THE TOP 5 QUARTERLY FAMILY LAW REVIEW
INCLUDING 5 BONUS COVID-19 CASES

Volume 2, Issue 3

1. Scott v MacLean, 2020 ABCA 173

M. Paperny, J.A.; T.W. Wakeling, J.A.; R. Khullar, J.A.

Appeal from the Order of G.R. Fraser, J.C.Q.B.A.

Mobility; Parenting Plan

The parties had two daughters, ages 4 and 5, of whom they shared parenting pursuant to a Separation Agreement stating that they shall split parenting time 60% (Mother) and 40% (Father) and must live within a 40-kilometre radius of one another. The Father resided in Edmonton and was employed as a firefighter which required him to do shift work. The Mother accepted employment in Saskatoon that allowed for a 4-day work week, and on that basis sought to relocate the children to Saskatoon.

The Special Chambers Judge dismissed the Mother's application, causing her to appeal the decision on the basis that the Chambers Judge failed to "consider the effect of separating the children from their mother; and the misapprehension of, or failure to consider, key evidence".

In reviewing the decision of the lower Court, the Court of Appeal reiterated the test set out in *Spencer v Spencer, 2005 ABCA 622* and *MacPhail v Karasek, 2006 ABCA 248*, as follows:

"The relevant inquiry is to the children's best interests, evaluated in the new circumstances as found…compared to its affect on them if they are not allowed to move. The children's best interests must be assessed in the new circumstances, its impact on them if they stay or if they go."

The Court of Appeal also stressed that they must assume the parent seeking to relocate will do so and should not consider a third alternative in the analysis, being whether it is better for the children if no one moves.

In the case at hand, the Court of Appeal found that the Chambers Judge did not assess the best interests of the children in the context of them living in Edmonton without their Mother versus living in Saskatoon without their Father. They noted that the Chambers Judge considered the risk to the Father if the children moved to Saskatoon and the reduced parenting time that would result, but failed to consider the impact on the children should the Mother move to Saskatoon without them. The Court determined this was an error in principle warranting appellate intervention.

The Court of Appeal also agreed with the Mother that the Chambers Judge had misapprehended or overlooked some evidence, namely, by scrutinizing the Mother's proposed parenting plan and failing to consider that the Father had presented no parenting plan whatsoever. The Court of Appeal took issue with the Father's lack of plan, finding that, where the parent opposing a move provides no evidence as to how the children will be cared for if they stay or how that parent proposes to ensure contact with the relocating parent, as was the case here, then "the only reasonable inference for how the chambers judge could have concluded that that scenario was in the children's best interests was to inferentially rely on the status quo; which is impermissible and an error of law."

The appeal was allowed, and the Mother was entitled to move with the children to Saskatoon.

Practical Implications: The test with respect to mobility remains that set out in MacPhail and Spencer, namely, that the best interests of the children must be determined by assessing the effect on the children of staying with one parent in their current location versus relocating with the other. A detailed parenting plan should be put before the Court to assist in determining the best interests of the child in a mobility application.

2. CRC v DAJC 2020 ABCA 143

F. Schutz, J.A.; S. Greckol, J.A.; R. Khullar, J.A.

Appeal from the Order of J. Gill, J.C.Q.B.A. *Imputing Income; Gifts*

The parties married in 1993 and had 4 children prior to their separation in 2007 and subsequent divorce in 2009. At the date of separation, the Father was earning an annual income of $200,000 and paid both child and spousal support based on same. However, in 2008, the Father went on disability leave resulting in his income decreasing to $84,000 per year and the support Order was varied accordingly.

In 2008, the Father began residing with a new partner who would eventually become his wife in 2012. Prior to marrying, the Father signed a pre-nuptial agreement whereby he waived any interest in her property, including the wife's corporation ("T Co"). The Father began working for T Co in September 2009, earning an annual salary of $52,000.

In 2012, the support Order was once again varied and set the Father's income at $100,000. This Order also required the parties to exchange their income tax returns and notice of assessments annually. The Father's disclosure was sparse, and the Mother brought an application in 2018 for the missing information. She also successfully applied for disclosure from the Father's new spouse and T Co.

The disclosure from T Co and the Father's new spouse revealed that T Co was a successful company with annual revenues of between $6 and $11 million in the three years before the Mother's application, and that the Father's new spouse's income had been at least $1 million per year over the same three year period. The new spouse had significant assets including real estate and vehicles and paid all of the family's day-to-day living expenses like food, gas, housing costs, and vehicle costs, the benefit of which the Father enjoyed, though his line 150 income for the previous three years was only between $67,500 and $77,800.

In August 2019, the Mother applied to impute income to the Father for child support, for child support retroactive to 2013, and to seek contribution to Section 7 expenses. The chambers judge imputed the Father's income to $250,000 retroactive to 2013 and found that he was responsible for 75% of the Section 7 expenses. The chambers decision noted that one of the objectives of the *Federal Child Support Guidelines* is that children benefit from the "financial means" of both parents. The Father appeared to be living beyond his income as his credit card statements revealed that he was spending a greater amount per month (approximately $4,000/ month) than his net monthly income ($3,800/ month).

The Father appealed the chambers decision on the grounds that it was an error to impute income to him and an error to set Section 3 support and Section 7 expenses in this instance because of one of the adult children's ability to contribute to his post-secondary education costs.

The Court of Appeal agreed with the lower Court in finding that the Father had financial means greater than his line 150 income. However, the appeal was granted with respect to the quantum of imputed income.

In coming to their decision, the Court of Appeal noted that in determining whether a Line 150 income reflects a payor's guideline income, the Court may draw evidence from the individual's lifestyle. They further noted that gifts are not typically included in the payor's guideline income, however, "gifts to payor parents have been attributed as income when they are regular, long standing, materially affect the payor parent's standard of living and are likely to continue". In the case at hand, it was significant that the Father's expenses were paid by the spouse and that he was able to service monthly expenditures greatly in excess of his net income.

The Court of Appeal deviated, however, from the Chambers Judge's decision in terms of quantum and specifically noted that the Chambers Judge did not provide an explanation in how he reached $250,000 as the appropriate imputed income for the Father. In the interest of judicial economy, the Court of Appeal provided that the Father's income should be imputed at his line 150 income plus $4,000/ month as per the credit cards statements and $2,000 for his northern tax deduction.

The Father's second ground of appeal regarding Section 3 and Section 7 expenses was dismissed by the Court.

Practical Implications: A gift may be included in income for the purposes of support where a party can demonstrate they are regular, long standing, materially affect's standard of living, and is likely to continue.

3. SR v TR, 2020 ABQB 251

C.M. Jones, J.C.Q.B.A.

Costs; Retroactive Child Support

The parties were married in 1993 and separated in 2006. A high-conflict dispute primarily in relation to custody and access issues eventually culminated in a four-day trial on retroactive Section 3 child support and Section 7 expenses. The parties had two children, who at the time of trial were in their twenties. At trial, the Mother sought approximately $200,000 in retroactive Section 3 child support and $12,000 in retroactive Section 7 expenses from 2010 to 2017, when the youngest child ceased to be a child of the marriage.

The Mother also sought costs of the trial on a solicitor and own client basis, as well as approximately $366,000 in costs on a solicitor and own client, full indemnity basis, representing the total historical costs she claimed were incurred in two related and consolidated actions carried on in the Court of Queen's Bench, as well as costs in respect of an action in the Provincial Court of Alberta. The costs related to over 25 different Court appearances predominantly on the custody and access issues, and also included disbursements for mental health professionals and costs to produce expert evidence from the commencement of the action in 2007 to the start of trial in 2019. In total, the Mother sought a payment from the Father of nearly $600,000.

Justice Jones granted the Mother's claim for retroactive Section 3 child support and Section 7 expenses and dismissed her claim for costs, other than those directly attributable to bringing the matter of retroactive child support and the matter of costs to trial.

On the issue of retroactive child support, Justice Jones found that the Father had failed to provide a reasonable level of support commensurate with his income for an extended period of time and a retroactive award was appropriate. Based on the blameworthy conduct of the Father, retroactive support was awarded from 2010 forward.

On the issue of costs, Justice Jones concluded that the costs of all previous applications were not intended to be addressed at trial as the filed documents and process leading to trial did not convey that the parties intended or agreed to address historical costs as an isolated issue. Nonetheless, the decision of Justice Jones considers the merits of the Mother's claim.

Rule 10.29(1) of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*Rules*") establishes that the successful party to an application, proceeding or action is entitled to costs payable forthwith, unless otherwise ordered by the Court. In making a costs award, the Court may consider a list of factors under Rule 10.33(1) and 10.33(2), including results of the action, degree of success of the parties, conduct of the parties within the actions, and delay in or failure to seek costs.

Regarding the result of the action and degree of success of the parties, the Mother's submissions were largely related to the custody and access issues, which were not issues for the trial dealing with retroactive child support. Consequently, Justice Jones was not in a position to determine success and failure, whose actions interfered with whose, whose actions facilitated the children's best interests, or which applications were necessary or frivolous. A request for historical costs would be a request to consider whether or not Justice Jones agreed with the conclusions arrived at by previous attending Justices, without the benefit of evidence on those issues. Accordingly, there was no "event" in respect of which costs could follow.

Similarly, there was no basis on which to assess the parties' conduct years after the custody and access issues were decided. Evidently, previous attending Justices did not view these considerations as sufficient justification to award costs at the time despite being immediately involved.

Regarding the Mother's delay in or failure to seek costs, Justice Jones concluded that considering the default rule for costs in each application before the Court, and in light of the fact that the parties were already present before the Court in each dispute, the fact that neither party had addressed costs was not justified. Costs should have been addressed on an ongoing basis, by those familiar with the action and with the parties' conduct in the action.

Finally, Justice Jones found no authority for the Court of Queen's Bench to award costs in respect of matters heard in Provincial Court. On the issue of disbursements, the Court cannot judge the appropriateness of third-party costs incurred to achieve results on matters not immediately in issue. Finally, given the circumstances, there was no evidence showing that the Father was guilty of litigation misconduct to justify solicitor and own client costs.

Practical Implications: Costs must be addressed on an ongoing basis. There is no justification in waiting to claim historical costs.

4. PDB v AJB, 2020 ABQB 298

M.J. Lema, J.C.Q.B.A. *Status Quo; Shared Parenting*

The Father applied in morning chambers for a first-time parenting Order directing shared parenting. He had previously exercised access at his Mother's residence during the first three months of the parties' separation, followed by approximately six months of two-consecutive-weekends-per-month access once he had his own residence. In support of his application, the Father pointed to more-or-less shared parenting before separation. The Mother proposed that the status quo that developed after separation (i.e. the last six months) should continue until a special application could proceed. At issue before the Court was the significance of status quo parenting when determining interim-parenting arrangements, particularly first-time Orders.

Justice Lema surveyed recent caselaw including *Sorenson v Cooney, 2018 ABCA 17, Krause v Krause, 2018 ABCA 293, Hopkins v Delavin, 2018 ABCA 415, LDM v WFT, 2017 ABCA 106, HG v RG, 2017 ABCA 89, Thember v King, 2020 ABCA 97, DSW v DLW, 2009 ABQB 279, Dimmock v Featherstone, 2010 ABQB 773, Gebert v Wilson, 2015 SKCA 139, Miller v White, 2018 PECA 11*, and *CDJ v HR, 2020 NBCA 5* and collected the following synopsis of "status quo" principles:

1. The overarching factor is the best interests of the child or children involved;
2. The status quo parenting is a factor in gauging the "best interests" interim parenting arrangement;
3. That includes both the pre- and post-separation status quo;
4. As between those two, the pre-separation status quo will usually be more significant (typically representing a longer period of parenting and the "baseline" for the family);
5. A parent's agreement, after separation, to a particular interim arrangement, should not be treated as a waiver of the right to seek a different (longer-term) arrangement;
6. The significance of post-separation status quo may be particularly diminished where:
   a. It is short-lived;
   b. It resulted from one parent's (i.e. unilateral) decision (e.g. moving with the child or children); or
   c. It was affected by one parent's inability, or reduced ability, to parent in the aftermath of the separation (e.g. arranging suitable accommodation and adjusting work schedules).
7. On the other hand, the longer the post-separation status quo, and particularly where it extends beyond the "immediate adjustments" stage, the more significance that status quo may acquire;
8. On that aspect, a party may provide an explanation for apparent delay in applying for a parenting Order i.e. other than simply agreement, or acquiescence, to a new status quo; and
9. The status quo parenting (in either period) may be difficult, if not impossible, to determine in a chambers setting e.g. because of conflicting evidence. In such case, it minimizes or even disappears as a factor.

In this case, it was not possible at the regular-chambers stage to determine who had the primary-parenting role, or what percentage of parenting each party had carried prior to separation, however, the Mother had clearly been the primary parent since separation. Justice Lema found that continuation of the parties' existing two-consecutive-weekends-monthly access for the Father was in the children's best interests for several reasons:

- The children had been based in the Mother's home for 9 months since separation;
- The Father had not pushed for any midweek access or any form of enlarged access over the most recent 6 months;
- There was no evidence of the children's unhappiness with the existing arrangement;
- The pre-separation parenting arrangements did not add weight to the analysis due to lack of clarity in each party's role;
- The Father did not explain why he had not applied for shared parenting or propose it to the Mother until six months had passed after he had moved into his new residence;
- The driving-time-per-day for the children in relation to school and extra-curricular activities favoured the existing arrangement (outside of pandemic);
- The parties had agreed to facilitate daily contact with the non-residential parent.

Overall, Justice Lema found that the Father's actions over the previous six months reflected a willingness to parent on the existing arrangement and that the Father had, until very recently, viewed it as an acceptable holding pattern.

Practical Implications: The significance of pre- and post-separation status quo parenting arrangements will change as time progresses and must be assessed in context, with regard to the length of time a parenting arrangement is in place, the reason for a particular arrangement, and the efforts made by a party to change the status quo or their apparent willingness to continue with it.

5. MacDonald v Brodoff, 2020 ABCA 246

F. Schutz, J.A.; R. Khullar, J.A.; D. Pentelechuk, J.A.
Appeal from the Decision of N.E. Devlin, J.C.Q.B.A. *Shared Parenting; Nuanced Approach*

This is the appellate decision arising from *GM v JB 2019 ABQB 772*, featured in Volume 2, Issue 1 of the Alberta Top 5 Quarterly. In that case, the Father brought an application to vary retroactive and ongoing child support two years after the parties moved to a shared parenting arrangement. The chambers judge determined that there would be a retroactive adjustment of child support for July 2017 – December 2018 using the set-off of the parties' table amount based on their guideline incomes, with no support being paid by either party on an ongoing basis. At the time of the decision, the Mother had been unemployed since 2018, though she was a lawyer with an impressive resume.

In his decision, Justice Devlin found that, notwithstanding the Alberta Court of Appeal's decision in *Hunt v Smolis-Hunt, 2001 ABCA 229*, wherein they determined that income may only be imputed where there is proof of specific intention to undermine or avoid support obligations, that the case law allowed for a more nuanced approach in the context of a shared parenting analysis. Specifically, he found that Section 9(c) of the *Guidelines* calls for an inquiry into the parents' "means", as distinct from their actual achieved income, and that the *Hunt* requirement for a specific-intent to avoid support obligations does not logically apply to the broader assessment of the parents' means. Justice Devlin endorsed a "broad, holistic view of a family's unique circumstances" to render a result that is fair and functional for them and found that "earning potential" can be properly factored into the "means" analysis under Section 9(c) of the *Guidelines*.

Considering the factors set out in Section 9, Justice Devlin found that the actual incomes of the parties, and the table amounts of child support payable, were a poor proxy for the parties' historical pattern of earnings and overall capital positions, and that based on the parties' "means" no ongoing child support was payable.

The Mother raised multiple grounds of appeal, all of which pertained to the chamber judge's approach to the Section 9 analysis. The Court noted that the appeal brought by the Mother engaged two main topics, namely, the "imputation of income for the purposes of determining the Table amount of child support payable, and the resultant determination of child support payable in the context of shared parenting."

With respect to the first concept, the imputation of income, the Court noted that their earlier decision in *Hunt v Smolis-Hunt, 2001 ABCA 229* is binding precedent standing for the proposition that income "can only be imputed for child support purposes where "the obligor has pursued a deliberate course of conduct for the purpose of evading child support obligations".

With respect to the second concept, the determination of child support payable in the context of shared parenting, the Court noted that the Supreme Court of Canada's decision in *Contino v Leonelli-Contino, 2005 SCC 63* is binding precedent with respect to the analytical framework that must be applied for interpreting the Section 9 factors.

The Court of Appeal noted that both these precedents have caused practical challenges to family law litigants and have been subject to criticism, however, they remain binding authority. As such, the Court could not accept the nuanced approach endorsed by Justice Devlin, finding that it amounted to an error in principle. Particularly, the Court found that:

"The chambers judge erred in principle in finding that the s 9 framework subsumes the need to determine the amount of Table support payable by each party under s 9(a) and any resulting need to determine whether income should be imputed. Further, we conclude that Hunt and the test for imputation of income under s 19 does apply to s 9 child support assessments, and s 9(a) assessments in particular."

The Court found that Section 9 of the *Guidelines* is a complete system and while the Courts have broad discretion, it does not allow a judge to forego a determination of the Table amounts owing under Section 9(a) of the *Guidelines*. Accordingly, imputation of income is a necessary step in determining the "amounts set out

in the applicable tables for each parent".

Further, the Court emphasized that the test in *Hunt* was not made out on the facts. The chambers judge noted that it was "unreasonable for [the Mother] to seek subsidization" from the Father for her choice to not pursue employment more aggressively. However, the test in *Hunt* is not reasonableness, rather there must be an "intention to avoid or undermine child support obligations".

Notwithstanding these errors, the Court found that a consideration of the Section 9 factors pursuant to the analytical framework set out in *Contino* does support the chambers judge's conclusion that no child support should be payable by either party. Particularly, the finding by the chambers judge that the Father had increased costs associated with shared parenting (Section 9(b) consideration) militating toward a reduction in the support payable, and that the parties both had significant means by way of assets, with the Mother having a greater net worth than the Father (Section 9(c) consideration).

The Court emphasized that the over-arching policy behind Section 9 that is often overlooked is that "children should enjoy a reasonably consistent living standard in each home" and that an assessment of the condition, means and needs goes beyond guideline income and considers each party's financial position and lifestyle. They further emphasized that Section 9 affords "tremendous discretion" to a judge in arriving at a support figure they think is fair in the circumstances, and viewed contextually and holistically, the chambers judge's conclusion in this case was reasonable.

At the end of their decision, the Court of Appeal makes some "Concluding Comments" which are very informative for the family law bar with respect to child support in shared parenting regimes and imputing income, and we have therefore reproduced them in full as follows:

Shared Parenting and Child Support

"…engaging in a full Contino analysis is prohibitively expensive for most family law litigants because a fulsome analysis depends on a robust evidentiary record. This includes, at a minimum, statements of assets and liabilities and detailed household budgets that outline not only the total family expenditures, but those related to the children—both fixed and variable…"

"…the wide discretion afforded under s 9 creates unpredictability…"

"Thus, it is not surprising that many family law litigants and their lawyers decline to engage in a comprehensive Contino analysis; rather, the default position in shared parenting tends to be the simple set-off approach—that is, taking each parent's Table amount of support, and having the higher income earner pay the net amount to the other parent."

"… the greater the income disparity between the parties or the more pronounced the difference in living standards, the less a simple set-off approach will meet the policy objectives behind s 9. Similarly, where one parent can demonstrate a disproportionate contribution to child expenses, a quick acceptance of the simple set-off approach runs the risk of unfairness."

"To the extent possible, a significant variation in the living standard children enjoy as they move between homes should be avoided. This has a sound basis in policy: to prevent a child's "drift" toward the parent that provides the significantly superior living standard."

"…Contino emphasizes there is no presumption that s 3 base support will be reduced because one parent has crossed the 40% threshold. This helps avoid the "cliff effect"—a dramatic reduction in child support received despite parenting time only increasing by as little as 1%—which effect can motivate a primary care parent to oppose even small increases in access…"

"Family practitioners and litigants should be cautious about defaulting to a simple set-off approach. The non-exhaustive list of factors to first consider includes:

Is there significant income disparity between the parties?

Is there an obvious difference in living standards between the parties?

Is one party clearly bearing the majority of the child expenses such as school fees, clothing and extra-curricular activities that fall outside s 7?

Any of these factors should give pause to whether a simple set-off is fair and appropriate."

Imputing Income

"Alberta is the only jurisdiction in Canada that has interpreted s 19(a) of the Guidelines, which allows for the imputation of income to a parent who is "intentionally under-employed or unemployed", as requiring something akin to bad faith. All other jurisdictions apply a reasonableness standard…"

“Even to Alberta trial Courts, the test set out by the majority in Hunt has been identified as unsatisfactory, and many have distinguished Hunt to circumvent having to apply the stringent test.”

“This Court has full reconsideration powers. Hunt may be upheld, over-ruled or varied, but it may be time to look at this issue again.”

Practical implications: Where a shared parenting regime is present, the family law bar and litigants must consider the actual incomes of the parties and the amount of support payable based on same, but should not be too hasty to apply the straight set-off, particularly where the income disparity between the parties is great. Rather, the appropriateness of the set-off should be considered in conjunction with the means, needs and circumstances of the parties and any increase in the costs of the parties due to shared parenting. The test with respect to imputing income is not different in shared parenting regimes, Hunt v Smolis-Hunt and the stringent test arising therefrom remaining binding precedent.