THE TOP 5 QUARTERLY FAMILY LAW REVIEW

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1. Thalheimer v Chalut, 2021 ABQB 19

R.A. Graesser, J.C.Q.B.A. *Limitation; Cohabitation*

The parties cohabitated for 25 years before separating in 2016. In March 2020, the Applicant brought an action seeking partner support under the *Family Law Act*. The Respondent argued the claim for partner support should be dismissed as being barred by the *Limitations Act*.

The issue before the Court was whether the *Limitations Act* applies to applications for partner support under the Family Law Act. Justice R.A. Graesser determined that the *Limitations Act* does not apply to claims for support by separated adult interdependent partners but acknowledged that a delay may undermine retroactive claims.

Justice Graesser began his analysis with a summary of the relevant legislation. Notably, sections 56 and 57 of the *Family Law Act* oblige adult interdependent partners to provide support for each other, but do not establish any deadlines. However, section 2 of the *Limitations Act* states the Act applies to all claims for remedial orders sought in a proceeding before a Provincial or Federal Court. In other words, although the *Family Law Act* does not provide deadlines for partner support claims, nothing precludes the application of the *Limitations Act*. Although this suggests that time limits apply to partner support obligations, Justice Graesser concluded that limitations would contradict the obligations of partner support under the *Family Law Act.*

Notably, the *Family Law Act* encourages independence following separation. However, applying the limitation period would undermine this goal and require Courts to determine how long a separated party can try to be independent before realizing the need for partner support. Justice Graesser concluded that there is no principled reason why common-law spouses should be treated differently from married couples.

Applying this reasoning to the case before him, Justice Graesser concluded that the *Limitations Act* does not apply to claims for support by adult interdependent parties in Alberta. However, he qualified this conclusion by noting that the limitations period may still apply to retroactivity issues in *Family Law Act* claims. Such claims are highly fact specific and ultimately discretionary in nature.

Applying this conclusion to the case at hand, the limitations defence was not available to the Respondent. Instead, Justice Graesser held in favour of the Applicant and granted an interim order for support from the date of application. This decision left the retroactive claim covering the period between the date of separation and application to be determined by a special application.

Practical Implications: The *Limitations Act* does not apply to claims for support by separated adult interdependent partners in Alberta. However, delays in bringing an application may undermine claims for support, especially regarding retroactive payments.

2. MK v CF, 2021 ABQB 194

M.J. Lema, J.C.Q.B.A *Restraining Order; One-Time Threat*

The Applicant husband and wife ("Applicants") obtained a Restraining Order against a woman ("Respondent"), whose husband had a multi-year affair with the Applicant wife. Shortly after the Respondent learned about the affair she went to the Applicants' home and, while she did not end up seeing the Applicant wife, said words to the effect that if I ever saw [the Respondent] again I would knock her lights out. The Applicant wife called the police who warned the Respondent not to contact the Applicant wife again. Additionally, the Applicants' lawyer issued a formal letter requesting that the Respondent cease any and all communication with the Applicants. Three months after the incident, the Applicants applied for and were granted an *ex parte* Restraining Order.

On review of the *ex parte* Restraining Order, the Applicants requested that the Restraining Order be confirmed

and extended for one year. The Respondent requested the Restraining Order be set aside or, alternatively, be replaced with a mutual no-contact order. The issue before the Court was whether an acknowledged one-time threat of bodily harm, viewed in its extramarital-affair-revelation context, is sufficient for the Restraining Order to be confirmed and extended.

Mr. Justice M.J. Lema presided over the review. He outlined that a key factor on review of a Restraining Order is whether it is still necessary, noting that although a threat may fuel initial fear, this fear may dissipate in some circumstances, resulting in the Restraining Order no longer being necessary. In this case, Justice Lema considered whether the one-time nature of the threat could be regarded as a one-off reaction to the unexpected or unusual circumstances, with no material risk of repetition or escalation.

In exploring whether the behaviour should be regarded as a one-off reaction, the Court cited *ED v JS, 2020 ONSC 1474* as follows:

A Restraining Order will be made where a person has demonstrated a lengthy period of harassment... There should be some persistence to the conduct complained of and a reasonable expectation that it will continue without Court involvement.

Although Justice Lema found that the Applicants were alarmed immediately following the threat that the Respondent would knock [the Applicant wife's] lights out, there was insufficient evidence of a material risk of the Respondent acting on her comment. The Court noted that the Respondent had no history of violence or any other anti-social conduct, thus reducing the likelihood of continued harassment and a material risk of repetition or escalation. Justice Lema found that the threat in this case was an unfortunate but understandable one-time eruption.

In coming to this conclusion, Justice Lema further cited case law surrounding single threats that are not intended to be taken seriously and out-of-character actions (*Fuller v Cryer, 2010 ABQB 622; Stave v Chartrand, 2004 ONCJ 79*). In both scenarios, the context and circumstances surrounding a threat can provide evidence as to whether a single threat can ground a continuing fear. Specifically, a stressful situation, uncharacteristic behavior, and a highly emotional dispute can lead to initial, but not continuing fear.

Ultimately, Justice Lema relied on the fact that the Applicants did not apply for a Restraining Order immediately after the Respondent made the threat. Notably, the Applicant wife was content to rely on the police warning and lawyers' letter for three months before applying for a Restraining Order. Justice Lema concluded that although the Applicant wife was initially fearful immediately following the threat, that fear has dissipated and can no longer anchor the Restraining Order. The Court declined to grant the one-year extension of the Restraining Order, instead directing the issue to a viva voce hearing with the existing Restraining Order to remain in place pending the outcome.

Practical Implications: A one-time threat of bodily harm, viewed in the context of unexpected circumstances, without a material risk of repetition or escalation, is insufficient to support an extension of a Restraining Order.

3. Henderson v Micetich, 2021 ABCA 103

Paperny J.A., Watson J.A., Wakeling, J.A. *Retroactive Child Support; Undue Hardship*

The parties were in a common law relationship from 2004 to 2009 and have two children aged 17 and 15. The parties had no separation agreement and until 2018, no Court orders addressing parenting or support. The mother had primary care of the children for the 11 years following separation, with the father exercising access on alternate weekends. After separation, the parties agreed to a child support arrangement in which the father was to pay the mother $800.00 per month, though from 2013 to 2017 the father's payments exceeded this amount. The father did not pay any section 7 expenses for the children following separation, nor was he asked to contribute.

In 2018 the father applied for increased parenting time, and the mother cross-applied for section 3 child support, both retroactive from January 1, 2017 and ongoing, as well as section 7 expenses beginning in 2019. An interim without prejudice order was granted in June 2018 providing that the father would pay section 3 child support of $1,169.00 per month and 73% of section 7 expenses, all commencing June 1, 2018. The child support amounts were based on an estimated income of $80,000.00 for the father, which was significantly lower than his actual income which information was not provided to the mother or the Court at the time the order was made.

In September 2020, the mother's child support application was heard by Justice Bercov in Special Chambers. Justice Bercov found that for 2018 through 2020 the father had underpaid section 3 child support by $18,603.00 based on the father's guideline income. However, Justice Bercov refused to award any retroactive child support

on the basis that the children were well provided for by their mother's new husband and requiring the father to pay retroactive child support would cause him hardship. The mother appealed.

On appeal, the Alberta Court of Appeal ("ABCA") noted that Justice Bercov had treated the mother's application as one for retroactive support, when in fact that was not what was sought by the mother. As the mother made her application in May 2018, the Court was entitled to make a finding for that entire year. Nevertheless, the ABCA found that they must address legal errors in Justice Bercov's analysis for a retroactive award.

Justice Bercov relied on the seminal decision of the Supreme Court of Canada in *DBS v SRG, 2006 SCC 37* which sets out the four factors a trier of fact must take into account in a retroactive support claim, namely (1) the reason child support was not sought earlier, (2) blameworthy conduct by the payor parent, (3) the circumstances of the child, and (4) the existence of hardship for the payor parent.

With respect to why support was not sought earlier, Justice Bercov found that the mother was satisfied with the parties' arrangement, and only sought support in retaliation to the father's application for increased parenting time. On appeal however, the ABCA notes that DBS is out of date, and fails to put an adequate emphasis on fairness for the recipient parent and the children whose right to child support has been jeopardized. The ABCA relied on the recent decision of *Michel v. Graydon, 2020 SCC 24* from the Supreme Court of Canada which relooked at the law related to retroactive support claims. In Michel, the SCC identified many valid reasons for a delay on the part of the recipient parent. When considering a delay Courts must consider the broader social context, including intimate partner violence and access to justice, recognizing that a delay is not inherently unreasonable. The ABCA took this one step further saying, delay will rarely substantially prejudice a payor parent and has a very limited role to play in determining the success of an application for retroactive child support. The ABCA held that Justice Bercov erred in finding a delay and overlooked the children's entitlement to support.

When considering blameworthy conduct, Justice Bercov held that the father's conduct was reasonable because he was paying child support in an amount previously agreed to by the parties. On appeal, however, the ABCA cites *Goulding v Keck, 2014 ABCA 138* for the premise that the payors intention is irrelevant. What matters is whether the payor's conduct has the effect of privileging his or her interests over the child's right to support. The ABCA held that the father's conduct was blameworthy because he did not disclose his income until a notice to disclose was served. Further, he was aware, or ought to have been aware, that he was paying support below the Guideline amount. Notwithstanding this finding, the ABCA noted that blameworthy conduct is not a necessary precondition for an order for retroactive support. A retroactive award ought not be punitive, but rather, restorative for the recipient parent and children.

Looking at the circumstances of the child, Justice Bercov heavily weighed the fact that the mother's husband was providing a high standard of living for the children and concluded that retroactive child support would provide no benefit for the children but would produce hardship for the father. On appeal, the ABCA held that this was an error in law. There is no requirement to prove a need on the part of the children, as child support is a right the child is entitled to. A payor parent cannot avoid a retroactive award simply because one parent has married a high-income earner.

For the fourth factor of undue hardship, Justice Bercov considered section 10 of the *Federal Child Support Guidelines* and held that an award for retroactive child support would pose a significant financial burden to the father. On appeal, the ABCA noted that hardship to the recipient parent and child beneficiary, in addition to the payor parent, must be considered. While section 10 of the *Guidelines* are the starting point, the Court should take a holistic approach to considering fairness. It is not necessary that there be no hardship caused by the award for it to be granted. The claim of hardship must be supported by evidence, and the hardship must be undue. The ABCA held that there was no undue hardship faced by the father in this case, and that any concerns of unfairness could be managed through an adjustment to the amount of the award, or through a payment schedule.

The ABCA allowed this appeal and ordered the father to pay child support arrears of $24,408.90 in monthly installments of $500.00.

Practical Implications: *DBS* factors, while still applicable, must be viewed considering the effluxion of time, and the more recent statements in *Michel*. This includes considering the right of the child to support, and hardship to the recipient parent and children. This decision is the first application of *Michel* by an appellate Court.

4. AB v CD, 2021 ABQB 152

M.J. Lema, J.C.Q.B.A *Contact Order; Significant Relationship; Necessity*

The Applicant was the maternal aunt of three children ages 12, 10, and 8. The aunt sought permission under s. 35(2) of the *Family Law Act* to apply for a Contact Order, which was opposed by the children's father. The children's mother died in 2015.

The Applicant argued that she had a significant relationship with the children until 5 months after their mother's death, when the father cut off her direct access. Between that time and 2018, the Applicant had limited contact with the children when they visited their maternal grandmother; however, since 2018 her access had steeply declined. The Respondent father argued that the children did not have a significant relationship with the Applicant, that their best interests would be served by having no contact with her, and that they already had adequate contact with their mother's family.

Justice Lema undertook a thorough review of Alberta cases considering s.35(2) of the *Family Law Act*, distilling the principles into the following list at paragraph 26:

1. The function of s. 35(4) seems to be to **screen out contact applications that are destined to fail***,* i.e. those that do not have a reasonable chance of success. Alberta Courts largely focus on two "best interests" factors: **the significance of the relationship** in question and the **need for an order***.*
2. Other "best interests" factors may be considered at the preliminary stage – for example, the **effect of the relationship on the child**, and whether the Applicant may be **ill-equipped to provide safe and secure care** during proposed contact.
3. **A full-on best-interests inquiry is not required at this stage**. If leave to apply is granted, a comprehensive best-interests inquiry will then be completed before any contact is ordered.
4. The **low-intensity review** at the leave stage is reflected in most Alberta cases.
5. Regarding "**significance of the relationship**", it is possible to be granted leave to apply for contact even if there is **no** current relationship; however, most of the Alberta cases reflect a clear "significant relationship" hurdle (**i.e. no significant relationship, no leave**).
6. **A biological connection alone** is insufficient to establish a significant relationship.
7. The relationship **need not have persisted through to the contact breach** (if any) i.e. historical relationships may suffice, depending on the circumstances.
8. Other "significance" factors include the **formal nature** of the relationship, the **kind of contact**, the **frequency and intensity** of contact, the **impact of the relationship** on the child involved, the "**durability**" of the relationship, and the **child's preferences** (depending on age/maturity).
9. The "**necessary**" element is designed to screen out destined-to-fail applications (i.e. if the Applicant receives contact without an order, there is no need to grant one).

Upon review of the Applicant's evidence of a significant relationship with the children and the father's evidence in response, Justice Lema found that the aunt did have a significant relationship with the children. Although the Applicant's relationship with the children was limited prior to their mother's death in 2015, a significant relationship developed when the Applicant moved to help the father's family in their time of loss, including helping care for the children. The father welcomed the Applicant's assistance at that time and found it beneficial for the children. That the children had strong connections with other maternal relatives was not relevant to the question of whether the relationship between the Applicant and the children was significant. Given the father's consistent "no contact with aunt" position, a contact order would be necessary for contact to occur.

Upon finding a significant relationship and that no contact would occur without an order, the Applicant was granted leave to proceed with her contact application.

Practical Implications: A full-on best-interests inquiry is not necessary in the determination of an application for leave to apply for contact. Evidence should focus on the significance of the relationship between the Applicant and the children and the necessity of an order.

5. McClelland v Harrison, 2021 ABCA 89

Pentelechuk J.A., Feehan J.A., Khullar, J.A. *Interim Order; Appeal; Fresh Evidence*

The Appellant, Ms. Harrison, appealed portions of an Interim Without Prejudice Order granted following a Special Chambers hearing which set out a shared parenting schedule, interim child support, and interim partner support. The appeal was made on the basis that the Special Chambers judge had failed to take into consideration the best interests of the children, did not look at all the facts, and misapprehended key facts in assessing the quantum of partner support. The Appellant also applied to admit fresh evidence on appeal.

On the issue of fresh evidence, the Court of Appeal determined that nothing sought to be admitted was admissible under the test set out in *Palmer v The Queen, [1980] 1 SCR 759* and dismissed the Appellant's application.

The appeal was dismissed. Madam Justice Khullar and Mr. Justice Feehan observed that support and parenting orders are entitled to deference and that a support order should only be disturbed if it reflects "an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong". This principle is particularly true of Interim Without Prejudice orders. In addition, the Interim Without Prejudice Order of the Special Chambers judge had included built-in reviews for child and spousal support, further amplifying the need for deference.

In separate reasons (concurring in the result), Madam Justice Pentelechuk highlighted comments previously made by the Court of Appeal, including those of Mr. Justice Kerans in *Langevin v Langevin, 1995 ABCA 16*:

- Appeals from interim orders, particularly in family law matters, should be discouraged (at para 2);
- To add delay in the context of an already protracted family law proceeding is "tantamount to abuse of process" (at para 2); and
- Warfare over interim orders is not in the best interests of the parties involved (at para 8).

Justice Pentelechuk observed that Justice Kerans' comments are still true today. Family law litigation, and particularly fast track appeals, drain significant financial, time, and energy resources which could be better put toward the needs of the family. Furthermore, fast track appeals rarely resolve the ongoing issues and will only prolong the conflict between the parties. In recognition of these challenges, the Court of Appeal launched the Appeal Conference Pilot Project for Family Law Fast Track Appeals.

Justice Pentelechuk's comments at paragraph 35 are clear:

It is trite law. Appeals are not a "do-over". They are not a platform to re-litigate and make the same arguments before three new judges, hoping the result will be different. Nor, generally, are they an opportunity to advance new grievances not raised before the chambers judge, or an opportunity to tender new information or evidence that was available and could have been placed before the chambers judge, but was not. Nor can an appellate Court provide relief that was not claimed in the application before the chambers judge (except upon consent of both parties). The role of this Court in this appeal is limited; absent an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong, this Court may not intervene.

Notably, a significant problem in this matter was the number of substantive issues before the Special Chambers judge. There was an application for shared parenting and joint decision-making, an application to adjust child support, an application for partner support, and an application for division of equity in the family home and to determine whether one party stood *in loco parentis* to a child. Family Practice Note 2 restricts the parties in the number and length of affidavits filed, and the number of exhibits, regardless of the number of issues raised. As a result, there was incomplete evidence before the Special Chambers judge on some issues, including those which Ms. Harrison raised in her appeal and sought to adduce new evidence. Nevertheless, there was no basis on which to disturb the Interim Without Prejudice Order.

Practical Implications: Ensure that the issues to be determined in a Special Chambers application are narrow such that all required evidence can be provided and the issues can be properly argued within the constraints of Family Practice Note 2. Appeals of Interim Without Prejudice orders are discouraged.