

CANADA / JUDGMENT

M.F.W. v. M.A.H.

2020 BCCA 284

COURT

British Columbia Court of Appeal

DECIDED

23 October 2020

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2020 BCCA 284 M.F.W. v. M.A.H. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: M.F.W. v. M.A.H. , 2020 BCCA 284 Date: 20201023 Docket: CA46083 Between: M.F.W. Respondent (Claimant) And: M.A.H. Appellant (Respondent) Before: The Honourable Madam Justice Newbury The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Willcock On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2019 (M.F.W. v. M.A.H., 2019 BCSC 588, Chilliwack File E12720). Counsel for the Appellant, via videoconference: F.A. Nudel M. Kamangari The Respondent, M.F.W., via videoconference: Self-Represented Place and Date of Hearing: Vancouver, British Columbia September 23, 2020 Place and Date of Judgment: Vancouver, British Columbia October 23, 2020 Written Reasons by: The Honourable Madam Justice Newbury Concurred in by: The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Willcock Summary: Appeal from orders of guardianship and parenting arrangements made under Family Law Act ("FLA") dismissed; appeal re quantum of spousal support allowed. Trial judge had not erred in law in deciding parenting arrangements without having seen assessor (appointed under s. 211) cross-examined in court; nor in failing to leave guardianship decisions up to parenting co-ordinator when two guardians disagreed. Trial judge had intended to grant an order for spousal support under SSAG at mid-point but his calculation was apparently faulty. Appeal granted to rectify this error. Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This family law case raises issues concerning the roles of assessors and parenting co-ordinators -- both creations of the Family Law Act, S.B.C. 2011, c. 25 ("FLA") -- in determining the best interests of children for purposes of parenting and guardianship orders. (A schedule is attached to these reasons setting out the relevant statutory provisions.) Counsel for the appellant/father contends that in a "high-conflict" case, a trial judge is required as a matter of law to follow the recommendations of an assessor appointed under s. 211 of the FLA unless the assessor has been cross-examined at trial; and that where a parenting co-ordinator has been appointed under s. 18 to assist the parties, a trial judge may not as a matter of law grant final decision-making authority to one of the parents in circumstances where the parents as guardians are unable to agree.

- [2] The appellant/father also relies on a presumption that the status quo in parenting arrangements represents a preferred outcome that should be displaced only if there is evidence that the status quo is "not working in the best interests of the children." No such presumption was applied by the trial judge in this instance.
- [3] Another issue raised by the appeal is the role of the principle, enshrined in s. 16(10) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), that a child should have as much contact with each parent "as is consistent with the best interests of the child". Section 16(10) applies only to a court when "making an order under this section" (my emphasis) -- i.e., when making a custody order under the Divorce Act. In the case at bar, the claimant/mother framed her prayers for parenting time and guardianship under the FLA rather than the Divorce Act. For his part, the appellant/father indicated his intention to rely on both the Divorce Act and FLA in his Response in relation to parenting and guardianship. However, the portions of the trial judge's order relating to parenting and guardianship were made under the FLA.
- [4] The final aspect of the trial judge's order raised on the appeal relates to the granting and calculation of spousal support: the appellant/father submits that the trial judge made an error in calculating spousal income under the Spousal Support Advisory Guidelines.
- [5] I will refer hereafter to the appellant and respondent as the "father" and "mother" respectively. Factual Background
- [6] The trial was heard by Mr. Justice Brundrett over 26 days beginning in May 2018. His lengthy reasons, covering various claims between the parties, are indexed as 2019 BCSC 588. I do not intend to set out the facts in any detail, except as necessary to decide the issues of law raised by the father. I do note that the case was indeed a 'high-conflict' one and that the judge made adverse findings concerning the behaviour of both parties -- the father's marked immaturity and his "willingness to lie where it suits him" (see the judge's reasons at para. 55), and the mother's high degree of emotionalism. However, where there were conflicts in the evidence, the judge preferred the evidence of the mother to that of the father. The judge found the mother to be highly credible and consistent on material points, and rejected much of the father's evidence as untrustworthy. These findings of credibility are not directly challenged on appeal.
- [7] In the fall of 2017, Mr. Robert Finlay was appointed by consent as an assessor under s. 211 of the FLA in order to:
- i) Determine a parenting plan including guardianship and decision-making and information sharing with regard to the needs of the children. ii) Determine a parenting plan for parenting time and parenting responsibilities allocated between the parties. Mr. Finlay interviewed and observed the parties at length and carried out psychological testing on them. His recommendations contemplated a two-stage parenting time schedule by the end of which each parent would have equal time with their two children, a boy who was age 10 at the time of trial, and a daughter aged 9. As well, the assessor recommended that parental responsibilities should be divided equally and that a parenting co-ordinator should be

retained for at least one year to ensure "meaningful consultation between the parents and determinations if needed regarding significant decisions in caring for the children's needs." The trial judge described these recommendations in greater detail at paras. 83-86.

- [8] During the marriage, the mother had been the primary caregiver of the children. The trial judge described her role and that of the father: There is no dispute about the history of the children's care (s. 37(2)(d)). It is agreed that the claimant [mother] was the primary caregiver and in fact most often the sole caregiver to both children throughout the marriage. This arrangement was agreed upon by the parties early on in their relationship and seemed to work as well as one reasonably could have expected. It was the claimant who historically took the children to the doctor or dentist, dealt with teachers, and facilitated extra-curricular activities. Throughout the marriage, she read to the kids at night, ensured their homework or school projects were done, attended to their hygiene, and put rules in place for their behaviour. She is very involved in their school-related activities and volunteers at the school. The claimant's devotion to the children and attendance to their needs has been deep and unwavering. This commitment continued during the separation and afterward. Throughout the marriage, the respondent [father], for his part, made great sacrifices to pursue financial goals to support the family unit and it is only recently that he has been able to take his foot off the gas, so to speak, and spend more time with the children. The respondent is not to be faulted for being away as often as he was, given the financial necessity and his devotion to his family in doing so, though he was undisputedly less involved in the children's day-to-day care given his role in the relationship as the so-called breadwinner. [At paras. 123-5.]
- [9] In the months leading up to trial, a judge in chambers had ordered that the father was to have the children in alternating weeks from Thursday afternoons to Sunday nights, and the mother at all other times. However, in early February 2018, the father's new partner, Ms. O., made allegations against the mother. After an ex parte application, a judge in chambers suspended the mother's parenting time. The matter came before a second judge in chambers later in February. This time the Court ordered that the mother was to have parenting time from Sunday evenings to Wednesday mornings each week and the father from Wednesday after school until Sunday evenings -- i.e., that the father have the children four days, and the mother three days, per week. In July 2018, the parties agreed to share parenting time in alternating weeks.
- [10] The trial commenced in May 2018. The mother sought to have primary parenting time with the children, with the father having from Thursday to Sunday every second week, increasing at a later date to Wednesday to Sunday every second week. For his part, the father sought to restrict the mother's parenting time from Thursday after school to Monday morning every second week. Again as the trial judge observed: Thus, holidays aside, each of the parties recommends they have parenting time approximately $\frac{3}{4}$ of the time. The positions of the parties are starkly in contrast. The claimant seeks relief in terms of parenting responsibilities and parenting time under the FLA. The respondent proposes parenting

arrangements pursuant to the Divorce Act, R.S.C. 1985, c. 3 and the FLA. [At paras. 106-7; emphasis added.]

- [11] The trial judge addressed the matter of Ms. O.'s allegations at paras. 90-99 of his reasons and concluded: I find on all the evidence that the February incidents do not give rise to ongoing concerns with respect to the physical or mental well-being of the children, and do not impact my overall assessment of parental responsibility and parenting time. [At para. 100.] He also noted that the unfortunate effect of the allegations had been to "upend" the children's living situation in that the father's parenting time had increased in February 2018 from just over three days every second week to more than four days each week and in the summer, to one week on/one week off.
- [12] The judge referred to the comments of the Court in *A.B.Z. v. A.L.F.A.* 2014 BCSC 1453 concerning the "interplay" between the Divorce Act and the FLA in context of "custody" or "guardianship" or "parenting time". Warren J. had observed: Like the Divorce Act, the Family Law Act provides that the court must only consider the best interests of the child in granting an order respecting guardianship or parenting arrangements: s. 37(1). Section 37(2) of the Family Law Act lists a number of factors that must be considered under the "best interests" test, which provide a useful framework to decide the issue, even under the Divorce Act. [At para. 175.]
- [13] The trial judge in the case at bar observed that under the FLA there is no presumption that parental responsibility should be allocated equally, nor in favour of one guardian regarding the best interests of the child, citing s. 40(4) of the FLA and *M.W.B. v. A.R.B.* 2013 BCSC 885 at para. 179. He continued: That said, I must take into account the maximum contact principle set out in s. 16(10) of the Divorce Act. That principle provides that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child, and, for that purpose, shall take into consideration the willingness of the party seeking greater custody to facilitate contact with the party whose custody will be reduced: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 24. The consideration of parenting time and responsibility is governed by what is in the best interests of the children, as set out in s. 37(1) of the FLA. [At paras. 112-3; emphasis added.]
- [14] Under the heading "Application of the Best Interest Factors", the trial judge then reviewed his factual conclusions in light of the factors relevant to the children's best interests under s. 37 of the FLA. With respect to the children's need for stability, referred to at s. 37(2)(e), he noted that the mother had "clearly shouldered the vast majority" of parenting responsibilities in the past such that "the most readily stable arrangement going forward is one that will continue to involve the claimant taking on wide-ranging responsibilities." The father and Ms. O. were also, he said, "ready to play key roles in the children's ongoing development." (At para. 126.)

- [15] The judge noted the evidence given by Ms. T., who was the grade 2 teacher of the parties' daughter and previously of their son in grades 1 and 2. Ms. T. had reported that early in 2018 when the daughter was with her mother less, her behaviour had become more withdrawn and worsened more once the daughter was removed from her mother's care in February. The teacher testified that the child was "still not back to how I knew her before". The judge found that the daughter's behaviour was causally linked to her being away from her mother for greater periods of time in the relevant period, and also that the drop in the children's grades in early 2018 "further corroborated the point that the claimant's absence from her children's lives had a demonstrably negative [effect] on them in early 2018." (At para. 129.)
- [16] Beginning at para. 130 the judge considered the ability of each party to exercise parental responsibilities. He found that apart from some "outbursts" during the marital breakdown and her disposition to worry constantly about the children's well-being, the mother appeared to be a "very responsible parent who is completely dedicated to the children." He also found that the father loved his children and wanted to spend as much time as possible with them -- a possibility enhanced by his recent change in occupation from truck-driving to an ownership role in a construction company. The judge observed at para. 138 that the father's relationship with Ms. O. was "reported by both to now be stable, despite the previous periods of volatility, up to and including what I accept were instances of Ms. O. becoming physical with the respondent." (At para. 138.) The Court then noted some of the observations made by Mr. Finlay in his report: Mr. Finlay noted that the respondent [father] had some history of anti-social behaviour and impulsivity. This was borne out by the claimant's testimony in which she referred to historical instances of the respondent being prone to road rage. I accept the claimant's evidence that during the marriage the respondent was not a patient person and could occasionally get frustrated with the children when they would not do the things he wanted. As noted, the respondent has occasionally exhibited a lack of maturity and good judgment. The respondent arguably introduced the children prematurely to Ms. O., immediately after his separation with the claimant [mother], when he invited the children into bed with himself and Ms. O. He admitted to Mr. Finlay that this was an error. [The parties' son] occasionally came home and disclosed statements his father apparently made to the effect that the claimant was "making it hard for him to get divorced" and "dad says you will call the police if he doesn't give you money." The respondent has falsely referred to Mr. G.W. as the claimant's "boyfriend" in what he characterized as a "jerk move." He also photographed the claimant with Ms. T. on school grounds, in an ill-advised attempt to prove the claimant was improperly in attendance at the school on his parenting time; however, this upset Ms. T. to the extent that she testified she would only talk to the respondent with her administrator present and she cancelled the class bike trip over concerns that he might attend. [At paras. 139 and 140.]
- [17] With respect to the factor referred to in s. 37(2)(i) -- the appropriateness of an arrangement that would require the children's guardians to co-operate on issues affecting them -- the judge observed that the parties continued to have "high conflict" in their relationship with each other. Each had acted in a negative, rude or obstinate manner toward the other at some

point, especially during the marriage breakdown period. Overall, the judge concluded that while the father had "undoubtedly matured" more recently, his past non-attendance at school events, his lack of co-operation in co-parenting with the mother, his inclination towards impulsivity, his past "relationship instability" with Ms. O., and his negative statements to the children about their mother indicated he still had "some distance to go in becoming an optimally responsible parent". The fact that both children were still at an impressionable age tended, the Court observed, to "heighten the concern that the respondent's problematic behaviour will negatively affect the children."

- [18] The judge then stated his general conclusions regarding parenting responsibility and why he was not inclined to follow all of Mr. Finlay's recommendations: I depart from Mr. Finlay's recommendations in his s. 211 report regarding parenting time and responsibility. In my view, this report does not sufficiently account for the children's historically closer bond with their mother, the fact that she has historically undertaken the vast majority of parenting responsibilities, and the respondent's encouraging but still relatively modest track record to date in successfully parenting the children. Moreover, the s. 211 recommendations do not adequately reflect the degree to which the claimant has sought to support the children in their schooling and the respondent's historical avoidance of the children's school activities. Having regard to all the evidence, and the best interests of the children including the enumerated factors in s. 37 of the FLA, I find that the parties ought to share parental responsibilities in respect of day-to-day decisions but that the claimant ought to have primary control over parenting responsibilities with respect to the children, pursuant to s. 40 and 41 of the FLA. [At paras. 148-9.] (I also note that at para. 55, the judge found that the father had "deliberately misled" Mr. Finlay.)
- [19] With respect to the specific parenting arrangements, the Court ruled that a greater amount of parenting time should be ordered in favour of the mother in light of her primary role in the children's lives before and after separation. The judge observed that there was no presumption that the status quo was the preferred position, noting *Nunweiler v. Nunweiler* 2000 BCCA 300 at para. 30. In any event, given the fact that the previous arrangement had been altered only because of the February 2018 allegations, the preservation of the status quo in this case was not a "significant factor" in determining the children's best interests. The judge went on to find that the present schedule was "not in keeping" with those best interests in future and that "significant adjustment in the interest of stability and predictability" was required. (At para. 156.)
- [20] The Court's order was made specifically under the FLA. The mother was given primary residence of the children and the father was given specified parenting time, consisting of Wednesdays after school to Sunday evenings every second week in the school year. Both parents were to be the guardians of the children under s. 39(1) of the FLA and were to have responsibility for day-to-day decisions during their respective parenting times. In the event they were unable to reach agreement on a "significant" decision despite best efforts, the mother "as guardian with the majority of parenting time" was to be entitled to make such

decisions. These portions of the judge's order also contained detailed provisions with respect to time on holidays, travel, passports, etc. On Appeal Cross-examination of the Assessor

- [21] The first and primary ground of appeal advanced by the father is that because Mr. Finlay was not called to be cross-examined at trial, the trial judge erred in law in "ignoring pertinent parts" of his report and "departing from the role of the expert". Counsel cited no authority for the proposition that the assessor was required to be called to testify, either under the FLA or its predecessor, the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), s. 15 of which also contemplated 'expert' reports. (See generally *S.E.B. v. T.J.B.* 2009 BCSC 1650 at paras. 22-25.) For convenience, I set out s. 211 here: Orders respecting reports 211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4, one or more of the following:
- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
 - (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.
- (4) A person who carries out an assessment under this section must
- (a) prepare a report respecting the results of the assessment,
 - (b) unless the court orders otherwise, give a copy of the report to each party, and
 - (c) give a copy of the report to the court.
- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section. No mention is made of any obligation that the assessor must be called or must appear to be cross-examined at trial.
- [22] There are several decisions of the Supreme Court of British Columbia that demonstrate that the Court is not required to follow the recommendations of the appointed "expert" and indeed, that the Court should not "abdicate" its role in favour of an assessor's recommendations: see *King v. Borserio* 2018 BCCA 308 at para. 76. As observed in *A.P. v. J.C.* 2018 BCSC 1381: The context under s. 211 is not comparable to that of an expert retained by a party in a non-family case. As observed by Parrett J. in *Goudie v. Goudie*, [1993] B.C.J. No. 1049 (S.C.), at para. 33:

- [33] The procedure anticipated by s. 15 is one in which the investigator interviews the people involved, observes the relationship and interaction between the spouses and the children and reports those observations, facts and impressions to the court. In the truest sense these individuals act as the courts eyes and ears in what are all too frequently highly emotional areas of conflict. The safeguards built into the process include the early delivery of the investigation reports, the opportunity to call the investigator to the witness stand and the opportunity to respond to the report generally by other evidence. FRA s. 15 reports were not governed completely by the evidentiary rules which would be in effect when dealing with reports requisitioned by one of the parties from an expert: *Wu v. Sun et al*, 2006 BCSC 1891, at para. 3. Similar legal principles can be applied to both s. 15 FRA and s. 211 FLA assessments or reports: *K.B. v. J.B.*, 2015 BCSC 704, at para. 6. The s. 211 author may provide an opinion, but it is for the court to decide the matters at issue: *Johnson v. Skillen*, 2009 BCSC 209, at para. 8; *I.J.G.P.G. v. K.M.*, 2016 BCSC 1072, at para. 100; *A.L. v. L.W.*, 2017 BCSC 964, at para. 8. The court must not abdicate its role in favour of the recommendations made: *King v. Borserio*, 2018 BCCA 308, at para. 76. Regardless of the information that goes to the report writer, the court ultimately has the discretion to review the background information presented in the report, carry out an independent assessment based on the evidence at trial, and come to a different conclusion as to the best interests of the child: *K.B. v. J.B.*, 2015 BCSC 704, at para. 10, citing *T.C. v. S.C.*, 2013 BCPC 217, at paras. 143-144; *Plant v. Kempton*, 2011 BCCA 171, at para. 11. . . . In the same year *Fawcett* was decided (1999), in the trial decision in *Van de Perre, T. P. Warren J.* declined to follow the recommendations of Dr. Korpach pursuant to the s. 15 FRA report, that custody of the child should go to the father and his wife. He granted custody to the child's mother. This illustrates both that the practice of s. 15/ s. 211 report writers making recommendations is nothing new, and that judges can and do disregard such recommendations. The trial decision was reversed by the Court of Appeal, and restored by the Supreme Court of Canada. [At paras. 116-121; emphasis added.]
- [23] With respect to cross-examination at trial, the cases are clear that each party's right to call the assessor to the witness stand is an "opportunity" -- not an "obligation". In *K.M.W. v. L.J.W.* 2010 BCCA 572, this court acknowledged that the court-appointed expert (at that time under s. 15 of the FRA) "must attend any trial to explain or defend his report if requested to do so by a party or the judge", citing *L.E.G. v. A.G.* 2003 BCSC 412 at paras. 20 and 26. (My emphasis.) Huddart J.A. for the Court continued: While a trial judge should rarely preclude the cross-examination of the author of a s. 15 report by a parent, either directly or by refusing an adjournment, the right to cross-examine is not absolute. It must always give way to the best interests of the children. In *Rockwell v. Rockwell* (1998), 59 B.C.L.R. (3d) 380 (C.A.) one of the grounds of appeal was that the trial judge erred in law in proceeding with the trial in the absence of oral evidence and cross-examination of the Court-appointed expert of a s. 15 report. This court concluded at para. 21: It would in my view be nothing short of tragedy to have a new trial in this case. I cannot think of anything worse for the children to have this matter drag on for months and probably many months. However, as I see this case, I am not faced with the decision of whether a new trial should be ordered. I

say here that in my opinion if the appellant were to succeed on this issue the only remedy open to the court would be a new trial. The reason I do not think a new trial has to be considered is my conclusion that the presence of Dr. Posthuma at trial could not have changed the view the trial judge took of the evidence of Mr. Russell in particular, and what I see as a significance of that evidence to the judge in concluding as he did. [At para. 56; emphasis added.]

- [24] Mr. Nudel, counsel for the father in this court, told us that the question of whether Mr. Finlay would appear at trial was canvassed early in the trial. The mother initially told the Court that she had tried to subpoena Mr. Finlay but did not know if she had done it properly. Counsel for the father later produced an email from Mr. Finlay, sent to both parties prior to the trial, saying he required a retainer of \$4765 to confirm his attendance. The mother said she had not seen this email until the trial had started and that she was not able to pay the fee. Counsel for the father argued that she was being untruthful about her ability to pay and was permitted to cross-examine her on this matter at some length. The trial judge ultimately made no finding on this point.
- [25] I am not persuaded the trial judge erred in law in proceeding without Mr. Finlay's being cross-examined before the Court. The judge gave due consideration to the assessor's report in reaching his own decision, which was fully supported and explained in his reasons. The fact that the case was a 'high-conflict' might have made the report more significant, but at the end of the day, it was the trial judge who had to determine what parenting arrangements were in the best interests of the children. I must also reject the father's suggestion that the trial judge was obliged to accept Mr. Finlay's recommendations in this case because it was "all the trial judge had to go on" and without it, there was a "void". As we reminded Mr. Nudel during the hearing of the appeal, the trial lasted some 26 days. The judge therefore had ample evidence with which to 'assess' and determine where the children's best interests lay. He carefully considered the report itself and explained his reasons for reaching different conclusions than had Mr. Finlay. It was open to the father himself to call Mr. Finlay for cross-examination (see the Supreme Court Family Rules, Rule 13-7(3)) but he did not do so.
- [26] I would not accede to the first ground of appeal. Role of Parenting Co-ordinator
- [27] A somewhat similar point is made by the father with respect to the Court's order that the mother have final decision-making authority in the event that she and the father were unable to agree on a guardianship matter, rather than ordering that the parenting co-ordinator have this ability. Again, the father submits that the trial judge "failed to comprehend the role of the parenting co-ordinator under the FLA" and thus erred in law. He referred us to a passage from this court's decision in *F.J.V. v. W.K.S.* 2019 BCCA 67, in which Tysoe J.A. noted that the court "should encourage decision-making by parenting co-ordinators in high-conflict cases, where permissible, to fulfill the purpose expressed in s. 4(c) (i) of the Family Law Act of resolving conflict other than through court intervention." (At para. 40.)

- [28] It must be said that ss. 15-19 of the FLA and the extremely broad wording of the Family Law Regulation, B.C. Reg. 84/209 (see the schedule to these reasons) give rise to many questions and uncertainties, in particular regarding the interplay between a court order and a parenting co-ordinator's authority to make "determinations". In *Fleetwood v. Percival* 2014 BCCA 502, Groberman J.A. for the majority noted that while the statute does not set out criteria that must be satisfied before a court will order that a parenting co-ordinator be engaged to "build consensus" or make "determinations", such an order will typically be made only where: a judge is convinced that a parenting coordinator will enjoy significant advantages over the court in achieving a resolution that will benefit the parties and their children. As well, because a parenting coordinator will be paid for by the parties, the court must consider the parents' ability to pay, and the economic costs or savings that the appointment of a parenting coordinator will entail. [At para. 48.]
- [29] The trial judge in the case at bar considered the relevant statutory provisions and *Fleetwood*, and was satisfied that a parenting co-ordinator should be appointed for a period of 12 months. The relevant provision of his order stated:
4. The parenting coordinator shall provide guidance, advice and recommendations as to how to encourage the parties to engage in cooperative parenting including:
 - a. facilitating the manner and place and of drop-offs and pickups to exchange the children;
 - b. reducing the potential for conflict between the claimant and the respondent's spouse;
 - c. facilitating the children's telephone call(s) to the noncustodial parent;
 - d. facilitating positive communication between the parties; and
 - e. scheduling parenting time during holidays. [Emphasis added.] As earlier mentioned, the judge ultimately ordered that if the parties as guardians could not reach agreement on a "significant decision" despite their best efforts, the mother, "as guardian with the majority of parenting time" would be entitled to make such decisions.
- [30] I see nothing to suggest that the trial judge fell into legal error in granting this authority to the mother, or that his final order was inconsistent with the order appointing the parenting co-ordinator. It was open to the judge to give greater authority to the co-ordinator, but he chose not to do so. He explained his reasons for ruling as he did (see para. 18 above), and of course is owed a high degree of deference given his familiarity with the facts of the case and the parties who appeared before him. I note that in *K.B.P. v. K.E.* 2019 BCCA 152 at para. 24, this court upheld a trial judge's order giving the father final decision-making authority in a high-conflict case. Madam Justice Smith emphasized at para. 24 the high degree of deference owed to the decision of the trial court.
- [31] I also note that it is likely that the term of the co-ordinator's appointment in this case (12 months) has now expired.

- [32] I would not accede to this ground of appeal. Status Quo and the Maximum Contact Principle
- [33] The final issue arising with respect to the parenting arrangements concerns two related factors that the father submits the trial judge failed to consider. First, counsel says the judge erred in law in stating at para. 156 that "There is no presumption that the status quo is the preferred position". On this point, Mr. Nudel referred us to a passage from *Poole v. Poole* 1999 BCCA 203, a case decided under the FRA. At para. 25, Madam Justice Proudfoot observed in that case: Madam Justice Stromberg-Stein correctly suggests that the parties seeking to alter a child's status quo must present evidence to show that the status quo is unsatisfactory and not in the best interests of the child and should therefore be changed. Again, after a thorough reading of the transcripts, I was unable to find such evidence. [At para. 25.]
- [34] In *Nunweiler*, however, this court clearly rejected the notion that "failing a convincing case being made for a move, the status quo is the preferred position." Madam Justice Saunders for the Court reasoned as follows: In my view, such an approach re-inserts into custody discussions a presumption which is contrary to the instructions and *Gordon v. Goertz* to assess each case individually, which is contrary to the observations of this Court in *Robinson v. Filyk* (1996) 84 B.C.A.C. 290 that presumptions are inappropriate in custody cases and detract from the individual justice to which every child is entitled, and which is contrary to the instruction in *Gordon v. Goertz* to respect the view of the parent wishing to relocate, barring an improper motive. [At para. 30; emphasis added.] See also *Mitchell v. Mitchell* [1998] B.C.J. No. 1684 at para. 46 (B.C.S.C.).
- [35] As we have seen, the trial judge in this case explained his reasons for not according a great deal of significance to the preservation of the status quo: the arrangement in place at the time of trial had been imposed only because of the allegations made by Ms. O. in February 2018 that turned out to be groundless. The 'real' status quo was one in which the children spent the majority of their time with the mother, both before and after separation.
- [36] The second principle relied upon by the father on his appeal is the so-called "maximum contact principle", which McLachlin J. (as she then was) explained in the seminal authority on parental mobility, *Gordon v. Goertz* [1996] 2 S.C.R. 27. Speaking for herself and five other members of the Court, she said this: The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interest, the court can and should restrict contact. The reduction of beneficial contact between the child and the access parent does not also dictate a change of custody or an order which restricts moving the child. If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move. This said, the reviewing judge must bear in mind that Parliament has indicated that maximum contact with both parents is generally in the best interests of the child. [At paras. 24-5; emphasis added.] In *Nunweiler*, this court ruled that

this reasoning from *Gordon v. Goertz* was not restricted to applications to vary existing custody orders and should also be considered in making initial custody determinations. (See para. 27.)

- [37] Perhaps because the father had pleaded the Divorce Act in the relevant portion of his Response in this case, the trial judge did make reference to the maximum contact principle set out in s. 16(10) of the Divorce Act. For this purpose, he said, he was required to take into consideration the willingness of the party seeking greater parenting time to facilitate contact with the party whose time will be reduced. The trial judge did so, particularly in connection with his discussion of the factor mentioned in s. 37(2)(i) of the FLA. It was because of his concerns regarding communication between the parents that he found that the presence of a parenting co-ordinator would be useful. (See para. 145.)
- [38] As I have already noted, the trial judge's order was made under the FLA. It is therefore the FLA that governs: see *Yu v. Jordan* 2012 BCCA 367 at paras. 54-7. Consistent with this, s. 16(10) of the Divorce Act says that it applies to a court only when "making an order under this section" (my emphasis) -- i.e., when making a custody order under the federal statute. Strictly speaking, then, the trial judge was not required to consider expressly the maximum contact principle in determining the best interests of the children. Nevertheless, he did so and took steps to try to ensure maximum contact to both parents in the difficult circumstances before him. I suspect that such an approach is inherent in a court's determination of any custody or parenting arrangement.
- [39] I would dismiss this third ground of appeal. Spousal Support
- [40] Finally, counsel for the father brought to our attention an apparent miscalculation in the spousal support payable by the father to the mother. The topic of "prospective" spousal support was dealt with by the trial judge beginning at para. 278 of his reasons. He expressed the view at para. 281 that permanent spousal support was required to address the economic inequities arising from the marriage, and he therefore declined "at this stage" to specify an end-date on future spousal support. Having fixed the father's Guidelines income at \$170,000, he stated at para. 282 that he would award the claimant \$3846 in monthly support, "a mid-range figure".
- [41] Mr. Nudel has supplied us, however, with a DivorceMate calculation which indicates that, using a "with child" formula, the "mid" amount would be \$3324, assuming the recipient earns no income. The "high" amount is \$3803. A search of the transcript shows that trial counsel for the father told the Court that she had some "calculations done up via DivorceMate" and that she handed these calculations to the trial judge. Unfortunately the calculations do not appear to have been marked as an exhibit, and the mother did not have a copy at the hearing of the appeal.

- [42] In response to Mr. Nudel's suggestion that the order should have been time-limited, the mother told us that that once the children finish school, she is "open to" obtaining some retraining so that she will be able to earn income at some point. For now, however, she was continuing to perform the role of a "traditional" mother as she had during the marriage -- a role similar to that taken on by the father's mother when he was a child. I am not persuaded that the trial judge erred in failing to specify an end-date at this time.
- [43] As for the calculation of the midpoint, it does appear from the calculation provided by Mr. Nudel that if the trial judge intended to choose the mid-point under the Guidelines, the amount should have been \$3324 per month.

Disposition

- [44] I would allow the appeal only to the extent of replacing \$3846 per month, specified at para. 26 of the trial judge's order, and replacing it with the figure of \$3324 per month. In all others respects, I would dismiss the appeal. "The Honourable Madam Justice Newbury" I AGREE: "The Honourable Madam Justice MacKenzie" I AGREE: "The Honourable Mr. Justice Willcock" LEGISLATIVE PROVISIONS Family Law Act, S.B.C. 2011, c. 25 Assistance from parenting coordinators 17 A parenting coordinator may assist the parties in the following manner:
- (a) by building consensus between the parties, including by
 - (i) creating guidelines respecting how an agreement or order will be implemented, (ii) creating guidelines respecting communication between the parties, (iii) identifying, and creating strategies for resolving, conflicts between the parties, and (iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;
 - (b) by making determinations respecting the matters prescribed for the purposes of section 18 [determinations by parenting coordinators]. Determinations by parenting coordinators 18
 - (1) A parenting coordinator
 - (a) may make determinations respecting prescribed matters only, subject to any limits or conditions set out in the regulations,
 - (b) must not make a determination respecting any matter excluded by the parenting coordination agreement or order, even if the matter is a prescribed matter, and
 - (c) must not make a determination that would affect the division or possession of property, or the division of family debt.
 - (2) In making a determination respecting parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 37 [best interests of child].

- (3) A parenting coordinator may make a determination at any time.
 - (4) A parenting coordinator may make an oral determination, but must put the determination into writing and sign it as soon as practicable after the oral determination is made.
 - (5) Subject to section 19 [changing or setting aside determinations], a determination
 - (a) is binding on the parties, effective on the date the determination is made or on a later date specified by the parenting coordinator, and
 - (b) if filed in the court, is enforceable under this Act as if it were an order of the court.
- Changing or setting aside determinations 19 (1) On application by a party to a determination made by a parenting coordinator, the court may change or set aside the determination if satisfied that the parenting coordinator
- (a) acted outside his or her authority, or
 - (b) made an error of law or of mixed law and fact.
- (2) If the court sets aside a determination, the court may make any order that the court may make under this Act to resolve a dispute between the parties in relation to the subject matter of the determination.
- (3) If the court does not set aside a determination, the court may make any order that the court may make under this Act to enforce compliance with the determination. Best interests of child 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.
- Parenting arrangements 40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.
- (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances. . . .
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
- (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.
- Parental responsibilities 41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:
- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - (b) making decisions respecting where the child will reside;
 - (c) making decisions respecting with whom the child will live and associate;
 - (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
 - (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;

- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
 - (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
 - (h) giving, refusing or withdrawing consent for the child, if consent is required;
 - (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
 - (j) requesting and receiving from third parties health, education or other information respecting the child;
 - (k) subject to any applicable provincial legislation,
 - (i) starting, defending, compromising or settling any proceeding relating to the child, and (ii) identifying, advancing and protecting the child's legal and financial interests;
 - (l) exercising any other responsibilities reasonably necessary to nurture the child's development. Parenting time 42 (1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.
- (2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child. Exercise of parental responsibilities 43 (1) A child's guardian must exercise his or her parental responsibilities in the best interests of the child.
- (2) If a guardian is temporarily unable to exercise any of the parental responsibilities described in section 41 (a), (c), (d), (f) to (j) or (l) [parental responsibilities], the child's guardian, in writing, may authorize a person to exercise, in the best interests of the child, one or more of those responsibilities on that guardian's behalf while the guardian is unable to do so. Orders respecting reports 211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:
- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
 - (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.

- (4) A person who carries out an assessment under this section must
 - (a) prepare a report respecting the results of the assessment,
 - (b) unless the court orders otherwise, give a copy of the report to each party, and
 - (c) give a copy of the report to the court.
- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section. Section 6 of the Family Law Regulation, B.C. Reg. 84/2019
- (3) The following are the matters in respect of which a parenting coordinator may make determinations:
 - (a) parenting arrangements;
 - (b) contact with a child.
- (4) For the purposes of subsection (3), a parenting coordinator
 - (a) may make determinations in respect of
 - (i) a child's daily routine, including a child's schedule in relation to parenting time or contact with the child, (ii) the education of a child, including in relation to the child's special needs, (iii) the participation of a child in extracurricular activities and special events, (iv) the temporary care of a child by a person other than (A) the child's guardian, or (B) a person who has contact with the child under an agreement or order,
 - (v) the provision of routine medical, dental or other health care to a child, (vi) the discipline of a child, (vii) the transportation and exchange of a child for the purposes of exercising parenting time or contact with the child, (viii) parenting time or contact with a child during vacations and special occasions, and (ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties and the parenting coordinator, and
 - (b) must not make determinations in respect of
 - (i) a change to the guardianship of a child, (ii) a change to the allocation of parental responsibilities, (iii) giving parenting time or contact with a child to a person who does not have parenting time or contact with the child, (iv) a substantial change to the parenting time or contact with a child, or
 - (v) the relocation of a child.
- (5) Repealed. [B.C. Reg. 347/2012, s. 2 (b).]

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Prepared on 26 October 2026 · Esheria