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

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COVID-19 Vaccination Update From the Trypanophobic Authors of This Week in Family Law

O.M.S. v. E.J.S., 2021 CarswellSask 547 (Q.B.) — Megaw J.

B.C.J.B. v. E.-R.R.R., 2021 CarswellOnt 13242 (S.C.J.) — Sanfilippo J.

This week, we have two more decisions that you'll want to have on hand when dealing with disputes about whether a child should be vaccinated against COVID-19.

In *O.M.S.*, Justice Megaw dealt with a motion by the father for authority to vaccinate the parties' 12-year-old daughter against COVID-19 without the mother's consent. The mother was a staunch anti-vaxxer, and tried to file evidence from a host of purported experts, and a variety of websites and other sources.

Justice Megaw would have none of this, and made it clear in his reasons that the *only* issue he had to decide was whether it would be in the parties' daughter's best interests to be vaccinated against COVID-19:

2. What This Application Is Not About

[41] This case is not about whether there is, or has been, a pandemic with respect to the Covid-19 virus. It is also not about whether the numbers with respect to that pandemic are accurate, sufficiently large, or really affect children. It is also not about the safety or the efficacy of the Pfizer vaccine. I will explain these statements in more detail further in this judgment.

[42] This case is also not about governments bullying or forcing citizens to take experimental drugs. It is not about freedom of speech or the lack thereof. And, it is not about the inability of certain individuals to have their points of view heard to their personal satisfaction.

[43] Finally, it is not about either right or left politics. And it is not about society or the Court picking a side in a legitimate ongoing societal debate. In short, it is not about the current health situation and any suggestion it has been politicized. Thus, it is not about the propriety or impropriety of the various levels of government imposing health guidelines, restrictions, masking, or lack of vaccination consequences.

3. What This Application Is About

[44] This application is about only one thing: should this 12-year-old child be ordered to be vaccinated for the Covid-19 virus if she is saying she does not want that to be done and in light of evidence concerning a condition called "vaccine toxicity"? In arriving at the appropriate conclusion on this issue, it will be necessary to make findings of fact based on the evidentiary record that is before the Court. The basis for making these factual determinations is not complicated and will

not come as a surprise to those reading these reasons. This despite the fact the petitioner has gone to extreme lengths to attempt to illustrate the entirety of response, and follow up to the Covid-19 pandemic, has been done pursuant to a false narrative and based on false information.

Not surprisingly, Justice Megaw concluded it would be in the child's best interests to be vaccinated against COVID-19.

B.C.J.B. does not specifically deal with the COVID-19 vaccine. However, it is still useful for COVID-19 vaccination cases because Justice Sanfilippo, sitting on appeal from a decision that Justice Finlayson made before he was elevated to the Superior Court, upheld Justice Finlayson's decision to take judicial notice of the following adjudicative and legislative facts:

1. Ontario's publicly funded vaccines are safe and effective at preventing vaccine preventable diseases.
2. The widespread use of Ontario's publicly funded vaccines has led to severe reductions or eradication of incidents of disease in our society.
3. The harm to a child from contracting a vaccine preventable disease may even include death.
4. Canada and Ontario have a coordinated immunization strategy in the interest of public safety.
5. Canada and Ontario's immunization strategy includes sophisticated delivery systems, oversight and vaccine safety monitoring and compliance measures.
6. The *Immunization of School Pupils Act* is part of Ontario's public health strategy.
7. Government policy, at both the federal and provincial levels, supports the widespread use of vaccination to promote individual health and public safety.

These statements have already been followed in a number of subsequent cases (including *O.M.S.*), and we suspect they will be repeated many more times once children younger than age 12 become eligible for the vaccine.

Sometimes Hard Facts Make Bad Law. And Sometimes Hard Facts Are Just Hard Facts.

N. v. F., 2021 CarswellOnt 12685 (C.A.) — Lauwers, Hourigan, and Brown JJ.A.

Cases involving a request to return a child to a foreign jurisdiction that is not a signatory to the *Hague Convention on the Civil Aspects of International Child Abduction* are complicated. And cases to return a child to a non-*Hague* signatory with a system of law that may not be based on our own North American views are even more complicated.

These complexities are on clear display in the Ontario Court of Appeal's recent 88-page judgment in *N. v. F.* The majority in *N. v. F.* upheld the trial judge's decision (2020 CarswellOnt 18401 (S.C.J.)) to order the return of the parties' two young children to Dubai in the United Arab Emirates, while the dissent would have reversed the trial judge's decision, and found that Ontario should have taken jurisdiction to decide the case based on the best interests of the children.

They say that hard facts make bad law. In this instance, that is not *necessarily* the case. Sometimes hard facts are just hard facts.

Given the length and importance of this decision (and the fact that people have asked that we not do 20-page *Newsletters*), we have devoted most of this week's edition of *TWFL* to it.

The Appellant mother was born in Pakistan and immigrated to Canada when she was 15 years old. She is a Canadian citizen. The Respondent father was born in Pakistan and is a Pakistani national.

The parties were married in Pakistan in February 2012, but lived in Dubai for their entire marriage. They had two young children under the age of five when they separated, both of whom were Canadian citizens. Neither the parties nor the children were UAE citizens or permanent residents.

The mother regularly visited her parents in Ontario during the marriage. And, on June 19, 2020, with the father's permission, she took both children to Ontario for a month-long trip. However, and despite having purchased return tickets for herself and the children, within two weeks of arriving in Canada the mother told the father that she had decided not to return, and that she intended to stay in Ontario with the children indefinitely.

The father started proceedings in both Dubai and Ontario. In the proceeding in the Ontario Superior Court of Justice, the father sought an order under s. 40 of the *Children's Law Reform Act*, R.S.O., 1990, c. C.12 (the "CLRA") to have the children be returned to Dubai.

The mother responded by asking the Ontario court to take jurisdiction over the parenting issues pursuant to ss. 22 and 23 of the *CLRA*. She also raised a host of arguments about the constitutionality of the return order provisions of the *CLRA*.

The Trial Judge's Decision

The trial judge heard evidence and submissions about the jurisdiction issues over 11 days in November 2020. The Attorney General of Ontario also intervened with respect to the mother's constitutional claims. Both parties testified, and they both called family and friends as witnesses on their behalf. Both parties also called experts about family law in Dubai, and the mother called a psychotherapist.

Prior to the trial, the father served a "with prejudice" settlement offer that was disclosed to the trial judge. The terms of the offer provided that the children would return to Dubai on the following terms

- The mother would be the children's primary residential parent, but that major decisions would be made jointly;
- The father would secure a visa for the mother so that she could remain in Dubai; and
- The father would purchase a house in Dubai in the mother's name that she would hold in trust for the children.

The offer also provided the mother with the alternative of pursuing her remedies in the UAE court if she was not satisfied with the proposed custody and support arrangements, and that its terms could be incorporated into a s. 40 order under the *CLRA*.

[As an aside, we're not sure how a settlement offer was disclosed to the trial judge, unless both parties consented. There is no such thing as a "with prejudice" settlement offer such that it can be unilaterally disclosed to the court: *Leonardis v. Leonardis* (2003), 43 R.F.L. (5th) 144 (Alta. Q.B.); *1021018 Alberta Ltd. v. Bazinet*, 2015 CarswellAlta 439 (Q.B.) . . . But we digress.]

The trial judge found that the father was more credible than the mother, and was satisfied that:

- a court in Dubai would determine custody by making the best interests of the children its paramount consideration;
- a court in Dubai would be able to incorporate, approve, and enforce, as a valid order, the with prejudice settlement proposed by the father if it was agreed to by the mother; and
- while infants could face adverse emotional and psychological impacts when they are separated from their primary caregiver, it was unknown whether the particular children in this case would suffer serious harm if they were separated from the mother.

The trial judge concluded that the Court did not have jurisdiction over the children under ss. 22 or 23 of the *CLRA*. Furthermore, pursuant to s. 40 of the *CLRA*, he was satisfied on the balance of probabilities that the children's best interests would be served by their return to Dubai so that a Dubai court could decide the custody and access issues. The trial judge also declined to exercise the Court's residual *parens patriae* jurisdiction pursuant to s. 69 of the *CLRA*, and dismissed the mother's constitutional challenge.

As a result, the trial judge ordered that the children were to be returned to Dubai forthwith pursuant to s. 40 of the *CLRA*, which permits a court that has declined jurisdiction under ss. 22 and 23 to make various orders, including ordering "a party to return the child to such place as the court considers appropriate[.]"

The Court of Appeal's Decision

The mother appealed the trial judge's decision to the Ontario Court of Appeal, and obtained an order staying the trial judge's decision pending the appeal.

In dismissing the mother's appeal, Justice Hourigan, writing for himself and Justice Brown, started by emphasizing the very exacting standard of review that applies in family law cases:

[1] Trial courts are frequently called upon to make difficult decisions about the future care of children due to the break-up of parental relationships. Trial judges are parachuted into a family, made privy to its most intimate details, and charged with determining the best course for the children's future in the face of the parents' opposing viewpoints. On appeal, considerable deference is paid to those decisions because trial judges have the opportunity to observe first-hand both the witnesses and the family dynamic. This case raises squarely the role of appellate courts in reviewing family law decisions.

.....

[5] On appeal, the [mother] invites us to retry the case. However, she does not offer any persuasive reasons for why we should do so, and cannot articulate any errors of law or palpable and overriding errors of fact or mixed fact and law. Instead, she asserts that we should effectively consider her case *de novo* and rule in her favour.

[6] These reasons explain why I would decline to interfere with the trial judge's decision. When an appellate court trespasses into the domain of a trial court and redoes its analysis, it runs the risk of rendering a results-based decision. Such decisions do not serve the cause of justice; they pervert it by creating uncertainty in the law for other similarly situated parties. This concern is particularly acute in family law cases where there may be sympathetic facts. Appellate courts must resist the temptation to conduct what is essentially a second trial on appeal.

[As another aside, the standard of appellate review in family law cases is one of the issues the Supreme Court of Canada will be considering on December 1, 2021 and December 2, 2021, when it hears oral arguments in the appeals from *Alansari v. Kreke*, 2020 CarswellSask 522 (C.A.), *J.D. v. DCP, et al*, 2020 CarswellPEI 73 (C.A.); and *Barendregt v. Grebliunas* (2021), 50 R.F.L. (8th) 1 (B.C. C.A.).]

Justice Hourigan also noted that the standard of appellate review in Ontario on questions of foreign law and its proper interpretation is correctness: *Grayson Consulting Inc. v. Lloyd*, 2019 CarswellOnt 1812 (C.A.). [However, this *may* not be the rule in all provinces. For example, in British Columbia it appears that conclusions as to the foreign law constitute findings of fact subject to the palpable and overriding standard: *Friedl v. Friedl* (2009), 67 R.F.L. (6th) 239 (B.C. C.A.).]

The majority then turned to considering the merits of the mother's appeal.

Under ss. 22(1)(a) and 22(1)(b) of the *CLRA*, a court in Ontario can only take jurisdiction to make a parenting or contact order if:

(a) The child was habitually resident in Ontario at the start of the proceeding;

OR

(b) **All six** of the following requirements are met:

- (i) the child is physically present in Ontario at the commencement of the application for the order,
- (ii) substantial evidence concerning the best interests of the child is available in Ontario,

- (iii) no application respecting decision-making responsibility, parenting time or contact with respect to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
- (iv) no extra-provincial order respecting decision-making responsibility, parenting time or contact with respect to the child has been recognized by a court in Ontario,
- (v) the child has a real and substantial connection with Ontario, AND
- (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

[See *Wang v. Lin* (2013), 29 R.F.L. (7th) 1 (Ont. C.A.) at para. 50, where the Ontario Court of Appeal confirmed that the requirements of s. 22(1)(b) are conjunctive.]

The mother conceded that s. 22(1)(a) of the *CLRA* did not apply because the children were not habitually resident in Ontario at the start of the proceeding. However, she argued that the trial judge erred in not taking jurisdiction under s. 22(1)(b), and in finding that four of its six requirements had not been met.

Justice Hourigan quickly disposed of this aspect of the mother's appeal on the s. 22(1)(b) issue, as he was not persuaded that the trial judge erred in finding that she had not met her onus of establishing that there was substantial evidence about the best interests of the children in Ontario under s. 22(1)(b)(ii):

[48] . . . the trial judge noted, among other things, that the children had only lived in Ontario for six months, that neither the parties nor the children had spent significant time in Ontario during the period from February 2012 to June 2020, and that "nobody in Ontario testified except for . . . [the mother] and her mother". These findings were well-grounded in the evidence and free of error. They are immune from appellate interference.

Having found that one of the six requirements of s. 22(1)(b) had not been met, there was no need for the Court to go further and consider the rest of the mother's arguments about s. 22(1)(b).

The most interesting issue in this case, however, was whether the trial judge had erred by declining jurisdiction under s. 23 of the *CLRA*, which provides that even if the court does not have jurisdiction under s. 22, it can still make parenting orders and contact orders if it is satisfied that:

- (a) the child is physically present in Ontario; **AND**
- (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
 - (i) the child remains with a person legally entitled to decision-making responsibility with respect to the child,
 - (ii) the child is returned to a person legally entitled to decision-making responsibility with respect to the child, or
 - (iii) the child is removed from Ontario.

In this case, the trial judge was not satisfied that the children would suffer serious harm if they were returned to Dubai because:

- There was no evidence that the children were at risk of being physically harmed if they returned to Dubai;
- There was only circumstantial evidence that the children would be at risk of emotional and psychological harm;
- There was no evidence that the children had specific views or preferences about whom or where they resided; and
- There was no reliable evidence that the court system in Dubai would not decide the parenting issues based on the children's best interests, and would not approve the father's "with prejudice" settlement proposal.

On appeal, the mother argued that the trial judge had "erred in his consideration of (a) her uncertain residential status in Dubai; (b) the [father's] proposed settlement offer and consent order; (c) the law of the UAE that she says disadvantages her; (d) the adequacy of the [father's] parenting plan; and (e) the nature of the potential harm to the children."

The majority rejected the mother's arguments, and found that she was really just asking the Court of Appeal to reweigh the evidence and to draw different conclusions. And that, according to the majority, is something an appellate court cannot do, and it reiterated this point multiple times throughout its decision (see paras. 58, 61-62, 68, 73, 75, 82, 85, and 95).

The majority was also clearly concerned that not sending the children back to Dubai would serve as an invitation to other parents to abduct very young children to Ontario:

[83] . . . if [the dissent's] analysis were to be followed . . . , the precedent established would be concerning. Such a decision would send a message to parents living in the UAE that if they unilaterally come to Ontario with their children, they will not be required by the Ontario courts to send their children home. Instead, they can avoid the s. 22 analysis and reduce the s. 23 analysis to a question of whether they would be subject to the law of the UAE. Thus, the underlying objective of the *CLRA* to reduce child abductions would be jettisoned in the wake of the rather provincial view that unless Ontario law is applied, children will suffer serious harm. As a matter of comity, public policy, and common sense, such a precedent leaves much to be desired.

With respect to s. 40 of the *CLRA*, which allows, but does not require, a court in Ontario to order that a child be returned to his/her habitual residence, the majority declined to consider this issue, as the mother had not raised it in her Notice of Appeal or her Factum.

Justice Lauwers, in dissent, would have allowed the mother's appeal. He was of the view that "the trial judge failed to take into account the Mother's peculiar vulnerability as a foreign national, and as a woman undergoing a divorce process in Dubai under the laws of the UAE, with its effects on the children." Both parties' expert evidence showed that the mother's residency status in Dubai was clearly precarious, and the dissent was of the view that the father's arrangements in his "with prejudice" offer "to address her precarious residency status were all unacceptably contingent."

Furthermore, the dissent took serious issue with the trial judge's conclusion that the risk of harm of returning the children to Dubai and separating them from the mother was unknown, as "the risk of this harm was precisely what the trial judge had to assess in order to make determinations under ss. 23 and 40 of the *CLRA*."

Having found that the trial judge made these errors, Justice Lauwers then turned to the issue of whether the mother had met her onus of establishing a serious risk of harm if the children were ordered to return to Dubai.

Unlike the majority, which deferred to the trial judge's decision that the mother had not established a serious risk of harm on the particular facts of this case (notwithstanding the children's ages and the mother's precarious status in Dubai), the dissent was prepared to accept that, *as a general principle*, "an indefinite separation of two quite young children, one under two years and the other only four, from the parent who has always been their primary caregiver, constitutes a risk of serious harm."

Although it is hard to disagree with this general proposition, the majority expressed serious concerns about essentially establishing a general principle that separating very young children from their only primary caregiver who has tenuous legal status in the children's habitual residence and refuses to return will rise to the level of a risk of harm for the purposes of s. 23 of the *CLRA*:

[93] . . . According to [the dissent's] logic, to succeed on a s. 23 argument, all that a primary caregiver needs to establish is: (1) that the children in issue are under the age of five; (2) that they refuse to return the wrongfully retained children to the children's home jurisdiction; and (3) that they refuse to return to the children's home jurisdiction if the children are required to go back there.

[94] This logic is problematic for several reasons. First, it encourages child abductions, contrary to one of the public policy purposes underlying the *CLRA*. Second, it calls for an analysis that focuses solely on the preferences of the custodial parent and not on the best interests of the children. Third, it uncritically accepts that there will be serious harm regardless of the circumstances in a particular case, which are ignored entirely. Fourth, it comes dangerously close to reviving the long-discredited tender years' doctrine. Fifth, it replaces the discretion to be exercised by the trial judge with a hard-and-fast rule.

While we agree with these policy concerns, it is nevertheless hard to conceive a scenario where the possibility of permanently separating a very young child from the only primary caregiver s/he has ever known would *not* create a risk of serious harm.

In any event, having accepted that indefinitely separating the children in this case from the mother would place them at risk of serious harm, the dissent concluded that the real issue it had to decide was whether "the court is convinced on a balance of probabilities that this separation will occur." In finding that such a separation was, in fact, more likely to occur than not, the dissent considered the following factors:

1. The mother's residential status in Dubai was precarious, as she had no legal right to remain there, and her residency permit was, and always had been, contingent on the father's residency permit. Although the father's "with prejudice" offer stated that he would help the mother obtain a new residency permit, there was no evidence to show that he actually had the ability to do this, or that the mother would have any recourse if he was ultimately unable to fulfil his promise or subsequently changed his mind.
2. While the father's "with prejudice" offer stated that the mother would be the children's primary residential parent, and that major decisions would be made jointly, there was no evidence that the mother would actually be able to enforce the offer in Dubai if the father decided not to abide by these terms.
3. If the mother could not enforce the "with prejudice" offer, the court in Dubai would apply the UAE's *Personal Status Law*. Although the *Personal Status Law* used wording that *sounded* like a "best interests" test, in substance the law in Dubai actually represented a "pronounced departure from Ontario's understanding of the best interests of the child in determining parenting arrangements." For example, although the *CLRA* provides that both parents are equally entitled to custody of a child, both parties' experts agreed that in Dubai, "the initial allocation of parenting responsibility is automatic, with custody (care of the children) going to the mother and guardianship (decision-making) to the father."
4. The evidence strongly suggested that, under UAE's *Personal Status Law*, it was extremely unlikely that the mother would be able to take the children with her if she could not obtain residency status and was forced to leave Dubai.

As a result, the dissent would have taken jurisdiction to decide the question of what parenting orders would be in the children's best interests (as that term is understood in Canadian law).

The dissent also concluded that it did not need to address s. 40 of the *CLRA* given its finding that the court should take jurisdiction. However, it still took the opportunity to discuss how to decide what Orders can/should be made if Ontario decides not to take jurisdiction in abduction cases where the *Hague Convention* does not apply:

[331] Where a court finds no risk of serious harm, and so refuses to exercise jurisdiction under s. 23, a return order under s. 40, cl. 3 does not automatically follow. Section 40 lists things that a court "may" do. While art. 12 of the *Hague Convention* obliges a court that does not find a grave risk under art. 13 to order a child's return, s. 40 does not operate in the same manner, because "unlike under the *Hague Convention*, the court is given broad discretionary powers when determining what order will remedy a wrongful removal to or retention in Ontario": [*Geliedan v. Rawdah*, (2020), 38 R.F.L. (8th) 261 (Ont. C.A.) at para. 69].

.....

[338] The implementation of a return order under s. 40, cl. 3 could have a deep and lasting impact on a child, particularly, but not only, where that order is enforceable by police. In my view, before making such an order, the court must determine

that doing so is in the best interests of the child, focussing, as called for by s. 24(2) of the *CLRA*, on "the child's physical, emotional and psychological safety, security and well-being" and having regard to the list of factors in s. 24(3). Other factors may be relevant in the circumstances, including the citizenship and residency status of each child and each parent in all of the relevant countries.

[339] To repeat, the best interests of the child analysis conducted under s. 40, cl. 3 need not mirror the analysis required to make a parenting order.

That the dissent suggests that citizenship of each child is a relevant factor brings to mind *Yassin v. Loubani* (2006), 39 R.F.L. (6th) 51 (Ont. C.A.). In *Yassin*, the British Columbia Court of Appeal considered whether, among the obligations of citizenship (the parties to that case both being Canadian citizens) was the obligation to submit to the jurisdiction of one of the Queen's courts (there, the Supreme Court of British Columbia), with respect to custody of children who were themselves Canadian citizens. Or, alternatively, do Canadian courts have a right, founded both on the duty of allegiance of the parents and on the Crown's *parens patriae* jurisdiction over children who are themselves Canadian citizens, to exercise jurisdiction by making an order for custody when the children at the time were neither "habitually resident" nor physically present within the jurisdiction. In a decision that has not been free of criticism, the Court in *Yassin* answered "yes."

However, in *N. v. F.*, only the mother was a Canadian citizen, and even the B.C. Court of Appeal did not extend the principle from *Yassin* to a foreign national: *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 59 (Ont. C.A.) and *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 91 (Ont. C.A.).

What a perfect segue into the constitutional issues.

The Constitutional Issues

The mother raised numerous constitutional issues, and argued that s. 40 of the *CLRA* was *ultra vires* the province because it dealt with the removal of a citizen of Canada, and that is a matter that falls within exclusive federal jurisdiction. She also argued that s. 40 infringed multiple provisions of the *Charter*.

Writing for both the majority and the dissent, Justice Brown rejected the mother's arguments, and confirmed that:

1. Section 40 of the *CLRA* is **not *ultra vires*** the legislative authority of Ontario. Since a removal order under s. 40(3) "involves the enforcement of custody rights, protecting a child from the harm of a wrongful removal, and ensuring that the custody of a child is determined by the most appropriate state, it falls within the established provincial power to legislate with respect to child custody and welfare as a matter of 'property and civil rights in the province'."
2. The mother's rights under s. 2(a) (freedom of conscience and religion), s. 7 (security of the person), and s. 15(1) (equality) of the *Charter* had not been infringed.
3. Although s. 40 of the *CLRA* infringed on the mother and children's right to remain in Canada under s. 6(1), the infringement was justified under s. 1.

Some Concluding Thoughts

To repeat what we said at the start (and in the title), sometimes hard facts are just hard facts.

On the one hand, the mother's decision to keep the children in Canada without the father's consent or prior judicial authorization was clearly problematic.

On the other hand, what other choice did the mother *actually* have? She had no independent legal status in Dubai, and we suspect it would have been impossible to persuade a court in Dubai to let her move to Canada with the children against the father's wishes no matter how strong her claim is on the merits. Furthermore, if the father decides to resile from his "with prejudice"

offer or is unable to fulfil its terms after the children return to Dubai, there is a serious risk that the children will not see their mother again for many years, if ever. Even a very small risk of a catastrophic outcome is worth serious consideration.

We also wonder what would happen if the facts of this case were reversed, and one of the parents had removed the children from Canada and taken them to Dubai. Would Dubai have ordered the children to be returned to Canada? While we don't know for certain, we have our doubts. And comity without reciprocity is not comity at all.

In any event, the majority's decision may not be the last word about these very difficult questions, as the mother is in the process of seeking leave to appeal to the Supreme Court of Canada, and her motion for a stay pending her application for leave was granted by Justice Paciocco of the Ontario Court of Appeal on October 1st. We will let you know of any further developments in this fascinating case as they arise.

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