

L.L v A.I., 2023 BCSC 1503.

SUMMARY

This is an appeal from provincial court pursuant to section 233 of the [Family Law Act](#) (FLA). The Trial Judge (TJ) ordered that the child primarily reside with A.I. (non-Indigenous parent) and decisions related to education be made by A.I. L.L. (Indigenous parent) appeals on the basis that the TJ erred in interpretation and application of the law. L.L. submits that the TJ insufficiently considered important evidence and gave excessive consideration of the mother's heritage. A central issue is how the child's Indigenous heritage should be considered in the best interests of the child analysis. Regarding this issue, the court stated that section 37 of the Provincial legislation is broad enough that the specific factors referred to in the Federal Act do not need to be incorporated. The court found no error in the TJ's reasoning and dismissed the appeal.

JURISDICTION	British Columbia
COURT	Supreme Court of British Columbia
JUDGE	Lyster J
PARTIES	Appellant 1. L.L. Father Respondent 1. A.I. Mother
TREATY TERRITORY	None.
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	None.
APPLICABLE INDIGENOUS LAW	None.
TOPICS	Best Interests
LEGISLATION CITED	An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24. (Federal Act) No specific sections cited Family Law Act, SBC 2011, c 25. (FLA) Sections 37; 41(e); 233 Child, Family and Community Service Act, RSBC 1996, c 46. (CFCSA) Section 4

CASE LAW CONSIDERED	<i>R v REM</i>, 2008 SCC 51 (CanLII), [2008] 3 SCR 3. <i>Wewaykum Indian Band v Canada</i>, 2003 SCC 45 (CanLII), [2003] 2 SCR 259. <i>Van de Perre v Edwards</i>, 2001 SCC 60 (CanLII), [2001] 2 SCR 1014. <i>Kane v Proffitt</i>, 2018 BCCA 106. <i>Hokhold v Gerbrandt</i>, 2017 BCSC 1246. <i>Fraser v Ksenych</i>, 2022 SKCA 93.
CASE HISTORY	None.

CASE BRIEF

DECISION

- TJ (TJ) did not make any errors, appeal dismissed.

FACTS

- L.L. and A.I. entered a relationship in 2012 and married in 2013.
- L.L. is Indigenous and a member of the Kwakwaka'wakw of the Namgis First Nation. A.I. is not Indigenous.
- Child is born in 2017.
- A.I. suffered a mental health crisis and was hospitalized in August 2019.
- Parties separate in October 2019.
- Parties agreed to shared parenting time after separation.
- Both parties re-partner and want the child to live with them full-time and attend school in their own community.
- In December 2022, a TJ held that it is in child's best interest to reside primarily with A.I.
 - L.L. is appealing this decision stating the TJ erred in interpretation and application of the law.

ISSUES

1. Did the TJ err in his interpretation of the law?
2. Did the TJ give too much consideration to the Indigeneity of the child?

ANALYSIS

Scope of Appeal

- Section 233 of the FLA governs appeals to this court.
- The scope of appeal in family law matters is very narrow
 - Must be a material or reversible error that could have affected the result of the case.
 - Cannot interfere on the basis that a higher-level court might have interpreted the facts differently.
 - An appeal is not an opportunity to retry a case.

Decision Under Appeal

- The TJ reviewed the parties' evidence and found that A.I. is mentally stable and has been for some time.
 - Did not see any issue with A.I.'s past sex work or surrogacy.
 - Highlighted L.L.'s attempts to provoke A.I.
- TJ found that both parties had loving homes
- TJ considered the child's Indigenous Heritage
 - *Van de Perre v Edwards*, 2001 SCC 60.
 - Race can be a factor in determining best interests, due to its connection to the culture, identity and well-being of a child.
 - Child's Indigenous background important to her emotional development.

Analysis

Indigenous Heritage

- L.L. submitting that the TJ misinterpreted and misapplied *Van de Perre*
 - Not persuasive, *Van de Perre* only used for general principle that race can be a factor in the best interests analysis
- No basis for L.L. to claim the TJ prioritized the child's heritage over her best interests and safety.
 - The judge considered it as one factor among a number of factors.
 - Regardless, it is up to the TJ to determine how the best interest factors will be weighed given the case's unique facts.
- A.I. relies on *KKM v TJS*, 2021 BCPC 316 to support position that Indigenous identity and heritage can be an important factor in determining the best interests of an Indigenous child.
 - Case notes that section 37 of the FLA does not speak directly to maintaining cultural continuity for Indigenous children.
 - However, section 37(2)(c) refers to the strength of relationships between the child and significant people in their life – this can apply to Indigenous children.
 - Because of this open interpretation of the FLA, it is open for a court to adopt best interest of an Indigenous child factors identified in federal statutes, such as [An Act Respecting First Nations, Inuit, and Métis children, youth and families](#) (Federal Act).

- [Child, Family and Community Service Act](#) (CFCSA)
 - Governing legislation dealing with parenting issues for children in care.
 - Section 4 specifically refers to cultural heritage in determining best interest.
- Reference to statutes (like the Federal Act) was meant to illustrate the lack of specific reference in the FLA to cultural continuity as a factor in the best interests of the Indigenous child analysis.
 - They cannot guide the interpretation of the FLA.
 - Do not need to incorporate other factor (like those in the Federal Act) when considering the best interests of the child.
 - Section 37 already allows enough room to consider Indigenous heritage.
- TJ did not commit an error in considering the child's Indigenous background as relevant to her emotional development.

Surreptitious Recording

- L.L. submits that phone call had probative value that outweighed prejudicial effect of admitting it.
- TJ's analysis makes it clear that he did not say the recording wasn't admissible, but he simply did not find it as compelling evidence.

Factual Errors

- L.L. has not demonstrated the TJ misapprehended the evidence before him.
 - L.L. disagrees with TJ and is wanting to retry the case – this is not what appeals are for.
- *R. v R.E.M.*, 2008 SCC 51.
 - Sets out functional test for assessing whether a judge's reasonings are sufficient.
 - Must explain why the accused was convicted or acquitted for public accountability and effective appellate review.
- TJ fairly reviewed the evidence.
- TJ's decision showed why he came to the conclusions that he did.
- TJ must consider best interests, not how parents treat each other post separation.
- No material errors were made in findings of fact.

Bias

- L.L. submits that the TJ was biased in A.I.'s favour.

- *Hokhold v Gerbrandt*, 2017 BCSC 1246.
 - Allegation of judicial bias is a serious matter – the threshold for finding bias is high.
- *Wewaykum Indian Band v Canada*, 2003 SCC 45
 - Public confidence in our legal system is based on the idea that judges will always deal with the law in an unbiased manner.
- Objective test for bias: what would an informed person, viewing the matter realistically and practically, conclude?
- There is a presumption that judges will act according to their oath.
- *Fraser v Ksenych*, 2022 SKCA 93
 - There is nothing biased about a TJ attempting to keep proceedings moving in an efficient manner.
- L.L. submits TJ demonstrated bias by unfairly placing the responsibility on him for the respondent's outbursts at parenting time exchanges and disregarding the respondent's role in the altercations.
 - TJ criticized L.L. for provoking A.I. but found they were all at fault in context.
- L.L. submits TJ was biased in stating he stumbled when questioned about particular Indigenous ceremonies.
 - TJ is correct in this statement based on cross-examination record and TJ said it was understandable.
 - Does not show an apprehension of bias.
- L.L. submits he was under cross-examination for too long, there were adjournments granted to A.I., that he was cut off during cross-examinations, and led A.I.'s direct examination.
 - TJ has an ethical obligation to ensure self-representatives like A.I. are provided with fair access and equal treatment by the court.
 - TJ did nothing improper.

RELEVANT EXCERPTS

[29] It will be recalled the TJ referred to the Supreme Court's decision in *Van de Perre*, in which the Court stated at para. 40 that race can be a factor in determining the best interests of the child, due to its connection to the culture, identity and well-being of a child.

[38] I agree with the court in *K.K.M.* that in considering the best interests of a child under s. 37 of the FLA it is open to the court to consider the maintenance of cultural continuity for an Indigenous child. Indeed, I would consider it an error in principle not to consider the maintenance of an Indigenous child's identity in determining their best interests. In this connection, I would note that while s. 37 does not refer to indigeneity, s. 41(e) of the FLA does, providing that parental responsibilities include "making decisions respect the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if this is an Indigenous child, the child's Indigenous identity." This underscores the importance of Indigenous identity to Indigenous children.

[39] With respect to the court in *K.K.M.*, however, I would not go so far, in the absence of legislative amendment to the [FLA](#), as to specifically incorporate the factors referred to in other statutes such as the FNIMCYFA and CFCSA in considering the best interests of an Indigenous child. It is unnecessary to do so in any event, as the s. 37 factors are sufficiently broad and open-textured to permit the court to consider factors relevant to a child's Indigenous heritage in assessing their best interests.

LEGISLATION CITED

[*Family Law Act, SBC 2011, c25.*](#)

Section 37 – Best Interests of the Child

(1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Section 41(e) - Parental Responsibilities

For the purposes of this Part, parental responsibilities with respect to a child are as follows:

(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;

Section 233 – Appeals from Provincial Court Orders

(1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

(2) The time limit for starting an appeal is 40 days, beginning on the day after the order of the Provincial Court is made.

(3) After hearing the appeal, the Supreme Court may do one or more of the following:

- (a) confirm or set aside the order of the Provincial Court;
- (b) make any order that the Provincial Court could have made;
- (c) direct the Provincial Court to conduct a new hearing.

(4) On application by a party, the Supreme Court may extend the time limit for starting an appeal.

[Child, Family and Community Service Act, RSBC 1996, c 46.](#)

Section 4 – Best Interests of the Child

(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

- (a) the child's safety;
- (b) the child's physical and emotional needs and level of development;
- (c) the importance of continuity in the child's care;
- (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
- (e) the child's cultural, racial, linguistic and religious heritage;
- (f) the child's views;
- (g) the effect on the child if there is delay in making a decision.

(2) If the child is an Indigenous child, in addition to the relevant factors that must be considered under subsection (1), the following factors must be considered in determining the child's best interests:

- (a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;
- (b) the importance of the child belonging to the child's Indigenous community.