SCC File No. 39533

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

ASHLEY SUZANNE BARENDREGT

APPELLANT
(Respondent)

A N D:

GEOFF BRADLEY GREBLIUNAS

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT
(GEOFF BRADLEY GREBLIUNAS, RESPONDENT)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW & STATEMENT OF FACTS

OVERVIEW

1 The Court of Appeal applied this Honourable Court's decision *Gordon v. Goertz*.[1] For the Court of Appeal, the best interests of the children are served by the children staying in Kelowna with their father and mother. The Court of Appeal decision is correct. Keeping the children in Kelowna is the right thing to do for the reasons given by the Court of Appeal, including that:

- both parents are custodial parents;
- both parents are good parents;
- the children grew up in Kelowna;
- the children's friends are in Kelowna;
- their paternal grandparents have moved to Kelowna;
- permitting relocation is inconsistent with the object of maximizing contact between the children and both parents; and
- relocation would permanently and profoundly alter the relationship of the children to their father.[2]

2 Further, the Court of Appeal was correct in determining that concerns with respect to the Appellant's "need for some emotional support" do not outweigh the benefits attained by their remaining in Kelowna. Fundamentally, the best interests of these children are served "with their primary residence being in Kelowna and with their being parented by both their parents."[3]

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[1] *Gordon v. Goertz*, 1996 CanLII 191 (SCC).
[2] Appellant's Record ("AR") p. 48, para. 87.
[3] AR p. 49, para. 90.

3 The decision of the Trial Judge rested, in part, on findings made with respect to the Respondent's financial position.[4] In particular, the Trial Judge observed that "[a]s of the date of trial", the Respondent's financial position was uncertain.

4 The circumstances underlying these key findings have changed.[5]

5 The Respondent has financed the Family Home and purchased the Appellant's interest.[6] The Respondent's financial position is no longer "less than certain".[7]

6 The Court of Appeal determined that the Respondent's evidence was "cogent and material". The evidence "goes to the core" of the Trial Judge's analysis, demonstrating that the critical findings on which the decision rests are simply "incorrect".[8]

7 It is submitted that, whether the Respondent's evidence is received as "new" or "fresh" evidence, the fact remains: a key finding underlying the Trial Judge's conclusion with respect to relocation has changed.

8 The Court of Appeal concluded the Respondent's evidence *would* change the result at Trial or could reasonably be expected to do so. The reason is simple. This case involves a classic *Gordon v. Goertz* analysis. Since that analysis must be conducted "in the round",[9] <u>any</u> change in the underlying factual circumstances *necessarily* changes the result. The juridical equivalent of substituting honey for sugar in a cup of tea. They both sweeten the cup, but the change affects the resulting flavour.

STATEMENT OF FACTS

9 The Trial Judge found that, during the course of the marriage, the parties shared parenting of their two children by working opposite shifts at their respective employment. Within a month

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[4] AR pp. 14-15, paras. 39-40.
[5] AR pp. 33-34, paras. 26-28.
[6] AR pp. 33-34, paras. 26-28.
[7] AR p. 15, para. 40.
[8] AR pp. 39-40, paras. 50-51.
[9] AR p. 48, para. 87.

of the parties' date of separation, an interim order was made that continued their pre-separation arrangement.[10]

10 The Trial Judge ordered that each parent was to have the children on a three weeks on and three weeks off schedule. Three months later, a Judge of the Supreme Court ordered the Appellant to do the following:

- return the children to the family home in West Kelowna;
- return the children into the care of the Respondent; and
- share parenting in West Kelowna.[11]

11 From the date the children were returned to West Kelowna in April of 2019 to the date of the trial in October and November 2019, the Appellant did not return to Kelowna, even though the Chambers Judge ordered the Respondent's subsidization of the Appellant's rent (in contemplation of her return to Kelowna).[12]

12 From April 27, 2019 to January 3, 2020, the children resided with the Respondent in West Kelowna. The children were enrolled in kindergarten and pre-school in West Kelowna.[13]

13 The Trial Judge found that the Respondent was an active, caring, and concerned parent. The Trial Judge also noted that the Respondent had taken extraordinary steps to manage his work and sleep schedule so as to engage with the children when they were home and not in school. The Appellant testified that the Respondent was a "wonderful" father and had nothing negative to say about his parenting. The Trial Judge referred to the Respondent as a "loving, dedicated father."[14]

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[10] AR p. 5, para. 13.
[11] AR p. 5, para. 13.
[12] AR p. 5, para. 15.
[13] AR p. 5, para. 15.
[14] AR p. 5, para. 14; AR p. 10, para. 26.

14 The separation of the parties was precipitated by an argument wherein the Appellant alleged she was "assaulted". The Respondent denies this. The Respondent was not charged. No action was initiated by either the police or child protection authorities.[15]

15 The Trial Judge stated that:

> "a disproportionate amount of trial time was spent hearing the parties' evidence concerning particular incidents during the marriage and post-separation. My impression was that neither party was entirely honest and forthcoming as to these incidents. The evidence of both suffered from a tendency to minimize their own responsibility, and lay the blame at the feet of the other. However, subsection 16(9) of the Divorce Act RSC 1985 (2d Supp.) c. 3 provides that in making custody orders:…
> "The court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of the person to act as a parent of a child. Much of this testimony was not relevant to the question of which of the alternative parenting arrangements I must consider will best promote the children's interests."[16]

16 At Trial, a year after the separation, the Appellant testified that communication between her and the Respondent had much improved. They are now doing better.[17]

PART II – POINTS IN ISSUE

Question 1: Did the British Columbia Court of Appeal err in law by applying a modified *Palmer* test to the admission of new evidence at the appeal hearing?

Answer: No. Whether the Respondent's evidence is received as "new" or "fresh" evidence, the evidence *should* alter the Trial Judge's conclusion with respect to relocation.

Question 2: Did the British Columbia Court of Appeal pay appropriate deference to the findings of the Trial Judge?

Answer: Yes. The Court of Appeal did not dispute the findings of the Trial Judge, it merely assessed those facts in light of the new evidence submitted by the Respondents.

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[15] AR p. 4 para. 11.
[16] AR p. 10, para. 27, 28.
[17] AR p. 6, para. 18; p. 15, para. 41.

PART III – ARGUMENT

STANDARD OF REVIEW

17 The standard of review is correctness.[18]

BRITISH COLUMBIA SUPREME COURT DECISION

18 The Trial Judge ordered that the children would reside primarily with the Appellant, commencing January 3, 2020.

19 Fundamentally, the Respondent's position is that the Trial Judge's decision was not in the best interests of the children. There is a wider factual context here. This is a case in which:

a. the children had been jointly parented by the parties during their marriage;

b. the children were raised pursuant to an equal parenting regime, until April 27, 2019; and

c. the children were subject to an order returning them to the family home in West Kelowna, where they resided with the Respondent from April 27, 2019 to January 3, 2020.

20 In other words, with the exception of a one single month in which the children resided with their mother in Telkwa, they had been parented by the Respondent.

21 The Trial Judge approached the relocation issue herein by applying the principles espoused in *Gordon v. Goertz*.[19] The Respondent submits that, despite the Court of Appeal reaching the correct conclusion herein by applying *Gordon v. Goertz*, the case did not fully contemplate a scenario in which parents are active co-parents both during their marriage and after separation. There is a need, therefore, for this Honourable Court to clarify the application of *Gordon v. Goertz*. However, there is no concomitant need to revisit the conclusions drawn by the Court of Appeal on the basis of the evidence.

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[18] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; see also, *Fotsch v. Begin*, 2015 BCCA 403 at paras. 66-67.
[19] *Gordon v. Goertz*, 1996 2 SCR 27.

22 The British Columbia Court of Appeal has previously stated that *Gordon v. Goertz* provides "insufficient guidance for two good parents, their counsel and the trial court" and "is in danger of being distorted into a set of rules that undermine the best interests of the child principle."[20]

23 It can only be as a result of that 'distortion' that the Trial Judge below permitted the Appellant to relocate the children 1,000KM away from their father.

24 The Trial Judge adopted the reasoning from three British Columbia Court of Appeal cases,[21] reciting three main principles derived from these cases:

a) "The motive for relocation is relevant only to the assessment of the parent's ability to meet the needs of the child";

b) "The willingness of the relocating parent to facilitate contact with the other parent is subordinate to the child's best interests"; and

c) "Relocation must be approached from the perspective of respect for a parent's decision to live and work where they choose".[22]

25 The Trial Judge's reference in b) above is a paraphrase of s. 16(10) of the *Divorce Act*, 1985 which provides that:

> "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interest of the children and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."[23]

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[20] *REQ v. GJK*, 2012 BCCA 146 at para. 57 and *SSL v. JWW,* 2010 BCCA 55 at para. 22.
[21] *Nunweiler v. Nunweiler*, 2000 BCCA 300; *Falvai v. Falvai*, 2008 BCCA 503; and *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230. In each of these cases the moving parent had either sole custody, primary residence, or interim sole custody.

[22] AR p. 7, para. 21.
[23] *Divorce Act*, 1985 c. 3, s. 16(10).

26 However, the Trial Judge failed to provide any analysis of the mandate in s. 16(10) of the *Divorce Act* that maximum contact with each parent was to be considered in the context of the children's best interests.

27 The court in *Peterson v. Peterson* held that "determining the best interests of the child requires a child-centered analysis, representing the child's right to the best possible arrangement in the circumstances. While parental interests are entitled to serious consideration, they must be set aside where the welfare of the child demands it…and sometimes the application of the maximum contact principle will be a major factor in a mobility decision, even if facilitating maximum contact creates inconvenience for one parent or the other."[24]

28 The Trial Judge's reference to c) above may be applicable to the views of a "custodial" parent, but the Respondent submits it is of limited value in the analysis of a child's best interests where both parents have been fully engaged in parenting in a shared parenting arrangement during their marriage and after the parties' separation. In the case at bar, in the year following the parties' separation, until after the Trial Judge's reasons were handed down, the Respondent was the primary resident parent for 8 out of 12 months.

29 As Madam Justice Newbury held in *REQ v. GJK*, "[i]t is not clear how the 'great respect' principle should work where both parents are custodial parents."[25]

30 The Trial Judge identified "two issues arising from the evidence that significantly impact my analysis of the children's best interests… [t]he first, although less significant of the two, is the parties' financial situation, particularly as it pertains to the house."[26]

31 The Respondent submits that, rather than assessing the historical parenting roles of the parties, the Trial Judge focused on the parties' financial capacities. He fell into the same error as the Trial Court in *Stav v. Stav*[27] – namely, by giving financial factors "substantial and undue prominence in his reasoning" and making "unwarranted assumptions that the parties could not

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[24] *Peterson v. Peterson*, 2019 SKCA 76 at para. 36 and para. 39.
[25] *REQ v. GJK*, 2012 BCCA 146, at para. 57.
[26] AR p. 11, para. 30, 31.
[27] *Stav v. Stav*, 2012 BCCA 154 at para. 102.

afford to live" in West Kelowna. The Trial Judge's predictions about the Respondent's inability to retain the home, remain in West Kelowna, and support his family are demonstrably incorrect.

32 Moreover, the Trial Judge's findings contravene the principle established by the Court of Appeal in *Stav v. Stav*. In particular, the Court of Appeal held that "it is not for the courts to dictate the standard of living of the parties – these parties are not alone in living beyond their income. They did so when they lived together and it may well be that they will continue to do so while living apart."[28]

33 The second issue identified by the Trial Judge was "the relationship between the parties and the implications it has for the children."[29]

34 The Trial Judge chose to amplify the Appellant's evidence of highly-charged communications between the parties at the time of separation. In doing so, the Trial Judge was not sensitive to the fact that such communications were and are a thing of the past.

35 His reasons fail to consider that friction at the time of separation is not unusual for separating couples. The Trial Judge also failed to identify any conduct, on the part of either party, that had caused any emotional distress for the children. Moreover, the Appellant's own counsel submitted that "there is a preponderance of evidence that each party has equal capacity to parent and each enjoy strong bonds of affection with the children."[30]

36 The Trial Judge also noted that "a disproportionate amount of time was spent hearing the parties' evidence concerning particular incidents during the marriage and post-separation." The Trial Judge also remarked that "[m]uch of this testimony was not relevant to the question of which parenting arrangements I must consider will best promote the children's interests…evidence in family cases is often of a type that may be only suggestive of the truth and that resists specific conclusions being drawn. I found that to be true in the present case."[31]

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[28] *Stav v. Stav*, 2012 BCCA 154 at para. 102.
[29] AR p. 15, para. 41.
[30] AR p. 6, para. 18.
[31] AR p. 10, para. 28.

37 Despite his findings of irrelevance and his stated inability to make specific conclusions, the Trial Judge concluded the relationship between the parties did not support shared parenting in West Kelowna.

THE RESPONDENT'S EVIDENCE COMPLIES WITH APPLICABLE RULES

38 Section 31 of the *Court of Appeal Rules* provides that a party may adduce evidence that was not before the court below. It does not specify any particular test or analysis to be applied by the Court of Appeal.

39 Section 9 of the *Court of Appeal Act* explicitly provides that the Court of Appeal may:

a. make or give any order that could have been made by the lower court,

b. impose reasonable terms and conditions in an order, and

c. make or give an order that it considers just.

40 Further, the Court of Appeal is empowered to "draw inferences of fact" and to "exercise original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal."[32]

41 The Court of Appeal had before it a rule compliant application to adduce further evidence. It accepted that evidence on the basis of a thoughtful analysis. The Respondent submits that the Court of Appeal's conclusion on this point is entitled to deference.

42 The Court of Appeal observed that, in British Columbia, new evidence is not *necessarily* subject to the *Palmer* test.[33] In support of this proposition of law, the Court of Appeal cited *Fotsch v. Begin*,[34] *Korol (Re)*,[35] and *Jens*.[36]

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[32] Court of Appeal Rules BC Reg.297/2001, Section 31; Court of Appeal Act RSBC 1996, c.77 Section 9.
[33] AR p. 35, para. 30.
[34] *Fotsch v. Begin*, 2015 BCCA 403 (CanLII) at paras. 19-20.
[35] *Korol (Re)*, 2014 BCCA 380 at para. 36.
[36] *Jens v. Jens*, 2008 BCCA 392 at para. 29.

43 At the same time, the Court of Appeal determined that, depending on the circumstances of a given matter, a reviewing court *may* consider whether the new evidence "would change the result at trial or could reasonably be expected to do so."[37] Significantly, the Court of Appeal found ample support for the proposition that "it is contrary to the 'interests of justice' to have a decision that is inconsistent with the known facts".[38] This is particularly so in family cases.[39]

FINALITY

44 The Appellant conflates fresh and new evidence. This is wrong. The governing test for new evidence is *different*. Here the Trial Judge gave "primary residence" to the Appellant, in part based upon a concern for the Respondent's ability to sustain the family home and for financial reasons.[40]

45 The new evidence herein fundamentally removes the basis for that concern. Whereas the Trial Judge determined the Respondent had no plan to address these concerns, it is now evident that a plan is in place.

46 The Court of Appeal determined that new evidence can be received if it alters a fundamental premise upon which the Trial Judge's decision rests.[41] In the context of child relocation matters, the "best interests" of children are determined "in the round", which is to say on a global review of the evidence. Therefore, any change to that evidence, changes the analysis.[42]

47 In light of this evidence, the Court of Appeal determined the Trial Judge's concerns simply lack foundation – there has been a material change and it would be absurd to support a Trial Judge's decision that bears no relationship to the facts, as they exist presently.[43]

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[37] AR p. 35, para. 31.
[38] AR p. 35, para. 33.
[39] AR p. 38, para. 47-48.
[40] AR pp. 14-15, paras. 39-40.
[41] AR p. 75, para. 43.
[42] AR p. 41, para. 55.
[43] AR pp. 42-43, para. 62.

48 The Appellant submits that exceptions to the principle of finality are rare. However, from the perspective of the Respondent, not all new evidence compromises finality concerns to the same extent, and finality is not as important in some facets of law as in others.

49 It is submitted that, while finality is essential to a fair and effective adjudicative process, finality concerns should be given less prominence is some areas of the law. For example, the Ontario Court of Appeal observed that: "…finality carries less weight in cases involving child support and custody orders…"[44]

50 This is understandable given the fundamental principle that issues regarding children are to be decided on the basis of the children's best interests and that, as circumstances develop and change, courts must have the flexibility to address these changes in a child-focused manner.

51 The Appellant says that finality must effectively tie the hands of a reviewing court. However, to speak plainly, Canadian family legislation does not support this viewpoint. The best interests of a child cannot be constrained by principles of finality better suited to other areas of the law.

52 The very nature of the growth and maturity of infants and toddlers into young people requires that our courts have ultimate flexibility, and our lawmakers recognize this principle in various respects, including:

a. legislative and common law authority providing annual reviews of child support;[45]

b. reviews and variations in parenting orders based on changes in the circumstances of children or parents;[46]

c. reconsideration applications;[47] and

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[44] *Toronto City v. CUPE*, 2001 Canlii 24114 (ONCA) at para. 82.
[45] *Federal Child Support Guidelines* SOR/97-175, (Divorce Act), s. 14.
[46] *Divorce Act*, RSC 1985 c 3 (2nd Supp) s. 17(1).
[47] *STC v. DJB* 2020 BCSC 103 at para. 1.

d. re-opening trials to consider new evidence.[48]

53 The Appellant refers to *Van de Perre v. Edwards* in respect of a discussion of the finality required in cases involving children. The Respondent says that the passage on finality is specific to the facts in *Van de Perre* where, after four years, the young child's residence was uncertain due to multiple appeals and in circumstances where the appeal court opined that the standard of review was ill-suited to custody cases, a finding that was later rebuked by this court.[49]

ELASTIC APPROACH

54 The Appellant acknowledges that a "slightly more elastic" approach is taken to new evidence in cases involving children but submits that courts have still applied the "*Palmer* or *Palmer*-like tests". The Respondent's position is that the test applied by the Court of Appeal below was appropriate. Whether it was "*Palmer*-like" or a modified *Palmer* test, which mirrors the principles found in *Palmer*, a flexible approach is warranted where the best interests of a child are the "only consideration".[50]

55 The "elastic" approach was pioneered by Madam Justice Southin, where she admitted fresh evidence in a spousal support appeal and said "fresh evidence I will call other evidence because it is not fresh in the old-fashioned sense of the word." She also observed that Rule 31 of the Court of Appeal Rules, which permits further evidence, "does not put any limitations upon the power of the Court…Matrimonial litigation does, however, raise some difficulties or some basis for a slightly more elastic approach".[51]

56 As the Saskatchewan Court of Appeal confirms in *Riel v. Riel*, "fluid circumstances and late-breaking developments have often resulted in applications to admit fresh evidence."[52] Similarily, the Nova Scotia Court of Appeal remarked, in relation to a fresh evidence application:

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[48] *Hansra v. Hansra*, 2017 BCCA 199 at para. 4.
[49] *Van de Perre v. Edwards* 2001 SCC 60 paras. 12, 13.
[50] *Divorce Act* RSC 1985, c. 3 (2nd Supp.) s. 16(1).
[51] *Shabaga v. Shabaga*, 1992 BCCA 551, paras. 14, 15.
[52] *Riel v. Riel* 2017 SKCA 74, para. 20.

"[a] child's welfare is ongoing and fluid, an undamned stream, and usually it is better that the Court have the full context".[53]

57 The Appellant submits that fresh/new evidence applications may "encumber" appellate courts, however, where an appellant identifies *legitimate* grounds of appeal, files an appeal, and then new facts emerge which impact the best interests of the child, counsel would be remiss not to draw the new facts to the attention of the appellate court who will then apply the law and admit the evidence if:

a) the evidence could not have been adduced before;

b) the evidence is highly relevant in that it enables the court to make a determination on an accurate picture of the situation at hand;

c) the evidence is potentially decisive as to the child's best interests; and

d) the evidence is credible.[54]

58 This flexibility or elasticity which has been adopted by courts across Canada is necessary and appropriate when the best interests of a child are at stake.[55] This court in *Catholic Children's Aid Society v. M.(C.)* adopted the position on the admission of new evidence found in *Re Genereux* and Catholic *Children's Aid Society* stating, "[a]lthough I doubt that *Genereux* intended to depart significantly from the test in *Palmer* and *Stoler*, its approach is to be commended…*Genereux* is not only consistent with the jurisprudence of this Court but it is better suited to the child-centred focus of the CFSA, as it recognizes the importance of having accurate and up-to-date information on children whose fate often hangs on the determination by judges of their best interests."[56]

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[53] *Nova Scotia v. TG*, 2012 NSCA 43 at para. 82.
[54] *C.L.B. v. J.A.B*., 2016 SKCA 101 at para. 20.
[55] *Catholic Children's Aid Society of Metropolitan Toronto v. M (C)* 1994 Canlii 83 (SCC); *BRH v. RPS* 2017 ABCA 268 at paras. 42-44; *McAlpine v. Leason* 2016 ABCA 153 at para. 13, leave to appeal to SCC refused (2016) SCC No. 316; *Re L (JL)* 2002 SKCA 78; *Doncaster v. Field* 2014 NSCA 39 at paras. 47-48, leave to appeal SCC refused (2014) SCCA No. 2.
[56] *Re Genereux* 1985 Canlii 1969 (ONCA).

59 New evidence may also be admitted where the "evidence is necessary to deal fairly with the issues on appeal and to decline to admit the evidence could lead to a substantial injustice."[57] This principle is particularly apposite where the appeal involves a child's best interests.

60 The court in *Luney v. Luney* remarked that fresh evidence may be admitted in the "interests of justice since otherwise the court's decision may be regarded as resting on a misapprehension of the evidence".[58] To ignore relevant, decisive, and credible new evidence affronts one's sense of justice. If the Trial Judge's findings are to stand in the face of the changed circumstances, then the decision by which these children are bound to live and grow up, rests on an inaccurate picture of the world.

61 In the case at bar, the Trial Judge identified two bases for his order that the children would live with the Appellant. The new evidence admitted by the appeal court directly addresses one of those bases and the new evidence shows that the Trial Judge's assumptions were incorrect; the new evidence "falsified" the Trial decision.[59]

62 Where the new evidence has no relevance to the issues on appeal, it will not and should not be admissible. But when new evidence

a. bears *directly* on a significant point in the court below;

b. complies with the criteria in *Palmer*;

c. bridges the gap between the evidence submitted before the two levels of court; and

d. enables the court to make a determination on an accurate picture of the situation,

it should be admitted and considered.[60]

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[57] *Shiekh Re* 2019 ONCA 692.
[58] *Luney v. Luney* 2007 BCCA 567.
[59] *Cory v. Marsh* 1993 CanLII 1150 (BCCA).
[60] *Jean Louis v. Jean Louis* 2020 BCCA 220; *BRH v. RPS* 2017 ABCA 268 at para. 42.

63 A modified *Palmer* test, which the Respondent says was applied by the Court of Appeal appropriately in respect of the new evidence, focuses less on the due diligence aspect of the test. There is nothing wrong with this. The amount of weight given to due diligence depends on the strength of the other factors, or in other words, "the totality of the circumstances".[61] As the court said in *Babich v. Babich*, the *Palmer* test "can be applied with some flexibility when the best interests of the child are at stake.[62]

64 The Court of Appeal held that the due diligence provision in the *Palmer* test "does not strictly govern the admission of new evidence" and the Trial Judge's expectation or "assumption" that the Respondent might now be unable to remain living in West Kelowna or in the family home was displaced by the new evidence.[63]

65 In *R. v. St. Cloud*, this Honourable Court said in respect of the fourth prong of the *Palmer* test (i.e. 'whether the new evidence could be expected to have affected the result at trial?') that this element of the test *should* be modified as follows:

> "the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice…the new evidence must be significant."[64]

66 The new evidence admitted by the Court of Appeal went to the heart of what the Trial Judge characterized as an "issue that significantly impacted" his analysis of the best interests of the children.

67 The Court of Appeal did not re-weigh the evidence at Trial. What the Court of Appeal did was admit evidence that shattered one significant pillar of the Trial Judge's two-pronged rationale. The Court of Appeal was bound to follow the path that resulted from that shift in the underlying factual record. A determination that the children would be better served by living with the Appellant in Telkwa, rather than residing in a shared parenting arrangement with both parents in West Kelowna, is no longer supported or supportable on the facts.

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[61] *R. v. Price* 1993 Canlii 76 (SCC) at para. 1.
[62] *Babich v. Babich* 2020 SKCA 25 at para. 29.
[63] *Fotsch v. Begin* 2015 BCCA 403 at para. 21.
[64] *R. v. St. Cloud* 2015 SCC 27 at para. 137.

68 The Appellant submits that the modified *Palmer* test has created "significant uncertainty and confusion" in the realm of custody disputes. However, the Appellant has not shown this court a single instance of uncertainty related to new evidence and custody. Moreover, the admission of new evidence in custody cases ensures that all of the relevant information is before the court in order to consider only the best interests of the child.

69 Any uncertainty results from the simple fact that every case must be decided on its own merits, particularly relocation matters. There is no crisis in the courts.[65]

70 The Appellant submits that "there is no mention of applications for fresh evidence on appeal in the leading practitioner's work on family law in British Columbia", however, it should be noted that other legal practitioners and scholars have written extensively on this topic, including publications by Carswell, Irwin Law, and the BC Court of Appeal Guidebook for Appellants.[66]

71 The Appellant submits that the Trial Judge made "extensive findings" on the relationship between the parties, however, it should be noted that the Trial Judge specifically found "a disproportionate amount of time was spent hearing the parties' evidence concerning particular incidents during the marriage and post-separation." He remarked, further, that "[m]uch of this testimony was not relevant to the question of which parenting arrangements I must consider will best promote the children's interests…evidence in family cases is often of a type that may be only suggestive of the truth and that resists specific conclusions being drawn. I found that to be true in the present case."[67]

72 The Appellant submits that the case at bar is at odds with other decisions of the British Columbia Court of Appeal, including the 2021 case of *Johanssen v. Johanssen*. The Respondent says that the chambers judge in *Johanssen* determined that Germany was the appropriate

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[65] *Barrette v. Benson* 2019 ABCA 40 at paras. 19, 20.
[66] Anita Volkis and Harold Niman, Chapt. 10, "Fresh Evidence and Setting Aside Orders", in *Evidence in Family Law*, Vol. 2, Thomson Reuters, 2010 Book of Authorities [Tab 2]; Julien and Marilyn Payne, *Canadian Family Law* 6th and 8th Edition, Book of Authorities [Tab 1]; BC Court of Appeal Guidebook for Appellants, courtofappealbc.ca.
[67] AR p. 10, paras. 27, 28.

jurisdiction for the matter of custody to be heard. The new evidence adduced was that, after the order was pronounced, the mother and child remained in British Columbia, rather than immediately travelling to Germany.

73 The Court of Appeal in *Johanssen* held that the new evidence was concerning, but it did not demonstrate that the chambers judge made an assumption about future events that was fundamental to his conclusions. The new evidence in that case did not undermine the findings of the chambers judge.[68] In the case at bar, the new evidence *did* rebut the Trial Judge's speculation and assumptions with respect to the Respondent's ability to retain the family home and remain living in West Kelowna.

74 The Appellant submits that there is an inconsistency in British Columbia with respect to the legal test for the admission of fresh or new evidence. In support of that erroneous proposition, the Appellant cites a number of decisions where fresh or new evidence was sought to be admitted with various degrees of success. The Respondent says that this review is of little assistance in determining the issues in the case at bar, namely, whether the appeal court erred in applying a modified *Palmer* test and whether the court showed appropriate deference to the Trial Judge.

75 The Appellant also canvasses the use of the terms fresh or new evidence in courts across Canada, pointing out that some statutes use the terms interchangeably. In all cases the due diligence factor is of significance in respect of fresh evidence and of lesser or no importance where the evidence is new. The Appellant says there should not be a material difference between the admissibility of fresh and new evidence. The Respondent says there is not a material difference, except with respect to the due diligence factor. If new evidence is evidence that was not available in the lower court, then due diligence is – by definition – not an appropriate consideration.

76 Courts across Canada have dealt with fresh and new evidence in family law cases for many decades without major upset and will continue to judiciously adhere to fundamental

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[68] *Johanssen v. Johannsen* 2021 BCCA 190 at paras. 43, 44.

principles of appellate review, taking into account the impact of new evidence and the best interests of the child.

APPLICATION TO THIS CASE

77 The Court of Appeal admitted the Respondent's new evidence. That evidence showed that the Trial Judge's assumptions were unfounded.

78 The Trial Judge found that the willingness and ability of the Respondent's parents to pay off the mortgage and the line of credit debt, and finance the remainder of the renovations was "uncertain".

79 The Trial Judge also found that the "parties struggled to make ends meet while they were together" and doubted the respondent could afford to remain in Kelowna and "pay spousal and child support".[69]

80 The Trial Judge relied on the expert opinion of an appraiser who testified that the family home "required remediation and restoration work before it could be considered suitable for habitable accommodation". The appraiser also opined that obtaining financing would be difficult and that any mortgage would likely be amortized for 19 years, which would further limit the home's value.[70]

81 The new evidence consisted of:

- mortgage documents,
- an RBC line of credit facility,
- documents showing the transfer of the home from the Appellant to the respondent and his parents,

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[69] AR p. 14, para. 39.
[70] AR p. 13, para. 34.

- documents showing payment in full to the Appellant for her interest in the home and payment for her interest in a vehicle to be retained by the Respondent,

- correspondence between the parties' trial counsel confirming the agreement on the payments,

- evidence that renovations had continued on the home, and

- documents showing the drawings for the kitchen renovation by a kitchen construction company.[71]

82 The Trial Judge's concerns about the viability of living in West Kelowna were obviated by the reduction in the Respondent's mortgage payment from $1,930 a month to $1,186 a month, also a part of the new evidence, and the Trial Judge's dismissal of the Appellant's claim for spousal support.[72]

83 Further, if the Respondent were to relocate from West Kelowna to Telkwa, he would share custody and parenting responsibilities with the Appellant. The Court of Appeal observed that, if the parties could co-parent in Telkwa, it was hard to understand how, what the Trial Judge characterized as "friction" between the parties, would support a relocation order.[73]

84 The Appellant testified that she was prepared to reside in Kelowna. The Respondent submits a shared parenting arrangement would alleviate her "stress" and feelings of being "overwhelmed" in taking care of the two children, by virtue of the division of parenting time and responsibilities. The Trial Judge commented on the "emotional weight" on the Appellant to establish a "new life on her own" and of "learning to parent independently".[74]

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[71] AR p. 34, paras. 27, 28.
[72] AR p. 34, para. 27; AR p. 22, para. 61.
[73] AR p. 47, para. 83.
[74] AR p. 17, para. 44.

THE COURT OF APPEAL DECISION SUPPORTS MAXIMAL CONTACT

85 The Court of Appeal weighed the assertion that a need for emotional support on the part of the Appellant justified relocation[75] against the well-established principle of maximum contact.[76] The latter prevailed.

86 With respect to the "need for emotional support", the Court of Appeal noted, with perhaps a single exception,[77] that "[t]here are virtually no decisions of this Court where a need, on the part of the moving parent, for emotional support, even with some friction between the parties, has justified a relocation."[78]

87 The Court of Appeal appropriately distinguished *K.W. v. L.W.* (i.e. the "exception") on the basis that, unlike that case, the Respondent herein was present in the children's lives[79] and the children herein would have a *better* opportunity to be surrounded by extended family in Kelowna. Put another way, the Court of Appeal ultimately determined that concerns with respect to the Appellant's need for emotional support do not outweigh the benefits to the children which would result from remaining in Kelowna: "I consider that the best interests of the children would be served with their primary residence being in Kelowna and with their being parented by both their parents."[80]

88 Simply put, the Court of Appeal went to great lengths to demonstrate that, while there may be *some* cases in which hostility between parents interferes with their ability to jointly parent, "this is not that case".[81] The Respondent says that the Court of Appeal's finding on this point is entitled to deference – having conducted a *Gordon v. Goertz* analysis in light of the new evidence presented, the Court of Appeal is best suited to determine the capacity of the Respondent and Appellant to jointly parent the children in Kelowna.

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[75] AR p. 45, para. 74.
[76] AR p. 48, para. 87.
[77] *K.W. v. L.H.*, 2018 BCCA 204.
[78] AR p. 45, para. 74.
[79] AR p. 45, para. 75.
[80] AR p. 49, para. 90.
[81] AR pp. 46-48, paras. 79-86.

CONCLUSION

89 Fundamentally, this is a simple case. The *Gordon v. Goertz* decision of the Trial Judge below rested on certain findings with respect to the Respondent's financial circumstances.

90 On appeal, the Respondent adduced evidence which demonstrated that the Trial Judge's findings on this point were simply incorrect. For example, the Respondent obtained the financing necessary to maintain a home in Kelowna, both for himself and the children.

91 The Court of Appeal appropriately applied *Gordon v. Goertz* in light of this evidence – reconsidering the decision to reflect the true factual circumstances, just as courts across this country make adjustments to reflect "material changes" on a daily basis.

92 Whether the Respondent's evidence is received as "new" or "fresh" evidence, and regardless of whether that evidence is considered on a *Palmer*-like test or the *Palmer* test itself, the fact remains: the Trial Judge's conclusion with respect to relocation is no longer supported by the admissible evidence.

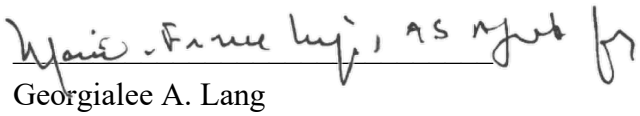
PART IV - SUBMISSIONS ON COSTS

93 If the appeal is dismissed the Respondent seeks costs in this Court and in the Court of Appeal.

PART V - ORDER SOUGHT

94 The Respondent asks this court to dismiss the appeal and reinstate the decision of the British Columbia Court of Appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2021.



Georgialee A. Lang
Counsel for the Respondent

PART VI - TABLE OF AUTHORITIES

Cases **Para. Ref.**

Secondary Sources

Legislative Provisions	**Section(s)**
Court of Appeal Rules BC Reg.297/2001	s. 31
Court of Appeal Act RSBC 1996, c.77	s. 9
Divorce Act RSC 1985, c. 3 (2nd Supp.)	ss. 16 (1), 17 (1)
Loi sur le divorce, LRC 1985, c 3 (2e suppl)	a. 16 (1), 17 (1)
Federal Child Support Guidelines SOR/97-175, (*Divorce Act*)	s. 14
Lignes directrices fédérales sur les pensions alimentaires pour enfants, DORS/97-175	a. 14