

CANADA / JUDGMENT

L.D.B. v. A.N.H.

2023 BCCA 480

COURT

British Columbia Court of Appeal

DECIDED

28 December 2023

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2023 BCCA 480 L.D.B. v. A.N.H.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

L.D.B. v. A.N.H.,

2023 BCCA 480

Date: 20231228

Docket: CA48603

Between:

L.D.B. (formerly G.)

Appellant

(Respondent)

And

A.N.H.

Respondent

(Claimant)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

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

September 12, 2022 (A.N.H. v. L.D.G., 2022 BCSC 1591,
Vancouver Docket E45924).

The Appellant, appearing in person
(via videoconference):

L.D.B.

No one appearing on behalf of the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

June 5, 2023

Place and Date of Judgment:

Vancouver, British Columbia

December 28, 2023

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

Summary:

This is the first appeal brought by the appellant mother in this highly contentious family proceeding. The respondent father has been declared a vexatious litigant in both this Court and the Supreme Court of British Columbia. The appellant appeals the dismissal of her application seeking resumption of spousal support, pursuant to s. 167(3) of the Family Law Act, S.B.C. 2011, c. 25. The parties had a four-year marriage-like relationship. At trial, the respondent was ordered to pay spousal support for four years. This order was extended by one year following a review application. Approximately four years after the expiration of the spousal support order, the appellant applied to reinstate support on the basis of a material change in the respondent's vexatious litigation conduct which had caused the appellant mental and psychological harm and disabled her from work. On appeal, the appellant argues that: the order should be set aside because of procedural unfairness and a reasonable apprehension of bias on the part of the chambers judge; the chambers judge erred in failing to consider her application to increase the monthly amounts paid by the respondent towards his outstanding child support arrears and costs; and the chambers judge erred in dismissing the application for resumption of spousal support. Held: Appeal allowed, but only to the extent of remitting the question of whether the

monthly payments for outstanding arrears and costs should be increased to the trial court. The appellant is unable to demonstrate a reasonable apprehension of bias on the part of the chambers judge or that the application was procedurally unfair. The chambers judge's conclusion that the evidence was insufficient to establish a material change in circumstances is entitled to deference and the appellant is unable to identify a material misapprehension of the evidence or error in principle.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] The parties have been engaged in high-conflict family litigation since 2010. They have attended more than one trial and brought numerous applications in the Supreme Court of British Columbia. Some of the resulting orders have been appealed to this Court by the respondent, A.N.H., who has also brought numerous applications in this Court. A.N.H. has been found to be a vexatious litigant in both courts.
- [2] In her first appeal in the long history of these proceedings, L.D.B. (who I will refer to by the initials that correspond to her current name, although in many of the previous decisions she is referred to as "L.D.G.") appeals the dismissal of her application for a reinstatement of spousal support: A.N.H. v. L.D.G., 2022 BCSC 1591. She also applies to introduce new and fresh evidence on appeal.

- [3] For the reasons that follow, I would allow the appeal but only to the extent of remitting to the trial court the question of whether the monthly amounts paid by A.N.H. toward support arrears and costs should be increased.

Background

- [4] The parties had a relatively brief marriage-like relationship that ended in 2010. They have two children. I will not set out the background in detail as the history of the parties' relationship and litigation has been described in numerous decisions, most recently by this Court in *A.N.H. v. L.D.G.*, 2022 BCCA 155 [BCCA 2022]. Some of the background is necessary to understand the issues raised in this appeal.
- [5] A.N.H. is a dentist who owns and operates his own practice. When the parties met, L.D.B. was working as a pharmacist, but stopped working in 2007, following the birth of the parties' first child. Her pharmacy licence lapsed in 2013.
- [6] Justice Cole first dealt with the questions of guardianship, child support, and spousal support in decisions indexed as: 2012 BCSC 1313; and 2012 BCSC 1683. He ordered that the parties have joint guardianship of the children, but that L.D.B. have sole custody. Justice Cole also refused to permit L.D.B. to relocate to Saskatchewan with the children. He imputed an income of \$610,000 to A.N.H. and ordered monthly payments of \$7,900 for child support and \$9,000 for spousal support based on that income. What followed from that decision was summarized in BCCA 2022:
- [8] In 2014, the parties appeared before Justice Cole again. Justice Cole found A.N.H. to be in contempt for failing to meet his child and spousal support payments and concluded that A.N.H. had structured his finances to avoid support payments: 2014 BCSC 1784. Later that year, Justice Cole found that A.N.H. had engaged in family violence, allowed [L.D.B.]'s application to move back to Saskatchewan with the children, and ordered that she would make all significant decisions in respect of the children: 2014 BCSC 1875 at paras. 134-136, 142. In separate appeals, A.N.H. appealed the latter orders unsuccessfully -- largely due to his continuous default of court orders for support -- but he was later successful in challenging the finding of contempt: 2015 BCCA 268; 2016 BCCA 6. His attempt to reopen his first appeal was unsuccessful, and this Court critiqued his "stonewalling" by filing obviously irrelevant material and flouting directions and orders: 2016 BCCA 159.
- [9] Following those appeals, A.N.H. returned to the Supreme Court by filing new actions, purportedly as the children's litigation guardian, against [L.D.B.] and her mother. He alleged that [L.D.B.] had defamed him, conspired with the Canada Revenue Agency, and acted in breach of trust with respect to some gold coins held for the children. Justice Abrioux, then of the Supreme Court, granted an application to strike the action with respect to the gold coins, as it had been improperly brought and A.N.H. had no standing as the children's litigation guardian: 2016 BCSC 1559.

- [10] A.N.H. brought four appeals from orders made by Justice Abrioux throughout 2016, partly on the basis of Justice Abrioux's alleged bias. [L.D.B.] sought that the four appeals be struck out or stayed, and that A.N.H. be declared a vexatious litigant in both this Court and the court below. In this Court, A.N.H. was declared a vexatious litigant and prohibited from commencing appeals against [L.D.B.] or any of her family without leave: 2017 BCCA 216.
- [12] Shortly after that, A.N.H. was also declared a vexatious litigant in the Supreme Court of British Columbia: 2017 BCSC 1249. Justice Abrioux found that the 2014 order allowing [L.D.B.] to relocate to Saskatchewan was the "genesis" of A.N.H.'s vexatious conduct, as he "essentially developed a 'scorched earth' approach to the litigation" as a result: paras. 26, 30. He highlighted the adverse impact of A.N.H.'s actions on the children, [L.D.B.], and his own health: paras. 32-35. He held that the same factors that Justice Newbury considered also applied to A.N.H.'s conduct in the Supreme Court; if anything, his conduct was "more egregious" given how long his conduct had persisted, the number of applications and last-minute filings,
- [7] Justice Cole's order required A.N.H. to pay spousal support for four years, followed by a review in July 2016.
- [8] The parties did not review spousal support in 2016; however, in 2018, A.N.H. applied to vary both child and spousal support. Justice Abrioux, as he then was, heard the application, and issued reasons on November 14, 2018: 2018 BCSC 2012 [Abrioux 2018]. L.D.B. opposed the application but did not participate in the hearing because she was not prepared to submit to cross-examination by A.N.H. The judge heard viva voce evidence from A.N.H. and another witness and considered admissible portions of affidavits tendered by both parties. Ultimately, Justice Abrioux retroactively reduced the income imputed to A.N.H. to \$325,000, effective January 1, 2013; and varied A.N.H.'s support obligations under Justice Cole's order as follows:
- a) In lieu of \$7,900 each month, A.N.H. was ordered to pay child support on the following terms:
 - i. From January 1, 2013 to October 31, 2017, the sum of \$4,309 each month; and
 - ii. From November 1, 2017 onward, the sum of \$4,224 each month, until varied by agreement or court order.
 - b) In lieu of \$9,000 per month from January 1, 2013 to July 1, 2016, A.N.H. was ordered to pay \$7,500 in spousal support each month from January 1, 2013 to August 31, 2017, following which spousal support would terminate.

Justice Abrioux directed the Family Maintenance Enforcement Program (FMEP) to recalculate the arrears of child and spousal support in accordance with his new order, and ordered A.N.H. to continue to pay L.D.B. \$6,000 per month toward his arrears. Finally, Justice Abrioux granted leave for L.D.B. to apply for an increase in A.N.H.'s monthly payments towards the arrears following FMEP's recalculation of the total amount owing.

- [9] Although L.D.B. did not attend at the hearing of A.N.H.'s variation application, the order extended L.D.B.'s entitlement to spousal support by one year. In arriving at that conclusion, Justice Abrioux stated:
- [137] Apart from her statement in her Affidavit #62, there is no independent evidence to support the assertion that she cannot work as a pharmacist. In that regard, although I am prepared to consider Dr. Bakare's report, it is of little assistance to me because his opinion is restricted to the stresses [L.D.B.] has with respect to appearing in court and the effects of A.N.H.'s conduct. He does not say she cannot requalify as a pharmacist or pursue other careers or forms of employment.
- [138] In my view, in light of [L.D.B.]'s expectation that she would not require spousal support after the summer of 2016, it was incumbent on her to establish and adduce proper evidence of her entitlement to ongoing support. I note that she did not "lose" her pharmacy license in 2013; rather, she allowed it to lapse.
- [139] I do accept, however, that the extent of A.N.H.'s oppressive litigious conduct appears to have commenced after November 2014 after the release of the Relocation Reasons. I also accept that that [L.D.B.] was entitled to a reasonable period of time after relocating to Saskatchewan to attempt to earn an appropriate income from the family business GAL or from other sources.
- [10] With regard to the order requiring A.N.H. to pay \$6,000 monthly towards child support and the arrears of child and spousal support, the judge stated:
- [173] The \$6,000 will continue to be paid, with leave to [L.D.B.] to have it increased once FMEP has recalculated the arrears. Should A.N.H. seek to have this amount reduced, he will require leave of the court, which must include an affidavit outlining what steps he has taken, including obtaining professional advice, to deal with his personal and the Company's creditors.
- [11] At the time of the application before Justice Abrioux, A.N.H.'s child and spousal support arrears were \$592,222.38, exclusive of interest. In addition, A.N.H. was also indebted to L.D.B. for \$56,098.52 in outstanding costs awards, plus costs to be assessed following orders made by Justice Abrioux on July 19, 2017 and June 12, 2018. These latter costs awards were subsequently assessed at \$64,901.57 and \$10,572.41, respectively.

- [12] In support of her application before the chambers judge, L.D.B. adduced an FMEP statement dated February 11, 2021, which showed A.N.H.'s remaining recalculated arrears to be \$101,904.38, excluding interest of \$51,410.98. L.D.B.'s evidence was that A.N.H. still owed her the outstanding costs awards, plus an additional \$40,000 of costs yet to be assessed from the parties' trial respecting parenting time in 2017.
- [13] L.D.B.'s application to reinstate spousal support evolved over time. Her first notice of application was dated January 21, 2020. In that application, L.D.B. sought: (1) an order setting aside Justice Abrioux's 2018 orders for spousal and child support; (2) reinstatement of Justice Cole's 2012 orders for child and spousal support until "a variation of support hearing" could be heard; and (3) an increase in A.N.H.'s monthly payments towards his support arrears and the costs awards against him. L.D.B. filed two additional notices of application on December 17, 2020, and August 13, 2021. Each sought a reinstatement of spousal support and child support at the levels that had been ordered by Justice Cole, an increase in the monthly payment of arrears and costs, and extensive financial disclosure from A.N.H. The final form of the application was an amended notice of application dated May 5, 2021, and filed on September 1, 2021. It was similar in substance to the earlier applications and sought: (1) the reinstatement of spousal support; (2) retroactive child and spousal support at the levels set by Justice Cole; (3) an increase in the monthly amount payable toward A.N.H.'s arrears of support and costs; and (4) extensive financial disclosure from A.N.H. in support of L.D.B.'s application to increase the quantum of support, both retroactively and prospectively.

Decision Below

- [14] At the application below, L.D.B. maintained that A.N.H.'s conduct in the context of the litigation had caused her serious financial and mental hardship, and rendered her unable to return to her previous vocation as a pharmacist. L.D.B. took the position that she was disabled, and that her disability was a material change in circumstances. Referring to para. 173 of the Abrioux 2018 reasons, L.D.B. argued that she was given leave to seek an increase in support payments. She also submitted that A.N.H.'s income was much greater than the amount imputed to him by Justice Abrioux and that if she could establish a greater Guideline income, that would also amount to a change in circumstances.
- [15] In response, A.N.H. argued that the evidence presented by L.D.B. was insufficient to demonstrate a material change in circumstances. The ailments underlying her disability claim were the same complaints made in the application heard by Justice Abrioux. He also submitted that the volume and scope of the litigation was a product of L.D.B.'s conduct, not his.
- [16] The judge found that para. 173 of the Abrioux 2018 reasons did not give L.D.B. a right to revisit spousal support, merely to seek an increase in the amount payable in child support, arrears, and costs, matters that were not before him.

- [17] The judge rejected L.D.B.'s argument that if A.N.H.'s level of income was found to be much greater than the amount imputed by Justice Abrioux, that would constitute a material change in circumstances establishing a basis for reinstatement of spousal support. He noted that the level of income of a spouse for support purposes is relevant to the quantum of support, not entitlement. Further, L.D.B. had elected to limit her engagement in the hearing before Justice Abrioux when he determined A.N.H.'s income for support purposes. Consequently, the judge refused to address arguments based on L.D.B.'s assertion that Justice Abrioux had erred in assessing A.N.H.'s income.
- [18] The judge also rejected L.D.B.'s claim that she was unable to work because of her mental health. L.D.B. adduced evidence that she had been diagnosed with Generalized Anxiety Disorder and Posttraumatic Stress Disorder (PTSD) as a result of A.N.H.'s conduct. In rejecting this as a basis for entitlement, the judge referred at length to portions of the Abrioux 2018 reasons and noted the "clear parallels between the evidence and arguments there and here": at para. 37. He acknowledged L.D.B.'s claim that she was unable to work was supported by a letter from her treating psychiatrist, information submitted to CPP, and the fact that she was receiving CPP disability benefits, but was critical of the psychiatrist's letter for its brevity, and the fact that it did not give any indication as to when L.D.B. developed the noted disorders or whether they were caused by, or related to, A.N.H.'s conduct. The judge observed that the impact of A.N.H.'s conduct on L.D.B. appeared to be consistent with what had previously been found by Justices Cole and Abrioux. The judge considered it noteworthy that a psychologist who prepared a s. 211 report in 2014 had also observed that L.D.B. was "likely experiencing significant symptoms related to stress". The psychologist had also opined that "Individuals with similar symptoms are often diagnosed with Posttraumatic Stress Disorder (PTSD)." The judge stated:
- [44] All of this supports the proposition of [A.N.H.] that [L.D.B.]'s health issues are not new and have been considered by both Cole J. and Abrioux J. in their respective decisions as to entitlement and duration of spousal support.
- [19] Referring to *Herber v. Herber* (1992), 19 B.C.A.C. 103, 1992 CanLII 709 (B.C.C.A.) the judge observed that the mere fact that L.D.B. qualified for a CPP disability pension was not proof, in law, that she was actually disabled from working. At best, this evidence only established that CPP had accepted that she had a disability as of January 2018, which was almost a year before Justice Abrioux found that she was able to work. The judge concluded:
- [49] [L.D.B.]'s evidence as to the consequences of [A.N.H.]'s conduct were clearly before both Cole J. and Abrioux J. The evidence before me does not establish that a disability has arisen since the termination of spousal support.
- [50] To the extent that Abrioux J. did not have [L.D.B.]'s best evidence on this subject, a proposition that I do not specifically find to be proved, that was a product of [L.B.D.]'s decisions regarding her level of participation in that hearing.

- [20] The judge then considered L.D.B.'s contention that A.N.H. had become more litigious since the Abrioux order. The judge first found "that both parties share responsibility for the ongoing intensity and volume of litigation in this court, at least since my involvement as case management judge beginning in 2019": at para. 52. In support, the judge noted that L.D.B.'s application for findings of contempt against A.N.H. (reported at 2022 BCSC 470) was "largely unsuccessful and consumed many court days": at para. 53.
- [21] The judge also referred to an outstanding application filed by L.D.B. to have the parties' daughter's last name changed to that of her new partner. The judge stated:
- [55] While I make no comment on the merits of that application, her pursuit of it belies her assertion of litigation fatigue or that the claimant is solely responsible for the volume of litigation.
- [22] Turning to A.N.H., the judge quoted at length from paras. 48 to 51 of BCCA 2022, noting that it "confirmed" his "significant activity", presumably a reference to this Court's observations about A.N.H.'s persistence in wasting judicial resources, his abuse of the court processes and the fact that his litigation conduct constituted intimidation, harassment, and family violence. The judge was of the view that the court's order which extended the terms of the vexatious litigant order previously imposed on A.N.H. "meaningfully constrained" his ability to litigate.
- [23] The judge dismissed the application, concluding that L.D.B. had failed to demonstrate a material change in circumstances establishing a basis on which to reinstate spousal support. He observed that L.D.B.'s health issues had been previously addressed by Justices Cole and Abrioux, and that the evidence did not support the proposition that a new foundation for entitlement had arisen "years after the end of the relationship and years after the termination of support".

Issues on Appeal

- [24] L.D.B. alleges several errors in judgment. Her arguments are wide ranging and touch on matters relating to other aspects of this ongoing proceeding which are not relevant to this appeal. I will only consider three grounds of appeal and would restate the errors alleged as follows:
- 1) Should the order be set aside because the judge mismanaged the application resulting in a breach of procedural fairness or because L.D.B. has demonstrated a reasonable apprehension of bias?
 - 2) Did the judge err in failing to consider L.D.B.'s application to increase the monthly amounts paid by A.N.H. for costs and arrears of child support?

- 3) Did the judge err in failing to find a material change of circumstances by minimizing or failing to consider family violence and, in particular, litigation violence employed by A.N.H., and by minimizing or failing to consider evidence of L.D.B.'s mental illness and inability to work?
- [25] Before turning to these grounds of appeal, I note that I need not consider two other errors alleged by L.D.B. First, she argues that the judge erred by failing to consider that her application sought only an interim order for reinstatement of spousal support. Second, she submits that the judge failed to consider the compensatory nature of her claim for spousal support. I have not considered these grounds in any detail as they are without merit.
- [26] The suggestion that her application should have been treated as an interim application seems to be based on L.D.B.'s contention that for the purpose of the application, she needed to demonstrate only a possible entitlement to resumption of spousal support. She submitted that the actual amount and duration of spousal support could only be determined at a fuller hearing when A.N.H. had made proper financial disclosure. In other words, she argued that the application was akin to an interim application for spousal support where the task of the court is to make a "rough justice" assessment of support pending a trial of the issue: *Nestor v. Nestor*, 2019 BCCA 203 at para. 18; see also *Newson v. Newson* (1998), 65 B.C.L.R. (3d) 22, 1998 CanLII 6440 at para. 11 (B.C.C.A.). L.D.B. argues that because the judge failed to approach the application on this basis, he improperly dismissed the application because of perceived inadequacies in her evidence of her disability and inability to work.
- [27] L.D.B.'s contention that her application should have been treated as an interim application misunderstands the nature of her application and ignores the years of litigation between the parties. As the judge noted, her application asked the court to reinstate spousal support based on a material change of circumstances "years after the end of the relationship and years after termination of support": at para. 60. There had been a full trial of the issue of spousal support before Justice Cole in 2012. The final order from that trial was considered in *Abrioux* 2018 on A.N.H.'s variation application. There was nothing "interim" about L.D.B.'s application.
- [28] L.D.B.'s submission that the judge erred in failing to consider the compensatory nature of her application is also misconceived and ignores the history of these proceedings. Justice Cole found that L.D.B. was entitled to spousal support. While the reasons do not articulate the basis for entitlement, it is clear that spousal support was ordered on both a compensatory and non-compensatory basis. In light of the parties' short relationship, Justice Cole set the duration of support at four years, the high end of the range for duration in the Spousal Support Advisory Guidelines [SSAGs].
- [29] In *Abrioux* 2018, the court again reviewed spousal support principles and noted, at para. 118, that because the trial order set duration at four years, "the onus is on [L.D.B.] to establish that as of July 2016, she was entitled to spousal support on a compensatory or non-compensatory basis." L.D.B.'s submission to the court in 2018 was that she would "leave it to

the Court to make whatever decision it sees fit in the circumstances" regarding A.N.H.'s obligation to pay spousal support: at para. 124. Considering the "protracted period of family violence caused by oppressive and vexatious conduct perpetrated on [L.D.B.] by A.N.H." (at para. 149), Justice Abrioux concluded:

- [141] Under all the circumstances, taking into account the length and nature of the marriage-like relationship between the parties, I conclude that [L.D.B.] has established entitlement to spousal support on both a compensatory and non-compensatory basis until August 31, 2017, that is approximately one year after the July 2016 date referred to by the trial judge for the review.
- [30] On the application in the court below the judge was fully aware that the basis for entitlement for the previous spousal support orders was both compensatory and non-compensatory. In order to succeed with her application to reinstate spousal support, L.D.B. had to establish a material change in circumstances. As the ordered duration of spousal support had been determined by those prior orders in accordance with the relevant jurisprudence and the SSAGs, the decision about whether to reinstate spousal support did not require reconsideration of the original bases for entitlement. It required examination of what had transpired since Abrioux 2018. As the circumstances that led Justices Cole and Abrioux to conclude that there was a compensatory basis for support that had not changed in those years, the judge's focus was necessarily on L.D.B.'s needs and ability to support herself, and whether the resumption of spousal support was "necessary to relieve economic hardship", in accordance with s. 167(3)(a) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. In other words, the analysis entailed an inquiry akin to that undertaken to consider entitlement for non-compensatory support. However, the judge's conclusion was necessarily based on the evidence before the court examined with regard to all of the circumstances including the recognized bases for entitlement. There is no merit to the suggestion that the judge failed to consider L.D.B.'s compensatory entitlement to spousal support.

The Fresh Evidence Application

- [31] L.D.B. applies to introduce fresh and new evidence contained in affidavits she swore in this appeal on February 1, 2023 ("Affidavit 2"), and March 24, 2023 ("Affidavit 4").
- [32] Affidavit 2 is lengthy (76 paragraphs) and attaches volumes of material (more than 250 pages), much of which post-dates the hearing of her application. The first part of the affidavit (paras. 1 to 8) is argumentative and summarizes the bases for her appeal. The next portion, (paras. 9 to 31) describes some of the steps taken in the trial court between late September 2022, and early 2023, and communications between L.D.B. and A.N.H. during that period. The balance of the affidavit deals with subject matter under the headings: "Extra and Increasing Expenses of the Children"; "New and Fresh Evidence of Past and Present Continuous Litigation Violence and Other Family Violence which is Spousal Misconduct"; "Mental Illness and Disability Update"; and "Procedural Errors, Unfairness, Bias and Factual Errors". These portions of the affidavit touch on events and communications that occurred

both before and after the application was heard in the trial court.

- [33] Affidavit 4 is brief. L.D.B. states that she was compelled to provide it because A.N.H. "has achieved an unprecedented, new, and extreme level of litigation violence against me and the children". The affidavit attaches court documents filed by A.N.H. in Saskatchewan in March 2023, including a notice of claim in which he seeks to relitigate matters between the parties that were determined by the courts in this province and claims extensive damages against L.D.B. for anxiety, psychological and emotional harm, loss of income and alienation from their children.
- [34] Admission of new and fresh evidence is determined with reference to the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8. The criteria are well known:
- 1) The evidence could not, by the exercise of due diligence, have been obtained for the trial ;
 - 2) The evidence is relevant in that it bears upon a decisive or potentially decisive issue;
 - 3) The evidence is credible in the sense that it is reasonably capable of belief;
 - 4) The evidence is such that, if believed, it could have affected the result at trial.
- [35] L.D.B. argues that the affidavits should be admitted in evidence as they provide information that should have a material bearing on the outcome and are relevant to the arguments she advances on appeal. She says the issues raised on appeal involve the best interests of the children and, accordingly, a flexible approach to the Palmer criteria should be adopted. She also submits the evidence should be admitted in the interest of bringing finality to the case.
- [36] Recently, in *Barendregt v. Grebliunas*, 2022 SCC 22, the Court discussed the application of the Palmer criteria for the consideration of fresh and new evidence in family cases.
- [37] *Barendregt* was a "parenting case" as it concerned the appeal of a relocation order. The Court affirmed that the Palmer test applies to all evidence tendered on appeal for the purpose of reviewing a decision of the trial court, including appeals of family cases involving the best interests of children: at para. 38. The focus in *Barendregt* was on new evidence, which comes into existence after the hearing in the trial court, rather than fresh evidence which is available but not presented at the trial court hearing. At paras. 54-55, the Court held that the Palmer test was sufficiently flexible to deal with both types of evidence.
- [38] L.D.B. seeks to admit both fresh and new evidence, but much of the evidence in her affidavits concerns events occurring or steps taken in the underlying proceeding after the hearing concluded in June 2022. In *Barendregt*, the Court noted that a unique aspect of family litigation is that the admission of new evidence may be unnecessary because courts retain oversight of family arrangements through the ability to vary previous orders. In doing so, the Court noted that variation applications and appeals "are distinct proceedings based on fundamentally different premises":

[73] Turning to the second feature that arises in the family law context, the admission of post-trial evidence on appeal may be unnecessary because, unlike decisions that award damages in one final order, litigation about ongoing parenting arrangements remains subject to court oversight. Specifically, variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. As I will explain, the admission of post-trial evidence on appeal unnecessarily undercuts both finality and order in family law judgments, as well as Parliament's statutory design.

[75] Moreover, courts must be wary of permitting parties to use the Palmer framework to circumvent legislative schemes that provide specific procedures for review. An appeal cannot serve as an indirect route of varying the original parenting order. A variation application and an appeal are distinct proceedings based on fundamentally different premises.

[Emphasis added.]

[39] The fresh or new evidence that L.D.B. asks us to consider pertains to three issues that are central to the grounds of appeal I have outlined above. She seeks to admit evidence about what the judge did for case management generally, and in particular, with regard to this application. Ground 1 requires consideration of such evidence. There is no doubt that this Court can consider the evidence tendered in her affidavits that is relevant to those grounds of appeal. As the Court affirmed in *Barendregt* at para. 30, Palmer does not apply to evidence going to the validity of the trial process itself, citing *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70 at paras. 76-77. To the extent that Affidavit 2 concerns allegations about bias, case management, and procedural fairness, I would admit that evidence.

[40] Different concerns arise with respect to the fresh and new evidence that L.D.B. seeks to admit in support of her arguments dealing with ground 3. Ground 3 concerns L.D.B.'s mental health and ability to work as well as her allegations of family violence and, in particular, of A.N.H.'s oppressive litigation conduct and its impact on her. Evidence about these issues was available and presented at the application below, and was presented at the hearing leading to the order made in *Abrioux* 2018 which L.D.B. is seeking to vary. Those issues were foundational for L.D.B.'s application to reinstate spousal support because it was her position that her mental health and ability to work had diminished and that A.N.H.'s vexatious conduct had increased, resulting in a material change in circumstances. It is trite to say that when the application proceeded before the court below, L.D.B. was required to put forward the best evidence available to her dealing with those issues.

[41] It is important to place the evidence in Affidavits 2 and 4 within the chronology of these proceedings.

[42] As I have noted already, the application to reinstate spousal support was protracted. It took more than a year and a half in preparation, and more than a half year to present to the court. The notice of application was first filed on January 21, 2020, and went through several revisions before the final version was filed on September 1, 2021. The application took six

days of hearing which commenced on October 28, 2021, and concluded on June 17, 2022. Reasons for judgment were released on September 12, 2022. Needless to say, L.D.B. had a tremendous amount of time to prepare for the application and place relevant material before the court.

[43] To complete the chronology, L.D.B. filed this appeal on October 11, 2022. A.N.H. did not appear on the appeal and has not filed any material. L.D.B. first applied to adduce fresh and new evidence with her notice of application, dated February 3, 2023. Of course, A.N.H. has not responded to that application.

[44] I now turn to consider the Palmer criteria in relation to the evidence L.D.B. seeks to adduce from Affidavits 2 and 4. As I will explain, I would not admit any of the evidence on appeal, other than in relation to ground 1, as set out above. For convenience, I have considered the evidence under paragraph numbers and the headings employed by L.D.B. in Affidavit 2.

Affidavit 2: Paragraphs 1 to 8

[45] The first eight paragraphs of the affidavit set out L.B.D.'s basis for her entitlement to spousal support. She argues that the judge failed to consider certain matters and submits that he denied, trivialized or ignored A.N.H.'s litigation abuses and the extent of her mental illnesses. She asserts that through procedural errors and judicial mismanagement, the judge has led her to experience discrimination and "victim blaming/shaming". This is not evidence but argument in affidavit form and is not admissible: Supreme Court Family Rules, Rule 10-4(12) and (13); see also *MacLean v. Mio*, 2019 BCSC 375 at para. 37.

Affidavit 2: Paragraphs 9 to 31, and Affidavit 4

[46] These portions of her affidavits describe steps taken in the litigation by A.N.H. subsequent to the hearing of the application. For example, Affidavit 2 refers to a leave application filed by A.N.H. ("the most violent leave application to date") on October 26, 2022, which included 10 pages of orders sought in the British Columbia Supreme Court, including for "my arrest and imprisonment without charges, the removal of the children from my care and their home in Saskatchewan": at para. 16. Affidavit 4 attaches two versions of an application (one version purports to be without notice) in the Court of King's Bench in Saskatchewan seeking to have a Vernon lawyer examined under oath about matters relating to the British Columbia Supreme Court file, including the conduct of Justice Cole. It also attaches A.N.H.'s unfiled amended statement of claim naming L.D.B. as defendant in which he seeks general, special, pecuniary and punitive damages for psychological and emotional harm, anxiety, mental anguish, injury and distress and for alienation from the children.

- [47] This evidence is sought to be adduced as relevant to L.D.B.'s allegation that A.N.H. has persisted in carrying on abusive litigation that amounts to family violence. However, the fact that this new evidence is potentially relevant to one of L.D.B.'s arguments does not make it admissible evidence on appeal. It must be remembered that the judge below was asked to consider--based on the evidence before him--whether there had been a material change of circumstances since the Abrioux 2018 order such that spousal support should be reinstated.
- [48] As noted in Barendregt, the variation scheme established in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), makes the parties in family disputes subject to continuing oversight by the court for the purpose of dealing with parenting issues. The same variation scheme is established in the FLA, and applies equally to support issues. Spouses are able to seek variation of a spousal support order only where there has been a material change of circumstances. That was the basis for L.D.B.'s application to reinstate spousal support. Of course, the decision on the variation application had to be made on the state of the record before the judge.
- [49] Applying the Palmer criteria to this proposed evidence, I would conclude that it should not be admitted. As explained in Barendregt, the admission of post-hearing evidence runs counter to the variation scheme. It would turn what should be an appeal of the judge's decision into a hearing of a new variation application based on different evidence. As noted in Barendregt at para. 75, "courts must be wary of permitting parties to use the Palmer framework to circumvent legislative schemes that provide specific procedures for review." It would also improperly change the focus of the appeal, which should be on the correctness of the previous decision, to consideration of the implications of subsequent events: at para. 77.
- [50] There is an additional reason why this evidence should not be admitted on this appeal. As I have noted, the application to adduce fresh and new evidence was not brought until February 3, 2023, after A.N.H. had determined that he would not appear on this appeal. A party always takes a risk in failing to contest an appeal even where they were successful in the lower court. However, in these circumstances, where L.D.B. seeks reinstatement of spousal support, it is my view that it would be unfair to permit new post-hearing evidence to be relied on to persuade the Court to arrive at a different result without providing A.N.H. an opportunity to respond. L.D.B.'s application on new evidence should be considered by a judge sitting at first instance, not by this Court.
- [51] I would not admit this new evidence on appeal.

Affidavit 2: "Extra and Increasing Expenses for the Children"

- [52] As the heading suggests, this section refers to expenses incurred by L.D.B. that may be considered as s. 7 special or extraordinary expenses. She notes that A.N.H. has never paid any funds towards the children's special expenses and attaches some statements regarding those expenses.

- [53] Applying the Palmer criteria, I am of the view that this evidence should not be admitted on appeal. It is similar to evidence that was before the court below. It has no relevance to the variation application and could not have changed the result below.

Affidavit 2: "New and Fresh Evidence of Past and Present Litigation Violence and Other Family Violence which is Spousal Misconduct"

- [54] This section of Affidavit 2 contains information about the numerous steps taken in the litigation between the time when the judge was first appointed as case management judge on October 7, 2019, and September 12, 2022, when the reasons were released. L.D.B. attaches and refers to a Court Services Online printout of Hearings and Results in the lower court. She notes that she made 58 court appearances in 35 months. In that time, there were 258 documents filed in court and she was "exposed to at least 316 emails and email chains with Supreme Court Scheduling". She also notes that A.N.H. filed 72 new affidavits in that period.
- [55] The information contained in this section was evidently known to the parties and the judge at the time of the hearing below. L.D.B. explains why, as an out of province litigant, she did not previously have access to Court Services Online. However, she was clearly aware of the extent and content of the court filings, the hearings and the communications with the court.
- [56] To the extent that this section of Affidavit 2 contains evidence, it is not fresh or new. I would characterize this portion of the affidavit as a revised argument based on evidence that was available to L.D.B. and the court at the time of the hearing. I would not admit it as fresh evidence on appeal.

Affidavit 2: "Mental Illness and Disability Update"

- [57] This section of Affidavit 2 attaches information "available on the internet from the Canadian Mental Health Association" pertaining to PTSD, Generalized Anxiety Disorder and depression, conditions that L.D.B. argued she had been diagnosed with at the hearing below. This information is submitted in support of her assertion that the judge failed to give adequate consideration to her medical condition, and that he trivialized and minimized her condition by describing her diagnoses as "emotional difficulties", "health issues" or "adverse health consequences": at paras. 41, 44, 59, 63 in the reasons for judgment.
- [58] L.D.B. also attaches post-hearing prescription receipts and her full CPP disability application that was referred to but not exhibited in the application below. At paras. 57 to 59, she explains the import of these documents and how they support the arguments she advanced at the hearing below: that she is unable to function effectively because of her mental health conditions. While this section of Affidavit 2 contains some evidence, it is predominantly new argument addressed at criticizing the judgment below.

- [59] Applying the Palmer criteria to this section of Affidavit 2, it is apparent that the evidence, with the exception of the prescription receipts, was available to be presented at the hearing below with due diligence. It also fails on the fourth Palmer criteria, as it is unlikely to have affected the result.

Affidavit 2: "Procedural Errors, Unfairness, Bias, and Factual Errors"

- [60] This section of Affidavit 2 is also highly argumentative. However, to the extent that it presents evidence about the proceedings below, that evidence is admissible to consider L.D.B.'s argument that she did not receive a fair hearing.

Was there a Breach of Procedural Fairness or has L.D.B. Demonstrated a Reasonable Apprehension of Bias?

- [61] L.D.B. advances numerous arguments on appeal about the manner in which the judge managed the hearing of the application. Collectively, her submissions raise two related issues dealing with the fairness of the proceeding. First, L.D.B. argues that an informed observer would conclude that the judge would not decide the application fairly. In other words, she says that she has demonstrated a reasonable apprehension of bias. Second, she says that the judge's directions and management of the application resulted in a hearing that was procedurally unfair to her.
- [62] It is difficult to categorize the complaints made by L.D.B. as they are wide ranging. I will set out some of her allegations to demonstrate the general nature of the statements, actions and rulings of the judge that form the basis for these submissions. This is not intended to be a complete listing of the particulars of her arguments.

Allegations Directed at Bias

- [63] The argument in L.D.B.'s factum on the allegation of bias is not extensive and does not provide particulars of that allegation, other than to state that the transcript references she has highlighted support her assertion. She submits that the effect of the judge's rulings was to favour A.N.H. and prioritize "the demands of a vexatious litigant" over her interests and those of the children.
- [64] Affidavit 2 contains more particulars of the bias allegation. L.D.B. states that the judge frequently yelled at her during the hearing. She characterized the judge's attitude towards her as openly hostile and submits that he demonstrated obvious personal disdain of her. She notes that the judge also had "frequent angry interactions" with A.N.H. about his conduct and his inappropriate communications with the registry. However, she submits that the judge inappropriately treated A.N.H. and her in a similar way--referring to them collectively as "you people", "the parties" and "both of you". In essence, she submits that the judge mischaracterized her conduct in the litigation and unfairly likened her behaviour to that of A.N.H., a vexatious litigant: Affidavit 2, at para. 64.

- [65] In Affidavit 2, L.D.B. says that she became aware from discussions (with an unidentified informant) that the judge was a personal friend of the lawyer who acted for A.N.H. in proceedings before Justice Cole. She also notes that the judge, when he was a Provincial Court Judge, granted an ex parte order on May 8, 2009 that began the acrimonious litigation between the parties and was part of the reason that she and the children had to litigate these matters in British Columbia.
- [66] L.D.B. also notes that the judge refers to her application to have the daughter's last name changed so she will not have her father's last name as "another example of her willingness to initiate further court processes": at para. 55. She argues that the reference to that application is "clearly derogatory toward me, meant to trivialize my application without stating what the application was truly about, and to portray me in the same category as [A.N.H.], the extreme vexatious litigant."

Allegations Directed at Hearing Management

- [67] L.D.B. is critical of the judge's organization and preparation. She criticizes the judge for starting hearings without having all of the relevant binders before him, and for admitting that his notes from a previous hearing were not "very precise". She contrasts the judge's management of the proceeding with the manner in which the previous judges scheduled and organized applications through instructive memos to the parties. She submits that the judge failed to require A.N.H. to comply with Rule 10-6 of the Supreme Court Family Rules governing application procedure. By failing to set filing deadlines and parameters, including firm dates, for the hearing, she argues that the judge enabled A.N.H. to use vexatious tactics to delay and control the hearing. Further, she argues that the judge permitted the hearings to proceed as "a free-for-all" where A.N.H. was permitted to rely on "whatever he wanted".
- [68] L.D.B. also argues that the judge improperly permitted A.N.H. to file materials after the time for doing so in the Supreme Court Family Rules had elapsed. She says that the judge improperly permitted A.N.H. to make submissions that included reference to affidavit material that was filed too late. She notes that, at one point, the judge stated he did not "really care what [A.N.H.] refers to" when making submissions. L.D.B. argues that she was not given a similar latitude with regard to filing of materials and making submissions.
- [69] L.D.B. also says that the judge erred in permitting A.N.H. to file materials that should have been excluded because of missed deadlines, and that the judge changed his mind on admissibility rulings as the application proceeded. I will refer to one example of this type of ruling made by the judge as it is indicative of the nature of her arguments. She submits that the judge should not have permitted A.N.H. to file and refer to his affidavit, No. 204, that included transcripts from the previous trials in the proceeding. Following discussion about the admissibility of the affidavit, the judge stated:

Listen, both of you, please.

[A.N.H.], I have the point. The point you wish to make is that her difficulty -- mental health difficulties, I'm just going to try to capture it broadly in that way, are generally not new. I have yet to see a reason -- and looking at affidavit 204 there is an abundance of additional material that ought to have been filed sooner. Having said that, transcripts of proceedings are, in my view, somewhat of a different form of evidence. In other words, they exist, and arguably parties can refer to those without the necessity of affidavits. So to the extent that you want to take me to excerpts from transcripts, I'm prepared to have you do that, but I am not at this stage inclined to allow affidavit 204, given all of the circumstances, to be tendered as evidence, and in part it's all due to the timing and the matter in which this proceeded, but having said that, as I say trial transcripts are, in my view, something that I am prepared to look at for their specific content.

But, [A.N.H.], I don't want you to take the time to walk me through line by line every reference to some issue that [L.D.B.] had back in 2012.

Suffice it to say, and I think [L.D.B.] has conceded this much, that in the 2012 trial there were references to struggles she had with her mental health, emotional wellbeing that manifested in depression, and perhaps other things. If there are some very specific references, [A.N.H.], that you say reference conditions or circumstances, let's look at those as necessary. But let's not spend the entire day going through every comment and every aspect of each transcript where something about her mental health is referenced.

[Emphasis added.]

[70] In short, after considerable argument from the parties, the judge generally accepted L.D.B.'s position that the affidavit was filed too late and, accordingly, he decided not to consider most of the evidence presented. However, the judge was prepared to consider the transcripts from the trials as they were in existence and the content was known to the parties and the information was clearly relevant to the question of whether L.D.B. had established a change in circumstance. I see no error in the judge's ruling. In addition, it was practical in the circumstances. Contrary to L.D.B.'s concern, it did not foreclose her argument that her earlier complaints of depression were qualitatively different from what she was presenting to the judge on this application: that she had now been diagnosed with PTSD and Generalized Anxiety Disorder.

[71] The two issues raised by this ground of appeal--bias and procedural unfairness--are closely related. As the primary focus of L.D.B.'s argument is that the judge's rulings and directions demonstrated a bias towards her, I have approached this ground of appeal primarily through the lens of reasonable apprehension of bias. However, as the standards of review are different for these issues, I will indicate why I would conclude that L.D.B. is not able to demonstrate any basis for this Court to intervene whether this ground is considered under bias or procedural unfairness.

Reasonable Apprehension of Bias

[72] In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at para. 20, the Court reaffirmed the test for a reasonable apprehension of bias:

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.

[73] The Court also set out principles applicable to allegations of bias. There is a strong presumption of judicial impartiality that is not easily displaced. The test requires "a real likelihood or probability of bias" as a result of which, a judge's individual comments should not be viewed in isolation. Allegations of perceived judicial bias must be considered in the context of the circumstances and in light of the whole proceeding: *Yukon Francophone* at paras. 25-26.

[74] The Court in *Yukon Francophone* also drew the distinction between permissible management of a hearing and improper interference with a case:

[54] Appellate courts are rightfully reluctant to intervene on the grounds that a trial judge's conduct crossed the line from permissibly managing the trial to improperly interfering with the case. Reprimands of counsel, for example, may well be appropriate to ensure that proceedings occur in an orderly and efficient manner and that the court's process is not abused. But as the Canadian Judicial Council's *Ethical Principles for Judges* (1998) suggest:

Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality... . A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality.

[Emphasis added.]

[75] Applying the test for reasonable apprehension of bias to the circumstances of this case, I am not persuaded that an informed person would conclude that the judge would not decide the matter fairly. I have arrived at that conclusion by examining the statements and actions of the judge in context and in light of the strong presumption of judicial impartiality.

[76] The inquiry into a reasonable apprehension of bias is highly fact-specific and inherently contextual. The context and the particular circumstances "are of supreme importance": *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 77.

- [77] The particular circumstances of this application are unique. As I have highlighted above, the high-conflict litigation persisted for years prior to the hearing of this application. By that time, A.N.H. had been declared a vexatious litigant in both courts. The vexatious litigant order in the trial court required him to seek leave to bring any application, and yet he persisted. The manner in which he brought applications was described by Justice Newbury in 2017 BCCA 216:
- [22] [A.N.H.] insists on filing (usually very shortly before the relevant hearing) volumes - literally hundreds if not thousands of pages - of materials with every application, no matter how insignificant. Virtually every affidavit has attached to it other affidavits and their exhibits, with the result that any substantive issues he might raise or response he might make, are simply lost in a sea of paper. No judge can digest such a stream of irrelevancies on a regular basis
- [78] In order to attempt to manage the litigation over the years, the Chief Justice of the trial court has assigned a judge to act as trial management judge to schedule, manage and hear the multiple applications. Those judges, including the judge here, have faced multiple allegations of bias from A.N.H. As noted in BCCA 2022, he brought four appeals to this Court based on allegations of Justice Abrioux's alleged bias: at para. 10.
- [79] L.D.B. is the primary focus of A.N.H.'s vindictiveness, and has borne the brunt of his vexatious behaviour. In response to A.N.H.'s "scorched earth" approach to litigation, L.D.B. has fought back contesting his countless applications and pursuing some of her own. While the parties had counsel in the early years of the litigation, they have been self represented for the last several years. As a result, the formal applications and the affidavit evidence submitted by the parties do not meet standards expected from counsel and this adds an additional level of challenge for the court.
- [80] It is critical to acknowledge this context when considering L.D.B.'s allegations of bias. The judge, acting as the case management judge, was faced with contentious and extremely challenging litigation over an extended period of time. As L.D.B. contends, and both levels of court have concluded, A.N.H.'s vexatious litigation conduct has been egregious in the extreme. It is an understatement to say that the judge was placed in an extremely difficult position.
- [81] I have examined the numerous excerpts from the transcript relied on by L.D.B. as supporting an apprehension of bias. In my view, none of the judge's comments, interjections, or rulings suggest that he was less than neutral. As L.D.B. has noted, the judge was critical of both parties. Indeed, L.D.B.'s argument seems based, in part, on her contention that the judge should have been more critical of A.N.H. as he has been found to be a vexatious litigant. However, that suggestion misunderstands the nature and import of judicial impartiality. A judge must approach each application and argument with an open mind and without a preconception that one party is deserving of judicial disapproval or sanction. While L.D.B. may have been frustrated that the judge was not more critical of

A.N.H.'s litigation tactics, I see nothing in the judge's conduct that supports L.D.B.'s contention that the judge was not impartial.

- [82] In short, it is my view that L.D.B. has failed to identify anything said or done by the judge in the course of the proceedings, whether examined individually or cumulatively, that could lead to a conclusion that the judge would not decide the matter fairly.
- [83] Before moving on, I would observe that there is no merit to L.D.B.'s allegation that the judge's prior association with a lawyer who acted for A.N.H. in 2012, and his prior involvement with the case when he signed an order as a provincial court judge, are a basis for a finding of a real apprehension of bias. Judicial impartiality does not mean that a judge must have no prior connections, conceptions or opinions or that they must abandon who they are or what they know: Yukon Francophone at paras. 33-35.
- [84] L.D.B. also argues that the judge's criticism of her application to have the daughter's last name changed indicates bias. I agree with L.D.B. that the judge's comment about that application was misplaced. There was no basis on which the judge could observe that L.D.B.'s willingness to bring that application "belies her assertion of litigation fatigue". As L.D.B. notes, she supported the application with relevant affidavit evidence. The judge had not heard the application, was not ruling on it, and accordingly could not suggest that the application was unnecessary or lacking in merit. However, I do not agree that the judge's comment provides support for her assertion of an apprehension of bias. The comment was directed only to the volume of litigation and by itself is of little moment.

Procedural Unfairness

- [85] Procedural fairness is a foundational principle; all parties must have an opportunity to present evidence and advance their submissions: *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 81.
- [86] L.D.B.'s arguments challenge directions and rulings made by the judge during the management of the proceeding throughout the period when the application was before the court. I understand her argument to be that when those directions and rulings are examined collectively, we should conclude that she was denied a fair hearing.
- [87] The legal principles applicable to the scope of a judge's trial management powers were recently summarized in *R. v. Samaniego*, 2022 SCC 9, at paras. 19-26. The same principles apply, with appropriate modification, to the exercise of case management powers in the conduct of a contentious chambers application. Case management power allows a chambers judge to control the process to enable a hearing to proceed fairly, effectively and in an orderly fashion. A chambers judge is able to intervene to conduct chambers hearings in many ways, including by: directing when and for how long a hearing will take place; directing the order of hearing of multiple applications before the court; and limiting the time for submissions so long as those powers are exercised carefully. Of course, when making the necessary orders and directions to facilitate the hearing, a chambers judge must

not sacrifice the rules of evidence.

- [88] This Court is generally reluctant to interfere with interlocutory directions made by a case management judge who has an informed appreciation of the facts and circumstances of a case because of their role in managing the litigation: *Sienema v. British Columbia Insurance Company*, 2001 BCCA 440 at para. 14. Such decisions are discretionary and attract appellate deference.
- [89] In *Katz v. Zentner*, 2022 BCCA 371, this Court undertook a more detailed consideration of the standard of review applicable to arguments based on procedural fairness and concluded that the applicable standard of review depends on the legal basis for the substance of the allegation: at para. 44. In *Katz*, the Court considered the standard of review to be applied to an allegation that the judge's direction limiting the time a party had to present evidence resulted in an unfair proceeding. The Court rejected the submission that a correctness standard of review, as applied to administrative decision makers for questions of procedural fairness, should be applied. Instead, the Court applied a deferential standard of review to the direction made by the judge in the course of trial management:
- [46] Properly framed, this ground of appeal, in my opinion, is from an order pronounced after a trial, which is grounded in an alleged material error and/or unreasonable exercise of discretion made during the trial pursuant to the judge's trial management power. This, according to Mr. Katz, resulted in an unfair trial; a miscarriage of justice occurred, with the appropriate remedy being a new trial.
- [47] Characterized this way, the standard of review which applies is that set out in *Samaniego* at para. 26 quoted above at para. 39. Absent error in principle or unreasonable exercise of discretion by the judge, the Direction is entitled to deference.
- [90] I would adopt that approach to the standard of review to be applied to the errors alleged to have been made by the chambers judge here. L.D.B. appeals the dismissal of her application after a lengthy hearing that lasted more than five days. Her appeal is grounded in allegations that the judge made material errors or exercised his discretion unreasonably in the course of hearing and managing that application. The particular errors alleged all involve directions or rulings made by the judge exercising his case management powers. Absent error in principle or unreasonable exercise of discretion, there is no basis to interfere with the judge's directions or the order dismissing L.D.B.'s application.
- [91] Having reviewed the portions of the transcript referred to by L.D.B., I am of the view that she has not been able to identify any error in principle or unreasonable exercise of discretion. None of the arguments she makes raise questions of law to be examined on a correctness standard. While she submits that the judge acted unfairly in permitting A.N.H. to submit and rely on certain affidavits, her objections to the rulings raise questions of timing and the practical application of procedural rules rather than admissibility. It is my view that all of the matters questioned by L.D.B. can fairly be described as directions or rulings that involved the exercise of the chambers judge's discretion made in the course of a

highly contentious hearing.

[92] In summary, I would not give effect to this ground of review, whether founded on apprehension of bias or procedural unfairness.

Did the Chambers Judge Err in Not Considering L.D.B.'s Application to Increase the Monthly Amounts Paid by A.N.H. for Costs and Arrears of Child Support?

[93] L.D.B. argues that the judge erred by failing to consider her application to increase the monthly payments for costs and arrears of child support. There is no doubt that the judge did not consider that application. At the commencement of the reasons, the judge stated that he would only consider L.D.B.'s application for reinstatement of spousal support. He explained his reason for limiting the issues for consideration:

[5] In the evolution of the application, various orders for disclosure have been made. The respondent, at this time, limits her application to establishing the basis for the reinstatement for entitlement and if successful seeks to have support paid in the amount it had been prior to termination. She indicates that, if successful, it is her intention to use the financial disclosure to then seek an increase in the quantum of both child support and spousal support.

[6] On June 20, 2022, I sent a memorandum to the parties that included the following:

This memorandum is to confirm that all issues arising from Document 1087, the respondent's Amended Notice of Application dated May 5, 2021, have been dealt with save and except for the question of whether spousal support should be reinstated at the level it had been prior to termination by Abrioux J. in his order dated November 14, 2018.

The respondent is responsible for having the order prepared and entered for those portions of the application that have been concluded. Those orders were made during the course of arguments on October 28, 2021; January 17, 18, March 28, June 16 and 17, 2022.

[94] L.D.B. submits, and I agree, that the judge's statement is incorrect. She did not limit her application to reinstatement of spousal support. Her application to increase the monthly payment by A.N.H. towards costs and arrears was included in each version of the notice of application prepared by L.D.B. and was never withdrawn. Further, none of the orders referred to in the judge's June 20, 2022 memorandum dealt with L.D.B.'s application for an increase in the amount of monthly payments towards costs and arrears. In my view, the judge erred in failing to consider that application. Accordingly, I would give effect to this ground of appeal and would remit to the trial court the determination of whether there should be an increase in the monthly payments required to be paid by A.N.H. towards arrears and outstanding costs.

- [95] Before concluding my comments on this ground of appeal, it is worthwhile putting the issue underlying this application in perspective. Justice Abrioux had ordered that A.N.H. pay \$6,000 each month to cover his child support obligation and to pay amounts towards arrears and costs. L.D.B.'s ability to seek an increase to that amount was highlighted in Abrioux 2018. For ease of reference, I include that passage again:
- [173] The \$6,000 will continue to be paid, with leave to [L.D.B.] to have it increased once FMEP has recalculated the arrears. Should A.N.H. seek to have this amount reduced, he will require leave of the court, which must include an affidavit outlining what steps he has taken, including obtaining professional advice, to deal with his personal and the Company's creditors.
- [96] The total amounts owed by A.N.H. for arrears and costs were, of course, immediately due and owing, subject to the discretion of the court to grant relief by making an order for payment over time. The order required A.N.H. to pay only \$1,776 per month towards substantial arrears and costs based on Justice Abrioux's conclusion as to his then current Guideline income. It is apparent that the decision limiting the monthly payment to that amount and the order granting leave to L.D.B. to reapply was premised on A.N.H.'s assertion that he was unable to pay the full amount owing. It appears to have been influenced by: 1) the uncertainty as to the total amount of arrears that required FMEP recalculation; and 2) the fact that L.D.B. had not participated actively in that proceeding so that the conclusion about A.N.H.'s Guideline income had not been tested through the adversarial process.
- [97] As I have noted in paras. 11 and 12 above, the FMEP recalculation has occurred. There remains a substantial amount owing for both arrears and costs. As those amounts are owed to L.D.B., and the Abrioux 2018 order gave her leave to apply to increase the monthly payment, there is no reason why the judge should not have considered it.

Did the Judge Err in Failing to Find a Material Change of Circumstances?

- [98] The standard of review on an application to vary a support order is deferential. Support orders are based on findings of fact, and are discretionary in nature. Absent an error in principle, or a material misapprehension of the evidence, this Court will not interfere: *KPB v. ASR*, 2016 BCCA 382 at para. 15. The deferential standard of review promotes finality in family litigation and acknowledges the judicial discretion involved in making the order, which is "best exercised by the judge who has heard the parties directly": *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 1999 CanLII 691.
- [99] As set out below, the judge's task here was to apply the statutory test for resumption of spousal support to his findings of fact. This was a fact-intensive exercise. Although L.D.B. submits that the judge made errors of law, her arguments all question the conclusions the judge reached based on his findings of fact. She invites this Court to reweigh the evidence and arrive at a different conclusion. That is not our role.

Family and Litigation Violence as a Material Change in Circumstances

[100] L.D.B. submits that the judge erred in failing to find a material change of circumstances justifying the reinstatement of spousal support because he ignored, minimized, or failed to consider evidence of family violence, including litigation violence, employed by A.N.H., and the consequences of that violence on L.D.B.'s health and ability to work.

[101] Section 167(3) of the FLA governs applications to reinstate a spousal support order:

Changing, suspending or terminating orders respecting spousal support

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
- (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
 - (a) the order is necessary to relieve economic hardship that
 - (i) arises from a change described in subsection (2) (a), and
 - (ii) is related to the relationship between the spouses, and
 - (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

[Emphasis added.]

[102] Applications to resume spousal support after the expiration of the ordered duration are not common. We have not been referred to, and are not aware of, any decisions that have considered s. 167(3). An application for resumption of spousal support is a variation application with two additional requirements imposed on the applicant. They must demonstrate that the order is necessary to relieve economic hardship arising from the change in circumstances, and that the hardship is related to the relationship between the spouses.

- [103] Accordingly, in these circumstances, L.D.B. had the onus to prove a material change in her condition, means, needs, or circumstances since the Abrioux 2018 order. She had to adduce sufficient evidence to satisfy the court that the change in circumstance was material, in the sense that if it was known to the court at the time, the order would have been made in different terms (see also *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 31-33). Additionally, she had to demonstrate that the order sought was necessary to relieve economic hardship arising from the change in circumstances, and that the hardship was related to her relationship with A.N.H. It is accurate to describe the evidentiary challenge facing L.D.B. as difficult; she was seeking to reinstate payment of spousal support more than four years after the obligation to pay support had ended under the terms of an existing order that had already extended the duration of spousal support made in a final order.
- [104] To satisfy the onus, L.D.B. adduced limited evidence on the two changes in circumstances that she needed to establish: 1) the nature and extent of A.N.H.'s vexatious litigation conduct; and 2) her inability to work as a result of her mental health. I have already set out the evidence regarding the first subject area. As I have noted, I would not admit the new evidence that L.D.B. has asked us to consider on appeal. The remainder of the evidence on that issue was well known to the parties and the judge.
- [105] On the issue of L.D.B.'s mental health and inability to work, the evidence presented was not extensive. She submitted a very brief letter from her treating psychiatrist confirming her diagnoses of Generalized Anxiety Disorder and PTSD, some of the information she had submitted to CPP in order to claim disability benefits, and the fact that she was receiving CPP disability benefits.
- [106] The judge considered all of this evidence, and concluded it was insufficient to prove that L.D.B. was unable to work. Further, the judge found that even if the evidence established that L.D.B. was disabled, there was no evidence that her condition was materially different from the time the Abrioux 2018 order was made. The judge explained why he arrived at that conclusion: the record revealed that there was evidence before the court, from as early as 2014, that L.D.B. was exhibiting symptoms of both PTSD and anxiety, attributable to A.N.H.'s conduct. There was also no evidence before the judge that L.D.B.'s mental health had deteriorated as a result of A.N.H.'s conduct. On the limited evidence before the judge, I can see no basis for interfering with his conclusions. As the judge noted, the evidence was lacking in detail and substance.
- [107] The judge also found that A.N.H.'s conduct had not worsened, and had perhaps lessened as a result of the vexatious litigant orders. I see no basis for interfering with that finding. Indeed, it appears to have been factually accurate at the time of the hearing. Having made those findings, the judge could not conclude that A.N.H.'s conduct, and its affect on L.D.B.'s health, would have resulted in the Abrioux 2018 spousal support order being made on different terms.

- [108] While I cannot conclude that the judge failed to consider the evidence of L.D.B.'s health and ability to work, I agree with the submission that the judge's comment at para. 41 of his reasons appears to minimize the significance of L.D.B.'s condition. The judge described her confirmed diagnoses of PTSD and Generalized Anxiety Disorder, for which L.D.B. was receiving treatment from a psychiatrist, as "emotional difficulties". A diagnosis of mental disorders recognized in the Diagnostic and Statistical Manual of Mental Disorders - Fifth Edition (DSM-5), is not equivalent to a finding or observation that someone is experiencing "emotional difficulties". It is unfortunate that the judge chose this language to describe L.D.B.'s condition. However, examining the reasons as a whole, I cannot say that he failed to consider the medical evidence before him. Indeed, it was the shortcomings in that evidence that led the judge to conclude that L.D.B. had failed to establish a material change of circumstances.
- [109] I also note the absence of any evidence to support L.D.B.'s contention that the variation order she is seeking is not only necessary to relieve economic hardship arising from a material change, but also that her economic hardship and inability to work is "related to the relationship between the spouses". I appreciate that L.D.B. strongly asserts that this is the case and that Justices Cole and Abrioux found that A.N.H.'s conduct in the litigation had been abusive and had affected her ability to return to work. However, Justice Abrioux specifically found in 2018 that L.D.B. was able to work as a pharmacist and extended A.N.H.'s obligation to pay spousal support only to August 2017. Given that order, which is presumed to be correct when made (*Walters v. Walters*, 2011 BCCA 331 at para. 48), L.D.B. needed to adduce evidence that connected or related any change in her inability to work after 2018 to A.N.H.'s conduct. She failed to do so.
- [110] Finally, I would emphasize that while the judge did not err in failing to find a material change in circumstances on the evidence before him, that does not mean that evidence of litigation abuse amounting to family violence can never meet that threshold.
- [111] Section 166 of the FLA restricts the use of evidence of spousal misconduct for the purpose of making a spousal support order. However, in *Leskun v. Leskun*, 2006 SCC 25, the Supreme Court noted:
- [21] There is, of course, a distinction between the emotional consequences of misconduct and the misconduct itself. The consequences are not rendered irrelevant because of their genesis in the other spouse's misconduct. If, for example, spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, the consequences of the misconduct would be highly relevant (as here) to the factors which must be considered in determining the right to support, its duration and its amount
- [112] Family violence is one form of spousal misconduct. The term "family violence" is broadly defined by s. 1(1) of the FLA as follows:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[Emphasis added.]

[113] In the guidebook "Family Law Handbook for self-Represented Litigants" at 141, the Canadian Judicial Council recognized litigation harassment as a form of abuse in family proceedings. This type of abuse occurs where one spouse uses the court's process to continue to control, intimidate, embarrass, or harass the other spouse after their relationship has ended. Unfortunately, litigation abuse can be difficult to detect, particularly at the outset of a family proceeding, because courts may not be able to determine whether the conduct is caused by malicious intent or a genuine inability to navigate the legal system without assistance (Haley Hrymak and Kim Hawkins, *Why Can't Everyone Just Get Along: How BC's Family Law System Puts Survivors in Danger* (Vancouver: Rise Women's Legal Centre, 2021) at 30; see also Susan Miller and Nicole Smolter "'Paper Abuse': When All Else Fails, Batterers Use Procedural Stalking" (2011) 17:5 *Violence Against Women* 637).

[114] Where litigation abuse is not caused by a genuine inability to navigate the legal system, but is instead perpetrated to control, intimidate, or harass the other spouse, it clearly falls within the definition of "family violence" under the FLA.

[115] As set out above, A.N.H. has a lengthy history of using the court's process as a weapon to harass L.D.B. There is no doubt that A.N.H.'s conduct constitutes family violence. Justices Cole and Abrioux both found that his conduct had serious health consequences for L.D.B. In his reasons indexed as 2014 BCSC 1875, which permitted L.D.B. to relocate to Saskatchewan with the children, Justice Cole made the following observations:

[134] The respondent's family doctor and her psychologist are all of the opinion that the emotional harm suffered by the respondent has been caused by the claimant's conduct. This conduct is emotionally abusive and amounts to intimidation and harassment and I am satisfied that it constitutes family violence.

[135] I find that the family violence perpetrated by the claimant is serious and that it has continued over the last two years, and that it is perpetrated by the claimant because of his controlling personality. Although the violence was not directed at the children, they have been indirectly affected because of the effect that family violence has had on their mother.

[Emphasis added.]

[116] But the question before the judge was not whether A.N.H. had, in the past, committed acts of family violence that caused emotional harm. The question was whether L.D.B. had established a material change of circumstances, since the Abrioux 2018 order, that made a resumption of spousal support necessary to relieve her economic hardship arising from those changes and related to the relationship with A.N.H. As I have noted above, L.D.B. failed to put forward sufficient evidence to satisfy the test set out in s. 167(3) of the FLA.

[117] Finally, I acknowledge that the dismissal of L.D.B.'s application to adduce new evidence about A.N.H.'s litigation conduct after the hearing of this application means that I have not considered her assertion that A.N.H.'s litigation abuse has increased since June 2022, and that it has had a significant negative impact on her mental health. However, as I have noted, that matter should not be considered by this Court in the first instance.

Disposition

[118] I would allow the appeal but only to the extent of remitting to the trial court the question of whether the monthly amounts paid by A.N.H. towards arrears and costs should be increased.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Hunter"

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