NOVA SCOTIA COURT OF APPEAL
Citation: *Kendall v. Weagle*, 2025 NSCA 48

Date: 20250619
Docket: CA 536692
Registry: Halifax

Between:

Olivia Byrd Kendall

Appellant

v.

Joseph Daniel Weagle

Respondent

Judges:	Wood, C.J.N.S., Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	June 4, 2025, in Halifax, Nova Scotia
Facts:	The case involves a dispute between two parents over the relocation of their child, A, who is nearly 7 years old. The appellant sought to relocate the child from Halifax, Nova Scotia, to Ottawa, Ontario, which the respondent opposed. The parties have been engaged in litigation over the child's living arrangements for several years (paras 1-2).
Procedural History:	• Weagle v. Kendall, 2023 NSCA 47: The Nova Scotia Court of Appeal set aside a decision permitting the child's relocation and ordered a new hearing (para 3). • 2024 NSSC 220: Justice Daniel W. Ingersoll dismissed the appellant's application to relocate the child (para 4).
Parties' Submissions:	• Appellant: Argued that the hearing judge's credibility analysis was flawed, misapprehended the evidence, and misapplied the burden of proof by

incorrectly placing it on her to establish the child's best interest in relocating (paras 16-17).

- Respondent: Contended that the hearing judge's reasons, when read as a whole, did not demonstrate any errors in the application of the burden of proof or credibility assessment (para 19).

Legal Issues:

- Whether the hearing judge's credibility analysis was flawed.
- Whether the hearing judge misapprehended the evidence.
- Whether the hearing judge misapplied the burden of proof regarding the child's best interests in the relocation decision.

Disposition:

- The appeal was dismissed with costs awarded to the respondent (para 28).

Reasons:

Per Wood, C.J.N.S., Bourgeois, and Van den Eynden, JJ.A.:

The Court found no support for the appellant's claims that the hearing judge misapprehended the evidence or erred in the credibility assessment. The hearing judge's findings were grounded in the evidence, and the Court of Appeal's role is not to reassess the evidence unless there is a clear error (paras 20-22). The Court also concluded that the hearing judge did not misapply the burden of proof. The hearing judge was aware of the burden resting with the respondent and consistently applied it throughout his analysis. The appellant's evidence was considered, but the hearing judge did not find it persuasive enough to conclude that the child's needs would be better met in Ottawa (paras 23-27).

NOVA SCOTIA COURT OF APPEAL
Citation: *Kendall v. Weagle*, 2025 NSCA 48

Date: 20250619
Docket: CA 536692
Registry: Halifax

Between:

Olivia Byrd Kendall

Appellant

v.

Joseph Daniel Weagle

Respondent

Judges:	Wood, C.J.N.S., Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	June 4, 2025, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons of the Court
Counsel:	Bryen E. Mooney for the appellant Lola Gilmer and Nicholas Darbyshire for the respondent

Reasons for judgment by the Court:

[1] The appellant, Ms. Kendall, and the respondent, Mr. Weagle, are the parents of A who will turn 7 in September 2025. The parties have been engaged in litigation regarding where the child will live, and with whom, for several years.

[2] This is the second time this Court has been asked to review a decision made by a judge of the Supreme Court of Nova Scotia (Family Division) in relation to this child. Both appeals relate to an application the appellant made pursuant to the *Parenting and Support Act*[1] (*PSA*) in which she sought permission to relocate the child from Halifax to Ottawa, Ontario.

[3] In June 2023, this Court set aside a decision (rendered in December 2022) which permitted the child's relocation and ordered that the matter be remitted for a new hearing (*Weagle v. Kendall*, 2023 NSCA 47).

[4] The application was reheard in June 2024. The hearing judge, Justice Daniel W. Ingersoll, dismissed the appellant's application to relocate the child. His written reasons are reported as 2024 NSSC 220 with an Order subsequently issuing.

[5] The appellant filed a Notice of Appeal in which she alleges the hearing judge committed several errors and requests the decision be set aside and for this Court to permit the child's relocation with her to Ottawa. In the alternative, the appellant asks for a new hearing.

[6] The appeal was heard on June 4, 2025, with the panel's decision being reserved. For the reasons to follow, we would dismiss the appeal.

Decision under appeal

[7] At the rehearing of the application, the parties put forward substantial evidence by way of their own affidavits, as well as those offered by several witnesses. Both parties were thoroughly cross-examined. They were given the opportunity to file post-hearing submissions.

[8] To put the arguments on appeal in context, it is useful to highlight the hearing judge's analytical path and conclusion. Further details will be addressed when responding to the appellant's specific concerns.

---

[1] R.S.N.S. 1989, c. 160, as amended.

[9] The hearing judge commenced his reasons with a review of the litigation history. He then turned his mind to the issue of which party, in accordance with the *PSA*, bore the burden to demonstrate that relocation to Ottawa was, or was not, in the child's best interests.

[10] The parties had very different views of this issue. The appellant argued the burden rested with the respondent to demonstrate the relocation was not in the child's best interests. The respondent had submitted the burden ought to be borne by the appellant, or alternatively, equally between them.

[11] After considering the provisions of s. 18H(1A) of the *PSA*, the hearing judge concluded subsections (b) and (d) applied to the circumstances before him, resulting in the respondent bearing "the burden of proving relocation is not in [A]'s best interests". Those provisions state:

> **(1A)** The burden of proof under subsection (1) is allocated as follows:
>
> . . .
>
> (b) where there is a court order or an agreement that provides that the child spend 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, unless the party who intends to relocate the child is not in substantial compliance with the order or agreement, in which case clause (e) applies;
>
> . . .
>
> (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;

[12] The above finding was not challenged on appeal.

[13] The hearing judge began his analysis of the relocation issue by noting s. 18H(1) of the *PSA* required him to apply as the paramount consideration, the child's best interests. That section states:

> **Relocation considerations**
>
> **18H (1)** When a proposed relocation of a child is before the court, the court shall give paramount consideration to the best interests of the child.

[14] He observed that s. 18H(4) prescribed ten factors to be considered on a relocation application which included the best interest factors set out in s. 18(6). The hearing judge then proceeded to address the factors in s. 18(6) referencing the evidence before him. He finished his analysis by considering the remaining relocation factors set out in s. 18H(4).

[15] The hearing judge concluded the respondent had demonstrated it was not in the child's best interests to relocate and as such, she would remain in Nova Scotia. As the appellant had indicated in her evidence that she intended to move to Ottawa regardless of the outcome of the relocation decision, the hearing judge directed the respondent would assume primary care of the child.

Arguments on appeal

[16] The appellant advances three arguments on appeal:

- the hearing judge's credibility analysis was flawed, specifically he did not consider a discrepancy in the respondent's evidence and that of his partner;
- the hearing judge misapprehended the evidence; and
- although he correctly determined the burden rested with the respondent, he failed to apply it in his analysis.

[17] The appellant focused in both her written and oral submissions is in relation to the hearing judge's alleged misapplication of the burden of proof. In short, the appellant argues various passages in the hearing judge's reasons demonstrate he consistently and incorrectly placed the burden on her to establish it was in the child's best interest to relocate to Ottawa. She argues the hearing judge should have started from the presumption it <u>was</u> in A's best interest to relocate with her primary parent, and it fell to the respondent to demonstrate otherwise.

[18] Some of the allegedly problematic passages in the hearing judge's reasons include:

- in paragraph [10] when he identifies as an issue – "Is [A]'s relocation to Ontario in her best interests?";
- in paragraph [44] where he stated, "I must take all relevant factors into account and compare and balance the advantages and disadvantages of each competing parenting plan to determine whether relocation is in [A]'s best interests. . .";

- in paragraph [52] when he indicated he must consider whether the respondent had established that the child's needs "cannot be met or better met in Ottawa";
- in paragraph [58] where he stated that "[i]n addition to considering whether [A]'s needs have been met in Nova Scotia and could be met in Ottawa if she relocates, I must also consider if [A]'s needs are better met by relocating to Ottawa";
- when he determined certain factors were "neutral" in terms of assessing whether the proposed relocation was in the child's best interests; and
- in assessing the appellant's reasons for relocating (a factor in s. 18H(4)), he made a number of statements which highlighted his view that the evidence presented by Ms. Kendall to be inadequate, thus reversing the burden onto her.

[19] The respondent submits none of the above errors are established when the hearing judge's reasons are read as a whole and in conjunction with the record before him.

Analysis

[20] The appellant's first two issues can be dealt with summarily. Having carefully reviewed the record, we see no support for the view that the hearing judge misapprehended the evidence. His findings were grounded in the evidence before him. It is not our role to re-assess the evidence and reach different conclusions.

[21] Further, this Court's ability to interfere with a hearing judge's credibility assessment is limited. In considering the hearing judge's conclusions and the appellant's complaint, we found helpful the comments of Cromwell, J.A. (as he then was) in *MacNeil v. Chisholm*, 2000 NSCA 31:

> [9] The judge, as the trier of fact, must sort through the whole of the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. **The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent**

> **errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.**
>
> [10] Making these judgments is the job of the trial judge and the Court of Appeal generally should not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong. Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw**, supra at para 88:
>
> > ...it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'.
>
> **Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.**
>
> (Emphasis added)

[22] Here, we see no error that would justify our intervention, particularly respecting the hearing judge's conclusions regarding the credibility of the parties or their respective witnesses.

[23] Finally, we are not convinced the hearing judge misapplied the burden of proof. In reaching this conclusion we are mindful of the Supreme Court of Canada's direction that appellate courts are to assess the reasons of trial judge's contextually and considering the entirety of the record. Where reasons are open to differing interpretations, we must prefer one which is consistent with a correct application of the law, unless it is clearly demonstrated otherwise.[2]

[24] There is no doubt the hearing judge in this instance was attuned to the burden of proof. He began his analysis by stating it rested with the respondent. Several times throughout his reasons the hearing judge repeated that it was the respondent's obligation to show it was not in the child's best interests to relocate. At the conclusion of his analysis, and after thoroughly considering the statutory factors, the hearing judge concluded the respondent had met his burden.

[25] Having reviewed the record, it is clear the appellant put forward substantial evidence regarding her proposed plan for the child in Ottawa and why living there would provide better opportunities for both of them. She gave evidence as to her reasons for relocating. She presented evidence as to the supports from family and friends that she would have if parenting the child in Ottawa.

---

[2] *R. v. G.F.*, 2021 SCC 20 at para. 79.

[26] The hearing judge's impugned comments were simply a function of assessing the evidence and arguments that had been placed before him by the appellant (and the respondent). It is clear from his reasons, that he did not view the appellant's evidence in the manner she wished. The hearing judge did not agree the child's needs, as argued by the appellant, would be better met in Ottawa. That, however, is not indicative he reversed the burden of proof to her.

[27] Both parties provided evidence that was relevant to the statutory factors the hearing judge was mandated to consider. He assessed that evidence and made findings accordingly. The hearing judge kept the paramount consideration – A's best interests – at the forefront of his analysis, as he was required to do. He assessed the factors in that light, and at the end, determined the respondent had demonstrated it was not in the child's best interests to relocate. Considering the hearing judge's reasons as a whole and in light of the record, we cannot conclude he improperly reversed the burden of proof as alleged.

Conclusion

[28] For the reasons above, the appeal is dismissed. Given his success on the appeal, we would award costs of $2,500.00 in favour of the respondent. Since he was represented by Nova Scotia Legal Aid the costs will be payable to that organization.

Wood, C.J.N.S.

Bourgeois, J.A.

Van den Eynden, J.A.