NOVA SCOTIA COURT OF APPEAL
Citation: *Gallant v. Gallant*, 2025 NSCA 29

Date: 20250424
Docket: CA 534003
Registry: Halifax

Between:

Brian Christopher Gallant

Appellant

v.

Marilou Gallant

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	April 14, 2025, in Halifax, Nova Scotia
Facts:	Following the breakdown of their marriage, the parents of two children, C and J, initially shared equal parenting time. However, in November 2021, the children remained solely with the father due to unsubstantiated allegations of sexual abuse against the mother's boyfriend. The mother had limited contact with the children for nearly a year, prompting her to initiate court proceedings under the Divorce Act to re-establish her relationship with them (paras 1-2, 5-7).
Procedural History:	• 2024 NSSC 73: The trial judge found it in the children's best interests to be placed in the primary care of the mother to foster meaningful relationships with both parents (para 3).
Parties Submissions:	• Appellant (Father): Argued that the trial judge erred in placing the children in the primary care of the mother, failed to give proper weight to the evidence, and

made findings not supported by the evidence (paras 15-16).

- Respondent (Mother): Asserted that the father was not complying with interim orders aimed at reuniting her with the children and that the trial judge's decision was in the children's best interests (paras 2, 12).

Legal Issues:

- Were the trial judge's reasons sufficient to permit appellate review?
- Did the trial judge misapprehend the evidence?
- Did the trial judge err in assessing what custodial arrangement was in the best interests of the children?

Disposition:

- The appeal was dismissed with costs awarded to the respondent mother (headnotes, para 33).

Reasons:

Per Bourgeois J.A. (Wood C.J.N.S. and Van den Eynden J.A. concurring):

The trial judge provided clear and detailed reasons, adequately explaining why placing the children in the mother's primary care was in their best interests (paras 21-22). The trial judge did not misapprehend the evidence, particularly the counselling notes, which were deemed unreliable due to their lack of attribution and incomplete disclosure (paras 23-28). The trial judge's findings regarding the father's interference with the mother's relationship with the children were supported by ample evidence, and the decision to change the custodial arrangement was justified to ensure the children's best interests (paras 29-32).

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Judges:	Wood, C.J.N.S., Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	April 14, 2025, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Wood, C.J.N.S. and Van den Eynden, J.A. concurring
Counsel:	Stephen Jamael, for the appellant Gordon Gear, for the respondent

Reasons for judgment:

[1] The parties are the parents of two children, C and J. For a period following the parties' marital breakdown, the children spent equal time with each parent. In November 2021 that changed. The children remained exclusively in the care of the appellant father. For a period of nearly a year, the respondent mother had little to no contact with the children.

[2] Court proceedings were initiated by the respondent mother under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). Several interim consent orders were issued with the express goal of re-unifying the mother and the children. That goal was not achieved. The respondent mother asserted the father was keeping the children from her and not abiding by the terms of the orders. The appellant father said he was doing everything possible to have the children engage with their mother.

[3] Following a two day hearing, the trial judge, Justice Pamela Marche, found it was in the best interests of the children to have a relationship with both parents. She concluded that placing the children in the primary care of the respondent mother would provide the children with an opportunity to have meaningful relationships with both parents. A Corollary Relief Judgment was issued on March 25, 2024. The trial judge's reasons are reported at 2024 NSSC 73.

[4] The appellant now challenges the trial judge's placement of the children in the primary care of the respondent mother. For the reasons to follow, I would dismiss the appeal.

Background

[5] The parties separated in March 2019, but continued to reside together in the matrimonial home for over a year. In April 2020, the respondent mother moved from the home. Until November 2021, the children spent roughly equivalent time in the home of each parent.

[6] In November 2021, based on allegations of sexual abuse made by the oldest child against the respondent mother and her then boyfriend, the appellant father unilaterally decided to retain the children in his sole care. At that point, the children were 12 and 11 years of age.

[7] The allegations of sexual abuse were investigated by child protection authorities and police. They were found to be unsubstantiated. Following the conclusion of the investigations, the parties entered into several interim consent orders with the express intent of re-introducing parenting time between the children and the respondent mother. The orders set out specified visits both virtually and in person, initially utilizing a family friend to supervise, and then the Supervised Access and Exchange Program.

[8] Two of the interim consent orders entered into by the parties (issued May 24, 2023 and June 29, 2023) contained the following acknowledgements:

> There are no safety or wellbeing concerns relating to the children having parenting time with the Petitioner, [the mother], in the present circumstances, that require the Petitioner, [the mother's] parenting time to be supervised, and that the supervised parenting time contemplated in the Supervised Access and Exchange Order is for reintroduction purposes only.
>
> There are no safety or wellbeing concerns relating to the children having parenting time with the Petitioner, [the mother] that require the Petitioner, [the mother's] parenting time to be supervised, and any supervised parenting time contemplated in a Supervised Access and Exchange Order, including any renewal of such an order, is for reintroduction purposes only.

[9] Further, at the commencement of the trial, the parties entered a Joint Statement of Facts asserting:

> 1. The Minister of Community Services has no child protection concern in regard to the Petitioner, [the mother], in relation to her children [JG] and [CG];
>
> 2. Any previous investigation into the Petitioner, [the mother], relating to her children has been closed; and
>
> 3. There is no current or ongoing investigation being conducted by the Cape Breton Regional Police, or any other policing organization, in regard to the Petitioner, [the mother].

[10] The trial proceeded on January 16 and 17, 2024. The parties had filed affidavits and were cross-examined. The mother called evidence from a friend who had supervised the visits. The father called the children's counsellor and had her notes introduced as an exhibit. The trial judge also had the benefit of a Voice of the Child Report completed on August 4, 2022 and notes from the Supervised

Access and Exchange Program documenting visits between the children and their mother from March 25, 2023 to November 4, 2023.

[11] The parties filed post-trial written submissions and the trial judge issued her reasons on March 15, 2024. A brief review of the trial judge's findings will be helpful to place the issues on appeal in context.

[12] After correctly setting out the relevant provisions of the *Divorce Act* and governing principles, the trial judge determined:

- The mother did not endorse or witness any person inappropriately touch the oldest child or engage in any other action or behaviour that would cause the children to be traumatized in her care;
- There was no evidentiary basis to conclude the children having contact with the mother would be contrary to their physical, emotional or psychological safety, security and well-being;
- The father's efforts to engage in family therapy as ordered were minimal. The father displayed a non-chalant attitude on that issue. The father did not fully engage in the therapeutic process and he acted contrary to the children's physical, emotional and psychological safety, security and well-being;
- The father and his former partner had made multiple unsubstantiated referrals to police and child protection authorities which unnecessarily drew the children into the conflict between their parents;
- The father exposed the children to adult topics and involved them in mature conversations;
- The father inappropriately posted on his public Facebook page that the oldest child was "raped" by the mother's boyfriend which was potentially damaging to the children and their relationship with the mother;
- The existing parenting arrangement (with the father) had not afforded the children a sense of stability;
- The father demonstrated an ongoing failure to comply with the interim consent parenting orders, the goal of which was to reunify the children and the mother;
- The father had unreasonably withheld the children from their mother and failed to appropriately support the children's re-engagement with her. In

addition, the father had failed to keep the mother informed of significant health or education issues that affected the well-being of the children;

- The mother had demonstrated a willingness to support the father's parental role with the children; and
- The father's proposed continuation of the children being in his primary care, would result in ending the children's relationship with their mother.

[13] Notably, in considering the children's views and preferences, the trial judge acknowledged they had expressed reluctance in the Voice of the Child Report to have contact with the mother. In determining the weight to be afforded to the children's wishes, the trial judge noted:

> [49] I am cautious about affording the VOC Report a significant amount of weight for several reasons.
>
> [50] First, I acknowledge and respect that young people have the right to have their views and preferences considered by the courts, giving due weight to the child's age and maturity, unless those views cannot be ascertained (s.16(3)(e) of the *Act*)[1]. However, even if I accept the VOC unreservedly, the children's views and preferences are not determinative and are only one factor of many that I must consider when assessing what parenting arrangement is in the children's best interests.
>
> [51] Second, I have made the finding that the children have been resistant to contact with their mother and [the father] has demonstrated an unwillingness or inability to be responsive to that issue. I have also found, a history of child protection and police referrals, allegations of unsubstantiated abuse and a pattern of withholding. The children have been caught up in their parent's conflict. They have been interviewed by police and social workers and their parenting time with their mother has been suspended or supervised. It is within this context that I am hesitant to afford significant weight to the views and preferences of the children as expressed in the VOC Report. I share [the mother's] concern that the opinions expressed by the children have been negatively influenced by their parent's high conflict divorce.
>
> [52] Third, the VOC Report was not the only vantage point from which I was afforded insight to the children's views and preferences. The SAE observation notes about visits which happened after the VOC Report was prepared offer a different perspective. While I acknowledge there are fewer visits with J from which to draw an opinion, the notes describing the visits between [the mother] and the children do not suggest the children are uncomfortable or otherwise

[1] The *Divorce Act*, *supra*.

> negatively affected by their contact with [the mother]. To the contrary, the notes generally reflect visits that are characterized by appropriate and pleasant conversation, a lot of laughter, expressions of love and gestures of affection (hugs and kisses). During the supervised visits, these children did not present as children who did not want contact with their mother. They did not present as children traumatized by contact with their mother.
>
> [53] Based on the foregoing, I find the children have demonstrated a willingness to have contact with their mother and this contact has been positive.

[14] The trial judge concluded it was in the children's best interests to have a positive and healthy relationship with both of their parents but this was unlikely to happen if they remained in their father's primary care. Although acknowledging in the short-term a change in parenting would cause disruption to the children, the trial judge concluded:

> [67] This decision will disrupt and upset the children's lives, in the short term at least. However, intermediary court interventions, such as facilitated access and family therapy, designed to avoid such an intrusive response as this, have been tried and exhausted. [The father] has demonstrated an unwillingness or inability to comply with these measures. I am left with few options.
>
> [68] Effective immediately, the children shall be placed in the primary care of [the mother]. [The mother] will have final decision-making authority for the children. [The mother] must consult with [the father] on major decisions related to the children.

Issues

[15] In his Notice of Appeal the appellant sets out the following grounds of appeal:

1. That the trial judge erred in failing to give full and due consideration and weight to the evidence adduced regarding the best interest of the children.

2. That had (*sic*) the trial judge failed to give proper weight to the various factors she considered when determining the best interest of the children and failed to give an adequate explanation in relation to this.

3. Did the trial judge err in her award of primary care, decision making and child support?

4. That the trial judge made findings of fact not supported by the evidence and failed to consider relevant and material evidence sufficiently.

5. Did the judge misapprehend the evidence?

[16] Having considered the appellant's written submissions and oral arguments, I would reframe the issues to be determined on appeal as follows:

1. Were the trial judge's reasons sufficient to permit appellate review?

2. Did the trial judge misapprehend the evidence?

3. Did the trial judge err in assessing what custodial arrangement was in the best interests of the children?

Standard of Review

[17] The standard of review in relation to each of the above issues is well-established.

[18] Regarding the sufficiency of reasons, Justice Beaton noted in *Titus v. Kynock*, 2022 NSCA 35:

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

[19] With respect to a misapprehension of evidence, Justice Scanlan in *Novak v. Novak*, 2020 NSCA 26 observed:

> [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 at paras. 38-40:
>
> > [38] In reviewing the decision of a trial judge involving custody, an appellate court is to employ a narrow scope of review. Because of its fact based and discretionary nature, a trial judge must be given considerable deference by an appellate court when such a decision is reviewed. The narrow scope of appellate review precludes an appellate court from delving into a custody case in the

> name of the best interests of a child where there is no material error. A court of appeal is not in a position to determine what it considers to be the correct conclusions from the evidence; that is the role of the trial judge. An appellate court may intervene only where there has been a material error in law or a misapprehension of the evidence or the conclusions drawn from it.
>
> [39] The approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. However, omissions in the reasons will not necessarily imbue the appellate court with jurisdiction to review the evidence heard at trial. The test is that an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence. [...]

[20] This Court has repeatedly stressed that the decisions of trial judges in custody matters are to be viewed with deference. In *D.A.M. v. C.J.B.*, 2017 NSCA 91, the Court explained:

> [28] This is an appeal. As C.J.B. argues, we do not overturn a custody or support order unless the judge has made an error in principle, has significantly misapprehended the evidence or unless the decision is clearly wrong, (*Murray v. MacKay*, 2006 NSCA 84, ¶ 22, citing *Hickey v. Hickey*, [1992] 2 S.C.R. 518, ¶ 10, 11 and 12; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, ¶ 12; and *Willick v. Willick*, [1994] 3 S.C.R. 670, ¶ 27).
>
> [29] In *Van de Perre*, Justice Bastarache noted the narrow grounds of appellant intervention:
>
> > [15] . . . If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. . . . an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. . . .

Analysis

1. Were the trial judge's reasons sufficient to permit appellate review?

[21] The trial judge's decision was clear and detailed. Her reasons set out the findings of fact she made and the evidence upon which she relied. She explained why she found it was in the children's best interests to have a relationship with both parents and why that would only be achieved by placing them in the primary care of the respondent mother.

[22] I am not convinced the trial judge failed to provide an "adequate explanation" of why her custody determination was in the best interests of the children.

2. Did the trial judge misapprehend the evidence?

[23] The appellant's misapprehension of evidence argument is centered on the trial judge's alleged failure to properly consider the import of the notes made by the children's counsellor. Specifically, the appellant says the trial judge failed to recognize the notes demonstrated the children had suffered trauma while in the care of their mother. This failure, according to the appellant, undermines the trial judge's conclusion regarding their primary care.

[24] In his factum the appellant explains:

> 24. Within the Trial Judges (*sic*) decision the children's counseling records . . . were only mentioned briefly, but the Trial Judge did not discuss or give any weight to the context or content of what's (*sic*) in those records; the Trial Judge indicated that the children's counselor was not qualified as an expert to give opinion evidence, yet this was not why she was called; she was called so the court could see the children's thoughts, voice, concerns, and what they spoke to their counselor about.
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> 25. I would ask that the court review this exhibit in detail as it portrays evidence that should be given significant weight yet it was not mentioned besides the fact that it merely exists.
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> . . .
>
> 36. It is submitted that the Trial Judge ignored, or gave no weight to evidence that clearly shows the children were dealing with serious emotional trauma in relation to their mother.
>
> . . .

> 38. The Trial judge did not consider the children's counselling records, which is a misapprehension of evidence nor was proper effect given to this evidence; it's quite clear from this evidence the children, especially C, has not overcome whatever trauma she has endured, and the Trial Judge's decision would force her back to the root cause of this trauma.

[25] There are two difficulties with the appellant's argument. First, there was no evidence properly adduced which supported the appellant's claim the children had suffered trauma and if they had, what was the source. His reliance on the notes to establish the children had been traumatized in their mother's care is misguided.

[26] Secondly, the trial judge's determination not to use the counselling notes in the manner espoused by the appellant discloses no error. In the circumstances, she was entitled to give them no weight. In her post-hearing brief, the respondent mother described the evidence adduced in relation to the counselling notes:

> 39) On cross-examination, [the counsellor] confirmed that she met in-person with both [the father] and his former partner, [AC], and that [the father] had even been present during sessions with C. However, when questioned about [the mother's] involvement with the sessions, [the counsellor] confirmed that she has never spoken with [the mother], that [the mother] has never been involved in the sessions, and that she has never provided [the mother] with a report regarding any of the children's sessions.
>
> 40) [The counsellor] confirmed on cross-examination that she has never reviewed the notes from the program facilitators of the Supervised Access and Exchange Program, relating to the children's visits with [the mother]. Moreover, [the counsellor] confirmed that **she has never reviewed the numerous Court Orders in this matter, which were issued on the consent of [the father]**.
>
> 41) When questioned about specific statements made in her notes, [the counsellor] confirmed that the disclosed sessions notes contain unattributed information and statements. For example, when questioned about notes from the January 12, 2023, session with J, [the counsellor] confirmed that the information regarding the divorce proceeding to trial was likely obtained from [the father], but that she has not attributed it as such. When questioned, [the counsellor] confirmed that this is a frequent practice for her, **and she conceded that other session notes may contain unattributed information from people other than the children**.

> 42) When questioned about the apparent year-long gap in C's sessions, between July 8, 2022, and July 13, 2023, [the counsellor] indicated that the records disclosed were incomplete, as there should be notes regarding sessions that took place between July 2022 and July 2023. **This disclosure issue resulted in a conversation between Counsel and the Court, and ultimately, despite being presented with the opportunity to do so, Counsel for [the father] did not seek an adjournment to obtain and review the supposed missing session notes**.
>
> (Emphasis added)

[27] In her submissions to the trial judge, the respondent mother argued, given the frailties exposed by cross-examination, the counsellor's evidence and the content of the notes should be given little to no weight:

> 44) The evidence of [the counsellor] is questionable at best, if not entirely unreliable. Since [the counsellor] was not tendered as an expert witness, and unable to provide opinion evidence, the entire basis for her evidence were the session notes entered as Exhibit 7. [The counsellor] very clearly indicated that these notes contain unattributed information and statements, making the session notes unreliable as the Court will be unable to distinguish between what was said by the children versus what information was provided by [the father] or his former partner, [AC]. Furthermore, [the counsellor], by her own admission, failed to disclosure (*sic*) entirety of the session notes relating to the children. Therefore, the disclosed session notes do not provide the Court with a reliable record of the children's counselling sessions, and there is no mechanism by which the Court is able to infer what is contained in the missing records. Given the above, it is respectfully submitted that the evidence offered by [the counsellor], along with the session notes, should be given little to no weight by the Court in this matter.

[28] I am satisfied the respondent mother accurately set out the nature of the evidence elicited in cross-examination which served to undermine the reliability of the counselling notes. I am further satisfied the trial judge did not ignore or misunderstand the contents of the counselling notes. The trial judge made no error in assigning little weight to the evidence. Absent an error, it is not this Court's function to re-assess and re-weigh the evidence.

3. Did the trial judge err in assessing what custodial arrangement was in the best interests of the children?

[29] In his factum the appellant father submits the trial judge erred in concluding he had interfered with the mother's relationship with the children.

[30] This concern can be dealt with in summary fashion. There was ample evidence before the trial judge which permitted her to make that finding of fact. The appellant has not demonstrated any error on the trial judge's part in reaching this conclusion.

[31] The trial judge considered the various factors in assessing the best interests of the children. She had determined it was in their best interests to have a relationship with both parents. The appellant father's unwillingness or inability to support the children's relationship with their mother was a relevant consideration and one which the trial judge was entitled to view as being significant.

[32] As with his allegation of a misapprehension of evidence, the appellant's complaint is simply a request that this Court re-assess and re-weigh the evidence adduced at trial. That is not our function.

Disposition

[33] For the reasons set out above, I would dismiss the appeal. At the hearing of the appeal, the respondent mother requested costs of $2,500.00 in the event the appeal was dismissed. As such, I would order the appellant pay the respondent costs of the appeal in the amount of $2,500.00, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Wood, C.J.N.S.

Van den Eynden, J.A.