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

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Matter of Life & Death and Mature Minors

JI v. Alberta (Child, Youth and Family Enhancement Act, Director) (2022), 73 R.F.L. (8th) 45 (Alta. Q.B.) — Millar J.

Justice Millar's decision in *JI v. Alberta* deals with the complicated interplay between child welfare legislation, and the right of a mature minor to withhold consent to medical treatment. It offers an excellent refresher about the Mature Minor Doctrine, and how courts should be dealing with these types of incredibly challenging cases.

The child, J.I., and the parents were Jehovah's Witness. When she was 14 years old, she was admitted to hospital with sickle cell anemia. After about a week in hospital, and after other treatments had failed to yield results, her doctor recommended a blood transfusion; but J.I. and her family refused because blood transfusions went against their religious beliefs.

The Director of Child and Family Services (the "Director") decided to intervene by seeking an apprehension Order and a medical treatment Order pursuant to the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 ("*CYFEA*").

At 1:30 a.m. on October 14, 2019, an emergency hearing took place in a hospital boardroom before a provincial court judge, who heard oral evidence from a social worker and J.I.'s doctor. He also heard from J.I's father, who explained J.I.'s religious beliefs, and asked for more time to see if other treatments might work. He had some assistance from several members of the hospital's liaison committee for Jehovah's Witnesses, but he was not given enough time to retain a lawyer.

J.I. was not given formal notice of the proceeding, and she did not attend the hearing or have a lawyer attend on her behalf.

Although the hospital had assessed J.I. as a mature minor who *might* have capacity to make her own medical decisions, the judge determined that J.I.'s maturity was irrelevant to the issues before him, and ultimately granted the relief sought by the Director. However, he also directed the doctor to wait until he felt J.I.'s health was at serious risk before he gave her a blood transfusion to give the other treatments additional time to work, and adjourned the matter to the next day to give J.I. and her parents time to retain counsel.

On October 15, 2019, J.I. and her parents retained counsel. Although J.I.'s lawyer was not available that day, her parents' lawyer tried to make substantive submissions about the importance of giving J.I. an opportunity to be heard and to defend her views. However, the judge advised the parties that their submissions could wait until the next hearing on October 21, 2019.

In the meantime, J.I.'s condition started to improve, and she ultimately did not need a blood transfusion. As a result, on October 17, 2019, the Director applied to set aside the October 14, 2019 Orders, and the judge granted the Director's request.

Although the case was moot once the Orders were set aside, J.I. and her parents nevertheless filed a Notice of Appeal in the Alberta Court of Queen's Bench. The Director moved to quash the appeal, but the Court dismissed the motion because there was a strong public interest in having the matter heard to determine whether "safeguards are in place to ensure that medical treatment orders granted under *CYFEA* are justified and issued in accordance with the *Charter*," and allowed the appeal to proceed.

The Director tried to argue the *CYFEA* provided a complete code for medical decision-making for mature minors, but the appeal judge, Justice Millar, would have none of it. He found that the hearing judge had erred in finding that J.I.'s maturity was irrelevant. While J.I.'s views were not *determinative*, there was no question that her views, and the extent to which she had the maturity and capacity to make independent decisions, were very important considerations that ought to have been taken into account. This is clear from the Supreme Court of Canada's decision in *Manitoba (Director of Child & Family Services) v. C. (A.)* (2009), 65 R.F.L. (6th) 239 (S.C.C.), a case that dealt with Manitoba's child welfare legislation, where Justice Abella for the majority confirmed that while a child's maturity is not determinative in these difficult cases, it is nevertheless an extremely important consideration:

> [87] **The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion** under s. 25(8). In some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor. **If, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected. Such an approach clarifies that in the context of medical treatment, young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity.** [**emphasis** added]

Although J.I.'s views had been taken into account to some extent as there was evidence before the hearing judge that she did not want to have a blood transfusion for religious reasons, and that she wanted to wait and see if other treatments would work, simply considering her views was not the same as assessing her maturity and capacity.

In order to properly assess the weight to be afforded to J.I.'s views, the hearing judge had to hear evidence that would have allowed him to assess her level of maturity. As Justice Abella explained in *C. (A.)*:

> [95] In those most serious of cases, where a refusal of treatment carries a significant risk of death or permanent physical or mental impairment, **a careful and comprehensive evaluation of the maturity of the adolescent will necessarily have to be undertaken to determine whether his or her decision is a genuinely independent one, reflecting a real understanding and appreciation of the decision and its potential consequences.**
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> [96] As all of this demonstrates, the evolutionary and contextual character of maturity makes it difficult to define, let alone definitively identify. **Yet the right of mature adolescents not to be unfairly deprived of their medical decision-making autonomy means that the assessment must be undertaken with respect and rigour.** The following factors may be of assistance:
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> • What is the nature, purpose and utility of the recommended medical treatment? What are the risks and benefits?
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> • Does the adolescent demonstrate the intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences?
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> • Is there reason to believe that the adolescent's views are stable and a true reflection of his or her core values and beliefs?
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> • What is the potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment?

- Are there any existing emotional or psychiatric vulnerabilities?
- Does the adolescent's illness or condition have an impact on his or her decision-making ability?
- Is there any relevant information from adults who know the adolescent, like teachers or doctors?

This list is not intended to represent a formulaic approach. Its objective is to assist courts in assessing the extent to which a child's wishes reflect true, stable and independent choices. [**emphasis** added]

To this, Justice Millar added that, from a practical standpoint, while it may be appropriate to hear evidence directly from the child in some cases, "there must be flexibility in the manner of assessment", as there will be situations where the child's health is too compromised to allow them to testify, or where testifying would be detrimental to the child's physical or mental state. Furthermore, while medical evidence about a child's maturity is important, "a hospital team's decision that a child is a 'mature minor' is not determinative for the child or the court in these types of applications."

J.I. and her parents also raised a number of procedural issues. Although Justice Millar ultimately concluded that they had not been denied procedural fairness, he did hold that "in the future the Director should prioritize providing timely notice to a child aged 12 or over, pursuant to section 23 because it is in an adolescent's best interests to recognize their maturity and growing autonomy, including their awareness of and possible participation in such proceedings."

How to Make Sure the Court Awards Retroactive Support Against You on an Interim Motion

McConkey v. McConkey, 2022 CarswellOnt 11242 (S.C.J.) (further reasons at 2022 CarswellOnt 11230 (S.C.J.)) — Kurz J.

This case dealt with a motion for interim child and spousal support back to February 2019.

The parties separated on February 9, 2019, after a 25-year "traditional marriage." During the relationship the wife had worked outside the home on only a part-time basis because of her parenting responsibilities for the parties' three children. At the time of the motion one of the children was independent, while the others were still completing their post-secondary education.

In January 2022, the wife brought a motion for interim child and spousal support retroactive to February 2019. Justice Kurz noted that the wife had failed to offer "compelling reasons" for the delay in bringing the motion. While the wife's counsel had provided *some* justification, there was no evidence that would, in the words of the Court "justify or even fully explain a three-year delay in bringing this motion." In passing, Justice Kurz was also concerned that the wife had uploaded 136 documents for the motion, including numerous charts and spreadsheets in support of what the wife initially claimed was a "short motion." The motion was converted into a 90-minute-long motion — which was argued (you guessed it) over approximately two hours.

Justice Kurz properly emphasizes that a motion for interim support is not meant to take the place of a trial. Rather, as we know, interim motions are meant to allow the parties to maintain a reasonable lifestyle until the full merits of a case can be determined at trial. Even when, as was the case here, there is no issue of entitlement, courts generally do not engage in a detailed examination of the merits of a case at the interim motion stage. Nor should they. (However, how far a Court must delve into the issue of entitlement on an interim motion is a challenging question.)

Justice Kurz noted that while it is open for a motion judge to make an interim retrospective (back to the time of the original application) or even a retroactive (back beyond the date of the original application) support order, it should be cautious in doing so without a finding of some blameworthy conduct. Courts should be cautious in making determinations about blameworthy conduct on a motion, as examinations have not taken place before most motions.

In this case, the husband had been working, very successfully, in Toronto in the area of human resources. He lost his job in the year before separation. Two months after separation, he moved to Winnipeg to be with his new partner who was also in the HR field. The husband claimed that this was done "in the best interests" of the children, as he could better use his new

partner's network in Winnipeg to find a new position. There was little evidence of any attempts the husband had made to find work in Toronto.

The Court did not accept the husband's evidence as to his intentions. Of particular concern to the Court was an e-mail in which the husband had told a potential employer in the month before separation that he would accept a lower salary for "work-life balance reasons." The Court summed things up simply by stating: "His move had nothing to do with the interests of his dependants." Mic drop.

In Winnipeg, the husband enjoyed the financial support of his new partner. He made minimal contributions to her household.

The husband found a new position with a Winnipeg firm, albeit at an amount significantly less than what he had earned previously. He then lost that job and found another similar position in Winnipeg.

At the time of the motion, the husband was earning an income of $187,500. In the three years prior to separation, he had earned $384,532, $285,391 and $130,141 (being the year he was terminated). At best, the husband had a serious optics problem.

The wife earned a modest income working part-time throughout the marriage. In 2022, the wife estimated that she would earn $25,259.

Between the date of separation and April 2021, the husband paid no support to the wife. After he obtained his first job in Winnipeg he started paying $2,000 per month in uncharacterized support payments. This was then increased to $2,550 per month in June 2021.

Justice Kurz noted that, at a motion, it was not the role of the Court to "perform the level of analysis of the support issues that should be reserved for trial." Specifically, his Honour noted that it would not be appropriate to penalize the wife for any delay in bringing the motion. Any delay arguments could be raised at trial, though the Court did note that the Supreme Court in both *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.) and *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.) cautioned against a rigid stance regarding delay by the recipient, particularly in the face of blameworthy conduct of the payor. This position was strongly echoed by the Alberta Court of Appeal in *Henderson v. Micetich* (2021), 54 R.F.L. (8th) 295 (Alta. C.A.).

Based on the limited evidentiary record before it and only for purposes of this motion, the Court found that that the husband had engaged in blameworthy conduct. Specifically, the failure of the husband to make support payments in the initial years after separation was determined to be blameworthy conduct. The fact that he later started to make payments based on his own calculations did not alleviate this. While the Court made it clear that this finding of blameworthy conduct was not to be binding on the trial judge, given the basis for the finding of blameworthy conduct (the non-payment of support), this will be a challenging finding to overcome at trial.

While the Court determined that the husband's claims regarding his move to Winnipeg rang hollow, Justice Kurz was not prepared to impute an income to the husband based only on the motion record.

The Court did, however, order that support would start as of January 1, 2021. While normally, the court stated that it would order support from the time the motion was brought, the husband's blameworthy conduct made that unfair. In the Court's view, there had to be some recognition of the husband's failure to meet his support obligations for years since the parties separated.

The Court determined that the incomes for 2021 would be used to calculate support, and invited the parties to provide submissions as to how to calculate support for the period starting January 1, 2021.

The Court determined that while the husband would receive credit for the payments made, he would not receive any credit for payments he claimed to have made to the children directly. On this point the Court stated, "he should have made the arrangements to pay the amounts to the [wife], who was their primary caregiver after the separation." The Court stated that while the husband was not precluded from arguing that he should receive credit for the payments made to the children at trial, he needed further proof.

It is always dangerous for a payor to pay children directly as this is regularly frowned upon by the courts who regularly take the position that parents should not be allowed to unilaterally create their own support regimes. See, for example, *W. (G.F.) v. R. (J.L.)* (2012), 20 R.F.L. (7th) 263 (B.C. C.A.) at paras. 13-14 and *Greene v. Greene* (2010), 92 R.F.L. (6th) 52 (B.C. C.A.); *Fournier v. Broatch*, 2010 CarswellOnt 3484 (S.C.J.); *Reynolds v. Higuchi*, 2010 CarswellOnt 8072 (S.C.J.); *L. (L.B.) v. B. (S.)* (2010), 91 R.F.L. (6th) 141 (N.B. Q.B.), aff'd 14 R.F.L. (7th) 62 (N.B. C.A.); and *Kun v. Kun*, 2015 CarswellSask 416 (Q.B.).

With respect to the amount of support, the Court made a number of useful findings:

> • The Court determined that, despite the fact that the wife maintained a room for the daughter in her home, full table child support for a child going to school in Halifax was not appropriate. Instead, the Court set child support at an amount half-way between full-table child support and the "summer formula" under the Divorcemate calculator.
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> • The Court declined to award the wife support calculated on the basis of 70% NDI — thereby exceeding the "high range" of the *Spousal Support Advisory Guidelines*. The Court did, however, award interim support at the high-end of the range in recognition of the strength of the wife's claim to spousal support and the husband's failure to provide support in a timely fashion. (We pause to note that this appears to penalize the husband twice for the same blameworthy conduct: once to find that retroactive support is payable, and then again to order the high-end range.)
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> • The husband had sought an order that he be permitted to pay the "net" amount of spousal support to the wife. The Court declined to do so, noting that this is an area where the deductibility of support creates a situation where both parties benefit — as the wife's income tax bracket was so much lower than the husband's. In addition, the Court set out that the CRA would likely tax the wife on her receipt of support — regardless of what the order may say. Here, his Honour was correct. If payments meet the definition of support in the *Income Tax Act*, CRA will treat them as support. The Court can neither prevent a person from making a claim they are entitled to make or allow a claim that is not permitted: *Calogeracos v. R.*, 2008 CarswellNat 2076 (T.C.C. [Informal Procedure]); *Splett v. Pearo*, 2011 CarswellOnt 10349 (S.C.J.). Furthermore, a Superior Court has no jurisdiction to rule on the deductibility or the taxability of payments; that jurisdiction is conferred exclusively on the Tax Court of Canada: *LeBlanc v. Young*, 2011 CarswellBC 3050 (S.C.); *Arshinoff v. R.* (1994), 3 R.F.L. (4th) 221 (T.C.C.); *Bates v. R.*, 1998 CarswellNat 1474 (T.C.C.); *Nixon v. Nixon* (2014), 49 R.F.L. (7th) 196 (Sask. Q.B.); and *Silverman v. Silverman*, 2015 CarswellBC 245 (S.C.).