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— Franks & Zalev - This Week in Family Law

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Contents

The Grand Issue of Contact with Grandparents

VW v. AT, 2022 CarswellAlta 1934 (C.A.) — Veldhuis, Khullar and Antonio JJ.A.

The mother and father appealed an order granting the maternal grandparents contact with the children.

The parents were married in 2012 and separated in 2020. They had two children, one born in 2007, the other born in 2012. The parents continued to co-parent the children together despite their separation.

The respondent grandparents were very involved in the children's lives. They celebrated holidays and birthdays together. They cared for the children when the parents were in school or travelling, and the children stayed with them and vacationed with them.

Both parents, but particularly the mother, had a very strained relationship with her parents. The grandparents had racist, sexist, classist, anti-Semitic, and homophobic beliefs. When the parents challenged these views, the grandparents became angry and defensive. To further complicate things, the mother was in a same-sex relationship.

The parents also disagreed with the grandparents on parenting and discipline, especially insofar as it impacted the special needs of the children, one of whom suffered from autism, and the other had ADHD. While the parents tried to set guidelines and expectations for interactions with the children, the grandparents allegedly ignored them.

Things got particularly bad in the fall of 2018, and the children had no further in-person contact with the grandparents.

In 2019 and 2020, without the parents' consent, the grandparents and the older child had contact with each other through social media.

In May 2020, the parents asked the grandparents not to contact either child further, and advised that future contact with the grandchildren would be conditional on the grandparents changing their behaviour (including demonstrating an understanding of the trauma caused by over-criticism, constant disapproval, judgment, and emotional neglect on children, and showing an understanding of the appropriate role of a grandparent — as opposed to a parent — in the children's lives).

In April 2021, the grandparents applied for a contact order pursuant to s. 35 of the *Family Law Act*, S.A. 2003, c. F-4.5 (the "*Act*").

Section 18 of the *Act* sets out a list of factors to be considered in determining the best interests of a child, and s. 35 of the *Act* deals with applications for contact:

35(1) The court may, on application by any person, including a guardian, make an order providing for contact between a child and a person who is not a guardian.

35(2) Subject to subsection (3), a person other than

(a) a parent or a guardian of a child, or

(b) a person standing in the place of a parent

may not make an application under this section without the permission of the court on notice to the guardians.

35(3) **A grandparent of a child does not require the permission of the court to make an application under this section if**

(a) the guardians are the parents of the child and

(i) the guardians are living separate and apart, or

(ii) one of the guardians has died,

and

(b) the grandparent's contact with the child has been interrupted by

(i) the separation of the guardians, or

(ii) the death of the guardian.

35(4) ***In determining whether to grant permission*** **under subsection (2), the court shall consider the best interests of the child**, including

(a) the significance of the relationship, if any, between the child and the person for whom contact with the child is proposed, and

(b) the necessity of making an order to facilitate contact between the child and the person for whom contact with the child is proposed.

35(5) Before the court makes a contact order, ***the court shall satisfy itself that contact between the child and the person for whom contact with the child is proposed is in the best interests of the child*****, including whether**

(a) ***the child's physical, psychological or emotional health may be jeopardized if contact*** **between the child and the person for whom contact with the child is proposed** ***is denied*****, and**

(b) ***the guardians' denial of contact*** **between the child and the person for whom contact with the child is proposed** ***is unreasonable*****.**

35(6) The court may, in a contact order, provide for contact between the child and the person for whom contact with the child is proposed in the form of visits or in the form of oral or written communication or any other method of communication, and may provide for any related matter as the court considers appropriate. [emphasis added]

The chambers judge granted the grandparents permission to apply for a contact order, finding the grandparents' relationship with the children to have been lengthy and significant. She further found that unless the grandparents followed through on the requirements set by the parents, there would be no contact with the children.

The chambers judge determined that a contact order was needed to facilitate contact between the children and the grandparents. In doing so, the chambers judge acknowledged that she had to consider whether a contact order, on the facts of the case, was in the best interests of the children. The chambers judge heard the parents' evidence that contact would not be in the children's physical, psychological, or emotional best interests because of the grandparents' failure to recognize the children's particular needs and conditions, their inappropriate views, their threats of physical discipline, and their failure to respect the boundaries set by the parents.

The chambers judge found there was a "great divide on ideology", and that the insensitivity expressed by the grandfather towards the mother's life choices was "disappointing". However, she understood that it was not possible to change a person's ideology and that she had to consider whether the ideological divide could be bridged if contact was permitted.

The chambers judge believed that the children's physical, psychological, or emotional health could be jeopardized with unsupervised contact. But she was also of the view that it was unreasonable for the parents not to permit supervised access.

Ultimately, the chambers judge allowed the grandparents contact with the children for three hours, once each month, if the children desired it. She also imposed conditions, including no derogatory comments about the parents or their lifestyles, no corporal punishment, and no discussion of controversial topics. She required the grandparents to pay the costs of supervision, and for all parties to attend at least three sessions with a counsellor.

The parents appealed, and argued the chambers judge had erred by:

> (a) Misstating and misapplying the test in s. 35(5) of the *Act*; and finding that the parent's decision to deny contact was unreasonable and that contact with the grandparents was in the best interests of the children; and
>
> (b) Failing to give deference to the decision made by the separated, but aligned, parents about whether their children should have contact with the respondent grandparents.

The Court of Appeal determined that the chambers judge had erred in her application of the test set in out in s. 35(5) of the *Act*.

Again, pursuant to s. 35(5), before a contact order is granted, the court must be satisfied that contact is in the best interests of the children based on the following considerations:

> **35(5) Before the court makes a contact order, *the court shall satisfy itself that contact* between the child and the person for whom contact with the child is proposed *is in the best interests of the child, including whether***
>
> > **(a) *the child's physical, psychological or emotional health may be jeopardized if contact* between the child and the person for whom contact with the child is proposed *is denied*, and**
> >
> > **(b) *the guardians' denial of contact* between the child and the person for whom contact with the child is proposed *is unreasonable*.** [emphasis added]

However, in her reasons, the chambers judge mischaracterized the test as follows:

> In considering whether the girls' physical, psychological, or emotional health may be jeopardized if contact is **permitted**, I am of the view that it would be jeopardized if the contact was with the grandparents without supervision. However, with third party independent supervision, it is my view that contact will not jeopardize the emotional health/well-being of the children. [emphasis added]

In other words, the chambers judge had examined the issues through the wrong end of the telescope. As noted by the Court of Appeal, it was for the grandparents to establish that the children's physical, psychological, or emotional health may be jeopardized if contact was *denied*. By stating the issue as whether the children's physical, psychological, or emotional health may be jeopardized if contact was *permitted*, the chambers judge had reversed the onus.

This is reminiscent of the difference between the majority (McLaughlin J.) and minority (L'Heureux-Dubé J.) decisions in *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.), where L'Heureux-Dubé J. made the point that desire for contact is always subordinate to best interests, and that the best interests of the child cannot be equated with the mere *absence* of harm:

> Subsection 16(8) of the Act directs that the best interests of the child are to be determined "by reference to the condition, means, needs and other circumstances of the child". There is no mention of harm at all in this list of considerations, and nothing supports the inference that the best interests of the child not only can but also should be encompassed by the simple concept of absence of harm, thus making harm the controlling factor in custody and access decisions. On the contrary, the adoption of the harm test would require courts to ignore the very factors which are set out in the Act and which have guided the courts up until now in custody and access decisions. While it is self evident that if the exercise of access by the non custodial parent harms the child, access must be curtailed; even in the absence of harm the best interests of the child may also warrant such curtailment.

While the grandparents conceded that the chambers judge reversed the usage of "jeopardized" in applying s. 35(5), they argued the mistake was more a matter of form than substance. They argued that in *BM v. JM*, 2019 CarswellAlta 2715 (C.A.), the Alberta Court of Appeal confirmed a flexible approach when interpreting the meaning of "jeopardized" in s. 35(5):

> [17] . . . The use of the word "jeopardized" in the context of a child's best interests connotes a risk of harm to the child if contact which has been found to enhance the child's best interests (i.e. beneficial contact) is removed. It is the presence of the risk rather than manifestation of the risk which section 35(5)(a) requires.

However, in *BM* the Court of Appeal dealt with the meaning of "jeopardized" within the context of the proper application of the test for a contact order, acknowledging that such an order could only be made where the court was satisfied that contact was, in fact, in the child's best interests, *including* whether the child's physical, psychological, or emotional health may be jeopardized if contact is denied and whether the guardian's denial of contact was unreasonable.

In this case, by considering the inverse of the correct test, the chambers judge had not made the findings required by s. 35(5)(a) that the children's health would be jeopardized if contact was *denied*.

As a result, the parents' appeal was allowed.

While not necessary to decide the appeal, the Court of Appeal also discussed what has been called the "parental autonomy" approach to grandparent access. This is the argument that, generally, parents are the arbiters of their children's best interests, and absent a finding of harm flowing from *lack* of contact, the courts should not interfere with parental autonomy and decisions.

The Court of Appeal suggested that, in this context, the notion of "parental autonomy" should be viewed with caution given that its genesis appeared to not be based on a Canadian "best interests" origin, but rather derived from the "liberty interest" protected by the United States Constitution, where parental rights have been given the status of constitutional values. But such parental rights do not enjoy the same constitutional protection in Canada: *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1995), 9 R.F.L. (4th) 157 (S.C.C.).

In Canada, the leading case in support of the parental autonomy approach remains *Chapman v. Chapman* (2001), 15 R.F.L. (5th) 46 (Ont. C.A.), where the Ontario Court of Appeal (through Justice Abella, as she then was) overturned an order for access (as it then was) to an "overbearing" grandmother over the objection of the parents:

> [21] . . . In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see them.

However, while Justice Abella certainly spoke about parental rights in *Chapman*, ultimately, noted the Alberta Court of Appeal, *Chapman* was an application of the statutory best interests test based on the Ontario legislation that was in place at that time.

At the other end of the analytical spectrum lies what has been called the "pro-contact" approach as described by the Nova Scotia Court of Appeal in *Simmons v. Simmons* (2016), 89 R.F.L. (7th) 111 (N.S. C.A.) at para. 40.

And in the middle, we find the "hybrid" approach: *D. (D.) v. C. (A.)* (2017), 88 R.F.L. (7th) 492 (B.C. Prov. Ct.).

Here, the Alberta Court of Appeal disclaimed any "approach", noting that the only question was the best interests of the children as viewed through the lens of the enumerated statutory factors. For good measure, the Court of Appeal cited the Supreme Court of Canada in *B.J.T. v. J.D.*, 2022 CarswellPEI 31 (S.C.C.), where the Supreme Court noted at paragraph 102 that, "[p]arental preferences should not usurp the focus on the child's interests". Where the legislation sets out a non-exhaustive list of factors for determining the best interests, it is not an error to assign weight to a non-enumerated factor if there is some link to the child's best interests. However, courts should not be quick "to superimpose the factor onto a statute when a legislature has omitted it": *B.J.T. v. J.D.* at para 101.

In Alberta, s. 18 of the *Act* sets out the factors a court must consider in determining the best interests of the child. That list includes consideration of the parents' wishes: s. 18(2)(b)(ix). But there was no basis to automatically give parental wishes priority. Ultimately, the best interests of the child are paramount. Therefore, the chambers judge did not err in not deferring to the parents' wishes. This would not have been a successful ground of appeal.

Antigua and Barbuda — It's Not Just About Sandy Beaches Anymore

H.M.B. Holdings Limited v. Antigua and Barbuda, 2022 CarswellOnt 12333 (C.A.) — Fairburn A.C.J.O., and Thorburn and Favreau JJ.A.

Enforcement of *some* family law Orders from courts in other countries are governed by specific statutory regimes. For example, the recognition of foreign divorces is dealt with under s. 22 of the *Divorce Act*, which provides that a foreign divorce "shall be recognized for the purpose of determining the marital status in Canada of any person, if either former spouse was habitually resident in the country or subdivision of the competent authority for at least one year immediately preceding the commencement of proceedings for the divorce."

In Canadian provinces and other reciprocating jurisdictions, parties can have resort to the *Interjurisdictional Support Orders Act* (or whatever catchy name it may have in any particular jurisdiction) to enforce support orders.

And for final orders (such as for equalization payments), all Canadian provinces, not including Quebec (c'est dommage!) are reciprocating jurisdictions under provincial enforcement legislation, such as Ontario's *Reciprocal Enforcement of Judgements Act*, R.S.O. 1990 c R.5. (More on this below.)

But enforcement of other family law Orders from foreign courts (or orders from courts in jurisdictions where the above legislation does not apply) are governed by the common law, including but not limited to some non-support related payment Orders, and support Orders from foreign jurisdictions that do not have reciprocal enforcement arrangements with Canada. Accordingly, while *H.M.B. Holdings* is not a family law case, it is a useful read for family law lawyers because it provides an excellent summary of the common law test for enforcing foreign judgments in Canadian courts. And it shows it's not just all fun and games in the Caribbean.

In 2014, the Appellant, H.M.B. Holdings Limited ("H.M.B."), obtained judgment (to compensate it for land Antigua had expropriated) for almost $30,000,000 (that's a *lot* of rum) against Antigua and Barbuda ("Antigua") from the Judicial Committee of the Privy Council, which is the court of final appeal for various UK overseas territories and Crown dependencies — including Antigua.

H.M.B. apparently had concerns about whether it would be able to enforce the Privy Council's judgment in Ontario directly because of limitation period issues. So instead of trying to enforce the judgment in Ontario, it first obtained default judgment against Antigua in British Columbia, which has a 10-year limitation period for recognizing and enforcing foreign judgments,

whereas Ontario has only a two-year limitation period. Antigua did not defend the Action, presumably because it had no real or substantial connection to B.C.

After H.M.B. obtained default judgment against Antigua in B.C., it then tried to register the default judgment in Ontario under Ontario's *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5. As the Court of Appeal noted in its decision, this "is sometimes referred to as a 'ricochet judgment', a 'derivative judgment' or a 'judgment on a judgment'." We prefer "ricochet judgment". It sounds more fun.

However, H.M.B.'s request to register the judgment in Ontario under the *Reciprocal Enforcement of Judgments Act* was ultimately rejected by the Supreme Court of Canada in 2021 (see *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 CarswellOnt 15459 (S.C.C.)) pursuant to s. 3 of the *Reciprocal Enforcement of Judgments*, which provides that "[n]o judgment shall be ordered to be registered under this Act if it is shown to the registering court that . . . (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court[.]"

But it takes a lot to deter someone who is owed $30 million. Instead of just trying to enforce the Privy Council's judgment in Ontario and dealing with the potential limitation period issue head on, H.M.B. then started a further Application in Ontario asking to enforce the B.C. judgment at common law. Antigua responded by bringing a motion for summary judgment, which was granted on the basis that there was no real and substantial connection between B.C. and the underlying lawsuit in Antigua.

H.M.B. appealed the motion judge's decision to the Ontario Court of Appeal.

In dismissing the appeal, the Ontario Court of Appeal started by summarizing the principles that apply when attempting to enforce a foreign judgment in Canada based on the common law "real and substantial connection" test (and this is the part that should be of interest to family lawyers):

> [27] Accordingly, **in *Beals* [*v. Saldanha*, 2003 CarswellOnt 5101 (S.C.C.)], the [Supreme Court of Canada] confirmed that the real and substantial connection test applies to the process by which Canadian courts may recognize and enforce judgments granted by courts in foreign jurisdictions. In applying this test, the court must first consider whether the foreign jurisdiction has a real and substantial connection with the defendant or the subject matter of the litigation: at paras. 37-39. Next, the court can refuse to recognize and enforce the foreign judgment if it was obtained by fraud, if the foreign court breached the rules of natural justice or if recognizing and enforcing the foreign judgment would be contrary to public policy**: at paras. 35, 40. The court emphasized that the issue of public policy has a narrow application and is only to be invoked where it is appropriate for the court to condemn the foreign law on which the judgment is based: para. 75.
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> [28] More recently, **in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, the Supreme Court reaffirmed that the real and substantial connection test applies to the recognition and enforcement of foreign judgments by Canadian courts**. In *Chevron*, the Supreme Court addressed the issue of whether a Canadian court must have a real and substantial connection with the subject matter of the claim or the defendant before taking jurisdiction in an action for recognition and enforcement. Specifically, the court addressed whether a defendant must be present or have assets in the jurisdiction as a precondition to recognizing and enforcing a judgment in that jurisdiction. In that context, **the court held that "there is no need to probe the relationship between the enforcing forum and the action or the defendant": at para. 37. Instead, the enforcing court has jurisdiction over the defendant as long as there was effective service on the defendant against whom recognition and enforcement is sought**: *Chevron*, at para. 36.
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> . . . . .
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> [31] Accordingly, **as a general principle, a court in one jurisdiction will recognize and enforce the judgments of another jurisdiction, as long as the original jurisdiction had a real and substantial connection with the claim or the defendant, and as long as none of the bars to recognition and enforcement referred to above are present.** [emphasis added]

To this we would add that in order to be enforced in Canada, the foreign judgment in question must be final, and not just interim or interlocutory (see *Chevron Corp. v. Yaiguaje*, 2015 CarswellOnt 13353 (S.C.C.) at para. 35).

Although the Court of Appeal agreed with the motion judge that H.M.B.'s Application should be dismissed, it disagreed with her reasoning, and held that she had erred by deciding the motion based on whether B.C. had a real and substantial connection to the underlying lawsuit in Antigua. While that was a relevant question for the *B.C. court* to have considered when deciding whether to grant default judgment, it was irrelevant to the question of whether the Ontario court should recognize the B.C. judgment:

> [36] On that basis, in my view, it **was an error in principle for the motion judge in this case to focus on whether there was a real and substantial connection between British Columbia and the original dispute in Antigua and Barbuda, or between British Columbia and the parties, for the purpose of deciding whether the BC Judgment should be recognized and enforced in Ontario**. This does not accord with the original focus of the court's inquiry in British Columbia. Rather, **in British Columbia, the focus of the inquiry was whether the Privy Council Judgment should be recognized and enforced in British Columbia**. In deciding that issue, the British Columbia court had to consider: (1) whether the Privy Council had jurisdiction over the dispute or the parties pursuant to the *Court Jurisdiction and Proceedings Transfer Act*; (2) whether Antigua was properly served with the claim; and (3) whether Antigua had any defences to a judgment for recognition and enforcement in British Columbia, such as a limitation-period defence. **These issues had to be decided in accordance with the law in British Columbia.**
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> [37] Looked at from another perspective, **as between British Columbia and Ontario, the issue of comity does not arise when considering whether a court in Ontario should enforce the BC Judgment**. The rationale for British Columbia to recognize the Privy Council Judgment is, in part, respect for the Privy Council, which decided that Antigua owes a debt to H.M.B. for the expropriation of H.M.B.'s property. In contrast, **all the British Columbia court decided is whether the Privy Council Judgment should be recognized and enforced in British Columbia based on the law that British Columbia applies to such inquiries**. [emphasis added]

Instead, the Court of Appeal held that the motion judge ought to have dismissed H.M.B.'s Application for enforcement on the basis that "the common-law test for recognition and enforcement of original foreign judgments does not apply to the recognition and enforcement of ricochet judgments", and that if H.M.B. wanted to try to enforce the Privy Counsel's judgment in Ontario, it would have to seek that relief directly from an Ontario court, instead of trying to do so indirectly by asking the Ontario court to enforce the B.C. default judgment. The Court also noted that it was not going to prejudge the potential limitation period in Ontario, and that "if H.M.B. chooses to pursue a common-law action for direct recognition and enforcement of the Privy Council Judgment in Ontario, it will be for the court in that context to decide the limitation period issue, including whether discoverability may play a role in deciding that issue."

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