NOVA SCOTIA COURT OF APPEAL
Citation: ***Murray v. MacKay***, 2006 NSCA 84

Date: 20060705
Docket: CA 257097
Registry: Halifax

Between:

Harold Joseph Murray

Appellant

v.

Jacqueline Diane MacKay

Respondent

Judges:	Bateman, Saunders, Hamilton, JJ.A.
Appeal Heard:	June 12, 2006, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Hamilton, J.A.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Susanne Litke and Carolyn Baker, for the appellant respondent in person

Reasons for judgment:

[1] Harold Joseph Murray, the appellant, appealed the September 20, 2005 order of Judge Corrine E. Sparks of the Family Court which varied custody and access with respect to the parties' daughter, Sarah (DOB April 28, 2000), pursuant to the provisions of the **Maintenance and Custody Act**, R.S.N.S. 1989, c.160.

[2] The father was represented by counsel for the latter part of the trial and at the hearing before us. The mother, Jacqueline Diane (MacKay) Glen, the respondent, represented herself at both.

[3] At the outset of these reasons I should indicate that at the commencement of the hearing before us, the parties advised they had reached agreement on the father's income and the amount of child support, effectively withdrawing two of the father's grounds of appeal. They indicated they have agreed that the father's income was $20,874 per year and that child support should be $166 per month in accordance with the guidelines, retroactive to December 15, 2004. Counsel for the father agreed to prepare and forward to the mother before July 12, 2006 a consent order to be taken out in the Family Court to give effect to their agreement.

[4] The parties were not married. They lived together from July 1998 to August 2002. After they separated and prior to the appealed order they had been able to agree on orders providing for custody, access and child support.

[5] The operative consent order at the time of the hearing before the judge was issued by her on January 14, 2003. It provided for shared custody with day to day care as follows:

> ...[The mother], shall take the child to day care during the week days and ... [the father] shall pick the child up from day care at 4:00 p.m. and return the child to [the mother] by 6:30 p.m....[The father] shall have access every second weekend from Friday at 4:00 p.m. to Sunday at noon and other access as can be mutually agreed between the parties.

[6] Eighteen months later, on July 8, 2004, the mother applied to vary custody and access, seeking sole custody for herself, stating:

> That, since the making of said order, I have encountered difficulties with the [father] regarding appropriate communication in a co-parenting arrangement. Additionally, I have concerns regarding the quality of care being provided by the [father] to the child; Sarah Marie Murray, (DOB April 28,2000).

[7] In the custody and access statement she filed in support of her application, the mother proposed the father have access from 5 p.m. to 8 p.m. on Wednesday evenings and from 9 a.m. to 5 p.m. on Saturday. During the trial, upon hearing the father's testimony that the child slept in a bed when she stayed overnight with him, as opposed to on a mattress on the floor of the basement as reported by the child, the mother changed her position and was no longer opposed to the father having overnight access with the child.

[8] The custody and access statement filed by the father in response on August 3, 2004, while he was unrepresented, indicated:

> I would like shared custody to continue. I feel the child's interests are better served when both parents are involved and the more time Sarah spends with her dad the better. I would like to spend more time with Sarah and have a greater say in the way the child is being raised. Even though we have shared custody her mother does many things behind my back and does not inform me on issues regarding Sarah or even ask for my opinion. I will be returning to work shortly and do not know what my work schedule will be. Her mother will not talk to me. Right now I am seeking employment and would hope that Sarah's mother would allow me to change the schedule as I have done so many times for her each time she quit her job.

[9] The father filed a statement of financial information dated September 7th, 2004, with copies of his 2001 and 2002 tax returns attached.

[10] The hearing commenced October 19, 2004 with both parties unrepresented. Part way through the father's direct evidence, an adjournment was granted to allow him to seek legal advice as to alternative custody and access arrangements that may be acceptable to him. During the adjournment the father obtained legal counsel and on the day prior to the recommencement of the hearing on November 9, 2004, he filed a reply opposing the mother's application and a counter application in which he sought continued shared custody of the child, that the child spend alternate weeks with each parent, that she attend school in his neighbourhood as opposed to in the mother's new neighbourhood, that a

communication log be used to allow the parents to pass information between themselves about their daughter and that all major decisions be made by the parents jointly, with the assistance of a mediator or the court if they could not agree. Alternatively, if the alternating weeks were not acceptable, he sought to have his daughter with him from 3 p.m. on Wednesday to 3 p.m. on Sunday one week and from 3 p.m. on Wednesday to 3 p.m. on Friday the following week. The father proposed the same schedule before and after the child started school.

[11] At the time of the Family Court hearing the child was spending from Thursday evening to noon on Saturday with the father one week and from Thursday evening to noon on Sunday the following week. There had been various schedules over the years, not always documented in court orders, for the most part to accommodate the mother's work schedule.

[12] The judge released her decision, reported at (2004), 229 N.S.R. (2d) 16; N.S.J. No. 484 (Q.L.)(F.C.), on November 30, 2004. She ordered that the mother have sole custody of the child. She ordered that the father's *de facto* access at the time of the hearing, from Thursday night to noon on either Saturday or Sunday on alternating weeks, continue until the child started school in September, 2005. Once school started, she ordered that the father have access with the child from after school on Friday until 6 pm on Sunday every second weekend.

[13] She stated in her decision:

> [21] No financial disclosure was made by Mr. Murray; however, he has indicated a willingness to do so if the parenting arrangement for Sarah is varied. Thus, Mr. Murray is directed to file appropriate financial records with the court upon receipt of this decision....

[14] On May 16, 2005, the father filed an updated financial statement. The order under appeal followed on September 20, 2005.

Judge's Decision:

[15] The judge addressed the threshold issue of whether there was a material change in circumstances since the date of the outstanding consent order and found that there was:

> [17]...I find, in the present circumstances, Mr. Murray has downplayed the nature of the mistrust and poor communication between himself and Ms. MacKay. Even though the parents have had a joint custody order since 2002, **I find the level of communication and co-operation between them has worsened over time**, **especially since 2003**. Moreover, in my view, there appears to be little, if any, likelihood of the tension and mistrust abating between these two parents, even with mediation, communication notebooks and so forth. It seems to me a sufficient level of trust cannot be restored even in the face of an ironclad court order. Rather, the court concludes it is more likely that the lack of co-operation between the parties will, on the balance of probabilities, escalate as Sarah becomes older and more and more decisions have to be made consistent with her best interest....
>
> [18] **In the end, the court is, therefore, satisfied based upon all the evidence, on the balance of probabilities, that the level of communication between the parties has deteriorated to the level where the overall short and long term best interest of Sarah will be compromised. Under Section 37 of the Maintenance and Custody Act a substantial change, as required, has been established by the applicant**....
> (Emphasis mine)

[16] Having determined there was a change in circumstances, the judge then considered what custody and access should be ordered.

[17] She considered several cases noting that in some cases judges order joint custody when the parents cannot communicate effectively and that in other cases judges refuse to order joint custody in the face of poor communication between the parents; **McCann v. McCann** (1993) 120 N.S.R. (2d) 59 (S.C.); **Rivers v. Rivers** (1994) 130 N.S.R. (2d) 219 (S.C.); **Broder v. Broder** (1998), 42 R.F.L. (4th) 143(Alta. Q.B.); **Burwash v. Mirosh** (2001), 282 A.R. 399 (Alta. Q. B.); **Meyer v. Meyer**, [2002] O.J. No. 3013 (Q.L.) (Ont. S.C.J.) and **Kappler v. Beaudoin** (2000), 6 R.F.L. (5th) 269 (Ont. S.C.J.).

[18] The judge found the main problem between the parents related to their inability to communicate effectively:

> [14] Both parents have a loving relationship with their daughter, but, obviously, the main problem is the level of communication between them and whether their level of communication is compatible with Sarah's overall best interest. In the present circumstances, Mr. Murray, in my judgment, has overstated

> his ability to communicate with Ms. MacKay. He very carefully, on cross-examination, avoided answering questions which would put him in a bad light such as using profanities while being intoxicated when speaking to Ms. MacKay about Sarah. Furthermore, he seemed to have selective recall concerning child rearing responsibilities when the parties co-habited, again this seemed to be an attempt to inflate his involvement with Sarah when the parties co-habited. It should also be noted that Mr. Murray appears to be inflexible as his parenting plan seems to unduly focus on the past parenting arrangement where the custody alternated from week to week when Sarah was younger. This was also exemplified in his evidence when he alluded to the fact that the parties had discussed, when co-habiting, that Sarah would attend school in his residential area. This seems to point to a level of rigidity which is, at the very least, dim to an awareness of Sarah's ever changing needs given her age and development.
>
> [15] Moreover, in a situation such as this when one parent states the communication is manageable and the other parent states the communication is virtually non-existent, it should be recognized and underscored that meaningful communication cannot materialize unless both parents are able and willing to communicate without feeling threatened or demeaned in verbal exchanges. Both parents, therefore, must acknowledge communication deficiencies before they can be remedied. If the finger is constantly pointed at each other, without an acceptance of responsibility on both sides, there can be no marked improvement in the level of communication, but rather the perpetuation of continual allegations and counter allegations which ultimately serve to cause more confusion.
>
> [16] It seems to me, whenever possible, parents should be encouraged to have equal parenting time with a child, but it must also be remembered that this is not always possible. Parenting times cannot be based upon a strict mathematical calculation of time, but rather must be decided after carefully weighing competing parenting plans while devising a course of child care which will serve the short and long term needs of the child, and not the parents *per se*. Under the umbrella of the best interest of the child doctrine, there are numerous factors to be weighed as set out; for instance, in *Foley v. Foley* (1993) 124 N.S.R. (2d) 198.
>
> [17] While it is not necessary to comment on each category listed in *Foley v. Foley, supra*, it is important to acknowledge the love and devotion of each parent in the rasing of their daughter thus far. But in the present circumstances, it must be Sarah's needs which dictate the appropriate parenting arrangement which will ensure consistent stability and guidance for her....

[19] She found Mr. Murray’s suggestion that any disputes between the parents about their child, such as school selection, religious upbringing and birthday

parties could be solved with the help of mediation or the court to be "impractical and imprudent". There was evidence before her that the mother was getting married and would be a stay at home mother. The judge found that it would be better for the child to be with her stay at home mother than with a non-parent caregiver while the father was working.

[20] She found:

> Thus, it seems to me, in light of the above concerns, it is in Sarah's best interest to be placed in the day to day care and control of her mother, subject to reasonable and liberal parenting times with her father.ABTab7p14

Grounds of appeal:

[21] The restated grounds of appeal are:

> 1. Did the judge err in determining that there was a change in circumstances from the date of the outstanding consent order of January 2003 to the date of the hearing?
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> 2. Did the judge err in her assessment of the evidence and her application of the law when she varied custody and access as she did? Did she make findings of fact that were not supported by the evidence? Did she fail to consider all of the relevant evidence? Did she fail to properly apply the principle of maximum contact for the child with both parents?
>
> 3. Did the judge err in not allowing the father to put into evidence written documentation (emails and notes) from the mother as evidence of communication between the parties?
>
> 4. Did the conduct of the trial by the judge and her reasons give rise to a reasonable apprehension of bias?

Standard of Review:

[22] It is important to remember that this is an appeal. We are not a court of first instance. We are not to assess the evidence in the record afresh and substitute our discretion for that of the judge of first instance. We are not to overturn a custody or support order unless the judge has made an error in principle, has significantly misapprehended the evidence or unless the decision is clearly wrong; **Hickey v.**

Hickey, [1992] 2 SCR 518, paras. 10,11 and 12, **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, para. 12; **Willick v. Willick**, [1994] 3 S.C.R. 670, para. 27.

[23] The relevant standard of review was recently set out in **Zinck v. Fraser** (2006), 240 N.S.R. (2d) 335; N.S.J. No.43 (Q.L.):

> [6] In **D.L.W. v. J.J.M.W.** (2005), 234 N.S.R. (2d) 366; [2005] N.S.J. No. 275 (Q.L.), this Court confirmed the exacting standard of review in custody cases:
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> > [31] The narrow scope of appellate review is explained by the judgment of Justice Bastarache in **Van de Perre [Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, 2001 SCC 60]:
> >
> > > As indicated in both **Gordon** (**Gordon v. Goertz**, supra) and **Hickey** (**Hickey v. Hickey**, [1999] 2 S.C.R. 518) the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in **Van Mol (Guardian ad Litem of) v. Ashmore** (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused, [1999] S.C.C.A. No. 117, [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.
> >
> > [32] This approach is followed in Nova Scotia, recently in **Children's Aid Society of Cape Breton-Victoria v. M.(A.)** (2005), 232 N.S.R. (2d) 121; 737 A.P.R. 121; 2005 NSCA 58:

> 26 This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.**, [2003] N.S.J. No. 416 (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014, at paras. 10-16.

Analysis:

Ground 1 - Did the judge err in determining that there was a change in circumstances from the date of the outstanding consent order of January 2003 to the date of the hearing?

[24] Section 37 of the **Act** provides:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[25] This section is similar to s.17(5) of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.) commented on in **Gordon v. Goertz**, [1996] 2 S.C.R. 27:

> 10 Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the

> child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther: *Wilson v. Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.).
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> ...
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> 3 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[26] Thus, before the judge could consider a variation of the outstanding consent order, she had to find that there was a material change in circumstances since it was issued.

[27] The father argued that the judge erred in finding that there was a material change in circumstances. He argued that communications between he and the mother at the time of the trial were no worse than at the date of the outstanding consent order, or if they were, the problem was caused solely by the respondent who had stopped communicating with him once she filed her application. He stated in his factum:

> 40. It is submitted that communication between the parties had been “off and on” since the original order, but it had not changed significantly during the short time between the Consent Order and Ms. MacKay’s application to vary in July 2004. Communication had not changed enough to warrant a change in circumstances found by the trial judge.

[28] In support of his position he pointed to the mother’s November 7, 2002 Custody and Access Statement filed before the consent order was issued wherein she indicated:

> From Sept 8th (approx) to Oct 15th Sarah was spending alternating weeks with each parent. This was not a permanent arrangement as the communications with the parents was nil.

[29] He argued that if communication between the parties in November, 2002, before the January 14, 2003 outstanding consent order, was nil, it could not have deteriorated so as to constitute a change in circumstances. He argued there were no other changes that would give rise to a change in circumstances.

[30] Because the outstanding order was a consent order, there were no findings of fact as to the nature of the parties relationship at the time the outstanding order was issued. While the judge did have the mother's custody and access statement of November 7, 2002 stating that communication between them was nil, that statement had not been fleshed out at a hearing.

[31] There was evidence before the judge from both parties of their ongoing communication and co-operation difficulties.

[32] For example, the mother testified:

> A. I'm seeking sole custody for the main reason that there is no communication between Mr. Murray and myself. On occasions when I've tried to talk to him about Sarah, I get shoved off and almost told it's none of my business. And he's very difficult to deal with. And I just find Sarah's coming of an age where we really need communication because she's starting to grow up and starting to hear things and starting to repeat things. I...I have concerns because she tells me she sleeps on a couch in the basement in his three-bedroom home, and then when she's returned to me, she's extremely tired and cranky and she sleeps for 15 hours at a time, and she's a little irrational at times when she returns to me. And I also have seen her in the car with Mr. Murray and she's not been in her car seat, and that's [sic] causes me concern because I would like her to be in a car seat, because she's...it's law. I've tried to talk to Mr. Murray and there's just absolutely no communication and I don't know....
>
> ...
>
> A. ...it's almost like every time I said something, he would... he would try and make life difficult or almost undermining my position as a parent.
>
> ...
>
> A. Can I also say that I'm seeking sole custody for the definition of what it is, that one parent has to make major decisions?... And it's... and that's totally based on the fact that Mr. Murray and I can't have a civil conversation or communication

> together. And I, by no means, want to deny him access of Sarah. And when I read over all the other choices of custody, they all say that as long as there is a reasonable communication between the parents, which I feel we don't have.
>
> ...
>
> Q.(by Mr. Murray) You're saying you can sit down and have a conversation like two grown adults...why did we come to court the last time? Why couldn't we sit down and talk about this?
>
> A. Because Mr. Murray, in any time when we've had conversations, you have very clearly stated you do not want any of my input. You...you don't believe anything I say, and I'm very uncomfortable around you because of that. And I...I guess it probably stems back from living with you and understanding the way your behaviour is and what you are like, that...because I've got out of that relationship so I did not have to be put back in those positions of feeling so unsure of myself when in your company.

[33] The father's custody and access statement referred to in paragraph 8 above indicates communication and co-operation difficulties as did his testimony, one example of which is:

> Q. So it's not a question of just itemizing the communication, but tell the Court if you feel communication has been effective in Sarah's overall best interests, and how so.
>
> A. No, Your Honour, I don't feel it has been effective. The situation like the last birthday party, I called Ms. MacKay about Sarah, the concerns about the...several birthday parties, and she had hung up on me. I had called her about Christmas, the previous Christmas. That was my...my time to have Sarah.
>
> Q. Christmas 2003?
>
> A. That's correct, Your Honour.
>
> Q. Um-hum.
>
> A. Her son had informed me that she had Christmas on Christmas Eve. He was not happy with that, and I asked her about that...and asked her, "Was that confusing Sarah? Do you think that's in Sarah's best interests?" Because she had expressed to me...she asked me, "Is today Christmas Day, Daddy, or was it

> yesterday?" I've asked Ms. MacKay about the religion, but she does not recall the conversation. I would have liked to be the part [sic] of the discussion of taking Sarah from the day care, and I would like to know what Sarah's reaction [sic]were, but there's no communication on...on that issue. I had promised Sarah a bike for her birthday. Christopher, her brother, also knew it, and I had asked Ms. MacKay why she had given Sarah the very bike three weeks prior to Sarah's birthday. I didn't feel that was right, and that was also confusing Sarah. She replied, "She's just a kid. Kids are flexible." ...

[34] The judge was in the best position to assess the parents' evidence as to their ability to communicate and co-operate with each other. She found that the communication and co-operation between the parties had worsened over time, especially since 2003. She found the lack of co-operation between the parents would likely escalate. There was evidence before her that could support such findings of fact and inferences. In clause 12 of her decision she considered the father's argument that the mother had manufactured the communication problem to support her application for sole custody and rejected it. We cannot second guess her. While any of us may have taken a different view of the evidence and assessed it differently, it is not our role to interfere in the absence of legal error or palpable and overriding error in findings of fact and inferences.

[35] This Court's recent judgments in **D.L.W. v. J.J.M.V.** (2005), 234 N.S.R. (2d) 366 and **Zinck v Fraser**, **supra**, para. 21, exemplify circumstances where ongoing conflict was found to constitute a material change in circumstances.

[36] I would dismiss this ground of appeal.

> Ground 2 - Did the judge err in her assessment of the evidence and her application of the law when she varied custody and access as she did? Did she make findings of fact that were not supported by the evidence? Did she fail to consider all of the relevant evidence? Did she fail to properly apply the principle of maximum contact for the child with both parents?

[37] The father made several arguments that focussed on the judge's assessment of the evidence.

[38] In his factum the father set out numerous statements in the judge's decision that he argued were not supported by the evidence; i.e., the mother's talking to a

child psychologist; communications between the parents being in writing delivered by courier; that the parents had divergent parenting styles; the mother's reason for taking the child out of day care; the number of earlier consent orders; that the child's best interests were compromised by the communication difficulties between the parents; that there was little chance communication would improve; that the father was inflexible; and that the father had overstated his ability to communicate with the mother.

[39] The judge's description of some of the evidence in her decision was not as precise as it might have been, for example, when she described the mother's evidence of contacting a psychologist and when she stated; "Communication is presently in writing and transferred by courier" when the evidence was that only one letter was couriered.

[40] However, subject to my comments in the following paragraph, my review of the record satisfies me there was evidence supporting the key findings of fact made and inferences drawn by the judge; for example, that the parents had divergent parenting styles, that the child's best interests were compromised by the communication difficulties between the parents; that there was little chance communication would improve and that the father had overstated his ability to communicate effectively with the mother. There was also evidence supporting her statements regarding the mother's reason for taking the child out of day care and the number of earlier consent orders.

[41] There is, however, merit to the father's argument that one statement in the judge's decision was made without evidence and another statement was factually incorrect. The judge referred to there being evidence that the father had spoken to the mother on the phone while he was intoxicated and used obscenities. The mother suggested this in a question she put to the father, which he denied. This does not constitute evidence of affirmation. The judge erred in so finding. The judge also stated in her decision that the father had not made financial disclosure. This statement was incorrect. The father had filed financial information with the court in September 2004 prior to the trial.

[42] While there can be no question that the trial judge was wrong in these two respects, I am not persuaded that they are so important as to cause us to intervene. There was other evidence of significance before the judge from both parties of the

antagonism between them, making the judge's reference to the father being intoxicated and using foul language on the phone of little import. With respect to the judge's statement that the father had failed to make financial disclosure, it was made as a lead in to a direction to him to file current financial information so that child support could be determined in accordance with the guidelines. In May 2005, before the judge set the amount of child support in her order, the father filed updated financial information that the judge relied on in setting the amount of child support, making the statement of little consequence.

[43] The father also argued that the judge erred by ignoring or giving insufficient weight to certain relevant evidence that was favourable to him; i.e., that there was communication between the parents evidenced by changes in access that had been made between the parties from time to time; that the father had been flexible, while he was not working, in accommodating the mother's work schedule in terms of his care of the child; that the parties had communicated in writing, by email and in person from time to time; that the mother testified that she was not trying to reduce the father's time with the child; that the mother indicated she could share in transportation; that both parents loved the child and that she was well cared for; that the father was willing to arrange his employment to allow for maximum time with the child; that his living arrangements were familiar to the child; that the father would provide religious guidance for the child; that the mother had made decisions for the child without consulting the father and that the father provided appropriate activities for the child when she was with him.

[44] In effect this was a reargument of the father's case, putting forward the most favourable evidence supporting the father's position at trial and ignoring the findings of fact made by the judge. As set out above, it is not our function to consider the evidence anew and replace our discretion for that of the judge. The fact the judge did not mention all of this evidence in her reasons does not suggest she did not consider it in reaching her decision. There is no requirement in law that she mention all of the evidence.

[45] The father also argued that the judge erred by not giving effect to the principle that a child should have maximum contact with each parent when she ordered access with him every second weekend once the child started school.

[46] The judge specifically referred to the benefit of a child having maximum contact with both parents. She noted however that while this is a desirable goal, it was not always possible considering the best interests of the child, which she found to be the case here. One matter she considered in coming to her decision was that by the time the child started school the mother would be married and a stay at home mother. Therefore, if the child was in the mother's care during the week there would be no need for non-parent caregivers. Even taking into account the father's testimony that he would try to arrange flexible hours at his upcoming job, if the child was in his care during the week his testimony indicated she would be in the care of non-parent caregivers part of the time.

[47] The father has not satisfied me that the judge committed reversible error in her assessment of the evidence or her application of the law when she varied custody and access as she did.

[48] I would dismiss this ground of appeal.

> Ground 3 - Did the judge err in not allowing the father to put into evidence written documentation (emails and notes) from the mother as evidence of communication between the parties?

[49] The father argued that the judge erred by refusing to admit into evidence at trial copies of emails and notes which the mother sent to him. He attempted to have these admitted while he was unrepresented, once during cross-examination of the mother and once when he was giving his direct evidence.

[50] I agree with the father that the judge erred in refusing to allow him to admit these emails and notes, however I am not satisfied their admission would have affected the outcome of the trial and hence amount to reversible error.

[51] The purpose of the admission of these emails and notes was to prove there was communication between the parties. Even without these documents being admitted there was evidence before the judge that Ms. MacKay probably sent emails to Mr. Murray along with letters:

> Q. Have you ever e-mailed me in the past?

> A. I probably have. I'm not 100 percent sure. I do know your address is on my computer, but I do recall you telling me you had problems getting e-mails, so...

[52] There was also evidence of notes and letters being sent between the parties.

[53] Mr. Murray retained a lawyer following the time when the judge refused to allow him to introduce these emails and notes. When the trial reconvened the father's lawyer indicated to the judge that she had listened to the tapes of the earlier proceedings. The father was questioned by his lawyer during the continuation of his direct examination about his means of communication with Ms. MacKay. He testified that he had communicated with her by talking in the driveway when the child was exchanged, by telephone, by registered letter or letters delivered by courier, by messages in the child's school bag and by email. With respect to emails he testified:

> Q. And have you used it in the past to communicate with Ms. MacKay?
>
> A. I do believe so. I know she's e-mailed me.

[54] If counsel for the father had felt that the introduction of the original emails was important to the father's case one would have expected her to raise it when the trial resumed. She did not.

[55] I would dismiss this ground of appeal.

> Ground 4 - Did the conduct of the trial by the judge and her reasons give rise to a reasonable apprehension of bias?

[56] In the case of **R. v. R.D.S.**, [1997] 3 S.C.R. 484, the Court set out the test for determining if there is a reasonable apprehension of bias:

> 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person,

> viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"...

[57] The father argued a reasonable apprehension of bias arose from the judge's questioning of him about alternative access plans that might be acceptable to him, from the help she gave the mother while she was cross-examining him, from the comments she made to his counsel during her submissions after the evidence was complete and by the statements she made in her decision about him that were not supported by the evidence.

[58] The questioning about alternative access plans arose prior to the judge granting the father an adjournment to seek legal advice, where the judge was asking him questions during his direct evidence to help him place his evidence before the court. I will set out a substantial portion of the exchange the father argues raises a reasonable apprehension of bias for context. The specific sentences the father alleges show a reasonable apprehension of bias are highlighted:

> 23. Q. Well, what type of access would you propose, given that the current access may or may not remain in place?
>
> A. I would propose a schedule like we had, where Sarah spends approximately the same amount of time she has.
>
> 24. Q. But I'm asking you to address the possibility that...that the access will not remain the same. Now, keep in mind that Sarah's four, she's going to be starting school next September.
>
> A. Um-hum.

25. Q. So things will be changing at that point anyway, but I want you to ask yourself what kind of access would you propose, given that the current access may or may not be in place?

A. Your Honour, I haven't addressed that.

26. Q. Well, I'm asking you to.

A. I was...can I seek advice on this? I wanted...I wasn't sure how this was going to be, and I'm trying to change my schedule, I'm trying to do everything for Sarah.

THE COURT: Well now, Mr. Murray, when you were in court, the Court urged you to seek legal counsel, did it not?

MR. MURRAY: Um-hum.

THE COURT: I've urged that upon you and Ms. MacKay, and now you're in the middle of your evidence and you're saying that you want to consult with a lawyer, is that what you're saying?

MR. MURRAY: I just...

THE COURT: Or what do you mean "consult"?

MR. MURRAY: I would like to seek some advice.

THE COURT: From whom?

MR. MURRAY: From some legal counsel on the...the different types of custody and access.

THE COURT: Well, you...have you not discussed that somewhat at the parent education course?

MR. MURRAY: Somewhat, yes, Your Honour. But I have not...

THE COURT: Well, I...

MR. MURRAY: ...laid out a schedule, as such.

THE COURT: Well, I just want you to understand the dilemma from the Court's perspective. We're in a hearing...

MR. MURRAY: Um-hum.

THE COURT: ...and there are rules of evidence and rules of procedure in the courtroom. You're in the middle of your direct evidence.

MR. MURRAY: Um-hum.

THE COURT: And you're saying now that you want to consult with a lawyer. Now, it's difficult because first of all, if I grant your request, I have to direct that you're not to discuss your evidence with anyone including a lawyer until you return to court.

MR. MURRAY: Okay, Your Honour.

THE COURT: And secondly, that means that the matter is going to be delayed yet again, when the Court already advised you, and I believe I advised you quite strongly when you were in court the last day...

MR. MURRAY: Yes, you did.

THE COURT: ...to seek legal counsel. And I also told you that if you couldn't afford a private lawyer, that you may be eligible for legal aid. Isn't that correct?

MR. MURRAY: That is correct, Your Honour.

THE COURT: So now, what is it, do you want to carry on with the evidence or do you wish to have an adjournment?

MR. MURRAY: No, I'll carry on, Your Honour. I'm just confused as I have not sat down and laid out a schedule with proper times. I thought...my thinking was that first, someone was going to address the issue of sole custody or joint custody or shared custody, then we could agree upon a schedule.

THE COURT: Well, no, it's...it's all under all rubric, under one umbrella. It's an application to...

MR. MURRAY: Well...

THE COURT: ...vary the custody and the access. Well, this is a dilemma for the Court. I'm going to grant the adjournment primarily because Mr. Murray is...is unrepresented by counsel. He says that he's confused with respect to the parameters of the hearing. Certainly, it is not extraordinary for the Court or for anyone to ask Mr. Murray what he would be proposing in the event that the present custodial and access arrangement is not approved by the Court. **This is not an extraordinary question. It is something, in my mind, that Mr. Murray should have known that he would have to address in court.** However, I must be mindful that he's unrepresented by counsel.

Now, what I'm going to do, Mr. Murray, is I'm going to ask you...or direct that you not discuss your evidence with anyone including your lawyer between now and an adjourned date, do you understand?

MR. MURRAY: Yes, I do, Your Honour.

THE COURT: And I'm going to give you a last opportunity to consult with a lawyer. Please understand that if you do not consult with a lawyer during the adjourned period of time, that the matter will be proceeding when you return to court, do you understand?

MR. MURRAY: Yes, I do, Your Honour.

THE COURT: You're also directed to complete the parent education course.

MR. MURRAY: Yes, on the 4th of November.

THE COURT: And that should be done before you come back...

MR. MURRAY: Um-hum.

THE COURT: ...on the adjourned date.

MR. MURRAY: Just so I...I fully understand here, Your Honour.

THE COURT: Yes?

MR. MURRAY: Am I to return with a proposed schedule of visitation?

THE COURT: No, you do not have to have a proposed schedule of visitation. If you want your evidence to stand that you haven't given it any thought, that you

don't have a proposal, that is something the Court can take into account. But I have asked you the question, you seem to not have a proposal. You said you'd like to consult with someone about a proposal, and therefore, on the basis of your queries and your concern, I've granted you an adjournment.

MR. MURRAY: I am still confused, Your Honour. I do...I do not understand. Who...am I allowed to talk to Ms. MacKay and say, "What about these days during the week"? She...she has brought in a proposed schedule, I have not. Can I ask her about this when we leave here? Can I propose...

THE COURT: I'm not saying you can't discuss it with her. I suppose you can, but from what I've heard, I don't know if that would be productive.

MR. MURRAY: Um-hum.

THE COURT: I think if you're requesting an adjournment to consult with a lawyer, I'll give you an opportunity to do that. And certainly you can tell the lawyer that you're in the middle of a Family Court hearing. The lawyer will know that he or she can come down and peruse the Family Court file, they can listen to the Family Court tape.

You can certainly tell the lawyer that you were asked a question about a proposal with respect to custody and access, you had no proposal and you asked the Judge for an adjournment. Certainly you can tell the lawyer that much.

MR. MURRAY: Okay. Also, Your Honour...

THE COURT: **I have no idea what's going on in your mind, Mr. Murray...**

MR. MURRAY: I...

THE COURT: ...but...yes?

MR. MURRAY: In my original response, I had said I would like...I'm trying to return to work and I would like to...

THE COURT: I...

MR. MURRAY: ...have a schedule.

> THE COURT: Yes, I understand that, and I asked you in the event that you're unsuccessful with the current schedule, what do you propose?
>
> MR. MURRAY: Okay. So that...
>
> THE COURT: **This is not an extraordinary question.** Usually...and I'll just explain this, when parties come before the Family Court, they realize that the matter is litigious, a Judge is going to be making a decision. Sometimes if they're not successful in what they want, they have a back...alternative plan. Now, this is not extraordinary. This is the way things...
>
> MR. MURRAY: Okay, Your Honour.
>
> THE COURT: ...ordinarily proceed. Now, I can see that you appear to taken off guard or you didn't have a backup plan, and if you don't have one, that's fine. Many times, people do not have a backup plan, and that's fine, but if you want to have an adjournment to consult with a lawyer or to give some thought to an alternative plan, then I've already granted you the adjournment. But we have to know how you're going to proceed. I...
>
> MR. MURRAY: Okay, Your Honour.

[59] While some of the judge's comments may have sounded sharp to the unrepresented father, I am not satisfied they give rise to a reasonable apprehension of bias. It was not inappropriate for the judge to ask the father if he had an alternative position with respect to access if his first position was not accepted. A request for an adjournment in the middle of direct examination is highly unusual. In the face of such a request, it was not inappropriate for the judge to remind the father that she had earlier advised the parties to get legal counsel, which they did not do. The result of the exchange was that the father got what he sought, an adjournment, after the judge considered that he was representing himself and may have been confused about the parameters of the hearing.

[60] The father argued that generally the judge showed more respect to the mother than to him, explaining cross-examination to her, suggesting how she could frame questions during cross-examination of the father, and telling her to take her time when she was trying to think of questions. Again, I will set out the whole of the exchange referred to by the father for context, with the sentence specifically referred to by the father highlighted:

MS. MACKAY: I'm sorry.

THE COURT: ...you shouldn't give evidence yourself.

MS. MACKAY: Okay.

THE COURT: You can ask the witness, "Do you recall that Sarah was placed in the day care centre because of thus, thus and thus?"

MS. MACKAY: Okay.

THE COURT: Just ask him point-blank.

MS. MACKAY: Okay.

THE COURT: Yeah.

225. MS. MACKAY: Mr. Murray, do you recall Sarah being put in Mount Pleasant Day Care, the reason...

A. No, I do not.

226. Q. Okay. Excuse me, sorry.

THE COURT: Then ask, "What...what do you know about my understanding that she was placed in day care" for whatever reason you're going to offer, but just don't frame it as evidence from yourself.

MS. MACKAY: Oh...oh, okay.

THE COURT: Yes.

MS. MACKAY: Just objectively without...

THE COURT: Yes.

MS. MACKAY: Okay, all right.

THE COURT: Precisely.

MS. MACKAY: Okay.

THE COURT: Take your time. Just say, "Well, would you...would you be surprised...this is my..." well, "Sarah was placed in...in the day care because of thus, thus and thus. What do you know about this?"

MS. MACKAY: Okay.

THE COURT: I'm not sure what you're getting at, so I...I...

MS. MACKAY: Yeah, okay. No, well...

THE COURT: Yes, um-hum.

MS. MACKAY: All right. Okay. Yeah, I see...

THE COURT: **"Would you be surprised to learn that Sarah was placed in the day care because of such, such and such?"**

227. MS. MACKAY: Would you be surprised to learn that Sarah was put in Mount Pleasant Day Care because of your inability in the movement of your hand at the time?

A. I don't recall that.

228. Q. You don't recall that? Do...do you recall Sarah being in Mount Pleasant Day Care?

A. Yes, and I recall going to get her.

229. Q. Okay. Do you recall Sarah being taken out of Mount Pleasant Day Care?

A. Yes.

230. Q. Do you recall the reason why?

A. No, I do not.

231. Q. Okay.

MS. MACKAY: I'm sorry, I lost my train of thought.

THE COURT: That's okay. Take your time.

232. MS. MACKAY: Mr. Murray, do you...do you recall the other babysitters Sarah had had from March 2001 to...up until the time we separated?

A. No.

233. Q. No? Okay.

THE COURT: Well, you can say, "Do you recall the name of such and such?

Do you recall the name of such and such?" And...

MS. MACKAY: Yeah, I know, but I don't...just...I don't feel it's going to go anywhere if he doesn't recall. He hasn't...obviously has a memory lapse on certain issues, so that's fine.

THE COURT: Well, you can...you can test his memory, and then if you want to refute it, as I've already mentioned, I'll give you an opportunity to do so.

234. MS. MACKAY: Do you recall at the time when Sarah was in the Mount Pleasant Day Care that she...that there was many times that we had to go get her because she would constantly get sick at that day care?

A. Yes, I do.

235. Q. Do you recall that was the reason that Sarah...we decided to change day cares was because she was getting sick frequently at that day care?

A. No, I...I don't recall the reason why we changed.

[61] Judges who preside at trials where one or more party is not represented by counsel are faced with difficult challenges. They have to ensure a fair hearing for the unrepresented party or parties and the represented party. The assistance to be given by a judge in such a situation was recently dealt with in **Family and Children's Services of Cumberland Co. v. Mc. (D.M. and M.(D.) v Mc(S) and F(J)**, 2006 NSCA 75:

> 25 When self-represented parties are before the court the trial judge is expected to offer them some assistance if needed, especially in family matters. In **Murphy v. Wulkowicz** 2005 NSCA 147; [2005] N.S.J. No. 474, a family matter where both parties were unrepresented at trial one of them complained on appeal that the trial judge helped the other one too much. MacDonald, C.J.N.S. stated:
>
> > ¶ 37 Ms. Murphy asserts that the judge offered too much assistance to Mr. Wulkowicz as a self-represented litigant. I disagree. It is difficult for a judge to conduct a trial when one of the parties is self-represented. Two competing interests must be balanced. First the judge obviously cannot be an advocate for a party. At the same time the trial must be run as efficiently and fairly as possible. This may require the judge to offer guidance to a self-represented party. The appropriate balance falls within the judge's discretion. See **R. v. McGibbon** (1988), 45 C.C.C. (3d) 334 (Ont. C.A.). In this context I conclude that the judge in guiding Mr. Wulkowicz did no more than was necessary to ensure that the trial proceeded fairly and efficiently. The judge did not act as Mr. Wulkowicz's advocate.[emphasis added]

[62] In this case the father has not satisfied me that the help given by the judge to the mother was inappropriate or gave rise to an apprehension of bias.

[63] There is absolutely no merit to the father's argument that a reasonable apprehension of bias arose from the judge's interruptions of his counsel once the evidence was complete and she was making her submissions on his behalf. He argued some of the judge's comments showed that she had prejudged the case before her. By the time the judge questioned the father's counsel during submissions, the whole of the evidence was before her. It is proper and to be expected that the judge would raise with the father's counsel any issues she had with her submission, to give her an opportunity to address the judge's concerns, as she did.

[64] I would dismiss this ground of appeal.

[65] Accordingly, I would dismiss the appeal without costs.

Hamilton, J.A.

Concurred in:
Bateman, J.A.
Saunders, J.A.