VOGEL

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

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1. Unterschultz v. Clark, 2020 ABQB 755

A.W. Germain, J.C.Q.B.A. *Stay of Enforcement; Vexatious Litigant*

The parties had been involved in a high-conflict matrimonial dispute for many years and attended private arbitration to determine the issues of spousal support and matrimonial property division. The Arbitrator's Award (the "Award") directed the husband to pay periodic spousal support of $5,000 per month plus a $5 million lump sum spousal support award. The Award also stated that if the husband declared bankruptcy or insolvency, any unpaid balance of the equalization payment would convert to retroactive spousal support to enable registration and enforcement by MEP.

The husband challenged the Award via judicial review, which resulted in the Court directing that that Arbitrator provide more fulsome reasons to justify a lump sum spousal support award of $5 million. The Arbitrator's supplemental reasons expanded on the Award; however, the quantum of periodic and lump sum support remained undisturbed.

The husband accumulated extensive spousal support arrears and faced enforcement from MEP threatening both his driver's license and passport. The husband sought a stay of enforcement of the arrears as well as encouragement for MEP to help him get his driver's licence back. The wife sought to have the Award registered as a judgment of the Court, to have some aspects of the Award clarified and to declare the husband a vexatious litigant, amongst other remedies.

Notably, on the eve of the application, the husband made an assignment in bankruptcy.

On the issue of the stay, Justice Germain noted that the husband is not the type of person who is entitled to equitable relief as he consistently resisted paying any spousal support and he preferred other creditors to his ex-wife. Justice Germain also noted that the husband was at liberty to negotiate a settlement with MEP based on his needs and means in order to have his drivers license returned and that he could apply for a review of his ongoing support obligation to be heard in a special chambers application or trial.

The Court granted a stay on the payment of spousal support for a short period of time, noting there was much in play in this litigation "including creditor claims, further potential appeals and court challenges, and the involvement of a Trustee, who may also impose cash flow restrictions" on the husband. The Court also recommended that MEP authorize the return of the husband's driver's license.

On the issue of registering the Award as a judgment of the Court, both parties agreed that, under the *Arbitration Act* RSA 2000, c A-43 (the "Arbitration Act"), the Court should "track the lawful rulings of the Arbitrator in a judgment of the Court of Queen's Bench". However, the parties disagreed on the details from the Award to be included.

In particular, the husband and one of his creditors, Black Earth Products Inc. ("Black Earth") contested including in the judgment the portion of the Award that converted any outstanding equalization payment into spousal support because the Court lacked the jurisdiction to do so.

Justice Germain noted that pursuant to s. 49(7) of the *Arbitration Act* the Court must track the wording of the Award, unless (1) doing so would be prohibited by the *Arbitration Act*; (2) would exceed the jurisdiction of the Court; or (3) would fail the common-sense test.

Justice Germain noted the Arbitrator was ensuring payments in the face of potential bankruptcy and the interplay between property division and spousal support. However, he found there was no basis in law for converting an equalization payment into spousal support in the event of bankruptcy, commenting:

the courts generally do not prefer giving one creditor an advantage over another creditor simply by a declaration in the event of a bankruptcy. Nor do the courts prefer giving a creditor an advantage over a debtor who elects to go bankrupt.

Justice Germain declined to add this aspect of the Award to the Judgment. However, he found the wife was entitled to a vendor's lien over the assets that the Award directed she transfer to the husband, and that she would not be obligated to transfer assets to the husband's trustee until she received the equalization payment that she was owed pursuant to the Award. Justice Germain also granted the wife leave to make an application to transfer the unpaid vendor's lien to a preferred spousal support payment if it became necessary.

With respect to the wife's application to have the husband declared a vexatious litigant, the Court denied the relief, stating:

It is rare for a litigant retaining competent legal counsel throughout, and advancing what he perceives as his legal rights, to be declared a vexatious litigant. A declaration of a vexatious litigant is one who continues to relitigate the same issues even after they have been finally decided by the Courts. Abandoning appeal positions close to the date of the appeal hearing is not in and of itself evidence or indicia of a vexatious litigant; nor is an application to review spousal support that was made on an interim basis. Mr. Clark was throughout represented by prominent members of the bar, all who took an oath of office not to pursue frivolous or vexatious matters. This type of application is tantamount to criticizing the ethics of Mr. Clark's counsel in a public and aggressive way.

Practical Implications: The Court can only register as a judgment those aspects of an arbitration award which are within the Court's jurisdiction and do not defy principles of common sense. In an arbitration, counsel should contemplate and seek relief to protect their client's interest in the face of potential bankruptcy.

2. Stuve v Stuve, 2020 ABCA 467

Wakeling J.A., Greckol J.A., Hughes, J.A. *Rule 4.16, Arbitration*

The parties were married in 1986 and separated in 2012. The husband commenced a family law action in 2015. In 2019, the parties agreed to participate in a Binding Judicial Dispute Resolution ("JDR") with the Associate Chief Justice K.G. Nielsen to address outstanding issues related to the distribution of corporate assets and spousal support. Despite agreeing to this process, the terms of the Binding JDR Agreement were not agreed upon prior to the onset of the COVID-19 pandemic, such that no Binding JDR Agreement existed. The Binding JDR was cancelled as a result of the pandemic court closure.

The wife proposed to the husband private arbitration in the interest of expediting a resolution. After the husband refused her proposal, she applied for an Order directing the parties to private arbitration. The chambers judge dismissed the wife's application as there was no urgency, no consent, and no contractual provision to bind the parties to private arbitration.

The wife appealed the decision on the basis that the Court had erred in their consideration of the *Rules of Court* in refusing to direct the parties to arbitration. She relied on sections of the *Arbitration Act*, Rule 4.16 of the *Rules of Court*, and the Court announcement which accompanied the recent amendment to Rule 4.16 to support that, in agreeing to attend a Binding JDR, the parties had opted out of the litigation process and the Court had the jurisdiction to order arbitration.

The wife also sought direction from the Court as to the jurisdiction of a judge to order parties to arbitration in light of "differing treatment" of this question between judicial centres in Alberta, based on *Hasham v Kanji [Hasham]*, an oral chambers judge's decision in Calgary. In Hasham, the father sought an Order that the parties be directed to a mediation/arbitration process. The mother was agreeable to mediation but opposed arbitration. Nonetheless, the Court ordered mediation/arbitration. The mother appealed the Order and sought a Stay Pending Appeal. In an oral decision, the Court of Appeal denied the stay. In a further written decision (*Hasham v Kanji, 2020 ABCA 283*) the Court of Appeal ordered security for costs against the appellant stating that her appeal had "little or no prospect of success". The wife argued the rejection of the stay application and the Order for security for costs implicitly confirmed the chambers judge had the jurisdiction to direct the parties to mediation/arbitration absent consent.

The wife's appeal was dismissed.

The Court held that the chambers judge did not have the authority to order parties to litigation to participate in private arbitration without their consent. Rules 4.16(3) and (4) provide authority for the Court to direct the parties to a non-binding dispute resolution process; however, foundational Rule 1.2 contemplates resolution "in or by a court process". There is no authority to order a process outside of the Court, such as private arbitration,

without the consent of both parties.

The Court of Appeal concluded that absent specific legislative language authorizing the Court to do so, there is no power to order parties to litigation to participate in an extra-judicial private process like arbitration.

Our Court of Appeal also rejected the wife's argument that the parties had "opted out of the Court process" by agreeing to a Binding JDR, finding that a JDR judge is not equivalent to the role of a private arbitrator and is still a court process to which parties are entitled.

Finally, the Court held that the chambers judge did not err by imposing different tests in different regions of Alberta, as the decisions in Hasham were not conclusive with respect to the issue before the Court in this appeal.

Practical Implications: Any ambiguity arising from the amendments to Rule 4.16 is now resolved. The Court does not have jurisdiction to order parties to attend private arbitration without their consent. Parties to litigation are entitled to access court processes for resolution of their disputes.

3. AB v SN, 2020 ABQB 706

M.J. Lema, J.C.Q.B.A. *Contempt, Best Interests*

The parties were parents to a 13.5-year-old daughter. They had a long history of litigation which came to a head in 2015 when the mother moved with the child (then 8 years' old) without the consent of the father, or court authorization, from Edmonton to Prince Edward Island and eventually to Mexico. The mother and daughter stayed in Mexico for the next four years, during which time the father visited numerous times. Shortly after her departure to Mexico, the Court issued a warrant for the mother's arrest, as a result of civil contempt.

In September 2019, the child moved back to Edmonton to live with the father with the consent of the mother who remained in Mexico. This arrangement lasted only a short time and in January 2020, the child flew back to Mexico without the father's knowledge or consent. It was later determined that the mother had surreptitiously arranged for the child to be driven to the airport in Edmonton and to fly unaccompanied to Mexico while the father was at work. In April 2020, the mother and daughter returned to Edmonton due to increasing fear associated with the COVID-19 pandemic. The mother was arrested upon landing in Canada and released shortly thereafter. In May 2020, the Honourable Madam Justice J.A. Fagnan granted an Interim Order granting primary parenting to the father and limiting the mother's access to "through counsel".

The mother brought an application for primary parenting, which the father opposed. The Honourable Mr. Justice M.J. Lema determined that the child should return to the primary care of the mother in Edmonton after a thorough consideration of the "best interests" factors under s. 18 of the *Family Law Act*.

Justice Lema determined that both parties were sufficiently resourced and motivated to meet the child's physical needs, but that the mother was more in tune with the child's psychological and emotional needs, including education support and extracurricular activity. Justice Lema further found that the father, having taken no concrete or useful steps to secure the child's return to Canada from Mexico, had essentially acquiesced to the child remaining there with the mother. Justice Lema determined that the mother had played the more prominent parenting role for 5 years and that the child had generally blossomed more while under the mother's care than the father's, which clearly favored the mother's bid for primary parenting.

Moreover, the child expressed a clear preference to her counsel to return to her mother's full-time care, with access for her father. In considering the authenticity of the child's preference and weight to place on it, Justice Lema found that there had been no coaching and that the child's preference was informed, rational, clear, and authentic. Further, it was determined that the child's view should be given significant weight given her age, maturity, understanding, and life experience.

Justice Lema acknowledged the father's exasperation with the mother's runaway with the child in 2015 and the removal of the child from Edmonton again in January 2020; however, noted that the focus should be on the child's best interests rather than vindicating the father's characterization of the mother's past conduct. Considering the child's best interests and despite the mother's disregard for the father's relationship with the child in 2015 and in January 2020, the mother was granted primary care and the father received access every-other-weekend.

Practical Implications: The best interests of the child, now and in the future, will prevail over previous poor conduct of parents (including removal of the child from the jurisdiction) in determining parenting arrangements.

4. AJL v JTB, 2020 ABQB 649

M.J. Lema, J.C.Q.B.A. *Child Support Arrears; Severance*

The mother brought an application before the Honourable Justice M.J. Lema for increased retroactive child support from the father for the years 2014-2019 on the basis that the father had made inadequate disclosure of his "higher-than-understood" income for several years and failed to pay s. 7 expenses. The father opposed the application on the basis that his disclosure was adequate, the appropriate amount of child support was paid (with the exception of the 2018-2019 year), and that he bore no responsibility for the s. 7 expenses. While the father conceded one year of underpayment, he sought relief for undue hardship.

The primary issue before the Court was the treatment of a significant severance payment received by the father in 2017, which amounted to $189,840 and increased his employment income in that year from his regular income of $333,795 to $520,767. The parties disagreed as to how to treat the severance payment, whether as a component of the father's income for 2017, or as "an extraordinary and non-recurring receipt requiring adjustment of the father's income under s. 17" of the *Child Support Guidelines* (the "Guidelines"). The mother's position was that the father should pay support based on his annual "Total income" in the T1 General (as per s. 16 of the Guidelines) and on this basis, the father underpaid by $38,771 for that year. Conversely, the father submitted that his severance payments should be backed out entirely, or a three-year average should be applied.

In support of her position, the mother relied on *English v Steeves, 2001 ABCA 195* wherein the Court upheld the lower court's decision to include severance in the payor's income. The father, in turn, relied on *Ewing v Ewing, 2009 ABCA 227* wherein the Court endorsed a "running-average approach". However, Justice Lema favored the approach taken in *McDonald v McDonald, 1997 ABCA 409* and J*essen v Jessen, 2018 ABCA 59*, where the Court treated a severance package as an acceleration of the income that would normally be earned by the payor over a period of time.

Justice Lema did not accept either parties' position as the "accepted Alberta approach", which is to count severance pay as income and allocate it to the period for which it was earmarked. The Court compared the $189,840 in severance with the father's average monthly income of $37,000 to determine the severance applied for a period of 5-months. The father was terminated in September 2017, so the severance applied from October 2017 – February 2018 and was added to his guideline income for the appropriate years.

As the father's income was over $150,000.00, the Court then considered whether any adjustments were warranted under s. 4 of the Guidelines. The father argued such adjustments were warranted on the basis that the net severance amounts were used to clear debt, including paying off his second spouse's car loan and reducing mortgage debt on rental properties. The Court found that it was appropriate to depart from the table amount to exclude the severance in the circumstances based on the following:

- The father, and his second family, did not experience an enhanced standard of living as a result of the severance pay;
- The father's debt payments are an investment in the future and did not result in an increase in standard of living; and
- The mother failed to demonstrate, "with details, what particular reasonable needs for the child were going unmet and how much she and her husband had had to spend to meet them". The Court did not have a child expense budget or any equivalent to rely on to find that the mother and her husband were making up for an underpayment of base-level-income support.

Notwithstanding the Court's decision to adjust the father's income under s. 4, there was still an underpayment by the father of base support for 2018-2019. Justice Lema found that the father had still made a significant income in the year his employment ended and that it was unreasonable for him to use his entire severance for debt payment without consideration for his support obligations. Justice Lema did not accept the father's position that he was unable to pay arrears on the basis of undue hardship. An assessment of the parties' respective standard of living in 2017 demonstrated that the father still had an edge on the mother's household.

Justice Lema found the father owed the mother arrears for the year 2018-2019, such amount to be defrayed by any expense incurred by the father in covering the mother's proportionate share of counselling expenses for the child.

Practical Implications: Severance payments are income for the purposes of determining child support and should be allocated for the period of time for which it was earmarked.

5. Keeder v AlGendy, 2020 ABCA 420

Antonio, J.A. *Binding JDR*

The parties married in 2011 and separated in 2017. They had one child together. In February 2020, a Consent Order was granted allowing the mother to relocate to the United States of America with the child, and which also directed the parties to schedule a binding Judicial Dispute Resolution ("JDR") to resolve outstanding issues in relation to parenting time, child support, and decisions about the child's upbringing.

The JDR was scheduled for July 2020 before the Honourable Madam Justice C.S. Phillips. The parties entered into a JDR Agreement whereby they agreed to resolve the outstanding issues through the JDR process rather than by trial. Both parties received independent legal advice before signing the JDR Agreement. Although the scheduled JDR was described as "in lieu of a Binding JDR", the parties agreed that Justice Phillips could make binding recommendations. Notably, the JDR agreement stated as follows:

In the event that the parties do not reach an agreement to resolve the matters in these proceedings, Justice Phillips will make recommendations which the parties hereby agree to be final and binding upon both of them by entering into a Consent Order at the conclusion of the JDR. Justice Phillips shall have authority to make any substantive or procedural recommendations related to the outstanding issues outlined in paragraph 5 of [the February 14, 2020 Order], including the issue of costs.

Two Consent Orders resulted from the JDR, setting out terms for custody, parenting, child support, and a blanket travel authorization for the mother to travel internationally with the child.

The father subsequently instructed his counsel not to sign the Orders and filed a Notice of Appeal in August 2020. The mother filed a cross-application to have the Notice of Appeal struck as the father did not have the required permission of the Court to appeal Consent Orders. The father applied for permission to appeal, and if granted, for a Stay Pending Appeal of the Consent Orders.

Among the father's alleged errors of fact and law was that the JDR was labelled non-binding, and therefore it could not have binding effect. The Honourable Madam Justice J. Antonio presided over the application.

Justice Antonio noted the decision of *JW Abernathy Management & Consulting Ltd v 705589 Alberta Ltd* and *Trillium Homes Ltd, 2005 ABCA 103*, where the Court of Appeal held that parties may agree in advance that a judge's opinion will be binding:

Litigants are free to resolve a dispute in any manner they wish. They may, for example, agree to flip a coin, consult a Ouija board, or let a third party decide. The parties agree on the mechanism for settlement and are bound by their agreement. In the case of a binding JDR, the parties agree not only to participate in the JDR, but also to implement the judge's views if they are unable to negotiate a settlement. What makes the JDR "binding" is the parties' binding contractual commitment: the judge's decision is imposed on them as a result of their contract, not the court's authority. Therefore, if the settlement falls apart, the parties must sue on their contract, not enter a judgment based on the judge's opinion.

Justice Antonio found that the JDR Agreement in this case, regardless of whether the JDR itself was labelled "binding" or not, had clearly set out the effects of participation. The father's dissatisfaction with the results of the JDR did not entitle him to renege afterward.

The father also alleged errors of receiving hearsay evidence and making incorrect findings of fact, which Justice Antonio noted cannot apply to a JDR given that the rules of evidence do not apply as they would in a trial. Furthermore, Justice Antonio held that the parties' agreement to confidentiality in the JDR process prevented an independent assessment of any "trial-like" errors. The father further alleged that Justice Phillips was biased against him; but, due to the confidential process and lack of any record, Justice Antonio found there was no basis for the Court to review or assess the discussions that took place.

Ultimately, the father was denied permission to appeal as Justice Antonio was not satisfied that any of his grounds of appeal had a reasonable chance of success, his proposed appeal did not raise any legal question of general importance, and in the circumstances, an appeal would cause undue prejudice. Given the denied permission to appeal, it was unnecessary to consider the father's application to stay the Orders and the mother's cross-application to strike the appeal.

Practical Implications: Parties to a JDR agreement, regardless of label, who agree to be bound by the recommendations of the presiding judge will be held to those terms.