VOGEL

THE TOP 5 QUARTERLY FAMILY LAW REVIEW

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## 1. LAS v WRS, 2019 ABCA 65

Peter Costigan J.A., Sheila Greckol J.A., Dawn Pentelechuk J.A.

Appeal from the Decision of J.S. Little J.C.Q.B.A

*Vary Parenting, Substantial Change, Regular Chambers*

This appeal case concerned the Mother's appeal of an interim order granted in regular family chambers which varied the terms of the Father's parenting time.

For 7 years, the Father's parenting time had been supervised as reflected in an Interim Consent Order from November 2014. The reason for the supervision stemmed from the parties' 2 ½ year old child making a disclosure to the Mother in early 2011 that led her to believe that the child had been sexually abused by the Father. The Father agreed to the supervision to shield the child from parental conflict but has always denied the allegations. There is no independent evidence to support the allegations and the child is now 10 years old and asking why someone is always around during her parenting time with the Father.

The Father filed an application seeking increased, unsupervised parenting time to be heard in special chambers, along with an order for a PN 8 Parenting Evaluation. Notwithstanding a special chambers date had been scheduled, the Father attended regular family chambers to have his parenting time increased and to be unsupervised. The Father noted that if a parenting assessment was ordered that the expert would be limited in providing an option as to what parenting arrangement is in the child's best interest given the fact that for most of her life she has only had supervised time with the Father. The chambers judge granted the Father's request to vary the parenting order, ordering that the Father's agreed upon weekday parenting time be unsupervised, that he be permitted to attend the child's activities without supervision but that his weekend parenting time remain supervised. In her appeal, the Mother argued that the chambers judge erred in making a substantial change to the existing parenting order when no urgency existed and when the parties were awaiting a special chambers hearing.

The Court of Appeal noted that the standard of review in parenting decisions is deferential and that certain variations to parenting orders or initial interim parenting orders may be appropriately granted in regular chambers. While Practice Note 2 addresses substantial changes to parenting arrangements as not to be heard in regular family chambers, this case denotes that this is not a "bright line rule" and that there are sometimes exceptional circumstances that warrant such orders. The November 2014 order did not include a provision that the weekday parenting time with the Father was to be supervised and it did not put any restrictions on the Father's attendance at the child's activities. The Court held that the supervision restriction not be required going forward was thus not a substantial change to the parenting arrangement, "but rather a logical and incremental next step based on the evidentiary record before the chambers judge" (para 14). There was no independent evidence before the court to support the Mother's allegations that the child had been sexually abused, even after 7 years from the disclosures by the child, and the appeal court found the chambers judge's decision to be reasonable and in the best interests of the child. Appeal dismissed.

**Practical Implications: PN2 is not a bright line rule.**

## 2. Boateng v Darko, 2019 ABQB 38

D.R. Mah J.C.Q.B.A. *Evidence, Polygamy, Annulment*

In 2006 Ms. Boateng and Mr. Darko celebrated a traditional marriage and formally registered their marriage in Ghana. Ms. Boateng relocated to Canada within weeks after the parties' marriage and Mr. Darko joined her approximately three years later in 2009. Ms. Boateng sponsored Mr. Darko and the parties had three children together in Canada. In or around 2013, Ms. Boateng discovered that at the time of her marriage to Mr. Darko in 2006, he was secretly married to someone else (Ms. Aggrey) with whom he had a child. Ms. Boateng sought an annulment of her marriage to Mr. Darko on the basis that the marriage was procured by fraud. Ms. Boateng's position was that she believed Mr. Darko when he told her that was unmarried and did not have children at the time of their marriage. Mr. Darko denied being married at the time he married Ms. Boateng and instead contended that Ms. Boateng's allegations were part of a scheme to have him deported from Canada.

The Court was tasked with determining whether Mr. Darko was married to someone else at the time of his purported marriage to Ms. Boateng in 2006. And if so, to determine the effect of his prior marriage. (The issue of Mr. Darko's parenting was also before the court but is not discussed in this summary.)

In determining whether Mr. Darko was married to someone else at the time of his purported marriage to Ms. Boateng in 2006, the court relied upon the documentation put forward by Ms. Boateng: a notarized copy of the Darko/Aggrey marriage certificate and a letter of confirmation from the District Registrar in Ghana. The Court found Mr. Darko's suggestion that the documents were forgeries as being fantastical; giving no weight to the investigation report Mr. Darko submitted by the Ghanaian police force or the unauthenticated statutory declarations of Ms. Aggrey and Mr. Darko's parents jointly who have an interest in supporting Mr. Darko. Rather, the documentary evidence put forward by Ms. Boateng satisfied the Court that Mr. Darko was already married at the time he went through a form of marriage with Ms. Boateng in 2006.

The question then became whether Mr. Darko's prior marriage invalidated his subsequent marriage to Ms. Boateng. The Court noted that fraud as a ground of annulment is theoretically possible, however, authorities had not recognized mere fraudulent representation as a basis for annulment. As such, the Court was unable to annul the marriage on the basis of fraudulent representation alone, particularly in light of the uncertainty about whether polygamous marriage was legal in Ghana. No expert in Ghanaian law was procured for the Court.

The conundrum faced by the Court, was that "the ethnocentric and ecclesiastical approach to marriage in the English common law prevents recognition of a polygamous marriage for the purposes of divorce, basically rendering the couple incapable of obtaining a divorce". In response to which, the Court summarized at paragraph 42, as follows:

*…In my view, the law must be capable of addressing the legal issues of all who call Canada their home. It would be a curious anomaly if the law refused to recognize the existence of a circumstance (polygamous marriage) that disadvantages a conceivably vulnerable or exploited group of women now living in Canada because that circumstance was conferred by foreign law or custom. It would be anomalous indeed if Canadian law denied a remedy to a woman finding herself in that circumstance where that circumstance is itself prohibited by Canadian law.*

The Court ultimately relied upon Azam v Jan, 2012 ABCA 197 and adopted the approach taken in Azam v Jan, 2013 ABQB 301 to recognize the realities of immigration and pluralism in society and to provide a meaningful remedy to Ms. Boateng. On the basis of public policy, the Court recognized the polygamous marriage between Mr. Darko and Ms. Boateng for the limited purpose of finding the marriage to be invalid and granting an Order of Annulment.

**Practical Implications: Prior to trial or any adjudication, ensure the reliability and authentication of your evidence.**

## 3. McBean v McBean, 2019 ABCA

Patricia Rowbotham J.A., Thomas W. Wakeling J.A., Jo-Anne Strekaf J.A.

Appeal from the Judgements by W.P. Sullivan J.C.Q.B.A. *Retroactive Child Support, Delay*

This appeal case concerned the dismissal of an application by the Appellant Mother for retroactive child support at the Court of Queen's Bench, following a 9-day viva voce hearing. The parties were married in 1990, divorced in 2005 and had two children who were 25 and 23 at the time of the appeal hearing. Both parties had significant financial resources and had executed a comprehensive Custody, Support and Property Agreement (the "Agreement") in March 2005 which dealt with child support for their two children as well as distribution of matrimonial property.

The Agreement provided that the Father would pay $4,000 per month for child support for so long as each child was a child of the marriage, as well as $500 per month for section 7 expenses, based on a guideline income of $202,800. The parties acknowledged that the agreed upon child support amount exceeded what was prescribed by the Federal Child Support Guidelines and "is in consideration of the entire Agreement". It was also agreed that there would be no reduction to the child support amount unless the Father's income fell below $202,800 and that the parties would exchange tax returns and notices of assessment each year, and then re-calculate support based on their total actual incomes.

The parties' incomes changed over the years, but they did not exchange financial information or re-calculate support annually as contemplated by the Agreement. After separation, the Mother lived with the children in Calgary, while the Father lived abroad, except for 2008/2009 where the son lived with the Father and the Father paid his tuition and living expenses and did not seek any child support from the Mother who earned over $500,000 that year. Between 2005 and 2015, the Father supported the children by paying fees exceeding $60,000 for their memberships in various clubs, paid for various travel expenses, and established a $500,000 trust fund for their education or medical expenses. The Father ceased paying section 3 and section 7 support to the Mother once each child commenced university in 2010 and 2012. He instead contributed $10,000 per semester for their school tuition and living expenses and $1,500/month when they were not in school by depositing money directly into their accounts.

In June 2015 (when the children were 20 and 22 years old), the Mother filed an application seeking $1.1 million in retroactive child support going back 10 years to the date of the Agreement. The hearing judge considered whether the Mother was entitled to retroactive child support, and if so, in what amount. The hearing judge first found that both parties had full and complete financial disclosure during the mediations that led to the Agreement and had acknowledged this in the Agreement itself. Considering the factors outlined in DBS v SRG, 2006 SCC 37, the judge then found that by waiting 10 years after execution of the Agreement, the Mother had unreasonably delayed in bringing her application for retroactive support. The judge also found that the father was financially generous with his children and did not avoid his obligations or prioritize his interests over their right to appropriate support. The children "lived an extremely privileged life and benefitted from the high incomes of both of their parents", and furthermore, they were no longer children of the marriage. While there was no evidence that the Father would suffer any hardship associated with a retroactive award, there was also no evidence that the children would benefit from such additional support. The hearing judge thus concluded that there was no entitlement to retroactive support and dismissed the Mother's application.

The Court of Appeal recognized that the hearing judge's findings of fact were entitled to deference and noted that no palpable and overriding error had been established by the Appellant Mother. The judge's interpretation of the Agreement and assessment of whether the Father had underpaid or overpaid his child support obligations between 2005 to 2015 was also entitled to deference. The parties had different interpretations of the child support obligations under the Agreement and the Agreement failed to define "total actual income" for the purpose of calculating those obligations. Regardless, the Appellant Mother's position and calculation had failed to consider the comprehensive nature of the Agreement and no reviewable error in the judge's assessment of the party's positions was proven by the Mother on Appeal. The Mother did not demonstrate that the judge erred in law by rejecting her interpretation of the Agreement and thus denying her application for retroactive support. Appeal dismissed.

**Practical Implications: Be aware of delay. Make sure to consider both defining and including a method to calculate Guideline Income in Agreements/Orders.**

## 4. ALB v CVL, 2019 ABCA 94

Frederica Schutz J.A., Sheila Greckol J.A., Dawn Pentelechuk J.A.

Appeal from the Order of G.D. Kendell J.C.Q.B.A *Enforcement of Time, Best Interests*

This appeal case concerned setting aside an interim contact order. The biological Mother (CVL) and her former female partner (ALB) conceived a child through artificial insemination while in an adult interdependent relationship. The biological Father did not become directly involved with the child until after CVL and ALB separated in August 2018, 8 months after the child was born. After separation, the biological Father and CVL married and the CVL denied the ALB's access to the child as of August 29, 2018. The court was advised of the marriage at the hearing of the appeal.

In September 2018, ALB filed an application for guardianship, parenting, enforcement of time with the child, determination of child support, declaration of parentage, and interim order for parenting under the Family Law Act. ALB was ultimately successful as the chambers judge made an interim without prejudice order granting the ALB contact time with the child. The chambers judge also directed the parties to attend an oral hearing and set the terms for that hearing. CVL appealed this ruling, seeking to set it aside and have the parties re-apply in family law special chambers or at trial, as well as direct that the biological father be named as a party.

After the parties appeared in regular family law chambers, the chambers judge saw that substantive issues should not be addressed in regular chambers and directed the parties to return the next day so she would have the opportunity to review the evidence. While the parties disputed many aspects of their relations, the chambers judge did find through the materials filed that the child had a relationship of some significance with ALB since birth and held it to be in the best interests of the child for the interim without prejudice contact order to be made. The chambers judge also declined to make a parenting or guardianship order as she further recognized that it was not appropriate to do so on affidavit evidence in regular chambers.

The Court of Appeal noted that the standard of review of the chambers judge's interim order is deferential and decisions on custody and access may only be intervened with by an appellate court if the judge erred in law or made a material error in appreciation of the facts (para 16). While CVL raised several grounds of appeal, they were all dismissed, including most notably: i) whether the chambers judge erred by allowing ALB's claim to be heard without serving the biological father or naming him in the action, and ii) whether the chambers judge erred by changing the current parenting arrangement in regular family law chambers contrary to Practice Note 2.

Non service of the biological father did not prejudice him as his interests were represented by CVL's written and oral argument. No useful purpose was found to be served by remitting the matter to the lower court for a fresh hearing on the interim contact order. It was held that the biological father's interests in having contact with the child were not prejudiced by an order granting contact to ALB, in part because CVL had married the biological father, and logically, "their interests respecting parenting time with the child have coalesced" (para 22). Further, the Court held that the interim order did not make a substantial change to the parenting arrangements as ALB already enjoyed regular contact with the child prior to her separation from CVL and interim parenting orders may be appropriate in certain cases where it is in the best interests of the child. Appeal dismissed.

**Practical Implications: Chambers judges are entitled to make some decisions on an urgent and interim basis even with conflicting evidence before the Court.**

## 5. Blanchard v Blanchard, 2019 ABCA 53

Frederica Schutz J.A, Sheila Greckol J.A., Dawn Pentelechuk, J.A.

Appeal from the Deciscion of J.A. Fagnan J.C.Q.B.A *Retroactive Child Support, Imputation of Income, Undue Hardship*

This appeal case concerned child support related decisions made at the Court of Queen's Bench following a special chambers hearing. The parties married in 1997 and divorced in 2007 with a divorce judgment and corollary relief order granted in 2007. The Order provided that the Father would pay child support of $1,013 per month based on an income of $70,000 per year. The parties agreed to exchange financial disclosure each year, but did not settle on any provision for Section 7 expenses at the time. They parties two children were ages 21 and 16 at the time of the appeal hearing and the Mother was the primary caregiver to the children.

The Mother had filed to vary support payable by the Father, retroactive to October 2015. She submitted that support payable should accord with the Father's income, which she asserted he had actually earned; or alternatively, that the father's income should be imputed to a level equal to what he was capable of earning during that period. The Father had cross-applied, seeking a retroactive order to reduce child support payable based on undue hardship.

Between 2007 and 2015, the Father was employed in the offshore oil industry and voluntarily increased his support payments. He started a new relationship after the separation and fathered two children. He then became unemployed in late 2015 due to a downturn in the industry and shortly before he became unemployed, he began making reduced support payments of $1,000 per month when the eldest child turned 18. The Father remained unemployed for most of 2016 and was the sole income earner for his new family. He continued to make support payments from savings, eventually reducing payments to $250 per month. He later purchased a laundromat business in New Brunswick and found employment as an electrician in 2017.

While the Mother acknowledged that the Father was unemployed for a period of time in 2015 and 2016, she submitted that the Father's income should be imputed at $150,000 per year, retroactive to October 2015, in accordance with his previous pattern of employment and training as a journeyman electrician. The Mother further submitted that while the eldest child had turned 18 on October 2015, he remained a full-time high school student until June 2016 and had ongoing personal issues requiring continued parental care and attention. The Mother provided no evidence of any diagnosis of mental illness, addiction, or any other circumstance that would prevent him from obtaining gainful employment at the chambers hearing.

The Chambers judge ultimately held that the Father had not proven facts sufficient to establish undue hardship. The judge imputed no income to the Father in 2016, and imputed income of $53,000 for 2017 based on his tax return information. Additionally, the judge found that the Mother's anecdotal evidence regarding the eldest child was insufficient to prove that he was still a child of the marriage. The Mother appealed the decision.

On appeal, it was noted that the Court will only interfere with a child support order if there has been an error in principle, a misapprehension of the evidence, or the award is clearly wrong (Goett v Goett, 2013 ABCA 216, 553 AR 275) and that a judge's discretion to impute income is subject to the same standard (Hickey v Hickey, [1999] 2 SCR 518, 172 DLR (4th) 577). Furthermore, the appeal court noted that a forgiveness of arrears is a matter of judicial discretion whereby the judge must be satisfied on a balance of probabilities that the former spouse or judgment debtor cannot and will not be able to pay the arrears (Haisman v Haisman (1995), 157 AR 47, 1994 ABCA 249).

The Court of Appeal concluded the chambers judge correctly found that the Father had not established undue hardship as the requirement, on a balance of probabilities, that he could not then pay, and will not at any time in the future be able to pay, the arrears had not been satisfied. They also concluded that the chambers judge had made no error in not imputing income to the Father by finding there was insufficient evidence to conclude that the Father was intentionally underemployed with the intent of avoiding his child support obligations. The chambers judge was additionally found not to have erred in finding that the eldest child was no longer a child of the marriage after graduating from high school in June 2016 as the child's history had been extensively reviewed with no evidence that he had made any concerted, independent efforts to further his education or find employment. Appellate intervention was found to be unwarranted in this case.

**Practical Implications: Assertions without evidence are worthless.**