NOVA SCOTIA COURT OF APPEAL
Citation: ***Blennerhassett v. MacGregor***, 2013 NSCA 77

Date: 20130625
Docket: CA 409126
Registry: Halifax

Between:

Caitlin Jean Blennerhassett

Appellant

v.

Daniel Alexander MacGregor

Respondent

Judges:	Saunders, Fichaud and Farrar, JJ.A.
Appeal Heard:	June 13, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud, J.A., Saunders and Farrar, JJ.A. concurring
Counsel:	Michelle Rogers for the appellant Judith A. Schoen for the respondent

Reasons for judgment:

[1] The parties are young parents of a six year old, are unmarried, and have lived apart for over five years. They have co-parented their daughter cooperatively, without needing a judge's direction. But life's path has some bends. Recently the mother enrolled in a four year post-secondary program in Ontario. The father works in Pictou County. The courts are asked to resolve the child's primary care.

1. Background

[2] Ms. Blennerhassett and Mr. MacGregor grew up in Westville, Pictou County. They are unmarried. Their daughter Chloe was born in September 2006. Ms. Blennerhassett was seventeen at the time, Mr. MacGregor nineteen.

[3] Until June 2007, Chloe lived with her mother in the Westville home of Ms. Blennerhassett's parents. Mr. MacGregor was attending Community College in Halifax, but would see Chloe on weekends when he returned to Westville, and occasionally in Halifax.

[4] In June 2007, Ms. Blennerhassett moved in with Mr. MacGregor in Halifax. But the relationship dissolved, and in August 2007 Ms. Blennerhassett and Chloe moved to a separate apartment in Halifax. Since then, Ms. Blennerhassett and Mr. MacGregor have lived apart.

[5] Over the next three years, Ms. Blennerhassett attended St. Mary's University in Halifax. The parties had what the trial judge termed an informal parenting regime. Primarily, Chloe lived with her mother. Mr. MacGregor parented every other weekend, usually returning with Chloe to his mother's home in Westville.

[6] In 2010, Ms. Blennerhassett completed her undergraduate degree. She enrolled in a two year Masters program in clinical psychology at a university in Montreal, starting in September 2010. She asked Mr. MacGregor to agree that she could take Chloe to Montreal for the program's duration. Mr. MacGregor initially resisted, but then relented. Ms. Blennerhassett stayed in Montreal, with Chloe,

until March 2012. She completed just one year of the Masters program, and then worked in Montreal. She decided that clinical psychology was not her calling.

[7] While Chloe was in Montreal, her father twice travelled to Montreal to bring Chloe back to Westville, and he saw Chloe when she and Ms. Blennerhassett returned to Nova Scotia for holidays. He tried to maintain a connection by Skype and telephone.

[8] In March 2012, Chloe and her mother moved back to Nova Scotia. Chloe completed Grade Primary at an elementary school in Westville for the remainder of the spring 2012 school year. She was enrolled in Grade 1 at that school in September 2012, at the time of trial. Mr. MacGregor resumed frequent parenting time. Initially, he still worked in Halifax, and would see his daughter usually on weekends, returning to his mother's home in Westville. This corresponded well with Ms. Blennerhassett's work schedule which involved night shifts at a women's shelter on Fridays, Saturdays and Sundays. Later, by the time of trial in September, 2012, Mr. MacGregor had found employment in Pictou County and had taken steps to move there.

[9] In June 2012, Ms. Blennerhassett texted Mr. MacGregor that she had been accepted into a four year midwifery program at McMaster University in Hamilton, Ontario, and that she expected to move there with Chloe. She had not mentioned this before to Mr. MacGregor. They met to discuss it. Mr. MacGregor says he disagreed that Chloe should move away. Ms. Blennerhassett recalls it differently, and says he was sad at the prospect.

[10] On August 11, 2012 Ms. Blennerhassett emailed that she and Chloe were moving on August 22.

[11] On August 16, Mr. MacGregor filed a Notice of Application in the Supreme Court of Nova Scotia (Family Division). He applied under the *Maintenance and Custody Act,* R.S.N.S. 1989, c. 160, as amended, seeking custody of Chloe. This was the first litigated event between Mr. MacGregor and Ms. Blennerhassett. Ms. Blennerhassett replied with a request that she have primary care.

[12] Justice Gass heard the trial on September 14, 2012. Mr. MacGregor and Ms. Blennerhassett were the only witnesses. Each was represented by counsel.

After the morning hearing, the judge returned in the afternoon with an oral decision. Justice Gass (1) ordered joint custody, (2) placed Chloe in Mr. MacGregor's primary care from September through April, (3) placed Chloe in Ms. Blennerhassett's primary care from April through August, with no territorial restriction except that Chloe is to complete her school year in Nova Scotia, (4) prescribed special parenting times for each parent during summer holidays, Christmas and spring break, (5) directed that Mr. MacGregor pay for a return trip to Ontario for Chloe during each of Ms. Blennerhassett's two school terms, and (6) made it clear that the arrangement for care would be revisited after Ms. Blennerhassett completed her program at McMaster. Later I will refer to the judge's reasons.

[13] Ms. Blennerhassett appeals to the Court of Appeal.

2. Issue

[14] Ms. Blennerhassett's factum lists four issues and eight sub-issues. These all address whether the judge erred in her application of the tests, under the authorities for the determination of custody when mobility is a factor. I will analyse these points under the single issue - Did the trial judge make an appealable error in her articulation and application of the tests to determine a child's custody and mobility?

3. Standard of Review

[15] The Court of Appeal applies standards of correctness to issues of law, and palpable and overriding error - meaning an error that is both clear and material - to issues of either fact or mixed fact and law with no extractable legal error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras 8-10, 19-25, 31-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, paras 4, 65, 69, 72-74.

[16] These normal standards of appellate review apply to a judge's custody or mobility decision involving a child's best interests. In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, Justice Bastarache, for the Court, said:

> 13 As I have stated, the Court of Appeal was incorrect to imply that *Hickey, supra*, and the narrow scope of appellate review it advocates are not applicable to custodial determinations where the best interests of the child come into play. Its

reasoning cannot be accepted. First, finality is not merely a social interest; rather, it is particularly important for the parties and children involved in custodial disputes. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.

14 It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal. The Court of Appeal discussed, and the respondents relied heavily on, the decision of McLachlin J. (as she then was) in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case, the Court found that the trial judge had only mentioned one factor to be considered in determining the best interests of the child. As noted by McLachlin J., there was no way of knowing if the trial judge had considered the other applicable factors. Further, the Court noted that the trial judge had stated that he was relying heavily upon the findings of another judge. As a result, McLachlin J. stated, at para. 52: ". . . one may equally infer that the necessary fresh inquiry was not fully undertaken. . . . [I]t seems clear that the trial judge failed to give sufficient weight to all relevant considerations . . . and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly." Rather than indicating that appellate review differs when a court must consider the best interests of the child, *Gordon* is consistent with the narrow scope of appellate review discussed later in *Hickey, supra*. The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor in depth.

15 As indicated in both *Gordon* and *Hickey*, 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 [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.

To the same effect: *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 119, paras 44-45, leave to appeal denied [2004] 1 S.C.R. v; *H.A.N. v. Nova Scotia (Community Services)*, 2013 NSCA 44, para 32.

[17] Similarly, in *Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58, Justice Cromwell for the Court said:

> [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: [citations omitted].

4. Analysis

[18] I will address Ms. Blennerhassett's submissions topically as I track the judge's reasoning.

[19] Justice Gass commended the parties' non-litigious history, which she attributed to both the commitment of Chloe's parents to their daughter's interests and the grandparents' backstopping for Chloe's care.

[20] The parties had given evidence of their parenting plans:

> (a) Ms. Blennerhassett would attend a four year degree program at McMaster, culminating in a year of internship. The academic year is from September through April. The first and second summers are free, and then involve work placements. Ms. Blennerhassett had a one bedroom apartment in Hamilton, with a backyard and recreational space nearby. She would enroll Chloe in school in Hamilton, Ontario, including French immersion in

> the mornings, and an after-school program. Chloe would attend gymnastics. Ms. Blennerhassett had a friend in Hamilton, with whom Chloe was familiar, and who would act as an emergency contact and caregiver. Ms. Blennerhassett intended to return to Westville, during summers and holidays, and to seek work placements in Nova Scotia, though she acknowledged the possibility that work placements might not be available. Ms. Blennerhassett proposed specific parenting times for Chloe's father - three weeks each summer, March break and a portion of the Christmas holidays.
>
> (b) Mr. MacGregor had recently started a new job as a field technician for IT equipment, based in Stellarton, near Westville. He had left his Halifax job so he could offer Chloe a familiar home. He would live with Chloe in his mother's four-bedroom house. The home is next door to his sister and her children, and about ten minutes from his maternal grandparents. Eventually, he would obtain his own place nearby. Chloe was enrolled in Grade 1 at the local elementary school where she had attended primary. She is in gymnastics and swimming. Mr. MacGregor would rely on his mother and sister, and Chloe's maternal grandparents for childcare when he is unavailable.

[21] After summarizing the parenting plans, the judge turned to the legal principles. Earlier, as a point of departure, she had noted:

> ... This is, as well, a decision in the first instance; this is not an application to vary. It appears that there has never been a parenting order in place; that the parties have functioned, essentially, without a court order ...

The judge continued, in a passage that is central to the argument on appeal:

> What I have to consider here is custody in the first instance, or primary care in the first instance. There has been a lot of emphasis placed on the mobility aspect of this, and that is certainly a very significant factor for the court to take into consideration here, but it is more than a *Gordon v. Goertz* situation, because this is not an application to vary. There's not an order in place that provides for specific parenting time for each of the parents that's now being sought to be varied, but it is an application in the first instance.

> The leading case for the court in terms of what's in the best interests of the child are the principles that are set out in the *Foley* decision, which is a 1993 decision of Justice Goodfellow, which we all go back to from time to time, when a contested parenting application is before the court. So the court will be looking at the factors in the *Foley* decision as well, because this is more than a mobility application; it is a significant component of this application, but it is, essentially, a situation where the court has to weigh the plans that are being put forward by each parent to determine what's in the best interests of the child.

Later, in a similar vein, Justice Gass said:

> ... As I've indicated, those are some of the factors in *Gordon and Goertz*, which, in my view, take -- are secondary to the factors in *Foley* in a situation such as this. But they are, nevertheless, significant considerations as well for the court, in coming to a difficult decision like this.

[22] I will leave the judge's reasons for a moment to discuss the two decisions cited in these passages - *Foley v. Foley*, [1993] N.S.J. No. 347 (S.C.) and *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

[23] *Foley* involved competing applications by both parents for interim custody in a divorce. Justice Goodfellow said:

> [15] ... In determining the best interests and welfare of a child the court must consider all the relevant factors. The diversity that flows from human nature is such that any attempt to compile an exhaustive list of factors that could be relevant is virtually impossible.
>
> [16] Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:
>
> 1. Statutory direction **Divorce Act,** ss. 16(8) and 16(9), 17(5) and 17(6);
> 2. Physical environment;
> 3. Discipline;
> 4. Role model;
> 5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are

but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists, psychiatrists, etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child;

10. The physical and character development of the child by such things as participation in sports;

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The **Divorce Act**, s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

[17] The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question.

With Whom Would The Best Interest And Welfare Of The Child Be Most Likely Achieved?

[18] The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

[19] Nevertheless, some of the factors generally do not carry too much, if any weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.

[20] On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[24] Nova Scotia's courts often have cited *Foley*'s factors for guidance in assessing a child's best interest.

[25] In *Gordon v. Goertz* the divorce order had assigned the child's primary care to the mother, who lived in Saskatchewan, with generous access to the father. The mother then chose to move to Australia to study orthodontics. The father applied for a variation order, that he have custody. The mother cross applied for variation of the father's access, to enable her move to Australia with their child. Justice McLachlin (as she then was) wrote the plurality's reasons that have established the principles to govern the variation of custody and access that results from the custodial parent's change of residence. Justice McLachlin said:

49. The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, *inter alia*:

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

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

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

    (d) the views of the child;

    (e) the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child; [McLachlin, J.’s underlining]

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

> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> 50. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

Earlier, Justice McLachlin had elaborated on the ultimate question:

> 20. The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis": *per* Abella J.A., in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), at p. 443. Nevertheless, it stands as an eloquent expression of Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. Moreover, Parliament has offered assistance by providing two specific directions - one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents.

[26] I will return to this case. Justice Gass reviewed *Foley*'s factors. For most, the analysis did not favour either parent. She said that Mr. MacGregor might have more available time for Chloe than would Ms. Blennerhassett, with her studies, but made it clear the difference was not significant. The judge said that the opportunity for cultural development might favour Ontario, over Westville, but again indicated this was not a material discrepancy. Justice Gass found particular significance in two factors. First, Chloe would have contact with her extended family - her maternal and paternal grandparents, to whom she was close - in Westville, but not in Hamilton. Second, residing in Westville, Chloe likely would have more personal contact with her non-custodial parent (Ms. Blennerhassett), because of her mother's trips home, than Chloe would enjoy with her father if Chloe resided in Hamilton.

[27] Ms. Blennerhassett's concerns focus on the judge's application of *Gordon v. Goertz*'s criteria. She makes four submissions.

First -
The Judge's Use of *Gordon v. Goertz*

[28] Ms. Blennerhassett cites Justice Gass' statement (above, para 21) that *Gordon v. Goertz*'s principles were "secondary" to *Foley*'s principles, and submits that the judge erred in law. Ms. Blennerhassett urges that this was a "mobility" case, and therefore *Gordon v. Goertz*'s principles must have primary significance over *Foley*'s factors. Ms. Blennerhassett's factum says:

> 28. Consequently, the principles in *Gordon v. Goertz* were not considered as the test for mobility. The factors that were considered were given insufficient consideration and weight.

Ms. Blennerhassett's submissions then address *Gordon v. Goertz*'s factors. Where Justice Gass' conclusions differ from those submissions, Ms. Blennerhassett attributes the discrepancy to the judge's legally erroneous discounting of *Gordon v. Goertz*.

[29] I respectfully disagree with Ms. Blennerhassett's submission. This is not a case where *Foley*'s factors collide with those of *Gordon v. Goertz*, and the judge chose a lower court's ruling over a binding precedent from the Supreme Court of Canada. The judge blended her analysis of the principles from both decisions, and addressed all *Gordon v. Goertz*'s criteria. She attributed weight, as each criterion applied to Chloe's circumstances in a child-centered analysis, and not because of any precedential ranking between the two decisions.

[30] I agree with Ms. Blennerhassett that *Gordon v. Goertz*'s approach is not confined to variations, and applies to an initial custody application, such as this one, which involves a change of residence: *Burgoyne v. Kenny*, 2009 NSCA 34, para 21; *Handspiker v. Rafuse*, 2001 NSCA 1, paras 11-12. But Justice Gass did not ignore *Gordon v. Goertz*. She repeatedly described Justice McLachlin's criteria as significant:

> There has been a lot of emphasis placed on the mobility aspect of this, and that is certainly a very significant factor for the court to take into consideration here, ...

...

> As I've indicated, the principles in *Gordon and Goertz* have some significance, in that mobility is part of this application, ...
>
> ...
>
> As I've indicated, those are some of the factors in *Gordon and Goertz*, which, in my view, take -- are secondary to the factors in *Foley* in a situation such as this. But they are, nevertheless, significant considerations as well for the court, in coming to a difficult decision like this.

The judge's reasons addressed each criterion from *Gordon v. Goertz*.

[31] The facts required adjustments to the application of some of *Gordon v. Goertz*'s criteria. That was the context of the judge's statement that *Gordon v. Goertz* was "secondary". The judge could not base her inquiry "on the findings of the judge who made the previous order" (factor # 3 in *Gordon v. Goertz*, para 49). That was because there was no previous order, this being an initial application for custody, not an application to vary. Section 37(1) of the *Maintenance and Custody Act* - like s. 17(5) of the *Divorce Act* considered in *Gordon v. Goertz* - states that a judge may vary an existing custody order if "there has been a change in circumstances". Absent a prior order as a threshold, a "change in circumstances" is not the trigger for a fresh inquiry. This affects the first and second criteria from *Gordon v. Goertz*, para 49. Accordingly, Justice Gass said:

> But in my view, this is not a situation where a change in circumstances is required, because there's never been an order in place that establishes a formal parenting regime.

[32] There is no error in this approach, which accords with Justice Bateman's comments, for the Court, in *Burgoyne v. Kenny*, paras 20-22.

Second -
Respect for Ms. Blennerhassett's Views

[33] Ms. Blennerhassett's factum asserts that her position enjoys the benefit of the *status quo* as Chloe's custodial parent:

> 46. While no prior order places Chloe in the Appellant's primary care, this *status quo* has been in place for the majority of Chloe's life. ...

Ms. Blennerhassett refers to Justice McLachlin's comment in *Gordon v. Goertz*:

> 48. While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

Justice McLachlin reiterated this statement in the fourth factor (para 49, quoted above para 25). Though no prior order provided that Ms. Blennerhassett was the "custodial" parent, her factum submits that "as the *de facto* custodial parent, the Appellant's decision to relocate to Hamilton with Chloe is entitled to great respect". She contends that the judge misapplied *Gordon v. Goertz* by "[f]ailure to accord the Appellant's decision to relocate to Hamilton great respect".

[34] *Gordon v. Goertz* directs that: (1) the test involves a weighing of factors, (2) there is no legal presumption, or prescribed tipping point, that favours the custodial parent, but (3) the custodial parent's view should receive great respect, or weight, in the balance, and (4) the ultimate question, on this balance, is - What is in the child's best interest? In my view the decision under appeal applied those principles.

[35] I agree with Ms. Blennerhassett that, though there is no prior custody order, the custodial *status quo* is a factor that weighs in the balance of Chloe's best interests.

[36] Justice Gass took account of the *status quo*. She said:

> ... And then there is, as well, the status quo, which would reflect that the mother has actually been the primary caregiver.
>
> ...

> Certainly, the existing custody and access relationship is a factor in *Gordon and Goertz*, because there is a change being sought in the existing legal regime that had been in place, so those -- the court would look at the existing custody and access relationship, because that is what is being sought to be changed.

Later the judge said "the disruption as a result of the change in the parenting regime" was a "significant considerations".

[37] I also agree that the judge is to greatly respect the views of the *de facto* custodial parent. But this is not because that parent enjoys a legal presumption. Rather, it is because, in the child-centered balance, "the importance of the child remaining with the parent to whose custody it has become accustomed" (McLachlin, J. - *Gordon v. Goertz*, para 50) carries weight. But the ultimate question remains - "What is in the child's best interest?", not "What does the custodial parent want?"

[38] The judge duly respected Ms. Blennerhassett's views. Justice Gass characterized the principal factor, favouring Ms. Blennerhassett's primary care, as the maintenance of the "stable and nurturing environment" provided by Ms. Blennerhassett, who was Chloe's principal caregiver since birth. She found that Ms. Blennerhassett

> has done remarkably well as a single parent, pursuing her education and her career aspirations while raising a happy, healthy daughter, who has a good relationship with her father and, as well, all of the extended family.

The judge endorsed Ms. Blennerhassett's planned move, as being in Chloe's long term interest:

> Here, her reasons are absolutely valid; she's doing this, she's pursuing a career goal that she aspires to, and because in the long term it would be in the best interests of Chloe for her mother to pursue this course of study and be able to be employed as a midwife in a growing field that her mother is eager to pursue. And certainly, her reasons for moving to take that program are absolutely valid.

The judge tailored her disposition to this sentiment. She said that her ruling governs Chloe's "primary residence should be for the next four years, barring any other unforeseen changes in circumstances". After Ms. Blennerhassett completed her program at McMaster, Chloe's care would be revisited:

> When mom completes her program, the parenting arrangement will be reviewed. That means that this order is going to be subject to review upon completion of her midwifery course.
>
> ...
>
> But I do want to emphasize to both parents that, essentially, this is a co-parenting arrangement that enables mom to pursue this program, and it's a temporary shared parenting kind of arrangement -- although this isn't an interim order -- that enables that to happen but maximizes contact with both parents.

[39] The judge supported Ms. Blennerhassett's educational plans - the reason for the move - and gave that point weight to answer the question: "What is in Chloe's best interest?" Justice Gass concluded that the shared parenting regime "would be in Chloe's best interests at this time". But "in the long term it would be in the best interests of Chloe for her mother to pursue this course of study", and accordingly the shared care arrangement would be revisited upon completion of Ms. Blennerhassett's midwifery program. The judge's ruling is more Solomonesque than Ms. Blennerhassett currently perceives. The judge addressed the ultimate issue - Chloe's best interests - that is common to *Gordon v. Goertz* (para 50) and *Foley* (para 17).

[40] In my view, the judge made no error in the degree of respect accorded to Ms. Blennerhassett's views.

Third - The Judge's Choice of Factors

[41] Ms. Blennerhassett's factum says:

> 38. In her decision, the Learned Trial Judge described two factors as being "significant" in her determination: the number of moves in Chloe's life [citation from Appeal Book omitted], and Chloe's family support network in Westville [citation from Appeal Book omitted]. These factors are the only factors in her decision described as "significant", neither of which is a consideration pursuant to the principles in *Gordon v. Goertz*.

[42] For several reasons, I respectfully disagree.

[43] First, the judge did consider, as significant, the criteria cited by Ms. Blennerhassett - the mobility factor, and the disruption from a change in the parenting regime. The judge's decision said:

> ... There has been a lot of emphasis placed on the mobility aspect of this, and that is certainly a very significant factor for the court to take into consideration here, ...
>
> ...
>
> The other factors are the disruption to a change in primary care as a result of the move, the disruption as a result of the change in the parenting regime, and a disruption as a result of the move. As I've indicated, those are some of the factors in *Gordon and Goertz*, which, in my view, take - are secondary to the factors in *Foley* in a situation such as this. But they are, nevertheless, significant considerations as well for the court, in coming to a difficult decision like this.

[44] Second, as to the number of moves in Chloe's life, the judge said:

> This is a situation where there have been moves in the past, and that Chloe has already had a number of moves. She lived in Westville, then in Halifax, then in Montreal, then back to Westville, and now her mom wants her to move to Hamilton while she goes to school. It is, as well, that she started school in Quebec, and then moved back home to Westville and started school there in the spring, and she's been there, and now there's a proposed move that would result in her now leaving the school in Westville and going to the Cunningham School in Hamilton.
>
> There is, as well, the fact that mom's terms -- school terms -- generally run from September to early April, and what would then happen in April, when mom finishes school? Because it's her intention to return to Nova Scotia for the summer school break ...
>
> Then the question is, would she then wait until the end of June until school got out in order for Chloe to finish the school term there, or would she be leaving in April?

The judge's discussion of Chloe's moves, to date and prospective, pertains to *Gordon v. Goertz*, items 7(f) and (g) - the "disruption" factors - and to *Gordon v. Goertz*'s ultimate question - What are Chloe's best interests in all the circumstances?

[45] Third, *Gordon v. Goertz* [para 49, item 7(g), above para 25] cites "disruption to the child consequent on removal from family, schools, and the community he or she has come to know" as a factor. Justice McLachlin summarized the test:

> 50. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community.

The consideration of Chloe's family support network in Westville clearly is an appropriate criterion to be weighed under *Gordon v. Goertz*.

[46] Ms. Blennerhassett's submission essentially treats the "great respect" due to the custodial parent's view as a trumping legal presumption, and Chloe's connection to her family support network in Westville as legally irrelevant. With respect, the submission is mistaken on both counts. Ms. Blennerhassett's views weigh on the scale, as does Chloe's connection to her family support network. The judge undertook that balance.

Fourth - Weight of the Factors

[47] Ms. Blennerhassett submits that the judge placed too much weight on the factors that favoured Mr. MacGregor's position, and too little weight on those that favoured her own. Her factum cites "undue emphasis on maximizing contact between Chloe and the Respondent", "insufficient consideration of the disruption to the child of a change in custody", "undue emphasis on the disruption to the child consequent on removal from family, schools, and the community she has come to, know", and "undue weight on the fact that Chloe's school year does not end until June".

[48] At this point, the standard of review casts its shadow. It is not the Court of Appeal's role to retry the case by appraising the evidence afresh, and re-weighing circumstances in the balancing test. I refer to *Van de Perre* and *C.A.S. of Cape Breton-Victoria* (above, paras 16-17).

[49] The judge made no error of principle or palpable and overriding error of fact.

Alternative Submission -
Remain in Nova Scotia

[50] Counsel for Ms. Blennerhassett submits that, if she may not retain primary care of Chloe, then Ms. Blennerhassett would abandon her program at McMaster. She asks the Court of Appeal to allow the appeal based on that assumption. In response to a similar submission at the trial, Justice Gass' reasons said:

> Mom has argued that she retain primary care and move to Ontario, and in the alternative, she asks to be granted primary care and not move to Ontario, although that plan doesn't have any - there is nothing before the court to say what the alternative plan would involve.
>
> In my view, her plan to pursue the midwifery is very significant and very important, not only for her wellbeing, but for the long-term wellbeing of Chloe; ...

The judge did not accept Ms. Blennerhassett's invitation to leave Chloe in her primary care on the bare assumption that Ms. Blennerhassett would abandon the midwifery program, and stay in Nova Scotia.

[51] Ms. Blennerhassett's counsel made a similar submission in the Court of Appeal. But there is no evidence on which to base any analysis of the submission. We do not even know whether or not Ms. Blennerhassett has actually attended McMaster since September, 2012, the premise of the judge's shared custody ruling.

[52] An alternative of not moving may be an option to be tabled for consideration: *Slade-McLellan v. Brophy*, 2012 NSCA 80, paras 28-29. But that option needs evidence, such as a parenting plan to give it substance, so the judge can perform the balancing test. All the evidence in this case points to Ms. Blennerhassett's midwifery program in Hamilton, Ontario, which the judge found to be in Chloe's long term best interests. There is no basis for this Court to overturn the judge's finding.

5. Conclusion

[53] I would dismiss the appeal. In the circumstances, there should be no award of costs.

Fichaud, J.A.

Concurred:

Saunders, J.A.

Farrar, J.A.