SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *ND v. JM, KMM*, 2023 NSSC 227

Date: 20230711
Docket: *Sydney* No. 128058
Registry: Sydney

Between:

ND

Applicant

v.

JM, KM

Respondents

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	May 31, 2023, in Sydney, Nova Scotia
Written Release:	July 11, 2023
Counsel:	Maria Rizzetto for the Applicant Alan Stanwick for the Respondent, JM KM, Self-Represented

By the Court:

[1] This is a decision on a leave application filed by ND. She is the former partner of JM. JM and KM are the parents of two children, WM (age 4) and EM (age 8). ND seeks leave to apply for contact time with the children.

[2] JM and KM are opposed to ND's application. A focused hearing on the issue of whether leave should be granted was held on May 31, 2023. All parties, as well as JM's current partner, JD, testified.

[3] The statutory framework for ND's application was discussed by the Court of Appeal in **LC v KT**, 2018 NSCA 92 where Oland, J. noted:

> **10** When a person other than a parent, guardian or grandparent applies for contact time, leave must be obtained from the court (s. 18(2)(a) of the *Act*). The court is to give "paramount consideration to the best interests of the child" in any proceeding concerning contact time (s. 18(5)).
>
> **11** Section 18(6) sets out a non-exhaustive list of factors to be considered in determining those best interests:
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> > **(6)** In determining the best interests of the child, the court shall consider all relevant circumstances, including
> >
> > (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
> >
> > (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
> >
> > (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;

> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
>
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
>
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child; and
>
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> > (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
> >
> > (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.
>
> **12** Case law such as **Brooks v. Joudrey**, 2011 NSFC 5 at para 54 – 45 [sic], and **MacLeod v. Theriault**, 2008 NSCA 16 at para 17 - 24 provide additional factors relevant to determining leave applications for third party access.

[4] In **MacLeod v Theriault** (*supra*), the court declined to grant the grandmother leave to apply for custody. That case differs in that ND seeks only contact time, and not custody. It is similar in that it involved a high level of conflict between the parties.

[5] In **Brooks v Joudrey**, 2011 NSFC 5, the court granted the paternal grandparents leave to apply for access with their late son's child. That case involved

conflict between the child's mother and the grandmother, but Judge Gabriel (as he then was) concluded that wasn't an impediment, and that access with the paternal family was in the child's best interests.

[6] In **Simmons v Simmons**, 2016 NSCA 86, the Court of Appeal upheld a trial judge's decision to allow grandparent access with their late son's child. The court held that the trial judge was not wrong in refusing to adopt the "parental autonomy" paradigm in making a decision.

[7] The court stated:

> **36** I begin by observing that nothing in the *Maintenance and Custody Act* or the case law of this Province stipulates or establishes that the parental autonomy paradigm is the only acceptable approach in determining the best interests of the child when grandparents apply for access. For example, the appellant had drawn our attention to **M.O. v. S.O.**, 2015 NSFC 12 at para 94 where, after summarizing the law respecting grandparent access, Judge Daley stated:
>
> > [94] I also conclude that it is appropriate to give significant deference to parents who have primary care of a child in making such decisions. Given the burden of proof on the grandparents, it still remains available to them to persuade the court that the decision to deny or restrict access is unreasonable in all the circumstances and is not based upon the best interests of the child.
>
> However, parental deference was only one of the considerations and it was not determinative. At para 93, he had also emphasized:
>
> > 2. The paramount consideration and only test to be applied in such applications is what is in the best interests of the child. Consideration of the views and wishes of the parents and grandparents is only relevant if it informs the court on the best interests of the child.
> >
> > …
> >
> > 6.The court is not bound by any particular paradigm of grandparent access in its analysis of the best interests of the child. The court may consider parental autonomy, pro-contact or other paradigms, portions of any of them

> or none of them in its analysis so long as it takes into consideration the particular circumstance of the child.

37 See also **Manual v. Hughes**, 2005 NSFC 14. At para 17, Judge Sparks stated that, notwithstanding recognition of the two divergent approaches articulated in the parental autonomy and pro contact paradigms, each case coming before the Court will be determined sui generis; that is, on its own unique facts.

38 Moreover, the case under appeal is distinguishable from the Ontario Court of Appeal decision in **Chapman**. There, the children were considerably older (ages 10 and 8), the relationship with their grandmother was not a positive one, and the access order had been made in the speculative hope that a relationship could be built. Here, a relationship between Brayden and the respondents already exists and is a warm one. While the father was alive, they saw each other regularly, at least once a week. In his affidavit evidence, the grandfather described the access visit on March 12, 2016, the first in several months, as follows:

> 50. Our visit went extremely well. Laurina and I had a great time with Brayden. When we got to the library and Brayden first saw us, I got down on my knee and Brayden broke free from Nicole and [his maternal grandmother's] hands and came running to me. I gave him a huge hug, picked him up and told him I loved him. Brayden wanted to play in the play area so we played for the entire hour. He was grinning and laughing the entire time.

The appellant, who was present during this visit, did not challenge or contradict this evidence.

39 A review of the jurisprudence shows that while courts frequently cite **Chapman** as their legal starting point in a grandparent access case, they often distinguish it and order access, or interpret it as suggested in **McLaughlin v. Huehn**, 2004 ONCJ 426. In that case, McSorley, J. interpreted **Chapman** to mean that courts are to show deference to parental decisions where such decisions are reasonable. The judge wrote:

> 27 The case of **Chapman v. Chapman and Chapman** does not stand for the proposition that the wishes of a parent on the issue of access by a member of the extended family should take precedence over the factors in section 24 of the Act. It is but one factor that must be considered. It is always important to defer to the decisions of parents regarding their children. But deference is only accorded when those decisions are reasonable. When the decision to end all contact between a child who has a positive relationship with grandparents, aunts, uncles, cousins and great aunts and grandmothers is made entirely because of hurt feelings from 3 to 5 years ago, then the decision is not reasonable and is no longer entitled to deference.

This reading of **Chapman** has been accepted in many of the decisions of the Ontario Superior Court of Justice whose judgments form the bulk of Canadian grandparent access cases. See, for example, **Barber v. Mangal**, 2009 ONCJ 631;

> **Giansante v. DiChiara**, [2005] O.J. No. 3184; [2005] W.D.F.L. 4015 (Ont. S.C.J.); **Nichols v. Herdman**, [2015] W.D.F.L. 4127, 255 A.C.W.S. (3d) 650 (Ont. S.C.J.); **Blackburn v. Fortin**, [2006] O.J. No. 2256, [2007] W.D.F.L. 1297 (Ont. S.C.J.); **Torabi v. Patterson**, 2016 ONCJ 210; **O.(L.M.) v. S.(S.)**, 2015 BCPC 328.
>
> **40** In making this observation, I am not saying that our courts should necessarily follow the same analytical path that the Ontario courts have developed. I am simply noting that **Chapman** has not had the effect of making the parental autonomy model the singular way to proceed in grandparent access cases. Sometimes when it has been applied, a different approach in determining the best interests of the child may have led to the same result as so much depends on the particular circumstances of the case. See, for example, **Hayes v. Moyer**, 2011 SKCA 56, where the Saskatchewan Court of Appeal found that an interim order awarding grandparent access was causing unnecessary disruption to the children's lives. That order gave paternal grandparents access to their grandchildren each Monday overnight, two full weekends every month (Friday night until Sunday night), and for part of Christmas, spring break, and two weeks in the summer. The Court allowed the appeal, finding the interim order caused disruption in the day-to-day lives of the grandchildren, as they were shuffled between three residences (including their father's, who also had access), and left the mother seeing the children on an uninterrupted basis for only three days in any given 14-day period. Citing **Chapman**, it held at para 11 that the trial judge had failed to consider the "general view that parental rights prevail over those of the grandparents, and certainly fail[ed] to take into consideration the wishes of fit parents as to their view of what is in the best interests of their children."
>
> **41** In addition, judicial deference to parental authority can be tempered by the court's willingness to recognize benefits that extended family bring to a child whose life has been marked by the loss of a parent, such as love, support, and stability. These cases sometimes present best interest factors not apparent in cases with two living parents, including the fact that a child can know his or her deceased parent, including his or her personality, heritage, and culture, through his or her grandparents. See, for example, **White v. Matthews**, [1997] N.S.J. No. 604 (N.S. Fam. Ct.) and **Brooks v. Joudrey**, 2011 NSFC 5.

[8] In **Purcell v Purcell**, 2017 NSSC 253, MacDonald, J. denied a grandmother leave to apply for custody of her grandchild, because she had overstepped her role as grandparent. Despite that, MacDonald, J. found that it was in the child's best interests for the grandmother to have limited contact time.

[9] In **Spence v Stillwell**, 2017 NSSC 152, Cormier, J. denied a grandmother leave to apply for custody because her plan offered no benefit to the child.

[10] In **AC v KT**, 2017 NSSC 142, Jesudason, J. granted a grandmother access to her grandchildren, noting that:

> "…. even if I accept the Mother's evidence that there were past difficulties in their relationship, I do not find that they presently give rise to the level of conflict which would be detrimental to K having some limited access with the Grandmother."

[11] Jesudason, J. observed that litigation creates heightened conflict and that, once litigation is concluded, conflict often declines. In addition, he noted:

> Indeed as suggested in Simmons, sometimes court-ordered access can help parties avoid conflict by providing predictability and certainty regarding access visits (paras. 55-60).

[12] In **JMP v. AF**, 2018 NSSC 64, I denied a grandfather access with his grandson. I noted in that case that:

> **7** Many Nova Scotia courts have commented on the principles which apply in these cases. Most recently Justice Cormier in **Spence v. Stillwell**, 2017 NSSC 152 (paragraph 115) summarized them as follows:
>
> > a. The paramount consideration in determining whether to grant grandparent access is the best interests of the child.
> >
> > b. Parental decisions and views are entitled to a level of deference. However, the level of deference depends on the context. **Simmons v. Simmons**, 2016 NSCA 86.
> >
> > c. There is no preferred judicial approach to determining whether grandparent access is in the best interests of the child, which approach is

> appropriate depends on context. **MacLeod v. Theriault**, (2008), 2008 NSCA 16 (Can LII), 262.
>
> d. Under the *Act* the onus is on the applicant grandparent to prove that access is in the child's best interest. **M.O v. S.O.**, 2015 NSFC 12, **B. v. R.**, 2015 PESC 20 (CanLII).

[13] ND bears the onus of demonstrating, on a balance of probabilities, that it's in the children's best interests that she be granted leave to apply for contact time with them.

[14] I assessed credibility according to the principles enumerated in **Baker-Warren v. Denault**, 2009 NSSC 59. There were credibility problems with all witnesses, so I have weighed the evidence with care.

[15] I have considered the legislation, the caselaw, and the evidence as a whole. I have considered the parents' views, but I have not taken a parental autonomy approach to my decision. My focus is what's in the best interests of the children, not necessarily what the parents want.

[16] The boys were fortunate to have ND in their lives for over two years. They are fortunate to have people (other than their parents) who love them and want what's best for them. Unfortunately, not everyone who wants to play a role in a child's life can do so.

[17] I make the following findings:

- The children are 8 and almost 5 years of age;
- The older boy has special needs; he copes better when his routine is stable and predictable;
- The boys have been in their father's primary care for several years;
- KM now plays a more active role in the children's lives than when ND was involved;
- KM and JM and co-parenting more successfully now than they have in the past;
- The relationship between ND and the children was relatively short; she was JM's partner for about 26 months;
- Whether ND and JM lived together or not, they spent a lot of time together, and JM relied on ND to help him parent the children;
- ND is not a relative of the children by blood or marriage;
- ND played an active role in the children's lives when she and JM were a couple, but her involvement with the children ended when the relationship with JM ended;
- The lack of involvement in the children's lives was not by ND's choice;

- ND has had no contact with the children for over 18 months;
- There is a high level of conflict between the parents, JM's new girlfriend, and ND;
- The conflict has spilled over in front of the children on at least two occasions, leading to criminal charges after one incident;
- The parents and JM's new girlfriend demonstrated immature and disrespectful behaviour towards ND in the courtroom; their ability to behave appropriately around the children in ND's presence outside the courtroom is highly questionable;
- The outstanding issue with the child tax benefit leaves another cause for friction between JM and ND;
- The children already travel between two households during the week; to require them to travel between another would add disruption and unpredictability to their schedule; and
- If leave is granted, the parents would contest the contact, thus extending the litigation and likely increasing the animosity between the players; unlike in **AC** (supra), I highly doubt that an end to this litigation will reduce the conflict.

[18] ND says that the parents are neglecting the children's health and dental care. She wishes to have contact time so that she can ensure that these issues are addressed. However, it's not her place to police JM and KM's parenting. If there's risk to the children from neglect, it's the role of child protection services to investigate and intervene. Indeed, ND has made referrals to CPS in the past.

[19] In **Theriault** (supra) the grandmother advanced a similar argument. The trial judge rejected her claim that leave should be granted because the mother couldn't properly parent the child. Instead, the grandmother's concerns were balanced with a number of other factors in the overall assessment of what was best for the child. The grandmother's application for leave was dismissed and the Court of Appeal upheld that decision.

[20] Similarly in this case, the evidence that the children's medical needs are not being met is not compelling. Even if I did accept that the parents have been lax in that regard, I must balance the other factors enumerated above with ND's concerns.

[21] Having done that, I find that it is not in the best interests of WM and EM to grant leave to ND to pursue contact time with them. This case bears some similarities to the **Hayes** decision discussed in **Simmons** (supra) and to **Theriault** (supra). For some of the same reasons expressed in those cases, I am denying leave.

[22] ND will find this decision hard to accept. Her affection for the children is genuine. Her motivation is laudable. However, the likelihood of her plan adding benefit to the children's lives is outweighed by the disadvantages her involvement would bring to the children's lives.

[23] I would ask Mr. Stanwick to prepare the order. The parties are encouraged to agree on costs. Failing agreement, written submissions may be sent to my attention by August 22, 2023.

MacLeod-Archer, J.