

**INSIGHTS, RECENT ALBERTA FAMILY LAW DEVELOPMENTS,  
AND NEGOTIATION STRATEGIES PERTAINING TO THE LAW OF PARENTING**

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## INTRODUCTION

This paper discusses various developments in the jurisprudence throughout 2015 and early 2016 pertaining to parenting. It includes various practical observations, practice points, and negotiation strategies which I hope will assist solicitors, litigators, mediators, and collaborative lawyers alike. In addition, I aim to assist counsel to:

1. Understand the burden required to alter an established parenting arrangement;
2. Identify the proactive steps that can be taken to uphold shared parenting arrangements;
3. Address potential relocation disputes in advance;
4. Understand the factors that warrant restrictions on access; and
5. Learn about the evidentiary value of a psychological assessment's various components, and how to objectively analyze a report's potential shortcomings.

At **Appendix "A"** to this paper, I have enclosed a document which I distribute to new clients who are undergoing or may experience a parenting dispute. It contains advice for parents to help minimize conflict with their former spouse and the impact of that conflict on their children, improve their appearance if the matter proceeds to court, assist them to organize and preserve relevant evidence, and ultimately provide them with the tools to increase the probability of achieving their desired parenting arrangement. You have my permission to distribute the document to your clients if you find it to be of use.

## VARIATION

### Variation of Parenting Regimes prior to *Viva Voce* Evidence

The Court of Appeal released several decisions in 2015 pertaining to the variation of parenting arrangements, appellate outcomes in such instances, and the use of psychiatric reports to achieve a substantial variation.

The Supreme Court of Canada signaled in the 2014 decision *Hryniak v Mauldin* that resolving issues based on affidavit evidence is appropriate when proportional to the nature of the dispute and interest involved.<sup>1</sup> For example, in *DLW v HAD*, the Alberta Court of Appeal upheld a Special Chambers ruling permitting a relocation, where the Special Chambers Justice had determined on Affidavit evidence that even if the primary parent had issues with alcohol, those issues did not impact their ability to parent.<sup>2</sup>

However, later in the same year, our Court of Appeal subsequently confirmed that this approach is generally not appropriate when adjudicating substantial changes in parenting arrangements. On November 4, 2015, the Honourable Madam Justice M. S. Paperny issued a Judgment on behalf of the Court in *Shwaykosky v Pattison*, stating that making a substantial change to a parenting regime without the benefit of *viva voce* evidence was a practice not endorsed by the Court of Appeal.<sup>3</sup> The Court reasoned that “in the absence of seriously compelling circumstances, doing so is fraught with problems, is often procedurally unfair, [and] may lead to protracted litigation and moving children unnecessarily.”<sup>4</sup>

However, the Court did qualify this direction, allowing for a substantial change in a parenting regime in chambers without *viva voce* evidence in the “case of urgency and only where it is clearly in the child’s best interests”.<sup>5</sup>

These statements add to the Court of Appeal’s more recent treatment of *Hryniak*, in which two different decisions have since stated that courts should avoid procedural shortcuts, particularly where

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<sup>1</sup> *Hryniak v Mauldin*, 2014 SCC 7 [“*Hryniak*”] at paras 29 and 49.

<sup>2</sup> *DLW v HAD*, 2015 ABCA 203 [“*DLW*”].

<sup>3</sup> *Shwaykosky v Pattison*, 2015 ABCA 337 [“*Shwaykosky*”] at para 6.

<sup>4</sup> *Ibid* at para 6.

<sup>5</sup> *Ibid* at para 6.

those shortcuts would infringe upon the reasonable procedural expectations of the parties, or where such actions would risk adjudication on a record which was inadequate or one-sided.<sup>6</sup>

The Court of Appeal has already had an opportunity to revisit this issue. On December 4, 2015, a different panel issued their *per curiam* decision in *Crawford v Crawford*,<sup>7</sup> which considers *Shwaykosky*, *Nafie v Badawy*, and *Charles v Young*.<sup>8</sup> The Court of Appeal determined that the chambers Justice had the discretion to conclude that the situation was urgent, even though the Appellant argued that the urgency was manufactured by the Respondent. The Court acknowledged the phenomenon of establishing a new *status quo* or uprooting an existing *status quo* as a litigation strategy, but nevertheless the Court endorsed the approach contained in *Shwaykosky*. The Court noted that if the appellant's position was vindicated, compensatory parenting time remained a possibility.

### Stay of Enforcement

The Court of Appeal also issued two decisions which comment on stays of enforcement of parenting arrangements pending appeal. For reference, the tripartite test set out in 1994 in *RJR-MacDonald Inc v Canada (Attorney General)* requires the consideration of three factors:

1. Is there a serious question to be tried;
2. Will the applicants suffer irreparable harm if the stay is refused; and
3. Which of the parties would suffer greater harm from the granting or refusal of the stay? (the "balance of convenience" test).<sup>9</sup>

Our Court of Appeal had previously confirmed that in the context of stays of enforcement involving children, what is of overriding importance is still the best interest of the children.<sup>10</sup> In *Baker v Hunter*, the Court of Appeal clarified that in the context of parenting, it is the irreparable harm to the children which must be considered; harm to the applicant is subordinate to the best interests of the child.<sup>11</sup> Furthermore, the balance of convenience analysis can consider the impact of a further unnecessary transition back to the Appellant's care, and potentially back again to the Respondent's

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<sup>6</sup> *Charles v Young*, 2014 ABCA 200 at para 3; *Nafie v Badawy*, 2015 ABCA 36 at para 106, leave denied [2015] SCCA No 128.

<sup>7</sup> *Crawford v Crawford*, 2015 ABCA 376 ["Crawford"].

<sup>8</sup> *Supra* footnote 6.

<sup>9</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ["RJR"] at 334.

<sup>10</sup> *CLS v BRS*, 2013 ABCA 349 at 10.

<sup>11</sup> *Baker v Hunter*, 2015 ABCA 309 ["Baker"] at para 11.

care if successful at trial.<sup>12</sup> Ultimately, the Court determined that leaving the children in the care of the Respondent father would not cause irreparable harm, that there should not be a further transition to the Appellant grandparents' primary care, and dismissed the application for a stay.

In *MB v JH*, the Court of Appeal again addressed "irreparable harm", and determined that requiring parents to engage in drug testing did not constitute irreparable harm even though the frequency of the testing may be determined to be unnecessary.<sup>13</sup> In this case, following the initial decision, the mother alleged that the child was not adapting well to the ordered overnight visits because of difficulties with pumped breast milk. As this issue had not been raised in the lower court and was a new factor, the Court noted that an application to vary the Order may have been more appropriate, instead of an appeal and application to introduce fresh evidence.<sup>14</sup>

### **Use of Psychological Reports to Vary Parenting prior to Trial**

Despite the Court of Appeal's strong position against variation in *Shwaykosky*, the Court allowed the Case Management Justice's decision to remain in place. Justice Paperny cited the views of the 12 and 15 year old children, adding that the report "strongly suggest[ed] they [we]re expressing independent and considered opinions on where they wish[ed] to live", and concluded that as the matter was proceeding to a *viva voce* hearing, further disruption to the children was not in their best interests.<sup>15</sup> In that regard, although the lower court's procedure was improper, the preservation of the new *status quo* outweighed the necessity of remediation.

Interestingly, the Court in *Shwaykosky* had based its earlier statements on the 1996 decision *Barter v Barter*, in which the chambers order was set aside.<sup>16</sup> Unlike the more narrow Voice of the Child Report relied on in *Shwaykosky*, in *Barter*, the lower court's decision to vary the *status quo* was based primarily upon an expert's psychiatric report, of which the Appellant had also expressed concerns. Although the appeal was granted in *Barter* and the chambers Order set aside, the Court did recommend that the Chief Justice expedite the trial and appoint a case manager to consider the necessity and means of directing a complete bilateral assessment.

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<sup>12</sup> *Ibid* at paras 12 and 13.

<sup>13</sup> *MB v JH*, 2015 ABCA 412 ["*MB*"] at para 10.

<sup>14</sup> *Ibid* at paras 7 and 9.

<sup>15</sup> *Shwaykosky*, *supra* fn 3 at para 8.

<sup>16</sup> *Barter v Barter*, 1996 ABCA 248 ["*Barter*"].

In *Crawford*, a Practice Note 8 Bilateral Parenting Assessment Report was utilized as the basis to substantially vary a parenting arrangement. However, that appellate decision hinged upon the urgency of the matter, which was not present in the aforementioned cases. As well, although the Case Management Justice in *Crawford* did not provide extensive reasons or quote from the Bilateral Assessment Report, the Court of Appeal acknowledged the Court of Queen's Bench's policy to refrain from publication of such reports, and upon reading the report, determined that the decision was not demonstrably wrong.<sup>17</sup>

### **Practical Considerations**

The principles articulated in these cases highlight the importance of the *status quo*. In some cases it may be appropriate to quickly seek the variation of a parenting arrangement before it becomes established or while urgency continues to exist. Clients should not expect that courts will quickly provide relief several months later if negotiation fails.

*Shwaykosky* demonstrates that an appeal may not provide an adequate remedy to a deficient decision in chambers, and may instead reward a parent who is opposing a change to the *status quo*. This is indicative of the inherent risk of litigation to which both counsel and clients should be aware. Hopefully such decisions will provide additional motivation for the parties to negotiate a compromise or attempt alternative dispute resolution processes.

It may be of significance that in both *Barter* and *Shwaykosky* there was no reference to the time which had elapsed prior to the appeal being heard, and the Court in *Barter* noted that the appeal was allowed from the bench and the reasons followed. This may suggest that the result could have differed based on the time in which the new parenting arrangement was in place, and that the arrangement in *Barter* may not have been in place long. In this regard, it is critical that litigators facing the same type of situation ensure that a fast-track appeal be brought immediately. Moreover, counsel may want to consider immediately applying for a stay of enforcement of the deficient order pending the results of appeal.

When discussing psychological assessments with clients, it is prudent to advise them that the recommendations therein may not be relied on at chambers. However, a favourable report may still discourage the opposing party from continuing the litigation and, if not, would find utility at trial.

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<sup>17</sup> *Crawford*, *supra* fn 7 at paras 13-16.

Also of note, the Court in *Shwaykosky* declined to interfere with a clause prohibiting further applications for custody within the following year without prior leave. Rather than preventing access to the courts, the clause was stated to be “intended to promote stability.”<sup>18</sup> As such, *Shwaykosky* serves as a precedent to request such clauses to limit frequent applications.

## SHARED PARENTING

The past year has seen several cases that provide useful tools for analyzing the appropriateness of shared parenting regimes. There were also several interesting cases which dealt with the intersection of shared parenting regimes and relocations, which are discussed further under the category of relocations beginning at page 16 of this paper.

### Additional Considerations

On September 1, 2015, the decision in *AB v CD* was rendered.<sup>19</sup> In that decision, the Honourable Madam Justice J. B. Veit listed several useful factors which were taken into account in determining that a week-on, week-off shared parenting arrangement would be in the best interests of the children.<sup>20</sup> These factors are paraphrased as follows:

- a) The former access parent’s history of active involvement in the children’s lives;
- b) The desirability of keeping siblings together;
- c) The willingness and ability of each parent to provide for the needs of their children;
- d) Each parent’s availability, with the assistance of others, to parent the children on a daily basis;
- e) Each parent agreed the children should remain in their present school, and the former access parent was willing to attempt to relocate his residence to make the travel to and from school shorter (although concerns about the length of travel were outweighed by the benefits of shared parenting);
- f) There was no suggestion that the former access parent would not follow the recommendations given in a psychoeducational assessment;

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<sup>18</sup> *Shwaykosky*, *supra* fn 3 at para 10.

<sup>19</sup> *AB v CD*, 2015 ABQB 551 [“AB”].

<sup>20</sup> *Ibid* at paras 32 and 33.

- g) Although not luxurious by comparison, the accommodation provided by the former access parent would be adequate for the children's needs; and
- h) There were no indicia that shared parenting would not be in the children's best interests.

These considerations may be useful in advising clients as to whether opposition to a shared parenting regime may be successful. It is also notable that in a previous Interim "Without Prejudice" Order, the former access parent had been granted alternating-weekend access, but with alternating-week access during the summer. This summer shared parenting arrangement, coupled with a lack of evidence of any difficulties, likely became the springboard to a full shared parenting arrangement. A possible strategy for those seeking shared parenting in a contentious dispute may be to seek alternating-week access during the summer only (which may be more amenable to the other parent as it would not reduce child support), and then to apply for a variation if the summer proceeds without incident.

### **Shared Parenting Combined with Sole Decision-making**

2016 has already seen an early foray into shared parenting as the *per curiam* decision of the Court of Appeal in *Prediger v Santoro* was delivered on January 14, 2016.<sup>21</sup> Although this case is also notable for its treatment of self-represented litigants on each side of the dispute, what is more interesting is that the Court upheld the trial judge's decision to order shared parenting with sole decision-making awarded to only one parent with respect to schooling, recreational activities, cultural activities, and healthcare.<sup>22</sup> After considering the opinion evidence and reports of three psychologists, the trial judge had determined that shared parenting would be in the child's best interests notwithstanding that the parents were unable to make joint health decisions. The trial judge also determined that the transitions were a "primary source" of conflict and they should therefore be minimized by having exchanges occur each Tuesday through the school.<sup>23</sup> The non-decision-making parent was however permitted to have "full and unfettered access to information about her son's educational programs and his healthcare including dental care and any specialist care he require[d]."<sup>24</sup>

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<sup>21</sup> *Prediger v Santoro*, 2016 ABCA 11 ["*Prediger*"].

<sup>22</sup> *Ibid* at para 6.

<sup>23</sup> *Ibid* at para 7.

<sup>24</sup> *Ibid* at para 8.

The Appellant's argument appears to have centred primarily on maintaining the notion of the previous form of parallel parenting. In parallel parenting high conflict parents disengage by having minimal contact with each other, guided by highly structured parenting plans, orders, or agreements, which result in discrete decisions and independent day-to-day routines.<sup>25</sup> The intention is to immediately reduce the children's exposure to conflict (which can be achieved through shared parenting arrangements),<sup>26</sup> and ultimately to gradually restore trust and cooperation after some distance away from the conflict. The Court however declined to reinstate joint decision-making, without further comment on parallel parenting arrangements.

Despite the academic evidence in support of parallel parenting, such arrangements appear to be relatively uncommon results of litigation, particularly given that our Court of Appeal has previously stated that "as a general proposition, joint custody and shared parenting arrangements ought not to be ordered where the parents are in substantial conflict with each other, and certainly not before trial especially when there is also significant disagreement on the evidence."<sup>27</sup> However, the decision in *Prediger* was rendered after a trial. This means that parents who embellish conflict to impede shared parenting on an interim basis may later face a determination at trial that sole decision-making is appropriate, not necessarily in their favour. This risk may dissuade some parents from pursuing these disputes to trial. It is however unfortunate that high conflict self-represented parents needed to complete a six-day trial with the assistance of three psychologists, counsel for the child, and testimony from sources such as the police and numerous Child and Family Services, in order to arrive at an arrangement that may finally temper their ongoing conflict.

The Court also found no error in the trial judge's various interventions to temper the conduct of each self-represented parent during the trial, including minimizing interruptions and controlling hearsay evidence.<sup>28</sup> Even though the parties were self-represented, due to the large volume of material the Respondent was awarded costs on appeal pursuant to Column 1 of Schedule "C", being \$3,000.00 plus disbursements, but no additional costs relating to counsel for the child, who had sought costs payable directly to the Legal Aid Society of Alberta.<sup>29</sup>

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<sup>25</sup> Professor Edward Kruk, Ph.D., "Parallel Parenting After Divorce" *Psychology Today* (1 September 2013), online: Psychology Today: <<https://www.psychologytoday.com/blog/co-parenting-after-divorce/201309/parallel-parenting-after-divorce>>.

<sup>26</sup> William V. Fabricius *et al.*, "Custody and Parenting Time: Links to Family Relationships and Well-being after Divorce." in Michael E. Lamb, ed., *The Role of the Father in Child Development*, 5th ed. (Cambridge: Wiley, 2010) 201.

<sup>27</sup> *Richter v Richter*, 2005 ABCA 165 at para 11.

<sup>28</sup> *Prediger*, *supra* fn 21 at para 22.

<sup>29</sup> *Ibid* at paras 31-32.

## Conflict

*AJU v GSW* is discussed at page 25 of this paper in relation to bilateral parenting assessments.<sup>30</sup> This case also contains notable comments in relation to the intersection of conflict and shared parenting arrangements.

In *AJU*, both parents had a history of poor communication and exacerbating conflict. The Defendant opposed shared parenting in part due to a lack of cooperation and communication. However, the Defendant had also admitted to making statements to the children which were critical of the Plaintiff and was found to have been primarily to blame for the most recent communication issues. The Honourable Madam Justice D. L. Pentelechuk referred to the Court's traditional position of avoiding shared parenting where there was inadequate communication and cooperation in relation to parenting,<sup>31</sup> and then considered the implication of such a principle where the party seeking to defeat a shared parenting regime is a significant source of the inadequate communication and cooperation.<sup>32</sup>

Justice Pentelechuk noted a recent case of the Saskatchewan Court of Appeal wherein shared parenting remained in force despite the parent who was the primary source of conflict also alleging that there was excessive conflict.<sup>33</sup> Her Ladyship remarked that “[i]t seems inherently unfair to relegate one parent to access-only parent status when the other parent refuses to take steps to improve their poor communication or because they insist on fuelling the acrimony.”<sup>34</sup>

Justice Pentelechuk noted that what distinguished this scenario from higher-conflict separations was the lack of any Parenting Order prior to trial, the lack of extensive Case Management and interim applications, the lack of any domestic violence or abuse, and that the children “seem[ed] oblivious to the conflict, and... show[ed] no adverse effects from it”, which was confirmed by various witnesses at trial.<sup>35</sup> Justice Pentelechuk also cautioned that “communication issues and lack of cooperation for a couple caught in the turbulence of divorce should not be compared to an impossible standard that does not exist in the most functional of families.”<sup>36</sup> Justice Pentelechuk also shared the Plaintiff's concern, that were primary residential care awarded to the Defendant, the Defendant might

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<sup>30</sup> *AJU v GSW*, 2015 ABQB 6 [“*AJU*”]. See also discussion of Assessments on page 25 of this paper.

<sup>31</sup> See *Richter v Richter*, 2005 ABCA 165 at para 11.

<sup>32</sup> *AJU*, *infra* fn 77 at paras 70-71.

<sup>33</sup> See *Ackerman v Ackerman*, 2014 SKCA 86.

<sup>34</sup> *AJU*, *infra* fn 77 at para 73.

<sup>35</sup> *Ibid* at paras 74, 79.

<sup>36</sup> *Ibid* at para 76.

consequently alienate the Plaintiff given the Defendant's animosity and previous behaviour.<sup>37</sup> Any such alienation would not be in the best interests of the children.

Further, Justice Pentelechuk encouraged the use of a third party to act as an intermediary at the outset, and admonished the parties to "resist the urge to micromanage all activities and decisions while the children are in the other parent's care, and... learn to constructively address the issues that count".<sup>38</sup> In this regard, clients seeking to challenge a shared parenting arrangement should know that they may be less likely to succeed in their matter if they are perceived to be a principal source of the conflict, even though conflict may otherwise have been a barrier to a shared parenting regime. Hopefully this line of reasoning will create a strong practical incentive to cooperate and minimize conflict among parents.

### **Reinstating a Shared Parenting Arrangement**

In *Babich v Babich*, the Honourable Mr. Justice S. M. Sanderman declined to reinstate a shared parenting arrangement that had been in place from April 2011 until December 2013 in relation to 12 and 14 year old children.<sup>39</sup> In December 2013 the mother had consented to the children residing primarily with the father following the intervention of Child and Family Services which had determined that the mother's new partner put the children at risk. The mother thereafter attempted to deceive the Director of Child and Family Services, the RCMP, and the Courts in relation to her involvement with her new partner.<sup>40</sup> Over the following two years the mother's access gradually increased, however her attempts to re-establish shared parenting had been unsuccessful, particularly due to her questionable relationships since and lack of disclosure in relation to her newest partner.<sup>41</sup>

As her behaviour continued, Justice Sanderman decided that shared parenting would still be inappropriate given the mother's poor choices and proclivity to place her own wants and desires over the interests of her children.<sup>42</sup> She had been told repeatedly that a shared parenting arrangement would be in the children's best interests if it could become workable and that a return to the shared parenting arrangement would be desirable, placing the onus on the mother to improve her behaviour.<sup>43</sup>

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<sup>37</sup> *Ibid* at para 79.

<sup>38</sup> *Ibid* at para 81.

<sup>39</sup> *Babich v Babich*, 2015 ABQB 497 [*"Babich"*].

<sup>40</sup> *Ibid* at paras 4-6.

<sup>41</sup> *Ibid* at paras 6-8.

<sup>42</sup> *Ibid* at para 7.

<sup>43</sup> *Ibid* at para 13.

Dismissing this advice, the mother had again provided sparse details in relation to her newest partner.<sup>44</sup> As a result, her application was dismissed, and she was barred from bringing another application for shared parenting at any time during the next seven months.

Furthermore, Justice Sanderman also noted that each parent had attempted to subvert court orders, and that each parent was focused on keeping score of the other's deficiencies.<sup>45</sup> His Lordship also commented on the expectations of separated parents and the frustrations caused by litigious high-conflict parents, stating:

"I reiterated to the parties at that time, that I expected the two of them to begin to cooperate with one another and to show respect for each other when communicating with their sons. I indicated to them that they did not have to care for one another; they did not have to like one another; but they had to respect one another and the roles that each played in the lives of their sons. I indicated to both parties that they had a compelling need to reinforce in their sons' minds that even though they no longer lived with one another, they respected one another as a capable and loving parent. I encouraged the two of them, as I have been doing so for years, to embrace this attitude in their ongoing conflict. Even though I have indicated to them on many occasions that they should take this position in court and in the materials they file, they ignore this common-sense advice. They continue to denigrate one another's abilities as a parent and they continue to pick away at scabs that should have healed a long time ago."<sup>46</sup>

## **Practical Considerations**

Based on the prevailing case law shared parenting may be problematic where:

- a) There are significant logistical hurdles, such as parties' residences located too far apart from a convenient school (although some distance may be tolerable if outweighed by the benefits of shared parenting);
- b) Employment schedules do not accommodate daily parenting, even with the assistance of others;

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<sup>44</sup> *Ibid* at paras 13-14.

<sup>45</sup> *Ibid* at paras 11-12, 15.

<sup>46</sup> *Ibid* at para 9.

- c) There is substantial conflict or a lack of communication and cooperation between parents, especially prior to trial where there is significant disagreement as to the evidence (one exception is when the parent making this argument is the principal source of conflict or cause for inadequate communication/cooperation). After a trial, this can also be overcome through parallel parenting or sole decision-making;
- d) Siblings would be split (either due to differing preferences or the existence of half-siblings); or
- e) It would otherwise not be in the children's best interests, such as where a parent is a source of physical, psychological, or emotional harm, has not been involved in the children's lives, is unable to provide for the children's needs, doesn't follow professional recommendations, or has an unsuitable residence (although the same level of luxury is not a necessity).

## **RELOCATION**

The relocation of children continued to be a litigious topic throughout Canada in 2015, and at all levels of court in Alberta. The year also saw several cases discussing relocations where shared parenting regimes had been in place.

### **Additional Considerations**

One potentially useful case from Saskatchewan, *Chepil v Chepil*, lists 23 factors which can be considered in relation to a relocation, which are as follows:<sup>47</sup>

1. The views of the child where appropriate;
2. The parent's reasons for moving, only where that is relevant to the parent's ability to meet the needs of the child. Specifically the advantages of a move to the moving parent with respect to that parent's ability to better meet the child's needs;
3. The disruption to the child if there is a change in residence. Specifically, the disruption to the child if there is a change in family, schools and the community the child has come to know, including the disruption of the child's existing social and community support and routines;

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<sup>47</sup> *Chepil v Chepil*, 2014 SKQB 341 [“*Chepil*”] at para 40.

4. The age, maturity and special needs of the child;
5. The feasibility of a return by the moving parent to the original location;
6. The feasibility of a move by the moving parent's new partner to the original location;
7. The feasibility of a parallel move by the parent who is objecting to the move;
8. The time it will take the child to travel between residences and the cost of that travel;
9. The willingness of the moving parent to ensure access will occur between the child and the other parent;
10. Similarly, the willingness of the parent living at the original location to ensure access will occur between the child and the moving parent;
11. The nature and content of any agreements between the parties about relocations;
12. The financial resources of each of the family units;
13. The expected permanence of the new custodial environment;
14. The continuation of the child's cultural and religious heritage by either parent;
15. The general ability of each parent to foster the child's relationship with the other parent over long distances;
16. The parenting capabilities and the child's relationship with parents and new partners, including the desirability of a proposed new family unit;
17. The role of the primary parent in the child's life should a move be allowed;
18. The existing arrangement for both custody and access and the ability to maximize contact between the child and both parents, which necessarily involves a consideration of the *status quo* for the children;
19. The access to and support of the extended family of each parent;
20. The psychological and emotional well-being of the child generally and with respect to the specific move;
21. The impact of the proposed move on the well-being of each of the parents to the extent that is relevant to the effect on the child;
22. Ultimately, the best interests of the child; and
23. The focus throughout, with all of the factors and considerations, must be on the best interests of the child and not on the interest and rights of the parents.

In the unreported Special Chambers hearing in *DLW v HAD*, the Honourable Madam Justice J. E. Topolniski requested that counsel address *Chepil's* 23 factors.<sup>48</sup> Although *Chepil* has yet to be cited in any reported Albertan cases, its mention from the bench and its presentation by Zelma Hardin at a recent Canadian Bar Association meeting in Edmonton may mean reliance upon by lawyers and courts in the future. As an aside, the Court of Appeal in *DLW v HAD* also directed that airfare costs to exercise access could be deducted from child support, to a maximum of 50% of the monthly child support payable.<sup>49</sup>

With permission from the author, Amanda Baretta of Legal Aid of Alberta's Family Law Office, at **Appendix "B"** to this paper I have included her comparison of *Chepil v Chepil* and *Gordon v Goertz*.

### Recent Examples

Zelma Hardin of the Family Law Office recently compiled lists of useful cases denying and approving mobility applications. With her gracious permission, I have reproduced these lists:

#### *Recent cases denying mobility applications*

- a) *MO v CO*, 2012 ABCA 297;
- b) *POT v BEM*, 2010 ABCA 22;
- c) *Zukiwsky v Zukiwsky*, 2010 ABQB 377;
- d) *CS v EL*, 2010 ABQB 285;
- e) *Gordon v Towell*, 2010 ABQB 396;
- f) *Spencer v Spencer*, 2005 ABCA 262;
- g) *ADS v DLS*, 2010 ABQB 508;
- h) *Adams v Adams*, 2004 ABQB 547; and
- i) *Supersad (Brake) v Supersad*, 1999 ABQB 1011.

#### *Recent cases approving mobility applications*

- a) *HAD v DLW*, 2015 ABCA 203;
- b) *MacPhail v Karosek*, 2006 ABCA 238;
- c) *Christmas v Christmas*, 2005 ABCA 213;
- d) *HS v CS*, 2006 SKCA 45;

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<sup>48</sup> For the appellate decision, see *DLW supra* fn 2.

<sup>49</sup> *DLW supra* fn 2 at para 8.

- e) *F(RJ) v F(CM)*, 2014 ABCA 165;
- f) *Milton v Letch*, 2013 ABCA 248;
- g) *Chepil v Chepil*, 2014 SKQB 341;
- h) *AD v LDD*, 2010 NBCA 69;
- i) *Nunweiler v Nunweiler*, 2000 BCCA 300;
- j) *Falvai v Falvai*, 2008 BCCA 503;
- k) *DFP v BAB*, 2014 ABQB 793;
- l) *Sather v McCallum*, 2011 ABQB 34; and
- m) *Edwards v Basaraba*, 2015 ABQB 594.

### **Overlap of shared parenting and relocation**

In reported Alberta decisions, relocation applications have been overwhelmingly denied when there has been a lengthy shared parenting regime in place.<sup>50</sup> However, as shared parenting regimes become increasingly prevalent, exceptions are starting to appear.

In *DB v MB*, the Court of Appeal dismissed the appeal of a Chambers decision to permit a relocation, notwithstanding that both residences were suitable, and that a shared parenting regime had been in place since November 2013 (although the date of the Chambers decision was not stated and the appeal was heard January 12, 2015).<sup>51</sup> The Honourable Mr. Justice F. F. Slatter, writing for the Court, stated:

“This was one of those difficult cases where both parents were able to provide a good home to the child. The chambers judge was faced with the difficult task of selecting the more appropriate of two suitable alternatives. She weighed all of the relevant circumstances, and concluded that the child should live with his mother in Kelowna. She was aware of, and considered the wishes of the child, as communicated by his counsel. Her ultimate decision is entitled to deference, and we see no reviewable error that would justify appellate intervention.”<sup>52</sup>

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<sup>50</sup> For example, see *POT v BEM*, 2010 ABCA 22; *Muth v Dewaal*, 2015 ABQB 360; *TFH v NH*, 2012 ABQB 654; *DAW v MJW*, 2005 ABQB 942.

<sup>51</sup> *DB v MB*, 2015 ABCA 15 [“DB”].

<sup>52</sup> *Ibid* at para 5.

The decision is relatively short at 7 paragraphs, including facts and history. This does not provide substantial insight as to what considerations were relevant, the history of prior care, and whether there was any conflicting evidence that should have necessitated a trial prior to allowing a substantial variation. As the previous Consent Order was granted under the *Family Law Act*, the only issue discussed in any detail was the lack of a change in circumstances given that the relocation was anticipated at the time that the November 2013 Consent Order was granted. Justice Slatter addressed this point by remarking that continuing the *status quo* would be impossible as the moving parent had remarried and had another child with a new spouse who resided in another province.<sup>53</sup> However, the Court declined to award costs of the appeal because the problem was exacerbated by the moving parent's consent to a shared parenting regime knowing that she planned to relocate.<sup>54</sup> This illustrates that permitting the other parent to have additional parenting time to compensate for potential lost time in the future may backfire.

In another decision, *Edwards v Basaraba*, following a four-day trial, the Honourable Mr. Justice J. J. Gill provided detailed reasons approving a relocation to England notwithstanding that a shared parenting regime had been in place since a trial in October 2008 and that the child would lose contact with her brothers.<sup>55</sup> Here, the father had 40% of parenting time. The mother was found to recognize the importance of the child's relationship with her father and offered to subsidize the father's travel through her employee benefits. She also set out a plan for up to 8 weeks a year of access and it was noted that the father had the means to afford travel given his operation of a chiropractic practice.<sup>56</sup> The child had also visited England many times, had positive relationships with her grandparents, had friends in England and, although the mother was employed as a flight attendant, this would only occupy two days per week during which time the child's grandparents would watch her.<sup>57</sup>

However, of particular note was the parental conflict, as well as the mother's admission of a desire to relocate due to the very negative behaviour of the father which resulted in constant feelings of fear and anxiety and her consequential inability to continue co-parenting. Justice Gill determined that permitting the relocation "would enable her to parent in a manner more effective to meet the needs of" the child.<sup>58</sup> Whereas wanting to move to limit the other parent's involvement is generally

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<sup>53</sup> *Ibid* at paras 3, 4.

<sup>54</sup> *Ibid* at para 6.

<sup>55</sup> *Edwards v Basaraba*, 2015 ABQB 594 ["*Edwards*"].

<sup>56</sup> *Ibid* at para 110.

<sup>57</sup> *Ibid* at paras 119-20.

<sup>58</sup> *Ibid* at para 117.

seen as a negative factor, here avoiding an extreme level of conflict was seen as ultimately beneficial to the child.

Indeed, the father's behaviour was cause for concern. Among recent incidents, the father:

1. Contacted the airport to allege kidnapping when the mother and the child were to attend a Pokémon tournament in Vancouver, which caused the police to take the mother and child aside to investigate;
2. Contacted the police to allege extortion following a settlement offer;
3. Filed a baseless and subsequently-discontinued civil action against the mother alleging "hacking" of a computer and email;
4. Continuously alleged that the mother was responsible for breaking and entering into his office despite an alibi for the mother provided by the child;
5. Alleged to the child and others that the mother suffered from mental illness including bipolar disorder; and
6. Attempted to interfere with the mother's application for Canadian citizenship by alleging tax and immigration fraud.<sup>59</sup>

When shared parenting was first granted in 2008, the father was also directed to seek sustained counselling for anger management, of which he was unable to provide satisfactory proof of completion, which did not inspire confidence in future compliance.<sup>60</sup>

The child was represented by independent counsel and a psychologist was qualified as a parenting expert, who reported the 13 year old child's desire to reside with the mother. The existing arrangement caused the child significant stress, she was more comfortable in the care of the mother, and the psychologist confirmed that it was in that child's best interests to live with her mother.<sup>61</sup>

In many cases the non-moving parent is likely suffering heightened stress compared to a moving parent, particularly in cases where the moving parent can elect to abandon his or her plan to relocate if the child is not permitted to accompany the parent. However, in this case the non-moving parent displayed a longstanding pattern of belligerence and conflict perpetuation. Were it not for his actions, the relocation application may very well have been denied.

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<sup>59</sup> *Ibid* at para 102.

<sup>60</sup> *Ibid* at paras 105-07.

<sup>61</sup> *Ibid* at paras 98, 114.

## The “Double-bind” Problem

Following *Spencer v Spencer*, the law in Alberta remains that courts should not rely on a custodial parent’s statements regarding whether they would move without the children if their application to relocate is denied.<sup>62</sup>

Several appellate courts outside of Alberta have recognized that such a consideration puts the custodial parent in the position of either appearing to be willing to abandon their children, or else risk the court favouring the *status quo* if it appears that they are willing to abandon their relocation should the application be declined.<sup>63</sup> The concern is that by allowing such evidence into consideration, the *status quo* could become the presumptive disposition. However, these cases rendered outside of Alberta refrained from extensive comment on the admissibility of such statements and the appropriateness of their judicial consideration under a *Gordon v Goertz* analysis.

There have been several decisions in British Columbia discussing this issue. Of particular interest is the most recent consideration of the issue, the 2015 British Columbia Court of Appeal decision *TK v RJHA*.<sup>64</sup> After considering several British Columbia decisions as well as the Alberta approach, the British Columbia Court of Appeal determined that particularly in joint custody and/or shared parenting arrangements, both questions of (a) whether the relocating parent would stay if a relocation were denied; and (b) whether the non-relocating parent would move to join the children if a relocation were permitted, would be relevant factors in considering the best interests of the children, and therefore the answers to each double-bind question are admissible.<sup>65</sup> Several factors in the Saskatchewan decision *Chepil* also refer to these considerations which are presently to be disregarded in Alberta.

Since *Spencer*, the Alberta Court of Appeal has used the paramountcy of the best interests test to rule out a presumption in favour of shared parenting and the tender years doctrine.<sup>66</sup> Although courts should not presume that the *status quo* is in the best interests of the children, a complete consideration of each possible scenario (with a view to the best interests of the children) would logically entail a consideration of the answers to both double-bind questions as either alternative

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<sup>62</sup> *Spencer v Spencer*, 2005 ABCA 262 [“*Spencer*”] at para 18.

<sup>63</sup> *Johnston v Kurz*, 2006 SKCA 106 at para 11; *Bourgeois v Plante*, 2009 PECA 12 at para 32; *NT v WP*, 2011 NLCA 47 at para 9.

<sup>64</sup> *TK v RJHA*, 2015 BCCA 8 [“*TK*”].

<sup>65</sup> *Ibid* at para 66.

<sup>66</sup> *Hamilton v Leach*, 2013 ABCA 423; *Cavanaugh v Balkaron*, 2008 ABCA 423.

arrangement may very well be in the best interests of the children. In order to avoid a presumption in favour of the *status quo*, *Spencer* effectively removes the option of the *status quo* from consideration altogether, rather than considering whether the moving parent declining to relocate or both parents relocating would be in the best interests of the children. Given the affirmation of the paramountcy of the best interests of the children test in Alberta, the division between appellate courts, and the increasing prevalence of shared parenting arrangements, this issue is ripe for reconsideration by either the Alberta Court of Appeal or the Supreme Court of Canada.

## **Practical Considerations**

### *Proactive clauses in orders and agreements*

Although the *Divorce Act* and the *Family Law Act* each contain provisions permitting courts to order notice in advance of any relocation,<sup>67</sup> these provisions appear to be uncommon in both orders and agreements. These clauses provide a fair opportunity for parents to either negotiate a resolution or bring a proper application for judicial determination, and they may avoid the necessity of an emergency application to return the child pending determination. Such terms are particularly advantageous in situations where clients originate from outside of their present municipality, reside in a rural or small town setting, or have several family members or their new partner's family in another region.

Many lawyers use clauses which shift the onus to seek court approval onto the moving parent. Doing so precludes concerns relating to inadequate notice as well as addresses concerns of capricious relocations and may be especially beneficial in relation to shared parenting arrangements. Requiring an order prior to a relocation also ensures that the forum (Alberta) is convenient to both parents and addresses the scenario where an access parent's time would not be affected by the relocation but that access parent would want to use the child's familiarity and connections with their existing residence to seek primary residential care.

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<sup>67</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 16(7); *Family Law Act*, SA 2003, c F-4.5, s 33(2).

Either of the following clauses may be used to address relocation in agreements:<sup>68</sup>

a) Shared parenting

The parties acknowledge that this shared parenting arrangement will work best if they continue to reside in the same geographic area. In the event that the Wife or the Husband decides to relocate their residence more than 50 kilometers from his or her present location, prior to relocating he or she shall first obtain the other party's consent to the relocation in writing, or obtain an order of the Court of Queen's Bench of Alberta permitting the relocation.

b) Onus on moving party

The parties acknowledge that this joint custodial arrangement will work best if they continue to reside in the same geographic area. In the event that the Wife/Husband decides to relocate their residence more than 50 kilometers from his or her present location, prior to relocating the Wife/Husband shall first obtain the Husband/Wife's consent to the relocation in writing, or obtain an order of the Court of Queen's Bench of Alberta permitting the relocation.

c) Notice

The parties acknowledge that this joint custodial arrangement will work best if they continue to reside in the same geographic area. In the event that the Wife or the Husband decides to relocate their residence more than 50 kilometers from her or his present location, she or he shall give the other party two (2) months' notice of her or his intention to relocate, and the questions of primary residential custody and access shall be reviewed by the parties. Should the parties not be able to come to an agreement with respect to the relocation, then the parties shall attend mediation. In the event that mediation does not result in a mutually acceptable solution, then either party may apply to the Court of Queen's Bench of Alberta for adjudication.

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<sup>68</sup> With gracious contributions from my colleagues Pierre Boileau, Q.C., Marla Miller, Q.C., and Curtis Ready.

d) Advance consent

The parties acknowledge that this joint custodial arrangement will work best if they continue to reside in the same geographic area, but this Agreement shall not preclude the Wife/Husband from relocating her/his residence, and in the event she/he does relocate, it is anticipated that the child(ren) shall relocate with the Wife/Husband.

*Negotiating relocations*

Proposing a workable parenting plan is often viewed as a positive factor in having a relocation permitted by the courts. Maintaining or at least minimizing the impact on the non-moving parent's parenting time can also help to deter strong opposition. Similarly, taking steps to improve communication and cooperation, despite the additional stress resulting from a potential relocation, may dissuade the moving parent from their desire to relocate, particularly where a perceived advantage to the relocation is the ability to minimize their interaction with the non-moving parent. It should also be noted that many parents will object to a relocation primarily due to their disinclination to increase their amount of travel time, especially since they often see the relocation as the fault of the moving parent and believe that the moving parent should bear the burden of the change. Although this expectation may be unrealistic, it does demonstrate that frequent access periods which would result in lengthy travel are less palatable to many parents than larger blocks of access, such as monthly long-weekends coupled with lengthy summers and winter holiday parenting time.

Many relocation disputes involve little if any negotiation. It is often assumed that given the minimal amount of compromise possible over long distances, a decision from the courts may be necessary. The non-moving parent is also typically in the position of wanting to appear unshakeable in their desire for primary residence or their objection to the relocation in the hopes that the moving parent will ultimately abandon their application rather than incurring the expense of conducting a trial and in order to maintain a defence that the proposed parenting plan is unworkable.

Those of us trained in interest-based negotiation may find it difficult to discern the non-moving party's values and concerns given this proclivity to decline negotiation and claim all arrangements unworkable. However, even in the face of declined offers, counsel for moving parents should not be easily dissuaded from attempting to find a workable solution.

Many access parents who have received independent legal advice understand that despite the additional factors contained in *Gordon v Goertz*, access parents are often unsuccessful at trial. I believe that given an offer that addresses the right concerns (especially one addressing the increased cost of access; minimizing the burden of increased travel; and providing more access than may be ordered by the court), as well as some exposure to the cost and frustration of the legal system, many more access parents than assumed would ultimately consent to the relocation without trial.

Given the non-moving parent's frequent unwillingness to discuss terms under which a move would be acceptable, one strategy may be to employ multiple equivalent simultaneous offers (MESOs), which are designed for instances when opposing parties are reluctant to negotiate.<sup>69</sup> When employing MESOs, at least three offers are presented to the opposing party at the same time, and in each case the offeror achieves their goals, but various modifications are made to non-critical aspects of the offer in an attempt to appeal to the offeree's interests. Ideally at least one of the offers will create more value for the non-moving party than they would likely receive by proceeding to trial. MESOs may also assist to preserve the parenting relationship, avoid looking overly aggressive (due to the perception of flexibility, despite essentially seeking the same result in each scenario), maintain a credible negotiating standpoint, and potentially determine the opposing party's interests through their criticism of any aspects of the offers.<sup>70</sup>

The following is an example of how counsel may use MESOs to resolve a relocation:

1. The child to reside primarily in the new jurisdiction, but your client to have generous parenting time distributed pursuant to either of the following arrangements, as elected by your client:
  - a. One long weekend per month, alternating Christmases, and three weeks of summer vacation parenting time;
  - b. Thanksgiving weekend, spring break, alternating Christmases, and four weeks of summer vacation parenting time; or
  - c. All of the child's time away from school for the Christmas break, and three weeks of summer vacation parenting time.

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<sup>69</sup> Victoria Husted Medvec *et al.*, "Choice and Achievement at the Bargaining Table: The Distributive, Integrative, and Interpersonal Advantages of Making Multiple Equivalent Simultaneous Offers" (Paper presented at the International Association for Conflict Management 18th Annual Conference, University of Amsterdam, 1 June 2005).

<sup>70</sup> *Ibid* at pp 25-27.

2. Travel expenses to be addressed per either of the following arrangements, as elected by your client:
  - a. The cost of up to one flight every second month for your client or the children to be contributed to by my client based on the proportion of their income to your client's income;
  - b. The cost of up to one flight every second month to be deducted your client's child support obligations for that month, such deduction not to exceed 50% of that month's support; or
  - c. The sum of \$500.00 per month to be deducted from your client's child support obligations so that your client can afford to travel or pay for the children to travel to them.

## **PSYCHOLOGISTS**

In the past year, several courts have addressed the procedures and evidentiary value of psychological reports. These comments will be of particular use when attacking reports during litigation. They may also assist counsel in discussing the reliability of such reports with their clients, even when clients do not intend to proceed to a trial. Such an analysis may also enable you to advise certain clients that a report contrary to their position does not mean that they will necessarily be unsuccessful in all cases, especially given that anxiety can make clients over-rely on an expert's opinion or advice, even if the advice is improper.<sup>71</sup> In some cases, it may be appropriate to maintain a healthy skepticism where there are significant concerns about the procedures employed.

### **Expert Impartiality**

The broader legal community recently took note of the Supreme Court of Canada's decisions in *Mouvement laïque québécois v Saguenay (City)*<sup>72</sup> and *White Burgess Langille Inman v. Abbott and Haliburton Co.*<sup>73</sup> Although there has been broad consensus as to an expert's duty of independence, the effect of a breach of that duty was less clear.<sup>74</sup> The Supreme Court of Canada held that impartiality does not go solely to weight. There is a threshold after which expert evidence should be found

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<sup>71</sup> Francesca Gino *et al.*, "Anxiety, Advice, and the Ability to Discern: Feeling Anxious Motivates Individuals to Seek and Use Advice" (2012) 102:3 Journal of Personality and Social Psychology 497.

<sup>72</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 ["*Mouvement*"], at para 106.

<sup>73</sup> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ["*White Burgess*"].

<sup>74</sup> *Ibid* at para 33.

inadmissible due to the expert's lack of impartiality, objectivity, or independence.<sup>75</sup> The Honourable Mr. Justice T. A. Cromwell, writing for a unanimous Court, also made the following comments with respect to the relevant evidentiary burdens:

“...the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded.”<sup>76</sup>

### **Parenting Assessments**

Of particular note to family law counsel is the observations of Honourable Madam Justice D. L. Pentelchuk in *AJU v GSW*, which provides several insights which can be used to assess the usefulness of a psychological report.<sup>77</sup> Therein her Ladyship set out recommended guidelines pertaining to Practice Note 8 bilateral parenting assessments, although the comments may also be helpful in relation to other types of reports. In particular:

- a) Trial should be scheduled at the same time that the assessment is ordered, so that if the trial is held within 6 to 9 months of the assessment, the assessment will be less likely to be in need of a further update;
- b) The scope of documents to be reviewed by the psychologist should be discussed in advance;
- c) All documents reviewed by the expert should be admitted into evidence through an Agreed Book of Exhibits;
- d) Experts shouldn't receive or review inadmissible evidence such as eavesdropped phone calls or improperly-intercepted emails;
- e) The report should outline which documents were reviewed and who was interviewed;

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<sup>75</sup> *Ibid* at paras 34, 45.

<sup>76</sup> *Ibid* at para 48.

<sup>77</sup> *AJU v GSW*, 2015 ABQB 6 [“*AJU*”].

- f) On request, subject to the terms of the Order, the expert should provide a complete copy of their file to counsel, excluding psychological test data; and
- g) The expert should give their evidence after all witnesses have testified, if possible.<sup>78</sup>

Justice Pentelechuk also confirmed that an expert's opinion shouldn't be used as proof of underlying facts, because doing so would give undue weight to an opinion premised on unproven facts or potentially-admissible evidenced.<sup>79</sup> Moreover, the expert's opinion should be given less weight "if many of the factual underpinnings or assumptions relied upon by the expert are unproven or inaccurate".<sup>80</sup> Justice Pentelechuk noted the particular difficulty of excising inadmissible portions of a report when witnesses interviewed for a report were not called to trial.<sup>81</sup> Given the reliance on such reports at Special Chambers, Justice Pentelechuk also clarified that these rules of evidence apply not only to trials, but to Special Chambers as well. The recent judicial treatment of psychiatric assessments used to vary parenting arrangements is discussed further at page 5 of this paper.

### **Voice of the Child Reports**

In *Angebrandt v Shaw*, the Honourable Mr. Justice M. D. Gates addressed Practice Note 7 Voice of the Child reports.<sup>82</sup> In *Angebrandt*, the Applicant sought to vary a Consent Order granted approximately three years earlier in relation to children who had grown to 16, 13, and 11 years of age. Justice Gates ultimately placed "little weight" on the views of the children after determining that the report did not reliably represent the "actual thoughts or wishes of any of the children, due to evidence of coaching, and a conclusion that the children were attempting to please their parents."<sup>83</sup> Justice Gates also remarked upon the more relaxed parenting style of the Applicant, that the Applicant's historical parenting time had previously been more enjoyable "holiday time", and the effect of a parent continuously forcing the children to choose a residence.<sup>84</sup> Justice Gill also criticized an earlier assessment's recommendation that the primary residence alternate each year, which was also repeated by two of the children as their preferred arrangement. This recommendation did not analyze the short, medium, and long-term impact of drastic annual changes such as severed friendships and

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<sup>78</sup> *Ibid* at para 175.

<sup>79</sup> *Ibid* at paras 177.

<sup>80</sup> *Ibid* at 136, citing *R. v. Lavallee*, [1990] 1 S.C.R. 852.

<sup>81</sup> *Ibid* at para 148.

<sup>82</sup> *Angebrandt v Shaw*, 2015 ABQB 417 [*"Angebrandt"*].

<sup>83</sup> *Ibid* at paras 49-51.

<sup>84</sup> *Ibid* at paras 45, 47, 48.

connections with each community.<sup>85</sup> Ultimately the Court performed a broader analysis of the children's best interests and the Application was dismissed. The Court's resulting treatment of the Applicant's alienating behaviour is discussed further at page 29 of this paper.

### **Professionals not Court-certified as Experts**

In *Brown v Pulley*, the Honourable Mr. Justice S. B. Sherr of the Ontario Court of Justice performed an interesting analysis into the evidentiary value of a psychotherapist who was not called as an expert, but instead only called as a witness to confirm statements purportedly made by the children.<sup>86</sup> Justice Sherr's comments could be applicable to similar forms of evidence in Alberta. The proponent of the evidence sought to introduce the evidence under the "necessity and reliability" exception to the rule against hearsay evidence pursuant to *K v Khan* and *R v Khelawon*.<sup>87</sup> The parties agreed that necessity was established due to the young ages of the children and the possible resulting emotional harm of testifying in Court.<sup>88</sup>

However, Justice Sherr excluded the report after determining that the evidence did not meet threshold reliability given the following flaws which affected the reliability of the circumstances in which the statements were made:

- 1) The psychotherapist did not bring any notes to Court, and "[i]t should be a basic step for any professional to keep notes of child interviews and bring them to court when testifying";
- 2) As the psychotherapist was relying on her memory, many specifics were absent;
- 3) Due to the above, the opponent of the evidence was not able to perform a satisfying cross-examination;
- 4) The psychotherapist testified that when she did take notes, only answers were recorded, not questions, giving the court little opportunity to examine context, the leading nature of any questions, and the accuracy & intention of statements made;
- 5) The proponent was able to listen to the interview from the other room and shouted her comments to the psychotherapist, meaning that the children were aware that their conversation was not private;

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<sup>85</sup> *Ibid* at para 78.

<sup>86</sup> *Brown v Pulley*, 2015 ONCJ 186 ["*Brown*"].

<sup>87</sup> *R v Khan*, [1990] 2 SCR 531; *R v Khelawon*, [2006] SCR No 57.

<sup>88</sup> *Brown*, *supra* fn 86 at para 97.

- 6) The children were not interviewed separately;
- 7) The psychotherapist relied only on the proponent's version of events and made no effort to contact the opponent or their counsel to obtain more information;
- 8) The psychotherapist was unilaterally retained by the proponent, whose counsel explained to the psychotherapist the relevant legal test that they were seeking to satisfy;
- 9) The psychotherapist testified that prior to the interview she assumed that the children were traumatized victims of domestic violence, which was accepted without question;
- 10) The psychotherapist admitted that she had never prepared a report in relation to a family court matter;
- 11) The psychotherapist failed to screen for any evidence indicating that any other party had discussed the interview with the children or that they may have been coached or otherwise influenced (which was particularly troublesome as there was evidence that the proponent of the report had discussed her version of the family history with the children);
- 12) Only one interview was conducted, which was approximately 45 minutes in length;
- 13) A follow-up interview to ensure the consistency of the children's statements was not conducted;
- 14) The psychotherapist testified that nearly all statements made by the children were direct responses to her questions (as opposed to a child relaying an incident without merely asking for confirmation) which could have been influenced through suggestible or prompting questions;
- 15) The psychotherapist admitted that she did ask several leading questions ("Do you remember being in school and being distracted due to your memories?", "What violence did you witness?", and "Did you see alcohol?");
- 16) The psychotherapist did not ask any questions relating to the proponent's conduct. The focus of the interview was entirely upon the opponent; and
- 17) The psychotherapist purported to make a clinical diagnosis which she was unqualified to provide, especially given no attempt to certify the psychotherapist as an expert in court, which suggested that she "did not appear to recognize the limitations and boundaries of her ability to provide opinions."<sup>89</sup>

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<sup>89</sup> *Ibid* at para 106.

## CONDITIONAL ACCESS

### Alienation

*Angebrandt v Shaw* is discussed at page 26 of this paper, in relation to Voice of the Child psychological reports.<sup>90</sup> Therein, the Applicant was found to have repeatedly pressured the children to choose his residence. The Honourable M. D. Gates discussed the applicability of the “maximum contact” principle, particularly in light of alienation. Although the best interests of the child are the paramount consideration in any event, Justice Gates also determined that the negative aspects of the Applicant’s behaviour outweighed the positive benefits of the Applicant’s relationship with the children.<sup>91</sup>

Justice Gates explained that as a result of the Applicant’s behaviour, his access would be reduced and restricted for a brief period to undergo counselling for anger management and to enhance parenting skills “through appropriate courses, programs or counselling facilities that may be available.”<sup>92</sup>

### Medical Marijuana Impairment

One of the Court of Queen’s Bench’s more politically relevant decisions was granted on December 14, 2015. In *Platt v Hutzal*, a mother who had been purportedly prescribed medical marijuana to control her epileptic seizures was limited to supervised access following a morning Chambers application.<sup>93</sup> Although there appeared to be minimal evidence corroborating an actual prescription or confirming the medical necessity of the marijuana, the Honourable Madam Justice J. B. Veit addressed her reasons towards the young infant’s inability to care for herself following her mother’s seizure or impairment, particularly given that there were no other adults living at her residence.<sup>94</sup> The extent of the mother’s marijuana use was also difficult to ascertain given the lack of witnesses. She was also not employed, which would have otherwise demonstrated a minimum level of functionality.<sup>95</sup>

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<sup>90</sup> *Angebrandt*, *supra* fn 82.

<sup>91</sup> *Ibid* at para 124.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Platt v Hutzal*, 2015 ABQB 795 [“*Platt*”].

<sup>94</sup> *Ibid* at paras 14-15.

<sup>95</sup> *Ibid* at para 16.

Ultimately more information was required and Justice Veit suggested that spot checks may be appropriate.<sup>96</sup> The mother was ordered to have as generous access as a sober supervisor would permit, including overnight access.<sup>97</sup> However, Justice Veit also directed that counsel should make immediate arrangements for trial.<sup>98</sup>

## CONCLUSION

Although several courts have provided us with useful frameworks to address complex determinations such as relocation and shared parenting, most of these decisions have been issued in areas where there are copious approaches and contrary case law. If they are determined to be desirable, it will be the task of counsel to incorporate these frameworks into their negotiations, persuade their adoption by subsequent and higher courts, and advocate for legislative reform to provide a clearer framework.

*With gratitude to Marla Miller, Q.C., Kylie Stephen, Curtis Ready, Zelma Hardin, Amanda Baretta, Tami MacGregor, and Pierre Boileau, Q.C.*

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<sup>96</sup> *Ibid* at paras 16-17.

<sup>97</sup> *Ibid* at para 18.

<sup>98</sup> *Ibid* at para 13.