
CANADA / JUDGMENT

L.S. v. G.S.

2016 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 346 L.S. v. G.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

L.S. v. G.S.,

2016 BCCA 346

Date: 20160809

Docket: CA42807, CA43102, CA43315

Docket: CA42807

Between:

L.S.

Appellant/

Respondent on Cross Appeal

(Claimant)

And

G.S.

Respondent/

Appellant on Cross Appeal

(Respondent)

Docket: CA43102

Between:

L.S.

Respondent

(Claimant)

And

G.S.

Appellant

(Respondent)

Docket: CA43315

Between:

L.S.

Respondent

(Claimant)

And

G.S.

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

On appeal from: Orders of the Supreme Court of British Columbia, dated April 20, 2015 (L.S. v. G.S., 2015 BCSC 1041, Vancouver Docket E103335); August 20, 2015 (L.S. v. G.S., Vancouver Docket E103335); and November 17, 2015 (L.S. v. G.S., Vancouver Docket E103335).

The Appellant G.S. in CA43102 & CA43315 and the Respondent in CA42807:

In Person

Counsel for the Appellant L.S. in CA42807 and for the Respondent in CA43102 & CA43315:

B.J. Ingram

N. Sikka (A/S)

Place and Date of Hearing:

Vancouver, British Columbia

April 6, 2016

Place and Date of Judgment:

Vancouver, British Columbia

August 9, 2016

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

Summary:

This judgment addresses three appeals: (1) L.S. appeals from an order varying the terms upon which she is entitled to exercise custodial rights (CA42807). The chambers judge found that a deterioration of her mental health constituted a material change in circumstances and varied an earlier order by imposing upon L.S. stricter conditions, including a daily witnessed medication requirement. He also ordered the preparation of a report under s. 211 of the FLA to assist him in determining the best interests of the children having regard to L.S.'s chronic mental health challenges. Held: appeal dismissed. It was open to the chambers judge to find that the change in L.S.'s mental health constituted a material change in circumstances. Having made this determination, it was open to the chambers judge to impose an interim order pending receipt of the report under s. 211 of the FLA; (2) G.S. appeals from the order of a chambers judge permitting L.S. to apply to vary a travel restriction term relating to her without demonstrating a material change in circumstances (CA43102). The chambers judge held that a "liberty to apply" term included in the previous order and effective one year after the date of that order permitted L.S. to apply to vary the travel restriction term as of right. Held: appeal dismissed. The chambers judge made no error in concluding that L.S. had liberty to apply to vary the travel restriction term after one year without demonstrating a material change in circumstances; (3) G.S. also appeals from the dismissal of his application for an order that L.S. be found in contempt of court as a result of her non-payment of a special costs order (CA43315). In conjunction with the appeal, he sought to adduce new evidence relating to L.S.'s capacity to pay the costs order. Held: application to adduce new evidence dismissed; appeal dismissed. The proposed evidence did not meet the test for the admission of new evidence on appeal. The chambers judge made no error in fact or in law in dismissing the contempt of court application.

Reasons for Judgment of the Honourable Fitch:

I. Introduction

- [1] These reasons address three appeals arising out of the extensive and prolonged litigation the parties have pursued in this high conflict family law matter.
- [2] In addressing each appeal, I will set out only so much of the factual background as is required to dispose of that appeal. The history of the litigation in this matter is summarized by MacKenzie J.A. in the reasons for judgment of this Court indexed as 2014 BCCA 334.
- [3] By way of brief overview, the parties married in Israel in 1995. Their eldest child was born in 1997. The parties moved to Vancouver in 2002. They became Canadian citizens in 2005. L.S. gave birth to twins in August 2005. Any references in these reasons to the "children" relates only to the twins. The parties separated shortly after the birth of the twins. With brief exceptions, the parties have shared equal responsibility for parenting the twins. The parties were divorced in 2011. Since at least 2010, they have been in conflict over a variety of issues relating to the maintenance of a workable shared parenting regime.

II. Appeal No. CA42807: The Daily Witnessed Medication Term

- [4] This is an appeal by L.S. from a custody order made by Schultes J. on April 20, 2015 that varied a custody order he made on December 23, 2013. The reasons for judgment at issue are indexed as 2015 BCSC 1041. An appeal by G.S. from the same order was dismissed as abandoned.
- [5] While the order made on April 20, 2015 addressed a number of issues, the focus of this appeal pertains to a term of the order imposing on L.S. an obligation to have her daily ingestion of medication prescribed for a bipolar disorder witnessed by a pharmacist (the "daily witnessed medication term"). The order under appeal is more onerous than the one previously in place. L.S. argues, among other things, that Schultes J. erred in finding that a material change in circumstances had been demonstrated justifying variation of the previous order.
- [6] By way of background, L.S. was diagnosed with severe postpartum depression after the birth of the twins. She was subsequently diagnosed with bipolar disorder. Bipolar disorder is a chronic but treatable mental illness. It is episodic in nature. When she is well, L.S. capably manages herself and her parenting responsibilities. When she is unwell, L.S. tends to question treatment decisions made by her doctor and becomes irritable, frustrated with the side effects of her medication, and medically non-compliant. When L.S. goes off her medication, it is more likely she will experience a manic episode. She benefits from close monitoring as early warning signs such as sleep disturbance, irritability, and behavioural disinhibition emerge as reliable predictors that a manic episode may be on the horizon.

- [7] L.S. was hospitalized while she was in an acute manic state in August 2005 and June 2006. Despite these hospitalizations, L.S. went off her medication in August 2006 and failed to comply with her psychiatrist's recommendation that she have regular blood tests taken to monitor the drug serum level in her system. L.S. experienced another less acute episode in November 2006. She appears to have been relatively stability between 2007 and the fall of 2013.
- [8] On October 18, 2013, L.S. was again admitted to hospital in an acute manic state. It is alleged that L.S. had threatened a neighbour and was expressing suicidal ideation at the time of her admission. She was in a psychotic state and, as with previous hospital admissions, needed to be restrained. Although her delusions were not directed at the twins, when L.S. was apprehended she appeared to be uncertain about their whereabouts. She reportedly told attending police officers that she "thought [the twins] might be with their father". Hospital records reflect that L.S. admitted she had not been taking her medication prior to these events.
- [9] The shared parenting regime in place at the time of the October 2013 admission was subsequently suspended by order of N. Smith J. The order included a provision that L.S.'s parenting time would resume on a more limited and supervised basis when she became well enough to be released from hospital. L.S. was discharged from the hospital on November 8, 2013. Her treating psychiatrist expressed confidence that L.S. was stable and that she would return to her previous high level of functioning in the community.
- [10] Shortly thereafter, L.S. came under the care of Dr. Birgitta Donahue, a psychiatrist, and Kathleen Pennykid, a social worker, both of whom work with the Raven Song Mental Health Team under the auspices of Vancouver Coastal Health. L.S.'s condition stabilized and random blood tests confirmed that she was taking her medication.
- [11] In December 2013, L.S. applied to vary the order of N. Smith J. that suspended her equal parenting time with the twins. In reasons for judgment delivered on December 23, 2013 and indexed as 2013 BCSC 2465, Schultes J. said this:
- [31] Obviously, the best interests of the children are my guiding consideration here. In that regard it is important to say something about mental illness in the context of family cases. It is not something that is, as counsel colourfully put it, a scarlet letter on the person. It is a thing that many, probably millions of Canadians struggle with. As G.S. put it in the quote that he provided, it is not whether you have a mental illness; it is what you do about it.
- [32] L.S. is not to be considered inherently a less capable or suitable parent merely because she has this disorder. However, when she suffers from an acute episode, the Court has to look carefully at what happened and why, to ensure that the children receive only the benefits of her parenting when she is well, and none of the potential detriments of her behaviour when she is ill.

- [33] In this case, no one has suggested that when she is herself, she is anything other than a fine parent. Indeed, even when she was in recovery it appears these hospital officials, who do not have to say supportive things, took it upon themselves to note, in the case of the social worker, that she interacted appropriately with her children, and in the case of the doctor, that they look forward to her having a full recovery.
- [34] I take G.S.'s point very seriously that any relapse could fall in a situation when she has the care of the children. But I also have to look at what she has committed to do in the future, and judge whether that is sufficient to address the Court's concerns.
- [35] I am satisfied that her recovery to date does constitute a material change in circumstances which, if known at the time of the suspensions, would have resulted in a different order. In fact there might not have needed to be any order suspending parenting time, or there would have been a less restrictive order than what resulted.
- [36] I am going to put conditions in place to govern L.S.'s parenting time, and there are going to be some additional conditions attached to it that relate to her own conduct. I want to make it clear that the Court's jurisdiction to do so arises solely in the context of her exercising this parenting time. She is not under the Court's jurisdiction for any other purpose. What I am ordering her to do is as a precondition to exercising her parenting time and not some freestanding effort to govern her conduct in the community.
- [Emphasis added.]
- [12] Schultes J. granted the application and varied the earlier order so as to permit L.S. to exercise unsupervised parenting time with the twins on conditions that: she maintain herself in a condition such that her mental illness would be unlikely to emerge in a way that would cause harm to the children; she continue to be under the care of Dr. Donahue and Ms. Pennykid and attend Raven Song as directed by them but, in any case, not less than once every two weeks; and, she continue to take all medication prescribed by her psychiatrist and undergo blood tests as required by her psychiatrist to ensure continuing compliance with the treatment regime.
- [13] G.S. appealed the order of Schultes J. to this Court, arguing, among other things, that he erred in concluding that L.S.'s recovery constituted a material change in circumstances. In reasons for judgment indexed as 2014 BCCA 334, MacKenzie J.A., for the Court, dismissed G.S.'s argument commenting that:
- [78] I see no merit to G.S.'s contention that L.S.'s recovery from her manic episode was not a material change in circumstances. Mr. Justice Schultes reasonably considered that an improvement in her condition was not sufficiently definite or predictable to qualify as being within the contemplation of N. Smith J. when he earlier varied her equal access to supervised access. Thus, her recovery did not preclude L.S.'s variation application.

- [14] In April 2014, Dr. Donahue, at L.S.'s urging, lowered the dose of medication L.S. had been taking to manage her bipolar disorder. She initially appeared to do well on the lower dose.
- [15] By November 2014, however, it was becoming apparent that L.S.'s condition was deteriorating. She was becoming irritable, dismissive and depressed below her baseline. Dr. Donahue decided to increase the dose and L.S. said she would comply.
- [16] On November 27, 2014, G.S. spoke with L.S. on the phone. The twins were in the care of L.S. at the time of the call. L.S. told G.S. she was not feeling well, that Dr. Donahue had identified a risk of a new acute mental health episode, and that she had increased her medication dose. She told G.S. her parents were in transit from Israel to Vancouver to assist her and that the children were scared.
- [17] G.S. contacted the police after this call. With the assistance of the police and with L.S.'s cooperation, the twins came to stay with him.
- [18] On December 11, 2014, Wong J. ordered that the shared parenting arrangement continue with the exception that L.S. was required to have at least one of her parents present during her parenting time with the twins.
- [19] Based on the decline in L.S.'s mental health in late 2014, G.S. applied before Schultes J. to vary the custody order to require the twins to be primarily in his care. The application commenced on December 5, 2014 but did not conclude until mid-March 2015.
- [20] In an affidavit sworn December 9, 2014 in response to G.S.'s application to vary, L.S. said that the greatest source of stress in her day-to-day life comes from the ongoing litigation over custody issues. She asserted that G.S. was attempting to dramatically alter the custody arrangements on the strength of the brief conversation she had with him in November 2014 when she was feeling "a little off".
- [21] L.S.'s mental health continued to deteriorate in December 2014. Contrary to the advice of Dr. Donahue, she went off her medication for three or four days on December 18, 2014.
- [22] On December 22, 2014, Dr. Donahue saw L.S. and thought she was moving toward a further manic episode. Dr. Donahue, who did not then trust L.S.'s judgment, told L.S. she could either go to the hospital or agree to have the intake of her prescription medication "daily witnessed" at a pharmacy. Dr. Donahue also told L.S. that if she did not comply with the daily witnessed medication program, or if there were further signs of deterioration, Dr. Donahue would certify her under the Mental Health Act, R.S.B.C. 1996, c. 288.
- [23] Dr. Donahue began prescribing L.S.'s medication in liquid form to ensure it was taken. L.S.'s condition improved in January 2015 once the daily witnessed medication regime was implemented.

[24] Dr. Donahue swore an affidavit for use on G.S.'s variation application. The affidavit was sworn December 5, 2014 before L.S. went off her medication. Schultes J. gave leave to G.S. to cross-examine Dr. Donahue on the application. Dr. Donahue's evidence on the application may be summarized as follows:

- it was inevitable that L.S. would end up being hospitalized in 2013 because she was not taking medication and not under psychiatric care;
- L.S. started to display signs of mood disturbance with increased irritability toward the end of November 2014;
- the decline in L.S.'s mental health was likely attributable to distress arising from ongoing litigation between the parties;
- L.S. displayed sound judgment by disclosing to G.S. that she was becoming unwell when it may not have been in her best interests to do so;
- L.S. agreed in November 2014 to a change in her medication and to Acute Home-Based Treatment (AHBT) to monitor her daily;
- while under Dr. Donahue's supervision, L.S. was compliant with her medication regime until December 18, 2014;
- on December 22, 2014 L.S. agreed to a daily witnessed medication regime;
- L.S.'s pattern is that she responds favourably to treatment within a short period of time;
- there are identifiable warning signs when L.S. begins to experience a deterioration in her mental health;
- at no time did Dr. Donahue believe the children were at risk when they were being parented by L.S. Even when L.S. is in a manic state, her delusions have never involved the twins. In Dr. Donahue's opinion, there is only a negligible risk that L.S. would be in a position or mental state where she could cause harm to the twins; and
- Dr. Donahue said that the treatment team could "do better" by developing a more comprehensive safety plan.

[25] In reasons for judgment delivered on April 20, 2015 and indexed as 2015 BCSC 1041, Schultes J. found that the deterioration in L.S.'s mental health in November 2014 constituted a material change in circumstances:

[64] In my view, L.S.'s episode in November of last year does represent a material change of circumstances from those that existed when I made the last order, one that was not foreseen at the time and one that would have resulted in a different order if it had been present. My order was premised on an understanding that the proposed treatment and supervision regime would maintain L.S., not just in a stable mental state, in the sense of not having further manic episodes, but also in an overall more positive mental state in relation to her

children and her day-to-day functioning. The strong implication was that the previous risk factors, especially the lack of psychiatric care and medication, had been addressed decisively, and the Court needed to have no further concerns beyond linking her with ongoing psychiatric care, more out of an abundance of caution than anything else.

- [65] The current evidence reveals that L.S. suffers from ongoing depression and needs to be reminded from time to time that taking medication is essential to the management of her bipolar illness in the best interests of her children, and likely will need to be for the foreseeable future. Had I known of her greater vulnerability to relapse, as revealed in the circumstances of last November and in Dr. Donahue's evidence, I would certainly have made different orders. I think I would have structured her access more rigorously, perhaps staging it in to allow her to build a track record of compliance at each stage, and put greater safeguards in place to prevent the development of any mental state that is contrary to the children's best interests.
- [26] The chambers judge varied the order to require L.S., as a condition of the exercise by her of custodial rights, to undergo blood tests to ensure compliance with her treatment regime not less than once per month. L.S. was also directed, in consultation with Dr. Donahue, to create a written safety plan responsive to any change in her mental health that had the potential to affect the physical or emotional well-being of the twins. Most importantly for the purposes of this appeal, L.S. was ordered to enter into a program with a pharmacy to have the taking of her medication witnessed on a daily basis and any non-compliance communicated to her psychiatrist by the pharmacy on an urgent basis.
- [27] Although the chambers judge understood that he was being asked to make a "further final order" (at para. 57), he invited submissions on whether a report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25 should be ordered to assist him in determining the best interests of the children (at para. 58). He returned to this issue near the end of his reasons:
- [80] What I do not know, because the evidence has not been focused on it, is how L.S.'s chronic mental illness, including her depressed state and her impaired functioning in situations short of an actual manic episode, as described by Dr. Donahue, may affect the children's emotional and psychological well-being on a day-to-day basis and in the long term. I take seriously G.S.'s concerns about further intrusions into his children's lives, and I can infer already that acute or hypomanic episodes would be troubling to them to some degree, but I do not see how a proper determination of the best interests of the children can be arrived at without an objective inquiry into how her illness affects her ability to parent them in an overall sense.
- [81] Accordingly, pursuant to s. 211(1)(c) of the Family Law Act, I am ordering a report concerning L.S.'s ability, due to her mental illness, to satisfy the needs of her children.

[Emphasis added.]

- [28] L.S. applied before Schultes J. for clarification of various aspects of the April 20, 2015 judgment. Among other things, she sought clarification on whether it was contemplated that the daily witnessed medication term of the order be a mandatory term or a term to be invoked only as necessary and at the discretion of Dr. Donahue. In supplementary reasons for judgment delivered July 20, 2015, Schultes J. said this:
- [40] On the issue of the witnessed medication program, I have to say that I did intend this to be something that would happen independently of Dr. Donahue's discretion. I considered it to be a way of addressing an issue that Dr. Donahue herself had to manage in the incident that led to the current order -- Ms. S.'s occasional resistance to taking medication. My intention is that we will not have another situation where three or four days go by without taking the medication and then Dr. Donahue has to manage Ms. S. in that state.
- [41] If this requirement ever becomes too onerous on Ms. S., in a way that I did not foresee at the time I made the order, then it would obviously be a material change in circumstances and I could entertain an application to vary it.
- [29] The s. 211 report ordered to be prepared by the chambers judge is not before us on this appeal and we were not supplied with information about whether it has been completed.
- [30] L.S. submits that the chambers judge erred by : (1) misapprehending the evidence of Dr. Donahue; (2) determining that the threshold requirement of a material change in circumstances had been met so as to enable variation of the prior custody order; and (3) imposing the daily witnessed medication term. In the alternative, L.S. submits that the chambers judge erred by failing to build a review date into the daily witnessed medication term. Without such a term, L.S. submits that the order may oblige her to attend at a pharmacy every day for the next eight (8) years to have her ingestion of medication witnessed. L.S.'s alternative argument appears to proceed on the footing that the age and developing maturity of the children could never constitute a material change in circumstances.
- [31] G.S. submits that there was ample evidence upon which Schultes J. could come to a conclusion that the deterioration of L.S.'s health in the fall of 2014 constituted a material change in circumstances. He notes that this Court previously held that it was open to the judge to regard an improvement in L.S.'s health as a material change in circumstances. By parity of reasoning, he argues that an unanticipated deterioration in her health was properly regarded as a material change in circumstances. He further submits there was no misapprehension of the evidence and that the judge was not obliged to include a review provision in the order.
- [32] On the hearing of the appeal, the Court sought submissions on whether the chambers judge intended to make a final order without a review provision, or an interim order pending receipt of the s. 211 report.

- [33] G.S. says that the order must be regarded as a final order. He submits that once a final order has been made there is no jurisdiction to make an interim order under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) even in circumstances where a material change in circumstances has been demonstrated. In these circumstances, he submits that the only order that can properly be made is a further final order. In support of this submission he relies on *Vargas v. Berryman*, 2009 BCCA 588.
- [34] I turn next to consider the merits of this appeal.
- [35] Clearly, decisions about how to allocate custodial rights and condition the exercise of parenting responsibilities are discretionary and entitled to deference. Appellate courts should only interfere where there is a material error, a serious misapprehension of the evidence or an error in law: *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 11-16.
- [36] In my view, the chambers judge did not misapprehend the evidence of Dr. Donahue. He set out her evidence fully and fairly, including her opinion regarding the negligible risk L.S. poses to her children even when she is unwell. L.S. has not identified a single occasion in which the chambers judge misapprehended the evidence given by Dr. Donahue. While the chambers judge may have adopted a more cautious approach than was being advocated by Dr. Donahue, and while he certainly imposed terms going beyond those contemplated by Dr. Donahue, it was within his discretion to do so. In my view, the essence of L.S.'s complaint is not that the chambers judge misapprehended Dr. Donahue's evidence, but that he imposed what she considers to be an unnecessarily restrictive term. I cannot give effect to this ground of appeal.
- [37] I am also of the view that it was open to the chambers judge to conclude that the deterioration in L.S.'s mental health in November and December of 2014 was a material change in circumstances warranting a variation of the 2013 order. Indeed, the chambers judge was in the best position to determine this issue. His decision on this point is entirely consistent with this Court's decision in 2014. Further, I cannot give effect to L.S.'s submission that the chambers judge erred in finding the deterioration of her mental health to be a change in the condition, means, needs or other circumstances of the children of the marriage since the making of the last order as required by s. 17(5) of the Divorce Act. The children are ten (10) years of age. They depend on the parties to ensure that their physical and emotional needs are met. The unforeseen susceptibility of L.S. to a relapse of the type that occurred in 2013 in the absence of stricter monitoring conditions constitutes a material change in the needs or other circumstances of the children. In my view, it is a circumstance that could alter the ability of L.S. to meet the needs of her children, even if the impairment in her ability to do so is of short duration: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at paras. 10-13, 49.

- [38] Further, I see no reviewable error in the decision of the chambers judge to impose the daily witnessed medication term. In doing so, the chambers judge was extending and formalizing a monitoring regime Dr. Donahue had implemented a few months earlier. The decision to impose this term does not constitute a material error nor was it an unreasonable exercise of discretion.
- [39] Had the chambers judge made a final order compelling L.S. to attend at a pharmacy to have the ingestion of her medication witnessed on a daily basis without a right of review (except on the demonstration of a material change in circumstances), it is at least arguable that such an order would raise issues susceptible to appellate review. I do not, however, think this is what the chambers judge did.
- [40] In my view, the chambers judge found a material change in circumstances and made an interim order he considered to be in the best interests of the children pending receipt of the report ordered under s. 211. He gave the parties leave to make further application upon completion of the report. In my view, the chambers judge was putting a safety plan in place pending the receipt of additional information he considered necessary to determine the best interests of the twins. In my view, either party is now at liberty to bring the matter back before the Supreme Court for further consideration based on the s. 211 report without the need to demonstrate a material change in circumstances.
- [41] In coming to this conclusion, I have not lost sight of the chambers judge's observation in his supplementary reasons for judgment that if the daily witnessed medication term became onerous in a way unforeseen at the time the order was made, an application could be made to vary the order on grounds that a material change in circumstances had occurred. When the chambers judge made these remarks he would have known of the substantial delays that have been experienced in British Columbia in the preparation of s. 211 reports. While the matter is not free from doubt, it is my view that the chambers judge was simply acknowledging that it was still open to L.S. to make an application under s. 17(5) of the Divorce Act to vary the daily witnessed medication term if grounds to do so arose before the s. 211 report had been completed. In my view, the chambers judge would not have made a final order subject to variation only upon the demonstration of a material change in circumstances in the face of his finding that a s. 211 report was required to determine the best interests of the children.
- [42] Further, I cannot accept the position of G.S. that the chambers judge lacked jurisdiction to proceed in the way he did or that Vargas stands for the proposition that an interim order can never be made under the Divorce Act after a final order is issued.
- [43] In Vargas, a chambers judge varied a term of a final order relating to custody and guardianship. The variation was ordered in anticipation of a material change in circumstances that never arose. Against this background, the Court held that the chambers judge was without jurisdiction to make the variation order:

- [15] There is no provision in the Divorce Act for an interim order to vary a custody order. The only authority to make an interim custody order is that contained in s. 16(2). It permits a court to make an interim order only "where an application is made under subsection (1)," that is, an original application for custody or access. In this regard, we agree with the explanation given by Meiklem, J. in *Greffard v. Greffard*, [1991] B.C.J. No. 310 (S.C.):
- [7] Subsection 17(5) requires a court to satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child occurring since the making of the original order or last variation before reconsidering the best interests of the child by reference to that change. Logically, therefore if the court is satisfied that there has been a change in circumstances of the child and a variation is necessary in the best interests of the child, the order should be made; if the evidence falls short, it should not. The test set out in ss 17(5) does not contemplate an interim or temporary order on *prima facie* evidence pending determination. It is well accepted that the legislative purpose of these Divorce Act provisions is to ensure a stable environment for children once custody orders have been made. The absence of provision for interim consideration of variation applications is consistent with that purpose. It is inconsistent with that purpose that anything short of meeting the onus of satisfying the ss 17(5) test should result in an interim order pending the determination of the question.
- [8] This is not to say that there will not be cases of urgency where allegations of serious harm are made and a *prima facie* case falling short of satisfactory proof will invoke the *parens patriae* jurisdiction of the court to order what is in effect an interim variation. This case does not present such an urgency.
- [Emphasis added.]
- [44] In my view, *Vargas* stands for the narrow proposition that because a court must find a material change in circumstances before varying an order, it cannot vary an order pending a determination about whether there has been a material change. *Vargas* does not say that when a material change in circumstances has been shown, a court cannot make a time-limited variation order pending the receipt of further evidence relevant to how a final order should be framed in order to meet the long-term needs of the children.
- [45] The order made in this case does not run afoul of *Vargas*. The chambers judge found that the deterioration of L.S.'s mental health constituted a material change in the needs or other circumstances of the children since the making of the last order. Having concluded, properly in my view, that the threshold test for varying the custody order had been met, the chambers judge had the power to include in a variation order any provision that could have been included in the order under review: Divorce Act, s. 17(3).

- [46] Section 16 of the Divorce Act governs the making of custody orders. Pursuant to s. 16(6), the court may make an order "for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just." The chambers judge was, as a result, within his jurisdiction to make a time-limited or interim order until the s. 211 report was prepared. In my view, that is what he did.
- [47] For the foregoing reasons, I would dismiss this appeal. The parties have leave to apply for a final order once the s. 211 report is filed. The moving party need not demonstrate a material change in circumstances.

III. Appeal CA43102: The Status of L.S.'s Passports

- [48] This is an appeal by G.S. from an order made by Myers J. on August 20, 2015 varying an order made by Ross J. on April 4, 2014 relating to the terms on which L.S. may obtain possession of her passports for travel purposes.
- [49] Paragraph 5 of the April 4, 2014 order provides as follows:
- These conditions are to be in place for one (1) year, following which either party will be at liberty to apply for a further change in conditions.
- [50] The order made by Ross J. varied a pre-existing order requiring L.S.'s passports to be kept at the office of her lawyer and not released to anyone without either a court order or the written consent of both parties. One of the issues before Ross J. was whether a material change in circumstances had been demonstrated justifying a variation of the previous order. As Ross J. varied the previous order, the only inference to be drawn is that she found that a material change in circumstances had been established. In any event, no appeal was taken by either party from the order made by Ross J.
- [51] On August 20, 2015, L.S. applied before Myers J. for a variation of the order made by Ross J. Specifically, L.S. sought to regain her passports and be relieved of the obligation to take defined steps and obtain court orders before travelling outside of the jurisdiction.
- [52] In response to the application, G.S. argued that the order of Ross J. could only be varied if L.S. demonstrated a material change in circumstances since the making of that order. G.S.'s argument was rejected by Myers J. for the following reasons:
- [5] In my view, the liberty to apply after one year is not an application to vary. It is what it says, a right to apply for a reconsideration of the passport restrictions after one year. I also do not agree that the Order contemplates only a relaxation of the provisions such as a change in the notice provisions but not a removal of the restriction all together [sic].

- [6] The Order contemplates a reconsideration of the provisions or its terms for reasons that might amount to a material change of circumstances or for circumstances that do not rise to that threshold, including either a relaxation of the restrictions or their removal or for that matter a tightening of the restrictions depending on how the regime has operated for the year following the Order.
- [53] Myers J. dismissed L.S.'s application to regain her passports and be relieved of the obligation to obtain court orders before travelling outside the jurisdiction, but proceeded to make relatively minor modifications to the order. The order of Myers J. includes a term providing that the conditions are to be in place for ten (10) months, following which either party will be at liberty to apply for a further change in conditions.
- [54] On appeal, G.S. argues that the chambers judge erred in concluding that the "liberty to apply" term included in the order of Ross J. exempted L.S. from the requirement of demonstrating a material change in circumstances as contemplated by s. 17(5) of the Divorce Act.
- [55] I am unable to accept G.S.'s argument on this point. Ross J. gave the parties liberty to apply for a further change in conditions one (1) year after the making of the order. In my view, as explained in the previous appeal, she was authorized to make this order under ss. 17(3) and 16(6) of the Divorce Act. Further, the phrase "liberty to apply" when included in an order does not carry with it the notion that changed circumstances must be shown. As this Court noted in *Krahn v. Krahn*, 2004 BCCA 138 at para. 4, the phrase carries with it the concept that all matters are at large when the event triggering liberty to apply comes about.
- [56] On the hearing of the appeal, an issue arose about whether the order of Ross J. expired on April 4, 2015, one (1) year after it came into effect. As noted earlier, paragraph 5 of that order provides that the conditions are to be in place for one (1) year, following which either party will be at liberty to apply for a further change in conditions. Neither party sought to make anything of this issue on appeal. Although perhaps inelegantly worded, it is my view that paragraph 5 does not bring the order to an end one year after it came into force. Rather, it is intended to provide the parties with what amounts to a review mechanism after one (1) year. Accordingly, it is my view that the order of Ross J. was still in place when the application came before Myers J. on August 20, 2015.
- [57] In the result, the parties had leave to apply for, and Myers J. had jurisdiction to grant, a variation of the order made by Ross J. By the combined operation of ss. 17(3) and 16(6) of the Divorce Act, Myers J. also had the authority to make an order including a "liberty to apply" term designed to come into effect ten (10) months after the making of the order. I would reject the submission of G.S. to the contrary.
- [58] For the foregoing reasons, I would dismiss this appeal.

IV. Appeal CA43315: The Contempt Application Arising from The Non-Payment by L.S. of a Special Costs Award

- [59] This is an appeal by G.S. from the order of Butler J. made on November 17, 2015 dismissing his application to find L.S. in contempt of court for not paying a special costs order. The appeal was dismissed at the time of the hearing with reasons to follow. These are my reasons for dismissing this appeal.
- [60] On March 5, 2010, Cullen J. (as he then was) granted a consent order which included declarations that the children are habitually resident in British Columbia for the purposes of the Family Relations Act, R.S.B.C. 1996, c. 128 and the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983) [Hague Convention]. He also ordered that neither party was to initiate legal proceedings outside British Columbia relating to the children.
- [61] On June 17, 2011, after a 10-day trial, the trial judge made an order for divorce. Then, on August 5, 2011, the trial judge made a final order permitting L.S. to move with the children to Israel. The trial judge also made an order for joint custody and joint guardianship of the children and designated L.S.'s residence as the children's primary residence. On August 23, 2011 L.S. and the children left Canada for Israel.
- [62] G.S. initiated an appeal from the orders made by the trial judge. On April 5, 2012 (in reasons for judgment indexed as 2012 BCCA 154), this Court allowed his appeal and ordered that the children be returned to Vancouver on June 30, 2012 or so soon thereafter as flight arrangements could be made. The order for joint custody and joint guardianship was affirmed but the primary residence of the children was ordered to be with G.S. in Vancouver.
- [63] L.S. applied for a stay of this Court's order pending an application for leave to appeal to the Supreme Court of Canada. In reasons for judgment dismissing the stay application indexed as 2012 BCCA 420, Low J.A. commented that L.S. was obliged to comply with the order of this Court or risk being found in contempt of court. L.S.'s application for leave to appeal to the Supreme Court of Canada was subsequently dismissed.
- [64] Following this Court's judgment, G.S. commenced proceedings in the Israeli Family Court in Jerusalem to enforce the order of this Court. L.S. applied for summary dismissal of those proceedings. Although L.S. was unsuccessful in this regard, she managed to obtain interim restraining orders prohibiting the children from leaving Israel. Subsequently, the Israeli Family Court ordered the immediate return of the children to Canada, holding that Canadian courts had exclusive jurisdiction on custody-related issues. L.S. appealed that order to the Jerusalem District Appeal Court and obtained a stay pending the determination of the appeal. When her appeal was dismissed, L.S. applied for and obtained another stay pending a further appeal to the Supreme Court of Israel. G.S. returned to Canada with the children on November 7, 2012. L.S. returned to Canada about a week later, but not before asking the Ministry of Justice in Israel to commence proceedings under the Hague Convention on grounds that G.S. had abducted the children. That request was rejected. L.S.'s appeal to the Supreme Court of Israel was dismissed on July 28, 2013.

- [65] G.S. subsequently applied for an order that L.S. be found in contempt of court for failing to return the children to Vancouver as directed by this Court. In reasons for judgment given September 19, 2013 and indexed as 2013 BCSC 1725, N. Smith J. found L.S. to be in contempt of court from June 30, 2012, when this Court ordered that the children were to be returned to Vancouver, to November 7, 2012 when the children were in fact returned to Vancouver. In addition, L.S. was found to be in contempt of court for pursuing actions before the Israeli courts alleging that Israel had become the habitual residence of the children, and to have the Israeli courts take jurisdiction in defiance of the consent order made in British Columbia on March 5, 2010. Smith J. concluded that no purpose would be served by imposing a period of imprisonment or fine upon L.S. as the children had already been returned to the jurisdiction. Further, he found it would not be the best interest of the children to imprison L.S. or impose upon her a financial penalty given her limited resources. He concluded that the goals of deterrence and denunciation could be met by making clear to L.S. that she was in contempt of court and obliging her to sign a written undertaking not to initiate new proceedings in Israel or in any jurisdiction outside of British Columbia on matters relating to custody, and to surrender her passports. He did, however, order that L.S. pay special costs to G.S.
- [66] Following his successful appeal in this Court, G.S. was awarded costs in excess of \$70,000. When these costs were not paid, G.S. brought a further application for an order that L.S. be found in contempt of court. This application was also heard by N. Smith J. In reasons for judgment indexed as 2014 BCSC 187, the application was dismissed for the following reasons:
- [27] The respondent seeks a finding that the claimant is in contempt because she has not paid the costs previously awarded to her. An award of costs can be executed upon as a judgement and a failure to pay it does not in itself amount to contempt, *Shaw v. Louie*, [1998] B.C.J. No. 2415, (1998) Vancouver Registry No. D51922. The respondent has taken execution proceedings, but the claimant has no income and no assets in this jurisdiction.
- [28] The respondent argues that the claimant's parents have substantial wealth in Israel and have been financing her in this litigation. That may be, but the parents are not parties to this action and are under no obligation to pay the respondent's costs.
- [29] A failure to pay a costs award may become a matter of contempt where there is evidence of a deliberate attempt to hide assets, but there is no such evidence in this case. At most, there is evidence that the claimant at one point had money in an Israeli bank account and used to it pay her Israeli lawyers in preference to the respondent. I know of no authority under which such conduct, in itself, would amount to contempt.

- [67] G.S.'s appeal from this decision was dismissed. In reasons for judgment indexed as 2014 BCCA 334, this Court noted (at para. 120) that in cases of an order for payment of money, the applicant alleging contempt must establish, beyond a reasonable doubt, not only that the respondent breached an order of which notice had been given, but also that the respondent had the capacity to pay the amount: see *Swann v. Swann*, 2009 BCCA 335.
- [68] On June 10, 2015, the special costs L.S. was ordered to pay G.S. on September 19, 2013 were assessed by the Registrar of the Supreme Court of British Columbia. On the same day, a Certificate of Costs was entered in the amount of \$14,100.
- [69] On July 21, 2015, G.S. applied for an order that L.S. be found in contempt of court as a result of non-payment by her of the June 10, 2015 costs certificate. This is the application that was dismissed by Butler J. and the order from which G.S. now appeals.
- [70] In dismissing the application, Butler J. referred to *Swann* and the four elements that must be proved by a party seeking an order for contempt based on another party's failure to make a court-ordered payment: (1) that the non-paying party knew of the order; (2) that there had been non-payment; (3) that the non-payment was willful, in the sense of being deliberate rather than accidental; and (4) that the party had the means or capacity to pay. The chambers judge noted that this case engaged consideration of the third and fourth elements.
- [71] In support of the application, G.S. relied on much of the same material he put before Smith J. In addition, G.S. noted that L.S. recently paid into court \$5,000 as security for costs in relation to her appeal from the order of Schultes J. made on April 20, 2015. Butler J. admitted evidence on the application that the funds used to satisfy the security for costs order were received by L.S. from her father. Butler J. accepted that evidence and found that L.S. has no income or assets, and continued to struggle with mental health challenges.
- [72] Against this background, Butler J. noted G.S.'s submission that a failure to make a further finding of contempt would mean that L.S. would not be punished or sanctioned for her wrongful actions. In dismissing the application, Butler J. said this:
- [19] The evidence relied on by G.S. falls far short of establishing that L.S. can pay the outstanding costs. The only new evidence was the payment of \$5,000 as security for costs in the cross-appeal. The source of those funds has been explained. I accept L.S.'s evidence regarding her current financial situation.
- [20] When I consider all of the evidence, I conclude that G.S. has failed to establish that L.S.'s failure to pay the costs ordered is wilful or that she has the ability to pay any amount towards those costs. Accordingly, G.S.'s applications are dismissed.

- [21] Before concluding these reasons, I want to comment on two other matters. First, it is clear that L.S.'s parents are funding the litigation. That includes paying for Mr. Ingram's services and posting the security for costs ordered for the appeal. G.S. perceives this to be unfair. That is not surprising given his perspective on the case. However, as noted by Smith J., the fact that her parents are funding the litigation in British Columbia does not mean that L.S. has the ability to pay. Further, this Court cannot order a non-party to pay costs.
- [22] Second, G.S. argued that a failure to pay special costs arising from a contempt application is somehow different from other costs orders. He says it is part of the punishment for the contempt and so a failure to pay those costs must be contemptuous.
- [23] That is not a correct statement of the law. This was explained by Chiasson J.A. in *Frith v. Frith*, 2008 BCCA 2. Contempt is a matter between the court and the litigant. As set out at para. 34 in *Frith*, what is "[r]elevant to the disposition of a contempt proceeding is a contemnor's acknowledgment that it was an error to disobey the court's order and a commitment to obey in the future."
- [24] Here, the disposition made by Smith J. in the Contempt Ruling ensured that L.S. acknowledged her error in disobeying a court order and that she gave an appropriate undertaking to give the court confidence of her commitment to obey court orders in the future.
- [25] As explained in *Frith*, it is an error to equate an order for costs with the imposition of a penalty. A costs order is not part of the disposition of the contempt proceedings. Rather, it is a consequence which flows from the success on the application in accordance with the Rules of Court. The costs award is an obligation owed to the party, not to the court. It is worthwhile to set out the explanation of Chiasson J.A. at para. 36:
- [36] The chambers judge stated "the awarding of costs [was] sufficient penalty" (para. 31). Although I do not suggest that it was necessary to impose any particular penalty on the mother, a matter within the discretion of the chambers judge, in my view it was an error to equate the payment of costs with a penalty for contempt (*Weston v. Courts Administrator of the Central Criminal Court*, [1976] 2 All. E.R. 875). Costs is a matter between litigants. A contempt penalty is a matter between a person or entity and the court. As was noted by Dubin C.J.O. in *Paul Magder Furs Ltd.*, a finding of contempt "transcends the dispute between the parties".
- [26] In summary, G.S.'s applications are dismissed.
- [73] Butler J. cautioned G.S. that his application was very close to being vexatious and that further unsuccessful applications of this kind may entitle L.S. to special costs.
- [74] G.S. appeals from the order of Butler J. on a variety of grounds. While it is difficult to understand all of the points G.S. seeks to make in connection with this appeal, I understand him to allege that Butler J. erred: (1) by concluding that a special costs order arising from a contempt of court finding should be treated similarly to other costs orders; (2) by not

treating the special costs order as a punishment akin to that which would be imposed in a criminal case; (3) in his application of Swann to the circumstances of this case; (4) by "undermining the deterrence and denunciation aspects of the penalty" of special costs and approaching the matter from a perspective that is inconsistent with Canada's obligation under the Hague Convention to deter parents from the wrongful removal and wrongful retention of children; and (5) by warning G.S. of the special costs sanction he might trigger by unsuccessfully pursuing similar applications in the future.

- [75] In conjunction with this appeal, G.S. seeks to have admitted as fresh or new evidence two affidavits sworn by him on January 25, 2016 and March 29, 2016. The test for admission of fresh and new evidence on appeal is well-settled: see *Palmer v. The Queen*, [1980] 2 S.C.R. 759 at 775; *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCCA 148 at para. 10. In my view, the evidence G.S. seeks to have admitted on appeal does not meet the test for the admission of fresh or new evidence.
- [76] The first affidavit relates to the fifth ground of appeal and the warning Butler J. gave G.S. about the cost implications of pursuing similarly ill-founded applications in the future. As I understand it, G.S. filed the first affidavit to alert this Court to the potential that L.S. would use the remarks of Butler J. to ground an application prohibiting him from initiating any further contempt applications against L.S. in the future without leave of the court.
- [77] I would not admit this evidence. The warning was designed to provide guidance to G.S. about the risks he would court by continuing to pursue meritless contempt applications. These remarks formed no part of the order under appeal. They are, in my respectful view, irrelevant to any issue this Court needs to decide. As the admission of this evidence could not possibly have affected the result, it is not in the interests of justice that it be admitted on appeal. As an aside, I would note that while L.S. in fact pursued an application to prohibit G.S. from initiating any contempt applications against her for a period of one (1) year unless leave to do so was granted, that application was dismissed by Harris J. on June 20, 2016 in reasons for judgment indexed as 2016 BCSC 1130.
- [78] The second affidavit G.S. seeks to have admitted as new evidence relates to his assertion that L.S. now has the capacity to pay the special costs award. In support of this contention, G.S. seeks to have admitted evidence that in March 2016 L.S. rented a new apartment that would increase her annual rental costs by \$14,400.
- [79] In response to G.S.'s application, L.S. seeks to have admitted evidence that: (1) she was forced to move from her previous rental accommodations because the building did not pass an inspection conducted by the City of Vancouver; (2) her new apartment was chosen by her parents and that they are paying the rent; and (3) as was the case when matter came before Butler J., L.S. continues to have no income.

- [80] I would not admit the second affidavit of G.S. or the affidavit submitted by L.S. in response as new evidence on this appeal. Taken as a whole, the evidence simply confirms the factual finding of Butler J. that L.S. has no current source of income, is reliant on her parents' generosity to cover her living expenses, and has no capacity to pay the special costs award. As this evidence could not possibly have affected the result below, no injustice arises from refusing to admit it on appeal.
- [81] I turn next to consider briefly G.S.'s grounds of appeal. First, no error has been shown in the application by Butler J. of the factors identified in Swann. Second, the factual finding made by Butler J. that L.S. has no capacity to pay the special costs award was amply supported by the evidence and is entitled to deference on appeal. G.S. has not shown this factual finding to be the product of palpable or overriding error. Finally, I do not accept G.S.'s submission that the factual finding of Butler J. on L.S.'s capacity to pay is inconsistent with the findings made by Smith J. on the same point. In any event, those factual findings were made more than two years apart and, while the factual records underlying the two applications were very similar, they were not identical. In my respectful view, these conclusions are dispositive of the appeal.
- [82] As for the remaining grounds of appeal, I am of the view that G.S. inappropriately conflates a costs award with a penalty imposed following a finding of contempt of court. On these related grounds of appeal, I would respectfully endorse the reasons of Butler J. at paras. 22-25 of his reasons for judgment.

V. Conclusion

- [83] I would dismiss the appeal of L.S. in CA42807.
- [84] I would dismiss the appeal of G.S. in CA43102.
- [85] The appeal of G.S. in CA43315 was dismissed on April 6, 2016. My reasons for dismissing this appeal are set out herein.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Willcock"

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