

CANADA / JUDGMENT

L.L. v. A.I.

2023 BCSC 1503

COURT

Supreme Court of British Columbia

DECIDED

28 August 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1503 L.L. v. A.I.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.L. v. A.I.,

2023 BCSC 1503

Date: 20230828

Docket: E22556

Registry: Nelson

Between:

L.L.

Appellant

And

A.I.

Respondent

Before: The Honourable Madam Justice Lyster

On appeal from: An order of the Provincial Court of British Columbia, dated December 8, 2022 (A.I. v. L.L., Nelson Docket 3639).

Reasons for Judgment

The Appellant, appearing in person:

L.L.

The Respondent, appearing in person:

A.I.

Place and Date of Hearing:

Nelson, B.C.

May 15, 2023

Place and Date of Judgment:

Nelson, B.C.

August 28, 2023

Table of Contents

Introduction. 2

Scope of Appeal. 3

Decision under Appeal. 5

Analysis. 10

Indigenous Heritage. 11

Surreptitious Recording. 15

Factual Errors. 16

Bias. 19

Conclusion. 26

Introduction

- [1] This is an appeal from a family trial decision of a Provincial Court judge, brought pursuant to s. 233 of the Family Law Act, SBC 2011, c 25 [FLA].
- [2] The trial judge presided over an eight-day trial in which both parties applied to have the parenting time schedule for their child changed to permit her to attend kindergarten in the city in which they reside. The appellant further sought an order that he have "day to day control" of the child, with the respondent having supervised parenting time from Friday after school to Saturday at 6 p.m.
- [3] By way of brief background, the parties had commenced their relationship in 2012, and were married in 2013. The appellant is Indigenous, a member of the Kwakwaka'wakw of the Namgis First Nation. The respondent is not Indigenous. Both are well-educated. Their child was born in October 2017. The parties lived separate and apart in the former family home for a number of months before they physically separated on October 1, 2019. The respondent suffered a mental health crisis at around the time of the parties' separation which included a suicide threat and subsequent hospitalization in August 2019. The

respondent moved out of the former family home on October 1, 2019. At that same time the parties agreed to a consent order under which they had equal parenting time with the child. As of trial, the parties were subject to an order made September 20, 2021, under which they had equal parenting time on a seven day rotation. They lived in separate communities in the West Kootenays, and each wanted the child to live primarily with them, and to attend school in their community. Both parties had re-partnered, with the respondent's new partner moving in with her in September 2020, and the appellant's new partner moving in with him in or about August 2021.

- [4] In reasons for judgment pronounced December 8, 2022, the trial judge held that it was in the child's best interests to reside primarily with the respondent, and for the respondent to have the authority to decide where she would attend school. The appellant was ordered to have parenting time with the child for the first three weekends of each four week rotation, with the parties having equal parenting time during Christmas, Easter and spring break and summer holidays.
- [5] The appellant appeals to this court seeking to have the decision set aside, and to be granted the relief he sought in Provincial Court. In his factum, he submits that:

the trial judge made errors in interpretation and application of the law. I submit that the trial judge gave insufficient consideration to important evidence and excessive consideration to the mother's heritage. Further, I submit that there were errors made in his factual findings. Lastly, I submit that there was bias in the proceedings. The factors above resulted in a decision being made that was not in the best interest of the child.

- [6] For the reasons that follow, I have concluded that the trial judge did not make any errors reviewable on appeal to this court. I therefore dismiss the appeal.

Scope of Appeal

- [7] I begin by stating the law with respect to the scope of appeal in a family matter. Section 233 of the FLA governs such appeals to this court in these terms:

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

- (2) The time limit for starting an appeal is 40 days, beginning on the day after the order of the Provincial Court is made.
- (3) After hearing the appeal, the Supreme Court may do one or more of the following:
- (a) confirm or set aside the order of the Provincial Court;
 - (b) make any order that the Provincial Court could have made;
 - (c) direct the Provincial Court to conduct a new hearing.

- (4) On application by a party, the Supreme Court may extend the time limit for starting an appeal.
- [8] In *Kane v. Proffitt*, 2018 BCCA 106, the Court of Appeal reviewed the law with respect to appeals of family disputes. At paras. 42-43, Justice D. Smith stated the following:
- [42] The scope of appellate review in family matters is a narrow one; intervention by an appellate court is subject to a high standard of review. The function of appellate review is not to re-try a case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. See *Scott v. Scott*, 2006 BCCA 504; *Jens; R.E.Q. v. G.J.K.*, 2012 BCCA 146; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 832-833; and *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.
- [43] In *R.E.Q.*, Madam Justice Newbury summarized the appellate review jurisdiction as follows:
- [33] The Supreme Court of Canada has said that the standard of review is a high one, i.e., that in family cases as elsewhere, an appellate court may not interfere with the exercise of discretion of a trial judge in the absence of a material error (including a "significant misapprehension of the evidence", the trial judge's having "gone wrong in principle or [his] final award [being] clearly wrong"): see *Moge v. Moge* [1992] 3 S.C.R. 813, at 832; and *R.M.S. v. F.P.C.S.* 2011 BCCA 53, at para. 43, citing *Hickey v. Hickey* [1999] 2 S.C.R. 518 at para. 12 and *Van de Perre v. Edwards* 2001 SCC 60, [2001] 2 S.C.R. 1014 at paras. 14-5. In the latter case the Court wrote:

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

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

- [9] At para. 44, Smith J.A. made clear that appeals to this court from the Provincial Court are subject to the same deferential standard of review outlined in the preceding paragraphs. The trial judge's decision was a discretionary one, focussed on the determination of the best interests of the child. This court may intervene only if he erred in law or principle or made a material error in his appreciation of the facts. It is not for this court to reweigh the evidence or interfere on the basis that I would have given more weight than the trial judge did to one

factor or another in determining the child's best interests.

Decision under Appeal

[10] At the time the decision was rendered the child was five years old, and she had been eligible to begin kindergarten in September 2022. The respondent (applicant at trial) testified, as did her new partner, a friend, her employer and her brother-in-law. She was self-represented. The appellant (respondent at trial) and his new partner also testified. The appellant was represented by counsel at trial.

[11] The trial judge thoroughly reviewed the evidence of the parties and their witnesses at paras. 2-37 of the decision. I will review portions of the evidence, to the extent they are relevant to the grounds of appeal before me, in my analysis.

[12] Having reviewed the evidence, the trial judge referred at para. 35 of the decision to s. 37 of the FLA, which provides as follows:

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

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

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

- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
 - (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
 - (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [13] The trial judge then began his consideration of the issues raised by the parties. He dealt first with the appellant's concerns about the respondent's ability to parent. These concerns had been summarized at para. 34 of the decision, as follows:
- [34] The Respondent testified that he believes the Applicant is mentally unstable, and provides the following examples:
- 1) Her emotional outbursts, as indicated in a telephone call which the Respondent secretly taped.
 - 2) The contents of the text messages to the Respondent and his new partner
 - 3) Her behaviour during pick up and drop offs of [the child].
 - 4) Her acting as a surrogate for the gay couple who live in Vancouver.
 - 5) Her engagement in sex work.
 - 6) Her mental health breakdown following the separation when she threatened to commit suicide and was hospitalized.
- [14] At para. 37, the trial judge found that:
- [37] there is no real likelihood of a recurrence of the combination of factors that existed in 2019 that led to the [respondent's] suicide threat. I find she is mentally stable and has been for some time.
- [15] At para. 42, he addressed the appellant's concern that the respondent had been engaged in sex-work some time after they separated and before her current relationship. The trial judge found that this was "not her way of life" and occurred over a short time in a "tumultuous period". Most importantly, he found that there was no evidence it had any impact on the respondent's ability to parent.
- [16] The respondent acted a surrogate mother for a gay couple, giving birth on October 14, 2022. The appellant had raised concerns about the respondent acting as a surrogate. At para. 43, the trial judge dismissed those concerns, finding that the surrogacy had no impact on the parties' child.

- [17] The appellant had raised concerns about the contents of text messages sent by the respondent to the appellant and his new partner. The trial judge considered "a significant volume of text messages" at paras. 44-46. At para. 44, he found that both parties had been guilty of offensive conduct in insulting each other in the text messages, and that "it is simply not productive to determine who was more offensive, more frequently." He further found that there was no evidence the child was aware of the hostile text messages or that they had any negative impact on her. At para. 45, the trial judge also noted that there were "nuggets of positive attitudes and a capacity the parties have to converse in a civil manner" in the text messages. He gave examples of each of them being complimentary about the other's parenting abilities.
- [18] At para. 46, the trial judge found that the commencement of the appellant's relationship with his new partner in September 2021 "significantly increased the simmering stress between the parties and manifested in the verbal confrontations during exchanges and in text messages." He dealt with a number of issues related to interactions between the respondent and the appellant's new partner in the following paragraphs. At para. 48, he found that the respondent's concerns about the appellant's new partner posting photographs of the parties' child online were understandable.
- [19] At paras. 49-50, he addressed a telephone conversation between the parties that was surreptitiously recorded by the appellant. In it, the respondent raised her voice when she heard the appellant's new partner in the background. The trial judge found that the recording was "staged" at a time the appellant knew that the child was with the respondent. He found this most unfortunate, and that the appellant "knowingly provoked" the respondent in their child's presence.
- [20] At para. 51, the trial judge found it "a significant concern" that the appellant continuously brought his partner to parenting time exchanges, as he knew it upset the respondent. The trial judge found both the appellant and the respondent to be at fault in negative incidents which had occurred at such exchanges. He did not find it:
- [51] productive to try to microscopically diagnose each negative event that details the interplay between [the parties and the appellant's new partner] and attribute fault. The presence of all three of them is a formula for friction and confrontation.
- [21] At para. 52, the trial judge found that the respondent acknowledged that certain aspects of her behaviour needed adjustment and that she was attending counselling. Conversely, he noted that the appellant and his new partner did not acknowledge engaging in any wrong behaviour.
- [22] At para. 54, the trial judge considered the evidence of the respondent's witnesses, all of whom he found credible. They all described the respondent as a caring, responsible and loving parent.

- [23] At paras. 55-57, the trial judge found that the evidence was overwhelming that both parties dearly love their child. In their new relationships, each of them provides her with a loving home. At para. 64, he found that they both have stable home situations.
- [24] At paras. 59-64, the trial judge considered the child's Indigenous background, which he found relevant to her healthy emotional development. At para. 59, he referred to *Van de Perre v. Edwards*, 2001 SCC 60 [Van de Perre], for the proposition that "Race can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the child." At para. 60, he found that the respondent was committed to ensuring the child was fully involved with her heritage. He noted that the appellant also indicated he was committed to ensuring the child was exposed to that heritage. At para. 61, he found that the respondent was "far better equipped to teach [the child] about her heritage", and that she was also better able to help her address the effects of intergenerational trauma and racism.
- [25] At para. 65, the trial judge concluded that it was in the child's best interests to remain in the day-to-day care of the respondent on school days and every fourth weekend, and for her to make decisions relating to her education.
- [26] At para. 66, the trial judge made the following order:
- [66] I make the following Order:
1. The Applicant, [A.I.], shall have day-to-day care of [the child] on weekdays and decide the school where she will attend school.
 2. The Respondent, [L.L.], shall have parenting time to [the child] following a four week rotation as follows:
 - i. From Friday after school until Monday morning for the first three weekends of the rotation. The Applicant shall be responsible for the transport of [the child] to Nelson for the Respondent to commence his parenting time on Friday in the event that he is unable to pick up [the child] from her school and the Respondent shall be responsible for the transport of [the child] from Nelson to her school in Trail on Monday mornings, unless otherwise agreed upon between the parties.
 - ii. The Applicant shall have parenting time on the fourth weekend of the rotation in addition to her weekday parenting time.
 - iii. In the event that the Respondent's parenting time falls on a weekend that has a statutory holiday or a teacher's professional development day then his parenting time shall be extended to include that day by commencing at 9 a.m. if that day falls on a Friday and ending on Tuesday before school if that day falls on a Monday.

3. The parties shall have equal parenting time during the school Christmas, Easter, spring break and summer holidays to commence at times agreed upon and failing agreement as fixed by the Court on application of either party.
4. The parties shall share the transport of [the child] to permit the commencement and end of the other party's parenting time. Unless otherwise agreed, the pick up and drop off location in Trail shall be at the Safeway parking lot and the pick up and drop off in Nelson shall be at the Credit Union located at the area known as the junction.
5. The parties may agree to modify the parenting schedule from time to time to reflect each parties work schedule or special events or to provide additional parenting time.
6. The parties shall:
 - a. Put the best interests of [the child] before their own interests;
 - b. Encourage [the child] to have a good relationship with the other parent and speak to the child about the other parent and that parent's partner in a positive and respectful manner, and
 - c. Make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of [the child]

Analysis

- [27] The heart of the appellant's argument on appeal is that trial judge gave the child's Indigenous heritage excessive weight in comparison to other concerns he had raised regarding the respondent's parenting. In relation to those latter concerns, the appellant also argues that the trial judge made palpable and overriding errors in his findings of fact, and in the weight he gave to the parties' evidence. In essence, he submits that the child's Indigenous heritage was given greater weight than her best interests.

Indigenous Heritage

- [28] I will begin by considering the significance of the child's Indigenous heritage to the best interests of the child analysis.
- [29] It will be recalled the trial judge referred to the Supreme Court's decision in *Van de Perre*, in which the Court stated at para. 40 that race can be a factor in determining the best interests of the child, due to its connection to the culture, identity and well-being of a child.
- [30] The appellant submits that the trial judge misinterpreted and misapplied *Van de Perre* because the outcome in that case does not support the decision. In this connection, he notes that the Supreme Court allowed an appeal from the Court of Appeal and restored the trial judge's decision in which the white parent was granted custody of the child, not the Black parent. This argument is not persuasive. *Van de Perre* was relied upon by the trial judge for the general principle that race may be a factor in the best interests analysis, and the case is

clearly binding authority for that proposition.

- [31] The appellant states that he accepts that a child's heritage is very important, but submits that the trial judge erred in prioritizing the child's heritage over her best interests and safety. In this connection, he relies upon a number of decisions and a journal article considering Van de Perre, all of which have stated that race and culture are important, but not determinative, factors in determine the best interests of a child:
- i. Boyd, S. & Dhaliwal, K. (2015). "Race Is Not a Determinative Factor: Mixed Race Children and Custody Cases in Canada". Canadian Journal of Family Law, Vol. 29, Iss. 2, at pp. 369 para 2.
 - ii. Aziz v. Dolomont, 2006 NSSC 194 at para. 49.
 - iii. C.(P.) v. C.-G(P.C.), 2004 ONCJ 130 at para. 16.
 - iv. Sawatzky v. Campbell, 2001 SKQB 250 at para. 13.
 - v. M.C.S. V. R.L.F. et al, 2001 NSSF 27 at para L.
 - vi. G.W.Z. v. S.M.Z., 2010 BCSC 92 at paras. 34-37.
 - vii. D.H. (Re), 2013 ABPC 283 at paras. 54-55.
- [32] There is no basis for the submission that the trial judge prioritized the child's Indigenous heritage over her best interests and safety. The trial judge considered the child's heritage, and each parent's ability to ensure that she is connected to her heritage, as a factor in the best interests analysis. He did not improperly prioritize that factor over the other best interest factors relied upon by the parties and considered by the trial judge. He considered it as one among a number of factors relevant to the child's best interests. In any event, it is for the trial judge to determine how to balance the various factors in play in any given case. It is not for this court on appeal to reweigh the best interest factors.
- [33] The respondent relied on K.K.M. v. T.J.S., 2021 BCPC 316, [K.K.M.] in support of the proposition that Indigenous identity and heritage can be an important factor in determining the best interests of an Indigenous child. At para. 65 of that decision, the court correctly noted that s. 37 of the FLA does not speak directly to maintaining cultural continuity for Indigenous children. At para. 67, the court held that issues of cultural continuity for an Indigenous child are captured under s. 37(2)(c), which refers to "the nature and strength of the relationships between the child and significant persons in the child's life". I agree with that observation.
- [34] At paras. 68-73, the court in K.K.M. referred to An Act respecting First Nations, Inuit and Metis Children, Youth and Families, S.C. 2019 c. 24 [FNIMCYFA], in support of the importance of maintaining cultural continuity as a factor in determining the best interests of Indigenous children. At paras. 73-74, the court referred to the Child, Family and Community Services Act, R.S.B.C. 1996, c. 46 [CFCSA], the governing legislation dealing with parenting issues for children in care, which specifically refers in s. 4 to a child's cultural

heritage and in particular Indigenous heritage, in determining their best interests.

[35] As noted by the court in K.K.M. at para. 75, reference to these statutes was meant to illustrate the lack of any specific reference in the FLA to cultural continuity as a factor in the best interests analysis for Indigenous children. They cannot, in my view, guide the interpretation of the FLA.

[36] At para. 76, the court in K.K.M. referred to Bill 29, the Interpretation Amendment Act, 2021, c. 36, which had just received Royal Assent at the time K.K.M. was rendered. It amended the Interpretation Act, R.S.B.C 1996, c. 238 by adding s. 8.1. Section 8.1 provides:

8.1(1)in this section:

"Declaration" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;

"Indigenous Peoples" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;

"Regulation" has the same meaning as in the Regulations Act.

(2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the Constitution Act, 1982.

(3) Every Act and regulation must be construed as being consistent with the Declaration.

[37] The court in K.K.M. concluded at para. 77:

[77] In the context of maintaining the cultural continuity of an Indigenous child, while not specified directly within section 37(2) of the FLA, it is open for a court to interpret this section so as to specifically consider within the best interest of a child analysis, the cultural continuity of an Indigenous child. In doing so, it is open for a court to adopt best interest of an Indigenous child factors identified in federal statutes such as the FNIMCYFA and provincial statutes such as the CFCSA. Specifically, the factors may include:

- (a) cultural continuity is essential to the well-being of a child, a family and an indigenous group, community or people;
- (b) the transmission of languages, cultures, practices, customs, traditions, ceremonies and knowledge of indigenous peoples is integral to cultural continuity;
- (c) a child's best interests are often promoted when the child resides with members of his or her family and the culture of the indigenous group community or people to which he or she belongs is respected; and
- (d) the characteristics and challenges of the region in which a child, a family or an indigenous group, community or people is located are to be considered.

- [38] I agree with the court in K.K.M. that in considering the best interests of a child under s. 37 of the FLA it is open to the court to consider the maintenance of cultural continuity for an Indigenous child. Indeed, I would consider it an error in principle not to consider the maintenance of an Indigenous child's identity in determining their best interests. In this connection, I would note that while s. 37 does not refer to indigeneity, s. 41(e) of the FLA does, providing that parental responsibilities include "making decisions respect the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if this is an Indigenous child, the child's Indigenous identity." This underscores the importance of Indigenous identity to Indigenous children.
- [39] With respect to the court in K.K.M., however, I would not go so far, in the absence of legislative amendment to the FLA, as to specifically incorporate the factors referred to in other statutes such as the FNIMCYFA and CFCSA in considering the best interests of an Indigenous child. It is unnecessary to do so in any event, as the s. 37 factors are sufficiently broad and open-textured to permit the court to consider factors relevant to a child's Indigenous heritage in assessing their best interests.
- [40] The trial judge did not commit an error of law in identifying the child's Indigenous background as a factor relevant to her healthy emotional development. Nor did he assign this factor excessive weight in his best interests analysis. The trial judge clearly concluded that both parties love their child, and are capable parents, and he did not prioritize the child's Indigenous heritage over her safety and best interests.

Surreptitious Recording

- [41] The appellant submits that the trial judge erred in his application of the law in considering K.W.K. v. V.L.C., 2022 BCSC 1321 [K.W.K.], with respect to the surreptitiously recorded phone call. He submits that this phone call had probative value that outweighed the prejudicial effect of admitting it, and that it should have been used to support his viewpoint. The judge erred, he submits, in misapprehending the evidence to label himself and his partner as antagonists. He submits this alleged error should be reviewed on a correctness standard.
- [42] The trial judge's reasons with respect to K.W.K. are found at para. 50, where he wrote:
- [50] In KWK v. VLC, 2022 BCJ No 1427, Justice Ball referred to paragraph 85 to the Claimant who tendered evidence of recorded conversations as proof of the Respondents allegedly abusive language towards the Claimant. At paragraph 81, the Court stated that surreptitious recordings in family proceedings reduce trust, diminish the ability of parties to work together, increase conflict and thwart the restructuring of family relationships. The Court continued that this would not be in the best interest of a child. The Court continued at paragraph 97, "while I have admitted these recordings, I do not view them as strong evidence which support the claimant's arguments that the respondent has negatively influenced the child or that they are evidence of a larger issue of the respondent speaking ill of the claimant in front of the child". I adopt the reasoning of Justice Ball with respect to the

recording admitted in evidence in the case at bar.

- [43] From this passage, it is apparent that the trial judge held that the surreptitiously recorded telephone call was admissible, but, adopting Justice Ball's reasoning, did not find view it as strong evidence in support of the appellant's position. As set out in the preceding para. 49, he found that the respondent raised her voice and was angry after hearing the voice of the appellant's partner. He found that the appellant knowingly provoked the respondent in their child's presence.
- [44] The trial judge did not err in admitting the surreptitiously recorded telephone call into evidence. Having admitted the recording, it was for him to assess and weigh the evidence and to make his findings of fact. No basis for interfering with the trial judge's assessment of this evidence has been established.

Factual Errors

- [45] In his factum, the appellant identifies a number of allegedly palpable and overriding errors in the trial judge's findings of fact and the weight he gave to certain evidence, as follows:
- a. Determining that the mother was mentally stable without sufficient qualifications or professional advice.
 - b. Giving unfair weight to the mother's testimony, evidence and witnesses.
 - c. Dismissing important evidence and testimony of events as petty or insignificant disputes.
 - d. Not considering empathy shown towards [the respondent] when passing judgement on my character.
- [46] In general, the appellant disagrees with many of the findings of fact made by the trial judge, and the weight he gave to the evidence before him. An appeal is not an opportunity to retry a case. The appellant has not demonstrated that the trial judge materially misapprehended the evidence before him. The weight to be given to the evidence was for the trial judge, who had the unique advantage of hearing the parties over eight days of trial.
- [47] The appellant submits that significant evidence was ignored. While not framed by the appellant as an attack on the adequacy of the reasons for decision, this submission can usefully be considered under that rubric.
- [48] In *R. v. R.E.M.*, 2008 SCC 51 [R.E.M.] at para. 15, the Supreme Court of Canada set out a functional test for assessing whether a trial judge's reasons are sufficient:
- [15] The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

As a result, an appellate court must read the reasons "as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes of functions for which they are delivered" (at para. 16). The purposes are fulfilled if they show why the judge made their decision, not how (at para. 17). This does not require the trial judge to set out every finding or conclusion in the process of reaching the verdict (at para. 18).

- [49] At para. 28 of R.E.M., the court relied on its earlier decision in *R. v. Gagnon*, [2006] 1 S.C.R. 621 [Gagnon], with respect to the sufficiency of reasons when credibility is in issue. In *Gagnon*, the Supreme Court held that the appellate court had ignored the trial judge's unique position to see and hear witnesses and had erred in substituting its own assessment of credibility. The court cited para. 20 of *Gagnon*, as follows:
- [20] Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.
- [50] Applying these principles to the decision under appeal, I find that the trial judge fairly reviewed the parties' evidence. He did not refer to every piece of evidence led, but he was not under any obligation to do so. In this connection, it is important to keep in mind that the central issue in this trial was where the parties' child would attend school. The trial had taken longer than expected, extending far into the school year, the child was not in school full-time, and a decision needed to be made as soon as possible in order to address her schooling. The trial judge averted to the importance of providing an expeditious decision during final submissions on November 28, 2022, and issued his decision shortly thereafter on December 8, 2022. Given that context, the decision more than fulfilled its purposes of deciding with which parent the parties' child would primarily reside, and where she would go to school, and the decision clearly showed why the trial judge came to the conclusions he did.
- [51] The question of the respondent's mental stability was one put in issue by the appellant. He relied upon it in support of his position that the child should reside primarily with him and that the respondent's parenting time should be supervised. Neither party led expert evidence with respect to the respondent's mental health. The respondent testified about her mental health history, including her post partum depression and the mental health crisis she experienced when the appellant asked her to leave the former family home. She testified about the mental health treatment she has received, including medications she continues to take, and counselling she continues to attend. It was open to the trial judge, on all of the evidence, to find that the respondent was now mentally stable, and that a repetition of the mental health crisis she experienced in August 2019 was unlikely to occur.

- [52] The appellant submits that the trial judge failed to consider empathy he showed to the respondent when assessing his character. The trial judge was focussed, as he was required to be, on assessing the child's best interests, not how the parties had treated each other at separation. Any consideration of the parties' characters was ancillary to this essential focus on the child's best interests. That said, the trial judge was complimentary of the appellant's character at several points in the decision. He noted at para. 45 positive text messages the appellant had sent to the respondent. At para. 55, he stated that both parties dearly love their child and show a total commitment to her. At para. 57, he specifically noted that the appellant is a loving parent who engages in healthy activities and routines with the child. At para. 60, he stated he had no doubt the appellant would bring the child to local Indigenous cultural events. At para. 64, he noted that both parties had stable home situations, and referred to the appellant's professional employment.
- [53] The trial judge did not make any material errors in his appreciation of the evidence or his findings of fact.

Bias

- [54] The appellant submits that the trial judge was biased in the respondent's favour. The appellant refers to a number of issues in support of his bias argument, each of which I address below.
- [55] In *Hokhold v. Gerbrandt*, 2017 BCSC 1246, a family law case, Justice Abrioux, then of this court, referred at para. 15 to the decision of Justice Smart in *R. v. Gaudaur*, 2007 BCSC 434 at paras. 3-16 for the following summary of the principles applicable to allegations of judicial bias:
- [15] The applicable principles were conveniently summarized by Justice Smart in *R. v. Gaudaur*, 2007 BCSC 434 at paras. 3-16:
- [3] An allegation of judicial bias is a serious matter. I therefore wish to commence my Reasons by referring to *R. v. R.D.S.*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, a significant decision on the issue of judicial impartiality. In particular, I wish to refer to Justice Cory's admonition in *R.D.S.* concerning the implications that flow from an allegation of judicial bias. At para. 113 of his decision he states:

... the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. ... Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[6] McLachlin, C.J. explained the importance of judicial impartiality in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45 (CanLII). At para. 57 of her judgment on behalf of the Court, she said:

... public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

[8] I return to Cory J.'s judgment in *R.D.S.* where at para. 91 he, too, emphasized the critical importance of judicial impartiality:

A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

[9] He continued at para. 94:

. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

[10] This is so, of course, because even a reasonable apprehension of bias will undermine confidence in a judge's decision.

[11] Demonstrating actual bias is not necessary, even if it could be established. The appropriate enquiry is whether there is a reasonable apprehension of bias or, as it is sometimes described, a "real likelihood" or "probability" of bias: see *R.D.S.*, supra, paras. 10-12.

[12] The test to determine bias is clear. It was explained in *Wewaykum* at para. 60:

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

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

[13] The application of the "de Grandpré test" was amplified by Cory J. in *R.D.S.* at para. 111:

... Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. ...

- [14] Both Cory J. in his judgment in *R.D.S.* and *L'Heureux-Dubé J.* and *McLachlin C.J.* in their judgment in *R.D.S.* emphasized that the words or actions of a judge that are said to demonstrate a reasonable apprehension of bias must not be looked at in isolation. Rather, they must be weighed in the context of all of the circumstances and in light of the whole of the proceedings. Context also requires a consideration of whether the impugned remarks were delivered orally in the rush of a busy judicial day: per *L'Heureux-Dubé J.* and *McLachlin C.J.* at para. 50.
- [15] *R.D.S.* and *Wewaykum* are clear that the test to determine bias is objective, not subjective; that the onus on the applicant is a high one; and that there is a presumption that judges will act according to their oath of office. However, at paras. 117 and 118 of *R.D.S.*, Cory J. explains that:

... despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. ...

Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

- [16] In order to maintain public confidence in the impartiality of our judges and the integrity of our justice system, judges must ensure that their words and actions do not create even a reasonable apprehension of bias. When a judge fails to do so, he or she must recuse him or herself.
- [56] I approach the appellant's bias arguments with these principles in mind. I must consider what an informed person, viewing the matter realistically and practically - and having thought the matter through - would conclude. Would they think that it is more likely than not that the trial judge, whether consciously or unconsciously, would not decide fairly?
- [57] In support of his position, the appellant submits that the trial judge demonstrated bias by unfairly placing the responsibility on him for the respondent's outbursts at parenting time exchanges and disregarding the respondent's role in the altercations. He also submits the trial judge ignored the practical reasons for his partner's presence during exchanges.
- [58] This represents a misreading of the trial judge's reasons with respect to parenting time exchanges. At para. 51 of the decision the trial judge clearly found that the appellant, his new partner and the respondent were all at fault in this context. He did criticize the appellant for unnecessarily provoking the respondent by continuously bringing his partner

to exchanges when he knew it upset the respondent. But the trial judge did not suggest the appellant's partner could not be present; rather, he suggested the appellant could ensure that she was not "immediately present". These findings are not evidence of a reasonable apprehension of bias.

- [59] A second example raised by the appellant is the trial judge's comments at para. 60 of the decision about the appellant's commitment to ensuring the child is exposed to her Indigenous heritage. In particular, he points to the trial judge's statement that "Understandably, he stumbled, when questioned, to define and detail particular ceremonies." I have reviewed the cross-examination of the appellant, and he did struggle in describing certain ceremonies, in particular a copper-breaking ceremony, where he acknowledged he could be "horribly mistaken about how it all works". As the trial judge said, that is understandable, and there is no suggestion in the decision that he held it against the appellant. To the contrary, the trial judge held that he had no doubt the appellant would bring the child to local Indigenous cultural events. None of this is indicative of a reasonable apprehension of bias against the appellant.
- [60] A third example of bias alleged by the appellant has to do with a number of procedural issues, including the length of time it took the respondent to cross-examine him, and adjournments granted to the respondent which resulted in him being left under cross-examination for 59 days. He submits that this put him at a disadvantage because he could not discuss the case with his counsel while he was under cross-examination, and he could no longer afford to retain counsel and was unable to call the remainder of his witnesses. He also submits that his counsel was continuously cut-off in cross-examination of the respondent, and that the trial judge pressed them to hasten their case. In the same vein, he refers to the trial judge leading the respondent's direct examination of herself as a witness.
- [61] In order to consider these allegations of bias, it is necessary to provide some context about the trial proceedings. The appellant was represented by counsel at trial; the respondent represented herself. The first day of trial was August 8, 2022. Proceedings began after the morning recess with an opening statement by counsel for the appellant, followed by an opening statement by the respondent. The respondent was the first witness at trial. The trial judge asked her questions in direct evidence, which took until the afternoon recess on August 8, 2022. Her cross-examination began that afternoon, and continued until after the afternoon recess on the second day of trial, August 9, 2022. Several intervening witnesses for the respondent and the appellant's first witness, his new partner, were examined the remainder of that day and on day three, August 16, 2022. The appellant began his direct evidence on the morning of day four, September 26, 2022. It was relatively brief, and his cross-examination began before the lunch recess and continued through the remainder of that day. The respondent attended trial on September 26, 2022, remotely from Kelowna, where she had been advised by her physician to remain until she gave birth.

- [62] September 27, 2022, the fifth day of the trial, was brief. The trial judge began by noting that the trial had not concluded the previous day as originally anticipated. He noted that the respondent was in Kelowna, where she was scheduled to remain until she gave birth in mid-October. The trial judge made an interim order dealing with the child's schooling arrangements, and adjourned the trial to October 27, 2022, when it was anticipated the respondent would be back from Kelowna. The trial did not resume as anticipated on October 27, 2022, and on the next day, the sixth day of trial, October 31, 2022, the respondent continued to be in hospital in Kelowna where she was scheduled to go into surgery that day for complications related to childbirth. She applied for and received an adjournment. The trial was scheduled to continue on November 23, 2022. It did continue that day, the seventh day of trial, with the conclusion of the appellant's cross-examination, which lasted approximately half a day. At the conclusion of his cross-examination, the appellant, through counsel, chose not to call any further witnesses in order to complete the trial. The trial concluded on November 28, 2022, the eighth day, with final submissions.
- [63] A trial judge has an ethical obligation to ensure that self-represented litigants are provided with fair access and equal treatment by the court. A judge's ethical obligations to self-represented persons are described in the Statement of Principles on Self-represented Litigants and Accused Persons, adopted by the Canadian Judicial Council in 2006. That document includes the statement that "Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation." One of the principles included under that statement is:
4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
 - (a) explain the process;
 - (b) inquire whether both parties understand the process and the procedure;
 - (c) make referrals to agencies able to assist the litigant in the preparation of the case;
 - (d) provide information about the law and evidentiary requirements;
 - (e) modify the traditional order of taking evidence; and
 - (f) question witnesses.
- [64] The appellant raises a concern about the trial judge questioning the respondent. There is nothing improper in a trial judge questioning a self-represented litigant to elicit their direct evidence, provided that in doing so they do not become the self-represented person's advocate or otherwise conduct themselves in a manner that gives rise to a reasonable apprehension of bias. I have reviewed the respondent's direct examination. Counsel for the

appellant did not object to the trial judge's questioning of the respondent. Nor was there any basis for him to do so. The questioning was fair, open-ended, and designed to ensure that the respondent's evidence on the issues in dispute was put before the court.

- [65] The appellant raises concerns about the trial judge cutting his counsel off during his cross-examination, and urging them to hasten their case. There is nothing improper about a trial judge attempting to keep proceedings moving along in an efficient manner. As stated by the Saskatchewan Court of Appeal in *Fraser v. Ksenych*, 2022 SKCA 93 at para. 40:
- [40] A bare assertion that a self-represented litigant was prejudiced, simply because a trial judge was mindful of the schedule, carries no weight. A trial judge has an obligation to manage a trial, eliminate wasted time, and keep the proceedings moving along at a proper pace. Trial time is a scarce and valuable resource .
- [66] The appellant refers to a point in his counsel's cross-examination of the respondent where the trial judge asked him to "get to the point sooner" and to "cut to the chase". I have reviewed those remarks. They were made in the context of an extended dialogue between the trial judge and the appellant's counsel about the relevance of a line of questioning about 62 pages of text messages between the parties. Counsel was able to explain the relevance of the line of questioning, and after a break to allow the respondent to read the text messages, he continued his cross-examination.
- [67] The appellant also refers to the trial judge asking his counsel how long he thought he would be in his case. This question was asked after the respondent had closed her case and just before the appellant had opened his. The trial judge asked for a time estimate, noting that they were on day three of the trial. Counsel indicated that they were originally planning to call four witnesses, but were not going to call one of them in the interests of time. He provided his estimate of how long his evidence in direct was likely to take.
- [68] There is nothing untoward in the way the trial judge exercised his case management powers. He was conscious of the parties' original time estimate, and the fact the trial was going longer than scheduled. He did not cut off the appellant's counsel's cross-examination, nor curtail his ability to present the appellant's case.
- [69] The appellant refers to the length of his cross-examination, and the amount of time he was under cross-examination due to the adjournment of the trial. The respondent's cross-examination of the respondent last approximately a day and a half in total. It was not excessive. The trial judge's comment to the respondent as she neared the end of her cross-examination that the line of questioning she was exploring was not helpful, that is to say, not relevant to the dispute, was appropriate. Nor was there anything untoward in the trial judge granting adjournments to the respondent while she was in Kelowna to prepare to undergo a caesarian section, and to recover. It would have been unfair for the trial judge to deny an adjournment in those circumstances. I appreciate that it is never easy for a witness, especially a party, to remain under cross-examination for an extended period of time, but there was no way to avoid that outcome given how this trial progressed.

[70] There is no merit to the appellant's position that the trial judge was biased against him. The trial judge was fair and even-handed in managing this family trial with one represented and one self-represented party. A reasonable apprehension of bias has not been established.

Conclusion

[71] For these reasons, the appellant's appeal is dismissed.

"L.M. Lyster J."

LYSTER J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/15/2023BCSC1503.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/l-l-v-a-i-2023>

Prepared on 29 October 2026 · Esheria