IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *M.E.G. v. S.P.*, 2022 NLCA 50
Date: August 23, 2022
Docket Number: 202101H0003

BETWEEN:

M.E.G. APPELLANT

AND:

S.P. RESPONDENT

Coram: Fry C.J.N.L., O'Brien and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201508G0094

Appeal Heard: June 8, 2022
Judgment Rendered: August 23, 2022

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant: Brian Wentzell
Counsel for the Respondent: Victoria Gregory

Authorities Cited:

CASES CITED: *B.J.T. v. J.D.*, 2022 SCC 24; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *M.E.G. v. S.P.*, 2022 NLSC 88; *King v. Low*, [1985] 1 S.C.R. 87.

STATUTES CONSIDERED: *Children's Law Act*, RSNL 1990, c. C-13, sections 26, 31.

O'BRIEN J.A.:

OVERVIEW

[1] This is an appeal of a parenting order respecting an eight-year-old boy, who was born in 2014.

[2] The appeal involves a parenting dispute between the appellant, M.E.G., the boy's paternal grandmother, and the respondent, S.P., the boy's mother.

[3] The grandmother was the boy's primary caregiver since he was an infant, during a time when the boy's mother was not capable of parenting and was not present in his life. The grandmother cared for the boy at her home along with her son, the boy's father, until the father's death in 2015, at which time the grandmother became the child's sole caregiver.

[4] The grandmother's role as the child's primary caregiver was confirmed by interim orders of the Supreme Court of Newfoundland and Labrador that were in force from 2015-2020, from when the child was one until he was six years old.

[5] After several years, the mother returned to the area where her son lived and expressed an interest in becoming part of her son's life, and in parenting. With the grandmother's cooperation and assistance, the mother gradually reintegrated into a parenting role. This occurred first through supervised visits authorized by the responsible government child protection agency, and later through unsupervised visits and overnight access.

[6] The relationship continued gradually and, after a period of time, the grandmother and mother agreed on an arrangement for the equal sharing of the boy's parenting. The agreement, made possible because the grandmother and the mother lived in nearby communities, was that he would continue to live half of the time with his grandmother, in the home where he had lived since his birth. The other half of the time, they agreed, he would live with his mother in her home, which she shared with her new partner and two children from her partner's previous relationship.

[7] There was no discussion or agreement between the parties to move beyond this equal parenting arrangement, and no understanding that this would ultimately lead to the mother having sole parenting rights.

[8] This equal parenting arrangement was in place and operating for approximately one year when a hearing was held in the Supreme Court of Newfoundland and Labrador, in December 2020, regarding the issue of parenting.

[9] At the Supreme Court hearing, the grandmother's position was that the agreed equal parenting arrangement was working well, the child was flourishing, and that it was in his best interests for this arrangement to continue. The grandmother noted that the arrangement provided stability and certainty to the child, who had been through much in his young life, and that he benefitted from continuing to live in an environment that he had known his entire life.

[10] The mother's position was that the boy's rightful place was with her, as his mother, and that it was in his best interests to live with her exclusively. The judge noted that the mother clearly expressed this view at the hearing. It was the mother's position that the shared parenting arrangement should cease, that the grandmother should no longer be a primary caregiver, and that she should be restricted to exercising access.

[11] The judge, in an oral decision delivered on December 15, 2020, ordered that, after a period of transition, the child was to live exclusively with his mother, who would have sole parenting rights. The judge further ordered that the grandmother was to have a minimum of one weekend per month of access.

[12] The grandmother is appealing this decision.

[13] She contends that the judge made errors in law and misapprehended the evidence when assessing the best interests of the child. The grandmother also alleges that the judge erred with respect to the final order. The mother submits that the judge made no error in assessing the best interests of the child or in considering the evidence, and that the order should not be disturbed on appeal.

[14] For the reasons that follow, I conclude that the judge erred in the best interests of the child analysis, that there was a misapprehension of the evidence, and that these were material to the judge's decision and order.

[15] In the result, I would allow the appeal and reinstate equal, shared parenting between the grandmother and the mother, with joint decision-making on all major decisions.

ISSUES

[16] The issues to be considered on appeal are as follows:

1. What is the appropriate standard of review on appeal?
2. Did the judge err in assessing the best interests of the child?
3. Did the judge misapprehend the evidence?
4. Did the judge err in respect of the order?

ANALYSIS

Issue 1: What is the appropriate standard of review on appeal?

[17] The Supreme Court of Canada recently considered the standard of review in *B.J.T. v. J.D.*, 2022 SCC 24, wherein the Court confirmed that the "best interests of the child is the guiding principle in most custody matters" (para. 53). Citing its prior decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 120, the Supreme Court observed that the best interests of the child involves "not only physical and economic well-being, but also emotional, psychological, intellectual and moral well-being" (para. 53).

[18] In *B.J.T.* the Supreme Court of Canada, referencing *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, and *Hickey v. Hickey*, [1999] 2 S.C.R. 518, confirmed that appellate intervention will not be warranted unless, in light of the evidentiary record, there has been "a material error, a serious

misapprehension of the evidence, or an error in law", in the conduct of the best interests of the child analysis (paras. 51, 52 and 56).

[19] The standard of review applied on appeal then is whether, in light of the evidence and the record, the judgment reveals a material error, a serious misapprehension of the evidence or an error in law.

[20] If so, appellate intervention may be required. If not, as the Supreme Court observed in *B.J.T.*, the judge's decision at first instance will attract significant deference, "owing to the polymorphous, fact-based, and highly discretionary nature of such determinations" (para. 58).

Issue 2: Did the judge err in assessing the best interests of the child?

[21] The grandmother alleges errors in the judge's decision respecting the best interests of the child assessment.

[22] She submits that the judge erred by referring, in several instances in the judgment, to a "natural progression" toward the child living with his mother, as opposed to his grandmother. The grandmother argues that this demonstrates the judge's adoption of an outdated and debunked presumption that the mother, not the grandmother, is the natural and preferred parent in this instance. She argues that the judge erred in law by assessing the best interests of the child through this lens, thereby distorting the best interests analysis.

[23] For the reasons that follow, having reviewed the record, including the transcript and the reasons for judgment, I would conclude that the references in the judgment to a natural progression toward the mother having sole custody of the child, considering the context in which they were made, constituted a material error.

The Judge's Decision

[24] Before considering the best interests of the child analysis, the judge made several preliminary observations.

The grandmother had custody from 2015-2020

[25] First, the judge noted that the grandmother applied for and was granted interim custody in 2015, after her son died, at a time when the mother had "some serious issues, including substance abuse issues and personal issues", and "was unable to care for [her son]" (Transcript, December 15, 2020, at 3-4). The

judge observed that "government authorities … became involved in 2015, and because of [the mother's] ongoing issues, this was the reason for [the grandmother] bringing the application" (Transcript, December 15, 2020, at 4).

[26] The judge further noted that the Supreme Court of Newfoundland and Labrador ordered, and the grandmother exercised, interim custody of her grandson since the application in 2015. The interim order granting custody to the grandmother remained in place for a five-year period from 2015-2020, until the order presently under appeal was made in December 2020.

The grandmother was considered a parent under section 26 of the *Children's Law Act*

[27] The judge also stated that the grandmother "stood in the position as the sole parent of [the child] since [her son] passed away" (Transcript, December 15, 2020, at 5).

[28] In considering the grandmother's status in respect of section 26 of the *Children's Law Act*, RSNL 1990, c. C-13 (the "*Act"*), which deals with equal entitlement to seek custody, the judge observed that, although the grandmother was not a natural parent, she occupied a parental role.

[29] The judge stated in this respect:

> Under section 26 of the *Children's Law Act*, the mother and father of the child are equally entitled to custody, as long as it is in the best interests of the child; and although [she] is the grandmother… and not a natural parent so to speak, there is no dispute that since [her grandson] was about four months old [the grandmother] has occupied the role of parent in relation to [him].
>
> (Transcript, December 15, 2020, at 5-6)

[30] This is significant. This is not a situation where a grandparent seeks custody of a grandchild, having never previously parented the child. The grandmother and mother in this case were both considered by the judge to be parents, seeking parenting rights.

The grandmother was considered a parent under section 31 of the *Children's Law Act*

[31] Further the judge stated that, for purposes of section 31 of the *Act*, which sets out the factors considered in assessing the best interests of the child, the grandmother was considered to be a parent. The judge found that "under

Section 31 … although [she] is the grandmother, there's no issue of her establishing herself as a parent. She has been standing in *loco parentis*, … so I'm starting with them both having an equal opportunity or right to have access to [the child] in that context" (Transcript, December 15, 2020, at 6-7).

[32] Again, as the judge noted, the context here is two parents with equal rights to advocate to the court regarding what parenting arrangement is in the child's best interests.

Maximum contact

[33] Finally, as a preliminary matter, the judge referenced the "maximum contact" principle, whereby contact with both parents should be maximized whenever possible, always subject to what is in the child's best interests.

[34] In summary, the judge noted that the grandmother had been a custodial parent, pursuant to Supreme Court interim orders, for five years. The judge further determined that the mother and grandmother were both considered parents in respect of sections 26 and 31 of the *Act*, and confirmed that the maximum contact principle applies, subject to the child's best interests.

Section 31 - Assessing the best interests of the child

[35] The judge next considered section 31 of the *Act*. Section 31(1) states that "the merits of an application … in respect of custody of or access to a child shall be determined on the basis of the best interests of the child".

[36] Section 31(2) sets out a number of statutory factors to be considered in determining the parenting arrangement that is in the child's best interests.

[37] Section 31(2) states:

> (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;

(b) the views and preferences of the child, where the views and preferences can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(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; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

The judge's assessment of the factors under section 31(2)

[38] The judge assessed the statutory factors in section 31(2) with respect to the mother and grandmother, as described below.

[39] Generally, the judge found that the child had a "strong bond with both [the grandmother] and [the mother]" as well as other family members, including the grandmother's partner, who the child "recognizes…as his grandfather", the mother's "new family", including her new partner and two children, and the maternal grandfather (Transcript, December 15, 2020, at 9).

[40] The judge also found that the grandmother and mother both had the ability to parent the child. The judge's consideration of the statutory factors reveals nothing that would obviously disqualify either the grandmother or the mother in terms of parenting.

[41] In several of the factors considered, the judge noted that the grandmother's ability to meet the criteria was readily apparent and uncontested, likely because she had solely parented the child for a number of years. The mother's ability to meet each criteria is, at times, the subject of some discussion by the judge, with the judge addressing various areas of concern before reaching a conclusion on each factor.

Section 31(2)(a) – love affection and emotional ties

[42] Noting the strong bonds that the child has formed with the parties and both extended families, the judge found that "as far as love and affection and emotional ties go, it supports that it is in [the child's] best interest to have abundant contact with both parties and both families" (Transcript, December 15, 2020, at 10).

Section 31(2)(b) – the views and preferences of the child

[43] This factor was not discussed because the child's age meant that his views and preferences were not discernable.

Section 31(2)(c) – the length of time the child has spent in a stable home environment

[44] The judge stated that the grandmother provided a "caring, nurturing, stable environment" for the child over an extended period that has positively fostered his development. The judge also noted that the grandmother's role in this regard enabled the mother to re-establish a connection with her son:

> … the length of time that [the child] has been in a stable environment … deserves some particular comment. I want to be very clear that [the grandmother] has provided [the child] with stability he would not have otherwise had and when [the mother] could not. … you owe everything to [the grandmother] for the health that you find [the child] in. … You have everything to thank for her and why you still need her in your life to help you. She's there as an anchor for you to help with [him]. She accepted responsibilities when you could not, and [her son] was not there to do it, and [the child] has had a caring, nurturing, stable environment with [the grandmother], and it's because of this and also because of her that you have been able to re-establish your own life with [him].
>
> (Transcript, December 15, 2020, at 10-11)

[45] Regarding the mother's situation, the judge acknowledged that her ability to provide a stable environment was non-existent for a number of years, and that this has more recently been established:

> Now, it can't be said that [the mother] has been able to provide a stable environment for [the child] for the same amount of time. Nobody disputes that, but the situation is now that [the mother] can and has provided—also provided stability for [the child] since turning her life around and establishing her relationship with [her new partner]…

> The testimony from all the parties is that [the child's] time with [the mother] as his mom in this environment has been positive for [the child].
>
> (Transcript, December 15, 2020, at 11-12)

[46] Ultimately, the judge concluded that, while there have been potential concerns regarding the mother's situation, both the grandmother and mother provided stable home environments:

> Both parties have been, and I accept, will continue to provide for stability for [the child]. I think both environments—I know there was some concern, and there was evidence about [the mother's new partner's] ex-spouse … but … we can't speculate, and the evidence that's before me is that the environment that [the mother] has living with [her new partner] as her husband and raising the children … is that the environment is stable.
>
> (Transcript, December 15, 2020, at 13)

Section 31(2)(d) – the parties' ability and willingness to provide the child with guidance and education, the necessaries of life and the special needs of the child

[47] On this factor, the judge stated that "they're both capable and willing to take care of the needs and necessaries of [the child]" (Transcript, December 15, 2020, at 14).

[48] In considering this factor, the judge noted the mother's willingness to have her son remain at the school he had been attending (which is closer to the grandmother's home), rather than take him out of that school and have him attend a school closer to where the mother lived.

[49] The judge stated: "In my view, [the mother's] evidence about the fact that she thought it was important that [her son] stay at [the school he had been attending] was evidence of her understanding the need for him to have continuity…" (Transcript, December 15, 2020, at 13-14).

[50] Accordingly, the judge's order in this matter included a provision that the child would continue to attend that school.

[51] This Court was advised on appeal that, contrary to the judge's order, the mother subsequently removed the child from that school, and placed him in a school closer to where she lived. The Supreme Court of Newfoundland and Labrador held the mother to be in contempt of court in this regard, and ordered

that the child be returned to the original school in September 2022 (*M.E.G. v. S.P.*, 2022 NLSC 88).

Section 31(2)(e) – the ability to parent

[52] The judge found that both parties had the ability to parent. Regarding the grandmother, the judge found that "there is absolutely no issue of her ability to parent", because she has parented the child "since he was four months old" (Transcript, December 15, 2020, at 14).

[53] In the mother's case, the judge noted that 'there is also no issue that [the mother] is able to parent [her son]" (Transcript, December 15, 2020, at 14).

[54] The judge referred to one aspect of the mother's behaviour that, the judge observed, "evidences some immaturity". This was the mother's history of posting on social media information about her life and details about the parenting dispute with the grandmother, including making negative comments about the grandmother. The judge noted that this practice was not in the child's best interests and would not "facilitate a productive relationship" with her son (Transcript, December 15, 2020, at 15). The judge stated:

> The next consideration is the ability to parent, and again this requires some comment. With respect to [the grandmother], there is absolutely no issue of her ability to parent [her grandson]. She has been there parenting [him] since he was four months old, but there is also no issue that [the mother] is able to parent [her son], although there is some evidence of which I'm going to speak briefly that evidences that [the mother] is — evidences some immaturity, and this relates to all the kerfuffle about the social media evidence. It does show some immaturity on [the mother's] part to have publicly posted her views on what should happen to [the child]. I think [the mother] understands it's not really in [his] interest to have his mother's struggles for him and her own — about herself broadcast to the world on social media.
>
> (Transcript, December 15, 2020, at 14-15)

[55] Ultimately, the judge determined that the mother's pattern of behavior in this regard would not be a disqualifying factor, and that the mother was "not immature in the way that is going to undermine her ability to be a caring parent and an able parent for [her son]" (Transcript, December 15, 2020, at 16).

[56] However, to address this concern, the judge's order in this matter prohibited the mother from making negative social media posts in future. On appeal, this Court was advised that the mother continued to make these posts, notwithstanding the judge's order, and that the Supreme Court of Newfoundland

and Labrador found the mother to be in contempt of court in this respect (*M.E.G. v. S.P.*).

Section 31(2)(f) – plans proposed for the care and upbringing of the child

[57] The judge acknowledged that neither party presented a formal plan. The judge found this to be "understandable" in the circumstances:

> Neither party would commit to a formal structural plan, and this is understandable. It means that both parties recognize that as [the child] grows his needs may change, and this could mean a need to change whatever formal plan is put in place now, so I didn't find that part … unreasonable. Like in fact, I think it's totally reasonable to say " I can't be too specific. Who knows what the future is going to bring?" I don't take issue with that.
>
> (Transcript, December 15, 2020, at 16-17)

[58] Rather than a formal plan, both argued their respective positions on future parenting arrangements. The mother contended that the child should live exclusively with her, and described the grandmother's future role as a "backup" (Transcript, December 15, 2020, at 17). The grandmother advocated that continuing with the *status quo*, equal parenting arrangement would be in the child's best interests.

[59] The judge described the mother's position, wherein she wanted to be the child's sole custodial parent and decision-maker, as "candid", but suggested that the grandmother's submission that the equal parenting arrangement continue meant that she was not "specific about how she saw the parenting arrangements in the future" (Transcript, December 15, 2020, at 17-18). However, this discounts the grandmother's stated position that the shared parenting arrangement, agreed to by the parties and in place for over a year, was in the child's best interests. The fact that the grandmother was not advocating for change, as the mother was, does not mean that she lacked a plan. The *status quo*, which the grandmother argued was working well, was in her view a tested and effective plan.

[60] The judge did acknowledge that the grandmother was "reasonable and sensible in that she could not be specific about how she saw the parenting arrangements in the future beyond the present 50/50 arrangement that they currently enjoy" (Transcript, December 15, 2020, at 18). However, the judge also stated that the reason the grandmother "did not explain how she saw the eventual parenting arrangements for [the child]" was because, in the judge's view, "[the grandmother] understands that … the natural and continued

progression would be for [the child] to eventually be with his mother". (Transcript, December 15, 2020, at 18). The judge also stated that the grandmother's "reluctance to acknowledge" this "natural progression" arises from a fear of potentially losing custody of the child (Transcript, December 15, 2020, at 18-19).

[61] Several points arise from this.

[62] First, and as will be discussed in detail later, the judge's reference to a "natural and continued progression" that the child eventually live full-time with his mother was, in the context of the judgment, an error. Second, as will also be discussed later, the judge's conclusion that the grandmother "understands" that there is this natural progression that the child move toward living exclusively with the mother, was unsupported by the evidence and directly contrary to the grandmother's testimony. Third, a suggestion that the grandmother was motivated by something other than the child's best interests is contrary to the numerous statements in the judgment that the grandmother "has always had [the child's] best interests at heart" and that "she has always just been concerned about what is best for [him]" (see, for example, Transcript, December 15, 2020, at 11).

[63] While discussing the "proposed plans" factor, the judge's focus returned to a consideration of a stable environment. The judge stated that "in terms of the proposed plan again – and this has been probably one of the things that has made me come to the decision I have, but it's been a balancing of everything, all these considerations" (Transcript, December 15, 2020, at 21).

[64] The judge had previously discussed this stable environment factor (see the discussion under section 31(2)(c), above) and would discuss it further under the next factor, in section 31(2)(g). As noted above, in the discussion under section 31(2)(c), the judge stated that the grandmother provided a "caring, nurturing, stable environment" for many years, and that the mother had more recently been able to offer a stable environment as well (Transcript, December 15, 2020, at 10-12).

[65] Somewhat incongruently, then, the judge determined that the mother's environment was "the eventual most stable environment" for the child. The judge stated: " … in my view, all things being equal, love and the affection and the parenting abilities, the willingness to provide, that the <u>eventual most stable environment</u> would be for [the child] to eventually live with [the mother]" (Transcript, December 15, 2020, at 21; emphasis added). It is not clear from this

how the mother's environment was regarded as "the eventual most stable environment" in this context, or what comparators were considered to determine this, as between two home environments that the judge had previously described as stable. As the judge had found that both parents could provide the requisite stable environment, consistent with the best interests of the child, this consideration of the "eventual most stable environment" should not be a determinative factor, especially as the basis for making this determination is not apparent.

[66] The judge also briefly referenced, in this factor, evidence that the child was thriving under the shared parenting arrangement, and potential concerns related to the child continuing to move between the two parents.

Section 31(2)(g) – the permanence and stability of the proposed family unit

[67] The judge again found that both proposed family units would provide the requisite stability for the child's best interests, stating "… I think I've addressed that … I have no concerns that either family unit is stable ..." (Transcript, December 15, 2020, at 16).

Section 31(2)(h) – the relationship by blood or adoption

[68] On this factor, the judge stated:

> Finally, the relationship is by blood, so, you know, I speak the obvious here. [The mother] is [his] mom. [The grandmother] is his grandmother but has acted as the parent, always being careful to recognize that [the mother] is his mom, so I'm not sure one outweighs the other so much.
>
> (Transcript, December 15, 2020, at 22)

<u>Summary on the assessment of the statutory factors</u>

[69] In summary, the judge's discussion of the statutory factors revealed that both the mother and grandmother were capable of parenting and that, considering the factors individually and cumulatively, there was no one decisive factor in this analysis. The assessment of the factors in this context might fairly be described as neutral. On a fair reading of the judge's discussion of the factors, nothing in the assessment of these factors would be considered determinative that the child's best interests require that he live exclusively with one of the parents, as opposed to maintaining the agreed equal, shared parenting arrangement.

The judge decided that the mother should have sole custody and decision-making authority

[70] Having considered the statutory factors, the judge concluded that, while "both parties are equally capable of parenting", the child would live full-time with the mother and that the grandmother would have "generous access" (Transcript, December 15, 2020, at 23-24). This access was stated to be a minimum of one weekend each month.

[71] The judge stated: "Looking at the factors and balancing them with a view to ensure that the level of contact between [the child] is maintained with [the grandmother] but to also ensure that [the child] has stability, I am of the view that the goal for the parties is that for — it is in [his] best interests for him to eventually reside with [the mother]. This has been the natural progression as [the mother] has grown and matured and returned to [his] life" (Transcript, December 15, 2020, at 22-23).

[72] As indicated in the above passage, the judge stated there was a "natural progression" in this circumstance toward the child living full-time with his mother, that this would ensure that the "level of contact" between the child and grandmother is "maintained", and that it would also ensure that the child "has stability".

[73] Several issues arise from the judge's statements and conclusions, which will be considered next. These are:

i. whether the judge erred by stating that there is a "natural progression" toward the child living full-time with his mother;

ii. whether the decision that the child live full-time with his mother is consistent with the judge's stated desire "to ensure that the level of contact between [the child] is maintained with [the grandmother]" (Transcript, December 15, 2020, at 23); and

iii. having previously found that both family environments were stable, whether the judge erred by referencing stability as a factor favouring the child living full-time with his mother.

(i.) *A "natural progression" that the child would live full-time with his mother*

[74] The judge refers, on several occasions in the judgment, to a "natural progression" toward the child living full-time with his mother.

[75] For example, during the discussion of the statutory factors, the judge indicated that "the natural and continued progression would be for [the child] to eventually be with his mother" (Transcript, December 15, 2020, at 18).

[76] The judge also referenced the grandmother's "reluctance to acknowledge" or "refusal to acknowledge" this "natural progression" toward the child living full-time with the mother (Transcript, December 15, 2020, at 18-19).

[77] After considering the statutory factors, the judge specifically references this natural progression when deciding that the child should live with his mother, stating "it is in [his] best interests for him to eventually reside with [the mother]. This has been the natural progression as [the mother] has grown and matured and returned to [his] life" (Transcript, December 15, 2020, at 23; emphasis added).

[78] The grandmother submits that the judge erred by referring to a natural progression toward the child living with his mother, as opposed to his grandmother. For the reasons that follow, I agree.

[79] The term "natural progression" is not defined or explained in the judgment.

[80] Counsel for the mother suggests the term is neutral. It is submitted that it refers to an increasing trend in the mother's parenting time; that is, the mother originally had no contact with the child and this evolved to the point where she enjoyed an equal parenting arrangement at the time of the hearing. Interpreting the term natural progression in this way, it is suggested, the trend is that the mother's parenting time should increase.

[81] Counsel for the grandmother submits that the term natural progression denotes a presumption or view by the judge that it is natural, in a parenting contest between a mother and grandmother, for the mother's access to progress, and increase, until the child lives full-time with the mother, which is what the judge ordered in this matter. Counsel for the grandmother contends that this suggests a view that, based on the child having a closer biological tie with the mother, the child's proper place is with his mother, and not his grandmother.

Counsel submits that this is inconsistent with assessing parenting based on the child's best interests.

[82] This issue of biological ties to a child in a custody dispute was recently considered by the Supreme Court of Canada in *B.J.T.*

[83] *B.J.T.* involved a parenting dispute between the maternal grandmother, who had cared for the child for an extended period, and the biological father, who had come into the child's life more recently. One of the issues considered was whether the father had some preferred parenting right because his biological tie to the child, as the father, was closer than that of the child's grandmother.

[84] First, it should be noted that *B.J.T.* differs from the case on appeal because it occurs in a child protection context. However, the Supreme Court indicated that the same rationale, and the same standard of review, applied to a private custody dispute. Further, the appellate court appealed from in *B.J.T.* specifically stated that a biological tie was an "important, unique and special" factor to be considered, and a potential tie-breaker when two custodial parents are otherwise equal or almost equal. The Supreme Court concluded that the appellate court had "overstated the importance of a biological tie" in this respect (para. 100). In contrast, the judge in the present case under appeal made no such statements.

[85] Notwithstanding these differences, the Supreme Court's discussion in *B.J.T.*, of biological ties in a custody dispute, is instructive. It informs decisions made in the context of a dispute between a natural parent and another parent (e.g. a grandmother), and is therefore relevant and of assistance in the present case on appeal.

[86] The Supreme Court in *B.J.T.* stated that "there is no presumption favouring biological parents" (para. 86) and that biology has no relevance "in a case like the one at bar, where both legal parents have biological ties and nothing in the record establishes that one type of tie is better than the other" (para. 100).

[87] The Supreme Court also noted that courts "have gradually moved away from an emphasis on parental rights and biological ties in settling custody matters" (para. 88). For example, it cited the decision in *King v. Low*, [1985] 1 S.C.R. 87, wherein the Supreme Court ended the presumptive right of custody in favour of natural parents over adoptive parents.

[88] The Court in *B.J.T.* further observed that, in *King*, it was held that the emotional or psychological bond that has been formed with the child is what is important, and this does not necessarily correspond to the closeness of the biological tie:

> [90] … Further, McIntyre J. endorsed the trial judge's conclusion that a natural parent is preferred not because of biology *per se*, but due to the emotional or psychological bond that is presumed to develop when a parent begins to care for a newborn. The question of which prospective custodial parents developed this bond is a consideration that should prevail over an "empty formula", like a biological tie (p. 104). …

[89] As noted in the above passage, this emotional or psychological bond "is presumed to develop when a parent begins to care for a newborn." Notably, in the case on appeal, the grandmother would have been the primary, and for an extended period, the sole caregiver during the first several years of the child's life.

[90] The Supreme Court in *B.J.T.* also cautioned that "a biological tie in itself should generally carry minimal weight" (para. 101). The Court noted that "too great an emphasis on biological ties may lead some decision makers to give effect to the parent's claims over the child's best interests" (para. 102).

[91] Additionally, and as referenced above, "*King v. Low* concluded that a child's *bond* is a consideration that should prevail over the "empty formula" of a biological tie" (para. 103; emphasis in original).

[92] The Supreme Court in *B.J.T.* added that courts should be "cautious in preferring one biological tie over another absent evidence that one is more beneficial than another" (para. 108). The Court further cautioned, in a statement relevant to both the facts in *B.J.T.* and the facts in the present case on appeal, that:

> [108] … Comparing the closeness or degree of biological connection is a tricky, reductionist and unreliable predictor of who may best care for a child. It fails to take into account how often other family members assume care for children whose biological parents cannot act as caregivers as a result of addictions, mental health issues, criminal behavior, or other challenges. …

[93] Notably, in the case on appeal, the record indicates that the grandmother assumed care of the child in circumstances where her son, the father, had died, and the mother was not capable of filling the role as a caregiver.

[94] The Court in *B.J.T.* concluded that biological ties "will generally carry minimal weight in the assessment of a child's best interests" (para. 109).

[95] Returning to the present case on appeal, and the judge's reference to a "natural progression" that the child live with his mother, it is important to be mindful that, as discussed earlier, the judge found that this dispute is not between a mother and grandmother as such, but between two parents.

[96] On either of counsel's suggested interpretations of the term "natural progression", the fact that the relationship of one parent (the mother) with the child has progressed over time, from non-existent for several years, to supervised visits, and eventually to a shared equal parenting arrangement with the other parent (the grandmother), is undoubtedly positive. However, this does not mean there is some pre-defined trajectory or natural progression to be followed leading, inevitably, to the child living exclusively with the mother.

[97] Nor should a natural progression displace the interests of the other parent (in this case the grandmother), who, as noted by the judge, has cared for the child since infancy and provided a "caring, nurturing, stable environment" in which the child has grown and thrived, on the basis that a natural progression means that the child's place is with his mother, and not his grandmother.

[98] Otherwise, the result in this context is that the grandmother's role, while salutary and honourable, is ultimately a placeholder role, filled by one parent (the grandmother) until the other parent is capable of carrying out the rightful role as mother. The grandmother, in this context, could then take up her own "natural" role, not a primary caregiver role that she performed for six years, but a secondary role, described as a "backstop".

[99] By way of comparison, it would be unlikely to find a similar reference, for example in a custody dispute between two parents who happen to be the natural parents of a child, to a natural progression toward the child living exclusively with the father or the mother. Such language in that context would be considered misplaced, and inconsistent with the current state of the law. The unsuccessful parent might be concerned that the best interests of the child analysis was affected or skewed by some presumption that a natural progression

existed in favour of the other parent, and that this was a relevant factor in the decision.

[100] The language is equally out-of-place in the present context, where the parents before the Court happen to be not a mother and a father, but a mother and a grandmother. To say there is a natural progression toward the mother in this context could be interpreted as suggesting that the natural progression is away from the other parent, the grandmother. Had the stated natural progression in this case been the reverse, toward the child living full-time with his grandmother, the mother would likely be concerned about the impact this had on the outcome.

[101] Notably, the references to a "natural progression" and a "natural and continued progression" were made at critical points in the judgment, when the judge was assessing the statutory factors to determine the best interests of the child, and immediately thereafter when the judge ultimately decided that the shared parenting arrangement would end, and the child would live full-time with his mother. The words and context create an impression that, as the other statutory factors were relatively equal and neutral, this natural progression toward the child living with one of the parents, the natural mother, was a relevant and material consideration.

[102] The judge acknowledged the successful parenting record of the grandmother since the child was an infant, and that the grandmother has provided a stable and loving environment and facilitated an equal parenting arrangement with the mother because it was in the child's best interests to do so. The judge also acknowledged the mother's successful journey in recovery, and commended her for dealing with issues that previously made it impossible to parent her child. It is not evident, in this context, how or why there would be a natural progression leading in either direction.

[103] Moreover, the best interests of the child analysis includes no presumption that any such natural progression exists. There is no natural progression in this context; rather the sole determinant with respect to the child's parenting is whatever arrangement is in the child's best interests.

[104] However, the various references in the judgment to a natural progression toward the child living exclusively with the mother suggests that this was a relevant and, based on the context in which it was used, perhaps even a determinative factor in the decision.

[105] Having considered the evidentiary record, including the transcript and the reasons for judgment, I would conclude that the references in the judgment to a "natural progression" and a "natural and continued progression" that the child live with his mother, considered in context, constituted an error in law.

(ii.) Maintaining contact with both parents

[106] The judge stated that the decision that the child live full-time with his mother was made "with a view to ensure that the level of contact between [the child] is maintained with [the grandmother]" (Transcript, December 15, 2020, at 23).

[107] Further, as discussed above, when considering section 31(2)(a) of the *Act*, the judge concluded that "as far as love and affection and emotional ties go, it supports that it is in [the child's] best interest to have abundant contact with both parties and both families" (Transcript, December 15, 2020, at 10; emphasis added).

[108] However, it is unclear how the decision purports to achieve this. The decision drastically reduces the previous level of contact with the grandmother, which went from equal shared parenting, to having access of one weekend per month.

[109] As noted above, the judge had previously referenced the maximum contact principle, whereby contact with both parents should be maximized, subject always to the child's best interests.

[110] However, it is not explained how the change in parenting, and the diminished parenting time ordered for one parent (the grandmother), either accords with this principle or otherwise is in the child's best interests.

(iii.) A stable environment

[111] The judge's decision stated that it was in the best interests of the child to live with his mother, to "ensure that [he] has stability" (Transcript, December 15, 2020, at 23).

[112] Again, it is not apparent how this is achieved by having the child live exclusively with his mother.

[113] As discussed above when reviewing the statutory factors, especially under section 31(2)(c) – the length of time the child has spent in a stable home

environment, and section 31(2)(g) – the permanence and stability of the proposed family unit, the judge found that both family units were stable. The judge concluded that there had never been any issue with stability in the years the child had lived with his grandmother. The judge also found that, as a result of changes made in her lifestyle and home environment, the mother also provided a stable environment.

[114] Subsequently, as discussed above, the judge referred to the mother's environment as the "eventual most stable environment" (Transcript, December 15, 2020, at 21). This is inconsistent with the discussion and conclusions reached earlier in the consideration of sections 31(2)(c) and (g) of the *Act*. As discussed above, the judge previously found that both parents could provide the requisite stability, consistent with the best interests of the child. As such, the judge's statement that, as between two stable home environments, the mothers environment was "the eventual most stable" one, should not be a determinative factor.

Conclusion on this issue

[115] In the result, and for the reasons provided, I would conclude that the judge erred in the assessment of the best interests of the child, and that this materially affected the decision in this matter (*B.J.T.*, at paras. 51, 52 and 56).

Issue 3: Did the judge misapprehend the evidence?

[116] The grandmother submits that the judge misapprehended her evidence.

[117] On several occasions in the judgment, the judge indicated that the grandmother believed or agreed that the child should live full-time with his mother. However, on each occasion the judge also acknowledged that the grandmother did not ever testify to this effect in her evidence, and that, in fact that her evidence was the opposite. That is, the grandmother testified that it would be in the child's best interests to continue with the equal parenting arrangement.

[118] On one occasion, the judge stated that the grandmother "understands" that "the natural and continued progression is for [the child] to eventually be with his mother", even though the judge acknowledged that this was actually contrary to the grandmother's testimony:

> … in my view I think [the grandmother] understands that, given how things have progressed with [the mother] returning to [the child's] life as a meaningful parent, that

> the natural and continued progression would be for [the child] to eventually be with his mother. [The grandmother] at no point testified that she could see this or that this could happen. She just said, "No, it's in [his] best interest to be 50/50".

(Transcript, December15, 2020, at 18; emphasis added)

[119] On another occasion, the judge stated she did not believe that the grandmother was actually opposed to the child living with the mother. Again, this was directly contrary to the grandmother's testimony, as the judge noted:

> While I find that [the grandmother] was reluctant to face the possibility that [the child] might eventually be living with [the mother], I do not believe that she is actually opposed to this if it is in [his] best interests. She didn't say that. She never said that. She did not testify at any point that I recall that she could see it in [his] best interest …

(Transcript, December 15, 2020, at 20; Emphasis added)

[120] On a further occasion, the judge stated that the grandmother "accepts" that the child should be living with his mother even though, again, the grandmother's testimony does not support this:

> … I believe that [the grandmother] accepts that with that continued positive development and re-establishment of the relationship of [the child] and his mom that [the child] should be living with [the mother]. I don't think she denies this even though she didn't testify to it.

(Transcript, December 15, 2020, at 21; Emphasis added)

[121] The grandmother argues that the judge erred by misapprehending her evidence in this regard because the judge's view (that the grandmother believed the child should live full-time with his mother, and that the grandmother would not be opposed to this parenting arrangement) is not supported by her evidence, nor by any other evidence at trial.

[122] A review of the transcript confirms that the grandmother testified consistently that it was in the best interests of the child for the equal parenting arrangement to continue between her and the mother. Her testimony and belief in this regard was tested on cross-examination, and it remained consistent.

[123] There is no evidence to support the view that the grandmother "understands that, given how things have progressed with [the mother] returning to [the child's] life as a meaningful parent, that the natural and continued progression would be for [the child] to eventually be with his mother". Similarly, there is no evidence to support the conclusion that the grandmother is

not "actually opposed" to the child living with his mother full-time. Nor is there evidence that the grandmother "accepts" that the child should live full-time with his mother. Rather, the grandmother's unequivocal testimony was that this would not be in the child's best interests.

[124] The conclusion follows that the evidence in this respect has been misapprehended. This is a material misapprehension going to the core of the grandmother's position and argument before the court. It suggests that the grandmother, who clearly advocated that an equal shared parenting arrangement is in the child's best interests, is actually not opposed to a very different parenting arrangement put forward by the other parent, whereby the child would live full-time with that other parent.

[125] There is no evidence, from the grandmother or any other witness, including the mother, to support a conclusion or inference that the grandmother's belief or view regarding the child's best interests was anything other than that to which she testified.

[126] Applying the standard of review in *B.J.T.*, I would conclude that, in light of the evidence and the record, the judgment reveals "a serious misapprehension of the evidence" (paras. 51, 52 and 54) in this regard.

Issue 4: **Did the judge err in respect of the order?**

[127] The grandmother submits that the judge erred regarding the order made.

[128] The judge indicated in the decision that the child should have "generous access" with respect to the grandmother (Transcript, December 15, 2020, at 23-24). The judge stated in the decision that, as "a minimum [the child] will get at least one weekend" each month for access with his "grandmother and grandfather" [i.e. the grandmother's partner] (Transcript, December 15, 2020, at 25-26). The judge added: "That's the minimum. I want him to have more, but that is the minimum" (Transcript, December 15, 2020, at 26).

[129] In the order, there is a further reference to "generous access to be given to [the grandmother]" and specifically that "the minimum amount of access for [the grandmother] will be one weekend per month" (Judge's Order, December 15, 2020, at clause 4). The judge set the baseline at one weekend a month and left it to the parties to determine the exact amount of access.

[130] The grandmother argues that this was an error. She submits that the judge's statements, that one weekend per month is the minimum access and that

the judge wanted the child “to have more time” than this with his grandmother, suggest that the judge believed that it was in the child’s best interests that he receive more access than one weekend per month.

[131] As such, to give effect to the child’s best interests, the grandmother submits that the judge should have ordered increased access, and should not have left it to the parties to determine this.

[132] While there is merit in having flexibility in a parenting order, in terms of how access is provided, and while there is also merit in having the parties act cooperatively in the operation and functioning of a parenting order, this is not the situation here.

[133] The judge’s comments in the decision, that the grandmother was to have generous access and that the judge wanted the child to have more access than one weekend per month, are not consistent with ordering a minimum of one weekend a month and leaving it to the parties to determine whether more than one weekend is provided.

[134] Nor is this consistent with the judge’s assessment under section 31(2)(a), discussed above, wherein the judge concluded, “it is in [the child’s] best interest to have abundant contact with both parties and both families” (Transcript, December 15, 2020, at 10).

[135] While negotiation and cooperation is always expected and encouraged in family law matters, the reality in the present case was that the parties looked to the Court to determine the parenting arrangement that was in the child’s best interests.

[136] The judge’s comments about generous access and wanting the child to have additional time indicates that the judge believed it was in the child’s best interests to spend more than the minimum one weekend a month with his grandmother.

[137] Accordingly, as the language of the decision indicates it was in the child’s best interests to have ordered greater access to the grandmother, this should have been ordered, and not doing so was an error.

CONCLUSION AND DISPOSITION

[138] As stated in *B.J.T.*, appellate intervention in this context is inappropriate absent "a material error, a serious misapprehension of the evidence, or an error in law" (paras. 51, 52 and 56). Having found, for the reasons provided, that the judge erred in the assessment of the best interests of the child and with respect to the evidence and the final order, this Court may intervene in this context.

[139] Such intervention may take different forms, for example including sending the matter back for a new hearing or, if it is possible and appropriate to do so, providing for a different parenting arrangement than the one ordered by the judge.

[140] In this case, it is apparent to the Court that the time and costs (financial, emotional, and otherwise) that would be engaged by sending the matter back for a re-hearing would be prohibitive, and would not serve the best interests of the child, or the parties.

[141] In this matter, there exists a sufficient evidentiary record to enable this Court to make an order regarding parenting. The transcript is robust, and thoroughly reflects the parties' evidence and positions. No further evidence would be required to inform a decision in this context.

[142] The Court also has the benefit of the judge's decision and counsel's submissions on the merits of the appeal, as well as supplementary submissions received from counsel respecting the parties' positions in the event that this Court concluded that appellate intervention was warranted. In these circumstances it is possible, and appropriate, for this Court to make an order in this matter.

[143] Having considered the evidentiary record, the judge's decision, and the oral and written submissions of counsel on appeal, I would conclude that it is in the best interests of the child to reinstate equal, shared parenting between the grandmother and the mother, with joint decision-making on all major decisions.

[144] In the result, I would allow the appeal.

[145] Accordingly, the provisions of the judge's order that direct that the child live full-time with his mother, and have a minimum one weekend of access each month with his grandmother, are set aside.

[146] In terms of an equal parenting arrangement, the Court is mindful of the fact that, when the parties first agreed to this arrangement, the child was younger and the arrangement provided for parenting on a three-day on, three-day off basis. Given that the child is now older, and has an established school routine, it is more appropriate that the time periods be longer, to reflect this. Therefore, rather than three days, the equal parenting arrangement shall be week to week, with the weekly transition occurring each Friday afternoon, at the end of the school day. The grandmother's first week of parenting shall begin on Friday September 16, 2022.

[147] All other relevant provisions in the judge's December 2020 order, including the provisions under clauses 11-16 under the heading "Decision Making and Order", are to remain in effect. These include provisions relating to day-to-day decision making, the prohibition against unilaterally moving the child out of the area in which he lives, the requirement that the child remain at the school provided for in the order, travel and removal of the child from the province, discussion with the child concerning the legal proceedings and changes in access, and the prohibition against posting negative comments about the other party, or the proceedings, on any social media platform.

[148] This Court is also mindful that this child has already experienced major changes due to the ongoing parenting dispute between his mother and his grandmother. He has gone from living exclusively with his grandmother for the first years of his life, to an equal, shared parenting arrangement between his mother and grandmother. As a result of the judge's December 2020 order, he has been living full-time with his mother for almost a year, since September 2021. Ongoing change of this sort is neither optimal nor desired. However, the grandmother has exercised the right to appeal the judge's decision, and the appeal has been allowed. This now leads to a further change, with a reversion back to equal shared parenting between his mother and grandmother.

[149] The fact that a child has lived in a parenting arrangement for a period of time after a court order, pending appeal, is certainly relevant and important. However, it is not determinative in terms of whether that same parenting arrangement will continue after the appeal. As *B.J.T.* illustrates, in a case where the Supreme Court reversed an appellate court's decision and ordered that a child cease residing with his father in western Canada and return to live with his grandmother in eastern Canada, the review of a parenting decision on appeal may result in a different parenting arrangement. Such is the result in the present matter.

[150] Finally, having considered the circumstances in this matter, there shall be no order as to costs.

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F. P. O'Brien J.A.

I concur: _____

D. E. Fry C.J.N.L.

I concur: _____

W. H. Goodridge J.A.