NOVA SCOTIA COURT OF APPEAL
Citation: *D.A.M. v. C.J.B.*, 2017 NSCA 91

Date: 20171213
Docket: CA 466666
Registry: Halifax

Between:

D.A.M.

Appellant

v.

C.J.B.

Respondent

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judges:	Hamilton, Farrar and Bryson, JJ.A.
Appeal Heard:	November 28, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of the Court
Counsel:	Judith Schoen, for the appellant Mallory Arnott, for the respondent

By the Court:

Introduction:

[1] In this appeal, D.A.M. seeks to restore a shared parenting arrangement ordered in 2012 following C.J.B.'s move to Ontario to study midwifery. The case is unusual because C.J.B.'s move took place five years ago. Since then she and D.A.M. have shared parenting of their daughter, C., who primarily resided in Pictou County. What has changed is that C.J.B. now has a job and lives in Toronto. She has a home and an income that would support more time with her daughter. Her application to the Family Court requiring C. to relocate with her to Toronto was successful, so D.A.M. has appealed.

Background:

[2] The parties grew up in Pictou County. They never married, and, except briefly, never cohabited. They have an eleven-year-old daughter, C., who was born in 2006 while her parents were in high school. She has extended family on both sides. Her maternal and paternal grandparents live in Pictou County.

[3] Until C. was six, C.J.B. and D.A.M. co-parented their daughter while each pursued studies in Halifax, and later Montreal in C.J.B.'s case. In these early years, C. resided primarily with her mother. In 2012, C.J.B. decided to pursue midwifery studies in Hamilton, Ontario. She wanted to take C. with her. D.A.M. objected, and the parties resorted to the Court.

[4] The Honourable Justice Deborah Gass of the Supreme Court (Family Division) awarded joint custody and ordered a co-parenting arrangement which accommodated C.J.B.'s academic year and C.'s school year. Between September and April, C. would reside with her father in Pictou County. Beginning in April, she would be in the primary care of her mother. C.J.B. was entitled to parenting time for March and study break, and part of the Christmas holiday. The order also provided that D.A.M. would be entitled to three weeks of parenting time in the summers. D.A.M. was ordered to pay for two round-trip flights to allow C. to visit her mother in Ontario during parenting times allotted to her.

[5] C.J.B. appealed Justice Gass' decision. That appeal was dismissed (2013 NSCA 77). In commenting on Justice Gass' analysis, this Court noted the two keys factors in her decision:

> [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 [D.A.M.] might have more available time for [C.] than would [C.J.B.], 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 [--], but again indicated this was not a material discrepancy. Justice Gass found particular significance in two factors. ***First, C. would have contact with her extended family - her maternal and paternal grandparents, to whom she was close - in [--], but not in Hamilton. Second, residing in [--], [C.] likely would have more personal contact with her non-custodial parent ([C.J.B.]), because of her mother's trips home, than [C.] would enjoy with her father if [C.] resided in Hamilton.***
>
> [Emphasis added]

The emphasised passages reappear prominently in D.A.M.'s submissions in this appeal.

[6] The decision of Justice Gass anticipated a review of the parenting schedule upon C.J.B.'s completion of her course of studies in 2016.

Shared parenting 2012-2016:

[7] As contemplated by Justice Gass' decision, the parties shared parenting during this period. C. lived with her father in Pictou from September to April and attended school in her local community. C. has extensive contact with her grandparents who all live nearby.

[8] Following the conclusion of the university academic year, each spring, C.J.B. would return to Pictou County. Some years she returned later than others. C. would then reside with her mother at her maternal grandparents' home while continuing to attend school. During the summers of 2013 and 2014, C.J.B. worked at day camps in Nova Scotia and enrolled C. in those camps to facilitate their time together. In the summers of 2015 and 2016, C. stayed with her mother in Toronto. C.J.B. describes travelling throughout Ontario, and doing many activities together. In the summers of 2016 and 2017, C. attended camps for children of LGBTQ+ parents.

[9] In 2014, D.A.M. married A.M., and they moved into a new home in rural Pictou. With support and encouragement from A.M. and her family, C. is heavily involved in 4-H. She has also participated in gymnastics, art, swimming and has studied guitar.

[10] In 2016, C.J.B. obtained work as a midwife in Toronto where she resides in her own apartment. She earns approximately $70,000 a year. Her work schedule involves one week in a clinic where she typically books clients between 9:00 a.m. and 6:00 p.m.; a second week where she is on call 24 hours a day to attend births; and a third week where she is off altogether. Her clinic weeks involve a four-day weekend. C.J.B.'s weeks off begin and end on Wednesdays. She has two four week periods of holiday each year.

[11] D.A.M. works in an IT department. He earns approximately $41,000 per year. He works on a two-month rotation, having the same eight-hour shift for two months at a time. The backshift is from 8:00 p.m. to 7:00 a.m. He is able to have breakfast and dinner with his daughter during the backshifts. D.A.M. says that he and his wife work as a team and parent C. together when she resides with them.

[12] A.M. is a pharmacist. She works 8:00 a.m. to 3:30 p.m. or 10:00 a.m. to 5:30 p.m., Monday through Friday; every third Saturday she works from 9:00 a.m. to 2:00 p.m. The judge recognized the cooperative effort and advantage of C.'s extended family in supporting her. D.A.M. describes that family in ¶ 63 of his affidavit:

> 63. C. has my mom, Dad, stepdad, C.J.B.'s mom and dad, two (2) aunts, uncle, A.M.'s mom and dad, two (2) brothers and sister, great grandparents, many cousins and many of my aunts and uncles around to help C. and help A.M. and I care for C.

C.J.B. applies to move C. to Toronto:

[13] Because she now lives and works in Toronto, C.J.B. wanted C. to join her there. D.A.M. did not agree. So, the parties again turned to the Court.

[14] The matter went before Judge Timothy Daley of the Family Court on June 1 and 2, 2017. In his July 14, 2017 decision Judge Daley concluded that C. should move to Toronto with her mother. D.A.M. now appeals, arguing that the judge's analysis was unbalanced, one-sided and did not consider less radical alternatives. In his factum, he advances four grounds which can be summarized in this way:

- The judge did not correctly consider or apply the criteria in s. 18 of the *Parenting and Support Act* when determining that it was in C.'s best interest to leave her father's home in Pictou and move to Toronto.
- Neither the evidence nor the judge's factual findings supported his conclusion that it was in C.'s best interests to move.
- In respect to some of the grounds of appeal, the judge's reasons were inadequate.

[15] C.J.B. responds that D.A.M.'s submissions really question the weight given to various statutory factors and are not reviewable by this Court. The evidence supports the judge's decision. To the extent that the judge was less explicit in his reasons than he might have been, one should defer to his "nuanced" approach.

[16] The judge asked the parties whether C.'s wishes should be canvassed. They declined. They did not wish to draw her into the legal proceeding. The judge was supportive of the parents' wishes, but noted the difficultly of assessing C.'s preferences through parental hearsay. Accordingly, he did not ground his decision on this evidence.

[17] At the initial hearing, D.A.M. sought child support from C.J.B. if he were successful. C.J.B. did not ask for child support. Instead, she proposed that any child support be applied to travel costs for D.A.M. or C. or both.

[18] Child support was not requested and was not an issue in this appeal.

The applicable legal principles:

[19] The judge found that the parents were in a shared parenting arrangement, which meant that C.J.B. had the obligation to prove that it was in C.'s best interests to move from her home in Pictou County to Toronto. The burden is described in clause 18(H)(1) of the *Parenting and Support Act*, R.S.N.S. 1989, c. 160:

> 18H (1) When a proposed relocation of a child is before the court, the court shall be guided by the following in making an order:
>
> (b) that the relocation of the child is not in the best interests of the child if the person requesting the order and any person opposing the relocation have a substantially shared parenting arrangement, unless the person seeking to relocate can show that the relocation would be in the best interests of the child;

[20] Section 18(5) of the *Act* requires the Court to give "paramount consideration to the best interests of the child".

[21] Section 18(H)(4) of the *Act* describes the relevant circumstances that the Court must consider when determining the best interests of the child in the context of a proposed relocation:

> (a) the circumstances listed in subsection 18(6);
>
> (b) the reasons for the relocation;
>
> (c) the effect on the child of changed parenting time and contact time due to the relocation;
>
> (d) the effect on the child of the child's removal from family, school and community due to the relocation;
>
> (e) the appropriateness of changing the parenting arrangements;
>
> (f) compliance with previous court orders and agreements by the parties to the application;
>
> (g) any restrictions placed on relocation in previous court orders and agreements;
>
> (h) any additional expenses that may be incurred by the parties due to the relocation;
>
> (i) the transportation options available to reach the new location; and
>
> (j) whether the person planning to relocate has given notice as required under this Act and has proposed new parenting time and contact time schedules, as applicable, for the child following relocation.

[22] In 18(6), the *Act* describes the circumstances referred to in sub-paragraph (a) above. The judge found that only sub-sections (a), (b), (c), (d), (g), (h) and (i) of s. 18(6) were relevant in this case. They are:

> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
>
> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
>
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> [. . .]

> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
>
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child;

[23] The judge added that he must also consider the criteria set out in the seminal case of *Foley v. Foley*, 1993 N.S.J. No. 347, in particular ¶ 16 of that decision, although he recognized that the *Foley* factors have been largely subsumed by the *Act*.

[24] The judge found that the *Act* displaced the mobility factors described by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. It is unnecessary for the purpose of this decision to decide whether the judge is right. Suffice to say that many—although not all—criteria in the *Act* are similar to the factors enumerated in *Gordon v. Goertz*.

The judge decides C. should relocate to Toronto:

[25] After his review of the evidence, the judge decided C. should move. His actual decision is brief. In two surprisingly terse and conclusory paragraphs he says:

> [137] Upon review of all the evidence and applying the burden of proof, the factors set out in *Act* and in the *Foley* decision, I am satisfied that C.J.B. has met the burden of proof to establish, on a balance of probabilities, that it is in C.'s best interest that she relocate with her mother to Toronto and live primarily in her mother's care.
>
> [. . .]
>
> [141] C. has reached a new stage in her life and, considering all the evidence and circumstances, I am satisfied that it is in her best interests that she spends the next stage of her life in her mother's primary care. She will have the advantage of significant parenting time with C.J.B., whose career permits that luxury, and she will have the experience of living in a diverse and vibrant community while returning regularly to Nova Scotia to take advantage of time with her family here and the more tranquil and rural life in Nova Scotia. She will have the benefit of the guidance and care of her mother as she moves through puberty into the next stage of her development and will be exposed to and learn from her mother's experience in the LGBTQ+ community while maintaining a strong connection to

> the more traditional life she has experienced and will experience in rural Nova Scotia with her father, stepmother and extended family.

[26] This summary reduces C.'s home for the last five years with her father, her extended family and community from a successful way of life to a wished for "strong connection" in the future.

[27] D.A.M.'s fundamental submission is that the judge's brief analysis is unbalanced and one-sided. D.A.M. says the judge failed to compare the benefits and shortcomings of life respectively with mom in Toronto and dad in Pictou. In doing so, he ignored or glossed over statutory criteria that he was obliged to consider.

[28] This is an appeal. As C.J.B. argues, we do not overturn a custody or support order unless the judge has made an error in principle, has significantly misapprehended the evidence or unless the decision is clearly wrong, (*Murray v. MacKay*, 2006 NSCA 84, ¶ 22, citing *Hickey v. Hickey*, [1992] 2 S.C.R. 518, ¶ 10, 11 and 12; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, ¶ 12; and *Willick v. Willick*, [1994] 3 S.C.R. 670, ¶ 27).

[29] In *Van de Perre*, Justice Bastarache noted the narrow grounds of appellant intervention:

> [15] . . . 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. . . . 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. . . .

[30] The judge's decision dramatically changed C.'s life from the pattern of residency and parenting that she has beneficially enjoyed for the past five years. To displace a shared parenting arrangement that was working well, it should be clear that a change is in the child's best interests. That requires comparing and balancing the advantages and disadvantages of each proposed parenting scenario. As the British Columbia Court of Appeal put it in *Hellberg v. Netherclift*, 2017 BCCA 363:

> [72] The importance of considering the best interests of the child "in the round" can be traced to this Court's judgment in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 (CanLII) per Saunders J.A. at para. 46. Although the expression was used in a particular context in *Hejzlar*, it is one of general application and simply means

> that ***consideration of the child's best interests requires a fully-rounded analysis that takes into account all relevant factors***.
>
> [Emphasis added]

[31] In *McAleer v. Farnell*, 2009 NSCA 14, the Court cautioned against an unbalanced approach:

> [26] While the trial judge acknowledged his obligation to consider these seven factors, ***I nonetheless have concerns with his failure to consider the impact on Cole's relationship with his mother***. This involves primarily factor (c), but also (a) and (f) from *Gordon v. Goertz*.
>
> [27] Specifically, while the judge fully addressed the need to maximize contact between Cole and his father, he appears to have ignored this goal when it came to Ms. McAleer. . . .
>
> [28] Yet, at the same time, the decision offers no such analysis *vis-a-vis* Ms. McAleer. Furthermore, this does not appear to be a situation where the judge may have conducted the proper analysis but simply failed to articulate it in his decision. I say this because the resultant order suggests otherwise. Let me elaborate.
>
> [Emphasis added]

[32] Chief Justice MacDonald later added:

> [38] Furthermore, this error, I believe, is serious enough to warrant our intervention. In reaching this conclusion, I accept that our role is not to usurp the trial judge's role in balancing the relevant *Gordon v. Goertz* factors. However, my concern is not with how this balancing exercise may have been achieved. Instead, I fear that the ***appropriate balancing exercise may not have been attempted***. This, therefore, in my opinion, constitutes an error in principle serious enough to call for our intervention.
>
> [Emphasis added]

[33] Similarly, in *Hellberg v. Netherclift*, 2017 BCCA 363, the Court describes the balancing that should occur:

> [86] In this case***, the disruptive impact the proposed relocation could have on the child had to be weighed against the benefits the child was likely to enjoy if the relocation was permitted***. The order made by the judge, for practical purposes, all but severs physical contact between Mr. Netherclift, a custodial parent, and his child, assuming Mr. Netherclift stays in British Columbia. The parties are of relatively modest means and likely cannot afford to pay for the child

> and an accompanying adult to travel between British Columbia and the UK more than once a year.
>
> [Emphasis added]

[34] The approach in the case before us was not balanced. It focused on C.J.B.'s circumstances to the detriment of C.'s relationships in Nova Scotia. As the British Columbia Court of Appeal observed in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230:

> [46] . . . While this is a different case, this case required at least consideration of the potential effect of refusing the move upon the relationship between the child and the moving parent, assuming the move will occur. In other words, ***it is consideration of the possibilities in the round, and not from one perspective only***, that is required. The subtle, and troublesome, consequence of approaching the question with preference for the status quo is that the fully rounded analysis does not occur. In my respectful view, this is what happened here. ***The narrow ambit of the factors considered by the judge in assessing the alternative, in my view, reflects a material error in principle***.
>
> [Emphasis added]

[35] In *Hejzlar*, the trial judge had favoured the status quo and did not give serious consideration to the alternative. Here, the opposite happened. The judge gave full consideration to a change in the status quo, and failed to properly assess the full impact on C. of the deleterious effects of the move or the alternatives for minimizing that harm, while maximizing the benefits to C.

[36] Resort to the statutory criteria illustrate the judge's one-sided approach. Consideration of these criteria do not suggest C.'s best interests are served by moving to Toronto. The judge's factual findings confirm this. We will review them.

Section 18(6)(a) and (c) – child's physical, emotional, social and educational needs and history of care:

[37] The judge was complimentary of both parents and both home situations:

> [120] I find that ***C. will be cared for and supported in the homes of both of her parents***. Though their parenting styles and their day-to-day care of C. differ, I find that each parent, A.M., as well as their respective extended families have supported C. in her growth and development and provided strong parenting to her throughout her life***. Both homes provide loving and supportive environments,***

> ***she is loved by everyone in her life and either home environment would be a good option for her***.
>
> [121] I consider that C. is a 10-year old girl who has entered puberty and is moving into the next stage of her life. For the first six years of her life she was cared for primarily by C.J.B. Since 2012, she has been in a substantially shared parenting arrangement and has spent substantial time in the care of each of her parents, both in Toronto and in Nova Scotia. ***By all accounts she is doing well at school, has friends in both communities, enjoys the lifestyles and opportunities offered both in a rural and urban setting and has benefited by those experiences.***
>
> [Emphasis added]

[38] None of these findings suggest that C.'s best interests were not being served by the shared parenting arrangement whereby she lives primarily in Pictou County. Nor do these findings support a move to Toronto as better—in other words, as being in C.'s best interests.

Section 18(6)(b) - parental support for child's relationship with other parent:

[39] The judge praised both parents:

> [122] Despite some difficulties over the past few years, ***I also find that each of her parents had been willing to support a close relationship with the other parent***. There have been disagreements and challenges. This includes some disputes regarding summer parenting time for D.A.M., parenting time for C.J.B. when she is in Nova Scotia and communication challenges around decisions about C., her diet, health and related issues. Despite this, I find that ***the parents have done a good job in reinforcing close relationships with one another*** and, as compared to many families that come before this court, they have done so to the benefit of their daughter.
>
> [Emphasis added]

[40] Nothing here suggests that a change in C.'s care is necessary or desirable.

Section 18(d) – plans for the child's care:

[41] Again, the judge's finding is supportive of both parents:

> [128] It is also relevant that C. has a stable life in Nova Scotia and is cared for by her father, stepmother and extended family here. In Toronto, she is also well cared for by her mother and the plan on relocation, though not fully formed, is certainly well thought out in terms of living arrangements, medical and dental care,

> education and activities. I am satisfied that both parents have strong plans for C.'s care and there are few gaps of any significance for either parent.
>
> [Emphasis added]

[42] Although this finding is complimentary of both parents, it is somewhat hypothetical where the planned care for C. in Toronto is concerned. There simply is not the same established track record that supports the very positive outcomes that C. has experienced to date in Pictou County. This factor does not favour a change.

Section 18(6)(g) –strength of relationships between the child and each parent:

[43] Although the judge does not explicitly address this, the entire decision is complimentary to both parents, and assumes a close connection between each parent and C. This is implicit in findings throughout the decision (for example ¶ 120, 121, 122, and 128 quoted above).

Section 18(6)(h) - the nature, strength, and stability of relationship between the child and grandparents and significant others:

[44] The judge glosses over this criterion. It is clear that the relationship with C.'s extended family is very strong. The judge describes C. as "being surrounded by extended family on both sides who love her and want what is best for her" (¶ 1 of decision). Of course, the extended family all reside in Pictou County.

[45] Owing to his work schedule, D.A.M. relied upon the assistance of his wife and extended family in caring for C.:

> [65] On the issue of available parenting time, I am satisfied that D.A.M. and A.M., along with their extended families, provide excellent parenting and support to C. when that she is in their care. It is, as they described, a team effort. That said, there is also no doubt that D.A.M. is unable to spend as much one-on-one time with C. as C.J.B. can.

[46] The judge also recognized the importance of A.M. in C.'s life:

> [123] C. has had the benefit of A.M.'s involvement in her life and the loving support she has provided. Her family has, likewise, been loving and supportive of C. This is a significant factor to be considered.

[47] From his decision, it is plain that the judge was well aware that C.'s grandparents on both sides, as well as A.M.'s mother, have been positively

involved with C. But in his "Analysis" section, he does not elaborate and does not describe the importance of these relationships to C., nor the consequences of their loss or diminution as a result of his decision. It is obvious that these relationships can best be encouraged and nurtured in Pictou where all these people live.

Section 18(6)(i) – the ability of each person to communicate and cooperate on issues affecting the child:

[48] Again, the judge's finding here praises both parents and indicates no preference for one over the other:

> [139] I am satisfied that the parents have demonstrated an ability to communicate and cooperate on issues concerning C. and have demonstrated that a joint custody arrangement is appropriate and in C.'s best interest.

Section 18(H)(4) – describes the criteria which must be considered in determining the best interests of the child in the context of an application to move:

[49] Section 18(H)(4)(b) of the *Act* requires the Court to consider the reasons for the relocation. This is what the judge said:

> [130] I am directed to consider the reasons for relocation. Normally, such consideration arises in a circumstance where a parent resides in Nova Scotia and wishes to relocate with the child elsewhere. In this circumstance, C.J.B. already resides in Toronto, has for some time and wishes to relocate C. there. Therefore, the reasons for relocation really focus on two issues.
>
> [131] First, I am satisfied that C.J.B. has good and substantial reasons for having relocated for education and for the establishment and continuation of her career as a midwife. There are almost no opportunities for her to practice in Nova Scotia and she already has a substantial practice in Toronto.
>
> [132] Second, the reasons for C.'s relocation, which are contained elsewhere in the evidence and in this analysis, focus on the advantages to C. in living with her mother in Toronto. I am satisfied that those reasons are material and I have considered them carefully.

[50] The judge begins with the reasons for relocation from the "point of view" of C.J.B.'s job and home because she has now finished her studies and has a home and work in Toronto and wants C. to join her there. The judge was satisfied that it would be difficult for C.J.B. to find comparable work in Nova Scotia. He describes the second reason or reasons for C.'s relocation more cryptically. They "are contained elsewhere in the evidence and in this analysis, [and] focus on the

advantages to C. in living with her mother in Toronto." The judge never clearly describes those advantages anywhere in his decision. He does quote C.J.B.'s description of the "many opportunities" in Toronto:

> [36] C.J.B. extolled the many opportunities for C. in Toronto including cultural activities and events, parks and museums, farmer's markets and many others.

But he recognizes that there are advantages to living in either place. He found:

> [124] There are substantial differences in the opportunities offered in both communities. In Nova Scotia, C. has benefit of a slower pace of life, involvement in 4-H and other typically rural activities, friends and family that she spends time with and a school that she is familiar with. In Toronto, she has access to different friends, activities, cultural exposures and a far more diverse community, as well as many services and activities that are unavailable to her in Nova Scotia.

[51] But earlier he had also said:

> [121] . . . By all accounts she is doing well at school, has friends in both communities, enjoys the lifestyles and opportunities offered both in a rural and urban setting and has benefited by those experiences.

This does not suggest one place is better than the other.

[52] Apart from the generic description summarized by the judge in ¶ 36 of his decision, the judge does not say what the "many services and activities unavailable to [C.] in Nova Scotia" are.

[53] It is hard to see how the hypothetical advantages of Toronto outweigh the real and established advantages of Pictou County. In any event, the judge does not express a clear preference for one over the other. He seems to say that both are good and are being experienced by C. now.

Section 18(H)(4)(c) – the effect on the child of changed parenting time and contact time due to relocation:

[54] Here, the judge does describe the advantage of enhanced time with her mother in Toronto compared to time with her father in Pictou:

> [127] It is also relevant that, now that C.J.B. has completed her education and is practicing as a midwife, there is a difference in the time each parent has available to spend with and parent C. C.J.B. has a very flexible and generous amount of time away from her profession throughout the year and, when on-call, substantial

> time available to her as well. D.A.M.'s employment is more structured and traditional which reduces the amount of time he has available to spend with C. This is not to criticize him but it is important to recognize that at this stage of C.'s life, there is a significant difference in the amount of time each of the parents has available for her.

[55] But the comparison should not end with contrasting work schedules that favour time with one parent. The advantage of this increased time with one should be set against the loss of any time with the other.

Section 18(H)(4)(d) – effect on child of removal from family, school and community:

[56] Apart from the advantage that C. will spend time with her mother, the judge dismisses this criterion in passing:

> [133] I have also considered the effect on C. of a change in the parenting arrangement and contact time with her extended family if she relocates. I do not minimize the impact this will have on her but in a properly structured order, she will be able to maintain a strong and meaningful relationship with her family in Nova Scotia. She already has relationships and friendships in Toronto, has been involved in in the community there and in activities with her mother. Thus, the transition, if permitted, would be simpler and less traumatic than for a child moving to a new community with which she has no familiarity or connection.

[57] Other than saying he has considered the effect of the changes, the judge says nothing more about it. He certainly does not describe it. He says nothing about the loss of C.'s school or community. He optimistically hopes that some of these relationships will be salvaged by an "appropriately structured order". This is not the balanced analysis that the law requires.

Section 18(H)(4) – appropriateness of changing the parenting arrangements:

[58] Again, the judge does not explicitly address this criterion but, to repeat, says:

> [141] C. has reached a new stage in her life and, considering all the evidence and circumstances, I am satisfied that it is in her best interests that she spends the next stage of her life in her mother's primary care. She will have the advantage of significant parenting time with C.J.B., whose career permits that that luxury, and she will have the experience of living in a diverse and vibrant community while returning regularly to Nova Scotia to take advantage of time with her family here and the more tranquil and rural life in Nova Scotia. She will have the benefit of the guidance and care of her mother as she moves through puberty into the next

> stage of her development and will be exposed to and learn from her mother's experience in the LGBTQ+ community while maintaining a strong connection to the more traditional life she has experienced and will experience in rural Nova Scotia with her father, step mother and extended family.

[59] Here, the judge notes the advantage of spending more time with C.J.B., but, again, makes no mention of the correlative loss to C.—time with her father, extended family, friends and community. He speaks again of a "diverse and vibrant community" in Toronto, contrasting Nova Scotia as "more tranquil". But he does not say one is better than the other. Nor does he say why C. cannot enjoy the benefits of Toronto's more urban culture under the existing shared parenting arrangement.

[60] As for the statement that "it is in [C.'s] best interests that she spends the next stage of her life in her mother's primary care", D.A.M. says this shows an unwarranted preference for same-sex parenting during puberty—so presumably teenage boys should reside with their fathers. C.J.B. responds that this is not what the judge meant. Rather, he was satisfied that C.J.B. could better parent C. at this time. He did not say that.

[61] Two issues arose in the evidence. C.J.B. expressed concern about body image with respect to the use of dolls, and C.'s first encounter with puberty. The judge said:

> [55] . . . D.A.M. and A.M. have a much more traditional view of parenting, including how to guide C. through this significant transition in her life. C.J.B. has a much broader view of appropriate parenting for a young woman in puberty and has views that go beyond the pragmatic. Each approach is valid. Each is important. . . .

[62] With respect to the use of Barbie dolls, the judge commented:

> [85] . . . This is another example of two different perspectives, one being a more traditional view of dolls, the other being a more socially and politically sensitive position. I find that each is valid but different. . . .

[63] Later, he summarized:

> [126] It is also material that C. has had [the] benefit of a more traditional perspective on issues such as puberty and toys such as Barbie dolls through her father and his wife as well as a more politically and socially sensitive perspective on the same issues through her mother. Each has its own validity and C. should

> have an opportunity to understand and experience each perspective in the next stage of her life.

[64] The judge notes the differences in approach, but does not find one better than the other. Moreover, there is no suggestion that either of these approaches is exclusive. Each parent has the opportunity during their time with C. to counsel her as they think appropriate. Since, as the judge found, neither approach is wrong, it is hard to see how it could be in the interests of C. to change the current parenting arrangement to accommodate something that is accomplished in the existing parenting arrangement.

[65] Most importantly, the judge does not explain why the advantages of both approaches—which he notes—could not be preserved. C. could remain in Nova Scotia, but live with her mother every third week in the home of C.J.B.'s mother, as alternatively proposed by D.A.M. in his trial submissions. This arrangement had worked for past parenting time with C.J.B.

[66] The evidence is that C. already has the benefit of her mother's advice and guidance. She has had the benefit of involvement in the LGBTQ+ community with her mother in Toronto and has attended summer camps there for children of LGBTQ+ parents. C. does not need the disruption of a drastic change in the circumstances of her life to enjoy the benefits of these exposures.

Section 18(H)(4) – compliance with previous court orders:

[67] This is not a factor, as the judge noted:

> [134] I note that there had been some compliance issues with the previous order but by and large they were resolved through reasonable negotiation and settlement between the parties. As noted earlier, these challenges regarding joint decision-making, parenting time and related issues are significant to the parties but not at all unusual in a parenting arrangement such as this. ***I find that each parent has reasonably complied with the previous order***, with a few exceptions that have been resolved or are not material to the outcome of this decision.
>
> [Emphasis added]

Section 18(H)(4)(h) – additional expenses:

[68] The judge observes that C.J.B.'s enhanced financial position permits travel:

> [129] I have considered that C.'s extended family on both sides reside in Nova Scotia. I have also considered that C.J.B. now has the financial means to visit

> with C. in Nova Scotia and, in an appropriately structured order, C. will have opportunities to spend extended time in Nova Scotia as well. Thus, these relationships can be maintained if she were permitted to relocate to Toronto.

[69] Correspondingly, the judge notes:

> [135] It is also relevant that if C.'s relocation to Toronto is permitted, there will be considerable expenses for C. to exercise parenting time with her father, stepmother and her extended family in Nova Scotia. This, however, is not different than the current arrangement where substantial costs are incurred already. With an appropriate child support order, such costs can be mitigated and managed appropriately.

[70] In his order, the judge made no allowance for D.A.M.'s substantial travel and visitation costs. The judge's equation of parental costs of travel and visitation is incorrect. When C.J.B. visits Nova Scotia she and C. can stay with her mother. D.A.M. has no such accommodation in Toronto. The judge equates foregone support payments from D.A.M. with the increased costs of travel for him. The judge provides no justification for this equation, and, on the record, none is apparent.

[71] As previously described, C.J.B. is in a better position to travel because of her work schedule, personal circumstances and superior income than is D.A.M. The unavoidable conclusion is the judge's order dramatically reduces C.'s contact with her father and extended family in Nova Scotia because it removes her from a school and a community with which she is familiar and in which she has thrived, and replaces that with enhanced contact with her mother and the hope of developing a good community in Toronto. In light of the statutory burden and the absence of clear findings to sustain a change, it is hard to see how the latter trumps the former in considering C.'s best interests.

Section 18(8) - maximum contact:

[72] D.A.M. says the judge ignored this principle.

[73] When assessing a child's best interests, the *Act* requires maximum contact with each parent. Section 18(8) says:

> In making an order concerning custody, parenting arrangements or parenting time in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child . . .

[74] The principle is conditioned by the child's "best interests". Contact must be consistent with those interests. In this case, the judge's order drastically reduces C.'s time with her father and substantially increases her time with her mother. But this stark contrast could be avoided. C.'s time with her mother could be increased and only moderately reduced to her father if the Court had considered the option of her living with her mother every third week as both her mother's finances and schedule permit.

[75] D.A.M. complains the judge ignored the "maximum contact" factor in his analysis. We agree. Other than mentioning it in his "Law" section as a criterion to be considered, the principle disappears and is unmentioned in the judge's analysis. In our view, it was an error of law for the judge to ignore this principle. The decision substantially violates it, without serving C.'s best interests.

Inadequacy of reasons:

[76] D.A.M. says the judge did not adequately explain himself. In view of our decision on other grounds, we need not delve deeply into this argument. We make two observations. To meet a submission that reasons are inadequate with a plea that they are implied in a "nuanced" decision is of little help to a reviewing court. Key findings should be explicit with clear explanations supporting them.

[77] During oral argument, C.J.B. suggested that the judge wrote a "gentle" decision, rather than be "scathing" about D.A.M. There is nothing in the record that would justify casting such aspersions on either parent. Despite inevitable friction, they have been excellent parents to C. and largely considerate to one another. That should be praised and will hopefully endure.

Another alternative:

[78] Cases like this, in which the parents enjoy a successful shared parenting arrangement, should not be lightly disturbed. Nor is their alteration a zero-sum game in which one parent "wins" and the other "loses". Rather, the goal is to ensure a "win-win" for the child. In this case, an alternative was obvious and offered. And the parties had more or less applied it since C.J.B. began working in late 2016. While we agree with C.J.B. that a judge is not required to consider every hypothetical parenting arrangement, judges are required to consider any viable options argued and supported in the evidence.

[79] It is plain that D.A.M. has neither the time nor the money to travel to Toronto frequently. He earns substantially less than C.J.B. He has nowhere to live in Toronto. He does not have the liberal time off that C.J.B. does. Despite the judge's optimism that "a properly structured order . . . will be able to maintain a strong and meaningful relationship with her family", he does not explain how that could be done apart from holidays. The "relationships" would be confined to phone calls and Skyping.

[80] The judge says nothing about C.'s loss of friends, her school, and the very strong extended family relationships that he earlier recognized. Moreover, he does nothing to consider the possible alternatives which would both substantially increase C.J.B.'s contact with C. and diminish or eliminate the deleterious effects of cutting C. off from her school, community, and extended family. The alternative is to permit C. to reside with her mother in the maternal grandparent's home every third week or as otherwise agreed when C.J.B. has her third week off.

[81] On the evidence, the cost of travel to Nova Scotia for C.J.B. has been anywhere from $200 to $500. She has a place to stay. She enjoys an income substantially higher than D.A.M. She does not have to pay any child support. The value of that obligation was estimated by counsel for the appellant during argument at about $650 per month. This is an arrangement that has worked for both parents and, more importantly, maximized contact for C. with school, friends and extended family. But the judge did not consider it. This is the unbalanced analysis of which D.A.M. complains, and the law eschews.

Conclusion:

[82] We must decide whether to send this matter back for rehearing before a different family court judge or make an order ourselves. We consider it in the best interests of the child to make an order. There is a full record before us. A rehearing could involve as much as a year's delay. If we make an order now, C. can return to the home, school and community she knows with minimum disruption.

[83] Judge Daley's order will be set aside. During the school year, C. will reside primarily with her father.

[84] C. may stay with her mother every third week or as otherwise may be agreed, in Pictou County, through the school year.

[85] During the summer school break, C. will reside with C.J.B. in Toronto or as C.J.B. may decide, provided that C. has three weeks' parenting time with her father in the summer or as the parties may agree.

[86] C.J.B. will have parenting time with C. for the school spring break each year and for the school study break, if C.'s school has one.

[87] At Christmas, C.J.B. will have C. with her for parenting time in the first half of Christmas break in odd numbered years and D.A.M. will have C. with him for parenting time for the first half of Christmas break in even numbered years. The first part of Christmas break will conclude on December 27th.

[88] During the school year, in addition to the one week in three in which C. may reside with her mother, C.J.B. shall be entitled to parenting time with C. for one additional weekend each month. It may include a long weekend.

[89] Provided C. misses no school, unless otherwise agreed, C.J.B. may exercise her parenting time with C. in Nova Scotia or elsewhere at her discretion.

[90] The travel arrangements described in ¶ 146, 147 and 148 of the judge's decision are confirmed.

[91] Our decision decreases parenting time for C.J.B. and increases it for D.A.M. But taking into account each party's income and parenting time, C.J.B. would have to pay some child support to D.A.M. In lieu of any child support, C.J.B. will be responsible for her own travel to and from and within Nova Scotia to exercise her parenting time with C. D.A.M. shall be responsible for the cost of one round-trip flight for C. to and from Toronto in each calendar year. C.J.B. shall be responsible for the cost of any other round-trip flights to and from Nova Scotia in exercising her parenting time with C.

[92] Costs ordered by Judge Daley are set aside, and, if they have been paid, shall be repaid to D.A.M., who will have costs of $2,500, inclusive of disbursements, on the appeal, and with respect to the stay motion.

Hamilton, J.A.

Farrar, J.A.

Bryson, J.A.