

CANADA / JUDGMENT

B.W.H. v. T.B.H.

2024 BCSC 1623

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1623 B.W.H. v. T.B.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.W.H. v. T.B.H.,

2024 BCSC 1623

Date: 20240828

Docket: 172121

Registry: Victoria

Between:

B. W. H.

Claimant

And:

T. B. H.

Respondent

Before: The Honourable Justice Wolfe

Oral Reasons for Judgment

Counsel for the Claimant:

V. Hemminger

The Respondent, appearing in person:

T.B.H.

Place and Date of Hearing:

Victoria, B.C.

August 21, 2024

Place and Date of Judgment:

Victoria, B.C.

August 28, 2024

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- [1] The following are my oral reasons for judgment. I reserve the right to edit for grammar, clarity and to address caselaw and citations, but the substance of my ruling will not change.

Overview

- [2] In late April and early May 2024, I heard two applications concerning relocation, parenting time and child support in respect of the parties' two children, A.H. (now 14) and C.H. (turning 12 in September). I delivered written reasons for judgment on July 9, 2024, which are indexed at 2024 BCSC 1235 (the "Reasons").
- [3] On relocation, I held the best interests of A.H. meant that she should remain in Victoria with the respondent mother, T.B.H. (the "Mother"), and attend school here. In contrast, I determined C.H.'s best interests required that she be permitted to relocate to Salt Spring Island, to reside with the claimant father, B.W.H. (the "Father"), and attend school there. In

recognition of the sisters' close relationship, I set a parenting schedule that has A.H. and C.H. together every weekend and for all holidays. I granted the Mother's application for orders for retroactive child support, and made a prospective child support order based on the new parenting time schedule. The formal order has not yet been entered.

- [4] The Father applies to reopen the previous applications so he can adduce further evidence and make further submissions on where A.H. should reside and attend school. In brief, the Father says the decision to separate A.H. and C.H. was devastating to A.H. He proposes to provide new and fresh evidence about where A.H. wishes to live and attend school. He says this is compelling evidence confirming that what is most important to A.H. is to be with C.H. and her half-sister on Salt Spring Island. The Father says there will be a miscarriage of justice if the Court does not reopen the applications and take A.H.'s newly expressed views into account in reassessing her best interests. The ultimate relief sought by the Father, if granted, would have implications for prospective child support.
- [5] Further, the Father argues the Court should revisit the order respecting A.H. before she starts high school on September 3, 2024. At a Judicial Management Conference ("JMC") held August 15, 2024, and again at last week's hearing, I advised the parties that if I were to grant this application, a further hearing and additional evidence would be required, meaning a decision could not realistically be made before September 3, 2024. In that light, the Father submits that, if the Court grants the reopening, it should also grant an interim order permitting A.H. to attend school on Salt Spring Island pending the outcome of the reopened hearing.
- [6] The Father also seeks clarification in respect of several terms of my order in the Reasons. The Mother consents to one of the proposed clarifications.
- [7] The Mother acknowledges that the children were initially very upset at the decision, the outcome of which was unexpected. However, the Mother opposes the application to reopen arguing A.H.'s reaction was not as characterized by the Father, nor has it been as prolonged. The Mother says that, with some distance from the initial shock, A.H. is looking forward to school and other activities in Victoria this fall. The Mother effectively submits the application to reopen is premature, as the parties have not yet had the opportunity to implement the parenting time schedule ordered by the Court as it pertains to the school year. This means any actual impacts of the new schedule on A.H.'s best interests are not yet known. The Mother also raises the possibility, with some evidentiary basis in support of her position, that once the schedule has been implemented, further consideration of C.H.'s best interests may be required as well.
- [8] For the reasons that follow, I dismiss the Father's application to reopen. While I have concerns about the reliability and credibility of some of the Father's proposed new evidence, I have more fundamental concerns about reopening at this time.

- [9] The proposed new evidence focuses almost exclusively on views of A.H. articulated during the summer and within a short period of time after I rendered judgment. Given the timing of this application, there has been no opportunity for the parties or children to experience the parenting time schedule during the school year. It is not possible for anyone to provide the Court with evidence about how it will work in practice and what impacts the schedule will have on the multiple factors that informed my previous best interests of the child analysis. While an important consideration, A.H.'s views are ultimately only one factor in that analysis. In light of that, it does not serve the interests of justice to reopen the matter at this time.
- [10] However, in dismissing the application to reopen, I am not discounting A.H.'s concerns, or those the Mother has raised on behalf of C.H. I agree that if the lived experiences of the parties and children under the parenting time schedule demonstrate a need for it to be revisited, that should be done. Accordingly, I am modifying my original judgment to require an earlier review of the parenting time schedule, to be set before me this fall, as detailed later in this ruling.

The background to this application

- [11] As the background to this matter is addressed in detail in the Reasons (see paras. 10-31), I will not repeat it here. At a high level, the parties have been separated since 2016. There have been different parenting arrangements for A.H. and C.H. since that time, which included a period of about four years between 2019 and 2023 when the parties followed a week on / week off schedule. That changed in summer 2023 when the Father relocated to Salt Spring Island with his wife and the children's half-sister. The Court issued an order on July 20, 2023 prohibiting the Father from relocating the children to Salt Spring Island without agreement or further court order.
- [12] As a result, beginning in September 2023, the children lived with the Mother in Victoria during the week and continued to attend school there. At the previous hearing, the evidence was that the children spent three weekends each month with the Father and the fourth weekend with the Mother. During this hearing, the parties clarified that schedule was in place from September to December 2023, but thereafter, the children spent most weekends with the Father.
- [13] The Father applied to relocate the children and vary the parenting time schedule. In addition to opposing any relocation, the Mother cross-applied for retroactive and prospective child support. I heard the applications together over four days in late April and early May and reserved judgment until early July. In the Reasons, I assessed the children's best interests individually, taking into account all of the statutory factors under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. To determine the children's views, I relied on a February 16, 2024 Views of the Child Report prepared under s. 211 of the FLA (the "Views of the Child Report"), as well as affidavit evidence and the cross-examinations of both the Mother and Father.

- [14] I ultimately determined that A.H.'s interests are best served by remaining in Victoria with her Mother, including so she can start high school in September 2024 with her friends. In contrast, I determined C.H.'s interests are best served by relocating to live with her Father and his family on Salt Spring Island and attending school there. In doing so, I acknowledged that separating the children was not something either party considered in the children's best interests, and provided my rationale for having determined it was appropriate in this case. To address the need to preserve the children's relationship with each other, I fashioned a parenting time schedule that has them together every weekend and for all holidays, alternating between the parents. I granted the Mother retroactive child support and made a prospective child support order based on the new split parenting time schedule.
- [15] On July 31, 2024, the Father submitted a "request to appear" before me, seeking a 30 to 60-minute summary trial to "amend" the parenting time order for A.H. to relocate her to Salt Spring Island. The request to appear provided a summary of proposed evidence from A.H. and her counsellor about A.H.'s views. Later that same day, counsel for the Father offered to provide a letter from the counsellor and a separate letter from A.H. should the Court wish to see them in advance of any appearance. The request to appear did not include the Mother's formal position as her previous counsel was on holidays, but it did anticipate the Mother's opposition.
- [16] I issued a memorandum to the parties dated August 1, 2024 seeking clarification from the Father's counsel about the nature and legal basis for the Father's proposed appearance. The parties did not receive the memorandum until August 6, 2024. The memorandum advised the parties that if the Father was seeking to reopen the previous applications and adduce further evidence, a formal application would be required and I would need to know the Mother's position. I advised I was not prepared to receive any proposed new evidence in advance of an application, but proposed a JMC to discuss logistics for such an application. The memorandum also noted that the Mother had filed a notice of address for service on July 30, 2024 indicating she was no longer represented by counsel.
- [17] The Father's counsel responded with suggested dates for a JMC and a hearing, but did not clarify the nature of the application. By further communication on August 9, 2024, I set deadlines for the Father to clarify the nature of the proposed application and for the Mother to provide her initial position. I also set a proposed schedule for a JMC on August 15 and for an exchange of application materials before a one-day hearing on August 21, 2024. The Father's counsel confirmed the same day that he was seeking to reopen the hearings and adduce new evidence, and to change the parenting time schedule and the school A.H. would attend in September 2024. As required, the Mother provided her position by August 13, 2024, advising she would oppose the application to reopen on the basis that the court judgment "needs time to settle before further evaluation and discussion".
- [18] At the August 15, 2024 JMC, I clarified that the August 21, 2024 hearing would only address the Father's application to reopen the earlier hearings and adduce new evidence. I confirmed that if the request to reopen were to be granted, a further hearing, potentially

with evidence beyond that proposed by the Father, would be required. The Father's counsel advised there were "housekeeping" clarifications he wished to seek, based on perceived errors or omissions from the Reasons. I asked counsel for the Father to discuss those with the Mother and to include them in the notice of application so I could determine whether to entertain them as part of the application to reopen.

[19] The Father's notice of application, filed August 16, 2024, seeks the following orders:

1. The evidentiary portion of the matter previously heard by the court on April 30, May 1-3, 2024, be reopened.
2. The Order of Justice Wolfe dated July 9, 2024 be varied so that the child, [A.H.] attend school at Salt Spring Island at Gulf Island Secondary School, commencing September 2024;
3. This matter be heard on a summary trial basis;
4. That the parties be permitted to conduct cross-examination should the court deem it appropriate and/or necessary;
5. The Claimant be awarded costs of this Notice of Application;
6. As to the Reasons of Justice Wolfe dated July 9, 2024, they be amended as follows:

[the parenting time schedule be amended to the schedule previously proposed by the Father at the earlier hearings, with the children residing and attending school on Salt Spring Island, and the Mother technically having parenting time from Thursday evening to Sunday evening (with the Father to care for the children on Fridays if the Mother is working); an order that the parties equally share the costs of the Views of the Child Report; and that neither party pay child support based on shared parenting];

7. The following orders with respect to the requirements of the parties in terms of pick-up and drop-off;
 - a. The parent who is ending their parenting time will send the children on the ferry as foot passengers from the ferry terminal, with [the Father] from Fulford Harbour and [the Mother] from Swartz Bay;
 - b. Until [C.H.] turns 12 on September 22, 2024, the parties will accompany the children on the ferry;
 - c. The receiving parent will be ready at their terminal to receive the children into their care;
8. That neither party will require consent of the other to travel out of province with the children, however the parties will advise the other if they plan to travel out of province, and will provide the travel information for the travel out of the province including: a) the itinerary of the trip; b) the locations to which the party will travel with the children; and c) contact information for the children and for the party during the trip, in the event of an emergency;

9. Extracurricular expenses will be shared equally unless otherwise agreed;
10. Costs will be shared equally for the Views of the Child Report.
- [20] In her application response, filed August 20, 2024, the Mother consented to the orders sought at paragraphs 4 and 8 of the notice of application, and opposed the remaining orders.
- [21] At the start of this hearing, I canvassed the orders sought in the notice of application and advised the parties that the orders sought at paragraphs 2-4 and 6 were orders that could only be sought if a decision were made to reopen the applications. I therefore adjourned the relief sought in those paragraphs generally.
- [22] I further advised the parties I was not prepared to deal with the relief sought at paragraph 9, in relation to extra-curricular expenses. In the Reasons, I made a deliberate decision to require the parties to share the cost of extra-curricular expenses in proportion to their respective incomes, subject to further agreement or adjustment by the parties in writing (Reasons at paras. 166 and 195(e)). Unlike with the orders sought at paragraphs 7, 8 and 10 of the notice of application, the Father does not characterize that term of my order as either an omission or an error that requires correction. He simply seeks a different outcome, without having provided a legal or evidentiary basis. While the term of the order allows the parties to agree to a different division of such expenses, the Mother does not consent to the term of the order itself being changed. I did not consider it appropriate to revisit that term in the circumstances, so I also adjourned generally the relief sought at paragraph 9 of the notice of application.

Issues

- [23] There are two issues before this Court on this application:
- Should the Court address the requested clarifications sought at paragraphs 7, 8 and 10 of the notice of application, and if so, how?
 - Do the interests of justice, including the best interests of the child, require the Court to reopen the previous applications and permit further evidence and submissions at this time?
- [24] The Father also seeks costs of this application.

Analysis

Issue 1: Requested clarifications

- [25] The Father seeks clarifications respecting three separate issues arising from the Reasons. First, the Father says the Reasons did not provide sufficient guidance respecting each parent's responsibility for pick-ups and drop-offs at changeover, and that has given rise to further disputes between the parties. Second, the Father says it was an error for the Court to order that a party requires the other's written consent before travelling with the children outside the province, as there was no request, nor is there a rationale, for that requirement.

Third, the Father seeks an order that the Mother contribute half of the costs of the Views of the Child Report on grounds the Court relied on it extensively and the parties were not given an opportunity to make submissions respecting its cost.

- [26] The Mother agrees further clarification is required regarding pick-ups and drop-offs, but proposes something different than the Father. The Mother also agrees there is no need for advanced written consent before a party travels with the children outside British Columbia; it is sufficient if details regarding the proposed travel are provided. The Mother does not agree that she should be required to equally share the costs of the Views of the Child Report. She says the Father agreed to pay for it and she never agreed to contribute.
- [27] I agree the first two requested clarifications arise because of omissions or errors on my part, and since the formal order has not been entered, I am satisfied I can and should correct them. The third request is of a different nature and I will deal with it separately. I am also aware the Father has filed an appeal. While the notice of appeal does not expressly relate to any of the three clarifications sought, I have borne in mind the cautions set out in *R. v. Teskey*, 2007 SCC 25 at para. 18.

Extra-provincial travel

- [28] With respect to extra-provincial travel, at paragraph 194(o) of the Reasons, I made the following order:

If either party is planning to travel with either or both children outside the province on their parenting time, they will notify the other parent in writing of their plan at least one week prior and will provide information including the travel itinerary, flight or other travel information, and contact information, and must receive written consent from the other party.

- [29] Both parties agree the last clause of the term of order is unnecessary; there have not previously been issues with extra-provincial travel that would necessitate advanced written consent. I am satisfied it is appropriate to modify the order pronounced in paragraph 194(o) of the Reasons to remove the words "and must receive written consent from the other party", and I so order. The corrected term of order will now read:

If either party is planning to travel with either or both children outside the province on their parenting time, they will notify the other parent in writing of their plan at least one week prior and will provide information including the travel itinerary, flight or other travel information, and contact information.

Pick-ups and drop-offs

- [30] With respect to pick-ups and drop-offs, at paragraph 194(k) of the Reasons, I specified:

On any changeover days, the parties will exchange the children as close to the 5:00 p.m. ferry as possible.

- [31] This term of order followed the order sought at paragraph 2(xi) of the Father's notice of application filed April 11, 2024, and was consistent with both parties' evidence that changeovers had generally taken place as close to the 5:00 p.m. ferry as possible, taking into account changes in the ferry schedule. At the JMC and at this hearing, both parties submitted further direction would be helpful because their different understandings of their responsibilities has created conflict.
- [32] The Mother says since she and the children have made sacrifices to accommodate the Father's move to Salt Spring Island, he should pick-up and drop-off the children at Swartz Bay ferry terminal on Vancouver Island, especially since she must drive 40 minutes to get to the terminal. The Father says he also has to drive to the Fulford Harbour ferry terminal on Salt Spring Island (he did not specify the duration of his drive), and the Mother's approach means he must take the ferry over and back for both pick-up and drop-off. He says the parties should share the responsibility for accompanying the children on the ferry. He proposes that, until C.H. turns 12 on September 22, 2024, the parent ending their parenting time will accompany the children on the ferry, and the parent beginning their parenting time will be ready at the other terminal to receive them. Once C.H. turns 12 (which, according to the BC Ferries website, is the age at which children can travel alone apart from school and school events), the Father proposes the parent ending their parenting time send the children on the ferry as foot passengers, to be received by the other parent on the other side. The ferry ride between Swartz Bay and Fulford Harbour is approximately 35 minutes.
- [33] The Father's proposal in particular contemplates the children taking the ferry together, but under the parenting time schedule in the Reasons, only one child would be taking the ferry each weekend. I canvassed this with the parties at the hearing and asked if they would be comfortable with each child riding the ferries as a foot passenger if they are not together. I understand the Mother is comfortable with that, but the Father is not comfortable with that for C.H., even after she turns 12.
- [34] While the parties did not request a more detailed term of order at the initial hearings, both agree the lack of greater detail around changeovers creates confusion and conflict. I am satisfied it is consistent with the original intent of the changeover term to provide further guidance to avoid conflict. However, given my conclusion on the reopening application, I must do so in light of the parenting time schedule set out in the Reasons and the parties' submissions about their comfort levels with their children riding the ferries unaccompanied.
- [35] My intent was for the parties to share responsibility for changeovers; I did not intend one party to bear a greater burden in that regard, which would be the result under the Mother's approach. In my view, the Father's suggestion - that the delivering parent be responsible for accompanying the child travelling - is more aligned with a model of shared responsibility. Taking into account the parties' differing comfort levels with the children riding the ferry unaccompanied, and the fact that the parenting time schedule has not yet been implemented for the school year, I modify the order pronounced in paragraph 194(k) of the

Reasons to read as follows:

- a) On any changeover days, the parties will exchange the children as close to their respective 5:00 p.m. ferry as possible, subject to the following conditions:
 - i. For the month of September 2024, the parent ending their parenting time with a child will accompany that child on the ferry and the parenting beginning their parenting time will wait at the other terminal to receive the child;
 - ii. After September 2024, if both parties agree, the parent ending their parenting time with a child will send that child on the ferry by themselves as a foot passenger and the parent beginning their parenting time will wait at the other terminal to receive the child. If either party does not agree that the particular child may ride the ferry by themselves, the parent ending their parenting time will accompany the child on the ferry to the other terminal. This will continue unless and until both parties agree the child may ride unaccompanied.

[36] The intent with this clarified order is to use September 2024 to permit the parties and children to implement the parenting time schedule and its associated ferry travel in a manner where the children are supported through the transitions. It is not necessary for the parties to bring a vehicle onto the ferry; they may travel as foot passengers themselves. After September 2024, if both parties agree, they may permit one or both children to ride the ferry unaccompanied. For example, if the parties are comfortable with A.H. riding the ferry unaccompanied as of October 2024, she may do so as a foot passenger. For the weekends when C.H. is travelling, if either party does not agree that she may ride the ferry unaccompanied, then she will continue to be accompanied by the parent ending their parenting time. This will also permit the parties to make adjustments through fall 2024 and potentially beyond, as the parties and children become more familiar and comfortable with the travel schedule.

Costs of the Views of the Child Report

[37] Turning finally to costs of the Views of the Child Report, I have reviewed the Father's notice of application from the previous hearings, filed April 11, 2024. At paragraph 5 of part 1 of the notice of application, the Father sought costs of his application. There is no further detail in the notice of application regarding the nature of costs being sought, but at paragraph 49 of his Affidavit #3, filed March 27, 2024, he deposes that the Mother refused his request for a Views of the Child Report until he threatened to make a court application. At that point, he deposes "she agreed, but only if I paid for the entire cost of the report. I did so on the agreement that it is without prejudice to costs" [emphasis added]. While this is some evidence of the Father's intention to seek costs of the Views of the Child Report, the Father did not provide any further evidence regarding the costs of the Views of the Child Report (including any invoices), and there is no documentation to corroborate the Father's evidence that he agreed to pay without prejudice as to costs.

- [38] At the previous hearings, the Mother opposed the Father's request for costs. In the Mother's Affidavit #3, filed February 29, 2024, she attached as Exhibit "E" an email communication from her then counsel to the Father's counsel, dated October 13, 2023, which confirmed the Mother did not agree to a hear the child report on the basis that the cost was "prohibitive and unnecessary". At paragraph 32 of the Mother's Affidavit #4, filed April 17, 2024, she responds to paragraph 49 of the Father's Affidavit #3 to provide additional details about her objection to the Views of the Child Report, but she does not address the Father's assertion regarding the condition on which he agreed to pay for it. My notes from the hearings indicate that in discussing this paragraph, the Mother's former counsel submitted the Mother ultimately agreed that the report be prepared because she acknowledged the Court often requires that type of information.
- [39] The Father now submits the parties were not given an opportunity to make submissions on the costs of the Views of the Child Report. Both parties sought costs of their respective previous applications. Neither counsel addressed costs in their oral submissions, but there was also nothing that prevented them from doing so. In her application response filed August 20, 2024, the Mother says the Father agreed to pay for the costs of the Views of the Child Report before it was undertaken, and submits "all costs and financial matters were dealt with already" in the Reasons.
- [40] At paragraph 196 of the Reasons, I concluded that as each party enjoyed partial success on their respective applications, they should bear their own costs. I did not make a specific order respecting costs of the Views of the Child Report, as I was not requested to do so, either in the previous notice of application or in oral submissions. That said, in the circumstances of this case, and where the formal order has not yet been entered, I consider it appropriate to address this matter.
- [41] Rule 16-1 of the Supreme Court Family Rules governs costs of family law proceedings. As in general civil proceedings, costs are understood to include a reasonable amount for disbursements which have been necessarily or properly incurred in the conduct of the proceeding: see R. 16-1(4) and C.L.M. v. D.J.M., 2010 BCSC 657 at para. 8.
- [42] Where a court appoints a person to prepare a views of the child or other report under s. 211 of the FLA, the court has authority to allocate the costs of such a report among the parties, or to require one party alone to pay those costs: s. 211(5). A brief review of the jurisprudence confirms the costs of such reports are generally treated as reasonable and necessary disbursements, particularly where, as here, the report is relied on by both parties and by the Court. Except where there is egregious conduct (such as a lack of diligence) on the part of one party, the Court will often order the costs of such a report to be borne equally by the parties, or on occasion, in proportion to their respective incomes: see for example, M.P.D. v. C.R.D., 2017 BCSC 397 at para. 59; A.W. v. S.M.F., 2021 BCSC 148 at para. 44.

- [43] As noted, while the Mother initially objected to the preparation of the Views of the Child Report, at the previous hearing, her counsel confirmed she eventually agreed because she recognized the Court might require that type of information. Given that acknowledgment, the utility of the Views of the Child Report to the Court, both parties' reliance on it, and the fact that I previously determined the parties should bear their own costs, in my view, it is appropriate that the parties share its costs equally.
- [44] Paragraph 6(d) of part 1 of the Father's notice of application filed August 16, 2024 states that the Mother's equal share of the costs of the Views of the Child Report would be \$1,535.62. Unfortunately, the Father did not file any evidence in support of that figure. In the circumstances, I am unable to make an order in a specific amount. If he has not already done so, the Father must provide the Mother with the invoice for the Views of the Child Report, showing the full amount paid, from which her equal share can be determined. In the absence of agreement as to the amount at that point, the parties are referred to the Registrar to settle the amount.

Issue 2: Reopening

The legal framework

- [45] The relevant principles on an application to reopen proceedings to adduce new or fresh evidence are not in dispute. In *Mong v. Giang*, 2024 BCCA 136 [Mong BCCA], the British Columbia Court of Appeal recently upheld a decision by Justice Milman not to reopen a trial, confirming he had correctly identified and applied the criteria that must guide a Court's exercise of discretion on an application to reopen (see paras. 24-28). In his decision, indexed at 2022 BCSC 1732 [Mong BCSC], Milman J. relied on a number of earlier decisions:
- [12] The relevant considerations were conveniently summarised by Ehrcke J. in *Zhu v. Li*, 2007 BCSC 1467, as follows:
- [20] From the cases, I conclude that the following principles apply to an application to re-open a trial to adduce fresh evidence:
1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
 3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.

5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.

[13] More recently, the principles to be applied were summarised as follows by Garson J.A. in *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 31:

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's unfettered discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

[14] More recently still, the Court of Appeal has clarified that the discretion is not, as characterised in some of the authorities, an "unfettered" one, but must be exercised judicially, that is, in a principled and consistent way: *Hansra v. Hansra*, 2017 BCCA 199 at para. 44; *Bajwa v. Habib*, 2020 BCCA 230 at para. 51.

[46] The overarching principle is that a decision about whether to reopen "turns on the interests of justice and particularly whether not to do so would result in a miscarriage of justice" (*Mong BCCA* at para. 28). As the excerpts quoted above make clear, the exercise of discretion on a reopening requires the Court to balance multiple interests, some of which may be in conflict. These include the recognition that the discretion must be exercised "judicially and with restraint" to preserve the integrity of the court's process, the importance of finality in legal proceedings and the obligation of parties to present their cases at first instance (and the corresponding risk of creating an incentive for parties not to do so if reopening is too readily available), the probability the proposed new evidence would change the result and the implications if reopening is refused (*Mong BCCA* at paras. 24-28).

[47] In its earlier decision in *Bajwa v. Habib*, 2020 BCCA 230, leave to appeal to SCC ref'd, 39468 (18 March 2021), the Court of Appeal confirmed the interests of justice must "clearly require prolonging the litigation"; this threshold may be reached where the Court is satisfied the original judgment "contains material errors that may be corrected by further submissions, or where evidence has been overlooked or misconstrued, or where the law has been misapplied, or where the reasons for judgment failed to address an argument advanced at trial" (at para. 48, citing *Grewal v. Grewal*, 2016 BCCA 237 at para. 86).

Application to the present case

[48] The premise of the Father's application to reopen is that A.H. was devastated by the Reasons, and particularly a parenting time schedule that results in her being separated from C.H. and her half-sister on Salt Spring Island. The Father submits A.H. wishes to provide further evidence as to her true views about where she wishes to live and attend school, and about what is most important to her, in light of the prospect of separation from her siblings. In support of his application to reopen, the Father has provided the following:

- a) his Affidavit #5, filed August 15, 2024, which speaks to A.H.'s reaction after being advised of the Reasons and reiterates the Father's request for the same parenting time schedule and child support arrangements he proposed in the previous hearings before me;
- b) an affidavit from his counsel's legal assistant clarifying two date aspects of the Father's proposed parenting time schedule; and
- c) an affidavit from A.H.'s counsellor, a proposed new witness, which attaches as exhibits both a letter the counsellor has written to the Court, and a letter written by A.H. to the Court.

[49] The Father says the proposed evidence about A.H.'s views includes both fresh and new evidence. The fresh evidence consists of elements of A.H.'s views that were said to exist previously but were not shared with the author of the Views of the Child Report for various reasons. The new evidence consists of A.H.'s views about separation from C.H., including as shared with her counsellor, since A.H. did not appreciate that was a possible outcome of the Father's previous application. The Father says the proposed new evidence is compelling proof that: A.H. wishes to move to Salt Spring Island and attend school there; maintaining her relationship with C.H. and her half-sister is more important than being close to her friends; and she wants a parenting time schedule that allows her to see everyone almost equally.

[50] In opposing the application to reopen, the Mother has provided her Affidavit #5, filed August 21, 2024. The Mother's affidavit addresses significant concerns with the proposed evidence of the counsellor, including concerns around:

- a) her qualifications (she is a registered hypnotherapist, not a registered counsellor or social worker, and does not have specific qualifications for dealing with vulnerable children);

- b) her standards of practice (including how she explained and obtained A.H.'s consent); and
- c) a potential conflict of interest as the counsellor failed to disclose that, in addition to seeing A.H. and C.H., she is also the Father's counsellor.

The Mother's affidavit acknowledges the children were initially shocked by the Reasons, but disputes the Father's characterizations and counters that while A.H. is concerned about being separated from C.H., she is "still expressing optimism and joy at starting high school and related extracurricular activities".

- [51] My role on this application is not to weigh the merits of the proposed new evidence per se, but rather to consider: the credibility of the proposed new evidence; whether it could have previously been provided to the Court; whether it is proffered in support of an attempt to re-argue or re-cast the case; and whether I am satisfied it would probably change the result if the applications were to be reopened. These factors will inform my consideration of whether a failure to reopen will result in a miscarriage of justice.
- [52] At its core, the Father seeks to reopen the applications on the basis that A.H.'s most recently expressed views require the Court to revisit the best interests of the child analysis for her. That issue is the antithesis of a discrete, mathematical exercise or mechanical error in consideration of the evidence. As discussed in the Reasons, the best interests of the child analysis is complex and nuanced, with multiple statutory factors that are often inter-related, none of which is necessarily determinative (Reasons at paras. 69-70, 117). Ultimately, it is a discretionary determination by the Court.
- [53] The Father does not submit that the Reasons misapply legal principles, or fail to address a legal argument advanced at trial, or even contain material errors in the best interests of the child analysis. Rather, the Father's primary assertion is that the Court "misconstrued" A.H.'s evidence (Father's notice of application, part 3, paras. 12-13).
- [54] To misconstrue evidence means to interpret the evidence incorrectly, which implies the subject evidence must have been before the Court. The evidence to which the Father points in support of his position was not previously before me, and it was not misconstrued. Through this hearing, it became clear the Father's submission is not that the Court misconstrued evidence, but rather that the Court did not previously have accurate or adequate evidence of A.H.'s views.
- [55] With respect to accuracy, the Father now says the previous evidence of A.H.'s views, including as captured in the Views of the Child Report, was not accurate because, in essence, A.H. was not forthcoming about her true views. The Father says A.H. was not comfortable with the author of the Views of the Child Report. In remarkably similar language, the Father and counsellor both suggest A.H. relied on C.H.'s "assertiveness" about moving to Salt Spring Island because she did not wish to hurt the Mother's feelings. Interestingly, the letter from A.H. herself does not state or in any way suggest she relied on C.H.'s stronger views or that she was not truthful because she wished to avoid hurting the

Mother's feelings. The Mother disputes both that A.H. relied on C.H.'s views and that the Views of the Child Report did not accurately capture her views, based on other experiences with A.H. over the past year.

- [56] With respect to adequacy, the Father says the previous evidence was inadequate because A.H. was not directly asked about possible separation from C.H., and therefore the Court did not have the benefit of her views in that regard. Both parties submit that no one expected the Reasons to result in A.H. and C.H. being separated. Counsel for the Father acknowledges that I asked the parties if anyone had considered the possibility of separation, but says because the parties both submitted the children should not be separated, and I did not appear to pursue the issue, the Father and his counsel at least assumed it was not necessary to make further submissions on that point. As I indicated during this hearing, the Father applied to relocate both children, which required a determination of the best interests of each child individually, based on the evidence and submissions provided. In that context, the Court had an obligation to consider all options and it was for the parties to make submissions and adduce evidence as they deemed necessary.
- [57] Turning to the relevant criteria, I have concerns with the credibility and reliability of the proposed new evidence, particularly that of the counsellor. It is concerning that the counsellor did not disclose her counselling relationship with the Father, did not swear to the truth of the contents of her own letter to the Court, and did not provide basic, foundational information such as when she met with A.H., what A.H. advised her on specific dates, how A.H.'s letter was provided to her and when it was written, and what language she used to explain consent to A.H. In her affidavit, the counsellor deposes that A.H. understood consent as permitting the counsellor to "advocate and speak on her behalf". I note as well that the counsellor deposes she has worked with A.H. for six years. This is not a new relationship, yet the Father did not previously seek to provide evidence from or rely on the counsellor as a fact witness.
- [58] The Father's evidence is that he took the children to see the counsellor on July 20 and August 2, 2024. Although it was not in evidence before me, as a result of my questions during the hearing, counsel for the Father advised that A.H.'s letter was first provided to the counsellor as a photo on July 24, 2024. It is not clear if it was written the same date. The parties agree they discussed the Reasons with the children on July 10, 2024, so the letter was written within two weeks of the children being informed of the Reasons, and while both children were in the middle of an extended period of time with the Father and his family. Given its timing, the proposed new evidence of A.H.'s views cannot reflect any experience with the parenting time schedule during the school year.
- [59] The Father relied heavily on a decision of the Alberta Court of Queen's Bench where that Court accepted evidence from a therapist in support of an application to reopen: *S.S.G. v. S.K.G.*, 2022 ABQB 518, rev'd on other grounds, 2022 ABCA 379. The decision in *S.S.G.* does not assist the Father. The therapist in that case was court-appointed and had played a key role during a 27-day trial conducted over the course of 23 months. At trial, the Court found

the therapist to be "thoroughly professional" and "one of the most important objective and accurate sources of information about the children" (at para. 23). It was against that backdrop that the Court relied on the therapist's evidence of what the children needed and wanted for purposes of the reopening application. Here, the counsellor is not court-appointed and is not a previous witness in this proceeding whose credibility and objectivity have already been accepted by the Court. In fact, the counsellor failed to disclose her relationship with the Father and has provided an affidavit and a letter that raise concerns about her objectivity and her practices. The circumstances are readily distinguishable.

- [60] Further, many of the Father's submissions on this application, and even some of the proposed new evidence, reargue matters considered and addressed at the previous applications. The potential benefits of the four-day school week on Salt Spring Island, including to better support academic needs and facilitate more equal time with both parents, were all canvassed before me previously and addressed in the Reasons. With two very minor exceptions, the Father proposes the same parenting time schedule he submitted during the previous hearings. He also proposes the same child support arrangement, suggesting that if the Court orders the Mother's parenting time to commence Thursday evenings, the parties can characterize their arrangement as "shared" parenting, so neither will need to pay support. As before, the Father makes this proposal knowing the Mother works most Fridays and thus offers to provide "care" for the children during the Mother's Friday parenting time. It is concerning that the Father continues to invite the Court to participate in what would essentially be a parenting time schedule on paper only.
- [61] I am also not satisfied that the proposed new evidence would probably change the result if the applications were to be reopened. There are two main reasons. First, the Mother's response to this application demonstrates she would seek to challenge much of the proposed new evidence, and to offer different evidence based on her own experience with A.H. The Mother also notes the proposed new evidence of the counsellor stands in contrast to what A.H. related to the author of the Views of the Child Report, and it was not until this application that the Father questioned the validity and accuracy of the latter report. For example, the Father now deposes A.H. was uncomfortable with the author of the Views of the Child Report, implying that impacted her responses. I note the author of the Views of the Child Report expressly addressed each child's level of comfort in speaking to her, and did not identify concerns that would call their responses into question.
- [62] If the applications were to be reopened, the Mother would be entitled to adduce further evidence. Based on her affidavit for this application, the Mother may well seek to adduce evidence respecting developments with C.H., both as they bear on A.H.'s interests and independently. Given the issues, it is entirely possible the Court would again consider cross-examination necessary in order to resolve conflicts in the evidence. I would then need to hear fresh closing submissions from both sides. I cannot say with any confidence that a particular result would likely follow if the matters were to be reopened.

- [63] Second, and relatedly, the "result" the Father seeks to change is the outcome of the Court's best interests of the child analysis. As noted above, that analysis involves multiple factors, only one of which is the views of the child. While important, particularly given her age, A.H.'s views will not necessarily be determinative. The Father's proposed new evidence does not purport to address in any detail the other factors the Court must consider in assessing A.H.'s best interests; the sole focus of the "change" the Father says warrants reopening is the change in A.H.'s views.
- [64] This concern is compounded by the fact that the parties have not yet implemented the parenting time schedule for the school year. There is therefore no ability to provide the Court with evidence respecting the impacts of the schedule on other factors relevant to the best interests of the child analysis - such as the nature and strength of important relationships, emotional well-being and stability. Since the greatest change under the parenting time schedule will be during the school year, at this point in time, the evidence that could be offered would be speculative at best.
- [65] In S.S.G., the application to reopen was heard more than four months after the trial judgment had been released. In considering whether to reopen the trial to address the order respecting decision-making for extra-curricular activities, the Court had evidence of how that decision-making regime was operating on the ground. The Court relied heavily on the lived experiences of the applicant and the children under the new regime in concluding the regime was not meeting its objective to advance the best interests of the children, and in fact, had exacerbated the conflict to which they were exposed (see, for example, S.S.G. at paras. 12, 26, 34-35).
- [66] The Father says that if the applications are not reopened and the parenting time schedule is not changed before September 3, 2024, there will be a profound miscarriage of justice. The Father acknowledges that a miscarriage of justice is something more than the mere possibility of a different result. Rather, it has been framed as "a result that would leave one party with such an unfair benefit or advantage at the expense of the other that a reasonable person would regard it as shocking and unconscionable": *Chan-Henry v. Liu*, 2017 BCSC 134 at para. 16 (further citations omitted).
- [67] The Father says that, in the context of this family, the parenting time schedule set by the Reasons meets that threshold as it pulls apart siblings who have been together since separation, and means each child sees the parent with whom they do not reside only every second weekend. While counsel for the Father admits there are many families for whom parenting time every second weekend is the norm, she submits that has never been the case for this family.
- [68] However, as clarified during the hearing, for the period of September to December 2023, the parenting time schedule had the children with the Father three weekends out of every four. This means that less than a year ago, there was a regular period of time when the children went two weeks and the intervening weekend without seeing their Father. While I

appreciate "every second weekend" has not been the norm for this family, given the recent experience in fall 2023, and the reality that parenting arrangements often shift as children grow and their needs and interests change, I do not agree that a reasonable person would find the result "shocking and unconscionable", particularly in light of the rationale set out in Reasons.

- [69] I do not dispute the best interests of the child is a principal consideration on an application to reopen a relocation decision. But reopening is an unusual remedy; the Court must also bear in mind other factors, including protecting the integrity of the court's process. The Father seeks reopening in a circumstance where the best interests of A.H. are obscure. While I recognize the proposed new evidence suggests an apparent change in A.H.'s views, I am not satisfied that those views are grounded in self-reflection based on lived experience. As the premise of the Father's application is that the Court did not have A.H.'s true views in assessing her best interests, it is imperative that any reassessment of her best interests does not suffer from the same frailties. I am not confident that would presently be the case.

Conclusion and orders respecting reopening

- [70] In light of the above, it is not in the interests of justice to reopen the applications at this time. A reopening would yield insufficient additional information to assist the Court in assessing whether the parenting time schedule set out in the Reasons remains in the best interests of the children. Instead, the appropriate course is to set a date for a court-ordered review of the parenting time schedule this fall, when the parties will be in a position to provide evidence about how the schedule is operating while the children are in school.
- [71] At paragraph 194(q) of the Reasons, I ordered the parties to conduct a review of the parenting schedule in July 2026, and granted the parties liberty to apply to vary in advance of that time in the event of material changes and if best efforts to reach agreement were not successful.
- [72] I am modifying the order pronounced in that paragraph to require as follows:
- a) There will be a court-ordered review of the parenting time schedule in fall 2024. It will be set for a two-day hearing to commence no earlier than November 25, 2024. As part of the review, the Court will conduct judicial interviews with each of A.H. and C.H. The parties will also be at liberty to adduce further evidence regarding the parenting time schedule as they deem appropriate. If both parties agree the review is unnecessary, they may adjourn the review generally by consent.
 - b) Regardless of whether a review occurs in fall 2024, the parties will conduct a review of the parenting time schedule in July 2026.

- c) The parties are at liberty to apply to the Court to vary the parenting time schedule in advance of July 2026 if there are material changes and best efforts to reach agreement have been unsuccessful, however an application to vary may not be filed before the hearing of the court-ordered review in fall 2024.

[73] I am seized of the review to be scheduled in fall 2024. I will set two days to permit me to conduct judicial interviews with A.H. and C.H. as part of the hearing process, so that I can hear directly their experience under the parenting time schedule. As the hearing will require the attendance of the children on one of the days, I have discussed with Supreme Court Scheduling and I am prepared to schedule two specific hearing days right now.

[DISCUSSION RE PROPOSED DATES FOR REVIEW, JUDICIAL INTERVIEW OF THE CHILDREN AND JMC PRIOR TO HEARING]

[74] The court-ordered review will be set for November 28 and 29, 2024, with the judicial interviews of the children taking place November 29, 2024.

[75] In addition, a JMC is to be scheduled before me approximately two weeks prior to the court-ordered review to clarify the judicial interview process in order that the parties may have a discussion with the children prior to the interviews. If the Mother retains counsel, they are to be informed that the dates for the court-ordered review will not be changed.

[76] I have also considered how to address the concerns raised about continuing uncertainty for the children. In my view, those concerns are best addressed by managing expectations. To that end, if the fall 2024 review satisfies me that changes to the parenting time schedule are required, any such changes will not be made effective before January 2025. This provides both the parties and the children with confirmation about where the children will reside and attend school through December 2024. In making this direction, I have taken into account A.H.'s high school timetable, noting that three of her courses will finish in December, while two are full-year courses. This makes January 2025 a natural time if a change is required. I will commit to providing the parties with a decision before the winter break from school to allow time for adjustments, if I subsequently decide to change the parenting time schedule.

[77] I also find it appropriate, in the context of this particular case, to make conduct orders under s. 222 of the FLA respecting communications with the children about the parenting time schedule that will govern through December 2024. It will be important that the parties make a genuine attempt to implement the parenting time schedule and do not, through words or actions, seek to undermine the parenting time schedule with the children. To that end, I order that:

- a) The parties will:
- i. put the best interests of the children before their own interests;
 - ii. encourage the children to approach the parenting time schedule in a positive manner; and

iii. refrain from discussion of the merits of the parenting time schedule in the presence of the children and from attempts to influence the children's perspectives about the parenting time schedule.

[78] Finally, with respect to costs of this application, the Father has not been granted the specific relief sought, as I am not reopening the applications. However, he did identify several matters in the Reasons that required clarification, and has drawn the Court's attention to the potential need for an earlier review. In the circumstances, I again consider it appropriate for the parties to bear their own costs of this application.

"K. Wolfe J."

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