NOVA SCOTIA COURT OF APPEAL
Citation: *Simmons v. Simmons*, 2016 NSCA 86

Date: 20161209
Docket: CA 452333
Registry: Halifax

Between:

Nicole Simmons

Appellant

v.

Ronald Simmons and Laurina Simmons

Respondents

Judges:	Bryson, Oland and Van den Eynden, JJ.A.
Appeal Heard:	November 8, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Oland, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Matthew Conrad and Patrick J. Connors, for the appellant Nicole MacIsaac, for the respondent

Reasons for judgment:

[1] At the heart of this appeal stands Brayden, a little boy barely three years old. When he was just 15 months old, he lost his father to cancer. His paternal grandparents, the respondents (the "grandparents", "grandfather", and "grandmother" as applicable) brought a motion for access to their grandson. His mother, the appellant, appeals from the decision of Associate Chief Justice Lawrence I. O'Neil and his order dated July 29, 2016 which granted the grandparents access.

[2] For the reasons which follow, I would dismiss the appeal.

Background

[3] This proceeding commenced on December 24, 2015 when the grandparents filed an application pursuant to s. 18 of the *Maintenance and Custody Act* for access to Brayden. Early the next month, they sought interim access. The original hearing date was adjourned by agreement to May 31, 2016.

[4] At the hearing which lasted a full day, both parties were represented by counsel. The judge had affidavit evidence sworn by each of the grandparents, the mother, and her parents. All five deponents testified and were cross-examined. After the close of oral submissions by counsel, the judge adjourned the hearing and then gave an oral decision.

[5] The judge concluded that it was in the best interests of Brayden that the relationship with his grandparents be fostered and nurtured. He was satisfied that this was a circumstance where access should be ordered by the court. In his order, he gradually increased access over a period of four months, followed by day-long visits every second weekend. Later, I will review the judge's reasons in greater detail.

[6] The mother applied for a stay of the judge's order. Her motion was dismissed on June 27, 2016 (2016 NSCA 55).

[7] At the hearing of the appeal on November 8, 2016, counsel for the parties advised that, except for one visit in June 2016, the grandparents had not enjoyed access with Brayden since April 23, 2016.

Issues

[8] The appellant mother sets out the following issues:

1. The Learned Trial Judge erred in ordering access because he failed to give proper deference to the Appellant's decision-making authority regarding access to the child.

   (a) The Learned Trial Judge failed to determine if the Appellant restricted or denied the Respondents access to her son.

   (b) The Learned Trial Judge misapprehended the Appellant's evidence regarding her position as to whether access with the Respondents was in her son's best interests.

   (c) The Learned Trial Judge failed to decide if the Appellant's decisions with respect to the Respondents' access with her son were reasonable and in his best interests.

      (i) The Learned Trial Judge conducted the wrong analysis with respect to the court's deference to the Appellant's decision-making ability.

      (ii) The only conclusion from the evidence is that the Appellant made reasonable decisions with respect to access.

   (d) The Learned Trial Judge erred in failing to balance the benefits of ordering access against the risks to the child in ordering access despite the Appellant's objections.

2. The Learned Trial Judge erred in making his order based on hope and speculation without an evidentiary basis to do so and without considering the risks to the child if he was wrong.

Standard of Review

[9] Trial judges deciding custody and access cases are entitled to considerable deference. In *A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSCA 58, Cromwell, J.A. for the Court stated:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision

> deserves considerable appellate deference except in the presence of clear and material error: *Family and Children's Services of Lunenburg County v. G.D.*, [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; *Family and Children's Services of Kings County v. B.D.* (1999), 177 N.S.R. (2d) 169 (C.A.); *Nova Scotia (Minister of Community Services) v. C.B.T.* (2002), 207 N.S.R. (2d) 109; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at paras. 10 - 16.

[10] In *Haines v. Haines*, 2013 NSCA 63, Farrar, J.A. for the Court explained:

> [5] This Court has consistently stressed the need to show deference to trial judges in family law matters. In the absence of some error of law, misapprehension of the evidence, or on the award that is clearly wrong on the facts we will not intervene. We are not entitled to overturn an order simply because we may have balanced the relevant factors differently. (*Hickey v. Hickey*, [1999] 2 S.C.R. 518, ¶10-12.)
>
> [6] Findings of fact, or inferences drawn from the facts are reviewed on a standard of palpable and overriding error. Matters involving questions of law are subject to a correctness standard. When the matter is one of mixed fact and law and there is an extricable question of law, the question of law will be reviewed on a correctness standard. Otherwise, it is reviewed on a palpable and overriding standard. (*Housen v. Nikolaisen*, 2002 SCC 33.)

See also *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 119 at ¶ 44-45, leave to appeal denied [2004] 1 S.C.R. v; and *H.A.N. v. Nova Scotia (Community Services)*, 2013 NSCA 44 at ¶ 32.

Analysis

Legislation

[11] In Canada, all jurisdictions permit grandparents to apply to a court for access to their grandchildren. In Nova Scotia, there were legislative reforms in 2014 to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, as amended. Unlike other family members and third parties, grandparents can now apply for access without first obtaining leave of the court:

> 18(2A) The court may, on the application of a parent, grandparent or guardian or, with leave or permission of the court, another member of the child's family or another person, make an order respecting access and visiting privileges of a parent, grandparent, guardian or authorized person.

[12] Subsection 18(5) identifies the paramount consideration in determining any access application to be the best interests of the child. Subsection 18(6) sets out factors to be considered when assessing best interests:

> 18(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
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> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
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> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
>
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
>
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
>
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
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> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
>
> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

while paragraphs 18(6A)(a) and (b) hold that

> (6A) In determining the best interests of the child on an application for access and visiting privileges by a grandparent, the court shall also consider
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> (a) when appropriate, the willingness of each parent or guardian to facilitate access by and visiting with the grandparent; and
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> (b) the necessity of making an order to facilitate access and visiting between the child and the grandparent.

Deference to a Parent's Decision-Making Authority

[13] In this portion of my decision, I will consider the appellant's arguments that the judge failed to give proper deference to her decision-making authority regarding access. This includes her submissions that he failed to determine if she had denied or restricted access, he misapprehended her position with respect to access by the grandparents, and he failed to decide whether or not her decisions regarding access were reasonable and in her son's best interests.

[14] Before addressing the judge's reasons and this ground of appeal, I will provide further background for context. The undisputed evidence was that prior to their son's passing in March 2015, the respondents would visit Brayden at his parents' home. According to the grandparents, this was almost every weekend and several times a week on weekdays. According to the mother, in the best of times, the grandfather visited Brayden once a week and the grandmother a couple of times a month.

[15] Shortly after her husband died in March 2015, the appellant and Brayden moved in with her parents. The respondents did not visit Brayden until October 2, 2015. Their evidence was that, for several weeks after their son's passing, they did not contact the appellant to visit Brayden and, afterwards, the appellant denied access and often their calls went unanswered and messages were not returned.

[16] The relationship between the parties became more strained with probate of Brayden's father's estate. The father had appointed the mother and the grandmother as co-executors. A meeting regarding the estate was held at a law office on October 7, 2015. The evidence of the mother was that, after the grandfather had spoken to her in a disrespectful manner, her own father had stood up for her. Her father says he supported his daughter after the grandfather said something to her that was out of context. In any event, both sides agree that her

father and the grandfather got into a heated discussion at that meeting. The mother's father testified that the altercation was "just words" and, afterwards, the two men had a chat in the elevators and had had a full conversation after that.

[17] There was no further contact between the parties until November 11, 2015 when the grandfather called the appellant. The mother's affidavit stated:

> 17 Ron asked if he could come by to see Brayden. I advised him that I was upset about the way he treated me the last time we saw each other and that I was upset it had been almost five weeks since he has made contact.
>
> 18 As a result, I asked him to apologize to me. He refused. I then told him he could not come visit.

They disagree as to whether, during that call, the mother told the grandfather that he wouldn't see Brayden until "all of this mess is cleared up," which the grandfather took to be probate of the father's estate, or that he would never see Brayden again, or any words to that effect. The mother and the grandmother disagree as to whether, when the grandmother called back, she said "When I'm done with you, you'll know how black I am, and Brayden will know how black he is," which the mother took to be a threat and so she hung up. According to the grandmother, she asked the mother "Was it because I was black" and the mother just hung up.

[18] The respondents then retained counsel. The appellant's evidence was that when she spoke with their lawyer in early December 2015, she advised that it was not true that she was denying access and that "the door was open for them to see Brayden but that an apology was required." She confirmed that she was not prepared to allow the grandparents to see Brayden until they apologized.

[19] Except for a request in their lawyer's letter of early December 2015, the respondents did not ask to see Brayden between their visit on October 2, 2015 and March 12, 2016. Neither side reached out to the other. Brayden's birthday and Christmas both fell within that period. The grandparents did not call or send gifts. The mother did not take any steps to arrange access visits or contact them. According to the grandfather, the respondents felt unwanted so they stayed away.

[20] Since the father's estate has been in probate, the grandparents have felt that the mother's parents are very cold to them. They are not comfortable going to their home where Brayden and his mother live. Asked if she would go to the respondents' home, the mother answered that she "certainly wouldn't today."

[21] The grandmother is Black and Brayden's father was bi-racial. Brayden's father had two children from a previous relationship, one of whom had spent regular time with him and Brayden until the father's passing. There was no evidence from Brayden's siblings or the father's extended family. The grandmother testified that she was willing to facilitate access to Brayden by his siblings and his father's extended family. The mother testified that Brayden's siblings were welcome to reach out to her and arrange to see Brayden, but they had not done so. There had been little contact with the rest of his family and they too were welcome to reach out to her.

[22] When the grandparents applied for access in later December 2015, they had not seen Brayden since the beginning of that October. On March 9, 2016, the judge set the date for hearing their motion. That same day, the appellant through her counsel took the initiative and wrote the respondents suggesting a meeting and, provided they agreed to several conditions, a visit with Brayden. This led to two access visits that month, each for an hour in a public place, and with the mother present. In her affidavit evidence, the appellant described the first visit as having gone "well overall" and the second as "… better than the first."

[23] What followed was a March 24, 2016 letter from the appellant offering to settle and proposing two 1.5 hour visits every four weeks. This arrangement would last three months and would be followed by mediation. The offer was conditional on, among other things, the grandparents withdrawing their motion. They wanted visits of a longer duration and were not prepared to withdraw their motion at that time.

[24] Counsel contacted the judge to remove the hearing from the April 25, 2016 docket. When a telephone conference with him was held on April 11, 2016, there had been three access visits and it was too early to tell if the motion would proceed. The hearing was rescheduled to May 31, 2016. It went ahead on that date and the judge gave an oral decision.

[25] His order stipulated that beginning immediately and continuing until the end of July 2016, the grandparents shall have access to Brayden every 10 days for two hours each visit. Until the end of June 2016, the visits would be at a neutral site and the mother could be present, but beginning July 1, 2016, the grandparents could determine the location and the mother may not attend. From the beginning of August to the end of November 2016, the grandparents were to have four hour visits every 10 days. Beginning December 1, 2016, they were to have access from

10:00 am to 4:00 pm during one day of every second weekend. Over the Christmas holiday, their access was to be for two hours at a time agreed by the parties. As mentioned earlier, in the last six months, the grandparents have only had one access visit in June 2016 pursuant to this order.

[26] I return to the grounds of appeal. The first alleges that the judge failed to give proper deference to the mother's decision-making authority regarding access to the child. The essence of her argument tracks one of two competing models of appropriate grandparent access. These are often referred to as the "parental autonomy" and the "pro contact" approaches.

[27] At pg. 11 of its report entitled "*Grandparent-Grandchild: Access*" (April 2007), the Nova Scotia Law Reform Commission outlined the pro contact and parental autonomy as follows:

> An examination of case law indicates that applications for access are brought by grandparents in a variety of contexts. …
>
> Broadly speaking, the cases appear to reflect two quite different approaches on the part of the courts, with significantly different implications, to the issue of grandparent access.
>
> The first approach, which has been characterized by some legal commentators as the "Parental Autonomy" approach, is based on the premise that parents have the legal responsibility and the right to make decisions with respect to with whom their child will associate, how often, and in what circumstances. Parents are traditionally, and continue legally, to be the arbiters of their child's "best interests". In the absence of a finding of parental unfitness, or harm flowing from the lack of access, the state has no right to interfere with parents' proper decision making authority.
>
> The second approach has been called the "Pro Contact" approach and tends to proceed from the premise that generally, contact between a child and their grandparent is beneficial, and therefore access should not be denied unless it can be shown to be harmful.

In short, the parental autonomy approach favours parental decision-making and the pro contact approach favours grandparent access.

[28] In support of her position, the appellant relies heavily on *Chapman v. Chapman*, [2001] O.J. No. 705 (ONCA). There, both parents opposed court-ordered access for the paternal grandmother. They wanted her to visit their 10 and 8 year old children, but were of the view that they, not the grandmother, should determine when and how access should take place in their children's best interests.

There was long standing friction between the parties. The grandmother lived a considerable distance from her grandchildren and did not have a positive relationship with them. She was granted 44 hours of access a year over at least six visits.

[29] The Court of Appeal quashed the order. Abella, J.A., (as she then was) for the court, wrote:

> [21] The trial judge acknowledged that the right of Larry and Monica Chapman "to independently raise their children should not be lightly interfered with", **yet he defers that right to the speculative hope that continued imposed access to the grandmother will one day produce a positive relationship for these children.** This speculation, it seems to me, is an insufficient basis for overriding the parents' right to protect the children's interests and determine how their needs are best met. **These are loving, devoted parents committed to their children's welfare. In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see them.**
>
> [22] Larry and Monica Chapman, not Esther Chapman, are responsible for the welfare of the children. They alone have this legal duty. Esther Chapman, as a grandparent, loves her grandchildren and, understandably, wants to maintain contact with them. **Nonetheless, the right to decide the extent and nature of the contact is not hers, and neither she nor a court should be permitted to impose their perception of the children's best interests in circumstances such as these where the parents are so demonstrably attentive to the needs of their children.** The parents have, for the moment, decided that those needs do not include lengthy, frequent visits with their grandmother. **Although the parents' conflict with Esther Chapman is unfortunate, there is no evidence that this parental decision is currently detrimental to the children. It should therefore be respected by the court and the children's best interests left in the exclusive care of their parents.**
>
> [23] The trial judge's articulated purpose was to create a close relationship between two children and a grandmother who loves them. There can be no criticism of this goal**. But any duty to create such a relationship lies with the children's parents. The failure to do so does not warrant judicial intervention, especially in circumstances such as these where the immediate family is functioning well and the children's best interests are being assiduously nurtured by dedicated parents.**
>
> [Emphasis added]

[30] The appellant also points to *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, where parents objected to blood transfusion for their infant for religious reasons. In addressing *Charter* rights to life and the security of the person, La Forest, J. for the majority stated at ¶ 86:

> … As children are unable to assert these, our society presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children. **If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases.** In fact, we must accept that parents can, at times, make decisions contrary to their children's wishes — and rights — as long as they do not exceed the threshold dictated by public policy, in its broad conception. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend. **However, the state can properly intervene in situations where parental conduct falls below the socially acceptable threshold. But in doing so, the state is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children.** …
>
> [Emphasis added]

In *F.(N.) v. S. (H.L.)*, [1998] B.C.J. No. 1739, aff'd 1999 BCCA 398, a grandparent access case, Esson, J.A. said at ¶ 7 that while *B.(R.)* dealt with state interference into parenting, "in my view [the case] has substantial application" to the dispute he was dealing with. He stated that it is "equally unacceptable for there to be unrestrained judicial interference with the rights of parents to decide what is in the best interests of their children."

[31] The appellant emphasizes her parental autonomy. She argues that, absent a finding of unfitness, she as the child's mother is entitled to determine what is in his best interests where contact with third parties, including grandparents, is concerned. She describes the judge's order as unwarranted state interference.

[32] The evidence made it clear that the appellant is a capable and loving mother. The grandfather described Brayden as a "happy, healthy" and "well-adjusted little boy." He testified that he respects the appellant as a mother and she is "a very good mom." The grandmother agreed that Brayden is "a sweet little boy," "pretty healthy," and "well fed, dressed, and looked after." She too said that the appellant is "a good mother."

[33] The judge's reasons show how he approached the grandparents' motion for access. He began by expressing his sympathy to all members of the family on the

loss of Brayden's father. He observed that everyone had been subjected to a lot of emotional turmoil and stress adjusting to the father's passing, Brayden's relationships with his immediate and extended family, and dealing with estate issues. He was satisfied that some hard feelings had developed and spoke of how difficult and stressful litigation is, particularly in a family situation. He then stated:

> The good news for Brayden is that he has a loving and caring mother, that's – no one disputes that, that Ms. Simmons, Nicole Simmons, is a good mother. I'm satisfied that Brayden also has four loving and caring grandparents, that he's lucky to have these people in his life. The loss of his father is evidence of how the world of a child can change quickly and of how important it is that there will be other family members present and available and supportive, particularly to a child or in this case to Nicole Simmons.

[34] The judge found that the grandparents did not pose "any type of a safety risk to the child." He continued:

> … there's no basis for me to conclude that Ronald and Laurina Simmons would not be appropriate and positive caregivers for Brayden, and Nicole Simmons didn't really, in my view, suggest that there was. **She supports the child, Brayden, having a relationship with the parental [*sic*] grandparents.**
>
> **In the letter of March 24th a proposal is made on her behalf with that in mind**, so whatever negativity existed at that time it was the conclusion of Nicole Simmons that the paternal grandparents could spend time with the child. And, obviously, implicit in that is the conclusion on her part that it was in the best interest of the child that that occur.
>
> **I'm satisfied that has been her view and that's the essence of her evidence today as well. Even if I'm mistaken in that conclusion, I'm satisfied that it is in the best interest of Brayden that he be given the opportunity to form a relationship with his paternal grandparents and that that be a meaningful opportunity.** The question then becomes how that can be best achieved. That seems to be the essence of the question placed before the Court.
>
> When I consider the *Maintenance and Custody Act* and all of the factors that go into a determination of what is in the best interest of a child, I conclude that it is in the best interest of Brayden, quite independently of what any of the witnesses say, that that relationship be fostered and nurtured. There are a number of factors that are important.
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> First of all -- or not first of all, but among them is the fact that the grandparents, the paternal grandparents, are loving, caring people, whose involvement in Brayden's life, I am satisfied, will enrich his life. These are members of his extended family. Brayden is the product of a biracial father. He has – Brayden has siblings. It's important that he be given the opportunity to develop a

> relationship with those siblings, cousins, uncles and aunts, on his side -- or his parents' side of the family, so there's a lot waiting for Brayden to enrich him.
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> **The Court is sensitive and is deferential to the decision-making of parents, and in this case Nicole Simmons. The Court places significant value on her role as the single parent, but in my view providing for the grandparents, the paternal grandparents, to have access does not in any significant way diminish the role of Nicole Simmons.**
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> We are not talking about taking away her decision-making authority on issues of education, religion, diet, clothing, where the child will live, what school the child will attend. All of those attributes or aspects of decision-making will continue to reside with Nicole Simmons.
>
> **What we're talking about here is an assessment of the child's best interest, and I have concluded that -- and I think it's a share [*sic*] conclusion among the parties -- that there -- it is in the child's best interest that there be a relationship with the grandparents and that side of the extended family. This is not a delegation or a reassignment of the decision-making authority by Nicole Simmons, other than, perhaps, in a very, very narrow circumstances, which is because she supports contact, she supports the relationship, it's really about scheduling.**
>
> She talks about the parties -- the parties talk about trust and hostility. I think there has been -- some mistrust has developed for the reasons I spoke about. I would not say it's a -- there's a relationship hostility, but I believe the uncertainty that has existed with respect to the time the grandparents, paternal grandparents, will have with the child, that uncertainty is fostering more mistrust.
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> [Emphasis added]

[35] It is apparent from his reasons that the judge did not adopt the parental autonomy paradigm exemplified in *Chapman*. He did not begin with and proceed from the premise that the mother had the legal right to decide when, how often, and in what circumstances, if ever, the grandparents should have access to Brayden. Did he err in law by not doing so? In my view, in the circumstances of this case, he did not.

[36] I begin by observing that nothing in the *Maintenance and Custody Act* or the case law of this Province stipulates or establishes that the parental autonomy paradigm is the only acceptable approach in determining the best interests of the child when grandparents apply for access. For example, the appellant had drawn our attention to *M.O. v. S.O.*, 2015 NSFC 12 at ¶ 94 where, after summarizing the law respecting grandparent access, Judge Daley stated:

> [94] I also conclude that it is appropriate to give significant deference to parents who have primary care of a child in making such decisions. Given the burden of proof on the grandparents, it still remains available to them to persuade the court that the decision to deny or restrict access is unreasonable in all the circumstances and is not based upon the best interests of the child.

However, parental deference was only one of the considerations and it was not determinative. At ¶ 93, he had also emphasized:

> 2. The paramount consideration and only test to be applied in such applications is what is in the best interests of the child. Consideration of the views and wishes of the parents and grandparents is only relevant if it informs the court on the best interests of the child.
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> …
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> 6. The court is not bound by any particular paradigm of grandparent access in its analysis of the best interests of the child. The court may consider parental autonomy, pro-contact or other paradigms, portions of any of them or none of them in its analysis so long as it takes into consideration the particular circumstance of the child.

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

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

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

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

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

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

This reading of *Chapman* has been accepted in many of the decisions of the Ontario Superior Court of Justice whose judgments form the bulk of Canadian grandparent access cases. See, for example, *Barber v. Mangal*, 2009 ONCJ 631; *Giansante v. DiChiara*, [2005] O.J. No. 3184; [2005] W.D.F.L. 4015 (Ont. S.C.J.); *Nichols v. Herdman*, [2015] W.D.F.L. 4127, 255 A.C.W.S. (3d) 650 (Ont. S.C.J.); *Blackburn v. Fortin*, [2006] O.J. No. 2256, [2007] W.D.F.L. 1297 (Ont. S.C.J.); *Torabi v. Patterson*, 2016 ONCJ 210; *O.(L.M.) v. S.(S.)*, 2015 BCPC 328.

[40] In making this observation, I am not saying that our courts should necessarily follow the same analytical path that the Ontario courts have developed. I am simply noting that *Chapman* has not had the effect of making the parental autonomy model the singular way to proceed in grandparent access cases. Sometimes when it has been applied, a different approach in determining the best interests of the child may have led to the same result as so much depends on the particular circumstances of the case. See, for example, *Hayes v. Moyer*, 2011 SKCA 56, where the Saskatchewan Court of Appeal found that an interim order awarding grandparent access was causing unnecessary disruption to the children's lives. That order gave paternal grandparents access to their grandchildren each Monday overnight, two full weekends every month (Friday night until Sunday night), and for part of Christmas, spring break, and two weeks in the summer. The

Court allowed the appeal, finding the interim order caused disruption in the day-to-day lives of the grandchildren, as they were shuffled between three residences (including their father's, who also had access), and left the mother seeing the children on an uninterrupted basis for only three days in any given 14-day period. Citing *Chapman*, it held at ¶ 11 that the trial judge had failed to consider the "general view that parental rights prevail over those of the grandparents, and certainly fail[ed] to take into consideration the wishes of fit parents as to their view of what is in the best interests of their children."

[41] In addition, judicial deference to parental authority can be tempered by the court's willingness to recognize benefits that extended family bring to a child whose life has been marked by the loss of a parent, such as love, support, and stability. These cases sometimes present best interest factors not apparent in cases with two living parents, including the fact that a child can know his or her deceased parent, including his or her personality, heritage, and culture, through his or her grandparents. See, for example, *White v. Matthews*, [1997] N.S.J. No. 604 (N.S. Fam. Ct.) and *Brooks v. Joudrey*, 2011 NSFC 5.

[42] In her submissions on parental deference, the appellant argues that the judge failed to determine if she had restricted or denied the respondents access to her son, and if her decisions with respect to access were reasonable and in his best interests. She says that the judge had to, but did not, make any findings of fact as to whether, as the respondents had maintained, she had restricted or denied access, or whether, as the mother maintained, she had not, and any limitations on access resulted from decisions the grandparents had made, such as not calling on Brayden's birthday or Christmas and bringing the motion for access.

[43] Even assuming, without deciding, that the judge did not accept the grandparents' evidence of the appellant not responding to their calls and denying access, the judge had heard uncontradicted evidence that, at least once, the appellant had denied the respondents access to her son and her reason for doing so. This was after the November 11, 2015 telephone calls when she did so because she wanted an apology and while she waited for one. More importantly, s. 18(5) of the *Maintenance and Custody Act* provides that the paramount consideration is the best interests of the child. What the grandparents were required to show was not that access had been denied or restricted, but that access was in the child's best interests.

[44] The mother then argues that when he stated that she supports her son having a relationship with the grandparents, the judge misapprehended her position.

[45] The judge's reasons show that his conclusion relied on the March 24, 2016 offer of settlement and the appellant's evidence. The offer of settlement had proposed two 1.5 hour visits every four weeks for three months, followed by mediation. Under direct examination, the mother testified that "to this day, that's something" she would have been prepared to do. During her lawyer's reply submissions, he stated that "We stand by that letter." Asked by the judge what had happened since March to make the March suggestion less palatable to the appellant, her counsel replied that "… we didn't suggest this was less palatable to my client, she just doesn't want a Court order ordering her access and – you know, and taking that decision-making power, which is very important to a mother, out of her hands."

[46] The judge found that it was implicit from the offer of settlement that the mother was of the view that spending time with the grandparents was in the best interests of Brayden. I see no palpable and overriding error in the inference that the judge drew from the offer such that this Court could intervene.

[47] The judge also relied on the mother's evidence. In her affidavit evidence, the appellant had deposed:

> 36 At the end of the day, I want Brayden to have a relationship with Ron and Laurina. But I want that relationship to proceed at Brayden's pace and not theirs.
>
> 37 I do not have a fundamental problem with Brayden being with Ron and Laurina. But before they take my only son alone with them I want to be certain he is in a safe and healthy environment. …
>
> …
>
> 40 I do believe it is important that they respect me as Brayden's mother. They do not have to like me but they can respect me without liking me.

[48] The appellant had also deposed that the fighting over the estate and the respondents' motion for access had been very stressful and affected her health and that, during the April 23, 2016 access visit, Brayden had picked up the tension between her and them, which had affected his behaviour with the grandparents. She found the prospect of them having visits without her present uncomfortable as the respondents had never had time with Brayden alone, fed or changed him, had him to their house, or had driven him in their car. The judge heard evidence from

the parties respecting the respondents allegedly smoking in their home and the grandfather's driving.

[49] At the conclusion of her oral testimony, the judge asked the appellant:

> Q. **Do you want Brayden to have a relationship with Tyril's parents?**
>
> A. **I'd love for that to happen, yeah.**
>
> Q. **Do you see that to be in his interest, best interest?**
>
> A. **Removing the hostility, yes.**
>
> Q. **No, that's not my question. I'm talking about Brayden. How important is it to you that Brayden have a relationship with his paternal grandparents?**
>
> A. **I think it's important.**
>
> Q. How important?
>
> A. Important enough that we should all be able to get along.
>
> Q. And what do you suggest as a way to accomplish that?
>
> A. That I don't know.
>
> Q. Are you concerned that Brayden would not be well cared for if left with Tyril's parents?
>
> A. Possibly, yes.
>
> …
>
> Q. … I mean, this child, if you -- if -- and **I don't question your -- that you want the child to have a relationship with his father's side of the family.**
>
> **The practical issue then becomes, how is that accomplished, and that's -- I think I understand you to say you want the child to have a relationship with the grandparents, the father's parents. The question becomes, how is that accomplished. That's the practical question.**
>
> A. **Um-hmm.**
>
> Q. **Right?**
>
> A. **I agree.**
>
> Q. And what's your answer to that question?
>
> A. Where to begin?
>
> Q. And how does it ---
>
> A. You're asking where do we end?
>
> Q. --- where to begin and how does it progress, for example?

> A. Well, I -- first there has to be trust. They clearly don't trust me, because here we are, so ---
>
> Q. Do you trust them?
>
> A. I don't.
>
> [Emphasis added]

[50] Re-examination by her lawyer led to this exchange:

> Q. His Lordship asked you if it was in Brayden's best interest to have a relationship with his paternal grandparents.
>
> A. Um-hmm.
>
> Q. Your answer was, "Yes, if the hostility could be removed." Why is the hostility -- what impact, if any, does the hostility have on Brayden's interest? Why do you say without that being removed it's not in Brayden's interest to have Court-ordered access with [inaudible]?
>
> A. Brayden is two and a half, but he senses when something is not right. He feeds off that. So, I don't think it's in a child['s] best interest to be in a hostile environment where people can't get along.

[51] In my view, the judge did not misapprehend the appellant's evidence in concluding that she wanted her son to have a relationship with the respondents, such that this Court should interfere. While her evidence repeatedly raised her concerns about the "hostility" in their relationship and her son's safety if in their care, her fundamental position was positive.

[52] As mentioned earlier, the judge found that the respondents did not pose any risk to the safety of Brayden. He considered the evidence respecting the relationship between the mother and the grandparents. Had he determined that it was hostile and the conflict so strong as to make access not beneficial and potentially harmful, that would have been a consideration against access. However, the judge concluded that while there was mistrust, there was not hostility. Again, I see no misapprehension of the evidence that would permit that finding of fact to be disturbed.

[53] Even if he had misapprehended the evidence regarding the offer of settlement or the mother's position, the judge made no reversible error. He specifically stated that even if he had been mistaken in his conclusion that the mother supports the grandparents having a relationship with Brayden, he was satisfied after considering the *Maintenance and Custody Act* factors that it was in

the best interests of Brayden that the relationship with the grandparents be fostered and nurtured. In all access cases, the overarching test is the best interests of the child. In speaking of deference to the decision-making of parents and throughout in his reasons, the judge's focus was correct when he stated "What we are talking about here is an assessment of the child's best interests."

[54] The judge's decision reflects his awareness that parental decisions and views were entitled to a level of deference. He weighed the evidence, including the appellant's concerns for her son's safety and well-being. While he granted access through visits that gradually increased in duration and changed from ones with the appellant present to ones where she would be absent, he rejected the grandparents' request for overnight access to Brayden, as the appellant had asked.

An Order Wrongly Based on Hope and Speculation

[55] The appellant argues that the judge erred in law by making an order based on hope and speculation without an evidentiary basis and without considering the risks to Brayden if he were wrong. She points to this passage from his reasons:

> [The mother] talks about the parties -- the parties talk about trust and hostility. I think there has been -- some mistrust has developed for the reasons I spoke about. I would not say it's a -- there's a relationship hostility, but I **believe the uncertainty that has existed with respect to the time the grandparents, paternal grandparents, will have with the child, that uncertainty is fostering more mistrust.**
>
> It is giving **-- that uncertainty is giving rise to conflict**, that uncertainty is resulting in negotiation, and it -- and to -- I'm not prepared to sanction a system which has -- provides -- which puts in place a state of arbitrariness on the issue of when the grandparents will see their grandson. I do not believe that to be in the interest of the child.
>
> There has been a breakdown in communication, and as Ms. Simmons herself commented on, the trust has to be rebuilt. The trust will be rebuilt, in my view, when the parents experience -- when a structure of access by the paternal grandparents is put in place and followed. The relationship among these parties will not improve as long as that variable is there and there's a lack of predictability and the issue of access can be used by either side as a weapon against the other, whether it's the grandparents or whether it's the mother.
>
> So, **I'm satisfied that this is a circumstance where there should be an order.** The question becomes, what should be in that order? And I am deferential to Ms. Simmons, I have a level of deference, but I believe, as I've stated, there must be some predictability and some certainty about how this is going to work. The

> concerns raised by Mr. Conrad obviously are relevant, and there has to be -- it's hard to legislate common sense, but clearly if the child is sick that's one thing.
>
> My impression of all these witnesses is that they have the capacity, if allowed to work together, it's -- quite apart from what they say and what's written in the affidavits, my conclusion is that these are a group of people who are sad to be here, are sad to say the things they've had to say or they felt that they had to say, that they're sad to be critical of each other, they're sad that things aren't different for Brayden, but it's almost like they're stuck in the mud and they need to get pulled out, so **I'm going to pull them out of the mud, I hope, and not put them into deeper mud.**
>
> [Emphasis added]

[56] The appellant submits that in ordering access, the judge focused on two goals: first, to resolve the tension between her and the grandparents, and second, to develop a relationship between the grandparents and Brayden. According to the appellant, neither of those goals was a sufficient basis to intervene and override her right to determine what is in the child's best interests.

[57] The appellant mainly relies on two decisions: the *Chapman* decision of the Ontario Court of Appeal reviewed earlier, and *Chapman v. Chapman*, [1993] B.C.J. No. 316 (S.C.). In the former, Abella, J.A. in ¶ 21 had faulted the trial judge for deferring the right of the parents to raise their children "to the speculative hope that continued imposed access to the grandmother will one day produce a positive relationship for these children." She observed in ¶ 23 that the "trial judge's articulated purpose was to create a close relationship between two children and a grandmother who loves them," and then stated that such a duty was parental and the failure to do so does not warrant judicial intervention.

[58] In the *Chapman* decision by the British Columbia Supreme Court, the mother, while growing up, had been sexually abused by her own mother's then-spouse. Her mother was unaware of the abuse at the time but, after she learned of it, lived with her spouse for seven more years. The hostility the mother felt towards her own mother and concerns she had for her child's safety led to a confrontation and denial of access. In overturning the decision to grant access based on speculation that their conflict could be resolved by granting access, Justice Brenner (as he then was) stated at ¶ 28:

> However, notwithstanding this, in my view the learned trial judge failed to adequately consider the health and emotional well being of the child in arriving at his decision. I am not satisfied that he adequately weighed the evidence of conflict and hostility between the appellant and respondent. He appears to have resolved

> this issue by means of a prospective appeal to both parties "to get together and discuss and resolve the issues..." While I am in complete agreement with the trial judge in expressing the hope that this occurs for it would clearly be in the child's best interests, **I believe it was an error to order access on the basis of a hope or perhaps even an expectation that this would occur.**
>
> [Emphasis added]

[59] The appellant correctly points out that the judge's reasons spoke of Brayden being given the opportunity "to form a relationship with his paternal grandparents." In reading them as a whole, I do not agree that he was speaking of the **creation** of a relationship, as in the Ontario *Chapman* decision. This is apparent from his reference to their relationship being "fostered and nurtured." In my view, the judge was referring to the fact that Brayden is a very young child, only two and a half at the time of the hearing. His ability to relate to the grandparents, and others, would develop and evolve as he grew older.

[60] Nor am I persuaded that the judge made his order based on hope or speculation that the parties would thereafter get along. He had heard the parties' evidence of their relationship and their difficulties in arranging earlier access visits. It was his view that, in the circumstances of this case, an order pursuant to s. 18(6A) was necessary to facilitate access and visiting with the grandparents. Among other things, it would provide predictability and certainty regarding access visits. His order was not speculative and was supported by the evidence.

[61] The mother also submits that the trial judge erred by failing to consider the benefits to the child, as against the risks, were he to order access. The risks she identified were those of destabilizing a family unit in which the child was thriving, and keeping him in the centre of a conflict. According to the appellant, the judge did not conduct a risk analysis.

[62] I would reject this submission. The judge's decision shows that he considered the child's age and stage of development, and his different needs, including his need for stability and safety. He also considered whether the tension and mistrust between the parties amounted to hostility, which would be detrimental to the child. The judge applied the correct test, which, again, is the best interests of the child.

Disposition

[63] I would dismiss the appeal.

[64] In the spirit of the order of Associate Chief Justice O'Neil, which has not been respected for reasons not before us and on which we refrain from comment, I would order that:

1. Ronald and Laurina Simmons shall enjoy access with the child, Brayden Simmons, according to the following schedule and according to the following terms:

   (a) Beginning immediately and continuing until February 15, 2017, Ronald and Laurina Simmons shall have access with Brayden every ten (10) days for two (2) hours each visit.

      (i) Until January 15, 2017, these visits shall take place at a neutral site agreed by the parties, and Nicole Simmons may be present during these visits.

      (ii) Beginning January 16, 2017, access may be at a location determined by Ronald and Laurina Simmons, and Nicole Simmons shall no longer attend access visits.

   (b) Beginning February 16, 2017, and continuing until May 15, 2017, Ronald and Laurina Simmons shall enjoy access with Brayden every ten (10) days for four (4) hours each visit.

   (c) Beginning May 16, 2017, and continuing until otherwise agreed by the parties or by further order of the Court, Ronald and Laurina Simmons shall enjoy access with Brayden every second weekend for one (1) day to be agreed by the parties, from 10:00 am to 4:00 pm.

   (d) Between December 24 and 31, 2016, Ronald and Laurina Simmons may enjoy access with Brayden for two (2) hours at a time agreed by the parties and at a neutral site. Nicole Simmons may be present during that visit. This visit will be in addition to the visits every ten days until February 15, 2017.

   (e) Between December 24 and 26, 2017, and every year thereafter, Ronald and Laurina Simmons may enjoy access with Brayden for two (2) hours at a time agreed by the parties.

   (f) Any additional access shall be as agreed by the parties.

(g) Should Brayden be unable to attend an access visit due to illness or any other reason, access will be made up as agreed by the parties.

(h) Brayden's sisters, Jordan Simmons and Taylor Simmons, may attend any access visits. Ronald and Laurina Simmons shall advise Nicole Simmons of any other participants in access visits.

(i) Ronald and Laurina Simmons shall provide Nicole Simmons with contact information where they can be reached during access visits in the event of an emergency.

The order will contain the same enforcement provisions as that issued by the trial judge.

[65] I would award the respondents costs of $3,500, inclusive of disbursements.

Oland, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.