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

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**Breaking News**

*B.J.T. v. J.D.*, 2022 CarswellPEI 31 (S.C.C.)

Way back in December 2021, the Supreme Court of Canada heard oral argument in three family law appeals that dealt with, among other things, the appropriate standard of review in parenting cases.

In the first case, *Kreke v. Alansari*, 2021 CarswellSask 679 (S.C.C.), the Saskatchewan Court of Appeal overturned the trial judge's decision to allow the mother to move with the parties' young child from Lloydminster to Saskatoon (a distance of approximately 275 km). In brief reasons from the Bench, the Supreme Court reversed the Court of Appeal, and restored the trial judge's decision as it was not convinced the trial judge had made a reviewable error.

In the other two cases, *Barendregt v. Grebliunas*, 2021 CarswellBC 3793 (S.C.C.) and *B.J.T. v. J.D.*, the Supreme Court also granted the appeals from the Bench, but with reasons to follow.

As we discussed in the 2022-19 (May 30, 2022) edition of *This Week in Family Law*, the Supreme Court released its reasons in *Barendregt v. Grebliunas* on May 20, 2022. And now, just a few weeks later, it has released its reasons in *B.J.T. v. J.D.*

Such an embarrassment of riches! We cannot remember the last time that there have been so many family law decisions emanating from the Supreme Court of Canada in such a short period of time (and we're still waiting for at least one more in *N. v. F.*, which was argued on April 12, 2022, and is still under reserve). But we'll certainly take it, and we very much hope that this is the start of a trend instead of just a blip. To paraphrase Sally Field: "They like us . . . they *really* like us!!"

*B.J.T. v. J.D.* was a child protection case that required the Court to determine whether to place a young child with his biological father, or with his maternal grandmother.

The trial judge placed the child with the maternal grandmother because, although both the father and grandmother were essentially equal in their ability to parent, she was concerned that the father would not promote a relationship between the child and the grandmother and his older half-brother.

A majority of the Prince Edward Island Court of Appeal overturned the trial judge's decision for a number of reasons, and determined that, all other things being equal, a child should be placed with a biological parent — sort of a biological tie-breaker:

> [112] The natural parent factor is but one factor of many relevant factors but one that is very important. It is not, however, a trump card. The focus is still on the best interests of the child.

> [113] However, **in cases where, after consideration of all relevant factors, the answer is unclear such as the case where the parent and the non-parent are more or less equal or comparatively equal, or perhaps even where the case for the non-parent is slightly better, the natural parent factor should be decisive.** [emphasis added]

In overturning the Court of Appeal's decision, the Supreme Court started by explaining that unless the applicable legislation says otherwise, the exacting standard of review it established for parenting appeals in *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) (and that it reiterated in *Barendregt v. Grebliunas*, 2021 CarswellBC 3793 (S.C.C.)), also applies in the child protection context:

> [57] This narrow scope of appellate review means that, absent a material error, the "Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence. This is the role of the trial judge" (*Van de Perre*, at para. 12 (emphasis deleted)). **An appellate court is therefore not permitted to redo a lower court's analysis to achieve a result that it believes is preferable in the best interests of the child.**
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> [58] **The *Van de Perre* standard reflects the significant deference that the decision of a judge at first instance as to a child's best interests attracts**, owing to the polymorphous, fact-based, and highly discretionary nature of such determinations (*Hickey*, at para. 10). **In my view, absent something specific in the governing legislation, this same standard applies to custody decisions pursuant to child protection legislation.**
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> [59] Nothing in s. 2(2) of the *Child Protection Act* supports or suggests a different standard of appellate review. Further, the same justifications expressed in *Hickey* that animated significant deference to child support awards apply with equal force to custody disputes under child welfare legislation. In both cases, **what is needed is an approach that promotes finality in family law litigation, recognizes the importance of the highly discretionary nature of the decision and the appreciation of the facts by the judge at first instance who heard the parties directly, and avoids giving parties an incentive to appeal judgments** in the hope that the appeal court will have a different appreciation of the relevant factors and evidence (*Van de Perre*, at para. 11; *Hickey*, at para. 12). [emphasis added]

As the father was unable to persuade the Supreme Court that the trial judge had made a "material error, serious misapprehension of the evidence, or legal error", a unanimous Supreme Court overturned the Court of Appeal, and restored the trial judge's decision to place the child with the maternal grandmother.

The Supreme Court also made it clear that it completely disagreed with the Court of Appeal's determination that, all other things being equal, it is in a child's best interests to be placed with a biological parent. Instead, the Court concluded that, for the following reasons, "a biological tie in itself should generally carry minimal weight" (query why, in that case, they did not officially "ditch" the fact of biological connection):

- "First, too great an emphasis on biological ties may lead some decision makers to give effect to the parent's claims over the child's best interests. Parental preferences should not usurp the focus on the child's interests." [paragraph 102]

- Second, "[s]ince biological ties are a presumed proxy for a bond, any advantages that favour the biological parent will usually be captured and subsumed within the broader inquiry into a child's best interests. . . . To the extent a parent relies on biology for considerations related to the child's culture, race or heritage, it may be addressed within those factors." [paragraph 105]

- "Third, the benefit of a biological tie itself may be intangible and difficult to articulate", which "makes it difficult to prioritize it over other best interests factors that are more concrete." [paragraph 106]

- Finally, "courts should be cautious in preferring one biological tie over another absent evidence that one is more beneficial than another. . . . Comparing the closeness or degree of biological connection is a tricky, reductionist and unreliable predictor of who may best care for a child." [paragraph 108]

 

Even before *B.J.T.*, however, the case law was already moving in the direction of minimizing the weight that should be given to biological ties when making decisions about a child's best interests. For example, in her recent decision in *Jacobs and Coulumbe v. Blair and Amyotte*, 2022 ONSC 3159 (Ont. S.C.J.), which was released only a few days before *B.J.T.*, Justice Gregson had this to say about this very issue:

> [222] I concur **there is no presumption in favour of the biological parents or genetics when determining a parenting order for a child**. The governing principle as per subsection 24(1) is best interests, having regard to the considerations outlined in 24(2) and the factors outlined in 24(3) of the *CLRA*. **The best interests standard is a child-centered approach.**
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> [223] I agree with the comments made by Keast, J. in *Pheasant v. Idowu*, 2008 ONCJ 420 when he aptly stated at Paragraph 31:
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> > There is no hierarchy of rights in considering the best interests of children under the Act. **To place emphasis on parental rights may diminish the importance of the attachment process in the healthy emotional development of children.** If there is a right, it is the right of the child to maximize his or her attachment and emotional development and minimize attachment uncertainties, regardless of blood relationship. [emphasis added]

*B.J.T.* is unquestionably the final nail in the coffin for the concept that biology should trump other more important considerations (or even serve as a tie-breaker) when a court is tasked with determining a child's best interests. And in our view, rightfully so.

**Does the Test for Interim Variation of Parenting Orders Apply to Interim Variation of Support Orders Hmmm?? Yes!**

*P. v. H.*, 2022 CarswellOnt 3203 (S.C.J.) — Diamond J.

Historically, a motion to vary a final order on an interim basis was met with a variety of responses:

1. "No!" — the *Divorce Act* does not provide jurisdiction to make an interim variation of a final order: *Bradley v. Callahan*, 2021 CarswellBC 3728 (C.A.); *Y. (H.) v. Y. (D.)* (1998), 42 R.F.L. (4th) 418 (P.E.I. C.A.). Clear and easy to remember — but maybe not so fair all the time.

2. "No! Unless it's really urgent": *Hilborn v. Hilborn*, 2007 CarswellOnt 5904 (S.C.J.). A little less clear, but a bit more flexible/fair.

3. "No! Unless it would be 'incongruous or absurd' not to make an interim variation": *Crawford v. Dixon* (2001), 14 R.F.L. (5th) 267 (Ont. S.C.J.); *Fredette v. Fredette*, 2005 CarswellOnt 6688 (S.C.J.). Even less clear but even more flexibility.

4. "OK . . . but only under the *Family Law Act*": *Clark v. Vanderhoeven* (2011), 4 R.F.L. (7th) 191 (Ont. S.C.J.). Interesting and perhaps a little unconstitutional.

5. "Yes . . . if you can show a *prima facie* case of material change; hardship; and clean hands": *Hayes v. Hayes* (2010), 87 R.F.L. (6th) 435 (Ont. S.C.J.). Clean hands?

6. "Yes . . . but we must proceed cautiously with an interim variation when there are material issues in dispute that require a trial": *Connell v. Connell*, 2006 CarswellPEI 87 (T.D. [In Chambers]). So really just a "tentative" yes.

7. "Yes . . . if you can show that there is, on the balance of probabilities, a clear and compelling need to make a change": *Huliyappa v. Menon*, 2012 CarswellOnt 12475 (S.C.J.); *J.B.-S. v. M.M.S.* (2021), 56 R.F.L. (8th) 438 (N.B. Q.B.). Another "tentative" yes.

For the benefit of all humanity, the Ontario Divisional Court recently cleared up some of the confusion in its recent decision in *S.H. v. D.K.*, 2022 CarswellOnt 2219 (Div. Ct.), which dealt with the court's ability to vary a final *parenting* Order on an interim basis. (For further discussion about *S.H.*, see our comment on it in the 2022-11 (March 28, 2022) edition of *TWFL*.)

 

In *P. v. H.*, Justice Diamond was tasked with deciding what the test is for varying a final *support* Order on an interim basis.

The parties separated in July 2009, after an 11-year marriage. They resolved all of the parenting and child support issues pursuant to a Consent Order on June 4, 2012 (the "Consent Order").

The Consent Order provided, among other things, that the Father would pay the Mother $1,115 a month in child support.

There were two children of the marriage, A and T. At the time of the hearing before Justice Diamond, A was 21 years old and in her last year of post-secondary studies. T was 17 years old and in Grade 12, and was planning to attend university in September 2022. The Consent Order did not deal with post-secondary expenses (in fairness, however, the children would have only been 11 and 7 years old when the Consent Order was signed).

The Mother argued that the Father had not paid proper child support, including his proportionate share of A's post-secondary expenses. To address this argued failing, the Mother started a Variation Application in late 2020. Within that Variation Application, the Mother brought a motion for an interim order requiring the Father to:

a. pay increased child support commencing on January 1, 2022;

b. contribute 58% towards the costs of the children's post-secondary expenses (based on her view of the parties' incomes); and

c. pay $43,744.45 in additional child support since 2013.

In other words, the Mother was seeking to vary a final order on an interim basis.

In *S.H.*, the Divisional Court confirmed that there is a very limited discretion to vary a final order on an interim basis — and the test for granting an interim variation of a final order is "stringent", requiring any supporting evidentiary basis to be "compelling."

The question before Justice Diamond was — is a motion for an interim variation of a final support order different?

In *S.H.*, Justice Dambrot for the Divisional Court offered the following helpful comments (again, referring to interim variations of *parenting* orders):

> [27] . . . **While the court has the authority to grant a temporary variation of a final order in the appropriate circumstances, the evidentiary basis to grant such a temporary variation must be compelling. The onus is on the party seeking a temporary variation to establish that in the current circumstances the existing order results in an untenable or intolerable situation** . . .
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> [28] The imposition of a stringent test for the granting of a temporary variation of a final parenting order of a court is sound in principle, since the purpose of an interim or temporary order is simply to provide a reasonably acceptable solution to a difficult problem until trial, when a full investigation will be made . . .
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> . . . . .
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> [38] To all of this, the appellant added, in her factum, that this stringent test (i) ensures that important and difficult decisions relating to a child's best interests are not, save for exceptional circumstances, made on the basis of incomplete information, (ii) limits the amount of judicial resources that are allocated to cases which have already been resolved by way of a court order, and (iii) ensures that a child's routine and schedule are not turned upside down on a motion only to be potentially changed again at a final hearing. I adopt these considerations as well as those identified in the cases I have referred to.
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> [39] The motion judge accepted the statement of the law in *F.K. v. A.K.*, with one caveat. While he agreed that there must be compelling evidence to support changing a final order on an interim basis, he cautioned that the stringent test in *F.K. v. A.K.* should not be read in a manner that places too much emphasis on maintaining the status quo.

 

> [40] I have already said that the imposition of a stringent test for the granting of a temporary variation of a final parenting order of a court is sound in principle and consistent with authority. **Before embarking on an inquiry into the best interests of the child, the court must first be satisfied that circumstances exist of so compelling and exceptional a nature that they require an immediate change.** I would only caution that there may be exceptional circumstances that justify a temporary variation of a final order other than those described in *F.K. v. A.K.* It will be recalled that Pazaratz J. insisted that a temporary variation of a final parenting order could only be made where the child's physical and/or emotional well-being is in jeopardy and the proposed new arrangement is so necessary and beneficial that it would be unfair to the child to delay implementation. That is certainly an indication of how exceptional the circumstances must be to make an interim variation of a final parenting order, but I would not foreclose the possibility that other, equally compelling circumstances might meet the test. [emphasis added]

Justice Diamond saw no compelling reason to depart from this approach when dealing with a request to vary a final support order on an interim basis. He found that, to vary a support order on an interim basis, the Mother had to show the existence of "compelling and exceptional circumstances."

While Justice Diamond is likely correct, and while it is certainly easier that the tests are the same, we do note that there will often be significantly more cause for concern when varying a parenting order on an interim basis. The need for "compelling and exceptional circumstances" is certainly justified when dealing with changes for a child. But need the test be equally stringent for a support case? Is a 20% decrease in a payor's income sufficiently "compelling and exceptional" to justify an immediate interim support reduction?

In any event, in this case, Justice Diamond found no such compelling and exceptional circumstances to justify an interim variation. And he was right.

**Is It Too Late Now To Say Sorry — For Speaking Too Soon**

*Heimlick v. Longley*, 2022 CarswellSask 141 (Q.B.) — Turcotte J.

In the 2022-16 (May 2, 2022) edition of *TWFL*, we posited that Justice Kurz' decision in *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) *might* be the final record on the issue of admitting surreptitious recordings into evidence in family law proceedings. And then we read Justice Turcotte's decision in *Heimlick*, and realized it seems we may have spoken too soon.

In *Van Ruyven*, Justice Kurz strongly cautioned (we might go so far as to say "condemned") the practice of admitting surreptitious recordings into evidence in family law proceedings, except in cases where the evidence disclosed serious misconduct by a parent, significant risk to a child's safety or security, or a threat to another interest central to the need to do justice between the parties and children.

In *Heimlick*, the mother brought an application seeking, among other relief, a variation of an interim parenting order. The father objected to the mother including as an exhibit to her affidavit a USB stick containing recordings of cellular phone calls between the parties, and video recordings of the parties during parenting exchanges or following parenting exchanges. The father argued that the recordings were highly objectionable and were contrary to longstanding jurisprudence strongly discouraging parties from trying to enter such recordings into evidence.

The mother argued that the recordings were highly relevant and necessary in the context of the application she had brought to the court. The mother sought to vary the interim parenting order having regard to the father's continuing misconduct, which affected his parenting time and decision-making responsibilities regarding their child.

The mother acknowledged the jurisprudence that dissuades parties from using surreptitiously obtained recordings in family law proceedings. But she argued that the new provisions of Saskatchewan's *Children's Law Act, 2020*, S.S. 2020 c. 2, and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), that require the courts to consider "family violence" as part of the best interests analysis, support the ability to file some form of corroborating evidence where family violence is alleged. The mother argued

 

that, otherwise, she would be disadvantaged due to the "he said/she said" nature of some of the allegations and her ability to meet the burden of proof on a balance of probabilities.

The mother also pointed to the terms of the interim parenting order, including the condition requiring the parties to conduct themselves appropriately in their parenting exchanges and other communications relating to their parenting time and decision-making responsibilities. She argued that, in the circumstances, some latitude against the policy of using surreptitious recordings must be granted, particularly where a breach of the order is alleged, to assist the court in assessing the credibility and reliability of the parties' affidavit evidence regarding the impugned conduct, and to assess what further terms or conditions in a parenting order may be necessary to regulate the father's conduct.

Justice Turcotte started by accurately summarizing the law on the use of surreptitious recordings in family law proceedings:

> [21] . . . this Court has strongly discouraged parties from surreptitiously recording their interactions in family law matters. Such recordings are viewed as having limited probative value, in that they require interpretation and explanation through the narrative provided by the parties, which narrative is often conflicting in the parties' affidavits. Further, such recordings are viewed as highly prejudicial in that they capture a portion of a contentious interaction between the parties, but not always the entire interaction, such that the Court is asked to rule on a party's stability or perfidy from a moment or a select series of moments in time. There are also times where the recordings may be edited such that the reliability of the recording is questioned. Finally, these types of recordings are viewed as repugnant from a policy perspective. Considerations here include that the inherent breach of privacy in the recording tends to promote conflict and mistrust between the parties while exacerbating the corrosiveness of their family litigation, prolonging the litigation, and increasing its expense with ever more voluminous affidavits and exhibits.
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> [22] **Given these concerns, such recordings are viewed as presumptively inadmissible, but there is no absolute rule against the admission of secret recordings in family law proceedings.** As Kalmakoff J.A. held in *A.M.D.* [*v. M.R.M.*, 2021 CarswellSask 266 (C.A.)], for these types of recordings to be admissible they must at a minimum "be shown to be authentic, unaltered, relevant and probative" (para. 49). The Court retains the discretion to consider the admission of this evidence, weighing its probative value against its prejudicial effect in the context of all the evidence and in consideration of the public policy concerns noted above, to determine whether there is a compelling reason to admit the recordings into evidence, including whether it discloses serious misconduct by a parent, a significant risk to a child's safety or security, or a threat to another interest central to the need to do justice between the parties and the children. [citations omitted; emphasis added]

Justice Turcotte stated that, while he agreed with the policy considerations set out in the above excerpts, many of the cases predated the changes to the *Children's Law Act* and the *Divorce Act*, which require the court to take allegations of family violence into consideration in assessing the best interests of the child. (We pause here to note that Justice Turcotte cited Justice Kurz' decision in *Van Ruyven*, which was released in September 2021, *after* the amendments to the *Divorce Act* came into effect.)

Justice Turcotte had considered the mother's allegations of family violence between the parties based on the affidavit evidence before him when making the interim parenting order (which the mother was now seeking to vary), and set out a structured parenting arrangement. We can't help but wonder why the parties' affidavit evidence on the issue of family violence *was* sufficient for the purposes of making the interim parenting order, but *was not* sufficient for the purposes of the application to vary the interim parenting order.

His Honour noted that the interim parenting order required the parties to encourage the child's relationship with one another, and to avoid making derogatory comments about the other parent in the presence of the child or allowing third parties to do the same. The mother alleged the father had not abated and self-regulated his behaviours, and that his behaviours were escalating. Justice Turcotte found the mother's allegations to be concerning, not just in the context of the terms of the interim parenting order, but relative to the negative impact the father's conduct might have on the child and the mother's personal safety concerns. The recordings also bore on the father's conduct and demeanour towards the mother during these interactions.

 

In the circumstances, having regard to the legislative changes, and taking into consideration the terms of the interim parenting order, Justice Turcotte allowed the recordings into evidence except for one recording provided to the mother by her neighbour. His Honour noted that the recordings "appeared" to be authentic and unaltered, they were relevant to the issues raised in the mother's application, and they had probative value. Justice Turcotte found that any prejudicial effect of the recordings was militated by the father's knowledge that the mother was recording their interactions, and by the need for the court to assess the extent to which family violence continued to bear on the child's best interests.

Contrast Justice Turcotte's decision in *Heimlick* with Justice Harris' decision in *Ting v. Ting*, 2022 CarswellAlta 800 (Q.B.), which was also released after Justice Kurz' decision in *Van Ruyven*. In *Ting*, the parties entered video footage obtained from the father's body worn camera into evidence by agreement. The mother was aware she was being recorded by the father, but she did not expressly consent to being recorded and testified that it made her very uncomfortable. After quoting from Justice Kurz' decision in *Van Ruyven*, Justice Harris held the fact that the father's video recordings were not surreptitious did not make a recording made without the mother's express consent any less corrosive. It was for this reason that Justice Harris chose not to consider or rely on the father's video recordings to come to his decision, as "[d]oing so would only encourage such a practice."

We tend to agree with Justice Kurz and Justice Harris. There will be many cases where recordings of the other parent or child will be technically "relevant" to the issues before the court, including allegations of family violence and issues of credibility — but that does not mean that courts should turn a blind eye to the prejudicial effects of those recordings and admit them into evidence (even in cases where the other parent is aware they are being recorded but does not consent to the recording).

Putting aside the risk that recordings can be manipulated and edited, or that they often only tell half-a-story, how can parents effectively parent when constantly worried that all they say and all they do is being documented to possibly be used against them if it can be shown to be relevant to the best interests of the children or family violence? And to allow such recordings into evidence in the name of protection against "family violence" or as relevant to the best interests of children only incentivizes the continued use of such recordings "for defensive purposes."

"Hey Billy — how come your parents are always wearing body cameras?"

"Oh . . . that's just the way they do things since they separated."

Very sad.

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