NOVA SCOTIA COURT OF APPEAL
Citation: *Evans v. Larocque*, 2025 NSCA 4

Date: 20250114
Docket: CAC 529633
Registry: Halifax

Between:

Joel Evans

Appellant

v.

Candace Larocque

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	November 18, 2024, in Halifax, Nova Scotia
Facts:	The appellant and respondent, parents of a child born in May 2018, were in a relationship from 2016 to June 2022. Their relationship broke down multiple times, leading to disputes over the primary care of their child. The respondent sought refuge at a women's shelter twice due to alleged domestic violence. An August 2020 Consent Order provided for shared parenting, but the arrangement was not followed as the parties had reconciled that summer. The relationship broke down irrevocably in June 2022. A trial to determine the parenting arrangement was heard in September 2023. The appellant appealed the trial judge's decision to grant primary care to the respondent, alleging errors of law and bias by the trial judge (paras 1-14).

Procedural History:	Supreme Court of Nova Scotia, Family Division, December 14, 2023: Granted primary care of the child to the respondent
Parties Submissions:	Appellant: Argued that the trial judge made errors and was biased, seeking to overturn the decision and have the child placed in his primary care. Alternatively, he requested a new trial and shared parenting as per the 2020 Consent Order. He also sought to introduce fresh evidence on appeal (paras 2, 47). Respondent: Emphasized her role as the child's most consistent and stable caregiver and the long history of conflict with the appellant who was controlling, angry and hostile toward her. She argued it was in the child's best interests to remain in her primary care, highlighting her stable employment and the child's established routine (paras 34-36).
Legal Issues:	Did the trial judge exhibit a reasonable apprehension of bias toward the appellant? Did the trial judge misapprehend the evidence? Did the trial judge err in her analysis of the best interests of the child test? (paras 49-50)
Disposition:	Motion to adduce fresh evidence and appeal dismissed without costs.
Reasons:	A parenting order is not to be reversed on appeal unless the trial judge made an error in principle, significantly misapprehended the evidence or made a decision that is clearly wrong. The appellant failed to dislodge the presumption of judicial impartiality. The court found no reasonable apprehension of bias, as the trial judge's comments and interventions did not indicate partiality. (paras 52-59). The trial judge did not misapprehend the evidence, as her findings were based on the record and she did not commit any material error (paras 64-72). The trial judge considered the evidence holistically. Although she did not explicitly enumerate the statutory factors under s. 18(6) of the *Parenting and Support Act*,

R.S.N.S. 1989, c. 160, her reasons were sufficient and focused on the child's best interests~~,~~. (paras 75-87). The appellant's motion to introduce fresh evidence was dismissed as irrelevant to the appeal (paras 60-62).

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Respondent

Judges:	Wood, C.J.N.S., Farrar, Derrick, JJ.A.
Appeal Heard:	November 18, 2024, in Halifax, Nova Scotia
Held:	Motion to adduce fresh evidence and appeal dismissed without costs, per reasons for judgment of Derrick, J.A.; Wood, C.J.N.S., and Farrar, J.A. concurring
Counsel:	Kelsey Hudson and Heather Mills, for the appellant Lola Gilmer, for the respondent

Reasons for judgment:

Introduction

[1] The appellant and respondent are the parents of L. On December 14, 2023, in an oral decision, Justice Cindy Cormier of the Supreme Court of Nova Scotia, Family Division (NSSC Family Division), granted primary care of five-year old L. to the respondent. This followed a trial on September 20 and 21, 2023. The parents had each sought primary care of their daughter.

[2] The appellant appeals the primary care order.[1] He says the trial judge made a number of errors and was biased against him. He wants the judge's decision overturned and L. placed in his primary care. In the alternative, he seeks a new trial and, in the interim, shared parenting of L. as provided by a 2020 Consent Order. The appellant also seeks to adduce fresh evidence on appeal.

[3] For the reasons that follow, I would dismiss the fresh evidence motion and the appeal and confirm the trial judge's order for primary care of L. and L.'s residence to be with the respondent.

Facts – A Chronology

[4] The appellant and respondent were in a relationship from 2016 to June 2022. L. was born in May 2018.

[5] The parties' relationship broke down in 2018 and again in 2020. On both occasions, the respondent sought refuge at Bryony House, a women's shelter. On the first occasion, the respondent and appellant resumed cohabitation after a separation of six weeks. The relationship fell apart again in February 2020. In an affidavit sworn August 14, 2023, the respondent said that during an argument started by the appellant he assaulted her which led to her taking L. and returning to Bryony House. Both parties were charged with assault and placed on no-contact orders.

[6] The appellant did not see L. from March to May, 2020. In June he saw her five times. The respondent's pre-hearing brief noted that her stay at Bryony House coincided with the COVID-19 lockdown.

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[1] The trial judge ordered the appellant to pay interim child support which has not been appealed.

[7] In March 2020, the respondent filed an application with the Family Division seeking custody and parenting of L. The parties entered into a Consent Order in August 2020. It provided that they would share parenting on the basis of week on/week off joint custody beginning on August 30, 2020. They agreed to joint decision-making. The Order set out the specifics of the parenting time, holidays and other special occasions. It gave the respondent "block summer parenting time during the month of July" and the appellant "block summer parenting during the month of August".

[8] By the time of the August 2020 Consent Order, the parties had reconciled although they maintained separate residences. The respondent had moved in June 2020 with L. from Bryony House to an apartment in Dartmouth. The appellant continued to live in Halifax. The respondent and L. would go to the appellant's apartment for overnight visits during the week. The parties acknowledged at trial that they never followed the terms of the August 2020 Consent Order.

[9] In June 2022 the parties' intimate relationship finally collapsed. This was followed by disruptions in the shared parenting of L.

[10] In July 2022 the appellant became ill due to stress and anxiety and for three weeks was unable to care for L. He saw L. on two occasions for lunch. A text message dated June 25, 2022 and attached as an Exhibit to the respondent's August 11, 2023 affidavit foreshadowed the appellant's deterioration:

> …Goodbye Candace, tell [L.] I was the best dad I could be, and I'm sorry for anything that I did that hurt you, it was never my intention. I'll leave some things at mom's and dad's for you and her and that's it. Do the best you can and I wish you well.

[11] The appellant recovered in August 2022 with the help of "happy pills" as he called them, and kept L. in his care for an entire month. The respondent had expected L. to be returned to her after a week-long visit with the appellant that started on August 7. At trial the appellant explained having L. in his exclusive care for August was how he had interpreted the August 2020 Order—"Joel Evans will have block summer parenting time during the month of August". He also enrolled L. for pre-primary with a September start at Oxford School in Halifax, close to where he was living. He did so unilaterally, having not obtained the respondent's consent.

[12] The evidence at trial established that the appellant had previously agreed the respondent could enroll L. in pre-primary at a Dartmouth school near her apartment. In the same June 25 text message he said, in part:

> It's obvious you don't want to talk, and I said some shitty things and I'm sorry for that…I won't be able to see [L] for a bit. Feel free to register her for school in Dartmouth…

[13] On September 7, 2022 the respondent retrieved L. from Oxford School and kept her until November 9, 2022. She placed L. in a daycare near where she was living. The respondent testified at trial that she believed the appellant would not return L. if she provided him parenting time in September and October 2022.

[14] On September 20, 2022 the appellant filed a Notice of Application with the Family Division pursuant to s. 41 of the *Parenting and Support Act*[2] requiring the respondent to appear in court and explain her non-compliance with the August 2020 shared parenting Order.

[15] On November 9, 2022 the trial judge granted an Interim Parenting Order which provided for a week on/week off shared care arrangement. L. was to attend day care.

[16] Following an interim hearing on August 28, 2023 before Justice Paul Morris of the Family Division, an Interim Order was granted directing that L. would attend school at Dartmouth South Academy near the respondent's apartment beginning in September 2023.

[17] The parties were next in court for their September 2023 trial. The trial proceeded on the basis of them agreeing it was a variation hearing as their reconciliation in the summer of 2020 represented a change in circumstances since the August 2020 Consent Order. This allowed the court to revisit the appropriate parenting arrangements for L.

Parenting Plans – Affidavit Evidence

[18] At the time of the trial, the appellant's apartment was walking distance from Oxford School where he intended to enroll L. if he was awarded primary care. In his July 25, 2023 affidavit he said L. was acquainted with the school having met the principal and many of the support staff. He indicated she was familiar with "the

[2] *Parenting and Support Act*, R.S.N.S. 1989, c. 160.

routine" as he had practiced it with her during August 2022. (What constituted "the routine" was not explored with the appellant during his testimony.)

[19] The appellant also noted in his affidavit that L. had friends in the area and services such as the doctor and dentist, and amenities such as the Conservatory music school, Natural History Museum, and the Commons splash pad and pool were within walking distance. The appellant said he and L. had visited all these locations and participated in regular playdates. He said he and his mother were nearby to provide before and after school care to L. At the time his mother was an 8 minute drive away.

[20] The appellant's parenting plan depended on his mother for transportation as he did not own a car, and other aspects of L.'s care. Despite evidence of his mother's involvement with L., she did not testify or provide affidavit evidence to confirm her role in the appellant's proposed parenting plan.

[21] The appellant confirmed in his trial testimony that he and his mother would be available to provide before and after-school care for L. if she was enrolled at Oxford Street.

[22] The appellant expressed strong criticisms of the respondent's care of L., alleging neglect, laziness, failure to attend in a timely fashion to her dental needs, and failure and refusal to share information.

[23] In summarizing what he offered L. as the primary caregiver, the appellant emphasized that he had provided a "worry-free environment for growing, learning, experimenting and failing which had helped L. learn, grow and thrive". He referenced activities involving music, crafts, reading, riding a bicycle and gardening.

[24] The appellant's proposal was for L. to be in his care from Sunday at 4 p.m. to Friday after school, and then with the respondent from Friday after school to Sunday at 4 p.m. He wanted to have "a quality weekend" with L. for the last weekend of every month with the respondent being entitled to an evening with L. during the week before that end-of-month weekend.

[25] In her affidavit evidence, the respondent stated she had always been L.'s primary caregiver, despite denials of this by the appellant. She said she had stayed at home full-time with L. during the relationship with the appellant. She noted that

in July 2022 L. was only out of her care every Wednesday to Friday when she was looked after by the appellant's mother.

[26] The respondent had recently obtained full-time employment at an insurance company. She also did not have a car. Dartmouth South Academy was within walking distance of her home.

[27] In her affidavit evidence, the respondent indicated the appellant had been aggressive and abusive toward her on a regular basis. She expressed concerns about the appellant's "history of cocaine and alcohol abuse". The respondent attached copies of text messages she received from the appellant on September 1, 2022 in which he made explicitly hostile statements including disparaging comments about her employment.

Trial Evidence

[28] Both parties were represented by counsel at trial. Cross-examination at the September trial did not delve comprehensively into the conflicting claims of the parties in their numerous affidavits. Cross-examination of the appellant focused on his financial circumstances and his employment/unemployment. The appellant testified he had left his job as a Communications Director for a financial company because the salary of $75,000 did not pay enough. He was on social assistance and had spent two years trying to establish a business. He described having a number of employable skills.

[29] The appellant admitted in cross-examination that the respondent disagreed with him keeping L. with him throughout August 2022 and during the first week of September.

[30] The appellant was asked if he remembered the interim hearing before Justice Cormier on November 9, 2022. He did. He recalled Justice Cormier commenting on his "rude manner" which she had described for the record as him "slamming" his papers down, "huffing and puffing" and rolling his eyes.

[31] The respondent was asked on cross-examination about her return to Bryony House with L. in February 2020. She agreed that she and the appellant had been arguing and he had been starting to pack up to leave. At that point, she decided to go to Bryony House. Appellant's trial counsel was seeking to establish that the respondent did not "flee" to Bryony House as she had claimed in her affidavit evidence.

[32] The respondent also agreed in cross-examination that she had made a unilateral decision on September 7, 2022 to remove L. from Oxford School and place her in a daycare without the appellant's consent.

Final Submissions

[33] The appellant's final submissions sought to persuade the trial judge of the following:

- Where the respondent unilaterally withheld L. on two separate occasions (February to June 2020 and September to November 2022) she could not be trusted to abide by a court order.
- The respondent continued to interpret orders relating to L.'s care in a manner that favoured her—the respondent's—interests.
- The trial had revealed the fault-lines in the respondent's credibility.
- The parties are unable to communicate without conflict.
- It was in L.'s best interests, in accordance with the factors under s. 18(6) of the *Parenting and Support Act*, to be placed in the primary care of the appellant and attend Oxford School.

[34] The respondent emphasized the following in final submissions:

- She had been separated from the appellant since June 8, 2022.
- It was in L.'s best interests to placed in her primary care. She has always been L.'s most consistent and stable caregiver. She was a stay-at-home mother prior to the relationship breakdown.
- There had been a long history of conflict with the appellant. He had always been controlling, angry and hostile toward her. She had provided clear and specific examples of the appellant's violence and aggression.
- As further evidenced by the appellant's demeanor and behaviour in court throughout the litigation, he is an angry and aggressive individual. The respondent lacked insight into how his behaviour could impact L. He did not take responsibility for his actions.

- The evidence including text messages attached to the respondent's affidavits indicated the appellant was unable to communicate with her in a respectful manner.

- There should be concerns about the appellant becoming ill again.

- After the parties separated finally, she secured a good job with a salary and benefits that could support L. and herself.

[35] The respondent submitted the following as her plan for L.'s care:

- Dartmouth South Academy where L. is enrolled is walking distance from the respondent's home. She secured before and after school care for L. with the Excel program at the school. The respondent works Monday to Friday from 9 a.m. to 5 p.m. and is able to work from home a few days per week.

- She had created a healthy routine for L. and walks her to and from school each day. (The appellant's plan for before and after school care for L. at Oxford School is dependent on his mother.)

[36] The respondent asked for sole decision-making authority in relation to L. She proposed in the alternative that the parties have joint decision-making responsibility, provided they follow the advice of any relevant third party professionals. Sole decision-making would revert to the respondent in the event the parties could not agree or there was no third party professional involved.

[37] The trial judge was actively engaged with counsel during their submissions. She indicated she would not be comparing the respective schools the parties were proposing for L. She also queried how the appellant was paying all the expenses he had described in his evidence when he was not working, saying: "That's what I have to look at".

[38] During the respondent's final submissions the trial judge said the following in response to an objection by the appellant's counsel to a point made by the respondent: "If they have opposing views…in their affidavit, (*sic*) I have to try to work out who I believe based on all the evidence, okay?"

[39] The trial judge also noted that fault lay with both parties when it came to certain decisions and arrangements. The judge made her comments when the respondent's counsel criticized the appellant's plan for L. to attend Oxford School

which would involve public transportation when the respondent was returning L. from her parenting time. The judge reminded the respondent's counsel that her client's decision to enroll L. in a Dartmouth daycare in September 2022 also involved public transportation to Halifax for parenting time with the appellant.

The Trial Judge's Decision

[40] There was extensive affidavit evidence from the appellant and the respondent for the trial judge to absorb—three affidavits filed by the appellant and four by the respondent—in addition to written briefs and the two days of trial testimony. Affidavits were also filed by two friends of the respondent and her mother, all of whom also testified.

[41] The trial judge gave an oral decision, delivered with everyone attending by telephone. She noted:

- The circumstances of each party: the appellant being unemployed and on social assistance while trying to launch a business and the respondent working for an insurance company in an administrative position.
- Her obligation to make credibility and reliability findings.
- Legal principles for assessing credibility and reliability.
- Her attributing some weight to the appellant's presentation during the trial where he displayed some difficulty containing his emotions.
- The need to avoid relying too heavily on demeanor.
- The fact that allegations were made of abuse and intimidation accompanied by denials.
- Her obligation to assess the nature and seriousness of the domestic violence and its implications for the child's physical, psychological, and emotional safety and security.
- Her obligation to focus on the best interests of the child and the requirement that her order "should protect to the greatest extent possible, a child's psychological, physical, emotional, safety, security, and well-being".

[42] The trial judge reviewed some of the evidence from the trial, apparently referring to her notes as she told the parties she was "scrolling":

> I'm just going to scroll down here. I know you're not here to see me do this, so if you're wondering about the silences. But I'll let you know when I'm scrolling.

[43] Mid-way through her discussion of the evidence, the trial judge found the respondent was L.'s primary caregiver, including during the period of reconciliation during August 2020 to June 2022:

> [44] And I accept though that Mom was the primary caregiver, and that if the child went to the Dad's during that period of reconciliation, she was there with the child as well. So, she was consistently at his place. I'm not sure if he was consistently at her place on the weekends but I accept that Mom was the person…a stay-at-home Mom and she was the person that was kind of first in line to make sure that [L] had what she needed. I'm not saying that…Dad wasn't an involved parent. I'm saying that she was the primary parent.

[44] After more discussion of the evidence, the trial judge outlined the respondent's claim for primary care:

> [76] The Mother summarized her case as being a situation where there's a long history of conflict between the parties. She described the Father as controlling, angry and hostile. She stated that she'd left with the child more than once. She'd spoken to his Mother about leaving him. That mostly recently he'd pushed and there is an ongoing investigation. I don't have the outcome of that investigation.
>
> [77] She described Mr. Evans as an angry individual, and when I talked about earlier, I talked about perceptions of demeanour in the Court Room. Certainly, Mr. Evans presented as an angry individual in the Court Room at times. That was apparent to me, and I believe I addressed it with him on the record a few times.
>
> [78] She has indicated she has been the most consistent stable caregiver. She had a good job with benefits, she works fulltime, that the Oxford School idea is an idea that gives little thought to how it would affect her. She doesn't drive. She'd have to take public transportation. And she's suggested that the schedule proposed by the Father ignores the child's need for stability. That he started off ... he started(inaudible) month; that she believed it was related to or he indicate to her was anxiety or stress, causing stomach issues. And as he testified, he was given happy pills and that seems to make things better. He certainly didn't give me a good explanation as to what was going on in is life that he's on social assistance. He could be working but he's not working, raises certainly some concerns for me.
>
> [79] She says that he's not able to ... she's indicated that he's not able to communicate with her in a respectful manner. She provided some clear examples

> to me of that and she's ... I believe she was suggesting that his parenting time would be more appropriately Friday to Monday.
>
> [80] Again, she was asking for joint decision making responsibility and for the parties to follow the advice of a relevant third party professional, and in the event they couldn't reach an agreement, that a third party professional would be ... would help them making some decisions. Otherwise, she'd have final decision making responsibility. She was agreeable to both parties having access to third party information.

[45] The trial judge, obviously finding it to be in L.'s best interests, accepted that joint decision-making was appropriate, with the parties following the advice of "a relevant third party professional":

> [81] Without having to repeat what the Father's position was because I think I outlined it earlier and I clarified it with Ms. Hudson [that the appellant was seeking sole decision making], I'm going to…I am going to grant joint custody to the parties. And I'm going to direct, or order, that they follow the advice of a relevant third party professional. In the event that they can't reach an agreement, and if there's no third party professional, I am going to direct that Ms. Larocque having [*sic*] final decision making responsibility…

[46] The trial judge concluded by reiterating her finding that the respondent had been the primary caregiver of L. and it was in L.'s best interests to be in the respondent's care. The appellant was granted care of L. every other weekend from Friday to Monday at school drop-off. On his off weeks, the appellant was to have L. on Thursday to Friday drop-off at school. He was also entitled to a mid-week call with L. on his off-weeks.

The Issues

[47] In his Notice of Appeal, the appellant alleged the following errors by the trial judge:

1) Apprehension of bias;

2) Misapprehension of the evidence;

3) Failure to properly consider his parenting plan;

4) Failure to properly consider his evidence;

5) Failure to consider the factors in s. 18(6) of the *Parenting and Support Act*;

6) Error in her analysis and application of the best interests of the child test; and

7) Failure to consider the history of childcare and parenting from 2022 to the present.

[48] In the listing of issues in his factum—which I note the appellant filed as an unrepresented litigant before obtaining representation for the appeal hearing—the appellant does not explicitly mention s. 18(6) *Parenting and Support Act*. However this was referenced in the appellant's written and oral argument. In his factum, when addressing the "error in analysis and application of the best interests of the child test" issue, the appellant says:

> 48. Her Ladyship did not outline the factors under the *Parenting and Support Act* when rendering her decision nor refer to same. She did not properly analyze each factor and how they applied in this case. Her Ladyship also did not review our parenting plans and why my plan did not meet [L's] best interest under the factors contained in the *Parenting and Support Act*.

[49] I am satisfied the issues can be conveniently re-stated as follows:

(1) Did the trial judge exhibit a reasonable apprehension of bias toward the appellant?

(2) Did the trial judge misapprehend the evidence?

(3) Did the trial judge err in her analysis of the best interests of the child test?

[50] Issue #3 encapsulates the appellant's complaints that the trial judge did not properly consider his evidence, his parenting plan, the factors in s. 18(6) of the *Act*, and the history of childcare and parenting from 2022 to the present.

[51] I will discuss the applicable standard of review when I address each issue.

Analysis

[52] **Reasonable apprehension of bias:** The appellant says the trial judge's decision was "clouded" by her bias against him. He says primary care was awarded to the respondent because the trial judge "did not like me" and not because it was in L.'s best interests.

[53] This Court recently referenced the standard of review through which an allegation of judicial bias must be examined. *R. v. Nevin*[3] quoted from the decision of Saunders, J.A. in *Nova Scotia (Attorney General) v. MacLean*:

> [39] First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision- maker should be disqualified on account of bias. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.

[54] The appellant complains about the trial judge's interventions at various times in the trial and says she failed to demonstrate an even-handed approach. He also says the trial judge appeared biased against him due to the fact he was facing a criminal trial on a charge of assaulting the respondent.

[55] I find the appellant has failed to dislodge the strong presumption of judicial impartiality. A comprehensive review of the entire circumstances of this case do not disclose bias against him. In comments to the parties, the trial judge acknowledged being blunt in her interventions and was not reluctant to express her views. She plainly had concerns about the appellant's under-employment/reliance on social assistance and viewed him as having some issues with emotional regulation. She identified this at a hearing with the parties in November 2022. In commenting in her decision on the appellant "at times as having difficulty containing his emotions", the trial judge said she had placed only "some" weight on those observations.

[56] I also note that, in the course of the trial, the judge intervened at one point with a reminder to counsel and the parties: "This is not a punitive court…My focus is [L.]'s best interest and what's in her best interest, not who did what, when, and when they were probably not at their best".

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[3] 2024 NSCA 64 at para. 49 (See also: *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 94 at para. 110).

[57] The appellant says the trial judge showed bias toward him by not affording him an opportunity during his cross-examination to listen to the audio of the November 9, 2022 hearing (when the trial judge commented on his demeanour). He contrasts this with the trial judge directing that a court recording be played for the respondent.

[58] There was no need to play the November 2022 court recording for the appellant. He stated he recalled what had been said to him by the trial judge on that occasion. The issue raised by appellant's counsel during the cross-examination of the respondent concerned what the trial judge had said at a proceeding in November 2022 about the block parenting time in July and August, 2022. The trial judge directed appellant's counsel to play the recording of what had been said to the parties. The respondent was then asked several questions. The two situations were entirely different and did not constitute biased treatment of the appellant.

[59] I find there is nothing to support the appellant's claim that bias drove the trial judge's decision on L.'s primary care. A review of the entire context of the case does not support any appearance of bias against the appellant. I am not persuaded that a reasonable person, fully informed of the circumstances, would view any of the trial judge's interventions, comments, or rulings in the course of the trial as indicative of bias against the appellant.

The Appellant's Fresh Evidence Motion

[60] This is an appropriate time to address the appellant's motion to adduce fresh evidence. The fresh evidence is the fact of his acquittal in February 2024 of the assault charge.

[61] The appellant intends the evidence of his acquittal of the assault charge to off-set the prejudice he says was caused to him at trial before there had been a resolution of the criminal proceedings. However, there is nothing in the trial judge's reasons to indicate she gave any consideration to the appellant having been charged with assault. She merely mentions it in her recital of the evidence. It played no role in her decision on primary care. When the incident that led to the charge was raised by the respondent's counsel in final submissions the trial judge said: "That's her evidence…he's not been convicted of it. I'm aware of that…He's charged with it…I understand the difference".

[62] I would not admit the fresh evidence as it is irrelevant to the appeal.

[63] I would dismiss the bias ground of appeal.

[64] **Misapprehension of Evidence:** The appellant variously complains the trial judge gave too much or too little weight to aspects of the evidence. For example, he says the trial judge should have considered that the parties had, in the past, each been charged with assaulting the other. The appellant argues the trial judge failed to consider the respondent's behaviour and labelled him as an abuser.

[65] In *Titus and Kynock*,[4] my colleague Justice Beaton, referencing this Court's decision in *Novak v. Novak*[5] set out the deferential standard of review to be applied in the appellate review of a parenting decision:

> [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 PECA 13 (CanLII), 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

[4] 2022 NSCA 35.
[5] 2020 NSCA 26.

> affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.
>
> [...]
>
> [Emphasis added]

[66] This Court in *R. v. N.M.*[6] approvingly referenced the explanation by the Ontario Court of Appeal in *R. v. Doodnaught*[7] of what constitutes a misapprehension of evidence:

> [71] A misapprehension of evidence may involve a failure to consider relevant evidence; a mistake about the substance of evidence; a failure to give proper effect to evidence or some combination of these failings: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218. To succeed before an appellate court on a claim of misapprehension of evidence, an appellant must demonstrate not only a misapprehension of the evidence, but also a link or nexus between the misapprehension and the adverse result reached at trial.

[67] This description is as applicable to the family law context as it is in criminal appeals. The trial judge's reasons do not indicate a misapprehension of the evidence in any material way. How she weighed the evidence absent error is not reviewable.

[68] In his complaints about misapprehension of evidence the appellant re-asserts his bias argument. For example, he states in his factum:

> 54. The evidence was clear that Ms. Larocque withheld [L.] from me from September until November 2022. Justice Cormier did not seem to give enough weight to this piece of evidence. During Her Ladyship's decision, she said that she was not surprised that Ms. Larocque had removed [L.] from school. This is a misunderstanding of the evidence and illustrates the bias Her Ladyship had towards me.
>
> 55. Her Ladyship accused me of "sharp practice" in the decision when I kept [L.] in my care in August 2022 following the terms of our then Order at Ms. Larocque's insistence. This was not sharp practice; I was following the Court Order.

[69] The appellant is presumably referring to the trial judge discussing the context in which the respondent removed L. from Oxford School on September 7,

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[6] 2019 NSCA 4 at para. 27.
[7] 2017 ONCA 781.

2022. She said in the circumstances that had not been ideal, but she was not surprised by the appellant's actions:

> [64] …Your child's been kept away for a month. Your child's been enrolled in a school that you didn't want her in. You consider yourself to be the primary caregiver. You planned for her to be going to the school near you. And you know, the Father's keeping her away and not returning her. So you take her, and you take her back and you do the same thing. So not a great co-parenting relationship obviously. Not a great situation.

[70] The trial judge saying she could understand the respondent's conduct was not an indication she approved of it. She identified the situation as fraught:

> [67] …I mean this was a tit for tat kind of situation, where both parents were getting a little bit desperate, recognizing that one or the other was probably going to get primary care and they wanted to be that other. And they were trying to position themselves…you know, they're trying to see [L.] to begin with but trying to position themselves to spend time with [L.]…

[71] The trial judge made it plain she disapproved of the respondent not permitting the appellant to see L. from September 7 to November, 2022: "…I do take exception to her keeping the child away from Dad. I understand why she might have and certainly getting into Court as soon as possible would have been the best idea". As I mentioned earlier, it was the appellant, not the respondent, who brought the parenting application in September 2022. The trial judge noted this, saying the respondent "should have applied when the Father had been denying access".

[72] I find the appellant has not shown the trial judge misapprehended the evidence. There is nothing to indicate she committed any error that was central to her reasoning process.

[73] And, as I have already found, there is no basis for a finding of bias.

[74] I would dismiss the misapprehension of evidence ground of appeal.

[75] **The Best Interests of the Child Test**: This ground of appeal encompasses the appellant's complaints that the trial judge failed to properly consider: (1) his parenting plan; (2) his evidence; (3) the history of childcare and parenting from 2022 to the present; and (4) the factors in s. 18(6) of the *Parenting and Support Act*. The appellant says the trial judge failed to properly balance the respective

parenting plans and did not address the statutory factors that guide the analysis of what parenting arrangement is in a child's best interests.

[76] Embedded in the appellant's best interests of the child ground of appeal is the question: were the trial judge's reasons sufficient? A very specific question arises in the context of this appeal: was the omission by the trial judge of any explicit mention of the s. 18(6) factors an error of law? Such an omission could lead to a finding of the reasons were insufficient but—and I am in agreement with the New Brunswick Court of Appeal on this point—does not necessarily lead to this conclusion.[8]

[77] Earlier in these reasons I set out the standard of review for appeals from parenting orders. We do not re-assess the evidence and substitute our determination for that of the trial judge. To reiterate: a parenting order is not to be reversed unless the judge made an error in principle, significantly misapprehended the evidence or made a decision that is clearly wrong.[9]

[78] The Supreme Court of Canada has directed a functional approach to the assessment of whether judicial reasons are sufficient. In *R. v. R.E.M.*,[10] the Court held:

> [35] ... (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

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[8] *L.P. v. B.M.*, 2022 NBCA 19 at paras. 15-17.
[9] *MacKay v. Murray*, 2006 NSCA 84 at para. 22, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10, 11 and 12; *Van de Perre v. Edwards*, 2001 SCC 60 at para. 12; *Willick v. Willick*, [1994] 3 S.C.R. 670 at para. 27.
[10] 2008 SCC 51.

[79] Although decided in the context of a criminal appeal, *R.E.M.* is the standard applied in civil and family appeals contending with a sufficiency of reasons issue.[11]

[80] Reasons must be sufficient to allow for effective appellate review. They must provide public accountability. And the parties are entitled to know why the trial judge decided as they did. However, an appellate court is not entitled to intervene "simply because it thinks the trial court did a poor job expressing itself".[12]

[81] In *Ferguson v. Ferguson*, the Ontario Court of Appeal recognized that: "In the context of busy family law trial courts, there must be a high bar for the insufficiency of reasons."[13] The Court held:

> [47] The question in every case is whether the reasons provide the basis for meaningful appellate review of the correctness of the trial judge's decision. Trial judges are not held to an abstract standard of perfection. In evaluating a trial judge's reasons, appellate courts must consider the time constraints and general press of business in the court: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55.

[82] While, as conceded by the respondent, it would have been preferable for the trial judge to have addressed the s. 18(6) factors expressly, I have concluded her failure to explicitly do so is not fatal. Of paramount importance was the adherence by the trial judge to the intention and purpose of the statutory factors. As a judge experienced in making parenting determinations, she was well aware of what she was obligated to consider. In determining the issue of primary care the trial judge kept her focus firmly on L.'s best interests. She made findings of fact to which deference is owed and crafted an outcome that balanced ongoing stability for L. with the appellant continuing to have a significant parenting role.

[83] I also note that the trial judge was familiar with the parties and issues, having dealt with them previously, in August 2020 and November 2022. Furthermore, the respondent's pre-trial brief set out the s. 18(6) factors and discussed considerations relevant to them. This included the submission that the respondent had been "the most consistent and stable person in [L.]'s life". The trial judge was also provided with the trial brief of the appellant and his submissions on the s. 18(6) factors.

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[11] See, for example: *Urquhart v. MacIsaac*, 2019 NSCA 25 at para. 64; *McAleer v. Farnell*, 2009 NSCA 14 at para. 12.
[12] *R. v. Sheppard*, 2002 SCC 26 at para. 26.
[13] 2022 ONCA 543 at para. 47.

[84] The trial judge's finding that the respondent had been L.'s primary caregiver was a factual determination based on the record. It was reasonable for her to reject the appellant's request for primary care and sole decision-making. His parenting plan required hands-on support from his mother, whom he did not call as a witness.

[85] Despite not being a model of judicial analysis, I find the trial judge's reasons satisfy the requirements of sufficiency. As this Court stated in *Murphy v. Ibrahim*[14], the trial judge's decision was "understandable" when considered in light of the record, the issues and the submissions. The "what" and the "why" of the reasons are clear. The trial judge provided a discernable path that permits appellate review. She reviewed the evidence in detail. She was not required to recite or reference each piece of evidence. She dealt with the history of the parties' relationship and L.'s needs and care. She made findings of fact and crafted a parenting order that promoted L.'s best interests. It is apparent she considered the evidence holistically and drew conclusions from it that grounded her ultimate determination.

[86] The trial judge complied with s. 18(5) of the *Act* which required her to give "paramount consideration to the best interests of the child" in determining "decision-making responsibility, parenting arrangements, parenting time, contact time or interaction in relation to the child".

[87] Read as a whole, the trial judge's reasons addressed the relevant s. 18(6) factors she was required to take into account:

- L.'s physical, emotional, social and educational needs, including her need for stability and safety, taking into account her age and stage of development. (s. 18(6)(a)).

- Each parent's willingness to support the development and maintenance of L.'s relationship with the other parent. (s. 18(6)(b)).

- The history of care for L., having regard to her physical, emotional, social and educational needs. (s. 18(6)(c)).

- The plans proposed for L.'s care and upbringing, having regard to her physical, emotional, social and educational needs. (s. 18(6)(d)).

[14] 2023 NSCA 42 at para. 14.

- The nature, strength and stability of the relationship between L. and each parent. (s. 18(6)(g)).

- The ability of each parent in respect of whom the order would apply to communicate and co-operate on issues affecting L. (s. 18(6)(i)).

[88] Sections 18(6)(j) and (i) direct a trial judge determining a parenting issue to consider "the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child".

[89] Recitals by the trial judge early on in her reasons show she understood that family violence, abuse or intimidation were to be considered, where relevant, in a determination of a child's best interests. Her reasons indicate she did not determine the issue of primary care on the basis of the respondent's evidence about abusive conduct by the appellant. Her focus throughout was on L.'s needs and how they had been met and by whom.

[90] The trial did not make any credibility findings in relation to the abuse allegations contained in the respondent's affidavits. She accepted there had been an incident in 2018 that led to the respondent leaving with L. to go to Bryony House. She approached the parties' narratives of that incident in a fair and balanced manner. First of all, she accepted the evidence of the appellant that he had been packing up to leave, a detail not originally mentioned by the respondent. Then, in addressing the respondent's evidence the arguing between them had been escalating, she noted that "sometimes…it takes two to argue".

[91] The evidence about the second time the respondent left for Bryony House was merely recited by the trial judge in her canvas of the chronology of the parties' relationship. As the trial judge noted, the respondent's move to Bryony House in 2020 was followed by the parties' reconciliation. The trial judge's focus was not on the events that preceded the respondent's stay at Bryony House; it was on L.'s care during this period. She found:

> [42] …I do accept that for a couple of years until things really went badly when they separated finally, the child's situation was that she would spend I believe Monday to Wednesday with her grandparents, Wednesday to Friday at his house and Friday to Monday at Mom's.

> [43] Now, Mom, the Mom, and I accept her statement that when the child was Wednesday to Friday at his place, she was also with the child…obviously when the child was with her grandparents, which I accept that the child was Monday to Wednesday, both parents got a break and that's great.

The Trial Judge's Order

[92] The trial judge's Order discloses an even-handed approach to the parties while foregrounding L.'s best interests and her entitlement to a robust relationship with each parent. It demonstrated the extent to which the trial judge had taken account of the evidence. In addition to the respondent having primary care, the Order directed:

- Joint decision-making responsibility for all major decisions affecting L.
- The requirement, in the event of an inability to agree, that the parties follow the advice of a relevant third party professional involved with L.
- The respondent to have final say on the decision only if there is no third-party professional.
- Scheduling and parenting time for each party, including holidays, in-service days, and summer block parenting time.
- Both parties to abstain from the use of non-prescription drugs and abuse of alcohol while caring for L.
- The parties to make their best efforts to minimize contact between themselves.
- The parties to communicate with each other in a respectful and child-centred way with no arguing in front of L.
- The parties to cooperate in having as positive a relationship as possible with each other and in supporting L. having a positive relationship with the other parent.
- The parties to keep L. out of their conflict. L. not to be asked to choose sides, carry messages, or hear complaints or negative comments about the other parent.

- Neither party to speak negatively about family members or friends in L.'s presence.

- Both parties to engage in counselling related to anger management and domestic violence and its impact on children.

[93] The trial judge's reasons were neither cursory nor merely conclusive. Although it is a much better practice for trial judges to reference the statutory factors under s. 18(6) in a parenting decision, the trial judge did not commit legal error by not explicitly enumerating them. I am satisfied she did not fail to properly consider the appellant's evidence and parenting plan in her determination that awarding primary care to the respondent was in L's best interests. Accordingly, I would also dismiss this complaint by the appellant.

Disposition

[94] I would dismiss the motion to adduce fresh evidence and the appeal. The appellant raised reasonable questions relating to the clarity of the trial judge's reasons and I would therefore award no costs.

Derrick, J.A.

Concurred in:

Wood, C.J.N.S.

Farrar, J.A.