FAMLNWS 2023-09
Family Law Newsletters
March 6, 2023

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

This Case Brought to You by the Flat Earth Society

J.W.T. v. S.E.T., 2023 CarswellOnt 1495 (S.C.J.) — Bennett J.

Mom wanted the kids to be vaccinated. Dad did not. Ugh.

We had thought this was over. We thought we were done. We thought that the Court of Appeal had finally ended the ***legal*** debate about whether children should be vaccinated for COVID-19 when it released its seminal decision in *J.N. v. C.G.*, 2023 CarswellOnt 1538 (C.A.), which we discussed at length in the 2023-08 (February 27, 2023) edition of *TWFL*. But not so much, it would seem.

The most important part of *J.N.* for the purposes of our discussion of *J.W.T. v. S.E.T.* was the Court of Appeal's clear statement that if a parent is seeking an Order permitting a child to be treated with a medication that has been approved by Health Canada, the ***other*** parent bears the onus of proving that the Order should ***not*** be granted:

> [45] Stated otherwise, **judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness.** That being the case, **where one party seeks to have a child treated by a Health Canada-approved medication, *the onus is on the objecting party to show why the child should not receive that medication***. The motion judge erred by reversing that onus.
>
> [46] **The [Mother], as the parent seeking not to have the children vaccinated, had the onus to establish that, despite Health Canada's opinion as to the vaccine's safety and effectiveness, they should not be.** That onus was not satisfied. [***emphasis*** added]

Notwithstanding this clear statement of the law by the highest court in Ontario (well, technically, the Supreme Court of Canada is *in* Ontario; but you take our point), and although the father in *J.W.T.* did not adduce ***any*** evidence (admissible or otherwise) capable of rebutting Health Canada's approval of COVID-19 vaccines for children, the motion judge in this case determined that a trial was required to decide the issue, and dismissed the mother's motion. Given the Court of Appeal's decision in *J.N.*, in our view, the motion judge here was not as right as he could have been.

The parties in *J.W.T.* had three children together, who were ten, five, and four-years-old at the time of the motion. It is not clear from the decision when the parties separated, but we can tell from the court file number that the family law case had been ongoing since 2020.

In April 2022, the parties signed Minutes of Settlement that provided, among other things, that the children would reside primarily with the mother during the school year, and would have equal time with both parents in the summer. The Minutes also

contained the following clause about how the parties would decide whether the children should receive the COVID-19 vaccine (suggesting that this was an issue between the parties):

> The children shall not be vaccinated against COVID-19 without a court order, as per Justice Himel's endorsement and order dated December 13, 2021. The mother will be at liberty to bring a motion in the May 2022 trial settings for an order that she obtain COVID-19 vaccinations for the children of the marriage.

Pursuant to the Minutes, the mother brought a motion to allow her to have the children vaccinated for COVID-19. The father opposed the motion and argued that a trial — where both parties could call expert evidence — was necessary to decide the issue. According to the motion judge:

> [34] The father's position is that the vaccine is different than other vaccines. He argues that the COVID-19 vaccine has been "rushed" and has not been the subject of typical clinical trials that other vaccines have been required to be put through prior to being approved for use by the general population. He cites that he believes that there are experts who would proffer an opinion as to the dangerous side effects of these vaccines and that this case should not be decided until a court has had the opportunity of hearing both sides of the argument and receiving evidence from experts on both sides of that argument.

In other words, the father raised the exact same speculative arguments that have been repeatedly raised — and rejected — in similar cases across Canada. The father also did not produce ***any*** expert evidence to substantiate his position that the children should not be vaccinated, or to show that there was even a triable issue. And, again, this case had been ongoing (and vaccinations an issue) since 2020.

Although the motion was supposed to be heard during the May 2022 trial sittings, it had to be adjourned to the November 2022 sittings, and was not argued until November 21, 2022. Both parties filed their own Affidavits in support of their respective positions, but neither filed any admissible expert evidence. (Although the mother tried to rely on unsworn letters from the children's doctors, his Honour found they were inadmissible for a number of reasons, including that they did not comply with the provisions of the *Family Law Rules* that deal with the admissibility of expert evidence. See also *Berger v. Berger* (2016), 85 R.F.L. (7th) 259 (Ont. C.A.).)

At the conclusion of oral argument on November 21, 2022, his Honour reserved his decision.

While the decision was under reserve, on February 3, 2023, the Ontario Court of Appeal released its decision in *J.N. v. C.G.*, discussed above.

Given the Court of Appeal's ruling in *J.N.*, and as the father did not adduce ***any*** admissible evidence (expert or otherwise) to satisfy his onus, we would have thought that the motion judge was required to make an Order authorizing the mother to have the children vaccinated.

But in a surprise twist, that is not at all what happened.

Less than a week after the Court of Appeal released its decision in *J.N.*, the motion judge released a 673-paragraph decision. In that decision, he thoroughly reviewed and summarized almost all of the reported cases about the COVID-19 vaccination (it is actually a good resource for vaccination cases in general), and explained why he had decided to *not* follow the weight of authority or the Court of Appeal's decision in *J.N.*, and had decided to dismiss the mother's motion, and send the issue of whether the children should be vaccinated against COVID-19 on to trial.

The reasons also wade into the contentious debate about whether and to what extent the government and pharmaceutical companies can or should be trusted, in similar fashion to *J.N. v. C.G.* (2022), 67 R.F.L. (8th) 277 (Ont. S.C.J.), rev'd, 2023 CarswellOnt 1538 (C.A.). However, the outcome of the case really turned on the motion judge's conclusion that a trial was required because he was not prepared to take judicial notice of the facts that the vaccines are "effective" and "safe", so that is what we are going to focus on for now. According to the motion judge:

> [431] This court does not have expert evidence on the subject of the effectiveness or ineffectiveness of vaccines and is therefore not concluding that the vaccines are not effective.
>
> [432] However, this court does not put all of those who question the effectiveness of the COVID-19 vaccines in the same category as individuals who would continue to claim that the earth is flat.
>
> [433] The court finds that there are "reasonable people" who have appear to have some considerable degree of expertise who have an opinion different to that of the public health authorities as to the effectiveness of the vaccines.
>
> [434] In fact, this court finds that the effectiveness of vaccines can be called into question by public health pronouncements alone.
>
> [435] Initially, public health was recommending a single dose of a vaccine. Public health then began to recommend a second dose of the vaccine.
>
> [436] Public health recommendations have now further evolved such that booster shots are being recommended to be taken every three to six months. For many individuals, public health has now recommended up to five doses of the vaccine. Once again, all of this is the subject of public record.
>
> [437] This court is not prepared to take judicial notice based on public health pronouncements, and based on that which is set out above, that simply because public health is continuing with the messaging that the vaccines are "effective" that judicial notice should be taken of this and that this "fact" should be accepted as clearly uncontroversial or beyond reasonable dispute.
>
> . . .
>
> [463] The court has no evidence before it as to the basis on which public health authorities have concluded that COVID-19 vaccines for children are "safe".
>
> [464] We know that anyone who claims (including public health authorities) that the vaccines are safe, is clearly speculating certainly based on any possible long-term negative side effects.
>
> [465] The question then becomes, is it reasonable to take judicial notice of such speculation where public health authorities are claiming that the vaccines are "safe"?
>
> [466] This court could find simply that it is not prepared to take judicial notice of a "fact" based on what is clearly speculation.

However, again, the Court of Appeal in *J.N. v. C.G.* did not say that the Court could or should take judicial notice of the safety or efficacy of the vaccine. It ***did*** say that judicial notice should be taken of regulatory approval, *and regulatory approval is a strong indicator of safety and effectiveness* — ergo placing the onus on the objecting parent.

The motion judge did acknowledge the Court of Appeal's decision in *J.N. v. C.G.* in his decision. However, he distinguished it on the basis that, unlike in *J.N.* where both parties were asking the motion judge to decide the issue on the merits, the father in *J.W.T.* was asking to have the issue of whether the children should be vaccinated "deferred to a trial to allow him the opportunity to present expert evidence in order to support the position that he was taking that being that the COVID-19 vaccines were not 'safe and effective' as had been messaged by public health authorities."

Very respectfully, the motion judge's reasoning and focus on the limits of judicial notice was not correct. Again, based on *J.N. v. C.G.*, it was the ***father's onus*** to establish that despite Health Canada's opinion about the vaccine's safety and effectiveness, the particular children in this case should not be vaccinated. Based on the evidentiary record before the Court and his failure to file proper (or any) expert evidence to support his position — ever — the father clearly did not meet his onus.

Furthermore, this was not a case where the father's failure to file expert evidence could be explained by not having had enough time to get the necessary report(s). The father in *J.W.T.* had at least ***six months*** from the time the motion was served for the original May 2022 return date and November 2022, when it was argued, to serve and file whatever evidence — expert or otherwise — he wanted to rely on in support of his position — but crickets.

While the mother's motion was technically not framed as a motion for summary judgment, given that the father bore the onus of showing why the children should not be vaccinated, surely he had an obligation to put his "best foot forward" (or even a toe forward) by using the significant amount of time he had available to provide at least *something — some* admissible expert evidence to support his position, and to demonstrate that a trial was actually necessary in the circumstances. Having not done so, we do not understand why a trial (and court resources) are necessary to decide the issue.

In our view, the motion judge should have decided the case by relying on *J.N.* to: (a) find that the father had not met his onus of showing why the children should not receive a medication that had received regulatory approval, which as the Court of Appeal noted is a strong indicator of safety and effectiveness; and (b) authorize the mother to have the children vaccinated.

We also have serious concerns that the decision leaves the mother in the unenviable position of having to either give up and not have the children vaccinated, or to pay for what will undoubtedly be an extremely expensive trial about the safety and efficacy of the COVID-19 vaccine. Furthermore, even if the mother ultimately decides to proceed to trial, the trial judge will then have to devote an enormous amount of time to hearing and deciding this incredibly complicated issue, but will not have any control over the quality and calibre of the expert evidence that is put before the court. This is not at all a good way to decide whether a particular drug is safe. As we learned from the Court of Appeal in *J.N.*, not all "experts" are created equal.

Furthermore, requiring a long and expensive trial about this issue is inconsistent with the Primary Objective in Rule 2(2) of the *Family Law Rules*, O. Reg. 114/99 of "dealing with cases justly", which includes ensuring that the procedure is fair to all parties, saving expense and time, dealing with the case in ways that are appropriate to its importance and complexity, and giving appropriate court resources to the case while taking account of the need to give resources to other cases. It is difficult to see how the motion judge's decision to require the mother to take the case to trial is consistent with any of these objectives.

The decision also delves into questions about the extent to which courts and the public should be relying on information from the mainstream media, government regulators, and pharmaceutical companies. We aren't going to delve into these parts of the reasons as we don't believe they were necessary to decide the case or relevant to the development of the law in Canada (particularly given our view the matter ought to have been decided on the basis that the father failed to meet his onus). However, suffice it to say that they will be read with enormous interest by those who are already opposed to vaccinations and conventional wisdom in general, and raise some significant concerns for those on the other side of the fence or closer to the middle.

We understand that the mother is seeking leave to appeal the motion judge's interim decision to the Divisional Court. And, despite the Divisional Court's reluctance to grant leave to appeal on interim family law decisions, we suspect that leave will be granted here. But even if the decision is not appealed, in our view it is simply wrong in law, and ought not to be followed.

In the meantime, we can all take judicial notice that the earth ain't flat.

One of the 3 (4?) C's

Ward-Lerch v. Lerch, 2023 CarswellOnt 1815 (S.C.J.) — Leach J.

It's not often that we have the chance to consider the statutory bars to divorce — otherwise known as the "3 C's": collusion, connivance and condonation. These bars, tucked away in ss. 11(1)(a) and (c) of the *Divorce Act,* R.S.C. 1985, c .3 (2nd Supp.) ("*Divorce Act*"), may be from a bygone era, but they are still operative. And, in fact, if we consider s. 11(1)(b), we could actually add a 4 th "C" — reasonable arrangements for the support of the children.

In this case, Justice Leach was dealing with a somewhat standard application for a joint, uncontested divorce by two unrepresented parties. But the situation was not so standard. Something was amiss . . .

The matter had been before the Court once before, on October 22, 2022, at which time Justice Raikes made an endorsement noting:

> (a) that the parties had failed to indicate a precise separation date in the supporting affidavits;
>
> (b) that the parties instead had asked that they be granted a divorce simply on the basis of "irreconcilable differences";
>
> (c) that the law required separation of the parties for one year or more before a divorce could be granted (on the basis of breakdown of the marriage by reason of separation for one year); and
>
> (d) that the parties' request for a divorce on the basis of separation would be premature unless and until the parties had remained separated for one year or more, at which point their request for a divorce would be reconsidered.

The applicant then filed a supplementary affidavit swearing to the fact that the parties separated on February 1, 2022 — more than one year ago.

His Honour declined to grant the divorce because he found reason to believe that the evidence in the supplementary affidavit may have been inappropriately "tailored" to expedite a divorce, by swearing to a date of separation that would allow for an immediate divorce.

For example, the (joint) Application signed by both parties in September 2022, indicated a date of separation of **April 2022**. Then, on the supplementary affidavit, the applicant had originally written that the parties had separated on "February 2nd, 2022", before changing the "2 nd " to the "1 st ", so that the period of separation would clearly be at least one year.

Therefore, his Honour thought it inappropriate for the divorce order to be granted prior to May 1, 2023, at which time the parties would have been separated for more than a year according to their joint Application.

When Parliament amended the provisions of the *Divorce Act* so as to enable spouses to obtain a divorce after remaining separate and apart for only one year (before that a three-year separation was required), it represented a substantial change in Canada's divorce law. It could have legislated a short period of separation, but there was a tension between the idea of "divorce on demand" and the public policy of supporting reasonable attempts at reconciliation. Parliament did not opt to allow divorce on demand without a period of separation.

Justice Leach was of the view (the correct view, in our opinion) that the court should not grant a divorce where there is a clear question as to whether the parties have been separated for the requisite period — and the Application was adjourned to May 1, 2023.

While his Honour did not refer to s. 11 of the *Divorce Act* explicitly, he was making oblique reference to the bar of collusion in s. 11(1)(a) and (4):

> **Duty of court — bars**
>
> 11 (1) In a divorce proceeding, it is the duty of the court
>
> (a) to satisfy itself that there has been no **collusion** in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;
>
> (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made; and

(c) where a divorce is sought in circumstances described in paragraph 8(2)(b), to satisfy itself that there has been no condonation or connivance on the part of the spouse bringing the proceeding, and to dismiss the application for a divorce if that spouse has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the divorce.

Condonation

(3) For the purposes of this section, a continuation or resumption of cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose shall not be considered to constitute condonation.

Definition of collusion

(4) In this section, **collusion means an agreement or conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court**, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the exercise of parenting time or decision-making responsibility. [emphasis added]