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**Family Law Newsletters**
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# — Franks & Zalev - This Week in Family Law

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**Contents**



**NOTE:** We'll be off for March Break next week, but will be back with the next edition of *TWFL* on March 21st.

**Anticipating Further Vaccination Consternation**

***J.N. v. C.G.*, 2022 CarswellOnt 2062 (S.C.J.) — Pazaratz J.**

***Warren v. Charlton*, 2022 CarswellOnt 2359 (S.C.J.) — Ramsay J.**

***D. Jr. v. T.*, 2022 ONSC 1441 (S.C.J.) — Jarvis J.**

As we discussed in the 2021-39 (October 11, 2021) edition of *TWFL*, in *A.C. v. L.L.* (2021), 63 R.F.L. (8th) 134 (Ont. S.C.J.), Justice Charney held that "[a]bsent compelling evidence to the contrary, it is in the best interest of an eligible child to be vaccinated", and that "there can be no dispute that, as a general presumption, it is in the best interest of eligible children to get vaccinated before they attend school in person." At the time, we also suggested it appeared that we were "close to the point where everyone understands that, absent truly exceptional circumstances, a court is going to find that it is in a child's best interests to be vaccinated."

Or so we thought.

In two very recent cases — *J.N. v. C.G.* and *Warren v. Charlton* — Justice Pazaratz and Justice Ramsay both declined to order a parent to have the children in those cases vaccinated, and cast serious doubt on whether a general presumption in favour of vaccination exists. However, they reach their conclusions in very different ways.

The law about the contentious issue of COVID-19 vaccination is now, we respectfully suggest, needlessly conflicted. Some courts are still applying the general presumption in favour of vaccination subject to "compelling evidence" that vaccination would not be in a child's best interests from *A.C. v. L.L.*.

But some decisions are now focusing more on parental and individual autonomy. For example, in *Warren v. Charlton*, which is discussed further below, the Court determined that unless there is evidence that the child has a "particular vulnerability" to the virus or vaccine, the decision about whether to vaccinate a child should be left up to the parent who has decision-making authority (or to the child if s/he has capacity to consent to treatment).

In *J.N. v. C.G.*, the topic of science figures prominently. We are not scientists, and we know this is a sensitive topic for some people, so we are going to do our best to restrict our commentary to the strict legal issues that are raised by these cases. That said, the efficacy of immunization and vaccine epidemiology is not "junk" or "weak science" that should be ignored when litigants submit their disputes to the public court forum. It is beyond reasonable dispute that vaccinations prevent (serious) illness, save

lives, and have materially reduced the strain on the health care system. There is no serious evidence to the contrary, and but for that reduced strain on the healthcare system, very sick people, with very serious illnesses, or in need of potentially lifesaving in-patient surgeries and procedures, might still be waiting. Polio and smallpox were eradicated because of vaccines. Again, this is beyond dispute.

We agree with Justice Charney in *A.C. v. L.L.* that, as a general rule, it will be in a child's best interests to be vaccinated against COVID-19 unless there is a *very* good reason not to do so. [In a similar vein, also see *A.S.N. v. K.E.K.*, 2021 CarswellBC 3988 (S.C.); *O.M.S. v. E.J.S.* (2021), 61 R.F.L. (8th) 341 (Sask. Q.B.); *B.C.J.B. v. E.-R.R.R.* (2020), 47 R.F.L. (8th) 165 (Ont. C.J.), aff'd (2021), 63 R.F.L. (8th) 207 (Ont. S.C.J.)]. Polio and smallpox were eradicated because of vaccines. Again, this is beyond dispute. Justice Akbarali was of the similar view in *A.P. v. L.K.* (2021), 51 R.F.L. (8th) 334 (Ont. S.C.J.) and (2021), 53 R.F.L. (8th) 403 (Ont. S.C.J.).

It is also important to remember that even if a court determines that it would be in a child's best interests to be vaccinated, health professionals may still decide whether s/he is legally and ethically permitted to vaccinate a particular child who opposes vaccination. As we noted in our comment on *A.C. v. L.L.*, "even if a court were prepared to order a non-consenting child to get the COVID-19 vaccine, we strongly suspect that no health professional would be willing to administer it without the child's consent and/or in the face of active resistance to it from the child."

***J.N. v. C.G.*, 2022 CarswellOnt 2062 (S.C.J.) — Pazaratz J.**

Even though the Court's decision in *J.N. v. C.G.* was only released on February 22, 2022, unless you have been living under a rock, in a cave, on Mars — we suspect you have already read it (or at least heard about it) given the significant debate it has generated amongst the Bar and judiciary, and the articles that have been published about it in the media under headlines such as: (a) "Ontario judge rules mother doesn't have to vaccinate her children against COVID-19" (posted on the Globe and Mail's website on February 28, 2022, and the CBC's website on March 2, 2022); and (b) "Citing 'thought-provoking' anti-vax sources, Ontario judge rules couple's kids should not be vaccinated" (posted on the Toronto Star's website on March 1, 2022).

To some, Justice Pazaratz has now assumed the mantle of "Anti-Vax Hero" for having the courage to write this decision in the face of what was certain to be significant adverse commentary. To others, not so much. Whatever your personal views, there is no question that, from a strictly legal point of view, the decision has given us all something to think about. With great respect to Justice Pazaratz whose contributions to family law jurisprudence across Canada cannot be overstated (see, for example, *Ribeiro v. Wright*, 2020 CarswellOnt 4090 (S.C.J.), one of the first and most-regularly cited COVID-19 parenting cases), we disagree with his reasoning.

The commentary in the decision was dismissive of *centuries* of immunization science (smallpox vaccinations were first identified as effective in 1796; 1885 for rabies) and the now two years of battle-tested experiences of front-line health-care workers, long-term healthcare facilities, etc. People are again able to attend funerals to grieve; weddings to celebrate; and hospitals for lifesaving treatment.

The parties in *J.N. v. C.G.* were married for seven years, and had three children together, who were 14, 12, and 10 at the time of the motion. The 14-year-old lived with the father, and the two younger children lived with the mother. The father had sole decision making authority for the 14-year-old, and the mother had it for the children that lived with her. However, the parties' Minutes of Settlement specifically provided that "[t]he issue of the [two younger children] receiving a COVID-19 vaccine shall remain a live issue and shall be determined at a later date. The [14-year-old] can determine whether or not he wants to be vaccinated now."

The 14-year-old decided he wanted to be vaccinated, and both parents supported his decision. However, as they could not agree about what to do with the younger children, the father brought a motion to ask the Court to order that they be vaccinated. The father's motion materials included various articles from the Canadian Paediatric Society and the Government of Canada about the safety and efficacy of COVID-19 vaccinations for children. He also filed an Affidavit in which, according to Justice Pazaratz, he attempted to paint the mother as a "conspiracy theorist" and "some sort of lunatic".

 

The mother responded by filing her own internet articles expressing various concerns about the safety and efficacy of COVID-19 vaccines. She also explained in her Affidavit that she is not opposed to vaccines in general, that the children had received all of their regular immunizations, and that she was open-minded about vaccinating the younger children against COVID-19. However, she was worried that "the potential benefit of the current COVID-19 vaccines for [the children] is outweighed by the serious potential risks", and that "there are too many unknowns" at this point. The mother also pointed out that the children already had some natural immunity to COVID-19, as they had previously contracted and recovered from it.

In addition to the parties' own evidence, they filed a Voice of the Child report from a well-respected social worker. The report indicated that neither of the younger children wanted the vaccine. The father, however, argued that the children's stated views and preferences should be given little or no weight because they had been improperly influenced by the mother.

Quite rightly, Justice Pazaratz pointed out that the father's attempt to vilify the mother was completely unhelpful. He urged both parties (and all litigants) to stop demonizing each other for disagreeing with or questioning conventional wisdom, and determined that he could not just ignore the children's views and preferences, especially since there was "no evidence that the mother has inappropriately drawn the children into any sort of personal or political agenda."

Justice Pazaratz also recognized that just because the parties "both consented to my receiving all this unsworn material [from the internet] doesn't make it properly admissible", and pointed out that the problems associated with relying on internet downloads are exacerbated where, as in this case, the matter is proceeding on a paper record without the benefit of cross-examination.

Then things took an odd turn.

Despite expressing concerns about unsworn and untested materials from the internet, Justice Pazaratz made specific findings at paragraph 59 of his decision that "none of the materials presented by the mother are from fringe organizations or dubious authors. To the contrary, the mother quotes extensively from leaders in the medical and scientific community."

In support of these findings, Justice Pazaratz discussed one of the articles that the mother filed that quoted extensively from a "Dr. Robert W. Malone", whom he referred to as "the inventor of the mRNA vaccine." But a basic search of "Dr. Robert W. Malone" on Google makes it quite clear that there are very serious questions as to whether Dr. Malone is, in fact, a "leader" in the medical and scientific community, and about the role he actually played in developing mRNA vaccines.

For example, in a New York Times Article from **February 8, 2022**, entitled "Fact-Checking Joe Rogan's Interview With Robert Malone That Caused an Uproar", the Times concluded that during the interview, "Mr. Rogan, a wildly popular podcast host, and his guest, Dr. Malone, a controversial infectious-disease researcher, offered a litany of falsehoods over three hours."

Or, as another example, on **January 24, 2022**, the Washington Post published an article about Dr. Malone under the headline "A vaccine scientist's discredited claims have bolstered a movement of misinformation". The article states, among other things, that Dr. Malone's "claims and suggestions have been discredited and denounced by medical professionals as not only wrong, but also dangerous", and notes that "Twitter barred [Dr. Malone] for violating the platform's coronavirus misinformation policy[.]" Does this not sound "dubious" or otherwise concerning?

To be clear, we are not scientists (we're not even good at science), and we do not know whether these criticisms of Dr. Malone are warranted or not. But what we do know is that, given these criticisms, it is difficult to see how a court in Ontario could rely on untested hearsay from Dr. Malone as a reason to disregard prior judicial findings that the COVID-19 vaccines are safe and effective, or Justice Charney's conclusion, which has already been followed in a number of other cases, that there should be a general presumption that it is in a child's best interests to be vaccinated against COVID-19. Since when does a possibly debunked internet "expert" trump the general rule of *stare decisis* and previous decisions of courts of coordinate jurisdiction?

While we certainly agree with Justice Pazaratz that open discourse about ideas and authority is one of the fundamental privileges in a free and democratic society, another principle of our society is the Rule of Law. And as a matter of law, judges are supposed

 

to follow prior decisions from courts of coordinate jurisdiction (i.e. the same level of court) unless there is a *very* good reason not to do so. As Justice Strathy (as he then was) noted in *R. v. Scarlett*, 2013 CarswellOnt 1517 (S.C.J.):

> [43] **The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them**: see *Hansard Spruce Mills Ltd., Re*, [1954] 4 D.L.R. 590 (B.C. S.C.); *R. v. Northern Electric Co.*, [1955] O.R. 431, [1955] 3 D.L.R. 449 (Ont. H.C.) at para. 31. Reasons to depart from a decision, referred to in *Hansard Spruce Mills Ltd.*, Re, include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. **These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong**. . . . [emphasis added]

See also: *Better Beef Ltd. v. MacLean*, 2006 CarswellOnt 3260 (Div. Ct.).

Justice Pazaratz obviously had every right to express doubt about whether it was appropriate for previous courts to have taken judicial notice about the safety and efficacy of COVID-19 vaccines. Furthermore, the efficacy of vaccines is a matter of public importance that warrants serious discourse and debate. But been there, done that. The fact of the matter is that these prior decisions were made, there does not appear to be any reason to suggest that they are "plainly wrong", and they ought to be followed unless and until they are overruled by a higher level of court.

Allowing parties to be able to rely on these prior decisions is also important because it creates certainty, and eliminates the need for individual litigants to have to hire experts in these types of cases, which would simply be impractical and unaffordable for the vast majority of family law litigants across Canada. This decision does the opposite. And not only does it eschew certainty with respect to the COVID-19 vaccine; it cuts away at previous near certainty with respect to *all* vaccines — the same scientific breakthroughs that eradicated polio and smallpox.

Finally, in an attempt to remind us that conventional wisdom sometimes turns out to be wrong, and that governments are not always right, at paragraph 67 of his reasons, Justice Pazaratz listed some examples of prior government decisions and policies that we now recognize as abhorrent and that ended up causing significant harm to many individuals and groups. While we understand the point that Justice Pazaratz was trying to make — that the government is not always right — the government did not develop the vaccines and did not mandate vaccination.

To compare the government *encouraging* COVID-19 vaccinations with Residential Schools, the forced sterilizing of indigenous women in Northern Canada, and Japanese and Chinese internment camps during World War II, is a false-comparator or straw man argument. In contrast, we have all shared *real* experience of the effects of COVID-19 (or the historical experience of the effects of small pox, polio, rabies, measles, mumps, etc.) on our society, and the fears of that which COVID-19 can do to the particularly vulnerable in our communities. Those are the *real* comparators. Vaccinations save lives and have allowed people to move forward. Furthermore, such comparisons are needlessly hurtful to those that suffered those historic abominations and, candidly, unfairly dismissive of the front-line workers that have literally held the line for the past two years at great personal expense.

Justice Pazaratz also partially grounds his decision on the basis that it is inappropriate to take judicial notice of the efficacy of the COVID-19 vaccine for children. To answer that we offer the following lengthy quote from Justice Jarvis in the even more recent case of *D. Jr. v. T.*, 2022 ONSC 1441 (S.C.J.):

> [20] In J.*N. v. C.G.*, Pazaratz J. noted that the objecting mother in that case, like the mother in this case, pointed to Pfizer-published guidance that the safety and effectiveness of the Covid-19 vaccine had not been established (it is the mother's "strongest concern" in this case). But notwithstanding that court's consideration of the risks associated with applying judicial notice to cases where expert opinion is unclear or in dispute (and may never be free from doubt) and speculating on the evidence, or lack of evidence, about the wisdom of mandatory child vaccination, the decision in that case really pivots on the rationality of each parent's position and the facts unique to that family. Distinguishing *J.N.* from the case before this court are the principal facts, as found, that the children had "very specific, strongly held and independently formulated

 

views about Covid vaccinations" those views being "verified independently by an experienced social worker who would be alive to the possibility of parental influence or interference" of which there was no evidence in that case. There is no evidence in this case of AD's views about vaccination and none about parental manipulation. There is no evidence either that the child has any health issue that contraindicates vaccination. The father relies on Health Canada guidance whereas the mother relies on her research. While the mother also raised the issue of AD's consent to treatment under s. 11 of the *Health Care Consent Act* it is not relevant given that the child functions at a Grade 1 level of learning and understanding.

[21] The mother challenges this father's reliance on Health Canada and other government guidance on vaccination and the degree to which this court should apply, if at all, judicial notice. In *R.S.P. v. H.L.C.*, a case to which the court in *J.N.* referred, Breithaupt Smith J. noted the definitive decision of judicial notice by the Supreme Court of Canada in *R. v. Find*. In *R. v. J.M.* the Ontario Court of Appeal elaborated on *Find* in describing that facts of which a court could take judicial notice included: "(a) **those that are so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons**; and (b) those that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy . . . The sources may include both large bodies of scientific literature and jurisprudence".

[22] So what are the notorious or "accepted" facts which this court is prepared to accept and which cannot be the subject of dispute among reasonable persons? And represent our collective lived experience. They are:

(a) The Covid virus kills;

(b) The virus is transmissible;

(c) The virus can, and has, mutated;

(d) Variants of the virus are more transmissible than others;

(e) Asymptomatic carriers of the virus can infect other people;

(f) Symptoms of the virus may vary according to age, health and co-morbidity factors;

(g) The virus does not discriminate;

(h) There is no known immunity to contracting the virus;

(i) There is no verifiable evidence of natural immunity to contracting the virus, or any mutation, a second or more times;

(j) Vaccines work;

(k) Vaccines are generally safe and have a low risk of harmful effects, especially in children;

(l) Vaccines do not prevent infection, reinfection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes.

[23] This is not "fake science". It is not "fake medicine". Whether there is a drug company conspiracy callously or negligently promoting unsafe medicine (the "lie") in collusion with federal and provincial authorities this court leaves to another day and to those who think Elvis is alive. He isn't. He left the building decades ago.

[24] In *A.C.* Charney J. suggested that as general presumption it is in the best interests of a child to be vaccinated. This court agrees. In *J.N.* Pazartz [sic] J. asked rhetorically whether judicial notice should be taken of the fact that all children should get vaccinated. The answer in my view is that parents should rely on government guidance and should have their children vaccinated unless there is a compelling reason not to do so. That may amount to a legal presumption, placing the onus on the objecting parent, but even if it isn't, the court is satisfied that it is in AD's best interest to be vaccinated.

 

To this, we would add that the court may take judicial notice of indisputable and relevant historical facts by reference to readily obtainable and authoritative sources: *R. v. Augustine*, 1986 CarswellNB 246 (C.A.), leave to appeal refused; *R. v. Zundel*, 1987 CarswellOnt 83 (C.A.), leave to appeal refused. Again, the historic efficacy of vaccines cannot be reasonably disputed.

In the end, however, Justice Pazaratz resorted to some much less controversial principles to decide the case, as he ultimately dismissed the father's motion to vaccinate the younger children. He was satisfied that the mother was capable of making these types of decisions for the children, and that judicial intervention was not required:

> [84] The mother has consistently made excellent, informed, and child-focussed decisions. In every respect she is an exemplary parent, fully attuned to her children's physical and emotional needs. She has demonstrated a clear understanding of the science. She has raised legitimate questions and concerns. I have confidence that she will continue to seek out answers to safeguard the physical and emotional health of her children.
>
> [85] She is not a bad parent — *and no one is a bad citizen* — simply by virtue of asking questions of the government.
>
> [86] At a certain point, where you have absolute confidence in a parent's insight and decision-making, you have to step back and acknowledge that they love their child; they have always done the right thing for their child . . . *and they will continue to do the right thing for their child*.

***Warren v. Charlton*, 2022 CarswellOnt 2359 (S.C.J.) — Ramsay J.**

The facts in *Warren v. Charlton* are surprisingly similar to those in *J.N. v. C.G.* The parties were married for 14 years, and had three children together, who were 14, 12, and 6 respectively at the time of the motion. After they separated, they signed Minutes of Settlement that provided, among other things, that:

- The 14-year-old child would live with the father;
- The 12- and 6-year-old children would live with the mother; and
- They would each have decision making authority for the child/children who resided with them, except that the issue of healthcare, specifically vaccinations, would be dealt with by way of a motion for summary judgment.

Justice Ramsay heard the motion for summary judgment about healthcare decisions that was contemplated by the Minutes. By the time of the motion, the 14-year-old child had already been vaccinated against COVID-19, but the other two had not.

The mother agreed that the 6-year-old should be vaccinated against COVID-19. She also told the Court that she would not object to the 12-year-old receiving the COVID-19 vaccination as long as he consented to it, and agreed that the 12-year-old could/should talk to a doctor about vaccination and inform himself.

The father, on the other hand, was concerned that the mother had unduly influenced the 12-year-old against the COVID-19 vaccination, and asked for an order prohibiting the mother from talking to the child about vaccination to "protect him from her bizarre views."

Justice Ramsay, as he often does, wrote a brief decision that got right to the point. He found that the father had not actually established that the mother held any "bizarre views" about vaccines, and was satisfied that her willingness to have the 12-year-old inform himself by talking to a doctor about vaccination was sufficient to deal with the father's concerns. Furthermore, given the child's age, and as there was no question that this particular child was capable of consenting to be vaccinated [see s. 4 of the *Health Care Consent Act*, S.O. 1996, c. 2], Justice Ramsay was of the view that "[w]hether his mother's influence is behind [the child's reluctance to be vaccinated] or not is ultimately irrelevant."

 

Justice Ramsay also determined that, in general, courts should leave it up to the parent who has decision making authority (or to the parent who the court determines should be entrusted with decision making if it has not already been allocated), to decide whether a child should receive the COVID-19 vaccine:

> [9] Within limits, I can take **judicial notice** of some facts related to the issue. I think that I can go as far as to say the following:
>
> a. SARS-CoVi-2 has a low mortality rate, especially in children.
>
> b. The **authorized vaccines are generally safe and have a low risk of harmful side effects, especially in children**.
>
> c. The vaccines do not prevent infection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes.
>
> [10] **In the absence of evidence of any particular vulnerability, whether to the virus or to the vaccine, I would defer to the party who has decision-making authority**. I do not think that whether to vaccinate a 12-year-old against COVID-19 is a question that justifies intervention by the court where decision-making authority has already been allocated. [emphasis added]

Since the 12-year-old child in this case had capacity to decide whether to consent to the vaccine, and as he resided with the mother who already had decision making authority over all other aspects of his life, Justice Ramsay dismissed the father's request for decision making authority over medical decisions. And, while Justice Ramsay indicated that both parties were free to schedule and accompany the child to an appointment with a qualified medical professional to obtain information and documentation about the benefits and risks of vaccination, he ultimately left it up to the child to decide what he wanted to do.

Although *J.N. v. C.G.* was about COVID-19 vaccinations for children, we fear that the commentary — especially about science — may have the unfortunate effect of throwing the immunization "baby" out with the bathwater, and promoting litigation about vaccinations in general. And *that is really* something to worry about.

**When Nesting Doesn't Come Home to Roost**

*Droit de la famille - 21917* (2021), 56 R.F.L. (8th) 284 (C.A. Que.) — Marie-Josée Hogue, J.C.A.

This was a motion for leave to appeal an interlocutory order and a stay pending appeal. However, the applicant was only appealing the part of the order below that imposed a nesting arrangement whereby the children would remain in the home, while the parents would shuttle in and out of the home.

The parties lived together from July 2017 to February 2021. They had two young children: a two-year-old boy, and a 10-month-old girl.

The applicant left the family home at the end of February 2021, alleging that she was the victim of psychological, physical, and sexual violence at the hands of the respondent. She moved to a different city some distance away to live with her parents. The respondent categorically denied all allegations of violence. He moved to an apartment.

The respondent started proceedings in April 2021, and sought joint decision-making for the children, a determination of child support, and a safeguard order.

Because of the distance between the family home and the applicant's parents' home (where she was living), the court below ordered a nesting arrangement. This arrangement was put in place over the applicant's objections given her allegations about family violence (given the very preliminary stage of the case, the court judge did not make any determination with respect to those allegations). The Court, however, was of the view that the nesting arrangement was in the children's best interests, and

  

that the applicant's safety could be protected by granting each the exclusive use of the residence while in the home, and by having the exchanges take place outside of the home.

As in most jurisdictions, leave to appeal an interlocutory order is granted only in exceptional cases. Here, the applicant's argument was essentially that a nesting arrangement should not be ordered where there are outstanding allegations of domestic violence.

Justice Hogue was of the opinion that the issue of a nesting order in the context of unproven allegations of domestic violence was novel, and granted leave to appeal - even though, generally, a mere novel question is not sufficient to justify granting leave to appeal.

On the facts of this case, Justice Hogue also found that a stay pending appeal was appropriate.

The test for a stay pending appeal in Quebec is similar to the test for a stay in other provinces: (1) genuine issue for appeal; (2) irreparable harm; and (3) the balance of convenience.

Having found that leave to appeal should be granted because the case presented a novel issue, the question of a genuine issue for appeal was clearly met.

On the question of irreparable harm, Justice Hogue noted the "security issue" that could result from the nesting order. Here things get a bit complicated. Justice Hogue noted that, at this point, the allegations about abuse were no more than unproven allegations that could not be assumed to be true. But she then suggested that, at the same time, the allegations cannot just be ignored.

Ultimately, Justice Hogue has this to say about irreparable harm:

- Forcing the applicant to live in the home during her parenting time, a residence to which the respondent had access, is likely to cause irreparable harm to the applicant.

- The nesting order would force the applicant, for her parenting time, to leave her parents' home and to stay in a place where the respondent could easily enter. This could constitute a serious danger for the applicant's "physical, psychological and sexual integrity" if it were eventually to be shown that she was, in fact, the victim of domestic violence.

- While the allegations of domestic violence may eventually prove to be unfounded, at this point, the Court must exercise caution and accept that the allegations may be true to determine if there is irreparable harm.

This reasoning, in the face of unproven allegations, does cause some concern. It is arguable that the question should not be whether the allegations have been proven, but whether, on the whole of the evidence, there is a real risk of harm: *L. (B.J.) v. L. (E.J.)*, 1983 CarswellBC 444 (C.A.); *K.G.C. v. G.A.C.* (2017), 97 R.F.L. (7th) 467 (B.C. Prov. Ct.); *G (JD) v. G (SL)* (2017), 2 R.F.L. (8th) 255 (Man. C.A.). On the other hand, "substantial risk" is a real chance of danger that is apparent on the evidence, proven on the balance of probabilities: *B. (M.J.) v. Family & Children's Services of Kings County*, 2008 CarswellNS 364 (C.A.); *S. (B.) v. British Columbia (Director of Child, Family & Community Service)* (1998), 38 R.F.L. (4th) 138 (B.C. C.A.); *C.R. v. Nova Scotia (Community Services)* (2019), 33 R.F.L. (8th) 1 (N.S. C.A.). That is, the court must only decide that the "chance of danger" is real rather than speculative or illusory: *C.R. v. Nova Scotia (Community Services)* (2019), 33 R.F.L. (8th) 1 (N.S. C.A.); *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)* (2000), 10 R.F.L. (5th) 122 (S.C.C.).

Ultimately, the notion of "risk of harm" lies on a continuum, from minimal risk of minimal harm to practical certainty of significant harm: *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.).

Here, based on unproven allegations — and nothing else — it is debateable whether irreparable harm at this stage was sufficient to favour a stay pending appeal.

However, there was also one last test to consider: the balance of convenience. Here, the applicant was not looking to change the respondent's parenting time. Rather, she was only asking that the respondent exercise his parenting time in his apartment, where

 

he had been living since separation. While perhaps less convenient to the children, it was hard to see how this would cause any significant prejudice to the respondent — whereas the nesting order could possibly result in significant prejudice to the applicant.

Therefore, the balance of convenience clearly favoured the applicant. And, as the three parts of the test for stay pending appeal are not watertight compartments — the strength of one may compensate for the weakness of another — the balance of convenience factor here, likely would have tipped the scales in favour of the applicant without the need to find irreparable harm absent any corroborating evidence: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, 1986 CarswellOnt 525 (C.A.); *Abuzour v. Heydary*, 2015 CarswellOnt 5208 (C.A.).

As a result, the motion for leave to appeal was granted and a stay pending appeal ordered.

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