**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Titus v. Kynock*, 2022 NSCA 35

**Date:** 20220503
**Docket:** CA 508108
**Registry:** Halifax

**Between:**

Luke Gerry Titus

Appellant

v.

Carley Vernessa Kynock

Respondent

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| **Judge:** | The Honourable Justice Carole A. Beaton |
| **Appeal Heard:** | February 15, 2022, in Halifax, Nova Scotia |
| **Legislation:** | *Parenting and Support Act*, R.S.N.S. 1989, c. 160; ss. 18(5) – (8); ss. 18H(1); (3); (4) |
| **Cases Considered:** | *Titus v. Kynock*, 2021 NSCA 64; *D.A.M. v. C.J.B.*, 2017 NSCA 91; *Reid v. Faubert*, 2019 NSCA 42; *L.C. v. K.T.*, 2018 NSCA 92; *Boone v. Luedee*, 2018 NSCA 55; *Horbas v. Horbas*, 2020 MBCA 34; *Novak v. Novak*, 2020 NSCA 26; *R. v. Sheppard*, 2002 SCC 26; *McAleer v. Farnell*, 2009 NSCA 14; *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24; *Ward v. Murphy*, 2022 NSCA 20; *Foley v. Foley* (1993),124 N.S.R. (2d) 198; *Bourke v. Davis*, 2021 ONCA 97; *J.E.W. v. W.E.D.*, 2019 NSSC 141 |
| **Subject:** | Appeal; Family—child custody; Family—child custody—best interests test; Family—child custody—relocation; Family—mobility; *Parenting and Support Act* |
| **Summary:** | Both parents sought primary care of their child. The father planned to relocate from HRM to Stewiacke. The mother planned to relocate from HRM to Idaho. Each maintained |

their plan would serve the child's best interests. The judge determined it was in the child's best interests that the mother assume primary care, effectively approving the relocation of the child to Idaho. The father appeals the judge's decision.

**Issues:** (1) Did the judge err in her analysis and application of the best interests of the child test?
(2) Did the judge misapprehend the evidence?
(3) Did the judge err in not providing adequate reasons for her decision?
(4) Did the judge's decision demonstrate an apprehension of bias?

**Result:** The judge did not properly assess the best interests of the child. She did not engage in a proper balancing of the plans put forward by each parent. The judge focussed more on the impacts of the proposed plans in terms of their implications for the mother, not the child.

In light of the conclusions reached on the first issue, it is not necessary to consider the remaining grounds of appeal. Nonetheless, certain remarks made by the judge call into question whether the appellant received a fair hearing before the judge.

The appeal is allowed. The father sought a new hearing, which relief is granted. Costs of $3,000 are payable by the mother to the father.

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| | |
|---|---|
| **Judges:** | Bryson, Scanlan and Beaton JJ.A. |
| **Appeal Heard:** | February 15, 2022, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed with costs, per reasons for judgment of Beaton J.A.; Bryson and Scanlan JJ.A. concurring |
| **Counsel:** | Linda Tippett-Leary, for the appellant<br>Leigh Davis, for the respondent |

**Reasons for judgment:**

[1] The appellant Luke Gerry Titus and the respondent Carley Vernessa Kynock are the parents of nine-year-old [J.]. They have been engaged in litigation over parenting for much of [J.'s] young life. Mr. Titus now appeals a July 2021 oral decision ("the decision") of the Honourable Justice Cindy G. Cormier of the Supreme Court of Nova Scotia, Family Division ("the judge"). Mr. Titus objects to the judge having granted primary care of [J.] to Ms. Kynock, which permitted the child to relocate to the state of Idaho, USA where Ms. Kynock intended to join her husband following Justice Cormier's decision. For the reasons that follow, I would allow the appeal.

## Background of Proceedings in Family Division

[2] The parents' lengthy history of litigation was summarized in the stay application decision made following the filing of Mr. Titus' Notice of Appeal (*Titus v. Kynock*, 2021 NSCA 64). There, the Court described:

> [6] The parties first secured an interim order in November 2016; they were to share joint custody of J., who was to reside with each parent under an alternating week-about schedule. In August 2017 the court determined where the child would attend school. In February 2018, the parties were back before a judge following a series of efforts by counsel and a settlement conference judge to try to achieve a comprehensive consent parenting arrangement. Mr. Titus advised the court he was seeking primary care and residence of the child at the end of that school year. Other issues to be addressed were identified, including travel with J. outside of the country. [Footnote omitted]
>
> [7] April 12th, 2018 was the parties first appearance before Justice Cormier. At least 15 more would follow. Ms. Kynock told the judge she had spoken to a lawyer and did not want to continue to trial or get further legal advice. After some discussion, a detailed parenting plan was reached, providing that at the end of the school year, primary care of five-year-old J. would be with Mr. Titus and Ms. Kynock would have access every second weekend. The schedule for holidays and other times was also identified, as was travel. The matter was adjourned to May 11th, 2018 for a one-hour hearing on whether J. should be vaccinated, and in relation to financial support of the child.
>
> [8] On May 11th, 2018, the judge informed the parties she was uncomfortable with the parenting plan agreed to on April 12th, because she felt Ms. Kynock may have agreed to a resolution due to the stress of the situation. Mr. Titus' lawyer expressed concern that notwithstanding an agreement having been earlier reached,

> all issues were being raised again; she advised the judge she would be recommending her client secure new counsel.
>
> [9] By December 3rd, 2018, counsel for Ms. Kynock was asking that the issue of decision-making authority be heard immediately, on an interim basis. She also wanted the matter of parenting reviewed, along with communication, vaccinations, and child support. The judge was advised that in November Mr. Titus had arranged for J. to be vaccinated and have two teeth extracted, without Ms. Kynock's consent.
>
> [10] Following an [other] interim hearing on December 20th, the judge ordered Ms. Kynock to have primary care of J. and sole decision-making authority. Mr. Titus was given parenting time every second weekend. Neither party was to relocate with J. outside of Nova Scotia without the advance written agreement of the other party or order of the court.
>
> [11] Although the Running File indicates there were efforts over many months by counsel and court staff to obtain a Custody and Access Assessment commissioned by the court, inexplicably it never materialized.[1] By January 2020, efforts were underway to secure an assessor to prepare a Parental Capacity Assessment; trial was scheduled for July 2020. By mid-June 2020, COVID-19 had interrupted the assessment preparation and the July trial was adjourned. At the end of October 2020, the parties were advised by the judge the assessor was no longer available and a new one would have to be found. The parties were to decide on an assessor and advise the court.
>
> [12] By December 2020, the parties had not been able to find a new assessor. On December 21st, the judge advised counsel that upon reviewing the file, she did not feel the completion of any assessment was necessary.
>
> [13] The trial was conducted over five days in June 2021. Counsels' final oral submissions were made on July 12th, 2021, followed immediately by the judge's decision. It appears that custody and relocation were determined in lockstep. The judge did not review the history of the matter, but observed she was very familiar with the parties as their case had been before her over a number of years.

[3] The November 2016 interim shared parenting order continued after Ms. Kynock married a resident of Idaho in 2018. Following that, Mr. Titus acted as the *de facto* primary parent on several occasions when Ms. Kynock was in Idaho for extended periods of time.

[4] At a contested interim hearing in December 2018, a second interim order (issued February 2019) placed the child in Ms. Kynock's primary care in Nova

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[1] The reasons for the lack of an Assessment, not apparent to the Court at the stay hearing, were subsequently provided in information contained in the Appeal Book and counsels' facta.

Scotia, as she requested, and made her responsible for all major decisions about the child, pending a final hearing.[2] That order arose directly in response to Mr. Titus having arranged for a childhood inoculation and the removal of two of the child's teeth during his regular parenting time. It was apparent to both parties and the court that a final hearing would require consideration of time to be spent by [J.] in Idaho, either resident with Ms. Kynock and her husband, or during access periods there.

[5] At the five-day June 2021 hearing the judge had the evidence of each parent and various of their respective family members and friends. With the consent of both parties, the child's counsellor of over two years, Shireen Singer, testified as an "expert in the field of clinical social work with extensive experience in family therapy".

[6] Ms. Kynock asked the judge to award her primary care of [J.] in light of her intention to relocate, to reside with her husband and his family on their Idaho farm. She maintained that the strained and conflict-ridden history of her efforts to parent positively with Mr. Titus demonstrated she was better able to meet the child's needs. Her position was Mr. Titus had shown he was unable to make sound decisions concerning [J.'s] care. She argued it was in [J.'s] best interests to reside with her. Ms. Kynock proposed block access periods for Mr. Titus with the child during holidays and in summer.

[7] Mr. Titus urged the judge to find it contrary to the child's best interests to relocate to another country and be placed in wholly unfamiliar surroundings, among people unknown to the child. Mr. Titus maintained removing [J.] from meaningful and regular contact with him and the Nova Scotian extended family of both parents, to which [J.] was accustomed, was also detrimental to the child's best interests. Mr. Titus' plan also involved a relocation, as he was intending to move from Halifax Regional Municipality to a home he owned in the Stewiacke area, one with which the child was already familiar.

[8] The judge's decision granted Ms. Kynock primary care of [J.], with sole decision-making authority on all issues and the ability to travel with the child without Mr. Titus' consent. The judge directed [J.] was to continue in counselling. Mr. Titus was to have parenting time prior to the anticipated date of Ms. Kynock's

[2] I make no comment on the propriety of conducting a contested hearing to generate a second order of an interim nature, despite an earlier consent interim order, rather than proceeding to a final hearing.

relocation to Idaho on August 15, 2021.[3] Commencing in 2022, Mr. Titus would have block parenting time each summer, or in the alternative, during a portion of each summer and a portion of Christmas holidays. Mr. Titus would have weekly telephone access of one-half hour, plus any other time as initiated by the child. He was permitted to travel with the child during his parenting time. Owing to Mr. Titus' modest financial situation there was no child support payable, but he was required to finance the airfare for the child to travel to and from Nova Scotia for his parenting time.

## Issues

[9] Mr. Titus asserts multiple grounds of appeal, which I have reframed as follows:

1. Did the judge err in her analysis and application of the best interests of the child test?
2. Did the judge misapprehend the evidence?
3. Did the judge err in not providing adequate reasons for her decision?
4. Did the judge's decision demonstrate an apprehension of bias?

## Standard of Review

[10] By their nature, custody decisions are highly discretionary and entitled to deference by this Court. It is not the Court's task to replace its views of the evidence for those of the judge. The standard of review in such cases was explained by the Court in *D.A.M. v. C.J.B.*, 2017 NSCA 91:

> [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

[3] At the commencement of oral argument during the appeal hearing, counsel for Ms. Kynock confirmed she relocated to Idaho in November 2021.

> 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. . . .
>
> [Emphasis added]

See also *Reid v. Faubert*, 2019 NSCA 42 (para. 16); *L.C. v. K.T.*, 2018 NSCA 92 (para. 16); *Boone v. Luedee*, 2018 NSCA 55 (para. 25).

[11] As noted in *Horbas v. Horbas*, 2020 MBCA 34 (para. 25) the scope of appellate review in cases such as this is narrow, owing to the fact-driven nature of custody litigation and the discretion to be exercised by the judge.

[12] Similarly, as to Mr. Titus' assertion of the judge's misapprehension of evidence, a deferential scope of review was identified in *Novak v. Novak*, 2020 NSCA 26:

> [7] In the family law context the Supreme Court of Canada gave direction on the misapprehension of evidence in *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 9-16. This was succinctly summarized by the Prince Edward Island Court of Appeal in *O.(P.D.) v. W.(S.L.)*, 2009 PECA13 at paras. 38-40:
>
> > [38] In reviewing the decision of a trial judge involving custody, an appellate court is to employ a narrow scope of review. Because of its fact-based and discretionary nature, a trial judge must be given considerable deference by an appellate court when such a decision is reviewed. **The narrow scope of appellate review precludes an appellate court from delving into a custody case in the name of the best interests of a child where there is no material error.** A court of appeal is not in a position to determine what it considers to be the correct conclusions from the evidence; that is the role of the trial judge. **An appellate court may intervene only where there has been a material error in law or a misapprehension of the evidence or the conclusions drawn from it.**
> >
> > [39] 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 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. However, omissions in the reasons will not necessarily imbue the appellate court with jurisdiction to review the evidence heard at trial. The test is that 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.
>
> […]
>
> [Emphasis added]

[13] Mr. Titus' third complaint, that of inadequate or insufficient reasons, does not permit this Court to intervene only because we might disagree with the manner in which the judge's reasons were expressed (*R. v. Sheppard*, 2002 SCC 26 (para. 26)). The Court must take the functional approach to assessing reasons advocated in *Sheppard* and echoed in *McAleer v. Farnell*, 2009 NSCA 14 (para. 15); the question is whether the reasons permit meaningful appellate review.

[14] Finally, concerning Mr. Titus' argument of reasonable apprehension of bias, there is a strong presumption in favour of judicial impartiality and a heavy burden on Mr. Titus to demonstrate such bias (*Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24 (para. 39); *Ward v. Murphy*, 2022 NSCA 20 (para. 86).

**Issue No. 1—Did the judge err in her analysis and application of the best interests of the child test?**

[15] Mr. Titus says the judge misdirected herself on the law by determining mobility only as a secondary function of her decision in chief to grant primary care to Ms. Kynock. He asserts that as a result, the judge failed to properly consider certain elements of the best interests test she was required to apply, thereby closing her mind to his parenting plan.

[16] The *Parenting and Support Act*, R.S.N.S. 1989, c. 160 ("the *Act*") provided the judge's authority to decide the parenting issues before her. Subsections 18(5) – (8) set out the guiding principles applicable to the task, enumerating the factors informing the assessment of a child's best interests, and giving them paramountcy. Those statutory factors draw on the often-cited list set out almost three decades ago in *Foley v. Foley* (1993),124 N.S.R. (2d) 198 (para. 16). Since then, revisions to the *Act* over time have continued to emphasize the need for the court to analyze parenting issues through the lens of the child's perspective.[4] Subsections 18(5) – (8) provide:

[4] On April 1 of this year, an amendment to s. 18H of the *Act* came into force, adding in s. 18H(1) specific direction requiring a judge to give paramount consideration to the best interests of the child when considering relocation.

18(5) In any proceeding under this Act concerning custody, parenting arrangements, parenting time, contact time or interaction in relation to a child, the court shall give paramount consideration to the best interests of the child.

(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.

[…]

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

(a) the nature of the family violence, abuse or intimidation;

(b) how recently the family violence, abuse or intimidation occurred;

(c) the frequency of the family violence, abuse or intimidation;

(d) the harm caused to the child by the family violence, abuse or intimidation;

(e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and

(f) all other matters the court considers relevant.

(8) 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, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j).

[17] Sections 18E – H of the *Act* dispense additional direction to a decision-maker faced with the specific question of whether to permit relocation of a child. Subsections 18H(3) and (4) enumerate criteria to be applied to the assessment of the evidence, and incorporate by reference the list of best interest factors contained in s. 18(6) (as found at para. [16] above):

(3) In applying this Section, the court shall determine the parenting arrangements in place at the time the application is heard by examining

(a) the actual time the parent or guardian spends with the child;

(b) the day-to-day care-giving responsibilities for the child; and

(c) the ordinary decision-making responsibilities for the child.

(4) In determining the best interests of the child under this Section, the court shall consider all relevant circumstances, including

(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.

[18] As the matter before her involved the question of relocation, the judge was required to apply the applicable burden of proof. In light of both parents' intended moves, the judge indicated during final argument that the operative burden was that found in s. 18H(1)(c):

> 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:
>
> […]
>
> (c) for situations other than those set out in clauses (a) and (b), all parties to the application have the burden of showing what is in the best interests of the child.

[19] Her determination placed an equal onus on both parties to persuade the judge as to what parenting arrangement would be in [J.'s] best interests. The judge stated she would "be remiss in not saying that of course this is a relocation both ways and in terms of [he's/she's] not staying where [he/she] used to be, [he'd/she'd] be going to Stewiacke or to Idaho".

[20] As will be seen, while the judge referenced certain of the statutory factors in s.18H(4) in her analysis, it does not appear from her reasons the judge maintained the equal application of the burden to both parties throughout.

[21] The decision demonstrates two elements that constitute error. First, the judge favoured a change in the child's situation both to address the tension between the parents, and with a hyper-focus on Ms. Kynock's interests, thereby relegating the best interests of the child test to second place. Secondly, read as a whole, the judge's reasons suggest Mr. Titus' plan was not given sufficient

consideration. The judge did not properly balance his plan against that of Ms. Kynock, which lacked important details.

[22] In oral argument, Mr. Titus suggested the judge erred in failing to consider an order that would address the child's best interests by placing the child in Ms. Kynock's primary care in Nova Scotia, but not in Idaho. In this way, says Mr. Titus, the judge limited the menu of options before her. I cannot agree.

[23] In *Bourke v. Davis*, 2021 ONCA 97 the court noted the impact of a parent's position on the structure of an analysis such as was undertaken in this case:

> [30] The trial judge acknowledged and agreed with *Hejzlar*, at para. 27, that courts should not put the moving parent in a "double bind" by relying on an expression by the moving parent that they would stay if the children were not allowed to move, in order to justify an order that maintains the status quo. Similarly, it would be improper for a court to speculate that the moving parent would not move without the children and then impose the status quo, relying on that speculation.

[24] As early as 2018 Ms. Kynock had assumed relocation would be decided before the appropriate parenting plan was determined, given each parent's time with [J.] would be structured according to whether [J.] was resident primarily in Idaho or in Nova Scotia. As then expressed by her counsel, Ms. Kynock recognized relocation would need to be considered first, because it informed her own position on moving to Idaho:

> **MS. DAVIS:** […] If [J.] is not permitted to move to Idaho, then my client will not be moving to Idaho without [J.]. And then the appropriate parenting arrangement, decision making, and whatever support flows as a result of that will be the issue.
>
> **THE COURT:** Yeah.
>
> **MS. DAVIS:** And so definitely whether or not the move is allowed...
>
> **THE COURT:** Hm..mm.
>
> **MS. DAVIS:** ...would be, from our perspective, a primary question.
>
> **THE COURT:** Hm..mm.
>
> **MS. DAVIS:** And then it would [*sic*] what does that mean in terms of Mr. Titus' parenting time, and what does that mean to child support. If the move is not allowed, then what does that look like if everybody's here in Nova Scotia, recognizing that my client will still attend in Idaho from time to time. She would

> like to be able to visit with [J.] in Idaho as well, and so you know, what would that arrangement look like.

[25] However, by the time of the 2021 hearing, Ms. Kynock was not advocating anything other than relocation of the child to reside with her in Idaho. She was not suggesting that in the alternative she could assume primary care of [J.] in Nova Scotia. Therefore, the judge was only able to approve one of the two positions put forward at the final hearing—that the child reside with Ms. Kynock in Idaho or with Mr. Titus in Nova Scotia. The judge did not err in limiting herself to those two options.

[26] The primary thrust of Mr. Titus' written and oral argument rests in his position the judge erred in deciding to grant Ms. Kynock primary care and by virtue of that decision, automatically approving relocation to Idaho as a function of where Ms. Kynock would reside. Mr. Titus says the judge was required instead to assess the matter of relocation first, within the context of the child's best interests. He urges the judge's improper "collapse" of the mobility and parenting questions into one, rather than treating them as separate issues, was a significant error in her approach to the task.

[27] It is not mandated by the *Act* that relocation always be decided first. The order of the analysis will be driven by the circumstances of the particular case. In several of the many appearances prior to the final hearing, the judge spoke of the need to eventually consider the plan of each parent to determine which would better serve the child's best interests. As noted earlier, by the time of the final hearing Ms. Kynock was no longer suggesting she would move to Idaho only if accompanied by [J.]; rather, she was intending to relocate regardless of the parenting arrangement imposed. That amendment to Ms. Kynock's position then moved the relocation question to the forefront.

[28] Mr. Titus maintains the judge did not properly consider the impact of the move on the child before she turned her mind to who would act as primary parent. He relies on the evidence before the judge of the history of his involvement with [J.], and the evidence of Ms. Singer that the child had expressed a wish for more, not less, time with him. He says the judge did not keep the "child-centric approach" advocated in *J.E.W. v. W.E.D.*, 2019 NSSC 141 when considering the question of mobility:

> [35] If a child-centric approach is adopted, then the best interests of each child will gain paramountcy in keeping with s.18(5) of the *Act*. As a result, decisions

> will be fact based, and may lack the predictability that many had hoped would be achieved from the mobility amendments. A child's best interests, however, must not be sacrificed to predictability.
>
> [36] … the scheme of the *Act* indicates that **the court must analyse the unique facts of each case, from the lens of the child's welfare, while balancing the stated legislative factors.** [Emphasis added]

[29] Mr. Titus suggests had such an approach been maintained in this case, the profound and negative impact of relocation on the child would have been obvious. He points, for example, to the child's extended family and community ties, all in Nova Scotia. Mr. Titus says if the judge had approached her task by first applying the best interests test to assess the pros and cons of the move for the child, it would have been apparent the latter outweighed the former.

[30] While the Court cannot re-decide the case because it might have weighed the evidence differently or taken a different view than the judge, I am satisfied there is merit to Mr. Titus' argument the judge did not properly consider the best interests test.

[31] The judge was not correct in her statement, early in the decision, that the best interests test was about the child's sense of connection:

> [24] I am very appreciative, actually, having gone through a - a hearing where we're talking about - we're talking about relocation, which is an extremely gut-wrenching situation for both parties, I'm extremely pleased with having to have a therapist - a person qualified as an expert - talk to me about [J.]. It was very refreshing to have that wealth of knowledge. She knew the child. I don't know a lot of the children that I'm... She met with [him/her] repeatedly and had a sense of what - where is [*sic*] connections were. **And that's what the best interest test is about, where is [J.] connected.** [He's/she's] connected to [his/her] mom, securely, and not to [his/her] dad. **What else could a judge decide?** [Emphasis added]

The best interests test undoubtedly includes such a consideration, but it encompasses much more than that consideration alone. Her comment suggests the judge limited her application of the best interests test, possibly to the exclusion of other of the factors prescribed by s. 18(6) and s. 18H(4) of the *Act*. This is particularly so given the judge's statement later in her reasons that wherever Ms. Kynock might be is where [J.] should be:

> [60] […] The thing that I'm most concerned about is that [he/she] be with mom. [He/she] continue counselling, and **I think wherever mom is in this**

> **world, that's [his/her] home. And that's - that's what I feel.** I think that she'll continue as she always has, direct [his/her] religious upbringing, and if her views are slightly different or more deeply felt than other people, I'm not weighing in on that […]. [Emphasis added]

[32] The judge's observation implies that no matter what plan Ms. Kynock would put forward, it would be accepted by the court owing to [J.] being "connected" to Ms. Kynock. In my view, that does not show the judge objectively weighed each parent's plan.

[33] Ms. Kynock says the various references by the judge to specific factors found in s. 18(6) and s. 18H of the *Act* demonstrate appropriate attention was paid to them. With respect, there is a difference between referencing factors and their proper application. Where the judge did reference certain of the statutory factors in play, she appears to have focused almost exclusively on Ms. Kynock in considering them. Read as a whole, it does not appear the judge considered the impact of a move to Idaho through the lens of the child's best interests.

[34] The judge began her reasons acknowledging the child's best interests as "the most important consideration". However, numerous times in her treatment of the various statutory factors, the judge's conclusions focused almost exclusively on their implications for Ms. Kynock, not the child. For example, in discussing the effect on [J.] of removal from Mr. Titus and from Nova Scotia, the judge gave only "lip service" to the impact on the child, finding:

> [69] The effect on [his/her] removal. Of course [he'll/she'll] miss everybody, of course it'll be a change. I think it's going to be a positive change. [He/she] needs to be with [his/her] mother. I've said that before, [his/her] mother's going to Idaho. I accept that, and I accept that it's appropriate that she do so. She's married to a man, she's been married for some years now, and I find it to be... Mr. Bytheway testified, although some of the Facebook documents - screen shots - provided raised a slight concern with me - to me, Ms. Davis is right. There's no evidence there, and there was [*sic*] no questions put to him with respect to his position, and I – based on what Ms. Carley Kynock has done, or how she's raised her [child] so far, I'm trusting her to do what's right and to make sure that the child is safe.

[35] While not entirely clear from her reasons, the judge's "slight concern" appears to be an oblique reference to particular screenshots of Facebook posts by Mr. Bytheway, the husband of Ms. Kynock.

[36] While s. 18(6)(h) directs a judge to consider the child's relationship with, among others, grandparents, the judge's mention of that factor starts with a misinterpretation of it. The judge incorrectly purports to examine the parents' ability to maintain contact with their own families. Her comments then devolve into, among other things, a criticism of his family's failure to influence certain of Mr. Titus' behaviours:

> [55] The loss of a relationship with his extended family, stability, her extended family, I've no doubt that Ms. Kynock will stay in touch with her extended family. His extended family has not been supportive in my view of him throughout this process. If they're - if they're not telling him the truth, which is stop - just stop with all of this - if they're not saying, look, you know, don't, you know, go ahead with this conflict with the counsellor when everybody's telling you not, that's not supportive. And I don't anticipate them being supportive or making the right choices in the future where they say stop, Mr. Titus, just stop, you know. At some point you have to tell your son, stop. And she recognized, which I saw was very - a refreshing - I think Ms. Davis referred to it as well. She recognized those kids are hard working kids. They look like they're having fun, they're wherever - I'm sorry, it might be a - they look like... I forget his exact quote, but at least she could recognize that.

[37] It is clear from the voluminous record the child has enjoyed a relationship with both grandmothers. However, the judge gave only passing mention of the impact of the child's loss of regular contact with the paternal grandmother that would result from relocation, and then only tangentially to Ms. Kynock's circumstances:

> [57] … and I accept that, Ms. Nicholson, that [he/she] said [he/she] wanted to live 50/50. I just don't find it's in [his/her] best interest to do so. I don't find it's in [his/her] best interest to stay here, and to do so. Under different circumstances I might if this conflict didn't exist, I might have decided that it was in [his/her] best interest to stay here in Nova Scotia. I see that, you know, this is a familiar environment. I don't think that Idaho's going to be - it's not the moon, it's just in another country, but it is different, it's in another country, and I accept that certainly [his/her] grandmother was extremely concerned about it and felt like she'd never see [him/her] again, and I heard that pain in her voice, and I - I heard that. But I can't get around the fact that I don't think that [J.] is in a healthy situation being here exposed to their thoughts about [his/her] mother, a person who [he's/she's], I believe, connected to in a way that makes her the primary parent, and the continual attack on her, and on her ability to parent is just - it - it does affect my decision. **It's guiding my decision more so than anything else.** [Emphasis added]

[38] Read as a whole, the judge's decision does not persuade me she took into account in a sufficient or meaningful way how the relocation to Idaho might impact [J.'s] relationships with both maternal and paternal extended family, all located in Nova Scotia.

[39] This Court has previously endorsed the need for a judge to properly balance the relocation plans put forward by each parent when assessing the best interests of the child. Such an approach ensures the proposals of each parent receive equal treatment through that lens. In *D.A.M. v. C.J.B.*, *supra* the Court concluded anything less than a proper balancing would constitute error:

> [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***.
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> [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.
>
> [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.

[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.

[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. […]

[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. [Underline emphasis added]

[40] Here, the absence of a sufficient balancing of the plans and positions of each party rears its head in the persistent theme, throughout the judge's reasons, of the parents' inability to engage positively with one another. The judge pointed to it repeatedly to explain why it was necessary to relocate the child. For example, she expressed her concern about the "outside behaviour of the parents. I don't think that it'll ever settle down…I think [J.] would do better if [he/she] had some distance and things calmed down." Later, the judge continued:

> [67] **The reasons for the relocation under the law today are perfectly acceptable for me. She's remarried, she found somebody she loves. She's part of another family, she wants [J.] to join her there. I have no - I feel that that's sufficient. The effect of the child to change parenting time and the contact, I'm hopeful that [J.] will accept this decision** in a way, and it'll be presented to [him/her] in a positive way. Either way [he/she] needs to be separated from this conflict, it needs to stop […]. **And I think it's going to be hard on [him/her]. It**

> **has to be done because [he/she] can't continue to live in this situation where [he's/she's] just exposed to a negativity all the time.** That's my impression is that, you know, there's always negativity, there's always fighting, there's always arguments.
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> […]
>
> [70] The appropriateness of changing the parenting arrangements. I find that **it's absolutely necessary to change the arrangements until you have some distance for some period to let things settle down** and to have that child know that this court has made the decision. Nobody else, I made the decision. I looked at everything. […] [Emphasis added]

[41] Such comments leave the disquieting impression the judge was overly focused on eliminating conflict between the parents through removal of the child from Nova Scotia, rather than filtering the history of their conflict through the lens of the child's best interests. While tension between the parents was germane to the judge's analysis, the practical reality of her decision would be the parents would no longer have the same type of contact as in the past. For these parties, it meant their child would no longer be transitioning between their homes with remotely the same frequency or with them having face-to-face contact, given one parent would be in Idaho and one in Nova Scotia. Again, it appears the judge was emphasizing certain factors over others, rather than giving all applicable factors equal weight.

[42] Mr. Titus also expresses concern the judge decided the case without sufficient information about Ms. Kynock's plan. He says it was inappropriate for the judge to rely on Ms. Kynock's ability to meet the child's needs following relocation, in the absence of details or specifics as to how Ms. Kynock would do so.

[43] Mr. Titus says the judge went on "blind faith", assuming Ms. Kynock would develop an appropriate plan for the child once in Idaho. He objects to the judge having made a decision in the absence of important details that should have been contained in Ms. Kynock's plan, such as where the child would go to school, how the child would access medical care or counselling, and how the child would move back and forth between Idaho and Nova Scotia while any pandemic-induced travel restrictions might be in place. I agree.

[44] The judge was confident Ms. Kynock would ensure that whatever might come to pass in terms of future arrangements for the child would be in the child's best interests. In the absence of details, the judge was prepared to rely on Ms. Kynock:

> [51] When you say she has little detail about the plan, I've seen pictures of this family. I've heard about their home, I've seen a drawing of their area where they have their - all of their outbuildings, you know. [He's/she's] going to go live there and go to school locally. I have no doubt in my mind that Ms. Kynock will have a dentist, a doctor, all of those things in place for [him/her], and all the supports [he/she] needs. She's always been the one that's been most interested in extracurricular activities, and in her testimony she talked about how much more is available in that jurisdiction. I accept her evidence.
>
> […]
>
> [54] […] I just - I trust that Ms. Kynock will do what's necessary to make sure that that child has contact with [his/her] dad if it's [J.'s] best interests, and I'm leaving it to her to make sure that that happens. […]

[45] The record illustrates that in her oral interim decision in December 2018, the judge had contemplated Ms. Kynock would eventually need to set out a detailed plan for [J.'s] life in Idaho. At the final hearing, details were not forthcoming. Ms. Kynock's plan lacked important particulars, including with respect to counselling for the child in Idaho, which the judge emphasized was to continue.

[46] A party seeking to make a profound change in a child's circumstances should, whenever possible, furnish meaningful detail in a relocation plan to assist in an informed conclusion about a child's best interests. This would include information such as, for example, the particulars of a proposed school, the size of the proposed neighborhood or community and its amenities, the availability of extra-curricular programs or opportunities, the interests and activities of other occupants of the home, and the availability and particulars of health services (doctor, dentist, hospital). Such detail is specifically mandated by s. 18(6)(d) of the *Act*, and is implicit in the language found in s. 18(6) and s. 18H. None of that information was included in Ms. Kynock's plan, other than vague reassurances the child would attend school and counselling.

[47] I am not persuaded by Ms. Kynock's argument it was only once the judge concluded the parenting arrangements that she could then put "specific supports in place" for the child in Idaho.

[48] Ms. Kynock asked the judge to rely on her to ensure an appropriate plan would eventually be implemented. In doing so, the judge did not determine the best interests of the child in the context of the plans offered by each parent. Instead, the judge presumed Ms. Kynock would address the child's best interests. Evidence about the particulars of Ms. Kynock's plan was needed. There was

ample time between her 2018 marriage and the hearing three years later to research and develop those details, and to provide them to the court and to Mr. Titus. It was incumbent on both parties to provide as much detail as possible to assist the court in making an informed decision.

[49] It is clear from the record the judge did not have meaningful details from Ms. Kynock, only general assurances. The judge was prepared to endorse such generalities, but it begs the question as to how she could properly assess the best interests of the child in relation to relocation to Idaho. It also raises the question as to how Mr. Titus was to be able to understand the child's situation in Idaho.

[50] The judge placed undue reliance on Ms. Kynock not only to develop a post-relocation plan for the child—"I'm trusting her to do what's right and to make sure that the child is safe"—but to also develop a post-relocation schedule for the child's time with Mr. Titus in Nova Scotia—"I'm sure that a lot of thought's gone into and it's more appropriate that Ms. Kynock identify the time if [J.'s] going to go there, that's convenient and will work, than that I do that." With respect, it was up to the judge to make all of the decisions and map out the particulars that would flow from her conclusions on parenting. This was especially so given the judge's concerns about the lack of positive communication and co-operation between the parents. The parties needed the court to provide finality; the child needed it even more.

[51] Finally, there is the concern the judge's decision directly references Mr. Titus' parenting plan only once in her analysis, and only in general terms:

> [58] […] Do I think that Mr. Titus can feed [him/her] breakfast, take [him/her] to school, and do those things? Yes. Do I think he can meet [his/her] emotional needs? No, I don't think he can.
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> […]
>
> [60] Again, Mr...I'm aware that Mr. Titus' plans to - would to be in Stewiacke and in the country with all those wonderful things that come with being in a country, that everybody recognizes [J.] would like, and a small school, all of that, I recognize that and I don't feel that that's the - I think that the place for [him/her] is with his/her mother and Mr. Bytheway and his extended family will become [his/her] family. […]

[52] The judge was not required to mention Mr. Titus' plan a requisite number of times to demonstrate it was properly balanced against that of Ms. Kynock. Nonetheless, the entire focus and tone of the decision indicates Mr. Titus' plan was

not sufficiently weighed or considered against that put forward by Ms. Kynock. The judge focused heavily on why relocation would best suit Ms. Kynock, rather than what aspects of her vague plan would support the child in living with her. The question of the best interests of the child was not given its proper primary emphasis.

[53] To summarize, the judge erred in not properly applying the best interests of the child test. Furthermore, she did not engage in a proper balancing of the plans for the child put forward by each parent.

[54] In view of my conclusions on the first ground of appeal, it is not necessary to consider the remaining grounds advanced by Mr. Titus. That said, certain of the judge's gratuitous remarks might well leave Mr. Titus with the impression he did not receive a fair hearing. For example, during a December 3, 2018 appearance the judge twice commented that the number of lawyers Mr. Titus had been through to that point was likely an indication he was difficult to deal with. At the December 20 hearing which followed, the judge again made gratuitous comments such as that Mr. Titus' credibility was "very, very low", that he was "difficult" and "immature" and did not follow directions, and that he was "lying" and that his family was prepared "to lie" on his behalf.

[55] During that same appearance the judge made a highly speculative, and therefore impermissible comment about the future behaviour of each parent:

> [13] […] I'm not dealing with what's going to happen. But I have every confidence that Ms. Kynock, even if she lived in Idaho, she'd find a way to include you in [J.'s] life, I have every confidence. I do not have any confidence that you would continue if given the chance to include her in [J.'s] life in a meaningful way.

[56] The foregoing passage appears to forecast exactly what the judge eventually decided in 2021, when she also spent considerable time contemplating how Mr. Titus might refuse or fail to follow the order arising from her decision. It is understandable Mr. Titus would be left with a concern he did not receive a fair hearing.

**Conclusion**

[57] I would allow the appeal. Mr. Titus asked this Court to order a new hearing of the parenting and relocation issues; therefore, I would remit those questions to the court, to be considered afresh by a different judge. I acknowledge doing so

will further delay finality for the child, and require the further effort by each parent necessitated by a new hearing.

[58] Mr. Titus also requested the Court direct the preparation of an assessment of the capacity of each parent, as part of a remitted hearing. I am not persuaded it is appropriate for the Court to do so. It will be for the new hearing judge to decide if any such assessment is needed.

[59] Until another decision is made, the parties' February 2019 interim order (described earlier at para. 4) continues to govern their situation, as it has since this Court imposed a stay. That order was structured with a presumption the parties would both be present in this jurisdiction; the *de facto* circumstances of the child may look different depending on the geographic location of each parent pending re-hearing.

[60] Mr. Titus, as the successful party, is entitled to costs, which I would award in the amount of $3,000.

Beaton J.A.

Concurred in:

Bryson J.A.

Scanlan J.A.