SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *LB v LH,* 2025 NSSC 117

Date: 20250401
Docket: HFD *SFHPSA*, No. 134323
Registry: Halifax

Between:

LB

Applicant

v.

LH, TH, SH, JC

Respondents

Judge: The Honourable Justice Cindy G. Cormier

Heard: February 25, 2025, in Halifax, Nova Scotia

Counsel: Melvin Mulo Farenkia, counsel for the Applicant
LH, self-represented
TH, self-represented
SH, self-represented
JC, self-represented (did not participate)

By the Court:

1 Introduction

[1] This is a decision on a leave application filed by LMB, the former partner / wife of the children's father, SH. On July 3, 2024, LMB filed a Notice of Application seeking leave to apply for contact time with her former partner/ husband SH's four biological children with the children's biological mother, JC. The children are: KDBH (age 15); KEH (13); GJH (12); and AGH (11).

[2] The respondents include the paternal grandparents, LH and TH, who are the children's guardians, and the children's father, SH, who has parenting time with the children. The respondents are opposed to LMB's leave application. They argued, among other reasons, that a further order for contact involving the children would negatively impact the children's established counseling and / or treatment routines, extracurricular activities, friendships, and other social routines.

2 2017 Consent Order

[3] Pursuant to the Consent Order granted in June 2017, all four children, KDBH (age 15), and KEH (13), GJH (12) and AGH (11), were placed in the care and custody of their paternal grandparents, LH and TH. The children have been in their paternal grandparents' care since 2014.

[4] Beginning June 16, 2017, the children's biological father, SH, was granted parenting time with his four children every third Saturday or Sunday between 10:00 am and 5:00 pm. The children's biological mother, JC, was granted parenting time every third Saturday or Sunday between 10:00am and 5:00 pm beginning June 23, 2017.

[5] The Consent Order reads in part:

> [4] TH and LH shall make no major decisions regarding any of the four children without JC and SH having input as to same. In the event of a dispute, final decisions shall be made by LH and TH with the understanding that any such decision could be reviewable by any court of competent jurisdiction upon application by any party.
>
> [5] The provisions regarding input, information sharing, notice re travel, etc. are contingent upon LH and TH being able to reach JC and SH.
>
> [6] All parties shall provide up to date contact information to the others at all times including up to date addresses, telephone numbers, email addresses or other forms of communication.
>
> …
>
> [10] Any parties can attend extra curricular (sic) activities that the children may be participating in.
>
> …
>
> [16] When exercising access, the best interests of the children shall prevail.
>
> [17] Every attempt will be made to allow the children to attend any birthday parties or other social events that they maybe invited to or wish to participate in.
>
> [18] In addition the parents may have such other access as agreed upon by the parties at reasonable times upon reasonable notice.
>
> …

[6] The children's biological mother has not had ongoing regular contact with the children since approximately 2018 and / or 2019. The children's paternal

grandmother, LH, explained that since the children's mother, JC, left, the children have seen their maternal grandmother, PC, on one occasion in Ontario. In addition, the children's maternal grandmother, PC, has sent cards to the children, and the children have chatted by video with their maternal grandmother.

[7] LH further explained that PC has stated she does not know where JC is, and / or she is not in contact with JC. The applicant in this proceeding, LMB, stated that she was unable to serve JC and argued that JC was "disentitled to notice of this proceeding" as JC had not seen her four children in approximately six years.

[8] Based on the terms of the Consent Order paragraphs four through six, and the evidence regarding JC's lack of involvement with the children since 2019, I was prepared to consider LMB's application for leave despite the lack of service / notice to JC. I find JC is either avoiding service / contact and / or she does not wish to be found and / or she is unable to be involved in the children's lives.

3 LMB, her Children, and her Family

[9] The applicant, LMB, began dating the children's father, SH, in or around July 2016. She moved in with the father in November 2017. She met the father's children in or around September 2019, and she married the children's father in October 2020. LMB and SH separated in or around March 2023. For

approximately three and a half years, between September 2019 and March 2023, LMB suggested she took on the role of the children's "stepmother" for seven hours on a Saturday or a Sunday, every third weekend, and at other times when she attended the children's special events.

[10] LMB has two of her own biological children, LA (13) and LU (17), who are not the subjects of this proceeding. LMB has stated that between September 2019 and March 2023 her children, LA and LU, participated in some of the father's, SH's, visits with his children, KDBH (age 15), KEH (13). GJH (12), and AGH (11).

[11] LMB's daughter, LA, was living with LMB and SH full time between 2019 and March 2023 and LMB suggested LA "was present for the majority of visits, only missing a few if she was away with her grandparents." Although LMB's son, LU, resided primarily with his own father before April 2022, LU was present on those weekends when her parenting time with LU aligned with the father's parenting time with the children KDBH, KEH, GJH, and AGH.

[12] LMB described the children's, KDBH (age 15), KEH (13). GJH (12), and AGH (11), relationships with her children LA (13) and LU (17) as "good." She referred to the children as stepsiblings to her children. LMB suggested that KDBH

"naturally bonded" with LU, although LU was two years older. and that KEH, GJH and ABH bonded with LA.

[13] LMB further claimed that LA and KEH, the eldest girls, previously had lots in common in terms of music, movies, TV shows, and hobbies, and that although LU and KDBH were two years apart, they had gotten along well and that "the boys still get along, don't spend time together but do attend the same high school and talk to each other there on a few occasions they have seen each other." In her affidavit filed in July 2014, LMB stated that the children's relationships had "deteriorated simply because they have not seen each other."

[14] LMB indicated that her extended family members welcomed the children as part of their family, and they included the children in her extended family's gatherings around the holidays:

> …
>
> During visits, I planned different outings and activities (trips to my parents, the zoo, lakes for swimming, shopping, etc) to do with the kids. In 2019, we took all the kids to one of my family's Christmas parties on the South Shore, about an hour's drive each way.
>
> This party was planned purposely on a day we had the children so they could be included. This was four months after I met them; this was the first time my aunts, uncles, and cousins met them all.
>
> Everyone accepted them into our family, and since their father and I were getting married the following year, it was known they were now my stepchildren and part of our family.

> The children formed bonds with my parents. My children have spent their lives going to my parent's home for weekends or weeks (March, Summer and Christmas breaks) at a time.
>
> All of the children expressed interest in spending time down there, too, which both of my parents wanted to happen as well. They consider the children their grandchildren, just like my children, and want to treat them equally.
>
> We have had small parties for each child on or around their birthdays, which included my parents most of the time. We did our best to celebrate my children's birthdays when we visited, so they were included, and we planned special gatherings for Christmas and Easter to occur during their visits. These would consist of my parents (the most present extended family who would be present), who would treat the kids like mine, bring gifts the same as they did for my kids, and spend time with them just as much as possible.
>
> …

[15] LMB also stated:

> KDBH has always had a strong relationship with my father and would confide in him just as openly as he confided in me. He has my father's phone number, and has spoken to him **numerous times over the past few years.** He has expressed a great desire to spend time at my parent's home. My father has gone so for as to try to talk to TH about this, arrange to have coffee or figure out how to get him and LH on board with the kids being able to go down there. All efforts have been denied; the H's have even denied KDBH's own requests.

[16] After SH and LMB separated in March 2023, LMB's daughter, LA, attended only one additional visit with SH, and LU did not attend any. LMB stated that SH did not wish to continue a relationship with LMB's children.

[17] On the other hand, LMB stated that she continued to attend "many" of SH's visits with his children after she and SH separated in March 2023. LMB also stated she had some ongoing online contact with the two eldest children through Snapchat. LMB's last in person contact with the children was in or around July 2024.

4 LH's and TH's Refusal

[18] On June 3, 2024, LMB sent an email to the children's caregivers, the paternal grandparents, LH and TH, asking them if she could:

> ...be part of their life separate from their father, (SH). He doesn't keep me updated on anything he is told by either of you and I don't' expect that to change. I don't want to deal with him as a middle man"… "to be clear, am I to assume that you are not open to any sort of discussion about this? I would appreciate not ccing SH again. This isn't his business as far as I am concerned".

LH responded to LMB stating "we are not getting in the middle of u (sic) and SH" and LMB was redirected to the children's father, SH.

[19] A Petition for Divorce was filed on or about July 2, 2024. LMB last saw the children on or about July 13, 2024. Neither party provided me with the details about the proceeding.

5 Nature of the Case

[20] On February 25, 2025, a focused hearing was held on the issue of whether leave should be granted to LMB to seek contact time with the children, KDBH (age 15), and KEH (13), GJH (12) and / or AGH (11). All parties, except the children's biological mother, JC, were present for the hearing.

[21] The parties had previously agreed to rely on affidavit evidence and / or facts included in their written submissions to the Court, per discussions at a previous case management meeting with another judge. At trial, the parties agreed the

Court could consider additional facts including the fathers' affidavit evidence which was filed with the Court on the same day as the hearing. The parties indicated they did not wish to file supplementary affidavits in reply or to cross-examine any other party.

[22] At the hearing, all parties were open to the Court asking the paternal grandparents relevant questions related to the children's circumstances. The answers given had not been included in any of the parties' direct evidence in their affidavit and / or briefs. After some discussions about case law, the parties were granted a further opportunity to file written submissions following the hearing. No submissions were received.

6 Issues

1. Would granting leave to LMB to apply for contact time with the children be of benefit to the welfare of any of the children?

2. Should LMB be granted leave to apply for court ordered contact time with any of the children, KDBH (age 15), and KEH (13), GJH (12) and / or AGH (11)?

7 Relevant Legal Principles & Statutory Provisions

[23] Third parties may apply for contact with a child if they obtain leave of the Court. The relevant portions of section 18 are set out below:

> 18(1) In this Section and Section 19, “parent” includes the father of a child of unmarried parents unless the child has been adopted.
>
> …
>
> (2A) The court may, on the application of a parent, grandparent or guardian or, **with leave or permission of the court, another member of the child’s family or another person**, make an order respecting access and visiting privileges of a parent, grandparent, guardian **or authorized person**.
>
> …
>
> (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, **the court shall give paramount consideration to the best interests of the child**.

[24] The statutory framework for LMB’s application was discussed by the Nova Scotia 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:
>
> …

[25] The non-exhaustive list of factors at section 18(6) include:

> (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 co-operate 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.

(6A) In determining the best interests of the child on an application for access and visiting privileges by a grandparent, the court shall also consider

(a) when appropriate, the willingness of each parent or guardian to facilitate access by and visiting with the grandparent; and

(b) the necessity of making an order to facilitate access and visiting between the child and the grandparent.

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

(a) the nature of the family violence, abuse or intimidation;

(b) how recently the family violence, abuse or intimidation occurred;

(c) the frequency of the family violence, abuse or intimidation;

(d) the harm caused to the child by the family violence, abuse or intimidation;

(e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and

(f) all other matters the court considers relevant.

(8) In making an order concerning care and custody or access and visiting privileges in relation to a child, the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best

> interests of the child, the determination of which, for greater certainty, includes a consideration of the impact of any family violence, abuse or intimidation as set out in clause (6)(j). R.S., c. 160, s. 18; 1990, c. 5, s. 107; 2012, c. 7, s. 2; 2012, c. 25, s. 2; 2014,

[26] In *Simmons* v. *Simmons*, 2016 NSCA 86, Justice Linda Lee Oland stated in part:

> [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 (CanLII) at ¶ 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 ¶ 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**.

…

[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; 2023 NSSC 227 (CanLII) Page 6 **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.

[27] In *Spence v. Stillwell*, 2017 NSSC 152, I highlighted in part that:

[101] The case of *Brooks* v. *Joudrey*, 2011 NSFC, was decided by Justice Gabriel and he provides a review of factors which may be considered when determining the question of grandparent leave, he stated:

> [47] All individuals falling under the auspices of "other persons" noted in 18(2**), must apply for and obtain leave**, as a precondition to an application for either **custody** or access under subsections (a) and (b). There is **no guidance set forth in the legislation itself as to the circumstances under which such leave shall be granted**. Rather, the **test has evolved over time**. In developing the test, Courts have necessarily wrestled with the idea of **when it is appropriate for the state to interfere with the right of a parent (or parents) to decide with whom their child shall have contact**. It is trite to observe that cases such as this always come before the Court because the parent(s) or guardian(s) of the child are opposed to the Applicant(s) having contact as of right. (my emphasis)
>
> …
>
> [50] As Sparks JFC noted in Stewart v. MacDonnell (1992) 1992 CanLII 14057 (NS FC), 113 N.S.R. (2d) 41 et al .(although the Applicant in that case was not a grandparent):
>
> > **While a person may indeed be interested in the overall welfare of the child in a purely general sense, this does not mean that the court should permit them to enter or re-enter the life of a child without the approbation of the custodial parent.** If the interest is a fleeting one or one which is more directed toward the mother, as suggested here, the court should not intervene. **However, I do not suggest that there will not be cases when the best interest of the child would force the court to intervene in regard to family and non family contacts**, which are ordinarily in the sole and private purview of the custodial parent. **In effect, if a standing is granted,**

> **the court is agreeing that a legal stranger to the child should be given the right to challenge the authority of a custodial parent.** It seems to me that **there must be a strong and cogent reason asserted before the court will question the wisdom of a custodial parent respecting contacts with family and non-family persons.** It is my view that the evidentiary burden is heightened when a non-family individual claims standing.

…

[55] The Court of Appeal has commented favourably on the approach in Gray (Supra). In MacLeod v. Theriault, (2008) 2008 NSCA 16 (CanLII), 262 N.S.R. (2d) 184, 50 R.F.L. (6th) 33, at paragraphs 17 to 21 Bateman JA stated as follows:

> **[17]** There is **no single test to be applied on such leave applications**. The court must balance a number of factors. The applicability and significance of a particular factor will depend upon the circumstances of the case. The relevant factors must be gleaned from the context of a particular situation.

[56] Many individual factors have been considered over the course of time. An exhaustive list can never be developed, since each case is determined on its own facts. Some relevant factors have included (see, for example, Gray v Gray, (supra) and MacLeod v. Theriault (supra):

> 1) Is there a sufficient interest and/or connection between the child and the Leave Applicant and is there an obvious benefit to the child?
>
> 2) Is the child emotionally attached or bonded to the leave Applicant, or is the connection one of which the child is aware?
>
> 3) Does the Leave Applicant have a familial relationship she/he wants to foster?
>
> 4) Is the application frivolous and vexatious?
>
> 5) Are there other appropriate means to resolve the issue? (For example, mediation (especially under C.F.S.C.), or access in conjunction with the other parent (if this is a grandparent application)
>
> 6) Are there risk factors apparent on the evidence that would preclude the Applicant from having contact with the child if the leave application were granted?
>
> 7) Will the granting of a leave application place the child in more risk of litigation and uncertainty?

> 8) Are there extenuating circumstances? (Such as the death of a parent, or a parent not exercising parenting time due to being in jail, or out of the province for extended periods of time)
>
> 9) Is, or would, the involvement of the third party be destructive or divisive in nature?
>
> 10) Would leave put undue stress on the custodial parent, if the Leave Applicant were successful in the application for access?
>
> 11) Would granting leave, and the possibility thereafter, granting access, threaten the stability of the Family unit?
>
> 12) Would a Court Order preserve a positive relationship between the child and the leave-applicant?
>
> 13) To what extent does the custodial parent's decision effect the child and is it a reasonable decision in the particular circumstances of each case?
>
> 14) In a case under the C.F.S.A., would the granting of a leave application provide the child with potentially feasible plan to reintegrate into the child's own family that would be in the best interests of the child?
>
> 15) Considering all of the above, is the granting of leave, in the best interests of the child?
>
> …

[28] In *JMP v. AF*, 2018 NSSC 64, the Honourable Justice MacLeod-Archer denied a grandfather access with his grandson. She stated:

> **[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).

[29] In *ND v. JM, KMM*, 2023 NSSC 227, the Honourable Justice MacLeod-Archer found in part:

> [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.

[30] In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada found as follows:

> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that **is proof on a balance of probabilities.** Of course, **context is all important and a judge should not be unmindful of inherent probabilities or improbabilities or the seriousness of the allegations or consequences.** However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected the reasons that follow.
>
> …
>
> [49] In the result, I would reaffirm that **in civil cases there is only one standard of proof and that is proof on a balance of probabilities**. In all civil cases that, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

8 Parties' Positions

8.1 LH and TH, Paternal Grandparents and Caregivers for 10 years

[31] In or around mid July 2024, the Department of Opportunities and Social Development - Child Protection Services contacted the paternal grandparents, LH and TH, to advise them that a complaint had been made that SH had inappropriately touched KEH (born 2011). The allegation reportedly originated from one of LMB's children, LA.

[32] All three of LH's and TH's granddaughter / SH's and JC's daughters were interviewed by a child protection worker and a police officer. I was advised that the allegation against SH was not substantiated and that the "allegations were unfounded." Subsequently, the paternal grandparents questioned LMB's intentions.

[33] The paternal grandparents, LH and TH, stated they observed that after their three granddaughters were interviewed by a child protection worker and a police

officer, their granddaughters presented as confused and they had asked LH and TH why LMB and / or her daughter would "lie" about their father, SH. The paternal grandparents stated that thereafter the grandchildren expressed reluctance to have ongoing contact with LMB and / or her children.

[34] The paternal grandparents, LH and TH, also observed that after the reinvolvement of child protection services and / or the police in the children's lives following LMB's daughter's allegation about SH, the children began experiencing night terrors. The paternal grandparents observed that the intervention by child protection and the police reminded the children of how they were previously taken from their home and placed into care. Further, the paternal grandparents stated that the Court's involvement in the question of whether the children will be court ordered to spend time with LMB has been a concern for the children.

[35] The paternal grandparents, LH and TH, were concerned about LMB involving the children in adult matters. They reported that in the past, KDBH had stated to them that LMB had discussed with him the details of her "marital issues" with the children's father, SH, stating to KDBH "your father said he is bored and leaving" and "it's not fair to me and the kids."

[36] In a letter to the court dated July 30, 2024, the paternal grandparents, LH and TH. stated they were concerned that:

> During the period when SH and LMB were preparing for a custody dispute, the children frequently mentioned being pressured to choose between living with their grandparents or their parents. They reported being asked repeatedly about moving in with SH and LMB, with statements such as, "when your grandparents die you'll be with us anyway." This repeated involvement in adult matters is inappropriate and detrimental to the children's well-being.
>
> …
>
> Additionally, LMB has requested expanded access to the children, including additional evenings and weekends. We would like to highlight that such changes would significantly disrupt the children's established extracurricular activities, friendships, and social routines, which are important to their well-being.

The paternal grandparents suggested that I should speak directly to the children about their wishes with respect to any ongoing contact with LMB.

[37] With the permission of the parties, I asked the paternal grandmother, LH, to tell me about each child and about each child's circumstances and / or their scheduled activities / interests. I have summarized LH's statements about the children:

1. AGH attends piano for 30 minutes on Saturdays, and musical theatre on Saturdays for 1 hour. She participates in violin lessons twice per week (Mondays and Thursdays), and at other times for orchestra practices/performances.

2. GJH also attends piano for 30 minutes on Saturdays, and musical theatre on Saturdays for 1 hour. She also has violin lessons every Wednesday for three hours. In addition, GJH also attends counseling, and she sees an ADHD specialist at the IWK. AGH's and GJH's schedules on Saturdays will change at the end of June 2025, and they will have to make other arrangements for their piano lessons.

3. KEH takes piano and voice lessons on Saturdays. She has violin lessons on Wednesdays. She attends various sports events and dances at her junior high school, which are not necessarily on "set" evenings.

4. KDBH is attending high school. He attends the gym two evenings per week with his grandfather (Wednesdays and Sundays usually). He attends anger management counseling every three weeks, which is offered through the IWK, and he also attends additional counselling, and visits to the IWK regarding ADHD.

The paternal grandparents suggested the children had been through a lot over the last 10 years, that they were stable, happy, their lives were rich, and that adding any obligations in a court order would add stress to the children's lives.

[38] The paternal grandparents stated that they did not want LMB out of the children's lives, but that regular, specified contact time would be problematic. LH

explained that if LMB contacted LH and TH ahead of time to ask to see them, that they could check the children's schedules and check with the children to see if the children wished to go, and if so, they could. She suggested that if LMB wanted to drop off a card or a present, take a child out to lunch if the child wished to go, or if LMB wished to attend a child's recital – with some notice, then there would not be a problem. However, LH and TH continued to oppose LMB being granted standing and / or specified contact time.

[39] The paternal grandparents acknowledged the children had enjoyed visiting with SH and LMB, but they stated that since LMB and SH had separated, the children had not expressed any desire to have a continuing relationship with LMB and / or her children, and that the children had "moved on to meeting their father's new girlfriend and embracing her. They have never once asked us for time to spend with LMB or others…"

[40] Further, since the involvement of child protection services and the police:

> All four children have expressed to us strongly that they DO NOT want any further engagement with LMB and have even recently since the last court call, the two youngest have been in tears when they have asked us if the court has decided, and we informed them not yet still underway broken down in tears, and expressed concerns that they "will be forced to spend time with her" when they absolutely do not want to.
>
> This breaks our hearts at the thought of having to force them to do this should the court support standing and decision.

> We expressed from the start of these proceedings that the court speak to the children to hear their voice and inputs and to date that has not occurred. This way you can hear directly from them their concerns and wishes.

8.2 The Children's Father

[41] The children's father, SH, expressed concern about the children being court ordered to have contact with LMB, against what he suggests are the children's express wishes. The father suggested that prior to any decision being made by me about the children's contact with LMB, that the children's voices should be heard.

[42] The father filed a sworn affidavit and he stated in part:

> …there were numerous times that LMB's son came home either high or drunk from drinking underage and multiple times there he would run away from home till the cops brought him home.
>
> …

LH stated that KDBH had expressed concerns to her and to TH about LU's drug use, and KDBH had also reported that LU had run away from home and had been returned home by police escort.

8.3 LMB's position

[43] LMB argued that she had spent "far more time with the children than their biological mother, JC" and that at no point had she "crossed any boundaries or caused harm." LMB stated:

> I have offered advice and suggested "coping skills" for the moments when it's hardest to deal with. KDBH has struggled with home life and, over the past few

> years, has confided in different things to me, both positive and negative, that he asked me not to tell his father, and I didn't.

LMB did not elaborate on what things KDBH struggled with, but continued as follows:

> Since SH and I separated, there have been times when KDBH has asked to go for a walk, needing a break from home and wanting to talk to someone. There have been times during visits when he has done this, too (asked to talk), and we would walk away from everyone else or ahead of everyone else so he could talk freely.
>
> There was one visit in particular when we were walking in Shubie Park, where KDBH and KEH confided in me about times of abuse that happened, and were continuously happening, at home. These were things they had previously told other people and were ignored. After the visit, I spoke to their father about it, so he was also aware. They also attempted to have GJH talk; however, she is a much more timid child, scared of repercussions, and wouldn't speak about it. KDBH has since continued to tell me times of continued abuse and how it's making him feel. I have offered advice and a safety plans for him if he ever needs something to get away.

Again, LMB does not provide any details about the alleged abuse:

> The children trusting me enough to confide in me is proof of their trust in me, which comes from stability in being present not just physically but emotionally as well and the efforts made to build and maintain a strong relationship.

LMB highlighted that both the paternal grandparents, LH and TH, and the father, SH, had suggested that the Court should hear from the children before I made any decision about leave and / or LMB's contact with them, and she agreed.

[44] LMB stated that her plan was:

> …to continue what I have been doing for the past 5+ years; spending time with them, supporting them as much as possible, and including them in family events.
>
> If I can help with schoolwork, I would be happy to (for example, if I could see them through the week as I asked, and they had homework, I would ensure it was

> done. If they had a practice or something for an extracurricular activity during my time with them, I would take them to it.
>
> I have always prioritized their safety with me and will continue to do so. They will not be put in dangerous or distressing situations. I do not plan to ever leave their lives, like their mother. I said I would be there: I am not breaking that promise. When I married their father, I accepted them as my stepchildren, which is a lifelong commitment.

9 LMB's requests

[45] LMB asked for the following: a weekend visit with all four children on Saturday once every 3 weeks from 10:00 am to 7:00 pm during the school year and 12:00 pm to 7:00 pm on school breaks. At trial, I understood LMB was attempting to clarify that she was asking for contact time with the children every second Saturday and not every third Saturday, as she had suggested in her affidavit and her Statement of Contact Time and Interaction both filed on or about July 3, 2024. I have considered both scenarios.

[46] In addition, LMB had requested a weekly visit on Tuesdays or Thursdays from 3:00 pm to 7:00 pm during the school year and 12:00 pm to 7:00 pm on all school breaks, with one child, rotating between the children; a visit on the week of each child's birthday; a visit for Christmas on December 26th from 12:00 pm to 7:00 pm; and permission for the children to attend her family events outside her regular visitation with them – and in particular an order allowing all four children to attend her children's birthdays in February and August; and any other contact time agreed between the parties, including sleepovers at her home.

10 Credibility Assessment

[47] In *Children's Aid Society of Toronto v. G.S.*, 2018, ONCJ 124, 2018 CarswellOnt 3027, 5 R.F.L. (8th) 464 (C.J.), Justice Sheer took guidance from the recent decision of the Supreme Court of Canada in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865 which provided an updated restatement of the hearsay test.

[48] J. Sheer stated in part:

> …
>
> Part Two – Legal considerations
>
> **[9]** Child hearsay can be admitted as an exception to the hearsay rule, using the principled approach of **establishing necessity and reliability** as set out in *R. v. Khan,* 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531.
>
> **[10]** The parties agreed that the necessity portion of the test has been met.
>
> **[11]** The court in *Khan* set out many considerations to assess reliability, such as **timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement.** There is not a strict list of considerations for reliability. The matters relevant to reliability will vary with the child and with the circumstances.
>
> **[12]** In determining the issue of reliability, the legal test for the court to apply at a *voir dire* involving child statements is **whether the circumstances surrounding the statements achieve threshold reliability** – not whether the statements are ultimately reliable. The question for threshold reliability is **whether the particular statement is sufficiently reliable to be admitted**. See: *R. v. Khelawon,* 2006 SCC 57 (CanLII), [2006] S.C.J. No. 57.
>
> **[13]** The court must employ a functional approach by first **identifying the particular dangers posed by the proffered hearsay** and then **considering whether those dangers may be adequately overcome so that the hearsay may be considered sufficiently reliable to be admitted for consideration** by the trier of fact. At paragraphs 61-63 of *Khelawon*, Charron J. observes that the reliability requirement will generally be met in one of two ways:
>
> (1) that there is **no real concern about whether the statement is true or not because of the circumstance in which it came about**; or

(2) that no real concern arises from the fact that the statement is presented in a hearsay form because, in the circumstances, **its truth and accuracy can nonetheless be sufficiently tested by means other than** contemporaneous cross-examination.

[14] On the threshold test of reliability, it is not necessary that the judge be satisfied on each and every potential indicator of reliability. Weaknesses in some areas may be compensated for by strength in others. See: *Children's Aid Society of Ottawa-Carleton v. L.L.,* 2001 CanLII 28153 (ON SC), [2001] O.J. No. 4587 (SCJ); *Halton Children's Aid Society v. T.D.L.D.S.L.,* 2015 ONCJ 255.

[15] The recent Supreme Court of Canada decision in the case of *R. v. Bradshaw*, 2017 SCC 35 (CanLII), provided a synthesis and reorganization of the law pertaining to the admissibility of hearsay statements. The *Bradshaw* case was about the use of **corroborative evidence to support the threshold reliability of a hearsay statement**.[4] It appears to be a reorganization of the restatement of the hearsay test set out in *R. v. Khelawon*, as described in paragraphs 12 and 13 above.

[16] The following statements made in *Bradshaw* are pertinent to the hearsay analysis:

a) The presumptive inadmissibility of hearsay may be overcome where its proponent establishes on a balance of probabilities that what is proposed for admission **falls within a categorical exception**, or satisfies the twin criteria of **necessity and threshold reliability under the principled approach**. – *Bradshaw* at pars. 22-23.

b) In determining threshold reliability, the trier of fact must **identify the specific hearsay dangers inherent in the out-of-court declaration.** The trier of fact must then identify the **means by which these dangers can be overcome**. These dangers arise notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact (*Khelawon*, at paras. 35 and 48). The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome. – *Bradshaw* at para. 26.

c) The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are **adequate substitutes for testing truth and accuracy** (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah**[5]***, at para. 30) – *Bradshaw* at para. 27.

d) **Procedural reliability is established when "there are adequate substitutes for testing the evidence**", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay

statement (*Khelawon*, at para. 76; *Hawkins*, at para. 75;[6] *Youvarajah*, at para. 36).

e) A hearsay statement is also admissible if substantive reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith,* 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can **consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement** (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37 (CanLII), [2008] 2 S.C.R. 298, at para. 55). – *Bradshaw* at para. 30.

f) The two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (*Khelawon*, at para. 65) and "factors relevant to one can complement the other". – *Bradshaw* at para. 32.

g) The distinction between threshold and ultimate reliability, while "a source of confusion", is crucial (*Khelawon*, at para. 50). **Threshold reliability concerns admissibility, whereas ultimate reliability concerns reliance** (*Khelawon*, at para. 3). – *Bradshaw* at para. 39.

h) In short, in the hearsay context, the difference between threshold and ultimate reliability is qualitative, and not a matter of degree, because the trial judge's inquiry serves a distinct purpose. In assessing substantive reliability, the trial judge does not usurp the trier of fact's role. **Only the trier of fact assesses whether the hearsay statement should ultimately be relied on and its probative value**. – *Bradshaw* at para. 41.

[17] Justice Craig Parry recently applied *Bradshaw* in the case of *Children's Aid Society of St. Thomas and Elgin v. A.H*., 2017 ONCJ 852 (CanLII), [2017] O.J. No. 6581 (OCJ), in determining the admissibility of child hearsay. Justice Parry reviewed the following comments made in *Bradshaw* about the **use of corroborative evidence in the threshold reliability analysis** at paragraphs 46 and 47:

[46] **Corroborative evidence is not capable of enhancing the procedural reliability of a hearsay statement. However, in appropriate circumstances, it is capable of enhancing the substantive reliability of a hearsay statement**. To do so, it must be capable of buttressing the truthfulness or accuracy of the material aspects of the hearsay statement. In other words, **the corroborative evidence must address the fact in issue that the hearsay statement attempts to prove, not some other non-material fact. The corroborative evidence must also be trustworthy.** Finally, corroborative evidence can only enhance the substantive reliability of a hearsay statement if, on a balance of probabilities, it rules out any plausible explanations that disclose that the maker of the hearsay statement was either untruthful or unreliable. In other words, having considered **plausible alternative explanations for the making of the statement, the trier of fact must**

be satisfied that the only remaining <u>likely</u> explanation for the statement is the declarant's truthfulness about, or the accuracy of the material aspects of the statement.

[47] As the majority in Bradshaw summarized:

In sum, to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should:

(1) Identify the **material aspects** of the hearsay statement that are tendered for their truth.

(2) Identify the **specific hearsay dangers** raised by those aspects of the statement in the particular circumstances of the case.

(3) Based on the circumstances and these dangers, **consider alternative, even speculative, explanations for the statement**.

(4) Determine whether, given the circumstances of the case, **the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness** about, or the accuracy of, the material aspects of the statement.

[18] Justice Parry also reviewed the **categorical state of mind exception** in paragraph 39 of his decision as follows:

[39] **<u>Declarations of the declarant's contemporaneous state of mind, emotion, or intention are considered in some circumstances to constitute a common law exception to the hearsay rule.</u>** In these circumstances, the declarant has little opportunity to reflect upon and concoct a false account of their state of mind. Therefore there exists a circumstantial guarantee of the trustworthiness of the statement. The passage of time also erodes the likelihood the declarant witness providing equally accurate and unclouded recounting of the same state of mind during the course of the trial. In that sense, the contemporaneous state of mind declaration is considered necessary to obtaining the most truthful account of the declarant's state of mind. **<u>In other cases, courts have ruled that the contemporaneous declarations of the declarant's state of mind can be received as original evidence, as circumstantial evidence of the declarant's state of mind, and thus not hearsay at all</u>.** However categorized, this type of declaration has long been recognized as not attracting the hearsay exclusionary rule.

[19] **<u>The state of mind hearsay exception includes a child's wishes and preferences and statements made by the child about his or her physical, mental and emotional state</u>**. The statements must assert a contemporaneous physical, mental or emotional state. **<u>They cannot include the reason for the child's statement and should not be made under circumstances of suspicion</u>**.

Part Three – Analysis

3.1 State of Mind statements

[20] The child's statements the society wishes to introduce pursuant to the state of mind exception can be grouped into categories as follows:[7]

a) The **child's views and preferences about where she wishes to live**.

b) The **child's views and preferences about how much contact** she wants with the father.

c) The child's feelings about her aunt and her home.

d) The child's feelings about her relationship with the father.

e) The **child's feelings about the access visits with her father**.

f) The child's feelings about being pressured by the father to come and live with her.

g) The child's feelings about statements made by the father about the maternal aunt.

h) The child's statements about her stress level.

i) The **child's desire not to see a friend of the father's**.

j) The child's feelings about her sisters.

k) The child's feelings about how she is sleeping, eating and functioning.

l) The child's pride in her school performance.

m) The child's feelings about counseling.

[21] The society was able to establish that the child's statements within these categories met the **necessary requirements for admission pursuant to the state of mind exception**.

[22] The child's **statements were made contemporaneously to independent professionals**. The FSW and CSW had a duty to record their interviews with the child and they recorded them within 24 hours. The **society workers were independent and had no agenda to fabricate the evidence or mislead the court**. The court is satisfied that the statements made were accurately recorded.

[23] The statements asserted a contemporaneous mental or emotional state of the child. **The society did not attempt to introduce statements that set out the "why" of the child's feelings as part of the state of mind exception**.

[24] The child's statements are consistent. Similar statements about the child's state of mind were made to both workers. **There was no evidence led on the *voir dire* that indicated that the statements were made under circumstances of suspicion.** The father indicated in his opening statement that his position will be that the maternal aunt has coached the child to make these statements. If this evidence is led at trial, the court will determine what weight to give these statements at that time.

3.2 Truth of Contents

[25] The society wishes to admit the balance of the child's statements set out in its charts marked as Exhibits A and B on the *voir dire* for the truth of their contents.

[26] The **hearsay dangers in admitting the child's statements are the lack of ability to contemporaneously cross-examine the child and the resultant difficulty of assessing the child's perception, memory or sincerity with precision**.

[27] The child's statements the society wishes to introduce for the truth of their contents can be grouped into categories as follows:[8]

a) Why she wants to live with her maternal aunt.

b) Positive aspects of her life with the maternal aunt.

c) Her interactions with the maternal aunt.

d) Why, at times, she has refused to see her father.

e) Why she has sought reductions in access time with her father.

f) Her description of the father using her to contact females on Facebook.

g) Her access experiences with the father.

h) The father's behaviour at access visits and on phone calls.

i) Her experiences of access at her father's friend's home.

j) Her father denigrating the maternal aunt and asking her to make false statements about the maternal aunt to the society.

k) Her father's efforts to pressure her to live with him.

l) Her father's conduct to her when she lived with him, including allegations of drug use by him and inappropriate physical discipline.

m) Her interaction with her sisters.

n) Why she wants to change her last name.

[28] The court finds that there are sufficient elements of both procedural and substantive reliability present in this case to admit most of the child's statements for the truth of their contents, as requested by the society.

[29] In terms of procedural reliability, the court finds that the society workers' accounts of their conversations with the child were recorded accurately. Both workers are experienced and have received training in interviewing children. The workers had a duty to accurately record their interviews with the child. They both recorded their notes within 24 hours of the interviews with the child and were confident that their recordings were substantially accurate. They made these notes pursuant to their professional responsibilities. The FSW testified that he would **write down simultaneously any quotes attributed to the child and then transcribe them into the society's computer system within 24 hours. Neither worker had any motive to record the notes inaccurately**.

[30] The workers are **very familiar with the child and were able to assess her demeanour.** They both described the child as open and comfortable with them.[9] They both testified that she spontaneously made statements about her relationship with the father, without prompting, and willingly provided them with information about her life. She would answer their questions without hesitation and provided detailed and coherent answers.

[31] Both workers testified that they did not lead the child to make her statements and both were confident that her statements were made voluntarily. The FSW sets out that he recorded the questions he asked the child and gave examples to the court. The CSW described her discussions with the child as conversational.

[32] The reliability of the statements made to the CSW were of a higher quality than those made to the FSW, as most of the statements made to the FSW by the child were during telephone conversations. This made it more difficult for him to assess her demeanour. This will go to the weight to be given to the statements made to him when assessing their ultimate reliability.

[33] The society has also established sufficient substantive reliability for the child's statements to be admitted – the statements having achieved threshold reliability.

[34] The child's statements to the society workers are very similar. They are generally consistent and have been made over a long period of time. Many of the statements are specific and detailed, lending credence to them.

[35] The statements of the child are consistent with the position she is taking in this trial.

[36] The child was described as open and forthcoming by both workers. They noticed no change in tone by the child when making her statements that would cause them to believe they were not accurate.

[37] The child is of an age where she has an understanding of the statements she is making and the importance of those statements.

[38] The child's **statements also have some balance to them**. She makes statements about positive visits with the father and positive comments about her relationships with her sisters.

[39] The statements made to the CSW were made in private settings.

[40] The workers both testified that there was no evidence that the child was being coached or influenced to make her statements and neither believed that this was happening. The CSW emphasized that the child was adamant that these were her views – no one else's.

[41] The father did not lead any evidence on the *voir dire* to indicate that the child had been coached or influenced by any person (in particular, the maternal aunt) to make any of these statements. It may be that such evidence is

led at trial and if so, the court will weigh the ultimate reliability of these statements when making its final decision.

[42] The substantive reliability indicia are not perfect. The following concerns were identified:

a) The child made an allegation of physical abuse by the father to the police that she later recanted.

b) The child denied making a call to her sister in July, 2017. The CSW believes the child did make this call.

c) Many of the child's statements to the FSW were over the telephone. He could not assess if anyone else was present or influencing the child.

[43] **These adverse factors, however, are not sufficient to reject the child's statements at the threshold reliability stage – not all of the indicia of reliability have to be established to perfection at this stage of the analysis**. These factors will go to the weight to be given to the child's statements when the court determines their ultimate reliability.

[44] There is an exception to this analysis.

[45] The child has made statements about incidents that occurred when she lived with the father several years ago. In particular, she has made allegations of drug use by him and his partner at the time and inappropriate physical discipline by the father against her.

[46] The court finds that these statements are not sufficiently reliable to meet the threshold reliability test as:

a) The child has already recanted her allegations of inappropriate physical discipline by the father.

b) These alleged incidents occurred several years ago. The child's memory of these incidents may be flawed. There is no way to test this.

c) These allegations weren't made in a contemporaneous manner. They were made long after the child came into society care.

[47] The court finds that it would not be just to require the father to defend himself from these historic allegations at this stage of the case. These statements will not be admitted for the truth of their contents.

[48] The court finds that the balance of the child statements the society seeks to introduce for the truth of their contents are admissible. The court finds that the statements are sufficiently reliable to be admitted.

3.3 Admission for other purposes

[49] Child statements can be admitted for purposes other than the truth of their contents.

[50] If the court hadn't admitted the child statements for the truth of their contents, it would have **admitted the statements the child made about the father for the purpose of demonstrating the nature of her relationship with him**. The society and the child's counsel should be free to argue that the **statements the child is making, whether true or not, are indicative of a damaged relationship the child has with the father.** The father should also be free to pursue his theory that these statements are indicative of the child being unduly influenced by the maternal aunt. The statements that the child made about incidents that occurred while she lived with the father are admissible for these purposes.

Part Four – Order

[51] The court orders that:

a) The child's statements set out under the state of mind exception in the charts marked as Exhibits A and B on the *voir dire* are admissible for this purpose.

b) The child's statements set out for the truth of their contents in the charts marked as Exhibits A and B on the *voir dire* are admissible for this purpose, save and except for the child's statements about incidents that occurred when she lived with the father - in particular, the father's alleged drug use and use of inappropriate physical discipline on her.

c) The child's statements about incidents that occurred while she lived with her father are **admissible for the purposes of establishing the nature of the relationship between the child and the father** and to establishing that the child is being unduly influenced by the maternal aunt.

[49] As I stated in part in *Isnor v Boutilier*, 2024 NSSC 241:

…

5.1 Child Hearsay

[9] I cannot rely on a child's out of court statements unless I find they are necessary and reliable – I must consider when a child's statement(s) were made in circumstances which raise a reasonable suspicion about the reliability of the child's statements. Courts have often found that when a child's parents have been engaged in conflict **it is not unreasonable to expect and / or to suspect that a child's statement(s) may have been made to one parent or another to appease them and / or to please a parent and / or in an attempt by the child to avoid foreseeable consequences.**

[10] Courts have been willing to rely on out of court statements made by children when necessary and when there is a sufficient degree of reliability, including at times but not necessarily limited to the following situations: when children participate in formal interviews with trained police and / or child protection workers and / or therapists / assessors or when a child makes a spontaneous disclosure to a third party who does not have an interest in the matter

> / outcome of the court proceeding. In all cases, I must consider all the circumstances surrounding out of court statements or disclosures made by a child and / or evidence related to the out of court statement or disclosure.

[50] At the hearing, I explained to the parties that I must be cautious before relying on any child's "out of court" statement(s), and that even if I believed a child had made a statement as suggested by the parties, that I must turn my mind to the issues of "necessity and reliability." I find it was not necessary for me to rely on any of the children's statements and / or to have the children participate in the preparation of Voice of the Child reports to answer the question about whether leave should be granted to LMB.

[51] The parties did not challenge any of the evidence entered as exhibits at trial. Although I accept that the subject children most likely made the statements suggested by their grandparents and their father, and I would categorize most of their statements as "state of mind" exceptions, I still find the children's statements do not have any guarantee of reliability with respect to the ultimate question. The question is not whether the children want to have specified parenting time with LMB and / or her children and family.

[52] The question is whether LMB has satisfied her burden: has she established there is a sufficient connection to the children; that there is a benefit to the children; that there are no other appropriate means of the children having contact

with her and / or her children other than to grant specified contact; and that there is no risk to the children, including a risk of undue stress related to any contact the children might have with LMB and / or her children and family?

11 Relevant Evidence / Facts

[53] Is it in KDBH's (15), KEH's (13), GJH's (12) and AGH's (11) best interests to have court ordered contact time with the children?

> (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 co-operate 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.

(6A) In determining the best interests of the child on an application for access and visiting privileges by a grandparent, the court shall also consider

(a) when appropriate, the willingness of each parent or guardian to facilitate access by and visiting with the grandparent; and

(b) the necessity of making an order to facilitate access and visiting between the child and the grandparent.

(7) When determining the impact of any family violence, abuse or intimidation, the court shall consider

(a) the nature of the family violence, abuse or intimidation;

(b) how recently the family violence, abuse or intimidation occurred;

(c) the frequency of the family violence, abuse or intimidation;

(d) the harm caused to the child by the family violence, abuse or intimidation;

(e) any steps the person causing the family violence, abuse or intimidation has taken to prevent further family violence, abuse or intimidation from occurring; and

(f) all other matters the court considers relevant.

[54] I make the following findings:

(a) The children are KDBH (age 15), and KEH (13), GJH (12) and AGH (11);

(b) KDBH, KEH and GJH attend counseling services to address various challenges they have. All the children participate in extracurricular activities either in school and / or out of school;

(c) The children have been in their paternal grandparents' **primary care for 10 years.** They already have a mother figure and two father figures in their lives;

(d) The children's father continues to exercise his parenting time pursuant to the terms of the Consent Order granted in 2017. His new girlfriend is also involved in the children's lives;

(e) The relationship between the children's father, SH, and LMB was relatively short – she was involved in the children's lives between 2019 and March 2023, approximately three and a half years;

(f) The parenting time SH had with the children while LMB and / or her children or extended family were involved consisted of only seven hours (10:00 am to 5:00 pm) every third Saturday and some additional parenting time for some special events;

(g) LMB is a relative of the children by marriage, pending the parties' divorce proceedings concluding;

(h) LMB continued to play a lesser but still an active role in the children's lives when she and SH first ceased to be a couple until in or around the time that LMB contacted child protection services to report

allegations of abuse her daughter LA made against SH involving KEH;

(i) The reduction / lack of involvement in the children's lives was not by LMD's choice;

(j) LMD has not had in person contact with the children since in or around mid July 2024, but she has suggested she has also contacted the two eldest children, KDBH and KEH, by Snapchat at times;

(k) There is a high level of conflict between SH and LMB, and between LMB and LH and TH – the latter partly due to the unsubstantiated allegations of abuse LMB has either reported to child protection services about SH or she has alluded to in her affidavit about LH, TH and / or SH, without providing credible evidence of any such abuse;

(l) The children already travel between two households, their paternal grandparents' home and their fathers' home. To require them to travel between another home would add disruption and unpredictability to their schedule; and

(m) If leave is granted to LMB, the paternal grandparents, LH and TH, and the father SH would contest the contact, thus extending the litigation and likely increasing the animosity between the parties and

> creating stress for the children; and I highly doubt that an end to this litigation will reduce the conflict.

[55] LMB has reported the father to child protection services, reporting that her daughter LA had alleged SH had sexually abused KEH. In addition, LMB has made vague suggestions that KDBH, KEH, and GJH (and possibly AGH) have been abused / or exposed to abuse in their home. I believe, but I am not certain, whether LMB was suggesting that while the children were residing with their paternal grandparents and / or perhaps with their father that they were exposed to abuse.

[56] LMB wishes to have contact time with the children so that she can ensure that the children have someone to talk to, to disclose to, to do their homework with, and she can continue to talk with them about "safety plans" and keep them safe. However, it's not LMB's place to police LH's, TH's, or SH's parenting. If there's risk to the children from abuse, it's the role of child protection services to investigate and intervene. Indeed, LMB has made referral to child protection services in the past. The three eldest children are also attending counseling services and can seek support services through professional service providers.

[57] In *JMP v. AF*, *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.

[58] Similarly in this case, the evidence that the children are being abused is not compelling. The three eldest children have ongoing access to counseling services and can ask for assistance. Even if I accepted that the grandparents and / or the father had struggled with their parenting and perhaps exposed the children to abuse previously, I must consider the other factors enumerated above with LMB's concerns.

[59] In this case, I find that there is not a sufficient connection between any of the children and LMB and given the children's circumstances there is no obvious benefit to any of the children in granting leave for LMB to apply for specified parenting time.

[60] LMB has continued to communicate with the two eldest children by Snapchat and the paternal grandparents are open to LMB contacting them to

arrange to spend time with the children, if the children wish to do so. The paternal grandparents are also open to LMB sending cards, dropping off gifts, and attending recitals (with at least 24 hours notice).

[61] However, despite the paternal grandparents stated openness, there is a real concern with respect to conflict which may arise in response to the allegation LA made about the children's father, an allegation which resulted in KEH, GJH, and AGH being interviewed by a child protection worker and by police. Forcing the children to spend time with LMB and with LA and / or LU is not in their best interests. There is a real chance that LMB's involvement would be destructive and divisive in nature, and leave being granted and / or specified contact time being granted to LMB could threaten the individual and /or family work currently being completed through the children's counseling sessions.

[62] Also, LMB's argument that she has spent more time with the children than the children's biological mother, JC, really does not recognize the enormous contribution of time and care being made by the children's actual guardians, their paternal grandmother and their paternal grandfather. The children have parents, who happen to be their paternal grandparents, who have cared for them primarily for the last ten years.

[63] I agree with the paternal grandparents' position. I find their position is reasonable in the particular circumstances of each child. I find that granting leave to LMB would put undue pressure on the custodial parents, the paternal grandparents. I also find that if LMB was successful in her application for specified contact time with the children, that the paternal grandparents would be subject to additional pressure. Having considered and assessed all the relevant factors, I find that it is not in the best interests of KDBH (age 15), KEH (13), GJH (12), and AGH (11) to grant leave to LMB to pursue contact time with them.

[64] This case bears some similarities to the *Hayes* decision discussed in *Simmons* (supra) and to *JMP v. AF*, (supra). For some of the same reasons expressed in those cases, I am denying leave. LMD 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.

12 Conclusion

[65] LMB 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.

[66] 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.

[67] I have considered the legislation, the caselaw, and the evidence as a whole. I have considered the paternal grandparents' views, the father's views, and LMB's 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.

[68] The children were fortunate to have LMB in their lives for over three years. They were fortunate to have people (other than their paternal grandparents) 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.

[69] The court will draft the order.

[70] The parties are encouraged to agree on costs. Failing agreement, written submissions may be sent to my attention by May 1, 2025.

Cindy G. Cormier, J.