NOVA SCOTIA COURT OF APPEAL
Citation: ***Slawter v. Bellefontaine***, 2012 NSCA 48

Date: 20120511
Docket: CA 355688
Registry: Halifax

Between:

Leslie Michael Slawter

Appellant

v.

Amanda Lynn Rose Bellefontaine,
Gerald Ernest Bellefontaine, and
Mary Louise Bellefontaine

Respondents

Judges:	Saunders, Oland and Beveridge, JJ.A.
Appeal Heard:	January 25, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Beveridge, J.A.; Saunders and Oland, JJ.A. concurring.
Counsel:	Alex Embree, for the appellant Shelley Hounsell-Gray, for the respondent Amanda Lynn Rose Bellefontaine Gerald Ernest Bellefontaine and Mary Louise Bellefontaine (not appearing)

Reasons for judgment:

INTRODUCTION

[1] Mr. Michael Slawter and Ms. Amanda Bellefontaine are the proud parents of two young girls, Lacey, age six, and Faith, three years of age. Unfortunately, these parents had an unhealthy and tumultuous relationship. Fortunately, Ms. Bellefontaine and the girls have enjoyed the benefit of tremendous support from her parents and from Mr. Slawter's mother, and his extended family. A consent order dated June 10, 2010 set out detailed arrangements concerning custody and access. Essentially, custody was said to be joint, but with primary care of the girls with Ms. Bellefontaine. The girls were to spend 11 nights out of 28 with Mr. Slawter. Neither parent would locate or seek to locate outside the province without the other's consent or permission of the court.

[2] Relations became strained when Ms. Bellefontaine's parents decided to move to Kelowna, British Columbia. They invited Amanda and the children to join them. Amanda filed an application on May 16, 2011 to vary the consent order to change the primary residence of the children from Nova Scotia to British Columbia with a consequent change in access for Michael. No details were set out in her application documents or parenting plan. Her parenting plan referenced her affidavit. That affidavit suggested that Michael's access would be achieved by her agreement to help cover the cost for air travel for them to visit Nova Scotia once a year, and daily communication by internet or phone. Michael opposed the application, suggesting that the children should stay in Nova Scotia with the same joint custody arrangement formalized in the order of June 3, 2010.

[3] The application was heard by the Honourable Justice R. James Williams on August 8 and 9, 2011. On August 22, 2011 Justice Williams delivered oral reasons for judgment, now reported as a written decision (2011 NSSC 427). Justice Williams found a material change of circumstances had been established; that the best interests of the children dictated that Amanda be granted sole custody of the children and be permitted to move with them to British Columbia. He decided that Michael would have supervised access with the children at his mother's home for a minimum of two weeks each calendar year; and Michael's mother would have the opportunity to visit the girls in British Columbia for a week each year. The order was conditional on Amanda's parents becoming parties to the proceedings. In turn

this required Amanda, Michael, and the Bellefontaines' consent. Consent was obtained and the order issued.

[4] Mr. Slawter appeals to this Court. His Notice of Appeal sets out three grounds of appeal, each with several sub-paragraphs. The contended-for errors were distilled in his factum to four: the trial judge denied procedural fairness to the appellant; erred in ordering supervised parenting time; erred in finding it was in the best interests of the children to vary the custody order permitting the move; and in the alternative, erred in ordering that the appellant's parenting time be limited to two weeks each year.

[5] I would dismiss all of the appellant's complaints save with respect to procedural fairness. The respondent did not request nor argue that the appellant's access with the children be supervised. It was never suggested by the trial judge during the hearing that he was considering making such an order. As a consequence, there was no opportunity for the appellant to cross-examine, lead evidence, or make submissions on this issue. While trial judges must always keep the best interests of children paramount in any proceedings concerning custody and access, it is through the crucible of a process where the parties are at liberty to inform and influence the court as to the specifics in an order that should be made in furtherance of the best interests of the children. That process was denied to the appellant.

[6] As a consequence, I would strike all aspects of the order requiring the appellant's access be only under the supervision of the appellant's mother and at her home. If the circumstances are such that access should be supervised or otherwise restricted, the parties are at liberty to apply to require it. My reasons are as follows.

FACTS

[7] Affidavits were filed by Ms. Bellefontaine, her mother, Mary Bellefontaine, Michael Slawter, his mother, Linda Slawter, and Veronica Williams. Social Worker Beth Archibald testified, and by consent, the Case Recording Report of her office was made an exhibit as a business record. With the exception of Ms. Williams, all affiants were cross-examined.

[8] Ms. Bellefontaine is 31 years of age. She left home when she was 16 years of age. Drug addiction to opiates followed. She followed a drug treatment plan. Education and training has led to employment as a daycare worker. In 2006 she began a relationship with Leslie Michael Slawter, an older man of African and Indian ancestry. He is now 47 years old. Mr. Slawter had been employed in the construction industry as a concrete worker, labourer, and landscaping. He had been unemployed and on disability for eight years due to a back injury. His health is now seriously compromised by diabetes for which he requires multiple daily injections of insulin. He self described that his memory is not great due to recently diagnosed "dementia", apparently a byproduct of living with untreated diabetes for some period of time.

[9] Out of the conflicting evidence, the trial judge made clear findings of fact. He found that there had been a number of changes in circumstances since the consent order of June 1, 2010. These included:

> [9] ...(1) From the time the order was entered into in June of 2010 until May of 2011, the parenting arrangement referred to in the order was not followed. Mr. Slawter did not provide care to the children as agreed. The significant amount of the contact he had with the children came on Saturday and Sundays when Ms. Bellefontaine took the children to Mr. Slawter's mother's home where Mr. Slawter would usually, but not always, visit. I do not accept his evidence that his request for access and contact were refused. Once Ms. Bellefontaine made this application in May of 2011, Mr. Slawter stepped up his contact with the girls. Mr. Slawter's mother, Linda Slawter, has had as much or more contact with these children than Mr. Slawter.
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> (2) It is evident that Ms. Bellefontaine and Mr. Slawter have an unhealthy, conflictual relationship. Mr. Slawter was convicted of an offence pursuant to s. 264.1(1a) of the **Criminal Code**, uttering threats to cause death or bodily harm in relation to events that occurred June 3rd, 2010. The threat was made against Ms. Bellefontaine. Mr. Slawter was placed on two years probation on July 19th, 2011. This and other evidence makes it clear that the parties' relationship has been unhealthy, conflictual and confrontational. Both have yelled and screamed at the other at times.
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> (3) Ms. Bellefontaine, partly as a result of Mr. Slawter's intimidating behaviour, moved in with her parents in June or July of 2010. Ms. Bellefontaine is, I conclude, emotionally and financially dependent on her

> parents. Her parents have bought a home in Kelowna, B.C. and plan to move there.
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> (4) Mr. Slawter states that he has severe diabetes which is difficult to control and that this affects his behaviour. Mr. Slawter also stated that he has been diagnosed more recently, it appears, with dementia. As he said, "I have dementia so don't remember some things."

[10] The trial judge found that the children had been largely raised and cared for by Ms. Bellefontaine. However, she became emotionally and financially dependent on her parents, and through her, so had the children. It was through the assistance of her parents that she has been able to remove herself from the unhealthy relationship with Mr. Slawter. Without their assistance, it would not have happened.

[11] Mr. and Mrs. Bellefontaine made plans to move to Kelowna, British Columbia. He had recently retired as an employee of the federal civil service. She had sold her daycare business. The house they purchased in Kelowna has two apartments on the lower level; one they offered to Ms. Bellefontaine and her children; the other to her brother. Schools have been investigated. Gainful employment prospects for Ms. Bellefontaine were promising. For a modest fee, Lacey could attend a private school, and Faith would be with her mother at a local daycare.

[12] The trial judge was satisfied that it would be in the best interests of the children that they be placed in the sole custody of Ms. Bellefontaine and they be allowed to move to British Columbia. In terms of access, he concluded that Mr. Slawter would have supervised access with the children at the home of his mother, Linda Slawter, for a minimum period of two weeks each calendar year commencing in 2012. In addition, it would be a condition in the order that Ms. Bellefontaine would provide Linda Slawter with the opportunity to visit the girls in British Columbia for one week per calendar year. Mr. Slawter would also have the right to telephone and Skype contact with his children from the home of his mother.

[13] The only explanation that can be found for the requirement for supervised access is one paragraph. The learned judge said:

> [29] Mr. Slawter has described his medical conditions as being a factor in his poor behaviour as, perhaps, not an excuse for the behaviour but as a reason for the behaviour. I do not believe that he should be parenting these children on his own. I do conclude that his mother, the children's grandmother, has much to offer these children.

[14] One of the issues that the parties and the trial judge struggled with was the cost to exercise access if the children were placed in the sole custody of Ms. Bellefontaine and permitted to move to British Columbia. Neither Mr. Slawter nor Ms. Bellefontaine had the resources then, or in the foreseeable future, to finance access. This problem was finessed by the trial judge inviting all of the parties to consent to the *post facto* addition of the grandparents as parties to the proceeding. He said:

> [34] Finally, Mr. and Mrs. Bellefontaine, Amanda Bellefontaine's parents, are part of this application. They play a significant role in the lives of their daughter, Amanda, and grandchildren. This Order will be granted provided and conditional upon the following:
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> (a) That they consent to become parties to this proceeding which would be reflected in the Order. The Order would grant them standing.
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> (b) Ms. Bellefontaine would consent to this.
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> (c) Mr. Slawter consents to this. In the event that Mr. Slawter does not consent to it, the Order would recite simply that Ms. Bellefontaine and/or her parents would be responsible for the airfares referred to above.
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> [35] By adding the Bellefontaines as parties, I believe it enable[s] the financial provisions related to the visitation to be enforced. In other words, if Mr. Slawter chooses not to consent to the arrangement making the Bellefontaines a party to this proceeding, then really all we have is a situation where I am ordering that they pay for these visits but there would be no way of enforcing that if they failed to do so. I think it's in Mr. Slawter's interest that they be a party to the proceeding and that the access be enforceable by a Court if, for instance, the Bellefontaines failed to pay for this.
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> [36] The plan being put forward to me, essentially, is that they would pay for visitation. If Mr. Slawter does not consent to an Order of this kind within one (1) week of its receipt by his counsel, then the order, as I said, would issue merely

> referring to the expectation that the Bellefontaines would pay for the access, but I note on the record that it in all likelihood would not be enforceable against them.

[15] Mr. Slawter, Ms. Bellefontaine and her parents all consented. An Order was issued November 18, 2011 confirming the terms of the custody and access decided by the trial judge. The one exception is that although the trial judge decided that access should be "for a minimum of two (2) weeks each calendar year", the Order of November 18, 2011 provided that supervised access shall be at the home of Linda Slawter "Beginning in 2012 and in each calendar year Mr. Slawter shall have two weeks of supervised access with the children."

ISSUES

[16] The appellant framed the issues as:

Issue 1 That the learned judge erred in failing to provide procedural fairness to the appellant by:

i. making an order based on a plan (of Gerald Bellefontaine and Mary Bellefontaine being financially responsible for access) that was not before the court, and

ii. ordering supervised access when such an option was not included in any of the pleadings, evidence, or submissions thus preventing the appellant from having the opportunity to address either issue by leading evidence on either issue, cross examining evidence on either issue, or making submissions on either issue.

Issue 2 That the learned judge erred in ordering that the appellant's parenting time must be supervised.

Issue 3 That the learned judge erred in finding that, given the circumstances, it was in the best interests of the children to grant Ms. Bellefontaine's request to vary the custody order to allow her to move with the two children to British Columbia.

Issue 4 (In the alternative to Issue 3) - That the learned judge erred in ordering that the appellant's physical parenting time be limited to two weeks each year, while at the same time providing for access for his mother, Linda Slawter.

STANDARD OF REVIEW

[17] The parties are in agreement with respect to the standard of review to be applied with respect to each of the issues. Issues 2, 3 and 4 involve question of mixed fact and law. The scope for appellate review of such decisions is narrow. Considerable deference is owed to the fact-driven conclusions by a trial judge about custody, access and mobility (*Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014; *Cameron v. Cameron*, 2006 NSCA 76).

[18] However, with respect to the issue of procedural fairness, it is the duty of this Court to assess the process that led to the decision under appeal, as opposed to the actual decision itself. As such, there is generally no standard of review (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 74; *Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 24 at para. 66). Whether the duty to ensure procedural fairness was breached is a question of law, and as such the adjudicator either fulfilled the duty required or did not (*Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69).

ANALYSIS

Custody and Mobility

[19] With respect to the complaint of error in ordering sole custody and permission for the children to move with the respondent to British Columbia, I will be brief. Justice Williams properly directed himself on the appropriate principles outlined in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, and made findings of fact or mixed law and fact. These findings are amply supported by the record. The sole complaint by the appellant is that by adding the grandparents as parties to ensure enforceability of access for the appellant, the judge committed a palpable and overriding error by permitting the move on a plan not previously submitted. This complaint is intertwined with the appellant's submission about how this constituted a denial of procedural fairness, and is dealt with below. Otherwise the appellant identifies no error. I see none. I would dismiss this ground of appeal.

Supervised Access

[20] Ordinarily the burden would be on the custodial parent requesting supervised access to demonstrate that restrictions are in the best interests of the child. There was certainly some evidence that caused Justice Williams to be concerned about the health of the appellant and its impact on his ability to parent the children on his own. I later set out my reasons why, in these circumstances, there was a lack of procedural fairness that taints those aspects of the order requiring supervised access. I have no evidence as to the current status of the appellant's health. I would therefore prefer to dispose of this aspect of the appeal on the issue of procedural fairness.

Procedural Fairness

[21] The appellant cites a number of authorities in support of his arguments that the outcome of the application was impermissibly tainted by denial of procedural fairness. Only one is in a family law case, *Goslin v. Goslin* (1986), 4 R.F.L. (3d) 223 (Ont. C.A.). In that case, the trial judge made a custody order alternating annually the residence of the children between the parents who resided in different cities. Neither party had sought this kind of order, and there was consequently no evidence nor submissions about it. By Endorsement, the order was set aside and the matter remitted to the trial judge. The Endorsement was as follows:

> PER CURIAM: – ENDORSEMENT
>
> The trial judge concluded that both parties were excellent parents. We infer that he did not want to attach undue importance to the fact that at the time of trial the children had resided with the appellant father in Renfrew in the light of the manner in which that had come about. Accordingly, he made the extraordinary order in appeal [[1986] W.D.F.L. 1263] alternating the residence of the children annually between Renfrew and Ottawa. Neither party had sought this form of "joint custody": no evidence was led to show that it would serve the best interests of the children and counsel had no opportunity to make submissions to the trial judge in respect of its appropriateness in this case. It appears clear to us that rotating or alternating custody was not in the mind of Dr. Dinock, the psychiatrist who carried out the family assessment, when he testified about the merits of joint custody from a psychological point of view. Without intending to suggest that this kind of custody sharing may never be appropriate we do not think that it should have been ordered in the circumstances referred to above.

> Whether or not alternating custody is in the best interests of the children should be the subject of further consideration in this case. Accordingly the appeal is allowed and the order of the trial judge is set aside. The matter is remitted to the trial judge with the direction that he hear such evidence and submissions as the parties choose to present with respect to the custody of the children. In the meantime the interim custody order is to stand. No costs.

[22] The remaining authorities relied upon by the appellant are either criminal or civil. There is no need to refer to them. They contain comments that suggest it is fatal for a trial judge to grant a remedy or make an order which was not sought and for which the appellant had no opportunity to call evidence or make submissions. The respondent submits that the principles that may be derived from civil or criminal cases cannot be transplanted exactly into the family law context due to the paramountcy of the best interests of children in custody and access disputes.

[23] The respondent relies on *K.M.W. v. L.J.W.*, 2010 BCCA 572. This was a custody case decided by a judge by way of a summary trial. The mother appealed alleging she was denied procedural fairness that would have occurred if there had been a full trial, and that her counsel had been incompetent. Huddart J.A., for the court, emphasized that custody cases, whatever their statutory framework, are not like ordinary civil contests. The hearing is intended to be an examination into the best interests of the children. However protracted or heated the contest, the task of the court in every case is to keep the focus on the children's best interest (para. 48). This led her to say:

> **51** On appeal, the children's interests must remain the focal point of the hearing. The fairness and efficacy of the trial process must be reviewed with that same focus, less bounded by strict procedural rules than in another type of civil appeal, and mindful of the narrow scope of appellate review of custody decisions set down in *Van de Perre v. Edwards*, *supra*, ...

[24] I accept without hesitation these views. But this is the beginning of the analysis, not the end. I would not go so far as the respondent urges, that in essence, simply because this case was about the best interests of the children Lacey and Faith, this trumps the rights of any party to procedural fairness. It is no easy task to resolve the question of how does the focus of best interests intersect with the duty to ensure procedural fairness in this or in any given case. A perfectly fair trial or hearing may be an illusive goal. Perfection is, of course, not required, but fundamental fairness is. This is nonetheless so where best interests of children are

paramount (*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46). Indeed, without a full and proper opportunity for interested parties to properly participate may jeopardize the quest to ascertain where the best interests of a child may be (*Children and Family Services for York Region v. E.T.*, [2009] O.J. No. 5587 (Ont. Sup. Ct.)).

[25] It stands to reason that if the best interests of the child are paramount then the interests of others, including parents, must be secondary. But, in my view, the ultimate goal of making a decision that promotes the best interests of the children does not make procedural fairness a poor cousin to be sacrificed along the way. There are important practical and policy reasons for this.

[26] First of all, as mentioned above, if a party knows what the issues are they will be in the best position to call evidence and make submissions that can assist the court in making the most accurate and reliable assessment of best interests. Second, if a party does not get the result that he or she expected or wanted, and they perceive the process that lead that result to have been unfair, it is predictable that they will lose respect for the system that delivered that result and about the result itself. As Berger J.A. (in dissent) in *Brundrett v. Brundrett*, 1998 ABCA 2 commented:

> **13** While I agree with the majority that a trial judge retains the jurisdiction to make any order that may be appropriate in the best interests of the child, I do not, with respect, agree that the exercise of that jurisdiction immunizes a breach of the audi alteram partem principle. Nor do I agree that the failure to alert counsel to the prospect of a sole custody order is a mere procedural irregularity. **In matters involving the welfare of children, procedural and adjudicative fairness have significant implications for future relations between the child and his or her parents. The parent who retains sole custody is not, of course, likely to complain. But the aggrieved parent who has been denied an opportunity to adduce evidence or to address arguments relative to a live issue is very likely to feel estranged from the process and more likely to be bitter about the result. That, surely, is not in the best interests of the child who will continue to have a close relationship with the aggrieved parent, but unfortunately tainted by that parent's perception that she did not have her day in Court**. Had fair notice been given that sole custody was under consideration, it cannot be said that additional evidence would not have been marshalled or further argument advanced. [Emphasis added]

[27] *Ferrara v. Trafford* (1987), 7 R.F.L. (3d) 151 (N.B.C.A.) is another case involving custody. Apparently the trial judge, before the appellant had concluded his case, awarded custody to the respondent. The Court wrote:

> It is a basic principle of our system of justice that all tribunals when determining the rights of parties "must act fairly, in good faith, without bias, and in a judicial temper and must give to [the litigants] the opportunity to adequately state [their] case": see *Duke v. R.*, [1972] S.C.R. 917 at 923, 18 C.R.N.S. 302, 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129 (Ont.).. **The standard to be achieved in the conduct of a trial is "that every litigant, however disappointed in the result of his action, should have no justifiable cause to complain that his case was not fairly and fully heard":** see *Delaney & Co. Ltd. v. Berry and Perry* (1964), 50 W.W.R. 493, 49 D.L.R. (2d) 171 at 173 (Man. C.A.), cited with approval by this Court in *Nat. Bank of Canada v. Zed* (1986), 72 N.B.R. (2d) 34 at 37, 183 A.P.R. 34: ... [Emphasis added]

[28] That is not to say that the duty to provide procedural fairness may not be impacted by the requirement to keep paramount the best interests of the child and the subject matter of the hearing. In *Nova Scotia (Community Services) v. N.N.M.*, *supra*, the foster parents had successfully argued in the Family Division that the Minister had breached her duty of procedural fairness when she chose other persons to adopt the children who had been in their care. Specifically, the trial judge had found the Minister had breached her duty first "by not offering to meet with the foster parents during the review process to obtain their input into her decision," and secondly, "by not disclosing to the foster parents the facts about them that she would rely on in reaching her decision so that they would have had the opportunity to correct any misinformation." Hamilton J.A., writing for this Court disagreed. She concluded that the Minister did not have to meet with the foster parents or disclose additional information to them. As Justice Hamilton explained :

> [86] The scheme of the **CFSA** providing a broad discretion to the MCS, equivalent to that of a parent, limited rights to foster parents and strict time limits for dealing with children, indicates minimal procedural rights for foster parents. Higher procedural protections (such as greater participatory rights to foster parents, or a formalized, more judicialized decision-making process) inevitably result in delay and therefore would not usually accord with a child's best interests.

[29] Hamilton J.A. concluded there was no breach of the duty of fairness owed by the Minister to the foster parents in selecting the prospective adoptive home for the children. She wrote:

> [98] For the foregoing reasons, I am satisfied on the facts of this appeal that the MCS did not breach the duty of fairness she owed to the foster parents in selecting the prospective adoptive home for the children or in reviewing her selection. The duty she owed to the foster parents must be determined by reference to the best interests of the children. The selection of the best adoptive parents for the children is a personal and sensitive decision of importance to many people. The scheme of the **CFSA** gives broad discretion to the MCS, that of a parent, few rights to foster parents and focusses on the importance of time in removing children from harm's way and placing them in a permanent stable adoptive home if their biological parents are found to be unable to continue to care for them. No bad faith has been suggested and there is no indication that the MCS did not take into account the best interests of the children at all stages of the process of selecting the adoptive parents.

[30] In my opinion, the duty of fairness must be assessed in light of the legislative scheme and the issue being addressed. Here the proceedings were under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. Paramountcy of the best interests of the child is enshrined in s. 18(5) of the *Act*:

> **18(5)** In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[31] However, the *Act* also directs that the mother and father of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise ordered. Section 18(4) provides:

> **18(4)** Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise
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> (a) provided by the *Guardianship Act*; or
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> (b) ordered by a court of competent jurisdiction.

[32] The Nova Scotia Supreme Court (Family Division) is a court of competent jurisdiction by virtue of the *Judicature Act*, R.S.N.S. 1989, c.240. The *Maintenance and Custody Act* provides:

> **18 (2)** The court may, on the application of a parent or guardian or other person with leave of the court, make an order
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> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
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> (b) respecting access and visiting privileges of a parent or guardian or authorized person.

[33] The original order of the court was the consent order of June 3, 2010. The respondent applied, pursuant to s. 37(1), for an order to vary the order for custody and access to obtain sole custody and permission to move the children to British Columbia. **Rule 59 - Family Division Rules** applied to these proceedings. Rule 59.12(1) sets out the requirements for a variation application. It includes in subparagraph (d) the dictate that the notice include "a summary of the variation or change that is sought". The respondent's notice contained no reference to a request for supervised access. It simply said "Mr. Slawter's access with the children will have to be changed from the current arrangement". The parenting plan filed with the respondent's notice in the section for proposed visiting arrangement said "Please see my affidavit". Ms. Bellefontaine's affidavit proposed a trip by the children and her to Nova Scotia once a year, with daily contact between the appellant and the children by internet or phone.

[34] It is with this background I turn to the complaints by the appellant.

Joinder

[35] I fail to see any reversible error arising out of the trial judge's invitation to the grandparents to be made parties to the proceedings. It was the appellant who argued at the hearing that neither he nor Ms. Bellefontaine would have the financial ability to cover the travel costs attendant on the appellant being able to exercise access with his children. It is obvious that the trial judge considered that it would be in the best interests of the children to move to British Columbia with their mother and her parents. The initiative to join the grandparents was a solution

to address the appellant's concerns; absent joinder he would be without an adequate remedy to be able to exercise access.

[36] The appellant complains he did not have knowledge of the solution suggested by the trial judge until the end of the hearing. He therefore did not have an opportunity to seek production of the grandparents' financial information. However, I agree with the submissions of Ms. Bellefontaine that the evidence was clear that the grandparents had consistently and unselfishly provided financial assistance to Ms. Bellefontaine and their grandchildren, and had the means to continue to do so. I fail to see any prejudice to the appellant.

[37] In addition, the appellant consented to the grandparents being joined as formal parties to the proceedings. Section 39 of the *Judicature Act*:

> 39 No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the Court of Appeal.

[38] No leave has been sought. Assuming that this Court even has the jurisdiction to entertain an appeal from the provisions of the order consented to by the appellant, I fail to see any reversible error by the procedure that unfolded at the conclusion of the hearing in terms of adding the grandparents as parties to the proceeding.

Supervised Access

[39] There can, of course, be no dispute that access is to be determined only according to what is in the best interests of a child. The Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3, [1993] S.C.J. No. 112 (Q.L.), was divided in result over whether the restrictions on access requested by the custodial parent and imposed by the trial judge were properly imposed. But I can discern no practical differences in the test to be employed.

[40] L'Heureux-Dubé J., dissenting in result, discussed access in light of the paramountcy of the best interests prism:

60 Access rights exist in recognition of the fact that it is normally in the interests of the child to continue and foster the relationship developed with both parents prior to the divorce or separation. This being said, the right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.

61 As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose. Accordingly, it is in the interests of the child, and arguably also in the interests of the access parent, to remove or mitigate the sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship.

[41] McLachlin J., as she then was, expressed the same overall approach:

202 First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.

...

206 I would summarize the effect of the provisions of the *Divorce Act* on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of the child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child.

...

208 Risk of harm to the child is not a condition precedent for limitations on access. The ultimate determinant in every case must be the best interests of the child. Many decisions on access may involve no reference to harm. For example, a judge might conclude that it is not in the best interests of a child that he or she see the access parent every day on the ground that this would result in undue disruption to the child's schedule of activities. Again, a judge might conclude that

> it is in the best interests of the child that he or she move with the custodial parent to a distant location, notwithstanding that this will limit the access of the other parent. Optimum access may simply not be in the best interests of the child for a variety of circumstances.
>
> **209** On the other hand, in some cases the risk of harm may be a factor to be considered in determining what is in the child's best interests. For example, where the limits on access relate to the quality of the access -- what the access parent may say or do with the child -- the question of harm may become highly relevant. Given the interest of the child in coming to know his or her access parent as fully as possible, judges may well be reluctant to impose limits on what the access parent may say or do with the child in the absence of some evidence suggesting that the activity may harm the child. The legal test is not harm; the *Divorce Act* makes this clear. However, in some circumstances, the risk of harm to the child or the absence thereof may become an important factor to be considered. To this extent I agree with the Court of Appeal that, in determining whether religious discussions and activities between parent and child should be curtailed, it may well behoove the judge to enquire whether the proposed conduct poses a risk of harming the child. In doing so, the judge should bear in mind that conflict between parents over the access issue does not necessarily indicate harm, nor does the objection of the child necessarily impose that conclusion. In some circumstances they may; in some they may not.
>
> **210** I conclude that the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access -- what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence.

[42] Both Justices L’Heureux-Dubé and McLachlin recognized the direction by Parliament in s.16(10) of the *Divorce Act* that the court must give effect to the principle a child of the marriage is to have as much contact with each spouse as is consistent with the best interests of the child (paras. 53 and 204). While there is no

equivalent statutory direction in the *Maintenance and Custody Act*, this Court as well as other appellate courts recognize the applicability of the maximum contact principle in non-*Divorce Act* proceedings (see *Handspiker v. Rafuse*, 2001 NSCA 1, para. 19; *MacKay v. Murray*, 2006 NSCA 84, paras. 45-48; *Weeks v. O'Connor*, 2009 PECA 13, para. 134; *Bjornson v. Creighton* (2002), 31 R.F.L. (5th) 242, leave to appeal refused, [2003] S.C.C.A. No. 14; and see also *Paul v. Pettie*, 2009 NSSC 334, para. 9).

[43] Ordinarily, an order for supervised access is requested by the custodial parent. In such circumstances, the onus is on the custodial parent requesting curtailment of access that restriction is in the best interests of the child. This was expressed by L'Heureux-Dube J. in *Young* as follows (pp. 85-86):

> **116** ...As a practical matter then, the question of restrictions only arises where something in the evidence or the circumstances of the parties suggests a concern or a potential problem. Where those concerns emanate from the custodial parent, that parent will, of course, bear the evidentiary burden of establishing that access should be curtailed. However, the standard that must be met is not the harm standard but evidence that restrictions are in the best interests of the child or, to put it otherwise, that unlimited access is not in the best interests of the child.

[44] There is ample authority that an order for supervised access is seldom seen as an indefinite order or long term solution (*V.S.J. v. L.J.G.*, [2004] O.J. No. 2238 (Sup. Ct.); *K.M.E. v. D.M.Z.*, [1996] B.C.J. No. 464 (S.C.). That is not to say it can never be an appropriate solution, but only in rare circumstances (*Montgomery v. Montgomery* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.), leave to appeal refused, [1993] S.C.C.A. No.65; *Merkand v. Merkand*, [2006] O.J. No. 528 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 117. The respondent does not take issue with these principles. Indeed, she cited many of these cases in her factum as containing the appropriate principles.

[45] Nova Scotia authorities contain similar expressions of the appropriate legal principles. For example in *Crews v. Daigle* (1992), 110 N.S.R.(2d) 75, Daley J.F.C. wrote:

> **[26]** Decisions concerning access are governed by the welfare of the child rule – whether or not, what kind and under what conditions, a child shall have access to its parent(s) is dependent on what is decided to be best for the child. The wishes of the parent are important but are secondary to what is best for the child. What is

> best for the child is decided on a balance of probabilities. Access to a parent is the right of the child and the law generally begins with the proposition that access is to be granted unless it is proven to be harmful or not in the interests of the child. This is not a case where the father argues to deny access but to restrict it by supervision in Nova Scotia. In my view, the onus rests on him to so prove.

[46] With respect to the factors to be considered in ordering supervised access, Daley J.F.C. confirmed:

> [32] When supervised access is the issue, as here, some of the questions to be answered are:
>
> > 1. What has been the emotional and behavioural development of the child, for example, for the 12 months prior to the separation of its parents, and what changes in the emotional and behaviour patterns of the child have been observed since the separation?
> >
> > 2. What is the current emotional and behavioural state of the child? If this state is observably different from what is considered "normal", what are the differences, when did they occur, what has changed, if anything, in his immediate home, and family relationships on both parental sides, which may have precipitated, exacerbated or continued the different behaviour, state or change?
> >
> > 3. What has been the pre and post separation relationship and contact between the child and the access parent? If there is an access order or agreement in writing or verbally, what is the agreement and has it been honoured by both parents? If not, why not?
> >
> > 4. What has been the ongoing pattern of access? If the terms have not been honoured how has this affected the child, the relationship between the child and access parent?
> >
> > 5. What are the grounds for supervised access? How do these relate to access and why are they put forward? What is the evidence that supervised access is in the best interests of the child given the relationship, emotional and behavioural state of the child and the access parent as identified in the questions above?
> >
> > 6. What are the advantages and disadvantages of supervised access over unsupervised access for the particular child?

> 7. What are the supervisory access arrangements proposed and how do these address the best interests of the child?
>
> 8. Where the child is sufficiently able to participate in the process, what are the expressed interests of the child?
>
> 9. Where supervised access is proposed, what is the period it may properly last, what will it accomplish during the period and when may it properly revert to unsupervised access?

[47] In *Lewis v. Lewis*, 2005 NSSC 256 the mother wanted the father's access to be supervised. Forgeron J. wrote of the nature of such a request:

> **[23]** Supervised access is an exceptional remedy. A child is entitled to share in the daily life of his/her parents unless such is not in the child's best interests to do so. Access is the right of the child and not the right of the parent. There is no presumption that contact with both parents is in the best interests of the child, although such contact generally is: **Young v. Young** (1993) 160 N.R. 1 (S.C.C.) and **Abdo v. Abdo** (1993) 126 N.S.R. (2d) 1 (C.A.).
>
> **[24]** Supervised access is appropriate in specific situations, some of which include the following:
>
> > [a] where the child requires protection from physical, sexual or emotional abuse;
> >
> > [b] where the child is being introduced or reintroduced into the life of a parent after a significant absence;
> >
> > [c] where there are substance abuse issues; or
> >
> > [d] where there are clinical issues involving the access parent.
>
> **[25]** Supervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent. Access is for the benefit of the child and each application is to be determined on its own merits.

[48] The purpose of setting out these authorities is to demonstrate that the issue of an indefinite order for supervised access, while certainly possible, is a somewhat rare occurrence in the normal course, let alone where it is a form of relief not pled nor sought. It is no mere tweaking of terms involving custody and access. Here

the respondent did not request supervised access. Much of the evidence filed by the parties went to the issue of the relative parenting capacity of Mr. Slawter and Ms. Bellefontaine and their respective plans for furthering the best interests of the children. Mr. Slawter was unemployed and on disability. He had made no attempts to retrain. He had made little concrete financial contribution to support his children. Ms. Bellefontaine had pursued educational training, and had better job prospects in British Columbia once she became qualified in that province. She had inexpensive but very appropriate living arrangements and the financial and emotional support for her and the children.

[49] Mr. Slawter had struggled to bring his diabetes under control, and he said he had recently been diagnosed with dementia. Nonetheless the evidence of the respondent at the hearing of the application was:

> **MR. DELLAPINNA**: Thank you, My Lord. Now if the Court allows your application and allows you to move to Kelowna, B.C. obviously Mr. Slawter is going to have to have access with the kids, do you agree?
>
> **A.** Yes.
>
> **Q.** And would you be okay with Mr. Slawter having the entire summer, every summer?
>
> **A.** As long as there was enough time at the end of the summer for the kids to get ready to go back to school, yes.
>
> **Q.** Say about a week or so at the ... the beginning and end of summer?
>
> **A.** I would think, like, two weeks at the end of the summer would be my preference but ...
>
> **Q.** Okay, and then one week at the start?
>
> **A.** Yes.

[50] The appellant testified that his diabetes was under control and he had no problems taking care of himself, his children or others. It was uncontested that in June 2011 when Ms. Bellefontaine and her mother travelled to British Columbia they left both girls in Mr. Slawter's care. It was also uncontested that Mr. Slawter

loves his children and spends time with them on outings and at his apartment. In final submissions, the respondent acknowledged the children appear to be happy in his care. No suggestion was made of any concern or need to place restrictions. There was certainly evidence that he turns to his mother for support and help in dealing with some issues with the girls; and that his mother plays an important role in the lives of her grandchildren.

[51] That is not to say that there was no evidence about the potential for harm when the children were with the appellant. He had a Lifeline system to be activated if he lost consciousness from his disease. Even the word dementia conjures up concerns. Despite these known facts, in the respondent's pre-hearing written and final oral submissions, there was not even a suggestion by the respondent that access be in any way supervised or restricted. Instead, the respondent advocated that she wanted Mr. Slawter "...to continue to be part of the children's life. This will be achieved by allowing liberal access for Mr. Slawter and the children to be exercised over the summer, alternating Christmas and alternating March break holidays. Ms. Bellefontaine would also agree to any other reasonable access". In the frequent exchanges between counsel and the hearing judge during final submissions, there was no concern raised by the judge about restrictions such as supervised access.

[52] I certainly do not imply that absent a motion or submission by a custodial parent, a judge is without jurisdiction to impose restrictions on access if he or she concludes it is in the best interests of a child to do so. But it would be a rare and exceptional circumstance that restrictions should be ordered absent appropriate notice to the parties. What constitutes appropriate notice and consequent fulfilment of a fair procedure would depend on a host of circumstances, including the urgency of the situation, the nature of the restrictions, the evidence already adduced, and the kind of order – is it an interim or is it a final order – subject only to a variation application based on the usual criteria of a material change in circumstances.

[53] There is some authority that granting access in excess of the specified access requested is a jurisdictional error. In *A.L.M. v. K.H.*, 2004 BCSC 1420, a Master ordered interim joint custody but granted access to the father in excess of the specified access sought in the notice of motion. The mother appealed, arguing that the Master had exceeded his jurisdiction. The respondent father suggested that he

had sought overnight access and that access is decided on the basis of the best interests of the child, it is not an excess of jurisdiction to go beyond what one of the parties sought. To say otherwise would be a severe restriction on the discretion of the court to act in the best interests of a child. C. Lynn Smith J. concluded that the appellant was prejudiced in her opportunity to consider her position, and provide material bearing on the issue of pre-trial overnight access, and that the Master should have given her the opportunity to provide further evidence and submissions on this question. Failure to do so amounted to an excess of jurisdiction. She wrote:

> **38** I recognize that orders may be made that go beyond the specifics set out in a Notice of Motion. In Chambers, the interaction between counsel and the court may lead to an order beyond that sought in the Notice of Motion, but the appropriate practice is to ensure that the parties have had adequate opportunity to provide evidence and make submissions on the matter, and to adjourn if necessary to provide that opportunity.

[54] I am not convinced that it is necessarily correct to label an order that deals with specifics of custody and access in a manner different than what the parties specifically requested as jurisdictional error (see *Brundrett v. Brundrett*, *supra*, and *Greenough v. Greenough*, [2003] O.J. No. 4415 (Sup. Ct.)). The courts enjoy a broad statutory, and if necessary, inherent jurisdiction to act in the best interests of children, and should not feel constrained in their goal to fashion specific terms in an order that strive to achieve that goal, subject to ensuring procedural fairness.

[55] Although not a family law case, the comments of the Master of the Rolls, Lord Neuberger in *Murphy v. Wyatt*, [2011] EWCA Civ 408 commend themselves to me with respect to the proper approach if a judge is contemplating deciding a case in a way significantly different than what was argued. He wrote:

> 13. However, before doing so, I should say something about the proper approach for a judge to adopt when he is proposing to decide a case on the basis of a point which was not argued, or in a way, or to an extent, which is more favourable to a party than the case which that party advanced in court.
>
> 14. The first point to make is that, at least as a matter of principle, a judge is entitled to take such a course. After all, a judge must decide a case according to the facts and the law as he believes them to be. Accordingly,

subject to any particular reason to the contrary in the particular case, there is no reason for objecting in principle to a judge taking such a course.

15. Secondly, however, there may be particular reasons why such a course is not open to the judge in a particular case. For instance, the course he wishes to take may not be open on the pleadings, or it may be precluded by virtue of a concession which has not been, or cannot be, withdrawn. Equally, a finding of primary fact, or even a finding of secondary fact or an assessment of a witness or expert evidence, may simply not, on analysis, be open to the judge on the evidence before him.

16. Thirdly, whether or not the point turns out to be open to the judge, it is clear that, save perhaps in very exceptional circumstances (which I find it very hard to envisage), he must ensure that the parties are given a fair opportunity to deal with the point. If the point is, on analysis, a bad one, it is fairer to the parties and less embarrassing for the judge that this is established before the judgment is available, rather than the parties either having a hearing at which the judge has to withdraw or amend the judgment or suffering the delay and expense of an appeal.

17. But there is an even more important reason for the requirement that the parties are given a proper opportunity to deal with the judge's point, namely procedural fairness. It is simply unfair on a party if she loses a case because of a point thought up by the judge, which she or her representatives have not properly been able to address. In this case, a major factor which (if I may say so, correctly) influenced Mummery LJ when giving the defendant permission to appeal, was that her representatives stated that they had not been given a proper opportunity of dealing with the two reasons advanced by the Judge for holding that the 1983 Act did not apply.

18. How a judge ensures that parties have an opportunity to deal with a point which he has thought of must depend on the circumstances. If the point occurs to him before or during the hearing, he should obviously raise it in court in clear terms with the parties, ideally ensuring that it is reduced to writing, and give the parties a fair opportunity to deal with it. Sometimes it can be fully disposed of at the hearing; on other occasions, it may be only fair to give the parties time, and subsequent written submissions may be the appropriate course. If the point occurs to the judge after the hearing, it would, I think, normally be sufficient if he writes to the parties or their representatives, giving them the opportunity of dealing with the point in written submissions (sometimes with the opportunity for

> counter-submissions). Occasionally, a further hearing may be appropriate, but it would normally be disproportionate.

[56] Here, the appellant knew that his capacity as a custodial parent was in issue, but there was no indication that his access with his children would be restricted to two weeks and only to be exercised at his mother's residence. This was not an interim order, but a final one subject only to variation on demonstration of a material change in circumstances. With respect, in these circumstances, it was an error of law for the hearing judge not to have alerted the appellant to his contemplated order requiring only supervised access. I am satisfied that the appellant was prejudiced by this oversight. He had no opportunity to cross-examine, lead evidence or make submissions on this issue.

[57] I would therefore remove the restrictions on access ordered by the hearing judge. I would also correct the order to comply with his reasons directing at least two weeks of access per year. However, the evidence adduced before Justice Williams obviously caused him to have concern about the appellant's ability to take care of the girls on his own. I have no information about the current status of Mr. Slawter's health or other personal circumstances. I would therefore direct that it is open to the respondent to apply to seek restrictions on access without having to demonstrate a change in circumstances since the making of the previous orders.

Beveridge, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.