

FAMILY COURT OF NOVA SCOTIA

Citation *M.O. v. S.O.*, 2015 NSFC 12

Date: 20150813

Docket: FNGMCA-092907

Registry: Pictou

Between:

M.O. and R.O.

v.

S.O. and N.D.

Judge: The Honourable Judge Timothy G. Daley

Heard: July 24, 2015, in Pictou, Nova Scotia

Decision August 13, 2015

Counsel: M.O. and R.O., Applicants, Self-Represented
Shaun MacLaughlin for the Respondent S.O.
Roseanne Skoke for the Respondent N.D.

By the Court:**Introduction**

[1] This case is about 18-month-old twins K.T.S.O. and P.D.O. and whether they should have access with their paternal grandparents, M.O. and R.O., contrary the wishes of their parents, S.O. and N.D. Put simply, the court must decide whether it is in the best interests of the children to have access with the grandparents, taking into account the circumstances of this family and in particular the circumstances of the children.

[2] As with similar cases involving applications by grandparents, these grandparents and parents are at odds respecting this issue. In most families, grandparents spend time with the grandchildren in a variety of ways, and under a variety of circumstances, without dispute. In fact, the maternal grandparents currently enjoy time with these children with the parents' agreement. Unfortunately, the same cannot be said of the paternal grandparents and they and the parents cannot find their own way forward in this matter.

[3] Given that the parties cannot reach an understanding, they have left it to the court to determine the matter.

Procedural History

[4] In January of 2015 there was a hearing before Judge James C. Wilson of the Family Court as a result of an application pursuant to section 18(2A) of the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160 brought by the grandparents seeking access with the children. The order from that hearing was labelled an interim order. On careful review of the decision of Judge James C. Wilson and the terms of that order, however, I find that it is a final order subject to review.

[5] The parties are now back before this court as a result of an application pursuant to section 41 of the *Act* brought by the grandparents seeking enforcement of the order of January of 2015 and applications pursuant to section 37 of the *Act* brought by each of the parents to vary the same order seeking termination of the grandparents' access.

The Evidence

[6] At the hearing each party provided evidence, both via affidavit and *viva voce* and I next provide my summary of that evidence.

The Grandmother

[7] The grandmother testified that she and the grandfather should be allowed to spend time with the grandchildren and that doing so would be in the children's best

interests. She said that the grandparents spent a significant amount of time with the children after their birth. They visited at the home of the parents several times per week and held, played with and assisted the parents in the care of the children during those visits.

[8] She stated that access broke down because the father felt slighted at the wedding of his sister in June of 2014 when he was not seated at the table with the rest of his family. She said there is no other reason that she is aware of for the father to stop the access and she feels he is being unreasonable in doing so.

[9] She also testified that the father was treated well throughout his childhood, was treated the same as his sister and that he was loved by his parents. She does not understand what he means when he says that he had a terrible childhood and that this is the basis for his hostility towards his parents.

[10] There is common ground among the parties that whatever access the grandparents had after the birth of the children ceased just after the wedding of the father's sister and did not begin again for approximately seven months. The access recommenced after an order of this court following a hearing on January 15, 2015.

[11] The grandmother provided evidence detailing every visit that took place after January 2015. All visits took place at the home of the parents pursuant to the court order. The grandfather did not take part in any of these visits once they were

reinstated. In fact the grandfather has not visited with the grandchildren since June of 2014.

[12] The grandmother described being affectionate with the children and them being affectionate with her. It appears that the initial access, which was in the presence of the mother, did go reasonably well. Unfortunately, the access visits did not continue to be positive.

[13] The grandmother said that after the first few visits, she began to experience resistance from the mother in arranging for access. Several access visits were missed by her due to illness and weather. Several other visits were missed by her because the father was in the home at that time and she did not wish to be there when he was present.

[14] On the issue of her and the grandfather's relationship with the father, the grandmother provided her evidence respecting several relevant matters. First, she said that if her son believes that there are difficulties in their relationship, he is the one with the problem and not her or the grandfather.

[15] She also confirmed that she had made an offer of family counselling to the father at an earlier time and he had refused. In the decision of this court which gave rise to the order of January 2015, the court recommended family counselling for the parents and the grandparents to attempt to work through the issues that were

causing problems between them and affecting access. Family counselling was also recommended by the court on subsequent occasions when the parties appeared before the court in this matter.

[16] The grandmother also confirmed that although family counselling had been sought by the father since January of 2015, she and the grandfather were adamantly opposed to any such counselling whatsoever and she was clear that they would refuse to participate. She says that because the father refused the family counselling on an earlier occasion, she and the grandfather would not participate now.

[17] The grandmother testified that she is afraid of the father. She fears his temper and describes being “very scared” of him. For that reason, she refused and refuses to attend at the parents’ home for access or any other reason when the father is present. She did clarify that she is not fearful of him being physically aggressive but fears verbal assault by him.

[18] She also described some family history including her allegation that the father, many years ago, stole money from the grandfather and a nephew, lied about the theft and that this caused a breakdown in the relationship between the father and the grandparents. She said that the father went out West for approximately four years and they did not speak for an extended period of time. She said the father did

contact her and the grandfather and they began to speak again but that she is still not ready to forgive the father. When pressed in cross-examination as to what she meant by that, she said that she was not able to forgive the father “for all of this” including these proceedings, interruptions to access and the problems that arose since the sister’s wedding.

[19] She described the father as being manipulative and claimed that both parents are using the justice system in an inappropriate way to their advantage. She claimed that the father lied to the court and that the mother swore to his lies in her evidence.

[20] The grandmother was also critical of the parents in other ways. For example, she suggested that if the parents had attended the Parent Information Program offered through the Family Court they would not be using the children “as pawns against us”.

[21] The grandmother said that she observed that there was no child safety gate at the top of a stair in the parents’ home and that a booster chair in the kitchen was not properly secured. She confirmed that she did not bring these issues to the attention of the parents until she filed her affidavit containing these allegations.

[22] The grandmother also commented on the father’s child from another relationship, M.O. The father does not have a relationship with M.O. and M.O. has

not been introduced the twins who are the subject of this proceeding. The grandmother acknowledges that the father does not want her to introduce the twins to M.O. Despite this, the grandmother makes clear that she will only abide by the father's wishes if ordered by a court to do so.

[23] The grandmother did say that she has no issue with the mother but said that the mother was not cooperative in setting up access for her and the children despite the court order. She felt it became increasingly difficult to arrange the access and that telephone calls went unreturned by the mother.

[24] The grandmother testified that matters came to a head on January 29, 2015 in a phone call between the mother and the grandmother. The father was at home that day. The grandmother said the mother and she were discussing whether some switches could be made in the access. In the course of the conversation, the grandmother said that the father could be heard in the background cursing and swearing, threatening to appeal the court's decision and saying that the grandparents would never see the grandchildren again. The grandmother testifies that she never raised her voice but simply said in a stern tone that she would see the mother on the next access visit.

[25] Shortly after this call the grandmother and mother spoke again by phone and the mother informed the grandmother that all access would stop until she received

a written copy of the court order. When asked why, the grandmother says the mother told her it was because of the previous phone call in which the grandmother was yelling at her, causing stress.

[26] Once the court order was received by all parties, access began again with only the grandmother attending at the parents' home. Some were missed due to weather, some due to the health of the grandmother and some because the grandmother refused to visit if the father was in the home. Once again, over time these access visits became increasingly tense.

[27] On March 23, 2014 the grandmother testified that she spoke to the mother and was told that access would end. She said the mother told her that the parents decided to end the access because it was not right that the grandparents had taken them to court.

The Grandfather

[28] The grandfather and grandmother jointly swore one affidavit. The grandfather provided further evidence in his brief oral testimony. His position was the same as the grandmother's. He denied any problems in the childhood of the father. He confirmed that he has had no visits since June 2014 even though he was entitled to attend visits at least since the order of January 2015. He also confirmed that he will not attend or participate in family counselling.

[29] When asked if he had a relationship with the father, he confirmed it was not a good relationship “according to him” (meaning the father) and that he had had no contact with the father since his daughter’s wedding in 2014. When asked why he had had no contact, his reply was that “you would have to ask him”.

The Father

[30] The father provided evidence that he had a terrible childhood and that the grandparents did not show the same support and affection to him as his sister.

[31] As an example of that poor relationship and treatment, the father described when he was young and the grandfather took him to play hockey. After the game he said that his father told him he did not play well and that the whole game had been a waste of the grandfather’s time.

[32] He testified that he has been afraid of the grandfather most of his life and that the grandfather treats him like an idiot to this day.

[33] He provided his view that during his childhood the grandparents tried to buy love with material things. He said that when he and the grandparents were on speaking terms they went weeks without talking to him but spoke to his sister daily.

[34] He explained that when he lived in Western Canada from around 2006, he did not speak to his mother for four years and did not speak to his father for five years. At no time did they reach out to him to mend the relationship. He confirmed that the relationship was damaged in part because he took money and although there is disagreement about the details of that situation, he said that the breakdown in the relationship with the grandparents was difficult for him.

[35] When asked about family counselling, he provided evidence that he has suggested this several times to the grandparents including at the prior hearing. He said that the mother has asked the grandmother several times as well. He maintained that he is still prepared to engage in family counselling but that the grandparents have adamantly refused to participate.

[36] The father said that he was working with a counsellor at the Nova Scotia Community College where he attended for training from November 2014 to April 2015. He attended for counselling once per week when at school and found it helpful. He is not currently attending any counselling.

[37] The father also said that the grandparents have caused a great deal of stress in his relationship with the mother and all of this has had an effect on all the children including the twins.

[38] He explained the importance of structure and routine in the home given that there are five young children and given health issues of the mother. He explained that the twins had never spent any significant amount of time away from their mother.

[39] The father testified that the access exercised by the grandparents caused a lot of stress in the home. This affected his relationship with the mother. For example, he says that he took out his frustrations verbally on her. He admitted that he was less patient with the children and that the mother sometimes cried and was moody.

[40] He said that as early as the first visit of the grandmother when he was present for about a half an hour the grandmother was hostile to him. He was not present for any other access visits after that.

[41] Respecting the telephone call between the mother and the grandmother on January 29, 2015 the father explained that he was in a bedroom of the home and from some distance away he could hear the grandmother hollering at the mother. He admitted he hollered at the grandmother but he was not on the phone directly. He said he told her that she had no right to see the children when the grandparents were not willing to work anything out in their relationship with him. He told her she would have to take part in family counselling.

[42] Since access ended, he testified that the day-to-day stress of family life is still present but that all other stress related to the grandparents has ended. His relationship with his family has much improved.

[43] In his testimony he described that “it all hurts” when asked about the legal proceedings and described his parents as “heartless people”. He said that communication with the grandmother is difficult because she is overbearing, likes to bully people and always wants her own way. He claimed that he feels sad about this and hoped family counselling might improve the situation but did not know if it would work.

[44] He said the fact that the grandmother refused to come to visit the children at the home during the March break when he was present hurt him.

[45] Respecting his other child M.O., he explained that it hurts him that the grandparents go behind his back to spend time with her. He says the fact that the grandmother will only abide by his wish that they not introduce the twins to M.O. if ordered by a court demonstrates the lack of respect for his parenting decisions by the grandparents.

[46] He said that although photographs were taken of presents for the children, the gifts were not given to the children by the grandparents.

[47] He stated in an affidavit

Emotional scars may not be visible to the human eye however they are nonetheless real and I do have emotional scars from my childhood and adulthood with respect to my relationship with my parents. My parents are making my emotional scars in that regard worse day by day and they refuse to acknowledge it and they try to make me sound like I have some kind of mental health issues and that I am dishonest.

[48] When asked, he did not hesitate in saying that he does not love his parents.

His position on access is equally clear. He does not want his parents to have any access with the children as he is worried that the grandparents will cause the same type of damage to the children he suffered as a child if they remain involved.

[49] The father also provided evidence that he works Monday to Friday from 8:00 a.m. to 5:00 p.m. He leaves the home at 7:30 a.m. and does not return until 5:30 p.m. The twins go to bed at 6:30 p.m. so, during the work week, he has little time with them. He said the weekends are when he can spend time with all the children. His concern is that any time spent with the grandparents will mean less time spent with him.

[50] As a result of all this, he is not open to the grandparents having any access with the children even if it were facilitated.

The Mother

[51] The mother testified that she is in a common-law relationship with the father and that he is the biological father of the twins. She has three other children from previous relationships ages seven, three and two. All five children reside with her and the father.

[52] The mother said that she is 27 years old and is a stay-at-home mother. She has sole custody of her three other children and they have access with each of their respective fathers.

[53] She described her home as very busy. She has five active children and things can become chaotic. This is particularly so because one of her children requires a special diet and another is developmentally delayed and difficult to control. The twins are rambunctious. She described the home at times resembling a “circus”.

[54] She explained that the twins attend daycare two to three times per week from 9:30 a.m. to 4:30 p.m.

[55] She did say that she has good support from her family including two sisters and her parents who assist her with anything she needs. She also confirmed that the father is a good support to her and they have a good and strong relationship in caring for all five children together.

[56] As to the early involvement of the grandparents, she said they did visit the home a couple of times each week after the birth of the twins.

[57] Respecting her health, she explained that she has multiple sclerosis of the relapsing-remitting type. It is currently in remission. She says this condition affects her balance, fine motor skills (mostly in her right arm), her muscles, her memory and her focus. While the overall condition is currently in remission, she experiences increasing symptoms when certain triggers are present. Those triggers are excessive heat, infection and stress.

[58] She explained that her home must be very structured both because of the needs of her five children and their young ages and her own health. At the best of times, her busy family causes stress for her. Any external stressors create significant additional health problems for her.

[59] In her evidence the mother provided details of her observations and experience of the grandmother's access visits since January of 2015.

[60] Respecting the January 29, 2015 telephone call between her and the grandmother, the mother said that the grandmother become very angry and raised her voice when she disagreed with the grandmother about changing access visits. She explained that the father heard the grandmother yelling at her when he was in another room and he became enraged. Although he did not take the phone from

her, he began yelling at the grandmother saying that there would be no more access visits until they went to family counselling with him and that he wanted to appeal the decision. When the mother explained this to the grandmother, the grandmother refused to agree to family counselling. The access visit did not go forward that day because the grandmother refused to attend at the home so long as the father was present.

[61] The mother said that she spoke to the grandmother shortly after that call and told her that there would be no more access visits until the written court order was received. She explained that this was because she wanted to ensure that there was no confusion about the access or any arguments.

[62] She testified that she had a lengthy telephone conversation with the grandmother on March 11, 2015 because she wanted to reach out to the grandmother to allow her to understand the mother's position in the circumstances. She said she explained to the grandmother that the father wanted a relationship with the grandparents and he was seeking everyone's participation in family counselling in hopes of working through issues. She said the grandmother told her she did not want a relationship with the father. The grandmother denied she had done anything wrong. She denied she needed counselling. The grandmother said that the father was the one with the problem. The mother testified that she tried in

different ways throughout the conversation to persuade the grandmother to take part in family counselling to develop a relationship with the father. That suggestion was repeatedly refused.

[63] Visits during the March break were missed because the grandmother did not want to be around the father who was home at the time. Other visits were missed due to weather and the grandmother's health.

[64] The final conversation took place on March 23, 2015. The mother provided her evidence that she called the grandmother who informed her she was ill and would not be able to attend for a visit that day. The mother informed the grandmother that the visits were not beneficial to the children. The mother said she explained to the grandmother that the dispute between the grandparents and the father was creating chaos in her family. There were no further conversations nor any further visits.

[65] The mother said that generally, when she tells anything to the grandmother that she does not like, the grandmother becomes upset and angry instead of trying to understand and attempting to communicate in a useful way. The mother explained that she felt like a facilitator for the visits which caused her a great deal of stress. She described herself as a shy and nervous person and that it was difficult

to act as a go-between. She confessed that she blamed decisions that she should be making on the father to avoid the consequences of the grandmother's reaction.

[66] She explained how after each visit she would have to hear from the father who became more upset each time. She would listen to him and how he felt mad, frustrated and hurt and for her it was a roller coaster of emotions. She felt like she was in the middle of the dispute.

[67] She confessed she has a difficult time understanding how a family could be in this circumstance, describing her own family as close-knit and loving. As she noted, "it is embedded in me that family love is unconditional."

[68] She said that since the end of access visits her conversations with the father about the grandparents have also stopped. There have been no more angry discussions or tears. She says that the stress she experienced, which was related to the access visits and the relationship between the father and the grandparents, stopped as well.

[69] She testified that when there was stress from the access visits, it did affect all five children and caused upset to them. For example, she said that she and the father were short with or disciplined the children during the stressful times when they would otherwise behave more calmly. This impacted each of the children.

[70] She also said all of this affected her health, worsening her symptoms, and when the stress disappeared after the access stopped, her health improved.

[71] The mother provided her evidence that the access visits and tension involving the grandparents has created a problem in her relationship with the father. He expected her to be strong in communicating with the grandmother but she is a shy, non-confrontational person. It caused real disagreement and stress in the relationship and had a negative effect on them.

[72] The mother said that the twins have never spent any significant amount of time away from the home or her. The father works outside the home. When she has to attend for appointments or any reason to be out of the home, the twins are with her mother or her sister. Usually her mother comes to the home to spend time with the twins when she is away.

[73] At the hearing the grandmother introduced photographs of various presents purchased for the twins. The mother said that only one gift each was ever provided to the children and all others were kept by the grandparents and only photos were provided.

[74] When asked, the mother provided her view that access between the grandparents and the children should end because the access caused stress and related problems in her home. She went on to say that she believes that she and the

father should decide who should be in the children's lives and who should not. She explained that she has already decided that some other people in her life cannot be involved with her family in order to reduce the stress within her home.

[75] When asked if she believed the relationship between the grandparents and father can be fixed, she said she does not believe it can be mended. She went on to say that all three have strong personalities and are "thick-headed" and cannot see how this can be resolved.

[76] She asked that the court end access but if the court decided not to do so, that access be suspended until family counselling takes place.

Legislation

[77] All applications in this matter were brought pursuant to the *Maintenance and Custody Act*. Section 18 of the *Act* sets out the authority for such applications and the issues and factors to be taken into account on an application by a grandparent for access with a grandchild. The relevant portions of section 18 are set out below:

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.

...

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

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

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

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

[78] Prior to the amendments to the *Act* in 2014, a grandparent seeking access with a grandchild was required to seek the leave of the court prior to making an application for access. This requirement to seek leave was removed when the amendments were made, confirming the right of any grandparent to make such an access application.

[79] This amendment, however, did not grant grandparents the presumptive right to access. The court must still satisfy its obligation to determine whether access between grandparents and grandchildren is in the best interests of the children.

[80] To assist the court in that analysis, the *Act* was further amended to include a series of factors to consider when assessing the best interests of the children. While not all are relevant in every case, those factors which are relevant to any particular circumstance must be considered by the court.

[81] Likewise, not every factor must be or should be given the same weight. It is the responsibility of the court to assess which factors should be taken into account and what weight should be given to each.

[82] The amendments to the *Act* also provided guidance within section (6A) when the court is assessing the best interests of the children in the context of an access application by a grandparent.

Burden of proof

[83] It is helpful to also note that the burden of proof in this matter rests with the grandparents and the standard is on the balance of probabilities. They seek access with the grandchildren and they must therefore meet that test. This was confirmed in the decision of **F.H. v. McDougall**, 2008 SCC 53 when the Supreme Court of Canada found as follows:

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected the reasons that follow.

...

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases that, the trial judge must scrutinize the relevant evidence with care to

determine whether it is more likely than not that an alleged event occurred.

Approaches to Grandparent Access

[84] In 2007 the Law Reform Commission of Nova Scotia issued a report entitled **Grandparent-Grandchild: Access**. The report was generated at the request of the province when it was considering amendments to the *Act* in particular what changes, if any, should be made respecting the rights of grandparents to have access with their grandchildren.

[85] The report is helpful in its review of provincial legislation and case law across Canada and in addressing the issues raised by interested parties respecting grandparent access with grandchildren. The report identified two main approaches in Canadian case law and describes them as follows:

An examination of case law indicates that applications for access are brought by grandparents in a variety of contexts. Courts have addressed applications in the course of divorce and separation proceedings, as well as the as those involving intact families where both parents oppose the access sought by grandparents. In addition, courts have dealt with situations involving single parent families with and without an involved non-custodial parent.

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 children 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 lack of access, the state has no right to interfere with parents' proper decision making authority.

The second approach is been called the "Pro-Contact" approach and tends to proceed from the premise that generally, contact between the child and their grandparent is beneficial, and therefore access should not be denied unless it can be shown to be harmful. The legislation in some jurisdictions, as noted above, requires a court to expressly consider the quality of the grandparent-grandchild relationship as a factor in determining the best interests of the child when making a custody or access order.

Although an examination of case law can be instructive, it is difficult to generalize about what the cases say, particularly in an area of law where decisions are so fact sensitive. The common thread connecting grandparent access cases is, however, the courts' adherence to the "best interests of the child test" in weighing the relevant facts and deciding whether to grant or deny access.

Case Law

[86] There are cases available to us in reviewing the approach of various courts on the issue of grandparent's access with grandchildren. Several were referred to in the report of the Law Reform Commission. As well, counsel for the father provided two cases to the court for its consideration. Many are in the context of leave applications by grandparents and not in the context of applications for access proper.

[87] The decision of *Manuel v. Hughes*, 2005 NSFC 14 is a decision of Judge Sparks of the Nova Scotia Family Court in which she provided some very helpful guidance. This decision was rendered prior to the amendments to the *Act* which

removed the requirement for an application for leave by the grandparents and was made, therefore, in the context of a leave application.

[88] Judge Sparks notes in her discussion of legal principles as follows:

17 Of course, third party access is by its nature intrusive as it will almost always be contrary to the wishes of the parents; parents who are fundamentally charged with determining the overall well being and safety of their own children. However, two fundamental judicial approaches are articulated, categorized and analyzed as the "parental autonomy" versus the "pro contact" with concomitant policy considerations for each judicial approach... Irrespective of the policy considerations on either side of the paradigm, it becomes debatable whether the state, through the Courts, should, without strong and compelling reasons, pierce parental autonomy which may, among other things, in the end, result in encouraging children to disrespect parental decisions. It is important to remember "the best interests of the child rule is characterized by its fluidity and flexibility to respond to the circumstances of each individual child. This is its strength." See: *Dixon v. Hinsley* (2001), 22 R.F.L. (5th) 55. Thus, notwithstanding recognition of these two divergent approaches, each case coming before the Court will be determined *sui generis*; and even though it is useful as an analytical tool to not only appreciate these two disparate approaches to access leave applications it is equally important to comprehend the underlying policy considerations utilized with their applications. As mentioned previously, however, the facts presented to the Court will, undoubtedly, have an overriding effect on any eventual outcome on an application of this nature.

...

19 I start with the proposition that a child, generally speaking, will benefit from the additional love and support offered by grandparents, with the grandparents for the most part lending support not only to grandchildren but to biological parents as well. In a nuclear family, it is the parents who set the ground rules, if you will, for raising their own children; and if there are harmonious relations between the parents and grandparents, most grandparents will wisely defer to the guidance provided by the parents. One obvious reason for this deference to a parent's wishes is so that the child will not be placed in the unenviable position of having to choose between the direction of a parent or a grandparent when a conflict arises.

[89] An earlier decision of Judge Sparks is also helpful in setting out an approach to such claims. In *Salter v Borden*, [1991] N.S.J. No.543 she wrote in part:

...Traditionally, any access to grandparents has flowed from the parent. It is best that parents make these decisions as the law clearly recognizes the parental right to control the upbringing of their children. Rarely, will the state interfere with the moral and legal parental obligation to determine the best course in life for their children. Reasonable parents, however, in determining, what is best for their children, can readily identify the multiple benefits which can be bestowed upon children by spending time with grandparents. Knowledge of bloodline and an expanded family support base for love, affection and understanding are but two such benefits. Similarly if the grandparents are undermining the parental authority, creating conflict or physically exposing the child to danger, then a reasonable parent would deny or curtail access in the best interest of the child.

...

... more frequently it is becoming common for children denied the right to know their biological ancestry, to embark on such searches in an attempt to complete their identity. Should the court then thwart or deny such a potentially valuable relationship considering the long-term implications for secure identity development.

Apart from the above concern, an attempt should be made to examine the reasonableness of the parent in denying access. ...Unfortunately, the mother, in my view, is unreasonable and immature.

Counsel for the mother, urges the court to carefully consider an intrusion into the inner workings of the family. He argues that the state should not interfere with the right of the custodial parents, here the mother, to determine access especially if the mother can make the best decision. I deliberately examined the reason advanced by the mother in support of a denial of access. This was done so as to illustrate the lack of judgement and prudence in dealing with her own affairs and inability to properly understand and assess, independently, the best interest of her son. The crux of the respondent's argument is that the mother will be emotionally destabilized if access is granted to the grandmother. It seems to me the mother is easily aggravated. But, should her emotional frailty be considered to the extent that it would prevent the child from visiting with

his grandmother. The mother can and should seek counselling to deal with her emotional problems. And if the access is limited, this should minimize the anguish caused to the mother.

[90] Looking outside Nova Scotia, a useful decision is that of the Ontario Court of Appeal in *Chapman v Chapman*, [2001] O.J. No. 705. Justice Abella, writing for the court, found for the parents in denying access for the grandparents and stated in part as follows:

17 The essence of the grandmother's submission is that, in general, it is in the best interests of children to maintain contact with members of their extended family. The test, however, is not what, in theory, is best for children in general, but what is in the best interests of the particular children before the court.

...

19 A relationship with a grandparent can - and ideally should - enhance the emotional well-being of a child. Loving and nurturing relationships with members of the extended family can be important for children. When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship....

20 In this case, however, the issue is not about preserving a positive relationship, but about whether the disruption and stress generated by the grandmother's insistent attempts to get access on her own terms are in the children's best interests.

21 ... **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. [emphasis added]**

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. ... 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.

[91] The British Columbia decision also named *Chapman v Chapman*, [1993]

B.C.J. No. 316 is useful in setting out some specific criteria in the analysis as follows:

...In determining the best interests of an infant, such as the four old child in this case, the court must also be mindful of the following:

1. The onus is on the applicant to demonstrate that the proposed access is in the child's best interests.
2. The custodial parent has a significant role. The courts should be reluctant to interfere with a custodial parent's decision and should do so only if satisfied that it is in the child's best interests.
3. It is not in the best interests of a child to be placed into circumstances of real conflict between the custodial parent and a non-parent. While the court must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access to non-parents, in cases of real conflict and hostility, the child's best interests will rarely, if ever, be well served by granting access.

[92] Other cases worthy of note and which were considered by this court include *Stewart v. MacDonnell* (1992), 39 R.F.L. (3d) 163 (N.S.F.C.), *Lewis v. Wells* (1993), 125 N.S.R. (2d) 76 (N.S.F.C.), *B.D. & R.D. v. S.D.* (1995), 145 N.S.R. (2d) 149 (N.S. F.C.), *Gray v. Gray* (1995), 147 N.S.R. (2d) 369 (N.S.S.C.), *Daley & Daley v. Daley (Gilfoy) & Daley* (1993), 124 N.S.R. (2d) 273 (N.S.F.C.), *M.B. v. W.C.* (1997), 31 R.F.L. (4th) 351 (N.S.F.C.), *M.D.S. v. S.A.M. & G.C.* (1999), 182 N.S.R. (2d) 337 (N.S.F.C.), *Lusher v. Lusher* (1988), 13 R.F.L. (3d) 201 (Ont. P.C.), *McLellan v. Giddon* (1996), 23 R.F.L. (4th) 106 (N.B.Q.B. F.D.), *L.M.M. et al T.J.P. et al* (1992), 119 N.S.R. (2d) 149, , *M.B. et al v. C.W. et al* (1997), 161 N.S.R. (2d) 349.

Analysis

[93] The central question for this court to address is what is in the children's best interests? In doing so, I find it helpful to summarize the law respecting grandparent access taking into account the *Act* and case law and I set out that summary below:

1. Under the *Maintenance and Custody Act*, grandparents may apply for access with their grandchildren without need to seek the leave of the court to do so. This does not, however, give grandparents the presumptive right of access with a grandchild.
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.

3. The burden of proof rests with the grandparents bringing the application and the test is on the balance of probabilities throughout.
4. The analysis of what is in the child's best interests is informed and guided by the factors set out in sections 18(5) and 18(6A) of the *Act* but the court is not limited to those factors and must take into consideration all relevant evidence in making its determination.
5. Not all of the factors set out in section 18(5) of the *Act* will apply in every case and the court need only consider those which it deems applicable and may assign differing weight to any factors as it finds appropriate.
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.
7. Among the factors to consider in determining the best interests of a child when grandparents are making such applications include, but are not limited to, the following:
 - a. The nature, strength and stability of the relationship between the child and the grandparents (s.18(6)(h));
 - b. The history of the relationship between the child and the grandparent including the involvement of the grandparents in day to day care of the child or their involvement in significant religious, spiritual, sports, cultural or social events or activities;
 - c. The needs of the child, whether special, physical, emotional, social, educational, safety and stability and the impact of granting or denying access on those needs;
 - d. The reasons for the conflict between the parents and the grandparents and the denial or restriction of access and whether the position of the parents in denying or restricting access has a rational basis;
 - e. The likely impact on the child, both positive or negative, if access is granted versus if the access is denied or restricted;

- f. The probability that positive access will be sustainable including whether the parties can effectively isolate the child from conflict among the parents, grandparents and other persons in the child's life, the willingness of the parents to facilitate such access and the necessity of making an order for such access (s.18(6A));
- g. The importance of the grandparents in maintaining connection with the child's family, cultural, ethnic or linguistic history (*Salter v Borden*);
- h. The type, location, duration and content of proposed access with the grandparents;
- i. The probable impact, if any, of the proposed access on the child within the home of the child;
- j. The child's views and preferences (s.18(6f));

[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.

[95] In the present case, I find that the father has a genuinely-held belief that his parents were not good to him as a child, he had a terrible childhood and that if his children spend time with their grandparents, the children may be adversely affected in the same or similar ways that he says he was.

[96] The grandparents deny all of the allegations of poor parenting and emotional damage to the father during his childhood. They say they cannot understand what he is talking about and that his childhood was fine. They say he was treated equally

with his sister and there is no basis on which he should believe what he is expressing to the court.

[97] There is no way for the court to determine what happened those many years ago in the home of the grandparents and in the life of the father. Further, it is not necessary to determine what that home was like and how the grandparents may have negatively affected the father. What is important to consider at this stage, given the father's genuinely-held belief respecting the grandparents among other factors, is whether it is in the best interests of the children to spend access time with their grandparents.

[98] The uncontroverted evidence is that the grandparents did spend time with the grandchildren after their birth by visiting the home of the parents at least a few times each week. The evidence does not indicate that the grandparents were deeply involved in the day-to-day care of the grandchildren. I infer from the evidence that they were excited with the arrival of their twin grandchildren, spent time at the parents' home interacting with the grandchildren and left all of the parenting responsibilities to the parents. In other words, unlike some grandparents, they were not involved in the day-to-day care of the grandchildren.

[99] I also take into account that over the 18 months since the children's birth the grandparents have spent limited time with them both before and after the

interruption of access. Even when access was reinstated in January 2015, it is the grandmother's evidence that she visited when permitted under the order but missed several visits due to her health, weather and her refusal to visit when the father was present in the home. She spent time with the grandchildren playing with them and interacting with them at the home of the parents, never travelled outside of the home with the children and therefore the nature of relationship with them did not change over time.

[100] I take into account the fact that the grandfather did not take part in any access visits whatsoever since June 2014 even when he was entitled to do so under the order of January 2015. The fact that he chose to stay away from the home, even when the father was not present, suggests that the access being sought is really access for the grandmother.

[101] These children are very young. They are at an early stage of their development and while there is no doubt that the grandparents love them and the grandchildren enjoyed their time with their grandmother, the evidence does not lead me to conclude that the grandmother has a long-standing or strong relationship with them, nor is there evidence that she meets any particular needs of the children.

[102] That said, the court must look beyond the simple question of whether the children will be immediately impacted if access is terminated. For any child, grandparents might be peripheral to their daily life at an early age.

[103] Yet grandparents can have a significant impact on the well-being of any child as the child grows. Indeed the relationship between the grandparent and grandchild evolves over time and does so within the context of each particular family. It may be that when the child is young, the grandparents are less involved but as the child grows, the grandparents may play a more significant role in the life of the grandchild. This might involve connecting the grandchild with family, linguistic, ethnic or cultural heritage, taking the child to and from various activities, providing the parents with respite, support, advice and guidance which will benefit the child or simply being part of the extended family, a shoulder to cry on or an ear to listen.

[104] In this particular family, much of the evidence focuses on the breakdown in the access both before and after the order of January 2015. That same evidence makes clear that there is very high tension between the grandparents and the father.

[105] The father says his emotions respecting his parents are well-founded and the parents deny this. It may well be that the truth lies somewhere in between. But the

fact remains that the evidence is clear that the dysfunction of that relationship impacts both families.

[106] Specifically, the parents' evidence is that whenever access takes place, it creates conflict within the parents' home in the form of arguments, tension and stress. The parents say the stress trickles down to and impacts on the children by reducing their patience with the children, causing them to behave in ways that they would otherwise not if the stress was not present.

[107] Moreover, the mother's testimony is clear respecting the impact on her health. She suffers from multiple sclerosis and tells the court that the ordinary stress of day-to-day living in a home with five young children can be managed by her. This is despite the fact that some of the children have special needs, the twins are only 18 months old, all the children are under 8 years of age and she is at home all day. She goes on to make clear, however, that the stress of the grandparent access which arises from the conflict between the father and the grandparents negatively affects her health. It triggers otherwise dormant or reduced symptoms even though she is in the remission stage of her disease.

[108] The mother testified that when the symptoms are triggered due to stress, they involve her balance, fine motor skills, memory and focus. I find that any increase in her symptomatology as a result of the stress caused by the access of the

grandmother does have a direct and significant negative impact on the children including the grandchildren who are subject of this application. Her ability to safely and effectively care for the children is compromised. So too is her and the father's ability to deal with discipline and other parenting issues in that they are sometimes more stern and hard on the children than they would otherwise be.

[109] In assessing the evidence of the parties in this matter, credibility comes into play. The leading decision respecting assessment of credibility in civil matters is that of *Baker-Warren v. Denault* 2009 NSSC 5 in which Justice Forgeron provided the following helpful comments:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. v. Gagnon** 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. R.E.M.** 2008 SCC 51, para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: **Re: Novak Estate**, 2008 NSSC 283 (S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;

- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorney** [1952] 2 D.L.R. 354;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: **R v. Norman**, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in **Re: Novak Estate**, *supra*, at para 37:

There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See **R. v. D.R.**, [1996] 2 S.C.R. 291 at 93 and **R. v. J.H.**, [2005] O.J. No. 39, *supra*).

...

[110] In this case, there is some dispute in the evidence between the grandparents and the parents. For example, the grandmother says that in the telephone call of January 29, 2015 she did not raise her voice but was simply very firm with the mother. The mother says otherwise and testifies that the grandmother was hollering at her. The father says the same.

[111] Similarly the father says that his childhood was a very bad one and the grandparents deny this absolutely.

[112] I have had the opportunity to observe the witnesses and in particular the grandmother. She provided the bulk of the evidence for the grandparents. I have listened to and read the evidence of each of the parties very carefully. I find that there are several troubling aspects to the evidence of the grandmother.

[113] I note in her evidence that, despite knowing that the mother suffers from multiple sclerosis, she never made any inquiries of the mother, or from any other sources, as to the nature of that disease or any impact stress may have on the mother.

[114] I note the un-contradicted evidence of the parents that the toys for the children in the photographs were not all provided to them.

[115] I also note that, despite the obvious emotional pain of the father, the grandparents showed no empathy or compassion for the father. While they were steadfast in their position that his recollection of his childhood was wrong and they were entitled to take that position, one might reasonably have expected them to recognize that to him, his recollections were real and to expect them to express some level of understanding of their son's pain.

[116] This is particularly noteworthy with respect to family counselling. The only explanation given by the grandparents as to why they would not participate, despite the fact that it had been recommended by the court and requested by the father,

was the tit-for-tat position that because the father had refused to participate when they had suggested it, they would absolutely refuse to participate now. I find this demonstrates a lack of insight into the dynamics of their relationship with the father and the resulting impact that lack of insight has on the grandchildren.

[117] I find that the testimony of the grandmother lacks credibility. It is generally self-serving. For example, she and the grandfather were consistently unable to make even a modest concession including any role they may have played in the father's perception of his dysfunctional upbringing.

[118] The grandmother says she observed safety hazards in the home, such as the absent stair gate and unsecured booster chair, but did not alert the parents to this. She then used this evidence in what I find to be a criticism of the parents at the hearing.

[119] The father gave his evidence in a straightforward manner. While I am not persuaded that his description of his childhood is entirely accurate, I am persuaded that he has a genuinely held belief as to his recollection. His evidence is also consistent with that of the mother in his description of the dynamics of the family, the stress of the grandparent access, the difficulties arising from that access between he and his mother and the impact all of this is had on the children.

[120] I am impressed by the evidence of the mother. She provided her evidence in a balanced and even-handed way. She was not overly emotional and was able to articulate in a very clear and helpful way both her perception of the various events and the reasons why she supported the termination of access or the imposition of family counselling. Put simply, she was able to connect the dots between the dysfunctional relationship of the grandparents and father, the stress that it caused on her and her family and the direct and real impact it has on the children. I accept her evidence in that regard.

[121] Where there is conflict in the evidence between the grandparents and the parents, I prefer the evidence of the parents.

[122] I agree with the mother that given the absolute and unequivocal refusal of the grandparents to engage in any form of family counselling with the father or her does not bode well for the grandparents' relationship with the father in the future.

[123] The grandparents had limited involvement with the children before this hearing and even before the court orders were required in the matter. They have no insight into the reasons why the father feels the way he does. They have no insight into the impact, both direct and indirect, their dysfunctional relationship with the father is having on the mother and her health and the well-being and best interests of all of the children in the home.

[124] I find that the grandparents are focused on their own interests and wishes. They have developed no appreciation or understanding of the emotional dynamic at play in this family. This is particularly evident in the grandmother's testimony when she says that she will only abide by the father's wishes that she not discuss the twins with his other daughter, M.O., if there is a court order requiring her to do so. This demonstrates a failure to understand the role of grandparents and parents in children's lives.

[125] I further find that if access were allowed to go forward at this time, it is probable that the grandparents, and the grandmother in particular, would not be able to withhold criticism of the parents nor withhold providing the grandchildren with inappropriate information regarding M.O.

Conclusion

[126] I therefore find that it is not in the best interests of the children to permit the grandparents to have access. I strongly encourage, but will not order, that the grandparents and parents take part in family counselling as recommended repeatedly by the court and as sought by the father.

[127] If, at some later time, the grandparents are able to demonstrate greater insight, this issue may remedy itself in that the parents may be prepared to provide them with access.

[128] Given that there are existing orders in the matter, I will order that the grandparents shall not have access with the grandchildren except as permitted by the parents within the absolute discretion of the parents.

[129] I shall further order that the grandparents shall not discuss with M.O. anything respecting the children or the parents except as permitted by the parents within their absolute discretion. The grandparents shall not introduce M.O. to the children.

[130] I dismiss the application of the grandparents seeking enforcement of the order of January 2015. In doing so I acknowledge that there was an existing order at the date of the hearing which provided the grandparents access with the children. That order, by the admission of the parents, had been breached once they refused to allow further access in March of 2015.

[131] It should go without saying that court orders are expected to be obeyed. Parties cannot ignore them or they face the possibility of a contempt finding or other remedy which might include changes to the order against their interests.

[132] That said, I am persuaded that in this case the parents chose to deny access as they did in breach of the order for good reason as I have reviewed herein. I therefore do not find that they are in contempt.

[133] I have consider the matter and will not order costs in this case.

[134] I direct that one of the counsel for the parents draft the order and provide it for review by the grandparents. If counsel does not hear from the grandparents with any proposed amendments within five days of providing the draft order to the grandparents, the order may be submitted to the court for its review and issuance. If there are any disputes with respecting the contents the order, the parties may bring the matter back before the court for the terms to be settled.

Judge Timothy G. Daley