
CANADA / JUDGMENT

D.M. v. S.J.

2019 BCSC 850

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2019 BCSC 850 D.M. v. S.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.M. v. S.J.,

2019 BCSC 850

Date: 20190530

Docket: E16941

Registry: Quesnel

Between:

D.M.

Appellant

And

S.J.

Respondent

Before: The Honourable Madam Justice Ker

On appeal from: A decision of the Provincial Court, dated May 12, 2017 (D.M. v. S.I. formerly known as S.J., Unreported Judgment, Quesnel Registry #16490).

Reasons for Judgment

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Counsel for Respondent:

P.L. Schmit, Q.C.

Place and Date of Hearing:

Quesnel, B.C.

September 27, 2018

Place and Date of Judgment:

Quesnel, B.C.

May 30, 2019

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Introduction

[1] D.M., the appellant, and S.J., the respondent are the biological parents of M.M.M., a girl born December 31, 2010. D.M and S.J. were dating when S.J. became pregnant with their daughter. They both lived in Quesnel, B.C. during the relevant timeframe of these proceedings. They have never lived together.

[2] Until March 2015, the parties were able to amicably navigate the waters of shared parenting. For a variety of reasons, that amicable relationship disintegrated in March 2015. Thereafter the parties became involved in a bitter dispute in the Provincial Court of British Columbia that raised a variety of issues under the Family Law Act (the "FLA"). Those issues were regarding parenting responsibilities, parenting time, child support and other ancillary matters. S.J. conceded that D.M. was a guardian, as is line with the presumption set out in s. 39 of the FLA.

- [3] At trial, the appellant sought 50/50 shared parenting time and shared parenting responsibilities. One of the main issues at trial was the amount of parenting time the appellant had spent with his daughter following her birth. The appellant submitted that his involvement approached a 50/50 shared parenting arrangement. The respondent maintained, however, that she was the primary caregiver and that the appellant only had sparse contact with their daughter.
- [4] The matter went to trial in October 2015. Though originally scheduled for two days, it turned into a five-day trial that was heard over a six month period. The learned trial judge heard the appellant's evidence on October 13-14, 2015. Unfortunately, insufficient time had been set aside for the trial. A continuation was scheduled for April 20-22, 2016. In addition to his own evidence, the appellant also called three witness: his mother, V.H, his then girlfriend, A.S., and his brother, M.M. The respondent and her husband, J.I., testified in support of the respondent's case.
- [5] At the conclusion of the evidence, the trial judge set a timetable and directed that counsel provide written submissions on the matter. The written submissions were filed on June 10, 2016 by counsel for D.M. and June 27, 2016 by counsel for S.J. It took approximately 10½ months for the trial judge to render his decision following receipt of the written submissions.
- [6] On May 12, 2017, the trial judge gave oral reasons for judgment (via videoconference). In essence, he found for the respondent S.J., granting parenting responsibility to her pursuant to s. 40(3)(a) of the FLA, and parenting time pursuant to s. 45 of the FLA, save where otherwise outlined in the terms of the order.
- [7] D.M. was granted parenting time on terms set out in the order (alternating weekends; Wednesday afternoons from 3:00 p.m. to 6:00 p.m.; adjustments to the alternating weekend schedule for summer periods; and specified times at Father's Day, Christmas and M.M.M.'s birthday). There was also a "basket clause" allowing the parties to agree to other parenting times. When D.M. had his daughter for parenting time, he was entitled to make day-to-day decisions concerning her care.
- [8] The balance of the trial judge's order addressed child support issues and financial disclosure issues. Those aspects of the judgment have not been appealed.
- [9] Following the decision of May 12, 2017, counsel for S.J. endeavoured to settle the terms of the order arising from the trial judge's reasons for judgment. On August 21, 2017, counsel for D.M. filed a notice of motion seeking a mistrial based on the trial judge's delay in providing the reasons for judgment.

[10] The application for a mistrial was heard on February 14, 2018. The appellant argued that the delay resulted in both a misapprehension of the evidence and a reasonable apprehension of bias such that the trial process was no longer fair. The mistrial application was dismissed at that time, the trial judge concluding that an appeal was the more appropriate avenue for the appellant's concerns.

Grounds of Appeal

[11] Pursuant to s. 233 of the FLA, D.M. now appeals the May 12, 2017 and February 14, 2018 orders. Counsel for D.M. acknowledged that the grounds advanced on the mistrial application mirror the grounds of appeal he advances on this appeal. Although his notice of appeal only advanced one ground of appeal (material misapprehension of the evidence causing an error of law), his written argument advanced the following four grounds:

- i. The trial judge seriously misapprehended the evidence;
- ii. The trial judge failed to consider the evidence of his then common-law spouse, A.S.;
- iii. The trial judge erred in law in treating aspects of counsel's submissions as evidence; and
- iv. The trial judge erred in failing to declare a mistrial.

Standard of Review

[12] As this is an appeal from a trial decision dealing with the parties' parenting responsibilities under the FLA, a high standard of review governs: *Van de Perre, v. Edwards*, 2001 SCC 60. The decisions of trial judges must be given considerable deference by appellate courts and should only be interfered with when there is a material error, a serious misapprehension of the evidence, or an error in law. Indeed, the parties on this appeal acknowledged this fact in their written and oral submissions.

[13] This standard was succinctly outlined by Madam Justice Smith in *Kane v. Proffitt*, 2018 BCCA 106:

[42] The scope of appellate review in family matters is a narrow one; intervention by an appellate court is subject to a high standard of review. The function of appellate review is not to re-try a case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. [Citations omitted.]

[43] In *R.E.Q.*, Madam Justice Newbury summarized the appellate review jurisdiction as follows:

[33] The Supreme Court of Canada has said that the standard of review is a high one, i.e., that in family cases as elsewhere, an appellate court may not interfere with the exercise of discretion of a trial judge in the absence of a material error (including a "significant misapprehension of the evidence", the trial judge's having "gone wrong in principle or [his] final award [being] clearly wrong"): [Citations omitted.] In the latter case the Court wrote:

Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. [At para. 13]

Thus the authorities make it clear that it is not for an appellate court to re-weigh the evidence or to interfere on the basis that the appellate court would give more weight than the trial judge did to one factor or another - or, in the words of the Court in Hickey, that it would have "balanced the factors differently."

[Emphasis added]

[14] A narrow scope of appellate review promotes the social interest of finality, which is especially important for the parties and children involved in custodial disputes. Children should not be unsure of their homes for significant periods of time. More significantly, custody and access decisions are inherently exercises in discretion best left with the trial judge: *K.M.W v. L.J.W.*, 2010 BCCA 572 at para. 51; *Van de Perre* at para. 13.

[15] As Madam Justice Huddart noted in *K.M.W.* at para. 48, in all child custody hearings, regardless of whether they are held under the FLA, Divorce Act or pursuant to child protection legislation, the primary focus is the child's best interest:

a custody hearing is intended to be a respectful enquiry by a court into the best interests of the children whose parents cannot agree on appropriate child care arrangements or whose child care capacity has been questioned. While a custody dispute that ends in court is often, as in this case, a heated adversarial contest in which the parents have become locked, supported in their perspective by family and close friends, and especially by the children's grandparents, the task of the court in every such dispute is always to keep the focus on the children's best interests, as it has been since the court's *parens patriae* jurisdiction was first invoked to protect children centuries ago.

[Emphasis added.]

[16] And, on appeal, the best interests of the child must remain the focal point of the hearing: *K.M.W.* at para. 51.

[17] Insofar as challenges to findings of fact are concerned, the Supreme Court of Canada in *Rick v. Brandsema*, 2009 SCC 10 stated at para. 30:

- [30] It is inherent in disputes generally, and matrimonial conflicts in particular, that parties have inconsistent versions of the underlying events. It is the trial judge's job as judicial historian to sift through the record, watch and listen to the parties, and determine which version of disputed events is the most reliable. Findings of fact and factual inferences made at trial, as a result, are not to be reversed unless there is "palpable and overriding error", or a fundamental mischaracterization or misappreciation of the evidence [citations omitted].
- [18] These are the principles that govern the analysis of the grounds of appeal advanced in this case.

Relevant Legislative Provisions

- [19] The best interests of the child provisions are set out in s. 37 of the FLA:

37(1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Factual Background

[20] Before examining the four grounds of appeal raised in this case, it is first necessary to outline the chronology leading up to the trial in the Provincial Court. Such a review is necessary to provide the overall context as to how the matter developed into such an adversarial and protracted proceeding.

The Chronology

- [21] As counsel for the respondent noted in her opening, the case originally started as a mobility case, with the respondent expressing an intention to move to Cache Creek, B.C. for employment reasons. At no point did she ever actually move to Cache Creek -- this was just her stated intention. She spent a short period of time in Cache Creek during April 3-18, 2015 in and around the time she took M.M.M. to a medical specialist appointment in Vancouver on April 7, 2015. The respondent was back in Quesnel by April 18, 2015. Thereafter and at the time of the trial, the parties all lived in Quesnel.
- [22] Prior to the birth of her daughter, the respondent lived in a subsidized apartment unit in Quesnel. She remained in that unit until April 30, 2015. On that date, she moved out of the apartment and into her mother's residence, also in Quesnel. The appellant did not live with the respondent, in large part due to residency restrictions in respect of the apartment unit. He instead lived in another residence with two male roommates. He went back and forth to see his daughter at S.J.'s apartment.
- [23] It is important to understand that for much of the first year of M.M.M.'s life (January-September 2011), the appellant worked a 7:30 a.m. to 4:30 p.m. shift at a sawmill in Quesnel. He was not spending such a significant amount of time with his daughter in and around this time that it rose to the level of a 50/50 shared parenting arrangement. The appellant stopped work at the sawmill at the end of 2011.
- [24] The appellant continued to live with his two male roommates until September 2013. That residence was not a suitable place for a child to be and the respondent objected to their daughter being there.
- [25] From September-December 2013, the appellant was either living in Kelowna or in Fort McMurray working. He returned to Quesnel at Hallowe'en and spent approximately four hours with his daughter.

- [26] By December 2013, the appellant had finished working in Fort McMurray and Kelowna and returned to Quesnel. He moved in with his father. That month, he met A.S. and they began dating.
- [27] Although the appellant endeavoured to establish in his evidence that he spent a significant amount of time caring for his daughter, arguing it was almost a 50/50 shared parenting arrangement, the force of his evidence on this point was nothing more than a series of general assertions lacking in specifics. Significantly, he did not:
- know the medications his daughter was taking;
 - attend his daughter's doctors appointments or specialist appointments in Vancouver;
 - provide much in the way of support for his daughter prior to a Provincial Court order in June 2015; or
 - contribute to the procurement of clothing, toys or baby-related items prior to the birth of his daughter.
- [28] By mid-2013, the respondent, who was working in a nursing program, had their daughter in daycare when she worked. The appellant's time with their daughter through 2013 was therefore limited by the child's attendance at daycare and would have been negligible in the last quarter while he worked in Kelowna and Fort McMurray. This is not to fault him for pursuing employment. Rather, it goes to the credibility of his statement that he parented 50% of the time.
- [29] In 2014, the appellant was living in Quesnel at his father's residence, working full-time and dating A.S. He and A.S. moved in together in January 2015. The parenting relationship up until this point was mostly workable, but in and around this timeframe, cracks in the ability to cooperate started to develop. For instance, the evidence established that the appellant introduced his daughter to A.S. without consulting with the respondent before the introduction. And, that the appellant enrolled his then four year old daughter in a boxing class without consulting the respondent who was the child's primary caregiver.
- [30] On March 31, 2015, the appellant filed an application in Provincial Court seeking orders with respect to his daughter. He did not serve the respondent with the application.
- [31] On April 3, 2015, the respondent went to Cache Creek with her daughter. She was offered employment.
- [32] On April 7, 2015, the parties' daughter had a medical specialist appointment in Vancouver with a Dr. McNeely. Prior to the appointment, the respondent asked the appellant for financial assistance to offset the cost of travel to Vancouver. The appellant refused to do so.
- [33] Although the appellant asserted in his evidence (and his written argument on this appeal) that the respondent moved to Cache Creek and kept their daughter from him, the evidence did not support such an allegation. In fact, it was contradicted by text messages that the

appellant eventually produced during the trial. The text messages revealed that the respondent gave only notice of an intention to move to Cache Creek. That notice was sent on April 15, 2015 in a text message to the appellant. She remained in her subsidized apartment in Quesnel until April 30, 2015 and then moved in with her mother, also in Quesnel.

- [34] On April 15, 2015, the respondent agreed that the appellant could have their daughter until the Sunday of that week (April 19). The appellant and A.S. travelled to Cache Creek and picked up M.M.M. that same day, with the respondent's permission.
- [35] After the appellant picked up his daughter, the respondent texted the appellant a number of times from April 15-16 to confirm that their daughter was alright.
- [36] On April 17, 2015, the appellant filed a notice of motion and affidavit in respect of the proceedings he had initiated on March 31, 2015. On that same day, the respondent texted the appellant reminding him that she would be picking up their daughter on April 19 between 10:00 a.m. to 11:00 a.m.
- [37] On April 18, 2015, the respondent was served with the notice of motion by the appellant's brother.
- [38] On April 19, 2015, when the respondent texted the appellant to confirm the pickup and location time, she learned that the appellant was not returning their daughter. Rather, he was going to keep her for two weeks and go to court over the issue of the respondent's intended move from Quesnel to Cache Creek.
- [39] On April 20, 2015, the respondent filed a reply to the appellant's action, as well as a notice of motion and affidavit seeking the return of their daughter.
- [40] On April 20, 2015, the Honourable Judge Dyer of the Provincial Court made a number of orders in relation to the appellant's notice of motion including that he return M.M.M. to her mother that day. An RCMP assist clause was included in this order. In addition, a non-removal clause was included prohibiting either party from removing their daughter from Quesnel without prior approval of the court or without a prior written agreement between the parties.
- [41] On June 22, 2015, the matter was in Provincial Court before the Honourable Judge Cartwright. An interim order was made on consent in respect of prospective child support and parenting time for the appellant. Cartwright P.C.J. ordered that the appellant have parenting time with his daughter on Wednesdays from 2:00 p.m. to 6:00 p.m. and on every second weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. Further, that he have the right of first refusal if the respondent had to work out of town.
- [42] The trial commenced on October 13, 2015. It became apparent during the appellant's testimony that he had not produced certain text, email and Facebook communications that he had in his possession. His examination in-chief on that point was stood down. The appellant was directed to produce all such communications by the following morning. Cross-

examination started later on the afternoon of October 13 but respondent's counsel indicated that she would not address certain events until the text and email communications had been produced in full.

- [43] On the morning of October 14, 2015, it was apparent that the appellant had been unable to obtain all the text messages that he thought he had. By agreement of counsel and with the trial judge's approval, cross-examination continued for the entire day. Respondent's counsel did not address the issue of the text communications, saving that area of cross-examination for the continuation of the proceedings.
- [44] A trial continuation date was set for April 20, 2016. By that time, the appellant was able to produce approximately 170 text messages covering the time period of March 30, 2015 through September 3, 2015. Direct examination of the appellant resumed regarding events addressed in the text messages as well as events that had occurred following the initial trial dates in October 2015.
- [45] Cross-examination of the appellant resumed and his evidence concluded on April 20, 2016. Thereafter, his then girlfriend, A.S., testified briefly on April 20, 2016. On April 21, 2016, the appellant's mother, V.H., and his brother, M.M., both provided brief evidence.
- [46] The respondent commenced her evidence on the morning of April 21, 2016 and concluded it in the afternoon of April 22, 2016. The only other brief witness in the trial was the respondent's husband, J.I., who testified on April 22, 2016.
- [47] The most significant witnesses in this trial were the appellant and the respondent. The other witnesses were largely peripheral and provided only generalized observations about the parenting arrangements between the parties.

The Trial Judge's Reasons for Judgment

- [48] The trial judge's reasons were delivered orally on May 12, 2017. The reasons, while brief, clearly frame the parenting arrangement analysis around the predominant underlying factor: the best interests of the child (per s. 37(1) of the FLA).
- [49] It is necessary to outline in detail the trial judge's findings in respect of the best interests of the child factors enumerated in s. 37(2) of the FLA. These factors will have informed the trial judge's decisions respecting the parenting orders.
- [50] When the reasons for judgment are reviewed as a whole, as they must be, they demonstrate that the trial judge had a firm grasp of the issues and the evidence. While the trial judge certainly did not review every item of evidence (including the evidence of A.S.), his reasons provide a clear and understandable pathway to the ultimate result he reached in this case. Having considered the enumerated factors in s. 37(2) of the FLA, he concluded that it was not in the best interests of the child to grant the appellant any significant parenting responsibilities. Further, that it was not in the best interests of the child to allow D.M. to have anything other than limited parenting time.

- [51] Of significance, the trial judge found that the weight of the evidence demonstrated to him that the appellant had limited involvement in his daughter's medical issues (specifically with respect to a recurring bladder infection). This was not a case where the respondent withheld medical information, rather, the appellant was not interested or prepared to make an effort to inform himself about the issues. Moreover, insofar as attendance at specialist appointments, the appellant only attended one appointment in Prince George. The trial judge found the appellant to be dismissive of the respondent's concerns about their daughter. This dismissive tone was demonstrated in one particularly acrimonious series of text messages sent on April 2, 2015.
- [52] The trial judge also found that the weight of the evidence contradicted the appellant's bare assertion that he cared for his daughter almost 50% of the time. A review of the transcript of the proceedings supports this finding. Of particular concern to the trial judge was the appellant's inability to name the child's family doctor, his failure to speak with the family doctor, his lack of familiarity with the child's treatment plans, and his non-attendance at specialist appointments (save for the one in Prince George). This, together with the appellant's living arrangements and employment schedule after the birth of his daughter through 2013, contradicted his assertion that he was as actively involved in M.M.M.'s parenting as he claimed. Cumulatively, this informed the trial judge's finding under s. 37(2) (d) (history of the child's care) that the appellant's involvement with his daughter was on a more casual basis.
- [53] Insofar as s. 37(2)(f) of the FLA was concerned (the ability of each parent to exercise his or her parenting responsibilities), the weight of the evidence led the trial judge to find that the appellant's ability to exercise his family responsibilities, particularly in respect of his daughter's medical care and in providing for her upkeep via child support, was at best modest if not minimal.
- [54] Of particular concern to the trial judge was the assessment of family violence factor enumerated in s. 37(2)(g) of the FLA. Although the trial judge was clear that there was no suggestion in the evidence that the appellant had been violent towards his daughter, the trial judge was very concerned with the appellant's visceral animus and anger towards the respondent as evidenced in the plethora of texts between the parties. The trial judge outlined seven excerpts from the exchanges and made the following comments:
- [30] D.M. has perennially excused his behaviour by testifying in his examination by characterizing the relationship as "heated" and characterized it as "no violence, just harshness."
- [31] My greatest concern, having observed D.M. at length, is that he seems unwilling, or unable, to recognize how inappropriate, and how offensive his actions are. In other words, D.M. appears, in my respectful opinion, to lack any insight, or understanding into how toxic and destructive his attitude towards, and his treatment of his daughter's biological mother could be, or will be to [M.M.M.] herself. The above excerpts are but a fraction of the angry and

splenetic texts and emails authored by D.M. I see no useful purpose in reciting further examples; such an exercise would generate much heat, but little light on the issues before the court.

- [55] A review of the voluminous number of text messages between the parties, as contained in Exhibit #4 at trial, supports the trial judge's finding and conclusion on this factor at s. 37(2)(g) of the FLA.
- [56] In considering the factors enumerated in ss. 37(2)(h) and (i) of the FLA (respectively: whether the impact of family violence impacts the parties' parental abilities, and, the ability of the parties to cooperate on issues affecting the child), the trial judge found that this case was one of the worst high-conflict parenting cases he had encountered in his judicial career. He found that this case was unique due to the high-conflict behaviour that was mainly driven by the appellant's "blinkered and inaccurate perception that somehow S.J. is dedicated to thwarting his relationship with his daughter." The trial judge went on to find that the respondent had made every effort to engage the appellant in constructive discussions but that the appellant used those opportunities to insult or vilify the respondent.
- [57] The trial judge went on to find under s. 37(2)(i) that given his earlier findings as to the appellant's casual involvement with his daughter and his high-conflict approach to dealing with the respondent, the appellant had demonstrated an inability or unwillingness to work together respectfully or cooperatively. In the end, the finding in respect of the appellant's behaviour and attitude towards the respondent led the trial judge to conclude that any arrangement giving the appellant any significant allocation of parental responsibilities would likely produce more acrimony and disharmony. Such findings are entitled to a high degree of deference, particularly where, as here, the evidentiary record supports this conclusion.
- [58] With those findings of the trial judge in mind, coupled with an understanding of how the trial judge structured his analysis, I turn now to the grounds of appeal advanced by the appellant.

Issue #1 - Did the Trial Judge Seriously Misapprehend the Evidence in this Case?

Positions of the Parties

- [59] The appellant argues that the trial judge seriously misapprehended the evidence and that appellate intervention is warranted. The appellant points to four main areas of alleged misapprehension:
- i. The trial judge's finding that the appellant had no contact with M.M.M. for four months at the end of 2013;
 - ii. The trial judge's misunderstanding of several important aspects of the appellant's mother's evidence;

- iii. The trial judge's finding that the appellant did not care for M.M.M. 50% of the time; and
- iv. The trial judge's significant reliance on text message evidence without considering the text messages in proper context.

[60] The respondent's position on the four points itemized by the appellant is that the appellant has conducted an isolated and selective review of the evidence. The respondent asserts that the appellant's argument is not supported when viewed in the totality of the evidence and in the context of the proceedings. Accordingly, the respondent argues this ground of appeal ought to be dismissed.

Governing Legal Principles

- [61] As already noted in the standard of review section of these reasons, it is not just any misapprehension of evidence that warrants appellate intervention. Rather, the appellant must demonstrate that there was a significant or serious misapprehension of the evidence that could reasonably have affected the result: Kane at para. 42. In the criminal law context, this test was articulated in R. v. Lohrer, 2004 SCC 80 at para. 2:
- [2] The misapprehension of evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".
- [62] Another way of stating the misapprehension of evidence test is found in R. v. Ngo, 2009 BCCA 301 where Madam Justice Rowles wrote:
- [64] The threshold to be met in demonstrating a misapprehension of evidence warranting appellate intervention is a stringent one in the sense that the misapprehension (i) must be a question of substance, (ii) must be "material" to the trial judge's reasoning process, and (iii) must play an essential role, not just in the narrative of the judgment, but in the reasoning process resulting in conviction: R. v. Lohrer, 2004 SCC 80, [2004] 3 S.C.R. 732 at paras. 2, 6. The test is conjunctive.
- [63] More recently, in R. v. Kaemmer, 2019 BCCA 136 (at paras. 25-29), Mr. Justice Hunter reviewed the jurisprudential lineage of the misapprehension of evidence test. In summarizing the principles, Hunter J.A. wrote:
- [27] The most recent articulation of this standard by the Supreme Court of Canada can be found in R. v. Sinclair, 2011 SCC 40, where Justice LeBel made the following comments:
- [56] For a misapprehension of evidence to be material within the meaning of the Lohrer test, it must go to a central element of the trial judge's reasoning on which the conviction is based (Lohrer, at para. 2, per Binnie J.). As Binnie J. correctly stated in Lohrer, the standard described by Doherty J.A. in Morrissey is a stringent one (para. 2). In other words, an error

in the assessment of the evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground.

[Emphasis added by the Court in Kaemmer.]

[28] Two principles emerge from the summary of the law set out in Sinclair:

- (i) a misapprehension of the evidence will only vitiate a conviction if the error was a central element of the judge's reasoning on which the conviction is based; and
- (ii) the means of determining whether the error was a central element of the judge's reasoning is to consider whether striking it from the judgment would leave the trial judge's reasoning on unsteady ground.

[64] Transposed to the context of family law proceedings, a trial judge's misapprehension of the evidence will only vitiate the decision and underlying order if the error was a central element of the judge's reasoning process: Kane at para. 42. In other words, the misapprehension must play an essential part in the end result.

[65] To determine whether the error was a central element of the judge's reasoning, an appellate court should consider whether striking it (the offending passage) from the judgment would leave the trial judge's reasoning on unsteady ground: Kaemmer at para. 56.

[66] A further legal principle that informs the analysis is that reasons for judgment must be read as a whole and not parsed or subjected to microscopic dissection: R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 204. Moreover, the reasons must be read with the backdrop of the evidence and the overall context of the trial in mind.

[67] Finally, the best interests of the child remains the sole factor to be considered both at trial in the first instance and on appellate review.

Analysis

[68] Where an appellant advances an argument asserting serious misapprehension of the evidence, this requires that the appellant accurately and fairly set out the totality of the evidence on the point that is said to have been misapprehended by the trial judge. Regrettably, the appellant in this case has provided only a select review of the more favourable aspects of his evidence and has failed to put the full evidentiary picture forward in his argument.

[69] With the foregoing principles informing my analysis, I turn to the four areas of evidence that the appellant asserts the trial judge seriously misapprehended.

- i. No contact with the child for four months in 2013

- [70] The appellant asserts that the trial judge misapprehended the evidence about the amount of contact he had with his daughter in the last four months of 2013. The trial judge found the appellant had no contact with his daughter during that period due to the fact that he was living and working in Kelowna and Fort McMurray.
- [71] The trial judge's reasons on this point are found in para. 13 at the conclusion of his assessment of the first factor enumerated in s. 37(1)(a) of the FLA -- the child's health and emotional well-being. The trial judge stated:
- [13] D.M. said that he cared for [M.M.M.] 50 percent of the time from her birth until about March 2015, yet D.M.'s own evidence is that he only spent occasional overnights at S.J.'s residence [omitted], and that he stayed primarily with his two roommates. Immediately following [M.M.M.]'s birth, D.M. testified he worked a 7:30 a.m. to 4:30 p.m. shift at M & K Sawmills. D.M. was working in Kelowna from September to December 2013, and had no contact with [M.M.M.] for that almost four month period.

[Emphasis added.]

- [72] The underlined passage is what the appellant takes issue with and asserts constitutes a serious misapprehension of the evidence. Respectfully, I must disagree. When this entire section of the reasons, that is paras. 8 through 13, are reviewed in context, it is apparent that the trial judge was simply trying to determine whether the appellant had actually cared for his daughter 50% of the time, as he had claimed, from birth to March 2015 (prior to the schism between the parties and the difficulties that developed thereafter).
- [73] It is true that the evidence at trial establishes that the appellant had at least one four-hour visit with his daughter on October 31, 2013 and that he took her trick-or-treating on that date. Accordingly, the trial judge was mistaken about the lack of visits in the time period of September through December 2013.
- [74] There are three other areas of evidence to assess in relation to the misapprehension of evidence ground of appeal. I will first address whether there are errors in respect of those remaining areas and will then consider whether any found misapprehensions constitute serious misapprehensions that could reasonably have affected the result, either singularly or cumulatively.

ii. The evidence of the appellant's mother - V.H.

- [75] The appellant asserts that his mother's evidence is completely contrary to the trial judge's recollection of her evidence as outlined in para. 15 of the reasons for judgment under the s. 37(2)(c) FLA analysis (the nature and strength of the relationships between the child and significant persons in the child's life). In the impugned passage, the trial judge summarizes in brief compass the import of the evidence about the child's relationships with both the respondent's side of the family and the appellant's side of the family.

- [76] It is apparent from the trial judge's findings, as supported by the evidence of the respondent which he accepted, that the respondent made significant efforts to involve the appellant's mother and extended family in the child's life whenever possible. V.H. and the respondent had a good relationship until March 2015. They visited frequently so that V.H. could have time with her granddaughter.
- [77] As part of the reasons, the trial judge stated in para. 15 that "Ms. H. in fact could not recall her son visiting her with [M.M.M.], prior to April 2016." An examination of V.H.'s evidence on this point demonstrates that the trial judge was mistaken on that point.
- [78] V.H.'s evidence was couched in generalities such that the only piece of evidence she really provided was that she saw less of her granddaughter after the parties broke up and had their subsequent falling out sometime in 2014. When asked how the time with her granddaughter changed, V.H. replied: "Well I get to see [M.M.M.] with - with her dad because [S.J.] and [D.M.] weren't together anymore so, you know, it was mostly with - with [D.M.] that I would get to see her."
- [79] In cross-examination, respondent's counsel established that V.H. was aware that the parties' relationship became strained when the appellant started to date A.S. V.H. was also aware that the respondent grew increasingly concerned that D.M. was becoming more involved in drugs. Initially, it was concerning to V.H. as well.
- [80] V.H. had no memory of when the appellant lived and worked in Kelowna (the latter part of 2013). When pressed on her recollection of when the appellant came to her house with his daughter, V.H. could only answer in generalities that he showed up with her from time-to-time after M.M.M. was a year old. V.H. went on to testify she could not remember the dates but said that the appellant would come to visit with M.M.M. a lot. The evidence later showed that a visit V.H. believed to have happened on her birthday (November 21, 2013) could not have occurred due to the appellant working in Kelowna and Fort McMurray at the time.
- [81] Having examined the totality of V.H.'s evidence, however, and in light of the respondent's concession on this point, it is apparent that the trial judge misapprehended the evidence of V.H. when he stated that she "in fact could not recall her son visiting her with [M.M.M.], prior to April 2016." The impact of this mistake will be assessed with any other misapprehensions found.
- iii. The appellant did not care for his daughter 50% of the time
- [82] On this ground, the appellant asserts that the trial judge's conclusion that the appellant did not care for his daughter 50% of the time (at para. 18 of his reasons) is based on his misapprehension of the evidence about the appellant's living and working conditions during the relevant time.
- [83] The impugned passage from the trial judge's reasons state:

- [181] Much of the history of [M.M.M.]'s care is covered in (c) above. I would observe at this point, however, that beyond D.M.'s bald assertion there is a preponderance of evidence to contradict his testimony that he cared for [M.M.M.] almost 50 percent of the time, until March 2015. D.M., even on his own evidence, never lived with S.J.; he always had his own residence that he shared with two male friends. He never took [M.M.M.] to his residence. Given that he lived in a separate residence; given a job that required him to work a 7:30 a.m. to 4:30 p.m. shift; given his absence from Quesnel for almost four months in 2013, there is no evidentiary basis to support D.M.'s contention that he was involved in parenting [M.M.M.] to the degree he suggests.
- [84] To put this passage in its proper context, it is important to understand that at this section of the reasons, the trial judge is assessing the evidence as it relates to s. 37(2)(d) of the FLA - the history of the child's care. When read as a whole, including the following paragraph where the trial judge summarizes the appellant's lack of involvement in M.M.M.'s healthcare (including an inability to name the child's family doctor, his failure to attend any of the medical appointments save for one, as well as his lack of familiarity with M.M.M.'s medications and treatment plans), it is readily discernible that the trial judge's reference to the appellant's living arrangements and shift work are but examples in the evidence that assisted the trial judge in reaching the conclusion that the appellant's involvement with his daughter was "on a far more casual basis than he asserts."
- [85] Once the impugned passage is understood in its proper context and in light of the totality of the evidence adduced, I am unable to agree that the trial judge misapprehended the evidence on this point. The totality of the evidentiary record, and the reasons for judgment when read as a whole, overwhelmingly supports the trial judge's conclusion that the appellant's involvement with his daughter was far more casual than he asserted. Accordingly, I conclude that the trial judge's reasons do not contain any misapprehension of the evidence on this point.
- iv. Significant reliance on text messages in the absence of appreciating the context of the messages
- [86] The appellant argues in his written submission that the trial judge "seriously misapprehended the evidence by placing a significant amount of reliance on the text messages that were before the court." The appellant further argues that the misapprehension on this point is due to the failure of the trial judge to consider the context of the text messages. The appellant asserts that this misapprehension can be found in para. 32 of the reasons.
- [87] Again, the context and structure of the trial judge's reasons is important to the determination of this issue:
- [32] I pause to observe that over my 12 years as a provincial court judge, I have seldom, if ever, encountered such a high-conflict parenting case. What makes this case distinctive, however, is that the high-conflict behaviour is, in my respectful opinion, mostly driven by D.M.'s

blinker, and, in my opinion inaccurate perception that somehow S.J. is dedicated to thwarting his relationship with his daughter. My sense, having heard all the evidence, and having observed both parties, is that S.J. has made every reasonable effort to engage D.M. in constructive discussions about [M.M.M.], but D.M. has invariably resorted to taking those opportunities, either to insult, or to vilify S.J.

[Emphasis added.]

- [88] This paragraph is located in the portion of the reasons addressing s. 37(2)(h) of the FLA (whether the parent's engagement in family violence might impair their ability to care for the child) and immediately follows the analysis of s. 37(2)(g) of the FLA (assessment of the best interests of the child in the context of family violence).
- [89] The trial judge reviewed a series of vile and offensive text messages that the appellant sent to the respondent in March 2015, outlining a sample of them at paras. 23-29 of his reasons. As already outlined, the appellant's communications with the respondent and his lack of insight into the toxic nature of his treatment of the respondent was extremely troubling to the trial judge in light of how this conduct might impact M.M.M.
- [90] The appellant asserts that the trial judge has overlooked the fact that these communications were made in the context of the respondent having moved to another city with their daughter. With respect, this assertion is inaccurate. The respondent merely notified the appellant on April 15, 2015, by text message, of her intention to move to Cache Creek. In fact, the respondent never moved to Cache Creek. And by April 20, a provincial court judge had ordered the appellant to return the child to the respondent and that neither party was to remove the child from Quesnel.
- [91] The text messages outlined by the trial judge at paras. 23-29 of his reasons are all, except the last one, from an approximately two-hour period on March 30, 2015 between 1:17 p.m. and 3:47 p.m. The last cited text message in the reasons is from April 2, 2015 at 10:44 a.m. While it is true that the respondent travelled to Cache Creek on April 3, 2015 with their daughter to visit and look for work, she had not moved. Thus, all of the texts that the trial judge outlined occurred well before the respondent gave any notice of her intention to move and seemingly occurred at a time when she was still living in Quesnel. Accordingly, the trial judge did not misapprehend the evidence about the text messages by failing to consider the context surrounding them nor did he place undue emphasis upon them. A review of the collection of the text messages demonstrates that from time to time, and certainly on March 30 and April 2, 2015, the appellant treated the respondent with contempt and derision.
- [92] To suggest that the context of the text messages was that they occurred when the respondent had moved to another city is misleading and unsupported in the evidentiary record.

Finding

- [93] I have found two mistakes or misapprehensions of two components of the evidence in the trial judge's reasoning. The question remains whether the mistakes go to a central element of the trial judge's reasoning.
- [94] The first misapprehension of evidence that I have found relates to the trial judge stating the appellant did not see his daughter for a four-month period from September through December 2013. In fact, the evidence established that the appellant saw his daughter for a short period on October 31, 2013 when he took her trick-or-treating.
- [95] In my view, when the evidence is considered as a whole without this minor mistake, or it is considered from the corrected perspective that the appellant saw his daughter once in the four-month period in 2013, this misapprehension does not affect the core of the reasoning process and would not have affected the trial judge's determination that the appellant was only casually involved in parenting his daughter from the time of her birth until March 2015. Striking the statement does not leave the judgment on unsteady ground.
- [96] Further, this misapprehension was not materially linked to his overall finding that the appellant did not parent his daughter 50% of the time from birth until March 2015.
- [97] The second misapprehension of evidence by the trial judge relates to the import of V.H.'s evidence on when she saw the appellant and her granddaughter. The evidence establishes and the respondent concedes that V.H. did, in fact, see her granddaughter with the appellant from time-to-time. In my view, however, the misapprehension is not one that can be said to go to an essential part of the reasoning process. To state it another way, this misapprehension of an aspect of V.H.'s evidence is not a significant misapprehension that could reasonably have affected the result.
- [98] I have found two misapprehensions of evidence. Individually, they do not constitute serious misapprehensions of the evidence, particularly when the totality of the record is considered. Even considering the two mistakes cumulatively, I am satisfied that the minor misapprehensions do not approach the level of significance in the context of the judge's findings.
- [99] In my opinion, the balance of the reasoning fully supports the conclusion the trial judge reached and the order he made in this case. The appellant did not establish that he was involved in the care of his daughter 50% of the time. Moreover, the trial judge concluded that it was in the best interests of the child that most of the parenting responsibilities remain with the respondent. An examination of the evidentiary record fully supports this conclusion. Accordingly, the decision and underlying orders respecting parenting arrangements in this case do not constitute a miscarriage of justice, notwithstanding the two minor misapprehensions of evidence found above.
- [100] I would not accede to this ground of appeal.

Issue #2 - Did the Trial Judge Commit a Material Error in Failing to Mention the Evidence of A.S. in this Case?

Positions of the Parties

- [101] The appellant asserts that the trial judge failed to consider the evidence of his then girlfriend, A.S., as evidenced by the fact that she is not mentioned in the reasons for judgment. The appellant asserts that this constitutes a material error and demonstrates that the trial judge either forgot, ignored or misconceived the evidence, perhaps in part due to the delay between the conclusion of the evidence and the delivery of the reasons for judgment.
- [102] The respondent submits that the trial judge's failure to mention A.S. is not fatal, particularly given the fact that there were many other aspects of the evidence that were also not canvassed. In fact, the respondent submits that the exclusion of other aspects of the evidence actually inures to the benefit of D.M. I took this to mean that other aspects of the evidence not mentioned in the reasons were not supportive of the appellant's position at trial and militated against a finding of shared parenting on an equal basis.

Governing Legal Principles

- [103] The same high standard of review as outlined above also governs with respect to this asserted error. Indeed, as the appellant notes in his argument, the decision in *Van de Perre* remains the governing authority in respect of this ground of appeal:
- [15] the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 68 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.
- [104] Although the appellant alludes to para. 98 of the decision in *F.H. v. McDougall*, 2008 SCC 53 in his written argument, no submissions were made in respect of an attack on the trial judge's reasons as being insufficient or inadequate. I will only consider the matter of the trial judge's failure to mention A.S.'s evidence in the reasons from the perspective of whether the omission rises to the level of a material error.

Analysis

- [105] The appellant is correct that the trial judge did not mention the evidence of A.S. in his reasons. It would have been preferable if he had, but the omission is not what I would characterize as an error of law or a material error in the appreciation of the facts.
- [106] As established in the jurisprudence cited above, an appellate court may only intervene in the decision of a trial judge if they erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child.
- [107] A review of A.S.'s evidence demonstrates that she was only able to testify in generalities about the contact between the appellant and his daughter from mid-2014 onward (when A.S. and the appellant started dating). She was not able to speak to the level of the appellant's involvement with his daughter prior to the commencement of their dating relationship in early 2014.
- [108] A.S. conceded that she and the appellant did not keep a diary to establish the actual times that M.M.M. stayed with them. The respondent, however, did keep such a diary to assist the trial judge in determining the amount of time that M.M.M. spent with each party.
- [109] Cross-examination revealed that A.S. worked during the day from 9:00 a.m. to 5:30 p.m. and that the appellant, when he started working, worked the night shift from 2:30 a.m. to 2:30 p.m. Thus, there was nothing in A.S.'s evidence that would assist in informing how the appellant would be able to parent his daughter on an equal and shared basis or how the best interests of the child would be met with such an arrangement.
- [110] Cross-examination also revealed that A.S. was a less than credible witness. She demonstrated a motive to assist the appellant and seemingly attempted to undermine the respondent by denying things about the appellant that even he conceded. For example, an incident during the Billy Barker Days festival in June 2015 revealed that A.S. and the appellant had been drinking in a beer tent and had an argument about the appellant spending too much time with his daughter. The appellant and A.S. were very loud in their argument. The police were called and the appellant was arrested.
- [111] On that same day, the respondent and her then fiancé (now husband) had entered M.M.M. to ride her pony in the barrel race competition for young children. M.M.M. was very excited about this and had hoped that her father, the appellant, would come and watch her. Instead, he remained in the beer tent, drinking with A.S.
- [112] A.S.'s evidence in cross-examination also established that A.S. felt it was not inappropriate for M.M.M. to be sleeping in the same bed as the appellant and A.S. notwithstanding the respondent's direction that the practice cease.

- [113] Finally, the evidence of the respondent and the appellant's mother spoke about concerns about A.S.'s visiting, on at least one occasion, the house of a cocaine drug dealer. A.S. testified that the information was incorrect.

Finding

- [114] It is important to recall that a trial judge need not recite every item of evidence adduced in a trial. In this case, the trial judge failed to mention other facets of the evidence that addressed events which cast the appellant in an unfavourable light, e.g. cutting the child's hair without consultation, failing to consult the child's mother before introducing the child to his girlfriend A.S. and enrolling the child in boxing classes in the fall of 2014 without first consulting with the respondent.
- [115] In my view, having reviewed the evidence of A.S., the failure to mention her evidence does not give rise to a reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. In the end, I am satisfied that the trial judge's omission of A.S.'s evidence in his reasons does not rise to the level of a material error that warrants appellate intervention. Accordingly, I would not accede to this ground of appeal.

Issue #3 - Did the Trial Judge Err in Law in Treating the Submissions of Counsel as Constituting Evidence From the Appellant?

Positions of the Parties

- [116] The appellant asserts that the trial judge erred in law in treating certain submissions of counsel as if they were the appellant's evidence. The impugned submission relates to a comment made by counsel that "the parties have had some difficulty cooperating in the recent past."
- [117] The respondent argues that though the trial judge critiqued counsel's submission as a gross distortion of the nature of the relationship, he did not ascribe those words to the appellant.

Governing Legal Principles

- [118] The appellant relies upon the decision of *Cairns v Cairns*, [1931] A.J. No. 76 (C.A.) at paras. 39-41 to support his argument that the trial judge erroneously attributed his counsel's submissions on the nature of the parties' ability to cooperate to the appellant as if they were his evidence.
- [119] In *Cairns*, the Alberta Court of Appeal was actually dealing with an application to extend the time in which to file an appeal. In reviewing the application and noting the deficiency in the application record submitted, Justice McGillivray wrote:

- [39] Turning now to the statements of fact before mentioned to the Court by counsel for the applicant in the course of argument. It is often said that counsel before the Court as officers of the Court are always under oath and so the Court may rely on their statements of fact. It is of course traditional that members of the bar will not mislead or deceive the Court and counsel are frequently asked concerning matters that are of passing interest to the Court but Courts do not decide cases upon the hearsay statements of counsel.
- [40] It is to be borne in mind that the function of counsel in any Court is that of an advocate, he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness. Counsel before a Court of Appeal are entitled to stand upon the record and they certainly are not required to stand prepared to rebut any statements of fact then made by opposing counsel.
- [41] In this case as I have pointed out, counsel opposing the application has not subscribed to the statements made by counsel in support of the application and so these statements cannot be considered by the Court in coming to a conclusion. It follows from what I have said as to the material properly before the Court that in my opinion the application should be dismissed.
- [120] The underlined portions in Cairns are the excerpts that counsel in this appeal relies upon to advance this ground of appeal. In my view, Cairns is of no assistance to the appellant in terms of this ground of appeal. While the appellant may well be correct in referring to the fact that courts do not decide cases upon the hearsay statements of counsel, that is of little assistance in determining the ground of appeal advanced by the appellant in this case.

Analysis

- [121] It is important to have the proper context of the trial judge's reasons in this case to understand whether the trial judge was, in fact, ascribing the submissions of counsel to the appellant and treating it as his evidence.
- [122] The appellant takes issue with the following extract from the trial judge's reasons:
- [35] In my respectful opinion, D.M.'s counsel's written submissions that, "The parties have had some difficulty cooperating in the recent past," is a gross distortion and yet one more reflection of D.M.'s failure to acknowledge the angry and vulgar screeds he has directed at S.J. for what was approaching one and half to two years, as of when the trial commenced, in October [2015].
- [123] The appellant takes this comment out of context. This passage is included in a larger section of the reasons addressing s. 37(2)(i) of the FLA -- the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child.
- [124] At para. 33 of his reasons, also under this s. 37(2)(i) heading, the trial judge tied his earlier findings and observations to the inexorable conclusion that the appellant had demonstrated, over a lengthy period of time, his inability or unwillingness to work

respectfully or cooperatively with the respondent. It was the trial judge's conclusion that, based on the totality of the evidence including the voluminous amount of text messages, it would not be in the best interests of the child to order an arrangement allocating significant parenting responsibilities to the appellant. He concluded that if the appellant was granted significant parenting responsibilities, he most likely would engage in behaviour that sows significant acrimony and disharmony between the appellant and the respondent, something completely contrary to the best interests of the child. This was a finding of fact the trial judge was entitled to make and a conclusion completely supported in the evidentiary record.

[125] While the appellant appears to have acknowledged in cross-examination that some of his text messages were not appropriate and could have been worded better, he also minimized this conduct by suggesting he was emotional at the time and that he had just called it as he saw it. As an example:

Q. Mm-hmm. You think it's appropriate to call my client a "stupid ignorant prick"?

A. No; I do not. But in the heat of the moment, my daughter is being kept from me. I was very passionate about it, 'cause it bothers me. So, yes, I shouldn't have talked like this, but

Q. So Mr. M[.], at 3:30, you email my client. You say [as read in]:

LOL, no threats. Remember, you're not victim. You're the monster. You can't listen to her, 'cause you're her voice. You're evil. Instead of letting her see her dad, you cut me out and do't let me see her. You are controlling and fucked. I don't threaten. I promise you this is it.

A. Yeah, That's -

Q. Do you -

A. I did write this. Yes

Q. Mm-hmm. And you wrote this to my client?

A. Yes.

Finding

[126] In my view, the trial judge was not treating counsel's submission as evidence. Rather, he viewed the submission as being a confirmation of what the evidence established -- the appellant engaged in angry, vile and disrespectful text messages with the respondent. This course of conduct and behaviour caused the trial judge to have concerns insofar as whether a shared parenting arrangement would be in the best interests of the child.

[127] The trial judge, who had the benefit of seeing the appellant and respondent testify, concluded that the appellant's interactions with the respondent caused him grave concerns as to the appellant's ability to cooperate and communicate in a shared parenting arrangement. It was the trial judge's obligation to assess this factor within the context of the

entire evidentiary record and he did so. In the end, the trial judge concluded that the best interests of the child militated against the shared parenting arrangement. Accordingly, I would not accede to this ground of appeal.

Issue #4 - Did the Trial Judge Err in Failing to Declare a Mistrial After He Had Rendered his Reasons for Judgment?

Positions of the Parties

[128] The appellant asserts that the trial judge erred in dismissing his application for a mistrial, thereby committing an error of law.

[129] The respondent asserts that an application for a mistrial, coming as it did months after the trial judge had delivered his reasons but before the order could be entered, was not the appropriate remedy in this case. In the circumstances, appellate review was the only appropriate remedial avenue.

Governing Legal Principles

[130] The granting or refusing of a mistrial is a discretionary decision that ought not to be interfered with lightly: *Glover v. Leakey*, 2018 BCCA 56 at paras. 50-51. The jurisprudence is clear that a mistrial is a discretionary remedy of last resort that should not be granted unless other less extreme corrective measures are incapable of preventing a miscarriage of justice. Resort to a mistrial is usually reserved for instances where the proceedings have become "fatally wounded" such as, for example, inadmissible evidence having been tendered before a jury that cannot corrected through a limiting instruction: *R. v. Muller*, 2013 BCCA 528 at paras. 63-66. A "fatal wounding of the trial process" is a wounding to the administration of justice which cannot be cured by other remedial measures: *R. v. Paterson*, 122 C.C.C. (3d) 254 (B.C.C.A.) at para. 93.

[131] In the recent case of *R. v. Bugar*, 2018 BCCA 291, the Court of Appeal, in allowing a conviction appeal, noted the trial judge should have declared a mistrial when the wrong medical records were entered in the trial and not discovered until the jury started to deliberate (and after the accused had advanced his defence based on the medical records he believed were his). In allowing the appeal from conviction, Mr. Justice Frankel, writing for the Court, noted:

[30] In deciding whether it is necessary to declare a mistrial, a judge is required to consider whether a mistrial is needed to prevent a miscarriage of justice: *R. v. Burke*, 2002 SCC 55 at para. 75, [2002] 2 S.C.R. 857. Whether a miscarriage of justice has occurred is a case-specific inquiry: *Khan* at para. 74. Apposite is the following from the judgment of Justice Richards (as he then was) in *R. v. Moosomin*, 2008 SKCA 168 at para. 25, 239 C.C.C. (3d) 326:

"Miscarriage of justice" is a flexible term which comprehends a range of situations. There is no closed-ended list of circumstances or problems which can be said to exhaustively define its scope.

Analysis

- [132] The appellant brought his mistrial application only after the oral reasons for judgment had been rendered. Counsel based his mistrial application on the assertion that "the delay in rendering the reasons raised a real danger of prejudice to [D.M.] and there's a danger of miscarriage of justice. Further, the prejudice cannot be corrected and the only available remedy at this point is a mistrial."
- [133] On the mistrial application counsel submitted that trial fairness had been compromised by the delay in the delivery of the reasons. In counsel's submission, this resulted in the omission of important witnesses' evidence and an inaccurate recounting of vital details thus creating a real danger of prejudice to the appellant. In other words, counsel for the appellant argued the same grounds at the mistrial application as he does on this appeal.
- [134] It is important to understand that counsel for the appellant did not seek to take action with respect to the delay prior to the reasons being provided. And, when the mistrial application was finally brought, months after the delivery of the oral reasons, there was no accompanying application to adduce fresh evidence. Rather, the application for a mistrial was based purely on the passage of time from the conclusion of the trial to the delivery of the reasons and the assertions that now also form the grounds of appeal enumerated above as flowing from that delay.
- [135] In the case at bar, the appellant relied upon a series of decisions at both the trial level and appeal level involving an Ontario case called *Rosati v. Reggimenti*. This case originated as a civil fraud trial between two spouses where the Court had already heard 13 days of evidence. The trial judge issued a ruling that found the respondent's expert unqualified to proffer an expert opinion. Counsel for the respondent indicated that, as a result of the ruling, he needed to call an additional 14-20 witnesses and required a further 12-15 days of trial time. The trial judge declared a mistrial solely on the basis of the delay that would accrue. In the trial judge's view, the fact that the trial could not be completed in one continuous installment risked the danger of occasioning a miscarriage of justice.
- [136] Leave to appeal to the Divisional Court of the Ontario Superior Court of Justice was required to appeal the interlocutory mistrial order of the trial judge. Leave was granted by Justice Campbell in *Rosati v. Reggimenti*, 2014 ONSC 5493 ("*Rosati 2014*"). Campbell J. was of the view that the issue of mistrials due to trial length was an issue of broader importance: at paras. 15-16.
- [137] In *Rosati v. Reggimenti*, 2015 ONSC 1335 ("*Rosati 2015*") the Divisional Court dismissed the appeal, noting that the trial judge had properly exercised her discretion in declaring the mistrial.

[138] The decisions in the Rosati proceedings are not authority for the proposition that a mistrial must be declared where there is a delay in a trial continuation. Nor is it authority for the proposition that a mistrial must be declared where there is a delay in the delivery of reasons for judgment. Rather, it is an example of where a trial judge exercised her discretion to declare a mistrial and appellate review did not find it to be clearly wrong.

Finding

[139] In my view, having read the submissions made to the trial judge and having considered the ruling made dismissing the mistrial application, I cannot say that the trial judge exercised his discretion inappropriately in this case. Indeed, the trial judge's decision dismissing the application for a mistrial is entirely correct and appropriate. The trial judge quite properly noted that the bases advanced in support of the mistrial application would be more properly dealt with in the normal appellate review process.

[140] By bringing an application for a mistrial at the conclusion of the proceedings, the appellant was effectively endeavouring to do an end run on an appeal. In effect, the appellant's mistrial application endeavoured to have the trial judge review his own decision. If there was any error, it was in the misconceived basis of advancing the application in the first place.

[141] The trial judge committed no error in dismissing the application for a mistrial in the circumstances of this case. The decision not being clearly wrong is entitled to deference and as such insulated from appellate interference. Accordingly, I would not accede to this ground of appeal.

Conclusion

[142] I have not acceded to any of the grounds of appeal advanced by the appellant and so the appeal must be dismissed.

[143] Unless there are matters of which I am unaware that may require further submissions, the respondent, having succeeded in this appeal, is entitled to her assessed costs and disbursements in accordance with Appendix B, Scale B of the Supreme Court Civil Rules, B.C. Reg. 168/2009. If a hearing is required to address the issue of costs, then counsel shall reserve a hearing date through Supreme Court Scheduling within 45 days of the release of this judgment. If a hearing date is arranged, counsel shall file written submissions, not exceeding 15 pages in length (double spaced and in 12-point font), as well as any authorities, no later than 14 days before any such hearing.

"Ker J."

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