FAMLNWS 2020-09
Family Law Newsletters
March 9, 2020

— Franks & Zalev - This Week in Family Law

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Fresh Evidence on Appeal: Immunizing, Inoculating & Vaccinating

A.P. v. L.K., 2019 CarswellOnt 20636 (Ont. S.C.J.) - Akbarali J.

In the spring of 2019, newspapers across Canada published various articles about a family law case where an arbitrator dismissed a father's motion to force the mother to vaccinate their adolescent children.

The arbitrator actually released his decision on the merits in 2018, but the decision apparently did not come to the media's attention until March 2019 when the arbitrator awarded the mother $35,000 in costs and the father "went public."

While the decision was heavily criticized in the media (and by many lawyers on social media), the criticisms appear to have been based on the idea that no matter what evidence is put before a trier-of-fact, he or she ultimately ***must*** conclude that it is in a child's best interests to be vaccinated.

But this is just wrong.

Whether before a court or an arbitrator - decisions must be based *on the admissible evidence* adduced during the hearing. Nor can it be reasonably suggested that the Doctrine of Judicial Notice applies with respect to the "benefits of vaccination". Pursuant to the Doctrine of Judicial Notice, a court may take notice of facts so notorious and generally accepted as not to be the subject of debate among reasonable people and capable of immediate or accurate demonstration by resort to readily accessible sources of undisputed accuracy: *R. v. Find*, 2001 CarswellOnt 1702 (S.C.C.). Furthermore, a trier-of-fact should not take judicial notice of social facts close to the centre of the controversy: *R. v. Spence*, 2005 CarswellOnt 6824 (S.C.C.).

It is a fundamental principle of the Adversary System that decisions be based on the evidence.

Without the arbitrator's reasons - which are not yet in the public domain - or knowing the evidence, it is not at all possible to assess the arbitrator's decision on the merits. It is an attack in the air.

We, like many (but not all) personally agree that children should be vaccinated, and our understanding is that the science behind the anti-vaccination movement has been largely, but not entirely discredited. Furthermore, there may be children with specific medical sensitivities. We have no idea if that was a factor in the case. However, at the risk of repetition, in our legal system, the facts have to be decided based on admissible evidence. The mother was represented by senior and experienced counsel at the

arbitration, and put forward expert evidence from several professionals to support her position that the parties' children should not be vaccinated. The father, in contrast, represented himself, and did not put forward expert evidence to challenge the mother's position. It also does not appear that the father vigorously challenged the mother's experts' evidence either at the qualification stage, or when they gave their actual evidence.

When the father appealed the arbitrator's award, the ensuing media attention ultimately led to the mother bringing a motion to initialize and seal the court file, and for a publication ban. In June 2019, Justice Akbarali granted a partial publication ban and initialized the case, but dismissed the request for a sealing order. Her decision was reported at *A.P. v. L.K.* (2019), 29 R.F.L. (8th) 205 (Ont. S.C.J.), and was discussed in the August 26, 2019 edition of this *Newsletter* (*volume* 2019-34).

In this incarnation of this ongoing saga, Justice Akbarali was asked to decide whether the father should be permitted to file extensive fresh evidence on his appeal, including three new expert reports to support his request to vaccinate the children that he had not even tried to adduce during the arbitration.

Motions for fresh evidence are usually heard by the judge or panel that ultimately hears the appeal (see e.g. rule 61.16 of the *Rules of Civil Procedure*, which provides that a motion to introduce fresh evidence "shall be made to the panel hearing the appeal"). In this case, however, the parties persuaded the Court to determine the admissibility of the proposed evidence in advance, at least in part, so that they could decide whether to incur costs on cross-examinations before the appeal was heard.

Justice Akbarali started by summarizing the well-known principles for dealing with fresh evidence on appeal that were set out by the Supreme Court of Canada in *R. v. Palmer*, 1979 CarswellBC 533 (S.C.C.):

> a. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
>
> b. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> c. The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> d. The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Her Honour also recognized that:

- The rules about fresh evidence can be relaxed in family law cases where the best interests of a child are at stake: *Salehi v. Tawoosi* (2016), 92 R.F.L. (7th) 261 (Ont. C.A.); *Children's Aid Society of the Niagara Region v. A.C.*, 2018 CarswellOnt 2981 (Ont. Div. Ct.), and *Fernandes v. Darrigo* (2018), 11 R.F.L. (8th) 81 (Ont. Div. Ct.).

- The test for fresh evidence is more flexible in cases where the welfare of a child is at stake: *E. (H.) v. M. (M.)* (2015), 70 R.F.L. (7th) 350 (Ont. C.A.).

- The "due diligence factor is not a rigid one and must be considered in light of all the relevant facts", including that one of the parties was unrepresented: *Kuczera (Re)*, 2018 CarswellOnt 4892 (Ont. C.A.).

After considering these principles, Justice Akbarali decided to allow the father to introduce all three expert reports. She also allowed the mother to introduce fresh evidence from the children's doctor to update the Court as to the evidence that she gave at the arbitration.

We certainly understand that the Court wants to ensure that it has the best information available when dealing with the best interests of a child. However, we wonder whether the test for fresh evidence has been too relaxed in this case, perhaps given the notoriety of the matter. Given the result of the motion, it appears that the appeal is essentially going to be turned into a hearing *de novo*, albeit one where the new experts are presumably not going to be cross-examined before the trier-of-fact about their qualifications, independence, and opinions (and, depending on how things unfold, they may not actually be cross-examined at

all). The danger is that it becomes precedent for future cases - especially where the unsuccessful party was self-represented at the original hearing and now wants a "do over."

We will have to wait and see what happens when the appeal has been decided, but we wonder if the better course of action might have been to leave it up to the judge hearing the appeal to decide whether to admit the fresh evidence. That way, the appellate judge could assess whether s/he actually needed to rely on the fresh evidence to decide the appeal, or whether s/he could have dealt with the case in another way, perhaps based on some of the procedural concerns raised by Justice Akbarali in her decision. For example, the mother served her own expert reports on the self-represented father only two weeks before the hearing even though the timetable required her to have served them at least 30 days in advance. This could have been grounds to reject the mother's expert report.

In any case, this certainly could not have been an easy decision for the motion judge, and the decision is extremely well-written. That said, courts do have to be careful that "special" cases do not get "special" treatment and are not used to alter legal standards for future cases.

Determining Income Based on Historic Practice

H.M.S v. M.H., 2019 CarswellSask 647 (Sask. Q.B.) - Brown J.

The parties had a child together, K.H.

The father also had another child, J.L. The father's case with J.L's mother had previously gone to trial, and Justice McIntyre had ordered the father to: (a) provide the mother with his personal income tax return and the financial statement for his medical professional corporation by July 1st; and (b) adjust his child support payments based on the prior year's information as of September 1st of the current year.

While the father's income had typically been in the range of $315,000 a year, he only earned about $140,000 in 2018 because he had been suspended from practice for part of the year. Although the reason for the father's suspension is not mentioned in the judgment, the Court accepted that there were legitimate reasons for the reduction in his income and that it would not be appropriate to impute additional income to him for 2018.

The issue that Justice Brown had to decide was what income should be used to calculate the father's child support obligations for K.H.

Even though the motion was argued on December 5, 2019, and even though the father knew that his income in 2019 was going to be in the range of $315,000 (more than double what it was in 2018), the father argued that he should be able to pay support on his 2018 income of $140,000 because he did not yet know exactly what he was going to earn in 2019.

In Saskatchewan, although the prior year's income tax return is a useful source of information, it should not be used if the evidence shows that a person's current income is going to be materially higher or lower than that amount: *Fawcett-Kennett v. Kennett*, 2016 CarswellSask 216 (Sask. Q.B.); *Kelln v. Mryglod*, 2017 CarswellSask 431 (Sask. Q.B.); and *Peterson v. Peterson* (2019), 30 R.F.L. (8th) 341 (Sask. C.A.). This conclusion is consistent with appellate authorities from across the country: *Vanos v. Vanos* (2010), 94 R.F.L. (6th) 312 (Ont. C.A.) at paras. 14-15; *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.) at paras. 17-31; *R. (M.K.) c. R. (J.A.)* (2015), 74 R.F.L. (7th) 47 (N.B. C.A.) at paras. 25-27; *Lee v. Lee* (1998), 43 R.F.L. (4th) 339 (Nfld. C.A.); *L. (R.E.) v. L. (S.M.)* (2007), 40 R.F.L. (6th) 239 (Alta. C.A.); and *MacDonald v. MacDonald*, 2009 CarswellNS 879 (N.S. S.C.).

The complicating factor in this case was that the parties had been informally following the regime/formula that Justice McIntyre had put in place for the father's other child. Justice Brown was concerned that it would not be fair to the husband to depart from the approach that the parties had taken to date. It has been suggested, in other cases, that a recipient cannot argue to use current income where there has been an established pattern of basing support on income from the previous year: *Burrell v.*

Robinson (2009), 78 R.F.L. (6th) 351 (Ont. S.C.J.); *Thomson v. Richardson* (2011), 4 R.F.L. (7th) 357 (Ont. S.C.J.); and *Schmidt v. Schmidt*, 2017 CarswellOnt 8161 (Ont. S.C.J.).

Justice Brown was also satisfied that the amount of support that the mother would receive based on the father's reduced income in 2018 was still sufficient to let her meet the child's reasonable needs pending trial, and made it clear that his decision "in no way affects [the mother's] ability or capacity to seek arrears should there be more owing dating back in time over the course of K.H.'s childhood."

This sensible result ensures that the mother will have adequate funds pending trial, while leaving it open to the trial judge to determine the most equitable way of dealing with the temporary decrease in the father's income, and whether or not the parties should continue following the regime that Justice McIntyre had put in place for the father's other child.

Non-Family Message on Contractual Interpretation Brought to You by the Alberta Court of Appeal

Alberta Union of Provincial Employees v. Alberta Health Services, 2020 CarswellAlta 13 (Alta. C.A.) - O'Ferrall, Khullar, and Feehan, JJ.A.

Even those reading this in front of the television will notice that this is not a family law case. However, in this case, the Alberta Court of Appeal offers some guidance on the limited role that the negotiations leading up to an agreement may play in interpreting the actual contract between the parties. And while this case is about the interpretation of collective agreements, the general principles of contract interpretation apply to domestic contracts: *Dutton v. Davies*, 1997 CarswellOnt 4040 (Ont. Gen. Div.); *Campbell v. Campbell* (2013), 28 R.F.L. (7th) 298 (B.C. C.A.); *Turner v. DiDonato* (2009), 63 R.F.L. (6th) 251 (Ont. C.A.); *Moses Estate (Trustee of) v. Metzer*, 2016 CarswellOnt 4177 (Ont. S.C.J.); *MacDougall v. MacDougall* (2005), 19 R.F.L. (6th) 103 (N.S. S.C.); and *Holm v. Holm* (2013), 35 R.F.L. (7th) 255 (Alta. C.A.). As a result, and given the less-than-clear nature of the case law as to the use that can be made of pre-contract negotiations, we thought this case might be of interest.

Given that the case deals with labour arbitration, the facts are not terribly useful. But by way of both review and general principles:

- Courts must always consider the surrounding circumstances (the "factual matrix") known to both parties at the time a contract was made. Specifically, the Supreme Court in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.) ("*Sattva*") at paras. 47 and 58 determined that contractual interpretation requires the decision-maker to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." The Supreme Court also required courts to consider the "surrounding circumstances" known by the parties at the time the contract was made.

- Evidence regarding the negotiation of a contract is generally inadmissible as an aid to the interpretation of a contract, unless the contract is found to be ambiguous (*Sattva* at para. 59). Surrounding circumstances do not include evidence of the parties' subjective intentions, and cannot be used to add to, detract from, vary or otherwise "overwhelm" the written words. As a result, the parol evidence rule is not offended: *Sattva* at paras. 59-60.

- These principles can contradict each other. In practice, what the parties communicated to each other while negotiating a contract is often relevant to establishing the background facts that were known to both parties when the contract was made.

- Evidence of negotiations, including prior drafts, is generally inadmissible as part of the surrounding circumstances. Even though evidence of the surrounding circumstances and evidence of the parties' negotiations may overlap in some instances, evidence of the parties' subjective intentions is **always** inadmissible. [Para. 27]

- The surrounding circumstances are an objective interpretive aid. A court must always consider the surrounding circumstances, to ensure that the words of the contract are "not looked at in isolation or divorced from the background context against which the words were chosen." [Para. 28]

• Evidence of subjective intention is inadmissible because it is irrelevant. There would be no dispute if there was consensus as to intent, so the lack of consensus does not aid in interpretation. Such evidence would also simply allow parties to create self-serving evidence. [Para. 30]

• If the pre-contractual negotiation evidence does not meet the test for surrounding circumstances, then its admission requires ambiguity. For several reasons, the Court of Appeal rejected the idea that surrounding circumstances should be defined "so broadly as to include all pre-contract negotiations, so long as evidence of subjective intentions is excluded." [Para. 32]

While the phrase "subjective intention" is often mentioned when dealing with the interpretation of contracts, few cases actually explain its meaning, and that is why this case is useful. According to the Alberta Court of Appeal, "subjective intention" refers to a party giving direct evidence to the effect of: "I think that the phrase means X", or "at the time we entered into the contract, I thought that the provision meant Y". This sort of evidence is *always* inadmissible to help interpret a contract. However, the Court noted that inadmissible evidence about "subjective intention" can also include *indirect* evidence about what a party thought the language in a contract meant. For example, a party testifying that he or she proposed language in a draft agreement to resolve a specific problem that it would have resolved only if the language had a certain meaning. It is in this way that inadmissible evidence about subjective intent can sometimes improperly creep into the interpretation exercise.

These interpretive tools and admonitions are important to keep in mind when dealing with the negotiation of domestic contracts where parties are often inclined to lead evidence as to the supposed purpose and meaning behind specific provisions of a contract. However, when it comes to interpreting a contract, courts are more interested in the putative understanding of the reasonably objective bystander than the subjective evidence of the parties themselves: *Lacroix v. Loewen*, 2010 CarswellBC 1125 (B.C. C.A.).

Certificates of Pending Litigation in Fraudulent Conveyance Cases (and a great summary of the principles of fraudulent conveyance)

Szymanski v. Lozinski, 2019 CarswellOnt 19802 (Ont. S.C.J.) - Master Sugunasiri

This civil case deals with the question of whether and when one can obtain a Certificate of Pending Litigation (a "CPL" - or elsewhere still known as a *lis pendens*) against a property in which your client never actually held an interest, but that may have been transferred to a third party in an attempt to defeat your client's claims.

The husband and wife transferred the husband's interest in their matrimonial home to the wife for no consideration. **Two years later**, the husband borrowed money from the plaintiff. When the husband defaulted, the plaintiff sued the husband to recover the money. The plaintiff alleged that the earlier transfer of the matrimonial home to the wife had been fraudulent, and asked for permission to register a CPL against the property. (Presumably the plaintiff took this position because he was concerned that the husband was judgment proof.)

Master Sugunasiri held that in order for a plaintiff to obtain a CPL against a property in which s/he has no interest other than a claim for fraudulent conveyance, s/he must meet the following 3-part test from Justice Smith's decision in *Grefford v. Fielding*, 2004 CarswellOnt 1181 (Ont. S.C.J.):

(a) The CPL claimant must satisfy the court that there is high probability that s/he would successfully recover judgment in the main action;

(b) The claimant must introduce evidence demonstrating that the transfer was made with the intent to defeat or delay creditors - evidence that the transfer was for less than fair market value lightens the burden; and

(c) The claimant must show that the balance of convenience favours issuing a CPL in the circumstances of the particular case.

Master Sugunasiri was satisfied that the plaintiff's claim had a high probability of success as the husband had admitted that he owed money to the plaintiff. Furthermore, based on Justice Vallee's comprehensive summary of the principles that govern fraudulent conveyance claims in *Miller v. Debartolo-Taylor*, 2015 CarswellOnt 6518 (Ont. S.C.J.) [Note: this is an ***excellent*** summary of the principles of fraudulent misrepresentation and the "badges of fraud"], Master Sugunasiri accepted that it was open to the plaintiff to try to rely on the *Fraudulent Conveyances Act* even though the allegedly fraudulent transfer had occurred two years before the plaintiff had loaned the money to the husband.

However, Master Sugunasiri ultimately dismissed the plaintiff's request for a CPL because: (a) the plaintiff failed to adduce any evidence whatsoever to contradict or challenge the husband's evidence that the transfer had been *bona fide* as it was done based on advice that the husband and wife had received from their bank; and (b) it would not be fair to the wife to let the plaintiff encumber her home when there was no evidence to suggest that she had anything to do with the loan in question.

Ultimately, however, the import for family lawyers of this case is the fact that a historic transfer can still potentially be attacked as a fraudulent conveyance. In some instances (and in some provinces), this could be an important arrow in the family lawyer's quiver, especially in the case of suspect property transfers on the eve of separation.

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