Citation: Stevens v Haley, 2019 MBCA 88 Date: 20190826
Docket: AF18-30-09027

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

DUSTIN JAMES WILLIAM STEVENS	)	***R. A. Horton*** *and*
	)	***R. J. Hocken***
	)	*for the Appellant*
(Petitioner) Respondent	)	
	)	***M. R. Lofchick*** *and*
	)	***S. B. Couture***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
SANDRA LYNN HALEY	)	***March 22, 2019***
	)	
	)	*Judgment delivered:*
(Respondent) Appellant	)	***August 26, 2019***

On appeal from 2017 MBQB 124

BEARD JA

I. THE ISSUES

[1] This is an appeal dealing with the custody of a very young child (A.H.) and the difficult issue of whether the respondent (the mother) could move A.H. from Manitoba to Saskatchewan, where the mother was attending university. The trial judge refused the mother's application. She ordered that the parents would have shared custody with final decision-making power to the petitioner (the father) and that A.H. would remain in Manitoba, where she would reside with the father while the mother was away at university. She

gave the maternal grandparents regular visits and provided for the parents to have shared care and control during the mother's school breaks.

[2] The issues for consideration on this appeal, as clarified by the mother in oral argument, are as follows:

(i) whether the trial judge misapprehended the evidence;

(ii) whether the trial judge erred in her application of the principles in *Gordon v Goertz*, [1996] 2 SCR 27; and

(iii) whether the trial judge erred in giving the father final decision-making authority.

II. THE FACTS

[3] As children, the mother and the father both lived in the same town close to Winnipeg, Manitoba. They met in high school, where they were casual acquaintances but did not have a dating relationship or even a friendship. After graduation in 2010, they ran into each other occasionally, but did not socialise or have a relationship. For example, neither knew the other's parents.

[4] In the fall of 2010, following graduation from high school, the mother took a 10-month course in Manitoba to become a pharmacy technician, receiving her diploma in June 2011. She then worked as a pharmacy technician from June 2011 to August 2012. Between August 2012 and June 2015, the mother attended university in Saskatchewan and Alberta to complete the courses required to be accepted into the pharmacy program at either the University of Saskatchewan or the University of Manitoba. She

changed her residence to Saskatchewan, obtaining a Saskatchewan health card and filing income taxes as a Saskatchewan resident.

[5] The mother's parents were assisting her financially with the cost of her education. Throughout that time, they continued to live in Manitoba and the mother returned to their home in Manitoba for all of her university breaks. She also obtained employment in Manitoba during the summer breaks.

[6] As was her custom, the mother returned to her parents' home for the spring break in February 2015. She attended a party one evening at which the father was also present. As a result of this one-time meeting, the mother became pregnant. The father acknowledged in cross-examination that he was aware that the mother was in Winnipeg in February 2015 for her spring break and that she was returning to Saskatchewan to continue her university program.

[7] At that time, the mother was 22 years old and the father was 24. Upon learning of the pregnancy, the mother advised the father. After considering various options, the mother decided to have the baby, and the father accepted that decision and indicated that he wanted to be an involved father. He made it clear to her, however, that he had no interest in entering into a romantic or dating relationship with her.

[8] The mother told her parents of the pregnancy and her decision to keep the baby. They accepted her decision and agreed to support her and the baby. The mother decided not to return to school for the 2015-16 academic year but, rather, to remain with her parents during her pregnancy and the baby's birth. The baby was born in November 2015.

[9] Following high school, the father obtained employment as a cabinet installer. About four years before the trial, he began an apprenticeship to become a cabinet maker and was employed full-time in that trade as he worked through the apprenticeship. He was, and planned to continue, living with his mother in her home.

[10] The father and paternal grandmother outfitted a nursery in her home for the baby. Approximately a week before the baby was born, the mother went to the house to meet the paternal grandmother (for the first time) and to see the nursery.

[11] The mother and father had sporadic contact during the pregnancy, mostly by text messages. The mother did, however, take several steps to involve the father. For example, she invited him to attend for her ultrasound appointment, she discussed baby names with him and she asked his opinion about having the baby baptized. When the mother went into labour, she contacted the father. He immediately went to the hospital and supported the mother through the delivery and cut the umbilical cord when the child was born. The father spent the next two days at the hospital with the mother and the baby, where he was able to hold the baby and assist the mother. The father met the maternal grandparents for the first time at the hospital. At one point, the mother became upset and asked the father to leave, which he did.

[12] While in the hospital, the mother and father discussed the registration of the birth. They were given a birth registration form and the father signed it with the understanding that he would be identified as the father on the registration. After getting advice from several members of the hospital staff, including a hospital social worker, and her parents, the mother changed

her mind and, without advising the father, did not include him on the registration, so there was no father identified in A.H.'s birth records.

[13] After her discharge from the hospital, the mother and A.H. continued to live with the maternal grandparents. The mother agreed to the father having frequent and regular access with A.H. The maternal grandparents had misgivings about the father, whom they met for the first time in the hospital, and the access arrangements. Further, the hospital staff had expressed concerns and advised the mother to remove the father's name from the birth registration. Despite this advice, the mother continued the father's regular and frequent contact with A.H. and supported his parental role. For example, she invited the father to A.H.'s doctors' appointments, and they exchanged social media messages about A.H. and photos of her.

[14] Initially, the access was for a few hours, a few evenings per week. As the mother was breastfeeding A.H., she supplied milk for the father's visits. The father had his first overnight visit on New Year's Eve, 2015. After that, his overnight visits increased, until he was having approximately three per week. On most occasions, he would pick A.H. up after work, being approximately 5:30 p.m., and return her the next morning on his way to work, at approximately 6:30 a.m. By June 2016, he was having approximately 13 of these overnight visits per month. The evidence is that, by June 2016, A.H. was spending approximately 30 per cent of her time with the father and 70 per cent of her time with the mother.

[15] In early 2015, the mother applied to be admitted to the pharmacy programs at both the University of Manitoba and the University of Saskatchewan, in Saskatoon. She learned that, due to the regulations

regarding course marks, she could never qualify for admission to the pharmacy program in Manitoba. She met the requirements in Saskatchewan, but was not accepted that year because other applicants were given priority.

[16] In 2016, the mother again applied to the University of Saskatchewan. This time, she was offered a position in the class to start in September 2016, which she accepted. While she had applied to go to two health-related programs at the University of Manitoba, those were not her first choices and she declined the acceptances in favour of the pharmacy program in Saskatchewan.

[17] While the mother and father were meeting in June to arrange the father's visits, the mother advised him that she and her parents were taking A.H. to the United States for a vacation. The father learned at that time that he was not listed as the father on the birth registration. He immediately filed a petition for a declaration of parentage, joint custody, shared decision-making power and other ancillary relief. He also filed a motion for interim relief, including a declaration of parentage and an order preventing the mother from taking A.H. out of the jurisdiction. The motion was resolved by consent at the first court appearance, including the declaration of parentage and having the father identified as A.H.'s father on both the birth registration and A.H.'s passport.

[18] In early August 2016, the mother filed an answer to the petition, in which she contested the father's petition and asked for sole custody of A.H., or, alternatively, either joint custody with final decision-making authority to her, or primary care and control to her with periods of care and control to the father as agreed. She also petitioned for an order that she be allowed to move

to Saskatoon, where she had been accepted into the pharmacy program, to "pursue her educational and professional prospects".

[19] Shortly after filing her answer, the mother filed a motion for an interim order permitting her to take A.H. to Saskatoon for the 2016-17 school year. Her motion included a proposal that she and her parents would arrange and pay for A.H. to be returned to Manitoba every second weekend to spend four days with the father, as well as the mother and A.H. returning to Manitoba for her school breaks in November 2016, at Christmas and in February 2017. In addition, the mother would forego child support and her parents would contribute to the cost of the father travelling to Saskatoon to visit on the alternate weekends. The motion was heard in early September 2016, and resulted in an interim order that adopted the mother's proposal.

[20] The visits proceeded according to the order. While the father availed himself of the offer not to pay child support, he made no effort to have any visits in Saskatoon. As a result, the only visits that took place were the bi-weekly visits in Manitoba and those during the mother's school breaks.

[21] The trial took place from May 29 to June 1, 2017, and the trial judge released her decision on June 26, 2017. As noted above, she dismissed the mother's application to move A.H. to Saskatoon, either permanently or while the mother was at university. She ordered that the parents have shared custody with the father having final decision-making authority, and she set out the mother's periods of care and control. She also ordered that A.H. be in the care of the maternal grandparents on a weekly basis.

[22] The trial judge also ordered that the father pay child support to the mother, including retroactive child support from A.H.'s birth to

September 7, 2016 (the date of the interim order) and from July 1, 2017, on an ongoing basis.

III. STANDARD OF REVIEW

[23] The standard of review for family law decisions is well known but bears repeating. It was set out by the Supreme Court of Canada in *Hickey v Hickey*, [1999] 2 SCR 518 at paras 10-13, and repeated and explained by that Court in *Van de Perre v Edwards*, 2001 SCC 60 at paras 9-16. Bastarache J, for the Court in *Van de Perre*, stated (at para 11):

> In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review. L'Heureux-Dubé J. stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at paras. 10 and 12:
>
> > (Trial judges) must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
> >
> > . . .
> >
> > . . . Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. (Emphasis added.)

[24] The mother in this case has alleged that the trial judge both seriously misapprehended the evidence and failed to correctly apply the principles in *Gordon*.

[25] Bastarache J, in *Van de Perre*, explained reviewable errors of this nature as follows (at para 15):

> As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[26] Bastarache J explained the material error in *Gordon* as follows (at para 14):

> . . . The Court of Appeal discussed, and the respondents relied heavily on, the decision of McLachlin J. (as she then was) in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case, the Court found that the trial judge had only mentioned one factor to be considered in determining the best interests of the child. As noted by McLachlin J., there was no way of knowing if the trial judge had considered the other applicable factors. Further, the Court noted that the trial judge had stated that he was relying heavily upon the findings of another judge. As a result, McLachlin J. stated, at para. 52: ". . . one may equally infer that the necessary fresh inquiry was not fully undertaken. . . . (I)t seems clear that

> the trial judge failed to give sufficient weight to all relevant considerations . . . and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly." Rather than indicating that appellate review differs when a court must consider the best interests of the child, *Gordon* is consistent with the narrow scope of appellate review discussed later in *Hickey*, *supra*. The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor in depth.

[27] Alternatively, an allegation of an error in findings of fact by a trial judge is reviewed on the standard of palpable and overriding error. In other words, an appellate court must defer to the trial judge's findings and conclusions of fact unless the trial judge has made a palpable and overriding error. A palpable error is one that is plainly or readily seen, while an overriding error is one that is sufficiently significant to vitiate the finding of fact or "goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error" (*Waxman v Waxman*, 2004 CarswellOnt 1715 at para 297 (CA); see also para 296; *Posthumous v Foubert*, 2011 MBCA 43 at para 19; and *Hyczkewycz v Hupe*, 2019 MBCA 74 at paras 129-31).

[28] If any of the alleged errors are well founded, there would be no deference owed to the trial judge's decision. These errors would make it appropriate for this Court to review that decision and, should it find the conclusions at trial unsupported by the evidence, vary the order (see *Gordon* at para 52).

IV. THE APPLICABLE LAW

[29] The trial judge set out the law governing the issues in this case, being the determination of the custody of A.H. in the context of the mother's wish to re-locate to Saskatoon. She stated that the application was under *The Family Maintenance Act*, CCSM, c F20 (the *Act*) and that the applicable provisions are sections 2(1), 39(1), 39(2), and 39(2.1). Those provisions are set out in the attached appendix. She also found that, because there was an issue regarding mobility, the principles in *Gordon* would apply notwithstanding that this is an application of first instance, rather than a variation application. For this, she relied upon *Bjornson v Creighton* (2002), 221 DLR (4th) 489 (Ont CA); and *Norrish v Norrish*, 2005 SKQB 396. To these, I would add *Nunweiler v Nunweiler*, 2000 BCCA 300 at paras 27-28.

[30] The parties agree, as do I, that the trial judge, in relying on *Gordon*, selected the correct legal test. That test, found in *Gordon*, is as follows (at para 49):

> The law can be summarized as follows:
>
> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
>
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> 7. More particularly the judge should consider, *inter alia*:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;
>
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[31] Saunders JA's comments in *Nunweiler* on the application of that test in a custody application of first instance are instructive (at paras 27-28):

> . . . While the first stage inquiry (requirement of a material change in circumstances) clearly is not applicable to a case of an initial custody order, the discussion of the second stage determination of custody and access is, in my view, instructive,

> and the factors enunciated by Madam Justice McLachlin should be considered, with the appropriate modifications.
>
> The significance of the reasoning in ***Gordon v. Goertz*** in an initial determination of custody is, I consider, three-fold. First, the decision directs the court to consider the motive for a parent's relocation only in the context of assessing the parent's ability to meet the needs of the child. This, in my view, is as relevant a direction on an initial custody hearing as on a variation hearing. Second, the decision confirms the significance of the instruction, found in s. 16(10), to consider the willingness of a parent to facilitate contact, but notes that this consideration is subordinate to over-all consideration of the best interests of the child. Third, and more broadly, it approaches the issue of a relocation of residence from a perspective of respect for a parent's decision to live and work where he or she chooses, barring an improper motive.

V. THE TRIAL JUDGE'S DECISION

[32] The trial judge reviewed the applicable *Gordon* factors as they relate to this case. I would summarise her findings as follows.

[33] *The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.* The trial judge came to a number of negative conclusions related to the mother and the maternal grandparents that led her to find that, while the *Gordon* principles required her to give the custodial parent's views great respect, "I struggle to do so in this case because the mother has shown herself to have abdicated a portion of her custodial role to her parents" (at para 55).

[34] Regarding the mother, the trial judge found that she presented as a confused and conflicted witness at trial. She noted that the mother testified that the father was disinterested and used her as a "vessel" for his baby (at

para 47), but she also admitted that he was honest with her about their relationship (he was not interested in a romantic one). The trial judge stated that the mother admitted to striking the father's name off the birth registration after he had signed it, and then she tried to blame the hospital social worker. She stated that the mother "admitted she lied to the allergist about the exposure of [A.H.] to cats in July 2016 and about the presence of cigarette smoke and animals in the father's home" (at para 47). She also noted that, in cross-examination, the mother admitted that she felt like she was in a "tug of war" between her parents and the father over A.H.'s care and future.

[35] The trial judge found that the maternal grandparents were overbearing. She pointed to the grandfather's testimony that he was the architect of various proposals made to the father regarding A.H.'s future care, including the schedule that was incorporated into the interim order. She stated that the grandfather overstepped the bounds of a grandparent in telling the father that he should be paying child support, and she found that it was clear that the grandfather did not like the father, whom the grandfather described as "being rude and sarcastic" (at para 51). She stated that the maternal grandmother was overly protective and very worried about her granddaughter. She found that "[b]oth maternal grandparents have shown a tendency to overstep their roles as grandparents in order to control how often and under what conditions the father is allowed to care for [A.H.]" (at para 53).

[36] *The existing custody arrangement and relationship between the child and the custodial parent and between the child and the access parent.* On these factors, the trial judge stated (at para 57):

> Despite the circumstances the parents found themselves in, they were able, on a monthly basis, to sort out a regular care and control schedule for [A.H.]. The intervening interim order upset that schedule for the period September 2016 through April 2017. The child [A.H.] has had to endure at least a dozen trips by air or by vehicle between Saskatoon and [Manitoba]. Both parties took the position that [A.H.] was well bonded to each of them. The witnesses on each side confirmed that [A.H.] is equally happy in the care of either parent. The evidence is that [A.H.] is well cared for in the homes of each parent.

[37] *The desirability of maximizing contact between the child and both parents.* The trial judge found that the access schedule in the interim order, which required A.H. to return to Manitoba every second weekend, was not in A.H.'s best interests because the travel was too stressful for her. She dismissed the argument that the father should have had some visits in Saskatoon by stating that the quality of visits in a hotel room was not equal to A.H. being in the father's home, and that the mother's proposed schedule would make the father a "special weekend fun time" parent, rather than the involved parent that he had been (at para 70).

[38] Regarding the father's plan of keeping A.H. in Manitoba with him, the trial judge stated that it would be much easier for the mother to travel to Manitoba on weekends during the school year and to share time equally on school breaks.

[39] *The custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.* The trial judge found that the mother had no improper purpose for wanting to live in Saskatoon and finish her education. She stated, however, that the mother could return to Manitoba to work upon completing her degree.

[40] The trial judge noted that the mother had stated that a permanent move to Saskatchewan was always in her future as her parents would move back there upon their retirements. The trial judge stated that the maternal grandfather testified that he was due to retire soon, while the maternal grandmother testified that she had no immediate plans to retire, but that, when she did, she would move back to Saskatchewan to be near her elderly mother, although she also stated that there were many unknowns in the future.

[41] The trial judge then concluded, "[w]hile I have considered the mother's future plans, they do not determine the mobility issue. I must focus primarily and, most importantly, on the best interests of [A.H.]" (at para 78).

[42] *Disruption to the child of a change in custody and disruption to the child consequent on removal from family, schools, and community he or she has come to know.* The trial judge stated as follows (at paras 79-81):

> In examining the facts of this case, it is clear that the terms of the interim order disrupted [A.H.] and that she suffered as a result. As stated earlier, the "experiment" of the biweekly travel resulted in a child who was clingy and tired and estranged from extended family members. The tug of war between the father, the mother and the maternal grandparents intensified. The cost and the frequency of the travel wore on everyone. The mother and maternal grandparents resented the arrangements and they unilaterally set out to alter the terms of the interim order by refusing to allow the father to pick up [A.H.] at the airport in Winnipeg. They also complained that the father failed to visit [A.H.] in Saskatoon.
>
> Prior to the interim order, [A.H.] was seeing her father regularly three times a week with few separations longer than four days. She was being well cared for in two loving, but separate homes. This arrangement was in [A.H.]'s best interests. It is an arrangement that the father has promoted in his proposal for custody.

> With respect to the disruption of the child consequent on removal from family, schools and the community [in Manitoba], the child [A.H.] is too young to be in school. [A.H.] is well connected to her family who reside in [Manitoba], which include her maternal grandparents, paternal grandmother, paternal aunt, maternal uncles and family friends. Those connections would be substantially diminished if [A.H.] were to move to Saskatoon on a permanent basis. She is simply too young to maintain those relationships independent of frequent contact with those persons.

[43] Finally, the trial judge set out what she viewed as the available options, being: that the mother continue to have sole custody, permit her to move A.H. to Saskatoon and grant the father access either bi-weekly in Manitoba, as in the interim order, or alternating between Manitoba and Saskatoon; grant the father primary care and control and permit the mother to have access on an equal basis when she is in Manitoba; have the parents share custody in Saskatoon; or have the parents share custody in Manitoba, with A.H. residing with the father while the mother is in Saskatoon, the maternal grandparents having weekly access and the parties having equal time when the mother is in Manitoba.

[44] The trial judge found that the last option was the plan that was in the best interests of A.H. She then concluded her reasons on this issue by finding that the father had made sound decisions for A.H. and had co-operated with the mother, so she granted him final decision-making authority.

VI. THE PARTIES' POSITIONS

[45] The first issue is that the trial judge misapprehended the evidence, that the misapprehensions were serious, and that they caused her to come to the wrong decision. While the mother alleges that there were a number of

misapprehensions, I will address the following: the mother admitted that she lied to the allergist; the mother removed the father's name from the birth registration because he had rejected her; the maternal grandparents contravened the interim order by refusing to permit the father to pick A.H. up at the airport; and the maternal grandmother referred to A.H. as "our baby" and stated that the mother and maternal grandparents were a "triangle" of support for A.H.

[46] The father's position is that the evidence supports the conclusions of the trial judge and that there were no serious misapprehensions of the evidence.

[47] The second issue is that the trial judge erred in her application of the principles in *Gordon*, by failing to consider the existing custody arrangement between the child and the custodial parent and by failing to give substantial, or any, respect to the views of the mother, as the custodial parent.

[48] The father argues that the trial judge did not make any errors in the application of the legal principles in *Gordon* and that the evidence supports her findings and her order.

VII. ANALYSIS

Misapprehension of Evidence

(i) The Mother Lied to the Allergist

[49] The trial judge stated, "[t]he mother admitted she lied to the allergist about the exposure of [A.H.] to cats in July 2016 and about the presence of cigarette smoke and animals in the father's home" (at para 47).

[50] The mother's evidence was that A.H. had eczema and other skin problems and that she had reacted to eating eggs. As a result, she made arrangements for A.H. to see an allergist, whose report states that the appointment was "for consultation regarding egg allergy". The father knew about the appointment in advance and was invited to go, but he was not able to attend. The allergist did a skin test to test for reactions to a variety of known allergens, and the tests showed that A.H. was allergic to cats, eggs and had an equivocal reaction to dogs. The doctor prescribed an EpiPen Jr and recommended that A.H. should avoid exposure to eggs, cats and cigarette smoke.

[51] The mother testified that the allergist asked her a number of questions about A.H.'s exposure to allergens and, in response, she told him that there were animals at the father's house. She included a reference to birds because the father told her that his sister had birds. She said that she had never been in the sister's room, so she did not know that the birds were no longer there, but she knew that there were three dogs and two cats in the house. She testified that the allergist also asked her whether anyone smoked, and she said that the paternal grandmother did.

[52] The father testified that he had cats and dogs, that he is allergic to them and to horses, and that he treats his allergies with Reactine. Further, he has eczema that he treats with cream. The paternal grandmother testified that she had cats and that she smokes, although she said that she does not smoke in her house. She also testified that her daughter had had a bird, but it died before A.H. was born.

[53] The allergist's report also contains a statement that A.H. developed a rash after playing with the father's cat in July 2016. In cross-examination, the mother said that she did not recall A.H. having a reaction at that time. She explained that, after the skin test disclosed that A.H. was allergic to cats, the doctor was asking her questions about her exposure to cats and she provided that information. When asked if she was lying to the allergist, she said no.

[54] In my view, the evidence does not support a finding that the mother lied to the allergist, and there is certainly no evidence that she admitted that she lied. The skin test confirmed the suspected allergy to eggs and disclosed a previously unknown allergy to cats. The issue of allergies was of sufficient concern to the trial judge that she included a requirement in her order that the father follow-up with the allergist and ensure that A.H. not be exposed to the known allergens – exactly the mother's concerns. The trial judge's finding that the mother admitted to lying to the allergist is, in my view, the result of a misapprehension of the evidence. To the extent that it is an error of fact, it is palpable.

(ii) *Removing the Father's Name from the Birth Registration*

[55] The trial judge found that the mother admitted to striking the father's name off the birth registration after he signed it, "but blamed her actions on advice from a hospital social worker" (at para 47). The trial judge then stated that the mother conceded that she did not want the father's name on the birth certificate because she was upset with the father for rejecting her, and that she admitted to lying to him about it for months.

[56] The father did not point to any evidence that the mother conceded that she did not want the father's name on the birth certificate because she was

upset at him for rejecting her. The mother and the grandfather both testified that the hospital social worker advised them against putting the father's name on the birth registration.

[57] In direct examination, the mother was asked why she kept the father's name off the birth registration. She began her answer by stating, "Everyone who was looking after me in the hospital including nurses, doctors, social workers, I told them my story and they said well you should --". At that point the trial judge, on her own initiative, directed that whatever the mother was told by someone was inadmissible hearsay unless that person testified. In an attempt to rephrase the answer, the mother said, "I was advised by multiple hospital staff that I should remove his name off the birth --". The trial judge again interceded and prevented the mother from explaining why she removed the name. In the end, the mother stated, "I didn't think it was a good idea at the time." She also said that her parents did not think that it was a good idea, so she felt torn as to what to do.

[58] The trial judge was clearly wrong in stating that the mother's testimony about the information from the hospital staff was inadmissible hearsay. Information from a person who is not a witness is only hearsay and, therefore, inadmissible if it is presented for the purpose of proving the truth of the information. If that information is provided to explain why a witness did something, it is not hearsay and is admissible (see Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) at 249-50, 257-58).

[59] In this case, the evidence was not being presented to prove the truth of the statements of the hospital staff but as proof of what was said—that is, to prove the content of the advice that the mother and the maternal grandparents were given by hospital staff, upon which the mother testified that she relied and to which the maternal grandfather referred. The trial judge should not have prevented the mother from providing her explanation.

[60] The evidence about the birth registration was clearly important to the trial judge and was one of the significant reasons for the negative inferences that she drew against the mother and the maternal grandparents. It was an error of law for the trial judge to prevent the mother from providing this explanation for her actions. This resulted in the trial judge not receiving and, therefore, not taking into account, relevant evidence.

(iii) The Airport Pick-ups

[61] The trial judge stated that the interim order "specifically provided for the father to pick up the child at the airport" (at para 25), and she found that the mother and maternal grandparents "unilaterally set out to alter the terms of the interim order by refusing to allow the father to pick up [A.H.] at the airport in Winnipeg" (at para 79).

[62] The interim order was pronounced on September 7, 2016, and that order did not contain any reference to the pick-ups. The judge who made that order was not available to settle the terms of the order, so the parties appeared before another judge on January 20, 2017, to do so. It was at that time that the provision was added to permit the father to pick A.H. up at the airport. The evidence is that, following that date, the father was provided with A.H.'s arrival information so that he could pick her up at the airport.

[63] The trial judge mentions this issue three times in her reasons, and it was another important issue in leading her to make negative findings against the mother and maternal grandparents. The trial judge's finding that the mother and maternal grandparents "unilaterally set out to alter the terms of the interim order by refusing to allow the father to pick up [A.H.] at the airport in Winnipeg" (at para 79) is the result of a misapprehension of the evidence and is another palpable error of fact.

(iv) The Maternal Grandmother's Comments

[64] The trial judge found that the maternal grandmother was "overly protective and very worried about her granddaughter" (at para 52). The trial judge stated that the maternal grandmother referred to A.H. as "our baby" and testified that "she and her husband, the child [A.H.] and the mother were a "triangle"" (at para 52).

[65] The mother argues that the maternal grandmother did not make either of these statements, and the father has not pointed out where, in the transcript, they appear.

[66] These were comments that the trial judge relied upon in coming to her conclusion that the maternal grandmother was overly protective, and they are the result of a misapprehension of the evidence and a palpable error of fact.

Misapplication of the Gordon Principles

[67] At the hearing, the mother focussed her argument regarding the misapplication of the *Gordon* principles. She took the position that the trial

judge made two such errors: (i) she erred in failing to take into account the existing custody arrangement and relationship between the mother and A.H.; and (ii) she erred in failing to give "great respect", or, indeed, any respect, to the mother's views, as the custodial parent.

[68] The father's position regarding the first error is that this is really an argument for a presumption in favour of the *status quo*, and that such a presumption does not apply in mobility cases. His position regarding the second error is that the evidence supports the trial judge's decision not to respect the mother's views.

(i) Failure to Take Into Account the Existing Custody Relationship

[69] The mother had sole custody of A.H. from her birth until the trial by operation of section 39(1) of the *Act*, which provides that "where the parents have never cohabited after the birth of the child, the parent with whom the child resides has sole custody and control of the child."

[70] A.H. lived with the mother at the maternal grandparents home, so that the mother not only had sole custody, she also had primary care and control. The mother allowed the father to have frequent and regular access to spend time with A.H. from her birth, and she agreed to increases in that access over the next few months, as A.H. got older. That said, by June 2016, A.H. was spending approximately 30 per cent of her time with the father and 70 per cent with the mother, and this was essentially the arrangement at the time of the interim order.

[71] Under the access provisions in the interim order, the father had A.H. in Manitoba for at least eight days per month from September to April, which is approximately 28 percent of the time, leaving A.H. with her mother 72 percent of the time. Thus, the reduction in his time with A.H. was minimal. Further, the father had the opportunity to increase the time he spent with A.H., had he chosen to avail himself of visits in Saskatoon.

[72] While the trial judge repeated the factors from *Gordon*, including the requirement to consider this factor, her analysis of it was limited to one short paragraph in which she made no mention of the existing custody or care and control arrangements, or to the effect on A.H. of a significant reduction in the amount of time that she spent with the mother (see para 36 of these reasons). In fact, this is not mentioned anywhere in the decision.

[73] Verna Sullivan was called by the father as an expert in areas related to custody and access. She was asked by the mother's counsel about the effect on a child of significantly reducing the frequency and amount of access to a primary caregiver. Her response was, "[i]t would also be very bad, you know, assuming that that primary care provider has a secure attachment with the child."

[74] Michael Stambrook was called by the mother, also as an expert in areas related to custody and access. He was also asked about the impact of significantly reducing the primary caregiver's time with a child. His response was:

> Big, big. A child who's spent a great amount of time is with a parent as a primary care and control parent and that changes perceptually, precipitously that can have a significant effect. That would be a loss. That would be felt and experienced loss. . . .

> Fifty percent would be very meaningful, 75 percent, a loss of 25 percent would be meaningful as well. 'Cause a, a child develops, you know, their structure, their routine, their special things, their blanket, their bed, their room, it's all the things that give them their sense grounding and stability and you know, threats to that are going to be challenging.

[75] The failure of a trial judge to consider the effect of removing a child from the custodial parent's care was at issue in *McAlpine v Leason*, 2016 ABCA 153. The Court stated as follows (at paras 6, 8):

> The main error here is a variant of the analytical problem identified by this Court in [earlier decisions, citations omitted]. This Court has repeatedly cautioned against approaching the best interest test by comparing the effect on children if they are permitted to relocate with the custodial parent versus maintaining the status quo (i.e. the children remaining with the custodial parent in their current location). Approaching the issue in that manner ignores a key component of the *Gordon v Goertz* [citations omitted] test – the effect of removing the child from the care of his or her primary caregiver after that parent moves.
>
> . . . The trial judge made that order without full consideration of the effect on the child of being removed from her mother's care and notwithstanding clear evidence from the assessor that being removed from her mother's care would be detrimental to the child's well-being. The trial judge acknowledged that evidence in his reasons, but did not give due consideration to, or offer any analysis, on that important factor.

[76] The trial judge in this case made no reference in her reasons to this aspect of the expert evidence or the fact that the mother was the primary caregiver. In failing to take into account the reality of A.H.'s relationships with her parents, the trial judge placed too much emphasis on the extended family in Manitoba and the impact of the separation on the father, and she did not consider at all the impact of the proposed separation of A.H. from her

mother, or the desirability of maintaining stability in the relationship between the primary parent and A.H. She completely ignored the testimony of both experts on this issue. She ordered regular access with the maternal grandparents in Manitoba, but that could not replace the loss of A.H.'s primary relationship with her mother.

[77] This error was addressed in *HS v CS*, 2006 SKCA 45, wherein Vancise JA, for the Court, stated (at paras 24-25):

> In our opinion, the trial judge placed too much emphasis on the fact that the children had grown up in Midale and that the respondent's extended family live there. He stated clearly that he was cognizant of the maximum contact principle and supporting psychology on which it is based but then only considered the impact on the proposed separation of the children from their father. He did not consider the particular role of the primary parent in the lives of the children: the bonding between the children and the mother; the importance of maintaining the relationship with the psychological parent; and the desirability of maintaining the link. He did not consider the importance of maintaining stability in the relationships between the primary parent and the children. . . .
>
> The trial judge was preoccupied with the effect the move would have on the access parent and how difficult it would be for him to have access to the children. The appellant did however offer extremely generous terms of access to the respondent that exceeds the access he currently enjoys. The impact on the children if they were forced to remain in Midale is more important than the slight impairment in the access to be granted to the respondent. The trial judge did not consider the possible negative effects on the children if the appellant was restricted or prohibited from moving. . . .

[78] In my view, the failure to consider this factor constitutes an error in principle, being an error in the application of the law (see *Housen v Nikolaisen*, 2002 SCC 33 at para 27). Further, to the extent that the decision gave no consideration to the effect on A.H. of a significant reduction in her

time with her mother, the decision must be said to have been made without full consideration of her best interests. (See *Nunweiler* at para 46.)

(ii) *Failure to Give "Great Respect" to the Custodial Parent's Views*

[79] This factor was explained in *Gordon* as follows (at para 48):

> While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

[80] The failure to give effect to this factor was at issue in *Nunweiler*, in which Saunders JA, for the Court, stated (at para 42):

> . . . In the absence of an improper motive, the discussion should have started, according to ***Gordon v. Goertz***, from a point of view respectful of Ms. Charlton's decision to make a new home in McBride. As logical as it may be to many people that she should wish to reside in the Fort St. John area where she had roots, her choice to live elsewhere was entitled to respect in the absence of an improper motive, in the same manner as would the respondent's decision to move should he choose to do so.

(See also *Delichte v Rogers*, 2011 MBCA 50 at para 27.)

[81] The trial judge in this case considered the mother's reason for moving and accepted that her best option was to attend the pharmacy program in Saskatoon, finding that she had no improper motive for wanting to live in Saskatoon and finish her degree.

[82] While the trial judge had concerns that the mother was a "confused and conflicted witness at trial" (at para 47), that the maternal grandparents were overbearing (see para 48) and that the maternal grandmother was overly protective (see para 52), none of those concerns related to the mother's motive for moving.

[83] In fact, the evidence in support of the move was overwhelming. The mother had been planning for a career in pharmacy since high school. At the time of the pregnancy, she had already spent four years in post-secondary school related to pharmacy and had worked as a pharmacy technician. She was not eligible for the pharmacy program in Manitoba, but she was able to get into the pharmacy program in Saskatoon because she had become a resident of Saskatchewan and, therefore, had priority over non-residents.

[84] Further, she was a single mother who would have to look after herself and A.H., and the father had made it very clear that he was not interested in any relationship with her apart from their parental roles. While he stated that he wanted to be an involved father, he had not paid any child support between November 2015 and the interim hearing in September 2016.

[85] It is clear that the mother's decision to complete her education in Saskatchewan was intended to meet A.H.'s needs and, therefore, both relevant and not improper. As a result, the trial judge should have given her views on the move great respect. In my view, the failure to apply this factor constituted an error in principle, being an error in the application of the law. Further, to the extent that the decision gave little or no respect to the mother's views, it must be said to have been made without full consideration of A.H.'s best interests.

Conclusion

[86] Before a misapprehension of evidence leads to a review of the trial judge's order, that misapprehension must be "serious" or "significant"; if it is an error of fact, it must be overriding. In other words, a harmless error will not result in an order being set aside; rather, the error must give rise to a reasoned belief that the misapprehension affected the result. (See *Van de Perre* at para 11; *Horch v Horch*, 2017 MBCA 97 at para 50; and *SLW v PDO*, 2009 PECA 13 at para 39.)

[87] In this case, there were four misapprehensions of the evidence that the trial judge relied upon to arrive at negative findings about the mother and the maternal grandparents. Each of the four evidentiary findings was clearly significant to the trial judge, as she mentioned them more than once in her analysis. While any one, on its own, may not have been sufficiently serious to have affected the result, in my view, when considered together, they are both serious and material. These errors, all relating to the facts and factual findings of the trial judge, would also meet the test of being overriding.

[88] Of more concern, however, is the misapplication of the *Gordon* principles. The trial judge failed to take into account the existing custody arrangement and the relationship between A.H. and her mother, and she also failed to give the views of the mother, as the custodial parent, great respect or, in fact, any respect. As a result of these errors (even apart from the misapprehension of the evidence), there is no deference owed to the trial judge's decision.

VIII. DETERMINATION OF CUSTODY

[89] Having found that the trial judge both seriously misapprehended the evidence and materially misapplied the law, her decision is not entitled to deference. It is, therefore, up to this Court to determine whether the evidence supports her finding regarding custody.

[90] The Court in *Nunweiler* made the following finding (at para 36):

> . . . While much of the trial was concerned with the minutiae of both physical and telephone access, the record reveals that any difficulties were minor, and that Chelsea was made available for access on nearly all occasions sought, with the exceptions having an appropriate explanation.

[91] In my view, that is what happened in this case. There was much focus on less-significant details, on the minutiae contained in a large number of social media messages, minor clashes and "he said, she said" disagreements, like those that occur in all families, and little consideration of the big picture. That big picture is explained in the following application of the *Gordon* factors to the facts of this case.

[92] At the trial, the mother testified that it was her plan to remain permanently in Saskatoon. She was living with an aunt and cousins while at school, and her aunt, who was a stay-at-home mom, was babysitting while the mother was in classes. Her plan was to remain there while going to university.

[93] At the end of the trial, the mother offered an alternative solution to a permanent move to Saskatoon. She proposed:

- to continue the arrangements contained in the interim order, including her family financing and facilitating A.H.'s bi-weekly visits to Manitoba;

- as A.H. got a little older, she would agree to a 50-50 split on a weekly basis, between Saskatoon and Manitoba;

- when she is in Manitoba on school breaks, A.H. could alternate between her and the father on a 2-2-3 basis.

[94] The plans of both parents are still in flux as each is in the process of completing post-secondary education and, presumably, moving towards establishing their own homes apart from their parents. As a result, there will, undoubtedly, be changes for both in the not-to-distant future. How material they will be remains to be determined. With this in mind, I am of the view that the mother's alternative plan is the better of her two proposals and, on that basis, I will now consider the *Gordon* factors (which are set out at para 30 herein).

[95] The first two factors require the Court to consider the custody arrangement and the child's relationship with the parents. At the date of the trial, A.H. was 18 months old. The mother had sole custody and the father had access as agreed. A.H. was spending approximately 70 per cent of her time with the mother and 30 per cent of her time with the father. While the evidence was that she had a good relationship with both parents, it is clear that the mother was the primary caregiver. For that reason, her relationship with the mother was her most important relationship, and both experts testified that the effect on A.H. of a significant reduction in that relationship would be a meaningful loss, which would be very bad.

[96] While the father had a close relationship with A.H., he was clearly not the primary caregiver. Further, the mother's alternative proposal maintained his time with A.H. while she was in Saskatoon, albeit in a different configuration, and the father had the ability to increase that time by having visits in Saskatoon. Under this proposal, most of the father's visits would be in Manitoba, so the fact that he would spend one or two weekends per month in Saskatoon would not make him a "special weekend fun time" parent.

[97] This raises the question of whether this is merely an application of the presumption of custody arising from the *status quo*, which was done away with in *Gordon*. While *Gordon* eliminated the legal presumption of custody arising from the *status quo*, it emphasised the factual importance to be given to the relationship between the child and the custodial parent (see *Gordon* at para 48, at para 77 herein). (See also *Delichte* at paras 21-23.)

[98] Considering that the mother was A.H.'s primary caregiver at the time of the trial, and giving her views great respect (given the absence of an improper motive), both of these factors support a finding that she should be permitted to move A.H. with her to Saskatoon while she attends university there.

[99] The father's proposal would result in a reversal in the care and control arrangements, for which there was no support in the evidence.

[100] The next factor is that of maximising contact between the child and both parents.

[101] The mother and the maternal grandparents made what, in my view, was an exceptionally generous offer to maintain the father's contact with A.H.

on a regular and frequent basis. The maternal grandparents assumed the entire cost of transporting A.H. back to Manitoba on a bi-weekly basis over the school year so that she could spend four days with the father every two weeks. This involved them not only paying the cost of the transportation, but also taking on the "heavy lifting" by actually doing most of the travelling with A.H. Added to that was the offer to waive child support so that the father could afford to travel to Saskatoon to have regular visits, which, given that they were assisting the mother financially, meant that they were paying the costs that would have been covered by the child support.

[102] In my view, it was the father who was not willing to maximise his own contact with A.H. by refusing to have any visits with A.H. in Saskatoon. He offered no explanation, other than that he could not afford the visits. This rings hollow, given that he had the $3,178 in child support that was waived, and the maternal grandparents offer of $200 to $300 per visit to subsidise his costs, of which he did not avail himself. This would have covered the cost of several visits to Saskatoon and led to an increase in his time with A.H.

[103] The mother, with the assistance of her parents, demonstrated that she was willing to maximise the father's contact with A.H. It was the father who was not prepared to cooperate with them to maximise his own contact.

[104] The next factor is that of the reason for moving, which is relevant only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child. The mother was a single parent who was in the middle of obtaining a degree in pharmacy when she became pregnant. It is clear that obtaining that degree would significantly increase her ability to provide for

A.H.'s needs, and that she was not able to obtain that degree in Manitoba. Thus, the mother's motivation for moving was clearly in A.H.'s best interests.

[105] The next factor is the disruption to the child of a change of custody. The mother's proposal would have maintained A.H.'s contact with the father and allowed him to continue A.H.'s contact with his family in Manitoba. On the other hand, the father's proposal of the mother going to school and A.H. remaining in Manitoba reversed the care and control arrangement and significantly reduced the amount of time that A.H. spent with the mother. Both experts expressed the opinion that a significant reduction in a child's time with her primary caregiver would be "very bad". It was the mother's proposal that resulted in the least disruption for A.H.

[106] The trial judge found that the arrangement that was in place with "[A.H.] . . . seeing her father regularly three times a week with few separations longer than four days" (at para 80) was the one that was in A.H.'s best interests. This conclusion assumes that the *status quo* remains and that the mother does not move. As the Courts have stated in *McAlpine*; *HS v CS* (see paras 75 and 77 herein); and *Delichte* at paras 21-23, this is the wrong way to approach the analysis as it gives no consideration to the effect of removing the child from the care of the parent who wishes to move.

[107] In my view, the mother's alternative plan results in much less disruption to A.H. than does the father's plan to change primary care and control.

[108] The final factor is the disruption to the child consequent upon the removal from family, schools and the community that the child has come to know. Given the very young age of A.H., these are of little or no consequence.

As regards A.H.'s relationship with the extended family in Manitoba, that could be maintained with contact while she was in Manitoba every second weekend and during the mother's school breaks. As noted, those breaks totalled approximately five months each year, which provided sufficient time for A.H. to have regular contact with her extended family to maintain those relationships.

[109] In my view, A.H.'s best interests would best be met by continuing the mother's role as A.H.'s primary caregiver, being A.H.'s most significant relationship. The father's role was significant, but secondary, and it would have been maintained under the mother's alternative plan. The alternative of giving the maternal grandparents access, which has the appearance of being a consolation prize, was not a suitable substitute for A.H.'s primary relationship with the mother.

[110] The parties testified that the bi-weekly travel under the interim order was hard on A.H. Due to A.H.'s young age, there is no evidence as to why she was upset but, given the evidence of the experts that the loss of the primary caregiver would be "very bad", it is at least equally likely that the four-day separation from the mother contributed significantly to that. In any event, the plan that would have been in A.H.'s best interests was not the one that would reduce her primary caregiver to a visitor, but the one that would support that relationship. Refusing to permit A.H. to remain in the mother's primary care and limiting the mother's visits to her coming to Manitoba on weekends did not do that.

[111] Upon a consideration of the applicable *Gordon* factors in the context of the facts of this case, I am of the view that A.H.'s best interests were, and are, best served by leaving her in the mother's primary care and control.

[112] Finally, the trial judge gave the father the final decision-making authority. In my view, the evidence does not support that decision. The mother accepted the father's wish to be involved and included him in decisions from the beginning of the pregnancy. The mother's decision to move to Saskatoon to complete her pharmacy degree was well motivated and clearly justified. She and her parents made genuine and significant efforts to maximise the father's contact with A.H., while he, by refusing to go to Saskatoon for any visits, clearly made no reciprocal effort to do so. He accepted the waiver of child support and made no payments, while not carrying out his part of that offer. There is no basis upon which to grant the father final decision-making authority.

[113] In conclusion, A.H.'s best interests would be served by granting the mother primary care and control. The mother will consult with the father on all major decisions in a timely manner. If there is no agreement following reasonable consultation, the mother will have the authority to make the final decision on the matter at issue.

[114] The mother may re-locate to Saskatoon with A.H. for the purpose of completing her pharmacy degree at the University of Saskatchewan. Given that A.H. is older now, she may easily adjust to the extended visits in Manitoba on alternate weekends that were in place under the interim order. With this in mind, I would order that the father have care and control of A.H. according to the terms of the interim order—being every second weekend in

Manitoba and, in addition, in Saskatchewan as the parties may agree. If, after a reasonable time, the visits prove too disruptive for A.H., the mother will have the authority, after consulting with the father, to make reasonable adjustments to accommodate A.H.'s needs while maximising, to the extent possible, the father's contact with her.

[115] If the father exercises the option of visits in Saskatchewan, he can deduct his reasonable expenses, as agreed by the mother upon him providing her with receipts, from the child support payments. I will leave it to counsel to make the required arrangements with maintenance enforcement.

[116] The mother will return A.H. to Manitoba for the academic breaks in November 2019, for Christmas 2019 and in February 2020, during which time the parties will share time with A.H. equally on a 2-2-2-day alternating basis, unless otherwise agreed.

[117] Upon graduation or in the event that the mother withdraws from the pharmacy program, the mother will return A.H. to Manitoba, unless the parties agree or she obtains an order otherwise. If she returns to Manitoba, the parties will share time with A.H. equally on a 2-2-3-day rotation, unless the parties agree or a court orders otherwise.

[118] But for the re-location issue, the parties were able to resolve the sharing of time for holidays, vacations and other significant events, and there is no reason to believe that that will not continue. Thus, I would make no specific order in that regard.

[119] For clarity, once this order has been settled, any application for a variation will be made to a different judge of the Court of Queen's Bench and not to this Court.

IX. DECISION

[120] The mother's appeal is granted for the reasons and on the terms set out above.

[121] As the mother has been successful, she will have her costs under the Tariff, both at trial and on appeal.

Beard JA

I agree: Cameron JA

I agree: leMaistre JA

APPENDIX

Relevant provisions of *The Family Maintenance Act*, CCSM c F20:

Best interests test applies
2(1) In all proceedings under this Act the best interests of the child shall be the paramount consideration of the court.

Joint rights of parents in children
39(1) Subject to subsection (2), rights of parents in the custody and control of their children are joint but where the parents have never cohabited after the birth of the child, the parent with whom the child resides has sole custody and control of the child.

Either parent may apply for custody of child
39(2) Either parent of a child may make an application

(a) for custody of the child; or

(b) for access to the person of the child;

and upon the hearing of the application the court may order that

(c) custody of the child be committed to the applicant or respondent or both;

(d) the non-custodial parent have access, at such times and subject to such conditions as the court deems convenient and just, for the purpose of visiting the child and fostering a healthy relationship between parent and child;

(e) a party pay costs in such amount as the court may determine.

Best interests of child
39(2.1) In determining a child's best interests in an application under subsection (2) or section 46, the court shall consider all matters relevant to the best interests of the child including, but not limited to, the following:

(a) the nature, quality and stability of the relationship between

(i) the child and each parent seeking custody or access, and

(ii) the child and other significant individuals in the child's life;

(b) the child's physical, psychological, educational, social, moral and emotional needs, including the need for stability, taking into consideration the child's age and stage of development;

(c) the impact on the child of any domestic violence, including consideration of

(i) the safety of the child and other family and household members who care for the child,

(ii) the child's general well-being,

(iii) whether the parent who perpetrated the domestic violence is able to care for and meet the needs of the child, and

(iv) the appropriateness of making an order that would require the parents to co-operate on issues affecting the child;

(d) the ability and willingness of each parent to communicate and co-operate on issues affecting the child;

(e) the willingness of each parent seeking custody to facilitate the relationship between the child and the other parent;

(f) any special needs of the child, including special needs for care, treatment or education;

(g) the proposed plan of care for the child, including the capacity of the parent seeking custody or access to provide a safe home, adequate food, clothing and medical care for the child;

(h) the history of the care arrangements for the child;

(i) the effect on the child of any disruption of the child's sense of continuity;

(j) the views and preferences of the child, where the court considers it appropriate to ascertain them;

(k) the child's cultural, linguistic, religious and spiritual upbringing and heritage.