THE TOP 5 QUARTERLY FAMILY LAW REVIEW

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1. AF v DS, 2022 ABCA 20

Veldhuis JA, Ho JA, Kirker JA

Appeal from the Order by Malik J

Interim Parenting; Procedural Fairness

The parties cohabited from 1998 to 2003 and shared two children, the younger of which was subject of this action. The parties had been engaged in high conflict litigation for many years resulting in many interim Orders and were eventually assigned a Case Management Justice ("CMJ"). In March 2019 the CMJ issued an Order which stipulated that the parties shall have a Practice Note 7 report ("PN7") conducted, that the parties shall cooperate with the parenting expert, and that the father should substantially pay for it. The parties were self-represented.

The parties had a trial scheduled for June 2020 which was cancelled due to the Pandemic. The parties were then directed to morning chambers which set two separate half-day specials to decide the parties' parenting issues in lieu of the full trial.

By email dated December 17, 2020, the CMJ noted that the parties' trial was adjourned *sine die* but that the parties were scheduled to address parenting issues in special chambers in February 2021. She then directed that the matter be adjudicated regardless of whether the PN7 report was completed. This direction was never set into an Order.

The parties attended a half-day special on February 17, 2021 which considered the mother's Application for sole decision-making authority and the father's Application for increased parenting time. Prior to the special, the PN7 was only partially completed. The mother's portion of the PN7 was not completed because the father neglected to pay for it. The report was not provided to the special chambers Justice by the parties but was available for his review on the Court file. At the special, the mother's Application was dismissed and the father's was granted.

The mother appealed the decision asserting that the special chambers Justice erred by:

1. Not appreciating the facts by relying on, or giving improper weight to, an incomplete PN7 report;
2. Not ensuring procedural fairness was provided by relying on the PN7 report without providing notice to the parties and that he decided the outcome prior to hearing submissions given he had already drafted an Order; and
3. Failing to consider whether an increase in the father's parenting time and shared decision-making was in the child's best interest.

The appeal was allowed.

The Alberta Court of Appeal ("ABCA") held that the special chambers Justice erred by relying on the incomplete PN7. The PN7 was the most pertinent information for the mother's case and the father was substantially responsible for paying for the report. However, if he did not pay, the special chambers Application would still proceed on the information available at the time of the hearing. The father therefore controlled the ability of the mother to present her fulsome case. Further, the email from the CMJ was never formalized into an Order which the mother could have appealed so the mother was forced to comply with a direction which injured her argument. It was unclear from the record whether the chambers Justice was aware of the March 2019 Order from the CMJ or the December 2020 email and therefore may have been unaware of the obligation on both parties to assist the Court to address parenting concerns.

In coming to this conclusion, the ABCA stressed the difference between a trial, with *viva voce* evidence, and a special chambers Application, which has none. It was procedurally unfair of the special chambers Justice to treat

the appearance as a trial due to the conflicting evidence and the circumstantial nature of the determination of the best interests of the child.

Ultimately the issue of parenting between this couple was a weighing of credibility in a high-conflict situation. In the Order the special chambers Justice issued, which he had pre-drafted prior to the hearing, the preamble stated "AND UPON reviewing the (sealed) PN7 Parent Psychological Report that has been completed" notwithstanding only the father's PN7 assessment had been completed and that neither party relied on the PN7 in the special.

The ABCA held that a special chambers Justice should consider if the forum over which they are presiding is best suited to determine the best interest of the child, or if a hearing involving *viva voce* evidence might be more appropriate. They further discouraged repeated appearances to alter interim parenting Orders and encouraged maintenance of the *status quo*, absent urgent circumstances, until a proper hearing.

The ABCA further found that it was procedurally unfair for the special chambers Justice to rely on the PN7 report without providing the parties with notice of his intention to do so. They commented that the reasoning of the special chambers Justice to resolve a contentious file in an expeditious manner for the benefit of all parties involved was understandable, but cautioned that the goal of assisting the parties in an efficient manner cannot come at the expense of procedural fairness.

While the special chambers Justice did tell the parties that he had read the report, he did not tell them that he would be relying on it for his finding. In his dismissal of the mother's Application however he stated that "there is nothing in the PN7 report that indicates that you should have sole decision-making of the child." Prior to this decision, it was not clear to the parties that the special chambers Justice was relying on the PN7 report and the mother did not have any opportunity to address the issues she raised regarding the report at the special.

Practical Implications: It is important to consider the venue for the issue being determined. Repeated variations of interim parenting Orders is discouraged and matters are better focused towards a forum which will result in a final determination.

2. YZVM v DTT, 2022 ABCA 87

Schultz JA, Hughes JA, Ho JA

Appeal from the Order by Dario J — *Relocation; Return Order*

The parties married in November 2011 in Colombia. The Appellant mother immigrated to Canada in 2013 and the parties married again in Hythe, Alberta in 2014. The two children of the marriage were born in 2015 and 2020.

In February 2021, the mother left the family home with the children and relocated to a women's shelter in Grande Prairie. On March 2, 2021, the mother obtained an Emergency Protection Order ("EPO"), alleging she witnessed the father engaging in conduct with the children that was sexual in nature. This initial EPO was extended to allow for a Practice Note 5 investigation to take place. RCMP and Children and Family Services investigated but did not file any charges.

On May 26, 2021, the Court terminated the EPO and granted an interim parenting Order. The mother obtained day-to-day parenting time and the father unsupervised parenting time every other weekend, plus one day per week. On June 15, 2021, the father applied for an Order directing the mother return the children to the Beaverlodge/Hythe area and enroll the eldest child in Grade 1 in that community.

On August 16, 2021, the chambers Justice granted the father's Application and ordered that the mother and children return to the Beaverlodge/Hythe area by no later than September 30, 2021.

The mother obtained a stay of this Order pending an appeal on the grounds that the chambers Justice:

1. Erred in requiring she return with the children;
2. Failed to apply the correct legal test and disregarded the best interests of the children; and
3. Erred in appreciating the mother's ability to find suitable housing in the Beaverlodge/Hythe area and the amount of time the children would spend commuting if they remained in Grande Prairie.

The Alberta Court of Appeal ("ABCA") held that the chambers Justice should not have ordered that the mother return to the Beverlodge/Hythe area with the children. The Court amended the language of the Order so only the children were required to return.

The ABCA situated the best interests of the children within 2021 amendments to the *Divorce Act*, RSC 1985, c. 3 (2nd Supp). The Court held that sections 2(1) and 16.9 of the *Divorce Act* require a person who intends to relocate a child of the marriage to notify any other person who has parenting time with the child at least

60 days before the expected date of the proposed relocation. According to the ABCA, these amendments were designed to protect the children's relationship with specified individuals, deter "self-help," and ensure the *status quo* pending a proper hearing to determine the best interests of the children.

The amendments to the *Divorce Act* came into force on March 1, 2021. In other words, the amendments to relocation notice came into effect after the mother left the family home with the children but before any of the ensuing Court Orders. Additionally, the ABCA noted that the mother did not file a cross-application seeking an Order to allow the children to relocate to Grande Prairie before the August hearing took place.

Given the timing of the move and amendments to the *Divorce Act*, the ABCA found that the mother had unilaterally relocated the children without notice to the father or permission from the Court. The ABCA held that the chambers Justice's Order that the children return to the Beaverlodge/Hythe area was designed to redress the mother's unilateral re-location and restore the *status quo*.

Third and finally, the ABCA held that the chambers Justice did not misapprehend the evidence regarding the mother's ability to find suitable hosing in the Beaverlodge/Hythe area or the amount of time the children would spend commuting if the mother was to remain in Grande Prairie.

Overall, despite the slight amendment to the wording of the Interim Order, the ABCA deferred to the chambers Justice and dismissed the appeal.

Practical Implications: A parent who intends to re-locate with the children must notify any other person who has parenting time, decision-making responsibility, or contact under a contact Order, of their intended move at least 60 days before the expected date of relocation. Although these amendments deter "self-help" remedies, if you are forced to relocate without notice it will be important to apply for an Order seeking permission from the Court.

3. Godin v Stone, 2022 ABQB 86

Lema J — *Imputed Income; Gifts; Supervised Access; Decision Making*

The parties cohabited for two years and are parents to two young children, born in 2019 and 2020. The father left the family home in September 2020 and reported the mother to Children and Family Services ("CFS") for perceived inadequate care of the children. The father alleged that the mother was not taking appropriate care of herself which impacted her ability to provide sufficient nutrition to their infant child. This complaint backfired on the father. CFS investigated the parties, finding instead that the father required supervised parenting deeming him unfit due to a positive drug test, addictions difficulties, and subsequent concerns for the children's safety in his care. A safety plan was established by CFS requiring the father's parenting time to be supervised, and at the discretion of the mother. Both parties consented to this safety plan which was then reflected in several subsequent consent Orders.

At trial, the father argued that the supervision requirements were unnecessary and sought unsupervised parenting time. The mother sought sole decision-making authority and child support.

On the issue of supervision, Lema J reviewed the case law and determined that supervision is appropriate when a parent is fundamentally unable or unfit to provide safe and attentive parenting to the children. In this case, by the time of trial, the supervision requirement had been in place for one year and in that time the father had taken steps to address his substance abuse and dependency issues. As there was no evidence of ongoing substance abuse impacting the father's ability to parent, Lema J concluded that supervision of the father's parenting time was no longer required. Instead, conditional access was ordered, forbidding the father from using alcohol and drugs during and prior to parenting time.

On the issue of decision-making, the trial Justice found that because the parties were unable to communicate, collaborate, or cooperate with one another, joint decision-making was not realistic. As the mother was the primary parent, she was awarded sole decision-making authority in every sphere.

On the issue of child support, the trial Justice identified the key issue as "whether almost-daily payments by the father's mother to him should be treated as an additional source of income or resources for him when setting his child-support obligations." The father had been receiving near daily e-transfers from his family members, amounting to approximately $30,000 over a 12-month period. The father's banking records reflected an average of 42 e-transfers per month totaling $2,025 from the father's mother, in addition to his mother's consistent and regular direct payment for several of the father's expenses including his rent, utilities, car insurance, cell phone, and child support for a child from a previous relationship. Between the e-transfers from family members and the father's mother directly paying for the father's expenses, he was receiving an

overall increase to his income of approximately $50,000 per year. The mother argued that the father's income should be imputed based on these substantial and consistent gifts.

Lema J canvassed the case law on the issue of gifts and determined that Courts have imputed a "gift-based" income in circumstances where gifts are regular, frequent, of long duration, were part of the family's income during cohabitation, are likely to continue, without an obligation to repay, are intended to improve standard of living, and which materially improve the lifestyle of the receiving party. However, the Courts have denied imputing a gift-based income in circumstances where almost all of the money was received after the date of separation, triggered solely by the marital breakdown or financial instability, where funds were advanced as loans, or were situation specific such as for medical treatment or supplies.

The trial Justice ultimately distinguished the e-transfers from the father's mother of approximately $2,000 per month from the direct payment of expenses by the father's mother. The payment of expenses was classified as meeting the father's basic needs rather than boosting him into a category of improved standard of living. However, the father's bank records reflected that the kinds of purchases enabled by the e-transfers included purchases of cannabis, liquor, dining out, ordering in, and recreational activities. As such, the e-transfers were classified as improving the standard of living and lifestyle of the father. Ultimately, the facts established that the e-transfer gifts pre-dated the parties' separation, were consistent, regular, lacked evidence to suggest that the payments were loans, and the father's income without these gifts was only slightly higher than minimum wage. Therefore, the trial Justice concluded that it was appropriate to impute a gift-based income to the father of $2,000 per month, grossed up for tax.

Practical Implications: Supervised parenting is required only when a parent is fundamentally unable or unfit to provide safe and attentive parenting to the children. Joint decision making is not suitable when parties cannot communicate, collaborate, or cooperate with one another. Imputing a gift-based income is appropriate in circumstances where gifts are regular, frequent, of long duration, were part of the family's income during cohabitation, are likely to continue, without an obligation to repay, are intended to improve standard of living, and which materially improve the lifestyle of the receiving party.

4. JWS v CJS, 2022 ABCA 63

Veldhuis JA, Hughes JA, Kirker JA
Appeal from the Order by Kenny J

Solicitor-Client Costs

The Appellant father and Respondent mother had been engaged in high-conflict litigation that lasted over seven years with 58 Applications. The parties have five children together which were the subject of a trial in 2016, decision delivered in October 2018. The trial Justice had before him a substantial record including 19-days of evidence from 23 witnesses; meetings between the Justice and the children; numerous interim Applications; a Court-ordered expert report; and written submissions by counsel for the children. The trial Justice granted primary care to the mother with generous access to the father. There were numerous post-trial Applications as well as an appeal by the father that was ultimately dismissed.

The trial Justice retired prior to submissions on costs being made, resulting in a different Justice being appointed to hear the costs issue. Given the father's conduct and the mother's success at trial, solicitor-client costs were ordered against the father, which included costs for approximately 2/3 of the interim Orders that did not address costs. The costs Justice further deducted a lump sum amount of $50,000 to account for Orders that expressly set out how costs of that Application would be addressed. The mother was awarded $424,000 in total costs.

The central issue on appeal was whether the Justice erred in his award of $424,000 in costs.

The father argued that the Alberta Court of Appeal ("ABCA") should not apply any deference to the costs Justice's decision because she was not the trial Justice, and did not review all the relevant materials from the trial. The ABCA found that this argument was inconsistent with *Housen v Nikolaisen*, 2002 SCC 33, wherein the majority held that deference is owed to the lower Court's factual findings and inferences of fact for many reasons other than having heard witness testimony. Moreover, in *Deans v Thachuk*, 2005 ABCA 368, it was held that a discretionary decision on costs "may be set aside if an Appellate Court finds that a judge has misdirected herself on the applicable law or made a palpable error in her assessment of the facts." The ABCA concluded that this was the standard of review applicable to this case.

The ABCA held that the argument that the costs Justice had not reviewed all the trial material had no merit and further that their decision had summaries and quotes from the trial Justice's finding.

The ABCA referred to Rule 10.29 of the *Alberta Rules of Court*, which states that the successful party is presumptively entitled to costs. The ABCA further relied on *DBF v BF*, 2018 ABCA 108, where it was stated that "success in family matters means substantial success, not absolute success." In this case, since the mother was successful with the primary issue dealing with which party would have day-to-day parenting of the children, the costs Justice was right to follow the general rule.

Further, the costs Justice supported her decision by concluding that the father's conduct met six of the circumstances set out in *Jackson v Trimac Industries Ltd*, 1993 138 AR 161, including:

1. Circumstances constituting blameworthiness in the conduct of the litigation by that party;
2. Cases in which Justice can only be done by a complete indemnification for costs;
3. Where there is evidence that the Plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
4. An attempt to deceive the Court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the Plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the Plaintiffs and failing to produce material documents in a timely fashion;
5. Where the Defendants were guilty of positive misconduct, where others should be deterred from like conduct and the Defendants should be penalized beyond the ordinary order of costs; and
6. An attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.

Even though the trial Justice hadn't addressed the *Trimac* factors, the costs Justice's inference from the trial Justice's findings and her review of additional evidence was sufficient to support her conclusion. The Appellate Court held that the costs Justice did not make any palpable or overriding errors when exercising her discretion to award costs and the appeal was dismissed.

Practical Implications: Costs awards are discretionary and entitled to deference. A costs award made by a different Justice appointed for that purpose is not entitled to less deference nor is there a different standard of Appellate review.

5. TLM v JTM, 2022 ABQB 109

Loparco J

Decision-Making; Best Interests

The mother and father are former adult interdependent partners who have a nine-year-old child with complex medical issues. In addition to having asthma, the child was also diagnosed with B-Cell Acute Lymphoblastic Leukemia in 2019, which has required ongoing treatment.

The father has a history of acting reluctantly towards following the child's medical protocols. The mother deposed that the father told her he felt "cancer was fake" and "just a way for the government and pharmaceutical companies to make money." As a result, the Court ordered the father to comply with the child's medical treatment. Since that Order, it was recommended by medical professionals that the child be vaccinated against COVID-19, as it would help reduce his risk of infection. The father did not consent as he believed in theories supporting ideas of the vaccine being experimental and unsafe for use. The father shared his beliefs with the child, causing him to fear the vaccine.

The child's mother proceeded to file an emergency Application seeking an Order providing her with sole decision-making authority with respect to the child's medical needs, and another Order directing the father to take the child to every medical appointment scheduled during his parenting time.

The Court's analysis referred to a number of cases including *Sembaliuk v Sembaliuk*, 2022 ABQB 62, wherein it was stated that Courts may take judicial notice of the COVID-19 pandemic, specifically, "its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission." The Court also relied on the analysis of Justice Kubik in *TRB v KWPB*, 2021 ABQB 997, where she took judicial notice of the fact that Health Canada approved the Pfizer-BioNTech vaccine for use in children from ages 5-17, and that the vaccination is recommended by the Chief Medical Officer of Health for Alberta. Additionally, the Court took further judicial notice of the fact that children who are immunocompromised have a higher risk of severe illness or death if they contract COVID-19.

As the parties had joint decision-making pursuant to a final Order, the Court first had to determine if there was a material change in the circumstances since the last Order was made. The Court found that the material change threshold had been met on the basis that a strong COVID-19 variant (the "Omicron Variant") was circulating, and that the father refused to follow medical advice regarding the vaccination. These two factors allowed the Court to conclude that there was a material change and move forward in the best interests analysis by considering the requirements highlighted under s. 18 of the *Family Law Act*.

Due to the father's continuous denials and refusals to comply with the child's medical treatment, the Court held that he was not to be trusted with his child's healthcare decisions. Further, numerous medical experts have recommended that children between the ages of 5 to 11, who are moderately to severely immunocompromised, be vaccinated with three doses of the Pfizer-BioNTech COVID-19 vaccine.

The Father urged the Court to listen to the voice of the child, as he believed the child would refuse the vaccine. The Court stated that "while Children have a voice in proceedings that affect them, they do not have a choice." A child must be a mature minor if they want to have a say in the proceedings. To be a mature minor, it must be shown that the child (a) has the capacity to make the decision, (b) is adequately informed, and (c) the resulting decision is voluntary and presents no coercion. In this case, the Court was convinced that the child was coerced into believing the vaccine was unsafe. This led to the conclusion that it is in the best interests of the child that the mother could authorize the child's COVID-19 vaccination.

The Court found that it was in the child's best interests to be vaccinated and granted the mother sole decision-making authority with respect to the child's medical needs. The Court also ordered the father to take the child to all medical appointments scheduled during his parenting time.

Practical Implications: The Court may take judicial notice of the risks presented by the COVID-19 pandemic and the public health recommendation that children aged five and over receive the vaccine, such that it is unlikely that the Court will deny a parent's request to allow their child to be vaccinated against COVID-19.