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Family Law

June 2022

Admission of New Evidence on Appeal: The SCC's Decision in Barendregt v. Grebliunas

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On May 20, 2022, the Supreme Court of Canada released its long-awaited reasons in *Barendregt v. Grebliunas*, a landmark decision which considered when and how an appellate court can consider new evidence in family law cases.

The case before the Supreme Court of Canada involved the appeal of a 9-day trial in British Columbia which primarily addressed the mother's application to move the children from Kelowna, BC, where the family had lived prior to the parents' separation, to the mother's home community of Telkwa, BC. The father was opposed to the relocation.

The trial judge granted the mother's request to relocate the children to Telkwa for two reasons. The trial judge's primary concern was that if the mother stayed in Kelowna, she would be subjected to continued abuse from the father. A secondary concern was the state of the father's home in Kelowna, which required work to be habitable. While the father said that he would obtain financing to complete the work and buy out the mother's share of the home, there was insufficient evidence before the court regarding the father's financing options.

The father appealed the trial judge's decision to the BC Court of Appeal. At the conclusion of the appeal hearing, the father sought to introduce affidavit evidence that he had refinanced the home and his parents had increased their personal line of credit, which went towards renovations that had been partially completed. He then asked the Court of Appeal to consider this new information when deciding the appeal.

The Court of Appeal characterized the additional evidence from the father as "new" evidence because it had not existed at the time of trial. In doing so, the court applied a different test than that set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, which requires courts to apply the following four criteria when deciding whether to admit additional evidence to supplement the record on appeal:

1. the evidence could not, by the exercise of due diligence, have been available for the trial;

2. the evidence is relevant in that it bears upon a decisive or potentially decisive issue;

3. the evidence is credible in the sense that it is reasonably capable of belief; and

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

The Court of Appeal went on to find that the *Palmer* test did not strictly govern the admission of new evidence on appeal and admitted the father's evidence on the basis that it undermined a primary underpinning of the trial decision and displaced the assumption that the father might not be able to remain in the Kelowna home. As one of the 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.

In granting the mother's appeal of the Court of Appeal's decision, the Supreme Court of Canada held that the Court of Appeal erred by failing to apply the *Palmer* test in admitting the father's fresh evidence. The *Palmer* test was designed to be sufficiently flexible to respond to any unique concerns that arise with "new" evidence, and to ensure that the admission of additional evidence on appeal will be rare.

The majority of the Court, in reasons written by Karakatsanis J. (with Wagner C.J. and Moldaver, Brown, Rowe, Martin, Kasirer and Jamal JJ. concurring) found that the father's evidence did not satisfy the first branch of the Palmer test because it could have been available for trial with the exercise of due diligence. It was the father's responsibility to take all reasonable steps to present his best case at trial and he failed to do so. To permit the father another opportunity to make up for deficiencies in his case or to remedy gaps in his trial strategy with the assistance of the trial judge's reasons on appeal would be profoundly unfair and would undermine the integrity of the justice system. Finality and certainty in a trial outcome must be promoted, particularly in a family law case that directly impacts the life of a child.

The majority also found that even if the father's new evidence could not have been available for trial, its admission would nevertheless not be in the interests of justice because it was open to either party to vary the trial order to address any material change in circumstances that may have arisen after the order was made. In other words, the interest in reaching a just result could have been fostered through means other than an appeal. When considering an appeal of a parenting decision (including a relocation decision), an appeal court should consider the appropriateness of a variation application and still view any additional evidence through the lens of the *Palmer* test.

Finally, the majority found that the Court of Appeal was wrong to intervene in the trial judge's finding that the mother's relocation to Telkwa was in the children's best interests. While the trial in this matter took place prior to the new relocation framework in the 2019 *Divorce Act* (which came into force on March 1, 2020), the majority nevertheless took the opportunity to discuss these new provisions at length, expressing the view that the amendments essentially codified the mobility framework set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, "as refined over the past two decades".

In a dissenting opinion, Côté J. agreed that the test laid out in *Palmer* applied, but disagreed on the application of the test to the facts of the appeal. Côté J. reasoned that the Court of Appeal's ultimate conclusion about the admissibility of the father's evidence was correct and should have resulted in the matter being remitted to the trial judge for consideration. It was also Côté J.'s view that the majority's narrowing of *Palmer*'s flexibility to "exceptional cases" is unduly rigid and does not give an appellate court the tools it needs to make a sound determination of the best interests of the child in a particular case. In the case at bar, the new evidence brought forth by the father bore on a critical aspect of the trial judge's reasoning. According to Côté J., "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".

Côté J. went on to indicate that she would have avoided addressing the new relocation provisions of the *Divorce Act* as they were not actually engaged on the facts of the case before the Court.

In this timely decision from the Supreme Court, the family law bar has received some long-awaited clarity on the continued applicability of the *Palmer* test when considering the admission of new evidence on appeal. We have also learned that there continues to be a very narrow standard of review in parenting cases, including in mobility cases.

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