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— Franks & Zalev - This Week in Family Law

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Contents

Limitation Periods? For Arbitrations?? Read on Macduff!

Maisonneuve v. Clark, 2022 CarswellOnt 1375 (C.A.) — Huscroft, Sossin, and Favreau JJ.A.

Courts? Jammed. Lists? Long. Court delays? Unacceptable. Arbitration? Increasingly popular.

Arbitration can be an excellent alternative to litigation. The flexibility it offers in speed, process, and scheduling will often more than overcome the cost of an arbitrator. Working with the arbitrator, the parties can design a process that works for them and the specific issues to be decided. It is clear now that the arbitration process need not mirror the court process: *Kroupis-Yanovski v. Yanovski*, 2012 CarswellOnt 11826 (S.C.J.); *Geary v. Geary* (2017), 94 R.F.L. (7th) 314 (B.C. S.C.); *Jirova v. Benincasa* (2018), 5 R.F.L. (8th) 317 (Ont. S.C.J.); *Petersoo v. Petersoo* (2019), 29 R.F.L. (8th) 309 (Ont. C.A.); *McLaren v. Casey*, 2016 CarswellBC 274 (S.C.); *Nolin v. Ramirez*, 2019 CarswellBC 1641 (S.C.). And parties can agree on an arbitral process that is proportional to the issues in dispute: *Jung v. Jung* (2015), 72 R.F.L. (7th) 175 (Ont. S.C.J.).

However, people often forget that an arbitration is a creature of both statute and contract. And when we think of contracts, we must consider limitation periods. This appeal dealt with the applicability of limitation periods to an arbitration agreement.

The case involved a dispute between cousins: Jean Maisonneuve and Christopher Clark. The cousins were in business together, and were shareholders of a company. Things went bad, and Mr. Clark started proceedings against Mr. Maisonneuve.

On September 26 and 27, 2016, the parties reached a settlement. They signed Minutes of Settlement and mutual releases. But one issue remained outstanding, that being payment of some expenses with respect to one of the businesses. The mutual release they had signed provided that this issue would be submitted to binding arbitration if they were unable to resolve it:

> The undersigned agree and understand that there is one issue that is not covered by the Mutual Release and it is as set out in this paragraph (the "Excluded Issue") . . . **If the parties are unable to resolve the Excluded Issue as between them, then the Excluded Issue shall be fully and finally referred to the Arbitrator for resolution**. The Arbitrator's decision shall not be subject to any appeal, either of law, fact or mixed law and fact. [emphasis in original] (the "Arbitration Clause").

In July 2017, Mr. Clark commenced an action to enforce the Minutes of Settlement. In his defence, Mr. Maisonneuve asserted that the parties had contemplated that any arbitration pursuant to the Arbitration Clause would take place within 90 days.

In January 2018, Mr. Maisonneuve's lawyer sent Mr. Clark's lawyer a settlement proposal, including a proposed mechanism to resolve the outstanding issue. Mr. Clark's lawyer responded that there would be no negotiation.

In June 2019, Mr. Maisonneuve changed lawyers. He retracted his argument that the parties intended that an arbitration take place within 90 days — and he then requested arbitration. Of course, this time Mr. Clark refused arbitration on the basis that the arbitration was time-barred, and that it should have been completed 90 days from the date of the Minutes, or within two years of that date given the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched B (the "*Act*").

Mr. Maisonneuve asked the Court to appoint an arbitrator. He took the position that the Arbitration Clause required the parties to at least *try* to resolve the outstanding issue before arbitration. Absent such an attempt, the limitation period never started. And since Mr. Clark did not clearly communicate his refusal to negotiate a resolution of the issue until January 2018, the request to arbitrate was not time-barred.

The motion judge found that there was no agreement that the parties would conduct the arbitration within 90 days of the Minutes being signed. The Court also determined that the arbitration was not barred by the two-year limitation period in the *Act*. In Ontario, s. 5 of the Act provides:

> A claim is discovered on the earliest day that the person with the claim knew, or reasonably ought to have known that:
>
> 1. the injury, loss or damage had occurred,
>
> 2. the injury, loss or damage was caused by or contributed to by an act or omission,
>
> 3. the act or omission was that of the person against whom the claim is made, and
>
> 4. having regard to the nature of the injury, loss or damage, a proceeding would be an **appropriate** means to seek to remedy it. [emphasis added]

The motion judge found that it was not clear that arbitration was "appropriate" until it was clear that the dispute could not be resolved through negotiations. The motion judge also determined that Mr. Maisonneuve should have known by January 31, 2018, that a negotiated settlement was not going to be possible, and on that basis, Mr. Maisonneuve had commenced his proceeding within the two-year limitation period.

At the Court of Appeal, Mr. Clark argued that the motion judge erred in not applying *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 CarswellOnt 4051 (C.A.), an insurance case, where the Court of Appeal held that negotiation was *not* a precondition to arbitration — and therefore, the limitation period did not start to run at the conclusion of unsuccessful negotiations. Below, the court had distinguished *Markel* because it involved the statutory interpretation of an arbitration clause in the *Insurance Act*, R.S.O. 1990, c. I.8, not an arbitration clause in an agreement.

Mr. Clark also argued that the decision below would create uncertainty about the application of limitation periods to arbitration clauses because it is very difficult to know when negotiations are "at an end."

The Court of Appeal rejected both arguments, and found that the motion judge's decision turned on the specific wording of the Arbitration Clause and the factual matrix of the negotiations:

> [15] . . . Parties are free to agree to arbitration clauses that make no reference to the possibility of an informal agreement or that are more specific about the steps and timing leading to arbitration. In this case, as stated by the application judge, it was open to [Mr. Clark] to let [Mr. Maisonneuve] know at any time that no further negotiations would take place. Indeed, this is what occurred in January 2018, which the application judge found triggered the start of the limitation period.

So what does this mean for provinces such as B.C., Alberta, and Ontario, for example, where arbitration is quite popular? Arbitration agreements should clearly set out timelines. An agreement to arbitrate has a shelf-life. If parties agree to submit an issue to arbitration "failing agreement," at some point, it will become clear that agreement is not possible, and the clock will begin to tick. One party may strategically decide to make it clear early that negotiations will not be successful.

What is less clear, however, is what happens to an issue that is to be arbitrated, should the limitation period to arbitrate expire? The agreement to arbitrate will no longer be enforceable, but the parties, having agreed to arbitrate, are not likely able to just resubmit the matter to court. Just another thing for family lawyers to diarize. Caution please.

Ode to a Cotton Swab

T.S. v. J.L.W. (2022), 70 R.F.L. (8th) 1 (Sask. C.A.) — Caldwell, Ryan-Froslie and Leurer JJ.A.

In January 2018, TS sought a declaration of paternity under s. 4 of the *Children's Law Act, 1997*, S.S. 1997, c. C 8.2 [the "*CLA*"] (since repealed and replaced by the *Children's Law Act, 2020*, S.S. 2020, c. 2) with respect to JLW's child. As part of the application, TS sought blood or genetic testing to confirm or deny paternity under s. 48(1) of the *CLA*. He also claimed joint custody (as it was then known) and parenting time with the child.

The parties began cohabiting in May 2015. The child was born in March 2016. From what we remember of 11 th grade biology, this meant the child would have been conceived somewhere around June 2015.

In the court below, TS was not successful in his claim for a declaration of paternity, but his claim for genetic testing was granted as the court could not determine whether or not a presumption of paternity based on cohabitation at the time of conception would apply because of the conflicting evidence. (There was a dispute as to whether the parties were cohabiting at the time of conception.)

JLW appealed the order for genetic testing, and TS cross-appealed the Court's refusal to find a presumption of paternity. Why this matter took four years to get to the Court of Appeal, we do not know.

JLW argued that the court below erred in exercising its discretion to order genetic testing by:

> (a) failing to give reasons for why TS's action was properly constituted;
>
> (b) misapprehending evidence that she said showed that TS had an improper motive for bringing the application (specifically to control and harass her); and
>
> (c) making an order contrary to the child's best interest (in that TS was allegedly physically and emotionally abusive such that it would be inappropriate for him to have any role in the child's life).

As the decision below was a matter of discretion, both appeals would inevitably be dismissed unless one of the parties could show that the court below erred in principle, disregarded a material matter of fact, failed to act judicially, or that the decision below was clearly wrong: *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) at para. 15; *Jones v. Bahr* (2010), 82 R.F.L. (6th) 73 (Sask. C.A.) at para. 8.

As in most Canadian jurisdictions, the *CLA* provides for both presumptions of paternity and for genetic testing:

> **Parentage**
>
> **43(2)** Any person having an interest may apply to the court for a declaratory order that:
>
> (a) a man is recognized in law to be the father of a child; or
>
> (b) a woman is recognized in law to be the mother of a child.
>
> . . . . .
>
> **Presumptions**

> **45(1)** Unless the contrary is proven on a balance of probabilities, there is a presumption that a man is, and that a man is to be recognized in law to be, the father of a child in any one of the following circumstances:
>
> (a) at the time of the child's birth or conception the man was cohabiting with the mother, whether or not they were married to each other;
>
> . . . . .
>
> **Blood tests**
>
> **48(1)** On the application of a party to a proceeding pursuant to section 43 or 44, the court, subject to any conditions it considers appropriate, ***may*** give the party leave to:
>
> (a) obtain blood or other genetic tests of the persons named in the order; and
>
> (b) submit the results in evidence. [emphasis added]

It was uncontroverted that the parties had cohabited, but the date of separation was in issue. JLW swore that they separated in early June of 2015, which was prior to conception. TS, however, took the position that the separation was in October of 2015, which was after the child was conceived. The birth registration listed the father as "unknown".

As the court below could not determine whether parties had been cohabiting when the child was conceived (so as to apply the above-noted presumption), the question became whether genetic testing should be ordered pursuant to s. 48(1) of the *CLA* to determine the issue of paternity.

The court below held that s. 48(1) required two questions to be answered:

> 1. whether TS's request was being made in the context of a "properly constituted proceeding": *N.M.S. v E.B.C.S.*, 2005 CarswellSask 448 (Q.B.) ("*N.M.S.*"), and if so,
>
> 2. whether the court should exercise its discretion to make an order requiring genetic testing, taking into account the factors set out *D.H. v D.W.*, 1992 CarswellOnt 3891 (Gen. Div.), including
>
> (a) the strength of the case for paternity and, in particular, whether it is based on "mere speculation" or alleged facts, which, if proven, would substantiate the claim;
>
> (b) an assessment of whether TS's motives for bringing the application are *bona fide*;
>
> (c) the best interests of the child; and
>
> (d) the interests of justice.

In determining that blood or genetic testing should be ordered, the court below stated as follows:

> [24] In the present circumstance, I am satisfied that [TS's] case is not based on mere speculation. There is a real issue as to parentage. The evidence suggests [TS] could be the father. There is no evidence to suggest someone else may be the father. I am not satisfied this is a circumstance where an application for paternity testing should be denied on the basis of the *bona fides* of [TS]. Like *F.R.*, **[JLW's] view that it would not be in the child's best interests to have any contact with [TS] speaks to the merits of whether or not [TS] should be permitted access and not to the issue of paternity.** This is not one of those rare circumstances where paternity testing should be refused such as where conception was the result of an illegal act and the application is brought while criminal charges are pending. [emphasis added]

The Court of Appeal made short work of the cross-appeal. The evidence about whether the parties were cohabiting at the time of conception was hopelessly contradictory. Therefore, TS could not establish that a presumption of paternity existed. (While a legal presumption allocates the burden of proof — there still must be an evidentiary basis for the application of the presumption. A presumption is not evidence.)

In considering the main appeal, the Court of Appeal ever-so-helpfully started with a review of the legal principles governing the ordering of genetic testing under s. 48 of the *CLA*. While it is clear that an order for genetic testing is discretionary (s. 48 of the *CLA* says "may"), the *CLA* does not set out the factors a court should consider in *exercising* that discretion.

First and foremost, there must be a real issue as to parentage: *D.H.* at paras. 8 and 9.

From there, the factors to consider can vary depending on the circumstances of each case. Those factors can include:

(a) the strength of the case: *D.H.* at para. 10;

(b) whether the application is *bona fide* or whether it is brought for an ulterior or improper motive: *D.H.* at para. 11;

(c) the best interests of the child: *D.H.* at para. 12; and,

(d) the interests of justice: *D.H.* at para. 12.

Notably, this non-exhaustive list of factors has been endorsed by courts across Canada: For example: *N.M.S.* at para. 19; *JCC v. NNC* (2018), 9 R.F.L. (8th) 70 (Alta. C.A.) at para. 42; *A.M. v. S.B.*, 2021 CarswellNB 313 (Q.B.) at paras. 22 and 30; *R.J.P. v. N.L.W.* (2013), 33 R.F.L. (7th) 310 (B.C. C.A.) at para. 21; and *F.X.B. v. M.S.B.* (2007), 36 R.F.L. (6th) 403 (Y.T. S.C.) at paras. 20 and 23.

As to the first ground of appeal, the Court of Appeal easily determined that the chambers judge was correct in finding that the matter was a properly constituted action. There was clearly a properly constituted proceeding in which TS sought to be declared to be the man recognized in law to be the father.

The next question for the Court of Appeal was whether TS's application was the result of an improper motive. Here, JLW argued that the court below did not properly consider evidence as to TS's alleged abuse, mistreatment and control of her, and that the proceedings were merely TS's way of continuing that abuse and control.

The Court of Appeal was unmoved. The court below was clearly alive to JLW's argument with respect to motive. In fact, the court below had specifically noted JLW's suggestion that the purpose of TS's application was to threaten or harass her. However, the court below was satisfied that paternity testing should be ordered, as there was a real issue as to paternity; the evidence suggested that TS could be the father; and there was no evidence to suggest that anyone else may be the father.

Finally, JLW argued that decision of the court below was contrary to the best interests of the child because, even if TS was the father, he should not have a relationship with the child given his abusive behaviour. In support of her position, JLW relied on *F.R. v. A.K.A.* (2010), 89 R.F.L. (6th) 201 (Ont. C.J.) [*F.R.*]. In *F.R.*, the mother had been sexually assaulted by the putative father (resulting in conception), and the court refused to make an order for paternity testing, finding that it would not be in the best interests of the child.

Here (again), however, the court below had determined:

> [24] . . . Like *F.R.*, [JLW's] view that it would not be in the child's best interests to have any contact with [TS] **speaks to the merits of whether or not [TS] should be permitted access and not to the issue of paternity.** This is not one of those rare circumstances where paternity testing should be refused such as where conception was the result of an illegal act and the application was brought while criminal charges are pending. [emphasis added]

On appeal, JLW argued that there was no point in ordering genetic testing if TS could not show that his involvement in the child's life would benefit the chid.

The Court of Appeal did not accept this argument either. Essentially, the Court of Appeal found that this argument was putting the "parenting-time cart" before the "parentage horse."

The factors to be considered with respect to whether to order genetic testing are different from those governing the question of actual parenting. The factors with respect to the question of parenting arrangements and best interests are set out in s. 10 of the *CLA*. Those factors include the usual considerations of the child's needs, their relationships, the willingness of each parent to support a relationship with the other parent, etc.

But the considerations with respect to parentage are different, as the question is just whether it is in the best interests of the child *to know* their parentage. If paternity testing showed that TS was the child's biological father, the next question would then be what, if any, relationship TS should have with the child. To apply those factors at this juncture, however, would be premature.

The Saskatchewan Court of Appeal agreed with the British Columbia Court of Appeal in *R.J.P.*, where the B.C. Court of Appeal held that the court need not consider the likelihood of the applicant's ultimate success on underlying parenting issues prior to ordering paternity testing. And, in doing so, like the B.C. Court of Appeal, the Saskatchewan Court of Appeal disagreed with suggestions to the contrary in the English case of *F (a minor), Re*, [1993] 3 W.L.R. 369 (Eng. C.A.), leave to appeal to the House of Lords refused.

In Canada, most cases support the proposition that determining parentage is generally in a child's best interests: *A.M.* at para. 17; *D.H.* at para. 12; *JCC* at para. 49; and *N.M.S.* at para. 20, for several reasons. As a general rule, a child has the right to know and understand their parentage. In fact, this is set out in Article 7 of *the United Nations Convention on the Rights of the Child* to which Canada is a signatory. Furthermore, as the Court of Appeal explained in its decision:

> [43] . . . knowing one's parentage is generally in a child's best interests because of: (a) the importance of a medical history and genetics to a child's health care; (b) the child's right to financial support from their biological parents; (c) knowledge of the existence of siblings and other extended family; (d) knowledge of ethnic, cultural and religious origins; (e) knowledge of one's intergenerational roots; (f) rights of inheritance; and (g) to establish consanguinity in considering a spousal relationship.

Finally, according to the Court of Appeal, the interests of justice are, as a general rule, best served by obtaining the truth about a child's parentage. A declaration of paternity clarifies the legal rights and obligations the putative father and child have with respect to each other: *D.H.* at para. 13; *J.S.D. v. W.L.V.* (1995), 11 R.F.L. (4th) 409 (B.C. C.A.); *R.J.P.* at para. 23; *JCC* at para. 48; *A.M.* at para. 31; and *Griggs v. Cummins*, 2014 CarswellOnt 9300 (S.C.J.).

Ultimately, while courts must guard against permitting blood or genetic testing if it would be against the child's best interests [such as where testing could be emotionally damaging to a child — see, for example, *T. (A.L.J.) v. J. (K.J.)* (2011), 98 R.F.L. (6th) 115 (Man. Q.B.)], to make such an Order the court need not be satisfied that the outcome will necessarily benefit the child: *I.M. v. K.M.*, 2003 CarswellBC 1017 (S.C.).

Undoubtedly, part of the consideration with respect to genetic testing is how easy, unintrusive, and accurate such testing is today: no more needles and no more drawing blood. Today, it's just a swab of the cheek. And, in the end, in this age, why rely on presumptions when we have at our disposal unintrusive testing that is in excess of 99% accurate.

Appeal dismissed. Cross-appeal dismissed. No costs. Swab away.

For a recent similar result in a recent similar case, see *K.M.S. v. A.H.*, 2021 CarswellBC 1417 (Prov. Ct.) — Saunders, J.

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