
CANADA / JUDGMENT

Hammond v. Hammond

2020 BCCA 314

COURT

British Columbia Court of Appeal

DECIDED

29 October 2020

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2020 BCCA 314 Hammond v. Hammond

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hammond v. Hammond,

2020 BCCA 314

Date: 20201029

Docket: CA46962

Between:

Giuseppine Hammond

Respondent

(Claimant)

And

Steven Matthew Hammond

Appellant

(Respondent)

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

July 20, 2020 (Hammond v. Hammond, Cranbrook Docket 28787).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

D.F. Collins

Counsel for the Respondent

(via teleconference):

R.S. Miles

J.H. Van Wyk (appeared for oral judgment only)

Place and Date of Hearing:

Vancouver, British Columbia

October 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 29, 2020

Summary:

The applicant seeks leave to appeal an order dismissing an application to vary the original consent order, which allows for shared custody of the child of the marriage. The applicant raises seven grounds of appeal, arguing that the chambers judge erred in fact and law in dismissing the variation application. A preliminary issue was whether the order could be appealed as of right, or whether the applicant required leave to appeal. Held: Leave to appeal is required and the application for leave to appeal is dismissed. The order at issue is an interim order concerning the best interests of the child, which attracts significant deference on appeal. The facts of this case do not rise to the level of 'extreme' or 'exceptional' such that would warrant granting leave to appeal the order.

BENNETT J.A.:

Nature of Application

- [1] The applicant, Steven Matthew Hammond, seeks leave to appeal the order of Justice Hori (the "chambers judge") of the Supreme Court of British Columbia pronounced on July 20, 2020 (the "Order"). The Order dismissed Mr. Hammond's application for the variation of an earlier consent order, entered February 14, 2019, to allow for shared custody of the parties' child.

- [2] The reasons for judgment of Justice Hori are unpublished and can be found in the transcript of proceedings (the "Transcript of Proceedings").
- [3] The applicant filed the notice of application for leave to appeal on August 13, 2020. The applicant filed the motion for leave to appeal on October 7, 2020.
- [4] For clarity, I will refer to the applicant as Mr. Hammond and to the respondent by her preferred name, Ms. Romeo.

Background

The Factual Background

- [5] The underlying action at issue concerns a custody and access battle between Mr. Hammond and Ms. Romeo.
 - [6] The parties were married June 21, 2008.
 - [7] There is one child of the marriage, A., born on December 22, 2016.
 - [8] During the marriage, both parties worked full-time as teachers. After the child was born, Ms. Romeo took maternity leave before returning to work in January 2018.
 - [9] The parties separated on or about September 24, 2018.
 - [10] The parties were able to negotiate terms of a consent order (the "Consent Order"), filed February 14, 2019.
 - [11] The Consent Order outlined that the parties shall retain joint custody of the child of the marriage.
 - [12] In para. 3, the Consent Order provides:
 - 3. The child of the marriage shall, for the time being, continue to reside primarily with the Claimant. Provided however, the parties acknowledge their intention is to work toward an equal shared parenting regime so long as that objective meets the physical and emotional needs of the child. The parties further agree to review parenting time annually each September, or more frequently if agreed upon by the parties and circumstances warrant such a review.
- [Emphasis added.]
- [13] In para. 4, the Consent Order provides:
 - 4. The Respondent shall have reasonable parenting time with the child of the marriage. At present, that parenting time will be Sundays and Mondays overnight and Thursday (not overnight) each week and, as the child adapts, an additional one-half day Friday visit per month coinciding with a school professional development day. Furthermore, the Respondent shall be entitled to additional parenting time as is agreed upon by the parties in advance based on the Spring Break, Christmas Break, and Summer Break as determined by

School District No. 5 school calendar.

[Emphasis added.]

The Proceedings Below

[14] On May 4, 2020, Mr. Hammond made an application to vary the parenting time provision contained in the Consent Order.

[15] The chambers judge's reasons for dismissing Mr. Hammond's application are found at pages 42-43 of the Transcript of Proceedings. They are reproduced below:

I'm prepared to give you my decision now.

The respondent seeks an order varying the parenting time provision contained in a consent order granted by the court on February 14, 2019.

The relevant parts of the order provide as follows in paragraphs 3 and 4:

The child referred to in the consent order is [A.], born December 22nd, 2016, which makes her three-and-a-half years old. The respondent applies to vary the consent order to a shared parenting regime in which the parties will share parenting time with [A.] equally.

At the time when the consent order was made, the parties were dealing with anxiety issues with [A.]. For some reason, probably the effects of a separation and the personality of the child, [A.] was experiencing anxiety which manifest itself in crying, screaming, and nightmares.

There is an exchange of correspondence by way of text message as well as confirmation in the respondent's supporting affidavit, that there were issues with respect to anxiety relating to [A.] before the consent order was filed.

It is likely as a result of these anxiety issues that the consent order included the provision that the parties intend to move towards shared parenting regime "so long as that objective meets the physical and emotional needs of the child." There is no evidence that either of the parties is not a good parent to [A.]. To the parties' credit, neither of them takes that position. I am sure that both parties are loving and caring parents and there is nothing before me in this application about the parties' parenting skills that would cause me any concern with ordering an equal parenting arrangement.

However, the best interest of the child are the only consideration for the court when deciding parenting time issues. When the parties agreed to the terms of the consent order, they must have taken [A.]'s anxiety problems into consideration. Given the terms of the order, the parties must also have considered that the best interest of [A.] would be served by the terms of the parenting time set out in the order. Based on the evidence before me, I find that the anxiety issues experienced by [A.] in and around February of 2019, have not changed in any material way since that consent order was pronounced. Therefore, there has not been a material change in the most significant factor on which the consent order was based, namely [A.]'s emotional state with respect to anxiety. Accordingly, as was the case when the consent order was pronounced, it is in

the best interest of [A.] that the parenting order remain as ordered on February 14, 2019. Therefore, the respondent's application to vary that order is dismissed.

Facts Relevant to the Application

- [16] In his appeal, Mr. Hammond seeks to vary the Consent Order to allow for shared custody of A. on a seven-day alternating schedule. Mr. Hammond raises seven grounds of appeal:
- (1) the chambers judge erred in fact in finding that Mr. Hammond's execution of the Consent Order was an acknowledgement that the child suffered from anxiety;
 - (2) the chambers judge erred in finding that Mr. Hammond's execution of the Consent Order was an acknowledgement that the child suffered from anxiety to an extent that a shared parenting regime was not in the best interests of the child;
 - (3) the chambers judge erred in failing to find that Mr. Hammond's purchase of a house, geographically close to Ms. Romeo, and the change in the parties work schedule, constituted a change in circumstances justifying a variation;
 - (4) the chambers judge erred in law in failing to consider the May 4, 2020 notice of application as the review referred to in the Consent Order, such that a finding of a material change in circumstances was unnecessary to vary the order;
 - (5) the chambers judge erred in failing to consider the affidavit evidence of the father and submissions of counsel that any anxiety experienced by the child only occurred on transitions between the parties;
 - (6) the chambers judge erred in failing to order a shared parenting regime in the absence of a finding that the schedule proposed would increase the child's anxiety; and
 - (7) the chambers judge erred in awarding costs to Ms. Romeo.

Law

Is Leave to Appeal Required?

- [17] There is a live issue as to whether leave to appeal is required.
- [18] The Reasons and Order do not specify whether the decision was made under the Family Law Act, S.B.C. 2011, c. 25, or the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). If the Order is made under the Family Law Act, it qualifies as an interim order, which is a "limited appeal order", and leave to appeal is required. If, however, the Order was made under the Divorce Act, leave is not required, appeal is as of right.
- [19] Section 6 of the Court of Appeal Act, R.S.B.C. 1996, c. 77 governs appeals to this Court:
- 6 (1) An appeal lies to the court
- (a) from an order of the Supreme Court or an order of a judge of that court,

[20] Section 7 of the Court of Appeal Act sets out the circumstances in which a litigant must seek leave to appeal:

- (1) In this section, "limited appeal order" means an order prescribed under the rules as a limited appeal order.
- (2) Despite section 6(1), an appeal does not lie to the court from a limited appeal order without leave being granted by a justice.
- (3) In an order granting leave to appeal under this or any other Act, a justice may limit the grounds of appeal.

[21] "Limited appeal orders" are defined in Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001 [Rules]:

2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act:

...

- (b) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Family Rules:

...

- (ii) Rule 7-1 [judicial case conference];

- (c) an order granting or refusing interim relief under the Family Law Act;

[22] Thus, orders of a judge of the Supreme Court of British Columbia may be appealed as of right unless they qualify as limited appeal orders. Only those orders specifically provided for in each subrule of Rule 2.1 are limited appeal orders: *Yao v. Li*, 2012 BCCA 315 at para. 27.

[23] I note that the Order being appealed is not the Consent Order. It is the Order that seeks to vary the Consent Order.

[24] In this case, the Order was made under Rule 7-1(15) at a judicial case conference, in Form F51.1 (pursuant to the Supreme Court Rules, 15-1(1)(d.4)). Counsel advise that the form of the Order is in error, and it was not a judicial case conference order, but an application in regular chambers.

[25] If it was made as a judicial case conference order, then leave to appeal is required. However, in any event, as stated below, in my view, leave is required.

[26] Pursuant to the Practice Directive, Commencing an Appeal When Uncertain if Leave to Appeal is Required, (May 8, 2017), if a party is unsure if leave to appeal is required, the party should file a notice of application for leave to appeal and seek leave to appeal. If leave to appeal is not required, the presiding justice may order that the notice of application for leave to appeal stand as a notice of appeal along with any necessary extension(s) of time. If

the application for leave is brought in time, the justice should convert the notice of application into a notice of appeal: *Gonzalez v. British Columbia (Attorney General)*, 2019 BCCA 88 at para. 39 (Chambers), citing *Hiebert v. Miller*, 2018 BCCA 216.

[27] I note that in the applicant's memorandum of argument, Mr. Hammond states:

Given the form of the original consent order entered into between the parties and filed on February 14, 2019, the appellant is unsure whether the order granted by Mr. Justice Hori was a limited appeal order for which leave is necessary or a final order for which leave need not be sought (at para. 37).

[28] Further, at page 21 of the Transcript of Proceedings, it is apparent that counsel for Mr. Hammond is unsure whether the Consent Order was made under the Divorce Act or the Family Law Act.

[29] Finally, in the May 4, 2019 application by Mr. Hammond to vary the Consent Order, the portion of the application requiring Mr. Hammond to check the box of the type of application submitted is left unanswered.

[30] Therefore, despite his uncertainty about the nature of the Order, Mr. Hammond has properly chosen to file a notice of application for leave to appeal and seek leave to appeal.

[31] Ms. Romeo, however, submits that the Consent Order amounted to a final order. She further submits, at para. 26, that Mr. Hammond knew the matter was not a "limited appeal order" vis-à-vis his specific acknowledgement that the matter was not within the jurisdiction of a master.

[32] I note that the order for joint custody of the children was made under the Divorce Act in the Consent Order. However, it is not the Consent Order (which is clearly a final order) that is under appeal.

[33] This Court has only commented on the meaning of "interim relief" under Rule 2.1 on a few occasions.

[34] In *Harras v. Lhotka*, 2015 BCCA 329 (in Chambers), the issue was whether leave was required to appeal an order which reviewed the parties' child support obligations under a separation agreement.

[35] The appellant argued that leave to appeal was not required because the impugned order was a final order on child support, subject only to future review, and thus not in the nature of interim relief. He also argued that the order was made pursuant to the Divorce Act, and therefore leave was not required.

[36] Justice Saunders concluded that the application was made under the Divorce Act. However, in obiter at paras. 15-16, she held:

[15] However, even looking at this as an order under the Family Law Act, I would conclude it is not an order for interim relief: the mere ability to review the amount of child support in the future does not make the order interim. The court has given a complete answer to the only issue before it.

[16] In other words, whatever be the basis for the court assuming jurisdiction to determine the matter, an order has resulted that does not provide interim relief under the Family Law Act. Thus leave to appeal is not required.

[Emphasis added.]

[37] In *S.H.F.N. v. A.B.N.*, 2015 BCCA 314 (in Chambers), the issue was whether leave was required to appeal a protection order made under the Family Law Act in the context of proceedings under the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can T.S. 1983 No. 35.

[38] Justice Saunders found that the protection order did qualify as a limited appeal order under the Rules. At paras. 5-9, she held:

[5] The term interim relief is not defined in the Court of Appeal Rules or the Family Law Act.

[7] It is well established that interim orders in family proceedings are primarily designed to maintain the status quo and to provide short-term solutions: *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403; *Johnson v. Jessel*, 2012 BCCA 393; and *Aleong v. Aleong*, 2013 BCCA 167.

[8] The term "interim" has two connotations. One is "time limited" and the other is "interlocutory". In both senses I consider that the term "interim relief" connotes something short of permanent relief and something short of the entire relief sought in a proceeding.

[9] In this case the protection order is subject to further extensions by the court, is not the entire relief sought in the litigation, and is limited. In my view it falls squarely within the term "interim relief" in Rule 2.1. This leads me to conclude that leave to appeal is required.

[Emphasis added.]

[39] In *Routkovskaia v. Gibson*, 2020 BCCA 189, Justice Harris, writing for the Court, stated:

[18] I observe that the Family Law Act does not define the difference between an interim and a final order but the Act does provide jurisdiction to make interim orders. Section 216 contemplates that interim orders are temporary pending trial, intended to preserve the status quo or put in place arrangements that bridge the gap to trial. Conversely, it seems to me, the section contemplates that orders emerging from the adjudication of the issues on the merits at trial, *prima facie* lead to final and not interim orders.

[19] In brief, I accept Ms. Routkovskaia's submission that in the ordinary course interim orders are time limited and interlocutory in character. They are intended to be stop-gap, to bridge the parties to trial, so that a trial can take place in which parties lead their evidence and a judge can assess all relevant evidence to adjudicate the dispute on its merits. At the

conclusion of trial, a judge is expected to make an order in relation to the relief sought in the proceeding. The relief may be granted in whole or in part or it may be refused, but the trial is at an end and a definitive result is provided. That result provides certainty to the parties. It is the adjudication of their rights that have been in dispute in the proceeding. It is by its nature final and it provides a basis for appeal, if a right of appeal lies.

- [20] I accept that there is a sense in which orders in family matters are never, in a colloquial sense, "final", because the law makes provision for them to be "revisited" in a variety of different circumstances. And, indeed, the orders themselves may make provision for subsequent review. These facts alone do not support an argument that such orders are not properly viewed, in the legal sense, as final.
- [22] It is necessary then to assess whether the order under appeal is interim or final. Doing so requires an analysis of the true nature of the order and whether it is a determination of the issues that were before the court for adjudication. That analysis can be undertaken only by appreciating the issues before the court calling for determination and how they were disposed of by the judge. In this respect the observation of Justice Donald writing for a five judge division in *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, 2008 BCCA 480 at paras. 20 and 34 is helpful:
- [20] the ultimate question is what kind of order is challenged on appeal, the answer should be found in the true nature of the matter, not its surface appearance.
- [34] The classic formulation of the order approach refers to disposition of all the rights of the parties. It should now be understood to include partial dispositions whereby the order determines a substantive issue in the litigation. The reformulation responds to the fact that it has become increasingly common for parties to seek rulings on substantive issues that only partially disposed of the matters in dispute.
- [26] Finally, I agree that the fact that the September 2018 Order provided for a review is not necessarily decisive of the nature of the order. An illustration of this proposition is found in a judgment of Justice Saunders where, in *Harras v. Lhotka*, 2015 BCCA 329 (B.C. C.A.) at paras. 12-16, she concluded that the mere ability to review the amount of child support in the future did not make the order interim, because the court had given a complete answer to the only issue before it.
- [28] In my respectful view, those orders were objectively in the nature of final orders, representing a decision on those issues as they fell for adjudication in the trial. I see nothing interim about them.

[Emphasis added.]

- [40] In my view, while I would classify the Consent Order as a final order, the Order under appeal was interim. The fact that the Consent Order contemplates future review and future variation speaks to the nature of family law proceedings of this kind, rather than to the classification of the order as "interim". The Order, on the other hand, is one that maintains the status quo. Indeed, its very nature as a dismissal of an application seeking to change the status quo is indicative of this fact.
- [41] The decision in *A.L.J. v. S.J.M.* (1996), 81 B.C.A.C. 268, Justice Proudfoot (in Chambers), cited in *Rupertus v. Rupertus*, 2012 BCCA 426 at paras. 16-17, is of considerable importance in this context. Justice Proudfoot stated, at paras. 10-11:
- [10] This order in my view does not finally determine the rights between the parties. Access orders, in my view, would rarely be final orders. Variations are applied for and are granted. The law provides for that, circumstances change. If for no other reason but for that of public policy purposes one could only imagine the number of access appeals that would arrive in this Court if leave were not required. An appellant must be able to meet the test of a meritorious appeal. Counsel for the appellant argues that these cases are different, indeed they are, and for that reason alone some control must be in place. In cases without merit they should not be here. One could envisage a wealthy spouse embroiling the other party with endless appeals with no merit involving access. In my view that would be wrong. It would not serve the "best interests of the child or children", it would not serve [M] in the case at bar to prolong this case by granting leave on this point.
- [11] In summary the order for access is an interlocutory order. Leave is required. No leave being sought the appellant cannot succeed on this application

[Emphasis added.]

- [42] Note that the Family Law Act no longer allows for orders of "custody" or "access", but instead uses terms "parenting time" and "contact". These differences are not merely cosmetic. However, many of the same principles pertaining to custody and access should still apply: see e.g., *T.N. v. J.C.N.*, 2013 BCCA 432 (in Chambers).
- [43] Viewing the Order as interim relief is most suitable in the circumstances. Accordingly, I would find that leave to appeal is required.

Leave to Appeal

- [44] As I have classified this as an interim order, I will continue with the test for leave to appeal.
- [45] The test for leave to appeal was set out by Justice Saunders in *Goldman, Sachs & Co. v. Sessions et al.*, 2000 BCCA 326 at para. 10 (in Chambers):
- [10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
- (1) whether the point on appeal is of significance to the practice;

- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

See also *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328 (C.A.).

[46] The party seeking leave bears the onus: *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 at 11 (C.A.), *V.F. v. E.B.*, 2011 BCCA 238 at para. 22; *Gichuru v. Law Society of BC*, 2012 BCCA 159 at para. 17.

[47] The "overarching concern is the interests of justice": *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2.

Positions of the Parties

Applicant

[48] The appeal will concern the issue of a shared parenting regime moving forward, as "all other disputes have been resolved between the parties". Mr. Hammond concedes that the appeal is of limited importance generally, though he argues that the reasons of the judgment may set a precedent where parties in the future are more hesitant to enter into anticipatory consent orders with review terms. He states, however, that the appeal is of "considerable importance" to the parties in question.

[49] Mr. Hammond is of the view that the appeal has merit, arguing that the chambers judge "failed to consider several points of uncontroverted evidence between the parties". In Mr. Hammond's submission, the errors of the chambers judge, listed above, constitute palpable and overriding errors worthy of appellate intervention. He submits that the judge misstated the evidence, when he said that "[t]here is an exchange of correspondence by way of text message as well as confirmation in the respondent's supporting affidavit, that there were issues with respect to anxiety relating to A. before the consent order was filed". He submits that this is in error, and that the respondent did not confirm that A. had anxiety before the Consent Order was filed.

[50] Mr. Hammond also argues that given the "paucity of the reasons for judgment and the volume of material before the court this gives rise to an error of law with the perverse result that the child spends less time with the parent in whose care she suffers less anxiety".

Respondent

[51] Ms. Romeo submits that the chambers judge "made no error of law or fact and that his decision was amply supported by the evidence before him".

[52] Ms. Romeo submits that this matter "does not bear the hallmarks of importance generally".

- [53] Ms. Romeo argues, on the point of specific importance to the parties, that "child parenting time issues that remain unresolved by the court necessarily add stress to the parties". It is her position that the chambers judge properly prioritized the physical and emotional needs of A. over Mr. Hammond.
- [54] Ms. Romeo says there is no practical utility to the appeal, as the Consent Order already contemplates annual reviews and variations.
- [55] Ms. Romeo submits that appeals of these kinds of orders are owed considerable deference by appeal courts, and thus Mr. Hammond's appeal has "extremely low" prospects of success. She takes the position that the Order was entirely within the judge's discretion and should not be disturbed.

Leave to Appeal

- [56] Throughout this analysis, I bear in mind that as most limited appeal orders involve exercises of discretion, leave will usually only be granted where the order under review is clearly wrong, would occasion a serious injustice, demonstrates an error of principle, or the discretion was not exercised judicially: see V.F. at paras. 22-23). In the context of family proceedings, it is only "in the most extreme circumstances" that leave will be granted to appeal interim orders: *Munro v. Munro*, 2015 BCCA 530 at para. 7 (emphasis added); *N. (T.) v. N. (J.C.)*, 2013 BCCA 432 at paras. 10-11; *Newson v. Newson* (1998), 110 B.C.A.C. 235 at para. 2.
- [57] In general, the Court's jurisdiction to vary interim orders made in family matters is "extremely limited": *T.N.* at para. 10. The Court should only interfere with such orders "in exceptional circumstances" and where there is a "clear reason" to do so: *F.(J.G.) v. B.(C.L.)*, 2003 BCCA 382 at para. 10 (in Chambers).
- [58] The best interests of a child are a factor when considering whether to grant leave to appeal a continuing custody order: *A.M. v. British Columbia (Director, Child, Family and Community Service)*, 2007 BCCA 612 at para. 22 (in Chambers), discussing the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46.
- (1) Significance of Issues to the Practice
- [59] I agree with both parties that this appeal may be of limited utility to the practice at large.
- (2) Significance of Issue to the Action/Benefit to the Parties
- [60] Nevertheless, I accept that the issue is of significance to the action and the parties themselves. It involves an order to vary a consent order, the factual basis for which is now a matter of contention between the parties. Custody of a child is undoubtedly significant to everyone involved.
- (3) Merits of the Appeal
- [61] In my view, this appeal has no merit.

[62] Custody determinations are necessarily a decision of mixed fact and law: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 50. Thus, deference will be granted to the decision of the trial judge but a material error may arise if there is a reason to believe that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected the conclusion: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12.

[63] The chambers judge found that there was "nothing before [him] in [the May 4, 2020] application about the parties' parenting skills that would cause [him] any concern with ordering an equal parenting arrangement". He concluded, however, that was not the test:

However, the best interest of the child are the only consideration for the court when deciding parenting time issues. When the parties agreed to the terms of the consent order, they must have taken [A.]'s anxiety problems into consideration. Given the terms of the order, the parties must also have considered that the best interest of [A.] would be served by the terms of the parenting time set out in the order. Based on the evidence before me, I find that the anxiety issues experienced by [A.] in and around February of 2019, have not changed in any material way since that consent order was pronounced. Therefore, there has not been a material change in the most significant factor on which the consent order was based, namely [A.]'s emotional state with respect to anxiety. Accordingly, as was the case when the consent order was pronounced, it is in the best interest of [A.] that the parenting order remain as ordered on February 14, 2019. Therefore, the respondent's application to vary that order is dismissed.

[64] In terms of the misstatement contended by Mr. Hammond regarding his position prior to the Consent Order, it is not contested that there was considerable evidence that A. had anxiety before the Consent Order was filed--if the judge misstated or misapprehended the evidence, in my view, it was not a material misapprehension that would have or could have changed the result.

[65] I note that "a trial judge has a duty to give adequate or sufficient reasons for his or her decision": *Shannon v. Shannon*, 2011 BCCA 397 at para. 4. Here, the judge's reasons were brief.

[66] Nevertheless, the failure of the trial judge to discuss the evidence in detail is not sufficient reason for this Court to re-examine it unless it gives rise to a "reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion": *Van de Perre* at para. 15.

[67] I do not believe, that on the facts of this case, it can be said that the chambers judge's failure to discuss all the evidence in his reasons gives rise to "a reasoned belief that the trial judge must have forgotten, ignored, or misconceived the evidence". On the contrary, his reasons demonstrate that he considered the evidence as a whole, despite not listing each piece individually.

- [68] The chambers judge's conclusion about what does or does not constitute a material change in circumstance affecting the child should only be interfered with in "the most extreme circumstances". On the facts, I see no clear reason for such interference.
- [69] I do not accept Mr. Hammond's argument that his May 4, 2020 application to vary the Consent Order was in the nature of a review, not a variation, such that a finding of material change in the circumstances was unnecessary. The Consent Order specifically provides that such reviews are to be conducted annually each September, "or more frequently if agreed upon by the parties and circumstances warrant such a review". Clearly, the contested application was indicative of the fact that Ms. Romeo was not consenting to a review. What Mr. Hammond was seeking was a variation, not a review. The chambers judge acknowledges this fact in the opening of his reasons.
- [70] Therefore, a threshold finding of material change was necessary in order for the judge to consider a variation. The judge found that the evidence Mr. Hammond raised with respect to his new house, the lack of anxiety A. experienced while in Mr. Hammond's care, change in work schedule and the proposed transitions under the new schedule, had not met this burden. He concluded this on the basis that there was no material change in the most significant fact upon which the Consent Order was made. The chambers judge was entitled to arrive at this conclusion.
- [71] Mr. Hammond submits that the chambers judge "made a material error in ignoring the evidence of the appellant (and the respondent) as to a material change in circumstances sufficient to meet the *Gordon v. Goertz* [, [1996] 2 S.C.R. 27] test". However, in that case, the Supreme Court of Canada described the "material change" test as the "threshold condition" to a variation order: at para. 9. In defining this threshold condition, the Court in *Gordon* wrote:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued.
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.

[Citations omitted; emphasis added.]

- [72] The evidence Mr. Hammond put before the chambers judge did not, in the mind of the chambers judge, alter "the child's needs or the ability of the parents to meet those needs in a fundamental way".
- [73] Even if a material change of circumstances was not required, the judge correctly applied the best interests of the child test, and concluded it was not in A.'s best interest to vary the status quo at that time.
- [74] The chambers judge's finding that there was "nothing before [him] about the parties' parenting skills that would cause [him] any concern with ordering an equal parenting arrangement" is not at odds with his finding on what was in the best interests of the child. His conclusion on the best interests of the child focused on the evidence of the child's anxiety.
- [75] Therefore, I cannot conclude that a division of this Court would find that the Order "is clearly wrong, would occasion a serious injustice, demonstrates an error of principle, or the discretion was not exercised judicially": see V.F. at paras. 22-23.
- [76] In my view, the facts of this case are not "extreme" such as to grant leave to appeal.
- (4) Whether the Appeal Would Unduly Hinder the Action
- [77] I fail to see the relevance of this factor. There is no action for this appeal to hinder. Mr. Hammond may always apply to vary the Consent Order. He may also make use of the annual reviews.
- (5) Interests of Justice
- [78] I find that the consideration of the best interests of the child made by the chambers judge are entitled to significant deference. Therefore, in my view, the interests of justice do not weigh in favour of granting leave to appeal.

Conclusion

- [79] An application for leave to appeal is required. The application for leave to appeal is dismissed. Ms. Romeo will have her costs of the application.

"The Honourable Madam Justice Bennett"

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