

FAMLNWS 2022-19
Family Law Newsletters
May 30, 2022

— Franks & Zalev - This Week in Family Law

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Breaking News

Barendregt v. Grebliunas, 2022 CarswellBC 1292 (S.C.C.)

On May 20, 2022, the Supreme Court of Canada released their long-awaited reasons in *Barendregt v. Grebliunas* (the appeal was granted in December 2021 with reasons to follow).

As we mentioned in our discussion of the B.C. Court of Appeal's reasons in the 2021-19 (May 17, 2021) edition of *This Week in Family Law*, *Barendregt* was about the mother's request to let the children move with her to the Bulkley Valley, which is about 1,100 km away from the family's home in Kelowna.

The trial judge granted the mother's request to relocate. However, the B.C. Court of Appeal reversed his decision, in large part because of new (as opposed to "fresh") evidence (i.e. "evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial") that showed one of the trial judge's major assumptions about a key factual issue was no longer correct.

In admitting the new evidence, the B.C. Court of Appeal concluded (as had several appellate courts before it) that the test for allowing new evidence on appeal is less stringent than the test for admitting fresh evidence (i.e. "evidence that existed at the time of the trial but was not adduced at that time") set out in *R. v. Palmer*, 1979 CarswellBC 533 (S.C.C.), which requires the appellate court to be satisfied that the proposed fresh evidence could not have been adduced at trial through the exercise of due diligence; is reasonably credible; bears on a potentially decisive issue; and if believed, would likely have affected the result at trial.

The majority of the Supreme Court of Canada disagreed — strongly disagreed — with the B.C. Court of Appeal on this issue, and concluded that the test for *new* evidence is, in fact, exactly the same as the test for *fresh* evidence. And, since the father could have adduced the evidence in question at trial with the exercise of due diligence, he could not adduce it now for the first time on appeal:

[3] In my view, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below, **regardless of whether the evidence relates to facts that occurred before or after trial**. Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.

[4] In cases where the best interests of the child are the primary concern, the *Palmer* test is sufficiently flexible to recognize that it may be in the interests of justice for a court to have more context before rendering decisions that could profoundly alter the course of a child's life. At the same time, finality and order are critically important in family proceedings, and factual developments that occur subsequent to trial are usually better addressed through variation procedures.

[5] In this case, the Court of Appeal for British Columbia held that *Palmer* did not strictly govern the admission of new evidence on appeal. Instead, it applied a different test and admitted the evidence. It erred in doing so.

[6] In my view, the evidence did not satisfy the *Palmer* criteria. The respondent sought to overturn an unfavourable trial outcome by adducing evidence on appeal that could have been available at first instance, had he acted with due diligence. Effectively, he was allowed to remedy the deficiencies in his trial evidence on appeal — with the benefit, and guidance, of the trial reasons. This gave rise to considerable unfairness. And in any event, evidence in family law appeals that is tendered for the purpose of showing a material change of circumstances is more appropriately raised at a variation hearing. *Palmer* should not be used to circumvent a variation scheme that Parliament specifically designed to address such developments. Admission of this evidence on appeal was not in the interests of justice. [emphasis added]

Having found that the B.C. Court of Appeal erred in admitting the new evidence, the Supreme Court then had to decide whether to allow the mother to move the children to the Bulkley Valley. This is where things get a bit strange.

The new relocation provisions of the *Divorce Act* did *not* apply in this case because the trial took place *before* they came into force. Nevertheless, the majority took the opportunity to discuss these new provisions at length, without the benefit of a legislative or factual record — or even significant argument. In doing so, the Court expressed the view that the *Divorce Act* amendments essentially codified the Court's earlier decision in *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.):

[148] More than two decades ago, this Court set out a framework for relocation applications in *Gordon*: paras. 49-50. It applies to relocation issues that arise at first instance and in the context of applications to vary existing parenting orders.

[149] **Since then, our jurisprudence has refined the *Gordon* framework, and, subject to two notable exceptions, the *Divorce Act* has largely codified it. Where the *Divorce Act* departs from *Gordon*, the changes reflect the collective judicial experience of applying the *Gordon* factors.** While *Gordon* rejected a legal presumption in favour of either party, the *Divorce Act* now contains a burden of proof where there is a pre-existing parenting order, award or agreement: s. 16.93. And although *Gordon* restricted whether courts could consider a moving party's reasons for relocating, this is now an express consideration in the best-interests-of-the-child analysis: s. 16.92(1)(a).

[150] The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades, which did not arise in *Gordon*. Section 16.92(2) now provides that trial judges shall not consider a parent's testimony that they would move with or without the child. Furthermore, ss. 16(3)(j) and 16(4) of the *Divorce Act* now instruct courts to consider any form of family violence and its impact on the perpetrator's ability to care for the child. [emphasis added]

We are not sure we agree that the new mobility/relocation provisions of the *Divorce Act* actually *codify Gordon* "as refined" by 20 years of subsequent jurisprudence.

Although we have not had a terribly long time to digest the decision, we also find ourselves tending to agree with Justice Côté, who in a lone dissent, indicated that she would have avoided addressing the new relocation provisions of the *Divorce Act* as they were not actually engaged on the facts of this case:

[192] I respectfully part company with my colleague's analysis on two points. First, it is in my view inappropriate to comment on the *Gordon v. Goertz*, [1996] 2 S.C.R. 27, framework in the context of this appeal. This issue was not raised by the appellant, Ms. Barendregt ("mother"), nor was it formally raised by the respondent, Mr. Grebliunas ("father"), who did not cross-appeal. It is therefore not properly before this Court. Even if it were, **I do not believe it prudent to comment on amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), without the benefit of submissions and of a full**

evidentiary record on the matter. It follows that I cannot agree with my colleague's analysis as set out in paras. 105-89 of her reasons. I will say no more on this issue; it ought to be left for another day. [emphasis added]

If cases — and appeals — are to be decided based on the pleadings, and if new issues are not supposed to be raised on appeal — Justice Côté has a point. However, as the law is what the majority of the Supreme Court of Canada says it is, it doesn't really matter what we think. Accordingly, paragraphs 92 to 189 of the majority's reasons are essential reading for anyone dealing with a mobility case.

Finally, the majority made it clear that the Court really meant it when it said, in *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.), that there is a *very* narrow standard of review in parenting cases, and that mobility cases are no exception:

[104] Absent an error of law or a palpable and overriding error of fact, deference is vital: *Housen*, at paras. 8, 10, 36 and 39. Appellate courts must review a trial judge's reasons generously and as a whole, bearing in mind the presumption that trial judges know the law: *G.F.*, at para. 79. As I have explained, an appeal is not a litigant's opportunity for a "second kick at the can", especially in parenting cases where finality is of paramount importance: *Van de Perre*, at para. 13.

This is important because although most appeals from parenting Orders are doomed to fail because of the high standard of review, the same could not always be said in relocation cases, where the odds often felt closer to a coin flip than anything else. In fact, for several years, the best way to predict the ultimate winner in a mobility case was to see who lost at trial.

Not anymore.

Assessing the Timing of Assessments

A.C.V.P. v. A.M.P., 2022 CarswellOnt 4581 (C.A.) — Trotter, Coroza and Favreau JJ.A.

The parties married in May 2005, had two children, and separated in May 2014. Until November 2014, the appellant (the mother) had primary care of the children, while the respondent (the father) had regular parenting time.

In November 2014, the father brought a motion seeking, among other things, sole custody of the children, and supervised access for the mother. The father alleged that the mother had serious mental health issues, including suicidal ideation and depression. In response, the mother alleged that the father had physically and verbally abused her during the latter half of their marriage.

The motion judge granted the father's motion and asked the Office of the Children's Lawyer (the "OCL") to conduct an investigation and prepare a report pursuant to s. 112 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"). That report was prepared in 2015, and the temporary custody order remained in place until the start of the trial in September 2018.

The trial judge released his reasons on March 11, 2019 — after a 30-day trial. He gave the father sole custody of the children with supervised access for the mother. In his reasons, the trial judge noted that, despite the parties' serious cross-allegations, neither had requested an assessment pursuant to s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*"). In his view, a s. 30 assessment may have led to a resolution of the parenting dispute or, at least, a more focused trial.

However, rather than finalizing access terms in his decision, knowing that to do so would only force a rather immediate Variation Application, the trial judge directed the mother to obtain a psychiatric assessment pursuant to s. 30 of the *CLRA* and/or s. 105 of the *CJA*.

Unfortunately, the mother did not cooperate. After six post-trial conferences with counsel, on December 3, 2020, the trial judge found that compliance with his psychiatric assessment order had been far too long overdue. Therefore, the trial judge finalized his previous order of supervised access for the mother.

The mother appealed. The main point on appeal was that the trial judge erred by ordering her to obtain a psychiatric assessment at the *end* of the trial pursuant to s. 30 of the *CLRA*.

The mother brought a motion to admit fresh evidence on the appeal. That motion was dismissed with respect to *most* of the proposed fresh evidence as not meeting the rigors of the *Palmer* test, which is addressed above in our discussion of *Barendregt*.

However, the proposed fresh evidence also included a psychiatric evaluation report from Dr. Gavett-Liu, dated January 30, 2022, who assessed the mother more than one year after the trial judge finalized his orders. Dr. Gavett-Liu was of the opinion that the mother did not have any mental health issues, did not pose a risk in parenting her children, and did not require a treatment plan.

The father objected to the admission of Dr. Gavett-Liu's report, citing numerous faults: it was late; it did not indicate that Dr. Gavett-Liu had been provided with the OCL report, the trial judge's reasons, or all the trial exhibits; and it contained privileged materials, as well as statements barred by the rule against hearsay.

Prior to *Barendregt*, the Ontario Court of Appeal and other appellate courts consistently relaxed the *Palmer* test (or suggested that those criteria become more "flexible") for appeals involving the best interests of children, in which case it is important to have the most current information possible "[g]iven the inevitable fluidity in a child's development". See, for example: *Bors v. Bors* (2021), 60 R.F.L. (8th) 36 (Ont. C.A.) at para. 58; *Goldman v. Kudelya*, 2017 CarswellOnt 5308 (C.A.) at para. 25; *D. (R.) v. Children's Aid Society of Owen Sound & Grey (County)* (2003), 44 R.F.L. (5th) 43 (Ont. C.A.) at para. 21; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)* (1994), 2 R.F.L. (4th) 313 (S.C.C.); *JDB v. DKM* (2019), 25 R.F.L. (8th) 14 (Man. C.A.); *BRH v. RPS* (2017), 98 R.F.L. (7th) 32 (Alta. C.A.); *Bacic v. Ivakic* (2017), 91 R.F.L. (7th) 255 (Sask. C.A.); *Babich v. Babich*, 2020 CarswellSask 115 (C.A.).

The mother should have complied with the trial judge's direction to obtain a psychiatric assessment before December 3, 2020 (when the trial judge finalized his order). However, as the Court of Appeal did not yet have the benefit of the Supreme Court's reasons in *Barendregt*, it admitted the medical report as fresh evidence because it was of the view that it was important to have the most current information possible before it. (As an aside, we suspect the result would have been different if *Barendregt* had been released before the Court of Appeal decided this case.)

The first issue raised by the mother was that the trial judge erred in his assessment of the best interests of the children. As we noted in our discussion of *Barendregt*, it is very rare that such an alleged error is going to amount to a successful appeal. What could be more discretionary than balancing factors relating to the best interests of children? An appeal cannot amount to a criticism of the trial judge's balancing of factors: *Holman v. Holman* (2015), 65 R.F.L. (7th) 273 (Ont. C.A.). Unless a trial judge goes way off course and fails to consider relevant factors or considers irrelevant factors, this ground of appeal is rarely going to be successful: *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.). An appellate court is not there to re-try the case or to re-weight the evidence: *Mason v. Mason* (2016), 83 R.F.L. (7th) 1 (Ont. C.A.).

This case was no exception, and this ground of appeal was dismissed.

As noted above, the primary error alleged by the mother was that the trial judge ordered a psychiatric assessment at the end of the trial. She argued that the trial judge did not have jurisdiction to make an order for such a report at the end of trial before determining whether her access could be unsupervised and that an assessment report was reserved for situations where clinical issues were present.

Speaking for a unanimous Court of Appeal, Justice Coroza was of the view that the trial judge *did*, in fact, have jurisdiction to order an assessment pursuant to s. 30 of the *CLRA* and/or s.105 of the *CJA* after the trial. An assessment can be ordered where there is sufficient evidence that such an assessment would be relevant to determining the best interests of a child: *Jennings v. Garrett* (2004), 5 R.F.L. (6th) 319 (Ont. S.C.J.), at paras. 147-48; *Merkand v. Merkand*, 2006 CarswellOnt 712 (C.A.), at para. 6, leave to appeal refused, 2006 CarswellOnt 3313 (S.C.C.); *Young v. Young*, 2013 CarswellOnt 9741 (S.C.J.), at paras. 87-89; *Kucan v. Santos*, 2017 CarswellOnt 18117 (S.C.J.), at para. 78; *Children's Aid Society of London & Middlesex v. B. (C.C.)*, 2007 CarswellOnt 9191 (S.C.J.), at paras. 71, 87.

On the reading of s. 30, there was nothing in the wording that would prohibit the trial judge from ordering an assessment at the end of the trial, especially in light of the trial judge's willingness to revisit his preliminary conclusion about access upon

obtaining the results of the assessment. Although the Court of Appeal suggested that s. 30 of the *CLRA* is silent as to when an assessment may be ordered — we actually suggest the wording of the section is clear that an assessment can be ordered any time before final judgment:

Assessment of needs of child

30 (1) The court before which an application is brought for a parenting order or contact order with respect to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

When order may be made

(2) An order may be made under subsection (1) **on or before the hearing of the application** and with or without a request by a party to the application. [emphasis added]

Further, the trial judge had clearly explained why he needed this evidence:

[287] The motions judges were concerned with the various emails and other communications authored by [the mother]. Those concerns continue. She made disturbing comments regarding depression and ending her life. Her explanation cannot be compelling in the absence of a medical opinion. It is beyond my ability to reach any conclusion as to the state of her mental health.

Importantly, while the trial judge found that there were clinical issues on the part of the mother that had to be addressed, the Court of Appeal also addressed the conflict in the case law as to whether a "clinical issue" is actually *required* before an assessment can be ordered under s. 30. According to the Court of Appeal, such assessments need not be reserved for when clinical issues are present. The weight of the jurisprudence suggested there was no rule that clinical issues are necessary. Rather, the inquiry is fact-driven and flexible. For example, see *Glick v. Cale* (2013), 48 R.F.L. (7th) 435 (Ont. S.C.J.), at para. 48; *A.A. v. D.S.*, 2022 CarswellOnt 3110 (S.C.J.), at paras. 30-4; *Kramer v. Kramer* (2003), 37 R.F.L. (5th) 381 (Ont. S.C.J.); *Parniak v. Carter* (2002), 30 R.F.L. (5th) 381 (Ont. C.J.); *Glance v. Glance* (2000), 10 R.F.L. (5th) 276 (Ont. S.C.J.); *Ursic v. Ursic* (2006), 32 R.F.L. (6th) 23 (Ont. C.A.).

Furthermore, it is very important for trial judges to have the most current information about the circumstances of the parties, their parenting abilities, their overall functioning and well-being, and the particular needs of the children before the court.

In her report, Dr. Gavett-Liu completed a psychiatric assessment of the mother. She concluded that the mother did not have any mental health issues, did not pose a risk in parenting her children, and did not require a treatment plan. Although her report was admitted as fresh evidence, the Court of Appeal gave it very little weight. The Court had significant concerns with the timing of the report, which was served on the father only about a week before the appeal was to be heard. As such, the father had not had the chance to address the report in any real way or to have his concerns addressed:

- Although Dr. Gavett-Liu stated that she read the *order* of the trial judge, it was not clear that she read the *reasons*, nor whether she was even provided with the reasons.
- Dr. Gavett-Liu did not indicate that she was provided with the OCL Report.
- Dr. Gavett-Liu referred to emails authored by the mother which were exhibits at the trial. And while she recited a description of the content of the emails provided to her by the mother, it was not clear that she saw the emails or the note that were exhibits at the trial, which raised a key concern on the part of the trial judge as to the mental health of the mother.

To rely on the report without providing the father a meaningful opportunity to test it would be unfair and not in the children's best interests.

The timing of the report was consistent with the trial judge's observation that the mother had shown an inability to follow court orders, frequently misinterpreting them in her own favour. By not complying with court orders and not supporting the children's relationship with their father, the mother has not acted in the children's best interests.

In the circumstances, the report did not change anything. If the mother wanted changes, a Variation Application would be necessary.

While we certainly do not expect it will be common to see a s. 30 assessment ordered after trial, this case does make it clear that a s. 30 assessment can be ordered at any time, and without the need to show a clinical issue at play. And that may be of significant use in appropriate cases.

This is Why Our Taxes are Going Up

Children's Aid Society of the Region of Peel v. L.M., 2022 CarswellOnt 6609 (C.A.) — Feldman, Pepall, and Tulloch JJ.A.

For good reason, costs are rarely ordered against Children's Aid Societies. As Justice Chappel explained in *Children's Aid Society of Hamilton v. L. (K.)*, 2014 CarswellOnt 8154 (S.C.J.):

[13] The special approach to costs claims against Children's Aid Societies recognizes the extremely important and difficult task which those agencies are entrusted with, and the challenging judgment calls which child welfare professionals must make on a regular basis in carrying out their mandate to protect children. **Child protection staff must be encouraged to err on the side of caution in favour of protecting children in situations where they have reasonable grounds to do so, without having the added burden whenever they are required to make difficult judgment calls of having to embark upon a taxing cost/benefit analysis as to whether they can financially afford to protect the child in question.** [emphasis added]

But this is not an inalienable rule, and child protection agencies can be liable for costs in appropriate circumstances. In its recent decision in *Children's Aid Society of the Region of Peel v. L.M.*, the Ontario Court of Appeal established a comprehensive legal framework for dealing with claims for costs against a Children's Aid Society.

In 2017, the Children's Aid Society of the Region of Peel (the "Society") brought a motion for summary judgment against the mother to have all three of her children placed in extended society care without access. The motion was granted.

The mother wanted to appeal. As she was denied legal aid, she brought a motion for state funding for the appeal. The Society opposed the motion — not really sure why. It agreed that the mother had met four of the five parts of the test for state funding from *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1999 CarswellNB 305 (S.C.C.). In particular, her s. 7 rights were engaged, she could not receive a fair hearing without counsel, she had exhausted all other possible avenues for obtaining state funding, and she could not afford a lawyer on her own. However, the Society also took the position that "none of the alleged errors met the more than 'no merit' minimal threshold."

The motion judge disagreed with the Society, found that the mother had raised at least four potentially meritorious grounds of appeal, and granted her request for state funding. He also ordered the Society to pay the mother \$12,482.49 in costs, because the Society had acted unreasonably for arguing the appeal had no merit when it was "patently clear" that it did. The Society had also rejected an offer from the mother to consent to the motion, which would not have meant that the motion would be granted, but might have simplified things.

[As an aside, the appeal clearly had at least some merit given that it was actually granted — see *L.M. v. Peel Children's Aid Society* (2019), 33 R.F.L. (8th) 288 (Ont. C.A.); see also Philip Epstein's discussion about the decision on the merits in the 2019-45 (November 11, 2019) edition of *This Week in Family Law*.]

The Society appealed the motion judge's decision to the Divisional Court. In a 2-1 decision, which is reported at (2021), 54 R.F.L. (8th) 321 (Ont. Div. Ct.), the Divisional Court granted the Society's appeal. It concluded that the motion judge's finding

that the Society had acted unreasonably was "clearly wrong" because: (a) even if the Society had not opposed the motion, the mother "would still have had to demonstrate that the appeal had merit before the court could make an order for state funding"; and (b) merely taking the position that the appeal did not have merit was an insufficient basis to warrant a costs order against the Society. Justice Gordon, in dissent, would have upheld the motion judge's decision, but reduced the costs order to \$2,500 because the mother would have had to bring the motion even if the Society had consented, and while "[t]he actions of the Society resulted in additional preparation time and additional time for argument", they "otherwise did not increase the costs of the motion."

The mother appealed the Divisional Court's decision to the Ontario Court of Appeal. In granting the mother's appeal and restoring the motion judge's original costs Order, the Court of Appeal approved of and relied on Justice Chappel's thorough summary of the law for ordering costs against a Children's Aid Society in *Children's Aid Society of Hamilton v. L. (K.)*, 2014 CarswellOnt 8154 (S.C.J.), where she stated as follows:

[14] The following general principles apply when a claim is advanced for costs against a child protection agency:

1. **Child protection agencies do not enjoy immunity** from costs awards.
2. However, the starting point in analyzing a claim for costs against a child protection agency is that **child welfare professionals should not be penalized for carrying out their statutory obligation** to protect children.
3. The approach to costs as against child welfare agencies must **balance the importance of encouraging child protection professionals to err on the side of protecting children and the need to ensure that those professionals exercise good faith, due diligence and reason** in carrying out their statutory mandate.
4. **The high threshold of "bad faith" is not the standard** by which to determine a claim for costs against a child protection agency.
5. **Costs will generally only be awarded against a Children's Aid Society in circumstances where the public at large would perceive that the Society has acted in a patently unfair and indefensible manner.**
6. **A Society should not be sanctioned through costs for an error in judgment**, or in cases where the nature of the case makes it very difficult to weigh and balance the evidence and predict the legal outcome.
7. Important factors to consider in deciding whether costs against a Society are appropriate include the following:
 - i. Has the Society conducted a thorough investigation of the issues in question?
 - ii. Has the Society remained open minded about possible versions of relevant events?
 - iii. Has the Society reassessed its position as more information became available?
 - iv. Has the Society been respectful of the rights and dignity of the children and parents involved in the case?
 - v. In cases involving procedural impropriety on the part of a Society, **the level of protection from costs may be lower if the irregularity is not clearly attributable to the Society's efforts to diligently carry out its statutory mandate of protecting children.** [emphasis added]

After considering these factors, the Court of Appeal concluded that the Divisional Court should not have interfered with the motion judge's costs decision. According to the Court of Appeal, the Society had acted unreasonably by not accepting the mother's offer to settle. Furthermore, it had been "patently unfair" for the Society to take the position that the mother could not meet the "no merit" test, when there was clearly merit to her appeal of the no access order, particularly since "[a] consideration of access is in the children's best interests and so squarely within the Society's mandate."

As a result, the Court of Appeal set aside the Divisional Court's Order, and restored the original costs Order of \$12,482.49. Every resident of Ontario will now see their taxes rise by \$0.002 to pay the costs award.

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