VOGEL

THE TOP 5 QUARTERLY FAMILY LAW REVIEW

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1. MAM v WEM, 2019 ABQB 478

A.W. Germain J.C.Q.B.A

Judicial Notice, Safety, Mobility

In MAM v WEM, the Court was tasked with determining whether it was in the best interests of a 15 year old to temporarily relocate to China with her mother for 12 months. Two adult dependent children would also be moving with the mother.

The reason for the one year relocation was that the mother's teaching contract in rural Alberta would be expiring. The mother had sent out numerous applications in Alberta and British Columbia in addition to applying to teach in China. In response, the mother was offered a one year contract to teach in China.

The Court questioned whether the mother had standing to make the mobility application, noting a strong argument could be made that there was no change in circumstances as at the time of the divorce the mother was living and teaching in rural Alberta and had always contemplated that she would have to move around. In any event, the Court went on to consider the best interests of the children as paramount.

While the mother's position was that the children would be given the opportunity to explore "at the street level" a culturally exotic and different country, the Court commented that the cultural experience and opportunity had to be balanced against the disruption to the children. The Court was concerned that the family had no experience with the Chinese culture and language, and took judicial notice of the fact that the Canadian Government had recently increased its risk assessment for travel to China to "exercise a high degree of caution in China due to the risk of arbitrary enforcement of local laws".

Ultimately, the Court declined the mother's application for a temporary relocation, having considered the best interests of the children, as follows:

- The mother failed to provide any assessment or analysis in her materials about how she would escape a bad situation in China, if it developed;
- The mother identified the cultural experience, but minimized the disruptive risk to her middle son who was nearly through grade 12 and her oldest son who had mental health issues and assessed no disadvantage to her daughter by being removed for one year from studies in Canada;
- While the submission that the children would be participating in a Nova Scotia curriculum taught in China perhaps may have been a parallel, it was not viewed as the same as schooling in Alberta; and
- The family required the Canadian social net, given the identifiable mental health issues that existed on the part of the oldest child.

The Court recognized that any job the mother may receive may take her further from the father, but that the trip to China for a year was a stretch too far. The Court concluded that the mother had not proven on a balance of probabilities that it was in the best interests of the 15 year old to go to China and that the potential disadvantages of the temporary relocation out-weighed the cultural experience.

Practical Implications: Cultural experience/opportunity may be outweighed by disadvantage to the children when it comes to social safety nets.

2. Stuve v Stuve, 2019 ABCA 142

Frans Slatter J.A., Barbara Lea Veldhuis J.A., Dawn Pentelechuk J.A.

Appeal from the Decision of M.E. Burns J.C.Q.B.A. *Property, Date of Division, Lengthy Separation*

Stuve v Stuve is an appeal of a trial decision dividing matrimonial property. The primary issues at trial were: (1) the treatment of two interim distributions to the parties, (2) whether the distribution of $50,000 to each of the children should be considered a gift from the wife alone and (3) the division of the husband's post separation debt of $115,699. At trial, the Judge found that despite the parties' separation for 6 years, their financial lives continued to be highly interconnected, such that it would not be unjust or inequitable to divide the property and post-separation debts equally. The $50,000 gift to each of the children, however, was seen to be a gift by the wife alone.

The Court of Appeal confirmed that displacing the presumption of equal distribution of matrimonial property is not to be reached lightly. However, relying on the presumption of equal division does not relieve the Court of undertaking an analysis of the discretionary factors set out at section 8 of the Matrimonial Property Act to ensure the division ordered is just and equitable in the circumstances. The Court of Appeal thus overturned the trial Judge's decision as follows:

Interim Distributions: Each of the spouses had purchased real property with amounts received by way of interim distribution, the wife having purchased a property outright, while the husband made a small down payment and incurred a large mortgage in respect of the property he purchased. The trial Judge had attributed the real property and associated debts to the parties in the distribution of matrimonial property.

The Court of Appeal identified a clear error in the trial Judge's treatment of the interim distributions, finding that "the agreed upon distributions, and any property purchased with those funds, should not have formed part of the matrimonial property distribution. The property had already been divided through the interim distributions." The Court of Appeal confirmed that where matrimonial property is divided to facilitate an interim distribution, it is an error to consider the property purchased with such distributions a second time as part of the overall property division.

Distributions to the Children: The parties signed an acknowledgement that they were in agreement with a distribution of $50,000 to each of their two children and the wife transferred such amounts to the children. The father later expressed his desire to see the children become financially independent and that any funds given to the children would be from the wife's share of matrimonial property. The trial Judge found that the husband strongly opposed providing the money to the children and directed that $100,000 be placed in the wife's asset column so as to credit the husband with $50,000.

The Court of Appeal found the document signed by the father was clear and that there was no reason to allow the father to resile from the terms of the document he signed. Furthermore, the Court of Appeal observed that the parties had demonstrated a history of generously providing for their children, and that this had been part of the parties' ongoing financial interconnection. The Court of Appeal directed that the gifts in the amount of $100,000 should not have been included on the equalization chart.

The Husband's Post-Separation Debt: The parties were debt free at separation, however at the time of trial, the husband claimed $591,834 in debt composed of a mortgage on a property purchased post separation, personal taxes, credit card debt and a line of credit. The trial Judge determined the $115,000 in credit card and line of credit debt was joint debt and divided it equally between the parties.

The Court of Appeal overturned the trial Judge's treatment of the credit card and line of credit debt, finding that the trial Judge misapprehended the onus on the husband to establish the purpose for which the debts were incurred and instead justified an equal division of the husband's debt on a lack of evidence which was an error. The Court of Appeal confirmed that it is the onus of the party incurring debt after separation to demonstrate that the debt was used for the benefit of the family and not solely for the debtor's own purposes and that where it cannot be established, that section 8 of the Matrimonial Property Act permits an unequal distribution of the debt to the party that incurred it.

Practical Implications: There must be a consideration of section 8 factors of the Matrimonial Property Act.

3. Vavrek v Vavrek, 2019 ABCA 235

Frederica Schutz J.A. *Child Support, Disclosure, Stay*

The decision of Vavrek v Vavrek dealt with a stay application. The father had been ordered by Justice Mah to provide a number of financial documents (the "Mah Order"). The mother believed the father failed to provide all financial documents pursuant to the Mah Order and accordingly filed a contempt application and sought further disclosure. At the show cause application, Justice Sullivan ordered the father to produce an expert guideline income report within 30 days, that the parties complete questioning within a further 15 days and that a special chambers hearing be scheduled, if necessary, rather than ordering the father to provide further financial disclosure (the "Sullivan Order"). The mother appealed the Sullivan Order, arguing that she could not proceed to questioning without full disclosure. The father filed his expert guideline income report and served the mother with an application to compel questioning, following which the mother filed an application for a stay of the Sullivan Order.

The Court of Appeal underwent an analysis with respect to the test for a stay, as set out by the Supreme Court of Canada in RJR–MacDonald Inc v Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 334-335, 111 DLR (4th) 385. In completing its analysis, the Court of Appeal noted the obligations for disclosure set out previously in Cunningham v Seveny, 2019 ABCA 4 and identified that to the extent that the stay application raises the best interests of the children, such interests were paramount, impacting all three parts of the test for a stay.

Serious Issue to be Tried: The Court of Appeal found in considering the best interests of the children, that there was a serious issue to be tried. The Court ought to primarily focus on the best interests of the children because child support is their entitlement, and in any event, the issue to be tried was serious, not frivolous or vexatious.

Irreparable Harm and Balance of Convenience: The Court of Appeal considered the second and third branches of the test for a stay together. The Court of Appeal relied upon the statements of the Supreme Court of Canada in DBS v SRG, 2005 ABCA 2 (CanLII) at para 133, 249 DLR (4th) 72, reversed on other grounds 2006 SCC 37 (CanLII), [2006] 2 SCR 23:

"The obligation to provide the proper amount of financial support for a child does not depend on the existence of a duty to disclose. It works the other way around. The duty to disclose is part of the obligation to pay support where the regime requires information about the payor's income to determine the appropriate level of support."

Through this lens, the Court of Appeal considered whether proceeding to questioning (and potentially a special chambers hearing) before the appeal of the order would be heard would cause irreparable harm and whether proceeding to questioning would likely render the appeal moot, and thus tip the balance of convenience towards granting a stay.

Ultimately, the Court of Appeal found that missing material from the father's financial disclosure would affect the mother's ability to fully and completely question the father on his financial disclosure. Relating the issue back to the best interests of the children, full and fair financial disclosure was necessary to allow for a determination of the father's income available for child support, which was the entitlement of the children. The Court of Appeal concluded that the test for a stay pending appeal had been met and granted the mother's application for a stay.

Practical Implications: The duty to disclose is paramount when it comes to child support.

4. Corlett v Cavanagh, 2019 ABQB 316

J.S. Little J.C.Q.B.A *Interdependent Partner, Employee*

At issue in Corlett v Cavanagh was whether the nature of the parties' 18 year relationship considered them adult interdependent partners ("AIPs")under the Adult Interdependent Relationships Act, SA 2000, c A-4.5 (the "Act"). Ms. Cavanagh had sued for unjust enrichment and support and Mr. Corlett had defended same by claiming that their relationship was one of "friendship and employment" and thus Ms. Cavanagh's application should be dismissed.

The Act provided the framework for Justice Little's analysis, specifically its definition of a relationship of interdependence, setting out the criteria of adult interdependent partners. Justice Little examined the nature of the parties' 18-year relationship who met in 1999 and began dating in 2000 when Mr. Corlett was 57 and Ms. Cavanagh was 27. Relevant circumstances of this relationship related to the AIP Act criteria included:

Shared Lives: The parties shared each other's lives extensively. They regularly vacationed together, cohabited together in Alberta when he was there and British Columbia when she was there (accompanying him on his parenting visits), spent Christmases together (also with each other's children). While Mr. Corlett noted that he was good to all his employees, he did not vacation with or provide gifts (ie. $30,000 worth of jewelry or a Lexus) to his other employees.

Emotional Commitment and Economic/Domestic Unit: The parties exchanged "loving emails" and had a continuous conjugal relationship, kept each other company, socialized and cooked meals together. Ms. Cavanagh was clearly financially dependent on Mr. Corlett and he supported her financially. There was an "indicia of mutual support of each other's children and the children were clearly integrated into their relationship". Mr. Corlett assisted Ms. Cavanagh with her drug abuse problems, and it was not found to be an open relationship.

Despite Mr. Corlett's affidavit evidence that he had attempted to lay down 'ground rules' for their relationship including:

"I only date women between 26 and 29. They want a good time. After 29, they want three things: marriage, baby and picket fence. So we can date, but when you turn 29, we're done"

Justice Little did not accept Mr. Corlett's attempts to minimize the length and quality of the relationship between the parties. Justice Little was satisfied that the parties were clearly AIPs within the meaning of the Act.

Practical Implications: Ensure you are prepared for a written decision.

5. JLB v WMB, 2019 ABQB 323

D.A. Labrenz J.C.Q.B.A *Variation, Retirement, Dissipation*

In JLB v WMB, an application to vary spousal support was brought by the husband after almost 30 years of marriage. He sought to reduce or terminate support payable as he had complied with the parties' original order granted in 2003 (the "Original Order") and paid nearly $2,000,000 in spousal support over the years. The parties' matrimonial property division had also been completed years earlier and resulted in each party receiving approximately $1,000,000 in non-taxable assets.

At the time of this application, the husband was 73 years old and retired. The wife was 71 years old and sought spousal support to continue past the husband's retirement. The wife also sought a retroactive increase in support due to the husband having a line 150 income that surpassed what was contemplated by the court in 2003.

While the husband had significant financial assets and a retirement income of $171,000 per year, the wife had no income and no financial assets, no longer having her share of the matrimonial property nor generated income from same. Justice Labrenz made clear that spousal support can continue past retirement but need, ability to pay, as well as double dipping (e.g. pension income) must all be considered.

In regards to the wife's application for a retroactive increase in support, it was noted that her application for retroactive support was delayed and not made until 4 months after the husband filed his application to reduce or terminate support. Further, Justice Labrenz found that if spousal support was going to increase, it should have been during the husband's income-earning years. After retirement, such an increase would cause financial hardship for the husband. Despite the husband having accumulated a strong financial position, the wife's hardship was not due to any failure by the husband to provide sufficient support. The application for retroactive adjustment was denied.

Regarding the husband's application to vary support, Justice Labrenz found that the husband had demonstrated a material change of circumstances (retirement, age, and nearly $2,000,000 in support already paid) that would justify a variation to the Original Order. Justice Labrenz also found that at the time of the Original Order, the court clearly contemplated a change at the time of retirement, stating: "…if he retires that doesn't mean that this level of support will continue".

While it was noted as reasonable for the husband to ask how responsible he should be for the wife's poor money management and that the wife's non re-entry into the workforce was related to mental health issues, Justice Labrenz found it indisputable that had the wife made proper use of her share of the matrimonial assets and the high level of support she had received, she would have reached a level of self-sufficiency by the time of this application. Instead, the wife had dissipated every last cent.

Although Justice Labrenz ultimately found that the wife's compensatory claim for spousal support had not been extinguished, the husband's application to vary the Original Order was granted and his spousal support was reduced to $3,000/month indefinitely.

Practical Implications: Expect as a payee of spousal support to make a reasonable effort to use equalized assets/support in an income producing way.