

CANADA / JUDGMENT

A.H. v. M.B.

2025 BCSC 873

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 873 A.H. v. M.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.H. v. M.B.,

2025 BCSC 873

Date: 20250509

Docket: E232839

Registry: Vancouver

Between:

A.H.

Claimant

And

M.B.

Respondent

Before: The Honourable Madam Justice Sukstorf

On appeal from: An order of the Provincial Court of British Columbia, dated November 1, 2023 (A.H. v. M.B., Vancouver Registry File No. F-162449).

Reasons for Judgment

The Claimant Appearing in Person:

A.H.

Counsel for the Respondent:

H. Basi

Place and Date of Hearing:

New Westminster, B.C.

June 5 and 6, 2024

Port Coquitlam, BC

November 6 and 7, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 9, 2025

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I. OVERVIEW

- [1] The parties began living together in a marriage-like relationship in 2003. They married on August 20, 2010, separated on February 9, 2016, and were divorced on May 26, 2017.
- [2] They have two children: A.B. born in 2012, and N.B., born in 2014 (collectively, the "Children").
- [3] At the time of separation, the parties resided in Kitimat, British Columbia.

- [4] On March 15, 2016, they entered into a Separation Agreement (the "Separation Agreement"), which was filed in the Provincial Court of British Columbia. Among its terms, the Separation Agreement permitted the appellant, A.H., to relocate to Gibsons, British Columbia, with the Children.
- [5] The Separation Agreement was amended on May 10, 2018, to add additional parenting terms which dictated that the Children would spend one week with the respondent, M.B., during Christmas and spring breaks, approximately one month with him during summer holidays, and would engage in regular Skype contact with him.
- [6] Over time, significant conflict developed between the parties, particularly regarding decision-making about the Children. For context, after the Children relocated to Gibsons, they developed serious behavioural issues. These behavioural issues coincided with the appellant's new romantic partner becoming active in the Children's lives. In response, the appellant managed the Children's behavioural issues unilaterally and made serious medical decisions without the respondent's input, despite the respondent's repeated requests for meaningful involvement.
- [7] These circumstances gave rise to the application that is the subject of this appeal. On June 1, 2022, the appellant filed an application with the British Columbia Provincial Court, seeking:
- a) exclusive parenting responsibilities;
 - b) an order prohibiting the respondent from participating in joint meetings with the Children's professionals;
 - c) alternating selection of the summertime parenting schedule;
 - d) regular contact between the Children and the respondent during his parenting time; and
 - e) a requirement that the respondent provide detailed flight information in relation to parenting time.
- [8] On January 25, 2023, the respondent filed an amended reply and counter application. The respondent opposed the relief sought by the appellant and requested:
- a) that the Children's primary residence be changed to his residence in Kitimat; and
 - b) that the Children be permitted to fly unaccompanied using the Unaccompanied Minors' Program.
- [9] The appellant filed a reply to the counter application on February 17, 2023, opposing the relief sought by the respondent.
- [10] Over various dates between February and September 2023, a 14-day trial was conducted in Sechelt at the Provincial Court of British Columbia. This was the parties' third trial related to this family law dispute.

- [11] Judge Smith delivered her parenting decision in two parts: first an oral ruling on November 1, 2023, followed by the corresponding written reasons on November 9, 2023 ("First Decision"), and a second decision addressing child and spousal support on April 23, 2024.
- [12] In her First Decision, Smith P.C.J. granted the respondent sole parenting responsibilities and ordered that the Children relocate to Kitimat, to reside primarily with the respondent.
- [13] The appellant filed a notice of appeal on November 3, 2023, disputing Smith P.C.J.'s First Decision on several grounds. The respondent opposes the appeal and argues that Smith P.C.J.'s decision should be upheld.
- [14] On November 10, 2023, shortly after Smith P.C.J. provided her full written reasons of the First Decision, A.H. requested that Smith P.C.J.'s parenting order be stayed until the appeal could be heard. Judge Smith dismissed the request for a stay.
- [15] On May 16, 2024, the respondent filed an application to adduce fresh evidence on appeal. On May 24, 2024, the appellant filed a cross-application to adduce fresh evidence
- [16] Before me, therefore, is the appellant's appeal of Smith P.C.J.'s First Decision related to parenting, as well as a request by both parties to adduce fresh evidence on appeal.

II. RELIEF SOUGHT

- [17] With respect to the substance of the appeal, the appellant seeks the following relief:
- that the appeal be allowed;
 - an order remitting the matter to the Provincial Court for a new hearing, in accordance with such directions as this Court may consider appropriate;
 - such further and other relief as this Court may deem just; and
 - costs of the appeal.
- [18] The respondent asks that the court uphold Smith P.C.J.'s decision.
- [19] Both parties request that they be allowed to adduce fresh evidence at the appeal hearing.

III. GROUNDS OF APPEAL

- [20] The appellant raises the following grounds of appeal:
- That the trial judge erred in law by providing partial reasons for judgment, or, in the alternative, erred in law by failing to provide adequate reasons;
 - That the trial judge erred in law by granting the respondent sole parental responsibilities, despite the fact that the respondent had not made an application for such relief, and that no such application was before the court at trial;

- c) That the trial judge erred in law by setting aside the parties' Separation Agreement dated March 15, 2016, as modified by the order of Judge Ferris pronounced May 10, 2018, without considering whether a material change in circumstances had occurred;
- d) That the trial judge erred in law, or made an error of mixed fact and law, in her assessment of the testimony of the Children's teacher, L.P., particularly as to whether the appellant was the preferred parent for the children; and
- e) That the trial judge erred in law, or made an error of mixed fact and law, in her assessment of the appellant's credibility.

IV. STRUCTURE OF REASONS

[21] As the parties have raised both procedural and substantive issues, I begin by addressing the applications to adduce fresh evidence, as these applications determine the evidentiary record for the appeal. I will then consider each ground of appeal advanced by the appellant, applying the applicable standard of review.

V. Applications to Adduce New Evidence on Appeal

A. Applicable Legal Test

[22] The legal test for the admission of fresh evidence on appeal was established by the Supreme Court of Canada ("SCC") in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 (S.C.C.) [Palmer]. In *Palmer*, the SCC concluded that, in order for fresh evidence to be admitted, the evidence must meet all four of the following criteria:

- a) **Relevance:** the evidence must bear upon a decisive or potentially decisive issue;
- b) **Due Diligence:** the evidence could not have been obtained at trial with reasonable diligence;
- c) **Credibility:** the evidence must be reasonably capable of belief; and
- d) **Effect on Outcome:** the evidence, if believed, must be capable of affecting the result.

[23] Failure to satisfy any one of these criteria will generally result in a dismissal of the application to adduce fresh evidence. Due diligence is often the most difficult element to establish; however, in family cases, particularly where post-trial developments influence the courts analysis of the best interests of the child, some flexibility may be warranted.

[24] The above four-part test, which is now commonly referred to as the "Palmer test", seeks to balance finality in litigation with fairness and ensure that significant, credible new evidence is not unjustly excluded.

[25] The SCC reaffirmed the *Palmer* test in *Barendregt v. Grebliunas*, 2022 SCC 22, confirming its applicability in all appeals, including in family law cases where post-trial developments may engage the best interests of the child analysis.

[26] The British Columbia Court of Appeal has also recently confirmed this framework in *Jagpal v. Samra*, 2024 BCCA 384; and *Zahariev v. Zaharieva*, 2025 BCCA 35. These cases emphasized a context-sensitive approach, particularly in family matters where the court must safeguard the integrity of the appeal process while balancing finality, fairness, and the best interests of the child.

B. The Appellant's Request to Adduce New Evidence

[27] At trial, Smith P.C.J. found the appellant lacked credibility. The appellant now seeks to introduce the following fresh evidence, aimed at rebutting the trial judge's adverse credibility findings:

- a) Receipts and photographs showing the children's consistent participation in extracurricular activities;
- b) Text messages from A.B.'s teacher referencing A.B.'s disclosures and concerns regarding his father; and
- c) Additional photographs depicting the condition of the appellant's home over time.

[28] The appellant submits that this material would confirm her consistent efforts to support the Children's physical and emotional well-being. She argues that she could not have anticipated the trial judge's adverse credibility findings and, thus, did not foresee the need to adduce this evidence at trial.

[29] In considering the appellant's request, I must apply the Palmer test, as described above.

[30] With respect to the first criterion, I find that the appellant has not satisfied the due diligence requirement. The receipts, photographs, and text messages were in existence before trial and could have been obtained with reasonable effort. The appellant's assertion that she did not anticipate a negative credibility finding does not relieve her of the obligation to present a complete evidentiary record at trial.

[31] As to the second criterion, the proposed evidence is relevant. It pertains to the children's welfare and the appellant's capacity to parent; both issues that were central at the trial.

[32] Regarding the third criterion, the proposed evidence appears facially credible. The receipts and photographs are objective, and the text messages from a third party are reasonably capable of belief.

[33] Fourth, regarding the effect on the outcome, I am not satisfied that the proposed evidence would have reasonably changed the result. The trial judge's credibility findings were based on a broad evaluation of the appellant's conduct and the identification of inconsistencies within the evidence put before the court. I find that the evidence the appellant requests to tender on appeal is unlikely to have undermined or altered those credibility findings, and that even if this evidence had been before the trial judge, there remained sufficient evidence before Smith P.C.J. to support an adverse finding of credibility about the appellant's

evidence.

[34] As a result, the appellant's application to adduce fresh evidence is dismissed.

C. The Respondent's Request to Adduce New Evidence

[35] The respondent seeks to introduce fresh evidence consisting of updated information regarding the Children's post-trial circumstances. In a sworn affidavit, he describes significant improvements in both the Children's health, education, and daily life following their relocation to Kitimat.

[36] With respect to A.B., the respondent states that the child previously had an Individualized Education Plan ("IEP") designation for Intensive Behaviour Intervention and Serious Mental Illness. That designation has since been revised to a Learning Disability with moderate behavioural support needs. The respondent also asserts that current medical advice suggests that an IEP may no longer be required.

[37] The respondent also reports that A.B. has not been sent home for behavioural issues since relocating to Kitimat, that he no longer requires in-class support, and is no longer falling asleep in school as he did previously. A.B. has also been successfully tapered off two medications - one for depression and anxiety and one for behavioural concerns - without incident. M.B. states that A.B. is now thriving, participating in school activities, swimming, and regular karate lessons. M.B. also indicated that A.B. remains under the continuing care of a family physician.

[38] With respect to N.B., the respondent notes that the child experienced chronic lateness and absenteeism while in the appellant's care, to the point that he had acquired a lateness-based nickname among peers at school. Since relocating, N.B. has not been late for school, has experienced no further episodes of cyclic vomiting, and has engaged actively in the local community. He now participates in a range of physical activities including baseball, swimming, and gymnastics.

[39] The respondent also wishes to tender recent school report cards, which indicate that both Children have demonstrated academic and behavioural improvement since their relocation. He contends that this evidence confirms the effectiveness of the current parenting arrangement, supports the trial judge's findings, and provides a necessary update to ensure this court's decision is informed by the Children's present circumstances.

[40] Applying the Palmer test to the facts at hand, I am satisfied that the evidence meets all four criteria and is therefore admissible.

[41] First, the proposed evidence is clearly relevant. It speaks directly to the issues of whether the trial judge's order remains aligned with the Children's best interests. This is a live issue in this appeal.

- [42] Second, the due diligence requirement is met. The evidence concerns post-trial developments and could not have been available at the time of trial.
- [43] Third, the evidence is credible. It consists of a sworn affidavit with detailed, fact-based observations supported by objective material, including educational assessments and behavioural improvements.
- [44] Fourth, the evidence, if accepted, could reasonably assist the court in assessing whether the trial order continues to reflect the Children's best interests. Although it may not have altered the outcome at trial, it is relevant to the court's ongoing supervisory role in ensuring the Children's best interests are maintained on appeal.
- [45] Accordingly, the respondent's application to adduce fresh evidence is granted. The evidence will be admitted for the limited purpose of informing the court's assessment of the appeal.

D. Disposition of the Two Applications to Adduce Fresh Evidence

- [46] The parties have taken contrasting approaches in their respective applications to adduce fresh evidence. The appellant seeks to reargue the trial judge's credibility findings based on material that was previously available but not adduced by the appellant at trial. Conversely, the respondent seeks to update the court on the Children's current well-being using evidence which was not available at the time of trial.
- [47] The appellant's proposed evidence does not meet the Palmer test. In contrast, the respondent's evidence satisfies the test and appropriately informs the court about the Children's ongoing welfare.
- [48] In the result:
- a) the appellant's application to adduce fresh evidence is dismissed; and
 - b) the respondent's application to adduce fresh evidence is granted, for the limited purpose stated above.

VI. Legal Framework and Standard of Review

A. Standard of Review

- [49] Pursuant to s. 233(1) and (3) of the British Columbia Family Law Act, S.B.C. 2011, c. 25 [FLA], a party may appeal a family law decision made by the Provincial Court of British Columbia to the Supreme Court of British Columbia:

Appeals from Provincial Court orders

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

[]

- (3) After hearing the appeal, the Supreme Court may do one or more of the following:
- (a) confirm or set aside the order of the Provincial Court;
 - (b) make any order that the Provincial Court could have made;
 - (c) direct the Provincial Court to conduct a new hearing.
- [50] Having established jurisdiction, the applicable standard of review depends on the nature of the alleged error. Questions of law are reviewed on a standard of correctness. Questions of fact, or mixed questions of fact and law where there is no extricable legal error, are reviewed on the standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.
- [51] A palpable and overriding error is one that is plainly seen and that affects the outcome of the decision. Credibility findings, findings of fact, and assessments of the best interests of the child are entitled to significant deference on appeal. The purpose of appellate review is not to retry the case but to determine whether the decision under appeal discloses a material or reversible error: *Housen* at paras. 5, 8, 10, 23; *Kane v. Proffitt*, 2018 BCCA 106 at para. 42.
- [52] Findings about what is in the best interest of the child are questions of mixed fact and law and are therefore "reviewable on a standard of palpable and overriding error unless some extricable error of law was made": *Seibel v. Davis*, 2017 BCSC 847 at para. 21.
- [53] Appellate review in family matters is limited in scope and subject to a high standard of review. In *Kane*, Justice D. Smith, writing for the Court of Appeal, held:
- [42] The scope of appellate review in family matters is a narrow one; intervention by an appellate court is subject to a high standard of review. The function of appellate review is not to retry the case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. [Citations omitted.]
- [54] Similarly, in *Seibel*, Butler J., as he then was, emphasized that appellate courts should show considerable deference to the trial judge, who had the benefit of hearing the witnesses and assessing their credibility and reliability: at para. 21.
- [55] For questions of law, the standard of review is correctness. This standard of review requires the appellate court to conduct its own analysis to determine whether the trial judge properly interpreted and applied the law: *Housen*, at para. 8. Under this standard, no deference is given to the lower court. This ensures that legal principles remain uniform and predictable across cases.

VII. Positions of the Parties and Review of each Ground of Appeal

- [56] The appellant raises five grounds of appeal which include allegations of legal, procedural, and factual errors warranting appellate intervention. The respondent submits that the trial judge did not err, and requests that the decision be upheld.
- [57] The question on appeal is whether the record and reasons disclose a material or reversible error by the trial judge, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence.
- [58] An omission constitutes a material error only if it leads to a reasoned belief that the judge must have forgotten, ignored, or misconceived the evidence in a manner that could have affected the outcome: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.
- [59] I will address each of the alleged grounds of appeal separately. The burden rests with the appellant to demonstrate that the trial judge erred in fact or in law.

A. Error in Partial or Absent Reasons for Judgment

1. Summary of Positions

- [60] The appellant contends that the trial judge erred by failing to provide adequate reasons at the time of the oral ruling on November 1, 2023. She argues that the brief oral order, without contemporaneous reasons, impaired her ability to seek a stay of the parenting order and to meaningfully advance her appeal. She submits that the delay in the issuance of written reasons resulted in procedural unfairness. I note that the written reasons were released on November 9, 2023.
- [61] The respondent submits that the oral ruling, followed by the detailed written reasons within a reasonable timeframe, did not prejudice the appellant's right to appeal. He argues that any delay between the oral pronouncement and the issuance of written reasons was modest, and that the appellant was able to initiate and fully pursue her appeal. He further submits that the sufficiency of reasons must be assessed in light of the reasons as a whole, and not merely based on the timing of their delivery.

2. Legal Framework

- [62] It is well-established that trial judges must provide reasons sufficient to explain the basis for their decision and permit effective appellate review: *R. v. Sheppard*, 2002 SCC 26 at para. 55. Reasons must be intelligible and responsive to the material issues in dispute, but they need not be exhaustive or address every piece of evidence.
- [63] A brief delay in the issuance of written reasons is not, in itself, a ground for setting aside a decision. A party alleging procedural unfairness must demonstrate actual prejudice resulting from the delay.

[64] The failure to produce sufficient reasons is a question of law reviewed on a standard of correctness. The test is whether the reasons, read in context, disclose an intelligible basis for the decision sufficient to permit meaningful appellate review. Where that threshold is not met, an error of law is established: see *R. v. R.E.M.*, 2008 SCC 51 [R.E.M.] at para. 52; *Sheppard* at para. 28.

3. Analysis

[65] This ground of appeal raises two related issues. The first is whether the trial judge's reasons--delivered orally and then in written form--were substantively adequate to permit meaningful appellate review. The second concerns the timeliness of the written reasons, and whether the delay between the oral ruling and the written decision impaired the appellant's ability to seek a stay of the parenting order. I address each issue in turn.

[66] The appellant argued the trial judge failed to adequately explain key findings, which made it difficult to determine the basis of the decision and hampered the appellant's ability to prepare her appeal. However, the appellant did not point to specific findings or omissions in the trial judge's reasons that she claimed were lacking but rather relied on the timing and general content to assert procedural unfairness.

[67] Having reviewed the 61-page written decision, I am satisfied that it sets out a detailed and coherent explanation of the trial judge's reasoning. The reasons address all material issues in dispute, including the parties' respective parenting capacities, the Children's developmental and emotional needs, the history of co-parenting challenges, and the rationale for relocation. The decision enables meaningful appellate review and provides a clear basis for understanding why the trial judge reached her conclusions.

[68] The trial judge pronounced the relocation order orally on November 1, 2023, and released her written reasons six business days later, on November 9, 2023. Under s. 233 of the FLA, a party has 40 days from the day after the order is made to file a notice of appeal. The appellant did so promptly, on November 3, 2023, before the written reasons were issued.

[69] With respect to the appellant's ability to prepare for her appeal, while it would have been preferable for the written reasons to be available sooner, I am not satisfied that the delay caused any actual prejudice to the appellant in advancing her appeal.

[70] On December 14, 2023, the parties consented to extend several procedural deadlines. The appellant was granted an extension to January 31, 2024, to file her written outline and to file and serve the trial transcript. The deadline for filing and serving the Notice of Hearing of Appeal was also extended, to a date no earlier than March 25, 2024, once long chambers dates became available through the Registry.

[71] On January 31, 2024, the parties again consented to further extensions. The appellant's deadline to file her written outline was extended to March 31, 2024, and the deadline to file and serve an amended notice of appeal was extended to February 28, 2024.

- [72] In these circumstances, I find that the brief delay in the release of the written reasons did not impair the appellant's ability to comply with the procedural requirements of her appeal. In fact, with the benefit of multiple timeline extensions--granted by consent--she had ample time to review the reasons, amend her materials, and prepare her submissions. There is no indication that she was forced to act prematurely or without sufficient opportunity to organize her case. Accordingly, I am not persuaded that the timing of the written reasons caused her any prejudice.
- [73] With respect to the stay application, the appellant contends that the trial judge's reasons were not available in a timely manner and that this impeded her ability to consider her legal options and seek a stay of the relocation order. She submits that this delay placed her at a procedural disadvantage.
- [74] The appellant filed her stay application on November 10, 2023, the day after the written reasons were released. In short, she had access to the full 61-page reasons for decision at the time of filing.
- [75] The appellant did not appeal Smith P.C.J.'s refusal to grant a stay, nor did she provide a transcript or other record of that application to support any claim of procedural unfairness in how it was decided. Her argument in this appeal is confined to the timing and adequacy of the trial judge's reasons, rather than alleging any legal error in the adjudication of the stay application itself.
- [76] The timing and content of the trial judge's reasons must be assessed in context. A stay application does not depend on the correctness or completeness of the reasons for the order, nor is it an opportunity to revisit the merits of the decision. The remedy is forward-looking and directed at whether interim relief is required while the appeal is pending. The onus rests on the applicant to bring forward sufficient evidence in support of that request. It is a distinct procedural remedy governed by a settled legal test. The applicant must demonstrate:
- a) a serious question to be tried,
 - b) irreparable harm if the stay is refused, and
 - c) that the balance of convenience favours the granting of a stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
- [77] The first step in a stay application under the *RJR-MacDonald* framework is to determine whether there is a serious issue to be tried. This is a low threshold, requiring only that the appeal be arguable and not frivolous. It does not require the applicant to show that the appeal is likely to succeed.

- [78] The appellant also submits that the trial judge was in a compromised position when asked to consider a stay of her own order. That submission is without merit. Although parties may perceive that a trial judge is unlikely to question the correctness of their own decision, the legal test does not require the judge to reassess the merits of the order. The function at this stage is simply to determine whether the appeal raises an issue that is arguable on its face.
- [79] Section 234 of the FLA provides that an order remains in effect unless the judge who made it directs otherwise. The statutory scheme expressly anticipates that the trial judge may determine whether a stay is appropriate. As confirmed in *Poulin v. Poulin*, 2002 BCSC 1520, this reflects the practical reality that the trial judge--having heard the evidence in full and assessed credibility--is best positioned to apply the legal test. The suggestion that this process is inherently unfair is not supported by law or principle.
- [80] In parenting matters, particularly where relocation is at issue, courts often assume that there is a serious issue to be tried. Given the nature of this appeal and the fact that it involves a relocation order affecting young children, the first branch of the RJR-MacDonald test would likely have been satisfied. However, this does not conclude the analysis.
- [81] In relocation cases, the second branch of the RJR-MacDonald test--irreparable harm--is often determinative. As emphasized in *J.T.P. v. K.S.*, 2023 BCCA 303 at para. 39, the focus of this second branch must be on whether the child--not the parent--will suffer real and significant harm if the stay is refused. Emotional hardship to the parent, logistical inconvenience, or disruption to the parent-child relationship is not sufficient. The applicant must show that the child will experience harm that is serious, more than transient, and incapable of being remedied.
- [82] Although the appellant did not appeal the stay decision, she argues in this appeal that the timing and adequacy of the trial judge's reasons prejudiced her ability to argue for a stay.
- [83] It is important to recognize that the irreparable harm analysis is a fact-driven inquiry focused on the anticipated impact of the relocation order. It is not an appeal of the underlying merits of that order.
- [84] The relevant question is whether the appellant had sufficient information to argue that the Children would suffer real and lasting harm if relocated to Kitimat with their father. That is the type of evidence required to support a stay.
- [85] In any event, the appellant had access to the full 61-page reasons at the time she filed her stay application, which included specific findings about the Children's developmental challenges and the need for a change in parenting environment.
- [86] Turning to the trial judge's findings, she conducted a detailed and careful best interests' analysis under s. 37 of the FLA that would have been helpful to all the parties in assessing whether there were grounds to believe that the Children would suffer irreparable harm from the relocation order.

[87] In her First Decision, Smith P.C.J. found that the children's development--social, physical, and emotional--had been adversely affected by their current environment and that relocation was necessary to support their well-being. As she stated at para. 20 of her decision:

The children need to be given an opportunity to thrive, as quickly as possible, in the most positive and healthy environment available to them. Hence, my decision of November 1.

[88] Later at para. 31, the trial judge writes: "In all the circumstances, I am not satisfied that the children's need for stability outweighs that which might be attainable with [A.H. redacted]"

[89] The trial judge found that the Children's development--social, physical, and emotional--had been adversely affected by their environment at the time. She concluded that a significant change in environment and parenting was necessary to support their well-being.

[90] Her reasons reflect a clear and considered conclusion that relocation was not only justified but necessary, given the Children's ongoing challenges. The decision was made in response to well-documented developmental concerns--not in defiance of them. These findings were central to the second branch of the RJR-MacDonald test and framed the issues the appellant needed to address.

[91] Although the appellant contends that the eight-day delay in the issuance of reasons impaired her ability to seek a stay, she has not provided any evidence to show how that delay hindered her.

[92] Based on my review of the record, I am satisfied that the appellant--who had been the Children's primary caregiver and who had previously made unilateral decisions regarding their care--was well positioned to present relevant evidence, drawing on her own knowledge of the Children's health, emotional needs, or other vulnerabilities. There is no indication that the timing or content of the written reasons impaired her ability to articulate whether the Children would suffer irreparable harm as a result of the relocation.

[93] While the timing of the written reasons was not ideal, the delay was brief and did not deprive the appellant of a meaningful opportunity to seek interim relief. I find no basis to conclude that her application for a stay was prejudiced or that any procedural unfairness occurred.

4. Conclusion

[94] In the result, I am not persuaded that the timing or adequacy of the trial judge's reasons gave rise to any reversible error. The written reasons were released within a reasonable time, and they were sufficiently detailed to permit meaningful appellate review and to inform the appellant's submissions on the stay application. Although the reasons were not available at the time the notice of appeal was filed, they were available before the stay was argued and did not prevent the appellant from advancing either remedy. No prejudice has been shown. The sufficiency of reasons is a question of law, reviewed on the standard of

correctness. Applying that standard, I find no basis to interfere with the trial judge's decision.

B. Order Granting Sole Parental Responsibilities Without an Application

1. Summary of Positions

- [95] The appellant submits that the trial judge erred by granting the respondent sole parental responsibilities when he had not made a request for this order. The appellant grounds her claim on the premise that parenting time and parental responsibilities are legally distinct concepts under the FLA and, therefore, while the respondent requested that the children primarily reside with him, he did not specifically request that the court grant him sole parental responsibilities.
- [96] She argues that because of the court making an order that was not expressly requested by the respondent, she was deprived of notice and of the opportunity to make submissions on this significant issue. She argues that this amounts to a breach of procedural fairness and that she suffered prejudice as a result.
- [97] The respondent submits that the allocation of parental responsibilities was properly before the court, either expressly or by necessary implication. He argues that the appellant herself placed the issue of decision-making authority before the court by seeking an order for sole parenting responsibilities.
- [98] Further, he submits that his amended reply and counter application, which sought to vary the Children's primary residence and the Separation Agreement, necessarily engaged the issue of which parent should have the authority to make major decisions.
- [99] The respondent also contends that the evidence at trial addressed the parties' relative parenting capacities, decision-making histories, communication challenges, and ability to meet the Children's needs. He submits that the appellant, who was represented by counsel at trial, had a full opportunity to adduce evidence and make submissions on these issues, and did, in fact, do so.

2. Applicable Legal Principles

- [100] The principles of procedural fairness require that parties be given notice of the issues to be determined and an opportunity to respond. A court should not grant relief on an issue unless the parties had notice and a fair opportunity to address the matter: *A.L.M. v. K.H.*, 2004 BCSC 1420 at paras. 30–31; *Naderi v. Naderi*, 2012 BCCA 16 at para. 22.

- [101] However, in the family law context, particularly in matters concerning parenting arrangements, the court's paramount consideration is the best interests of the child: FLA, s. 37(1). Section 45 of the FLA authorizes the court to allocate parental responsibilities where appropriate, upon application by a guardian. The use of "a guardian" indicates that a single guardian's application is sufficient to invoke the court's jurisdiction to make orders concerning parenting arrangements.
- [102] Once an application is before the court under s. 45(1), even if made by only one party--the court is entitled, and indeed obligated, to determine what parenting arrangement is in the best interests of the child, per s. 37(1). When such an application is made, the court's authority inherently requires the consideration and evaluation of both parties' positions.
- [103] Parenting time and parental responsibilities, while distinct concepts under the FLA, are often interrelated. Where a change in primary residence is sought, particularly between distant locations such as Gibsons and Kitimat, the question of who will exercise parental decision-making authority necessarily becomes engaged.
- [104] Courts must balance respect for pleadings and fairness to the parties with their statutory obligation to safeguard the best interests of children by making complete and appropriate parenting orders.
- [105] The standard by which procedural fairness is assessed is one of correctness: *Murray Purcha & Son Ltd. v. Barriere* (District), 2019 BCCA 4 at paras. 26-28.

3. Analysis

- [106] I am satisfied that the allocation of parental responsibilities was properly before the court and that Smith P.C.J. neither erred nor exceeded her authority when she granted the respondent sole parental responsibilities.
- [107] First, the appellant's own originating application sought exclusive parental responsibilities, thereby placing the issue of decision-making authority squarely before the court under s. 45(1) of the FLA. In asserting that the joint model was no longer functioning, the appellant invited the court to determine which parent was best suited to make significant decisions for the Children. Accordingly, both parties were on notice that the allocation of parental responsibilities would be determined.
- [108] Second, the respondent's counter-application sought to relocate the Children to his residence in Kitimat and replace the existing parenting arrangements. Given the geographic separation between the parties and the breakdown in communication, it was neither realistic nor in the Children's best interests to maintain a joint decision-making framework.
- [109] In her decision, the trial judge wrote that the appellant:

- [232] . has been, largely, unable to exercise her parenting responsibilities in conjunction with the children's father as required by the separation agreement. Clause 6 of the agreement provides that the parties must "both consult the other about any important decisions that must be made regarding the children and try to reach agreement concerning those important decisions". The evidence shows that [A.H.] has been unable, or unwilling, to comply with this clause, and her actions have created discord between the parties, contrary to the children's best interests.
- [110] Further, at paras. 233 and 234, Smith P.C.J. noted that the appellant had made several significant decisions regarding the Children's medical and educational care unilaterally, without consulting the respondent. These included placing one of the Children on antipsychotic medication, determining the timing of their return to school following COVID-19 closures, changing their paediatrician, and replacing their counsellor. The appellant acknowledged in her evidence that she merely "informed" the respondent after these decisions had been made. In the trial proceedings, she also sought an order to exclude the respondent from participating in meetings with professionals involved in the Children's care, alleging that his involvement was detrimental to her.
- [111] In these circumstances, I find that the relocation decision necessarily required the court to determine which parent would have primary responsibility for key decisions concerning the Children's education, healthcare, and general welfare. Judge Smith's decision was an appropriate ancillary order, which was necessary to give effect to the remedy sought by the respondent.
- [112] Third, the evidence at trial extensively addressed the parties' parenting capacities, historical decision-making roles, and ongoing communication challenges. The trial judge received submissions and evidence from both parties which directly addressed the issues of parental responsibilities; therefore, it cannot be said that the appellant was denied the ability to make submissions on this matter.
- [113] The appellant relied on A.L.M.; Naderi; and Boury v. Iten, 2019 BCCA 81, to support her argument that the trial judge lacked jurisdiction to make an order that was not explicitly sought. However, these cases are distinguishable. A.L.M. involved an interlocutory chambers application where the relief granted went beyond what was set out in the notice of motion; the court found the party had no meaningful opportunity to respond. Similarly, in Naderi and Boury, the court granted substantive relief without notice, in contravention of procedural fairness. In contrast, the present case arose out of a 14-day trial, during which the issue of parental responsibilities was clearly before the court, expressly raised by the appellant in her own originating application. The evidence and submissions on that issue were fully considered. This is not a case where relief was granted without notice or outside the issues framed by the pleadings and evidence.

[114] The appellant also submitted that the trial judge improperly relied on inherent jurisdiction to grant sole parental responsibilities to the respondent. She relied on *Baxter Student Housing Ltd. v. College Housing Co-op Ltd.*, [1976] 2 S.C.R. 475, to argue that the Provincial Court, as a statutory court, lacks the authority to make substantive parenting orders unless expressly authorized by statute.

[115] While it is correct that the Provincial Court does not have inherent jurisdiction to make substantive orders beyond those authorized by statute, that limitation is not engaged here. As discussed above, the issue of parental responsibilities was properly before the court pursuant to s. 45(1) of the FLA, as the appellant herself filed an application seeking exclusive parental responsibilities. Once that issue was raised, the trial judge was fully authorized under the FLA to allocate parental responsibilities as she considered appropriate, guided by the best interests of the children under s. 37. No reliance on inherent jurisdiction was necessary or made--either explicitly or implicitly.

4. Conclusion

[116] The allocation of sole parental responsibilities was within the jurisdiction of the Provincial Court and fell squarely within the scope of issues raised at trial. The matter was properly before the court under s. 45(1) of the FLA, based on the appellant's own application. Both parties had a full opportunity to address the issue. To the extent that the appellant raises procedural fairness, the applicable standard is correctness. No such error has been demonstrated. The trial judge's order was supported by the pleadings, the evidence, and the legislative framework, and reflected a proper application of the best interests' analysis. This ground of appeal is dismissed.

A. Setting Aside the Separation Agreement Without Finding a Material Change in Circumstance

1. Summary of Positions

[117] The appellant submits that the trial judge erred in law by setting aside the parties' Separation Agreement dated March 15, 2016, as modified by the May 10, 2018, order of Judge Ferris, without first finding a material change in circumstances.

[118] The appellant argues that the trial judge failed to conduct the necessary two-step analysis articulated by the SCC in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 1996 CanLII 191 (S.C.C.), namely that in order to change the pre-existing parenting arrangement, Smith P.C.J. would have needed to find there had been a material change in the needs or circumstances of the Children or the ability of the parents to meet those needs before conducting a fresh inquiry into the Children's best interests. The appellant submits that without a clear finding of material change, the trial judge's decision to replace the parties' prior arrangements was procedurally and legally defective.

[119] The respondent submits that the trial judge made sufficient findings, based on the evidence, to establish that a material change had occurred. He points to the Children's evolving behavioural, educational, and emotional needs, the deterioration in co-parenting communication, and the inadequacy of the existing arrangements. The respondent argues that while the trial judge did not use the phrase "material change", taken as a whole, her findings satisfy the legal requirements enumerated in Gordon.

2. Legal Framework

[120] The applicable test is set out in Gordon at para. 49, which requires the court to engage in a two-stage analysis:

- a) **Material Change Stage:** The court must first determine whether there has been a material change in the condition, means, needs, circumstances of the child, or the ability of the parents to meet the child's needs. The change must be substantial, significant, and relevant to the child's welfare.
- b) **Best Interests Stage:** If a material change is found, the court must then conduct a fresh inquiry into the best interests of the child in light of the new circumstances, applying the best interests' factors set out in the governing legislation.

[121] The threshold for establishing a material change is not onerous, but the court must be satisfied that the change is real, substantial, and one that could not have been reasonably contemplated at the time of the original agreement or order.

[122] A failure to apply the applicable legal test would constitute an error in law and is reviewable on the correctness standard.

3. Analysis

[123] The record indicates that per the respondent's amended reply and counter application, he sought to replace the Separation Agreement and relocate the Children to his care in Kitimat. Judge Smith granted this request.

[124] I find that although the trial judge did not expressly state that she found a "material change in circumstances," her reasons, read as a whole, clearly indicate that she did.

[125] The trial evidence included extensive material on the Children's developmental, educational, and emotional needs. It also included evidence about the appellant's parenting approach, and the limitations of the existing arrangement. Based on this evidence, the trial judge made a number of specific findings, including:

- a) A.B.'s serious behavioral dysregulation emerged post-separation (paras. 12-13). This dysregulation coincided with the applicant's romantic partner entering the Children's lives, but the applicant did not appropriately disclose the presence of this adult in the Children's lives (paras. 128, 311).

- b) Under the applicant's care, the Children were chronically late for school (para. 154).
- c) The appellant engaged in conduct that seriously impacted the Children; including, but not limited to, falsely reporting information to the Children's medical professionals, coaching the Children to produce certain courtroom evidence, exposing the Children to adult information, and not reporting incidents of violence in the home (paras. 19, 47, 153-154, 307).
- d) The Separation Agreement is no longer in the children's best interests (para. 19). Expert evidence supported the finding that the Children were not thriving under the existing arrangements.
- e) The applicant undertook unilateral decision-making and made serious medical decisions without consulting the respondent, in violation of the Separation Agreement (paras. 14, 91, 295-296).

[126] Taken as a whole, Smith P.C.J.'s reasons make clear that the Children experienced a significant escalation in behavioural, social, and educational difficulties after relocating to Gibsons with the appellant. These developments, which occurred following the implementation of the Separation Agreement, revealed shortcomings in the existing parenting arrangements. Judge Smith reasonably concluded that the challenges the Children faced were not adequately being addressed by the terms of the Separation Agreement as it stood.

[127] At para. 313, Smith P.C.J. stated conclusively, "I have concluded that, on all of the trial evidence, there has been a change in the children's needs such that their best interests will be served by the variation of the 2018 Order" (Emphasis added).

[128] In my view, Smith P.C.J.'s reasons make it clear that she found a real, substantial, and relevant change in the Children's needs and in the appellant's ability to meet those needs.

[129] When read as a whole, the trial judge's reasons demonstrate that she considered the evolving circumstances of the Children, the inadequacy of the existing arrangements, and the basis for the relocation request. These findings satisfy the material change inquiry set out in Gordon.

[130] Once she made these findings, Smith P.C.J. was entitled to proceed to a fresh assessment of the Children's best interests under s. 37 of the FLA.

[131] While Judge Smith could have been more explicit in her application of the Gordon framework, appellate courts are not entitled to set aside a decision merely because the reasons are imperfect. As the SCC held in *R.E.M.*, at para. 25, reasons are insufficient only if they fail to fulfill their functional purpose. In this case, the reasons provide a clear and intelligible basis for the decision and permit meaningful appellate review. The judge identified significant changes in the Children's needs and the appellant's ability to meet them and conducted a proper best interests' analysis under s. 37 of the FLA. Applying the

standard of correctness, I find no error in the trial judge's approach or conclusions.

4. Conclusion

[132] In the result, I am satisfied that the trial judge applied the correct legal principles and that her reasons, provide a sufficient and intelligible basis for appellate review. No error of law has been shown. This ground of appeal is dismissed.

B. Error in Assessing Testimony of L.P. Regarding Preferred Parent

1. Summary of Positions

[133] The appellant submits that the trial judge erred in assessing the testimony of L.P., a teacher who had longstanding involvement with the Children. She argues that L.P.'s evidence supported her position as the preferred parent, and that Smith P.C.J. failed to give appropriate weight to this evidence. The appellant contends that this misapprehension of important evidence led to an incorrect assessment of the Children's best interests.

[134] The respondent submits that the trial judge properly considered L.P.'s testimony and reasonably weighed it against the broader evidentiary record. He argues that the trial judge's factual findings are owed significant deference on appeal, absent a palpable and overriding error, and that the appellant has not demonstrated any such error.

2. Legal Framework

[135] A trial judge's assessment of witness credibility and the weight to be assigned to particular evidence is owed considerable deference on appeal. Misapprehension of evidence warrants appellate intervention only where the trial judge has ignored, misconceived, or failed to account for material evidence in a manner that could have affected the outcome: *R. v. Morrissey*, (1995), 22 O.R. (3d) 514 (C.A.), 1995 CanLII 3498 (O.N.C.A.).

[136] It is not an error for a trial judge to give lesser weight to a witness's evidence or to prefer competing evidence, so long as the judgment demonstrates that the key issues were considered: *Van de Perre* at para. 15.

3. Analysis

[137] The trial judge expressly acknowledged L.P.'s evidence, including her positive observations regarding the appellant's relationship with the Children. However, the judge also considered extensive contrary evidence, including concerns about unilateral decision-making, inconsistent school attendance, exposure to adult conflict, and failures to address the Children's behavioural and educational needs.

[138] The trial judge addressed L.P.'s evidence at length and properly weighed L.P.'s evidence alongside other relevant evidence. There is no indication that she misunderstood or ignored material aspects of L.P.'s testimony. At para. 208, she also notes that L.P.'s observations indicate that A.B. presented as more age-appropriate and emotionally stable while in his father's care. Such findings are owed deference on appeal.

[139] The trial judge was not required to accept L.P.'s testimony in isolation, nor to weigh it more heavily than the rest of the evidence. Rather, she was entitled to assess all of the evidence cumulatively in determining the Children's best interests, which she did.

4. Conclusion

[140] I find no palpable and overriding error in the trial judge's treatment of L.P.'s evidence. This ground of appeal is dismissed.

A. Error in Credibility Findings for the Appellant

1. Summary of Positions

[141] The appellant submits that the trial judge erred in assessing her credibility. She argues that the reasons for disbelieving her were either inadequately explained or unsupported by the evidence. She contends that the adverse credibility findings significantly influenced the trial judge's ultimate conclusions regarding parenting responsibilities, relocation, and the dismissal of her claims.

[142] The respondent submits that the trial judge's credibility findings were amply supported by the evidentiary record. He notes that Smith P.C.J. identified numerous inconsistencies, omissions, and contradictions in the appellant's testimony. The respondent emphasizes that appellate courts afford significant deference to credibility assessments, and that the appellant is unable to show that Smith P.C.J. committed a palpable and overriding error in her credibility assessment.

2. Legal Framework

[143] Credibility findings are among the most highly deferential findings in appellate review. They are owed significant respect because the trial judge has the advantage of observing the witnesses firsthand: *Housen* at paras. 12, 20, 24.

[144] An appellate court may intervene only if the trial judge's credibility findings are tainted by a palpable and overriding error - that is, an error that is obvious and that affected the outcome.

[145] A trial judge is not required to address every inconsistency or every piece of evidence, provided that the reasons, read as a whole, demonstrate that the judge grappled with the material issues: *F.H. v. McDougall*, 2008 SCC 53 at paras. 98-99.

[146] Minor errors or imperfections in the reasons will not justify appellate intervention unless they materially affect the outcome: Van de Perre at para. 15.

3. Analysis

[147] The trial judge's reasons reflect a detailed and careful evaluation of the appellant's credibility and carefully compared the appellant's testimony with documentary evidence. The trial judge ultimately identified multiple areas of concern, including:

- a) The appellant repeatedly provided false information to third parties, including providing inconsistent reporting to professionals regarding allegations of abuse;
- b) The appellant minimized her partner's role in the home following allegations of abuse, contrary to prior court orders;
- c) The appellant falsely accused the respondent of physical abuse, in a way which was inconsistent with the Children's best interests;
- d) The appellant falsely accused the respondent of exposing the Children to adult information, while concurrently exposing the Children to adult information herself;
- e) Objective financial records directly contradicted the appellant's evidence regarding support payments; and
- f) The appellant sought to undermine the reliability of court-ordered evidence by coaching A.B. prior to his Views of the Child report.

[148] These findings were not isolated but arose across multiple domains of evidence and testimony. The trial judge was therefore entitled to draw adverse credibility inferences based on the cumulative inconsistencies, omissions, and the appellant's overall presentation.

[149] The appellant also raised concerns about the trial judge's treatment of the s. 211 report and related third-party evidence, but these issues were directly tied to the judge's overall credibility assessment and were reasonably considered in the broader context of the best interests' analysis.

[150] While the appellant disagrees with the trial judge's assessment, disagreement alone does not establish a palpable and overriding error. A review of the record does not reveal that the trial judge ignored, misapprehended, or misconstrued material evidence in a manner that would justify appellate intervention.

4. Conclusion

[151] I find no palpable and overriding error in the trial judge's credibility assessment of the appellant. This ground of appeal is dismissed.

VIII. Disposition and Costs

- [152] The trial judge's decision was grounded in the evidence, consistent with the applicable legal principles, and remains aligned with the best interests of the Children. Nothing in the appellant's submissions displaces the trial judge's determinations, nor does the fresh evidence admitted on appeal undermine the soundness of the original findings.
- [153] Accordingly, the appellant's appeal is dismissed.
- [154] The respondent, M.B., is entitled to his costs of the appeal at Scale B, payable forthwith, unless the parties agree otherwise.
- [155] I note that if the appellant believes there has been a material change in circumstances affecting the Children since the date of trial, she may seek a variation of the parenting order by application to the Provincial Court pursuant to s. 47 of the FLA. Nothing in these reasons precludes either party from seeking a variation should circumstances materially change in the future.

"Sukstorf J."

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