

CANADA / JUDGMENT

De Medeiros v. Helgesen

2020 BCSC 589

COURT

Supreme Court of British Columbia

DECIDED

17 April 2020

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2020 BCSC 589 De Medeiros v. Helgesen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Medeiros v. Helgesen,

2020 BCSC 589

Date: 20200417

Docket: E20471

Registry: Terrace

Between:

Lucy De Medeiros

Appellant

And

Lars Helgesen

Respondent

On appeal from: An Order of the Provincial Court of British Columbia dated April 17, 2019 (File no.: 19441, Terrace Registry)

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Appellant:

D. Gallant

Counsel for the Respondent:

B. Crampton

Place and Dates of Hearing:

Terrace, B.C.

November 4 and 5, 2019

Place and Date of Judgment:

Terrace, B.C.

April 17, 2020

1. introduction

- [1] This is an appeal under s. 233 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] from an order of the Provincial Court dated April 17, 2019 (the "Provincial Court Order") made pursuant to the April 17, 2019 reasons for judgment (the "Trial Reasons").
- [2] The appellant and the respondent are the mother and father of a young girl born January 24, 2015.
- [3] The appellant asks that the Provincial Court Order be set aside. In brief, the key terms of the Provincial Court Order provide that after a graduated period, the respondent would have parenting time (a week-on-week-off basis), that during a party's parenting time, the parties' daughter may be cared for by the party's immediate family (including a parent, sibling, child or partner), and that a pick up of the parties' daughter by a person other than one of the parties, with advance notice, is allowed.
- [4] The parties are each guardians of their daughter. The appellant did not challenge the respondent being recognized by court order as a guardian of the parties' daughter.
- [5] The parties had a relatively short relationship. The trial judge found that the appellant who also has a teenage daughter from a previous relationship was not "anything other than an exemplary mother to that child". The respondent also viewed the appellant to be a good mother.
- [6] The ability of the respondent to be a good father was not realistically challenged. The respondent is a helicopter pilot who offers his services on a contract basis. He is kept quite busy with avalanche control, heli-skiing, forest fire fighting, mining activities, and logging activities. As a contract pilot, his work schedule is not predictable. He is often offered a contract on short notice and the contract may be longer or shorter depending on the circumstances, such as the weather.
- [7] The trial judge found that the appellant "would have nothing to do with [the respondent] if she could". The respondent has had limited access to his daughter.

- [8] In brief terms, the appellant says that the trial judge was biased, seriously misapprehended the evidence, proceeded when the appellant either had no counsel or incompetent counsel, and did not apply the best interests of the child principle.
- [9] For the reasons that follow, the appellant's appeal will be dismissed.
2. grounds of appeal
- [10] Counsel for the appellant, in his written submission, frames the grounds of appeal as follows:
1. [The Appellant] submits that there are the following issues, and sub-issues, which this court is asked to address:
 - a) Did [the trial judge] err by allowing his own bias towards [the Appellant] to influence the conduct of the trial, hearing of evidence, and reasons for judgment?
 - b) Did the [trial judge] err in seriously misapprehending the evidence?
 - i. Did the [trial judge] err by inferring his judicial notice or considering uncontroverted evidence, or being plainly wrong about facts and evidence?
 - c) Did the [trial judge] err when proceeding at trial and making orders while knowing the Appellant did not have competent and available counsel, and if so, did this result in an unfair trial or miscarriage of justice?
 - d) Did the [trial judge] err in principle and law or in his discretion by not giving any or proper weight to the only principle he must consider, the best interests of the child; and did he err by basing his decision based upon what the [trial judge] believed was fair, throughout the trial and in his final decision, to [the Respondent]?
 3. Standard of review
- [11] In *Kane v. Proffitt*, 2018 BCCA 106, Justice D. Smith, writing for our Court of Appeal, sets forth the applicable standard of review:
- [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. See *Scott v. Scott*, 2006 BCCA 504; *Jens; R.E.Q. v. G.J.K.*, 2012 BCCA 146; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 832-833; and *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.
- [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"): see *Moge v. Moge* [1992] 3 S.C.R. 813, at 832; and *R.M.S. v. F.P.C.S.* 2011 BCCA 53, at para. 43, citing *Hickey v. Hickey* [1999] 2 S.C.R. 518 at para. 12 and *Van de Perre v. Edwards* 2001 SCC 60, [2001] 2 S.C.R. 1014 at paras. 14-5. 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."

4. Bias

[12] Appellant's counsel submits that the trial judge had actual bias. In argument, he also submitted that there was a reasonable apprehension of bias.

[13] I understand the appellant's submission of actual bias is based on statements made by the trial judge. There is no assertion that the trial judge had a personal interest in the matter or otherwise stood to gain personally.

[14] If statements by the judge would establish actual bias (an extremely serious allegation), they would meet the test for a reasonable apprehension of bias.

[15] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada set forth the relevant test:

[60] In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, is the reasonable apprehension of bias:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[16] In *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 at para. 7, our Court of Appeal adopted from counsel's factum the following summary of the key principles:

[7] These principles are:

- (i) a judge's impartiality is presumed;
- (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
- (iii) the criterion of disqualification is the reasonable apprehension of bias;
- (iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
- (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
- (vi) the test requires demonstration of serious grounds on which to base the apprehension;
- (vii) each case must be examined contextually and the inquiry is fact-specific.

[Emphasis in original.]

5. disjointed trial

[17] As a result of the time estimates, scheduling issues, and change in counsel, the eight-day trial occurred on a disjointed basis. The trial judge summarized this aspect as follows:

[26] The trial started November 8th. I have heard evidence for eight days. At the time the trial started, Ms. De Medeiros added to the issues an application for relocation. She wanted to move to Kelowna. All the parties agreed that that was an issue of which Mr. Helgesen had had notice and that it was an issue that should be dealt with at that trial rather than at a separate hearing. The trial proceeded on November 8th and 9th of 2017. It continued January 29th, 30th, 31st, and February 1st of 2018.

[27] When it ended on February 1st, there was some cross-examination of one witness left to be done and Ms. De Medeiros had one more witness to call. When we started the continuation on January 29th, Ms. De Medeiros had put before the court a very specific job offer that she had in the Kelowna area that would have commenced in February.

[28] At the conclusion of the time that we had available on February 1st, when the matter had not been resolved, there was some time devoted to discussions between the court and counsel as to what would happen going forward. I expressed the view that if Ms. De Medeiros was permitted to relocate to take that job, that would be a significant change in the status quo and it ought not to occur. The way in which I expressed it was that the status quo should continue.

- [29] At that time, it was hoped that the matter might be able to continue in March, not that far away. Unfortunately, Mr. Helgesen's lawyer was not available for that time and the matter was then hoped to go to June. Ms. De Medeiros' witness was not going to be available in June. The first time that the witness was going to be available and all counsel were going to be available resulted in that the matter got put off to a date that was scheduled in February of this year.
- [30] That was unfortunate for several reasons. It was unfortunate that the matter was delayed so long. It was a year after the hearing had last been on. It was unfortunate because, at the time that we adjourned the hearing in February of 2018, we dealt with whether or not the relocation would be permitted in the interim, but nobody addressed their mind to the issue of what should happen to Mr. Helgesen's time with the child because it was anticipated that the matter would get on for a completion fairly soon. The result was that at that time the last order that was still in effect was the order of August 25th of 2017.
- [31] As a result of that, a notice of motion was brought before me in September of last year. At that time, for reasons that I cannot in any way fault Ms. De Medeiros, her counsel who had been counsel through the trial, although it was her third lawyer in these proceedings, found it necessary to get off the record.
- [32] At that time, in response to the notice of motion, I did make an order changing the time that Mr. Helgesen had with his child. It was a graduated schedule, but it provided for Mr. Helgesen to, for the first time, have overnight visits with his child and was graduated to move to what was supposed to be eventually two weekends a month.
- [33] The matter, as I say, was scheduled for the trial to continue in late February. On February 25th, an application was brought to adjourn that hearing because of, really, two issues. Ms. De Medeiros had obtained new counsel who was supposed to be available for that hearing. That counsel had just days before the hearing, and in a way that I have no hesitation in saying I found completely unprofessional, gone off the record and had abandoned Ms. De Medeiros. The adjournment was granted. It was entirely appropriate.
- [34] On the other hand, I did adjourn matters to the dates that we have just now completed because it was necessary. It had already been over a year since the matter had just been in court and it was necessary to get this on an over.

6. first ground - bias

- [18] Appellant's counsel, in his written submission, states:

23. The statements made about the Appellant, by the Judge, when interim orders were made, and the similar statements he made in the Reasons demonstrate the approach of the Judge's bias against the Appellant. The Judge did state the reason for his interim decision was based upon what is reasonable and fair to the Applicant and did make negative comments about the Appellant. The Appellant submits this can only be interpreted to mean that the Judge had bias against the Appellant and in favor of the Applicant.

[19] On September 13, 2018, the trial judge considered a motion brought by the respondent to have greater parenting time, on an interim basis, until the then scheduled continuation of the trial set for late February 2019 (the "September 13, 2018 hearing").

[20] The transcript of proceeding of the September 13, 2018 hearing reads (in part):

The Court: That's between you and your counsel.

LUCY DE MEDEIROS: -- to do -- yes, it had to do with not -- it wasn't my choice to remove Ms. -- or Ms. Kendregan [not the counsel about whom the trial judge made the critical comments]. So, no, it has nothing to do with me getting counsel, and I feel that I deserve to have counsel, and ~~

THE COURT: You are entitled to have counsel to help you with the trial of this matter, You were entitled to have counsel for this proceeding, which was originally scheduled for some time ago, and if you are unable to do that, that's something that as a cause for concern, but Mr. Helgesen is entitled to have some things dealt with, and the fact that it has not been dealt with is not his fault, and this aspect, which is an interim order only, is going to be dealt with today. That's what I'm going to do.

Now, do you have anything else to say about why I should or should not make the order in the kind of nature that he -

LUCY DE MEDEIROS: Because you haven't heard evidence and I think you -- you haven't heard evidence -

THE COURT: I've heard the evidence of you and Mr. Helgesen for days.

LUCY DE MEDEIROS: Present evidence, you haven't heard evidence, recent evidence, and I feel like what Mr. Crampton is asking is not at all nearly acceptable nor relating [indiscernible] consent, and I would -- I would go to Supreme Court to overhear this if you rule against me unless I -- I don't agree with this.

THE COURT: The -- the proposal that was made by your client -- your counsel, and it was made by on your behalf, if I had allowed you to move in February is that Mr. Helgesen would be having overnights by now.

LUCY DE MEDEIROS: I lost my position, and I have a recent position right --

THE COURT: No, I understand that, but what I'm saying is you offered back in February to give him overnights, and you haven't done that yet.

LUCY DE MEDEIROS: And I also said in court, Your Honour, I testified that I wouldn't be agreeable if I wasn't moving. I did testify to that.

THE COURT: No, I understand that, but that's -- that's a -- if -- if you're not agreeable because you're not moving I have to say that's an unreasonable position.

LUCY DE MEDEIROS: I wanted to increase the time to be in [the daughter's] best interests, so going from four hours, so if I wasn't moving, four hours to an overnight is absolutely ridiculous for her. He can't even complete a two-hour -- a four-hour visit. He can only do two hours. He's late every minute of the drop off. He's cancelling every minute. I know it's his job, but I'm not -- I shouldn't be punished because he's a pilot. I shouldn't be, but I am.

THE COURT: You have to -- you aren't punished, but you --

LUCY DE MEDEIROS: But I am.

THE COURT: -- have to accommodate.

LUCY DE MEDEIROS: And I try.

THE COURT: And you have not done that.

LUCY DE MEDEIROS: And I have. Yes, I have.

THE COURT: You have done the worst job of that of any co-parent I have had the pleasure of dealing with

LUCY DE MEDEIROS: I --

THE COURT: -- in this court.

LUCY DE MEDEIROS: -- I believe you are -- I -- I don't agree with you, Your Honour. I believe I have, and I have emails to prove I have, so I feel that it's very contra -- I know you're against me, Your Honour, but I haven't, and I feel like I'm going to have to go to Supreme Court for this.

THE COURT: Well -

LUCY DE MEDEIROS: I'm going to have to because I feel not listening to what I'm trying to say. And this is not fair, I should have counsel here, and this hearing should not go through without it being adjourned, and I'm putting that on record here.

THE COURT: I've heard you on record, and you're entitled to have time to get counsel for the trial -- continuation of the trial, but Mr. Helgesen is entitled to have this remedied, and I'm going to give it to him. Have a seat.

Mr. Helgesen seeks an interim order changing the time that he has with his daughter. It was agreed and it was con -- I do not know if an order has been entered but it was certainly conceded at the commencement of the trial matter that Mr. Helgesen was entitled to be a joint guardian of his child.

Mr. Helgesen seeks additional parenting time because the trial of this matter, which commenced last fall and is not now anticipated to conclude until this forthcoming February, has been delayed. Mr. Helgesen seeks very specific things that, in addition to time set out, he is seeking expanded time to include overnights and weekends. He is going to get some of that. He is not going to get everything that he asks for.

He asks that, for the first four weeks he has two overnight contact visits, each visit and unless he advises otherwise, that he would have those times Saturday afternoon, evening until Sunday morning, and Tuesday afternoon, evening ' until Wednesday morning, and he has to advise of changes to those days a minimum of seven days in advance of the scheduled time. For the first four weeks of this order, Mr. Helgesen will have one overnight visit per week and will have one visit other than an overnight visit. His one overnight visit can be either a weekend or a Tuesday/ Wednesday, and he will advise, seven days in advance, of which it is going to be. The other terms that [indiscernible] set out in his request about exact pick up and drop off being set by Mr. Helgesen, but drop off times no later than 9 a.m. the next day will continue to -- will be in the order.

Mr. Helgesen asks that after the first four weeks that he go to two weekends a month. I am going to say that after the first two weeks -- after the first four weeks -- actually, I am going to make that for the first -- what I said earlier will go for the first three weeks. After the first three weeks, he will go to two overnight contact visits each week, as originally proposed by Mr. Helgesen in paragraph 2 of his summary of orders sought, and that will continue for three weeks.

After six weeks, he will be entitled to two weekends a month, as he proposes, but Ms. De Medeiros is entitled to more notice of what days it is you intend to exercise that, so you will advise her at least 14 days in advance. Otherwise, the relief sought in paragraph 3 of the summary of orders sought is granted. The parties may, by agreement in writing, change any of these dates. All restrictions on how Mr. Helgesen exercises his parenting time are cancelled. He can have his dogs, he can have his girlfriend, he can fly --

LUCY DE MEDEIROS: Oh my gosh.

THE COURT: That is what is happening, Ms. De Medeiros, because -

LUCY DE MEDEIROS: Oh --

THE COURT: -- that is what is reasonable for him to continue his life with his daughter.

LUCY DE MEDEIROS: Can I say one thing before you make an order?

THE COURT: Yes.

LUCY DE MEDEIROS: He wants to take my -- my evidence is he wants to take my daughter to work with him while he's flying. This is why I needed evidence brought in. I have an email from Mr. -- from Mr. Helgesen saying he was going to take her to work.

MR. CRAMPTON: Your Honour, I will clarify. My clients will not -- my client will not be taking the child on the helicopter when --

LUCY DE MEDEIROS: I --

MR. CRAMPTON: -- he's working.

LUCY DE MEDEIROS: -- have -

MR. CRAMPTON: He --

LUCY DE MEDEIROS: -- evidence of it.

MR. CRAMPTON: When he's working, He may take the helicopter -- he may take the child on a helicopter for flights on occasion.

LUCY DE MEDEIROS: I have --

THE COURT: Yes, and he is entitled to do so.

[21] The Trial Reasons read (in part):

[41] Ms. De Medeiros, when she talked about [her older daughter], spoke very highly of her. She talked about her hope that her - her hope and her actual belief that her daughter might grow up to be a doctor. When I first heard that, I took that with a grain of salt. I think all parents have great hopes and views of what their children are, but as the trial has progressed, I have come to the conclusion that that may be a realistic thought. I have heard nothing but good about the older daughter and I have heard nothing but good about the way that Ms. De Medeiros has raised her daughter. I have absolutely no reason to think that she has been anything other than an exemplary mother to that child.

[42] Having said that, I have to say that I believe that the experience of raising that child by herself has had a negative impact on Ms. De Medeiros' ability to cooperatively co-parent the child, [the parties' daughter]. Part of the evidence that was put before me in the last couple of days has been the email record of all of the communications between these parties for the past more than 15 months. It goes back to about 17 months, I think, or something along those lines. I have read it all.

[43] I have to tell you, Ms. De Medeiros, I have been a judge for 18 years. It made me "mad". There is no way to sugar-coat this. In my view, you are the most unreasonable co-parent I have seen. You have done a wonderful job for your older daughter, and I do not have any doubt whatsoever that you want to do the best that you can for [the parties' daughter], but what comes to me clearly through those emails is that you do not have a - you do not have any concept of how properly to share that responsibility.

- [44] I understand that from your perspective, from the perspective of Ms. De Medeiros, Mr. Helgesen's schedule and his inability to be precise in his scheduling creates real problems for you. That is life. Mr. Helgesen is the father of your daughter and, if you are putting her best interests ahead of your own feelings, you would make a real attempt to accommodate that, and I am not satisfied that that has been done at all.
- [45] As Mr. Crampton said in his submissions yesterday, if you were putting a priority on building the relationship between Mr. Helgesen and your daughter, then that would have priority over playdates and all kinds of other things. As I went through the emails, when Mr. Helgesen would request time with [the parties' daughter], there are at least half a dozen occasions when it is not available because she has a playdate. In a year and a half, there was one occasion when a playdate was cancelled so that [the parties' daughter] could spend time with her father.
- [46] I do not intend to go through the evidence as a whole in any great detail. There are real differences between Mr. Helgesen's view of a number of events and Ms. De Medeiros' view of a number of events. I will say this, wherever there is a difference, with one exception and I will identify that, but other than the one exception, wherever there is a difference between their evidence, I accept the evidence of Mr. Helgesen. As far as your evidence is concerned, Ms. De Medeiros, I will say that I found you to be the least credible witness I have experienced in my 18 years on the bench.
- [47] Mr. Crampton went through a number of things yesterday where he said your behaviour was irrational and otherwise unreal. In cross-examination by Mr. Crampton on a number of occasions, you complained because you had been asked questions already on the same topic, and there is a general rule that if you ask - if you are asked once and you give an answer, you can be asked once again to test it and if you give the same answer, that is the end of the matter. That was not the case in this case. There were more than one occasion when you gave different answers and so it was revisited three or more times.
- [48] Your evidence, to my mind, was tailored and coloured by what you thought was going to affect the case. The most telling example of that that came to my mind was in your cross-examination when you had indicated that one of the reasons why you wanted to go to Kelowna was so that your [older] daughter, could attend a Catholic high school because there was no - there is no Catholic high school in Terrace. That is an appropriate consideration, but Mr. Crampton cross-examined you about the fact that there was a Christian high school in Terrace.
- [49] It would have been open to you to have acknowledged that, to have said that that was a Protestant Christian or Ecumenical or whatever and that it followed different beliefs than what might be espoused in a Catholic high school, but you did not choose to do that. You chose to refuse to admit that Catholicism was a branch of Christianity, that Catholics were Christians, and that is so contrary to logic and to reality, but you thought it was going to assist Mr. Helgesen and you refused to acknowledge it.

- [22] I do not find that there is a reasonable apprehension of bias. In other words, "an informed person, viewing the matter realistically and practically -- and having thought the matter through" would not conclude that the trial judge "whether consciously or unconsciously" did not "decide fairly".
- [23] In context, it is clear that each of the appellant and the respondent would be a good parent, serving the best interests of their daughter.
- [24] A child's "physical, psychological and emotional safety, security and well-being" is usually served with the child having as much contact with each parent: FLA, ss. 37(2) and (3).
- [25] The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) reflects Parliament's similar recognition of the importance of maximum contact: Divorce Act, s. 16(10).
- [26] In *K.L.G. v. D.J.T.*, 2013 B.C.S.C. 1684, Justice N. Brown stated:
- [104] The FLA does not contain a statement of the maximum-contact principle, as found at s. 16(10) of the Divorce Act. But the principle is harmonious with s. 37(2)(a) of the FLA, which identifies the child's health and emotional well-being as essential considerations. The principle of maximum contact is a natural adjunct to the goal of maximizing their health and emotional well-being.
- [27] The trial judge's statement during the September 13, 2018 hearing that the appellant had "done the worst job of any co-parent I have had the pleasure of dealing with" must be viewed in context.
- [28] In context, the trial judge viewed the appellant as a fully capable parent but recalcitrant in ensuring parenting time with the respondent. The law directs a trial judge to facilitate as much parenting time as is reasonably possible in the circumstances having regard to the best interests of the child. A right-minded person would view the trial judge as having decided matters fairly.
- [29] Where each parent is capable of exercising parenting responsibilities in the best interests of the child, the sharing of parenting time should, over time, be divided equally or approximately so.
- [30] The September 13, 2018 hearing also addressed a motion for an interim order. Interim orders are summary orders and serve to provide rough justice at best: *Newson v. Newson*, 1998 CanLII 6440 (B.C.C.A.) at para. 11.
- [31] By September 13, 2018, the trial judge had already heard a number of days of the appellant's testimony. As noted, the trial had started on November 8, 2017 (two days), had continued on January 29, 2018 (four days) and was then, at that time, set to continue in February 2019.
- [32] With the time and time gaps, a right-minded person would view an interim order providing more parenting time for the respondent as well within the bounds of reason.

- [33] In the Trial Reasons, the trial judge, after referring to the appellant as an "exemplary mother", states in reference to his review of the email record between the parties involving parenting time that he is "mad" and views the appellant as "the most unreasonable co-parent" he has seen.
- [34] Again, in context, a right-minded person would view the appellant's intractable approach as frustrating the parties' daughter's best interests warranting strong and direct judicial language.
- [35] In sum, I see no basis for a finding of a reasonable apprehension of bias (which includes actual bias).

7. Second ground - misapprehending the evidence

- [36] Appellant's counsel in his written submission refers to the trial judge's finding that the appellant was not credible having specific reference to Catholicism and Christianity. In this regard, appellant's counsel, states (in part):
35. The Judge, in his Reasons cited the Appellant's testimony (January 30, 2018 at pages 20-22; February 1, 2018 at page 98) about Catholic religion as a branch of Christianity at trial and determined that the Appellant was not credible. The testimony of the Appellant that the Judge declares is "contrary to logic and to reality" in order to undermine the Applicant's position (Judge's Reasons at page 14 paragraph 49) on a point where no evidence, including expert testimony, was proffered by either party. The Appellant submits that the Judge's conclusions are incorrect as a matter of fact.
36. The Judge's determinations infer that he took judicial notice (or in the alternative: uncontroverted evidence or plainly wrong as a statement of fact) regarding the testimony of the Appellant (Judge's Reasons at pages 13, 14 at paragraphs 46-49) pertaining to religion per se.
37. The issue at subject was whether Catholic religion is a branch of Christianity per se, and whether it is essentially the same as other Christian religions or Christianity. In the event, if it is determined that the Judge did not take Judicial Notice because he did not state it was Judicial Notice, this argument is advanced as uncontroverted evidence, or that the Judge's determination of this fact is plainly wrong as a statement of fact.

[37] The relevant portion of the cross-examination of the appellant reads:

Q Now I understand one of the concerns you have is that the Catholic school graduates their kids at nine -- grade nine?

A Correct.

Q So, your daughter is about to finish that program?

A Correct.

Q There is a Christian high school in Terrace, is [there] not?

A She's not Christian. My daughter's Catholic.

Q There is a Christian high school in Terrace; is there not?

A Yes. Correct.

Q Okay. And Catholicism is a Christian faith, is it not?

A It's separate from what our beliefs are, a little bit.

Q Okay. But it --

A It's not the same.

Q Okay. Christianity defines all religions based on the belief in Christ and his teachings, does it not?

A I'm not going to go with religion.

Q That is what Christianity means?

A Christian and Catholic are separate.

Q So, you're suggesting that Catholics are not Christian?

A They're different.

Q Are you suggesting Catholics are not Christians?

A No, they are Christians.

THE COURT: Just -- Ms. Kendregan -- just, Mr. Kendregan has stood.

A They are Christian, but --

MS. KENDREGAN: It's just --

A -- I don't know.

MR. CRAMPTON: That's all I was trying to confirm.

A It's not the same schooling.

Q And it's a Christian school.

A It's different beliefs than the Catholic beliefs.

Q Okay. But you're still taking your daughter to Catholic -

THE COURT: Okay. Ms. Kendregan is still standing.

MR. CRAMPTON: Sorry.

THE COURT: Let her make her objection.

MS. KENDREGAN: She's just -- can -- she can speak about Catholicism because she's -- that's her religion. I don't think she's in a position to comment on other Christianity, or -- 'cause it's -- it's -- this is not -- we're not taking judicial notice about a religion. She's not an expert in religion, so -

MR. CRAMPTON: Well, Your Honour, I would argue. Fairly, I am asking the witness the definition of Christianity. As a Catholic, I expect she knows it.

A I don't know it. I don't know the difference between the religions.

[38] I have difficulty reading the transcript to reach the trial judge's description of the "most telling example". That said, I do not see this aspect as a "material or reversible error" for two reasons. First, the trial judge found that there were other grounds on which to find the appellant not credible.

[39] Second, the finding of the lack of credibility is not material because it is not relevant. The trial judge found both parties to have the capability to be good parents. As noted, in this regard, the respondent was not challenged in any serious manner. As N. Brown J. in K.L.G. states, "[t]he principle of maximum contact is a natural adjunct to the goal of maximizing their health and well-being" (para. 104).

[40] To put matters another way, if the trial judge had found the appellant to be credible (and accordingly not recalcitrant to co-parenting), the reasonable order would have been the order made -- a graduated increase in the respondent's parenting time leading to a week-on-week-off sharing of parenting time. The conclusion was not affected.

[41] In sum, I do not find a material error arising from the trial judge's findings of fact that "could reasonably have affected the result and therefore warrants appellate intervention".

8. Third ground - lack of competent counsel

[42] The appellant's argument with respect to either no counsel or incompetent counsel involves two counsel who represented her at different times.

[43] With respect to the first of these counsel, the appellant says that this counsel failed to represent her competently in three ways:

- a) got off the record without assisting the appellant in speaking to an adjournment;
- b) did not intervene sufficiently during the cross-examination of the appellant while knowing that the appellant had been abused by men in the past; and
- c) failed to follow the appellant's instruction.

[44] The appellant further says that the trial judge failed to intervene to control her cross-examination which allowed respondent's counsel to "intimidate and bully" her.

- [45] With respect to getting off the record, this was done in a professional manner. Withdrawing counsel represented to the trial judge at the start of the September 13, 2018 hearing set to consider the respondent's motion for an interim order facilitating greater parenting time that she had to "withdraw as counsel" and that she could not "act for this hearing".
- [46] I see no reason to go behind counsel's word and the trial judge did not err by not doing so: *R. v. Cunningham*, 2010 SCC 10.
- [47] With respect to counsel not sufficiently intervening during the cross-examination of the appellant, counsel did object stating that the appellant was being intimidated. The trial judge ruled that he was not satisfied that there had been any intimidation.
- [48] Respondent's counsel acknowledges that his cross-examination was aggressive (at that time the appellant was proposing to move from Terrace to Kelowna), that he has a loud voice, and that the courtroom was small. Respondent's counsel also states that he specifically arranged matters so that "he would not be standing next to the witness".
- [49] It is improper for opposing counsel to obstruct cross-examination: *Law Society of British Columbia, Code of Professional Conduct for British Columbia, Rule 5.4-1*. As noted, counsel for the appellant had objected and her objection was dismissed. The trial judge would have been alive to the concern. I see no basis to find that the trial judge was not in control of his courtroom.
- [50] As noted, the appellant also says that this counsel failed to follow her instructions.
- [51] Respondent's counsel submits that there was no proof as to the particular instructions the impugned counsel received and the onus was on the appellant in this appeal to prove such, for example, by way of confirmation from counsel. I agree. There is only the appellant's assertion that the impugned counsel did not follow instructions or failed to make the type of usual judgment calls required of counsel during a trial.
- [52] The appellant's assertion falls short of "sufficiently clear, convincing and cogent evidence" to make a finding that the impugned counsel failed to follow the appellant's instructions: *F.H. v. McDougall*, 2008 SCC 53 at para. 46.
- [53] The second of these counsel, as the trial judge describes, in a "completely unprofessional" manner got off the record and abandoned the appellant shortly before the scheduled resumption of the trial in February 2019. As a result, the trial was adjourned to April 15, 2019.
- [54] In granting the adjournment, the trial judge modified the earlier interim order by allowing the respondent's mother or partner to pick up the parties' daughter.

- [55] I do not see any prejudice arising from the adjournment (beyond the timely resolution of the matter). On then an interim basis, the addition of the respondent's mother and partner as persons who could pick up the parties' daughter helped facilitate the respondent's parenting time with his daughter in the context of the uncertainty surrounding his work schedule. The parties' daughter's time with her paternal grandmother and the respondent's partner would also not be contrary to the daughter's best interests and are well within society's norms.
- [56] In sum, with respect to this third ground, I do not find that there was an unfair trial or a miscarriage of justice.
9. Fourth ground - best interests of the child
- [57] The appellant submits that the Provincial Court Order does not serve the best interests of the parties' daughter because it allows "parenting by proxy".
- [58] Paragraph 16 of the Provincial Court Order reads:
16. If [the daughter] is to be cared for by someone other than immediate family (including a parent, sibling, child or partner) for more than 8 hours, then the party who has care of [the daughter] will offer that time first to the other party.
- [59] I do not find that the trial judge erred in law. The Trial Reasons reflect that the trial judge considered specifically s. 37 of the FLA.
- [60] The Provincial Court Order served the parties' daughter's best interests, among other matters, by providing certainty for her. After the graduated period had passed, she would know each week whether she would be at her mother's residence or at her father's residence (with a scheduled afternoon each week with the parent that does not have parenting time that week).
- [61] The involvement of the respondent's mother and his partner as caregivers helped address the reality of the respondent's uncertain work schedule while ensuring the parenting time required to build the bond of father and daughter.
- [62] The care of a child by a grandmother or a partner in today's society is common. Sections 41 and 42 of the FLA contemplate parenting responsibilities and parenting time involving the control and supervision of the child.
- [63] Where the respondent is called for work during one of his parenting time weeks, it is reasonable and practical that the parties' daughter be taken care of by her grandmother or her father's partner. Many children benefit from further special bonds and relationships, including with a grandmother or with a parent's new partner or spouse.
- [64] I reject the appellant's argument that the Provincial Court Order represents "parenting by proxy" or was directed at serving the interests of the respondent over the best interests of the parties' daughter.

[65] In sum, I find that the trial judge did not err in law in making the Provincial Court Order.

10. New evidence

[66] The appellant sought to introduce new evidence as part of her appeal.

[67] In *Kane*, our Court of Appeal states:

[50] In contrast, new evidence is evidence that came into existence only after the trial. It is only admitted in rare circumstances, such as where a trial judge has made assumptions about future events and then, before the appeal is heard, those assumptions are discovered to have been incorrect: *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 (C.A.) at para. 26. The rationale for the stringent approach to the admission of new evidence is that it has the potential to undermine the need for certainty and finality of litigation by inviting an appeal court "to apply different laws to different facts than those which confronted the trial judge": *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 62, quoting from *Lambert J.A.* in *Lunde* at para. 26. As the Court observed in *Scott* at para. 25, "[a]lthough events that occur after trial may affect the issues between the parties, matters must be reviewed as they stood at the time of trial; to do so otherwise would offend the principle of finality" (emphasis in original).

[68] The appellant in her affidavit in support of her motion swears (in part):

16. I believe Mr. Helgesen did exercise a total number of 66 days of his allotted 88 days. 3 of the overnights missed by Mr. Helgesen was by his own request to have our Daughter stay with me overnight - these dates were: June 2-3; July 6-7; July 17-18. Also, there was an agreed overnight on August 28-29, due to our Daughter refusing to leave my home.
 17. I believe there was a total of 19 days where Mr. Helgesen did not care for our Daughter and our Daughter was cared for by Mr. Helgesen's mother during his allotted parenting time. I believe this is Mr. Helgesen exercising his parenting time by proxy and is not actually parenting time.
 18. On or about August 14, 2019, our Daughter volunteered information to me that Mr. Helgesen was not caring for our Daughter during his parenting time for several days, and that his mother was caring for her. I was not offered a first right of refusal as ordered in the Order.
 19. I have not ever declined an opportunity to exercise my first right of refusal. I have never sought to reschedule my parenting time. My Daughter is my main priority in life. I have been refused my first right of refusal while third parties not well known to my daughter care for her.
- [69] I will dismiss the motion. It was clear that the respondent would not always be available during his parenting time as a result of his uncertain work schedule. Accordingly, the further evidence is not new.

[70] I also note that the appellant has not understood correctly the Provincial Court Order in that where the respondent's mother (or the respondent's partner) is to care for the parties' daughter, there is not a first right of refusal. Both the parties' daughter's maternal and paternal grandmothers are capable of caring for the parties' daughter.

11. conclusion

[71] The appellant has not satisfied me that the trial judge made an error in principle or significantly misapprehended the evidence, or that his decision is clearly wrong.

[72] The appeal is dismissed and the Provincial Court Order of the Provincial Court is confirmed.

12. costs

[73] The respondent will have his costs and disbursements as a matter of ordinary difficulty for a one-day hearing.

"Funt J."

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