SUPREME COURT OF CANADA

CITATION: Barendregt *v.* Grebliunas, 2022 SCC 22

APPEAL HEARD: December 1 and 2, 2021
JUDGMENT RENDERED: December 2, 2021
REASONS FOR JUDGMENT: May 20, 2022
DOCKET: 39533

BETWEEN:

Ashley Suzanne Barendregt
Appellant

and

Geoff Bradley Grebliunas
Respondent

- and -

Office of the Children's Lawyer, West Coast Legal Education and Action Fund Association and Rise Women's Legal Centre
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 190)

Karakatsanis J. (Wagner C.J. and Moldaver, Brown, Rowe, Martin, Kasirer and Jamal JJ. concurring)

REASONS DISSENTING IN PART: Côté J.
(paras. 191 to 231)

Ashley Suzanne Barendregt *Appellant*

v.

Geoff Bradley Grebliunas *Respondent*

and

Office of the Children's Lawyer,
West Coast Legal Education and Action Fund Association and
Rise Women's Legal Centre *Interveners*

Indexed as: Barendregt *v.* Grebliunas

2022 SCC 22

File No.: 39533.

Appeal heard: December 1, 2, 2021.
Judgment rendered: December 2, 2021.
Reasons delivered: May 20, 2022.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law — Custody — Change of residence — Best interests of child — Primary residence of children awarded to mother at trial, allowing children to relocate some ten hours away from father's residence — Father successfully appealing relocation order — Whether trial judge erred in relocation analysis such that appellate intervention was warranted — Framework governing determination as to whether relocation in child's best interests.

Evidence — Additional evidence on appeal — Father appealing relocation order awarding primary residence of children to mother — Court of Appeal admitting new evidence adduced by father about financial situation — Whether Court of Appeal erred in admitting new evidence — Test governing admission of additional evidence on appeal.

The mother met the father in northern British Columbia in 2011, and followed him to Kelowna in 2012. Soon after, they got married, bought a house, and had two boys. The home purchase proved to be a project, as significant money was needed to bring it into livable condition. When the relationship ended in 2018, the house remained an ongoing construction project. After the father assaulted the mother during an argument, the mother brought the boys to her parents' home in Telkwa, some 10 hours away from Kelowna. A parenting arrangement emerged, splitting parenting time alternately between Telkwa and Kelowna, before it was agreed that the children would remain in Kelowna with the father. The parents were to alternate weekly parenting time when the mother returned to Kelowna, which never occurred. Rather,

the mother applied to the court to relocate the children to Telkwa. She indicated that she was willing to move to Kelowna if her application was unsuccessful, but the father was unwilling to move to Telkwa under any circumstances.

The trial judge awarded primary residence of the children to the mother and allowed them to relocate to Telkwa. He found that two key issues favoured the move: the more significant issue was the parents' acrimonious relationship and its implications for the children; and the less significant issue was the father's financial situation, particularly with respect to his ability to make the Kelowna home habitable. The father appealed and sought to adduce additional evidence about his finances and the renovations he had made to the house since trial. The Court of Appeal characterized this as "new" evidence because it had not existed at the time of trial. The court applied a different test than that set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In its view, *Palmer* — and in particular, the due diligence criterion — did not strictly govern the admission of new evidence on appeal. The court then admitted the evidence on the basis that it undermined a primary underpinning of the trial decision and the assumptions that the father might not be able to remain in the Kelowna home had been displaced. As one of trial judge's two main considerations no longer applied, the court held that relocation could no longer be justified. The court thus concluded that the children's best interests were best served by staying in Kelowna with both parents.

Held (Côté J. dissenting in part): The appeal should be allowed.

Per Wagner C.J. and Moldaver, **Karakatsanis**, Brown, Rowe, Martin, Kasirer and Jamal JJ.: Regardless of whether the evidence relates to facts that occurred before or after trial, the test laid out in *Palmer* governs the admission of additional evidence on appeal when it is adduced for the purpose of reviewing the decision below. The *Palmer* test is sufficiently flexible to respond to any unique concerns that arise with "new" evidence. The Court of Appeal erred by applying a different test and admitting the evidence on appeal. The evidence did not satisfy the *Palmer* test because it could have been available for trial with the exercise of due diligence. In any event, given the availability of a variation procedure designed to address any material change in circumstances, its admission was not in the interests of justice. Moreover, the trial judge did not err in his relocation analysis, which was consonant with the mobility framework set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as refined over the past two decades. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. The Court of Appeal was wrong to intervene.

Appellate courts have the discretion to admit additional evidence to supplement the record on appeal. When parties seek to adduce such evidence, the four criteria in *Palmer* typically apply: (a) the evidence could not, by the exercise of due diligence, have been available for the trial; (b) the evidence is relevant in that it bears upon a decisive or potentially decisive issue; (c) the evidence is credible in the sense that it is reasonably capable of belief; and (d) the evidence is such that, if believed, it could have affected the result at trial. This framework applies when evidence is

adduced on appeal for the purpose of asking the court to review the proceedings in the court below. The test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties narrow rather than expand as a case proceeds up the appellate ladder. The test strikes a balance between two foundational principles: finality and order in the justice system, and reaching a just result in the context of the proceedings.

The first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been available for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial, which ensures finality and order for the parties and the integrity of the judicial system. On an individual level, the principle of finality speaks to the profound unfairness in providing a party the opportunity to make up for deficiencies in his or her case at trial. On a systemic level, it preserves the distinction between the roles of trial and appellate courts: evaluating evidence and making factual findings are the responsibilities of trial judges, while appellate courts are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction. Accordingly, evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal. With respect to post-trial evidence, the reason why the evidence was unavailable for trial may very well have its roots in the parties' pre-trial conduct. Courts should

accordingly consider whether the party's conduct could have influenced the timing of the fact they seek to prove.

The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the due diligence criterion, which focuses on the conduct of the party, these three criteria focus on the evidence adduced and are conditions precedent to the evidence being adduced. Evidence that falls short of any of them cannot be admitted on appeal. These criteria reflect the importance of reaching a just result in the context of the proceedings, a principle that is directly linked to the correctness of the trial decision and the truth-seeking function of the trial process.

In the family law context, evidence that does not satisfy the due diligence criterion should generally not be admitted on an appeal of a best interests of the child determination. Finality and order are particularly important in such cases. Children should be afforded the comfort of knowing, with some degree of certainty, where they will live and with whom. Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Only in rare instances should an absence of due diligence be superseded by the interests of justice, such as in urgent matters requiring an immediate decision. This could also be the case where admitting the additional evidence does not offend the principle of finality despite the failure to meet the due diligence criterion, such as where the appellate court has already identified a material error in the trial judgment below and

further evidence may help determine an appropriate order. Such exceptional circumstances do not dispense with the other *Palmer* criteria. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal.

In family law cases, the admission of post-trial evidence on appeal may be unnecessary because legislative variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. The interest in reaching a just result can therefore be fostered through means other than an appeal and admission of post-trial evidence on appeal can therefore unnecessarily undermine finality and order in family law decisions. Courts must be wary of litigants using the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding nor to seek a fresh determination after remedying gaps in a trial strategy with the assistance of the trial judge's reasons. Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is in substance a disguised application to vary, a court may refuse to admit additional evidence without considering the *Palmer* criteria.

The Court's decision in *Gordon* sets out a two-stage inquiry for determining whether to vary a parenting order and permit a custodial parent to relocate

with the child: first, the party seeking a variation must show a material change in the child's circumstances; second, the judge must determine what order reflects the child's best interests in the new circumstances. Although *Gordon* concerned a variation order, courts have also applied the framework when determining a parenting arrangement at first instance, with appropriate modifications. As the first stage of the *Gordon* inquiry will likely not raise a contentious issue in relocation cases, determining the child's best interests will often constitute the crucial question.

For the past 25 years, case law has refined the *Gordon* framework. The 2019 amendments to the *Divorce Act* largely codified these refinements. 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)).

The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades. The language in s. 16(6) now expressly recognizes that the so-called maximum contact principle is only significant to the extent that it is in the child's best interests. This principle is better referred to as the parenting time factor, and must not be used to detract from the child-centric nature of the inquiry. Section 16.92(2) provides that trial judges shall not consider a parent's testimony that

they would move with or without the child, and ss. 16(3)(j) and 16(4) instruct courts to consider any form of family violence and its impact on the perpetrator's ability to care for the child. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child. This consideration is especially important in mobility cases.

In light of these refinements, the common law relocation framework can be restated as follows: courts must determine whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary, and the scope of appellate review is narrow. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. How the outcome of an application would affect either parties' relocation plans should not be considered.

In the instant case, there was a significant risk that the high-conflict nature of the parents' relationship would impact the children if they stayed in Kelowna, and the mother needed her family's support to care for the children, which was only

available in Telkwa. Moreover, the mother was more willing to facilitate a positive relationship between the children and the father than the converse, and there were findings of family violence. Accordingly, there was no reason to set aside the trial judge's decision that relocation was in the children's best interests.

Per **Côté** J. (dissenting in part): The appeal should be allowed in part. The new evidence should be admitted, and the appeal should be remanded to the trial court for reconsideration of the children's best interests in light of the new evidence.

There is agreement with the majority that the test laid oud in *Palmer* governs, as it applies to both fresh and new evidence, yet there is disagreement with the majority's application of *Palmer* to the facts of the appeal. The Court of Appeal's ultimate conclusion that the evidence is admissible should be upheld, but its treatment of *Palmer* and its decision to reassess the best interests of the children should be rejected. The *Gordon* framework is not properly before the Court, as the parties did not raise the issue. It should be left for another day.

The *Palmer* test must be applied flexibly in all cases involving the welfare of children. A child's welfare is ongoing and fluid, and an accurate assessment of their current situation is of crucial importance on appeal. Although the rules for admitting new evidence are not designed to permit litigants to retry their cases, the best interests of a child may provide a compelling reason to admit evidence on appeal. An application to vary may in some circumstances be the appropriate procedure, but it remains

adversarial in nature; as such, it would also cause strains on the parties' resources and delays.

Narrowing *Palmer*'s flexibility to exceptional cases is unduly rigid and undermines the specificity needed in cases involving children's welfare. Indeed, it would often deny judges the full context they need in order to make a sound determination of the best interests of the child in a particular case. Additionally, a rigid view of the *Palmer* criterion of due diligence focuses inordinately and narrowly on the litigant's conduct. The mere fact that new evidence could potentially have been obtained for the trial should not, on its own, preclude an appellate court from reviewing information that bears directly upon the welfare of a child. To be sure, a failure to meet the due diligence criterion is not always fatal, as it is not a condition precedent to admission. When this occurs, it must be determined whether the strength of the other *Palmer* criteria is such that failure to satisfy the due diligence requirement is overborne.

Appellate courts are not entitled to overturn trial court decisions simply because they would have made a different decision or balanced the factors differently. While the Court of Appeal was correct to admit the new evidence, it should not have used it as a pretext to reweigh the trial judge's findings regarding the relationship between the parties. Those findings were not affected by the new evidence and were entitled to appellate deference.

In this case, the new evidence could have affected the result at trial, as it bore on a critical aspect of the trial judge's reasoning. Finality, although important,

should not tie the hands of a reviewing court so as to prevent it from crafting a remedy that would advance the best interests of the child. The matter should be remitted to the trial judge because of his extensive knowledge of the family and the children. Any additional delay and expense resulting from the reconsideration of this matter is justified by the need to assess the best interests of the children in light of their father's current circumstances.

Cases Cited

By Karakatsanis J.

Applied: *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; **referred to:** *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Grandview (Town of) v. Doering*, [1976] 2 S.C.R. 621; *Henderson v. Henderson* (1843), 3 Hare 100; *Stav v. Stav*, 2012 BCCA 154, 31 B.C.L.R. (5th) 302; *S.F.D. v. M.T.*, 2019 NBCA 62, 49 C.C.P.B. (2nd) 177; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Lévesque*, 2000 SCC 47, [2000]

2 S.C.R. 487; *R. v. Warsing*, [1998] 3 S.C.R. 579; *R. v. Nikolovski*, [1996] 3 S.C.R. 1197; *Child and Family Services of Winnipeg v. J.M.F.*, 2000 MBCA 145, 153 Man. R. (2d) 90; *Children's Aid Society of Windsor-Essex (County) v. B. (Y.)* (2004), 5 R.F.L. (6th) 269; *J.W.S. v. C.J.S.*, 2019 ABCA 153; *Sheikh (Re)*, 2019 ONCA 692; *Riel v. Riel*, 2017 SKCA 74, 99 R.F.L. (7th) 367; *Hellberg v. Netherclift*, 2017 BCCA 363, 2 B.C.L.R. (6th) 126; *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201; *Jens v. Jens*, 2008 BCCA 392, 300 D.L.R. (4th) 136; *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5; *Miller v. White*, 2018 PECA 11, 10 R.F.L. (8th) 251; *Beauchamp v. Beauchamp*, 2021 SKCA 148; *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248; *Radcliff v. Radcliff* (2000), 7 R.F.L. (5th) 425; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *Bent v. Platnick*, 2020 SCC 23; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Children's Aid Society of Halton (Region) v. A. (K.L.)* (2006), 32 R.F.L. (6th) 7; *Children's Aid Society of Toronto v. P. (D.)* (2005), 19 R.F.L. (6th) 267; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, 334 D.L.R. (4th) 49; *MacGyver v. Richards* (1995), 22 O.R. (3d) 481; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *R. v. G.F.*, 2021 SCC 20; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Nunweiler v. Nunweiler*, 2000 BCCA 300, 186 D.L.R. (4th) 323; *L.D.D. v. J.A.D.*, 2010 NBCA 69,

364 N.B.R. (2d) 200; *Bjornson v. Creighton* (2002), 62 O.R. (3d) 236; *G.J. v. C.M.*, 2021 YKSC 20; *Droit de la famille — 2294*, 2022 QCCA 125; *Q. (R.E.) v. K. (G.J.)*, 2012 BCCA 146, 348 D.L.R. (4th) 622; *Ligate v. Richardson* (1997), 34 O.R. (3d) 423; *Young v. Young*, [1993] 4 S.C.R. 3; *Folahan v. Folahan*, 2013 ONSC 2966; *Slade v. Slade*, 2002 YKSC 40; *Spencer v. Spencer*, 2005 ABCA 262, 257 D.L.R. (4th) 115; *D.P. v. R.B.*, 2009 PECA 12, 285 Nfld. & P.E.I.R. 61; *Hopkins v. Hopkins*, 2011 ABCA 372; *N.T. v. W.P.*, 2011 NLCA 47, 309 Nfld. & P.E.I.R. 350; *Morrill v. Morrill*, 2016 MBCA 66, 330 Man. R. (2d) 165; *Joseph v. Washington*, 2021 BCSC 2014; *Prokopchuk v. Borowski*, 2010 ONSC 3833, 88 R.F.L. (6th) 140; *Lawless v. Lawless*, 2003 ABQB 800; *Cameron v. Cameron*, 2003 MBQB 149, 41 R.F.L. (5th) 30; *Abbott-Ewen v. Ewen*, 2010 ONSC 2121, 86 R.F.L. (6th) 428; *N.D.L. v. M.S.L.*, 2010 NSSC 68, 289 N.S.R. (2d) 8; *E.S.M. v. J.B.B.*, 2012 NSCA 80, 319 N.S.R. (2d) 232; *Burns v. Burns*, 2000 NSCA 1, 183 D.L.R. (4th) 66; *L. (S.S.) v. W. (J.W.)*, 2010 BCCA 55, 316 D.L.R. (4th) 464; *Orring v. Orring*, 2006 BCCA 523, 276 D.L.R. (4th) 211; *Larose v. Larose*, 2002 BCCA 366, 1 B.C.L.R. (4th) 262; *H.S. v. C.S.*, 2006 SKCA 45, 279 Sask. R. 55; *D.A.F. v. S.M.O.*, 2004 ABCA 261, 354 A.R. 387; *Harnett v. Clements*, 2019 NLCA 53, 30 R.F.L. (8th) 49; *C.M. v. R.L.*, 2013 NSFC 29; *Pelech v. Pelech*, [1987] 1 S.C.R. 801.

By Côté J. (dissenting in part)

Palmer v. The Queen, [1980] 1 S.C.R. 759; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994]

2 S.C.R. 165; *T.G. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, 316 N.S.R. (2d) 202; *C.K.S. v. O.S.S.*, 2014 ABCA 416; *Bacic v. Ivakic*, 2017 SKCA 23, 409 D.L.R. (4th) 571; *P. (J.) v. P. (J.)*, 2016 SKCA 168, 89 R.F.L. (7th) 92; *O. (A.) v. E. (T.)*, 2016 SKCA 148, 88 R.F.L. (7th) 34; *C.L.B. v. J.A.B.*, 2016 SKCA 101, 484 Sask. R. 228; *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61, 315 D.L.R. (4th) 498; *Jiang v. Shi*, 2017 BCCA 232; *PT v. Alberta*, 2019 ABCA 158, 88 Alta. L.R. (6th) 235; *G (JD) v. G (SL)*, 2017 MBCA 117, [2018] 4 W.W.R. 543; *Babich v. Babich*, 2020 SKCA 25; *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487; *K.K. v. M.M.*, 2022 ONCA 72; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Hickey v. Hickey*, [1999] 2 S.C.R. 518.

Statutes and Regulations Cited

Children's Law Act, S.P.E.I. 2020, c. 59, ss. 46 to 52.

Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 39.4.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 2(1) "family violence" [am. 2019, c. 16, s. 1(7)], 16 [*idem*, s. 12], 16.92(1) [ad. *idem*, s. 12], (2) [*idem*], 16.93 [*idem*], 17(5) [am. *idem*, s. 13(2)], (5.2) [ad. *idem*], (9) [rep. *idem*, s. 13(4)], 35.3 [ad. *idem*, s. 34].

Family Law Act, S.B.C. 2011, c. 25, ss. 65 to 71.

Family Law Act, S.N.B. 2020, c. 23, ss. 60 to 66.

Parenting and Support Act, R.S.N.S. 1989, c. 160, ss. 18E to 18H.

The Children's Law Act, 2020, S.S. 2020, c. 2, ss. 13 to 17.

Treaties and Other International Instruments

Convention on the Rights of the Child, Can. T.S. 1992 No. 3, art. 3(1).

Authors Cited

Artz, Sibylle, et al. "A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014), 5 *I.J.C.Y.F.S.* 493.

Bailey, Allen M. "Prioritizing Child Safety as the Prime Best-Interest Factor" (2013), 47 *Fam. L.Q.* 35.

Bala, Nicholas. "Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's *Divorce Act*" (2020), 39 *C.F.L.Q.* 45.

Boyd, Susan B., and Ruben Lindy. "Violence Against Women and the B.C. *Family Law Act*: Early Jurisprudence" (2016), 35 *C.F.L.Q.* 101.

Canada. Department of Justice. *A Study of Post-Separation/Divorce Parental Relocation*, by Nicholas Bala et al. Ottawa: Department of Justice, 2014.

Canada. Department of Justice. *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce*, by Peter Jaffe et al. Ottawa: Department of Justice, February 2014.

El Fateh, Eiad. "A Presumption for the Best?" (2009), 25 *Can. J. Fam. L.* 73.

Handley, K. R. *Spencer Bower and Handley: Res Judicata*, 4th ed. London: LexisNexis, 2009.

Jaffe, Peter G., Claire V. Crooks and Nicholas Bala. "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009), 6 *J. Child Custody* 169.

Jollimore, Elizabeth, and Ramona Sladic. "Mobility — Are We There Yet?" (2008), 27 *C.F.L.Q.* 341.

Kelly, Fiona. "Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts" (2011), 49 *Osgoode Hall L.J.* 277.

Leach, Carolyn, Elizabeth McCarty and Michelle Cheung. "Further Evidence in Child Protection Appeals in Ontario" (2012), 31 *C.F.L.Q.* 177.

Martinson, Donna, and Margaret Jackson. “Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases” (2017), 30 *Can. J. Fam. L.* 11.

Neilson, Linda C. *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed. Ottawa: Canadian Legal Information Institute, 2020, 2017 CanLIIDocs 2 (online: https://canlii.ca/t/ng; archived version: https://www.scc-csc.ca/cso-dce/2022SCC-CSC22_1_eng.pdf).

Thompson, D. A. Rollie. “Ten Years After *Gordon*: No Law, Nowhere” (2007), 35 *R.F.L.* (6th) 307.

Thompson, Rollie. “Where Is B.C. Law Going? The New Mobility” (2012), 30 *C.F.L.Q.* 235.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, DeWitt-Van Oosten and Voith JJ.A.), 2021 BCCA 11, 45 B.C.L.R. (6th) 14, 50 R.F.L. (8th) 1, [2021] B.C.J. No. 38 (QL), 2021 CarswellBC 46 (WL), setting aside in part a decision of Saunders J., 2019 BCSC 2192, 34 R.F.L. (8th) 331, [2019] B.C.J. No. 2460 (QL), 2019 CarswellBC 3770 (WL). Appeal allowed, Côté J. dissenting in part.

Darius Bossé, *Mark Power* and *Ryan Beaton*, for the appellant.

Georgialee A. Lang, for the respondent.

Ian Ross, *Caterina E. Tempesta* and *Samantha Wisnicki*, for the intervener the Office of the Children’s Lawyer.

Claire E. Hunter, Q.C., *Kate Feeney*, *Kimberley Hawkins* and *Diana C. Sepúlveda*, for the interveners the West Coast Legal Education and Action Fund Association and the Rise Women's Legal Centre.

The reasons for judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[1] An appeal is not a retrial. Nor is it licence for an appellate court to review the evidence afresh. When appellate courts stray beyond the proper bounds of review, finality and order in our system of justice is compromised. But not every trial decision can weather a dynamic and unpredictable future. Once it is rendered, lives go on and circumstances may change. When additional evidence is put forward, how should appellate courts reconcile the need for finality and order in our legal system with the need for decisions that reflect the just result in the proceedings before the court? And conversely, what framework should guide trial judges when they determine whether relocation is in a child's best interests, to ensure a just result that can navigate what lies ahead? This appeal raises both questions.

[2] The Court must first determine the test that applies to the admission of additional evidence on appeal. The Court is asked to decide whether a legal distinction should be drawn between admitting "fresh evidence" (concerning events that occurred before trial) and "new evidence" (concerning events that occurred after trial).

[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.

[7] The second broad issue in this case relates to the legal framework for determining whether it is in a child's best interests to allow a parent to relocate with the child, away from the other parent. It concerns the application of *Gordon v. Goertz*, [1996] 2 S.C.R. 27, as refined by the case law over the past two decades and viewed in light of the recent amendments of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[8] Determining the best interests of the child is a heavy responsibility, with profound impacts on children, families and society. In many cases, the answer is difficult — the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child. The challenge is even greater in mobility cases. Geographic distance reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child. The forward-

looking nature of relocation cases requires judges to craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can withstand the test of time and adversity.

[9] The law relating to the best interests of the child has long emphasized the need for individualized and discretionary decision making. But children also need predictability and certainty. To balance these competing interests, the law provides a framework and factors to structure a judge's discretion. This case calls on the Court to examine how some of those considerations apply in mobility cases. In particular, I clarify that a moving parent's reasons for relocation and the "maximum contact factor" are relevant only to the extent they bear upon the best interests of the child; a parent's testimony about whether they will move regardless of the outcome of the relocation application should not be considered; and family violence is a significant factor impacting the best interests of the child.

[10] Here, the trial judge did not err in his conclusion that relocation was in the best interests of the children. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. In the absence of any reviewable error, the Court of Appeal was wrong to intervene.

[11] At the conclusion of the hearing, the Court (Côté J. dissenting in part) allowed the appeal and restored the trial judge's order, for reasons to follow. These are the reasons.

II. Background

[12] Ashley Barendregt, the mother, met Geoff Grebliunas, the father, in 2011 in the Bulkley Valley, in northern British Columbia. She followed him to Kelowna in 2012, where he had moved for a change of scenery. Soon after, they got married. They bought a house and had two boys, who were aged three and five at the time of trial in 2019. They shared parenting duties throughout the marriage.

[13] The home purchase, already a burden on their modest finances, proved to be a project. An electrical fire shortly after they moved in exposed underlying problems — "rodents, water ingress, mould, and compromise of a structural floor joist" (2019 BCSC 2192, 34 R.F.L. (8th) 331, at para. 6) — that the father, with his background in carpentry, pledged to repair. He tore out drywall, planning to proceed room by room. But progress was slow. By trial, six years later, the house remained an "ongoing construction project" (trial reasons, at para. 5), with a makeshift kitchen and an only recently completed upstairs bathroom. The father's own expert witness described it as "a working environment, not a living environment": para. 33. Significant money was needed to bring it to marketable condition — funds the couple lacked, being well into six figures of debt by trial.

[14] Their relationship ended in November 2018, when the father "likely" assaulted the mother during an argument. That night, she drove the 2 boys some 10 hours to her parents' home in Telkwa, a village in the Bulkley Valley. The parenting arrangement that emerged in the aftermath was formalized in an interim order, splitting

parenting time between the parents, alternately in Telkwa and Kelowna, before they agreed to keep the children in Kelowna with the father. When the mother returned to Kelowna, they were to alternate weekly parenting time. But she did not return. A court order gave her parenting time with the boys in Telkwa in August 2019, but she had no further parenting time before the trial, which was held later that year.

[15] The central issue at trial was whether the children should be relocated to Telkwa with the mother or remain in Kelowna. She was willing to move to Kelowna if the father prevailed; he was unwilling to move to the Bulkley Valley under any circumstances.

[16] After a nine-day trial, the judge awarded primary residence of the children to the mother and allowed them to relocate to Telkwa. The father appealed and sought to adduce additional evidence. The Court of Appeal admitted the evidence, set aside the trial decision, and ordered the children to be returned to Kelowna. That decision was stayed pending appeal to this Court.

III. Decisions Below

A. *Supreme Court of British Columbia, 2019 BCSC 2192, 34 R.F.L. (8th) 331 (Saunders J.)*

[17] The trial judge found that both parents played active parts in raising the children, and relocation to Telkwa would have a significant impact on the children's relationship with their father. Two key issues, however, favoured the move.

[18] The more significant issue was the parties' acrimonious relationship and its implications for the children. He doubted they could collaborate to promote the children's best interests. Their marriage had involved "possibly some degree of emotional abuse"; the father had assaulted and emotionally traumatized the mother; and his conduct at trial was "abusive, and profoundly offensive": para. 41. There was, he found, "compelling evidence of [the father's] continuing animosity towards [the mother]": para. 42.

[19] He concluded that granting the mother primary care of the children would be in their best interests. She was more likely than the father to promote a positive attitude in the boys toward the other parent, and distancing the parents would help isolate the children from their discord. It was also unlikely that the parents could work cooperatively to promote the children's best interests in a shared parenting structure in the near future. The children would furthermore benefit indirectly from the mother living in Telkwa, where she had a stronger support network.

[20] The "less significant" issue was the parties' financial situation: para. 31. The house needed an influx of money to make it habitable. The father said he would accelerate the renovations but had not prepared a budget for the ongoing work. His plan to live in the house with the boys depended on his parents paying off the mortgage and

line of credit, an arrangement they had yet to confirm by trial. The judge concluded that the father's ability to remain in the house, or even in West Kelowna, was less than certain.

[21] The trial judge concluded that relocation would best promote the children's interests. He awarded the mother primary residence and granted her application.

B. *Court of Appeal for British Columbia, 2021 BCCA 11, 45 B.C.L.R. (6th) 14 (Newbury, DeWitt-Van Oosten and Voith JJ.A.)*

[22] The appeal proceeded, and the hearing had nearly ended, when the father's counsel informed the court that her client's financial situation had suddenly changed. The father later elaborated in an affidavit: he had taken steps to purchase the mother's interest in the property; his parents had purchased a half interest in the home and had increased their personal line of credit to finance renovations; the three of them had refinanced the home, nearly halving the monthly mortgage payments; he had completed the bathroom and master bedroom; and a contractor had been hired to finish the kitchen. He sought to admit evidence of all of these developments in the appeal.

[23] Voith J.A., for the court, characterized this as "new" evidence because it had not existed at the time of trial. As such, it was not subject to the *Palmer* test, and the due diligence criterion did not strictly govern its admission. Instead, "new evidence" could be admitted if it established "that a premise or underpinning or

understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered": para. 43.

[24] The court admitted the evidence, finding that it undermined a primary underpinning of the trial decision, namely, the judge's findings on the parties' finances. Specifically, the father had done almost exactly what he had said he would; and the "assumption[s]" that he might not be able to remain in the family home and might not "possibly even [be] able to remain in West Kelowna" had been displaced: para. 57. One of trial judge's two main considerations no longer applied.

[25] And given this, the other consideration — the parties' acrimonious relationship — could "no longer support the ultimate result arrived at by the trial judge": para. 69. The mother's need for emotional support could not justify relocation, even at the cost of "some friction between the parties": paras. 74-75. And the trial judge should have considered whether the children could have stayed with their father in Kelowna. The court concluded that the children's best interests were best served by staying in Kelowna with both parents and ordered accordingly.

IV. Issues

[26] This appeal raises two broad issues:

(i) What test governs the admission of additional evidence on appeal, and did the Court of Appeal err in admitting the evidence in this case?

(ii) Did the trial judge err in his relocation analysis, warranting appellate intervention?

[27] In brief, I answer as follows. Regardless of whether the evidence relates to facts that occurred before or after trial, the *Palmer* test governs the admission of additional evidence on appeal when it is adduced for the purpose of reviewing the decision below. The Court of Appeal erred by applying a different test and admitting the evidence on appeal. The evidence did not satisfy the *Palmer* test because it could have been available for trial with the exercise of due diligence. In any event, given the availability of a variation procedure designed to address any material change in circumstances, its admission was not in the interests of justice.

[28] Moreover, the trial judge did not err in his relocation analysis. His analysis of the best interests of the children is consonant with the mobility framework set out in *Gordon* as refined over the past two decades. His factual findings and the weight he ascribed to factors bearing on the children's best interests warranted deference on appeal. The Court of Appeal was wrong to intervene.

V. Analysis

A. *The Test for Admitting Additional Evidence on Appeal*

[29] Appellate courts have the discretion to admit additional evidence to supplement the record on appeal: *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at p. 188; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at para. 43. Whether in criminal or non-criminal matters (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 107), courts have typically applied the four criteria set out by this Court in *Palmer* when parties seek to adduce evidence on appeal:

(i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases);

(ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;

(iii) the evidence is credible in the sense that it is reasonably capable of belief; and

(iv) the evidence is such that, if believed, it could have affected the result at trial.

[30] *Palmer* applies when evidence is adduced on appeal "for the purpose of asking the court to review the proceedings in the court below": *Shulman*, at para. 44. *Palmer* does not, however, apply to evidence going to the validity of the trial process itself (*R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at paras. 76-77), nor to evidence adduced "as a basis for requesting an original remedy in the Court of Appeal", such as a stay of proceedings for an abuse of process (*Shulman*, at paras. 44-46).

[31] The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties should "narrow rather than expand as [a] case proceeds up the appellate ladder": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44, at para. 10.

[32] The test strikes a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings. The first criterion seeks to preserve finality and order by excluding evidence that could have been considered by the court at first instance, had the party exercised due diligence. This protects certainty in the judicial process and fairness to the other party. The remaining criteria — that the evidence be relevant, credible and could have affected the outcome — are concerned with reaching a just result.

[33] While the interest in the finality of a trial decision and order in the justice system must sometimes give way to reach a just result, as I will explain, a proper

application of *Palmer* reflects and safeguards both principles, as well as fairness to the parties.

[34] For the reasons that follow, I conclude that the *Palmer* test applies to all evidence tendered on appeal for the purpose of reviewing the decision below. In my view, the *Palmer* test ensures the proper balance and is sufficiently flexible to respond to any unique concerns that arise when considering whether to admit evidence regarding facts or events that occurred after the trial.

[35] My analysis proceeds as follows. First, I discuss the four *Palmer* criteria. Second, I address the unique challenges that arise when litigants seek to adduce "new" evidence. Third, I consider how *Palmer* applies in the family law context. Finally, I address the use of properly admitted evidence, before turning to the merits of the fresh evidence motion in this case.

(1) The *Palmer* Criteria

(a) *Due Diligence*

[36] Functionally, the first *Palmer* criterion — that the evidence could not, by the exercise of due diligence, have been obtained for the trial — focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial. This ensures finality and order in the judicial process: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 130; *R. v. G.D.B.*,

2000 SCC 22, [2000] 1 S.C.R. 520, at para. 19; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 15.

[37] The relationship between due diligence, and finality and order are deeply rooted in our common law. The law generally "requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18. This animates, for example, the cause of action estoppel doctrine, which safeguards "the interest of an individual in being protected from repeated suits and prosecutions for the same cause" and "the finality and conclusiveness of judicial decisions": K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at pp. 3-4. This doctrine achieves these ends through a due diligence component: it precludes a party from bringing an action against another party where the basis of the cause of action was argued or could have been argued in the prior action if the party in question had exercised reasonable diligence (*Grandview (Town of) v. Doering*, [1976] 2 S.C.R. 621, at pp. 634-38, citing *Henderson v. Henderson* (1843), 3 Hare 100).

[38] The *Palmer* test's due diligence criterion plays a similar role: it ensures that litigants put their best foot forward when first called upon to do so.

[39] The principle of finality and order has both individual and systemic dimensions in this setting. On an individual level, it speaks to the profound unfairness in providing "a party the opportunity to make up for deficiencies in [their] case at trial": *Stav v. Stav*, 2012 BCCA 154, 31 B.C.L.R. (5th) 302, at para. 32. A party who has not

acted with due diligence should not be afforded a "second kick at the can": *S.F.D. v. M.T.*, 2019 NBCA 62, 49 C.C.P.B. (2nd) 177, at para. 24. And the opposing party is entitled to certainty and generally should not have to relitigate an issue decided at first instance, absent a reviewable error. Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.

[40] On a systemic level, this principle preserves the distinction between the roles of trial and appellate courts. Evaluating evidence and making factual findings are the responsibilities of trial judges. Appellate courts, by contrast, are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction by permitting litigants to effectively extend trial proceedings into the appellate arena.

[41] By requiring litigants to call all evidence necessary to present their best case at first instance, the due diligence criterion protects this distinction. This, in turn, sustains the proper functioning of our judicial architecture (*R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 30), and ensures the efficient and effective use of judicial resources (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 16).

[42] The importance of the due diligence criterion may vary, however, depending on the proposed use of the evidence. Evidence sought to be adduced as a basis for intervention — to demonstrate the first instance decision was wrong — raises

greater concerns for finality and order than evidence that may help determine an appropriate order *after* the court has found a material error. Since appellate intervention is justified on the basis of a reviewable error in the decision below, there is less concern for finality and order. Accordingly, in such cases, the due diligence criterion has less bearing on the interests of justice.

[43] In sum, the due diligence criterion safeguards the importance of finality and order for the parties and the integrity of the judicial system. The focus at this stage of *Palmer* is on the *conduct* of the party. This is why evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal.

(b) *The Criteria That the Evidence Be Relevant, Credible and Could Have Affected the Result*

[44] The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the first criterion, which focuses on the *conduct* of the party, these three criteria focus on the *evidence* adduced. And unlike due diligence, the latter three criteria are "conditions precedent" — evidence that falls short of them cannot be admitted on appeal: *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 14.

[45] These criteria reflect the other principle that animates the *Palmer* test: the importance of reaching a just result in the context of the proceedings (*Sipos*, at

paras. 30-31; *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 56). This principle is directly linked to the correctness of the trial decision and the truth-seeking function of our trial process. Evidence that is unreliable, not credible, or not probative of the issues in dispute may hinder, rather than facilitate, the search for the truth. And as Cory J. observed in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 13, "[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth."

[46] After a court has decided to admit evidence on appeal, it should remain mindful that the evidence has not been put to the test of cross-examination or rebuttal at trial, and the adverse party may not have had the ability to verify its accuracy: *Lévesque*, at para. 25. If the evidence is challenged or its probative value is in dispute, appellate courts may, among other things, provide the opposing party an opportunity to respond, allow cross-examination of a witness, permit the submission of expert evidence in response to additional expert evidence, or remit the matter to the court of first instance: *Lévesque*, at para. 25; see also *Child and Family Services of Winnipeg v. J.M.F.*, 2000 MBCA 145, 153 Man. R. (2d) 90, at para. 27; *Children's Aid Society of Windsor-Essex (County) v. B. (Y.)* (2004), 5 R.F.L. (6th) 269 (Ont. C.A.), at paras. 12 and 19.

(c) *Palmer Resolves the Tension Between the Need for Finality and Order, and the Interest in Reaching a Just Result*

[47] The *Palmer* test reconciles the tension between these two foundational principles — the need for finality and order, and the interest in reaching a just result —

to determine the interests of justice in the circumstances of each case: *Sipos*, at para. 31. It is against this backdrop that I address whether the *Palmer* test applies to what has been called "new" evidence (more accurately referred to as evidence of facts or events that occurred after trial).

(2) The *Palmer* Test Applies to Evidence of Facts that Arise After Trial

[48] The primary issue in this appeal is whether and how the *Palmer* test applies to "new" evidence. According to the Court of Appeal, evidence is "new" if it pertains to facts that occurred after trial; "fresh" evidence pertains to facts that occurred before trial, but which, for one reason or another, could not be put before the court.

[49] Appellate courts across the country have differed in their approaches to "new" evidence. Some have applied the *Palmer* criteria (*J.W.S. v. C.J.S.*, 2019 ABCA 153, at para. 37 (CanLII); *Sheikh (Re)*, 2019 ONCA 692, at para. 7 (CanLII); *Riel v. Riel*, 2017 SKCA 74, 99 R.F.L. (7th) 367, at para. 16; *Hellberg v. Netherclift*, 2017 BCCA 363, 2 B.C.L.R. (6th) 126, at paras. 53-54), while others have applied a different or modified test (*North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 (C.A.), at paras. 25-26; *Jens v. Jens*, 2008 BCCA 392, 300 D.L.R. (4th) 136, at paras. 24-29; *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5, at paras. 159-61 and 166 (CanLII); *Miller v. White*, 2018 PECA 11, 10 R.F.L. (8th) 251, at para. 19; *Beauchamp v. Beauchamp*, 2021 SKCA 148, at para. 36 (CanLII)).

[50] This dissonance in the jurisprudence reflects two apparent paradoxes that arise in applying the first and fourth *Palmer* criteria to "new" evidence. Courts have queried whether new evidence could ever fail the due diligence criterion, since it relates to facts not yet in existence at the time of trial: see *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.), at paras. 21 and 28-29; *J.M.F.*, at para. 21. Others have asked how such evidence could possibly have affected a trial outcome that it postdated: *North Vancouver (District)*, at para. 25; *Radcliff v. Radcliff* (2000), 7 R.F.L. (5th) 425 (Ont. C.A.), at para. 10; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.), at p. 211.

[51] In the face of conflicting British Columbia case law, the Court of Appeal concluded that the *Palmer* test only applies to fresh evidence, and the due diligence criterion did not strictly govern the admission of new evidence. It outlined the following test:

> . . . depending on the circumstances, new evidence may be admitted if it establishes that a premise or underpinning or understanding of the trial judge that was significant or fundamental or pivotal has been undermined or altered. [para. 43]

[52] The mother takes issue with the Court of Appeal's approach: she submits that the *Palmer* criteria apply to both fresh and new evidence. The father argues that the test applied below was appropriate because the new evidence "falsified" the trial decision.

[53] I conclude that the Court of Appeal erred by applying a different test to "new" evidence.

[54] Applying a different test for admitting new evidence — which dispensed with the due diligence criterion — failed to safeguard the delicate balance between finality and order, and the interest in a just result. It is also inconsistent with this Court's *Palmer* jurisprudence. Indeed, this Court has consistently applied *Palmer* to evidence pertaining to events that occurred between the trial and appeal: see, for example, *Catholic Children's Aid Society*, at p. 188; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 50-51; *Sipos*, at paras. 29-30. The evidence in *Palmer* concerned facts that occurred both before and after trial and thus included both "fresh" and "new" evidence. The additional evidence included sworn declarations made by one of the key trial witnesses who recanted his testimony after trial, declaring that the RCMP promised him money before trial and made the payment after trial.

[55] The *Palmer* test is sufficiently flexible to deal with both types of evidence. As I will explain, the core inquiries under all four criteria remain the same regardless of when the evidence, or the specific fact, came into existence. Because the same test applies, it is unnecessary to distinguish between "fresh" and "new" evidence. *Palmer* applies to the admission of all additional evidence tendered on appeal for the purpose of reviewing the decision below.

(a) *The Due Diligence Criterion*

[56] A common thread running through the parties' submissions and the Court of Appeal's decision is that conceptual difficulties arise when applying the due diligence criterion to evidence about facts arising after trial. The mother accepts that due diligence should be eased in instances where it was impossible to adduce the evidence at trial. For the father, it is "by definition . . . not an appropriate consideration" in such cases: R.F., at para. 75. Similarly, the Court of Appeal decided that the due diligence criterion does not strictly govern the admission of new evidence.

[57] But under such a formalistic approach, the timing of events — and not the litigant's conduct — would dictate the application of the due diligence criterion. For events occurring subsequently, the criterion would effectively be eliminated. This would run counter to our jurisprudence, ignore the litigant's conduct and would fail to safeguard finality and order within the *Palmer* test. That is precisely what happened in this case. Focusing exclusively on whether the decision would be different gives undue weight to the interest in reaching a just result — and distorts the delicate balance that the *Palmer* test seeks to maintain.

[58] The due diligence criterion is sufficiently flexible to adapt to any unique concerns raised by evidence of facts that occurred subsequent to trial. As this Court held in *Bent v. Platnick*, 2020 SCC 23, at para. 60, the due diligence criterion is not a rigid one and has been held to be a practical concept that is context-sensitive.

[59] Ultimately, this criterion seeks to determine whether the party could — with due diligence — have acted in a way that would have rendered the evidence

available for trial. The due diligence inquiry should focus on the *conduct* of the party seeking to adduce such evidence rather than on the evidence itself. And in doing so, a court should determine, quite simply, why the evidence was not available at the trial: *G.D.B.*, at para. 20.

[60] The reason why "new" evidence was unavailable for trial may have its roots in the parties' pre-trial conduct. For facts arising after trial, courts should consider whether the party's conduct could have influenced the timing of the fact they seek to prove. Consider this case. If finances are at issue and a party does not take steps to obtain a financing commitment until after trial, the court may ask why the evidence could not have been obtained for trial. Parties cannot benefit from their own inaction when the existence of those facts was partially or entirely within their control. Again, litigants must put their best foot forward at trial. In the end, what matters is that this criterion properly safeguards finality and order in our judicial process.

[61] In sum, the focus of the due diligence criterion is on the litigant's conduct in the particular context of the case. Considering whether the evidence could have been *available* for trial with the exercise of due diligence is tantamount to the requirement that the evidence could not, with the exercise of due diligence, have been *obtained* for trial. Where a party seeks to adduce additional evidence on appeal, yet failed to act with due diligence, the *Palmer* test will generally foreclose admission.

(b) *The Other Palmer Criteria*

[62] There is no suggestion by the parties that the remaining *Palmer* criteria should operate differently depending on when the fact the evidence seeks to prove occurred. Needless to say, the evidence must be relevant and credible regardless of when it arose. The interest in reaching a just result requires nothing less.

[63] As for the fourth factor — whether the evidence, if believed, could have affected the result at trial — the logic remains the same: a court must approach this criterion purposively. While it is tempting to conclude that evidence of facts arising *after* trial could never have affected the result *at* trial, the inquiry is not so narrow. The question is not the evidence's timing but whether the evidence is sufficiently probative of the trial issues, had it been available. An overly formalistic approach at this stage ignores the underlying rationale of the *Palmer* criteria — here, the interest in reaching a just result in the context of the proceedings.

[64] As noted in *Palmer*, at p. 776, the fourth criterion will be satisfied if the evidence, assuming it was presented to the trier of fact and believed, possesses such strength or probative force that it might, taken with the other evidence adduced, have affected the result.

(3) The *Palmer* Test in Family Law Cases Involving the Best Interests of the Child

[65] I turn now to an underlying question raised by this appeal: the flexible application of *Palmer* in cases involving the best interests of the child.

[66] This Court has explained that these cases may require a more flexible application of the fourth *Palmer* criterion: *Catholic Children's Aid Society*, at p. 188. The Court recognized that the best interests analysis — which takes into account a broad range of considerations, including the needs, means, condition and other circumstances unique to the child before the court — widens the scope of evidence that could affect the result. This criterion, however, remains a condition precedent for the admission of evidence in family appeals. But the flexible approach to the fourth criterion is not the only aspect of *Palmer* that warrants further discussion in the family law context. Two other aspects include (i) the exceptional circumstances where a failure to meet due diligence is not fatal; and (ii) the existence of variation schemes that address factual developments that postdate trial. I address each in turn.

(a) *A Failure to Meet Due Diligence Is Not Fatal in Exceptional Circumstances*

[67] First, given both the premium placed on certainty in cases involving children and the importance of having accurate and up-to-date information when a child's future hangs in the balance (*Catholic Children's Aid Society*, at p. 188), evidence that does not meet the due diligence criterion may nonetheless be admitted in exceptional circumstances. Let me explain. Finality and order — in both their individual and systemic dimensions — are *particularly* important in cases involving the best interests of the child: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13. Children should be afforded the comfort of knowing, with some

degree of certainty, where they will live and with whom. And unfortunately, an appeal only prolongs the cloud of uncertainty and the hardship and stress a child must endure.

[68] Protracted litigation also places additional strain on the parties' resources. In the context of a spousal separation, families who resort to the adversarial process are often in crisis, with two households now in need of support. As this Court recognized in *Moge v. Moge*, [1992] 3 S.C.R. 813, family litigants, particularly women, are often already shouldering the economic consequences of a marital breakdown. Some will be unable to afford the financial and emotional cost of court proceedings at first instance, let alone the strain of relitigating the facts on appeal. Needlessly prolonging this adversarial process does little to assist parties who must find a way to restructure their relationships and cooperate for the sake of their children.

[69] Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Evidence that does not satisfy the due diligence criterion should therefore generally not be admitted, even on an appeal of a best-interests-of-the-child determination.

[70] That said, an absence of due diligence may in rare instances be superseded by the interests of justice: see *Children's Aid Society of Halton (Region) v. A. (K.L.)* (2006), 32 R.F.L. (6th) 7 (Ont. C.A.), at para. 56. There may be exceptional cases involving a child's best interests where the need for finality and order may need to yield in the interests of justice. The intervener the Office of the Children's Lawyer provides one such example: in urgent matters requiring an immediate decision — a pressing

medical or other issue bearing on the child's best interests — it may not serve the interests of justice to require a party to show due diligence and further prolong or delay proceedings.

[71] In other cases, admitting the additional evidence may not offend the principle of finality at all, despite the failure to meet the due diligence criterion. For instance, where the appellate court has already identified a material error in the trial judgment below, evidence that may help determine an appropriate order — whether to show the need for a new trial, support a substitute order, or otherwise — may exceptionally warrant admission: *Children's Aid Society of Halton (Region)*, at paras. 27 and 52-56; *Children's Aid Society of Toronto v. P. (D.)* (2005), 19 R.F.L. (6th) 267 (Ont. C.A.), at paras. 8-9. This may promote timely justice, consistent with a child's need to have their future determined with due dispatch: C. Leach, E. McCarty and M. Cheung, "Further Evidence in Child Protection Appeals in Ontario" (2012), 31 *C.F.L.Q.* 177.

[72] To be clear, such exceptional circumstances do not dispense with the other *Palmer* criteria — the evidence still must be relevant, credible, and have some material bearing on the outcome. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal. An appeal is not the continuation of a trial. Rather, the party must satisfy the judge that the interest of finality and order is clearly outweighed by the need to reach a just result

in the context of the proceedings. In such circumstances, the interests of justice may demand additional evidence to be admitted on appeal.

(b) *The Existence of Variation Schemes That Address Factual Developments That Postdate Trial in Parenting Cases*

[73] Turning to the second feature that arises in the family law context, the admission of post-trial evidence on appeal may be unnecessary because, unlike decisions that award damages in one final order, litigation about ongoing parenting arrangements remains subject to court oversight. Specifically, variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. As I will explain, the admission of post-trial evidence on appeal unnecessarily undercuts both finality and order in family law judgments, as well as Parliament's statutory design.

[74] Because variation procedures are available in parenting cases to address changes arising post-trial, the interest in reaching a just result can be fostered through other means. The admission of post-trial evidence on appeal therefore unnecessarily undermines finality and order in family law decisions.

[75] Moreover, courts must be wary of permitting parties to use the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal cannot serve as an indirect route of varying the original parenting

order. A variation application and an appeal are distinct proceedings based on fundamentally different premises.

[76] In a variation proceeding, "[t]he court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision": *Gordon*, at para. 11. The applicant bears the burden of proving that a child's best interests differ from those determined in the original decision because the circumstances on which that decision was based have materially changed since trial. Once an applicant discharges this burden, the assessment is prospective: a variation judge must enter into a fresh inquiry to determine where the best interests of the child lie, considering the findings of fact of the judge who made the previous order, together with the evidence of new circumstances (*Gordon*, at para. 17). Finality in this context respects the trial judge's original determination of the child's best interests: *Gordon*, at para. 17; *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 688, per Sopinka J.

[77] An appeal, in contrast, is designed to determine whether there is an error in the trial decision. In other words, the correctness of the previous decision — and not the implications of subsequent events — is the focal point in an appeal. This assessment is inherently retrospective, with the review typically circumscribed within the four corners of the judgment below. Here, finality in the original decision is preserved unless the court identifies a material error.

[78] It is essential that variation procedures and appeals remain distinct in the family law context: holding otherwise would unfairly require the opposing party to

defend the original order — absent a material error — in the wrong forum, with appellate judges effectively performing the work assigned to first instance judges in variation procedures. This would displace the corrective function of appellate courts and allow litigants to circumvent Parliament's variation scheme.

[79] Litigants must not be permitted to game the system in this way: an appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding; nor is it an opportunity to seek a fresh determination, after remedying gaps in a trial strategy with the assistance of the trial judge's "preliminary" reasons. Such a tactical approach in family cases will often be at the expense of the children.

[80] Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is "in substance a disguised application to vary" (*Riel*, at para. 20), a court may refuse to admit additional evidence without considering the *Palmer* criteria.

(4) The Use of Properly Admitted Evidence on Appeal

[81] As a final observation, even when evidence is properly admitted on appeal, appellate courts must defer to the trial judge's factual findings that are unaffected by the additional evidence. While assessing the proper outcome in light of additional evidence may require a global consideration of the case (*St-Cloud*; *Gordon*), appellate

courts are not entitled to reweigh or disregard the trial judge's underlying factual findings absent palpable and overriding error.

(5) Did the Court of Appeal Err in Admitting the Additional Evidence?

[82] In this case, the Court of Appeal erred in admitting the father's evidence on appeal. It applied the wrong test and failed to consider whether the father exercised due diligence. The evidence could have been available for trial with due diligence. And in any event, this matter could have been dealt with solely on the basis that a fresh evidence motion was not in the interests of justice given the availability of a variation procedure.

[83] The father sought to adduce an affidavit at the conclusion of the appeal hearing. He deposed that he had taken steps to pay the mother her interest in the family property "to comply with the order of the trial judge": C.A. reasons, at para. 27. He also deposed that he refinanced the home and his parents increased their personal line of credit, which went towards renovations that had been partially completed.

[84] The father argues that the evidence addressed the trial judge's concerns that because of their financial position, his ability to remain in the family home, or even in West Kelowna, was "less than certain": see R.F., at para. 5; see also trial reasons, at para. 40. These preoccupations, he says, are now "demonstrably incorrect": R.F., at para. 31.

[85] In a similar vein, the Court of Appeal admitted the evidence because it was "cogent and material", and it "directly addresse[d] one of the two primary underpinnings of the trial decision" (para. 51), since the trial judge's "concern, or expectation, or 'assumption'" regarding the father's ability to remain in the family home "ha[d] been displaced" (para. 57).

[86] The trial judge's predictions about the state of the father's finances and his ability to remain at his residence, however, should not be mischaracterized. It was open to the trial judge to make an assessment about the future and make a finding of fact based on the evidence before him. Here, the fact that the father later moved to cure evidentiary deficiencies regarding his ability to finance and renovate the home does not mean that the trial judge erred in his findings or conclusions.

[87] More to the point, the father failed to act with due diligence. Most obviously, the facts he now seeks to prove and rely upon on appeal — that he had the necessary financing to keep his home and make it habitable for the children — were squarely at issue before the trial judge. He could have taken reasonable steps to obtain financing before trial, since he was aware that he needed to refinance to stay in the house: trial reasons, at para. 35. His plan was contingent on obtaining financing from his father, whose testimony was "less definite" (para. 36):

> Mr. Grebliunas Sr. has no commitment letters regarding financing. Asked whether he was prepared to offer any more than the amount of the debt, he hedged, saying "We'll see what the final number is", and offered his opinion that the property would be "a good investment". [Emphasis added; para. 38.]

As the trial judge concluded, the practicability of that arrangement remained "an open question": para. 39.

[88] Allowing the father to resolve these concerns and redraw the factual landscape at the eleventh hour of the appeal occasioned considerable unfairness. In effect, he was allowed to relitigate the same issues on the basis of more favourable facts, displacing the corrective function of the appellate court. Nothing on the record indicates that he was prevented from obtaining the financing commitments before trial. This ran firmly against the interest in finality and order that due diligence is meant to safeguard.

[89] Further, as noted above, an alternative legislative mechanism for varying the trial order was available to deal with any material changes of circumstances arising after trial: *Divorce Act*, s. 17(5); *Gordon*, at para. 10. By successfully adducing the additional evidence, the father was able to circumvent the burden he would have faced in a variation application — that is, proving a change of circumstances from those that justified the children's relocation to Telkwa. Instead, he received what amounted to a near fresh evaluation of the children's best interests.

[90] A flexible approach to *Palmer* in cases involving the welfare of children must not permit what is "in substance a disguised application to vary": *Riel*, at para. 20. And as stated above, courts should be mindful of not permitting parties to use the *Palmer* framework to circumvent and undermine parliamentary schemes that provide specific procedures for review or variation upon shifts in the factual landscape.

[91] There are no circumstances here that render the admission of this evidence necessary in the interests of justice. The Court of Appeal erred in admitting the additional evidence on appeal.

B. *The Framework Governing Relocation Cases*

[92] I turn now to the second question in this appeal: whether the trial judge erred in his analysis of the mother's application to relocate to Telkwa with the children.

[93] The father argues that the trial judge erred in his application of the common law framework that governs relocation applications, and that this framework should be updated. He raises concerns regarding the trial judge's application of *Gordon* to the parties' shared parenting arrangement; his treatment of the "maximum contact principle"; the weight he afforded to the mother's reasons for moving; his neglect of the mother's testimony that she would stay in Kelowna and co-parent if her application failed; and the impact of family violence and discord between the parties on his analysis: R.F., at paras. 24-29, 33-37, 67 and 84-88.

[94] These submissions all bring into focus how case law across the country has refined and supplemented the *Gordon* framework for over 25 years. Indeed, the *Gordon* framework is flexible by design; it is not an unyielding set of rules. And with decades of *Gordon* jurisprudence as a guide, the federal government and many provinces have now enacted statutory relocation regimes that largely reflect the judicial experience evinced in the case law. As I will explain, this jurisprudential and legislative lineage

provides a clear framework for all family arrangements going forward. The trial judge's assessment of the best interests of the child is consistent with this refined framework. It was free from material error and entitled to deference on appeal.

[95] My reasons proceed as follows. First, I touch on the best interests of the child and the unique nature of mobility cases. Second, I underline the importance of deference in cases involving parenting issues. Third, I set out the refined *Gordon* framework in light of jurisprudential and legislative refinements that have occurred over the past two decades. Finally, I turn to the specific issues raised in this case: whether the trial judge erred in his application of the *Gordon* framework.

(1) The Best Interests of the Child

[96] The best interests of the child are an important legal principle in our justice system: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 9. It is a staple in domestic statutes, international law, and the common law: see, for example, *Divorce Act*, s. 16; *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 3(1); *Gordon*; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909.

[97] But, even with a wealth of jurisprudence as guidance, determining what is "best" for a child is never an easy task. The inquiry is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law*, at para. 11; *Gordon*, at para. 20.

[98] The difficulties inherent to the best interests principle are amplified in the relocation context. Untangling family relationships may have profound consequences, especially when children are involved. A child's welfare remains at the heart of the relocation inquiry, but many traditional considerations do not readily apply in the same way.

[99] In *Gordon*, this Court set out a framework for deciding whether relocation is in the best interests of the child. Under this framework, a judge has the onerous task of determining a child's best interests in the tangle of competing benefits and detriments posed by either outcome: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, 334 D.L.R. (4th) 49, at para. 23. And as Abella J.A. (as she then was) once observed, "[i]t can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.

(2) <u>The Importance of Deference in Parenting Cases Affecting the Best Interests of the Child</u>

[100] The scope of appellate review in family law cases is narrow: *Van de Perre*, at para. 11. Determining a child's best interests is always a fact-specific and highly discretionary determination: *Van de Perre*, at para. 9. And as Gonthier J. observed, "Courts of Appeal should be highly reluctant to interfere with the exercise of a trial judge's discretion": *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1374.

[101] The trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial: *R. v. G.F.*, 2021 SCC 20, at para. 81. After hearing from the parties directly, weighing the evidence, and making factual determinations, the trial court is best positioned to determine the best parenting arrangement.

[102] An appellate court's role, as noted, is instead generally one of error correction; it is not to retry a case. Permitting appellate courts to become venues for dissatisfied parties to relitigate issues already resolved at trial erodes the public's confidence in the judicial process and the rule of law. The proper functioning of our judicial system requires each level of court to remain moored to its respective role in the administration of justice.

[103] Therefore, an appellate court may only intervene where there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12; *Van de Perre*, at para. 11.

[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.

(3) The Legal Principles Governing Relocation Applications

[105] For over 25 years, *Gordon* has been the governing authority for mobility applications. McLachlin J. (as she then was) set out a two-stage inquiry for determining whether to vary a parenting order under the *Divorce Act* and permit a custodial parent to relocate with the child: first, the party seeking a variation must show a material change in the child's circumstances; second, the judge must determine what order reflects the child's best interests in the new circumstances. *Gordon* then provided factors to be considered in relocation cases.

[106] Although *Gordon* concerned a variation order, courts have also applied the framework when determining a parenting arrangement at first instance, with appropriate modifications: see *Nunweiler v. Nunweiler*, 2000 BCCA 300, 186 D.L.R. (4th) 323, at paras. 27-28; *L.D.D. v. J.A.D.*, 2010 NBCA 69, 364 N.B.R. (2d) 200, at paras. 10, 24-25, 27 and 29; *Bjornson v. Creighton* (2002), 62 O.R. (3d) 236 (C.A.), at para. 18. As well, courts have applied the framework in cases governed by provincial family law acts, even though *Gordon* concerned an application under the *Divorce Act*: *Bjornson*, at paras. 8 and 17; *G.J. v. C.M.*, 2021 YKSC 20, at para. 26 (CanLII); *Droit de la famille — 2294*, 2022 QCCA 125, at paras. 11-12 (CanLII).

[107] At the time *Gordon* was rendered, the *Divorce Act* and provincial family legislations did not contain any provisions pertaining to relocation. In 2019, Parliament amended the *Divorce Act* to provide a statutory regime that governs relocation applications. Several provinces have enacted similar statutory relocation regimes in recent years: see *Family Law Act*, S.B.C. 2011, c. 25, ss. 65 to 71; *The Children's Law Act, 2020*, S.S. 2020, c. 2, ss. 13 to 17; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 39.4; *Family Law Act*, S.N.B. 2020, c. 23, ss. 60 to 66; *Parenting and Support Act*, R.S.N.S. 1989, c. 160, ss. 18E to 18H; *Children's Law Act*, S.P.E.I. 2020, c. 59, ss. 46 to 52.

[108] Subject to some notable exceptions, the *Divorce Act* and these provincial statutes largely codified this Court's framework in *Gordon*. As I will explain, where they depart from *Gordon*, the changes reflect the collective judicial experience of applying the framework for over 25 years.

[109] The *Divorce Act* amendments came into force on March 1, 2021, after the courts below decided this case. Therefore, the mobility application under appeal proceeded under the *Gordon* framework. That said, the transitional provision in s. 35.3 of the amended *Divorce Act* provides:

> **35.3** A proceeding commenced under this Act before the day on which this section comes into force and not finally disposed of before that day shall be dealt with and disposed of in accordance with this Act as it reads as of that day.

[110] This Court did not receive any submissions on the application of s. 35.3. As I will explain, however, the outcome would be the same regardless of whether this case were decided under the amended *Divorce Act* or the refined *Gordon* framework. The new relocation provisions in the *Divorce Act* largely mirror developments in the common law since *Gordon*. As a result, I leave the discussion of the transitional provision for another day. This case, however, provides an opportunity to bring the common law framework in line with the amended *Divorce Act* to assist judges in dealing with future mobility cases.

[111] In the sections that follow, I clarify how certain aspects of the framework for determining parental relocation issues have evolved since this Court decided *Gordon*.

(a) *Determining Relocation Issues at First Instance and by Way of Variation Applications*

[112] The approach to mobility issues when they are raised at first instance, as in this case, differs from the approach to such issues when they are raised by way of a variation application, as in *Gordon*. Without a pre-existing judicial determination, a parent's desire to relocate is simply part of the factual matrix in the assessment of what parenting arrangement is in the best interests of the child. Therefore, the first stage of *Gordon* — which sets out the usual requirement for a variation order — has no application.

[113] Even where there is an existing parenting order, relocation will typically constitute a material change in circumstances and therefore satisfy the first stage of the *Gordon* framework: *Gordon*, at para. 14; see also *Divorce Act*, s. 17(5.2).

[114] Therefore, regardless of how the relocation issue is brought before the court, the first stage of the *Gordon* inquiry will likely not raise a contentious issue. That said, when the relocation issue arises by way of a variation application, a court must consider the findings of fact of the judge who made the previous order, together with the evidence of new circumstances: *Gordon*, at para. 17. The history of parenting arrangements is always relevant to understanding a child's best interests.

(b) *Determining a Child's Best Interests in Mobility Cases*

[115] Accordingly, the so-called second stage of the *Gordon* framework is often the sole issue when determining a relocation issue. The crucial question is whether relocation is in the best interests of the child.

[116] Five considerations that bear upon the best-interests-of-the-child analysis arise in this case: (i) the application of *Gordon* to shared parenting arrangements and the so-called "great respect principle"; (ii) a moving parent's reasons for relocation; (iii) the "maximum contact principle"; (iv) a moving parent's testimony about how the outcome of the application will influence their decision to relocate; and (v) the impact of family violence. I address each in turn, looking at their evolution in the case law since *Gordon* and their reflection in amendments to the *Divorce Act*.

(i) The Application of *Gordon* to Shared Parenting Arrangements and the So-Called "Great Respect Principle"

[117] In determining the best interests of the child, *Gordon* first instructs that "[t]he inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect": para. 49.

[118] In this case, the father contends that this aspect of *Gordon* is of limited value where there is a shared parenting arrangement: R.F., at para. 28. He says the trial judge should not have paid special "respect" to the mother's decision to move given their history of shared parenting roles. He relies on Newbury J.A.'s observation in *Q. (R.E.) v. K. (G.J.)*, 2012 BCCA 146, 348 D.L.R. (4th) 622, at para. 58, that "[i]t is not clear how the 'great respect' principle should work where both parents are custodial parents."

[119] The parent who cares for the child on a daily basis is in a unique position to assess what is in their best interests: *Gordon*, at para. 48. This logic applies to both parents in a shared parenting arrangement, and accordingly, both of their views are entitled to great respect in an assessment of the child's best interests. This makes sense: a court always pays careful attention to the views of the parents. In my view, it adds little value to this analysis to label it a separate principle of "great respect".

[120] As for any legal presumption in relocation cases, the Court in *Gordon* noted that the wording of the *Divorce Act* belied the need to defer to the custodial

parent. Rather, the Act expressly stipulated that the judge hearing the application should be concerned only with the best interests of the child, and the variation provisions did not place a burden on any parent at the merits stage of the analysis: paras. 37 and 39.

[121] But over time, certain patterns have emerged. In practice, a move is more likely to be approved where the clear primary caregiver for a child seeks to relocate and more likely to be denied if there is a shared parenting arrangement. Professor Thompson refers to this as the unspoken "primary caregiver presumption": see D. A. R. Thompson, "Ten Years After *Gordon*: No Law, Nowhere" (2007), 35 *R.F.L.* (6th) 307, at p. 317; R. Thompson, "Where Is B.C. Law Going? The New Mobility" (2012), 30 *C.F.L.Q.* 235.

[122] In discussing presumptions, *Gordon* relied on the fact that Parliament had not set out any general rules. It has since done so. In 2019, Parliament enacted a burden of proof, set out in s. 16.93 of the *Divorce Act*, which corresponds to the broad trends in the jurisprudence.

[123] Therefore, in all cases, the history of caregiving will be relevant. And while it may not be useful to label the attention courts pay to the views of the parent as a separate "great respect" principle, the history of caregiving will sometimes warrant a burden of proof in favour of one parent. Indeed, federal and provincial legislatures have increasingly enacted presumptions, bringing clarity to the law. In all cases, however, the inquiry remains an individual one. The judge must consider the best interests of the

particular child in the particular circumstances of the case. Other considerations may demonstrate that relocation is in the child's best interests, even if the parties have historically co-parented.

(ii) The Reasons for Relocation

[124] The second refinement to the *Gordon* framework concerns the moving parent's reasons for relocating. Here, the father and the Court of Appeal took issue with the weight the trial judge ascribed to the mother's reasons for relocation, the implication being that this consideration detracted from his focus on the child's best interests.

[125] In *Gordon*, McLachlin J. cautioned that courts should avoid "descend[ing] into inquiries into the custodial parent's reason or motive for moving" because "[u]sually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability": paras. 22-23. Therefore, "absent a connection to parenting ability, the custodial parent's reason for moving should not enter into the inquiry": para. 23. To hold otherwise, McLachlin J. reasoned, would shift the focus from the best interests of the child to the conduct of the custodial parent: para. 22.

[126] In practice, courts across the country have found that the reason for the move often bears on the best interests of the child: N. Bala, "Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's *Divorce Act*" (2020), 39 *C.F.L.Q.* 45,

at p. 71; Thompson (2007); E. Jollimore and R. Sladic, "Mobility — Are We There Yet?" (2008), 27 *C.F.L.Q.* 341.

[127] Recent amendments to the *Divorce Act* now instruct courts to consider the moving parent's reasons for relocation: s. 16.92(1)(a). Similarly, provinces across Canada have incorporated the moving parent's reasons for relocation within their statutory relocation regimes: *Family Law Act*, s. 69(6)(a) (B.C.); *The Children's Law Act, 2020*, s. 15(1)(a) (Sask.); *Children's Law Reform Act*, s. 39.4(3)(a) (Ont.); *Family Law Act*, s. 62(1)(a) (N.B.); *Parenting and Support Act*, s. 18H(4)(b) (N.S.); *Children's Law Act*, s. 48(1)(a) (P.E.I.).

[128] Indeed, isolating the custodial parent's reasons for the move from the broad, individualized inquiry of the child's best interests has frequently proven impractical. There will often be a connection between the expected benefits of the move for the child and the relocating parent's reasons for proposing the move in the first place. Relocation for financial reasons, for instance, will clearly carry implications for a child's material welfare. Considering the parent's reasons for moving can be relevant, and even necessary, to assess the merits of a relocation application.

[129] That said, the court should avoid casting judgment on a parent's reasons for moving. A moving parent need not prove the move is justified. And a lack of a compelling reason for the move, in and of itself, should not count against a parent, unless it reflects adversely on a parent's ability to meet the needs of the child: *Ligate v. Richardson* (1997), 34 O.R. (3d) 423 (C.A.), at p. 434.

[130] Ultimately, the moving parent's reasons for relocating must not deflect from the focus of relocation applications — they must be considered only to the extent they are relevant to the best interests of the child.

(iii) The "Maximum Contact Principle" or "Parenting Time Consistent With the Best Interests of the Child"

[131] *Gordon* requires courts to consider "the desirability of maximizing contact between the child and both parents": para. 49. This consideration has been referred to as the "maximum contact principle": see *Gordon*, at para. 24; see also *Young v. Young*, [1993] 4 S.C.R. 3, at p. 53, per L'Heureux-Dubé J., and p. 118, per McLachlin J. (as she then was). In this case, the father contends that the trial judge neglected this consideration.

[132] Concerns about parenting time with the child will inevitably be engaged in relocation cases: the crux of the dispute is whether it is in the child's best interests to move notwithstanding the impact on their relationship with the other parent. In other words, this concern is folded into the central inquiry before the court.

[133] What is known as the maximum contact principle has traditionally emphasized that children shall have as much contact with each parent as is consistent with their best interests. A corollary to this is sometimes referred to as the "friendly parent rule", which instructs courts to consider the willingness of a parent to foster and support the child's relationship with the other parent, where appropriate: see *Young*, at

p. 44. Both of these considerations have long been recognized by the *Divorce Act*: see *Divorce Act*, pre-amendments, ss. 16(10) and 17(9); and *Divorce Act*, post-amendments, ss. 16(6) and 16(3)(c).

[134] Although *Gordon* placed emphasis on the "maximum contact principle", it was clear that the best interests of the child are the sole consideration in relocation cases, and "if other factors show that it would not be in the child's best interests, the court can and should restrict contact": *Gordon*, at para. 24; see also para. 49. But in the years since *Gordon*, some courts have interpreted what is known as the "maximum contact principle" as effectively creating a presumption in favour of shared parenting arrangements, equal parenting time, or regular access: *Folahan v. Folahan*, 2013 ONSC 2966, at para. 14 (CanLII); *Slade v. Slade*, 2002 YKSC 40, at para. 10 (CanLII); see also F. Kelly, "Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts" (2011), 49 *Osgoode Hall L.J.* 277, at pp. 278 and 296-98. Indeed, the term "maximum contact principle" seems to imply that as much contact with both parents as possible will necessarily be in the best interests of the child.

[135] These interpretations overreach. It is worth repeating that what is known as the maximum contact principle is *only* significant to the extent that it is in the child's best interests; it must not be used to detract from this inquiry. It is notable that the amended *Divorce Act* recasts the "maximum contact principle" as "[p]arenting time consistent with best interests of child": s. 16(6). This shift in language is more neutral

and affirms the child-centric nature of the inquiry. Indeed, going forward, the "maximum contact principle" is better referred to as the "parenting time factor".

(iv) A Parent's Testimony About Whether They Will Relocate Regardless of the Outcome of the Relocation Application

[136] *Gordon* is silent as to whether, and how, a trier of fact may consider how the outcome of an application would affect the parties' relocation plans. In this case, the mother indicated that she would return to Kelowna if her application was refused, while the father indicated he would not move to the Bulkley Valley if her application was granted.

[137] In the years since *Gordon*, many courts have recognized the danger that such evidence will place parties in a "double bind". As Paperny J.A. explained in *Spencer v. Spencer*, 2005 ABCA 262, 257 D.L.R. (4th) 115, at para. 18:

> In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

[138] I agree. Considering a parent's willingness to move with or without the child can give rise to a double bind: a parent can either appear to be putting their own interests ahead of their child, or they risk undermining the strength of their relocation application (see *D.P. v. R.B.*, 2009 PECA 12, 285 Nfld. & P.E.I.R. 61, at para. 32; Jollimore and Sladic, at pp. 373-74).

[139] This risk has led appellate courts in many provinces to discourage trial judges from relying on a parent's representations about whether they will move without the children: see *Hopkins v. Hopkins*, 2011 ABCA 372, at para. 6 (CanLII); *Hejzlar*, at paras. 24-27; *D.P.*, at para. 32; *N.T. v. W.P.*, 2011 NLCA 47, 309 Nfld. & P.E.I.R. 350, at para. 9; *Morrill v. Morrill*, 2016 MBCA 66, 330 Man. R. (2d) 165, at para. 12.

[140] The same approach is now reflected in the *Divorce Act*: s. 16.92(2) precludes the court from considering whether the moving parent would relocate with or without the children. I would add that a responding parent could just as easily fall victim to the problematic inferences associated with the double bind: see *Joseph v. Washington*, 2021 BCSC 2014, at paras. 101-11 (CanLII). Therefore, in all cases, the court should not consider how the outcome of an application would affect the parties' relocation plans.

(v) Family Violence as a Relevant Factor

[141] In this case, the acrimonious relationship between the parties — featuring abusive conduct during the marriage, at separation, and at trial — was a significant

factor in the trial judge's relocation analysis. On appeal, the father argues that such "friction" is "not unusual for separating couples": R.F., at para. 35.

[142] Since *Gordon*, courts have increasingly recognized that any family violence or abuse may affect a child's welfare and should be considered in relocation decisions: see *Prokopchuk v. Borowski*, 2010 ONSC 3833, 88 R.F.L. (6th) 140; *Lawless v. Lawless*, 2003 ABQB 800, at para. 12 (CanLII); *Cameron v. Cameron*, 2003 MBQB 149, 41 R.F.L. (5th) 30; *Abbott-Ewen v. Ewen*, 2010 ONSC 2121, 86 R.F.L. (6th) 428; *N.D.L. v. M.S.L.*, 2010 NSSC 68, 289 N.S.R. (2d) 8, at paras. 22-23 and 35; *E.S.M. v. J.B.B.*, 2012 NSCA 80, 319 N.S.R. (2d) 232, at paras. 55-57. Courts have been significantly more likely to allow relocation applications where there was a finding of abuse: Department of Justice, *A Study of Post-Separation/Divorce Parental Relocation* (2014), at ch. 3.3.4.

[143] The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives: Department of Justice, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* (February 2014), at p. 12. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it: S. Artz et al., "A Comprehensive Review of the Literature on the

Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014), 5 *I.J.C.Y.F.S.* 493, at p. 497.

[144] Domestic violence allegations are notoriously difficult to prove: P. G. Jaffe, C. V. Crooks and N. Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009), 6 *J. Child Custody* 169, at p. 175; A. M. Bailey, "Prioritizing Child Safety as the Prime Best-Interest Factor" (2013), 47 *Fam. L.Q.* 35, at pp. 44-45. As the interveners West Coast LEAF Association and Rise Women's Legal Centre point out, family violence often takes place behind closed doors and may lack corroborating evidence: see S. B. Boyd and R. Lindy, "Violence Against Women and the B.C. *Family Law Act*: Early Jurisprudence" (2016), 35 *C.F.L.Q.* 101, at p. 115. Thus, proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support.

[145] The prospect that such findings could be unnecessarily relitigated on appeal will only deter abuse survivors from coming forward. And as it stands, the evidence shows that most family violence goes unreported: L. C. Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (2nd ed. 2020), 2017 CanLIIDocs 2 (online), at ch. 4.5.2.

[146] The recent amendments to the *Divorce Act* recognize that findings of family violence are a critical consideration in the best interests analysis: s. 16(3)(j) and (4). The *Divorce Act* broadly defines family violence in s. 2(1) to include any violent

or threatening conduct, ranging from physical abuse to psychological and financial abuse. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child.

[147] Because family violence may be a reason for the relocation and given the grave implications that any form of family violence poses for the positive development of children, this is an important factor in mobility cases.

(c) *Summary of the Framework for Determining Whether Relocation Is in the Best Interests of the Child*

[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.

[151] In light of the jurisprudential and legislative refinements, the common law relocation framework can be restated as follows.

[152] The crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary.

[153] Our jurisprudence and statutes provide a rich foundation for such an inquiry: see, for example, s. 16 of the *Divorce Act*. A court shall consider all factors related to the circumstances of the child, which may include the child's views and preferences, the history of caregiving, any incidents of family violence, or a child's cultural, linguistic, religious and spiritual upbringing and heritage. A court shall also consider each parent's willingness to support the development and maintenance of the child's relationship with the other parent, and shall give effect to the principle that a child should have as much time with each parent, as is consistent with the best interests of the child. These examples are illustrative, not exhaustive. While some of these

factors were specifically noted under *Gordon*, they have broad application to the best interests of the child.

[154] However, traditional considerations bearing on the best interests of the child must be considered in the context of the unique challenges posed by relocation cases. In addition to the factors that a court will generally consider when determining the best interests of the child and any applicable notice requirements, a court should also consider:

- the reasons for the relocation;
- the impact of the relocation on the child;
- the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision making responsibility or contact, taking into

consideration, among other things, the location of the new place of residence and the travel expenses; and

- whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

The court should not consider how the outcome of an application would affect either party's relocation plans — for example, whether the person who intends to move with the child would relocate without the child or not relocate. These factors are drawn from s. 16.92(1) and (2) of the *Divorce Act* and largely reflect the evolution of the common law for over 25 years.

[155] As I have explained, several pillars underlying the Court's reasoning in *Gordon* have shifted over time, leading courts and now legislatures to refine, modify, and supplement the *Gordon* factors. These refinements leave us with a clear framework going forward.

(4) Did the Trial Judge Err in His Relocation Analysis?

[156] The father raises four issues with the trial judge's analysis. He argues that (i) the trial judge failed to account for the historical parenting roles of the parties;

(ii) the trial judge's decision was inconsistent with the parenting time factor; (iii) the mother's need for emotional support could not justify relocation in this case; and (iv) the trial judge paid undue attention to the acrimonious relationship between the parties.

[157] I would not accede to any of these submissions. The trial judge's *Gordon* analysis was free from a material error, serious misapprehension of evidence, or error of law.

(a) *The Trial Judge's Decision Considered the Historical Parenting Roles of the Parties*

[158] The father first contends the trial judge's analysis did not reflect the parties' shared parenting responsibilities throughout the marriage and after separation. This submission relies on the trial judge's statement, derived from *Gordon*, that "barring an improper motive, relocation must be approached from the perspective of respect for a parent's decision to live and work where they choose": para. 21. This statement, says the father, may be applicable to the views of a "custodial" parent, but it is not applicable where both parents have been fully engaged in a shared parenting arrangement.

[159] In my view, the trial judge's reasons do not suggest that he gave more "respect" or undue weight to the mother's desire to live and work in Telkwa. Rather, the trial judge canvassed, in detail, why staying in Kelowna with their father was not

best for the children. Most notably, the trial judge was concerned about the father's animosity towards the mother and the possibility that it could influence or otherwise impact the children: paras. 41-42. There were significant issues with the Kelowna residence, which was described as a working environment, not a living environment: para. 33. And the children and the mother would benefit from family support in Telkwa, including from her parents and siblings: para. 44.

[160] Nevertheless, the Court of Appeal concluded that the trial judge erred by failing to consider Kelowna as a viable option, especially because the mother testified that she was willing to move to Kelowna should the application be denied. The mother's evidence on this point, however, could not be determinative. The trial judge understood the risk posed by the double bind.

[161] The Court of Appeal also took issue with the trial judge's failure to consider whether the children should stay with their father in Kelowna since he also concluded that either "parent was, in concept, able to care for the children": C.A. reasons, at para. 86. However, the trial judge expressed serious reservations about whether the father would foster a positive relationship between the children and their mother: para. 42. The trial judge was right to take this into consideration when determining the options before him.

[162] The trial judge's reasoning on these points disclosed no reviewable error. It was owed deference on appeal.

(b) *The Trial Judge Considered Parenting Time Consistent With the Best Interests of the Child*

[163] The father submits the trial judge failed to give due weight to the parenting time factor. The Court of Appeal took a similar position, concluding that "[p]ermitting the relocation was inconsistent with the object of maximizing contact between the children and both their parents. Indeed the relocation was likely to permanently and profoundly alter the relationship of the children with their father": para. 87. I have two concerns with this line of reasoning.

[164] First, the question before the trial judge was not how to best promote the parenting time factor; it was how to best promote the best interests of the children. These considerations are not synonymous. Nor are they necessarily mutually reinforcing. Courts should only give effect to the parenting time factor *to the extent* that it is in the best interests of the child.

[165] Second, the trial judge did not fail to consider that children should have as much contact with each parent as is consistent with their best interests. He considered that "the children would suffer a very significant loss in being deprived of frequent care from and contact with their father" and "[t]here would also be some detriment to the children in removing them from the community they have lived in and the friends they have made": para. 50. He was clearly alive to the risk of reducing contact with the father.

[166] The trial judge also did not fail to consider the corollary of the parenting time factor: whether either parent would be willing to facilitate contact and help foster a positive relationship between the children and the other parent. Again, the trial judge concluded that the father harboured animus towards the mother, and that she was more likely to build a positive relationship between the children and him than the converse.

[167] On the whole, the trial judge found that relocation would best promote the children's welfare, notwithstanding the impact on the relationship between the children and their father. This was a determination the trial judge was entitled to make, and it was owed deference on appeal.

(c) *The Mother's Need for Emotional Support*

[168] The father submits the trial judge gave undue weight to the mother's need for emotional support. The Court of Appeal similarly held that a parent's need for emotional support, "even with some friction between the parties", cannot justify relocation: para. 74.

[169] The mother's need for emotional support was a relevant consideration in the best interests analysis. The mother followed the father to Kelowna, but her family remained in Telkwa. A move that can improve a parent's emotional and psychological state can enrich a parent's ability to cultivate a healthy, supportive, and positive environment for their child. Courts have frequently recognized that a child's best interests are furthered by a well-functioning and happy parent: *Burns v. Burns*, 2000

NSCA 1, 183 D.L.R. (4th) 66, at pp. 81-82; *L. (S.S.) v. W. (J.W.)*, 2010 BCCA 55, 316 D.L.R. (4th) 464, at para. 33; *Bjornson*, at para. 30; *Orring v. Orring*, 2006 BCCA 523, 276 D.L.R. (4th) 211, at para. 57.

[170] It is also simplistic to suggest that emotional support for the mother was the only benefit that weighed in favour of relocation. The trial judge described, in great detail, how the continuing animosity between the parents would impact the children should they stay in Kelowna. He also noted that the move would provide the mother with the benefit of housing support, childcare, better employment, and opportunities to advance her education: paras. 1, 44 and 46-47.

[171] These considerations all have direct or indirect bearing on the best-interests-of-the-child assessment. Relocation that provides a parent with more education, employment opportunities, and economic stability can contribute to a child's wellbeing: *Larose v. Larose*, 2002 BCCA 366, 1 B.C.L.R. (4th) 262, at paras. 6 and 19; *H.S. v. C.S.*, 2006 SKCA 45, 279 Sask. R. 55, at para. 26; see also E. El Fateh, "A Presumption for the Best?" (2009), 25 *Can. J. Fam. L.* 73, at pp. 80-83.

[172] Similarly, the additional support of family and community at the new location can enhance the parent's ability to care for the children: *D.A.F. v. S.M.O.*, 2004 ABCA 261, 354 A.R. 387, at para. 17. Extended family, for example, can provide additional support to children while their parents begin to navigate the new terrain of post-separation life: *Harnett v. Clements*, 2019 NLCA 53, 30 R.F.L. (8th) 49, at paras. 22 and 42; *C.M. v. R.L.*, 2013 NSFC 29, at para. 139 (CanLII).

[173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, "the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent" is far from novel: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845; see also *Willick*, at pp. 724-25, per L'Heureux-Dubé J. A child's welfare is often advanced in tandem with improvements in the parent's financial, social, and emotional circumstances. The trial judge found this to be the case here.

[174] At all times, the trial judge remained focused on the child's best interests. He only considered the mother's needs — emotional or otherwise — to the extent that they were relevant to the children. The trial judge was clearly of the view that relocation would both directly and indirectly benefit the children, whereas "they would at least suffer indirectly to some degree if their mother remained in the Okanagan": para. 46.

[175] Once again, his analysis on this point was free from any reviewable error.

(d) *The Parties' Acrimonious Relationship*

[176] The father also submits the trial judge erred in placing undue emphasis on the acrimonious relationship between the parties. For the father, the "friction" was a "thing of the past" (R.F., at para. 34), it was nothing unusual for parties who are separating, and there was no evidence that it occasioned any distress for the children.

[177] I disagree. The trial judge's factual findings were well supported by the evidence.

[178] The trial judge carefully explained why he viewed the parties' relationship as acrimonious, both during the marriage and at the time of trial. He found that there was friction during the marriage: the mother had been subject to the father's controlling and overbearing personality; there was "possibly some degree of emotional abuse"; she had been physically assaulted; and she was emotionally traumatized.

[179] And the father's continued animosity towards the mother became readily apparent during the trial itself. The trial judge found his conduct at trial to be abusive: para. 41. Most notably, the father adduced a nude "selfie" of the mother in an affidavit, which the trial judge found served no purpose but to humiliate her. The trial judge also noted that the assault, and the father's denials that it had occurred, was "likely to be an ongoing source of acrimony": para. 41 (emphasis added).The trial judge concluded that this high-conflict relationship between the parties had "particularly significant" implications for the children: para. 41. These considerations weighed in favour of the children staying primarily with the mother. In these circumstances, it was open for the trial judge to conclude that a co-parenting arrangement could only work in Telkwa. If the mother returned to Kelowna, she would likely be socially isolated and reliant on the father.

[180] Despite the trial judge's findings, which were well supported by the record, the Court of Appeal intervened because "the trial judge's concerns about Mr. Grebliunas' behaviour towards Ms. Barendregt warrant some context": para. 70.

[181] The court identified four factors that purportedly "attenuated" the seriousness of the circumstances. First, the mother never argued that hostility between the parties supported her move; her evidence was that the parties were getting along better than when they first separated. Second, many of the issues the judge had been concerned about had taken place in the past. Third, there was no evidence of any event involving or taking place in the presence of the children since separation. And fourth, the trial judge failed to consider the evidence that the parties' relationship was improving.

[182] None of these factors gave the Court of Appeal licence to disturb the trial judge's factual findings regarding the relationship between the parties.

[183] First, although counsel for the mother did not advance the father's animus as a factor that supported relocation, the state of the parties' relationship was obviously relevant. And as the interveners West Coast LEAF Association and Rise Women's Legal Centre point out, it is important to be aware of the social and legal barriers to women disclosing family violence in family law proceedings.

[184] Second, the parties' acrimonious relationship was far from a relic of the distant past. Again, the acrimony surfaced during the trial itself. And abusive dynamics

often do not end with separation — in fact, the opposite is often true: Jaffe, Crooks and Bala, at p. 171; Neilson, at ch. 4.5.1, 7.2.2 and 7.2.6. Trial judges have the advantage of observing the dynamic between the parties first-hand; any resulting assessment of their ability to work together in the future must attract deference.

[185] Third, the fact that there was no evidence of any event involving the children, or taking place in the children's presence, could not be determinative. Not only can *indirect* exposure to conflict have implications for the children's welfare, the trial judge found there was a significant risk that conflict between the parties would spill over and *directly* impact the children. He was entitled to make that finding on the evidence before him.

[186] Fourth, the record discloses no indication that the trial judge forgot, ignored, or misconceived the evidence showing improvements in the parties' relationship. An omission in the reasons, in and of itself, does not mean that the appellate court is permitted to review the evidence heard at trial. And in any event, cooperating, staying, or reconciling with a party does not necessarily indicate that an incident of abuse or violence was not serious: see D. Martinson and M. Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017), 30 *Can. J. Fam. L.* 11, at p. 34. In the end, what mattered was the trial judge's conclusion that it was unlikely that the parents could work cooperatively to promote the children's best interests in a shared parenting structure in the near future: para. 42.

[187] Nevertheless, the Court of Appeal concluded that the trial judge's findings regarding the acrimonious relationship between the parties could "no longer support the ultimate result arrived at by the trial judge": para. 69.

[188] Quite simply, however, it was not the place of the Court of Appeal to decide that the broader context could "attenuate" the seriousness of the father's behavior in the absence of an overriding and palpable error. Nor was it the court's place to reweigh a factor that had been carefully considered by the trial judge. A difference in opinion does not provide an appellate court licence to eclipse the trial court's judgment in favour of its own. The Court of Appeal was wrong to dispense with deference in the absence of a reversible error.

(e) *The Other Gordon Factors*

[189] I am satisfied that the trial judge's *Gordon* analysis was free from material error. The following factors all supported the trial judge's conclusion that relocation was in the children's best interests: there was a significant risk that the high-conflict nature of the parents' relationship would impact the children if they stayed in Kelowna; the mother needed her family's support to independently care for the children, which was only available in Telkwa; she was more willing to facilitate a positive relationship between the children and the father than the converse; and there were findings of family violence. I see no reason to set aside the trial judge's decision.

VI. Disposition

[190] The appeal is allowed. The decision of the Court of Appeal is set aside, and paras. 1 to 6 of the trial judge's order regarding the primary residence of the children are restored. The mother is entitled to her costs in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[191] I have had the benefit of reading my colleague Justice Karakatsanis's reasons. While I agree that the test laid out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, governs, as it applies to both "fresh" and "new" evidence, I disagree with my colleague's application of *Palmer* to the facts of this appeal. For the reasons that follow, I would uphold the Court of Appeal's ultimate conclusion that the evidence is admissible, but reject its treatment of *Palmer* and its decision to reassess the best interests of the children.

[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.

[193] Second, as I mentioned, I disagree with my colleague's application of *Palmer* to the facts of this case. Appellate courts that strictly apply the *Palmer* test tend to focus too narrowly on the potential for further evidence to distort the appellate standard of review rather than properly focusing on the best interests of the child as the overriding consideration. The *Palmer* test must be applied flexibly in *all* cases involving the welfare of children. My colleague recognizes this well-established principle, yet her application of *Palmer* is devoid of flexibility.

[194] On a proper application of *Palmer*, I would admit the new evidence and remand the appeal to the trial court for reconsideration of the children's best interests in light of the new information regarding the father's financial situation and the condition of the West Kelowna home. The effect of holding otherwise would be to relocate 2 children 1,000 km away from their father based on an inaccurate picture of reality.

II. Analysis

[195] As my colleague rightfully notes, the *Palmer* test must be applied more flexibly in family law cases involving the best interests of a child (para. 67; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165). In such cases, an accurate assessment of the current situation of the parties, and of the children in particular, is of crucial importance (*Catholic Children's Aid*, at p. 188). A child's welfare is "ongoing and fluid, an undammed stream, and usually it is better that the Court have the full context" (*T.G. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, 316 N.S.R. (2d) 202, at para. 82).

[196] Although the rules for admitting new evidence are not designed to permit litigants to retry their cases, it is trite law that the best interests of a child "may provide a compelling reason to admit evidence on appeal" (*C.K.S. v. O.S.S.*, 2014 ABCA 416, at para. 10 (CanLII)). After all, a custody appeal "is ultimately about a child and will affect the welfare of a child" (*Bacic v. Ivakic*, 2017 SKCA 23, 409 D.L.R. (4th) 571, at para. 24; see also *P. (J.) v. P. (J.)*, 2016 SKCA 168, 89 R.F.L. (7th) 92, at para. 24; *O. (A.) v. E. (T.)*, 2016 SKCA 148, 88 R.F.L. (7th) 34, at paras. 115-17; *C.L.B. v. J.A.B.*, 2016 SKCA 101, 484 Sask. R. 228, at paras. 21-22).

[197] This flexibility is borne out by a review of the relevant case law. Over the last decade, Canadian appellate courts admitted additional evidence in family law cases in 48 out of 152 reported cases reviewed. Notably, however, the national rate of admission was considerably higher in cases involving child custody and the welfare of children. In 85 such cases, the court admitted the evidence almost half the time (41 out

of 85). By contrast, the national rate of admission in cases not concerning children was closer to one tenth (7 out of 67). This supports my view that the rules for admitting further evidence ought to be relaxed — and in practice *are* relaxed — where the best interests of a child are at stake.

[198] My colleague appears to accept the importance of flexibility in this context. She notes that there may be "exceptional cases" where a child's best interests favour admitting further evidence. For instance, she observes that the need for "finality" and "order" may yield "in the interest of justice" in "urgent matters requiring an immediate decision" (para. 70).

[199] But, respectfully, my colleague's approach — narrowing *Palmer*'s flexibility to "exceptional cases" — is unduly rigid and undermines the specificity needed in cases involving children's welfare. Indeed, it would often deny judges the full context they need in order to make a sound determination of the best interests of the child in a particular case.

[200] Contrary to my colleague's reasoning, all of the criteria must be applied flexibly in cases involving the best interests of children. I will briefly explain why this is so with respect to the first and fourth of the *Palmer* criteria — due diligence and whether the evidence could have affected the result at trial — as only these criteria are at issue in this appeal. I will then move on to apply *Palmer* — with the requisite flexibility — to the facts of this case.

A. *Palmer Test*

(1) Flexibility in Assessing Due Diligence

[201] Finality and order are not judicial straitjackets. Infants grow quickly into toddlers and then — in what may seem like the blink of an eye — into young adults. This development and maturation process demands that our courts have ample flexibility to decide each child custody case based on the most current information available. I could not agree more with the intervener the Office of the Children's Lawyer that a flexible approach "recognizes the need to be aware of children's updated circumstances to understand how appellate decisions will impact their current lives, not the lives they had when the original decision was made" (para. 6).

[202] With respect, my colleague takes a rigid view of due diligence. She focuses inordinately and narrowly on the "litigant's conduct", stating that parties should not be permitted to "benefit from their own inaction" (paras. 60-61). She asserts that only in exceptional circumstances may courts admit evidence that does not meet the due diligence criterion. I respectfully disagree with this rigid approach for three reasons.

[203] First, I believe the reason for flexibility in this context to be obvious. It is to ensure that reviewing courts have the full context, given the ongoing nature of a child's welfare — the undammed stream. This is precisely why appellate courts nationwide have held that due diligence is to be applied flexibly (*Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61, 315 D.L.R. (4th) 498, at para. 87; *Jiang v. Shi*, 2017

BCCA 232, at para. 11 (CanLII); *PT v. Alberta*, 2019 ABCA 158, 88 Alta. L.R. (6th) 235, at para. 61; *G (JD) v. G (SL)*, 2017 MBCA 117, [2018] 4 W.W.R. 543, at para. 39). These cases stand for a clear, principled proposition: the mere fact that new evidence could potentially have been obtained for the trial should not, on its own, preclude an appellate court from reviewing information that bears directly upon the welfare of a child (see, e.g., *Babich v. Babich*, 2020 SKCA 25; *Bacic*, at para. 24). Moreover, even if some of the evidence could have been adduced at trial, this does not end the *Palmer* analysis, as it is well established that a "failure to meet the due diligence criterion is not always fatal" (*R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 42). Where there has been such a failure, it must be determined whether the strength of the other *Palmer* criteria "is such that failure to satisfy the due diligence requirement is overborne" (*ibid.*). This clearly further supports my view that due diligence in the child custody context must be applied with greater flexibility than my colleague's approach permits.

[204] Second, finality is a double-edged sword. My colleague is rightly concerned about the impact of protracted litigation on "women, [who] are often already shouldering the economic consequences of a marital breakdown" and who "will be unable to afford the financial and emotional cost of court proceedings" (para. 68). But she seems to overlook the fact that a strict application of due diligence would only add to the burden she describes. By requiring all family law litigants to "put their best foot forward at trial" (para. 60), my colleague would require a self-represented single mother of modest means to advance her claim while simultaneously assembling

up-to-date financial documentation, the relevance of which may not be apparent until after the initial hearing. Otherwise, this single mother runs the risk that new and potentially decisive evidence about her present circumstances will be ruled inadmissible. The result of my colleague's approach to *Palmer* is that such a single mother would face a significant legal hurdle in pursuing custody of her children simply because she is unable to get her finances in order in a timely fashion. I fail to see how this promotes my colleague's conception of "the interests of justice".

[205] Third, I acknowledge that an application to vary may in some circumstances be the appropriate procedure. But an application to vary, like a motion to adduce further evidence on appeal, is "adversarial". It would also place "additional strain on the parties' resources" and generate further delays (para. 68). This begs the question: How does the variation mechanism mitigate the "financial and emotional" cost which so concerns my colleague? I do not find an answer for this in her reasons. Put simply, and with respect, my colleague's conception of the due diligence criterion undercuts the interests of *all* family litigants, and "particularly women", in child welfare cases (para. 68).

(2) Flexibility in Assessing Whether the New Evidence Could Have Affected the Result

[206] The fourth *Palmer* criterion requires the court to ask whether the further evidence, if believed, could have affected the result.

[207] As with due diligence, however, flexibility is once again nowhere to be found in my colleague's analysis. She does of course recite the definition of this criterion from *Palmer* and note that it must be approached "purposively". But she leaves it to readers to discern for themselves what this might mean (para. 63).

[208] Such an approach fails to recognize that in *Catholic Children's Aid*, this Court explicitly contemplated the need for flexibility in applying the fourth *Palmer* criterion. L'Heureux-Dubé J., writing for a unanimous Court, held as follows:

> Counsel for the child supports the approach advanced by the respondent society and also relies on *Genereux*. . . as the appropriate test in matters where the best interests of the child are the paramount concern.
>
> Although I doubt that *Genereux*. . . intended to depart significantly from the test of *Palmer* . . . its approach is to be commended. . . . If *Genereux*. . . has enlarged the scope of the admission of fresh evidence on appeal, it has done so, in the present case at least, with regard to the final arm of the [*Palmer*] test, that is, whether the fresh evidence may affect the result of the appeal when considered with the other evidence. If that is so, and the fact that the admission of up-to-date evidence is essential in cases such as the one at hand, *Genereux*. . . should be applied in cases determining the welfare of children. [Emphasis added; pp. 188-89.]

[209] This excerpt affirms what is by now beyond dispute: the *Palmer* criteria — particularly the fourth criterion — are more flexible in appeals concerning the best interests of children, "where it is important to have the most current information possible '[g]iven the inevitable fluidity in a child's development'" (*K.K. v. M.M.*, 2022 ONCA 72, at para. 17 (CanLII) (text in brackets in original)).

[210] In light of the foregoing, I will now apply *Palmer* to the situation in the case at bar.

B. *Application of Palmer*

[211] As I mentioned above, only the first and fourth of the *Palmer* criteria are in issue in this appeal. With respect to the first criterion, the mother argues that the new evidence could, with proper diligence, have been adduced at trial. In any event, relying on the fourth criterion, she contends that the new evidence could not have affected the outcome of the case.

[212] As I will explain, I disagree with the mother on both counts.

(1) Due Diligence

[213] First, due diligence is not a barrier to admitting the new evidence. By its nature, the evidence could not have been adduced at trial. I acknowledge that the father could have acted more expeditiously in taking steps to address his financial situation and the condition of the family home, and in bringing these matters to the court's attention. However, an inescapable fact remains: The evidence the father produced on appeal was not in existence at the time of the trial. The first *Palmer* factor therefore does not preclude its admission.

[214] Further, even if the evidence in question could have been obtained for the trial, this would not end the analysis. As I have indicated, giving effect to the need for flexibility in the child custody context demands that we apply the well-established principle that due diligence is *not* a condition precedent to admission. Yet this is precisely how my colleague treats due diligence, contrary to this Court's holding in *Lévesque*.

[215] Unlike my colleague, I do not accept that the existence of the variation procedure weighs against admission. She asserts that "[a] variation application and an appeal are distinct proceedings based on fundamentally different premises" (para. 75), and I agree with her. But in this case the father's appeal would have gone ahead regardless of whether he brought a separate application to vary in the trial court. Hence, the mere existence of the possibility of a variation order does not foreclose a litigant's right to appeal and therefore the right to present a motion to adduce additional evidence, particularly where the evidence in question is linked to the alleged error.

(2) Whether the New Evidence Could Have Affected the Result

[216] Applying the fourth *Palmer* criterion, I conclude that the new evidence could have affected the result.

[217] It is noteworthy that my colleague does not even reach this branch of the *Palmer* test. She bases her conclusion on the father's alleged lack of due diligence and on an absence of "circumstances" which might "render the admission of this evidence

necessary in the interests of justice" (para. 91). All I would say in this regard is that I do not understand "necessity in the interests of justice" to be a *Palmer* criterion.

[218] More to the point, however, the fourth *Palmer* criterion favours admission of the new evidence. I say this for three reasons.

[219] First, the new evidence bears on a critical aspect of the trial judge's reasoning. The trial judge found that the "parties' financial situation, particularly as it pertains to the house", was an issue that "significantly impact[ed]" his analysis of the children's best interests (paras. 30-31). It matters not in my view that this issue was *comparatively* less significant than the relationship between the parties. The trial judge devoted 10 paragraphs of his best interests analysis to the financial issues related to the West Kelowna home. It is thus plain that the new evidence, which suggests that the father's financial position and the condition of the home are much improved, *could* have affected the trial judge's ultimate conclusion on the question whether permitting the children to relocate with their mother was in their best interests.

[220] Second, the new evidence addresses concerns the trial judge had regarding the home environment the father would provide for the children. If believed, the new evidence suggests that the house is now much closer to a "living environment" than to a "working environment", as it was described at the time of trial (para. 33). The new evidence indicates that the father has renovated the bathroom and the master bedroom, and has definite plans to complete the kitchen renovation.

[221] Finally, the new evidence undermines the trial judge's conclusion that, given the father's dire financial straits, his ability to remain in the West Kelowna home was "less than certain" (para. 40). The trial judge found that the father's "plan to continue living in the house with the boys [was], for all practical purposes, entirely dependent on the willingness and ability of his parents to pay off the mortgage and the debt on the line of credit secured by the home, and finance the remainder of the renovations" (para. 39). As of the date of the trial, this was uncertain. His father had spoken with bankers about buying an interest in the home, but nothing concrete about this plan had been filed in evidence. If believed, the new evidence shows that the father's plan has come to fruition.

[222] The best interests analysis is of course highly contextual and fact-dependent. It is thus impossible to gauge exactly how this new evidence might have affected the trial judge's carefully calibrated analysis. However, I agree with the father that the new evidence plainly bears on "one significant pillar" of the trial judge's two-pronged rationale (R.F., at para. 67). In my view, this evidence could have altered the trial judge's view that the children's best interests would be better served by their living with their mother in Telkwa rather than in a shared parenting arrangement with both parents in the Kelowna area.

(3) Conclusion on *Palmer*

[223] Accordingly, on a properly flexible application of *Palmer*, I would admit the new evidence. I see no reason why the interest in "finality and order", to which my

colleague refers numerous times, should have tied the Court of Appeal's hands in admitting new evidence that was plainly relevant to the issues it had to decide in any event. I will now turn to the separate question of the proper use of that evidence.

C. *Proper Use of the New Evidence*

[224] I agree with the Office of the Children's Lawyer that the real concern with the new evidence in this appeal is not about appellate courts having up-to-date information on current circumstances which may affect a child's best interests. Rather, it is about the *use* of new evidence by appellate courts without proper deference to lower courts, which is contrary to the principles developed by this Court in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014. This issue should be dealt with separately from the admissibility analysis so as not to discourage the admission of new evidence about children's current circumstances that may be invaluable to appellate courts.

[225] The parties agree that an appellate court admitting further evidence in child custody matters may use that evidence in one of two ways: (1) to justify remanding the matter to the trial court for reconsideration in light of a potentially material change in circumstances or (2) to make its own determination of the best interests of the child.

[226] The mother concedes that if the new evidence is admitted, "the matter should [be] remitted to the trial judge because. . . he ha[s] 'extensive knowledge of this family and [these] child[ren]'" (A.F., at para. 71).

[227] I agree with the mother's concession. In my view, while the Court of Appeal was correct to admit this evidence, it should not have used the new evidence regarding the father's financial situation as a pretext to reweigh the trial judge's findings regarding the relationship between the parties. Those findings were not affected by the new evidence and were entitled to appellate deference.

[228] As this Court held in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, appellate courts are not entitled to overturn trial court decisions in family law matters "simply because [they] would have made a different decision or balanced the factors differently" (para. 12).

[229] The Court of Appeal accordingly erred in making its own determination based on the new evidence. Moreover, I agree with the father that finality, although important, should not tie the hands of a reviewing court so as to prevent it from crafting a remedy that would advance the best interests of the child. In this case, the new evidence bears directly — and perhaps decisively — on a matter of significance to the children's welfare. Any additional delay and expense resulting from the reconsideration of this matter is justified by the need to assess whether it is in the children's best interests to live closer to their father in his *current* circumstances. I would add that an application to vary in these circumstances would be pointless, since it would likewise, as was discussed above, involve further delay and expense to both parties.

III. Disposition

[230] For the foregoing reasons, I would admit the new evidence and allow the appeal in part, with costs to the father in this Court and in the court below.

[231] In the result, I would remand the appeal to the trial court for reconsideration of the children's best interests in light of the new evidence.

Appeal allowed with costs throughout, CÔTÉ J. *dissenting in part.*

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