NOVA SCOTIA COURT OF APPEAL
Citation: *Weagle v. Kendall*, 2023 NSCA 47

Date: 20230628
Docket: CA 520408
Registry: Halifax

Between:

Joseph Daniel Weagle

Appellant

v.

Olivia Byrd Kendall

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	May 31, 2023, in Halifax, Nova Scotia
Subject:	Family - application; Family - parenting time; Family - *Parenting and Support Act*; Family - relocation; *Parenting and Support Act*; Statutory Interpretation
Statutes Considered:	*Parenting and Support Act*, R.S.N.S. 1989, c.160, ss. 18H(1A), 18H(3), 18H(4)
Cases Considered:	*Barendregt v. Grebliunas*, 2022 SCC 22; *Titus v. Kynock*, 2022 NSCA 35; *Van de Pserre v. Edwards*, 2001 SCC 60; *Horbas v. Horbas*, 2020 MBCA 34; *D.A.M. v. C.J.B.*, 2017 NSCA 91; *Reid v. Faubert*, 2019 NSCA 42; *LeBlanc v. LeBlanc*, 2023 NSCA 36; *Novak v. Novak*, 2020 NSCA 26; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27; *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65.
Summary:	The father appealed from the judge's decision to permit the mother to relocate their child from Halifax to Ottawa.
Issues:	(1) Did the judge err in her assessment of the applicable burden of proof pursuant to s.18H(1A)(d) of the *Parenting and Support Act*?

(2) Did the judge err in the interpretation and application of s.18H(3) of the *Act*, thereby limiting the range of available parenting scenarios?

(3) Did the judge err in applying s.18H(4) of the *Act* and in assessing the best interests of the child?

(4) Did the judge misapprehend the evidence?

Result: The judge did not explain how she arrived at the applicable burden of proof, given the menu of options found in s.18H(1A) of the *Act*. Although preferable to have done so, her determination the father had the onus to prove relocation was contrary to the child's best interests does not constitute error, given her reference to the mother as primary caregiver. However, the judge did err in unduly overemphasizing all the reasons the father could not act as a primary parent, thereby effectively shifting the focus of his burden.

The judge erred in the interpretation of s.18H(3) of the *Act*. It does not prohibit the court from receiving evidence of the relocating parent's intentions should the move of the child(ren) be refused. The choice to reveal that evidence belongs to that parent, contrasted with the *Divorce Act*, which prohibits the tendering of such evidence. The judge's refusal to consider the information improperly limited the range of parenting options she could have considered.

In conducting the best interests assessment, the judge: (i) did not assess all the relevant factors required to be considered by s.18H(4), and (ii) did not sufficiently focus on whether the move was in the child's best interests, placing greater emphasis on the mother's interests in relocating.

The appeal is allowed, and the matter remitted for rehearing before another judge. The respondent shall pay costs of $1,000.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 17 pages.

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Date: 20230628
Docket: CA 520408
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Between:

Joseph Daniel Weagle

Appellant

v.

Olivia Byrd Kendall

Respondent

Judges:	Bryson, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	May 31, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed with costs of $1,000 payable to the Appellant, per reasons for judgment of Beaton, J.A.; Bryson, and Van den Eynden, JJ.A. concurring
Counsel:	Jennifer Reid and Lola Gilmer, for the appellant Ashley Dutcher and Eryn Heidel, for the respondent

Reasons for judgment:

[1] Relocation cases are driven, like all parenting cases, by the question of the best interests of the child(ren). In its recent decision in *Barendregt v. Grebliunas*, 2022 SCC 22 the Supreme Court of Canada recognized the particular burden presented to judges in cases of relocation:

> [8] Determining the best interests of the child is a heavy responsibility, with profound impacts on children, families and society. In many cases, the answer is difficult — the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child. The challenge is even greater in mobility cases. Geographic distance reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child. The forward-looking nature of relocation cases requires judges to craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can withstand the test of time and adversity.

[2] September 2023 will be an important month for young A. The child will mark the milestones of a 5th birthday and entry into the public school system. Undoubtedly, A has little appreciation of the disagreement between his/her parents which informs where he/she will reside. In December 2022, a decision of the Honourable Justice Cindy Cormier of the Supreme Court of Nova Scotia (Family Division) ("the judge") permitted the relocation of A from Halifax to Ottawa with his/her mother. That move had been opposed by A's father; the judge's decision to allow it (2022 NSSC 383) forms the basis of this appeal.

[3] The appellant father argues the judge's decision must be overturned owing to errors of law and misapprehension of evidence. The respondent mother says Justice Cormier's parenting order ("the order") should not be disturbed and the appeal should be dismissed.

[4] For the reasons that follow, I would grant the appeal, in light of three aspects of the judge's decision.

Background

[5] Over his/her short life, A has enjoyed parenting time with the father based on an informal arrangement between the parties. That arrangement has changed over time as several modifications to it have reflected the parents' respective circumstances combined with the mother's willingness, at certain junctures, to increase the father's parenting time.

[6] When A was 13 months old, the father formalized his wish for increased parenting time, filing an application in the Family Division on October 2, 2019, pursuant to the *Parenting and Support Act*, R.S.N.S. 1989, c. 160 ("the *PSA*"). He eventually asked the court to consider shared parenting. Throughout the proceeding, he maintained he wished to spend more time with A than that to which the mother was agreeable.

[7] The mother filed a Response to Application on December 2, 2019, opposed to shared parenting. As the matter was working its way through the court process, she filed an Amended Response to Application on November 18, 2020, at that point seeking authorization to relocate with A from Halifax to Ottawa.

[8] Initially, the mother sought to relocate to secure a particular promotion with her employer. By the time the matter was heard[1], the mother had been promoted to a different, one year term position also based in Ottawa; however, she continued working remotely from home, as she had done for some time. The mother's reason for relocation had also changed, now grounded in her broad assertion that Ottawa offered more opportunities for career advancement generally, both within her organization and across the government sector. It was her position relocation would provide improved circumstances under which A could forge connections with the mother's extended family resident there. She proposed block periods of parenting time for the father.

[9] The father argued the court should refuse the mother's relocation request and develop a shared parenting regime for the parties in Nova Scotia, one which would increase both his parenting time and his involvement in decision-making concerning A. Should the mother relocate to Ottawa, the father maintained it was in A's best interests to remain with him in Nova Scotia regardless, and he would of necessity assume a primary parenting role, with block parenting time for the mother. That said, it is clear throughout the record that the father's ultimate goal was to maintain A's Nova Scotia residency and for him to be part of a shared parenting regime. He sought primary parenting only as a last alternative.

[10] The mother's alternate position was that if relocation was refused, she should act as the primary parent in Halifax, with parenting time for the father mirroring the status quo arrangement already in place. That schedule saw A residing with the mother in Halifax proper, while the father resided 43 km away,

[1] The Covid-19 pandemic delayed the progress of the litigation over a two year period until an in-person hearing took place before the judge in May 2022.

within the Halifax Regional Municipality ("HRM"). The father informally enjoyed parenting time every second weekend, each Tuesday for three hours, blocks of time in summer and other periods as the parties negotiated from time to time. The mother argued the father should have less time than he was seeking to secure under a shared parenting arrangement.

[11] The father and the court were also made aware the mother did not intend to move to Ottawa if her request to relocate A was refused. In other words, the mother was not leaving Halifax unless A was with her. As will be seen, that aspect of the evidence and the judge's treatment of it forms one of the contentious issues before this Court.

[12] Both parties asked the judge to consider the relocation question first. Each provided a cascade of alternative outcomes they proposed the court impose as a parenting schedule, all contingent on a determination as to whether the mother would or would not be permitted to relocate A.

[13] The father provided the judge with details about the various activities and recreational events in which his family engaged when A would spend time with them, along with information about the physical features of his home. The judge also had evidence of A's ties to other children in the father's home: the father's child from an earlier relationship, the father's child (as of this decision now two children) from his relationship with his current partner, and his stepchild from that same relationship. The father put forward the specifics of his plan for transportation of A in a shared parenting regime, and how he would ensure A would continue with organized community activities and attendance at daycare (and eventually public school) in the mother's neighbourhood. Unlike the mother's plan, his contained concrete details for the judge to consider.

[14] The mother's plan was that she and A would relocate to Ottawa and once there, she would secure a home either in the Nepean region or in Ottawa proper. She testified living there would afford A exposure to the mother's family, including the maternal grandfather, who had previously lived with A and the mother in Halifax for a period of time when A was an infant. The mother's plan was scant on specifics, reflecting her position that the details of A's new lifestyle would be ascertained only after the relocation would occur. The judge understood the mother "does not want to sell her house or look for a new house in the Ottawa area until she knows the outcome of her relocation application", and noted the mother's "family and friends would be in a better position to offer support to Ms. Kendall and A if the relocation was authorized".

[15] The absence of any concrete information from the mother, combined with the judge's considerable emphasis on potential for future connections A could forge in Ottawa, portended the same difficulty found in *Titus v. Kynock*, 2022 NSCA 35:

> [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.
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> [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.

[16] I make this observation cognizant of the comments found in *Barendregt* (decided days after *Titus*) that:

> [127] Recent amendments to the *Divorce Act* now instruct courts to consider the moving parent's reasons for relocation: s. 16.92(1)(a). Similarly, provinces across Canada have incorporated the moving parent's reasons for relocation within their statutory relocation regimes: *Family Law Act*, s. 69(6)(a) (B.C.); *The Children's Law Act, 2020, s. 15(1)*(a) (Sask.); *Children's Law Reform Act*, s. 39.4(3)(a) (Ont.); *Family Law Act*, s. 62(1)(a) (N.B.); *Parenting and Support Act, s. 18H(4)*(b) (N.S.); *Children's Law Act*, s. 48(1)(a) (P.E.I.).
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> [128] Indeed, isolating the custodial parent's reasons for the move from the broad, individualized inquiry of the child's best interests has frequently proven impractical. There will often be a connection between the expected benefits of the move for the child and the relocating parent's reasons for proposing the move in the first place. Relocation for financial reasons, for instance, will clearly carry implications for a child's material welfare. Considering the parent's reasons for moving can be relevant, and even necessary, to assess the merits of a relocation application.
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> [129] That said, the court should avoid casting judgment on a parent's reasons for moving. A moving parent need not prove the move is justified. And a lack of a compelling reason for the move, in and of itself, should not count against a parent, unless it reflects adversely on a parent's ability to meet the needs of the

> child: *Ligate v. Richardson* (1997), 1997 CanLII 650 (ON CA), 34 O.R. (3d) 423 (C.A.), at p. 434.
>
> [130] Ultimately, the moving parent's reasons for relocating must not deflect from the focus of relocation applications — they must be considered only to the extent they are relevant to the best interests of the child.

[17] In this case the judge, in rendering a lengthy decision, reviewed in great detail the evidence put before her concerning the history of the parties respective parenting of A and the informal parenting schedules they had put in place over time. The judge described the father had been "consistent in exercising his parenting time with A and has been open to additional parenting time". The judge concluded A's move to Ottawa was appropriate but declined the mother's request for final decision-making authority. The judge directed each party to make the necessary decisions when A was in their respective care.

[18] The father says the judge erred in reaching her decision with respect to her application of the burden of proof and analysis of the relocation and best interests factors set out in the *PSA*, in her treatment of the "double bind" issue and by misapprehending the evidence. The father says these errors are material and require this Court's intervention.

[19] The mother argues the judge proceeded properly in light of the applicable burden of proof, and gave an expansive analysis of the child's best interest factors pertaining to a proposed relocation. Furthermore, says the mother, the judge's interpretation of the limitations to be placed on the mother's evidence, to prevent the double bind problem, was correct. Lastly, the mother maintains there is no support for an assertion the judge misapprehended the evidence.

[20] I would re-frame the issues as follows:

(a) Did the judge correctly assign and apply the burden of proof?

(b) Did the judge correctly interpret and apply s.18H(3) of the *PSA*?

(c) Did the judge properly apply s.18H(4) of the *PSA* to assess best interests?

(d) Did the judge misapprehend evidence?

[21] There is no controversy regarding the well-settled standard of review in relation to parenting matters. This Court must show deference, as the hearing judge is in the best position to determine the question(s) put before it: *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 11-12. Appellate review is "narrow"

(*Horbas v. Horbas*, 2020 MBCA 34 at para. 15), reflecting the highly fact-driven nature of the decision and the discretion exercised by a judge in reaching it (*Barendregt* at para. 152). Unless the judge has made "an error in principle, has significantly misapprehended the evidence or unless the decision is clearly wrong", this Court is not entitled to interfere: *D.A.M. v. C.J.B.*, 2017 NSCA 91 at para. 28. See also *Reid v. Faubert*, 2019 NSCA 42 at para. 16 and *LeBlanc v. LeBlanc*, 2023 NSCA 36 at para. 2.

[22] An assertion of misapprehension of evidence attracts a similar deferential scope of review (*Novak v. Novak*, 2020 NSCA 26 at para. 7).

[23] The judge's determination of the appropriate parenting plan depended on whether the mother would reside in Ottawa with A and the father in HRM, or both parties would reside in Halifax and HRM respectively, or whether the father would reside with A in HRM and the mother in Ottawa. Practically speaking, the third option did not need to be considered by the judge in view of the mother's position she would not relocate without A.

[24] The parties asked the judge to decide relocation first, as it would dictate which of the options then needed to be considered to craft the schedule of A's time with each parent. The order in which the particular issues raised on a relocation application are addressed is not critical. "The analysis will be driven by the circumstances of the particular case" (*Titus* para. 27). That flexibility does not remove the need to focus on the unique situation of the parties and children before the court. Here, the parties were identifying the most functional and efficient way in which to address the two key questions, being relocation and the parenting schedule, and the potential alternatives for the latter, dependant on the determination of the former.

The burden of proof

[25] The parties both argued before the judge that the burden of proof found in Section 18H(1)(c) of the *PSA* required each to prove what was in the child's best interests, given the absence of any prior court order or formal agreement on parenting. However, on April 1, 2022, approximately eight weeks prior to their hearing, amendments to the *PSA* had come into force which altered the provisions regarding the range of possible burdens of proof in relocation matters.

[26] The judge correctly recognized the recent amendments to the *PSA*. It meant there were three possible burdens of proof that could apply to the parties, as reflected in s.18H(1A)(c), (d) or (e):

> 18H (1A) The burden of proof under subsection (1) is allocated as follows:
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> . . .
>
> (c) where there is no order or agreement as referred to in clause (a) or (b) but there is an informal or tacit arrangement between the parties in relation to the care of the child establishing a pattern of care in which the child spends substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child;
>
> (d) where there is no order or agreement as referred to in clause (a) or (b) but there is an informal or tacit arrangement between the parties in relation to the care of the child establishing a pattern of care in which the child spends the vast majority of the child's time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child;
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> (e) for situations other than those set out in clauses (a) to (d), all parties to the application have the burden of showing what is in the best interests of the child.

[27] The judge concluded "A has always been in Ms. Kendall's primary care" and applied the burden set out in s.18H(1A)(d). She said "Based on my review of the evidence and the amended relocation provisions in the *Parenting and Support Act*, it is Mr. Weagle who has the burden of proving that the requested relocation would not be in A's best interests – not both parties."

[28] The judge's reasons do not reveal whether she had concluded the parties had, to track the language in s.18H(1A)(d), an "informal or tacit arrangement" whereby "the vast majority of the child's time" was in the care of "the party who intends to relocate". Presumably the judge was of the view there was an established "pattern of care" in which A spent "the vast majority" of time in the mother's care. I do not see this omission as constituting a material error.

[29] That said, I am not persuaded the judge then undertook the analysis she identified was required. Having concluded the burden rested with the father to prove the relocation was not in A's best interests, the judge later stated "If I decline Ms. Kendall's application for authorization to relocate with A to Ottawa, Ontario, I must first find it is in A's best interests to be placed in Mr. Weagle's primary care in [Halifax]". It is apparent the judge shifted the father's burden from that of establishing relocation to Ottawa was not in A's best interests, to establishing he should have primary care.

[30] In light of each party's positions, the judge's choices were to first decide the question of appropriate parenting time for the father, and then determine the relocation question, or to decide the relocation issue first and then determine what the father's parenting time should be in light of the answer to the relocation question. The latter procedure would be a more efficient and proportional undertaking, but either required the analysis to be conducted through the lens of A's best interests. Regrettably, the judge did neither. Instead, she focused on the history of the father's behaviours toward and interactions with the mother. The judge determined he was unsuitable to act as a primary parent, following which she immediately defaulted to approving the relocation. I do not read the judge's reasons as directly responding to the question of whether a move to Ottawa was in A's best interests.

[31] An assessment of primary care with the father was unnecessary because he was not advocating for assumption of it. It was a practical reality that he would have to assume it should the mother relocate without A, but the mother had made clear she would not relocate without A. If the judge refused the mother's application to relocate A, then she would need only concern herself with the father's request for shared parenting of A in Nova Scotia, because the mother was not leaving without A. The only question would then be whether it was in A's best interests that the father achieve shared parenting.

[32] Accepting the judge correctly identified the burden of proof, as the mother argues, in my view the judge's reasons read as a whole illustrate she instead conducted her analysis placing a burden on the father to prove he should be the primary parent. This was a material error.

Section 18H(3) - the "double bind" issue

[33] The father says the judge incorrectly concluded she could not consider the evidence the mother put before the court that absent approval to relocate to Ottawa

she would remain in Halifax, rather than relocate without the child. This type of evidence is commonly referred to as the "double bind" problem in relocation cases.

[34] Treatment of the double bind question has long been difficult for both counsel and courts. A parent is always free to stay or go; the court's focus is on the child's best interests. It is recognized there are potential hazards associated with having judges receive evidence regarding what will happen should the parent who seeks to relocate a child(ren) not be permitted to do so. Much has been written on the perils of placing the relocating parent in a double bind: if the parent tells the court they would not go without the child, judges may, intentionally or not, find it attractive to revert to the status quo arrangement in place for the child. Doing so effectively permits side-stepping the difficult question of whether the child(ren) should go. By the same token, a relocating parent will want to avoid casting themselves in a negative light by declaring they will relocate regardless of whether accompanied by their child(ren).

[35] In some Canadian jurisdictions, legislators have endeavoured to give statutory direction, thereby avoiding concern that reverting to the status quo will seep into a judge's analysis should the ultimate intentions of the relocating party be made known. The most recent amendments to the *Divorce Act*, R.S.C. 1985, c. 3 in 2021 reflect this effort, setting out a prohibition against considering such evidence:

> **16.92 (2)** In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

[36] Here, the judge relied on the discussion in *Barendregt* to formulate her treatment of the evidence the mother voluntarily put forward that if her relocation application was not successful, she had no intention of moving to Ottawa without A, and would remain in Halifax.

[37] The judge referenced the mother's position under the portion of her decision entitled "Parenting Arrangements I cannot consider". The judge then made it clear she would not consider the mother's evidence about not relocating without A:

> [64] I did not ask Ms. Kendall, but she has made it clear to me that she is not moving to Ottawa, Ontario without A. Ms. Kendall stated that if I deny Ms. Kendall authorization to relocate with A to Ottawa, Ontario, she will be seeking primary care of A in Halifax, Nova Scotia.

> [65] Again, I did not ask Mr. Weagle, but he stated that if Ms. Kendall remained in Halifax, Nova Scotia with A, he would be seeking a shared parenting arrangement and he would not be seeking primary care of A. He explained he was seeking to increase his regular parenting time with A and work toward a shared parenting arrangement with a 4/3/3/4 schedule and eventually a week-on week-off parenting schedule with A.
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> . . .
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> [72] The Supreme Court of Canada in *Barendregt, supra* commented about the trial judge's task and what courts must and must not consider when deciding a relocation case at first instance and otherwise:
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> . . .
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> > [114]…The history of parenting arrangements is always relevant to understanding a child's best interests.
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> > [154] […] **The court should not consider how the outcome of an application would affect either party's relocation plans — for example, whether the person who intends to move with the child would relocate without the child or not relocate**. **(my emphasis).** These factors are drawn from s. 16.92(1) and (2) of the *Divorce Act* and largely reflect the evolution of the common law for over 25 years.

[38] The judge went on to recite from the *PSA*, which governs these parents:

> [77] Other applicable sections of the *Parenting and Support Act* (amended), SNS 2021, c. 15 include but are not limited to the following:
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> > ...
> >
> > 18H(3) In **deciding whether to authorize a relocation of a child, the court shall not ask or permit a party who opposes the relocation to ask whether the party who intends to relocate the child would relocate without the child or not relocate if the child's relocation is prohibited. (my emphasis)**

[39] The judge did not properly interpret or apply section 18H(3) of the *Act* and its "don't ask" provisions. The restriction on evidence of whether the relocating parent would move without the child differs under the *PSA* from that in the *Divorce Act*. The *PSA* merely limits the court from asking or permitting the opposite party to ask the double-bind question. It does not prohibit the information from being offered, nor does it prohibit it from being used by the judge when

offered. "Shall not ask" is the language of the *PSA*, whereas "shall not consider" is the language of the *Divorce Act*.

[40] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 directs the modern approach to statutory interpretation. The words of a statute must be read "in their entire context" and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the Act and the intention of Parliament" (para. 21).

[41] I agree with the mother that Nova Scotia's legislators were seeking to have the *PSA* come into step with the various 2021 amendments to the *Divorce Act*. A review of the legislative debates in relation to the third reading of the bill to amend provisions of the *PSA* reflect the Minister of Justice and his department "identified a need for the existing legislation to be amended to bring our legislation more in line with the federal *Divorce Act*…" and that "[T]hey listened to Nova Scotians and, through supportive consultation, they were able to even add more to this piece of legislation - more to reflect what Nova Scotians were looking for."[2]

[42] As argued by the father, there is a wide gulf between not asking and not considering. The mother asserts the language in s.18H(3) mirrors the goal of the *Divorce Act*, which is to avoid tainting the relocation analysis. In my view, had the Legislature intended to mirror the language of the *Divorce Act* it could easily have done so, to achieve the same result. The different wording of s.18H(3), while it corresponds to the goal of avoiding the double bind problem by removing the ability of the court or the opposing party to ask the question, does not eliminate the ability of the relocating party, as part of its litigation strategy, to put the information forward voluntarily.

[43] The distinction between "shall not consider" in the *Divorce Act* and "shall not ask" in the *PSA* cannot be dismissed. The presumption of consistent expression - that the same words have the same meaning -- carries across statutes (*Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65 at para. 44). By the same token, different words have a different meaning[3]. It is reasonable to accept as intentional the difference in wording between "shall not consider" in the *Divorce Act* and "shall not ask" in the *PSA*.

[44] The judge's misinterpretation of the language of s.18H(3) led her to the incorrect conclusion she could not consider the volunteered evidence the mother

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[2] Nova Scotia, House of Assembly: **Bill 95 Debates and Proceedings**, 3rd Reading, 63-3 (15 April 2021) at 1469 (Hon. Kim Masland).

[3] Halsbury's Laws of Canada (online), *Legislation*, "**Factors to Consider for Statutory Interpretation: Textual Analysis**" (v11.1(4)) at HLG-69 "**Presumption of Consistent Expression**" (2021 Reissue).

would not relocate without A. The judge effectively limited herself to only two choices, being whether A could relocate to Ottawa with the mother or remain in HRM with the father. This was also a material error.

Section 18H(4) factors and assessment of best interests

[45] Section 18H(1) of the *PSA* is unequivocal that "when a proposed relocation of a child is before the court, the court shall give paramount consideration to the best interests of the child". The main thrust of the father's arguments, both written and oral, centre on the judge's treatment of s.18H(4) of the *PSA*. That section directs a judge to assess a child's best interests on a relocation question as follows:

> **18H (4)** In determining the best interests of the child under this Section, the court shall consider all relevant circumstances, including
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> (a) the circumstances listed in subsection 18(6);
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> (b) the reasons for the relocation;
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> (c) the effect on the child of changed parenting time and contact time due to the relocation;
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> (d) the effect on the child of the child's removal from family, school and community due to the relocation;
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> (e) the appropriateness of changing the parenting arrangements;
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> (f) compliance with previous court orders and agreements by the parties to the application;
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> (g) any restrictions placed on relocation in previous court orders and agreements;
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> (h) any additional expenses that may be incurred by the parties due to the relocation;
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> (i) the transportation options available to reach the new location; and
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> (j) whether the person planning to relocate has given notice as required under this Act and has proposed new decision-making responsibility, parenting time and contact time schedules, as applicable, for the child following relocation.

[46] The father asserts the judge did not fully follow the direction in s.18H(4), improperly applying certain factors and omitting to consider others. The judge was, in the words of the father, "hyper-focused" on his past. It is clear the history of the parties' interactions with the child and their respective parenting of A was undoubtedly relevant; however, the judge's decision reveals she let her concerns about the father's historical behaviours overtake assessment of his ability to act as a shared (or a primary) parent. This was despite the judge's recognition, corroborated by the mother's evidence, that the father's lifestyle and approach to his parental role had resulted in an increase in his parenting time over A's young life.

[47] The judge was satisfied "Mr. Weagle's lifestyle has changed for the better", that he "has been in a better position to provide care for A since December 2020" and since then "there have been many examples of the parties' ability to communicate and cooperate with respect to A." Later still she commented, "I accept that the parties' parenting relationship is sufficiently amicable for them to work together on certain matters." Despite reaching those conclusions, it is curious the judge later noted "I have serious concerns about Mr. Weagle's parenting skills and his decision making…".

[48] Following an extensive canvass of the evidence and its application to the best interests factors set out in s.18(6) of the Act, the judge began the portion of her decision she entitled "Analysis". In the first paragraph she immediately reached her conclusion:

> [272] I am prepared to grant Ms. Kendall's application to relocate to the Ottawa Ontario area with A. I am also granting Mr. Weagle block parenting time with A. I have based my decision on all of the evidence.
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> . . .
>
> [293] . . . Ms. Kendall has proven on a balance of probabilities that it is in A's best interest to move from Halifax, Nova Scotia to the Ottawa, Ontario area with Ms. Kendall. I find Mr. Weagle failed to prove it was in A's best interests to be placed in his primary care in [. . .], Nova Scotia.

With respect, the promised analysis did not reveal itself.

[49] I am in agreement with the mother that the judge conducted a thorough examination of the best interest factors enumerated in s.18(6) of the *PSA* as was specifically required by s.18H(4)(a). She discussed at considerable length the

evidence in relation to each applicable factor. However, two problematic aspects of the judge's treatment of s.18H(4) remain. The first relates to an absence of consideration of other factors mandated by s.18H(4) to be examined in relocation cases.

[50] I do not read the judge's decision as having fully addressed all applicable factors from the list set out in s.18H(4). As to s.18H(4)(b) - the reasons for the relocation - the judge recognized early in her decision that those reasons were to be considered to the extent they could be relevant to A's best interests. However, later she found:

> [275] Ms. Kendall's reasons for relocating will impact positively on A's best interests. Ms. Kendall will have better job opportunities, her family to support her, and her friend to support her.
>
> [276] Ms. Kendall has always placed A's needs first. She has paid for A's child care and her extracurricular activities. Because of her commitment to provide financially for A, she is in a position to sell her home in Dartmouth, and she will have the means to make a down payment to purchase a new home, possibly in Nepean near her brother.
>
> . . .
>
> [295] I am granting Ms. Kendall authority to move with A to Ottawa, Ontario. Among other things, the relocation to the Ottawa, Ontario area will allow Ms. Kendall, A's primary caregiver, to: have family and friends provide her with ongoing emotional and practical support; the possibility of career advancement; and a better life generally for Ms. Kendall and therefore for A.

[51] The emphasis on the benefits to the mother of relocation is misplaced. As stated in *Barendregt*:

> [130] Ultimately, the moving parent's reasons for relocating must not deflect from the focus of relocation applications — they must be considered only to the extent they are relevant to the best interests of the child.

[52] The judge was also required under s.18H(4)(c) to consider the effect on A of changed parenting and contact time with the father that would result from a relocation. Despite the judge's determination earlier in her decision that the father had consistently exercised parenting time, she gave it only the most cursory consideration, from the vantage point of what type of parenting he would have going forward:

> [296] I have considered the amount of time both Mr. Weagle and Ms. Kendall have spent with A. I have also considered the level of involvement they have both had in A's life in the last couple of years primarily. I find it is in A's best interests to spend several block periods of time with Mr. Weagle in Halifax, Nova Scotia each year.

It is difficult to reconcile these disparate conclusions.

[53] Section 18H(4)(d) required the judge to consider the effect on A of removal from family, school and community. Her brief finding was:

> [281] A's contact with Mr. Weagle's sons is an important consideration, but A did not grow up in Mr. Weagle's primary care or primarily with (his/her) step brother and (his/her) half brothers. A has always lived primarily with Ms. Kendall.
>
> [282] I agree that videochat is a poor substitute for in person visits, especially for A and (his/her) younger siblings. However, upon consideration of all the evidence, I am confident Ms. Kendall will support A in maintaining (his/her) existing relationships in Nova Scotia, including with (his/her) brothers. Block parenting time with A in Nova Scotia, supported by Mr. Weagle, will help A continue to develop (his/her) relationship with (his/her) paternal family.

[54] These comments suggest the judge was looking only at what the parenting arrangements would need to be so as to give effect to the relocation. Overall, the decision emphasized the value of A's future connections in Ottawa, rather than considering A's present connections in Halifax as required by a s.18H(4)(d) analysis.

[55] The mother urges that taken as a whole, the judge's analysis of the child's best interests did include consideration of the additional s.18H(4) relocation-specific factors the judge had to consider. She says the judge's reasons reflect a "blended" analysis of the s.18H(4) factors and the s.18(6) factors. I cannot agree. I am persuaded the judge did not consider all applicable factors as required by s.18H(4), which omission was in error.

[56] The second problematic aspect of the judge's treatment of s.18H(4) relates to the concern put forward by the father that the judge's best interests analysis, restricted to only the s.18(6) factors and not all applicable factors enumerated in s.18H(4), was considered through the wrong lens. The judge was critical of the father's past and unsuitability as a primary parent. This problem was compounded by the judge's treatment of the question of whether it was in the child's best interests to relocate to Ottawa. Unfortunately, as was the case in *Titus*, read as a

whole, the judge's reasons reveal that while she was ostensibly discussing the best interests of A, her conclusions "focused almost exclusively on their implications for" the mother (para. 34). The judge's treatment of s.18H(4) and her application of the best interests test constitute an error.

[57] Given the above assessment of the first three issues, it is unnecessary to consider the argument put forward by the father as to misapprehension of evidence.

Conclusion

[58] Section 18H(1) of the *PSA* requires a court to give paramount consideration to the best interests of a child when considering relocation. The relocation question is, of necessity, considered through a child-centered lens. Section 18H(4) of the *Act* further focuses the judge's task when a relocation question is in play.

[59] The judge instructed herself as to the various statutory factors to be applied, yet she placed undue emphasis on why the father's history made him an unsuitable primary parent, rather than asking the question of whether it was in A's best interests to relocate to Ottawa, and if not, whether it was in A's best interests to be in his shared care.

[60] The judge over-emphasized the father's historical shortcomings and why he would not be a suitable primary care parent, rather than "comparing and balancing the advantages and disadvantages of each proposed parenting scenario" (*D.A.M.* at para. 30). The judge did not consider all of the applicable relocation factors set out in s.18H(4), and her misinterpretation and misapplication of the s.18(3) prohibition limited her to two possible parenting scenarios, without any consideration of at least one additional parenting plans available that could potentially, with analysis, have been in A's best interests.

[61] I would allow the appeal, with costs payable by the mother in the amount of $1,000. The matter shall be remitted to the court for a new hearing before a different judge. Given the parties were previously without any order, pending re-hearing they shall, subject to any written agreement between them or other interim court order, revert to the parenting arrangement the judge described at para. 10 of her decision.

Beaton, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.