SCC File No.: 39567

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

BETWEEN:

TIFFANY JO KREKE

Appellant
(Respondent)

-and-

AMRO ABDULLAH M ALANSARI

RESPONDENT
(Appellant)

FACTUM FOR THE APPELLANT

TIFFANY JO KREKE

Pursuant to Rules 35, 36, 37, 42 & 43 of the *Rules of the Supreme Court of Canada*

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FACTUM
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I. PART I –Overview of Appellant's Position and Statement of Facts

1. This appeal involves issues of great importance to women, children and families in not just Saskatchewan, but throughout the country. It raises important questions around the scope of the standard of review that provincial courts of appeal may exercise over decisions of trial judges, with respect to relocation of children, and the appropriateness of spousal support awards. In the Appellant's submission, it is the role of this Honourable Court to ensure that decisions that come out of the highest court level of the provinces and territories are consistent, and are correct, in the articulation and interpretation of established legal principles in this country. Not only is it of great import to have accountability for courts of appeal in issuing correct decisions, consistent with Canadian jurisprudence, but it is essential that our courts understand the policy rationale behind the jurisprudence and the fundamental premises that form the backbone of those policies.

2. This is a case ostensibly focused on mobility and the relocation of the children from Lloydminster, Saskatchewan, to Saskatoon, Saskatchewan. However, much turns on the Saskatchewan Court of Appeal's decision to overturn the Learned Trial Judge's decision with respect to the ability or inability of the mother to become 'self-sufficient', either living in Lloydminster or in Saskatoon. As such, the jurisprudence around spousal support, as well as the law with respect to when a court of appeal may interfere with highly discretionary trial decisions on spousal support, is at also the heart of this appeal. In the Appellant's submission, the Court of Appeal overstepped their jurisdiction in reviewing the decision of the Learned Trial Judge and exercised a scope of review far outside of what is mandated by the jurisprudence established by this Honourable Court, both with respect to custody and spousal support. Further, it is the Appellant's submission that, in reviewing the decision of the Learned Trial Judge with respect to spousal support, the Court of Appeal took an approach antithetical to both the law and the policy considerations underlying the laws, and issued a decision which, in the Appellant's submission, is backwards in terms of the

direction the law has progressed since *Moge v. Moge*[1] was decided, in 1992.

3. At the forefront of policies and values inherent in the law that informs decisions with respect to spousal support is the concept of the feminization of poverty, as articulated by this Court in *Moge*. Inherent in the concept of the feminization of poverty is an understanding that the lives of women and children are integrally connected, and that women and children live in poverty at higher rates than men, particularly after family breakdown. While the *Moge* decision was rendered almost 30 years ago, the reality of the feminization of poverty, and the connection between women's financial status and that of their children, still exists. It also remains true that there is a profound connection between the feminization of poverty, and the child-rearing duties that women continue to primarily be responsible for. *Moge*, and all the jurisprudence that followed, recognizes that reality, and attempts to offset that inequality, and to assist in ameliorating the poverty of women and children in Canada. It is therefore essential that when a province's highest court makes a decision which is antithetical to those laws and the policy reasons underlying them, there is accountability to this Honourable Court, to ensure that the laws are applied correctly and to remedy the situation, and to ensure that it does not occur again, to the detriment of women and children, particularly in Saskatchewan, but with implications through the country.

Summary of Facts

4. The parties to this Appeal met in August 2006, in Saskatoon, Saskatchewan. The Appellant mother was a single mother raising her two children in a home (referred to as the "Vickies home") which was owned by her parents and situated down the street from their home. The Respondent was a foreign student from Saudi Arabia, studying English as a second language, and was just starting in the Engineering program, at the University of Saskatchewan, which he continued with for the following four years.[2]

[1] [1992] 3 S.C.R. 813 ("*Moge*")
[2] Vol. 6, Part V, T23, lines 3-17.

5. They were married on March 20, 2010, in Saskatoon, Saskatchewan, and separated June 2, 2018. There are two children of the marriage, Rakan Alansari (also known as Ray), born February 26, 2011 ("Ray"), and Keishawn Hailey-Kreke, born September 5, 2002 ("Keishawn"), to whom the Respondent stood in the place of a parent.[3] There is one adult child, Kasia Kreke ("Kasia") born June 21, 1998.

6. The Appellant was doing upgrading at the time the parties met, and, during the ensuing four years, she embarked upon her education in dentistry, graduating as a dental therapist in 2010.[4] By that time, she was pregnant with the parties' child, Ray.

7. Approximately a year after their marriage, on February 26, 2011, Ray was born; some four weeks after Ray's birth, the Respondent returned to his place of origin, Saudi Arabia, to fulfill his contract with his employer, SABIC,[5] leaving the Appellant single parenting all three children for the next three years.

8. During the over three years that the Respondent lived and worked in Saudi Arabia (and indeed prior to that time), the Appellant's parents were a 'huge support system' to her and she relied upon her parents and long-term Saskatoon friends, to assist her with the children.[6] She is very close to her parents and the family would see them as often as 4-5 times a day.[7]

9. When Ray was about eight months old, the Appellant attempted a part-time job as a dental therapist in Regina, driving there two days a week, primarily so that she could sponsor the Respondent in his application for permanent residency in Canada.[8] It was her first job as a dental therapist but only lasted about four months as the commute was unsustainable; both prior to, and following, that job, the Appellant stayed at home with the three children full-time.[9] During her brief employment, her parents cared for

[3]Vol. 1, Part I, page 2, Oral Judgment of Wilson, J. dated July 4, 2019, paras 2-5.
[4] Vol. 6, Part V, T22, lines 21-23; T24, line 35 to T25, line 13.
[5] Vol. 6, Part V, T27, lines 1-6; T382, lines 26-31.
[6] Vol. 6, Part V, T26, lines 7-18; T28, lines 28-40.
[7] Vol. 6, Part V, T30, lines 9-15.
[8] Vol. 6, Part V, T27, lines 36-41.
[9] Vol. 6, Part V, T28, lines 5-25; T30, line 31 to T31, line 4.

Ray, and helped with all three children, or the Appellant took Ray to work with her.[10]

10. The Appellant attempted working again when Ray was three years old, working for Dr. Chaukla, at his clinic in Outlook, Saskatchewan, again on a part-time basis.[11] Her mother cared for Ray when she was working.[12] Unfortunately, Ray was diagnosed with leukemia some months after the Appellant started that part-time employment. At that time, the Appellant took leave from her job in order to be '110%' available to care for Ray.[13]

11. When Ray was diagnosed with leukemia in July 2014, the Respondent, who was home on a visit from Saudia Arabia at the time, stayed in Saskatoon with the family, and they continued to live in the Vickies place.[14]The Respondent eventually resigned from SABIC in November 2014.[15]

12. Shortly before his resignation, he began looking for employment in Canada[16] and, in December 2014, he was offered a position with ATCO at their Lloydminster office.[17] He started that position on February 2, 2015, commuting home to Saskatoon for the weekends.[18]

13. The Appellant and the children remained living in Saskatoon until August 2015 when the Appellant, Keishawn, and Ray moved to Lloydminster to join the Respondent.[19]

14. After the family moved to Lloydminster for the Respondent's job, the Appellant continued to be a full-time stay-at-home mother and wife, only doing some very part-time/casual work selling beauty supplies at a beauty supply shop which a friend managed, when time allowed.[20]

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[10] Vol. 6, Part V, T28, lines 27-41.
[11] Vol. 6, Part V, T31, lines 6-40.
[12] Vol. 6, Part V, T32, lines 1-9.
[13] Vol. 6, Part V, T35, line 30 to T36, line 3.
[14] Vol. 6, Part V, T35, lines 1-10.
[15] Vol. 8, Part V, T415, lines 2-7.
[16] Vol. 8, Part V, T420, lines 22-41
[17] Vol. 8, Part V, T421, lines 29-37.
[18] Vol. 8, Part V, T424, lines 10-20.
[19] Vol. 6, Part V, T51, lines 16-23; Vol. 8, T425, lines 5-12.
[20] Vol. 6, Part V, T53, lines 32-41.

15. After Ray went into recovery in about October 2017,[21] the Appellant eventually took on a temporary maternity leave[22] position, in about December 2017, working part-time as a dental therapist in Lloydminster, three days per week, with hours that allowed her to drop the children off at school and be available after school.[23] The children did not have daycare; the evidence was that Ray went to her former friend, Sarah's, home for about a half hour to wait for her if she could not pick him up on one of her three working days.[24] She was in this temporary position when the parties separated on June 2, 2018.

16. During their three years living together as a family in Lloydminster, the Respondent was very involved, and successful in, his career, quickly progressing in his employment, winning awards and promotions.[25] In order to be so successful, the Respondent spent long hours at work and travelled frequently.[26] Just prior to the parties' separation, in about April of 2018, he in fact accepted a new position based out of Calgary, Alberta, and the family was planning to move from Lloydminster to Calgary.[27] Following that, he travelled even more; this is the position he remained in at trial.[28] The evidence was clear, at trial, that he continued to travel frequently, both for business and pleasure.

17. During these years, it was the Appellant's evidence that the relationship between the Respondent and her now teenage son, Keishawn, began to deteriorate, leading to conflicts between the two that eventually resulted in physical altercations.[29]

18. Dr. Christina Zimmer, Keishawn's psychiatrist, testified that, in addition to his ADHD, Keishawn was experiencing depression and anxiety during this time, which

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[21] Vol. 8, Part V, T395, line 38 to T396, line 11.
[22] Vol. 6, Part V, T56, lines 8-19.
[23] Vol. 6, Part V, T55, lines 23-40.
[24] Vol. 6, Part V, T59, lines 28-34.
[25] Vol. 6, Part V, T58, lines 14-16; Vol. 10, T707, lines 21-30.
[26] Vol. 6, Part V, T56, lines 26-37; T58, lines 10-27; Vol. 9 T624, line 40 to T625, line 10; Vol. 10, T642, lines 18-38.
[27] Vol. 8, Part V, T431, lines 2-24.
[28] Vol. 9, Part V, T629, lines 5-17.
[29] Vol. 6, Part V, T61, line 33 to T61, line 30.

led to a further diagnosis of PTSD in the year (post-separation and) prior to trial.[30]

19. It was in this context that the Appellant ended the relationship and charges were pressed against the Respondent for assaults upon Keishawn. Inevitably a Recognizance was agreed to on the morning of the trial and that matter did not proceed.[31] The Respondent admitted to causing Keishawn "to have reasonable grounds to fear that [he would] cause personal injury to him."[32] As a condition of the Peace Bond, the Respondent was to participate in an assessment for anger management, which he did; however, there was no evidence, expert or otherwise, that he was diagnosed as not having anger management issues (as stated in the Court of Appeal decision).[33]

20. The parties separated on or about June 2, 2018. Following separation, the Appellant and children remained in the family home, which they rented. The Appellant took a medical leave from her maternity leave position, due to her stress and anxiety around separating from the Respondent and becoming a single parent.[34]

21. Ray had very rarely been apart from the Appellant overnight, and the Respondent did not immediately have his own home; [35] although he saw Ray frequently during June 2018, the Appellant would not agree to overnight access.[36] The Respondent brought an application for interim shared custody and the Appellant counter-applied to relocate with the children to Saskatoon, and for child and spousal support.

Interim Application

22. The interim application was heard by the Honourable Mr. Justice F. N. Turcotte, in Saskatchewan Court of Queen's Bench Chambers. Mr. Justice Turcotte issued a Fiat on August 1, 2018, in which he did not allow the interim move, but ordered the

[30] Vol. 7, Part V, T274, lines 1-14
[31] Vol. 6, Part V, T72, lines 9-17.
[32] Vol. 5, Exhibit PR19, page 179.
[33] *Ibid*. page 180
[34] Vol. 6, Part V, T6, lines 5-6; T159 – 161.
[35] Vol. 6, Part V, T72, lines 31-39.
[36] Vol. 6, Part V, T72, line 41 to T74, line 2.

children would primarily reside with the Appellant if she remained in Lloydminster in the interim.[37] He further made an order for interim child and spousal support, finding the Appellant to have an income of $35,000; the quantum of spousal support was agreed to by the parties.[38]

23. There was no evidence that the Appellant ever breached the terms of the early interim access order by withholding access; all access ordered was complied with, and there was evidence that the Appellant agreed to and offered additional access, at times. In contrast, the Respondent did not pay the spousal support ordered, nor did he pay section 7 expenses.[39]

Trial Decision

24. The trial of the matter was held in May 2019 with the Honourable Madam Justice D. L. Wilson presiding. Justice Wilson's decision was given in two parts: recognizing the urgency of the parenting and mobility issue, she rendered an oral judgment on July 4, 2019 (the "Oral Judgment"), and later (July 17, 2019) rendered a written judgment (the "Written Judgment") with respect to the financial/property matters.[40] [In addition, the parties needed immediate direction with respect to summer parenting time, which she also provided].

25. In the Oral Judgment, the Learned Trial Judge found it to be in Ray's best interests to be in the primary care of the Appellant mother, who was found to be his psychological parent, and she ordered that the Appellant be allowed to move to Saskatoon with the children, where she would have the support of her parents while she entered the workforce.[41] The Learned Trial Judge granted the Respondent access of two weekends (one long) per month as well as shared holidays, finding that maximum contact with the child could be maintained at that distance (between Lloydminster and Saskatoon). She assessed child support on the Respondent's

[37] Vol. 2, Part II, Fiat of Turcotte, J. dated August 1, 2018, at page 20, para 16.
[38] *Ibid*. A15, para 22.
[39] Vol. 6, Part V, T97, line 28 to T99, line 1; T100, line 6 to T101, line 19
[40]Vol. 1, Part I, pages 1 & 12.
[41] Vol. 1, Part I, page 9, para 27.

income of some $124,850, for both Ray and Keishawn.[42]

26. In the Written Judgment, the Learned Trial Judge imputed an income to the Appellant of $45,000, representing a part-time income as a dental therapist working 2-3 days per week at $400 per day (the *viva voce* evidence provided by Dr. Chaukla.[43] She specifically declined to set a higher amount, finding that there was *no evidentiary basis* to do so, citing the Court of Appeal's decision in *Linn v. Frank.*[44] She set the Respondent's income, and ordered section 7 expense proportions.[45] Spousal support was ordered in the amount $900 per month, after a careful review of entitlement, vis-à-vis the factors set out in the *Divorce Act*, conceptual grounds for support, with reference to *Bracklow v. Bracklow*,[46] and quantum, as guided by the *Spousal Support Advisory Guidelines*. She ordered a review in January 2021, with specific reference to *Leskun v. Leskun*,[47] delineating the issue to be reviewed as both parties' financial circumstances leading up to the review; the Appellant mother had the onus of satisfying the reviewing judge that she needed further support. She declined to adjust support retroactively. Finally, she found that the Respondent's SABIC debt, if even a valid debt, had been brought into the marriage and was not a debt of the relationship,[48] and ordered a property equalization. She awarded costs of the trial to the Appellant.[49]

Court of Appeal motions

27. The Respondent appealed both decisions of the Learned Trial Judge and took the position that his appeal stayed the relocation order. The Appellant therefore had to bring an interim application to the Court of Appeal for Saskatchewan to lift the stay of execution of the Judgment.[50] On August 21, 2019, the Honourable Mr. Justice

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[42] *Ibid.* pages 10 & 11, para.33.
[43] Vol. 7, Part V, T324, lines 8 to 18.
[44] Vol. 1, Part I, page 21, para. 13.
[45] Vol. 1, Part I, page 21, para. 14.
[46] [1999] 1 S.C.R. 420.
[47] [2006] SCC 25, [2006] 1 SCR 920 ("*Leskun*")
[48] Vol. 1, Part I, pages 27 – 28, paras. 38 & 39.
[49] Vol. 1, Part I, page 28, para. 42.
[50] Vol. 2, Part II, page 27.

Caldwell made an order lifting the stay of execution of the Judgment of Madam Justice Wilson.[51] The children therefore had been living with the Appellant mother in Saskatoon since July 8, 2019, some 15 months before the appeal was heard.

28. In November 2019, the Appellant had to bring a further motion for the appeal to be perfected, as no action had been taken by the Respondent to proceed with the appeal;[52] a Consent Order was agreed to and issued on that motion. No costs were ordered on either motion, costs to follow the cause.

Court of Appeal Decision

29. The appeal was then heard on September 14, 2020; the decision of the Court of Appeal for Saskatchewan (hereafter, the "Court of Appeal") was issued on October 28, 2020.[53]

30. The Court of Appeal reversed the support orders and substituted its decision with respect to spousal maintenance, finding that the Appellant could have been earning $80,000 per year, and reducing support to $94/month payable from July 1, 2018, only until December 31, 2020 (thereby creating a debt payable by the Appellant mother to the Respondent father).[54] They found no basis to overturn the finding that the Appellant had both a compensatory and non-compensatory claim.[55] The Court of Appeal ordered a new trial on the custody and mobility issues, finding no reversible error on the ruling that the Appellant was Ray's psychological parent and should be his primary parent, but holding that "there was virtually no consideration of how relocation to Saskatoon might benefit [Ray] or be detrimental"[56]. There was no mention of Keishawn's interests.[57]

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[51] Vol. 2, Part II, page 29.
[52] Vol. 2, Part II, page 34.
[53] Vol. 1, Part I, page 34.
[54] Vol. 1, Part I, pages 48- 49, para. 45.
[55] *Ibid.* page 48, para. 43.
[56] *Ibid.* page 44, para. 29.
[57] Justice Caldwell, one of the judges on the panel, had mentioned Keishawn's interests as one of the primary reasons for lifting the stay on the earlier motion, see note 47, but no mention was made on the appeal proper.

31. Having ruled that the matter should go back to trial, the Court of Appeal then commented upon all of the factors that the Court found weighing *against* relocation[58] which will be further discussed below, and only touched briefly upon the reasons given by the Learned Trial Judge for allowing the move, not commenting upon counsel's arguments in that regard.

32. The Court further misconstrued the evidence, in the Appellant's submission, in paragraphs 34 and 35 of their decision, and concluded that, on the basis of that misconstrued evidence, this case was not one of the exceptional cases where the Respondent's 'desire' to work in/from Saskatoon was relevant to meeting the best interests of the child, thereby deciding upon a primary issue that would otherwise be before a new trial judge at the new trial.[59]

33. The Court therefore concluded that "the trial judge erred in principle in her approach to the issue of mobility by overlooking factors and evidence plainly relevant to the determination of what would be in [Ray's] best interest."[60] The trial decision was overturned and all orders, including joint custody, primary residence, access and child support, were set aside. The Court ordered that, in the interim, Ray would remain in the primary care of his mother, with increased access to his father. The only order that was affirmed was the division of property, and the equalization payment to be made by the Respondent to the Appellant.[61]

Overview of Appellant's Position

34. The Appellant's position is that the standard of review with respect to relocation cases may need to be considered by this Court separately from that of child custody (now parenting time and decision-making) and/or support. In this particular appeal, it is the Appellant's position that the Court of Appeal overstepped the scope of their authority to overturn a trial decision, substituting their findings of fact for that of the

[58] Vol. 1, Part I, pages 44-45, paras. 30, 31 & 32
[59] *Ibid.* pages 45-46, paras. 34 & 35.
[60] *Ibid.* page 46, para. 37.
[61] *Ibid.* page 50, para. 49.

trial judge. As the family had already moved, the Court found the best interests of the child could only be served by ordering a new trial. Having ordered a new trial, the Court of Appeal then erred in reviewing all of the evidence that would again be relevant at a new trial.

35. The implications of an appellate court overturning a trial decision, particularly where the family has already moved, are significant. The Appellant was dismayed to find herself facing another trial, after literally being financially broken paying for the first decision and subsequent appeal.[62] The Appellant's position is that the financial impact on women and children and families of a Court of Appeal ordering a new trial should be a consideration for courts of appeal when looking at *whether to interfere with the trial judge's discretion*. Finality in family law cases is of great importance, not just to this family, but to a general public interest. Putting aside the financial implications, in relocation cases in particular, children especially, but parents as well, need to know where they will live and to be able to make connections in their community and feel certain they will not be uprooted. It is not uncommon for family litigation to take years, and appeals prolong the uncertainty for children during important developmental stages of their lives. The costs to families, both financial and emotional, are extremely high.

36. The extent of the Court of Appeal's review of the Trial Judge's decision, was, in the Appellant's submission, extreme. The Court of Appeal virtually made different findings of fact than did the Trial Judge on almost every important point. In the Appellant's submission, the Trial Judge's reasons regarding mobility, were quite abbreviated; however, that is not reason for the Court of Appeal to go in and overturn every finding that she did make and ultimately find that she did not consider evidence that they found persuasive. The Learned Trial Judge had the benefit of hearing the entirety of the evidence and her reasons would have arisen from a more

[62] This is significant in that there has yet to be an 'equitable distribution' of either the family assets or income in this case, leaving the mother (and children) impoverished, while the father continues to hold the assets (ignoring the order to equalize them) and to have a high income and continue on with life 'as usual'.

comprehensive understanding of such evidence; she would have been in a better position to weigh the evidence. With the degree to which the Court of Appeal interfered in the Trial Judge's decision, in the Appellant's submission, it was like no standard of review existed at all.

37. The Appellant's position is that the Court of Appeal also overstepped the scope of it authority to review, and seriously misapprehended the evidence, when it came to their decision with respect to spousal support, by stating that the Learned Trial Judge misapprehended the evidence when finding that the Respondent was a stay-at-home mother and wife prior to separation.[63] There was virtually no evidence *but* that she was a stay-at-home mother for over 10 years. In paragraph 41, the Court of Appeal made its own findings of fact, not citing the evidence upon which the factual findings were made, nor referring to the conflicting evidence given in this regard and finally, they substituted their own decision with respect to spousal support *without referring to any law, legislation or otherwise*.[64] Their own decision, in the submission of the Appellant, showed a serious disregard for the underlying objectives of the *Divorce Act* and policy considerations in the law with respect to spousal support, by rendering invisible the mother's child-rearing obligations, both pre and post-separation.

38. It is in this context that the Appellant now makes this appeal. There is a strong public interest element to this appeal, given the extremely backwards, in the Appellant's submission, rationale in the Court of Appeal decision which goes against provisions in, and the objectives of, the *Divorce Act* and all the recent Canadian jurisprudence, from *Moge* on, which specifically addresses the inequities that result from the roles that people assume in relationships and from child rearing obligations. The Court of Appeal rendered invisible and entirely worthless, the work that the mother did in staying home and raising two children, one with cancer and one with severe ADHD, depression and anxiety, during a 10-year relationship, while the father went out and built a lucrative and rewarding career. The decision of the Court further rendered

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[63] *Ibid*. page 47, para. 40.

[64] Conversely, the Learned Trial Judge's reasons with respect to spousal support were NOT brief, and covered every aspect of entitlement, conceptual ground, quantum and duration, including reference to *Leskun*, when delineating the scope of the review.

invisible the extreme challenges that the now single mother would have in re-entering the workforce, while continuing to have primary responsibility for two children, with no supports in the community.

II. PART II – Issues to be addressed

39. The Appellant respectfully suggests that the issues are therefore as follows:

a) What is the scope of the Court of Appeal's jurisdiction to intervene in a Trial Judge's decision with respect to the relocation of children and did the Court of Appeal, in this case, err in law in finding that the omissions in the reasons of the Learned Trial Judge with respect to custody/mobility, were such as to provide the Court with jurisdiction to review the decision (and ultimately set the matter for a new trial)?

   i) Does the scope of their jurisdiction to review then allow the Court of Appeal to entertain all of the evidence and draw important conclusions, when they had ordered a new trial at the lower court level?

b) What is the scope of the Court of Appeal's jurisdiction to intervene in a Trial Judge's decision with respect to spousal support? Did the Court of Appeal err in substituting their findings of fact with that of the Trial Judge, and, further, did they misapprehend the evidence given at trial in doing so?

c) Did the Court of Appeal apply the law of this country, particularly this Honourable Court's decisions in *Moge,* and *Leskun,* correctly?

   i) Did the Court of Appeal err in law in imputing an income to the Appellant and overruling the Learned Trial Judge's order of a review, and instead holding that the Appellant should have reached self-sufficiency some two and a half years post-separation?

III. PART III - ARGUMENTS

a. What is the scope of the Court of Appeal's jurisdiction to intervene in a Trial Judge's decision with respect to the relocation of children and did the Court of Appeal, in this case, err in law in finding that the omissions in the reasons of the Learned Trial Judge with respect to custody/mobility, were such as to provide the Court with jurisdiction to review the decision (and ultimately set the matter for a new trial)?

40. There is no jurisprudence specific to the scope of an appellate court's review of a trial judge's decision on a relocation issue. The Court of Appeal, in this case, relied upon existing jurisprudence with respect to the standard of review of decisions stated in *Hickey v. Hickey*[65] and *Van de Perre v. Edwards*,[66] case law which has been consistently applied to child custody appeals throughout the country.

41. In the Appellant's submission, there are two issues with this: first, relocation cases differ from those of 'just' custody and may require differing treatment upon review (as might children's best interests decisions as a whole); second, in the Appellant's respectful view, the Court of Appeal cited the correct law, but then did not apply it correctly, substituting their findings of fact, for that of the trial judge.

42. It is conceded that the Learned Trial Judge's reasons were short, and did not go through each of the *Gordon v. Goertz*[67] factors, nor analyze the four scenarios set out in the Court of Appeal for Saskatchewan case of *Olfert v. Olfert.*[68]

43. The Court of Appeal, in *Olfert*, set out that it is 'best practice' for a trial judge to consider all of the possible scenarios; however, the Court held that it could "not conclude that every case will call for a court to conduct a high degree of detailed

[65] [1999] 2 SCR 518; 172 DLR (4th) 577
[66] [2001] SCC 60; [2001] 2 SCR 1014
[67] [1996] 2 SCR 27, 134 DLR (4th) 321
[68] [2013] SKCA 89 (CanLII)

analysis of each possible scenario." The Court concluded that "a failure to set out a detailed analysis of each possible scenario does not necessarily give rise to a material error in the nature of that described in *Van de Perre*".[69]

44. Indeed this Honourable Court, in *Van de Perre*, stated that:

> …omissions in the reasons will **not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial**… an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have **forgotten, ignored or misconceived the evidence** in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.[70]

45. The Learned Trial Judge, in my submission, did not forget, ignore, or misconceive any of the evidence that the Court of Appeal went on to highlight. The evidence at trial was that:

a. The family only lived in Lloydminster for the Respondent/Appellant's employment, they had no other connections (no evidence was led as to any other connections, other than the obvious, that Ray went to school in Lloydminster and had friends).

b. The family was indeed planning to move to Calgary, Alberta, pre-separation, as the Respondent/Appellant's promotion was based out of Calgary;

c. The Respondent/Appellant travelled extensively for work and also for pleasure;[71] his best friends had moved from Lloydminster to Edmonton, Alberta;

d. At separation, the Appellant was employed (for the first time in years) on a <u>part-time, temporary basis</u>, filling a maternity leave as a dental therapist – there was no evidence led by anyone to the contrary, and this evidence was corroborated by Exhibit P9, Letter from Westlake Dental Clinic;[72]

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[69] *Ibid.* at paragraph 22.
[70] *Supra,* note 65, at paragraph 15 [emphasis added]
[71] See Exhibit P7, Vol. 3, page 25,, setting out the Respondent's work travel for a year. On cross-examination, some further travel dates were established. In evidence the Respondent/Appellant acknowledged he travelled frequently to Edmonton to see his friends on the weekends.
[72] Vol. 3, page 29.

e. She took a medical leave from this employment due to the stress of ending her marriage and making a court application to relocate; her Record of Employment was exhibited, with the 'reason for issuing this ROE' listed as D00 – illness or injury;[73]

f. The family had strong family ties in Saskatoon, and all of the children had lived all of their lives in Saskatoon, being raised in the Vickies home, down the street from their very involved grandparents;

g. Ray's oncology team was based in Saskatoon, as was Keishawn's child psychiatrist who had been treating him since he was 10 years old;

h. The family had always done a lot of commuting/travelling back and forth between Saskatoon and Lloydminster;

i. The Vickies home remained available for them to live in, at a cost less than the rent they were paying in Lloydminster;[74]

j. The Appellant had work in Saskatoon, that was starting at one day per week and was to increase in the Fall.

46. While there were factors not addressed in her Oral Judgment, and not all of the evidence was reviewed, in my submission most of what is outlined above was touched upon in the facts or analysis of the Oral Judgment. Importantly, the Learned Trial Judge found the Appellant mother to have been a stay-at-home mother, the psychological parent to Ray, and to be needing familial support as she entered the workforce. In that context she decided that the move would be in Ray's best interests.

47. In my submission, having found, on all of the evidence, the Appellant to be Ray's psychological parent and for it to be in Ray's best interests to remain in her primary care, the Learned Trial Judge then put her mind to which parenting scenario would most benefit the children, with their mother as their primary care-giver. As stated in *Gordon v. Goertz*, "this may require an assessment of a parent's emotional and

[73] Exhibit P12, Vol. 3, page 36.
[74] This was also noted in the interim order of the Honourable Mr. Justice Caldwell, of the Court of Appeal for Saskatchewan, when allowing the application to lift the stay of enforcement of the trial judgment. See Vol. 2, Part II, page 29, para. 2, page 31, paras 10-12, and page 32, para.15.

economic prospects because children's interests are necessarily intertwined with those of their parents."[75]

48. The Court of Appeal is not entitled to substitute the decision of the Learned Trial Judge with its own conclusions from the evidence simply because the Court would have decided the matter differently (or provided more complete reasons). In *Van de Perre*, this Honourable Court held:

> The narrow power of appellate review does not allow an appellate court to delve into all custody cases in the name of the best interests of the child where there is no material error as decided in *Hickey*. The Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence. This is the role of the trial judge.[76]

49. With respect to that particular appeal, this Court, in *Van de Perre*, held that:

> It is in reconsidering the evidence that the Court of Appeal determined that the trial judge had made material errors. As discussed above, this is not the proper method of appellate review. If the Court of Appeal had followed the appropriate method, *it would not have reconsidered the evidence and found what it described as material errors*.[77]

50. In the Appellant's respectful submission, this is exactly what happened here: the Court of Appeal, in looking at the brevity of the reasons given, reviewed the evidence and drew conclusions contrary to that of the Learned Trial Judge, the Court itself misapprehending important evidence and drawing incorrect conclusions, in the Appellant's submission. Regardless of one's evaluation of the evidence, it is not up to the Court of Appeal to review the evidence and draw conclusions different from that of the Trial Judge, unless it is clear she did not consider the evidence, forgot or ignored it.

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[75]

[76] *Supra,* note 65, at para. 12.

[77] *Ibid.*at para. 16 (emphasis added)

51. There are important policy reasons for this, as outlined in *Van de Perre*, where this Court reasoned:

> First, finality is not merely a social interest; rather, **it is particularly important for the parties and children involved in custodial disputes**. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. **Custody and access decisions are inherently exercises in discretion**. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.[78]

52. The Appellant would add that the importance of finality is even more so in two situations that this appeal raises, that is, first, when it is not just about what the parenting schedule for a child might be, but it is about where the child will actually live, geographically; second, where the court, as here, orders a new trial, and prolongs both the period of, and the expense of, litigation, causing extreme financial pressure and emotional distress on families.

53. This begs the question as to whether there should be a different standard that applies to relocation cases, where the child may be moved from one location to another; should they then have the risk hanging over them, for years, of having to be moved again? Should parents, after paying for an interim application, a pre-trial, a full trial and an appeal, be then put to the cost of another trial, with the risk of a further appeal? The public interest in finality, as stated by this Honourable Court, above, is not just a social interest, but it is particularly important for the parties involved and for children, who literally can spend their entire childhood with their parents in litigation. The emotional and financial consequences of provincial courts of appeal overturning

[78] *Ibid.*at para. 13.

relocation decisions and then, because the children have already moved, ordering another trial, is nothing short of devastating for families.

54. In the Appellant's submission, because the *Gordon v. Goertz* factors were not fully canvassed in this case should not give rise to the jurisdiction of the Court of Appeal to review all the evidence, make different findings of fact and draw different conclusions. In my submission, to allow the Court to do so, and remit the matter back for a new trial, will mean financial hardship to the Appellant (and the children) and put additional stress on both parents and children as they again await a decision with respect to where their home will be.

i. <u>Did the Court of Appeal err in reviewing the evidence and drawing conclusions, when the Court had already held that the matter must return for a new trial?</u>

55. The Court of Appeal began the reasons by stating that "Some knowledge of the evidence is necessary to understand the analysis that follows but, because we ordered a new trial, we will be circumspect in summarizing it;'[79] however, the Court then went on to not just summarize the evidence, but to draw conclusions of fact on important issues. In the Appellant's submission, having ordered a new trial, this was an error in law which has serious implications in prejudicing the Appellant's case at a new trial, and ensuring she have a fair trial of the issues.

56. In the Appellant's submission, having ordered that a new trial was needed, the Court could have proceeded with the circumspect summary of the facts and analysis but saved findings of fact or drawing of conclusions strictly for the spousal maintenance issue, where the trial decision was overturned and a new decision was made. The Court's analysis and findings up to paragraph 29 of the decision, should have been adequate to review the evidence and provide an analysis as to how the Trial Judge had, in the Court's ruling, not adequately addressed all of the factors relevant to a

[79] Vol.1, Part I, page 37, para. 6.

mobility application and why it should return to a new trial.

57. Instead, the Court went on to make several incorrect findings of fact (starting with their statement that the Respondent was ordered to have an anger management 'assessment' and that the assessor found he did not have anger management issues, which was nowhere in the evidence) and went into an analysis about all of the factors, in their view, weighing *against* the relocation.

58. The first of these was the lack of evidence about Ray's schooling, activities he would engage in and extended family members. In evidence, the Appellant spoke to moving her children back to their birth home, where they would have a yard and be close to friends and family. She spoke to her hopes for Ray's education, including learning a second language or going to a Montessori school, as well as the fact that there would be more resources for Keishawn's special needs. She spoke to being a member of the church in Saskatoon and having more access to Ukrainian culture; she mentioned Saskatoon having more activities that the boys could go into, and specifically mentioned kayaking. She stated that they enjoyed spending time by the river.[80] Importantly she summarized how the move would be beneficial by stating, "It's… it's work. It's family. It's being able to provide for my kids on my own without having to have – or chase spousal support, just being able to do it on my own…"[81]

59. In the Appellant' submission, the Court could take judicial notice of the fact that Saskatoon would have comparable or superior public school systems and extra-curricular opportunities for an 8-year old boy, as Lloydminster would. The evidence was clear of his close relationship to his grandparents in Saskatoon and the fact that there was not one single extended family member (or even family friend) in Lloydminster. The Court of Appeal itself could not name one important tie that Ray had to Lloydminster and, indeed, at trial there was virtually no evidence as to connections to the community.

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[80] Vol. 6, Part V, T105, lines 14 – 34.
[81] *Ibid.* at lines 37-39

60. The second of these factors was the Court's finding of the Appellant's 'repeated interference' with the Respondent/Appellant's parenting of Ray, a finding that the Court of Appeal '*inferred'* from the Learned Trial Judge's belief that the Appellant would 'stop behaving badly'.[82] In fact, the evidence was that the Appellant withheld overnight access for the *first month* post-separation, and had called the police on one occasion, and threatened to on another, when Ray was not returned on time and was taken out of province without her knowledge. In my submission, these are simply 'growing pains' that we often see in family law as parents adjust to the post-separation co-parenting landscape; certainly they were not 'repeated interferences' of the like that we see in high conflict custody cases where court orders are ignored and access withheld.

61. In addition to the Court of Appeal's inferring of fact that did not exist in evidence, in paragraph 32 they found that the Appellant had failed to comply with court-ordered access "on several occasions", again, with no evidence cited.[83] There was, in fact, no evidence of 'repeated interference' and no evidence of any withholding of access once the interim order was made (less than two months post-separation). Similarly, there was no evidence of the Appellant attempting to 'sever or diminish' the relationship between father and son, nor was there much evidence of the father's efforts to raise Ray as Muslim, let alone any attempts by the Appellant to interfere with this. In fact, the Appellant's evidence was clear that she valued the relationship between son and father[84] and she was heartbroken that the relationship between stepson (Keishawn) and father was severed.

62. With respect, the Learned Trial Judge was in the best position to be certain that the early 'bad behaviour' would not continue, and she stated as much in her reasons[85]. The Learned Trial Judge expressed no concerns that any 'bad behaviour' on the part of the Appellant was geared towards severing or impacting the relationship of the Appellant with the children, and indeed there was no evidence to that effect. That

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[82] *Supra,* note 78, page 44, para. 31
[83] *Ibid.* page 45, para. 32
[84]Vol. 6, Part V, T90, lines 16-18.
[85] Vol. 1, Part I, page 10, para. 29.

being so, the Court of Appeal should not then suggest, *against the Trial Judge's conclusion*, that this was a factor weighing *against* the relocation – clearly this factor had NOT been ignored and had rightfully been weighed by the Learned Trial Judge.

63. Finally, in paragraph 34, the Court of Appeal again referred to evidence that simply did not exist, finding that the family had used childcare before, when they, in fact, never had. The Court was suggesting that the Learned Trial Judge's reasons for allowing the move, so that the Appellant would have the support of her parents, and Ray would benefit from the time with his grandparents, was not a valid consideration. The Court went on to state that the father's availability to assist the mother while she entered the workforce had not been considered. However, the evidence was clear, at trial, that the Respondent/Appellant, was rarely in town. His employer's evidence that he could create his own travel schedule was tendered to show that, should the court award him shared parenting, he could (allegedly) be in town on *his* parenting weeks, not all the time. In fact, even with the weekend access he had to Ray post-separation, the evidence was that he still had to ask the Appellant for assistance.[86]

64. As well, both the Learned Trial Judge and the Court of Appeal agreed that the Appellant was the psychological parent and should have primary residence of the child. Given the lack of communication and cooperation from the Respondent/Appellant father that was apparent in the evidence, his career aspirations and travel schedule, to suggest that he could assist the mother in her parenting obligations were she to travel an hour and a half each way to work, is not reasonable. In my submission, the Court of Appeal should not have been drawing such conclusions, and colouring the evidence that will need be presented at a new trial, on inference and speculation, with no reference to the actual evidence that the Learned Trial Judge had the benefit of hearing first hand.

65. In summary, although the Court of Appeal correctly stated the standard of review to

[86] See Exhibit P7, Vol. 3, page 26, for example, where, in the last paragraph of the letter outlining his work travel, the Respondent's counsel points out that, as an access parent, **he had asked the Applicant to take his parenting time on three occasions when his work travel schedule conflicted with his access**.

be applied, given there is no distinct standard of review applicable to relocation cases, they then applied that standard incorrectly. First, they substituted their own findings of fact for that of the Learned Trial judge, with no evidentiary basis, second, they found that the Learned Trial Judge had not considered evidence and issues that it was clear that she had, and third, having ordered a new trial, they should not then have embarked upon an analysis of the factors militating against the move.

66. Most importantly, in the Appellant's submission, was the interference of the appellate court with the fundamental premise underlying the Learned Trial Judge's decision, which was that the Appellant needed to return to Saskatoon to have the support of her family while re-entering the workforce, and that Ray's interests were inextricably tied to his mother, as she is his psychological parent (and, finally, that he would also benefit, separately, from the involvement of his grandparents, as his mother re-entered the workforce). This point was strongly argued in oral arguments, but the Court of Appeal clearly did not agree to this premise, and substituted their own findings of fact to support their ultimate decision on both relocation, and on spousal support.

67. The Court of Appeal, with all due respect, ignored the reality of a single parent's need for supports, the old adage that 'it takes a village' when concluding that the mother's 'desire' to work out of Saskatoon was not relevant to the child's best interests in the relocation matter. In contrast, the Learned Trial Judge, on the whole of the evidence, properly considered how difficult it would be for the Appellant to be successful in her chosen career in Lloydminster, as opposed to the better opportunities, and support system, available in Saskatoon. She further considered how the challenges that the Appellant would face in living in Lloydminster and working in North Battleford would impact her ability to continue to care for the children as well as she always had. Finally, in my submission, the sacrifices that the Appellant would have to make (remaining in Lloydminster) and the impact on the children, would be solely for the benefit of the Respondent, to keep his child living in the same city, while he himself focused on his career, travelled extensively, and made no sacrifices of the kind that he was asking the Appellant to.

b. <u>What is the scope of the Court of Appeal's jurisdiction to intervene in a Trial Judge's decision with respect to spousal support?</u> <u>Did the Court of Appeal err in substituting their findings of fact with that of the Trial Judge, and, further, did they misapprehend the evidence given at trial in doing so</u>?

68. In the Appellant's submission, the Court correctly stated the standard of review, as set out in *Hickey v. Hickey*,[87] but then incorrectly applied that law, navigating way outside of the scope prescribed by *Hickey,* where this Honourable Court ruled:

> Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. These principles were stated by Morden J.A. of the Ontario Court of Appeal in Harrington v. Harrington (1981), 1981 CanLII 1762 (ON CA), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in Pelech v. Pelech, 1987 CanLII 57 (SCC), [1987] 1 S.C.R. 801, per Wilson J.; in Moge v. Moge, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, per L'Heureux-Dubé J.; and in Willick v. Willick, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at p. 691, per Sopinka J., and at pp. 743-44, per L'Heureux-Dubé J.
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> 12 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**.[88]

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[87] *Supra*, note 64.
[88] *Ibid.*at paragraphs 11 and 12 (emphasis added)

69. With respect, the Court of Appeal in fact had a different appreciation of the facts than the Trial Judge, and overturned the support order because they appreciated the facts differently and would have made a different decision. This is exactly what our law cautions against. One of the important messages that *Hickey* provides is that the trial judge hears from the parties directly and, in fact, has a much better appreciation of the facts then an appellate court who reads factums and transcripts. In this case, that resulted in the Court of Appeal making several errors about what the evidence actually was, reinforcing the value of the ruling in *Hickey* that great deference should be given to the trial judge.

70. Nowhere is this more apparent than where the Court of Appeal states, in paragraph 35 that there was 'uncontroverted evidence' that the mother was gainfully employed in her chosen vocation prior to separation but voluntarily left that employment shortly before filing her Petition. In fact, the evidence was uncontroverted that she was covering a maternity leave on a part-time basis at the time of separation. The evidence was highly controverted that she 'voluntarily left' that employment; in fact, and in evidence (see earlier reference to the letter from her employer and her ROE), the mother took a sick/medical leave from that temporary employment upon separation. Had she not taken that sick leave, she would have only been employed (part-time) until September 1, 2018, some <u>three months</u> following separation. She then would have been seeking employment, in a specialized field, in a small city, after years out of the work force. Yet the Court of Appeal based the foundation of its decision, both with respect to relocation, and in overturning the support order, on that incorrect finding of fact.

71. In addition to that, the Court made findings of fact that employment was available to the mother in in North Battleford, some one and half hours from Lloydminster. The evidence on this issue was lengthy, speculative and controverted. Unfortunately, the trial judge did not refer to this evidence in her decision, but clearly she considered and rejected that it was established that a) the employment was even available for the

Appellant[89] and b) being available, it was appropriate or viable for her. In argument at the Court of Appeal, much time was spent on this issue, with counsel for the Appellant vehemently arguing that, assuming it was established the employment was available, it was not a viable option for the mother. The Appellant's position was, and is, that to take employment in North Battleford, while living in Lloydminster, was not feasible for her, as a single mother of two children.

72. Were the Appellant to take a job in North Battleford, she would have to leave her home at 6:30 a.m. to get to work for 8:00 a.m.[90] and she would return to Lloydminster at the earliest by 5:30 p.m., for a total of 11 hours away from home/her children. There would be no one to get the children off to school, there would be no one to pick the children up after school, there would be no one if a child was ill or if she was called to the school for a behavioural issue, there would be no one to take them to an activity, there would be no one nearby in case of emergency. The evidence was clear that Keishawn, although 16 years old, was not capable of getting himself to school, let alone assisting his brother; both parties agreed that they did not even allow Keishawn to babysit Ray. The evidence was that Ray had missed school between September 2018 and March 2019 numerous times due to being ill (Ray was frequently getting ill/infections from his compromised immune system from having cancer); in February 2019 alone, he missed 9 days of school.[91] The Appellant's evidence was that it was unlikely she could hold down a full-time job due to these issues and the fact of having no support in Lloydminster.[92]

73. It is extremely difficult to see how the Appellant would be able to keep such a job with a child that was sick as many as 9 days in one month and a minimum of 2-3 days

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[89] Even though it was established by a dentist, Dr. Rayburn, that she would have employed a part-time dental therapist at some point, it was also established that there was a point where she was not hiring, which may have been the same time that the Appellant made inquiries (thereby missing that opportunity): see the Appellant's evidence at Vol. 3, Part V, T94, line31-39. Further, no one put to her the issue of whether she would have employed a dental therapist with dated training and only some months experience in the actual field. Thus, in the Appellant's submission the very notion that employment was available to her was speculative.

[90] Dr. Rayburn testified that the hours of work would be eight hours per day, being 8:00 a.m. to 4:00 p.m.

[91] Ray's attendance record is Exhibit R30, Vol. 4, page 50; he was also frequently late due to medical appointments.

[92] Vol. 6, Part V, T91, line 31 – T92, line 26.

many other months. The Appellant gave evidence at trial that, when she worked part-time 3 days per week in Lloydminster, she already struggled to make it to work due to her parenting responsibilities, and would have to call in the night before to cancel her patients for the next day, when Ray was sick.[93] The Respondent/Appellant himself had testified that even when the Appellant was working part-time during the relationship, he had, on one or two occasions, had to leave work to care for Ray as the Appellant was unable to. No dental practice would be able to afford to keep her on, in the circumstances.

74. The Appellant was able to commute to Davidson, SK, for work, from Saskatoon, as her parents lived down the street from her home in Saskatoon. Her parents could see her children off to school, or take care of them if they were ill; her parents could pick up an ill (or misbehaving, as was the issue with Keishawn, having severe ADHD) child from school and watch them; her parents could pick a child up and take them to their extra-curricular activities or, if there were an emergency, her parents would be there to deal with it. In addition to her parents, she has a wide circle of close friends (although not much evidence was led with respect to these friends, she did make passing mention of it[94] and the evidence was that she had lived most of her life in Saskatoon[95]).

75. This is what was argued by the Appellant's counsel, both at trial and on appeal; the Learned Trial Judge clearly agreed with this argument and the Court of Appeal clearly did not. In my submission, the refusal of the Court of Appeal to give weight to this argument, was not only stepping outside the scope of their authority to interfere with the Trial Judge's decision, but it is an error in law and unsupported by Canadian social values and Canadian jurisprudence.

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[93] Vol. 6, Part V, T55, lines 25-40.
[94] Vol. 6, Part V, T26, lines 11-12.
[95] Vol. 6, Part V, T16, lines 22-23.

c. <u>Did the Court of Appeal apply the law of this country, particularly this Honourable Court's decisions in *Moge*, and *Leskun*, correctly?</u>

76. In rendering their decision overturning the Learned Trial Judge's decision with respect to spousal support, the Court of Appeal made no reference to any spousal support law save for *Leskun*, and it is uncertain what law they based their decision upon. Certainly the Court did not refer to, nor seem to follow, this Court's decision in *Moge v. Moge*.[96]

77. The decision of the Court of Appeal seems based on their substituting two findings of <u>fact</u>, for that of the Learned Trial Judge's findings: that it was 'uncontroverted' that the Appellant was employed (earning $80,000 per year) at the time of separation and 'voluntarily' left that employment, and that the Appellant had a further work opportunity in North Battleford, that, had she taken advantage of, would have brought her to self-sufficiency by December 2020.

78. With these two findings of fact, the Court of Appeal concluded that the Appellant was not a stay-at-home mother and wife at the time of separation and that she should have been fully self-sufficient by December 2020.

79. On a review of *Moge*, many of the facts are similar. In *Moge*, the mother worked part-time pretty much throughout the relationship, but yet the Court of Appeal (upheld by this Honourable Court) found that she had been in a 'traditional marriage', that she was in fact primarily a stay-at-home mother and wife prior to separation. Despite the fact that she took on more work post-separation, there was no expectation that she must reach self-sufficiency in a determined period of time, as this Honourable Court recognized 'the reasonable limitations in attaining self-sufficiency that may be encountered by a wife who has performed traditional roles in a marriage.'[97] But yet the Court of Appeal held, in the case at bar, that the Appellant was NOT a stay-at-

[96] *Supra*, note 1.
[97] Page 17, para. 36, referring to *Messier v. Delage*, [1983] 2 SCR, 401

home mother and wife at the time of separation, as she had some part-time, temporary, employment for the previous 6 months (of a 10-year relationship). In the Appellant's submission, this rationale is wrong in law.

80. In *Messier v. Delage*, as quoted in *Moge*, this Honourable Court held that: "In my opinion the Superior Court erred in *disregarding the present factors* submitted for its consideration, and *hypothesizing* as to the unknown and then unforeseeable future; and the Court of Appeal properly intervened."[98] Further, in *Patrick v. Patrick*, cited in *Moge*, the Court held that: "the evidence is clear that, as a result of the breakdown of her marriage and her *continuing child-rearing role*, she will be disadvantaged financially and professionally, both in comparison to her situation had the marriage continued and in comparison to her situation had no marriage occurred at all."[99] Again, these rulings from this Honourable Court, seem applicable to the case at bar, drawing the conclusion that the Court of Appeal, having ignored the realities of, and disadvantage to, the Appellant post-separation, is again incorrect in law.

81. The Court of Appeal did not consider the present factors that the Appellant was dealing with (either at trial, or at the time of the appeal, mid-Covid pandemic), including dated credentials, lack of work experience, lack of opportunities, and her continuing child-rearing obligations, including the high needs of the children, and *hypothesized* that she could have held employment in North Battleford. In addition, in hypothesizing that she could have had employment in North Battleford, the Court of Appeal went against the law of this country and the underlying policies expressed by this Honourable Court in *Moge*, that is, there was *no recognition of how her role in the marriage and her continued role as the primary parent to the two children of the marriage might impact her job opportunities* and how the breakdown the marriage might put her (and the children) at an economic disadvantage. This rationale, again, is wrong in law.

82. This Court held, in *Moge*, that:

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[98] *Ibid.* page 18, para. 36.
[99] *Ibid.*para. 38

> the purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry, when assessing spousal support after the marriage has ended, must be *the effect of the marriage in either impairing or improving each party's economic prospects*.[100]

The policy reasons behind such a purpose, it was held, are reflected in the objectives of the *Divorce Act*. Primary amongst those is the concept of the *feminization of poverty*, wherein women, and children, statistically, live in poverty post-separation at much higher rates than do men.[101]

83. The Court of Appeal, however, did not discuss <u>any</u> of the objectives of the *Divorce Act* when deciding upon spousal support, nor the policy considerations behind those objectives. In *Moge*, this Court stated that:

> All four of the objectives defined in the Act <u>must be taken into account</u> when spousal support is claimed or an order for spousal support is sought to be varied. <u>No single objective is paramount</u>. The fact that one of the objectives, such as economic self-sufficiency, has been attained does not necessarily dispose of the matter.[102]

However, the Court of Appeal hypothesized that the Appellant would be self-sufficient by December 1, 2020, with no evidence to support such a speculative finding, and that was the end of it; no discussion with regard to compensatory support or any of the other objectives or factors outlined in the Act.

84. As stated in *Moge,* self-sufficiency is neither the paramount nor the only objective of the Act. Although the Court of Appeal did not overturn the Trial Judge's finding that the Appellant had a strong compensatory claim, nor did they address the ways in which she had been disadvantaged by the marriage and by the breakdown of the

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[100] *Ibid.* page 20, para. 44
[101] *Ibid.* page 22, para. 55
[102] *Ibid.* page 21, para. 52

marriage and how their ruling would ensure she was compensated, is so far as possible, for such disadvantage. Instead, in the Appellant's view, she was *penalized* for prioritizing the well-being of her children over exploring the possibility of a work 'opportunity' in North Battleford that would have her 1.5 hours away from them for 11 hours a day.

85. Families in Canada depend upon the law to ensure that they are treated fairly in our Courts. When a provincial court of appeal steps outside of the scope of their jurisdiction to review a trial judge's decision, and then goes on to make rulings that do not follow or even *consider* the jurisprudence of this Honourable Court, there must be accountability to ensure that the law is being applied consistently and correctly throughout the country. Only with accountability can we ensure that the objectives and policy considerations that are important background to Canadian family law, will be achieved.

i. Did the Court of Appeal err in law in imputing an income to the Appellant and overruling the Learned Trial Judge's order of a review, and instead holding that the Appellant should have reached self-sufficiency some two and a half years post-separation?

86. The Court of Appeal's conclusion that the Appellant was not a stay-at-home mother and homemaker who was returning to the workforce after marriage dissolution has been discussed above. This statement is hard to reconcile with the evidence of the Appellant being a stay-at-home mother for over 10 years, with brief forays into part-time employment, as was the situation, at the time of separation. In the Appellant's submission, the Learned Trial Judge's conclusions in this regard were correct, as was her finding that, as the children's primary caregiver, it was important for the mother to focus on the children's needs immediately post-separation.

87. Putting those issues aside, the Court of Appeal stated that the Appellant was making

$80,000 per annum, and that is the income that they imputed to her as of July 1, 2019. They gave no indication of where this evidence arose from; in 2018, the Appellant earned some $50,000, deposing that this is the most income she had ever earned in her life.[103] An imputation of income, while discretionary, must have a basis in evidence. For the sake of argument, if she was making the equivalent of $80,000 per annum in her maternity leave position, the evidence was clear that such ended as of September 1, 2018, meaning she would only have earned income until that time (by my calculation some $53,333).

88. As of September 1, 2018, the Appellant would have been in a position of looking for work. In order to accept the Court of Appeal's conclusion that she could have been earning $80,000 per annum, at July 2019, this Court would have to accept the following:

    a. That the Appellant could, and should, have found employment as soon as her maternity leave position was up, even though only 3 months post-separation of an over 10-year relationship and status as a stay-at-home mother and homemaker;

    b. That a position was readily available in North Battleford at the exact time that she would have been looking (the evidence was unclear as to what the time frames were that the dental office there was looking for a therapist);

    c. That she, as the primary parent to two boys, one young and recovering from cancer[104] and one a troubled teenager with ADHD and depression, could and should have commuted one and half hours for work at least three days per week, immediately post-separation; and

    d. That she would have been able to successfully perform in this position and keep it, even with the extensive absences that would be necessary for her to care for her child when he was ill and to attend to Keishawn's behavioural issues and to ensure both of them attended school and necessary appointments.

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[103] Vol. 6, Part V, T97, lines 6 to 21.

[104] See the Appellant's evidence at Vol. 6, Part V, T83, line 34 to T84, line 10, where she gave evidence that Ray continued to be sick and miss school and have special needs after he was deemed recovered from cancer.

89. Further, the Court of Appeal then found that the Appellant should have obtained self-sufficiency by December 31, 2020. The Respondent/Appellant's income for 2018 was determined to be $124,853; presumably the Court was suggesting that the Appellant could be making that much in 2020. In my submission, the Court should have taken judicial notice of the fact of a worldwide COVID-19 pandemic that resulted in a shutdown of all but essential services in almost every province and territory in Canada. In Saskatchewan, this shutdown took place mid-March 2020 and dental offices were shut down until May 4, 2020, when they were allowed to resume practice subject to stringent guidelines, including limiting bookings and the number of patients in office at any one time; many of these practices continue in individual offices, regardless of public restrictions. To assume that the Appellant's income would increase from the imputed and imaginary $80,000 per annum, some $45,000 in the pandemic context is unreasonable and, with respect, incorrect.

90. If the above is accepted, in my submission, a new precedent will be set for the efforts that primary, stay-at-home parents must go to post-separation, an effort that appears to be unrealistic for most single parents in Canada. The efforts that the Court of Appeal is suggesting that the Appellant should have made, in my submission, would put parents in the position of having to choose whether to be present for their children and care for them, perhaps in poverty, or be absent and unable to attend to the wide array of needs children have, but be able to financially support them. Further, it places all responsibility on one parent, over the other, to both financially support and take care of the children, while the other simply has to ensure they can pay support. This is contrary to the objectives of our legislation (particularly with the recent changes) and to the principles set down by this Court, and this is why it is imperative that this Honourable Court overturn the Court of Appeal decision which will result, effectively, in a new standard being sent for custodial parents in Saskatchewan.

91. The Court was very clear that spousal support would be discontinued as of December 2020, with no possibility of a review, and they set aside the review provision, citing

this Honourable Court's decision in *Leskun*. While *Leskun* stands for the proposition that a review is only appropriate when there is a genuine and material uncertainty at trial that will be resolved in the near future, at trial, on the facts as found by the Trial Judge, there was an uncertainty as to the Appellant's prospects in obtaining more than the one day per week she was currently working. In *Leskun*, the Court held:

> Review orders under s. 15.2 have a useful but very limited role. As the amicus curiae pointed out, one or both parties at the time of trial may not, as yet, have the economic wherewithal even to commence recovering from the disadvantages arising from the marriage and its breakdown. Common examples are the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment. In such circumstances, judges may be tempted to attach to s. 15.2 orders a condition pursuant to s. 15.2(3) of the Divorce Act, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order. This will properly occur when the judge does not think it appropriate that at the subsequent hearing one or other of the parties need show that a change in the condition, means, needs or other circumstances of either former spouse has occurred, as required by s. 17(4.1) of the Divorce Act.
>
> 37 Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances…
>
> 38 Here the review order was justified by serious doubt at the time of trial as to the true financial situation and prospects of the wife and what level of support would actually be needed.[105]

92. In the Appellant's submission, this was the very situation at trial, where there was a possibility of her getting 1-2 more days per week of work: 1 more day would take her up the income that the Learned Trial Judge imputed to her, and 2 more would take her over that amount. In reality, she ended up getting less time than anticipated, the commute was not sustainable, there was no dental therapy work for her in in Saskatoon, and she decided to go back to school, at which time the COVID-19

[105] *Supra,* note 46, page 10, paras 36-38.

pandemic changed the landscape for everyone, the Appellant included. In the Appellant's submission, the Learned Trial Judge's order for a review was warranted in the circumstances and correct in law.

IV. PART IV - COSTS

93. At trial the Appellant won on all fronts and was awarded costs; as the decision was appealed, these costs were never paid. On Appeal, the Court reversed the costs award, ordered a new trial, and ordered that the Appellant pay costs of the appeal to the Respondent.

94. Although the Respondent was ordered by the Learned Trial Judge to pay the property equalization, and this decision was *affirmed* by the Court of Appeal, the Respondent has never made the equalization payment to the Appellant, nor has he paid section 7 expenses. In the Appellant's submission, the Respondent does not come to this Court with clean hands, having ignored the orders both to make the equalization payment and to pay section 7 expenses. In the Appellant's submission, the Respondent's actions have kept her from being able to pay counsel and have kept her and the children in poverty and this should be considered in any costs award on this appeal.

95. The Appellant seeks costs of the trial to be renewed and seeks costs of the Appeal, including the two interim applications she had to make to the Court of Appeal, and, finally, she seeks costs of the Application for Leave to Appeal to this Honourable Court, and the Appeal proper.

V. PART V – RELIEF REQUESTED

96. The Appellant seeks the following order from this Honourable Court:
    a. THAT the decision of the Court of Appeal for Saskatchewan to allow the appeal with respect to custody and related issues of access and child maintenance, and to order a new trial of that issue, be reversed, and the Trial decision be restored;

b. THAT the decision of the Court of Appeal to allow the appeal with respect to Spousal Maintenance and to substitute the Order of the Learned Trial Judge with respect to Spousal Maintenance, with that of the Court of Appeal, be reversed, and the Trial decision be restored;

c. THAT the decision of the Court of Appeal with respect to costs of the trial and costs of the Appeal be reversed, and the Trial decision be restored, and that the Appellant be awarded costs of the Appeal; and

d. THAT the Appellant be entitled to costs of this Appeal, including costs of the Application for Leave.

ALL OF THIS IS RESPECTFULLY SUBMITTED this 23rd day of September, 2021

MOKURUK & WOODS

Per: Karina Jackson

Karina Jackson,
Solicitor for the Appellant

VII. PART VII – AUTHORITIES

Moge v. Moge, [1992] SCR 813, 99 DLR (4th) 456.

Hickey *v.* Hickey, [1999] 2 SCR 518, 172 DLR (4th) 577.

Van de Perre *v.* Edwards, 2001 SCC 60, [2001] 2 SCR 1014.

Olfert v. Olfert, 2013 SKCA 89, [2013] 10 WWR.

Gordon v. Goertz, [1996] 2 SCR 27, 134 DLR (4th) 321.

Leskun *v.* Leskun, 2006 SCC 25, [2006] 1 SCR 920.

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