

CANADA / JUDGMENT

S.G. v. G.M.

2020 BCSC 975

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 975 S.G. v. G.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.G. v. G.M.,

2020 BCSC 975

Date: 20200507

Docket: E58771

Registry: Kamloops

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

S.G.

Petitioner

And

G.M. and Provincial Court of British Columbia

Respondents

Before: The Honourable Madam Justice Donegan

On judicial review from: An order of the Provincial Court of British Columbia, dated March 5, 2020 (Kamloops Registry No. F-17896).

Oral Reasons for Judgment

Counsel for the Petitioner appearing by teleconference:

D. Komori

Counsel for the Respondent G.M. appearing by teleconference:

S.T. Walter

For the Respondent Province of British Columbia:

No appearance

Place and Date of Hearing:

Kamloops, B.C.

April 22, 2020

Written Submissions Received:

April 27, 2020

Place and Date of Judgment:

Kamloops, B.C.

May 7, 2020

Introduction

- [1] This matter arises from a Provincial Court family case. On March 5, 2020, Judge Cleaveley made a number of interim orders under the Family Law Act, S.B.C. 2011, c. 25 [FLA] pertaining to the parties' parenting of their infant child, including an order that S.G. return the child to Kamloops by a certain date. That date has now passed.
- [2] Section 233 of the FLA provides that interim orders of the Provincial Court cannot be appealed. S.G. brings this petition for judicial review pursuant to the provisions of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA] seeking to have those interim orders set aside.

Background Facts

- [3] S.G., the petitioner, and G.M., the respondent, dated for about four or five months in 2018. They lived together for a period of that time. They separated near the end of October 2018. Within approximately a week of their separation, S.G. discovered that she was pregnant. The parties remained separated during the pregnancy, but G.M. personally and financially committed to support S.G. and their unborn child.
- [4] G.M. has lived and worked in Kamloops most of his life. He is in his 50s. His family lives in the area as well. S.G. lived in Kamloops for about eight or nine years before the birth of the child. She is in her 40s. Before living in Kamloops for those eight or nine years, she lived in Powell River. She has family in both Powell River and Kamloops.

- [5] A.G. was born on June 20, 2019 (the "Child"). The parties did not live together after the Child's birth. S.G. has been A.G.'s primary caregiver since birth. G.M. regularly went to S.G.'s home to help out with feeding, changing diapers, bathing, cuddling, and soothing the Child. He wanted to be more involved, but this was the extent that S.G. would allow. He has been paying appropriate child support to her since the Child's birth.
- [6] After the Child's birth, S.G. took the Child to visit family in Powell River from July 6 to August 7, 2019, and again from August 28 to September 3, 2019. On September 18 and 20, the parties attended at the Family Justice Centre in Kamloops to discuss co-parenting. During these sessions, S.G. told G.M. that she was suffering from postpartum depression and that she wanted to visit her family in Powell River for support. She told G.M. that she was not relocating to Powell River, it was simply a visit to enable her to receive support from her family through her illness.
- [7] The parties reached an agreement at mediation which reflected S.G.'s representation that she was not intending to relocate to Powell River. The mediator prepared a written agreement that purports to reflect their oral agreement. It included the following terms:
- S.G. shall go to Powell River on September 29, 2019, to get family support and help with her postpartum depression;
 - the parties agree this is not a relocation;
 - the parties agree to continue to nurture the relationship between G.M. and his son, while S.G. is in Powell River;
 - the parties agree that G.M. will have parenting time as agreed between the parties;
 - G.M. is to have parenting time with the Child on September 27 and 28; and
 - the parties will make an effort for G.M.'s parents to have contact time with the Child.
- [8] S.G. agreed to these terms at mediation, but later refused to sign the written agreement.
- [9] S.G. went to Powell River on September 29, 2019 as agreed and planned. G.M. believed this was for a temporary visit, but S.G. had other ideas, or at least very quickly changed her mind.
- [10] On October 10, 2019, S.G. gave notice to her Kamloops landlord that she would be vacating her rental accommodation. She did not tell G.M.
- [11] G.M. took holidays and visited S.G. and A.G. in Powell River from October 29 to November 1, 2019. S.G. did not tell G.M. that she had given up her Kamloops accommodation. During this visit, G.M. did not press the issue of parenting because of S.G.'s postpartum depression.
- [12] After G.M. returned to Kamloops and during the month of November, he and S.G. had almost daily contact. He saw the Child on FaceTime. Still, S.G. did not tell G.M. about giving up her Kamloops accommodation and her plan to live in Powell River with the Child.

- [13] It was not until G.M. pressed the issue of S.G.'s return to Kamloops with the Child during a November 25, 2019 telephone call that S.G. finally told him that she would not be returning to Kamloops and planned to live in Powell River with the Child. This was a full six weeks after she had given her Kamloops landlord notice that she would be leaving her rental accommodation.
- [14] On November 29, 2019, S.G. entered into an 18-month fixed-term residential tenancy agreement for a two-bedroom accommodation in Powell River, to commence on January 1, 2020.

Proceedings in the Provincial Court

The Pleadings

- [15] The day after G.M. learned S.G. did not intend to come back to Kamloops, he filed an application in the Provincial Court of British Columbia. Self-represented at the time, he indicated he was applying for:

- (a) guardianship
- (b) parenting time
- (c) allocation of parental responsibilities
- (d) child's immediate return to Kamloops

- [16] He further pled that he is:

seeking guardianship, shared allocation of all parental responsibilities, and secured parenting time as [S.G.], to date, has controlled when I can and cannot see my son. I have paid child support since [A.G.'s] birth. We mediated an MOU where I agreed for her to visit her mother in Powell River and NOT relocate. She has now recanted, will not return home to Kamloops, BC with our son. No 60-day relocation notice.

- [17] On the same day, November 26, 2019, G.M. filed a Notice of Motion in the Provincial Court proceeding seeking the following:

- (a) An order shortening or extending a time limit set out in the Provincial Court (Family) Rules
- (b) An order that a person not remove, or that person be allowed to remove, a child from a geographical area
- (c) An order to prohibit relocation of a child
- (d) An order for service of NOM Application and Affidavit by email/text as she has left home
- (e) An order for [A.G.'s] immediate return to his home here in Kamloops, B.C.

- [18] As for the details of the orders requested, G.M. pled:

Through mediation at Family Justice, we did an MOU in trust for [S.G.] to take [A.G.] to visit her mother in Powell River, BC with [the Child], for a rest. She intends to stay, w/o my consent, no notice.

[19] On December 5, 2019, S.G. filed her Reply. Represented by counsel, Mr. Komori, she pled that she agreed with G.M.'s requests for guardianship, allocation of parental responsibilities and parenting time, but added the following:

I wish to make the following comments regarding the requests even though I agree:

- While the Applicant does not qualify as of yet as a guardian, I acknowledge he is the biological father and am not opposed to him becoming a guardian.
- I agree with the Applicant having parenting responsibilities as follows: [sets out the Joyce model of guardianship orders]
- I agree with the Applicant having contact/parenting time for day visits at present as I am breastfeeding and the child cannot be away from me for extended periods. I am also now living in Powell River.

[20] S.G. also pled that she disagreed with G.M.'s application for an order for the Child's immediate return to Kamloops. She wrote:

I disagree because:

- The applicant as of yet is not a guardian, and as such is not in a position to dispute the relocation. As well the move to Powell River was in the child's best interest as I have been suffering from postpartum depression and have no support in Kamloops, whereas in Powell River I have support from family and friends.

[21] S.G. counterclaimed for the following orders.:

- (a) guardianship;
- (b) allocation of parental responsibilities;
- (c) parenting time;
- (d) child support; and
- (e) under Rule 19 of the Provincial Court (Family Rules), the file be transferred to Powell River for all purposes.

[22] In support of his Notice of Motion, G.M. filed an affidavit sworn November 26, 2019. S.G. filed an affidavit sworn December 5, 2019. Attached to her affidavit is a letter dated December 4, 2019 from Dr. Rossouw, S.G.'s family doctor. He wrote:

To Whom It May Concern:

This is a letter whereby I strongly recommend that [S.G.] should not leave/relocate out of Powell River at the current time.

She has significant post-partum depression and has excellent support locally. She is being seen at Mental Health on a ongoing basis, has the support of her parents and myself (as her longstanding family doctor) and is coping well under the circumstances. She is doing very well in raising her child, and he seems to be thriving.

I have advised her to see me in very frequent intervals, as well as her counsellor.

It obviously is extremely important that she continues to breastfeed, as it goes without saying that it is in the child's best interest to be exclusively breastfed at very frequent intervals.

[23] On December 10, 2019, the parties agreed to an interim, without prejudice, consent order in front of Judge Dickey that set out a schedule for visits between the Child and G.M., both in Kamloops and Powell River, for week-long periods at a time.

[24] G.M. filed a second affidavit in the Provincial Court proceedings on December 11, 2019.

[25] In accordance with the December 10, 2019 interim consent order, G.M. visited the Child in Powell River from January 5 to January 12, 2020, and S.G. brought the Child to Kamloops for a visit with G.M. from January 27 to 31, 2020.

The Hearing - February 20, 2020

[26] The parties scheduled their Provincial Court trial for June 29 and 30, 2020. In the interim, they scheduled a half-day on February 20, 2020 for the hearing of G.M.'s Notice of Motion. Judge Cleaveley presided over the hearing, and the parties, now both represented by counsel, relied on their affidavits, viva voce evidence, and a book of exhibits filed by consent. Counsel made written submissions, which were later tendered.

[27] G.M.'s counsel at the time, Ms. Glaicar, made an opening statement, where she discussed the issue that was to be decided on an interim basis. She advised the court that:

the only issue to be determined at this hearing is whether or not S.G. should return to Kamloops with the child This is that she would return the child to Kamloops pending a trial on the merits of the case, which is scheduled for June 29th and June 30th of this year.

[28] Ms. Glaicar also advised that S.G.:

herself has agreed to the applicant's application to be a guardian and to share in the specific parental responsibilities in her reply Under the Family Law Act, it is our position that the parties are guardians and ought to discuss important -- important decisions regarding [A.G.] including where [A.G.] shall reside.

[29] In response to the court's question about its authority to order that S.G. return to Kamloops with the Child, Ms. Glaicar submitted:

You have the authority under [section] 216 to make interim orders pursuant to the [FLA]. There's case law that supports a return of the child and I have provided a book of authorities . . . to my friend and I will to the court as well. Section 77 of the Act does allow the court to order return of the child and costs be payable as well for travel. And that's ultimately to -- to determine the issues of this case.

S.G. has removed the child, which was against her obligations as a guardian to discuss that with G.M.

[30] G.M. then testified and was cross-examined.

[31] Mr. Komori then made a brief opening statement on behalf of S.G. He advised the court: [S.G.'s] position on this matter is first that G.M. is not a guardian and therefore does not have standing to fight the relocation.

[32] Then the court and counsel had the following exchange:

THE COURT: Sorry, he doesn't have standing to fight the relocation?

MR. KOMORI: If he's not a guardian, he does not have standing.

THE COURT: All right, but this isn't a relocation case -

MR. KOMORI: I'm sorry?

THE COURT: This isn't a relocation case in the classic sense, is it?

MR. KOMORI: Well, if it's a request for her to be moved back, then I submit it is. And that is the application.

THE COURT: In [S.G.'s] reply, she agrees that [G.M.] is a guardian.

MR. KOMORI: No. She does not. She says in time she's willing to -

THE COURT: Well, may - just a sec, just [indiscernible/voice low]. Maybe I misread this.

MR. KOMORI: She said she's not opposed to him becoming a guardian. I'll find it myself.

THE COURT: Well, I'm looking at it.

MR. KOMORI: Well, "the applicant does not qualify as of yet as a guardian. I am - acknowledge that he is the biological father and I'm not opposed to him becoming a guardian," is what she says.

THE COURT: Well, I'm just looking at the first page. "I agree with his request for guardianship."

MR. KOMORI: But she says, "I wish to make the following comments regarding the request even though I agree," and that's her comment.

THE COURT: Okay.

MR. KOMORI: So ultimately speaking, long-term she's not opposed to him being a guardian, but she is now.

THE COURT: Okay. But she is now, so she changed her view since the reply was filed?

MR. KOMORI: What I'm saying is she's opposed to him being a guardian at the moment. She's not opposed to him becoming a guardian over time.

THE COURT: Okay.

MR. KOMORI: So the argument is essentially if he's not a guardian he does not have the ability to argue the relocation. Even if that's not so, then you have to look at what's in the best interests of this child. That's the test. And it's my submission that it is not in the best interests of this child to have what has been - what looks like has been a good thing for the mother and the child at this point in time varied, especially given that there is a hearing set for June 29th and 30th. So with that intro, I will call [S.G.]. She wishes to affirm.

[33] S.G. then testified and was cross-examined.

[34] At the conclusion of the evidentiary phase of the hearing, the court directed counsel to prepare written submissions. Specifically, the court directed counsel to address two issues:

Two issues I want to address in submissions, focuses what is -- what I sense is some unfairness as to how this developed, and the legal issue. If I were to resolve this matter by concluding that what S.G. did was unfair, what's my authority to make the order, and that's what I address with Ms. Glaicar right at the outset. Those are my concerns, just so that counsel know.

[35] In response to counsel's inquiry, Judge Cleaveley clarified that he wanted submissions from counsel on the court's authority to order S.G. to return to Kamloops with the Child.

[36] Ms. Glaicar filed written submissions on behalf of G.M. G.M.'s counsel for the proceeding at bar, Mr. Walter, attached those written submissions to his own submissions. I am satisfied that Ms. Glaicar's written submissions form part of the record of the proceeding and are properly before me on review.

[37] In short, Ms. Glaicar, referencing the relief sought in the Notice of Motion, again articulated that the issue to be determined was whether or not S.G. should return to Kamloops with the Child pending a trial on the merits. She indicated that at trial, G.M. would be seeking an order that he be named a guardian, certain parenting arrangements, including parental responsibilities and parenting time, and an order that S.G. remain in Kamloops. In support of the interim application, Ms. Glaicar relied on ss. 39(3)(c), 46, 73, 77, 216, 222, and 227 of the FLA, as well as various case authorities which she submitted "together empower the Provincial Court to make an order as sought".

[38] Ms. Glaicar first made submissions about G.M.'s guardianship. She argued that if the court does not determine G.M. is a guardian based on the "pure fact" the parties agreed (S.G. agreeing to his being a guardian in her Reply), then G.M. should be found to be a guardian

automatically under s. 39(3)(c) of the FLA. She discussed certain case authorities, including *A.A.A.M. v. British Columbia (Children and Family Development)*, 2015 BCCA 220, in light of the evidence before the court, and ultimately submitted that "whether on an interim or final basis, G.M. should be ordered a guardian of A.G. and be able to participate in these proceedings as a guardian and in future parenting decisions regarding [the Child]".

- [39] Ms. Glaicar then argued that, on the basis that G.M. is a guardian, the parties should share parental responsibilities, including making decisions about where A.G. shall reside. She then agreed to the Joyce guardianship model proposed by S.G. in her Reply.
- [40] Ms. Glaicar then argued that S.G. was obligated to provide notice to G.M. of her intention to relocate to Powell River or obtain a court order permitting her to do so. She discussed the factors outlined in s. 37 of the FLA pertaining to the best interests of the Child, and argued that it would be in the Child's best interest for S.G. to return to Kamloops with the Child on an interim basis pending the upcoming trial.
- [41] Ms. Glaicar then turned to ss. 73 and 77 of the FLA. In her concluding submissions, she again emphasized that G.M. is a guardian of the Child and that, as such, S.G. was obligated to provide him with prior notice of her proposed relocation or obtain a court order in advance of moving. She argued that S.G.'s secretive move should not be condoned by the court, that it would "offend the spirit of the FLA, and was ultimately against the best interests of the Child and against the interests of justice".
- [42] Counsel did not include Mr. Komori's written submissions from the court below in the petition record.

Judge Cleaveley's Reasons for Judgment

- [43] On March 5, 2020, Judge Cleaveley provided his reasons for judgment. He ultimately made the following interim orders at paras. 44-48:
- [44] I am making the following interim orders.
- [45] [G.M.] is a guardian under s. 39(3) of the Family Law Act.
- [46] The guardians shall share the parenting responsibilities as follows:
- (a) Each guardian will have the obligation to advise the other guardian(s) of any matters of a significant nature affecting the child;
 - (b) Each guardian will have the obligation to discuss with the other guardians any significant decisions that have to be made concerning the child, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
 - (c) The guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;

- (d) In the event that the guardians cannot reach agreement on a significant decision despite their best efforts, [S.G.] will be entitled to make those decisions and [G.M.] will have the right to apply for directions on any decision the guardian(s) consider(s) contrary to the best interests of the child, under s. 49 of the Family Law Act,
 - (e) Each guardian will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party caregivers.
- [44] Judge Cleaveley began his reasons by identifying the issues before the court. He wrote:
- [2] This interim ruling pertains to [G.M.'s] application for guardianship, parenting time, allocation of parental responsibilities, and the central issue before me, an order that [S.G.] return the child to Kamloops immediately.
- [45] The court identified that the primary purpose of interim rulings in family litigation is to "maintain the status quo provided that any order is in the best interests of the child": para. 4.
- [46] Judge Cleaveley began his analysis by making credibility findings against S.G. and in favour of G.M. Where their evidence conflicted, Cleaveley P.C.J. found that he preferred the evidence of G.M. He then found the facts, which are largely what I have outlined above.
- [47] Judge Cleaveley then identified that the first issue he had to decide was G.M.'s guardianship. He wrote:
- [29] G.M., to succeed in this application, must satisfy me that he is a guardian and that it is in the child's best interests that he be returned to Kamloops pending a full hearing.
- [48] Relying on the Court of Appeal's interpretation of the provision in A.A.A.M., the court found that G.M. is a guardian under s. 39(3)(c) of the FLA. Section 39(3)(c) of the FLA provides:
- (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
 - (c) the parent regularly cares for the child.
- [49] Judge Cleaveley held that G.M. falls within the definition of "regularly cares for the child", in that G.M. :
- [33] has very clearly demonstrated a continuing willingness to provide for the child and a history of doing so and, as I said earlier, had he been given more of an opportunity, I am satisfied that he would have been more involved.

- [50] Having found G.M. to be a guardian, the court went on to consider his application to have the Child returned to Kamloops. Judge Cleaveley found that S.G.'s postpartum depression was "now controlled medically and she is coping better": para. 40. He found that although she has family support in Powell River, that she is not without such supports in Kamloops and that, overall, the negative impact on A.G. would be limited if S.G. was required to return to Kamloops.
- [51] Ultimately, Judge Cleaveley considered the Child's best interests and held:
- [42] It is my view that the best interests of the child can only be met by having [the Child] return to Kamloops where [the Child] will have the benefit of both parents. This will allow the child to see G.M. on a consistent basis leading up to the June hearing. It is not fair or feasible to think that this can be done on the current access schedule and the time required to travel between Powell River and Kamloops.
- [43] The status quo which was in place before S.G. relocated without notice to Powell River in late September must be restored.

The Petition Proceeding

- [52] On March 16, 2020, S.G. filed the Petition now before this court, seeking to have Judge Cleaveley's order set aside pursuant to ss. 3 and 7 of the JRPA, s. 46 of the FLA, and the Supreme Court Family Rules, B.C. Reg. 169/2009. The Petition lacks detail and counsel significantly expanded S.G.'s grounds for review at the hearing. Counsel for the respondent was aware of the arguments to be made and was in a position to respond to them.
- [53] I should pause at this point to note that S.G. seeks other relief from this court as well. Her counsel concedes that this additional relief is outside the scope of a judicial review, but nevertheless asks the court, in its parens patriae role, to exercise its inherent jurisdiction to consider new evidence and order a stay of Judge Cleaveley's orders on the basis of a change in circumstance. To that end, S.G. filed an affidavit containing new evidence about her mental health and related to challenges associated to the COVID-19 pandemic.
- [54] To place this additional and unusual relief in context, it is important to know that on March 31, 2020, S.G. also filed an application for an urgent hearing in the Provincial Court, under its new COVID-19 urgent hearing protocols, seeking a stay of Judge Cleaveley's order that she and the Child move back to Kamloops by March 28, or alternatively, seeking an interim order that she and the Child may remain in Powell River until further agreement or court order. Her reasons for seeking those orders are identical to the reasons advanced in the unusual application before this court. S.G. filed an affidavit in support of her urgent hearing application in the Provincial Court, as well.
- [55] On the same day she filed her urgent hearing request, Judge Heinrichs denied her application, indicating that S.G.'s outstanding judicial review should be completed first.

- [56] S.G.'s counsel then scheduled the hearing of this Petition on an urgent basis under this court's protocols. She decided to take the opportunity to seek the relief she sought to have heard in Provincial Court in this forum, to save time and expense. To that end, S.G. filed an affidavit dated April 8, 2020, which included the new evidence and reasons why she thought the order should be stayed on the basis of the new evidence. G.M. objected to this procedure. However, he filed a responsive affidavit, in the event that the court was inclined to hear this separate application.
- [57] The petition hearing took much of the day on April 22, 2020. At its commencement, I addressed the new evidence S.G. sought to introduce and the unusual application that accompanied it. Mr. Komori conceded that the new material was not properly before me on the judicial review and I therefore ruled that neither S.G.'s new affidavit nor G.M.'s responsive affidavit were admissible on the review. Mr. Komori sought the opportunity to persuade me to consider S.G.'s separate application in the event that she was unsuccessful on the judicial review. I agreed to hear the application and indicated that the two affidavits would be admissible for that limited purpose only.
- [58] Having now heard that application, I have decided there is no basis upon which this court could, or should, assume jurisdiction over a matter properly within the jurisdiction of the Provincial Court. The judicial review forum is not the place to argue for a variation or stay of the order being reviewed based on a change in circumstance. On judicial review, a court is not undertaking a hearing *de novo* or a fresh look at one or more of the substantive issues. The function of the court is supervisory. For these reasons, a reviewing court generally does not admit evidence that was not part of the record before the tribunal: *Albu v. University of British Columbia*, 2015 BCCA 41 at para. 36.
- [59] As I explained in *Wan v. The National Dental Examining Board of Canada*, 2019 BCSC 32 at paras. 9-21, there are certain circumstances in which material not normally considered part of the tribunal's record would be admissible, but this is not one of those circumstances. To do what the petitioner asks with this unusual application would be to, I think, improperly expand the scope of judicial review and circumvent the proper process that should be undertaken, which is an application before the Provincial Court based on a material change in circumstance.
- [60] Turning now to the Petition.

The Review

- [61] It is settled law that where a party seeks to have an interim Provincial Court order set aside in this context, the correct procedure is to apply for judicial review pursuant to the JRPA (see, for example, *Jocelyn v. Fry*, 2016 BCSC 893 in the context of an interim order pertaining to child support).
- [62] Section 3 of the JRPA provides:

3. The court's power to set aside a decision because of error of law on the face of the record on an application for relief in the nature of certiorari is extended so that it applies to an application for judicial review in relation to a decision made in the exercise of a statutory power of decision to the extent it is not limited or precluded by the enactment conferring the power of decision.
- [63] Section 7 provides that the court may set aside a decision if an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid.
- [64] Section 1 provides that a "statutory power of decision" includes the powers of the Provincial Court. In *Dima v. Dima*, 2011 BCCA 86, our Court of Appeal confirmed that the JRPA applies to Provincial Court orders: para. 19.

Standard of Review

- [65] At the hearing, the parties disagreed as to whether appellate or administrative law standards of review are to apply here. However, from their further written submissions on the topic, it is apparent the parties now agree that the applicable standard, as per the framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, is reasonableness. Where they now disagree is on how that standard is to be applied.
- [66] In brief summary (which I confess does not do justice to the parties' scholarly written submissions on this topic), S.G. argues that in the unique context of a review of an interim Provincial Court decision under the FLA, the application of the reasonableness standard should effectively mirror an appellate review in the context of family law generally. She argues that the reviewing court ought to apply a deferential standard that is limited to a finding of material error, serious misapprehension of the evidence, or an error of law: *Bartch v. Bartch*, 2018 BCCA 271 at paras. 23-24. She submits that an error of law will always make a decision unreasonable and that the concepts of "material error" and "serious misapprehension of the evidence" adhere to the reasonableness analysis set out in *Vavilov* with regard to the decision maker's treatment of evidence, submissions, and past practices and decisions, as well as the more general requirement that a decision be internally coherent and rational.
- [67] G.M. submits that *Vavilov* mandates the presumption of reasonableness as the applicable standard of review, and that only certain situations rebut that presumption, none of which are applicable here. He argues that to engage in the contextual analysis of the reasonableness standard to find its application mirrors appellate review, as submitted by the petitioner, would be to run afoul of the Supreme Court of Canada's clear direction that courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of the reasonableness standard: para. 69. The standard of review should not change from one of reasonableness simply because the decision under review is a Provincial Court decision. It would also run afoul of the clear legislative intent that no

appeal lies from an interim decision of the Provincial Court under the FLA.

- [68] I agree with the position taken by G.M. here.
- [69] In Vavilov, the Court set out a revised framework for determining the standard of review in the administrative law context. Reasonableness is the presumptive standard in all cases: para. 16. This means it is no longer necessary or appropriate for the reviewing court to engage in a contextual inquiry to determine the standard of review. This presumption is premised on legislative intent. Where the legislature has created a decision-maker for the purpose of administering a statutory scheme, it is presumed that the legislature intends the court to adopt a deferential approach in reviewing those decisions.
- [70] The Court in Vavilov explained that the presumption of reasonableness can be rebutted in two types of situations: para. 17. The first situation is where the legislature has indicated an intention that a different standard applies. The second situation is where the "rule of law requires that the standard of correctness be applied".
- [71] With respect to the first situation, the presumption of reasonableness is rebutted where the legislature explicitly prescribed the applicable standard of review, or where the legislature provides a statutory appeal mechanism to a court, indicating appellate standards are to apply: Vavilov at para. 17.
- [72] In the present case, there is no indication that the legislature intended for a different standard to apply. The FLA does not contain a statutory right of appeal of an interim decision of the Provincial Court. In fact, it prohibits such appeals. Section 233 of the FLA provides that there is no appeal of an interim order of the Provincial Court, in very unambiguous language. It provides:
- (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.
- [73] With this provision, the legislature has made it clear that only final orders made in the Provincial Court under the FLA may be appealed. The existence of a statutory right of appeal for final orders signals a clear legislative intent that the court hearing such an appeal is to apply the usual standards of appellate review set out in *Housen v. Nikolaisen*, 2002 SCC 33. The appellate standard of review for questions of law is correctness and for questions of fact or mixed fact and law is palpable and overriding error: paras. 36-37.
- [74] Interim orders of the Provincial Court under the FLA are expressly excluded from a statutory right of appeal. Furthermore, the legislated standards of review set out in the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 do not apply.

- [75] The second situation or exception articulated in Vavilov does not apply here either. Respect for the rule of law requires the court to continue to apply the standard of correctness to three types of legal questions: (i) constitutional questions; (ii) general questions of law of central importance to the legal system as a whole; and (iii) questions regarding the jurisdictional boundaries between two or more administrative bodies. None of those apply here.
- [76] The petitioner argues that a line of authorities pre-dating the release of Vavilov continues to have some persuasive value in the application of the reasonableness standard. They are cases that held that a judicial review of an interim Provincial Court order made under the FLA or its predecessor is akin to an appeal. I am of the view that they are no longer applicable.
- [77] In *B.P. v. D.B.*, 2003 BCSC 1312, Justice Williams considered an application to set aside an interim order of the Provincial Court made pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. Like s. 233 of the FLA, s. 16 of the FRA provided that an interim order of the Provincial Court cannot be appealed. With respect to the standard of review, Williams J. held:
- [9] Although the proceeding is taken by way of the Judicial Review Procedure Act, it is essentially in the order of appellate review. With respect to the appropriate standard of review for an appellate court in custody cases, the issue has been definitively dealt with by the Supreme Court of Canada in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014:

11 In reviewing the decisions of trial judges in all cases, including family law cases involving custody, it is important that the appellate court remind itself of the narrow scope of appellate review. L'Heureux-Dubé J. stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at paras. 10 and 12:

[Trial judges] must balance the objectives and factors set out in the Divorce Act or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.

There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. [Emphasis added.]

- [78] In *O.C.C. v. A.C.*, 2013 BCSC 682, the petitioner also sought to set aside an interim order of the Provincial Court made pursuant to the FRA. Again, the petition was brought pursuant to the JRPA. The issues on review in this case were whether there had been procedural defects that constituted a denial of due process and whether there had been a reasonable apprehension of bias resulting in a denial of natural justice.
- [79] With respect to the standard of review, the court held:
- [34] Counsel made no submissions on the appropriate standard of review.
- [35] In *Panares v. Bieker*, 2003 BCSC 1312, the petitioner sought an order setting aside the decision of a Provincial Court judge granting interim custody of a child; in the alternative, that the judge reconsider his decision. At para. 9, Williams J. viewed the matter before him as "essentially in the order of appellate review" and proceeded to discuss the appropriate standard of review for an appellate court in custody cases.
- [36] This judicial review is not analogous to an appeal of retroactive support. The issues relate to procedural defects that may constitute a denial of due process and an apprehension of bias a denial of natural justice. Not swearing or affirming the parties raises the question of jurisdiction. I find the standard of review is correctness, as these issues are questions of law: see *Housen v. Nikolaisen*, 2002 SCC 33.
- [80] There are, however, other authorities from this court pre-dating *Vavilov*, that reach a different conclusion about the standard of review. One such authority is *Goyert v. British Columbia (Provincial Court)*, 2009 BCSC 1644. The petitioners sought judicial review of various orders made in the Provincial Court pursuant to the FRA. Justice Macaulay discussed the court's task on review in these terms:
- [4] It is important to understand the constraints that apply to applications for judicial review under the JRPA. Applications for review by way of certiorari to quash orders or for declarations or injunctive relief relating to the exercise of a statutory power all fall within the JRPA and may, in some circumstances, extend to setting aside decisions of the Provincial Court under the FRA. However, the proceedings are in the nature of an administrative law review, not an appeal.
- [5] My task is to decide if the Provincial Court judges did not have or, alternatively, had but lost jurisdiction to make decisions, not whether the decisions were right or wrong. See *Vanton v. British Columbia (Council of Human Rights)*, 25 Admin. L.R. (2d) 253, [1994] B.C.J. No. 497 (S.C.).
- [6] Further, even if the *Goyerts* succeed on a jurisdictional issue, I have the discretion to refuse relief in certain circumstances. Under ss. 8(1) and 9(1) of the JRPA, a court may refuse relief in the following circumstances:

8(1) If, in a proceeding referred to in section 2, the court had, before February 1, 1977, a discretion to refuse to grant relief on any ground, the court has the same discretion to refuse to grant relief on the same ground.

9(1) On an application for judicial review of a statutory power of decision, the court may refuse relief if

- (a) the sole ground for relief established is a defect in form or a technical irregularity, and
- (b) the court finds that no substantial wrong or miscarriage of justice has occurred.

[81] As I indicated, I decline to follow the line of authorities provided by the petitioner that pre-date Vavilov. The Court in Vavilov recalibrated and made a holistic revision of the standard of review analysis. The Court departed from decades of jurisprudence and has instructed courts to now start with the reasons in Vavilov and its companion case, Bell Canada, in identifying and applying relevant standard of review principles. Past precedents are to be approached cautiously.

[82] The Provincial Court is a statutory court and derives its powers from legislation. As a result, while legislation may provide a right of appeal from a Provincial Court order, in the absence of such legislation, the mechanism for oversight is judicial review and the principles of administrative law apply.

[83] The presumption is not rebutted and the standard of reasonableness applies in this case. To attempt to morph the application of that standard to mirror an appellate standard of review as sought by the petitioner would be contrary to the Court's direction. In Vavilov, the Court was clear that reasonableness is a single standard. After noting the wide variety of administrative decision makers whose decisions may be subject to judicial review, the Court held:

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context"

[84] Whether a decision is reasonable depends on the constraints imposed by the legal and factual context of the particular decision under review: para. 90.

Application of the Standard

[85] S.G. argues that the court below erred in four ways, any one of which renders the decision unreasonable. She submits at paragraph 5 of her written submissions:

- a. The court erred in law when it ordered the Petitioner to return the child to Kamloops, knowing that the only way this could be accomplished was the Petitioner and child [returning] to Kamloops, there being no application for the Respondent to have primary residence.
 - b. The court erred when it made orders (regarding guardianship and parenting responsibilities) that were not requested by either party. The court therefore failed to follow procedural fairness.
 - c. The court seriously misapprehended the evidence in finding that the Petitioner's post partum depression was not an issue in ordering her to return to Kamloops.
 - d. The court did not apply the proper test (section 46 of the Family Law Act) when making its decision and did not take a "blended" approach when considering the issue of mobility and custody.
- [86] G.M. submits that the court's decision and its reasoning process were reasonable and that none of the petitioner's complaints have merit. He argues there is no error of law in the face of the record, that procedural fairness was observed, and that the judge exercised discretion to make such orders as he saw appropriate after considering the best interests of the Child. The decision, he argues, is justifiable on the underlying facts and law.
- [87] In *Sierra Club of BC Foundation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 596, Justice Murray summarized the general principles that are now to underpin the court's application of the reasonableness standard of review. She wrote:
- [36] In *Vavilov*, the Supreme Court of Canada provided guidance as to how to apply the reasonableness standard of review, stressing the hallmarks of reasonableness - justification, transparency and intelligibility - and highlighting that the review is concerned with the decision maker's reasoning process as well as the impugned decision. Where the decision maker releases the decision in writing, the review is reasons-centred (*Vavilov* at para. 84).
- [37] The question for the reviewing court is whether the decision made by the administrative decision maker, including both the rationale for the decision and the outcome, was unreasonable (*Vavilov* at para. 83).
- [38] In *Vavilov*, the Court provided the following direction for reviewing a decision:
- 1) The burden is on the petitioner to show that the decision is unreasonable: para. 100.
 - 2) It is not enough for the outcome of a decision to be justifiable: para. 86. Where reasons for a decision are required, the decision must also be justified by the decision maker in his/her reasons: para. 86.
 - 3) Considerable deference will be given by the court to the decision maker in reviewing an exercise of discretion: para. 108.

- 4) The starting point in applying the reasonableness standard is to apply judicial restraint and respect the distinct role of administrative decision makers: paras. 13, 75. However, the reviewing court must conduct a robust review and not simply "rubber stamp" decisions: para. 13.
 - 5) The reviewing court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable in order to set aside a decision on this basis: para. 100.
 - 6) A decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it: para. 128.
 - 7) An otherwise reasonable outcome cannot stand if it was reached on an improper basis: para. 86.
 - 8) Two fundamental flaws would render a decision unreasonable:
 - i. First, if the decision is irrational, illogical or the conclusion reached cannot follow from either the analysis or the reasons read in conjunction with the record: paras. 102-103;
 - ii. Second, if the decision is not justified based on the underlying facts or law: paras. 105-107, 135.
 - 9) A number of non-exhaustive factors or elements will generally be relevant in deciding whether a given decision is reasonable, including:
 - i. the governing statutory scheme;
 - ii. other relevant statutory or common law;
 - iii. principles of statutory interpretation;
 - iv. the evidence that was before the decision maker;
 - v. the submissions of the parties;
 - vi. the past practices and decisions of the administrative body; and
 - vii. the potential impact of the decision on the affected individual.(para. 106).
 - 10) The reasons must not be measured against a standard of perfection: para. 91. They need not include all arguments, statutory provisions, and jurisprudence: paras. 91-93.
- [88] It is with all of these principles in mind that I approach my review.
- [89] Judge Cleaveley provided reasons for his decisions. Although the reasons may not have contained references to the applicable sections of the FLA, all of the parties' arguments, all of the jurisprudence, or other details referred to by counsel, I am not to assess the reasons against a standard of perfection. When I consider the reasons as a whole, I find that I am

able to trace the court's reasoning process. I see no fatal flaws in the overarching logic explaining what the court ordered and why. Read holistically in light of the submissions of counsel and the issues before him, I think Judge Cleaveley's reasons reveal a rational chain of analysis, lead to conclusions that follow from the analysis, disclose the reasoning on critical points, and do not exhibit any logical fallacies. The decision is internally coherent. Overall, it bears the hallmarks of reasonableness, justification, transparency, and intelligibility.

- [90] I also find that the decision is justified in relation to the relevant legal and factual constraints. G.M. applied, on an interim basis, to have the Child returned to Kamloops pending trial. S.G. took the primary position that G.M. was not yet a guardian and therefore had no standing to bring the application. The parties called evidence pertaining to the issue of guardianship and made submissions on the topic. It should have come as no surprise to the parties that Judge Cleaveley made a finding on guardianship in these circumstances. Whether G.M. was a guardian was a determination that had to be made if he was to have standing.
- [91] Judge Cleaveley had the authority to find that G.M. was a presumptive guardian under s. 39(3) (c) of the FLA in consideration of the jurisprudence, on the evidence presented and in light of the submissions made. It was clearly a finding that was open for him to make and indeed one that he was encouraged to either make or decline. There was no procedural unfairness in his so doing.
- [92] Once the finding of guardianship was made, I find that the court also had the authority to make the interim parenting responsibility orders it did. Judges are entitled to rely on the pleadings before them. They are entitled to exercise their discretion under the rules of their tribunal to make orders within their authority.
- [93] Rule 6(3) of the Provincial Court (Family) Rules, B.C. Reg. 417/98 expressly permits a judge to "make an order that all parties consent to in respect of all or any part of what is claimed in the application or reply". The judge did not depart at all from what S.G. expressly consented to in her reply with respect to the division of parenting responsibilities. Again, this decision was made after hearing viva voce evidence from both parties, subject to cross-examination, and with full submissions by counsel. The court made interim orders that were reasonably supported by the evidence, including not only a recognition that G.M. was a guardian, but the parental responsibility orders that S.G. actually proposed in her pleadings. The legislation requires Judge Cleaveley to consider the best interests of the child in making such an order and his reasons reveal that he did. There was no procedural unfairness in his so doing.

[94] The court also had the authority to make the order that was the focus of the hearing, the order for the return of the Child on an interim basis. While the court did not specify the particular legislative basis for this order in its reasons, judges are presumed to know the law. I am of the view that the court's authority lies in ss. 216, 218, 222, and/or 227 and, of course, the overarching consideration of the child's best interests set out in s. 37 of the FLA.

[95] Section 216 provides that if an application is made for an order under the FLA, a court may make an interim order for the relief applied for. The interim order must be made in accordance with any requirements or conditions of the statute that would apply if the order were not an interim order.

[96] Section 218 provides a court with discretion to include in an order any term or condition considered appropriate in the circumstances.

[97] Under s. 222, a court may make an order respecting conduct for a number of purposes. Section 222 provides:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

[98] Furthermore, s. 227 provides that a court may make an order requiring a party to "do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222".

[99] Together, these provisions provide a court with broad discretion. As noted by our Court of Appeal in *A.B. v. C.D.*, 2020 BCCA 11, ss. 222 and 227 have been interpreted as giving the court broad discretion to craft appropriate conduct orders.

[100] Of course, the best interests of the child are paramount and the consideration of those factors under s. 37 of the FLA are mandatory.

[101] Section 37 of the FLA provides:

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.

[102] There is nothing in the reasons to suggest that Judge Cleaveley did not fully consider the best interests of the Child as expressed in s. 37.

[103] The petitioner argues that the court's order that the Child return to Kamloops implicitly ordered S.G. to return to Kamloops as well, and she argues that the court lacks the authority to order her to return. In this regard, she cites *McIntosh v. Kaulbach*, 2014 BCCA 299, where our Court of Appeal stated, in part:

[16] While a court may prohibit a parent from relocating a child, or a court may make a custody order that indirectly limits a parent's mobility, "a court cannot indenture an individual to a community": *Falvai v. Falvai*

- [104] I think it is clear from the pleadings, the submissions of counsel, the evidence adduced and the reasons, that the judge was ordering both the child and S.G. back to Kamloops on an interim basis. It is also clear from the reasons that the court was motivated by the interim nature of the proceedings and the desire to preserve the status quo that existed prior to the petitioner's secretive relocation to a community many hours from the parties' home community and away from the Child's father.
- [105] Central to the court's conclusions were findings of credibility made in favour of G.M., the court's finding that S.G. had prioritized her own interests over those of the Child, and the court's overarching consideration of the Child's best interests. These conclusions were reached after a full and substantive hearing. As the trier of fact, the hearing judge was in the best possible position to assess credibility and make findings of fact. I see no serious misapprehension of the facts as alleged or at all. The findings the court made were available on the evidence. As the respondent argues, the granting of interim relief in family law proceedings is highly discretionary and not subject to the same concerns respecting finality as expressed in some of the authorities provided by the petitioner.
- [106] Judge Cleaveley's order requiring S.G. to return to Kamloops with the Child does not "indenture her to a particular community". Rather, it requires S.G. to return to the status quo and manage behaviours that might frustrate a resolution of the proceeding and/or facilitate arrangements pending final determination, all in consideration of the best interests of the child.
- [107] As with many interim orders, this order was intended to bridge the gap to trial when a final decision could be made on the merits. The parties' trial was only a few months away at the time the order was made.
- [108] In summary, I conclude that the outcome of the decision is justifiable and that the decision is also justified by the court in its reasons.
- [109] Judge Cleaveley meaningfully grappled with the key issues and central arguments raised by the parties. The orders made were a reasonable outcome reached on a proper basis. The decision is rational, logical, and follows from the analysis, in light of the evidence adduced and submissions made. The decision is justified based on the underlying facts and law. Overall, I am satisfied the decision was not unreasonable and that the reasoning process was coherent, rational, logical, justifiable, and transparent. For all of these reasons, the petition is dismissed.
- [110] With this result, the respondent is entitled to costs. Although Mr. Walter's provided written submissions on the issue of costs, Mr. Komori wished to address the matter of costs following my reasons for judgment. If the parties are unable to agree on the issue of costs, I direct that they arrange a hearing in front of me through Supreme Court Scheduling on or before May 31, 2020, or such other date as agreed by counsel. Alternatively, if counsel agree, they may rely upon written submissions, either the written submissions that have already been filed or further written submissions provided to the court on or before May 31, 2020. I

will leave that in counsel's hands.

[111] There is some flexibility there, counsel. If you are unable to agree on the issue of costs, then it can be brought back before me for oral submissions in a hearing arranged through Supreme Court Scheduling on or before May 31, if that timeframe works for you. I am open to hearing suggestions on a different timeframe. If you do not want to arrange an oral hearing, then you can provide written submissions, relying on the ones that have already been filed and/or providing further written submissions within that same timeframe.

[DISCUSSION RE SCHEDULING]

[112] THE COURT: I will put the outside deadline at June 12 then. My thanks to counsel.

"S.A. Donegan J."

DONEGAN J.

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