NOVA SCOTIA COURT OF APPEAL
Citation: J.Y.P. v. R.J.L.M., 2007 NSCA 58

Date: 20070515
Docket: CA 275239
Registry: Halifax

Between:

JYP

Appellant

v.

RJLM

Respondent

Judge(s):	Cromwell, Oland and Fichaud, JJ.A.
Appeal Heard:	April 16, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs per reasons for judgment of Fichaud, J.A.; Cromwell and Oland, JJ.A. concurring.
Counsel:	Lynn Reierson, Q.C., for the appellant Elizabeth Jollimore, Q.C. and Meghan Hanson, Articled Clerk, for the respondent

Reasons for judgment:

[1] The trial judge in this divorce decided that the parties' nine-year old son would be in their joint custody with primary care to the father. The mother appeals. She says that the father was abusive to her during the marriage, and this behaviour affected their son's welfare. She says that the trial judge wrongly ignored this factor, and she should have primary care.

Background

[2] Mr. M petitioned, and Ms. P counter-petitioned for divorce.

[3] The ground for divorce in the counter-petition, Mr. M's mental cruelty, was uncontested. The financial issues were decided either by agreement or by the trial judge and there is no appeal on those matters.

[4] The principal contested issue at trial was the primary care of the parties' only child, RM, nine-years old at the divorce trial in August, 2006.

[5] Mr. M and Ms. P are both well educated. They married in 1993 and moved to Wolfville in 1999. Each had a position on the faculty of Acadia University. They resided in their Wolfville home until their separation. Mr. M still lives there.

[6] In the spring of 2005 Acadia did not renew Ms. P's contract. She obtained another position at the Nova Scotia Research Foundation, but that contract ended in December, 2005.

[7] Ms. P decided to separate from Mr. M. She took her son to Ontario. The trial judge reviewed those events:

> [11] Eventually she decided that she had to separate from the Petitioner [Mr. M]. She said that she was unhappy and fearful, felt abused both physically, sexually and emotionally. On February 17th last she told the Petitioner that she and [RM] were going skiing at a ski development at nearby Martock and that they would be home late. Instead she took [RM] and checked in at the Chrysalis House which is a shelter for women in the Kentville area. She telephoned the Petitioner that evening to tell him that she was leaving with [RM] and that they were safe and hung up. She did not tell him where they were. The Petitioner made extensive inquiries and searches for Ms. [P] and his son without success. She

again called on Sunday evening, February 19th , and said that they were okay and not to worry and hung up. Subsequently, on the following Thursday of that week, she went with [RM] to Sudbury where she stayed at the home of a long time friend, Dr. Nicole Desmarais and her husband. The Petitioner did not learn that she had gone to Ontario until somewhat later, April the 26th, I believe is the date, when he was so informed by another person.

[12] In Sudbury the Respondent [Ms. P] enrolled [RM] in school shortly after arriving. Apparently, [RM] quickly made new friends at his school and in his community where they were residing. It was from a friend that the Petitioner learned that the Respondent was in Ontario.

[13] Shortly after arriving in Ontario, Ms. [P] applied in the Ontario Court of Justice and obtained an *ex parte* order granting her interim custody of [RM] subject to limiting conditions as to access and contact with Mr. [M]. On being notified of the Ontario legal proceeding, Mr. [M] commenced this petition in Nova Scotia.

[14] As a result, and taking into account the factual situation of the parties, the Ontario Court declined jurisdiction and the matter was returned to Nova Scotia for further action. An interim order respecting custody for the short term was obtained in this court on April 20th of this year. It seems that on March 27th the Respondent complained to the Sudbury Police respecting harassing telephone calls. That was earlier on. Later the Respondent made complaints against the Petitioner respecting assault, sexual abuse and death threats. These charges subsequently were dismissed for want of prosecution, as I understand it.

[15] Following the interim order of April 20th, [RM] remained in Ontario with his mother until the end of the school year. In accordance with the terms of the order he came to Nova Scotia for access with his father, June 17th I believe is the date, and remained with his father for a period of six weeks, then returned to Ontario with his mother. During the six week period that [RM] was with his father Ms. [P] was also present in the area and had contact by telephone and otherwise with him. There has been extensive telephone communication and other electronic means of communication between the parents and [RM] since the interim order was put in place, although there have been complaints on both sides about failure to facilitate.

...

[17] In May of this year the Respondent obtained a tenure track position at Laurentian University as an associate professor in the Education Department with an annual salary of $73,868. The Petitioner continues to be employed at Acadia

> University as associate professor in the Kinesiology Department, the Physical Education Department, with a salary of $73,800. The Petitioner has not provided any spousal or child support to the Respondent since the separation.

[8] The parties requested that the court order the preparation of a custody/access assessment report by a qualified assessor, whom the parties agreed would be Ms. Sheila Bower-Jacquard, a psychologist. I will discuss Ms. Bower-Jacquard's evidence later.

[9] At the trial's outset Justice Hall heard evidence on the grounds for divorce, and ruled that the divorce would be granted based on Mr. M's mental cruelty.

> **THE COURT:** I'll give the ruling on the ground of divorce that's been presented. The respondent, in the initial action, but Ms. [P] in a counter-petition for a divorce on the ground of cruelty under section 8B(ii) of the *Divorce Act*. I've heard the evidence of Ms. [P] in this respect. Mr. [M], the petitioner has not offered any evidence to contradict the testimony of Ms. [P]. I am satisfied that her evidence in this respect is reliable and that indeed does constitute cruelty, and a cruelty of the nature set forth in the section of the *Divorce Act* that I refer to, in other words, that I am satisfied that the evidence establishes that the petitioner has treated Ms. [P] with mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses. Accordingly the proceeding may continue as a divorce proceeding and the finding will be made as a conclusion as to whether a divorce should be granted at this time or not and we'll also be able to deal with the other issues under the provisions of the *Divorce Act* and the *Matrimonial Property Act*.

[10] Then the six-day trial proceeded with evidence on the other issues. At the end of the trial in August, 2006, the trial judge gave an oral decision and issued divorce and corollary relief judgments. His written decision followed on November 22, 2006. He ordered that RM be in the joint custody of his parents, but in the primary care of Mr. M. I will discuss the judge's reasons later.

[11] Ms. P appeals the ruling on primary care of her son.

Issue

[12] Ms. P's factum describes the issues as follows:

> I. Did the learned Trial Judge err in principle by refusing to hear evidence and/or failing to make findings about the nature, extent and impact of spousal violence upon the custody issue (i.e. [RM]'s best interests)? (Grounds 4,5,6)
>
> II. Did the learned trial judge err in principle with respect to key areas of inquiry into the best interests of the child, notably:
>
> > (a) the parenting style best suited to [RM]'s history and temperament experience;
> >
> > (b) the Appellant's conduct immediately following separation, and the inferences to be drawn there from apropos of the "friendly parent" principle embodied in s. 16(1) of the *Divorce Act* (Grounds 1,2,3,7)
>
> III. Did the learned Trial Judge err in principle by giving insufficient weight to relevant factors, (including the expert evidence of the Court-appointed assessor) taking into account irrelevant factors, and/or ignoring or materially misapprehending the evidence?

[13] In argument these points coalesced into one basic issue. Did the trial judge commit an appealable error by ignoring spousal abuse as a relevant factor in his custody ruling? Ms. P's factum puts it this way:

> 17. The Appellant respectfully submits that the learned Trial Judge's failure to address the fact of spousal violence, its effect on the [M]-[P] family dynamic, and its implications for [RM's] future care, lead him into a series of interrelated errors, which, taken together, undermine the integrity of his principal finding that [RM's] best interests lie in the primary care of his father.

Standard of Review

[14] In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, Justice Bastarache for the Court outlined the seminal principles governing the standard of review by a court of appeal to a trial decision respecting custody and best interests of a child:

11 In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review. L'Heureux-Dubé J. stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at paras. 10 and 12:

> [Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> . . .
>
> There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

12 *Hickey* involved the appellate review of support orders, but the principles related to appellate review discussed therein are equally applicable to orders concerning child custody. This is where the British Columbia Court of Appeal fell into error. Although Newbury J.A. cited *Hickey* and discussed the narrow scope of review, at para. 6, she stated:

> As L'Heureux-Dubé J. observed in *Hickey*, there are strong reasons for this deferential standard in family law cases: most importantly, it promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Still, the interests of the child, being paramount, must prevail over those of the parties and of society in finality, and appellate courts must do more than "rubber-stamp" trial judgments unless serious errors appear on their face. Otherwise, the possibility for clear injustice exists. As indicated by the passages quoted

> above, a trial court's ignoring of relevant evidence, or the drawing of incorrect conclusions from the evidence, may also require appellate interference.

This statement seems to imply that *Hickey* and the basic principles of appellate review are not fully applicable to child custody cases. The approach of the Court of Appeal is wrong. The narrow power of appellate review does not allow an appellate court to delve into all custody cases in the name of the best interests of the child where there is no material error as decided in Hickey. The Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence. This is the role of the trial judge.

. . .

13 As I have stated, the Court of Appeal was incorrect to imply that *Hickey, supra*, and the narrow scope of appellate review it advocates are not applicable to custodial determinations where the best interests of the child come into play. Its reasoning cannot be accepted. First, finality is not merely a social interest; rather, it is particularly important for the parties and children involved in custodial disputes. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.

14 It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal. The Court of Appeal discussed, and the respondents relied heavily on, the decision of McLachlin J. (as she then was) in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case, the Court found that the trial judge had only mentioned one factor to be considered in determining the best interests of the child. As noted by McLachlin J., there was no way of knowing if the trial judge had considered the other applicable factors. Further, the Court noted that the trial judge had stated that he was relying heavily upon the findings of another judge. As a result, McLachlin J. stated, at para. 52: "... one may equally infer that the necessary fresh inquiry was not fully undertaken... . [I]t seems clear that the trial judge failed to give sufficient weight to all relevant considerations ... and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly." Rather than indicating

> that appellate review differs when a court must consider the best interests of the child, *Gordon* is consistent with the narrow scope of appellate review discussed later in *Hickey*, *supra*. The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor in depth.
>
> 15 As indicated in both *Gordon* and *Hickey*, 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 of 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. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 2 S.C.R. vi, 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.
> [Emphasis in *Van de Perre* decision.]

[15] On the issue here — whether the trial judge ignored spousal abuse as a relevant factor — the key passage is in *Van de Perre*, ¶ 15.

Analysis

[16] Ms. P submits that the trial judge wrongly refused to hear evidence respecting spousal abuse.

(i) After the judge had ruled that cruelty was ground for divorce, Ms. P's counsel asked Ms. P:

> Q. Um-hmm. And that continued right up until the time that you separated, those kinds of things?
>
> A. Those kinds of things. It began with requests for more frequent sex. And then it got worse as we got along - as things went along, asking for putting me a trapeze...
>
> THE COURT: Where are you going, Ms. Dewolfe?

MS. DEWOLFE: I am trying to describe the environment that she was living in, that she...

THE COURT: Why?

MS. DEWOLFE: Pardon?

THE COURT: Why?

BY MS. DEWOLFE:

Q. With respect to...

THE COURT: Well, you didn't answer my question.

MS. DEWOLFE: I think it will give you a picture of the state of mind she was in when she left and why she took certain actions after she left as well, which have been...

THE COURT: Well, why don't you simply ask her, "Why did you leave without telling [RM]?"

BY MS. DEWOLFE:

Q. Why did you leave without telling your husband?

A. Because I was...

THE COURT: Isn't that a very simple approach. Did you answer the question? I'm sorry.

MS. [P]: No. I was just waiting until I could answer.

BY MS. DEWOLFE:

Q. Go ahead. Why did you leave your husband without telling him?

A. I left my husband without telling him because I was afraid of him. In the last while he would be doing things like putting his hands around my neck and - when he was really, really, really upset, and turn around and put his hands around my neck and tell me - and then put my - and also

> put his tongue down my throat while he is saying, "I love you." There are mixed messages there, and it made me extremely, very, very scared.

(ii) Ms. P's counsel asked Mr. M on cross examination:

> Q. Okay. Isn't it true that she didn't like using pornography?
>
> THE COURT: Excuse me, Ms. - what does this have to do with the matters that the Court has to deal with, has to decide?
>
> MS. DEWOLFE: It goes to credibility in terms of the allegations that - my client is making a very different - is stating that the situation in their relationship was very different. And I think it goes to what she was having to deal with. And it really is the basis for the problems she was having in the relationship. And I think we need to understand that.

After discussion, Ms. P's counsel was permitted to ask the question.

(iii) Ms. P's counsel asked Mr. M: "Weren't there occasions when you pushed you or . . . " The trial judge again questioned the relevance, and Ms. P's counsel said:

> Ms. DeWolfe: Now I am talking about the physical abuse. And I don't know if you want to hear about that My Lord. If you don't I'll move on.
>
> The Court: I don't want to hear it. If you insist on putting it forth I suppose I'll have to listen.

[17] Ms. P testified that Mr. M was controlling, obsessive and abusive, and that she left him because she was afraid. Mr. M acknowledged conflict, but denied abuse. The trial judge did not disallow the evidence. This is not an admissibility issue. The trial judge queried the relevance of these questions given that grounds for divorce had been determined at the outset of trial. In my view, Ms. P's submissions on this matter relate to the overall issue I will discuss next, whether the trial judge ignored a relevant factor in his custody determination.

[18] The trial judge recited Ms. P's testimony on the matter but, in his custody ruling, did not make a finding whether or not Mr. M had committed acts of spousal abuse. Ms. P's factum characterizes the trial judge's approach as follows:

> 38. ... He does not rule the conduct evidence irrelevant to the custody issue either; he simply ignores it. Having completed the necessary but distasteful job of summarizing the "messy" evidence, the learned Judge seems to have felt free to move on to decide the custody issue as if the messy evidence didn't exist.

[19] Did the trial judge ignore a relevant factor? The starting point is s. 16 of the *Divorce Act*, R.S.C. 1985, (2nd Supp.), c. 3 which governs custody in a divorce.

[20] Section 16(9) says:

> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

In *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at ¶ 21, Justice McLachlin discussed the impact of parental past conduct under s. 16(9):

> In s. 16(9), Parliament has stipulated that the judge "shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child". This instruction is effectively incorporated into a variation proceeding by virtue of s. 17(6). Parental conduct, however meritorious or however reprehensible, does not enter the analysis unless it relates to the ability of the parent to meet the needs of the child.

The court does not reward or punish the parent for past conduct. The court looks forward to project how the child would fare in the parent's care.

[21] Section 16(8) says:

> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

In *Young v. Young*, [1993] 4 S.C.R. 3 at pp. 116-18 Justice McLachlin discussed the meaning of "best interests of the child" in s. 16(8):

> Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.

> **First, the "best interests of the child" test is the only test.** The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
>
> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child**. Nevertheless, the judicial task is not one of pure discretion.** By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. **Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively.** There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.
>
> Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." **This is significant.** It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. **By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized.** The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access: Michael Rutter, *Maternal Deprivation Reassessed* (1981), Robin Benians, "Preserving Parental Contact: a Factor in Promoting Healthy Growth and Development in Children", in Jo Tunnard, ed., *Fostering Parental Contact: Arguments in Favour of Preserving Contact Between Children in Care and Their Families* (1982). [Emphasis added.]

See also *Gordon v. Goertz* at ¶ 17 - 25, per McLachlin, J.

[22] Justice McLachlin’s second principle in *Young* directs that the singular test of the child’s best interests be “applied according to the evidence in the case, viewed objectively”. The touchstone is the evidence.

[23] The parties jointly requested the preparation of the custody/access assessment report by Ms. Sheila Bower-Jacquard. Ms. Bower-Jacquard's evidence was central to both parties' submissions on custody.

[24] Ms. Bower-Jacquard's report recommended primary care with Ms. P. When she wrote her report, Mr. M was subject to criminal charges further to Ms. P's complaint to the Greater Sudbury Police Service in March 2006, and her statement to the RCMP in Wolfville. After Ms. Bower-Jacquard prepared her report, those charges were dismissed for want of prosecution. At the divorce trial, Ms. Bower-Jacquard was asked what impact the dropping of these charges had on her recommendation. She said it was a choice between styles of parenting:

> Q. Okay, and you're aware that since that time those charges have not been proceeded with?
>
> A. Yes, I am.
>
> Q. And does that in any way affect the conclusions or recommendations that you made in your assessment?
>
> A. I guess it would reduce the concern because it did create some uncertainty about, you know, his future but my recommendations would remain the same.
>
> Q. Thank you.
>
> THE COURT: Your what? Your…
>
> A. **My recommendations would remain the same.**
>
> Q. **And why is that?**
>
> A. Because I think I realized that there was a fairly good chance that that would be dropped at the time but mostly because **my concerns came from the styles of parenting, or his style of parenting.**
>
> Q. Okay, and **could you elaborate a little bit on the style of parenting concern** or the differences that you saw and how you saw Ms. [P]'s parenting perhaps to more compliment or to be better for [RM] at this point in time? I assume that's the assessment that you made.

A. Well I try to put parenting on a continuum which – I use Barbara Paul-Russell's terms which would be brick wall meaning that the parent makes the decisions and decides to the other end of the continuum where what she refers to as jellyfish, meaning that it's easygoing, whatever. There's not a lot of direct parenting style. It doesn't mean the parent is not involved but it means that there's not a lot of certainty around what to expect. **And in the middle of that, which is what most of us would see as being the ideal parenting, is called backbone which means that some structure is put in place but there's a fair bit of flexibility and so if I put this on a continuum, I believe that probably Ms. [P] and Mr. [M] both fall within the backbone with Mr. [P] [sic] falling closer to the brick wall – sorry, Mr. [M] falling closer to the brick wall and Ms. [P] falling closer to the jellyfish.** So, having said that, then I have to look and say, you know…

[emphasis added]

[25] After her examination by counsel for the parties, the trial judge asked Ms. Bower-Jacquard why she recommended primary care with Ms. P.

Q. Now I've read your report and I found it very informative. I didn't see your reasons for making the recommendations, why you concluded that the recommendations that are set forth are the appropriate ones in these circumstances, **what your actual reasons were for favouring, as one of counsel said, favouring one over the other insofar as the primary care aspect of the matter is concerned.**

A. I guess sort of it boils down to, as I think Ms. Connors has alluded to, is **that there's not a great deal of difference here. I think [RM] would thrive fine in both settings. I had factored in in terms of the conflict in the home in terms of [RM] having times in the home when he was fearful of his dad, right? And that when you're removed from that situation, the best situation is when there is no more conflict**. That's the way a child can recover I guess more quickly or in a more positive manner, when the threat of yelling or screaming is removed so I guess that factors a fair bit into my decision.

Q. Anything else?

A. And I guess the other part of that would be the **awareness that Ms. [P] had, which I felt was greater than Mr. [M]'s in terms of how this whole situation had impacted on [RM], right?** So therefore to be able to address his needs.

Q. **I take it that – am I correct in my view that your [position] is that either would be a good parent?**

A. **Yes, I think when we…**

Q. **Capable of providing the guidance for the child throughout his life, or the formative years of his life?**

A. **Yes, and there's just one setting that may be a bit more appropriate at this point than the other**.

Q. Does it have anything to do with the fact that a child of his age would be better with the mother than with the father? Better off with the mother than with the father?

A. No, I think that what stood out for me that was more important in this case was [RM] feeling really safe and secure because, **although there was really no behavioural tendencies or difficulties here, the concern I would have was that the school in New Minas had indicated he was somewhat withdrawn. The school in Ontario had said initially he was somewhat withdrawn.** That would be my greater concern for him.

Q. The he come out of shell?

A. And that was the impression that I got from the school and from when I look at [RM] now, he doesn't strike me as a child that had those tendencies that were being reported before by neutral sources like the school.

Q. **I think you suggested in your report that very often children respond to that when they are witness to violence or various degrees of violence of an emotional nature or otherwise in the home.**

A. **We usually see children either withdrawing or acting out and in [RM]'s case I think the result of that was probably for him withdrawing.**

Q. **Now didn't [RM] spend an extended period of time with his father this summer?**

A. Yeah, I think it was probably two to three weeks by my last involvement and that's why I saw them if I look at my [...]

MS. DEWOLFE: He did spend six weeks in total.

MS. CONNORS: Six weeks.

BY THE COURT:

Q. **Six weeks, but your observations were earlier on then?**

A. **Yeah, that's right. I think my report finished about two to three weeks after he had come to Nova Scotia**.

Q. **How did it appear that they were getting on?**

A. **Great, fine.**

[emphasis added]

[26] As set out earlier (¶ 7), Ms. P had taken RM to Ontario in February of 2006, where he remained until mid June. During that time RM lived apart from his father. Ms. Bower-Jacquard was asked about this:

Q. Again you will agree with me that [RM] hasn't had an opportunity to be with his dad for extended periods of time out of that conflicting situation.

A. Correct.

Q. And so that would impact his level of comfort in comparison with his dad and in comparison with his mother.

A. **Right, and he wasn't disclosing any difficulty around discomfort at this particular time. The information around discomfort was more prior to the separation.**

Q. So all things being equal, if he had had an opportunity to spend as much time with his dad as with his mom post-separation, he would be equally as comfortable with both parents.

A. **He seems to be equally comfortable in terms of, you know, spending time with them on their own without the two of them together.**

[emphasis added]

[27] In summary, Ms. Bower-Jacquard testified that both parents were in the "ideal" range and that RM would "thrive fine in both settings". She said Ms. P's setting "may be a bit more appropriate at this point". The reason related to "style of parenting." Ms. Bower-Jacquard said Ms. P was more flexible, Mr. M more structured. Ms. Bower-Jacquard preferred flexibility because RM had shown signs of withdrawal at school. She attributed this to RM's discomfort from witnessing conflict between his parents. That, in Ms. Bower-Jacquard's view, was the impact on RM of the parental strife. Ms. Bower-Jacquard testified that, since his parents' separation, RM's discomfort had abated and he was equally content with both parents. She said RM got along "great, fine" with his father when they rejoined in the summer of 2006.

[28] The trial judge's reasons considered Ms. Bower-Jacquard's approach. He reviewed the evidence of the witnesses, including Ms. P and Mr. M. With respect to Ms. Bower-Jacquard, the trial judge said:

> [42] Now, as already noted Ms. Bower-Jacquard recommended, among other things, that primary care of [RM] be with Ms. [P]. The court, of course, must give a good deal of consideration to the testimony and opinions of experts and has to be very careful in determining what weight is to be given to the opinions and recommendations expressed by any expert that appears before the court. It would be very nice of course for the courts if they could just simply accept the recommendation and opinions of the expert and make that the ruling of the court. That, however, is not the case. The court is charged with the ultimate responsibility and obligation to decide the issues and determine what the outcome is to be in all cases. In this case it is the court's obligation to determine, after considering all of the evidence, including the evidence of the expert, what is in the best interest of [RM] insofar as primary care is concerned.
>
> [43] After considering all of the evidence, and in particular the evidence of the parties and Ms. Bower-Jacquard, I have reached a different conclusion than hers.
>
> [44] In my view it would be in [RM]'s best interest for him to be in the primary care of his father. I have reached this conclusion because I am particularly concerned about [Ms. P]'s ability to appropriately discipline [RM], particularly as he is maturing and I think one can take judicial notice of the fact that more behavioural problems, not necessarily behavioural problems, but more discipline problems develop with children as they reach adolescence and proceed through it.
>
> [45] I was concerned when I heard the testimony of the witnesses with respect to the change, although it may be a moderate change, in [RM]'s behaviour and

> conduct since the separation. I am referring particularly to the evidence of Ms. Easson and Ms. Grund. Ms. Easson said that he seemed to be more aggressive verbally and didn't demonstrate the good manners that he had previously. Ms. Grund spoke of rudeness towards his mother. This is certainly a great concern to me. Clearly, in my opinion, the child needs to know that there are boundaries that must be observed in his conduct and behaviour. In my view, it is [Mr. M] who is the parent who would ensure that his conduct remains within those boundaries. There was concern about yelling by [Mr. M] in dealing with [RM] but the evidence on the whole does not support that there was any unreasonable yelling or shouting at the child such as would cause any emotional harm to him.
>
> [46] In any event, the Petitioner is undergoing counseling to deal with such issues if in fact it is an issue.
>
> [47] I am also of the view that the child needs structure in his life and, in my view, the Petitioner would better provide structure and organization for the child. Another factor is that for most his life [RM] has been in Wolfville. He has friends there and certainly has very close friends. He is engaged in activities with his friends such as hockey and otherwise. This has been an important contributing factor to his development.

[29] Ms. Bower-Jacquard's testimony established a choice of parenting styles - flexibility versus structure. The trial judge reflected on the evidence and addressed that choice. He decided that RM's best interests warranted a more structured parenting style.

[30] The trial judge's reasons refer to evidence giving objective support for his finding on parenting style. He heard testimony from witnesses who had known this family for years. Dr. Kruisselbrink and his wife had shared family outings with Mr. M, Ms. P and RM. Dr. Kruisselbrink testified:

> A. In my view and kind of the larger basis of an opinion it's who would I feel more comfortable sending my kids with and for me to have my – any number of my kids to be with either [RM] or [JP], I would choose [RM]. The reason for that is because I find him more engaged. I find his boundaries stronger and more defined and I find that you know, he tends to engage – he would play with them. He would interact with them. With [JP] she would be a lot more hands-off and just kind of let things go. I think, in terms of stability, I think [RM] has got a greater degree of stability in his life. He's emotionally more stable. He's less high and low. I think his job is stable and so there's less stress going on there. I think because he tends to be a more organized and structured person, I think that there would be more of a sense of routine in what to expect which is kind of calming rather than, you know, things kind of just going with the flow all the time and

> never knowing what to expect. And you know, in the end all those things put together would lead me to believe that my kids would be more comfortable with [RM] than [JP].

[31] I agree with Ms. P's counsel that, in the determination of custody, spousal abuse may, in a number of respects, affect the court's assessment of parenting ability and the child's best interests - *Gordon v. Goertz*, ¶ 21 (above ¶ 20). But the nature of any such effect is not legally branded, and depends on "the evidence in each case, viewed objectively" as stated by Justice McLachlin in *Young*. The evidence here, channelled through Ms. Bower-Jacquard's testimony, dwelt on differing styles of parenting and RM's temporary discomfort, since abated, from witnessing parental conflict. The trial judge disagreed with Ms. Bower-Jacquard's ultimate recommendation. But he dealt with the point and grounded his reasons on an objective analysis of Ms. Bower-Jacquard's evidence. He did not ignore a relevant factor.

[32] The trial judge cited subsections 16(8) and (9) of the *Divorce Act*. He related the parenting factors in his reasoning to RM's best interests.

[33] The trial judge referred to s. 16(10) of the *Divorce Act*:

> 16 (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Justice McLachlin in *Young* (pp. 117-18) [above ¶ 21] noted the significance of this factor. The trial judge said:

> [48] . . . I also convinced that [Mr. M] would better facilitate access with the other parent, that is, with [Ms. P]. He acknowledged the importance of the relationship with the child's mother and had only good things to say about her as a mother whereas she minimized his contributions and was very negative in her comments about him, about [Mr. M].
>
> [49] I am also concerned about Ms. P's willingness to facilitate access due to the experience following the separation.

There was an objective basis in the evidence for the trial judge's conclusions in this regard. Ms. P had, without notice, taken RM from Wolfville to Ontario in February 2006. Mr. M was unaware of his son's location until April, when he was so informed by another person. This severed RM's contact with his father at a critical time, immediately before Ms. Bower-Jacquard's assessment of RM and written report.

Conclusion

[34] The trial judge did not forget, ignore or misconceive relevant evidence, fail to consider a relevant factor or commit a material error, under the standard in *Van de Perre*. There is no appealable error in the trial judge's conclusion respecting primary care of RM.

[35] Neither party requested costs. I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.