

Issue No. 30

Protection Orders & Family Proceedings: *2021 ABPC 167*

Introduction

This case covers allocation of parenting time, relocation, and decision making in the wake of a separation involving a family with a history of family violence.

This case also dealt with issues of child support and spousal support, which will not be covered in this legal bulletin.



Background

The Applicant mother, ST, and the father, KT, began cohabiting together in Thorhild, Alberta, in January 2012, and were married in July 2012. The mother left the matrimonial home on July 28, 2019, and at the direction of the RCMP, sought the shelter of a women’s shelter in St. Paul, Alberta for herself and the children. The father requested an Amber Alert for the children in response. The mother filed for court relief in St. Paul the next day, seeking day-to-day parenting for the children (ages 8 and 10), and sole decision-making authority, with the father to have supervised time. She also sought to move with the children to Ontario for the 2019/2020 school year. The father filed a response, asking for day-to-day parenting to him, and shared decision making.¹

On August 7, 2019, the presiding Judge granted a consent Interim Order, giving the mother primary residential care and set dates for times with the father, as well as reasonable and generous parenting time to the father, as the parties can agree. The mother’s request to move

to Ontario was denied. The proceedings were transferred to Fort Saskatchewan, Alberta where the mother had located and enrolled the children in school.²

On November 11, 2019, there was an altercation between the father and mother during an exchange, and the mother pressed charges against the father. The mother alleged that the father shoved a toy at her and bruised her forehead. The charges were eventually withdrawn by the Crown in Spring 2020. Following this incident, the mother did not provide the father with parenting time (except on a couple of occasions).³ This lasted until a further Interim Order was pronounced on June 24, 2020, which carved out more specific times for the father, as well as counseling for the children.⁴

There was a further consent Interim Order pronounced at Case Management, which added

¹ ST v KT, 2021 ABPC 167, at para 9-10.

² Ibid at para 11.

³ Ibid at para 14-16.

⁴ Ibid at para 17.

further parenting time for the father.⁵

Going forward, the mother's position was that she should have day-to-day parenting of the children, with the father to have every second

weekend. The father sought shared parenting, on a week on/week off basis.⁶

Issues

- How should parenting time and decision-making be allocated?
- What should be the place of residence?

Analysis of the Issues

The Judge applied the best interests test within section 18 of the *Alberta Family Law Act* and applied it to the areas of contention between the parties.

Relocation to Fort Saskatchewan

Although a more radical move was not allowed earlier in the proceedings, the move to Fort Saskatchewan was found to be reasonable as shared parenting could still be possible, since the distance between Thorhild to Fort Saskatchewan was not significant.⁷

The Judge considered the case of *Scott v MacLean* 2020 ABCA 173, which stated that the focus should not be on the move versus the status quo, but rather where and with which parent are the best interests of the children being met.⁸ In considering the best interests in the present case, the mother presented evidence that the children's confidence had soared since the move. Additionally, there were more employment opportunities available to her.⁹

The mother's testimony also indicated that she had been the primary caregiver during the

relationship and was much more available to the children for tasks such as feeding, diaper changing, bedtime routine, but also attending to the children's needs and activities. This was corroborated by other witnesses.¹⁰ The evidence given about the father was that he was hands-off with the children and had traditional views that women should take the role of caring for children.¹¹

History of Care of the Children

Included in the best interests' analysis is looking at the history of care. This included an analysis of the history of care, third party evidence, and testimony of the parties. The mother's evidence showed that she provided more structured care to the children, for instance, monitoring screen time, being present for their needs and activities, and support in place for areas they were struggling.¹² The father worked 10-12 hours days and was often involved with his fraternal organizations when not working.¹³

In the father's testimony, he acknowledged the mother's role as primary caregiver. The third-party evidence also confirmed the mother's active role with the children, and the father's

⁵ Ibid at para 18.

⁶ Ibid at para 19.

⁷ Ibid at para 26.

⁸ Ibid at para 25.

⁹ Ibid at paras 28-29.

¹⁰ Ibid at paras 43-57.

¹¹ Ibid at para 57.

¹² Ibid at paras 32-37.

¹³ Ibid at paras 44-45.

lack of support in raising the children.¹⁴

Two of the witnesses also gave testimony that the father tried to dissuade them from testifying by contacting them in advance to indicate that he was not happy with their decision.¹⁵

The Judge preferred the mother's evidence and did not find the father's evidence credible. The Judge also noted the blatant attempt of the father to interfere with the administration of justice by trying to influence the witnesses against testifying.¹⁶

The Judge found that the mother was primarily responsible for the children to an overwhelming extent, while the father was involved when it suited and not a significant contributor to their care.¹⁷

Decision-Making

The mother testified that that she and the father could not communicate together regarding the children, indicating that he had a pattern of yelling when they disagreed.¹⁸ During the court proceedings, he was difficult to communicate with, and refused to participate in decisions with the mother, for instance sending the children to club programs, and insisted that the communication go through the lawyers.¹⁹ Further, despite the Fort Saskatchewan Interim Order ordering counseling, the parties had not been able to agree on a counsellor.²⁰

In his analysis of family violence, the Judge found that the emotional abuse she experienced would significantly impact the parties' ability to cooperatively make decisions together.²¹ The Judge cites the case of *Richter v Richter*, 2005 ABCA 165, to support his decision that joint

custody and decision-making should not be ordered where there is a history of substantial conflict between the parents.²²

Family Violence

Included in the best interest analysis is the requirement for the court to consider "family violence."²³

The definition of family violence in *Alberta's Family Law Act* includes behaviour that causes or attempts to cause physical harm to a family member or causes fear for safety to a family member.²⁴ *Alberta's Family Law Act* does not include the broader definition of family violence that is in the *Divorce Act*, which includes forms of violence such as psychological and financial abuse.²⁵

The Judge decides that there is room for interpretation within the best interests test in the *Alberta Family Law Act*, and that the court can consider all needs and circumstances of the children, including any history of domestic abuse when determining what is in the best interests of the children, even if the form of abuse does not strictly satisfy the narrow definition of "family violence" found in the *Alberta Family Law Act*.²⁶ The Judge also notes that if the parenting application had been brought under the *Divorce Act* the psychological and financial abuse would have been forms of family violence for the court to consider.²⁷ Further, the Judge emphasized the significance of emotional abuse and its effect on victims.²⁸

The Judge then goes on to discuss the testimony of the mother, father, and witnesses. The testimony indicated a history of emotional and psychological abuse, including flipping a table

¹⁴ Ibid at paras 55-57.

¹⁵ Ibid at paras 53 & 58.

¹⁶ Ibid at para 71.

¹⁷ Ibid at para 72.

¹⁸ Ibid at para 76.

¹⁹ Ibid at para 77.

²⁰ Ibid at para 79.

²¹ Ibid at para 98.

²² Ibid at para 117-118.

²³ Ibid at para 81.

²⁴ Ibid at para 98.

²⁵ Ibid at para 98.

²⁶ Ibid at para 98.

²⁷ Ibid at para 98.

²⁸ Ibid at para 82.

during an argument, threatening to kill her and the kids if she left him, and abandoning her in a parking lot. The witnesses' testimony indicated that there was a history of name-calling, such as "dumb girl," "fat," "lazy," and ordering her around. The Judge found the evidence of the mother and witnesses credible and did not believe the father's denials. The Judge commented that the behaviour of the father modeled poor behaviour to the children.²⁹

The parties also engaged a third-party to obtain the views of the children. The Reporting Letter from the Children's Counsel had numerous findings, including that the children were aware of the conflict between the parents, which caused them stress during exchanges. They also stated that they witnessed family violence, for instance the incident where the father flipped the table. The Children's Counsel stressed the

need for the parents not to speak negatively about each other in the presence of the children and not to discuss court proceedings, as well as the need for the children to obtain individual counseling.³⁰

The Children's Counsel communicated that the children desired to have time with both parents and wanted to see more of their father.³¹ Given the children's ages, their input was important, although not decisive.³²

In the recommendation of the Children's Counsel, they emphasized the need for the parents to minimize the impact on the children, such as the order containing a clause prohibiting them speaking negatively about each other, stop recording the other parent at exchanges, as well as recommending they work with a parenting coordinator to develop a parenting plan.³³

Decision

The Judge granted exclusive decision-making to the mother, with day-to-day decisions to be made by the parent during that parent's parenting time.³⁴

The mother's relocation to Fort Saskatchewan was permitted, finding that it was in the best interest of the children, but ordered a requirement that the mother give 60 days' notice in the event of a future change of residence.³⁵

The father was granted significant parenting time on non-school days, with parenting time awarded every second weekend, and evening facetime twice per week. Holidays and special occasions were to be shared equally. The Judge found that this arrangement provided the father with maximum contact principal consistent with the best interests of the children.³⁶

The Judge also ordered that there be a one-year period of continued involvement with Counsel for the Children, to assist in engaging the children further and assist the parents in their parenting. The Judge also ordered that the parents are precluded from bringing a variation proceeding on the Parenting Order for a period of one year without prior leave of the court.³⁷

²⁹ Ibid at para 98.

³⁰ Ibid at para 110.

³¹ Ibid at para 110.

³² Ibid at para 111.

³³ Ibid at para 123.

³⁴ Ibid at para 123

³⁵ Ibid at para 123.

³⁶ Ibid at para 123.

³⁷ Ibid at para 123.

Takeaways

This case demonstrates how important the broader definition of family violence is, which include non-physical forms of violence, including psychological abuse and coercive control. The expanded definition of family violence, found in the amendments to the *Divorce Act*, has been mirrored in other provinces as well, including the *Family Law Act*, Manitoba which came into effect in July 1, 2023.³⁸ It appears that Alberta has yet to revise their *Family Law Act* to mirror to the *Divorce Act* language.

I note the creative interpretation from the Judge of the best interests' test, which ultimately allowed him to consider the impact of the abuse on the children even though the form of abuse did not meet the definition of family violence in the Alberta *Family Law Act*, nor was it explicitly stated in the best interest's factors. This skillful approach emphasizes the importance of well drafted legislation and the importance of a careful interpretation of the language, i.e. the Judge was able to do his analysis by expanding on the word "including" and noting that this meant a non-exhaustive criterion.

This case also highlights the significant role that third party therapists, parenting coaches, etc., can play in disagreements over parenting. Their role is important as it provides insight into the children's needs, by working with the children directly. Depending on the child's age and maturity, the court may give significant weight to the recommendations of an assessment.³⁹ For instance, in Manitoba, a brief consultation, to hear the wishes of a child, may be available through Family Resolution Services to children

that are between 11-17 years old.⁴⁰

Ultimately, this case emphasizes the importance of legislation and language in combatting family violence, as well as the need for legislative reform. Further, the legislation would not carry the same impact without Judges, court staff, and third parties such as psychologists and therapists, involved in family law cases, understanding the broad forms and impacts of family violence, and basing judgments and recommendations based on this. It is equally important that members of the legislature push and advocate for further reform.

A current example of this in Manitoba is Bill 209, also known as Kiera's Law, which seeks to amend The *Provincial Court Amendment Act* for expanded further education topics to provincial court Judges to include intimate partner violence and coercive control in intimate partner relationship. The Bill also proposes requirements for candidates for a judicial justice of the peace appointment to undertake in education on sexual assault law, intimate partner violence, and coercive control in intimate partner and family relationships.⁴¹ Unfortunately, this Bill was recently halted by the NDP Government despite a unanimous vote at its second reading.⁴² MLA, Cindy Lamoureux, call the halting of this bill "undemocratic", noting that all political parties had supported the legislation both provincially and federally.

³⁸ The Family Law Act, C.C.S.M. cF20, s. 1.

³⁹ Department of Justice, "Fact Sheet – A Child's Views and Preferences" (last modified May 17, 2024), online: Government of Canada <<https://www.justice.gc.ca/eng/fl-df/fscvp-fipvpe.html>> [[web/20240604144541/https://www.justice.gc.ca/eng/fl-df/fscvp-fipvpe.html](https://www.justice.gc.ca/eng/fl-df/fscvp-fipvpe.html)]

⁴⁰ Family Law Manitoba, "Assessments and Brief Consultations" (accessed June 4, 2024), online: Government of Manitoba <<https://www.gov.mb.ca/familylaw/parenting/assess.html>> [<https://web.archive.org/web/20240604145645/https://www.gov.mb.ca/familylaw/parenting/assess.html>]

⁴¹ 209, The Provincial Court Amendment Act (Expanded Training for Judges and Judicial Justices of the Peace), 1st Session, 43rd Legislature, Manitoba, 2024, (<https://web2.gov.mb.ca/bills/43-1/b209e.php>).

⁴² Manitoba, Legislative Assembly, Debates and Proceedings (Hansard), 1st Session – 43rd Legislature, (May 22, 2024), at 2009.

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