

TOP FAMILY LAW CASES OF 2021



THE ROADMAP FOR TODAY

- 1. Review of Top 2021 Family Law Cases from January –December 2021**
- 2. Extensive Paper to be Distributed After Presentation by CBA**
- 3. Paper will have link to cases**

EMERGENCY PROTECTION ORDERS

***Schaerer v. Schaerer*, 2021 ABCA 104**

***DCM v. TM*, 2021 ABCA 127**

- [15] The test on a review of an EPO is whether (1) family violence has occurred; (2) there is reason to believe that the respondent will continue or resume carrying out family violence; and (3) by reason of seriousness or urgency, an order should be granted.
- An EPO cannot be granted out of “an abundance of caution” or as a matter of routine.

ADULT INTERDEPENDENT PARTNER CLAIM

***Mitchell v. Reykdal*, 2021 ABQB 301**

- **The *Alberta Adult Interdependent Relationships Act*, SA 2002, c. A-4.5 bars an AIP claim if he or she was a married person living with his or her spouse.**
- **Madam Justice Loparco underscored the purpose of the AIRA is to ensure those who create relationships of dependency remain responsible for taking care of the dependent individuals when the relationship breaks down.**

POLYAMORY

***British Columbia Birth Registration No.
2018-XX-XX5815, 2021 BCSC 767***

- Under the *parens patriae* jurisdiction of the court a third consenting adult in a polyamorous relationship is declared the legal parent of the child born to a married couple.

PARENTAL ALIENATION

***JLZ v. CMZ*, 2021 ABCA 200**

- The *per curiam* Alberta Court of Appeal upheld a variation of parenting to grant the father interim sole care of the children, with access of the mother to the children only with the father's consent, following a finding of egregious parental alienation and contempt of court orders.

RETROACTIVE CHILD SUPPORT

***Colucci v. Colucci*, 2021 SCC 24**

- **Madam Justice Sheilah Martin, writing for the Supreme Court of Canada, laid out a principled approach to issues of “retroactive” child support, both with respect to applications for retroactive increases in support that should have been paid given revealed increases in the payor’s income, and with respect to retroactive decreases in child support paid given the reduction in income of the payor.**



OPPRESSION REMEDY

Berman v. 905952, 2021 ABQB 434

- **The wife was granted a \$1,379,432 judgment as a result of her matrimonial property division and support actions, and granted a trust, or equitable, interest in two real estate development companies run by the husband with an active business partner.**
- **She sued under the oppression remedy under the *Alberta Business Corporations Act* to liquidate the companies to pay her judgment.**
- **This was a novel case.**

VARYING PARENTING – MORNING CHAMBERS

Huitt v. Huitt, 2021 ABCA 235

- Practice Note 2 No. 9 states that a change in a parenting arrangement is not to be made in Morning Chambers.
- [8] [W]hile it signals that substantive changes to parenting should not generally be made in morning chambers . . . Whether . . . the chambers judge should depart from the general guidance in Practice Note No. 2, [is] within the discretion of that judge.

MOBILITY PROVISIONS UNDER AMENDMENTS TO *DIVORCE ACT* *KDH V. BTH, 2021 ABQB 548*

- **M.J. Lema J decides a mobility application under the recently amended *Divorce Act*, and discusses, among other things:**
 - the burden of proof
 - the "vast majority of care" provision
 - the new statutory "best interests of the child" criteria
 - family violence

PRE-DISCLOSURE SUPPORT ORDERS

Heuft v. Bramwell, 2021 ABQB 642

- **[64] While I am not in a position to impute income to Mr. Bramwell on the basis of evidence on the record (given his disclosure failures and Ms. Heuft having no particular window into his income-generating activities), I can vary support on a pre-disclosure basis i.e. set support on a temporary basis, with Mr. Bramwell having an opportunity (albeit time-limited) to provide his long-outstanding disclosure and . . . argue that the temporary support exceeds his ability to pay support.**

PROCEDURE ON APPEAL FROM ARBITRATOR

Esfahani v. Samimi, 2021 ABCA 290

- The ABQB followed the procedure of hearing an application for permission to appeal from an arbitrator with the appeal. The ACA granted permission to appeal this procedure, as: “The gatekeeping function required by s. 44(2) [of the *Arbitration Act*] is important, and it should not be undermined by adjourning the permission to appeal application over to be heard with the appeal itself.”

REVENGE PORN

***ES v. Shillington*, 2021 ABQB 739**

***LDS v. SCA*, 2021 ABQB 818**

- ***ES v. Shillington*** confirmed that the tort of public disclosure of private facts was a viable tort in Alberta, explicitly endorsed in ***LDS v. SCA***.
- Damages for revenge porn will be awarded in a significant amount across Canada, with general damages approximating \$80,000 and aggravated damages approximating \$25,000, if malice is found. The amount awarded for punitive damages may still be a wild card, depending on the defendant's conduct.



PN7 REPORTS AFTER *DIVORCE ACT* AMENDMENTS

***McCauley v. McCauley*, 2021 ABCA 311**

- **[19] We do not agree the Divorce Act amendments narrow the discretion afforded to judges to refuse to order expert reports to ensure the child's views and preferences are before the court. The amendments simply codify a list of factors that a court must consider when deciding the best interests of the child. How to do that is within the judge's discretion . . .**

DOWER RIGHTS

Graham v. Graham, 2021 ABCA 340

- **The husband failed to procure the dower consent of the wife on three occasions by swearing false affidavits. She sued for damages under the *Dower Act*. The ACA confirmed that the measure of damages was mandatory under the Act and awarded her \$162,500, rather than the \$3000 fine imposed by the trial judge, buttressing that an action for damages for breach of the *Dower Act* is an efficacious tool for the family law practitioner.**



INDEPENDENT CHILDREN'S COUNSEL

DCE v. DE, 2021 ABQB 909

- **In this decision K.S. Feth J canvasses:**
 - **the factors re whether a child's age and maturity are such that the child's views should be considered**
 - **the circumstances that normally indicate that child's counsel should be appointed**
 - **the factors governing the customization of the role of counsel**
 - **the framework applicable in considering a request to appoint children's counsel**
 - **the factors governing whether in the alternative a PN7 report should be ordered.**

***IN LOCO PARENTIS* CHILD SUPPORT OBLIGATIONS**

Thierman v. Tymchuk, 2021 ABQB 902

- In this decision G.R. Fraser J found a common law spouse, following a tumultuous 5 year relationship, to be *in loco parentis* to two older children and responsible for the full measure of *Guideline* child support, notwithstanding the existence of a deadbeat biological father, and notwithstanding the severance of the relationship with the children after separation.

CHILD SUPPORT IN SHARED PARENTING ***Spiess v. Spiess*, 2021 ABQB 961**

- “The narrow question becomes **whether the father can effectively piggyback on the mother’s new partner’s income i.e. to carry the full weight of child-care expenses in the mother’s household i.e. with no contribution from him.**”
- There is a well-accepted principle that new spouses do not take on financial responsibilities for step-children, other than in *loco parentis* situations.

MOBILITY

Barendregt v. Grebliunas, 2021 CanLII 124350

- **Judgment has been issued, but we are awaiting reasons for judgment in this Supreme Court of Canada case re mobility.**



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