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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Sometimes it is Better to Ask Permission than to Beg Forgiveness

***Joe-Joe v. Joe-Joe* (2023), 94 R.F.L. (8th) 492 (Alta. K.B.) — Lema J.**

Issues: Alberta — Child Support — Contribution to s. 7 Expenses

This case involved a claim by the recipient mother for an increase in s. 7 child support to cover expenses that she had incurred — but without prior consultation with the payor father — including a claim for $10,000 in tennis expenses for their 15-year-old daughter.

The father, on the other hand, claimed that without any such prior consultation, his obligation should be limited to the $1,200 annual cap on his s. 7 exposure that was judicially imposed years earlier.

Guesses as to how this one turns out?

By way of background, on January 5, 2018, as part of a broader child support order, Justice Yungwirth directed that, with respect to s. 7 expenses, the father was to pay 43.8% and the mother was to pay 56.2% (those being their income-proportionate shares), including expenses for childcare, tennis and piano.

On March 30, 2021, Justice Rothwell made an interim variation order. With respect to s. 7 expenses, that order directed that the father pay s. 7 expenses for tennis only, the father's share to be 31.98%, **capped and to not exceed $100 per month** until further Order. At the time, the incomes of the father and mother for 2021 and 2022 were $45,000 and $73,000 and $91,827 and $95,000, respectively.

The mother was arguing to lift the cap and the father was arguing to keep it in place based on his age (55) and lack of savings and because the mother was earning enough to be able to pay for all s. 7 expenses when combined with the $736 a month she was receiving as child support.

As we are all intimately familiar with s. 7 of the *Child Support Guidelines*, SOR/97-175, we only refer to the most important parts:

> **Special or extraordinary expenses**
>
> 7(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the **necessity** of the expense in relation to the child's best interests and the **reasonableness** of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

. . . . .

(f) extraordinary expenses for extracurricular activities.

Definition of "extraordinary expenses"

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant. [**emphasis** added]

At Centre Court of the match between the parties was the issue of tennis expenses for the daughter that had increased to approximately $10,000 annually. Until 2018, the daughter trained at another facility, where the annual fee was much less (in the neighbourhood of $2,000 to $3,000).

Furthermore, the mother had not consulted with the father before incurring these higher expenses.

The mother argued that the daughter had shown — and continued to show — great potential in competitive tennis, and that the child derived great satisfaction and fulfilment from her tennis training and tournaments. The move to the new facility expanded her weekly training hours. Furthermore, this new facility was, in fact, *waiving* a further $10,000 in annual fees for the daughter.

The mother admitted that she had not consulted with the father as to the increased tennis expenses. While the mother's evidence was that she and the daughter had not seen the father for several years, in the lead-up to the facility transfer, she did *not* suggest that the father was unreachable. That is, she could have contacted him.

And while tennis was clearly important to the daughter, no evidence was called to speak of the child's "tennis aptitude", skill or potential.

In Alberta (and other provinces), failing to consult is generally treated as a relevant — and sometimes decisive — factor in gauging a parent's exposure to s. 7 expenses. See, for example, *DJE v. PAE*, 2014 CarswellAlta 1204 (Q.B.); *Park v. Thompson* (2005), 13 R.F.L. (6th) 415 (Ont. C.A.); *Luftspring v. Luftspring*, 2004 CarswellOnt 1481 (C.A.); *K. (D.J.) v. K. (C.J.)* (2006), 27 R.F.L. (6th) 196 (B.C. Prov. Ct.); *Correia v. Correia* (2002), 29 R.F.L. (5th) 28 (Man. Q.B.); *Holeman v. Holeman*, 2006 CarswellMan 430 (Q.B.); *Gould v. Penney* (2009), 65 R.F.L. (6th) 105 (Man. Q.B.); *Leachman v. Leachman*, 2007 CarswellBC 2232 (S.C. [In Chambers]); *D.P. v. M.J.P.*, 2011 CarswellNB 838 (C.A.); *D.J.E. v. P.A.E.*, 2014 CarswellAlta 1204 (Q.B.); *Williams v. Mapson*, 2015 CarswellC 1337 (S.C.); *Sydor v. Sydor*, 2005 CarswellOnt 2893 (C.A.).

In *DJE v. PAE*, 2014 CarswellAlta 1204 (Q.B.), the court held:

> [38] L was enrolled in private school on the mother's unilateral decision. The father was not consulted. He found out about it after the fact and through a third party. He disagreed because of the financial costs with little additional advantage to his son not already available to him.
>
> [39] **I find that the mother having unilaterally placed L in private school should pay the fees and all related costs associated with L's attendance at private schools in both Alberta and British Columbia.** Accordingly, private school fees at Strathcona-Tweedsmuir and St. George's School, are not a Section 7 expense in the all the circumstances of this case. [**emphasis** added]

This decision was affirmed by the Alberta Court of Appeal: *D.J.E. v P.A.E.*, 2014 CarswellAlta 2177 (C.A.):

> [31] In our view, the chambers judge properly concluded that the private school expense was neither necessary nor reasonable. She based her careful analysis on the history of the parents, the report of the parenting coordinator, the financial means of the parents, the needs of the child, and **the unilateral decision of the mother to place the child in private school**. We find no error in her exercise of judgment. The chambers judge did not misdirect herself on the applicable law, nor did she significantly misapprehend any of the evidence. [**emphasis** added]

In the opinion of Justice Lema, the failure to consult on such expenses can be a stand-alone reason for denying the payment, along with the failure to show that any such expenses is both reasonable and necessary.

A similar result was obtained in *Sherbo v. Sherbo*, 2021 CarswellAlta 594 (Q.B.):

> [53] With respect to the cost of counselling, I would direct that Mr. Sherbo pay Ms. Sherbo his proportionate share, specifically $828.00. **Given that Ms. Sherbo incurred the cost of tutoring for both children without Mr. Sherbo's prior consent, I decline to make an order requiring him to assume his otherwise proportionate share of this expense.** On a go-forward basis, **I would direct that the parties must agree in advance to any expense to be incurred by either parent will be subject to parental sharing. Any s. 7 expense that has not been agreed to in advance by both parents may still be pursued by the requesting parent, but no claim may be made for the sharing of that expense. [emphasis** added]

And then in *Nyereyogona v. Schofield* (2021), 60 R.F.L. (8th) 267 (Alta. Q.B.):

> [178] In *Bland v Bland*, 1999 ABQB 236, **one of the factors** set out in para. 24 to be considered in assessing the reasonableness of a s. 7 expense claim is **whether the parent from whom the contribution is sought was consulted about the expense before it was incurred.** See also: *NJP v DWH*, 2006 ABQB 352 at para. 9.
>
> [179] **There is no evidence that the Applicant consulted with, sought prior approval for or notified the Respondent with respect to any s. 7 expenses being incurred, whether before or after each of DNH and TNH turned 18 years of age.** Nor did she provide any evidence that she demanded or requested that the Respondent contribute to these expenses prior to this Application. See: *MLR v SLR*, 2020 ABQB 444 at paras. 43 and 46 [MLR]. [**emphasis** added]

And finally, *AJU v. GSU* (2015), 56 R.F.L. (7th) 284 (Alta. Q.B.):

> [207] The net, after tax cost of medical, dental and child care expenses will be apportioned between the parties in accordance with the parties' respective incomes for the relevant years. School fees, supplies and bussing will be split equally. **The other claimed Guidelines, s 7 expenses will be not be split between the parents because each party failed to consult with the other regarding these expenditures. [emphasis** added]

So, evidently, failing to consult with the parent from whom such expenses are requested matters. And it should matter, in the ordinary case, assuming away any family violence or other reasons one parent should not be obliged to seek permission from the payor parent: *Douglas v. Mitchell*, 2009 CarswellOnt 4761 (S.C.J.).

Here, Justice Lema determined that the mother's failure to consult with the father given the significant increase in tennis expenses was "critical." As noted by his Honour:

> [28] We are not dealing with a modest increase in the expense of an already-approved sec 7 activity. Again, while the evidence is imprecise here, it appears that the tennis expenses increased four- or five-fold.
>
> [29] . . . none of the referenced orders or any of the earlier orders on this file gave the mother the right to make s. 7 decisions on her own e.g. to increase the expense of approved sec 7 activities.

The next question, then, is: what is the consequence in this case of the failure to consult?

Here, Justice Lema found that, in the circumstances of this case, the mother was obliged to consult with the father before shifting the daughter's tennis training to the "massively more expensive facility."

While it may be that prior consultation would have resulted in a "no" — and a subsequent motion asking for increased contributions been successful — the point is that "we have a process for resolving such disputes. And the starting point is consulting in advance."

Again, assuming away any facts that would make consultation impossible or inappropriate — it is hard to argue with this logic. Sometimes it *is* better to ask permission than beg forgiveness, and parents should be discouraged from making unilateral s. 7 expense decisions.

As a result, the father was not obliged to contribute to the incremental increased tennis expenses, having not been consulted about them in advance.

There was a similar issue with respect to the expenses for a school trip and orthodontics.

The mother *did* consult with the father regarding a school trip to Europe for the daughter, as required. The father did not agree to contribute, and the mother ended up paying the full cost of the trip (about $4,000).

In response, the mother asked that the father be ordered to contribute. The problem here, however, was that the mother was unable to show that the trip was "reasonable" and "necessary" in light of the family income and absent any historic record of family funding for such trips.

Orthodontics ($5,500), however, were different. Here, the mother had sought advance approval by the father, who refused to contribute. But, medical expenses are different from "truly optional expenses" such as the enhanced tennis training and the school trip. The evidence showed that the daughter required orthodontic treatments, and the father offered no evidence to suggest that the $5,500 was unreasonable. As a result, the father was ordered to pay his income-proportionate share of orthodontic treatment.

Delay

***Sarnia-Lambton Children's Aid Society v. N.S.*, 2024 CarswellOnt 12283 (C.J.) — Pawagi J.**

Issues: Ontario — Child Protection — Delay

The Sarnia-Lambton Children's Aid Society (the "Society") were involved with the family voluntarily, on and off for six years, from shortly after the birth of the parents' first child in 2013 until the removal of their four children in 2019, following the death of their fifth child, who was two-years-old at the time. (While the cause of the child's death could not be determined, the child had been left alone in the basement of the family home from about 1:00 a.m. to 3:30 p.m. the following day and had serious medical problems.)

The children were 6 $^{1}/_{2}$, 4 $^{1}/_{2}$, 3 and 1 years-old, respectively, when they were removed from their parents' care in 2019. All four children had some developmental delay, and, at the time of their removal, they were not toilet trained, they seemed

unfamiliar with such things as bedtime routines, eating with utensils and playing outside, and the two school age children had attended school for only one day.

The parents had supervised access visits with the children after their removal. They attended every visit for the first two years the children were in care. The father stopped attending regularly after that, and the mother stopped attending once the trial began. The Society attempted to loosen the access restrictions and move from supervised to unsupervised access, but ultimately had to reinstate the tighter restrictions due to the mother's conduct.

The trial proceeded in June 2024, nearly five years after the commencement of the proceeding in August 2019. As of the hearing of the trial, the statutory time limits pursuant to s. 122 of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 (the "*CYFSA*"), were exceeded as followings:

> • Child A had been in temporary care and custody of the Society for nearly **three years** (on a cumulative basis). The statutory time limit for a child over six is **two years**.
>
> • Child B had been in the temporary care and custody of the Society for **five years** (on a consecutive basis). The statutory limit for a child under six is **one year**.
>
> • Child C and Child D had been in the care and custody of kin caregivers during the five years, not in the care of the Society. However, these orders had only ever been temporary.

After considering the evidence, Justice Pawagi made Orders placing Child A and Child B in the extended care of the Society pursuant to s. 101(1)3 of the *CYFSA*, and Child C and Child D in the custody of their respective kin caregivers pursuant to s. 102.

But what is perhaps most important about this case is what Justice Pawagi had to say about delay — and the ten "**concrete actions**" we can take to avoid delay in the child protection system. As her Honour says it better than anyone, we do not dare paraphrase:

> 4.2: Delay
>
> [280] I cannot conclude without addressing the issue of the delay in achieving permanency for these children. It is ironic, given the mother's relentless focus on all the forces she believed were arrayed against the children, that everyone overlooked the most formidable and implacable one of all: Time.
>
> [281] The Supreme Court of Canada has been clear about the importance of reaching a speedy resolution in matters affecting children: *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165.
>
> [282] The Court of Appeal has been clear that the timelines are applicable throughout the entire child protection proceeding and thus apply to temporary orders, not just to final ones: *A.K. v. Family and Children's Services of Guelph and Wellington County*, 2024 ONSC 296; *Family Simcoe Muskoka Child, Youth and Family Services v. M.J.C.*, 2024 ONSC 2669, citing *C.M. v. Waterloo Children Children's Aid Society*, 2015 ONCA 612 and *Windsor-Essex Children's Aid Society v. E.W.*, 2020 ONCA 682.
>
> [283] The Court of Appeal in the above cited *Waterloo* case, which also involved a 5 year delay for children under the age of 6, spoke sternly about delay (at paras. 31-35, emphasis added):
>
> > It is **imperative** that judges, court administrators, counsel (particularly counsel for Children's Aid Societies) and assessors take responsibility for ensuring adherence to statutorily required timelines
> >
> > . . . . .
> >
> > Where a statute requires that events occur within a specified time frame, it is **simply unacceptable** that justice system participants fail to adhere to those time frames . . .

> That requires, among other things, that assessment reports be prepared with dispatch; that Children's Aid Societies make decisions in accordance with statutory timelines about how to proceed in a particular case; that meaningful case management occur in which timetables are set and witness lists are fully canvassed; that trials be scheduled so that trial days are not stretched over months; and that trial judges receive adequate time to prepare reasons in a timely fashion.
>
> We acknowledge that additional factors may contribute to delay in particular cases. It is our hope, however, that all those involved in the child welfare system will do their part to minimize delay and promote finality for children. **The children involved in this system deserve better.**

[284] That case was almost 10 years ago, yet here we are again. And 20 years ago, Justice Lucy Glenn set out a list of time-wasting child protection traps to be avoided, yet here we are again, falling into some of the same traps: *Children's Aid Society of Huron County v. R.G.*, [2003] O.J. No. 3104.

[285] In response to the direction from court after court that we must do better, I propose 10 concrete actions we can take to avoid delay:

> 1. Single judge case management: This ensures a case does not drift.
>
> 2. Selection of trial sitting at the first appearance: Where a child under 6 is in the temporary care and custody of a society, the case should be scheduled for the trial sittings at the one-year mark. This ensures that all the work, including retaining counsel, confirming availability for trial dates, obtaining third party records and/or assessments, holding settlement and trial management conferences, is done within the statutory time period not outside.
>
> 3. Early identification of FNIM status/party status/services issues: This will avoid a child being deprived of services to which they are entitled and will ensure the First Nation or other community is included promptly.
>
> 4. Active role of OCL: Counsel for the child must take an active role in ensuring the matter moves forward and that the child's views and preferences (where they can be ascertained) are before the court.
>
> 5. Early determination of protection finding: The risk must be identified in order to be addressed. If by hearing, the Rules require that the hearing be held within 120 days. If by Agreed Statement of Facts, the basis for the finding must be clear. The statement should not contain disputed facts on material points.
>
> 6. Timely evaluations by the Society: The society must hold branch conferences and, if necessary, amend pleadings promptly.
>
> 7. Ensuring each court appearance is meaningful: Expectations should be clear regarding what all parties are to do for the next appearance — the Society, parents, First Nation, third party caregivers, OCL.
>
> 8. Importance of endorsements: In cases involving a child's placement, an adjournment is not a deferral of a decision, it is a decision, a decision in favour of the status quo. Endorsements should set out the reason for the adjournment and why it is in the best interests of the child.
>
> 9. Tracking time in care: Time should be tracked not only at the individual case level, but at an administrative level such that the following are automatically notified when a child under 6 has been in care for one year: the head of the Society's legal department and/or Director of Service; OCL Personal Rights Director; Local Administrative Judge. Inquiries can then be made as to what the plan is to either meet the timelines or seek to extend them in the best interests of the child.
>
> 10. Equitable access to child protection trial judges throughout the province.

> [286] There needs to be a greater sense of urgency. Here, while the conduct of counsel and parties at the trial itself was exemplary, I received the impression that in the five years leading up to the trial there was a sense of helplessness — among all the participants, including the court — a sense of being at the mercy of systemic delay. But there is no faceless system. We are the system. There is nothing in it except for us. And we each have an individual and a collective responsibility to make it work for the vulnerable children entrusted to us.

Goodbye, Farewell and Amen.

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