Date: 20151223
Docket: 15/47
Citation: *D.C. v. T.H.*, 2015 NLCA 59

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

D.C. APPELLANT

AND:

T.H. RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (F) 200302F0205
2015 NLTD(F) 16

Appeal Heard: November 26, 2015
Judgment Rendered: December 23, 2015

Reasons for Judgment by Welsh J.A.
Concurring Reasons by Hoegg J.A.
Dissenting Reasons by White J.A.

Counsel for the Appellant: Benjamin Curties
Counsel for the Respondent: Mary Boulos

Welsh J.A.:

[1] Ms. H. and Mr. C. are the unmarried parents of a child born in December 2011. By decision dated May 12, 2015, a judge of the Supreme Court, Family Division granted Ms. H.'s application to move with the child to Alberta to live with her parents. The judge encouraged Mr. C. to apply for access, but made no order. Mr. C.'s appeal raises issues regarding the judge's jurisdiction to direct Ms. H. to live with her parents and not to remove the child from her parents' "home and care", and the judge's failure to make an order regarding Mr. C.'s access. There is also a preliminary issue with respect to the admission of new information about the child proffered by Ms. H. at the appeal.

BACKGROUND

[2] This Court dismissed an application by Mr. C. to stay the Family Division judge's order pending a decision on the appeal (2015 NLCA 42). A summary of the background facts is provided in that decision:

> [1] … [Mr. C.] and [Ms. H.] separated in February 2013. A shared custody arrangement was put in place. Both parents have disabilities: [Mr. C.] is a hemophiliac and is vision impaired; [Ms. H.] has social interaction impairment and poor social judgment. [The child] has speech problems and (more recently diagnosed) autism. The parents had and continue to have an acrimonious relationship.
>
> [2] [Ms. H.] has received financial help and moral support from her parents, who live in Edmonton. [Mr. C.] was assisted in caring for [the child] by his mother, [name].
>
> [3] [Ms. H.] struggled to provide materially for [the child]; she was unable to work, as she could not obtain subsidized daycare. [Mr. C.] did not help [Ms. H.] in seeking subsidized daycare, under the shared custody arrangement. After the separation, [Ms. H.] lived on social assistance, along with some financial help from her parents. [Mr. C.] (who is working, albeit in a low-paying job) has provided no child support.
>
> [4] [Ms. H.] sought to obtain therapy for [the child's] speech problems. She encountered wait times and limited availability of relevant services, but obtained some therapy for [the child]. Until recently, [Mr. C.] did not acknowledge that [the child] had speech problems.

> [5] [The child] has good personal relations with both parents, as well as with [Mr. C.'s mother], who cared for her often. Her contact with [Ms. H.'s] parents, while positive, was more limited [since they live in Alberta].
>
> [6] In 2013, [Ms. H.] made a mobility application, seeking to relocate to Edmonton to live with her parents, to obtain services for [the child's] special needs and to obtain employment. Her parents are in their early/mid 60s, have professional incomes and own a house suitable for [Ms. H.] and [the child] to live with them.
>
> [7] [Mr. C.] opposed the mobility application on the basis that the proposed move would not be in [the child's] best interests, in that: [the child] would have limited involvement with [Mr. C.] and his mother; [the child] would be taken from familiar surroundings and placed in unfamiliar surroundings; and [the child's] needs could properly be met without moving to Edmonton.
>
> [8] The mobility case was heard in October 2014, January 2015 and February 2015. A judge of the Unified Family Court gave his decision in May 2015. The judge granted the mobility application. He also ordered that [Ms. H.] could not remove [the child] from [Ms. H.'s] parents' home without a court order to do so. The judge made no order for [Mr. C.'s] access to [the child]; rather, he "encouraged [Mr. C.] to commence his own application for access."

[3] In his decision, the applications judge set out a comprehensive review of the evidence and the relevant legal principles (2015 NLTD(F) 16, 366 Nfld. & P.E.I.R. 178). In his conclusion, he wrote:

> [150] … I am fully aware of the bond between [the child] and her father, as well as between [the child] and her paternal grandmother. However, I must look beyond any other issue and determine this matter solely on the best interest of the child. …
>
> …
>
> [152] … In our case, the mobility issue would create a different but serious physical separation between the child and her father and the child's paternal grandmother. However, here we are not contemplating a cessation of access by either parent and [the child] must be permitted to have meaningful access to both of her parents.
>
> …
>
> [158] The decision of [Mr. C.] not to inform [Ms. H.] of his marriage shortly after he and [Ms. H.] separated was mean spirited and emotionally abusive to her. The explanation that it did not concern her is not true. Of course it concerned her, and it concerned their child, [name]. [Ms. H.] is correct when she said that in not

> knowing about [Mr. C.'s] marriage, she could not prepare [the child] for a new person in her life.
>
> …
>
> [163] Overall I am satisfied that if the status quo were to continue and [Ms. H.] were to remain in St. John's, Newfoundland and Labrador, caring for her child, [name], both she and the child would be relegated to a marginal subsistence lifestyle dependent on the state for the necessities of life.
>
> [164] In Edmonton, Alberta, [Ms. H.] would be able to provide, through her own efforts, and with the support of her parents, everything that [the child] would need to grow and develop into a healthy and successful child towards adulthood. I fully realize the disruption that this will cause in the relationship between [the child] and her father and paternal grandmother but I am duty bound to decide this matter on the best interest of the child principle.

[4] Regarding the question of access by Mr. C., the applications judge wrote:

> [165] While I have heard from both [Ms. H.'s parents] as to their willingness to support meaningful access between [the child] and her father, I am of the opinion that such an arrangement would be a complex matter in its own right. [Mr. C.] therefore is encouraged to commence his own application for access to be considered on its own merits. All aspects of access could then be explored including the financial implications associated with access.

[5] In concluding, the applications judge indicated that Ms. H. and the child were to live indefinitely with Ms. H.'s parents:

> [166] … [Ms. H.] will no doubt be employed and her parents will care for [the child] in a comfortable home. [The child's] best chance of prospering will be to relocate to Edmonton, Alberta, where she and her mother [name], will live with [Ms. H.'s] parents, [names] who will provide for their needs. Having considered the best interest of the child, I am therefore granting permission for [Ms. H.] to relocate with her child, [name], to the Province of Alberta, where she will live with her parents, [names], indefinitely.
>
> [167] I too share a concern that [Ms. H.] may once again make an inappropriate decision and leave the home and care of her parents. In that regard, pursuant to sections 33(b) and 53(c) of the *Act*, I am also adding to this decision that [Ms. H.] is prohibited from removing the child, [name], from the home and care of [Ms. H.'s parents] without an appropriate court order to do so.

ISSUES

[6] A preliminary issue is whether a letter proffered by Ms. H. relating to the child's current situation should be admitted for purposes of the appeal. The issues on appeal are whether the trial judge erred in omitting to make an order as to Mr. C.'s access, and in ordering Ms. H. to live with her parents and not to remove the child from her parents' home without a court order.

ANALYSIS

Admission of New Evidence on Appeal

[7] Prior to hearing of the appeal, Ms. H. provided a letter to the Court which was not submitted by means of an affidavit. The letter, dated November 10, 2015, is printed on the Sturgeon School Division letterhead, Morinville, Alberta, and is signed by the director of early childhood education. The letter describes the programming being provided to the child and reports on her progress. Mr. C. objects to the Court considering the letter for purposes of the appeal.

[8] Mr. C. submits that the letter is irrelevant because the appeal must be based on the record. The admission of new or fresh evidence on appeal, where the principle of the best interests of the child is engaged, is discussed in *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at pages 187 to 189. While that decision dealt with child welfare legislation, the basic principle is that all litigation involving children raises special concern with regard to the child's best interests. This, in turn, requires a flexible approach to assessing whether the court should consider information proffered at the appeal stage regarding the current situation of the child and the parties.

[9] In this case, counsel for Ms. H. submitted that the information in the letter would be relevant only if this Court undertook to make an order as to access for Mr. C. For the reasons that follow, Mr. C.'s request to have this Court make that order is dismissed. Accordingly, it is unnecessary to determine whether the letter proffered by Ms. H. should be considered for purposes of the appeal.

Relevant Principles of Law

[10] Section 31 of the *Children's Law Act*, RSNL 1990, c. C-13, deals with custody of and access to a child. It provides, in relevant parts:

(1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.

(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who live with the child, and

(iii) persons involved in the care and upbringing of the child;

…

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and the special needs of the child;

(e) the ability of each parent seeking the custody or access to act as a parent;

(f) plans proposed for the care and upbringing of the child;

(g) the permanence and stability of the family unit with which it is proposed that the child will live;

…

(3) In assessing a person's ability to act as a parent, the court shall consider whether the person has ever acted in a violent manner towards

(a) his or her spouse or child;

(b) his or her child's parent; or

(c) another member of the household,

otherwise a person's past conduct shall only be considered if the court thinks it is relevant to the person's ability to act as a parent.

[11] Section 33 of the *Act* provides for the types of orders that may be made when an application regarding custody or access is made under section 27:

> The court to which an application is made under section 27
>
> > (a) by order may grant the custody of or access to the child to 1 or more persons;
> >
> > (b) by order may determine an aspect of the incidents of the right to custody or access; and
> >
> > (c) may make an additional order that the court considers necessary and proper in the circumstances.

[12] Principles relevant to an application to relocate with a child are discussed in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, in the context of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). This Court has concluded that, in assessing the best interests of the child under the *Children's Law Act*, while the factors enumerated in section 31(2) of that *Act* must be considered, consideration may also be given to the principles set out in *Gordon v. Goertz*, at paragraph 49 (*Whalen v. Whalen*, 2005 NLCA 35, 247 Nfld. & P.E.I.R. 344, at paragraph 18).

[13] The factors enumerated in *Gordon v. Goertz* are directed to consideration of the existing custody and access arrangements, the desirability of maximizing contact between the child and both parents, the parent's reason for moving if it is relevant to that parent's ability to meet the child's needs, and disruption to the child.

[14] As applied to this case, Mr. C. relies particularly on the principle of maximizing contact between the child and himself. As discussed in *Gordon v. Goertz* this involves the question of access.

Contents of the Order

[15] The order dated June 15, 2015 states:

> IT IS HEREBY ORDERED THAT:
>
> 1. The Applicant, [Ms. H.], shall relocate with the child, [name and birth date], to the Province of Alberta, where she and the child, [name], shall live with her parents, [names], indefinitely.

> 2. Pursuant to sections 33(b) and 53(c) of the *Children's Law Act*, R.S.N.L. 1990, c. C-13, the Applicant, [Ms. H.], is prohibited from removing the child, [name], from the home and care of [Ms. H's parents], without an appropriate order to do so.
>
> 3. The Respondent, [Mr. C.], is encouraged to commence his own application for access, which shall be considered on its own merits.
>
> (Underlining added.)

I note that the reference to section 53(c) is an error since there is no such paragraph and section 53 relates to taking notice of foreign law. It is not clear from a review of the *Act* which provision was being relied upon though it may be section 33(c) quoted above.

[16] Mr. C. submits that the judge erred in ordering the above underlined portions of the order for two reasons: first, an order that Ms. H. live indefinitely with her parents is vague and unenforceable; and second, the prohibition from removing the child from the "care" of Ms. H.'s parents amounts to granting *de facto* custody to the child's grandparents who were not parties to Ms. H.'s application.

[17] I accept these submissions, and conclude that the applications judge erred in including the underlined portions in the order. The question, then, is whether the underlined portions can be deleted, leaving an enforceable order that is consistent with the applications judge's decision.

[18] I begin by noting that the conditions specified in the order are taken from Ms. H.'s plan regarding the child. Applying section 31(2)(f) of the *Act*, these are factors, among others, which were relevant to the decision to permit Ms. H. to relocate with the child. Counsel advised that the contents of a plan would not ordinarily be included in an order. Rather, if the plan proves unworkable or leads to difficulties, an application may be made for a variation.

[19] Mr. C. submits that the judge's decision to permit Ms. H. to relocate to Alberta with the child was based on the two conditions in the order, and that to delete them would result in an order not supported by the judge's decision. This submission fails to take account of the judge's decision as a whole, including application of section 31 of the *Act* and his assessment of the two parents and the plan offered by Ms. H.

[20] The judge found that Ms. H. was unlikely to find work in this Province, but that she would not face the same difficulty in Alberta. Her inability to obtain day care for the child in this Province would not be an impediment in Alberta where she would be living with her parents who have undertaken to care for the child when she is at work. In outlining Ms. H.'s plan, the judge summarized:

> [146] … The mother's plan is to relocate with her child to Edmonton, Alberta, where the maternal grandparents have committed themselves to provide the care and support needed by [Ms. H.] to care for her child, [name]. In their evidence [Ms. H.'s parents] outlined in great detail how they would provide rent-free accommodations for [Ms. H. and the child] in the family home where two bedrooms and a private bathroom can be for the exclusive use of [Ms. H. and the child]. As well, [Ms. H.] has offers of full long-term employment at a decent wage where she can earn an income for herself and [the child].
>
> [147] Importantly, [Ms. H.'s mother] testified as to the readily available therapeutic needs of [the child] to treat her speech issues. The plan would also include financial assistance to [Mr. C.] so that he could maintain reasonable access to [the child] and her to him. [Ms. H.'s mother] also testified that she would provide daycare for [the child] as she required it and would assist [Ms. H.] in overall caring for the child.

And further:

> [149] The proposed plan to relocate the child to Alberta would see the child and her mother, [name], live with [Ms. H.'s] parents in their home in Edmonton. [Ms. H.'s] parents have been in a stable relationship all of their 31 married years. [Ms. H.'s] father, [name], is a chiropractic doctor and plans to retire in the near future. Her mother, [name], is employed with the Government of Alberta and soon to retire as well. The [H.'s] are financially well-off and are able to provide fully for the needs of [Ms. H. and the child] and have committed themselves to do so. Both [Ms. H.'s parents] have committed their involvement to care and provide for [Ms. H. and the child] indefinitely.

[21] By contrast, the father's plan was to maintain the status quo, except that he should be granted sole custody of the child in this Province:

> [148] … since joint custody is, in his opinion, not working and that it is he who should make all of the decisions concerning [the child]. … As to [the child] being able to receive treatment in Alberta for her speech delay and possible autism, [Mr. C.] stated flatly that she clearly does not need it and that she has no issues with her speech. [Mr. C.'s] position is that he has cared for [the child] since she was born and it's even easier now since he's married to care for her. …

[22] The judge accepted that both the maternal and paternal grandparents love the child. He noted that Ms. H.'s parents have traveled to this Province many times and have provided support and care for Ms. H. and the child, and financial assistance when Ms. H. and Mr. C. were together. Mr. C.'s mother has provided care and nurturing for the child, often looking after the child when she was in Mr. C.'s care. The judge commented that, while both parents love the child and she loves them, "without the support of their respective parents, it would be difficult" for either parent to provide "a safe, nurturing and stable environment" for the child (paragraph 144). That said, he recognized that Ms. H. had, in fact, been caring for the child in the absence of her parents before she relocated to Alberta. By contrast, the judge noted that, much of the time when the child was in Mr. C.'s care, she was looked after by Mr. C.'s mother.

[23] With respect to the father, the judge was particularly concerned with Mr. C.'s refusal to communicate relevant information to Ms. H. He refused to give his address to Ms. H. and did not tell her he was being married. The judge was satisfied that there had been, and continued to be, a complete inability of the child's parents to communicate with each other, a situation which was not a healthy environment for the child.

[24] An additional concern the judge had regarding the father was his apparent resistance to accepting that the child has developmental difficulties. In summary:

> [141] In that regard, the evidence is clear that [Mr. C.] does not accept that [the child] has a speech delay problem requiring ongoing therapy. He said so and while he might agree to some intervention to help the child, he is not committed to full recognition of the need for his child to be treated by professionals to remedy the problem.

[25] Mr. C. submits that the judge misapprehended his evidence and that he, in fact, admitted during his testimony that he would not interfere with professional assistance for his child. However, it is clear from the judge's decision, read as a whole, that he was not satisfied that Mr. C. accepted that his child has a developmental problem and that early intervention would help the child.

[26] Mr. C. also submits that the judge misapprehended the evidence regarding his mother's posting photographs of the child in the bath on Facebook as well as adult sexual jokes. The judge accepted that, while Mr.

C.'s mother meant no harm and was not exploiting the child, the posting showed poor judgment on her part. Further, he accepted Ms. H.'s evidence that Mr. C. did not see his mother's conduct as inappropriate. In fact, the police became involved and as a result of their intervention, the photographs were removed from Facebook.

[27] The judge accepted evidence from Ms. H. that Mr. C. had acted in a violent manner towards her on at least two occasions by grabbing and pushing her, and that Mr. C. had been dismissed from his job as a result of an incident of sexually interfering with a co-worker. Mr. C. has not demonstrated a basis for interfering with these findings of fact by the judge.

[28] Reading the applications judge's decision as a whole, I am satisfied that he applied the factors enumerated in section 31 of the *Act* in deciding to grant Ms. H.'s application to relocate with the child to Alberta. There is no basis on which to conclude that he would not have made the order permitting the relocation if the conditions he attached to the order were deleted. It is apparent that the conditions were taken from Ms. H.'s plan and that their inclusion in the order was intended to emphasize the importance of Ms. H. taking advantage of the assistance being offered by her parents. If she should leave their home and take the child, an application could be made to assess the effect of the change in circumstances.

[29] In reaching this conclusion, I am aware of the applications judge's comment in the final paragraph of his decision:

> [167] I too share a concern that [Ms. H.] may once again make an inappropriate decision and leave the home and care of her parents. In that regard, pursuant to sections 33(b) and 53(c) of the *Act*, I am also adding to this decision that [Ms. H.] is prohibited from removing the child, [name], from the home and care of [Ms. H.'s parents] without an appropriate court order to do so.
>
> (Emphasis added.)

[30] There was no authority to make the order conditional by adding the above term. The applications judge was improperly reaching into the future after deciding, based on the factors in section 31 of the *Act*, that Ms. H. should be permitted to relocate with the child. The section 33 authority to "determine an aspect of the incidents of the right to custody or access" or to "make an additional order that the court considers necessary and proper in the circumstances" does not permit the inclusion of conditions in an order which are vague and unenforceable or amount to granting *de facto* custody

to a person who is not a party to the application. The judge erred in adding the condition in paragraph 167 of his decision.

[31] In the result, I am satisfied that deleting the conditions set out in the order would result in an order that is consistent with the decision of the applications judge. The order should read:

> IT IS HEREBY ORDERED THAT:
>
> 1. The Applicant, [Ms. H.], may relocate with the child, [name and birth date], to the Province of Alberta.
>
> 2. The Respondent, [Mr. C.], is encouraged to commence his own application for access, which shall be considered on its own merits.

Failure to Make an Access Order

[32] Ordinarily, where a relocation order is made, an access order is made at the same time in respect of the other parent. In this case, the applications judge did not follow that practice, but encouraged Mr. C. to make the necessary application. He noted that, while Ms. H.'s parents testified that they were willing to assist with the financial aspect of access for Mr. C., Mr. C. indicated that he did not see his traveling to Alberta to be a viable option. In delaying the question of access pending an application by Mr. C., the judge commented that an arrangement of access which may involve financial assistance from Ms. H.'s parents "would be a complex matter in its own right", and that "[a]ll aspects of access could then be explored including the financial implications associated with access" (paragraph 165 of the decision, paragraph 4, above).

[33] At the hearing, counsel advised that Mr. C. has not yet made an application for access. However, after the judge's decision, counsel for Ms. H. and Mr. C. engaged in consultations regarding access. The issue was then referred to mediation under Family Justice Services. The Court was advised that, if mediation is unsuccessful, Mr. C. may make an application to be determined by a judge. Meantime, Mr. C. has regular Skype access.

[34] The difficulty in this case is the lack of financial means of both Ms. H. and Mr. C. While Ms. H.'s parents testified that they would assist financially with Mr. C.'s access, the parents were not parties, and an order could not be made requiring them to fund all or a portion of Mr. C.'s access. In the result, as indicated by the judge, the question of access involved some

complexities. The opportunity to make an application for access was immediately available to Mr. C. Presumably, he would have taken this step if he was unwilling to proceed by way of consultation and mediation.

[35] In any event, the fact that the judge did not make an access order simultaneously with the relocation order does not result in an error such that the relocation order must be set aside. In granting the relocation order, the judge was clearly aware of the implications for Mr. C.'s contact with the child. He considered the factors enumerated in section 31(2) of the *Act* in determining the best interests of the child. In the circumstances, he concluded that an access order would require additional judicial consideration.

SUMMARY AND DISPOSITION

[36] In summary, it is unnecessary to determine whether the letter proffered by Ms. H. should be considered for purposes of this appeal because the letter is not relevant to the issues on which the appeal is decided.

[37] The applications judge erred in adding conditions to the order that Ms. H. shall live indefinitely with her parents and that she is prohibited from removing the child from the home and care of her parents without a court order. Those conditions must be deleted from the order.

[38] However, when those conditions are deleted, the order permitting Ms. H. to relocate with the child to Alberta is valid and is consistent with the judge's decision and his application of the law.

[39] There is no basis on which to conclude that the applications judge erred by omitting to make an order as to Mr. C.'s access at the same time as he granted the relocation application.

[40] In the result, I would dismiss the appeal against the order granting Ms. H.'s relocation application. However, I would amend the order by removing the invalid conditions such that the order reads:

> IT IS HEREBY ORDERED THAT:
>
> 1. The Applicant, [Ms. H.], may relocate with the child, [name and birth date], to the Province of Alberta.

2. The Respondent, [Mr. C.], is encouraged to commence his own application for access, which shall be considered on its own merits.

_____

B. G. Welsh J.A.

Concurring Reasons by Hoegg J.A.:

[41] I concur with my colleague Welsh J.A. for the reasons she states that the child may relocate to the province of Alberta with Ms. H. I also concur with Justice Welsh that the judge's failure to order the child's access to Mr. C. should not result in the setting aside of the relocation order. While it would have been preferable for the judge to have ordered the child's access to Mr. C., his failure to do so, in my view, is not fundamental to the validity of the relocation order.

[42] I also add the following comments.

[43] Circumstances respecting where a child is to live and with whom, and the availability of supports, through extended family or otherwise, to a child and a parent seeking custody are valid considerations for a judge deciding custody. Sometimes these considerations find their way into judicial orders as conditions relating to the best interests of the child involved, but more often they do not.

[44] In this case, the support from the mother's parents in Alberta was clearly a strong factor influencing the judge's decision, and he attempted to ensure that support for the child by imposing conditions requiring the mother to live indefinitely with her parents and to apply to the court before removing the child from her parents' "care". While these errors are jurisdictional, as we all agree, they do not affect the judge's jurisdiction to order relocation. These errors and the judge's use of the word "shall" instead of "may" are errors more in the nature of overstatement and unfortunate wording and do not, in my view, undermine the judge's reasons for granting the mother's application.

[45] The facts and circumstances of this case as found by the judge and comprehensively discussed by Welsh J.A. above support disposition of the matter as indicated by Justice Welsh. To require a fresh hearing in this matter would not honour the best interests of the young and vulnerable child in this case.

_____

L. R. Hoegg J.A.

Dissenting Reasons by White J.A.:

[46] With respect, I cannot agree with my colleague Welsh J.A. that the order of the Family Division judge, with all conditions excised, can stand.

[47] After deletion of the conditions that upon relocation to Alberta, Ms. H. and the child shall live with Ms. H.'s parents indefinitely, that Ms. H. is prohibited from removing the child from the home and care of Ms. H.'s parents, and changing "shall" to "may", what is left is:

> Ms. H. may relocate with the child to the Province of Alberta.

[48] While my colleague leaves paragraph 3 in the revised order, a judicial encouragement to commence an application for access to be considered on its own merits is an unnecessary part of the decision, is not an "order" and is, on its face, completely unenforceable. It is, in effect, a denial of access.

[49] Accordingly, what is left is a bare order that a party and the child "may" relocate to Alberta.

[50] While my colleague agrees with both parties, as I do, that the judge had no jurisdiction to order Ms. H. to live with her parents indefinitely nor jurisdiction to prohibit removing the child from the care of Ms. H.'s parents, no concern is shown relative to allowing Ms. H. and the child to relocate to Alberta, unconditionally. Further, the court clearly lacked jurisdiction to order a person to live in any place ("shall relocate") with or without conditions and indefinitely or otherwise. This is recognized by my colleague by changing "shall" to "may" in the revised order she would impose.

[51] The judge's analysis of the best interests of the child plainly calls for giving Ms. H. custody of the child subject to the condition that she live with

her parents. The imposition of an unconditional custody order means that Ms. H. can, if she has any disagreement with her parents, move anywhere she wishes, taking the child with her. The judge specifically found that that was inappropriate. He found that as an individual she was "not able to provide the stability so necessary for a child to fully grow and prosper"; "without the support of [her] parents, it would be difficult for … [Ms. H.] … to provide a safe, nurturing and stable environment for the child".

[52] It is inconceivable that the judge would have made such an unconditional order. His review of the circumstances of Ms. H. makes it clear that he wanted to ensure that Ms. H. and the child would live with her parents and that Ms. H.'s parents would be fully involved. There is simply no basis to conclude that he would permit Ms. H. and the child to relocate without the conditions he considered as fundamental in granting full custody.

[53] My colleague seems to accept the judge's analysis of the best interests of the child but, nevertheless, gives an unconditional custody order – an option the judge considered and rightly rejected – instead of the conditional custody order the judge's analysis calls for.

[54] Further, the failure of the judge to make an access order, or to clearly state why there should be no access, in circumstances where the starting point is shared custody with significant access being exercised by Mr. C., is a fundamental flaw and, in the circumstances, unfair. When a court replaces a shared custody arrangement with a sole custody arrangement, a judge ought to consider and decide what access arrangements might be appropriate. Encouraging Mr. C. to make his own application for access does not cure this error. If more hearings were necessary, the judge ought to have scheduled them instead of placing the onus on a disadvantaged litigant.

[55] A mobility application which requires modifying an existing custody and access regime requires the judge to consider new access provisions. Here, the judge favorably considered access after the move to Alberta, but failed to order any access whatsoever. While he discussed difficulties regarding access once the child was in Alberta, he gave no reasons for failing to address access which, in the circumstances, amounted to effectively denying access, despite his clear view that Mr. C. should have access.

[56] Whatever the complexities, effectively denying access for no justifiable reason is inappropriate. This put Mr. C. in the position of having to mount a fresh application, likely without counsel, while Ms. H. and the child are outside this Province.

[57] My colleague suggests that "the judge was clearly aware of the implications for Mr. C.'s contact with the child". If the judge chose deliberately to impose the burden of applying on Mr. C., that makes the error more grievous. Access should not be reserved for parents who litigate persistently enough. Either contact with Mr. C. is in the best interests of the child or it is not. If it is, it should be ordered; if not, it should not; either way the point should be decided. Further litigation benefits no one.

[58] My colleague, in paragraph 28, concludes that "[t]here is no basis on which to conclude that [the judge] would not have made the order permitting the relocation if the conditions he attached to the order were deleted". On the contrary, I can see no basis whatsoever to assume that he would have made the order as it is clear the relocation was predicated on the conditions he attached: Ms. H. and the child to live with Ms. H.'s parents with the parents having *de facto* custody.

[59] In effect, the judge exceeded his jurisdiction by ordering Ms. H. to relocate with the child and by imposing the impugned conditions. He then failed to exercise his jurisdiction by not dealing with access. Merely changing "shall" to "may" in the revised order cannot save it.

[60] The essence of the judge's order was the condition that Ms. H. live with her parents. That condition was not within the judge's jurisdiction. The order is a nullity.

[61] Accordingly, I would set aside the judge's order.

[62] The next question is whether the record is such that a proper order can be substituted. It is not.

[63] The whole premise of the current order is the relationship with and responsibility taken by Ms. H.'s parents. As they are not parties, those orders are meaningless. It is impossible to determine what approach the judge would have taken in the absence of the restraints he attempted to impose on Ms. H. and the obligations he attempted to place on her parents. Accordingly, I would refer the matter back to the Family Division for a fresh hearing and disposition.

[64] While under the *Children's Law Act* the best interests of the child are of the highest concern, the legislation cannot confer jurisdiction where none exists.

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C. W. White J.A.