's care and how he danced. He did not agree with the number of activities the mother had enrolled the child in and did not agree with her decision to arrange for the child to attend for enhanced learning at Kumon.

[103] Although the father now deposes that he and the mother co-operated and co-parented, text messages between them reveal a very different story. The father did not agree with the mother's choice of the Home Family Daycare as it was not a public daycare and was critical of the daycare provider. I accept the mother's evidence that he decided to do a "spot check" on the daycare as opposed to the father's version of events that he happened to be sitting in his car and saw the daycare provider leave her home. He confronted her and did not accept that it was appropriate for her to leave the children in her care with her husband for a short time. He testified that this was "gross gross negligence". The father continually pestered the mother to remove the child and place him in a public daycare. After the mother relented and researched new daycares and invited the father to see the new daycare, he did not attend the initial meeting. The child only stayed at this daycare for a short time as he was constantly ill. The mother

then returned the child to his original daycare. However, the daycare provider would only allow the child to attend if the father did not come into her home.

[104] This is not a circumstance for joint custody. Although the father now testified that the mother is a great mother and he accepts that she met all of the child's needs, there is evidence of his criticism of her care in the past and they either disagreed with respect to major decisions or the father has deferred to the decisions the mother has made.

[105] I also find that there is no basis for a parallel parenting order. The mother has never attempted to diminish the father's role in the child's life. She has attempted to involve him in any decisions she has made and kept him advised of information about the child.

[106] I find that the mother should be granted custody based on the historical parenting roles and the mother's primary role. The mother has been in being in charge of the child's development. The mother is the parent who has established eating and sleeping routines, has had a primary role in implementing a sleep routine and in toilet training the child and arranging for all of his daycare, schooling and extracurricular activities. Although both parents have been involved in the child's medical care, there is no reason to question any medical decisions made by the mother or her ability to make appropriate decisions in the future. She is the parent that is most closely attached to the child and she is the parent best able to meet all of his needs.

Mobility

[107] At this stage of the analysis both parents have the evidentiary burden to prove the benefit or the detriment of the mother's proposed move to Ottawa. I have considered the various factors set out in *Gordon* and the cases that have analysed and applied those factors.

(a) the existing custody arrangement and relationship between the child and the custodial parent

[108] As I have found that the mother is the custodial parent, her views are entitled to great consideration. The Ontario Court of Appeal in *Bjornson v. Creighton*[15] recognized the relationship between the quality of the custodial parents' emotional, psychological, social and economic well-being and the quality of the child's primary care environment. It is in a child's best interests to be cared for by a well-functioning and happy custodial parent.

[109] The child has a strong attachment to his mother who has been the parent who has met all of his needs on a day to day basis and made all major decisions. The mother has made excellent decisions regarding the child and has demonstrated a commitment to ensure his happiness and well-being. Her opinion is that the proposed move is in his best interests and she and the child will have the support of her husband and an enhanced lifestyle.

[15] ibid, at para. 30; See also *Ryall v. Ryall,* 2009 ONCJ 687 at para.95 and cases cited therein.

[110] Economic factors impacting the moving parent are also entitled to great respect and serious consideration as they will invariably affect the happiness and stability of the child's environment. [16]

[111] The mother has demonstrated an excellent parenting history and there is no good reason not to trust her judgement about the benefit to the child of this move.

(b) the existing access arrangement and the relationship between the child and the access parent

[112] The mother provided a detailed history of the father's time with the child. The father either agreed with the mother's evidence or stated that he did not recall. I find that historical the father had a haphazard schedule of access. Generally he has only been with the child on alternate week-ends from Friday to Sunday and only for 5 week-ends in the 8 months in 2015 when he moved to Alberta. It is only in the last year that he began to see the child on alternate Tuesdays for several hours and for regular extended holiday access.

[113] The father was content with being an access parent and never pursued court proceedings to increase his time with the child. It was only since the litigation commenced that the father requested any mid-week access or extended holiday access. This status quo differs from the cases such as *Berry v. Berry*[17] relied on by counsel for the father where the father has equal parenting time with the child.

[114] There is no question that the father loves the child and that the child loves spending time with the father and his extended paternal family but this has always been an access arrangement.

(c) the desirability of maximizing contact between the child and both parents

[115] The desirability of a child maintaining contact between both parents is a mandatory consideration. Father's counsel places great emphasis on this issue and relies on several cases that have prohibited a move based on this principle.

[116] The mother's plan proposes that the father continue to see the child on alternate week-ends but with one week-end when the father would travel to Ottawa and one week-end when she would bring the child to Toronto. In addition, the mother offers the father the Family day week-end in Toronto, one week during the March break, Easter long week-end, May statutory long week-end, one month In July and half of the winter school holiday.

[117] This is not a case where the mother has ever attempted to curtail the father's contact or his role in the child's life which also distinguished this case with the cases father's counsel relies upon.

[16] *Woodhouse v. Woodhouse* 1996 ONCA 902 at para. 91; *Monaghan v. Dorion* 2016 ONSC 7560 at para.44
[17] 2011 ONCA 705

[118] During cross-examination the father was asked several times what access he would be proposing if the mother was permitted to move. He would not respond and became quite emotionally overwrought. The court then intervened and explained to the father that if such a move was permitted then it would assist the court to know what alternative plan for his access the father would propose. In view of the father's emotional state, the court suggested that the father think about his position overnight as his cross-examination would be continuing the next day.

[119] The next day, the father was again asked in cross-examination about his proposal. Quite astoundingly, he stated that he would only see his son one week-end a month when the mother brought him to Toronto. I would have expected him to ask for more time during the winter or summer holidays or even for all holiday week-ends or extended week-ends if there was a PD day. I would have expected him to testify that he would attempt to travel to Ottawa every month but in the winter it might not be possible. The father's focus was on his convenience rather than any effort on his part to spend more time with his child. It was not the father's finest moment during this trial but it did reveal a great deal about him. It was consistent with his approach historical to access namely, that it had to suit his timetable.

[120] In closing submissions father's counsel submitted that if the mother is permitted to relocate with the child to Ottawa, then the mother should be required to do all of the driving.

[121] The father did not dispute the mother's evidence with respect to the cost of travel to Ottawa namely, by car $75.00, by train $80.00, by bus $97.00 and by airplane $254.00. The father did dispute the time to drive to Ottawa and he did not agree that it was 4 or 5 hours but rather it was 6 or 7 hours. Neither counsel provided any Google maps with respect to the travel time but I find that I can take judicial notice[18] of the fact that it is about a 4 or 5 hour drive to Ottawa but that during the winter months it could take more time.

[122] The father testified that he could not drive such a long distance because he had serious back problems and his wife testified that she would not be prepared to drive. However, the father and his wife drove to Ohio for a holiday and travelled to Saudi Arabia, a 12 hour air plane trip and he was able to manage.

[123] The father also testified he feels that his requirement to pick up and drop off his son has exacerbated his back problems. No medical evidence was provided that the father was unable to drive long distances. The father grudgingly agreed in cross-examination that travelling by bus or train would enable him to stand and walk around if his back was hurting and he also agreed that he could manage a short air flight.

[18] *R. v. Calvert* [2011] O.J. 3086 at para. 8 where the court upheld the court's initiative in looking up Google maps and taking judicial notice of distance. The court did not rely on Google Maps in this case but in addition to taking judicial notice of the driving time the court also accept the mother's evidence on this issue.

[124] The father did not provide any medical evidence to corroborate his back problems. During the trial, the father asked to be able to stand up if his back bothered him and was granted that permission. He appeared to be able to function quite well with this minor accommodation. The only evidence provided was a copy of a referral for an MRI and the results of the MRI that were dated March 2017. No evidence was submitted as to the father's prognosis or a treatment plan.

[125] The father's job also requires that he travel to various sites throughout the day. The father testified that he has problems driving and has been given an accommodation at work. He is not required to go to his office more than once a month and he is able to do some work from home. He is able to leave a bit later in the morning to avoid rush hour and he is able to leave earlier at the end of the day again to avoid rush hour. He did not provide any proof from his employer with respect to any such accommodations.

[126] I draw an adverse inference from the father's failure to provide any medical report or information from his employer with respect to his workplace accommodation.[19]

[127] The father also provided several other explanations as to his inability to travel to Ottawa. The father testified that he was "in charge" of the child's medical care and he was the parent primary responsible for medical decisions However, other than continuing with Dr. Harrington there is no evidence of any medical decisions that needed to be made. Hamza is a healthy child although the father attempted to portray him as quite sickly. Although there was some evidence that the child was quite ill on several occasions when he was younger, the medical report of Dr. Harrington does not indicate that the child has any particular medical issues. The paternal grandmother testified that the child is healthy and gets colds like any other child and sometimes needs a puffer if he is wheezing.

[128] The father testified that he is "in charge" of his brother Abdi's medical needs. However, both the paternal uncle and paternal grandmother testified that Abdi's schizophrenia is well managed if he takes his medications and other than an incident in 2015 when he went off his medications and was missing for several days, his condition is under control. Abdi is able to take his medications on his own and although the father takes him to his medical appointments about once a month, the other brothers can take him when the father is unable to do so. How this self-imposed obligation to assume the care of his brother would interfere with his ability to travel to Ottawa once a month was not explained.

[129] The father continually referred to his financial inability to travel to Ottawa and the cost involved that would include not just the travel expenses but obtaining accommodations. No evidence was presented about the cost of a hotel, motel or an Airbnb accommodation. However, the father in 2016 earned $90,000 and in 2017 $86,000 and I draw the inference that he has the financial means to travel and stay to Ottawa for one week-end a month.

[19] *Sabanegh v. Habaybeh,* 2010 ONSC 6572 at para.73 with respect to a court drawing an adverse inference if a material and relevant witness is not produced.

[130] Despite the father's evidence that he could not afford to travel to Ottawa once a month, the father has been able to gift to the maternal grandfather about $900 to assist him in a flight to Saudi Arabia and he also gave the maternal grandfather other funds but he could not recall the amount but eventually agreed it was no more than $2,000.

[131] The father also had $5,000 to travel with his wife to Saudi Arabia. I accept the evidence of the father and his wife that it is a religious obligation to travel to Mecca if there is the financial means to do so. However, it is clear that the father has the means to save at least $5,000 and if the move is permitted then the father would be able to use these funds towards the cost of access.

[132] I find that the father is disingenuous as to his financial means and is simply using his alleged lack of finances as a convenient argument as to why the mother's proposal is impractical. He is attempting to portray a situation where the mother's proposal would result in not maximizing his contact with his son but it is the father who is creating a self-imposed reduction in his time with his son for no valid reasons.

[133] I agree with the submission of mother's counsel that the father is preoccupied with monetary issues. He continually referred to the fact that the child was with him 40% of the time to justify the amount of child support he was paying. He refused to pay his appropriate share of the child's activities. In his emails he states he won't pay for activities unless he knows the costs and then when the mother provided the cost, he still refused to pay. He deposed that he paid the child's soccer fees for 2017 but this was based on him not paying his full share of child support for July as the child was with him for two weeks. He even appeared to be boastful of the fact that he had paid for the wife's husband's coffee when they met.

[134] The father also testified that he did not trust that the mother would bring the child every month to Toronto. He based this on her refusal to share the driving for access visits prior to the court proceedings. I place no weight on this concern. It is not unusual for the access parent to be solely responsible for pick up and drop offs. Further, the mother did not have a car and was not only going to school but also working. The father was in a much better financial situation than her to arrange for transportation.

[135] The mother has complied with all court orders and based on her acceptance of the importance of the child maintaining a relationship with the father and his family I find that there is no reason to assume the mother will not comply.

[136] I find that the mother's proposal would not only enable the father to continue the access he has had since the separation but actually increases that time. The increase in time during the long week-ends and holidays would permit the child to spend quality time with not only his father but with all of the members of his extended family.

[137] I also find that travelling time with a child is still access and if properly managed can be quality time.[20]

[20] See *Corbeil v. St. John,* 2018 ONSC 805 at para. 54 for a similar observation.

[138] The father believes the reduction of his alternate week-day access and the necessity of spending time with his son in Ottawa will diminish his relationship with his son. He kept repeating that he will “lose” his son if the move is permitted. However, there is evidence that the father has a close bond with his son and there is no evidence that after he spent 8 months away and only visited the child for 5 week-ends that there was a change in his son’s relationship with him. I am satisfied that based on the quality of the relationship between the father and the child and based on the generous schedule of access being offered by the mother, the relationship between the father and child will not be diminished.

[139] I also find that it would be reasonable for the parents to share the transportation both on the week-ends and holiday access. Despite the mother being the parent that wishes to move, it would place an undue burden to her to be responsible for all of the transportation.

(d) the views of the child;

[140] In view of the age of the child, his views are not ascertainable. It was agreed that any reference to statements of the child in either parents’ affidavits or in any third party affidavit were not admissible.

(e) the custodial parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child

[141] The mother wishes to move to be with her husband who resides in Ottawa so that they can live as a family with Hamza. There is no ulterior motive for the move such as an attempt to curtail the father’s role in the child’s life. Pending the outcome of this litigation, the mother has continued to reside in Toronto with the child.

[142] It is submitted by father’s counsel that the mother did not testify that she was unhappy and to the contrary she testified that if necessary, she and her husband would live apart. I do not find that it was necessary for the mother to become distraught or emotional when testifying that she wished to live as a family with her son and husband. I find that the court can draw a common sense inference that the mother would be happier if she could live in Ottawa with her son and husband.

[143] I find that the mother’s calm and composed demeanour is to be preferred to the presentation of the father. The father at times became so emotional and distraught that it raised concerns about his emotional stability and if this is how he acts in the presence of the child I would have serious concerns about the impact on the child.

[144] In this case, the reason for the move is relevant as such a move would enable the mother to meet the needs of the child. The move would provide the child with the following benefits:

> (a) an improved standard of living as the mother and her husband would be living in one city and have more funds available to meet the needs of the child;

(b) an improved living environment. Currently the mother is living with her mother and sister in a 3 bedroom subsidized townhouse. She shares a bedroom with Hamza. In Ottawa, the mother and her husband have rented a 3 storey townhouse in a residential area with a finished basement and yard. Hamza will have his own bedroom;

(c) Hamza will attend a private school;

(d) Hamza will have the security of continuing to live with a well-functioning happy, emotionally secure primary caregiver and the mother will have the benefit of the emotional and logistical support of her husband;

(e) As the mother and her husband plan to have other children he will living with his half sibling; and

(f) The child will be exposed to another culture as the stepfather is German and the child will also have the advantage of living in a household where his step-father speaks not only English but German, French and Portuguese. As the stepfather is a diplomat the child will have the opportunity to be exposed to other diverse cultures.

(f) the disruption to the child of a change in custody

[145] There will be no change in the child's primary care or custody. If permitted to move then the mother would continue her role as the child's primary caregiver.

[146] If not permitted to move, the mother testified that she would not move without her son. The mother's position shows her unwavering love and devotion to her son and if necessary her willingness to sacrifice her own happiness and live apart from her husband.

[147] Based on the mother's evidence, it is submitted by father's counsel that the present parenting schedule should continue with a minor adjustments and that the child remain in Toronto and the mother and her husband can travel back and forth to Ottawa.

[148] I find that to approach a mobility case in this fashion unfairly penalizes the parent who is prepared to give up her desire to live with her husband and son as a family in one city if a move is not permitted.

[149] The Ontario Court of Appeal in the case of *Decaen v. Decaen*[21] noted that if the primary's parent's intention is to remain if the current location if the relocation is not permitted, the court should first determine whether or not the proposed relocation is in the child's best interests. If the court dismisses the request to move with the child, the court must then determine where the best interests of the child lie based on both parents remaining in the current location. It is therefore important to consider all potential plans for the child in determining the child's best interests.

[21] 2013 ONCA 218

[150] In the father's initial plan, the child would be placed in his custody and his school would be changed as of January 2019. The father proposed the mother have access in Toronto on alternate week-ends form Friday to Sunday to be extended to Monday on long week-ends and the mother could take the child to Ottawa one week-end a month and he also proposed an equal sharing of all the school holidays. The father would not do any driving. Such a plan would be totally disruptive to the child and contrary to the parenting arrangements for the last 6 years. The plan also indicates that the father does not appreciate the important bond between the child and the mother and that his plan does not attempt to facilitate or maximize the mother's contact with the child.

[151] The father also submitted that if the mother is permitted to move with the child, the father will no longer be able to provide health care to the child. This submission I assume is based on the father's position that he was a "co-parent" and that the parents had an informal parallel parenting arrangement wherein he was in charge of the child's medical and religious training.

[152] However, I find that the father was never a "co-parent" and the responsibilities for the care of the child were not shared. Based on the evidence that I accept, I find that the father merely took the child to the doctor as needed and followed either the direction of the mother or the doctor with respect to the child's health care needs. Further, the mother took the child to other appointments at walk–in clinics and to the hospital. I also find that the mother is perfectly capable of meeting the child's health needs as she has been the parent who has done so in the past.

[153] Although the father takes the child to the Mosque when the child is in his care on alternate Fridays, the mother also educates and raises the child in the Muslim faith. There is no evidence to substantiate the father's position that he was "in charge" of the child's religious education or training.

[154] I therefore find that it is in the child's best interests to continue to remain in the primary care and custody of his mother and that any plan that would have placed the child in the primary care of the father would not be in his best interests.

[155] Although the father loves his son he has never assumed a custodial role and he has not fulfilled his financial responsibilities which is part of a parent's parental role.

[156] It is further submitted that the mother's plan is not a permanent or well-thought out plan as her husband's position in Ottawa is only guaranteed for two years based on the terms of employment contact that was produced. I reject this submission and accept the evidence of the wife's evidence that his posting to Ottawa is for 4 years subject to a possible renewal for another 4 years. The fact that he entered into a lease for 4 years adds credence to that evidence.

[157] I found the evidence of the wife's husband to be candid and truthful. He did not try to embellish the circumstances of his employment and testified that the German embassy had been very accommodating to his family situation and he was hopeful that he would be granted a further 4 year extension to remain in Ottawa or even a move to Toronto as he applied for that position also. He testified that if he could not remain in

Ottawa after 4 years, then Hamza would be old enough where they would have to consider his views.

[158] I intend to include in my order a provision that the child's permanent residence not be moved out of Ontario as a move further away would interfere with the father's contact with his child.

(g) the disruption to the child consequent on removal from family, schools and the community he has come to know

[159] There is no question that a move to Ottawa would result in some disruption to the child. He has attended the same school for kindergarten and now in Grade 1.

[160] However, even if the mother is not permitted to move with the child to Ottawa his school will be changing as the mother will be moving from the maternal grandmother's home. In the father's initial plan he would have also moved the child's school. The father's concern was that the mother wanted to move the child before the end of the school term. However, Hamza is only in Grade 1 and he does well in school and has no learning issues. The father has always deferred to the mother with respect to educational decisions and there is no reason to question her decision as to the appropriate time to change the child's school.

[161] The mother testified that only a few children in the child's Grade 1 class are the same as the children in his kindergarten classes and that he only had one close friend. Given his young age, these are not long term childhood friends that he will miss.

[162] The child was described as a well-adjusted social child who gets along with adults and other children. Therefore I find that a move to a new school and the necessity of making new friends would not have any detrimental impact on him.

[163] There is no evidence that the child has had any issues with transitions in the past. Hamza began daycare, changed to a private daycare and then back to the home daycare, and has attended kindergarten and Grade 1. Even when the father moved to Alberta for 8 months and saw the father infrequently there was no evidence that he had problems readjusting when the father returned.

[164] Although there is evidence that after the separation and for about a year thereafter, the child had problems transitioning between the mother and father's home this was a result of the father's refusal or inability to commit to a regular and consistent schedule of access. There were also issues with the father not having the basic parenting skills with respect to feeding the child or understanding his sleeping routine. However, since the court proceedings were commenced and the father agreed to adhere to a regular alternate week-end access schedule the child has done well in transitioning between homes and adjusting to the regular schedule.

[165] The father and his wife both testified that the child has "break-downs" when leaving at the end of access visits. The father testified that the child always cries, sobs, shakes and hides under the table as he doesn't want to leave the "fun house".

[166] The father's wife initially also testified that the child does not cope well with the transitions between the father's and mother's home, has break downs and the does not understand the schedule but then admitted in cross-examination that the child is fine with the transitions and only sometimes has a break down.

[167] However, when the paternal grandmother was asked to explain the statement in her affidavit that she has witnessed the child having break downs she explained that this only happened once when he lost his shoes. I accept the paternal grandmother's evidence on this issue as she was a sincere witness and presented her testimony in a balanced manner whereas the father throughout his evidence exaggerated and embellished his testimony.

[168] The father submits that if the mother is permitted to move with the child, the father will no longer be able to provide health care to the child. Based on my finding that the father merely took the child to the doctor as needed and that the mother took the child to other appointments to walk–in clinics and to the hospital and my finding that the mother is perfectly capable of meeting the child's health needs as she has been the parent to do so in the past, there is no merit to this submission.

[169] The child would maintain contact with his maternal grandmother and aunt who are committed to frequently visiting in Ottawa.

[170] The father testified that if permitted to move, the father would no longer be able to attend the child's activities. However, if he spent a week-end a month in Ottawa he would be able to attend some of these activities. Further, during the extended summer holidays the father could enroll the child in a summer camp program or other activities.

[171] The father also testified that if permitted to move the father would not be able to attend any parent teacher meetings. However, the father could leave early and arrive in Ottawa early on a Friday and make arrangements for such a meeting or he could arrange a meeting through Skype. If the father chooses to do so, there are many ways in which he could continue to be involved in his child's life. There was also evidence from the mother that I accept that despite being invited to attend a preliminary meeting at the child's daycare and the school the father did not attend. I do not find that the father's ability to attend school or sporting events in which he child's participates is a significant impediment to the child moving with the mother.

[172] The primary disruption to the child if a move is permitted would be with respect to the child's contact with the extended paternal family. Currently, the father's access, except for Tuesday evenings, is primarily exercised at the paternal grandmother's home that was described as the "fun house" and where the family congregates. The child is very attached to his paternal grandmother and his cousin Sanaah who is a year younger than him. Sanaah's father testified that he would have no difficulty permitting the father to take his daughter with him for a trip to Ottawa. He also testified that his daughter who is only 5 years old has her own iPad and is able to use FaceTime. The relationship between the child and his cousin and other members of the paternal family can be maintained through the time that the child spends in Toronto and through electronic means.

[173] The access schedule proposed by the mother would allow the child to maintain significant contact with the paternal extended family once a month and for a great deal of time during the holidays. The father gave evidence that there is a large family gathering on the July long week-end that coincides with the Somali Independence Day. As based on the mother's proposed access schedule the child would be in the father's care during the month of July he can still enjoy this family gathering.

[174] Further, there is some advantage to the father spending one on one time with his son that he could do if he chose to travel to Ottawa once a month. Although there is no expert evidence in this case, I find that the court on a common sense basis, can conclude that a child benefits from some special and exclusive time with a parent. It is also not the quantity but the quality of access that is relevant. The father should consider that travel or driving time can be used as an opportunity to bond with a child instead of his immediate reaction which is to reject the mother's proposal and not propose any other solutions except to not permit the mother to relocate with the child.

[175] This is not a case where the mother has attempted to interfere and curtail the child's contact with the father or his family. While the father lived in Alberta, the mother permitted the paternal family to have contact with the child. There is a positive relationship between the mother and the paternal grandmother. After the paternal grandmother testified she spontaneously went to the mother and embraced her. I find that the mother respects the value of the child's relationship with his paternal grandmother and other members of the paternal family and would not interfere with that relationship and would do whatever was necessary to foster those relationships based on her past behaviour.

[176] It is submitted that the mother would not have the assistance of the maternal grandmother and maternal aunt as well as the assistance of himself and his family. However, the mother only needed assistance when the child was younger in arranging for his care when he was ill or when she was in school and working part-time. That type of assistance is no longer needed. The mother will have the support of her husband who has arranged his schedule to assist in any transportation to and from school or to and from the child's activities that may be needed.

[177] The father also testified that Toronto is the most multi-cultural city and it has a large Somali community. He refused to admit that Ottawa was also a multi-cultural city. In view of the fact that the mother is from the same cultural background as the father and the fact that the father will still be able to expose the child to cultural activities and the community in Toronto, I find there is no merit in this submission.

[178] In summary, I find that a move at this young age will not be significantly disrupt the child's life. As observed recently by the Court of Appeal in *Reeves v. Brand:*[22]

> Children's adaptability to change, especially at Ray's age, bolsters the trial judge's conclusion. As Furey J. sensibly noted in his recent decision in *Sexton v. Tipping*, 2017 CanLII 56984 (NL SC), 2017 CanLII 56984 (N.L. S.C.T.D.), at paras. 81-82:

[22] 2018 ONCA 263 at para. 30

> It is a reality of the times in which we live that many couples with children come together through partnership or marriage, separate or divorce after a period of time and then move on with their lives. … The crux of these scenarios is change – for the parents and for the children.
>
> Change is a constant in all our lives. As a general principle, children are adaptable in their lives. They change communities. They change schools. They change friends. Many change families, not because of their actions but because of the actions of their parents. That has happened in this matter.

[179] Courts have also recognized that in permitting a parent to move away with a child that modern-day technology has made it easier to overcome the distance problem regarding access and maximizes contact with the other parent.[23]

Conclusion regarding the mother's proposed move to Ottawa

[180] I have also considered and rejected the option of leaving the child with the mother but denying her permission to move him to Ottawa. As the custodial parent the mother's wish to relocate to Ottawa is entitled to great respect and there is no reason to disregard her wish. Her desire to move on with her life and live with her husband and child is reasonable and made in good faith. There is no reason to believe that she would use the move to interfere with the father's relationship with their son. The move will permit her to have the financial and emotional support of her husband.

[181] I find that the mother's plan to relocate to Ottawa is in the child's best interests. The mother has been the primary parent since the child's birth and responsible for making all major decisions with respect to selection of daycare, school, extracurricular activities and has been the parent that directed the father with respect to any medical care for the child. The mother's proposal for access provides the father and is family with regular and meaningful contact. Any reduction in week-day access is more than made up with extended times during the holidays. I find that the father has the financial means and the physical ability to exercise access in Ottawa. If he chooses not to do so, then I find that he has decided to curtail his contact with his son for no valid reason.

Child support

[182] The father has historically underpaid child support. Shortly after the parties separated in 2013 the father began to pay child support of $400 per month. The mother deposed that the father told her that the $400 he gave her along with the child tax benefit she received was sufficient to meet the expenses of the child. The mother was not aware of the Child Support Guidelines or the correct amount of support she should be receiving.

[183] In 2013 the father earned $69,258 and in 2014 he earned $91,632. He should have been paying monthly child support in 2013 of $$632 and in 2014 of $814. The mother in 2014 only earned $13,411. Yet the father continually blamed the mother for not assisting with the driving and complained that he had to borrow or rent cars.

[23] *Ryall v. Ryall* 2009 ONCJ 687 at para. 96 and cases cited therein.

[184] In 2015 the father deposed and produced his Notice of Assessment indicating that he only earned $28,048. The father testified that he had a student loan of about $48,000 and was aware that if he paid a lump sum he could reduce the amount of the loan. As a result he testified that he was forced to take a contact job in Alberta. The father testified that he was able to retire his entire student loan by paying a lump sum of $38,000.

[185] Given the apparent contradiction, I asked the father for an explanation. He then testified that he incorporated a company and when asked how much the company earned with some hesitation he said about $90,000. Nowhere in the affidavits filed by the father has he ever mentioned these earnings. In addition to the $28,048 he earned in 2015, his total earnings for that year would have been $118,048 and his child support obligation would have been $1,021 per month. But the father continued to give the mother child support of only $400 per month.

[186] In 2016, the mother began to seek more child support. The father blamed the mother for asking for more child support just when he was to be married. The parties attended mediation. I accept the mother's evidence that the father would only agree to increase child support to $600 per month and she felt she had to accept this amount. In 2016 the father earned $90,561 and his child support should have been $805 per month.

[187] The father's failure to disclose his actual income in 2015 raises further issues with respect to the father's credibility regarding his financial resources.

[188] In his affidavit and financial statement the father estimates his income to be $90,000. In 2017, the father's Notices of Assessment indicates he earned $86,129. The father was not asked to explain the decrease in his income and mother is content to accept child support based on the lower income. His child support obligation is therefore $802[24] per month based on the November 22, 2017 Child Support Guidelines.

[189] The parties have agreed that the father pay a lump sum of $10,000 with respect to retroactive child support and his share of the section 7 expenses, which is an acknowledgement of his failure to meet his child support obligations in the past.

[190] With respect to the child's section 7 expenses, the father deposed and testified that he was never asked to contribute to these expenses and assumed that the mother was receiving a government subsidy to cover the expenses. He also testified that they had an agreement that he would not pay for the activities. However, the mother produced text messages wherein she tells the father the cost and asks for his contribution. If they had such an agreement it would not make any sense that the mother would tell him the costs. The father could not produce any evidence to substantiate his claim that the mother agreed that she alone would be responsible for the cost.

[24] In the draft order submitted by father's counsel provides for child support of $771 per month as of November 1, 2018 based on the father's income of $86,129. But based on the revised child support guidelines as of November 22, 2017 the correct amount of child support is $802.00 monthly.

[191] With respect to the Kumon expenses the father deposed and testified that he did not agree to the need for Kumon tutoring so he did not see why he should pay. Even after the father spoke to other parents, saw the child enjoyed the program and took him to the program, he never offered to pay his share.

[192] With respect to all financial issues the father asserted his control and forced the mother to bear the financial burden even though she has always earned substantially less than him.

[193] In 2015, the mother earned $22,901, in 2016 $31,634 and in 2017 $48,000.

[194] As of August 2018, the mother left her employment as she was missing many days of work to prepare for trial and was feeling the stress of the pending litigation. She is currently being supported by her husband.

[195] The mother's counsel submitted that income should be imputed to her at minimum wage of $29,100 to calculate her share of any section 7 expenses.

[196] However, I agree with the submissions of father's counsel that the mother's share should be based on her last year's income of $48,000 in view of her voluntarily termination of her employment. There is no reason to assume that she could not obtain employment in the same range of income in the future as she testified that she intended to look for employment and was confident with her experience that she could find similar employment in Ottawa.

[197] The issue of retroactive child support and retroactive section 7 expenses was settled by consent that was incorporated into a court order dated October 26, 2108. Any child support order should therefore be effective of November 1, 2018.

Life insurance and extended benefits

[198] Despite the father professing not to know what life insurance was or if he had it, he attached to his own affidavit a copy of his benefits that include life insurance.

[199] I assume that there should be no issue with the father maintaining Hamza as a beneficiary for half of the proceeds[25] of his existing life insurance policy available through his employment. It appears that he has basic life insurance of 2 times his salary which at the current time would be about $180,000. However, father's counsel did not make any submissions on this issue.

[200] The Ontario Court of Justice only has the jurisdiction to require a parent to irrevocably designate a child as a beneficiary pursuant to an existing life insurance policy if it is for necessities or to prevent the child from becoming a public charge.[26] In making such an order on the facts of this case, the court would take a rather expansive view of the meaning of necessities or preventing the child from becoming a public charge. However, if the father agrees then I am prepared to make the order. If not,

[25] Father's counsel made no submissions with respect to this issue but the father should be entitled to leave half to his spouse for the benefit of their daughter.
[26] Sections 34 (1) (i) and 34 (2) of the *Family Law Act*

counsel are to arrange a further date or make submissions on this issue within the next 30 days.

[201] Based on the exhibit attached to the father's affidavit he has already listed Hamza as a dependent on his extended medical and dental insurance through his employment. No issue was raised with the father continuing this coverage.

Travel and passports

[202] The mother seeks an order that she be permitted to travel with the child to any Hague country without the prior written consent of the father and to be able to obtain both a Canadian and diplomatic passport for the child without the prior written consent of the father.

[203] The father opposes these orders as he testified there have never been any problems and he has even paid for notarized copies of travel consents. However, there have been problems in the past with the father refusing to give the mother the child's identification documents and health card because he paid for them. The father was reluctant to permit the child to travel to Germany to attend the mother's wedding. I accept the mother's evidence that it was only after being threatened with a motion that he agreed.

[204] There is no basis for the father to be concerned that the mother would abscond with the child or travel to anywhere that would put the child in danger. In view of the past difficulties compounded with the practical difficulties as the mother will now living in another city, there is no evidentiary basis to require the mother to obtain prior consent from the father to travel or obtain any documents for the child. I also see no reason why the mother should be prevented from obtaining a diplomatic passport for the child.

[205] The mother agreed that the father should be able to travel without her prior consent. Both parties would be required to provide each other with an itinerary and contact information.

Conclusion

[206] There will be an order as follows:

1. The Applicant shall have sole custody and primary residence of the child Hamza Ahmed Dirie born October 1, 2012.

2. The Applicant shall provide the Respondent with all contact information and sign any necessary authorizations, directions or consents to permit the Respondent to speak to the child's school, doctors, dentist, tutor, coaches or any other service providers.

3. The Applicant will consult with the Respondent with respect to any major decisions with respect to the child but if the parties are unable to agree the Applicant will make the final decision.

4. Either party may enrol the child in an extracurricular activity on their parenting time. If an activity falls on the parenting time of the other party, the other parent shall not be obligated to take the child to the activity.

5. The Respondent shall have access to the child as follows:

   a) One week-end from Friday after school to Sunday at 4:00 p.m. in Toronto. The Applicant shall be responsible for transportation;

   b) One week-end from Friday after school to Sunday at 4:00 p.m. in Ottawa. The Respondent shall be responsible for transportation;

   c) The week-end access shall be extended from Friday after school to Thursday after school if Friday is a school holiday or PD day and from Sunday at 4:00 p.m. to Monday at 4:00 p.m. if Monday is a school holiday or PD day;

   d) If the parties do not agree otherwise, the Applicant shall transport the child to Toronto on the second full week-end of each month and the Respondent shall exercise access in Ottawa on the fourth full week-end in each month. The Respondent shall confirm in writing that he intends to exercise access in Ottawa by the Wednesday preceding his week-end;

   e) The first week of the March break if the March break holiday is two weeks. If the holiday is only one week, the Respondent shall have the child for one week in odd years and the Applicant in even years.

   f) The Family long week-end in February;

   g) Easter long week-end;

   h) May long week-end;

   i) The month of July with the Respondent with the Applicant permitted to visit the child for one week-end from Friday to Sunday as agreed. The month of August with the Applicant with the Respondent permitted to visit the child for one week-end from Friday to Sunday as agreed;

   j) Half of the Eid holidays as agreed;

   k) In even-numbered years, commencing December 2018, the child shall reside with the Applicant for the first half of his Winter break from school to include Christmas Eve and morning and in odd-numbered years, child shall reside with the Applicant for the second half of his Winter break from school to commence after Christmas morning;

   l) Reasonable and liberal telephone and FaceTime contact;

   m) Any additional access as may be agreed upon in writing; and

n) Unless otherwise specified or agreed upon, the Respondent shall be responsible for picking up the child at the commencement of holiday access and the Applicant shall be responsible for picking him up at the end of any holiday access.

6. Regardless of the regular schedule, the child shall spend the Father's day week-end form Friday to Sunday with the Respondent and mother's day week-ends from Friday to Sunday with the Applicant.

7. Regardless of the regular schedule, the child shall spend Labour Day week-end with the Applicant.

8. The Applicant shall not change the child's residence from Ontario without the prior written consent of the Respondent or court order. In the event the Applicant intends to change the child's residence from Ottawa she shall provide the Respondent with 90 days' notice.

9. Either party shall be permitted to travel with the child outside of the province or to a Hague Convention country without the prior written consent of the other parents. The travelling party shall provide the other with details of their proposed travel and contact information no later than 14 days in advance of their planned departure.

10. The Applicant shall be permitted to apply for or renew any government issued documents, including the child's health card and his Canadian and diplomatic passport, without the prior written consent of the Respondent.

11. The Applicant shall be the custodian of the child's birth certificate, social insurance number, health card and passports, which documents shall be provided to the Respondent when needed. The Respondent shall promptly return the child's documents to the Applicant following his travel.

12. The Applicant shall provide the Respondent with a copy of the child's health card and with a copy of any updated health card upon receipt.

13. As of December 1, 208 the Respondent shall pay to the Applicant child support for the child $802.00 per month based on his 2017 income of $86,129 and in accordance with the Child Support Guidelines.

14.. The Respondent shall maintain the child as a beneficiary of his extended health and dental benefits plan available through his current employment. If the Applicant secures employment, she shall also maintain the child as a beneficiary of her extended health and dental benefits plan and the parties shall co-ordinate their benefits to maximize coverage for child's medical and dental benefits.

15. The Respondent shall designate the child as a 50% irrevocable beneficiary of his existing life insurance policy and maintain that

designation as long as such policy is available through his employment and as long as he is required to pay child support.

16. If either party seeks contribution to a section 7 expense for the child, he or she shall first provide the relevant details to the other party and obtain their prior written consent, which consent shall not be unreasonably withheld. For the purposes of proportionate sharing of the child's section 7 expenses, the Respondent shall pay 65% and the Applicant shall pay 35% based on the Respondent's 2017 income of $86,129 and the Applicant's imputed income of $48,000. If consent to the expense has been provided in writing in advance, the other party shall pay their proportionate share to the party incurring the expense within 14 days of being provided proof of payment (e.g., receipt or invoice).

17. By June 1st every year, commencing June 1, 2019, the parties shall exchange their Income Tax Returns and Notice of Assessment and Reassessment (if any) for the prior year and Table child support shall be adjusted as of July 1st in accordance with the Respondent's income from the previous year. For the purposes of proportionate sharing of section 7 expenses, the Applicant's income shall be imputed to be no less than $48,000.

18. As the successful party, the Applicant is presumed to be entitled to costs. If counsel cannot resolve the issues of costs, counsel for the Applicant shall submit written costs submissions not to exceed 3 pages with a Bill of Costs and any Offer to Settle attached within 30 days. Counsel for the Respondent shall submit his written response not to exceed 3 pages with any Offer to Settle and a Bill of Costs, if desired, within 30 days of receipt of the Applicant's costs submissions. All submissions to be filed with the trial co-ordinator.

Released: November 7, 2018
Signed: Justice Roselyn Zisman