
CANADA / JUDGMENT

A.S.P. v. N.N.J.

2015 BCCA 415

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 415 A.S.P. v. N.N.J.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

A.S.P. v. N.N.J.,

2015 BCCA 415

Date: 20151002

Docket: CA40666

Between:

A.S.P.

Appellant

(Claimant)

And

N.N.J.

Respondent

(Respondent)

Corrected Judgment: The text of the judgment was corrected at paragraphs 39, 51, 55, 56 and 58 where changes were made on October 8, 2015.

Before:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Stromberg-Stein

On appeal from:

An Order of the Supreme Court of British Columbia, dated January 28, 2013,

(A.S.P. v. N.N.J., 2013 BCSC 120, Vancouver Docket E093756);

An Order of the Supreme Court of British Columbia, dated June 21, 2013,

(A.S.P. v. N.N.J., 2013 BCSC 1101, Vancouver Docket E093756);

An Order of the Supreme Court of British Columbia, dated July 4, 2013,

(A.S.P. v. N.N.J., 2013 BCSC 1210, Vancouver Docket E093756);

An Order of the Supreme Court of British Columbia, dated August 8, 2013,

(A.S.P. v. N.N.J., Vancouver Docket E093756); and

An Order of the Supreme Court of British Columbia, dated December 31, 2013,

(A.S.P. v. N.N.J., 2013 BCSC 2377, Vancouver Docket E093756)

The Appellant:

In Person

Counsel for the Respondent:

P. Daltrop

N.D. Allen

Place and Date of Hearing:

Vancouver, British Columbia

March 26 and 27, 2015

Place and Date of Judgment:

Vancouver, British Columbia

October 2, 2015

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Stromberg-Stein

Summary:

In family law proceedings, the judge ordered that the mother have sole custody and guardianship of the couple's twins, and that the husband engage both an access exchange supervisor and a parenting coach in order to have access. The judge also refused the husband's application to change the children's surname from a hyphenated surname to his surname alone. At the conclusion of proceedings, the judge ordered the husband to pay lump sum special costs. The husband appealed, alleging bias against the judge, and many other errors. Held: Appeal dismissed except in respect of costs. Costs remitted to the trial court. None of the errors in the judgment on the merits were made out, nor was there a basis for the allegation of bias. The costs award is contrary to the Court's judgment in *Gichuru v. Smith*, 2014 BCCA 414.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] This appeal arises out of family law proceedings, and is primarily concerned with issues surrounding guardianship of and access to the parties' twins, born in 2009. The case is an example of high-conflict family litigation. The proceedings below were complicated and the orders granted by the trial court are detailed and complex.
- [2] The appellant, who represented himself at trial as well as on appeal, alleges some 35 errors of law in the judgment below. For reasons that follow, I am of the view that the only part of the appeal that should succeed is the appeal dealing with costs.

Background of the Marriage

- [3] The father, Dr. P., is a British citizen, who resides in England. He has a PhD in electrical engineering, focussing on quantum electronics. At the time of the trial he was 44 years old. The mother, Ms. J., is a Canadian citizen. She was 40 years old at the time of the trial, and worked as a chartered accountant. She lives in British Columbia. Since moving out of the matrimonial home in 2009, she has resided with her parents.
- [4] The parties met over the Internet in 2005, and first met in person in Vancouver in 2006. By May 2007, they decided to marry, which they did in August of that year. Four days before the wedding, they entered into a marriage agreement dealing with financial arrangements in the event of marital breakdown. In September 2008, Dr. P. acquired the status of permanent resident in Canada, though he returned to reside in England in 2013.
- [5] A psychologist who prepared evidence for the trial described the marriage relationship as "tumultuous", a description adopted, as well, by the trial judge. Sometime between April and August, 2009, while Ms. P. was pregnant with the parties' twins, the couple separated. After an incident in October 2009, Dr. P. was charged with assault and uttering threats. His bail conditions prohibited him from contact with Ms. J. or her relatives. Eventually the charges were dropped, with Dr. P. entering into a peace bond that contained provisions restricting contact between him and Ms. J.

- [6] Dr. P. filed for divorce in November 2009. It appears clear that the timing was motivated, at least in part, by a desire to take advantage of the provisions of the marriage agreement, which, by its terms, would have expired on the birth of the children.
- [7] The twins (a boy and a girl) were born two days later. While Ms. J. had had some discussions with Dr. P. about the children's names, the discussions were acrimonious, and the parties reached no agreement. Ms. J. gave evidence to the effect that Dr. P. insisted that his mother would name the children. Dr. P. refused to sign the certificate of birth unless the mother agreed to change the names, which she declined to do. Ultimately, Ms. J. named the children herself.

Access to the Twins up to Trial

- [8] Dr. P. sought access to the children within a week of their birth. It appears that Ms. J. was initially supportive of Dr. P. having access, but was not prepared to allow him unsupervised access, apparently due to fears that he might take the children out of the country. She offered access in her home, to be supervised by her or her family. Dr. P. considered such access to be unworkable, as he believed it would violate the terms of court orders prohibiting him from having contact with Ms. J. and her family. He was also unprepared to accept any access arrangement whereby his access would be in Ms. J.'s residence.
- [9] Dr. P. did not have any access to the children until they were almost seven months old. On June 16, 2010, the British Columbia Supreme Court awarded Ms. J. interim sole custody and guardianship of the children. Dr. P. was given supervised access three times per week, for two hours each time. Dr. P. exercised his right to access under that order on 15 occasions, but missed many access visits due to his travel schedule.
- [10] On September 21, 2010, the order was varied to give Dr. P. interim joint guardianship with Ms. J. In an attempt to accommodate Dr. P.'s travel schedule, the court also modified the access provisions. Under the new order, Dr. P. was to have supervised access on alternate weeks for three hours on each of five days. He exercised access under that order on only 16 occasions between October 2, 2010 and January 23, 2011. Dr. P. had several disagreements with the supervising agency, which alleged that he was uncooperative and abusive to staff on occasions, and also that he cancelled visits without adequate notice. After January 23, 2011, the agency refused to provide services to him.
- [11] Thereafter, the parties were unable to agree on a new access regime. Dr. P. wanted unsupervised access, while Ms. J. was prepared only to grant access supervised by a neutral party.

- [12] On March 1, 2011, the court again varied the access order, providing that a supervisor was required when the parties exchanged the children. Dr. P. was not required to have a supervisor present during the access visits, but was required to deposit his passport with his lawyer while he was in Canada. On May 16, 2011, the order was further varied, requiring Dr. P. to deposit his passport only during access visits.
- [13] While some access visits took place under this regime, there were further problems. Initially, Ms. J. videotaped the exchanges, which both the exchange supervisor and Dr. P. found disruptive. As well, some visits were cancelled by Dr. P. due to travel.
- [14] The trial commenced on September 6, 2011. Dr. P. had had only very limited access to the children. The trial judge summarized the evidence as follows:
- [88] At the time of the commencement of the trial in September 2011, the children were almost 1 year and 10 months old. The children had seen their father on 51 days of the 116 court-ordered access days available.

The Trial

- [15] The trial was set for 19 days, continuing until September 30, 2011. On September 30, the judge amended the passport order so that Dr. P. could deposit his passport with any member of the Law Society of British Columbia during access visits, pending her final order.
- [16] On November 29, 2011, Dr. P. applied to re-open the trial for three purposes: to produce additional evidence with respect to financial issues; to produce evidence of correspondence between himself and counsel for Ms. J.; and to apply for a change of the children's names pursuant to the Vital Statistics Act.
- [17] The re-opening of the trial commenced April 30, 2012, and the hearing proceeded to May 4, 2012. Shortly thereafter, Dr. P. again applied to re-open the trial so he could produce new evidence on parental alienation. Again, the re-opening was granted, and the trial continued for two additional days on July 3 and 4, 2012, with written submissions following on July 18, August 1 and August 8, 2012.
- [18] The judge pronounced judgment with written reasons on January 28, 2013. She granted Ms. J. sole custody of the children under s. 16(1) of the Divorce Act R.S.C. 1985, c. 3 (2nd sup.). The judge granted other relief under the Family Relations Act, R.S.B.C. 1996, c. 128. Ms. J. was granted sole guardianship of the children. The judge ordered that Dr. P. would have specified access, with access exchanges continuing to be supervised. She also ordered that Dr. P. retain a "parenting coach" to assist in making access arrangements, and to provide input to Ms. J. on Dr. P.'s behalf in respect of major decisions affecting the children. The judge eliminated the requirement that Dr. P. deposit his passport during access visits.

- [19] With respect to the children's names, the court ordered that the name "Kaur" be included as a middle name for the daughter. The court dismissed Dr. P.'s application to have the surnames of the children changed.
- [20] The order also dealt with certain financial arrangements. Two specific orders are of tangential significance to this appeal: an order dismissing Ms. J.'s claim for spousal support on the basis that the marriage agreement was binding on the parties; and an order that certain furniture was the property of Ms. J., and that the costs of storing the furniture pending trial must be paid by Dr. P.
- [21] Following the release of the reasons, the trial judge received a number of applications by the parties, some seeking clarification of the reasons, others seeking ancillary relief, and still others seeking to overturn part or all of her judgment. She dealt with certain urgent applications by way of memoranda to the parties, and then delivered lengthy supplementary reasons for judgment on June 21, 2013. The reasons of June 21, 2013 clarify certain provisions of the January 28, 2013 order, but, apart from a declaration that the judge is no longer seized of the matter, do not modify the earlier order.
- [22] The judge issued an addendum to the supplementary reasons on July 4, 2013, in response to yet another request by Ms. J. to reconsider aspects of her order. She refused the request.
- [23] The parties sought further clarifications and modifications of the order after it was entered. The judge dealt with those matters in oral reasons pronounced August 8, 2013.
- [24] Finally, on December 31, 2013, the judge pronounced judgment on the issue of costs. She awarded lump sum special costs to Ms. J. in the amount of \$35,000.

Analysis

[25] I turn, now, to the appellant's arguments on appeal. I have reduced the appellant's list of alleged errors down to 14 by consolidating some grounds and by eliminating some minor grounds that are devoid of merit. While I will not discuss all of the grounds set out in Dr. P.'s factum, I have considered them all.

1. Alleged Bias Arising out of the Passport Issue on July 4, 2012

[26] Dr. P.'s first ground of appeal is alleged bias on the part of the trial judge. He founds this allegation on events that occurred just prior to the conclusion of the hearing on July 4, 2012. At that point in time, the parties had closed their cases, subject to written submissions.

[27] Counsel for Ms. J. raised the fact that the existing access order was expiring, and that it would have to be extended pending the pronouncement of judgment. Counsel suggested that the existing order simply be extended. The judge then sought Dr. P.'s input:

The Court: Now, ongoingly access schedule. Mr. [P.], you said a few times that you'd prefer weekends. Does that mean you have [the exchange supervisor] on the weekends?

Mr. [P.]: No, I don't, My Lady .

The Court: So if it's been Tuesday, Wednesday, Thursday every other week, what I suggest is that that just stay in place on an interim basis. If we have weekends, then you have greater problems with [the exchange supervisor].

Mr. [P.]: My Lady, I will just tell you straight out if that is the state of affairs, given how things have changed in my need to travel, there will be no access on weekdays .

The Court: Now, from here on you're saying your travel schedule has changed and weekdays don't work?

Mr. [P.]: That's correct.

The Court: All right. And you prefer weekends?

Mr. [P.]: I do, but I am not depositing my passport because it's completely impractical.

The Court: Well, then you'll be in - Mr. [P.], that's a court order. And I can tell you, Mr. [P.], that will continue to be the court order. That's not going to change. I have suggested that you find counsel in Surrey that make it less problematic in terms of travelling times and distance and so forth. I repeat that suggestion, that it's not an unusual order. It's not temporary. So, Mr. [P.], if you're refusing to deposit your passport, you understand the consequences of that.

[There follows discussion between Dr. [P.] and the Court regarding previous orders.]

Mr. [P.]: So I'm not asking -- asking for access, My Lady, because -- and I will not be depositing my passport because I can't generate an income. And it's too costly, it's too expensive. So I am forced to make that decision. And I know no other case where anybody has to have that decision between access and -- and income. You know about the situation with respect to my circumstances. It's difficult. It's unique maybe. And I am continually faced with that dilemma and the children are 3 years old. And we are dealing with the consequences. So I am not making a request for access. That's why I did not make an application.

The Court: All right. Two things, Mr. [P.], just so it's very clear. It's been your choice not to retain counsel in Surrey to -- and many law offices are open Saturday, I'll -- I add. It's been your choice not to retain counsel in Surrey, notwithstanding suggestions that you do that. That's a decision you've made, Mr. [P.], and I can say, sir, advisedly that there's a series of decisions that you make that do not serve the goal of access with your children, but I leave that up to you. Those are entirely your decisions.

Mr. [P.]: My Lady, I -- there is no counsel really who does stuff in Surrey on a -- on a weekend. And my --

The Court: Well, whether it's on a weekend or not, Mr. [P.], there are counsel in Surrey that could assist. In any event, it's 4:35 and we really must close court. All right. Mr. [P.] has said he's not making an access request. There certainly should be access. That's crucial for the children, whether or not Mr. [P.] chooses or doesn't choose to avail himself of those opportunities. So they will continue - access visits will continue on an interim basis, on the same basis .

- [28] In summary, what occurred was that the court was made aware of the need to extend the access order pending the release of the judgment. The court then inquired of Dr. P as to whether access days should be changed. Dr. P. said he preferred weekends, but added that he would refuse to deposit his passport with a lawyer. The judge responded by saying "that's a court order. And I can tell you, Mr. [P.], that will continue to be the court order. That's not going to change." Dr. P. says that the judge's statement constitutes pre-judgment of an issue, and that such pre-judgment constitutes bias requiring the entire judgment to be set aside.
- [29] Dr. P.'s allegations of pre-judgment, in my view, are spurious. The judge, on July 4, 2012, was dealing, at the end of the trial, with the issue of continuing access pending judgment. She had no application before her, but considered it appropriate to ensure that an access order was in place pending judgment. Rather than simply extend the order, she extended Dr. P. the courtesy of asking whether he wished a change in the access days. Instead of engaging in dialog on that question, he stated that he would refuse to deposit his passport.
- [30] As I read the transcript, the judge pointedly informed Dr. P. that she was not going to deal with the issue of the deposit of the passport at that time. Given that it was already past normal court hours, and that no application was before her, the judge made no error in refusing to deal with that issue on July 4. Her statement that the order was "not going to change" was clearly made in reference to the proceedings on July 4. She did not pre-judge the issue for the future - indeed, she did eliminate the requirement for deposit of the passport after considering the parties' final submissions on the trial.

2. Failure of the Judge to Deal with the Bias Argument in her Original Reasons

- [31] The appellant contends that the failure of the trial judge to address his allegations of bias in her original reasons for judgment "elevates the jurisdictional error to near actual bias". There is no basis for this contention. The judge was not required to deal, in her written reasons, with every argument put to her by the appellant. The bias argument was, as I have indicated, baseless. There was no need for the judge to respond to it. The judge's failure to explicitly refer to the argument in her original reasons is of no moment on this appeal.

3. The Passport Deposit Order

- [32] Dr. P. also alleges that the judge was biased on the basis that she sustained an interlocutory order that he deposit his passport during access visits. He claims that there was no evidence establishing that there was a risk that he would remove the children from British Columbia, and that the order, therefore, should not have been made.

[33] The order was not one originally made by the trial judge. Rather, it was made by a different judge, in chambers, before the trial judge became seized of the matter.

[34] The fact that the order was continued until final judgment does not demonstrate any bias or pre-judgment on the part of the trial judge. Contrary to the appellant's assertion, there was evidence before the court demonstrating concern that the appellant might remove the children from the jurisdiction. The passport deposit order was made in order to facilitate access, by doing away with a requirement that access be supervised.

4. The Judge's "Credibility Assessment Method"

[35] Dr. P. also brings forward other allegations of bias, arguing that that judge's "credibility assessment method" was flawed. He cites the following paragraph of the original reasons for judgment:

[92] With regard to credibility of the parties generally, where their evidence differs I prefer the evidence of the mother. Her evidence throughout was calm, measured and thoughtful. Although she appeared nervous and concerned, she answered all questions fairly and thoroughly. Her testimony was internally consistent and consistent with the other evidence. In contrast, although the father is very intelligent and was at times clear and calm, on balance his evidence was unpredictable and inconsistent in tone and content. Often he was disdainful and dismissive in cross-examination. There were many answers which were not responsive to the questions asked.

[36] Dr. P. contends that a witness's credibility is not connected to the predictability of his evidence. He says, therefore, that the judge's credibility findings are flawed - so flawed, in fact, as to give rise to a reasonable apprehension of bias.

[37] Even if the judge had erred in her approach to credibility, the appellant's contention that such an error would give rise to a reasonable apprehension of bias is specious. There is no indication that the judge's assessment of credibility was other than a good faith effort to determine the veracity of the witnesses.

[38] In any event, I see no defect in the approach taken by the judge. In the context of para. 92 of the judgment, the judge used the word "unpredictable" to describe evidence that was unresponsive to questions, was contrary to other testimony given by the witness, or was delivered in a tone that indicated hostility or defiance. The judge was fully entitled to take all of those factors into account in assessing credibility.

5. Admission of Dr. Korpach's Report

[39] The appellant takes issue with the trial judge's ruling that an expert report was admissible at trial.

- [40] The report, ordered under s. 15 of the Family Relations Act, was prepared by Dr. Mary Chewning Korpach, a Registered Psychologist, and completed on June 29, 2011. The report is 55-pages in length, and is comprehensive.
- [41] Dr. P. alleged that Dr. Korpach was biased, and sought to have the report excluded on that basis. The allegation of bias was based on the following statement, made by Dr. Korpach in an article that she wrote in 1993 regarding female abuse:
- [A]s both individual therapists and feminists, we support the process of empowerment, especially with women who have been victimized repeatedly, under any type of circumstance
- [42] The judge gave a brief ruling in the course of trial, and then dealt with the matter more fully in her original reasons:
- [63] There is no jurisprudence in Canada stating that bias inevitably flows from feminism. Conversely there is not a statement, nor could there be, that no feminists are biased. The question must be decided on its facts.
- [64] The information regarding the article written in 1993 is not supportive of a claim of bias. Her statement that "as a feminist... support women..." in the [context] of abuse of females and assisting females with abuse, does not profess a bias.
- [65] With regard to the content of the Report, after hearing and considering the totality of the evidence heard in the trial with its continuations, I am unable to agree with the father that there is a serious imbalance with the evidentiary content or interpretations in the Report.
- [66] Self-identification as a feminist in 1993 is not proof of bias. Further, it does not raise a concern of a reasonable apprehension of bias sufficient to warrant a voir dire on impartiality.
- [43] Dr. P. argued that "being a feminist is antithetical to understanding a father's rights". The judge made no error in rejecting that argument. Mere self-identification as a feminist is not indicative of any bias against fathers, or men in general. Further, the article was written some 18 years before the s. 15 report. Nothing in the report itself supports an allegation of bias.
- [44] Dr. P. also alleges that the judge erred in failing to hold a voir dire on the issue. The judge did hear submissions on the issue, and was provided with a copy of the article that was alleged to disclose bias. In the circumstances, the judge had all of the information necessary to determine the admissibility of the report, without holding a voir dire (see R. v. Vukelich (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)).

- [45] I note, as well, that Dr. P. had the right to request that Dr. Korpach attend to testify at trial. Even though he failed to exercise that right in accordance with the rules, the court was prepared to allow him to have the witness called to give evidence. Dr. P. indicated that he did not require her to attend. Shortly after the commencement of trial, he wrote to Dr. Korpach, advising her that he would not be requiring that she testify, but threatening her with civil (or, perhaps, disciplinary) consequences if she did not withdraw the report:

I maintain my position that you have violated the College's Rules of Conduct, and your report, should it be admitted, and not withdrawn by yourself will necessitate redress consequential loss.

- [46] Dr. P. gave up the right to cross-examine Dr. Korpach on her qualifications, and cannot claim that the failure of the judge to declare a voir dire adversely affected his right to challenge her on issues of credibility.

6. Failure to Enter the Report as an Exhibit

- [47] Dr. P. also alleges that the judge erred in relying on the Korpach report, because it was not part of the evidence. He claims that the report was never admitted.
- [48] I have reviewed the transcript, and it is clear that the document handling at some points of the trial was imperfect. The Korpach Report, though ruled admissible and referred to extensively by the parties, was not formally marked as an exhibit.
- [49] While it is regrettable that the report does not appear to have been given an exhibit number, it is clear that it was ruled admissible, that Dr. P. indicated that he did not require that Dr. Korpach be called to give viva voce evidence, and that all parties proceeded on the basis that the Korpach report was in evidence.
- [50] In the circumstances, the failure to formally mark the report as an exhibit is a mere irregularity that does not result in reviewable error.

7. Objections to the Content of the Korpach Report

- [51] Dr. P. also objects to the contents of the Korpach report. The form and content of the report are not, in fact, at all unusual. Dr. Korpach reviewed numerous documents, and observed each parent with the twins. She reported her observations in detail, and provided her opinions.
- [52] Dr. Korpach was of the view "that Dr. [P.]'s pattern of behaviours, attitudes, and actions substantially affect his abilities to provide for the psychological best interest of the children, and work within a parenting plan that promotes the children's relationships with both parents."
- [53] She also commented that "Dr. [P.] appears to have difficulty being sensitive to the children's needs, beyond what would be expected due to a lack of contact with the children. He appears to have difficulty empathizing with the children, reading their cues, responding in a developmentally appropriate manner, and facilitating the needs of both children at once.

[W]hile the children appear to enjoy time with their father over the short period, they do not appear to maintain a secure attachment with him, and he has difficulty responding to their needs, and I would be concerned with his ability to tend to their needs over a longer period of time."

[54] These opinions were well-rooted in the observation evidence of Dr. Korpach. As well, she presented results of psychological testing, which tended to support her conclusions.

[55] With respect to Ms. J., Dr. Korpach commented positively:

According to their parents, the paediatrician, and my observation, the children appear to be thriving, despite the high conflict litigation. It is my opinion that their positive adjustment is primarily attributable to the high level of care they receive from their mother and her parents, with whom they have resided since birth. The relative warmth and stability of this home and the secure attachment with their mother and at least [their maternal grandmother] (I did not observe the relationship with [the maternal grandfather]) has likely served as an important buffer to the external stressors. Research in child development has consistently shown that adverse childhood events such as divorce, parental conflict, and ongoing parental stress can have long-term deleterious effects on children's cognitive, interpersonal, and emotional development, and that a secure attachment relationship is the single most effective buffer against such damage.

[O]f the two parents, Ms. [J.] appears to have substantially better judgment, insight, and ability to place the children's need primary. There were no findings from this assessment or through collateral contacts indicating the degree of psychological disturbance, emotional instability, or propensity toward violence alleged [by Dr. P.] against Ms. J. However, Dr. [P.]'s psychological difficulties, including his narcissism and anger issues appear to interfere with his judgment, ability to place the children's needs primary, ability to work cooperatively with others, perception, and, ultimately, decision making which is guided by the children's needs primarily. This assessment also indicates concerns with regard to Dr. [P.]'s capacity to be emotionally coercive, threatening, and denigrating, particularly when others do not agree with his perspective.

[56] Dr. Korpach concluded that the "children's psychological best interest and well-being would be best served by remaining in the sole custody of their mother."

[57] She also noted the difficulties inherent in any joint decision-making regime for the two parents:

Considering the level of communication and pattern of conflict between parties, Dr. [P.]'s pattern of denigrating and coercive communication with Ms. [J.] or her representatives, and his psychological and behavioural patterns it is difficult to imagine how any type of joint decision making on behalf of the children would not result in ongoing and severe conflict, emotional stress, costly litigation, and ultimately negative impact on the children. Ms. [J.]'s superior judgment, ability to consider the children's needs primary, and capacity to work cooperatively with others would appear to indicate she is in the best position to make major decisions

pertaining to the children's care. However, I would recommend she solicit Dr. [P.]'s opinion regarding any major decisions, through a Parent Coach.

[58] Dr. Korpach's report concluded with five recommendations:

- a) That Dr. P. participate in a lengthy course of therapy with a skilled psychologist "in which he examines his communication patterns, attachment and relationship difficulties, irritability, anger, and pattern of coercive, intimidating, and denigrating patterns."
- b) Visits between Dr. P. and the children should be supervised by a parenting/attachment specialist for a period of time. Such a specialist would assist Dr. P. in "reading and responding to the children's cues, interacting with them, setting limits on them, discipline and behaviour management, attending to both children's needs, child-proofing the home, and understanding the children's developmental needs." Alternatively, if not so supervised, the visits should be shortened, and Dr. P. should attend a parenting course addressing a number of those issues.
- c) Any change to the children's names would be confusing to them. Dr. P. should be encouraged to use their first names when speaking to them (during the observed visit, he referred to them as "Guy" and "Madam").
- d) Visitation scheduling is a complicated issue. One access proposal would involve alternating week visits to occur on a Thursday, Friday, Saturday or Sunday, and Monday. Dr. [P.]'s visits should end three hours before the children's regular bedtime, out of consideration for the children's feeding and sleeping schedules.
- e) Dr. P. should have a parenting coach, who would be a professional who could help him learn to support the children's relationship with Ms. J. and serve as Dr. P.'s spokesperson, relaying his input into major decisions as solicited by Ms. J. The parenting coach should also assist in scheduling missed access.

[59] Dr. P. engaged Dr. Larry W. Krywaniuk to prepare a report assessing various elements of Dr. Korpach's report. The report was completed on August 29, 2011. Dr. Krywaniuk noted that the observations made by Dr. Korpach of Ms. J. had occurred when she had her mother present to assist in the care of the children, while those of Dr. P. had been made when he was caring for the children by himself. He also remarked on the limited contact that Dr. P. had had with the children:

I calculated that Dr. [P.] has had a total of approximately 80 hours of contact with the children over the 20 months or so of their life. This works out to about four hours per month or one hour per week. In my view, this is an inadequate amount of contact to develop and maintain a full parent-child relationship. Although Dr. Korpach does mention this in passing, it does not appear to me that it has fully been considered in the formulation of Dr. Korpach's opinion, especially considering the weight she seems to have placed on the parent-child interactions.

- [60] Dr. Krywaniuk discusses a number of details of Dr. Korpach's report, pointing out certain shortcomings and noting Dr. P's position on aspects of the report.
- [61] On this appeal, most of Dr. P's criticisms of the Korpach report mirror the discussion in Dr. Krywaniuk's report. While the various criticisms, to a greater or lesser degree, may have affected the weight that the judge gave to Dr. Korpach's opinions and recommendations, none of the criticisms would render the report inadmissible.
- [62] Having said that, I should add that I agree with Dr. P's position that Dr. Korpach's recommendation that he participate in a lengthy course of therapy with a psychologist appears to go beyond the scope of the report that was ordered, as it does not directly address issues concerning child guardianship or access. As the judge did not adopt that recommendation, however, any error in failing to excise that particular recommendation from the report was harmless.
8. Use of Evidence on the "Re-openings"
- [63] Next, Dr. P. objects to the judge's use of evidence given after the first 19 days of the trial had concluded. He contends that evidence taken on the "re-openings" was not evidence at large on the trial, but rather evidence that could only be used to address the specific issues on which the trial was permitted to be re-opened.
- [64] Dr. P. does not cite any authority for the proposition that evidence admitted on the re-opening of the trial cannot be considered on issues other than the one on which the trial was re-opened. In my view, evidence admitted on a trial, including evidence heard on a re-opening prior to judgment being pronounced, will generally be evidence at large, available to be considered on all issues in the trial. There may be exceptional cases where the general rule does not apply (for example, where the use of such evidence would be unfair, because a party did not have an opportunity to answer it). In the case before us, however, I see no basis for limiting the trial judge's use of evidence heard on the re-openings.
- [65] Dr. P. also contends that it was improper for the trial judge to hear interlocutory applications during the trial, as the evidence on those applications may have affected her assessment of the evidence at trial.
- [66] There is no general prohibition on a trial judge hearing interlocutory applications during the trial. While, in some instances, the evidence to be heard on an interlocutory application might best be heard by a judge other than the trial judge (see, for example, *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (S.C.)), such cases are unusual.
- [67] In high-conflict family litigation, it is often efficient for the parties and for the administration of justice to have a single judge handling interlocutory applications as well as the trial. In the case before us, I see nothing objectionable in the way the interlocutory applications were handled.

[68] In particular, I am not persuaded that the trial judge wrongly used any information gleaned from the interlocutory applications in coming to her decision at trial.

9. Refusal of the Application to Change the Children's Surnames

[69] On the first re-opening of the trial, Dr. P. sought an order, under the Vital Statistics Act, R.S.B.C. 1996, c. 479, changing the children's names. In particular, he wanted the name "Kaur" included as a middle name for the girl, in accordance with Sikh traditions. He also wished their surnames to be his surname, rather than a hyphenated surname that included both Ms. J's surname and his own.

[70] The relevant provisions of the Vital Statistics Act were as follows at the date of the trial (they have subsequently been amended, but not in any substantive way):

4.1 (1) The court may, in an order declaring a child's parentage, make an order

- (a) that the registration of a child's name be changed .
- (2) If an order under subsection (1) is in respect of a child's surname, the court must order the child's surname to be
 - (a) the surname of a parent, or
 - (b) a surname consisting of the parents' surnames hyphenated or combined in alphabetical order .
- (3) Before making an order under subsection (1), the court must
 - (a) consider the best interests of the child, including the matters set out in section 9 (1) (a), (b) and (c)

9(1) [I]f the chief executive officer considers that a name that a person applying for registration of a birth or an amendment to a registration of birth seeks to give to a child

- (a) might reasonably be expected to cause
 - (i) mistake or confusion, or
 - (ii) embarrassment to the child or another person,
- (b) is sought for an improper purpose, or
- (c) is, on any other ground, objectionable,

the chief executive officer must

- (d) register the birth without the name applied for or refuse to amend the existing name on a birth registration, as the case may be, and
- (e) notify the applicant promptly of the decision.

[71] At para. 319 of her judgment, the judge quoted Dr. P's concerns, as expressed in his written submissions:

The middle names and surnames being sought in this action are prescribed by cultural norms and heritage. Unlike the [mother], my "choice" is not capricious or whimsical, nor guided by notions of "modernity", and does not seek a lawyer's input or sanction-it is my duty as their father, an action purely in their interest, to bring correction to something that is foundational to their identities and their well-being. My motivation is the protection of their identities, to ensure they are not "monikered" by circumstances, and that moniker not sow the seeds of cultural dissonance that would risk their relationship with their father, and a childhood of trying to explain a naming circumstance that is nothing more than an experiment of their person.

[72] The judge commenced her consideration of the issue by referring to the best interests of the children, and explaining that she would consider evidence of culture and heritage in reaching her conclusions.

[73] The court heard from three experts, and summarized their evidence at length in its judgment. The judge concluded that the inclusion of Kaur as a middle name was a cultural issue, while the decision as to whether to allow a hyphenated surname was "cultural in the view of the father and secular in the view of the mother."

[74] The judge's conclusions were as follows:

[383] The children are children of a British Sikh father and a Canadian Sikh mother. The father states that the importance of the name is to avoid cultural dissonance in a patriarchal ethnic group and harm to the father-child relationship. The name is reflective of his cultural authority as a father. It is the daughter's interests which I must consider.

[384] With regard to the necessity of including Kaur as a middle name of the daughter, I agree with the father that this affects the daughter's connection with her father and her father's family. The son has the corresponding male name of Singh. That is a part of the tradition of the father's family where the names are mandatory, and respectful of that family tradition which the daughter and son both inherit. The addition of the middle name of Kaur is in the daughter's best interests.

[385] However, the issue with regard to the surname differs. The evidence of the witnesses was consistent that hyphenated names are a new occurrence. It was also consistent that evolution in this regard is not inconsistent with Sikhism. There is no evidence that a hyphenated surname is contrary to any cultural rules or tradition. The tradition described by Dr. Bains of the patriarchal line of inheritance is not affected by a hyphenated surname for these children. Having both family names as their surname allows them to trace their lineage back to both families.

- [387] After consideration of the totality of the evidence, I find that it is not in the best interests of the children to change their last names to the name of the father alone. The children are Canadian Sikh children, and their hyphenated last name reflects the heritage of both parents.
- [75] Dr. P. argues that the judge erred in her approach to culture, and in failing to recognize the multicultural nature of Canadian society. He contends that the errors in approach also shows that the judge was biased.
- [76] Dr. P. is quick to label those who reach opinions that differ from his own as "biased", and this is simply another example of that habit. The judge approached this matter in an impartial, detached manner, and without pre-conceptions as to the children's best interests. The argument that she was biased is without foundation.
- [77] I am also not persuaded that the judge made any error in her analysis.
- [78] Dr. P. argues that the judge should not have considered expert evidence on Sikh culture, citing *Syndicat Northcrest v. Amselem*, 2004 SCC 47, for the proposition that "it is inappropriate for a court to use expert opinions on religious obligations, and the only inquiry is the sincerity of belief."
- [79] The judge did not, in this case, hear expert evidence for the purpose of determining what Dr. P.'s beliefs were, nor for the purpose of ruling on the validity of those beliefs. Rather, the expert evidence was used to test his assertion that the children would be alienated from Sikh culture unless their names were changed in the manner in which he sought.
- [80] I am not persuaded that the judge misused the expert evidence. She recognized that both Dr. P. and Ms. J. have strong beliefs as to the appropriate names for the children. In assessing the children's best interests, it was necessary to give weight to expert evidence on the Sikh culture and religion.
- [81] Dr. P. contends that the judge misinterpreted the legislation in two ways. First, he says that the judge erred in concluding that the considerations set out in s. 9(1)(a), (b) and (c) were irrelevant, and in considering only the best interests of the child.
- [82] I am not persuaded that the judge erred. Pursuant to s. 4.1(3)(a), the best interests of the child were the only considerations to be taken into account. The considerations in ss. 9(1)(a), (b), and (c) are explicitly included as factors informing the "best interests of the child". Here, however, the considerations in those sections were irrelevant, because no one suggested that the names that Dr. P. proposed ran afoul of them. Dr. P.'s concerns fell fully under s. 4.1(3)(a), and were fully considered by the trial judge.

- [83] Dr. P. also argues that the judge erred by failing to interpret s. 4.1(3)(a) in accordance with Charter values. I am not convinced that the judge failed in that manner. She considered values such as multiculturalism, freedom of religion, and equality of men and women in the course of her discussion. I see nothing in her analysis that is inconsistent with Charter values.
- [84] Dr. P. also takes issue with the judge's factual findings, arguing that she did not accurately interpret the expert evidence. He refers to specific passages from the expert testimony, and argues that the judge gave insufficient weight to those passages. I am not persuaded that the judge erred in her assessment of the expert evidence.
- [85] The judge, in my view, analysed this issue in a careful and culturally-sensitive manner. I would not give effect to this ground of appeal.
10. Assessment of the Evidence on Alienation
- [86] As I have indicated, the court allowed Dr. P. to re-open the trial a second time to provide new evidence that he said established parental alienation by the mother. The father had made audio and video recordings of access visits in which he claimed the children had used profanity in both English and Punjabi, and had said that their father should die.
- [87] The judge analysed the evidence in some detail at paras. 155-201. She concluded, at para. 201:
- [201] Having reviewed the transcripts, I conclude that the use of the words purported to be "pappa die" and "kutta" or "dog" as derogatory phrases, has no foundation in the translations and context and speech of the children as described by the mother. It is of concern that the children use the word "fuck". It is not clear if it is used once and then because it gets a reaction from their father, is continued to be used. One sequence of words "duck" and "fuck" are capable of the interpretation of Dr. Posthuma which is that the father intended to achieve the result of the children using, in that situation, the word "fuck".
- [88] It is not entirely clear what the judge means when she refers to the words (and, in particular, the words "papa die") as having "no foundation in the translations and context and speech of the children as described by the mother." Dr. P. contends that the judge found that the Punjabi words meaning "papa die" were not spoken by the children. He contends, rightly, that such a finding would have been contrary to the evidence.
- [89] While there was some dispute, during the trial, as to what words were spoken in Punjabi, the parties ultimately agreed that they were words that are properly translated as "papa die".
- [90] In light of the manner in which the trial proceeded, I am not prepared to interpret the judge's findings as does the appellant. I conclude, instead, that the judge was referring not to whether the words were actually spoken, but to the significance of those words in the context in which they were spoken - a context that included a great amount of baby talk and gibberish that was not clearly meaningful.

[91] The judge's conclusions on the alienation issue were as follows:

[202] On the extensive evidence heard on this continuation of the trial, I cannot conclude that the children's speech indicates any alienation attempted by the mother against the father. I do not find that this evidence has any negative bearing on the mother's application to be the sole guardian of the children.

[205] It is my observation that the father believes that the mother is attempting alienation and then locates situations which support his belief. I would urge him to, especially at the conclusion of this lengthy trial, be aware of the many occasions where the mother has attempted to assist his relationship with the children.

[92] These conclusions were open to the trial judge on the evidence, and I would not give effect to this ground of appeal.

[93] I note that Dr. P. has also raised grounds of appeal dealing with the judge's consideration of expert opinion on the issue of alienation. I am unable to find any error of law in the manner in which the judge weighed those opinions, and would also reject those grounds of appeal.

11. Maximization of Access

[94] Dr. P. contends that the trial judge erred in failing to maximize his access to the children.

[95] The judge carefully considered the access situation. The parties differed on the reasons that Dr. P. had not exercised his access rights. Dr. P claimed that the difficulty was largely a result of Ms. J.'s determination to thwart his attempts at access. The judge's conclusions were to the contrary:

[86] I am mindful that it is the submission of the father that the reason that the access has been sporadic is that the mother intends to minimise or eliminate his time with the children. It is his view that she would prefer if he had no relationship with the children. I reject that submission.

[96] The trial judge characterized the difficulties in arranging access as stemming from a failure of communications:

[95] The main factor in the context of access difficulties has been the lack of and problems with direct communication between the parents. At the time the children were born, the father was prevented by the terms of the Bail Order from direct communication with the mother. It was varied to permit communication regarding access. There was a civil restraining order in place from March 2011. A greater barrier occurred as a result of the tenor and content of the father's emails to the mother. She requested that he not write her directly, but communicate regarding access through her counsel.

[96] Although the father testified that he wrote in that manner as a result of his distress, the pattern has continued unabated. The cause of the disrespectful emails is not simply situational stress.

- [97] Communication from the father and to the mother's counsel deteriorated from strained to often rude and denigrating. At the father's request on May 4, 2012, I ordered that communication be between the father's friend, Chris Pratt, and counsel for the mother. The father requested that only alternate counsel participate in the email communication.
- [98] However, time differences, occasional unavailability and primarily an apparent inability or unwillingness to engage in respectful communication with counsel for the mother persuade me that communication through Mr. Pratt, while worthy of an attempt, was an entirely failed attempt in access arrangements.
- [99] Many of the emails in the time period to June 2012 from the father and Mr. Pratt to both of the mother's counsel are entirely inappropriate. They continued to be demeaning and insulting as well as taunting and threatening. They include references to the religion of one counsel. It is not necessary or desirable to repeat them in these Reasons.
- [100] The necessity of having an access exchange supervisor has further complicated communication regarding access. There is an issue regarding how far in advance the arrangements are made even when the schedule is known.
- [97] The judge identified certain specific aspects of access that had proven problematic:
- [133] [A] number of problems with access [are recurring]. Those are difficulties arranging an appropriate access exchange supervisor, which are partly due to the inherent difficulties in retaining a qualified person for this task and, I find, exacerbated and largely due to the failure of the father to plan and book those services in advance. Communication between the father and mother's counsel is increasingly difficult. The requirement to deposit the passport adds complexity and barriers to the exercise of access.
- [134] Finally, the father appears to prefer to insist on strict application of court orders rather than communication to alleviate difficulties.
- [137] On the evidence as a whole, I find that the reason for the minimal and sporadic access is communication difficulties between the parties primarily as a result of the father's abrasive and demanding style of communicating. At times, the mother has responded similarly, but it is not her who has instigated or who is committed to the pattern now firmly entrenched.
- [138] Further, I conclude that the father prefers to argue and to find reasons to support his view that the mother is impeding his access rather than make accommodations to ensure that access takes place. Whether the requirements are large or small, the reaction of the father to any difficulty or adjustment that is not to his liking is often to cancel access or not attend as scheduled.

- [98] The judge concluded that regularity of access was the most important goal of an access order. She ordered that access would occur on alternate weeks, on Saturday, Sunday, Monday and Tuesday - a total of four access days every two weeks. Hours of access were specified. As well, the order provides for specified access and specified variations on special days (such as birthdays and Father's Day), during school break periods, and for vacation and travel.
- [99] The judge accepted Dr. Korpach's recommendation that Dr. P. engage a parenting coach to assist in access arrangements, as well as to provide input to Ms. J. on major decisions affecting the children.
- [100] In his submissions before this Court, Dr. P. continued to blame Ms. J., the supervising agency, and the passport deposit provisions of the interim order for the lack of access. It is apparent that each of these factors played some role in the access difficulties, but it is also clear that Dr. P. could have overcome the inconveniences had he shown any measure of flexibility. The main factor that has impeded access is Dr. P.'s apparent disinclination to accept access other than on his own terms.
- [101] The order made by the trial judge is unusual in requiring a parenting coach as well as an exchange supervisor. The judge's explanation as to the qualifications for a parenting coach are not precise, and have led to disagreements by the parties.
- [102] In my view, an order requiring a parenting coach as well as an exchange supervisor can be cumbersome, and will probably be expensive to administer. While, as I shall indicate, I would not interfere with the order that was made, this should not be taken as suggesting that such orders should be commonplace. To the contrary, I would think that a court should assess very carefully the necessity to make such an order.
- [103] That said, this case is exceptional in the degree to which one party (Dr. P.) has elected to thwart effective communications on issues of child care and access. As well, there are obviously serious deficiencies in Dr. P.'s understanding of basic parenting skills. In these unusual circumstances, I cannot say that the imposition of a requirement for a parenting coach (whose functions are to take over communications for Dr. P. and to provide him with some insight into child rearing) was outside the discretion of the trial judge. While I have some reservations, even in this case, as to whether this order is the most appropriate manner of dealing with the situation, I would defer to the trial judge, who had much greater familiarity with the parties and the situation than this Court does.
- [104] I recognize that the parties have had difficulty agreeing to a parenting coach, and have disagreed on who may fill that position. In part, that has been due to Dr. P.'s insistence that his mother should be the parenting coach. It is evident from the original reasons that the judge considered that the parenting coach should not be Dr. P.'s mother:

[231] The father submits that his mother can come from England to assist him with parenting skills. It is unclear why his mother had not yet spent time with him and the children. For the children to know their paternal grandparents will be in their best interests. However, the following steps recommended in the Report must be in addition to any assistance by his parents.

[232] The father must therefore immediately retain the services of a Parenting Coach. This professional will provide the services described in the fifth recommendation of the Report .

[Emphasis added.]

[105] To the extent that there remains uncertainty surrounding the position of parenting coach, the parties are entitled to seek clarification in the trial court.

12. Storage Costs

[106] Dr. P. contends that storage costs for household furnishings should have been payable by Ms. J., rather than being payable by him. The trial judge discussed the issue as follows:

[298] The father submits that although he has limited personal possessions after moving from England, he does not oppose the mother acquiring the furniture and household items which have been in storage since the sale of the former matrimonial home on July 11, 2009. However, he says that the cost of storage of the items from the home has been entirely borne by him at a cost of \$358 per month plus \$505 removal costs. He seeks an order that the mother reimburse him for those costs of storage.

[299] On behalf of the mother it is submitted that pursuant to the marriage agreement, the household contents are her property as she purchased the household furniture. She has produced receipts for those purchases which she made with her funds.

[300] It is further submitted on behalf of the mother that the father insisted on putting the household contents in storage despite the mother's requests through counsel that the furniture be returned to her. The storage costs in relation to the furniture ought therefore to [be] the father's cost alone as he incurred the cost unnecessarily and despite the mother's opposition.

[301] The father says that he had no choice but to put the furniture into storage as the house had to be cleared for sale and he had no confidence the furniture matter could be resolved in time.

[107] After referring to documentary evidence, the judge concluded:

[303] I find on the evidence that the father chose to put the furniture into storage over the objections of the mother. There was an opportunity for the parties to sell the furniture, and the funds to be held in trust pending resolution. Alternatively, the mother proposed that she would take the furniture, thus reducing or eliminating the need for costly monthly storage.

[304] As it was the father's choice to store the furniture, the cost of the storage is to be borne by him.

[108] The judge's analysis is straightforward and reasonable. I would not interfere with it.

13. The Marriage Agreement

[109] Dr. P. sought to amend the entered order, pursuant to the slip rule, to state that the Marriage Agreement was binding on the parties. The trial judge refused his application, finding that the existing order is clear with respect to the Marriage Agreement, and the proposed amendment is unnecessary.

[110] I can find no error in the trial judge's reasoning on this issue.

14. Trial Costs

[111] The final issue on appeal is that of trial costs. The trial judge awarded lump sum special costs. Her intention was to provide a level of indemnity for Ms. J. beyond that provided by party and party costs, without ordering full special costs against Dr. P. The judge did not assess costs in any rigorous manner; her award appears to be based on very rough estimates without any evidence.

[112] After the trial judge delivered the judgment on costs, this Court released its decision in *Gichuru v. Smith*, 2014 BCCA 414, a case in which a trial judge made an order similar to the one in this case. This Court held that such an order is not within the discretion of a trial judge. Evidence must be provided to the court to establish the amount of legal fees paid by the party seeking costs. A judge can only assess the amount of costs after considering evidence.

[113] I agree with Dr. P.'s argument that the costs award in this case cannot be upheld given what this Court said in *Gichuru*. Dr. P. understands that if this matter is remitted to the trial court on the issue of costs, there is a possibility that the award against him will exceed the award currently embodied in the trial order. Nonetheless, he wishes to have the matter remitted.

[114] Accordingly, I would remit the issue of costs to the trial court.

Conclusion

[115] In the result, I would dismiss the appeal, except for the appeal of the costs order. I would remit the costs order to the Supreme Court for reconsideration in light of *Gichuru*.

[116] Notwithstanding Dr. P.'s successful appeal on the issue of costs, Ms. J. has been substantially successful on the appeal, and should have her costs.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

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