SCC File No.: 39567

IIN 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 OF THE RESPONDENT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This Appeal raises questions regarding the appropriateness of the current standards of review in parenting and spousal support matters and their application to the facts at hand.

2. In determining that the Trial Judge erred in allowing the children to relocate from Lloydminster to Saskatoon with the Appellant, the Saskatchewan Court of Appeal outlined and applied the standard of review articulated by this Court in *Van de Perre v Edwards*.[1] In finding that the Trial Judge made a palpable and overriding error with respect to her determination of the Appellant's income and employability, the Saskatchewan Court of Appeal followed the standard of review as stated by this Court in *Hickey v Hickey*.[2]

3. It is submitted that the Saskatchewan Court of Appeal was correct to intervene in the manner it did. The Trial Judge's reasons with respect to her decision to permit the relocation were very brief. In her Oral Judgment, no significant analysis was undertaken to demonstrate how the relocation was in the children's best interests, having regard for the factors provided for in *Gordon v Goertz*.[3] The only benefit to the child stated by the Trial Judge in support of the relocation was that he would be closer to his "Baba" with whom he has a close relationship.[4]

4. On a review of the evidence proffered at trial, the Saskatchewan Court of Appeal appropriately identified numerous facts which weighed against, and not in support, of the proposed relocation. These facts were not addressed by the Trial Judge in her Oral Judgment. A full consideration of this evidence led the Saskatchewan Court of Appeal to appropriately conclude that the Trial Judge's decision to permit the relocation could not be supported.

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[1] 2001 SCC 60, [2001] 2 SCR 1014 [*Van de Perre*].

[2] 1999 CanLII 691 (SCC), [1999] 2 SCR 518 [*Hickey*].

[3] 1996 CanLII 191 (SCC), [1996] 2 SCR 27 [*Gordon v Goertz*].

[4] AR, Vol I, Part I, Page 9, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 27.

5. On the issue of spousal support, the Trial Judge stated as a finding of fact that the Appellant was at stay-at-home mother as of the date of the parties' separation. This was incorrect. At the time of separation, the Appellant had been working outside of the home for six months earning approximately $8,000 per month.

6. Having regard for the standard of review outlined in *Hickey*, the Saskatchewan Court of Appeal correctly intervened in the Trial Judge's decision and adjusted the Appellant's imputed income to be more in line with her actual income at the time of separation.

7. Deference is owed to a trial judge in determinations of parenting and support matters as they have the benefit of hearing testimony from all witnesses, tested by cross-examination. However, such deference is not absolute. The purpose of Courts of Appeal is to intervene, having regarded for the appropriate standard of review, to correct errors made by the initial trier of fact.

8. Standards of review applicable to such matters have to strike a balance between promoting the finality of trial decisions against the need to ensure equal treatment and application of the law in the interests of justice for all.

B. Statement of Facts

9. The Respondent disagrees with the way the Appellant frames the facts of this case in her "Summary of Facts". As such, the Respondent provides the following statement of facts for this Honourable Court's review in the determination of this appeal.

Background

10. The parties met in August 2006 in Saskatoon, Saskatchewan.[5] The Respondent, who is originally from Saudi Arabia, was residing in Saskatoon to attend the University of Saskatchewan. The Respondent had received a full scholarship from his employer, SABIC, to attend university. Under that arrangement, SABIC paid for the cost of the Respondent's school, living costs and travel costs while he was attending the University of

[5] AR, Vol I, Part I, Page 1, Oral Judgement of Wilson, J. dated July 4, 2019 at para 2.

Saskatchewan,[6] on the agreement that the Respondent would return to Saudi Arabia following his graduation and work for SABIC for the same number of years he was in school for.[7]

11. At the time the parties met, the Appellant had two children from a prior relationship, Kasia Kreke ("Kasia") born June 21, 1998 and Keishawn Hailey-Kreke ("Keishawn"), born September 5, 2002.[8] She was also attending school to upgrade her education and then enrolled in the First Nation School of Dental Therapy in 2008, receiving her accreditation as a dental therapist in 2010.[9] The Respondent was also attending university during this time and completed his studies at the University of Saskatchewan in December 2010.[10]

12. The parties were married on March 20, 2010 in Saskatoon, Saskatchewan.[11] Shortly after their marriage, the Appellant became pregnant with the parties' child, Rakan Alansari, who was born on February 26, 2011 ("Ray").[12]

13. The Respondent was required to return to Saudi Arabia following graduation from university but was able to delay his departure until after Ray was born, so that he could be present for his birth and his first few weeks of life. He commenced work in Saudi Arabia in April 2011.[13]

14. During the time the Respondent was working in Saudi Arabia he would travel to Saskatoon to spend time with the Appellant and their children. The Respondent would travel to Saskatoon, on average, every four months. On these trips, he would remain in Saskatoon

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[6] AR, Vol VIII, Part V, T372 at lines 32-36.
[7] AR, Vol VIII, Part V, T373 at lines 1-3.
[8] AR, Vol I, Part I, Page 2, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 4.
[9] AR, Vol VIII, Part V, T381 at lines 24-30.
[10] AR, Vol VIII, Part V, T373 at line 20.
[11] AR, Vol I, Part I, Page 1, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 2.
[12] AR, Vol I, Part I, Page 2, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 3.
[13] AR, Vol VIII, Part V, T382 at lines 21-24.

for around three weeks.[14] While he was working in Saudi Arabia, he would communicate with the Appellant and see Ray almost daily via Facetime or Skype.[15]

15. In the fall of 2013, the Appellant obtained a position with a dental clinic in Outlook, Saskatchewan.[16] Outlook is approximately 100 kilometres from Saskatoon.[17]

16. In June of 2014 the Respondent was home in Saskatoon on a break from work, due to the cancellation of a large work project.[18] Prior to this visit, Ray had not been feeling well. He was experiencing unexplained fevers, leg/body aches and night sweats.[19] While the Respondent was in Saskatoon, the parties took Ray into to the ER on July 1st, 2014 and were referred to a consultation with pediatric oncology.[20] On July 9th, 2014 Ray was diagnosed with B-type cells, acute lymphoblastic leukemia.[21]

17. Ray immediately started treatment, the Appellant quit her job in Outlook and the Respondent took a "short-term leave" from his employment.[22] The Respondent initially kept extending these short-term leaves until November 2014 when he returned to Saudi Arabia for a short 10-day trip to officially resign from his employment.[23]

18. The Respondent commenced looking for work in Saskatchewan and accepted a position with ATCO at their Lloydminster office in December 2014, with a start date of February 2, 2015.[24] The Respondent negotiated with ATCO for paid time off to attend Ray's medical appointments in Saskatoon up until the end of March, 2015 when Ray was to enter

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[14] AR, Vol VIII, Part V, T387 at lines 5-10.
[15] AR, Vol VIII, Part V, T387 at lines 20-21.
[16] AR, Vol VIII, Part V, T387 at lines 31-36.
[17] AR, Vol VIII, Part V, T388 at lines 7-9.
[18] AR, Vol VIII, Part V, T389 at lines 4-9.
[19] AR, Vol VIII, Part V, T389 at lines 15-16.
[20] AR, Vol VIII, Part V, T389 at lines 22-23; 31-34.
[21] AR, Vol VIII, Part V, T390 at lines 1-16.
[22] AR, Vol VIII, Part V, T390 at lines 22-24; T415 at lines 2-15.
[23] *Ibid*.
[24] AR, Vol VIII, Part V, T424 at line 11.

the "maintenance" phase of his treatment.[25] Following March 2015, the Respondent used vacation days to continue to attend Ray's appointments then eventually negotiating with his employer for a different work schedule to accommodate these appointments.[26] Upon moving to Lloydminster to commence work in February of 2015, the Respondent travelled home each week for extended weekend visits, staying either the Friday or the Monday, or sometimes both.[27]

19. In August 2015 the Appellant, Keishawn and Ray relocated to Lloydminster.[28] Kasia stayed in Saskatoon with her grandparents to finish her last year of high school.[29] Ray continued to attend medical appointments in Saskatoon following the family's relocation to Lloydminster but was now in the "maintenance" phase of his treatment.[30] Ray went into recovery in October of 2017.[31] At the date of trial Ray was fully recovered and a healthy 8-year-old boy.[32]

20. Following their relocation to Lloydminster, the Respondent continued his employment with ATCO. In March of 2018 the Respondent accepted a different position within ATCO that would have ultimately seen himself and the family relocate to Calgary by September of 2018.[33] The Appellant initially obtained part-time work selling beauty supplies at a local shop in Lloydminster.[34] In December of 2017, however, she obtained employment as a dental therapist at the Westlake Dental Clinic, working three days per week.[35] This position was a maternity leave cover with an anticipated end date of November 2018.[36]

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[25] AR, Vol VIII, Part V, T421 at line 39 – T422 at line 2; T422 at line 33-35.
[26] AR, Vol VIII, Part V, T423 at lines 10-23.
[27] *Ibid*.
[28] AR, Vol VIII, Part V, T425 at line 8.
[29] AR, Vol VIII, Part V, T428 at lines 6-7.
[30] AR, Vol VIII, Part V, T400 at lines 19-33.
[31] AR, Vol VIII, Part V, T395 at lines 21-24.
[32] AR, Vol I, Part I, Page 6, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 16.
[33] AR, Vol VIII, Part V T431 at lines 9-14; 21-24.
[34] AR, Vol VI, Part V, T53 at lines 32-41.
[35] AR, Vol III, Part IV, page 36; Vol VI, Part V, T55 at lines 23-29.
[36] AR, Vol II, Part II, Page 19, Fiat of Turcotte, J. dated August 1, 2018 at para. 11.

The Appellant continued in this position until May 30, 2018 when she made the decision to leave this employment.[37] Based on her record of employment, the Appellant earned $39,953.24 from the Westlake Clinic between January 1, 2018 to May 30, 2018.[38]

Separation

21. On June 1st, 2018 the Appellant took Kasia and Keishawn to the RCMP and had them each provide statements, in addition to her own, in order to have the Respondent charged with assaulting Keishawn.[39] It was alleged that there were two incidents of assault, one on October 27, 2017 and another on an unspecified date in the early winter of 2018.[40] The Appellant then traveled to Saskatoon following this report and the Respondent became aware of these charges the following day, being the date of separation, June 2, 2018.[41]

22. The Respondent denied being physical with any of the children and testified as to what occurred with respect to the alleged assault at the trial of this matter, stating that on October 27, 2017 he found Keishawn outside of the home at approximately 11 p.m. with his sweatpants full of alcohol. The extent of any physical altercation was the Respondent reaching into Keishawn's pocket to take away his phone and Keishawn pushing him away to prevent this from occurring.[42]

23. With respect to the alleged incident in the winter of 2018, the Respondent testified that he found Keishawn trying to sneak out of the house past curfew. He grabbed Keishawn by the arm to try and take away his phone and have it placed on the counter before sending him to his room.[43]

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[37] AR, Vol VI, Part V, T56 at lines 4-6.
[38] AR Vol III, Part IV, Page 36.
[39] AR, Vol VI, Part V, T68 at lines 12-16.
[40] AR, Vol V, Part IV, Page 166.
[41] AR, Vol IX, Part V, T504 at lines 5-28.
[42] AR, Vol IX, Part V, T508 at line 27 – T509 at 32.
[43] AR, Vol IX, Part V, T509 at line 34 - T510 at line 25.

24. Kasia was present for alleged incident in the winter of 2018 and her testimony as to what occurred is almost identical to what the Appellant deposed to, but with less detail.[44]

25. During cross-examination, the Appellant acknowledged that she swore an affidavit on July 9, 2018 in support of her interim mobility application. She acknowledged at paragraph 133 of that Affidavit that she told the Court that the decision to go to the police station on June 1, 2018 was due to the fact that Keishawn told her that day that he could no longer handle the situation with the Respondent.[45] The Appellant further acknowledged that in her written statement provided to the police, she gave a different reason for proceeding with the charges than she had deposed to the Court. She had met with a lawyer prior to separation and was told that she needed a reason to move. This prompted her to proceed with the assault charges.[46]

26. Sarah Grenier testified that the Appellant, when explaining the reason for going to the RCMP, told her that Keishawn had confided in a school counsellor while at school and the counsellor was the reason for the ultimate police involvement.[47]

27. These charges did not proceed to trial. The Respondent entered into a peace bond and the charges were stayed.[48] As a condition of the peace bond, the Respondent was required to attend for an assessment to determine whether he had anger management issues and needed treatment. The conclusion of the assessor was that "no further sessions were determined to be needed based on the conversation … with this client".[49]

28. Following separation, despite there being no concerns between the Respondent and Ray, the Appellant restricted his parenting time to short visits and no overnights, sometimes

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[44] AR Vol VII, Part V, T304 at line 6 – T305 at line 16.
[45] AR Vol VI, Part V, T167 at line 28 – T168 at line 14.
[46] AR Vol VI, Part V, T168 at line 33 – T171 at line 9.
[47] AR Vol X, Part V, T736 at lines 9-27.
[48] AR Vol V, Part IV, Pages 168-170.
[49] AR Vol III, Part IV, Page 193.

even insisting on supervising the same.[50] Accordingly, the Respondent was required to commence an interim application for specified parenting time.[51] In response, the Appellant brought her own application to be able to relocate with the children to Saskatoon. The Appellant also requested interim child and spousal support.[52]

29. Such applications were heard by Mr. Justice Turcotte on August 1, 2018. Justice Turcotte dismissed the Appellant's application to relocate to Saskatoon on an interim basis. He granted the Appellant interim primary residence of the children, child and spousal support and provided specified parenting time to the Respondent which totalled five out of 14 days. The Respondent's income was determined to be $115,103 and the Appellant's income was determined to be $35,550. Based on those incomes, the Respondent was ordered to pay $1,593 per month for the support of the two children and $765 per month in spousal support to the Appellant. Justice Turcotte indicated that there were no section 7 expenses at that time, but any such future expenses would be shared proportionally.[53]

30. Once it was known that the parties were separating, the Respondent communicated with his employer and made arrangements to continue on in his new position from Lloydminster.[54] This was the position he maintained at trial. The Respondent testified, which was confirmed by his employer, that as a valued employee he was able to set his own schedule such that he could set his hours in order to allow him to care for Ray during his parenting time, including scheduling travel during the time he did not have care of Ray.[55] At the time of trial the Respondent was earning $124,853 per year from this employment.[56]

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[50] AR Vol VII, Part V, T183 at line 27 – T184 at line 23; T185 at lines 18-21; T185 at line 35 – T186 at line 10; T187 at line 9-15.

[51] AR Vol II, Part II, Pages 11-13.

[52] AR Vol II, Part II, Pages 14-16.

[53] AR Vol II, Part II, Pages 17-22.

[54] AR Vol VIII, Part V, T432 at lines 21-27.

[55] AR Vol IX, Part V, T573 at lines 13-24; AR Vol X, Part V, T753 at line 24 – T754 at line 8.

[56] AR, Vol I, Part I, Page 10, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 33.

31. The Appellant left her employment two days prior to separation and had not worked during the period following separation to and including the time of trial.[57]

Trial

32. The trial on all issues occurred on May 21 to 24 and the 27, 2019. The issues before the Trial Judge were custody of Ray, parenting time, mobility, child and spousal support, and division of family property.

33. By oral judgment rendered July 4, 2019, the Trial Judge allowed the Respondent's move, determined the Appellant's parenting time, and ordered base child support for two children to commence July 1, 2019, based on the Respondent's annual income of $124,850.[58]

34. By a second judgment rendered July 17, 2019, the Trial Judge determined the issues of spousal support, division of family property and costs. Madam Justice Wilson imputed income to the Appellant of $45,000 per year. Based on the Respondent's income, the Trial Judge ordered monthly spousal support payable by the Respondent to the Appellant of $900 per month commencing July 1, 2019 to and including December 1, 2020. The payment of spousal support after December 1, 2020 was subject to review, in which the Appellant had the onus of establishing that she was in continued need of further support.[59]

Court of Appeal

35. The Respondent appealed both the Oral and Written Judgments of Madam Justice Wilson following trial, which stayed the relocation order. On August 21, 2019 the Honourable Mr. Justice Caldwell lifted this stay of execution and the Appellant relocated to Saskatoon with Ray and Keishawn.[60]

36. The Court of Appeal for Saskatchewan ("SKCA") heard this appeal on September 14, 2020 and rendered its decision on October 28, 2020. In that decision the SKCA determined that:

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[57] *Alansari v Kreke*, 2020 SKCA 122 at para. 8; AR Vol VI, Part V, T90 at lines 23-24.
[58] AR, Vol I, Part I, Pages 1-11, Oral Judgement of Wilson, J. dated July 4, 2019 [Oral Judgment].
[59] AR, Vol I, Part I, Pages 17-28, Judgement of Wilson, J. dated July 17, 2019 [Written Judgment].
[60] AR, Vol II, Part II, Pages 29-32, Fiat of Caldwell, J. dated August 1, 2018.

> [15] We have reviewed the *Trial Decision* and the evidence proffered at trial with a view to determining whether the trial judge ignored or misdirected herself with respect to relevant evidence. In the result, we conclude that the trial judge misapprehended the evidence in a way that affected her conclusion that it was in the best interests of AB to relocate to Saskatoon. We also conclude that the trial judge failed to consider or overlooked factors relevant to that determination under *Gordon v Goertz*, 1996 CanLII 191 (SCC), [1996] 2 SCR 27.[61]

37. Based on this finding, the SKCA determined that due to the passage of time that had elapsed since the rendering of the trial decision and Ray's subsequent relocation to Saskatoon, the only remedy was to set the matter back down for trial.[62]

38. On the issue of spousal support, the SKCA found that:

> [40] The circumstance described by the trial judge are not supported by the evidence. Chiefly, the trial judge's finding that Ms. Kreke was, at the time of separation, a "stay-at-home mother and homemaker" who was returning to the workplace after marriage dissolution is a material misapprehension of the evidence (or a palpable and overriding error) that undermines the exercise of her discretion to impute $45,000 in earnings to Ms. Kreke.[63]

39. Having reviewed the evidence proffered at trial, the SKCA concluded that the Appellant was capable of earning "at least $80,000 per year".[64] Based on this imputed income, the Respondent's monthly spousal support obligation was reduced from $900 per month to $94 per month. In addition, on the matter of the review, the SKCA found no uncertainty at to the Appellant's ability to be self-sufficient by December 2020 and, based on the ratio in *Leskun v Leskun*,[65] determined that such a review would be inappropriate.[66]

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[61] *Supra*, note 57.

[62] *Ibid*. at para. 50.

[63] *Ibid*.

[64] *Ibid*. at para 42.

[65] 2006 SCC 25 [*Leskun*].

[66] *Supra*, note 57 at para. 44.

Events Since Court of Appeal

40. Following the decision of the SKCA, the Appellant sought leave of this Court to appeal the determination of the SKCA, which was granted on June 17, 2021.

41. Prior to leave being granted, but after both parties had filed their respective materials with this Court, the Respondent obtained employment with a company in Saskatoon and relocated to Saskatoon in April 2021. The parties attended a Pre-trial Settlement Conference in Saskatoon on May 28th and 31st, 2021 to attempt to resolve matters between them without the need for further court action. At that conference Minutes of Settlement were entered into which addressed ongoing parenting, spousal support and remaining division of property issues.[67]

PART II – STATEMENT OF QUESTIONS IN ISSUE

42. The Respondent submits that the issues raised by the Appellant fall into the following overall questions:

(a) When is it appropriate for a Court of Appeal to intervene in a mobility determination made following a trial of the issue?

(b) When is it appropriate for a Court of Appeal to intervene in a spousal support determination made following a trial of the issue?

(c) When is it appropriate to order a spousal support award be reviewed?

PART III – STATEMENT OF ARGUMENT

43. The Appellant's overarching submission appears to be that the SKCA erred in reviewing the evidence proffered at trial and then, based on that review, overturned the decision of the trial judge as it relates to parenting and spousal support. Based on those errors, the Appellant believes this Court should intervene and restore the decision of the trial judge.

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[67] Affidavit of Amro Abdullah M. Alansari, sworn November 4, 2021, Tab 1 of Respondent's Record, filed provisionally with a motion for leave to adduce fresh evidence.

44. The Respondent submits that the SKCA correctly intervened in this matter. The Trial Judge's limited reasons regarding the basis for permitting the relocation from Lloydminster to Saskatoon led to the reasoned belief that she had not considered relevant factors or evidence in reaching her conclusion. The SKCA then appropriately reviewed the evidence proffered at trial and found a lack of evidence in support of the relocation and other instances where significant evidence was misconstrued or appeared to have not been properly considered by the Trial Judge.

45. With respect to the issue of spousal support, the SKCA determined that the Trial Judge had made a material error with respect to the characterization of the Appellant a stay-at-home mother at the time of separation. The evidence at trial was that the Appellant had been working at a dental clinic in Lloydminster since December 2017, six months before the date of separation.[68] She left this employment on May 30, 2018, just two days before the date of separation. It is correct that this was a term position, but the term was not at an end. There was also additional evidence presented at trial that there were other viable employment opportunities for the Appellant in the area surrounding Lloydminster. In light of this serious misapprehension of the evidence, pursuant to *Hickey*, the SKCA was justified in intervening to correct this error. This misapprehension in the evidence also impacted on the Trial Judge's decision to order a review of spousal support. The Appellant was employable at the time of separation and at the time of trial, her decision to not be employed was her own. The SKCA applied the ratio in *Leskun* and correctly determined that there was no material uncertainty at the time of trial that necessitated a review of spousal support in the future.

A. When is it appropriate for a Court of Appeal to intervene in a mobility determination made following a trial of the issue?

46. The crux of the Appellant's argument is that the SKCA was not warranted in intervening in the instant case and that it overstepped the applicable standard of review in doing so. Although she acknowledges that the Trial Judge's reasons with respect to relocation "were

[68] AR Vol III, Part IV, Page 36.

quite abbreviated",[69] she submits that they were sufficient and that the Trial Judge's failure to set out all the factors which formed the basis for her decision does not give rise to a material error. The Appellant further argues that the SKCA made different findings of fact than the Trial Judge on "almost every important point". That is incorrect. It is more accurate to state that on a review of the evidence proffered at trial, the SKCA noted that there were a number of areas where evidence was presented which weighed against relocation, but where no reference was made to such evidence in the Oral Judgment.

47. In reviewing the reasons outlined by the Trial Judge the SKCA made the following comments:

> [24] The trial judge next turned to the mobility aspects of the matter. Here, the Trial Decision contains very little in the way of analysis of the *Gordon v Goertz* factors or of AB's best interest. There is, with one exception, no reference to how relocation to Saskatoon might benefit AB or help Ms. Kreke meet his needs. There is almost no analysis of the role AB's brother, CD, might play in that respect. Tellingly, when addressing the environment in Saskatoon, the trial judge wrote only in terms of Ms. Kreke's conclusory view that relocation was in AB's best interest. At the same time, the trial judge observed there was a paucity of evidence to support Ms. Kreke's view of things:
>
> > [25] The factors relating to the home environment each parent proposes must, as this is a mobility case, be considered along with the plans each parent has for the future of [AB]. If granted primary care, it is [Ms. Kreke's] view that it would be in [AB's] best interests to move with her and [CD] back to Saskatoon. She would move into the previous family home located near her parents. She would move the children into a school in Saskatoon. I must admit, however, that I was provided very little evidence from [Ms. Kreke] about the children's schooling including not even being provided with the name of the school the children would go to.
>
> [25] There was, on the other hand, no inquiry in the Trial Decision into how relocation to Saskatoon with his mother might disrupt AB by removing him from his father, his school, his activities, his friends and the community he had come to know. Although there was evidence on these points, it and the *Gordon v Goertz* factors to which it relates are not mentioned in the Trial Decision.[70]

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[69] Appellant's Factum at para. 36.

[70] *Supra*, note 57.

48. The SKCA went on to state that the only benefits associated with a move to Saskatoon that was referenced by the Trial Judge in her decision was that the Appellant would have the support of her parents as she enters the workforce and that Ray would get to spend more time with his grandparents.[71]

49. The standard of review outlined by the SKCA as applicable to appeals regarding parenting matters is the standard outlined by this Court in *Van de Perre*, namely:

> [15] As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. **If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence.** This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 1999 BCCA 6 (CanLII), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, 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.[72]
>
> [Emphasis added].

50. Having reviewed the trial decision, the SKCA noted that "there was virtually no consideration of how relocation to Saskatoon might benefit AB or how it might be detrimental. Those questions are at the heart of the child-centric enquiry mandated by *Gordon v Goertz* factors and the evidence that bears upon them was not identified or considered in the Trial Decision".[73] Based on this lack of detail the SKCA had reason to believe that the trial judge forgot, ignored or misconceived the evidence in a way that affected the ultimate conclusion.[74] That being the case, under the standard outlined in *Van de Perre*, it was then open to the SKCA to review the evidence presented at trial to

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[71] *Ibid*. at para. 33.

[72] *Supra*, note 1.

[73] *Supra*, note 57 at para. 29.

[74] *Supra*, note 5 at para 15.

determine if the decision to allow the relocation could be sustained. The SKCA's decision to proceed in this matter is further supported by this Court's decision in *Gordon* wherein McLachlin J. stated that:

> [52] The reasons of the trial judge fall short of demonstrating that he engaged in the full and sensitive inquiry into the best interests of the child required by s. 17 of the *Divorce Act*. He mentioned only one factor in support of his decision: that he "relied heavily" on the reasons of Carter J., who had already concluded that the mother was the "proper person to have custody of th[e] child". Other factors, such as the child's relationship with her father, her extended family and her Saskatchewan community, were not mentioned. No reference was made to the circumstances prevailing after the trial, the current needs and desires of the child, or the respective abilities of each parent to meet them. One may speculate that the trial judge, having heard full argument, had such factors in his mind when he made his decision in favour of the mother. But one may equally infer that the necessary fresh inquiry was not fully undertaken. In either event, it seems clear that the trial judge failed to give sufficient weight to all relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at p. 77), and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly.[75]

51. As outlined below, upon a review of the evidence proffered at trial, the SKCA determined that the conclusion on relocation was not supported and required intervention.

Trial Decision

52. At the time the trial decision was rendered, the leading case on relocation was this Court's decision in *Gordon v. Goertz*. In that decision, this Court outlined the following factors to be considered in such a determination:

(a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

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[75] *Supra*, note 3.

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody; and

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.[76]

53. As well, the Trial Judge was also required to consider the evidence with respect to the four possible parenting scenarios following trial to determine which scenario was in the children's best interests.[77] Those four parenting scenarios in this case were:

(a) A move by the Respondent to Saskatoon with the children, with the Appellant remaining in Lloydminster;

(b) No move from Lloydminster by any of the parties, thus all parties and the children remaining in Lloydminster;

(c) A move by the Respondent to Saskatoon, with Ray remaining in the care of the Appellant in Lloydminster;

(d) A move by the Respondent with the children to Saskatoon, together with a parallel move by the Appellant to Saskatoon.

54. Although the Trial Judge referenced these factors and parenting scenarios, her Oral Judgment gave minimal consideration as to how she weighed the same against the evidence presented at trial. The SKCA determined, among other things, that the evidence relating to the Appellant's reason for relocation, the maximum contact principle, and most importantly the disruption to Ray if the relocation was permitted was not properly considered by the Trial Judge. A full consideration of the evidence on these points weighed against, not for, a relocation in this matter.

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[76] *Supra*, note 3 at para. 49.

[77] See: *S.S.L. v J.W.W.*, 2010 BCCA 55; *Olfert v Olfert*, 2013 SKCA 89 [*Olfert*].

Reason for Relocation

55. The focus of much of the trial was the Appellant's reason for moving to Saskatoon. At the time of trial, under *Gordon v. Goertz*, a parent's reason for moving was only to be considered in "the exceptional case where it is relevant to that parent's ability to meet the needs of the child".[78]

56. The main reason advanced by the Appellant regarding her need to relocate was that the intended move was tied to her financial security and therefore her ability to meet the needs of the children.[79]

57. The Appellant made her alleged lack of employability in Lloydminster and area a main factor in her need to relocate at trial, as such, it was incumbent upon the Trial Judge to test the reality of that position against the evidence adduced at trial.[80]

58. In support of the Appellant's position, she tendered the following evidence:

(a) There were no jobs for dental therapists in Lloydminster[81] and if she relocated to Saskatoon, she had a job at the Davidson Dental Clinic working for her former employer, Dr. Chakula, two days a week. In the future, there was the possibility of a third day of work at his Outlook Dental Clinic.[82]

(b) She would be paid $440 a day.[83] If she worked two days per week, she would earn $45,760; three days of work would amount to $68,000 per year.

(c) She would commute each day for work. Dr. Chakula testified that the travel time was approximately one hour between Saskatoon and Davidson.[84]

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[78] *Supra*, note 3 at para. 49.
[79] AR Vol VI, Part V, T6 at lines 7-13.
[80] *A.L. v M.L.*, 2019 SKCA 61, at para. 40.
[81] AR Vol VI, Part V, T91 lines 20-26.
[82] AR Vol VI, Part V, T102 at lines 2-7; Vol VII, Part V, T323 at line 27 - T324 at line 29.
[83] AR Vol VII, Part V, T324 at lines 8-10.
[84] AR Vol VII, Part V, T326 at lines 9-11.

(d) Dr. Chakula testified that dental therapists were in high demand in rural centres as compared to urban.[85]

(e) Commencing June 1, 2019, the Appellant planned to work one day a week at the Davidson Dental Clinic.[86] Despite the significant distance, she would commute between Lloydminster and Davidson.[87]

(f) The Appellant testified that, even though there were no dental therapist positions in Lloydminster, she was willing to work in a job outside of this field temporarily as long as she could keep up with her dental therapist licensing requirements.[88]

(g) The Appellant tendered evidence as to job positions that she inquired about in Lloydminster and surrounding areas, along with rejection letters from such inquiries. She limited her request for work to that of a dental therapist.[89]

59. In contrast to the above, the Respondent tendered evidence on this issue as follows:

(a) There were two dentists in North Battleford seeking a dental therapist in their clinics. One, Dr. Williams, sought a full-time dental therapist. The other, Dr. Rayburn, sought a part time dental therapist.[90]

(b) Dr. Rayburn's testimony confirmed Dr. Chakula's testimony as to the high demand for dental therapists in rural clinics.[91] As a result, Dr. Rayburn was paying her dental therapists 27% of their gross billings.[92] An average gross billing for a dental

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[85] AR Vol VII, Part V, T327 at lines 9-12.
[86] AR Vol VI, Part V, T90 at lines 26-33.
[87] *Ibid*.
[88] AR Vol VI, Part V, T91 at lines 20-28
[89] AR Vol III, Part IV, Pages 27-28.
[90] AR Vol IX, Part V, T583 at lines 35-36; T585 at lines 15-16; Vol IV, Part IV, Pages 52-54.
[91] AR Vol IX, Part V, T585 at line 37 - T586 at line 8.
[92] AR Vol IX, Part V, T586 at lines 10-31.

therapist in her clinic was between $3,000 and $3,500 per day.[93] Her last dental therapist, who worked four days a week, earned in excess of $190,000 per annum.[94]

(c) Dr. Rayburn testified that no one applied for the dental therapist position open between February of 2017 and January 2019. Accordingly, in January she hired an associate dentist.[95]

(d) If a therapist had applied, Dr. Rayburn identified she was looking for someone twice a week, and if that therapist turned out to be capable, the number of days of work could increase to four.[96]

(e) Dr. Rayburn testified that, as of the trial date, there was still a possibility of her looking for a dental therapist in the future.[97]

(f) The Respondent testified, based upon google maps, that the distance between Lloydminster and North Battleford was approximately 138 km with a travel time of 1 hour and 19 minutes. The distance between Saskatoon and Davidson was over 100 km with a travel time of 1 hour and 15-25 minutes.[98]

60. The Appellant offered to explain why she did not apply for these positions stating that she was not interested in full time work,[99] it was too far to commute between Lloydminster and North Battleford,[100] and taking a job in North Battleford would create childcare issues since she did not trust anyone with the care of her children other than her mother.[101]

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[93] AR Vol IX, Part V, T587 at lines 8-11.
[94] AR Vol IX, Part V, T587 at lines 37-40.
[95] AR Vol IX, Part V, T585 at lines 11-27.
[96] AR Vol IX, Part V, T584 at lines 26-38.
[97] AR Vol IX, Part V, T588 at lines 25-30.
[98] AR Vol VII, Part V, T233 at lines 5-7; VII, Part V, T388 at lines 20-23.
[99] AR Vol VI, Part V, T92 at lines 11-19.
[100] AR Vol VII, Part V, T233 at line 31 to T234 at line 18.
[101] AR Vol VII, Part V, T234 at line 20 - T235 at line 35.

61. In her Oral Judgment, the Trial Judge did not refer to any of the above evidence to test the reality of the Appellant's stated position. The only comment the Trial Judge made on this issue was to say that "[u]pon moving, Tiffany will have the support of her parents while she enters the workforce. Ray is very close to his Baba and no doubt will benefit from more time with her and his grandpa".[102]

62. Given the above evidence, it is submitted that the Appellant's financial security and career aspirations could have been met in Lloydminster without the need to displace the children. The Trial Judge's failure to explain why she allowed the relocation in the face of this evidence led to the SKCA's reasoned belief that she had not properly considered this evidence. Upon a review of that evidence the SKCA determined that:

> [35] Moreover, the finding that Ms. Kreke had to move to Saskatoon to pursue her vocation loses all cogency when juxtaposed to the uncontradicted evidence that she had been gainfully employed in Lloydminster in her chosen vocation but had voluntarily left that employment shortly before she filed her petition for divorce and interim mobility application. Additionally, Ms. Kreke testified that she was prepared to commute from Lloydminster to Davidson, Saskatchewan, to work part-time in her vocation until the court permitted AB to relocate to Saskatoon, after which Ms. Kreke intended to continue commuting from Saskatoon to Davidson. Whereas, Mr. Alansari had led evidence at trial, through a dentist, that part-time and full-time employment as a dental therapist was available in North Battleford, Saskatchewan. The commute to North Battleford from Lloydminster is comparable to the commute from Saskatoon to Davidson. All told, we are unable to conclude on the basis of the evidence that this is one of the exceptional cases referred to in *Gordon v Goertz* where Ms. Kreke's desire to work from Saskatoon was relevant to her ability to meet AB's needs.[103]

Maximum Contract Principle

63. In addition to the failure to reality test the Appellant's basis for relocation, the Trial Judge provided little analysis on how the parenting arrangement she ordered satisfied the maximum contact principle. As mandated by the *Divorce Act* at the time, the maximum contact principle required consideration of two concepts – quality and quantity of contact

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[102] AR, Vol I, Part I, Page 9, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 27.

[103] *Supra*, note 57.

between a child and both parents. The Saskatchewan Court of Appeal, in *Olfert*, emphasized this as follows:

> [30] Let me say I agree that, for the judge, the mobility application ultimately turned on the maximum contact principle. From the reasons for judgment it is clear the judge was keenly aware of the importance of that principle in his determination of what was in the best interests of the children. On my assessment, the judge's comments about the principle were borne of his considerable experience with family law matters and reflect his understanding that **the maximum contact principle involves the twin concepts of *quality* of contact and *quantity* of contact between a child and his or her parent** … This is not to say, however, that the judge somehow misunderstood the maximum contact principle as applying to extended family, friends and community; it does not. **Rather, it recognizes that the *quality* of contact with the father is enhanced because, with the children and the father residing in or near the same community, the father will have year-round opportunities for incidental or mundane but nevertheless important contact with his children, even when they are in the mother's custody or care**. Here, I speak of school– and church– based activities, extended family gatherings and visits, local community events, recreational activities, extracurricular activities, medical appointments, birthdays, parent-teacher conferences, etc.[104]
>
> [Emphasis added]

64. On this factor, the Trial Judge focused entirely on the quantity of contact. She states, "[a]lthough I acknowledge that maximizing contact with Amro for Ray is a very important factor, I see this being possible from Lloydminster to Saskatoon…".[105] To achieve this quantity of contact, the Trial Judge ordered parenting time to the Respondent of one long weekend per month, with the option of having an additional weekend from Friday after school until Sunday evening, and 50% of the school holidays. However, of note is that this parenting time was less than what was being offered by the Appellant if the court were to permit her relocation. The Appellant, in direct testimony, was offering the Respondent parenting time every other weekend and more than 50% of the school holidays.[106] Not

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[104] *Supra*, note 77.

[105] AR, Vol I, Part I, Page 9, Oral Judgement of Wilson, J. dated July 4, 2019 at para. 29.

[106] AR, Vol VI, Part V, T89 at lines 34-41.

only did the Trial Judge order less parenting time than the Appellant was willing to provide, she failed to give any reasons as to why she was doing so.

65. Additionally, the Oral Judgment does not outline how the parenting time ordered would maintain the qualitative component of the maximum contact principle.

Disruption to the Child

66. Finally, and most importantly, in assessing the potential relocation, the Oral Judgment is silent as to the impact of that relocation on Ray. At the time of the trial, neither party bore the onus with respect to demonstrating that the move was or was not in Ray's best interests. However, each of them had the responsibility to present evidence in order to permit the court to make such a determination, with the Appellant attempting to demonstrate why a move to Saskatoon would be in Ray's best interests and the Respondent showing why such a move would not be in his best interests.

67. The evidence before the Trial Judge, which is not noted anywhere in her decision, demonstrated that Ray moved to Lloydminster when he was four years old. Although he had lived in Saskatoon from birth to four and a half, he had not been enrolled in activities there and had never attended school in Saskatoon. Ray started school in Lloydminster and continued to attend this school at the time of trial. The evidence established that Ray was academically ahead of his peers, liked his teachers, had developed friendships, and was actively involved in sports, all in Lloydminster. In addition, although Ray had undergone extensive medical treatment relating to his cancer, starting in July 2014, he was in recovery as of October 2017 and was by all accounts, a happy, healthy, 8-year-old boy.

68. Conversely, there was a lack of evidence as to what the children's life would be like in Saskatoon, aside from being closer to their grandparents. The Appellant provided no information on the children's educational plans, their extracurricular activities, or any evidence regarding their social lives in Saskatoon.

69. The Trial Judge did note that there would be a benefit to the Appellant with respect to childcare, having her parents close at hand, however, there was no evidence as to the Appellant's parents' current circumstances including the realistic longevity of this

childcare plan. There was also no discussion in the Oral Judgment with respect to the Respondent's ability to assist with caring for Ray if the Appellant was working or the parties' ability to access to appropriate childcare in Lloydminster. The Respondent's evidence was that he had the ability to set his work schedule around Ray and could be fully available to him during his parenting time. There was also evidence before the Trial Judge that the parties had availed themselves of childcare in Lloydminster during their relationship, relying on their close family friends to watch Ray on occasion after school or if they wanted to go out together.

70. Considering the child centric approach to parenting determinations generally, and mobility decisions specifically, the failure to reconcile this evidence was a material error by the Trial Judge which warranted intervention by the SKCA.

Court of Appeal

71. Under the current standard of review articulated in *Van de Perre*, a trial judge does not have to detail all of the reasons underpinning their decision, or that any omission in a trial judge's reasoning will support a review of the evidence presented at trial, however, in cases where the reasoning is so lacking, as in the case at bar, that it leads to a reasoned belief that the trial judge "must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion"[107] the Court of Appel reviewing the matter has the ability to look behind the decision to determine if the same is supported by the evidence.

72. Upon a review of the evidence before the Trial Judge, as outlined above, the SKCA concluded that "the trial judge misapprehended the evidence in a way that affected her conclusion that it was in the best interests of AB to relocate to Saskatoon".[108] The SKCA also concluded that "the trial judge failed to consider or overlooked factors relevant to that determination under *Gordon v Goertz*".[109]

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[107] *Supra*, note 1 at para 15.

[108] *Supra*, note 57 at para 15.

[109] *Ibid*.

73. Had a review of the evidence proffered at trial supported the ultimate decision reached by the trial judge, no intervention would have been appropriate. However, a review of the evidence before the trial judge clearly demonstrates that the Appellant did not need to relocate to obtain employment, that the parenting time provided to the Respondent did not maximize contact between himself and Ray and was less than that which was being offered by the Appellant, and, most importantly, that the disruption to Ray's life consequent on moving to Saskatoon was not justified by the benefits to be gained by such a move, as no evidence of such benefits were presented.

Changes to the Standard of Review

74. The Appellant argues that there maybe a need to establish a standard of review specific to mobility determinations but does not articulate what that standard should be. It can be inferred that she is proposing an even narrower standard of review than that which is currently outlined in *Van de Perre* based on her emphasis on the need for finality in mobility cases.

75. The need for finality in all parenting determinations is an important consideration in appellate jurisprudence;[110] however, equally as important is the need to ensure such determinations are supported by the evidence. These decisions have long lasting impact on the parents and children involved, especially in mobility matters. Allowing a parent to relocate with a child a significant distance from the other parent can substantially impair the remaining parent's day-to-day involvement in their child's life. When the court is asked to make such a determination, it should be incumbent upon the trier of fact to carefully consider the evidence and applicable law and convey the underlying rationale for their decision to the parties involved. A clearly articulated and supported trial decision would go further in ensuring the finality of such determinations than a further narrowing of appellate courts scope of review would. This is supported by this Court's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[111] in which this Court stated as follows:

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[110] *Supra*, note 1 at para. 13.

[111] 2019 SCC 65.

> [79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. **Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power**: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.[112]

76. In the event this Court is considering a mobility specific standard of review, it is submitted that the standard outlined in *Van de Perre* does not need to be narrowed. As it stands currently, a Court of Appeal can only reconsider the evidence proffered at trial if it has a reasoned belief that the lower court judge "must have forgotten, ignored or misconceived the evidence in a way that affected [the] conclusion".[113] Even after such a review is conducted, a Court of Appeal can only intervene in the trial judge's decision if the same is not supported by the evidence. This scope of review is already very narrow and significant deference is provided to triers of fact. However, there are occasions, as in the case at bar, where a review of the trial decision and subsequent intervention is necessary. The purpose and function of Courts of Appeal are to intervene where warranted to ensure equal treatment and application of the law. To narrow the scope of review even further, would render the right of appeal in such matters meaningless.

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[112] *Ibid*.

[113] *Supra*, note 1 at para. 15.

B. When is it appropriate for a Court of Appeal to intervene in a spousal support determination made following a trial of the issue?

77. It is appropriate for an appellate court to intervene in the decision of a lower court on the issue of spousal support when "the reasons disclose an error in principle, a significant misapprehension of the evidence, or … the award is clearly wrong".[114] An appellate court "is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently".[115] This direction is found in the leading authority in this area, *Hickey*.

78. *Hickey* has been cited extensively since it was rendered by this Court in 1999. The standard of review outlined therein is well-established law that has seen widespread approval and application by the appellate courts. This standard outlines that a significant amount of deference is owed to a trial judge in respect of support orders, however, it also indicates that "an appeal court **must intervene** when there is a material error, a serious misapprehension of the evidence, or an error in law".[116] [Emphasis added].

79. This is the standard of review cited and applied by the SKCA in this matter. In reviewing the decision of the trial judge, the SKCA determined that the conclusion reached by the trial judge was not supported by the evidence. The SKCA found that the trial judge had made a palpable and overriding error in finding that the Appellant was "at the time of separation, a 'stay-at-home mother and homemaker' who was returning to the workplace after marriage dissolution".[117] That was not the evidence before the trial judge.

80. The evidence before the trial judge was that the Appellant was working part-time in her chosen field in Lloydminster at the time of separation. From this employment she had earned $39,953.34 from January 1, 2018 to May 30, 2018.[118] This income annualized would total $95,888. The Appellant voluntarily left that employment two days before the

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[114] *Supra*, note 2 at para. 11.

[115] *Ibid*. at para. 12.

[116] *Ibid*. at para. 12.

[117] *Supra*, note 57 at para. 40.

[118] AR, Vol III, Part IV, Page 36.

date of separation.[119] As outlined in more detail above, the Appellant had other options for employment available to her that would have provided her with significant annual income following separation.

81. The Appellant asserts that the SKCA erred in finding she voluntarily left employment just prior to separation, stating that the employment she had at the time of separation was cover for a maternity leave. However, the term for that position was not up at the time the Appellant decided to leave. Additionally, there were other options for employment in the surrounding area that could have been available to the Appellant had she sought them out and the relevant time.

82. The Appellant further asserts that it was not an error for the trial judge to conclude she was a stay-at-home mother at the time of separation, because she had been a stay-at-home mother for much of the relationship. Respectfully, the fact that the Appellant had previously been a stay-at-home mother during portions of the parties' relationship does not change the fact that in the six months prior to and at the time of separation she was in fact working outside of the home earning a substantial income. This was not a situation in which a mother had been outside of the workforce for significant period of time and need time to retrain to secure employment. The Appellant was gainfully employed earning just under $8,000 per month working three days per week. It was a significant misapprehension of the evidence to find otherwise.

83. Based on a review of all of the evidence before the trial judge, the SKCA correctly determined that the trial judge's finding that the Appellant was a stay-at-home mother at the time of separation only capable of earning $45,000 per year could not be supported. The Appellant was employed at the time of separation and employable at the date of trial and capable of earning around $8,000 per month.

84. The SKCA correctly identified the appropriate standard of review in *Hickey* and applied that standard of review to the case before it. Although this standard of review accords a significant deference to the initial trier of fact, that deference is not absolute. There will

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[119] *Ibid*; *Supra*, note 57 at para. 41.

clearly be cases in which a trier of fact has made a material error, misapprehended the evidence, or made and error in law. In such cases "an appeal court must intervene".[120] Such a circumstance existed in this instant.

85. This standard of review strikes a balance between encouraging the finality of support orders by awarding significant deference to the trier of fact, against the need for material errors to be remedied in appropriate cases.

86. With respect to the Appellant's assertion that the SKCA gave no regard to the law in *Moge v. Moge*[121] when reviewing the trial judge's determination on spousal support, the SKCA did not overturn or interfere with the Trial Judge's finding that the Appellant had "suffered economic disadvantages by the marriage and its breakdown" and therefore that she was entitled to compensatory spousal support.[122] The SKCA determined that the imputation of income to the Appellant provided for by the Trial Judge was not supported by the evidence and adjusted that income accordingly. The SKCA then substituted the imputed income of $80,000 for the $45,000 imputed by the trial judge in the *Spousal Support Advisory Guidelines* calculation. Having regard for the Trial Judge's determination on spousal support, the SKCA then selected the top end of the quantum suggested by the *SSAG*'s in setting the new spousal support amount.

87. There was no need for the SKCA to review or comment on the application of *Moge* with respect to the Appellant's entitlement to spousal support, as that entitlement was not being questioned.

C. When is it appropriate to order a spousal support award be reviewed?

88. The leading authority on the appropriateness of review orders in spousal support matters is this Court's decision in *Leskun*. Binnie J., writing for the Court, held that:

> 36 **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

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[120] *Supra*, note 2 at para. 12.

[121] 1992 CanLII 25 (SCC), [1992] 3 SCR 813 [*Moge*].

[122] *Supra*, note 57 at para. 43.

> 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: *Choquette v. Choquette* (1998), 1998 CanLII 5760 (ON CA), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the *amicus curiae* fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no change in circumstances. The test for variation is a strict one: *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at pp. 688-90.[123]
>
> [Emphasis added].

89. Binnie J. went on to find that:

> 39 *Willick* and *Choquette* establish that a trial court should resist making temporary orders (or orders subject to "review") under s. 15.2. See also: *Keller v. Black*, 2000 CanLII 22626 (ON SC), [2000] O.J. No. 79 (QL) (S.C.J.). **Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances**. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances. Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case. That is what happened here. The more precise condition stated in the reasons of the trial judge was excessively broadened in the formal

[123] *Supra*, note 65.

> order. This resulted in a measure of avoidable confusion in the subsequent proceedings.[124]
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> [Emphasis added].

90. A string of recent cases before the Saskatchewan Court of Appeal have addressed the application of *Leskun* to review orders granted by lower courts. In each case, including the instant case, the SKCA has intervened to remove the review provisions on the basis that there was no general or material uncertainty with respect to support which would warrant such a review.[125] These circumstances included future retirement, where retirement itself wasn't uncertain, only the timing of that retirement,[126] health issues, where the support recipient had failed to lead evidence to fully support such a claim,[127] and the instant case where the SKCA determined the trial judge had misapprehended the Applicant's employability and that misapprehension impacted her decision to order a review.

91. Although the SKCA has faced a number of cases involving review orders, other Courts of Appeal have also intervened to remove review provisions imposed by a lower court on the basis of *Leskun*.[128] The Alberta Court of Appeal upheld a decision not permit a review of spousal support stating that a "no review" order:

> [50] … appropriately reflects the admonition from the Supreme Court of Canada that "[i]nsofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under section 17 [of the *Divorce Act*] on proof of change in circumstances": ***Leskun v Leskun***, 2006 SCC 25 at para 39, [2006] 1 SCR 920.[129]

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[124] *Ibid*.

[125] See: *Kassian v Kassian*, 2019 SKCA 101; *Radu v Radu*, 2016 SKCA 145; *Kosolofski v Kosolofski*, 2016 SKCA 106; and *Linn v Frank*, 2014 SKCA 87.

[126] See: *Kassian v Kassian*, 2019 SKCA 101; and *Linn v Frank*, 2014 SKCA 87.

[127] See: *Radu v Radu*, 2016 SKCA 145; and *Kosolofski v Kosolofski*, 2016 SKCA 106.

[128] See: *Fisher v. Fisher*, 2008 ONCA 11; and *Wills v. Kennedy*, 2015 NBCA 31.

[129] *Shigehiro v Shigehiro*, 2017 ABCA 392.

92. In a decision concerning a review with respect to parenting matters, the Manitoba Court of Appeal discussed the ratio in *Leskun* and summarized the law as follows:

> [81] … when dealing with either spousal support or custody orders, a final order is to be preferred. Review orders can be ordered in either situation where appropriate, but the circumstances will differ. Courts have been directed to avoid spousal support reviews that would allow "tinkering" upon minor changes in the parties' financial circumstances.[130]

93. In the case at bar, the SKCA following the ratio in *Leskun* and the four prior decisions of its Court on the imposition of a review, determined that:

> [44] The trial judge also concluded that support should continue until December 31, 2020, and then be reviewed, where the onus would be on Ms. Kreke to establish a continuing need for support (at para 28). However, a review order is only appropriate when there is a genuine and material uncertainty at the time of trial that will be resolved in the near future (*Leskun v Leskun*, 2006 SCC 25 at paras 36-38; *Kassian v Kassian*, 2019 SKCA 101 at paras 120-129). In our assessment, the evidence firmly establishes that Ms. Kreke could and should be self-sufficient by December 31, 2020. As noted, the trial judge erred by finding that Ms. Kreke was just re-entering the workforce after the dissolution of the marriage. In our assessment, there was no uncertainty as to Ms. Kreke's health, ability to work or likelihood of attaining self-sufficiency. We therefore find the trial judge's misapprehension of the evidence led her to err in principle when ordering a review of spousal support and we would set aside that order.[131]

94. The SKCA outlined and applied the ratio in *Leskun* appropriately. Where there is no genuine on material uncertainty at the time of trial, a review order is not appropriate. The Appellant was trained and was earning approximately $8,000 per month prior to separation. There was no reasonable basis to conclude that she would not be able to attain self-sufficiency in the time provided and therefore, no basis upon which to order a review. The SKCA did not err in overturning the trial judge's imposition of a spousal support review.

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[130] *JDB v DKM*, 2019 MBCA 68.

[131] *Supra*, note 57.

PART IV – SUBMISSION ON COSTS

95. The Respondent submits that regardless of the outcome of this appeal, costs should be awarded in his favour.

96. Prior to the granting of leave in this matter, the Respondent relocated to Saskatoon and the parties entered into Minutes of Settlement which altered their regular parenting schedule to provide the Respondent with parenting time every second Friday until the following Wednesday, which is to be reviewed at a subsequent Pretrial date. These Minutes also addressed issue of spousal support payable. Therefore, the Respondent submits that having regard for these Minutes, the issues of relocation and spousal support before this Court are effectively moot.

PART V – ORDER SOUGHT

97. The Respondent requests an order dismissing the appeal with costs to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Saskatoon, Province of Saskatchewan this 8th day of November, 2021

Kate Crisp
Counsel for the Respondent

PART VI - SUBMISSIONS ON CONFIDENTIALITY INFORMATION

There are no sealing or confidentiality orders, publication bans, classification of information in the file that is confidential under legislation or restriction on public access to information in the file could have an impact on the Court's reasons in this appeal.

PART VII – TABLE OF AUTHORITIES & STATUTORY PROVISIONS

Case Law:	Paragraph References
A.L. v M.L., 2019 SKCA 61.	57
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Van de Perre v. Edwards, 2001 SCC 60, [2001] 2 SCR 1014.	2, 49, 50, 71, 74, 75, 76
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