NOVA SCOTIA COURT OF APPEAL
Citation: *L.C. v. K.T.*, 2018 NSCA 92

Date: 20181123
Docket: CA 475149
Registry: Halifax

Between:

L.C.

Appellant

v.

K.T. and S.H.

Respondents

Judge:	The Honourable Justice Linda Lee Oland
Appeal Heard:	October 1, in Halifax, Nova Scotia
Subject:	*Parenting and Support Act*, s. 18 – Contact Time – Application for Leave – Costs – *Judicature Act* – Civil Procedure Rule 78.08 – Amending Court Orders
Summary:	For years, K.T. and her young son had substantial contact with L.C. When the Department of Community Services (the "Agency") required K.T and her son to leave where they were living, K.T. proposed a placement for the two of them with L.C. The Agency obtained a six month supervision order to that effect. Within three weeks, L.C. asked K.T. to leave. After K.T. and her son were reunited, K.T. refused L.C. any contact with him. L.T. applied for leave and, if granted, contact time with the boy. The judge held that since there was significant conflict between L.C. and K.T., it was not in the child's best interests that his relationship with L.C. continue unless his mother decides that it would benefit him. L.C. appeals.

Issues:

Whether the judge erred:

(a) by not considering the principle that deference should only be afforded to parents whose decisions are reasonable;

(b) by not considering the best interests of the child and by giving inadequate reasons as to how her decision was in the child's best interests;

(c) by failing to consider or misapprehending relevant evidence; and

(d) by impermissibly using the Agency's case notes.

Result:

Appeal dismissed with costs. The omission of an express finding that the parent's refusal to allow contact time was reasonable did not constitute error. In deciding the best interests of the child, the judge considered most of the statutory factors and the criteria in the case law, and conducted a proper balancing exercise. That she did not specifically refer to certain evidence does not mean that it was not considered.

Although the judge promised not to consider information in the Agency's case notes unrelated to the questioning of a witness, it is apparent that she did so. However, her comments either did not form part of her reasoning, or were not used to determine credibility, or were irrelevant.

Although the successful party had asked for costs, the judge failed to make any order on costs. Since it had not received any application for leave to appeal as to costs only or a cross-appeal which included an appeal as to costs, this Court has no jurisdiction to award costs in relation to the leave application. K.T. may wish to ask the Court below for an amendment to the order to include an order as to costs, pursuant to Civil Procedure Rule 78.08.

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Respondents

Judges:	Bryson, Oland and Scanlan JJ.A.
Appeal Heard:	Monday, October 1, 2018 in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Oland, J.A.; Bryson and Scanlan, JJ.A. concurring
Counsel:	Judith A. Schoen, for the appellant K.T., respondent in person S.H., respondent in person

Reasons for judgment:

[1] L.C. and K.T. had a longstanding, positive relationship. That changed. Afterwards K.T. refused to allow L.C. contact time with her son ("the child"), whom L.C. has known since he was born.

[2] L.C. applied for leave and, if granted, contact time pursuant to s. 18 of the *Parenting and Support Act* (formerly the *Maintenance and Support Act*), R.S.N.S. 1989, c. 160 (the "*Act*"). She wanted the child in her care one weekend a month, on Boxing Day and one day after, and two weeks in the summer. She appeals to this Court from the dismissal of her applications.

[3] The child is now ten years old. Except for a short period in 2016 when he was at the appellant's home, he has lived with his mother. His father, S.H., had not been a constant presence in his life. K.T. and S.H. are named as respondents in this appeal. Both appeared at the hearing of the appeal and represented themselves. However, references to the "respondent" in my decision mean only K.T.

[4] The appellant and the respondent met through L.C.'s daughter A.C., before the child was born. There is no question that K.T., her son and L.C. had substantial contact over the years. For example, the appellant took care of the child from time to time, at his mother's request. In 2014, following her separation from her husband, J.S., K.T. and her son stayed at L.C.'s for a week. While their testimony differed, it is clear that several times the two visited the appellant over the holidays, and the child was occasionally permitted to join gatherings of L.C.'s family. He called the appellant "Grammie". K.T. herself described L.C. before their rift as part of her "support system," the people she trusted the most and thought were there for her.

[5] In 2015 the respondent was living with J.K. and the relationship became unsafe. The Department of Community Services (the "Agency") required that she and her son move out of the home they were sharing with him. K.T., who wanted to ensure that she and her son stayed together, turned to L.C. With the appellant's agreement, she put forward L.C.'s name as a potential placement for her and her son. The Agency obtained a supervision order whereby they would live with the appellant for six months beginning in February 2016.

[6] The arrangement didn't last three weeks after they moved in. The appellant and the respondent had different parenting styles. According to the mother, the appellant made it terribly difficult for her to parent her son, as L.C. continually interjected and completely disregarded her views with respect to feeding, parenting and disciplining him. The respondent felt undermined in front of her son. The appellant agreed that they had different opinions when it came to the boy's well-being, and acknowledged that they had issues about some parenting matters. She took the position that the Agency had made her responsible for the child, so decisions regarding his care were her responsibility, not his mother's.

[7] One of the serious points of contention was the appellant's refusal to allow the child to visit his father, S.H., in Cape Breton during March Break of 2016 as the mother wished. The boy had visited his father and his father's family the previous March Break, and for a few weeks the summer of 2014. The appellant knew that the child had gone to Cape Breton to spend time with his father in the past. However, she didn't know S.H., had met him only very briefly twice, and felt that that was her decision to make.

[8] L.C. had her daughter A.C. tell K.T. that she was no longer permitted into her home. When the respondent returned there around 10 pm that February evening, the appellant told her that she couldn't come in. They argued at the door. L.C. called the police. They escorted K.T. inside so she could collect her belongings before she left. Under cross-examination, the appellant agreed that the respondent didn't have a great relationship with her own family, it might not have been an option for K.T. to ask them to take her in, and J.K. wasn't an option either. She said that she never thought of where K.T. would go that night.

[9] K.T. felt that the appellant, who was supposed to be part of her support system, had turned her back on her. After her son returned to K.T. that August, she kept him from any contact with L.C. This refusal led to the appellant's application for leave to obtain contact time.

The Statutory Framework

[10] When a person other than a parent, guardian or grandparent applies for contact time, leave must be obtained from the court (s. 18(2)(a) of the *Act*). The court is to give "paramount consideration to the best interests of the child" in any proceeding concerning contact time (s. 18(5)).

[11] Section 18(6) sets out a non-exhaustive list of factors to be considered in determining those best interests:

> (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> (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;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
>
> (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; and
>
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
>
> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[12] Case law such as *Brooks v. Joudrey*, 2011 NSFC 5 at ¶54 – 55, and *MacLeod v. Theriault*, 2008 NSCA 16 at ¶17 – 24 provide additional factors relevant to determining leave applications for third party access.

The Decision

[13] Justice Cindy Cormier of the Nova Scotia Supreme Court (Family Division) heard the application over two days. She had affidavit evidence from the appellant; her daughter, A.C.; her sister, K.C.; and her niece, A.W.; and from the respondent and S.H. M.C., a social worker with the Agency; A.C.; K.C.; A.W.; the appellant; the respondent; and S.H. testified. Counsel for each of the appellant and respondent, and S.H. on his own behalf, made submissions.

[14] A week later, the judge gave an oral decision, which is unreported. She recognized that L.C. loves the child. However, she found that since there was significant conflict between the appellant and the respondent, it was not in the child's best interests that his relationship with the appellant continue unless his mother decides that it would benefit him. Later, I will review her decision in greater detail.

Issues:

[15] The appellant sets out these grounds of appeal:

1. The judge erred in giving no consideration to the principle that deference should only be afforded to parents whose decisions are reasonable, resulting in an incomplete analysis;
2. She erred in law and fact in not giving consideration to the best interests of the child and/or inadequate reasons as to how her decision was in the child's best interests;
3. She erred in law and fact in failing to consider or misapprehending relevant evidence with respect to standing and contact time; and
4. She erred in law in failing to allow the appellant to review file material prior to cross examination of a witness, namely M.C., the Agency social worker, resulting in undue weight being given to the respondent's evidence.

Standard of Review

[16] It is well-established that trial judges deciding custody and access cases are entitled to considerable deference. The grounds for appellate intervention are narrow. In an often-quoted passage from *Children's Aid Society of Cape Breton-Victoria v. A.M.*, 2005 NSCA 58, Cromwell, J.A. for the Court stated:

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

See also *D.A.M. v. C.J.B.*, 2017 NSCA 91 at ¶28 where this Court reiterated that in such cases, appellate intervention is not warranted unless the judge made an error in principle or significantly misapprehended the evidence, or the decision is clearly wrong.

The Reasonableness of the Decision

[17] According to the appellant, the judge erred by not expressly finding that the respondent's decision refusing the appellant contact time was reasonable. She argues that in *Simmons v. Simmons*, 2016 NSCA 86, this Court accepted that deference to parental views is only accorded when the parent's decision is reasonable. In submitting that the judge failed to examine the reasonableness of the respondent's decision, the appellant emphasizes the respondent's refusal to provide her with her son's social insurance number so she could establish an RESP for him, regardless of the outcome of her application for leave and contact time. The respondent testified that she believed that what she was saving for her son's education will be sufficient.

[18] With respect, the appellant's argument is based on an incomplete or incorrect reading of *Simmons*. In that decision, this Court reviewed the different judicial approaches to contact with non-parents, namely the parental autonomy approach and the pro-contact approach. In doing so, it considered the Ontario

jurisprudence, including *Chapman v. Chapman*, [2001] O.J. No. 705 (ONCA) which supported the parental autonomy approach. The appellant relies on this passage from *Simmons*:

> [39] A review of the jurisprudence shows that while courts frequently cite *Chapman* as their legal starting point in a grandparent access case, they often distinguish it and order access, or interpret it as suggested in *McLaughlin v. Huehn*, 2004 ONCJ 426. In that case, McSorley, J. interpreted *Chapman* to mean that courts are to show deference to parental decisions where such decisions are reasonable. The judge wrote:
>
> > 27 The case of *Chapman v. Chapman* and *Chapman* does not stand for the proposition that the wishes of a parent on the issue of access by a member of the extended family should take precedence over the factors in section 24 of the Act. It is but one factor that must be considered. It is always important to defer to the decisions of parents regarding their children. <u>But deference is only accorded when those decisions are reasonable. When the decision to end all contact between a child who has a positive relationship with grandparents, aunts, uncles, cousins and great aunts and grandmothers is made entirely because of hurt feelings from 3 to 5 years ago, then the decision is not reasonable and is no longer entitled to deference.</u>
>
> [Emphasis added]

[19] In *Simmons*, this Court did not affirm the approach in *Chapman* and the Ontario cases. The paragraph the appellant relies upon was simply part of its review of that jurisprudence. In the very next paragraph, this Court stated:

> [40] In making this observation, I am not saying that our courts should necessarily follow the same analytical path that the Ontario courts have developed. I am simply noting that *Chapman* has not had the effect of making the parental autonomy model the singular way to proceed in grandparent access cases. . . .

[20] Here the judge correctly set out the law when she stated:

> So the paramount consideration is his best interests. Parental decisions and views are entitled to a level of deference. There's no preferential judicial approach to determining whether grandparent access is in the best interests of the child. The approach depends on the context.

[21] A parent's decision which is unreasonable is not likely to be upheld, but one which is reasonable may still not be in the best interests of the child.

Reasonableness can be a factor in determining the best interests of the child, but it may not be decisive, and there is no obligation on a judge to expressly refer to it in her analysis.

[22] The appellant also submits that the judge failed to caution herself that a parent may not be objective. She points to *Doncaster v. Field*, 2014 NSSC 181:

> [50] It is also important to keep in mind that the custodial parent may have difficulty being completely objective, particularly where there is a highly stressful family dynamic at play. …
>
> …
>
> [52] Because of my concerns about Ms. Field's ability to be objective I do not believe that her opinion about the best interests of the children should be determinative. The purpose of court review is to provide an independent, evidence based analysis of that question.

[23] The judge in the present case did not, as the appellant argued in her factum, conclude that the respondent mother's wishes "were the end of the inquiry." The fact that the judge did not explicitly refer to reasonableness or objectivity does not mean that these were not taken into account. It can be inferred from her reasons that she was not concerned about the objectivity of the respondent in not permitting the appellant to have contact with her son. Rather, it is clear that she found that the respondent's decision, which stemmed from conflict created by the appellant herself, was understandable. In particular, the judge noted:

- "[L.C.] and [K.T.] do not have a healthy relationship";
- "[L.C.] … stepped over the line when she started telling [K.T.] how to parent the child";
- while L.C. had "every right to ask [K.T.] to leave the home", in these circumstances that "was an unacceptable result";
- L.C. has denied the child from seeing his father in the past; and
- "there is no ability to cooperate, there is no ability to respect boundaries between [L.C.] and [K.T.]"

[24] In the specific dynamic before her, the judge considered the respondent's decision to refuse the appellant contact time to be a reasonable one. It is apparent that, in her view, the appellant's offer of financial support for the child's future education was insufficient to offset the negative consequences that would flow

from her ordering contact time with the appellant where the parties had not been able to co-operate and their previous relationship had disintegrated.

[25] I would dismiss this ground of appeal.

The Best Interests of the Child and Consideration of the Evidence

[26] I will address the second and third grounds of appeal together. The appellant argues that the judge in her decision did not refer to most of the factors set out in s. 18(6) of the *Act* and several in the jurisprudence, and that she failed to refer to certain evidence. She faults the judge's evaluation of the evidence and challenges the sufficiency of her reasons as to how her decision was in the child's best interests. According to the appellant, the judge failed to conduct the appropriate balancing exercise and so erred in law.

[27] The judge's decision is not a model of clarity or analysis. It began with a recounting of the respondent's several relationships and struggles, and described K.T. as having provided for the child as best she could over the years. The judge then spoke at some length of concerns that arose from her reading of the Agency records. She criticized advice the Agency had given the respondent, and how the Agency had dealt or had not dealt with certain matters, although these matters were not before her.

[28] Only then did the judge address the issue of whether leave should be granted. In doing so, she did not set out or describe the factors in the *Act* or in case law such as *MacLeod* and *Brooks* to be considered, or apply the evidence to them in any organized fashion. Rather, statements pertaining to the factors and the evidence were scattered throughout the entire decision. However, a detailed review of her reasons shows that she was aware of the *Act* and the relevant jurisprudence, and neither erred by failing to consider the best interests of the child nor by neglecting to conduct the proper balancing exercise.

[29] In considering whether to grant leave, the judge specifically referred, among others, to *MacLeod* and to *Brooks*. With regard to the case law, she stated:

> And they talk about the "presumptive deference to parental autonomy" and "greater inclination towards contact with non-parent third parties, particularly grandparents." It "requires a weighing of all extrinsic factors in an individual case prior to a determination of the issue." Granting the leave needs to be "likely to benefit the welfare of the child."

> If the applicant were a stranger to the child, normally the result would follow with the applicant not having an existing relationship or sufficient and would be hard pressed to convince a court that there is likely to be a benefit to the child.
>
> [L.C.] is not a stranger to the child.
>
> [Emphasis added]

[30] As well as speaking of the need to balance the relevant factors in favour of and against granting the relief sought, the judge referred to s. 18 of the *Act* and the paramount consideration being the best interests of the child, in the following portion of her reasons:

> . . . there is no single test to be applied. I've looked at *Gray v. Gray*, *MacLeod v. Theriault*. I've looked at the factors. Is the child emotionally attached or bonded to the leave applicant? Is there sufficient interest or connection or obvious benefit to the child?
>
> I find that there isn't because I think that [the child] would be placed in the middle of conflict once again. Conflict has been a part of his life for several years now and I feel that it would be detrimental to him to have his mother's wishes overruled at this stage.
>
> . . .
>
> So the paramount consideration is his best interests. Parental decisions and views are entitled to a level of deference. There's no preferential judicial approach to determining whether grandparent access is in the best interests of the child. The approach depends on the context.
>
> I've reviewed section 18, and I find that there is no current evidence before me that suggests [K.T.] is not providing for [the child's] needs. I'm concerned about [the child] developing and continuing a positive relationship with his father, which [L.C.] denied, just said, "I don't know him and he can't see him."
>
> [K.T.] has been the primary caregiver since his birth. Once [the child] had the benefit of spending time with his family members whom he is very comfortable and familiar with. No evidence he's still comfortable given the breakdown with [K.T.] She's always been his primary caregiver.
>
> He participated and was cared for by [L.C.] because his mother was encouraging it at the time. It's not appropriate for a nine-year-old to be asked if he'd like to spend time with a family his mother no longer has a relationship with and attend family events with them. The relationship was severed after [L.C.] challenged [K.T.'s] parenting style, that's where that started, and her decision or her request that the child not visit his father.
>
> I believe it would interfere with future plans if [K.T.] was to re-partner, have another child, would interfere with his father having exercising his access.

> This is not his extended family. He has two parents. One parent does not see him enough as it is. It's not going to help the existing problem, [K.T.] possibly not encouraging contact with [S.H.], by compounding the issue with [L.C.'s] involvement.
>
> I find that [L.C.], although as well I recognize she has affection for the child, I don't believe it's in his best interests to continue that relationship unless [K.T.] decides that that is something that would benefit him.
>
> There is no ability to cooperate, there is no ability to respect boundaries between the two. I don't have any current evidence of continuing family violence.
>
> …
>
> So I'm going to conclude by saying I find that, given the significant conflict between [L.C.] and her family and [K.T.], it is in [the child's] best interests to have the court consider what, if any, problems there are with respect to his right to contact with his father, [S.H.], and not allow [L.C.], who is a legal stranger to [the child], to challenge [K.T.'s] authority to seek support where she wishes, when she needs it.
>
> I am going to dismiss the application for leave and dismiss the application for access.
>
> [Emphasis added]

[31] After a careful and close examination of the whole of her decision, I am satisfied that the judge considered most of the factors in s. 18(6) of the *Act*, and many of the additional criteria set out in *Brooks*. The appellant submits that the judge did not address several of the *Brooks* criteria. However, the appellant did not do more than make a general assertion. She did not demonstrate how the judge failed to consider a relevant factor, or that any omission "gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence" in a manner that impacted her conclusion: *Van de Perre v. Edwards*, 2001 SCC 60 at ¶15; *D.A.M. v. C.J.B.*, 2017 NSCA 91 at ¶29; *B.A.J. v. J.S.V.*, 2018 NSCA 49 at ¶38.

[32] In the course of her decision, in regard to contact time with L.C., the judge stated: "I believe it would interfere with future plans if [K.T.] was to re-partner, have another child, would interfere with his father having exercising his access." The appellant argues that there was no evidence regarding these matters, and consequently the judge erred in law in making a finding without an evidentiary basis: *R. v. J.M.H.*, 2011 SCC 45 at ¶25.

[33] An examination of the record shows that while there was no direct evidence that court-ordered contact with L.C. would interfere with the child developing a

positive relationship with his father, there was evidence from which the judge could make that inference. It is undisputed that S.H. wanted the child to spend March Break of 2016 with him. Based on his participation in the hearing, the judge had found that S.H. was interested in being involved in his son's life. However, in the past the appellant had discouraged contact between father and son.

[34] There was no evidence regarding the respondent having more children or repartnering or how contact time with the appellant might interfere. However, it is apparent that the primary reason for the judge's decision was to avoid placing the child in the conflict between the appellant and the respondent. These comments were not an essential part of her reasoning in coming to her ultimate decision.

[35] The appellant then argues that the judge failed to refer to several facts which supported the importance of the stability that she and her family could provide for the child. Some of the matters which the appellant says were missing were actually addressed in the decision. For example, the judge observed that the boy had had several people in his life. She noted that the respondent's husband, J.S., had stood *in loco parentis* for several years and how disappointed the child was when J.S. did not remain involved with him, and that the respondent had been with J.K. who had been physically violent.

[36] The appellant is correct that the judge did not specifically refer to certain details concerning the upheaval in the child's life: the possibility identified by the respondent to the Agency that her son may have abandonment issues following J.S.'s departure; the fact that, before settling down, the child and his mother lived in several locations, including a shelter for women and children; and that after proceeding with charges against J.K., the respondent carried a GPS button for safety reasons. Most significant, in the appellant's estimation, was the judge's failure to even mention that the Agency thought it was in the child's best interests to maintain his relationship with the appellant.

[37] The fact that a judge does not recount every piece of evidence does not mean that all the evidence is not considered: *Miller v. Miller*, 2001 NSCA 31 at ¶35; *G.L. v. Children's Aid Society of Cape Breton-Victoria*, 2003 NSCA 112 at ¶18. My review of the decision shows that the judge was well aware that there had been turmoil in the child's life and appreciated how the appellant had provided for him.

[38] Agency social worker M.C.'s involvement with K.T. and her son ended in November 2016. She testified that the main rule the appellant was to follow while

the child was in her care was to ensure that the boy not be exposed to J.K. After the placement ended, more than once she had encouraged the respondent to continue her son's involvement with L.C., with whom he had a positive relationship because, in M.C.'s opinion, that would be in his best interests. She testified that while the Agency had had concerns about J.K., it had had none about K.T.'s ability to parent.

[39] Whether contact with the appellant is in the best interests of the child was for the judge to decide after reviewing and weighing all the evidence. The Agency's dated opinion could not be determinative. Even though she did not refer to it, it is apparent that the judge had understood the history of the placement and heard the social worker's evidence. In her decision, she commented:

> … And now, we're in a place where [the child] has been with his mom and he's been returned to his mom. The agency is involved. They're satisfied with her progress. They're satisfied with what she's doing. [K.T.] has a right to make decisions about her son.

[40] I would dismiss this ground of appeal.

The Agency's Case Notes

[41] As framed in the Notice of Appeal, this ground attacks the judge's refusal to allow the appellant to review the Agency's case notes prior to cross-examination of M.C. However, in written and oral argument, the appellant focuses on what she says was the judge's impermissible use of this material.

[42] Prior to the hearing, the judge issued an Order for Production of the Agency's case notes. She later decided that, since L.C. had not yet been granted leave, it would be inappropriate for her to access the entire record. Consequently, the appellant subpoenaed and questioned social worker M.C. to elicit certain information. At the hearing, the Agency's case notes were used to refresh M.C.'s memory. The appellant's counsel did not have them before or when examining that witness.

[43] The judge had a copy of the complete case notes, and promised several times that unless related to questions asked of the social worker, she would not consider the information in them. Later the judge allowed the appellant's counsel to take the original case notes in order to pull out the relevant parts. A copy of those parts was provided to the respondent.

[44] The appellant submits that, in reaching her decision, the judge relied on information in the Agency case notes that was not properly before her as it did not relate to M.C.'s testimony, and so made findings of fact without a proper evidentiary foundation. She impugns five findings or observations the judge made:

1. the respondent being told that a court date for a supervision order must be in five days;
2. what the child did on March Break of 2016;
3. J.K.'s "challenges";
4. the respondent being denied the ability to bring a support person to a conference; and
5. attributes of domestic violence victims and application of those attributes to the respondent.

[45] I will consider the first, second and fourth items together. The only evidence of what the child actually did during that March Break, of the respondent being informed that court dates for supervision orders must be in five days, and of the respondent being denied a support person at a conference is all found in the case notes that the judge implicitly rejected and promised not to consider. In my view, the judge only commented on these matters. If, as the appellant argues, the judge's comments actually constitute findings of fact, these are errors which would be obvious and palpable, and overriding in that they are "determinative in the assessment of the balance of probabilities with respect to that factual issue" (*Fralick v. Dauphinee,* 2003 NSCA 128 at ¶19).

[46] However, an error can be harmless if "it is clear that the appellant would inevitably fail even if the error or errors had not been made" (*Fralick* at ¶22). Since it is apparent from the judge's decision that the primary reason for her refusal to grant court-ordered contact with the child was to avoid placing him in a conflict between the appellant and the respondent, her words about March Break, court dates and support persons, even if constituting factual findings, were of no consequence in her assessment of the evidence and in reaching her conclusion.

[47] As to the third item, there was evidence outside the case notes before the judge that supported her comment. Under cross-examination, the respondent referred numerous times to J.K.'s "challenges" or violent behaviour.

[48] As to the fifth item, the appellant did not specifically identify what the judge said about attributes of domestic violence victims. In her reasons, the judge had made these comments about such victims:

> - [K.T.] was involved in a violent relationship. And any persons who have been involved or worked in the field of family violence know that there is a cycle of violence, that it's difficult for people to accept that they're a victim or a survivor. It's difficult for them to accept that the person they love turns on them… .
> - That [K.T.] took some time in being able to separate is not unusual and not unheard of. It's something we see in Family Court all the time.
> - And I'll comment as well about [K.T.] testifying. Women who are subject to family violence having to testify against their perpetrators and then, in essence, cause a significant difficult [*sic*] in that person's life, the perpetrator's life, and get them even angrier at them, that's a tall order, to ask somebody to do that. And you know, I would never base [K.T.'s] decision on whether or not she testifies, I would never make that a prerequisite for keeping her child. That is not what should be happening.

[49] These passages are found in the early part of the decision where the judge expressed her unhappiness with how the Agency handled K.T.'s file in several respects. They do not form part of her reasoning with respect to the issues before her, namely whether to grant leave to apply for contact time and, if so, whether to grant contact time and how much.

[50] Moreover, in making these comments, the judge was simply referring to her judicial experience. She did not draw upon it or upon any stereotypical assumptions about domestic violence victims to impermissibly reach any conclusion with regard to the respondent's credibility: see, for example, *R. v. Brame*, 2004 YKCA 13; *R. v. A.R.J.D.*, 2018 SCC 6 aff'g *R. v. A.R.J.D.*, 2017 ABCA 237; *R. v. J.L.*, 2018 ONCA 756 at ¶47. The central issues before the judge were whether leave should be granted and the best interests of the child, and not the credibility of either party or any witness.

[51] Finally, the judge's comment regarding the difficulty of domestic violence victims in testifying against their perpetrator is irrelevant, because K.T.'s evidence was that she did in fact plan to testify against J.K. in relation to charges of domestic violence.

[52] I reject the submission that, in making these comments, the judge made a reviewable error and would dismiss this ground of appeal.

Costs on the Leave Application

[53] In her pre-hearing letter brief to the judge, the respondent had asked for costs. However, the judge failed to make any order on costs.

[54] At the appeal hearing, the respondent asked this Court to award her costs for her success in the original proceeding. However, she had neither sought leave to appeal as to costs only, nor appealed costs as part of a cross-appeal. In these circumstances, this Court has no jurisdiction under the *Judicature Act*, R.S.N.S. 1989, c. 240 to grant the relief requested.

[55] After a final order has been made, a Court can correct or amend the order in certain circumstances. *Civil Procedure Rule* 78.08 provides:

> 78.08 A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> …
>
> [Emphasis added]

[56] In *Dawson v. Dawson*, 2012 NSSC 36, the Court issued a divorce order and a corollary relief order without having made a determination as to costs. A month and a half later, the successful party asked to be heard on costs. Warner, J. rejected the argument that the Court was *functus*, and found that *Rule* 78.08(b) provided authority to amend a previous order to address the issue of costs where costs had been requested pre-trial but were not adjudicated upon before the corollary relief order issued.

[57] See also *Sydney Cooperative Society Ltd. v. Cooper & Lybrand*, 2006 NSSC 276, where the original decision did not address the defendant's entitlement to costs. The Court found that the former version of *Rule* 78.08 authorized it to make a subsequent order on costs. In that case, the original oral decision was rendered on June 5, 2002, and the costs decision years later, on September 18, 2006.

[58] In both *Dawson* and *Sydney*, the key factor was that the party seeking costs had requested costs before trial, so it could not be said that there was any prejudice to the party against whom costs were to be awarded (*Dawson* at ¶6, 9–10; *Sydney* at ¶7).

[59] If she wishes, the respondent can ask the Nova Scotia Supreme Court (Family Division) to amend the Order dated March 21, 2018 pursuant to *Rule* 78.08 to include an order as to costs. Even if an amendment is granted, there is no guarantee that any costs in respect of the original proceeding will be awarded. That is a matter to be determined by that Court after hearing submissions.

Disposition

[60] I would dismiss the appeal, and award the respondent costs of $2,500 on the appeal.

Oland, J.A.

Concurred in:

Bryson, J.A.
Scanlan, J.A.