Docket: CA158602
Date: 20000111

NOVA SCOTIA COURT OF APPEAL

[Cite as Doiron v. Mahoney, 2000 NSCA 4]

Pugsley, Hallett and Flinn, JJ.A.

BETWEEN:

WANDA CHERYL DOIRON Appellant	William M. Leahey for the appellant
- and -	Roseanne M. Skoke for the respondent
TIMOTHY LEITH MAHONEY Respondent	Appeal Heard: December 8, 1999 Judgment Delivered: January 11, 2000

THE COURT: Appeal dismissed without costs, as per reasons for judgment of Pugsley, J.A.; Hallett and Flinn, JJ.A., concurring.

Pugsley, J.A.

[1] Wanda Doiron, birth mother of Jeremy Leith Doiron, appeals from the decision, and order, of Judge James Wilson of the Family Court, of September 3rd, and 9th, 1999, respectively, granting the application of the respondent, Timothy Mahoney, Jeremy's father, to vary a Family Court consent order of February 5, 1997, which had provided that the parents should have joint custody of Jeremy, "with de facto custody" to the appellant.

[2] After hearing evidence from twelve witnesses over two days, commencing September 1st, 1999, and viewing approximately twenty exhibits, including video tapes depicting Jeremy's relationship with his parents in their respective living accommodations, Judge Wilson determined that the parties should remain as joint custodial parents, but that day-to-day care should vest with the respondent father.

[3] I would summarize the grounds of appeal as alleging that Judge Wilson erred in the following respects:

- by failing to give any, or proper, weight to the fact that Jeremy had been in the sole day-to-day care and control of the appellant since his birth;
- by giving undue weight to the submission that Jeremy had significant contact with the respondent's extended family;
- by failing to properly apply the test set forth by the Supreme Court of Canada in **Gordon v. Goertz,** [1996] 2 S.C.R. 27;
- by refusing the appellant's post-decision application on September 8, 1999, that the Court reconsider its decision of September 3, in view of the appellant's change of

plan that Jeremy remain in Antigonish with his maternal grandparents, continue at school in Pomquet, and continue the previous access arrangements with his father. It was, apparently, proposed under this new arrangement that the appellant would commute on a daily basis between Antigonish and Halifax.

Background

[4] Jeremy was born in New Glasgow on November 8, 1991. He was under the day-to-day care of the appellant until September of 1998.

[5] His parents, unmarried, had been separated for a period of time before Jeremy's birth.

[6] Shortly after his birth, the appellant obtained employment in nearby Antigonish as a personal care worker and continued in that position until the summer of 1998 when she injured her shoulder, requiring her to seek training for alternate employment.

[7] She testified :

> When I went to U.I. I met with a counsellor . . . I said I was interested in the paralegal, legal admin. course. She said, you know, the jobs are good, but they're not very good here. I said well, I'll see what happens. I said, I just want to pass the course first before I do anything. So I didn't know when I took the course in September where I would be looking for a job.
>
> . . .
>
> I just didn't think it was a big issue whether I looked for employment in Antigonish or in Halifax or anywhere.

[8] She then enrolled in the Legal Administrative Assistant program at the Maritime Business College in Halifax in September of 1998. Halifax is approximately 200 kilometers from Antigonish.

[9] The appellant initially planned to remain in Halifax until the completion of the school year in June of 1999 and then would return to Antigonish. She rented her house in Pomquet. She made arrangements for Jeremy to reside with her parents at their home in Pomquet from September, 1998, to the end of June, 1999. Jeremy continued his attendance at Ecole de Pomquet, a French school.

[10] The appellant spent every second weekend with Jeremy from October, 1998, until the end of June, 1999, either at her parents' home at Pomquet or at her own lodgings in Halifax. Jeremy spent alternate weekends and Wednesday nights at the respondent's home near Antigonish.

[11] The appellant met Michael MacMillan in early October, 1998, and they started dating in January of 1999. Mr. MacMillan had been steadily employed in the Halifax area for a number of years and had a six-year-old son from a previous relationship. Mr. MacMillan had access to his son on each Wednesday and also during weekend visitation.

[12] She notified the respondent on April 19, 1999, testifying in part:

> I told him that I had made a decision to stay in Halifax and look for employment in Halifax. I told him I really liked it up there. I found it most relaxing and I just felt, I

> don't know, I felt really good about it. . . . There was lots of jobs and the money was always good.
>
> . . .
>
> ...I just thought it was much better than coming back to Antigonish where I would only be making probably, if not less, the same amount as what I was working for before.

[13] Judge Wilson recognized that her new circumstances were:

> In large measure motivated by a responsible need to be self-sufficient.

[14] The appellant and Mr. MacMillan took up residence in their present apartment on Macara street in Halifax about the end of June, 1999. Jeremy then moved to Halifax to live with them.

[15] The appellant commenced employment in August with a law firm in Halifax as a receptionist/administrator. In August, 1999, she enrolled Jeremy in the school Ecole du Carrefour, then located in Dartmouth. Arrangements were made by the appellant for suitable transportation to the school for Jeremy.

[16] Jeremy's extended family, on both sides, live in the Antigonish area. They all have been actively involved in Jeremy's life.

[17] The respondent entered into a relationship approximately four years ago which resulted in marriage in September of 1998. The respondent and his wife have no other children. The respondent operates a successful business in Antigonish and according to the trial judge has a:

> ...very comfortable home in a rural setting, where [Jeremy] enjoys his dog, his pony, bike riding, swimming, etc. In addition Mr. Mahoney's place of business is located nearby the French school Jeremy attends and Mr. Mahoney is able to transport Jeremy on a daily basis to the French school and his wife, Tamara, is available to pick him up after school. Tamara is actively involved with Jeremy in a number of activities, including riding lessons.

[18] The trial judge described the relationship of the parties in these terms:

> Both parties, as parents, have been described by witnesses in glowing terms and their commitment to Jeremy is unquestioned. The fact that Jeremy is such a happy, outgoing child is testimony to the involvement of all parties, including the extended family. Both parents present plans, supported by credible and sincere witnesses. That Jeremy will be adequately cared for under either scenario is not an issue.

[19] Judge Wilson determined that the resolution of the issue involved the application of s. 18(5) of the **Family Maintenance Act** (1989) R.S.N.S. c.160, which provides as follows:

> In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[20] Judge Wilson noted that the parties agreed that there had been a material change in circumstances in that the appellant, the primary care parent, made a decision to move from Antigonish County to Halifax.

[21] Following the dictates of the Supreme Court in **Gordon v. Goertz**, Judge Wilson determined that it was necessary to:

> ...make a fresh inquiry as to 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.
>
> As Justice McLachlin pointed out above this 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. Each case will turn on its unique circumstances . . . The focus is on the best interest of the child, not the interest and rights of the parents.

[22] Judge Wilson issued his decision on Friday, September 3, 1999, stating in part:

> In this case both parents can meet the child's needs but one plan must emerge as being better able to support those various factors contributing to the child's best interests. These factors include not just the physical needs of the child, given his age, sex and activities, but the ability to promote a productive life style that is both stable, predictable, and consistent. The ability to continue to draw support from both parents and extended family and the ability of a particular environment to address the needs of a child at a given stage of development are critical. . . .
>
> At this time, a permanent move to Halifax is a major change and disruption for Jeremy from the day to day life he has known. The plan proposed by Mr. Mahoney essentially maintains the status quo in terms of schooling and extended family and extra-curricular activities. While the court acknowledges the most significant contribution Ms. Doiron has made to Jeremy's development, her plan is not yet so established that it offers the type of stability Jeremy has known in Antigonish. While Jeremy may adjust well to a move, it is never wise to interfere with an established successful life style unless there are compelling reasons for doing so. While it is important to try and maintain day to day contact with his Mom, this factor alone does not outweigh all the other factors, the most important of which is the child's attachment to his father and the ability of the father and the extended family to sustain what has heretofore been a very successful life style for Jeremy.

[23] After delivery of the decision, counsel for the appellant retained new counsel. He (her present counsel on this appeal) made application on September 8, 1999, to Judge Wilson to reconsider his decision in light of new facts. He advised the Court that his client had:

> ...made arrangements for Jeremy to remain here in Antigonish and to carry on with his school, his cultural attachments, his extended family relationships in the same way that he was carrying on over the past years.

[24] The appellant had in effect abandoned the arrangement that Jeremy reside in Halifax and he would continue to reside with his maternal grandparents at Pomquet. The appellant would commute between Halifax and Antigonish; indeed, counsel advised that she:

> ... will now be at home each night here in Antigonish with Jeremy, and her employer (who I know very well) is going to see to it that the financial arrangements are such that she will be able to do that.

[25] Counsel asked Judge Wilson, pursuant to the provisions of s. 19 of the **Family Maintenance Act**, to request the Minister of Community Services to cause a written report to be prepared respecting care and custody of Jeremy.

[26] Judge Wilson advised that provided both counsel concurred, he was prepared to issue the order.

[27] The parties then agreed that, in light of these new submissions, the application for reconsideration would be set down for hearing on November 24, 1999.

[28] The notice of appeal was subsequently filed on September 17, 1999.

[29] We were advised by counsel, at the commencement of the appeal, that the consideration of the issue raised on September 8th has been adjourned by Judge Wilson until after the filing of the judgment of this Court.

Preliminary Evidentiary Issue

[30] Counsel for the appellant included in the appeal book a 30-page custody assessment report prepared in the summer of 1992 by a social worker employed with the Department of Community Services. The report was in response to an application advanced by Mr. Mahoney, the respondent in this appeal (an application opposed by Ms.

Doiron) for an order to change his access to Jeremy from a supervised, to an unsupervised, basis. The report was prepared at the request of Judge Wilson.

[31] The report was not introduced, or referred to, at the trial in September of 1999 before Judge Wilson.

[32] Counsel for the appellant submits that as:

- the parties and the child involved are the same involved in the present appeal,
- Judge Wilson's 1992 decision is a matter of public record,
- this Court must always have the best interests of the child as the paramount, if not the only, consideration,

the contents of the report should be received by this Court. Although not framed as such, counsel's submission**,** in effect, amounts to an application to introduce fresh evidence.

[33] Counsel for the respondent on this appeal opposes the application to introduce the report.

[34] I would adopt the following comments of Freeman, J.A. on behalf of this Court in **Ryan v. Ryan** (1999) NSJ No. 3221, Oct. 6, 1999, at p. 6:

> While the rule against introducing evidence which might have been available at the original hearing should not be rigidly enforced in family matters, the evidence the appellant seeks to bring forward not only fails that test, but also fails the other requirements of the test set out in R. v. Palmer and Palmer (1979) 50 C.C.C. (2d) 193 (S.C.C.)

[35] I have examined the contents of the report. The information is based on interviews and opinions conducted with, and held by, a variety of people in 1992 respecting many of the witnesses who testified before Judge Wilson in September of 1999. These witnesses were not given any opportunity to express disagreement with the statements made about them in 1992, nor have they had any opportunity to indicate how their lives might have changed in the interval.

[36] It would, in my opinion, be manifestly unfair to those witnesses to allow the report to be received, and further might impede the Court in reaching a just result.

[37] I am of the view that the report should not be accepted in evidence.

Analysis

[38] Two agreements were made by counsel for the parties - the first at the trial level, and the second at the commencement of this appeal.

[39] Counsel agreed at trial that the move by the appellant from Antigonish to Halifax, as it affected the day-to-day arrangements for Jeremy, constituted a material change in circumstances.

[40] Section 37 of the **Family Maintenance Act** provides:

> Where an order for the payment of maintenance or expenses or respecting care and custody or access and visiting privileges has been made pursuant to this Act, an applicant or a respondent may apply to the Court to have the order varied, rescinded

> or suspended and a judge may vary, rescind or suspend the order on the basis that the circumstances have changed. (emphasis added)

[41] This section has been judicially interpreted to mean that the change required must be a material, or significant change. (See **Fanning v. Boucher**, [1986] N.S.J. No. 491 (Fam. Ct.); **Langille v. Dossa** (1995), 144 N.S.R. (2d) 223; (S.C.); **McLeod v. Muise**, [1997] N.S.J. No. 52 (Fam. Ct.); **Archibald v. Archibald** (1996), 150 N.S.R. (2d) 256. (Fam.Ct.)).

[42] Section 17(5) of the **Divorce Act**, R.S.C. 1985, c.3 (2nd Supp.) provides:

> Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change. (emphasis added)

[43] This section, as well, has been judicially interpreted to mean that the change must be a material change. (See McLachlin, J. in **Gordon v. Goertz** at p. 43).

[44] The agreement of counsel, in light of the two-stage inquiry stipulated by Justice McLachlin, in **Gordon v. Goertz**, enabled Judge Wilson to conclude that the first stage had been satisfied.

[45] Justice McLachlin described the enquiry in these words at p. 42:

> The principles which govern an application for a variation of an order relating to custody and access are set out in the *Divorce Act*. The Act directs a two-stage inquiry. First, the party seeking variation must show a material change in the situation of the child. If this is done, the

> judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances. ...

[46] The agreement reached by counsel also removes the necessity of this Court responding to the invitation of counsel to consider whether the move by a parent enjoying *de facto* custody of a child form one town to a neighbouring town (a move from Antigonish to Truro was posed) would constitute a material change under s. 27 of the **Family Maintenance Act** or under s. 17(5) of the **Divorce Act**.

[47] The issue is essentially fact driven. Relocation, as Justice McLachlin noted, will always be a change, but whether it is a change that <u>materially</u> affects the circumstances of the child and the ability of the parent to meet those circumstances is another issue. Whether or not the move was foreseen, or could not have been reasonably contemplated by the judge who made the initial order, is another issue as well. (See McLachlin, J. at p. 44).

[48] Counsel further agreed that, for the purposes of this appeal, there was no material difference between the test to be applied under s. 18(5) of the **Family Maintenance Act**, or the test to be applied under s. 17(5) of the **Divorce Act**.

[49] Section 18(5) of the **Family Maintenance Act** under the title "Welfare of Child is Paramount" reads:

> In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the <u>paramount consideration</u>. (emphasis added)

[50] The parties in this appeal were never married and accordingly the application to vary brought by the respondent was advanced under the provisions of s. 37 of the **Family Maintenance Act**.

[51] As Robin Goertz was married to Janet Gordon, his application to vary custody was brought before the Unified Family Court of the Saskatchewan Court of Queen's Bench, pursuant to s. 17(5) of the **Divorce Act**, which required the Court to take into consideration "only the best interests of the child as determined by reference to that change" (emphasis added).

[52] The provisions in the two acts are dissimilar.

[53] Justice McLachlin in **Gordon v. Goertz** said at p. 47:

> What principles should guide the judge on this fresh review of the situation? This inquiry takes us to the last clause of s. 17(5) of the *Divorce Act*:
>
> > ...in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> The amendments to the *Divorce Act* in 1986 (S.C. 1986 c.4 (now R.S.C.,1985, c-3 (2nd Supp.)) elevated the best interests of the child from a "paramount" consideration to the "only" relevant issue.
>
> . . .
>
> Moreover, Parliament has offered assistance by providing two specific directions - one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents.

[54] The references to the two specific directions in the **Divorce Act** are to sections 16(9), 16(10), and 17(9) of the **Divorce Act**. Similar provisions do not appear in the **Family Maintenance Act.**

[55] Counsel's agreement, in effect, removes any question about the applicability of **Gordon v. Goertz** to the present case. The agreement was similar to that adopted by counsel in some provinces where a similar difference between the provincial legislation in issue, and the provisions of the **Divorce Act**, existed (see **Woodhouse v. Woodhouse** (1996), 20 R.F.L. (4th) 337, Ont. C.A). In Newfoundland and Alberta the Court has determined that no material distinction existed between the provisions of the provincial legislation and the **Divorce Act** (**Loder v. Holland**, (1997) N.S. 154 Nfld. & PEI Reports 261(Nfld.C.A.); **D.S. v. D. A.** (1999) 234 A.R. 60, (Alta. Prov. Ct., Fam. Div.)).

[56] The difference in wording between the two statutes is not material, in my opinion, for the purposes of this appeal.

[57] Having considered that the Supreme Court in **Gordon v. Goertz** set out the law to be applied by him, Judge Wilson then listed the seven criteria considered by Justice McLachlin as summarizing the law on the issue. Those criteria provide:

> 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 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.
>
> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is the best interests of the child in all the circumstances, old as well as new? (pp.60-61)

[58] Judge Wilson then considered the facts as established by the evidence before him in the light of the seven-point summary stipulated by Justice McLachlin.

[59] The appellant stresses that Judge Wilson failed to give adequate consideration to the appellant's views, which were entitled to great respect (point 4), and the existing custody relationship between Jeremy and the appellant (point 7(a)).

[60] Such consideration was particularly appropriate, it is submitted, in the present case, because the appellant and the respondent were separated prior to the birth of Jeremy, and never lived together as parents after Jeremy's birth, leaving the sole day-to-day care and custody of Jeremy to the appellant.

[61] It is convenient to deal with each submission in turn.

The Appellant's Views

[62] While Justice McLachlin stated that the views of the custodial parent are entitled to "great weight" (p. 54), and later," to great respect and the most serious consideration" (p. 60) she emphatically rejected the submission that there should be a presumption in favour of the custodial parent (p.59).

[63] The weight to be applied to the view of the custodial parent will vary depending on the facts of the particular case. (see McLachlin, J. at p. 58).

[64] There may be cases where a move by a child with his primary custodial parent to a new community may result in significant advantages to the child arising from educational, cultural, medical or other benefits or services, not available in the former community. Justice McLachlin directed (at p. 61) that the trial judge should consider, *inter alia*:

> (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;

[65] In this case, the appellant's initial move to Halifax, in September of 1998, to take a course at the Maritime Business College, and her subsequent decision to remain in the city to obtain a better paying job, were relevant to her ability to meet Jeremy's needs.

[66] Judge Wilson gave consideration to this issue. He said:

> Ms. Doiron is creating for herself a new life in Halifax based on her new employment and her relationship. This she has every right to do and the court can only applaud the industry and initiative she has shown. As an industrious and self-reliant person she has taken charge of that part of her life relating to her independence and security. These are admirable qualities in any parent. . . It is acknowledged a move to Halifax will present new opportunities for Jeremy to participate in various activities.

And later:

> His mom now finds herself in a new job, in a new city, in a new home and with a new partner. There can be no criticism of these circumstances as they are in large measure motivated by a responsible need to be self-sufficient.

[67] The further fact that the appellant had day-to-day custody of Jeremy from birth to September, 1998, while the respondent's involvement was less, was a factor that required most serious consideration to be given to the appellant's views.

[68] This factor as well was commented on by Judge Wilson.

[69] The views of the appellant were expressed in her plan, as disclosed in her affidavit evidence, and in her *viva voce* evidence before Judge Wilson. The detailed review Judge Wilson gave to the plan of the appellant demonstrates that he considered her views to have great weight, entitled to great respect and the most serious consideration.

[70] In reaching his conclusion that day-to-day care should vest with the respondent, assisted by the extended family, Judge Wilson did not ignore the views of the appellant, nor did he act on wrong principles.

[71] As he put it:

> It is the totality of all significant factors that determine what is in the child's best interests . . in this case, both parents can meet the child's needs but one plan must emerge as being able to support those various factors contributing to the child's best interests.

[72] If Judge Wilson intended by the above passage to suggest that the test is whether the parent who moves to a new community has adduced evidence establishing compelling reasons for the move, then, with respect, he erred. I am satisfied, however, that Judge Wilson did not confuse the test. A review of his reasons as a whole satisfy me that the test he employed was the test of the best interests of the child. That is the test set out in the **Family Maintenance Act** and it is the test applied in **Gordon v. Goertz**.

The Existing Custody Relationship

[73] While Judge Wilson may not have directed specific comments to the relationship between Jeremy and the appellant, it is clear from a review of the judgement that he gave consideration to the issue.

[74] I refer to the following comments:

> To date Jeremy has known stability. For most of his life he has lived with his Mom in her home in Pomquet . . . Since birth Jeremy's primary place of residence has been with his Mom . . Jeremy's parents have been the most significant factor in his life to date . . . Their commitment to Jeremy is unquestioned. The fact that Jeremy is such a happy, outgoing child is testimony to the involvement of all parties, including his extended family . . .

[75] The trial judge was well aware that Jeremy's primary place of residence since his birth has been with his mother, that they had developed a relationship which the trial judge considered was "strong and meaningful".

[76] Indeed, the trial judge concluded that Jeremy's parents had been "the most significant factor in his life to date".

[77] Judge Wilson's approach to this critical issue was entirely consistent with the mandate set down by Justice McLachlin when she stated:

> The threshold condition of a material change in circumstances satisfied, the court should consider the matter afresh without defaulting to the existing arrangement . . . The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative . . . (p.45) . . . The judge on the variation application must consider the matter anew, in the circumstances that presently exist [p.46]

And again at p. 54:

> It is thus no answer to an inquiry into the best interests of the child triggered by the material change to argue that the custodial parent has the right and responsibility to decide where the child shall live. The demonstration of a material change places that right at issue. The judge will normally place great weight on the views of the custodial parent, who may be expected to have the most intimate and perceptive knowledge of what is in the child's interest. The judge's ultimate task, however, is to determine where, in light of the material change, the best interests of the child lie. . . . Once a material change is established, the judge must review the matter anew to determine the best interests of the child.

[78] And finally, at p. 56:

> Until a material change in the circumstances of the child is demonstrated, the best interests of the child are rightly presumed to lie with the custodial parent. The finding of a material change effectively erases that presumption. . . . In short, the two-stage procedure required by the *Divorce Act* supports the view of Morden A.C.J.O. in *Carter v. Brooks*, *supra*, that once the applicant has discharged the burden of showing a material change in circumstances, "[b]oth parents should bear an evidential burden" of demonstrating where the best interests of the child lie (p.63).(emphasis added)

The Extended Family

[79] The appellant also submitted that Judge Wilson placed too much emphasis upon Jeremy's relationship with his extended family in the absence of any evidence that Jeremy would suffer in any way as a result of the move to Halifax.

[80] Jeremy was described by all witnesses as a happy, outgoing and well-adjusted child - an opinion which Judge Wilson concluded resulted from the involvement of all parties, including the extended family.

[81] The extended family consisted of both sets of grandparents, the respondent's wife, Tamara Mahoney, and a number of uncles and aunts, all of whom, with one exception, reside in the Antigonish area.

[82] While it is true that Judge Wilson gave considerable weight to Jeremy's relationship with his father and his extended family and community, this was, in my view, an appropriate consideration in view of Justice McLachlin's final summary at p. 61:

> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[83] There was an abundance of evidence that established the benefit of the association between Jeremy and his extended family. It is patent that a move to Halifax by Jeremy

would result in reduced contact with his extended family. No direct evidence on that issue was required.

The Importance of Stability, Predictability and Consistency

[84] The trial judge concluded that "stability, predictability and consistency" were:

> ...important factors in considering the best interests of the child. To date, Jeremy has no instability.

[85] Judge Wilson contrasted the plan advanced by the appellant, which for her involved a new job, a new home in a new city, with a new partner, and for Jeremy, a major change and disruption from the day-to-day life he had known, with the plan advanced by the respondent which essentially:

> ...maintains a status quo in terms of schooling and extended family and extra-curricular activities.

[86] It is to be remembered that from September, 1998, to the end of June, 1999, Jeremy continued to live in the Antigonish area, continued to attend the same school, and continued to reside with the respondent and his wife on every alternate weekend and every Wednesday through the week.

[87] The respondent was married in September of 1998 after a relationship of three years.

[88] Tamara Mahoney described her relationship with Jeremy in these words:

> I help Jeremy with just about everything his father, Tim, does. From homework, to getting school clothes ready, to packing lunches, making sure that he's picked up

> from school - if Tim can't make it, I'm there. I spend time with him playing. I teach him horseback riding, bicycle, swimming. Anything I think that a parent does, I do.
>
> And there's a lot of things that Jeremy and I do without Tim. I like to spend some time with him without Tim. Like I said, and horseback riding is my thing. That's what I teach. Jeremy really enjoys it and he's doing quite well at it. . . But anything a parent - school, everything I'm involved in in his day-to-day life, to feeding him, making sure he's looked after. Just everything, I'm involved in everything Jeremy does.
>
> . . .
>
> Jeremy and my relationship is great. Actually, he talks to me really openly. I find sometimes he tells me things that he doesn't tell his mum or dad because he's scared of hurting their feelings. . . . We go horseback riding. He discusses things and he said, Don't let anybody make me decide. he said. I don't want Mom upset and I don't want Dad upset. Seven-year-old child.

[89] The appellant met Mr. MacMillan in October of 1998. They started dating in January of 1999, and commenced living together in mid-June. On every second weekend, when Jeremy was not with the respondent, the appellant was with Jeremy either in Halifax or in Pomquet. The opportunity for a relationship to develop between Mr. MacMillan and Jeremy prior to the end of June, 1999, when Jeremy moved to Halifax, was obviously quite limited.

[90] The trial judge stated:

> Jeremy met Mr. MacMillan and his son during the winter and their relationship has continued in Halifax for extended periods during the summer. Jeremy has been involved in summer recreation camps and has developed some relationship with Mr. MacMillan.

Although not the subject of express comment by Judge Wilson in the reasons for judgment, there was some evidence concerning instability in the appellant's personal life, and consequent effect on Jeremy.

[91] The respondent was asked:

Q. ...can you tell the Court or give the Court information from your own personal knowledge as to why you're concerned about the stability, perhaps of this relationship, or the stability of Wanda in terms of her having this as a permanent move?
A. Well, number one, I read in the affidavit . . . in her affidavit that she plans to marry in autumn. So, I mean, I don't know if she's engaged or not, but if she's engaged it would be at least the third time that she was and at least the fourth person that she's lived with since Jeremy - since Jeremy was born.
Q. Now in relation to Jeremy - in relation to your son, you know, I mean this is Wanda's life and she's free to do what she wants -
A. Absolutely.
Q. But how - what effect or what impact, if any, do you feel that this has on Jeremy, what negative effect?
A. Well I don't think it's - I don't think that anybody that's going to be there and is going to be a father role to Jeremy should be - should be bouncing in and out of his life. Plain and simple. I mean, I've been his father since he was born. I was there when he was born and I've always been there and I think that's what he needs. Someone that's stable.

[92] During the course of cross-examination on this issue, counsel for the appellant suggested that there was only one person with whom his client had lived prior to her association with Mr. MacMillan, and further that the appellant would give evidence on this issue.

[93] The appellant was subsequently called to give evidence but her counsel failed to question her respecting this particular issue.

Deference to the Findings of the Trial Judge

[94] The deference to be paid to the findings of a trial judge in a case dealing with the best interests of a young child is arguably greater than that to be paid to the findings of a trial judge in any other type of case.

[95] Justices Cory and Iacobucci in **P.(D.) v. S.(C.)**, [1993] 4 S.C.R. 141 explained the rationale in these words at 192:

> Similarly the trial judge is in the best position to assess evidence pertaining to the best interests of the child. It is the trial judge who not only hears the evidence but also has the great advantage of watching the demeanour of all who testify. It is the trial judge who can take into account the significant pauses in the responses, the changes in facial expression, the looks of anger, confusion and concern. In the vast majority of cases, as a result of hearing and seeing all the witnesses, it is the trial judge who is in the most advantageous position to determine the best interests of the child.

[96] Chief Justice Clarke, speaking for the Court in **Routledge v. Routledge** (1987), 75 N.S.R. (2d) 103, expressed it this way, at p. 104:

> Competing claims for custody create difficult cases for trial judges. They are equally vexing on appeal. Of necessity, much weight must be given to the conclusions reached by the trial judge. In doing so, an appeal court must ascertain that he has not acted upon wrong principles and that there is evidence at trial to support the conclusions he has reached. In 1951, Lord Simonds in *McKee, supra* put it this way at p. 360:
>
> > Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

See also **Gorham v. Gorham** (1994), 131 N.S.R. (2d) 7.

[97] Judge Wilson, an experienced Family Court judge, regularly dealing with cases of this kind, recognized that the issues involved in the present case were "very difficult". Judge Wilson was in the most advantageous position to assess the evidence pertaining to the best interests of Jeremy. He heard the evidence of the witnesses and had the distinct benefit of observing them as they testified. He applied the test of Jeremy's best interests and in reaching the conclusion that both parents remain as joint custodial parents with day-to-day care to the respondent, his reasons do not demonstrate a manifest error, a significant misapprehension of the evidence, that evidence was ignored, or that he had

drawn erroneous conclusions from it (Weiler, J.A., for the majority in **Woodhouse v. Woodhouse** [1996] 20 R.F.L. (4th) 337 at 361).

[98] I would dismiss the appeal, but in view of the submissions of both counsel, I would not award costs.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Flinn, J.A.