THE LAWYER'S DAILY

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Family

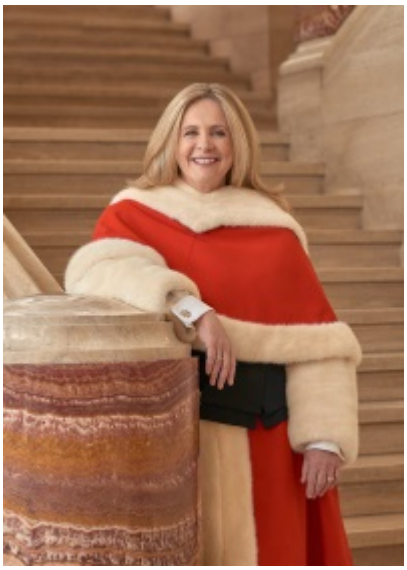
SCC rules biological ties carry 'minimal weight' in determining child's best interests for custody

By **Cristin Schmitz**

(June 3, 2022, 6:01 PM EDT) -- Reminding appellate courts to give "significant" deference to lower courts' custody determinations in child protection matters, the Supreme Court of Canada has ruled 9-0 that a child's biological ties to those competing for custody should mostly be accorded "minimal weight" in determining the child's best interests.

Justice Sheilah Martin's reserved reasons for judgment handed down June 3, explain why the top court last December restored a P.E.I. Supreme Court judge's determination in *Prince Edward Island (Director of Child Protection v. A.D.D.)*, [2020] P.E.I.J. No. 25, that a now-8-year-old boy be returned to the custody of the person who had cared for him for much of his life, his maternal grandmother in P.E.I., notwithstanding that the child has a closer biological tie to his father in Alberta, who was "more or less" equally able to care for his son, but was unwilling to support and foster the child's relationship with his grandmother, mother and older half-brother in P.E.I. (unless a court ordered him to do so): *B.J.T .v. J.D.*, 2022 SCC 24.

Justice Martin's reasons for judgment provide judges and lawyers with welcome guidance for grappling with child welfare cases and, additionally, specifically address the legal questions of (1) when can an appellate court intervene in determining the best interests of a child in custody matters — in this case, the standard of review for disposition decisions pursuant to child protection legislation and its application; and (2) what, if any, weight does the "natural or biological parent factor" carry in deciding a child's best interests in a custody/child welfare matter.



Justice Sheilah Martin

On the issue of standard of appellate review in custody matters, Justice Martin ruled that "significant deference is owed to a judge's determination of which custody arrangement is preferable in light of a child's best interests" and further that "appellate intervention is only warranted where a judge makes a material error, a serious misapprehension of the evidence, or an error in law" – a standard the P.E.I. Court of Appeal's majority did not meet in the case at bar.

With respect to what role biological ties should play in courts' custody determinations at common law

(i.e. absent legislated direction on biological ties), Justice Martin concluded that "while it is not an error for a court to consider a biological tie in itself in evaluating a child's best interests, a biological tie should generally carry minimal weight in the assessment."

She held that "a parent's mere biological tie is simply one factor among many that may be relevant to a child's best interests and judges are not obliged to treat biology as a tie-breaker when two prospective custodial parents are otherwise equal. Placing too great an emphasis on a biological tie may lead some decision makers to give effect to the biological parent's claim over the child's best interests and parental preferences should not usurp the focus on the child's interests."

Justice Martin elaborated that "a child's bond is a consideration that should prevail over the 'empty formula' of a biological tie. A biological connection is no guarantee against harm to a child and a child can be equally attached to persons who are not their biological parents and those persons can be equally capable of meeting the child's needs."

In addition, she explained, the benefit of a biological tie itself may be intangible and difficult to articulate, which makes it difficult to prioritize it over other best interests factors that are more concrete.

"The importance of a biological tie may also diminish as children are increasingly raised in families where those ties do not define a child's family relationships," Justice Martin said. "Further, courts should be cautious in preferring one biological tie over another absent evidence that one is more beneficial than another. Comparing the closeness or degree of biological connection is a tricky, reductionist and unreliable predictor of who may best care for a child."

Justice Martin's judgment was hailed by Laura Cárdenas of IMK LLP in Montreal, who represented the intervener LGBTQ Family Coalition. Her client argued at the Supreme Court that the P.E.I. Court of Appeal's "outdated" majority decision below was rooted in a biology-focused assessment of best interest factors that does not align with the requirement that such analysis must be child-centred, and consistent with the ongoing evolution of the definition of "parent." The upshot of the majority decision below would be that a custody claim of a parent who meets the legal definition of "parent," but lacks a biological tie to their child, would automatically be prejudiced in the best interests analysis, the intervener urged.

Laura Cárdenas, IMK LLP

"Adopting this view will have serious consequences for every child who has a non-traditional or non-biological parent," including children in LGBTQ-plus families, Cárdenas told the court in arguing against the notion that a parent's biological tie to their child should be a predominant, or tie-breaking, factor in a custody dispute.

"It's common in LGBT+ families for some, but not all, parents to have a biological tie with their children," Cárdenas told *The Lawyer's Daily*. "The decision of the Supreme Court makes it clear that if these parents eventually dispute the custody of their children, their child's best interest is what will be determinative in the custody dispute — not the fact of a biological tie."

Justice Martin's unanimous reasons for judgment "greatly diminish the importance of the biological factor," Cárdenas said. "Biological ties will only be relevant if they have some links to the child's best interest."

Moreover, the Supreme Court clarifies that the importance of biological ties stems from a historical presumption that they are a proxy for a bond between the parent and the child, she said. "Justice Martin also refers specifically to 'contemporary shifts in parenting and family composition' and the fact that there is a growing number of families in which biological ties do not define a child's family relationships. All of this further undermines the relevance of biological ties, which is precisely what the LGBT+ Family Coalition advocated," Cárdenas remarked.

Ryan Moss, Cox & Palmer

Counsel for the successful appellant grandmother, Ryan Moss of Cox & Palmer in Charlottetown, said the ruling basically reaffirms the standard of appellate review set out in *Van de Perre v. Edwards*, 2001 SCC 60, and applies it in the context of reviewing determinations of custody in child welfare cases. "There's significant deference owed," he said.

"The piece that probably surprised me the most is how much commentary there was from the court in providing direction and kind-of justifications to courts, when dealing with child protection matters," Moss said. "There's a good portion of the decision that really provides some guidance into how and what judges can consider when the director [of child protection], state actors, are playing a part in a court family matter."

Moss said that Justice Martin's judgment recognizes that child protection authorities have "full control of the child in their care and how or where they decide to place them really affects the [custody] situation, and that's something that judges can, and should, consider."

"As someone who has represented other parents in child protection matters as well, I think that kind of guidance to the courts, and to lawyers and parents, is helpful."

Moss noted the top court has not "closed the door" on biological ties as a factor in custody determinations, when relevant, but in most cases it's not relevant, and carries minimal weight in analyzing the child's best interests, he said. Moreover, given increasing custody claims from non-biological parents, it's "nice to have that confirmation from the court that as a non-biological parent you're not immediately faced with an uphill battle just because you don't share 50 per cent of your DNA with the child."

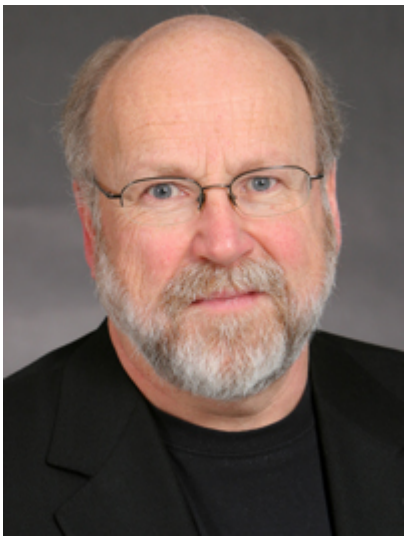
Nicholas Bala, Queen's University

Queen's University law professor Nicholas Bala, an authority on legal issues related to children, youth and families, commended Justice Martin's judgment as worth reading by all family law lawyers. "There's a lot in it," he observed.

The Supreme Court itself notes that "first and foremost, this appeal turns on the due operation of appellate deference in child custody matters," Bala quoted. "Similar to the decision two weeks ago in *Barendregt v. Grebliunas*, 2022 SCC 22, the court emphasized the narrow scope for appellate review in parenting cases and the importance of the role of trial judges who actually meet the parties and can assess their personalities. The court also recognized the value of 'finality 'in family litigation, though recognizing that parties can seek review if there is a change in circumstances."

Bala said the top court also recognized that child protection agencies have enormous authority over children and parents, and that their exercise of state power is constitutionally subject to the supervision of the superior courts. "The actual decision in this case to immediately remove this young boy from his sole caregiver [the appellant grandmother] and place him with foster parents, who were unknown to him, was very troubling, and clearly concerned both the trial judge and the Supreme Court."

Bala also highlighted the Supreme Court's recognition that a party's willingness to support a child's relationship with the other party/parent can be significant factor in the best interests of the child analysis. "This is significant for 'alienation' cases."



Rollie Thompson, Dalhousie University

Dalhousie University law professor Rollie Thompson, a Canadian family law authority, said Justice Martin "clearly" rejected the Appeal Court majority's treatment of the father's biological parent status as a tiebreaker. She "makes an important point — here both the maternal grandmother and the father had 'biological ties' to the child and both were 'parents' in the eyes of the [P.E.I.] *Child*

Protection Act, a point made a number of times by judges during oral argument."

Thompson noted that in Canada, for many years, before and after *King v. Low*, courts have taken a "functional" and "child-centric" approach to parenting, rather than one based upon "status".

"Whoever performs the functions of parental caregiving is a 'parent' in the eyes of the child and thus in the view of the law," he explained.

The expansive definitions of "parent" in family law and child protection statutes, including in P.E.I., reflect that approach, Thompson observed. "To be honest, I was surprised that Justice Martin didn't just bury any hint of natural parent status as a factor."

Instead she says (in para. 100) that a court "may consider" biological ties and that it's not "an error in itself", "then proceeds again to give good reasons why you shouldn't give such ties much weight on their own," Thompson expanded. "It might have been better to just say, 'it's not a factor' in a best interests analysis, apart from actual caregiving by a biological parent."

Thompson predicted the judgment might do away with "biological ties" alone as a factor in best interests analysis. "In the modern family context, you would not have thought that was necessary to be said, again, but it is important that the SCC said so, or came so close to saying so."

With respect to appellate deference to hearing judges, Thompson said P.E.I. Chief Justice David Jenkins, who was dissenting below, nailed it by stating that it was the hearing judge, Justice Nancy Key's, "call to make" in a hard case deciding best interests. "In these three cases heard together – *Barendregt, Kreke v. Alansari* 2021 SCC 50 and *B.J.T.* – the SCC restored a trial decision, after insufficient deference and unjustifiable intervention by courts of appeal," Thompson remarked.

He pointed out that the Director of Child Protection came in for considerable criticism when Justice Martin upheld the hearing judge's reasons with respect to her consideration of the conduct of child protection authorities. "The director's conduct in this case is a good example why we need child protection courts to assiduously supervise and check the exercise of the huge powers of child protection authorities."

At press time, *The Lawyer's Daily* had not received a response to queries made to counsel for the respondent father. There was also no comment from the intervener office of the P.E.I. Director of Child Protection, whose actions the hearing judge found were aimed at the father becoming the everyday parent, without consideration of the possibility of the grandmother becoming the permanent guardian.

The P.E.I .Court of Appeal's majority held that the hearing judge's consideration of the director's conduct was a legal error as the conduct was an "irrelevant" aspect of the case.

Justice Martin did not agree, following a painstaking review of the record. Rather, the Supreme Court of Canada held that the hearing judge's consideration of the child protection authorities' actions "did not inappropriately taint her analysis."

In that regard, Justice Martin noted that after the child protection authorities initially apprehended the then-4-year-old child because he was in need of protection from his mother, who was suffering from mental illness, the director directed every aspect of the child's life such as where and with whom he lived, where he went to school, and who could see him when, and the terms of access.

"It was, therefore, not a legal error for the hearing judge to consider the director's conduct insofar as it allowed her to gain an understanding of what had happened, how a certain status quo was created, and the conduct and position of the parties," Justice Martin held. "It was open to the hearing judge to take into account the different treatment provided to the father and the grandmother and to conclude that the director promoted the child's relationship with his father over the pre-existing connection with the grandmother. The hearing judge was also allowed to consider how any unbalanced facilitation of access the director gave to each parent would have had an impact on their bond with the child."

The P.E.I. Court of Appeal overruled the hearing judge, and granted permanent custody to the father,

on the basis, in part, that the hearing judge denied the father's right to be heard by failing to grapple with his principal legal argument that a child's welfare is best served in the custody of their natural parents, and that natural parents should be deprived of custody only when clearly necessary. Moreover, when a parent and non-parent are "more or less equal," after all relevant factors going to the child's best interests are considered, or when the non-parent is only slightly better, the "natural parent factor" is decisive, the majority held: *J.D. v. Prince Edward Island (Director of Child Protection),* 2020 PECA 14.

In allowing the grandmother's appeal, the Supreme Court of Canada ruled that the Appeal Court's majority failed to give appropriate deference to the hearing judge's assessment of the child's best interests and that there was no error in the hearing judge's assessment of the best interests of the child. She based her analysis on an extensive review of the evidence, and was not compelled to decide in favour of the father simply due to his closer biological tie to the child.

The hearing judge gave custody of the child to the grandmother after he was found to be in need of protection and removed from his mother's care. She found that the competing parties – who both qualified as "parents" under P.E.I.'s *Child Protection Act* – had fairly equal abilities to care for the child, but gave weight to the factor that the grandmother was willing to support and facilitate the child's relationship with his father and other family in Alberta, while the father was not willing to facilitate the child's relationship with his family in P.E.I., which included visits to the child's mother and with his 17-year-old half brother, with whom the child is close.

The hearing judge noted that W.D. had the right to the love, affection, and ties of his families in both Alberta and P.E.I. She found as a matter of fact that the grandmother would promote the relationship with the father and his family but, unless ordered by the court, the father would not ensure W.D. would have a meaningful relationship with his P.E.I. family.

The Supreme Court of Canada said the father and mother were married in 2012 in Alberta. They separated less than a year later when the mother moved to P.E.I. without informing the father that she was pregnant. Shortly after the child was born in 2013, his grandmother went to reside with the mother and child to help support them. When the child was 4 years old, and she was suffering from mental illness, the mother refused to allow the grandmother to have further contact with him. The child was then apprehended by the Director of Child Protection. He was eventually placed in the grandmother's foster care. The director subsequently alerted the father to his son's existence. The father and the grandmother then both sought custody.

Photo of Justice Sheilah Martin by Supreme Court of Canada Collection

If you have any information, story ideas or news tips for The Lawyer's Daily, *please contact Cristin Schmitz at* Cristin.schmitz@lexisnexis.ca *or call 613 820-2794.*