FAMLNWS 2021-42
Family Law Newsletters
November 1, 2021

— Franks & Zalev - This Week in Family Law

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What's Better than Shrimp on the Barbie? The Full Family Court of Australia on the *Hague Convention* and COVID-19

Kingsley & Secretary, Department of Communities and Justice (No. 2), Re, [2021] FamCAFC 144 (Australia Full Ct.) — Strickland, Tree and Gill JJ.

We have included this decision from the full court of the Family Court of Australia (the second level of appeal) for one simple purpose: to show that COVID-19-related risks, on their own, will neither support a wrongful removal or wrongful retention, nor meet the threshold of grave risk of physical or psychological harm. The child was wrongfully retained in Australia and the Court ordered that she be returned to Canada, the jurisdiction of her habitual residence.

The facts are simple:

- The mother was an Australian citizen. The father was a Canadian citizen, resident in Canada.
- The parties met in Canada in May 2018, while the mother was temporarily living and working in Canada.
- They started living together in March 2019.
- They had a child at the end of 2019. The child was born in Canada.
- The mother and the child travelled to Australia in February 2020, so that the mother could visit her family. The father consented to the trip, and they had agreed that the mother and the child would return to Canada on March 2, 2020.
- The mother did not return to Canada as agreed. The father applied that the child be returned pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"), of which both Australia and Canada are signatories.

Much like in Canada [*Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.)], the Family Court of Australia noted that a parent's intention regarding habitual residence is not a deciding factor. The mother could not alter the child's habitual residence post-wrongful retention. On March 2, 2020, the child was habitually resident in the Great White North.

Furthermore, a return to Canada did not subject the child to a grave risk of physical or psychological harm because of COVID-19. In order to make that argument, the mother would have had to marshal evidence about Canada's COVID-19 infection rates, vaccination rates, and hospitalization and morbidity rates — especially with respect to children. And an Australian government

travel advisory to Canada was also insufficient to show grave risk of harm. It was a global pandemic and people were at risk all over the world. It was held that the general international impact of COVID-19 was not so exceptional as to raise a ground to defeat the automatic return provisions of the *Hague Convention*. Nor should it have been.

Does an Arbitrator Retain Jurisdiction to Change Their Award? You Betcha. Are There Special Rules for Unrepresented Parties at Arbitration? Not So Much.

Marchetti v. Lane, 2021 CarswellBC 2033 (S.C.) — Tucker J.

This was the father's application under s. 19.18 of the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*"), in which he asked the Court to review an arbitration award. (In September 2020, the *FLA* was amended to include family arbitration provisions that were originally part of the *Arbitration Act*, R.S.B.C. 1996 c. 55.)

The issue was where the child should attend kindergarten — but that clearly ain't the important part.

The parties lived together and had a child.

After the mother filed a Notice of Family Claim, the parties agreed to remit their dispute to arbitration. They entered into a Consent Order (the "Consent Order") which included the following terms:

- All matters were remitted to arbitration with the arbitrator;
- The arbitration would commence on March 24, 2021, for one day;
- The single issue of school choice would be adjudicated on March 24, 2021; and
- The remaining matters would be arbitrated no later than July 1, 2021.

The parties also agreed to waive their rights to further litigate the issues in court, subject to rights of appeal, and signed an Arbitration Agreement with the usual terms.

The parties agreed to have the choice of school issue determined separately and prior to the main arbitration because that issue was pressing. The child was due to start school in September 2021, and the enrolment deadline was January 29, 2021. As is usual in choice of school disputes, the fight was not about which kindergarten would most likely lead the child to admission into an Ivy League University in 13 years. Rather, it was about the parties' convenience, as they both lived in different catchment areas.

By agreement, the first hearing proceeded on a paper record, with a Statement of Agreed Facts and oral argument.

The arbitrator issued an Award favouring a school outside the boundaries of both of the parties' catchment areas, but also provided for a "backup" school (being the school in the father's catchment area) should the child not be accepted at the first-awarded school.

As luck would have it, the child was not able to attend either school identified in the Award as neither school could accommodate the child's attendance. And, after the Award was issued, the school in the mother's catchment area added a kindergarten class and offered the child an immediate placement.

The mother then filed a variation application with the arbitrator under s. 47 of the *FLA*, requesting an award that the child attend the school in her catchment area, and a second arbitration was arranged:

> **Changing, suspending or terminating orders respecting parenting arrangements**
>
> 47 On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

The father then gave notice that he would be acting in person, and the arbitrator explained the process to him and what would be required in response to the mother's materials. At the second hearing, an Award was made favouring the school in the mother's catchment area.

The father brought an application to the Court asking to set aside the second Award and to enforce the first Award. In doing so, he relied on s. 19.18 (1)(d) and (e) of the *FLA*:

> **Orders respecting arbitration awards**
>
> 19.18 (1) On application by a party, the Supreme Court may change or set aside an arbitration award if satisfied that any of the following apply:
>
> (a) there are justifiable doubts as to the arbitrator's independence or impartiality;
>
> (b) a party was not provided a reasonable opportunity to be heard respecting the award;
>
> (c) the award was obtained by fraud or duress;
>
> (d) the award deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is beyond the scope of the arbitration agreement;
>
> (e) the arbitrator acted outside the arbitrator's authority.

The father argued that the arbitrator had exceeded her jurisdiction in making the second Award for the following reasons:

> (a) It was outside the Arbitrator's jurisdiction to issue an interim ruling about a matter that had been finally decided.
>
> (b) The Arbitrator had no jurisdiction to change her final and binding decision.
>
> (c) Any continuing jurisdiction the Arbitrator had in the matter of the school issue after issuing the first Award arose only under s. 19.15 of the *FLA* [Correction of Errors and Interpretation].
>
> (d) The first Award was final and binding subject only to the right of appeal pursuant to s. 19.19 of the *FLA* or on application to the Supreme Court by a party pursuant to s. 19.18 of the *FLA* [Orders Respecting Arbitration Awards].

Justice Tucker concluded that the arbitrator did not exceed her jurisdiction in making the second Award. In doing so, she made the following statement that is important for both parties and counsel regarding arbitration:

> [60] Jurisdictional issues can arise where an initial arbitral award turns out to have been made based on inaccurate or incomplete facts. In *Ford Motor Company of Canada Limited v. Sherriff*, 2012 BCSC 891, an arbitrator purported to correct an initial award by issuing supplemental reasons that were based on new evidence. The supplemental reasons, which changed the intent of the initial award, were found to amount to an arbitral error. In *Westnav Container Services v. Freeport Properties Ltd.*, 2010 BCCA 33, an arbitrator purported to clarify an initial award by giving supplemental reasons that reached the same outcome but based on different evidence. The supplemental reasons were found to amount to an alternative finding rather than a clarification, and thus an arbitral error was found.
>
> [61] **In this case, the Arbitrator did not purport to correct or clarify the First Award. Rather, she determined an application to vary brought before her while her jurisdiction over the matter remained extant under the terms of her submission and the terms of the applicable statute.**
>
> [62] The terms of the agreement to arbitrate are set out in the Consent Order and the Agreement. The parties broadly remitted all of the matters in dispute between them under the family law proceeding to arbitration. The submission specifically referenced the dispute regarding school choice. **It was specifically agreed that the Arbitrator was to resolve**

> **the dispute by applying the *FLA*, and it was agreed that she had the requisite jurisdiction and authority to provide a final resolution.**
>
> [63] **Section of 47 of the *FLA*, which permits an order to be varied on a material change in circumstance, is part and parcel of the jurisdictional authority the parties agreed to confer on the Arbitrator.**
>
> [64] **While an arbitrator may cease to have jurisdiction to entertain a s. 47 application at some point in time, there is no call to explore the outer boundaries on the facts of this case.** The Variation Application was brought while the Arbitrator had continuing arbitral jurisdiction over the family law dispute, including parenting matters. Further, because the First Award was actually incapable of being implemented, the First Award had failed to finally resolve the school choice issue.
>
> [65] The Arbitrator was acting within her jurisdiction in hearing the Variation Application and issuing the Second Award. [emphasis added]

Or to be concise: An arbitrator on whom jurisdiction is conferred to do a job retains jurisdiction over the matter until the job is done. This is an important statement in the context of arbitration.

Justice Tucker also took the time to comment on the fact of unrepresented parties at arbitration. Here, the father argued that he had been denied a reasonable opportunity to be heard.

Section 19.18(1)(b) of the *FLA* provides that an award can be set aside on the basis that a party was denied a reasonable opportunity to be heard — a codification of the *audi alteram partem* rule of natural justice.

In *0927613 B.C. Ltd. v. 0941187 B.C. Ltd.*, 2015 CarswellBC 3212 (C.A.), the B.C. Court of Appeal described natural justice *in the arbitral context* as follows:

> [59] Natural justice requirements in arbitration have been broadly stated to require the arbitrator to act in good faith (or stated otherwise to be unbiased), fairly listen to both sides, and to give a fair opportunity to those who are parties to make representations, including to correct or to contradict any relevant statement prejudicial to their view. . . .
>
> [60] Natural justice will require an arbitrator to act with procedural fairness, the requirements of which will depend on the subject-matter of the dispute, the circumstances of each case, the nature of the inquiry, and the rules under which the parties have agreed to arbitrate their dispute. . . . The duty of fairness is not a "one size fits all" requirement but is molded by the circumstances of each case. Its most basic requirement is "simple fairness" or "fair play in action". . . .
>
> [61] Arbitration is one form of private dispute resolution. Parties to an arbitration agreement have the freedom to identify those disputes that will be resolved through arbitration, choose the person who will resolve their dispute, and set out the procedure they will follow during the arbitration process or alternatively have the arbitrator determine the rules of procedure they will follow.
>
> . . . . .
>
> [64] **There are no special rules of procedure for a self-represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration: an impartial arbitrator, procedural fairness of notice, and a fair or reasonable opportunity to make submissions and to respond to the other side's case.** . . . [emphasis added]

Here, the father had nothing to complain about. Both parties had repeatedly characterized the resolution of the school as an urgent matter. Both parties expressly agreed that the first hearing would proceed on a written record. The first and second hearings took place only one month apart. The second hearing involved the same legal issues as the first (with the addition of a material change of circumstances), and the two hearings were, essentially, on the same facts.

A self-represented party to an arbitration proceeding is not entitled to special procedural accommodations (nor should they be), but is entitled to a fair and reasonable opportunity to make submissions and to respond to the opposing case. Here, the father had that opportunity. And, as noted by her Honour, "[t]he extent to which he might have made better use of his opportunity does not raise an issue of natural justice, but rather is a matter of advocacy."

Two's Company, Three's a Crowd

K.B. v. M.S.B., 2021 CarswellBC 2092 (S.C.) — Milman J.

This case involved a claim under s. 59 of the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*") for continued contact between a child, VNKB, and her biological mother, KB, who had acted as a surrogate for the biological father, MSB, and his wife, NBB. By the time of the hearing, VNKB was four years old and had not seen KB for well over a year because MSB and NBB refused to allow it.

KB also claimed a declaration that she was the child's legal parent, despite a surrogacy agreement, on the basis that the child was conceived through intercourse between her and MSB, the child's biological father.

Given the increasing use and availability of surrogacy and artificial human reproduction, it's a bit surprising issues like this do not arise more often.

KB did have a relationship with the child for the first two or three years of her life, although the nature and extent of that relationship was contested. There was also disagreement as to how VNKB was conceived — MSB and NBB said they used an in-home insemination kit. KB said the child was conceived the old-fashioned way. Some contemporaneous emails suggested that KB was correct.

MSB and NBB were having difficulty conceiving. Enter KB, who met MSB and NBB in 2014. Shortly thereafter, KB and MSB commenced a sexual relationship while KB also became friends with NBB. In 2016, KB offered to become a surrogate for MSB and NBB.

The parties first tried to implant one of NBB's frozen embryos into KB, but that was not successful. KB then offered to use one of her own eggs. KB became pregnant with her own egg and sperm from MSB, and all three of the parties signed a Surrogacy Agreement in which MSB and NBB were identified as the intended parents.

The child was born in May 2017, after which KB confirmed that she surrendered the child along with all parental rights to MSB and NBB. Their agreement provided that KB could see the child whenever she wanted.

All was well for two years, although there was disagreement as to the extent of KB's involvement with VNKB. Things went south when KB started to try to exercise further rights as a parent, and allegedly demanded a formal parenting schedule and payment of $100,000 for her services. In response, MSB and NBB refused KB further access to VNKB.

KB started her action in July 2020, in which she was claiming a declaration of parentage, equal parenting time, joint guardianship and child support. The matter was scheduled for trial in January 2022, and KB brought this interim motion for an order allowing her to resume contact with VNKB, under s. 59 of the *FLA*.

Section 37 of the *FLA* specifies that the only consideration is the best interests of the child, and s. 37(2) lists factors to be considered.

The test on an application by a non-guardian for contact with a child under s. 59 of the *FLA* was set out in *Kalafchi v. Yao*, 2015 CarswellBC 1852 (S.C.), aff'd 2015 CarswellBC 3772 (C.A.):

> [21] Section 59 of the *FLA* is a new provision replacing s. 35 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*], which granted the court the discretion to order access to a child to a non-parent or a non-relative. There were few reported

> decisions under the *FRA* regarding access rights of non-parents and non-relatives. However, the court generally applied the principles laid down by Brenner J. (as he then was) in *Chapman v. Chapman*, [1993] B.C.J. No. 316 (B.C. S.C.) at para. 24, which are as follows:
>
> > 1. The onus is on the applicant to demonstrate that the proposed access is in the child's best interests.
> >
> > 2. The custodial parent has a significant role. **The courts should be reluctant to interfere with a custodial parent's decision and should do so only if satisfied that it is in the child's best interests.**
> >
> > 3. **It is not in the best interests of a child to be placed into circumstances of real conflict between the custodial parent and a non-parent.** While the court must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access to non-parents, **in cases of real conflict and hostility, the child's best interests will rarely, if ever, be well served by granting access.** [emphasis added]

This is very similar to the classic test for grandparent access set out by the Ontario Court of Appeal in *Chapman v. Chapman* (2001), 15 R.F.L. (5th) 46 (Ont. C.A.).

The importance of avoiding real conflict for a child in such situations was further emphasized in *G. (L.J.) v. B. (N.)* (2017), 92 R.F.L. (7th) 90 (B.C. S.C.), where it was stated that extreme acrimony and mistrust cannot be in a child's best interests.

This case presented Justice Milman with highly unusual and unprecedented facts, and in an effort to assist those that may follow, his Honour set out the following principles and considerations:

> • A person who is not a guardian seeking an order for contact with a child bears the onus of showing that such contact would be in the child's best interests with reference to the factors set out in s. 37.
>
> • Self-serving evidence from the parties and their family and friends is not especially helpful. A report prepared by a neutral profession (here, under s. 211 of the *FLA*) would be of assistance.
>
> • History matters. While it was clear that MSB and NBB had been the primary caregivers and the only "parents" VNKB had known from the very beginning, the nature and quality of her relationship with KB mattered — but could not be determined on a conflicting paper record.
>
> • While the *status quo* mattered, MSB and NBB had not changed the *status quo* in the sense that KB never had any *right* to contact with the child save as permitted by MSB and NBB. They could not be faulted for having terminated contact if they justifiably (and presumably not capriciously or arbitrarily) believed that it was in VNKB's best interests to do so.
>
> • While the level of acrimony that had developed between the parties *could* be taken to suggest that MSB and NBB were motivated by malice, that was not the only inference that could be drawn. It was plausible that MSB and NBB felt it necessary to shield VNKB from the toxic dynamic that had developed between the parties.

While appreciating that denying KB interim contact might come at a potential cost to the child's welfare — particularly if KB were to be ultimately successful in her action; here the existing and likely continuing acrimony between the parties was the deciding factor for Justice Milman on this motion for interim contact. He did not want to place the child in the middle of parties at war. Who can blame him. Justice Milman opted for interim stability.

Therefore, Justice Milman denied KB's application. KB did not meet her burden to show that an order allowing her to resume contact with VNKB at this stage would be in the child's best interests.

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