NOVA SCOTIA COURT OF APPEAL
Citation: *Murphy v. Ibrahim*, 2023 NSCA 42

Date: 20230614
Docket: CA 515381
Registry: Halifax

Between:

Anna Marie Murphy

Appellant

v.

Rany Samir Ibrahim

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	May 9, 2023, in Halifax, Nova Scotia
Subject:	Appeal; Appeal - apprehension of bias; Application to vary; Costs; Family; Family - parenting time; Family - parenting time-supervised; Family - parenting time-parental capacity assessment; Family - *Parenting and Support Act*; Ineffective assistance of counsel
Cases Considered:	*R. v. Preston*, 2022 NSCA 66; *R. v. G.F.*, 2021 SCC 20; *R. v. R.E.M.*, 2008 SCC 51*; R. v. Sheppard*, 2002 SCC 26; *R. v. Braich*, 2002 SCC 27; *MacPhee v. Canadian Union of Public Employees*, 2008 NSCA 104; *Green* v. *Green*, 2022 NSCA 83; *Laframboise v. Millington*, 2019 NSCA 43; *Sanford v. MacPhee*, 2006 NSSC 363; *C.N. v. W.N.*, 2019 NSSC 299; *R.A. v. M.P.B.*, 2021 NSSC 102; TW v. GS, 2023 NSSC 179; *MacLean v. Boylan*, 2011 NSSC 314; *Roy v. Schofield*, 2019 NSCA 17; *Kedmi v. Korem*, 2012 NSCA 124; *M.W. v. Nova Scotia (Community Services)*, 2014 NSCA 103; *Patient X v. College of Physicians & Surgeons*,

2015 NSCA 41; *Volcko v. Volcko*, 2020 NSCA 68; *Link v. Link*, 2022 NSCA 140; *Ward v. Murphy*, 2022 NSCA 20; *AM v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSSA 58; *D.A.M. v. C.J.B.*, 2017 NSCA 91; *Novak v. Novak*, 2020 NSCA 26; *Green v. Green*, 2023 NSCA 38; *Barendregt v. Grebliunas*, 2022 SCC 22.

Statutes Considered: *Parenting and Support Act*, R.S.N.S. 1989, c. 160, ss. 18(6), 18B, 19; *Judicature Act*, R.S.N.S. c. 240, s. 32F

Summary: The appellant mother asserted various errors made by the judge hearing her application to vary in relation to, among other matters, parenting time with her child. The judge directed the mother's parenting time be supervised and that she participate in a parental capacity assessment with psychological component before any application to further vary her parenting time might be filed. The judge also ordered her to pay $21,000 costs.

Issues:

(1) Did the judge provide sufficient reasons?
(2) Did the judge demonstrate a reasonable apprehension of bias?
(3) Did the judge commit various errors of law, of mixed fact and law, or of fact in relation to a number of issues and evidence put before him?
(4) Did the appellant suffer ineffective assistance of counsel?
(5) Did the judge err in his awarding of costs?

Result:

(1) The judge's reasons are sufficient to permit appellate review.
(2) The record and the judge's decision do not reveal any apprehension of bias in favor of the respondent.
(3) The various errors of law, errors of mixed fact and law and errors of fact asserted by the appellant are not supported by the record. The judge properly applied the best interests of the child factors set out in s.18(6) of the *Parenting and Support Act*. Absent material error, his conclusions are entitled to deference.
(4) The assertion of ineffective assistance of counsel claims in civil matters is reserved for only the "rarest

of cases" where a "very compelling" public interest is engaged. This is not one of those cases.

(5) The judge properly exercised his discretion in awarding costs and committed no error.

The appeal is dismissed, with costs of $5,000 payable to the respondent.

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Between:

Anna Marie Murphy

Appellant

v.

Rany Samir Ibrahim

Respondent

Judges:	Bryson, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	May 9, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, with costs of $5,000, per reasons for judgment of Beaton, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Anna Marie Murphy, Appellant Christopher I. Robinson, for the respondent

Introduction

[1] The appellant Ms. Murphy and the respondent Mr. Ibrahim are parents to one child. Ms. Murphy asks this Court to overturn a decision concerning their parenting arrangements.

[2] The Honourable Justice Samuel Moreau of the Supreme Court of Nova Scotia (Family Division) ("the judge") heard Ms. Murphy's June 2020 Application to Vary on September 27-29, 2021. The judge received the evidence of Ms. Murphy, her mother, Mr. Ibrahim, and the child's godmother. In his decision reported as *Murphy* v. *Ibrahim*, 2022 NSSC 46 the judge varied a 2017 parenting order that had directed custody of the child with Mr. Ibrahim and parenting time for Ms. Murphy. Pursuant to his authority under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160 ("the *Act*"), the judge determined, among other matters, that there had been a change in circumstances, and it would now be in the child's best interests that Ms. Murphy's parenting time be supervised. Subsequent to that decision, the judge authored a file endorsement ordering costs in favour of Mr. Ibrahim.

[3] The judge's decisions generated three distinct orders to which Ms. Murphy now objects:

- a Variation Order ("the order") adjusting both Ms. Murphy's parenting time and child support, and directing her to participate in a psychological assessment with a parental component ("the assessment").

- a Supervised Contact Order for Veith House ("the VH order") setting out Ms. Murphy's supervised parenting time, for an undetermined period, under the auspices of the local supervised access provider.

- an Order for Costs ("the costs order") requiring Ms. Murphy to pay $21,000 costs on the application in favor of Mr. Ibrahim.

[4] After Ms. Murphy filed her Notice of Appeal, she made a motion in this Court for a stay of all three orders. That motion was granted in part (*Murphy v. Ibrahim*, 2022 NSCA 75). Farrar J.A. concluded:

> [33] The trial judge noted that supervised access is not a long-term solution. I suspect that is why he only ordered twelve, 1.5 hour sessions at Veith House. I am also of the view that he must have assumed by the time that the Veith House visits were over a psychological assessment would have been prepared, and the parties could move forward with the parenting arrangements. Unfortunately, that has not occurred. The trial judge could not have envisioned that more than a year after the trial and ten months after his decision no progress would have been made in this matter.
>
> . . .
>
> [38] I am also mindful of the time that will elapse until the appeal until this matter is heard. It is presently scheduled for May 9, 2023. Realistically, a decision may take two to three months after that. If the status quo remains, it could be six to nine months or longer before the issues can be dealt with.
>
> [39] As a result, I would stay the following provisions of the Orders:
>
> (a) The limitation on the number of supervised visits Ms. Murphy may have at Veith House (Supervised Contact Order);
>
> (b) The requirement that a psychological assessment is a pre-condition for a variation of the Variation Order. To be clear, I am not staying the preparation of a psychological assessment. I am only staying that it is a pre-condition to Ms. Murphy seeking to vary the Variation Order; and
>
> (c) The Costs Order dated July 28, 2022.

[5] A detailed background of the history of the various filings with and interventions by the court occurring after the 2017 order, but before the variation hearing, were chronicled in the introduction to the judge's decision. He correctly set out the legal test and identified his task on the application, which was to determine whether there had been a material change in the child's circumstances since the making of the 2017 order and if so, what parenting arrangement would now be in the child's best interests.

[6] The judge's decision explained he was satisfied there had been a change in the child's circumstances owing to Ms. Murphy's history, following the 2017

order, of a chronic inability to follow its terms in ways that significantly impacted the child. He concluded that change would now necessitate Ms. Murphy having parenting time in a supervised setting, and that an assessment was needed to assist in a determination of what Ms. Murphy's parenting time would look like in future. In addition, the judge was not satisfied there had been any change in Ms. Murphy's financial circumstances such that her child support obligation should be eliminated, as she had requested. Along the way to reaching his various conclusions, the judge determined neither Ms. Murphy nor her mother were credible witnesses.

[7] Ms. Murphy sets out a number of concerns regarding the decision in her materials put before this Court, some more broad in scope and others quite specific in nature. She asks for various forms of relief, including that this Court:

- order particulars regarding the preparation of the assessment;
- eliminate Ms. Murphy's supervised parenting time, or in the alternative, set out a procedure for a review and continuation of supervised parenting with a transition to unsupervised parenting (minimum 50 percent of the time) with equal decision making authority;
- identify a process for Mr. Ibrahim to provide regular updates concerning matters pertaining to the child;
- rescind the costs order or, in the alternative, reduce Ms. Murphy's costs obligation to less than $2,000;
- order Mr. Ibrahim to pay child support;
- provide certain explicit directions to Ms. Murphy's previous legal counsel and the Maintenance Enforcement Program.

[8] I note several of Ms. Murphy's requests are not within the Court's jurisdiction to award. Where the Court can respond, I am not persuaded Ms. Murphy's arguments have merit. For the reasons that follow, I would dismiss the appeal.

Grounds of Appeal

[9] Ms. Murphy's numerous and varied grounds of appeal may be distilled and reframed as follows:

1. Sufficiency of reasons;
2. Reasonable apprehension of bias;
3. Errors of law, of mixed fact and law, or of fact in relation to a number of issues and evidence put before the judge;
4. Ineffective assistance of counsel; and
5. Error in awarding costs.

Sufficiency of reasons

[10] Where sufficiency of reasons are challenged on appeal, they are assessed to determine whether they permit meaningful review, applying a functional and contextual approach (*R. v. Preston*, 2022 NSCA 66 at para. 65). Sufficiency of reasons is not a free-standing ground of appeal; this Court must assess the record to determine if the "what" and "why" of the reasons are clear (*R. v. G.F.*, 2021 SCC 20 at para. 70). Assessing the sufficiency of reasons requires a deferential approach (*R. v. R.E.M.*, 2008 SCC 51 at paras. 54-55).

[11] The decision demonstrates the judge assessed the question of the best interests of the child having regard to the factors found in s. 18(6) of the *Act*. Drawing from the evidence, he explained his conclusions on each statutory factor relevant to the circumstances before him. He chronicled the history of matters over the time since the issuing of the prior order, and in making credibility determinations he set out how they informed his reasoning. Referring to the child's bond with Ms. Murphy, the judge "question[ed] whether the mother's conduct since the making of the last order has seemingly strained that bond".

[12] The judge was careful to explain what propelled him to require both preparation of an assessment and supervised parenting time for Ms. Murphy:

> [87] The mother's lack of insight and inability to recognize and take responsibility for her own actions is concerning. The evidence clearly demonstrates her efforts to cause friction and discredit the father at every opportunity. During closing summations, counsel for the father aptly observed it would appear that the mother's strategy is to tear down and discredit the father to the point where she becomes the only viable option. In my estimation the mother

has employed a scorched earth approach in attempting to achieve her goal of gaining custody of J. Her modus operandi is akin to one taken in the competitive sporting arena rather than a matter such as the present case.

…

[89] The father requests I order that the mother's parenting time be supervised and her contact with J. remain as such pending the completion of the mother's participation in a "Psychological Assessment with Parental Component", and the results/recommendations of same.

[90] In many high conflict family court matters, some parents often adopt certain position(s) for the sole purpose of opposing the other parent, (without any articulable justification) and do so out of pure animus or contempt for the opposing parent. In this case I am satisfied the father's stated requests are not based on such motivations but borne out of the occurrences of the past four years as relates to the mother's involvement with the child.

[91] In *J. T. v. M. W*, 2017 NSSC 118 at paragraph 16, Justice Forgeron provides the following synopsis when conducting a supervised access analysis:

> [16] In addition, the following legal principles have emerged from case law, including the decisions of **Young v. Young,** 1993 CanLII 34 (S.C.C.). [1993] 4 S.C.R. 3 (S.C.C.); **Abdo v. Abdo** (1993), 1993 CanLII 3124 (NSCA). 126 N.S.R. (2d) 1 (N.S. C.A.); **Bellefontaine v. Slawter,** "2012" NSCA 48 (N.S. C.A.); and **Doncaster v. Field,** 2014 NSCA 39 (N.S.C.A.):
>
> - The burden of proof lies with the party who alleges that access should be denied or restricted, although proof of harm need not be shown. Proof of harm is but one factor to consider in the best interests test.
>
> - The right of the child to know and to be exposed to the influence of each parent is subordinate in principle to the child's best interests.
>
> - The best interests test is a positive and flexible legal test which encompasses a wide variety of factors, including the desirability of maximizing contact between the child and each parent, provided such contact is in the child's best interests.
>
> - The court must be slow to extinguish or restrict access. Examples where courts have extinguished access include

cases where access would place the child at risk of physical or emotional harm, or where access was found to be contrary to the child's best interests.

- An order for supervised access is seldom seen as an indefinite or long term solution.

- Access is the right of the child; it is not the right of a parent.

- There are no cookie-cutter solutions. Courts must examine the unique needs of each child and craft an order that protects and enhances that child's best interests.

[92] In this decision I have described and commented on several instances in which the mother's actions directly impacted J.

[93] I find various aspects of the mother's conduct to be highly concerning. The effects on J. will be more impactful as he grows older. I find the evidence confirms it is in J. 's best interest that his contact with the mother be supervised. The case law affirms supervised access is not a long term solution. *D.S. v. R. T.S.*, 2017 NSSC 155.

[94] In addition to the legislated factors in section 18(6) of the *Parenting and Support Act,* l have considered the sum of the factors provided by Justice Goodfellow in *Foley v. Foley,* supra, in particular; assistance of experts, such as social workers, psychologists, psychiatrists, etcetera and the interim and long range plan for the welfare of children.

[95] I find it is in J. 's best interest that the mother participate in and complete a psychological assessment with parental component for the following reasons:

- since the making of the last court order the mother's overall conduct calls into question her reasoning and judgment as relates to the child and his best interests;

- since the making of the last order the mother's overall approach with respect to and manner in which she has dealt with the child's service providers is at the very least concerning and requires examination by a qualified professional;

- the mother's lack of insight with respect to her conduct and behaviour and the impact of same on the child;

> - the mother's characterization of the father, including but not limited to her denigration of his culture and religion; and
>
> - the mother's repeated disregard for and consistent breaching of the terms of the parenting plan as set out by Justice MacDonald in the August 17, 2017, Order.
>
> [underline emphasis added]

[13] The judge's decision, when considered in the context of the record and the evidence put before him, is sufficient to permit meaningful appellate review. The principles articulated by the Supreme Court of Canada in *R. v. Sheppard*, 2002 SCC 26, *R. v. Braich*, 2002 SCC 27, and *R. v. R.E.M.*, albeit in the criminal law context, are no less applicable here. As was the case in *R.E.M.*, I am satisfied the judge's decision, considered in its entirety, is:

> [25] […] [S]ufficient to perform the functions reasons serve — to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons.[…]

[14] The judge's decision is understandable "when considered in light of the record, the issues and the submissions" (*MacPhee v. Canadian Union of Public Employees*, 2008 NSCA 104 at para. 74, leave to appeal to SCC refused [2008] SCCA No. 546). I would dismiss this ground.

Apprehension of bias

[15] Ms. Murphy bears a heavy burden to persuade this Court the judge's conduct demonstrated a reasonable apprehension of bias. The test for bias was discussed in *Green v. Green*, 2022 NSCA 83:

> [41] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada explained that the apprehension of bias must be a reasonable one:
>
> > 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board, supra*, at p. 394, is the reasonable apprehension of bias:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."...
>
> [42] As stated by this Court in *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9 where there is a finding of a reasonable apprehension of bias, the offending judge's decision results in an error of law:
>
> > [753] If a reasonable apprehension of bias arises from, or an actual bias is found in, a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law.
>
> [43] The burden on a party claiming a reasonable apprehension of bias or actual bias on the part of a judge is onerous. There is a strong presumption of judicial impartiality that must be overcome by a claimant. The inquiry is also fact-specific and the claimant must present cogent evidence establishing serious grounds (see *Wewaykum* at paras. 76-77 and *R. v. Teskey*, 2007 SCC 25 at para. 21).

[16] Ms. Murphy points to several aspects of the hearing to support her argument of bias. She objects to the judge having permitted Mr. Ibrahim to make a motion to strike portions of her evidence at the outset of the hearing, whereas her earlier motion to tender certain evidence had been denied as having been made too close to the commencement of the hearing. Ms. Murphy further asserts the judge demonstrated bias in deeming inadmissible an expert report she sought to enter into evidence.

[17] In summary, Ms. Murphy complains that all of the requests Mr. Ibrahim made to the judge were granted and all of those she made were refused. Therefore, she argues, the judge's bias in favour of him is made out. With respect, this is circular reasoning. There was nothing inappropriate in the judge's discretionary decisions. Management of the hearing was the judge's responsibility, and the order or manner in which he did so in this case cannot be said to be inappropriate, much less rise to the level of bias.

[18] The "strong presumption of judicial impartiality" (*Green*, para. 43) should temper an argument which unfortunately seems to be made in this Court with

increasing frequency of late, on appeal of family law decisions. While litigants may desire that a different outcome had occurred, it does not justify making frivolous claims of judicial bias. To say nothing of the time, effort and expense occasioned to a respondent in the face of a specious argument, there is also the matter of the public interest in the efficient use of the Court's time and resources. Litigants who persist in these types of claims do so at their peril, as costs consequences reflecting ill-considered arguments may result.

[19] Ms. Murphy's dissatisfaction with the judge's decision does not support the gravity of her assertion. I would dismiss this ground of appeal.

Errors of law, mixed fact and law, or fact

[20] Ms. Murphy raises a number of arguments with respect to the judge's approach to the issues and his treatment of the evidence, which she has alternately characterized as errors of law, errors of mixed fact and law, or errors of fact. The applicable standards of review are as set out in *Laframboise v. Millington*, 2019 NSCA 43:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[21] It is not necessary to canvass every argument and point by Ms. Murphy found in her Notice of Appeal and contained in her written and oral argument. Respectfully, her assertions are simply without merit in view of the record, or are matters outside this Court's jurisdiction to address. Several of Ms. Murphy's arguments will be discussed in the analysis that follows, to illustrate my conclusion

in relation to all of those matters raised by Ms. Murphy which she characterizes as errors of law, errors of mixed fact and law or errors of fact.

[22] To begin, Ms. Murphy says the judge erred in law in not considering the best interests of the child. I cannot accept this argument. The judge's decision, which includes discussion of the law and his application of it to the evidence, demonstrates he clearly identified and considered the best interests of the child, a theme repeated throughout. While the judge's decision is not the outcome Ms. Murphy advocated for, that does not necessarily make it "wrong" nor demonstrate error on the part of the judge.

[23] Ms. Murphy also suggests the judge erred in law by not requiring the parties to participate in mediation prior to undertaking consideration of her application to vary. With respect, she misinterprets the requirement in the 2017 order. It directed the parties to participate in mediation if they had "a disagreement about the interpretation or application" of that earlier order, or if "unable to agree about a decision requiring their agreement". I do not read either of those requirements as relating to any future applications to vary. Furthermore, this issue was never put before the judge. Finally, I need not do more than observe it was Ms. Murphy who filed the variation application so she is not now in a position to object to it having been adjudicated.

[24] Ms. Murphy also maintains the judge erred in law in not applying the maximum contact principle to the question of parenting time. Again, I must disagree. The judge's recognition that supervised access could not be a long term arrangement speaks to his awareness of what amount, frequency and duration of contact was in the child's best interests at the point when his decision was made. The maximum contact principle is assessed in relation to the child's best interests, not the interests of a parent, nor in accordance with what might be, in a "perfect world", a schedule where parents would share as equally as possible the amount of time each spends with their child.

[25] The judge was cognizant throughout his analysis of the evidence and his conclusions of the importance of ordering as much contact between the child and Ms. Murphy as would be appropriate through the lens of the child's best interests.

[26] Ms. Murphy also maintains the order is flawed as it does not contain a mechanism for her to obtain or for Mr. Ibrahim to provide to her any information concerning the child. Schedule "A" to the parties earlier 2017 order had required:

> 1.4 The Father must inform the Mother about any significant changes, problems or recommendations relating to the child's physical or mental health, dental care, physical and social development, counseling, and education, and must provide copies of all written reports received from service providers about these changes, problems or recommendations.

[27] In the recitals to his order, the judge references that it follows upon the 2017 order and that, among other matters:

> 1. Paragraphs 1-14 of Schedule "A" of the Order shall be varied insofar as they no longer have any force or effect, and they are replaced by the following paragraphs:. . .

[28] Thus paragraph 1.4 of the 2017 order was replaced by the order the judge made, which is silent on Mr. Ibrahim's requirement to inform Ms. Murphy. While perhaps unfortunate, the absence of such direction does not constitute a material error. The judge's reasons reveal he was cognizant of the issue, as he concluded Mr. Ibrahim had acted appropriately regarding s.18(6)(i) of the *Act*, under which the judge assessed:

> (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;

[29] The judge concluded Mr. Ibrahim "has demonstrated his ability and willingness as it pertains to this factor...he has acted appropriately in communicating with or attempting to communicate with the mother on issues affecting the child.[...]".

[30] In addition to the decision given to the parties, there is the operation of s. 18B of the *Act*, which provides:

> Unless other-wise provided by court order or agreement, a person with parenting time may, at any time, inquire and receive information regarding the health, education and welfare of the child.

[31] Ms. Murphy is entitled to avail herself of s. 18B of the *Act* in the absence of direction from the judge. However, she may do so only in a manner that does not

otherwise contravene any of the provisions of the judge's order, and Mr. Ibrahim's role pursuant to it as the "sole custody" parent having "sole authority with respect to any and all decisions regarding the child".

[32] Ms. Murphy's chief complaint under this third ground of appeal centers around her contention the judge erred in law in ordering an assessment, in the absence of any authority to do so. She characterizes the judge's requirement that she participate in preparation of the assessment as an improper precondition which creates a barrier to her filing any future application to vary. I set out earlier (at para. 12) the judge's reasons for ordering the assessment. The judge's direction with respect to the assessment was:

> [96] I order that the results of same assessment (including the assessor's recommendations) be provided to the father and the Court prior to or in conjunction with any future variation application(s) made by the mother as a result of the order flowing from this decision.
>
> [97] After carefully reviewing the evidence, applicable legislation and caselaw, including the factors enunciated in *Foley v. Foley*, supra, I have determined and find it is in J. 's best interest that the August 17, 2017, Order be varied as follows:
>
> - The father shall have sole custody of J., and he shall also have sole authority with respect to any and all decisions regarding J..
>
> - The mother shall have supervised parenting time with J. through the Veith House supervised access program.
>
> - The mother shall fully participate in and complete a Psychological Assessment with Parental Component.
>
> - If the mother requests that a hearing be scheduled with respect to varying any provision of this order she must first file with the father and the Court the following: An original copy of the completed Psychological Assessment with Parental Component including any and all recommendations made by the assessor […].

[33] It is clear the judge wanted to have the information such an assessment would generate available in anticipation Ms. Murphy would seek a change to her supervised parenting time in future. Nowhere in the decision or his order does the judge create any barrier or suggest any prohibition on the filing of a future variation application. Rather, the judge was persuaded the information an assessment would generate could assist in assessing the appropriateness of such a future change.

[34] Recognizing the child's best interests were served by a gradual re-introduction to time with Ms. Murphy, and under controlled circumstances, I do not accept the judge fettered Ms. Murphy's ability to seek a later variation of the order's terms. It was within the judge's jurisdiction to place such a parameter around a future proceeding, to assist in addressing the question of parenting time for Ms. Murphy, an inquiry undertaken with the focus squarely on the best interests of the child. In doing so, the judge was not introducing a novel approach: *Sanford v. MacPhee*, 2006 NSSC 363 at paras. 109-114 and 117; *C.N. v. W.N.*, 2019 NSSC 299 at paras. 48-49; *R.A. v. M.P.B.*, 2021 NSSC 102 at paras. 80-84; *TW v. GS*, 2023 NSSC 179 at paras. 44-47 are decisions of the same court where similar methods of information gathering were directed.

[35] The judge's decision reflects he was persuaded of the need for an assessment, in recognition that if Ms. Murphy was to move toward less structured time with her child, the additional information needed would "not otherwise be available because it falls within the special knowledge of the expert" (*MacLean v. Boylan*, 2011 NSSC 314 at paras. 40-41). He was within his authority to order the assessment pursuant to both s.19 of the *Act* and s. 32F of the *Judicature Act*, R.S.N.S. 1989, c. 240.

[36] The judge's requirement for an assessment was in response to his findings. He did not err in requiring an assessment, because he did so from the perspective of what would be in the child's best interests going forward, not from the perspective of what might hinder or help Ms. Murphy. She has not provided any authority to support her argument the judge should not have managed the case as he did, particularly in light of the acrimonious nature of the history of the parties litigation, the number of interventions by the court in the parties' parenting between 2017 and 2022, and the significant change the judge had decided to make regarding Ms. Murphy's parenting time. The purpose for which the assessment was ordered demonstrates the judge's focus on the child's best interests extended to contemplating future proceedings. He recognized Ms. Murphy would seek increased non-supervised parenting time in the future. The judge was not taking an approach that restricted the parent in some fashion; rather, he was taking an approach that served the child.

[37] With the benefit of hindsight, it may have been beneficial had the judge provided additional direction in respect of the preparation of the assessment. For example, much post-decision confusion seems to have arisen after the order was issued, regarding the mechanics of arrangements to give effect to it. Respectfully,

that might have been avoided had the judge directed the parties to return before him at a fixed future date, to provide an update or status report on the preparation of the assessment. This would also have allowed for:

- a target date for court staff and any assessor appointed to use for preparation of the assessment, or to provide an update on its progress;

- monitoring by the court and the parties of the progress of preparation of the assessment;

- a mechanism to avoid the preparation of the assessment "falling through the cracks" in a busy court.

[38] Similar confusion concerning the VH order could have been eliminated had the judge furnished in that order directions or a mechanism for efficient renewal of it if required, pending receipt of the assessment.

[39] Finally, Ms. Murphy argues that paragraphs 2 and 5 of the contents of the VH order are contradictory. Presumably, this is asserted to be an error of mixed law and fact. I am not able to discern any contradiction between paragraph 2, which sets out the duration and frequency of supervised access visits at Veith House, and paragraph 5 which requires Veith House to provide a record to the parties and the court at the conclusion of 12 scheduled visits. Nothing further need be said about this issue.

[40] I am not persuaded the judge's treatment of the issues and the evidence reveals any error of law, error of mixed fact and law, or error of fact. I would dismiss all of Ms. Murphy's arguments under this ground.

Ineffective assistance of counsel

[41] Ms. Murphy asserts ineffective assistance of counsel in relation to two of the several lawyers who acted as her counsel at various points during the time leading up to and following the hearing. It does not appear she has followed proper protocol to notify those lawyers against whom she levels her assertions that the matter is raised in this proceeding. Furthermore, ineffective assistance of counsel cases and claims are usually reserved to criminal proceedings and those pursuant to the *Children and Family Services Act*, R.S.N.S. 990, c. 5 (*Roy v. Schofield*, 2019 NSCA 17 at para. 25). This Court has been clear that an ineffective assistance of

counsel ground is available only in "the rarest of civil cases where a very compelling public interest is engaged": *Kedmi v. Korem*, 2012 NSCA 124 at para. 8. See also *M.W. v. Nova Scotia (Community Services)*, 2014 NSCA 103 at para. 41; *Patient X v. College of Physicians & Surgeons*, 2015 NSCA 41 at para. 41. As this is not one of those cases, there is no valid ground of appeal to consider.

Costs

[42] Ms. Murphy argues the judge's cost award is unjust. Costs awards are within the judge's discretion and entitled to deference unless there has been an error in law or an injustice (*Volcko v. Volcko*, 2020 NSCA 68 at para. 24; *Link v. Link*, 2022 NSCA 14 at para. 41; *Ward v. Murphy*, 2022 NSCA 20 at para. 28).

[43] The judge's unreported cost endorsement set out the applicable *Civil Procedure Rule* 77 and the principles derived from caselaw. He considered the history of the matter before him and the positions taken by the parties, along with their respective "success" on the issues raised. He was satisfied a lump sum award of $21,000 in favour of Mr. Ibrahim "does justice between the parties" as per the *Rule*. His reasons do not reveal any error or injustice.

[44] Ms. Murphy says in her factum:

> The income assistance act lays out the asset limits for income assistance and it is an error in law to award costs for more than the asset limits set by the department of community services as Ms. Murphy does not have more than that.

[45] Again, Ms. Murphy is mistaken. The judge made a discretionary decision within his jurisdiction, one that was available to him under the circumstances. In doing so, he was acting in accordance with the principle of judicial independence, meaning he was not bound by the strictures adopted by any government department or agency. The judge made no error in this regard. I would dismiss this ground of appeal.

Conclusion

[46] Throughout her written and oral submissions Ms. Murphy maintained the judge had reached conclusions and made decisions improperly, or without ample evidence to support them. I cannot agree. I see no basis upon which to interfere with the judge's decision nor the orders resulting therefrom.

[47] In effect, Ms. Murphy seeks to relitigate her application to vary in this Court. Such is not our function. In *A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSSA 58, Justice Cromwell reminded family law litigants the trial judge is well positioned to appreciate "the nuances of the evidence" and to weigh "the many dimensions of the relevant statutory considerations" (para. 26). Appellate courts must apply a high standard of deference to judges' decisions in custody matters, unless it is established there has been a material error or a misapprehension of evidence. See also *D.A.M. v. C.J.B.*, 2017 NSCA 91 at para. 28; *Novak v. Novak*, 2020 NSCA 26 at para. 7; and *Green v. Green*, 2023 NSCA 38 at para. 2. The Supreme Court of Canada's recent observation in *Barendregt v. Grebliunas*, 2022 SCC 22 illustrates the divide between this Court's role and Ms. Murphy's disappointment with the outcome of her variation application:

> [102] An appellate court's role, as noted, is instead generally one of error correction; it is not to retry a case. Permitting appellate courts to become venues for dissatisfied parties to relitigate issues already resolved at trial erodes the public's confidence in the judicial process and the rule of law. The proper functioning of our judicial system requires each level of court to remain moored to its respective role in the administration of justice.

[48] I would dismiss the appeal and order Ms. Murphy to pay costs to Mr. Ibrahim in the amount of $5,000. In an Order dated February 22, 2023, Justice Farrar also ordered Ms. Murphy to pay costs of $500 (in relation to an unsuccessful motion) directing "the costs are not payable until after the determination of the appeal". Those costs are also now due and payable.

Beaton, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.