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— Franks & Zalev - This Week in Family Law

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J.T. v. E.J. (2022), 79 R.F.L. (8th) 65 (Ont. S.C.J.) — Chappel J.

J.T. v. E.J. came out in 2022, but only just came to our attention. While we usually try to restrict our comments to recent cases, we have made an exception for *J.T.* because it includes an extremely comprehensive discussion about the interplay between, on one side, protecting the privacy of the children of family law litigants; and, on the other side, the open court principle, which, as Justice Chappel explained in *J.T.*, provides that "unless otherwise permitted or ordered, all court proceedings, including all material and information forming part of a court's records, must presumptively remain open and available to the public, including the free press (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822 (S.C.C.); *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 CarswellNS 675 (S.C.C.), at para. 11; *Canadian Broadcasting Corp. v. Manitoba*, 2021 CarswellMan 554 (S.C.C.), at para. 83)."

The facts in *J.T.* are straightforward.

The parties had an "on again/off again" relationship in 2008 and 2009, and the mother had their child in August 2009. Although the parties never lived together, they were both involved in the child's life from the time she was born.

The child lived primarily with the mother until October 2016, at which point the parties agreed that she would live primarily with the father. They also consented to a final Order that provided, among other things, that they would have joint custody, and that the mother would have access every other weekend and at such other times as agreed between the parties.

In July 2022, the child was dealing with some significant emotional and social challenges that are discussed in the decision but that we will not repeat here. Instead of trying to work with the father to help the child deal with the situation, the mother surreptitiously arranged to remove her from the father's care. The mother then refused to return her, and claimed that the child wanted to live with her, and would "suffer serious emotional trauma" if she was not allowed to do so.

Unsurprisingly, litigation ensued, and both parties brought interim motions to deal with the situation.

After considering the evidence, the motion judge determined that the mother should not have engaged in self-help and had demonstrated little insight and extremely poor judgment. She found it would be in the child's best interests to be returned to the father's care immediately, and suspended the mother's parenting time until she and the father had completed at least three joint family counselling sessions with a counsellor of the father's choosing to discuss "the child's needs, the events that led to this emergency motion, and a plan for protecting [the child] from further conflict and unauthorized withholding from the [mother] in the future."

In addition to deciding where the child should live, Justice Chappel took the opportunity to comment on what she referred to as a "noticeable trend in recent years of judges initializing names in the majority of family law cases involving children without explaining the legal rationale for doing so." While this trend might be "understandable, having regard for the importance of protecting the privacy interests of children", Justice Chappel also expressed the view that reasons **must** be given when a court decides to limit the Open Court Principle (including by initializing names in a decision), and provided a clear roadmap for other family law judges to follow when doing so.

After discussing the development of the caselaw about the Open Court Principle in Canada, Justice Chappel turned to the test set out by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 CarswellOnt 8339 (S.C.C.). In that case, the court explained (at para. 38) that the person seeking to limit the open court presumption (again, including initialization) must establish all three of the following prerequisites:

> 1. Court openness poses a serious risk to an important public interest;
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> 2. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
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> 3. As a matter of proportionality, the benefits of the order outweigh its negative effects.

Although *Sherman Estate* dealt with a request for a sealing Order, the Supreme Court made it clear that "[t]his test applies to all discretionary limits on court openness", including but not limited to "a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order[.]"

Justice Chappel also provided a detailed analysis of the principles that apply when considering each stage of the test (paras. 15-19), the special considerations that apply when the privacy interests of children are at stake (paras. 23-25), and practice considerations when dealing with requests to initialize a case (paras. 33-37).

Ultimately, based on *Sherman Estate*, Justice Chappel was satisfied that an Order initializing the names of the parties, the child, and anyone else referred to in the decision except for professionals was warranted in *J.T.* because:

> • The Reasons included "highly sensitive information about the child" and "highly personal information about communications between [the child] and her mother".
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> • Disclosure of this information would "pose a serious risk to [the child's] dignity interest."
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> • The child was a "highly vulnerable child having regard for the psychological and other challenges that she has experienced in her life, and the protection of her privacy interests is therefore a pressing concern for the court."
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> • It was in the child's best interests for the court "to safeguard her against any emotional distress that could result from the publication of her private information", and there were "no alternative measures that are less constraining on court openness that would likely be sufficient to prevent the risk to [the child's] privacy interests."
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> • Failing to initialize the names of the parties and everyone else referred to in the decision except for professionals "would have the domino effect of [the child] being identified as well, resulting in the disclosure of her sensitive private information."
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> • She was "satisfied that the benefits of initializing names in this case far outweigh any harmful effects", and initializing names was "a minimal intrusion upon the open courts principle" and would "not impair or adversely affect public comment or debate on the issues arising in the case."

Justice Chappel also indicated that she had decided to initialize the case on her own motion (or *ex proprio motu* for those that like Latin) and without first hearing from the parties or giving notice to the media (which is certainly required in the case of a

sealing Order) because "it did not become apparent to [her] until preparing [her] Reasons that initializing would be appropriate", and the matter was urgent and there was "insufficient time to invite the parties back to hear submissions on the issue." However, she confirmed in her reasons that the parties and/or the media were free to seek to vary this provision of the Order if they wanted to do so.

Based on *J.T.*, it now appears that a viable argument can be made that almost every parenting case ought to be initialized. Although not all parenting cases involve the level of emotional and social challenges that the child in *J.T.* was dealing with, most parenting cases involve sensitive information that could cause emotional distress to the child/children in the case if it was publicly disclosed. Accordingly, whenever you are dealing with a parenting case, you should consider whether it would be appropriate to at least *ask* to initialize the case. And, if you decide to make that request, you should definitely provide the presiding judge with a copy *J.T.*

We wonder (out loud) whether the time has come to seriously consider initializing all family law cases, or at the very least those that deal with children and parenting issues. While we recognize that the Open Court Principle is absolutely essential to the Rule of Law, forcing family law litigants and their children to risk having the intimate details of their private lives available for all to see for free on CanLii forever seems an inordinate price to pay for access to justice — especially for the children that have absolutely no say in the matter. If the Royal Bank and CIBC want to litigate publicly — so be it. But does all of the world really need to be privy to the intimacies of the separation of Mr. and Mrs. Jones?

At the very least, something to think about.

I Meant What I Said, and I Said What I Meant — And Sometimes a "Gap" is Just Legislative Intent (with apologies to Horton and the Who that He Heard)

Manitoba (Director of Child and Family Services) v. MK and CJO, 2023 CarswellMan 410 (C.A.), rev'g 2022 CarswellMan 343 (Q.B.) — Rivoalen C.J., Cameron and Pfuetzner JJ.A.

We discussed the trial decision in this case in the June 12, 2023 (2023-23) edition of the Newsletter.

In the court below, Justice Dunlop determined to use her *parens patriae* jurisdiction in a child protection case where she felt the options available to her in the *Child and Family Services Act*, S.M. 1985-86, c.8 (the "*Act*") were not actually in the child's best interests.

To summarize, the Director of Child and Family Services (the "Agency") apprehended the child at birth from his mother. The Agency had also apprehended the mother's other two children at birth, and they were adopted by their foster parents. The Agency placed the child in the same foster home as his siblings and, at the time of the trial, the child had been there for almost three years.

The Agency sought a permanent order of guardianship for the child, with the intention of placing the child for adoption with the foster parents as it did with the mother's other two children.

Below, Justice Dunlop noted that this case presented many challenging issues, including that the mother and the father were immigrants who had struggled since coming to Canada (the mother was born in Liberia, while the father was born in Nigeria). Justice Dunlop found that the Agency had utilized a "cookie-cutter approach," which did not recognize the parents' cultural differences in both language skills and styles of communication. This resulted in assumptions being made about the parents' behaviour that, in some instances, proved to be incorrect. Justice Dunlop was highly critical of the Agency's approach in this regard:

> [81] **Any person working in the field of child and family services**, from a judge to a social worker to a psychologist, **must be alert to the employment of assessment methodologies and value judgments that are not culturally attuned.** I find that the decision-making and services employed by the Agency in this case were poorly attuned to, and at times disrespectful of, the cultural differences between the social workers involved and [the mother] and [the father]. The social

> work employed also did not fairly navigate the power imbalance that existed between the Agency workers and the parents and the foster parents and the biological parents. [**emphasis** added]

Justice Dunlop was also highly critical of the Agency's approach to the mother's criminal charges, and the failure of the Child and Family Services system to work with the criminal justice system — in fact, the two systems worked in opposition to each other. The criminal system told the mother not to admit anything, while delaying the resolution of her case beyond any reasonable time frame, while the child and family services system said it could not work with her until her criminal charges were resolved or until she took responsibility for what she had done. It was the ultimate "catch-22" between one system that could take her liberty and another that could take her child. Justice Dunlop urged the Agency to substantially rethink the practice model that is applied to these types of cases.

Justice Dunlop understood that the only Order she could practically make was a permanent order of guardianship pursuant to s. 38(1)(f) of the *Act* — and that once such an order is granted, it would operate as an absolute termination of parental rights and obligations pursuant to s. 45(1) of the *Act*, thereby allowing the agency to place the child for adoption.

Her Honour also (correctly) concluded that any order of access she pronounced after a permanent order of guardianship was granted would become null and void once the Agency placed the child for adoption. The intent of s. 39 of the *Act* is clear; there can be no access once a child has been placed for adoption unless the Agency agrees. Access is at the discretion of the Agency and parents no longer have any avenue to the courts. Once the adoption occurs, the parents, the Agency and the courts lose all oversight ability that could ensure that access is taking place as envisioned. To Justice Dunlop, this posed a problem.

Justice Dunlop ultimately found that it was *not* in the child's best interests to move from a home where he was well attached to his foster parents and biological siblings, but that it was also *not* in his best interests to sever his attachment to his parents. To her Honour, the evidence supported the child having a continued vibrant, frequent and meaningful relationship with his parents. However, Justice Dunlop found that she could not, within the confines of the *Act*, make an enforceable order that was in the child's best interests allowing for continuing access and other connections to the child's parents if he was placed for adoption (and the Agency had indicated they intended to immediately place him for adoption).

Given the limitations of the *Act*, Justice Dunlop considered her *parens patriae* jurisdiction. Her Honour found there was a gap in the legislation because it did not allow for conditions to be attached to a permanent order when the imposition of such conditions were required to ensure that the fundamental principles of the *Act* were being acted upon and respected:

> [175] In this case and on these very specific facts, I do find that there is a "gap" in the *Act* because the *Act* does not allow an order to be made that the court has found to be in the child's best interests based upon expert opinion and prevailing social science. In fact, it is glaringly obvious that the *Act* in its current form is not in sync with modern thinking that supports the view that, in some cases, a permanent order should have conditions attached to it in order to protect a child's connection to his biological family and cultural roots. In other words, when a permanent order of guardianship is the only option for a child, it is not always in that child's best interests to sever all parental rights and connections. This can be accomplished while still respecting the need of the child for permanency as dictated by the *Act*.

That is, because her Honour was convinced that she had no statutory authority to make the order that she viewed as being in the child's best interests, it was necessary for her to resort to the *parens patriae* jurisdiction of the court. Her Honour determined that, in the circumstances, there was a gap in the *Act* because it did not permit a permanent order with access conditions, notwithstanding that the court found it to be in the child's best interests. The *Act* does not allow the court to attach conditions to a permanent order, even when the imposition of such conditions is required to ensure that the fundamental principles of the *Act* are being acted upon and respected.

Justice Dunlop then called upon the court's *parens patriae* jurisdiction to craft a permanent order that attached a number of parental access conditions and conditions entitling the parents to notice of adoption or other proceedings involving the child. The final condition attached to the permanent order enabled the Court of King's Bench to retain jurisdiction relating to any issues that affected the child while he was under the age of 18 years.

Predictably, the Agency appealed, asking that the Court of Appeal set aside the permanent order of guardianship and substitute a permanent order of guardianship without the conditions imposed by the trial judge. It argued that the *Act* does not allow for conditions to be attached to a permanent guardianship order and that the trial judge erred in relying on the court's *parens patriae* jurisdiction to impose conditions.

The main issue was whether Justice Dunlop erred by invoking the court's *parens patriae* jurisdiction to attach conditions to a permanent order, contrary to the provisions of the *Act*. As a question of law, this was reviewable on the correctness standard.

While a discussion of standard of review is not particularly exciting, the Court of Appeal does explain the "palpable and overriding" standard well, especially understandable to a lumberjack:

> [25] The question of whether the trial judge seriously misapprehended the evidence is a question of fact to be reviewed on a standard of palpable and overriding error. Palpable and overriding error is a difficult standard to meet. In one case, the Court explained that, "[w]hen arguing palpable and overriding error, **it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall**" (*Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46, approved in *Benhaim v St-Germain*, 2016 SCC 48 at para 38). In *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, the Federal Court of Appeal explained the standard as follows (at paras 62, 64-65):
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> > "Palpable" means an error that is obvious. Many things can qualify as "palpable". Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
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> > . . . . .
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> > "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding". The judgment of the first-instance court remains in place.
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> > There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. **So to speak, the tree is felled not by one decisive chop but by several telling ones**. [**emphasis** added]

In addressing the main issue on appeal, for the Court of Appeal, Justice Rivoalen treats us to a mini-treatise on *parens patriae* jurisdiction in the child protection context. Making the following points:

> • It is now well-established that such *parens patriae* jurisdiction is exercised by Superior Courts of record.
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> • The court does not have the power to review matters that have, by statute, been entrusted to the Director. The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority.
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> • Even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit.
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> • There are no pre-set limits on *parens patriae* jurisdiction; it is entirely case specific.
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> • The jurisdiction under *parens patriae* to act in the best interests of a child gives ambit to a Superior Court to take due notice of an agency's conduct insofar as it impacts a child's best interests: *B.J.T. v. J.D.*, 2022 CarswellPEI 31 (S.C.C.) at para. 65.

It is also important to remember that the *parens patriae* jurisdiction is not meant to be used as a form of "judicial override":

> [39] . . . It is important to remember that the exercise of the *parens patriae* jurisdiction by the court is not the exercise of the power of judicial override. By judicial override, I mean the power to disregard legislation, if the need arises in matters involving children. *Parens patriae* is generally viewed as being part of the inherent power of the court. Therefore, just as inherent power cannot be exercised in contravention of any statutory provision (see *Glover v. Minister of National Revenue*, [1981] 2 S.C.R. 561, neither can *parens patriae*. In other words, *parens patriae* does not include a general reviewing power of the court.

This is to say that the original *parens patriae* jurisdiction is ousted when legislation assumes the jurisdiction.

And, finally, the court retains jurisdiction to intervene on behalf of children where the state has not otherwise done so through legislation or where there is a gap in the legislation. But an express statutory limit on the court's jurisdiction is not a "legislative gap." It is not legislative oversight, but legislative intent — and in such circumstances, the court has no *parens patriae* jurisdiction left to exercise. [See, for example, *D. (T.) v. Manitoba (Director of Child and Family Services)*, 2015 CarswellMan 460 (C.A.) and *Bhajan v. Bhajan* (2010), 88 R.F.L. (6th) 11 (Ont. C.A.).]

In this case, the alleged "gap" identified by the trial judge was that, when making a permanent order of guardianship to the agency, the *Act* prohibited her from attaching conditions of parental access, of notice to the respondents of adoption proceedings and of the court's continued jurisdiction over the child while under the age of majority. This was because the Agency's plan was for the child to be placed for adoption with his foster parents. Under these circumstances, she tried to find a way to override this statutory barrier because she found that a permanent order with such conditions was in the child's best interests.

Here, the Court of Appeal found there was no legislative gap, but rather specific legislative intent to not allow the court to attach conditions to a permanent guardianship order.

Pursuant to s. 39 of the *Act, after* a permanent order is granted to an agency, the agency has complete discretion to determine what, if any, access a parent will be allowed. Section 39(4) provides that a parent may apply to the court for an order of access if they are not satisfied with the access the agency is willing to grant them.

And, pursuant to s. 39(6) of the *Act*, no application can be made under s. 39(4) where the child has been placed for adoption. The text is mandatory. Once the child is placed for adoption, the court has no authority to grant access.

Section 33 of *The (Manitoba) Adoption Act*, C.C.S.M. c. A2, provides that, once an order of permanent guardianship is made an openness agreement can be made in writing between an adoptive parent and a birth parent of the child if that birth parent is approved by the agency. This provision allows for birth parents to have contact with a child, even after permanent guardianship has been granted to an agency, and an adoption has been granted. *However, this provision leaves it up to these parties to arrive at such an arrangement. The court has no power to mandate or intervene in such agreements*.

Therefore, the Court of Appeal *agreed* that the court has no jurisdiction to impose conditions in permanent guardianship order or to wade into openness agreements. But it did not agree that this was a gap in the legislation. Rather, it was a clear expression of legislative intent:

> [70] Sections 38, 39, 45 and 48, when read together with all the other relevant provisions of the *Act*, form part of an interconnected, harmonious web of provisions. There is no confusion. There is no gap. The Act is a complete legislative and regulatory scheme, which sets out the powers of the agency and the powers of the court.

Therefore, according to the Court of Appeal, her Honour erred in invoking the *parens patriae* jurisdiction of the court to go outside the express grant of statutory powers in the *Act*. And by doing so, "she did not respect the separation of powers between the judiciary and the legislature."

When a permanent order of guardianship is granted to an agency, it is not for the court to act as the guardian of a child. As contemplated by the legislature, that is solely the agency's role. The agency was entitled to have the child placed for adoption with the foster parents so that he could remain permanently connected with them and his siblings.

Appeal allowed. All conditions set aside.

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