Top Ten 2019/2020 Family Law Cases

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1. ***Michel v. Graydon***, 2020 SCC 24

This September 18, 2020 Supreme Court of Canada decision held that retroactive child support may be payable even if at the time of the application the child was of adult age. In this The Lawyer's Daily article Anna Fei summarizes the facts:

- The parties lived in a common law relationship from 1990 to 1994. Their child was born in late 1991.

- An agreement (including provision for child support) was entered by way of consent order in 2001. However, it was later found that the father had understated his income, which also continued to rise and far exceeded the stated amount throughout the child's upbringing.

- In 2012, the parties entered a consent order terminating the father's child support obligations "on a without prejudice basis to any claims for retroactive support."

- The mother applied for retroactive child support in January 2015, when the parties' child was 23 and no longer a "child of the marriage."

Apparently the mother was in receipt of government welfare benefits and her child support was therefore assigned over to the government, which did not apply for an increase in child support over the years.

Per the majority decision of Brown J:

When deciding an application for retroactive child support, a court must analyze the statutory scheme in which the application was brought, and the different policy choices made by the federal and provincial governments must be respected. In *D.B.S.*, the Court examined the enforcement mechanism set out in s. 15.1 of the *Divorce Act*, which addresses original child support orders, and concluded that a court has no authority to grant a retroactive award of child support under that provision if the child beneficiary is no longer a "child of the marriage" at the time of the application. The Court did not consider or decide the issue of retroactive variation orders under s. 17 of the *Divorce Act*. **Accordingly, *D.B.S.* does not stand for the proposition that courts can retroactively vary child support only while the child beneficiary is a "child of the marriage";** furthermore, the Court in *D.B.S.* did not state a sweeping principle that transcends the *Divorce Act* to embrace all other statutory schemes regardless of legislative intent. The Court insisted that provinces remain free to espouse a different paradigm than that adopted by Parliament in the *Divorce Act*. Where they do so via legislation establishing an application-based regime such as the *FLA*, and where an application for retroactive child support is brought thereunder, it is that legislation which governs a court's authority to grant retroactive child support. Courts should not be hasty to recognize jurisdictional impediments that bar applications for retroactive child support. Jurisdictional constraints are inimical to the principles and policy objectives articulated in *D.B.S.*, and may be imposed only where the legislature has clearly intended that they be imposed. Such constraints must therefore be apparent in the statutory scheme, bearing in mind that preventing courts from even considering an award for retroactive child support would prevent enforcement of an unfulfilled legal obligation even in the most appropriate of circumstances**. Unless compelled by the applicable legislative scheme, courts should avoid creating an incentive whatsoever for payor parents to avoid meeting their child support obligations**. [Emphasis added]

Martin J took a much broader policy position in her concurring judgement. In her view, to **procedurally bar historical child support owed "prevents access to justice, runs counter to the best interests of many children, gives rise to an under-inclusive outcome, and reinforces patterns of socio-economic inequality**" (para 72). In the course of her expansive judgment Martin J discusses the feminization of poverty and its enmeshment with child poverty.

Although some may argue this case has a narrow application as limited to interpretation of the British Columbia statute, the broad policy positions expressed auger for a broad application of the case. As stated by Christine Montgomery in The Law Times, the

broader message is "unmet child support obligations are a debt to be paid and the payor parents will no longer be granted immunity from paying this debt simply because the child has reached adulthood."

Michel v. Graydon references and builds on the Alberta Court of Appeal case of ***Brear v. Brear***, 2019 ABCA 419 wherein retroactive child support was granted for the benefit of children past the age of majority. Apparently the SCC will revisit this issue soon in the appeal from the Ontario Court of Appeal case of ***Colucci v. Colucci***, which will consider the test to order a retroactive reduction in child support.

2. ***McDonald v. Brodoff***, 2020 ABCA 246

In this July 22, 2020 decision, the Alberta Court of Appeal *per curiam* invites a revisitation of the harsh test for imputation of income for the purposes of determining child support set out in ***Hunt v. Smolis-Hunt***, 2001 ABCA 229 and discusses how the ***Hunt*** principles apply to a s. 9 ***Contino v. Leonelli-Contino***, 2005 SCC 63 analysis of the shared parenting provisions of the Alberta Child Support Guidelines .

Section 9 of the Alberta Guidelines provides:

Shared parenting

9 Where a parent exercises a right of parenting time, or a right of access to, or exercises physical care and control of a child for not less than 40% of the time over the course of a year, the amount of a child support order must be determined by taking into account

(a) the amounts set out in the applicable tables for each of the parents,

(b) the increased costs of shared parenting arrangements, and

(c) the condition, means, needs and other circumstances of each parent and of any child for whom support is sought.

The ACA summarizes the ***Hunt v. Smolis-Hunt*** test as follows:

[10] As noted, ***Hunt*** is the leading Alberta case regarding imputation of income under s 19(a) of the *Guidelines.* In ***Hunt***, a majority of this Court established that income

can only be imputed for child support purposes where "the obligor has pursued a deliberate course of conduct for the purpose of evading child support obligations": para 42. Simply failing to earn their maximum potential or failing to take reasonable employment is not enough. Imputation of income requires "either proof of a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the intention of the obligor is to undermine or avoid his or her support obligations": para 42. Intention can be inferred "where the unemployment, under-employment or other acts of the obligors indicate a deliberate refusal to live up to the obligation to support one's children": para 73.

With respect to the s. 9 principles, the appellate court summarizes:

[12] The calculation of basic child support under the *Guidelines* is premised on the number of children and only the payor's annual *Guidelines* income, thus promoting predictability and efficiency. **In contrast, s 9 emphasizes fairness and flexibility and adopts a more holistic approach in assessing the economic circumstances of each parent and their ability to meet the needs of the children**. ***Contino*** provides an analytical framework for interpreting the s 9 factors and identifies key principles that are summarized as follows:

- The language of s 9 is imperative. **The courts must determine child support in accordance with all three factors;**

- No one factor should prevail, but the weight to be given to each factor depends on the particular facts of the case;

- **There is no presumption that the *Guidelines* Table amount, or the set-off amount calculated under the Tables will be awarded**. Similarly, there is no presumption that something other than the set-off amount should be awarded;

- The analysis is necessarily contextual, so a sound evidentiary foundation, including the parties' budgets and actual expenses of both parents, is critical to the court's analysis. Courts cannot and should not make assumptions about the parties' situation, and courts should demand information relating to s 9(b) and (c) when the evidence filed is deficient;

- The analysis under s 9 reflects a stated objective of the *Guidelines*: to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

- A critical inquiry is whether the children experience a difference in the standard of living as they move between the two households, as one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households;

• The goal under s 9(b) is to apportion actual expenses between the parents in accordance with their respective incomes;

• In shared parenting arrangements, the court has great discretion when assessing the three factors. In particular, the court has full discretion under s 9(c) to consider “other circumstances”.

The *ratio* of ***McDonald v. Brodoff*** is:

[46] In other words, in order to determine the correct Table amounts under s 9(a), a court must first determine each party’s annual income in accordance with sections 15 to 20 of the *Guidelines*, which includes imputation of income under s 19. . . .

47] The applicable Table amounts provide the starting point, the “snap-shot” of the parties’ respective positions. Whether income should be imputed should have been determined by the chambers judge before he went on to consider the factors in s 9(b) and (c). . . .

The appellate court cautions against defaulting to a set-off approach:

[64] Further, ***Contino*** emphasizes there is no presumption that s 3 base support will be reduced because one parent has crossed the 40% threshold. This helps avoid the “cliff effect”—a dramatic reduction in child support received despite parenting time only increasing by as little as 1%—which effect can motivate a primary care parent to oppose even small increases in access: ***Contino*** at paras 44, 49.

[65] **Family practitioners and litigants should be cautious about defaulting to a simple set-off approach**. The non-exhaustive list of factors to first consider includes:

• Is there significant income disparity between the parties?

• Is there an obvious difference in living standards between the parties?

• Is one party clearly bearing the majority of the child expenses such as school fees, clothing and extra-curricular activities that fall outside s 7?

[66] Any of these factors should give pause to whether a simple set-off is fair and appropriate. [Emphasis added]

On a more pragmatic basis, Poroshad Mahdi offers the following approach in a The Lawyer's Weekly article:

In reality, this is how we use the principles of *Contino* to fix child support where there is shared parenting:

- **Figure out if you have actually passed the 40 per cent threshold** — to be safe, count the number of hours, the overnights and days.
- **Determine the set-off amount**. This entails determining how much each parent would owe the other based on his/her income, and the number of children, pursuant to the Child Support Guidelines*,* under the assumption that the child/ren reside/s with the other parent. The amount payable would be the difference between the two numbers. This calculation satisfies s. 9(a) of the Child Support Guidelines.
- **Create a children's budget — meaning, set out the child's expenses and determine which parent pays which expense**. Some expenses are considered special or extraordinary expenses, and must be paid in proportion to the parties' incomes (i.e. daycare, private school, rep hockey) pursuant to s. 7 of the Child Support Guidelines. However, many other mundane expenses are simply part of raising a child (i.e. clothing, haircuts, meals). As set out in s. 9(b) of the Child Support Guidelines, it is anticipated that the total cost of raising a child in a shared parenting arrangement would be higher than a primary residence arrangement, given the duplication of expenses.
- **Determine the right number for child support owing — taking into account the ratio of income between the parties, the net worth of the parties and ability to pay increased costs associated with shared parenting, and taking into account variations in the child's standard of living in the homes and prior child support arrangements upon which parents are now relying**. This application of s. 9(c) of the Guidelines is the section that leads to the most uncertainty.

With respect to the rigorous ***Hunt*** test, the appellate court in ***McDonald v. Brodoff*** states:

[68] **Alberta is the only jurisdiction in Canada that has interpreted s 19(a) of the *Guidelines*, which allows for the imputation of income to a parent who is "intentionally under-employed or unemployed", as requiring something akin to bad faith**. All other jurisdictions apply a reasonableness standard consistent with the minority decision of Picard JA in ***Hunt***. In ***Smith***, in her thorough review of the jurisprudence since ***Hunt***, Yungwirth J concludes at para 128: "Even to Alberta trial courts, the test set out by the majority in ***Hunt*** has been identified as unsatisfactory, and many have distinguished ***Hunt*** to circumvent having to apply the stringent test."

[69] If this is so, this may signal the need for this Court to reconsider its decision in ***Hunt*** which is 19 years old. As stated in ***Arcand*** at para 187:

The law, as with society, changes with time. How do the courts ensure that the common law continues to be responsive to the dynamic and evolving fabric of our society? The modern approach to changing precedent allows courts to reconsider and overrule past precedent in accordance with a defined reconsideration process.

[70] This Court has full reconsideration powers. ***Hunt*** may be upheld, over-ruled or varied, but it **may be time to look at this issue again**.

3. ***CAS v. NPC***, 2020 ABQB 421

In this July 21, 2020 decision Lema J explores shared parenting and in a very helpful way, stating:

[9] Factors supporting shared parenting include:

- both parties being capable and engaged parents: ***PJG v ZIG***.[2] See also ***AB v CD***[3] ("both parents have the willingness, and ability, to provide for the needs of their children"); ***CRW v SJA***[4] ("[non-primary parent] exhibit[s] good parenting skills"); and ***Botticelli v Botticelli***[5] (where one-time statement by non-primary parent expressing doubt about his child-care abilities explained and discounted);
- good communication between the parents: ***SDK v ALK***.[6] In ***Thember v King***[7], "serious communication problems" and generally high conflict had been partly overcome and did not preclude shared parenting. In ***Gray v Gray***[8], parties were perceived as capable of achieving sufficient level of cooperation;
- each parent loving the children and "no evidence that they will not be properly cared for with all their needs being met in the care of each parent": ***Gordon v Gordon***[9]; "both parents loving and capable": ***Parsons v Parsons***[10]; "no evidentiary basis for questioning either party's commitment or ability to provide for all of the physical, emotional, cultural, moral and spiritual aspect of their children's lives": ***Duckett v Duckett***[11];
- adequate proposed work and child-care arrangements from the non-primary parent, even if less developed than the primary parent's: ***Gray v Gray*** (para 17);

- history of shared parenting (during relationship and first two years after separation – discontinued when father moved temporarily for work): ***Leikeim v Leikeim***[12];
- parents having different and important interests and capabilities to pass on to their children: ***Leikeim v Leikeim*** at para 33;
- where children (8 and 9 years old) have spent significant time with the non-primary parent and have strong attachments to both parents: ***TLG v CLL***[13]; where young child (2.75 years) having had close to daily contact and every-second-weekend overnights with non-primary parenting for over 1.5 years: ***VC v KC***[14];
- a parenting assessment recommending shared parenting: ***MacDonald v MacDonald***[15]; ***PJG v ZIG*** at paras 15-17 and 29;
- children (9 and 10 years old) preferring shared parenting (views sounded by parenting expert): ***PJG v ZIG*** at para 33;
- child's extracurricular activities not having to change; ***MacDonald v MacDonald*** at para 6;
- shared parenting enhancing children's contact with mother's cultural background: ***Hunt v Hunt***[16];
- increased opportunity for child to learn each parent's first language: ***VC v KC***[17];
- "[increased] rich time" with half-siblings residing with the non-primary parent: ***CZ v RB***[18]; see also ***MacDonald v MacDonald*** (cited above) at paras 6 and 10; increased contact with half-sibling not residing with mother but in her orbit: ***Hunt v Hunt*** (para 83); opportunity for closer contact with half-siblings living with non-primary parent (particularly important where those children are mid- to late-teen ages and soon to be more involved in outside-of-family life): ***VC v KC*** at para 21;
- child retaining "meaningful contact" with other members of his family (step-siblings residing with current primary parent): ***MacDonald v MacDonald*** at para 11;
- continuation of shared parenting allowing children to continue attending the school where their friends are and where one of the parents worked: ***PJG v ZIG*** at para 32;
- nothing to suggest any harm to or neglect of child by non-primary parent (***CRW v SJA*** at para 20) or that non-primary parent unfit: ***SDK v ALK***[19];
- non-primary parent in unique position to assist child with disabilities, having experienced similar ones in childhood: ***CRW v SJA*** at para 20;
- both parents having an appropriate residence for the children: ***Nissen v Nissen***[20]; father's home not as luxurious as mother's but "adequate for the children's needs": ***AB v CD*** (at para 33);
- where the non-primary parent "would likely require the assistance of his parents" with child care, the involvement of those grandparents not being a negative

factor: ***Nissen v Nissen*** (paras 16 and 24); "[shared parenting will help] maintain the close relationship [the children] have always had with their paternal grandparents", who will assist the father when he shared-parents the children: ***Moreau v Moreau***[21];

- the ability of both parents to adapt easily to shared parenting: ***Nissen v Nissen*** (paras 16 and 24);
- a shift to shared parenting "[giving the current primary parent] a break from the children and allow[ing] her more time to build [a] business]: ***Nissen v Nissen*** (paras 16 and 24)
- manageable driving time between parental residences: ***CZ v RB*** at para 33; ***MacDonald v MacDonald*** (cited above) at para 6 (parties living in a "small community" and travel arrangements "not onerous"); ***SDK v ALK*** (cited above) at para 33 ("[child's] travel time to school is significant with both parents and should not be an impediment to shared parenting");
- where the current primary parent's only objections were that "change would be difficult" and that the other parent "can be difficult": ***Nissen v Nissen*** (latter dimension attributed to resolved-by-trial financial issues) (para 119 of QB decision);
- where shared parenting may neutralize or minimize the parents' communication difficulties and personal hostility: ***TT v JT***[22]; "shared parenting will tend to prevent the type of bickering in which the parents currently engage over small matters": ***Moreau v Moreau*** at para 16;
- a primary parent's efforts to thwart the other's parenting time: ***CZ v RB*** (para 33 of CA decision);
- the current access parent and a new partner "providing a loving home to the children": ***CZ v RB*** (para 33 of CA decision);
- a working-at-home non-primary parent's ability to manage both work and child care: ***VC v KC***[23];
- child care provided by one parent's new partner not a counter-indicator to shared parenting, especially where other parent also relies on non-parental child care: ***PLM v DJH***[24];
- when setting interim parenting, where the post-separation *status quo* was shared parenting: ***HG v RG***.[25] See also ***LDM v WFT***[26] at paras 7-8; and
- existing shared parenting to continue during investigation of one parent's mental health as long as she resided with her parents: ***Christensen v Stephen***.[27]

[10] Factors signaling against shared parenting include:

- parents' inabilities to put their children's interests ahead of their own to such a degree that regular cooperation and coordination in scheduling is impossible: ***Rensonnet v Uttl*** [28]at para 25 (CA decision). See also an earlier ABCA

decision in that matter: ***Rensonnet v Uttl***[29], as well as ***DH v. MLD***[30] and ***PT v LM***[31] (one parent largely responsible);

- the parties being and having been in "substantial conflict" and lacking a "genuine willingness to work together to ensure the success of a shared-parenting arrangement." (Per a parenting expert, it would be "pretty much impossible" for them to make decisions together): ***AE v TE***[32];
- where separation of the child from his or her primary caregiver, particularly at a young age (children there 8 and 9), may be emotionally and developmentally disruptive for the child: ***TLG v CLL***[33];
- medical evidence suggesting no major changes to routines of seriously disabled child: ***AJC v TCC***[34];
- a parent's frequent violence and angry outbursts against child; child feeling need to disparage other parent in that's parent's presence; child at risk of serious psychological problems (shared parenting discontinued): ***LSA v JM***[35];
- one parent's residential and new-relationships instability, coupled with information gap about who would care for child during that parent's working time: ***Davenport v Misa***[36];
- a parent's proposal that each enroll the children in separate activities, to be pursued only while with the enrolling parent ("would lead to parallel, compartmentalized lives and … severely restrict the type of activities in which they could engage"): ***Rensonnet v Uttl*** (CA decision #1) at para 20;
- one parent having "more scheduled" work commitments requiring him to "delegate responsibility to third parties[,] which would offer less consistency than that available with [the other parent], who worked from home": ***Rensonnet v Uttl*** (CA decision #1) at para 20;
- the absence of definite plans for where the non-primary parent would live with the children or where they would go to school: ***Rensonnet v Uttl*** (CA decision #1) at para 20;
- the opposed-to-shared-parenting opinions of the children (15 and 12 years old), as reflected in a Practice Note 7 "View of the Child" report finding their opinions to be "independent and considered": ***Shwaykosky v Pattison***[37] (interim-order context). See also ***VSG v TAH***[38];
- one parent's move (from Edmonton to Kelowna) making it "impossible to continue with the alternating week parenting schedule": ***DB v MB***[39];
- too much travel (between Red Deer (school) and Rocky Mountain House (mother's residence)): ***Cook v Ross***[40]; distance between parents' residences (Lloydminster to Paradise Valley area) making shared parenting impractical once children starting extracurricular activities: ***Gregory v Ball***[41];

- one parent very likely moving away to resume education: ***Gregory v Ball*** at paras 30 and 31 (QB decision);
- "demonstrated inability [of non-primary parent] to responsibly exercise his access over the last two years" (father missed about 80 per cent of access time), plus father in flux with new family on a different continent and trying to relocate them to Canada … father unable to provide "stability and predictability": ***Ernst v Martins***[42];
- before trial, where there is significant disagreement on the evidence: ***Rensonnet v Uttl*** (CA decision #1) at para 9;
- a shared-parenting regime will not automatically be restored after a long departure from it (father out of contact for many years): ***RV v RP***[43];
- mere fact of non-primary parent (here, father) having more time and ability to parent is insufficient; evidence lacking on strength or importance of relationship between children, on the one hand, and father's new partner and child with her, on the other, as well as on father's proposed special-needs accommodations and school-attendance commitments: ***IMD v RAD***[44];
- shared parenting not to start until non-primary parent has his own residence that can accommodate him and the children: ***Leikeim v Leikeim*** at para 34;
- shared parenting not in four-year-old's best interests; may be appropriate later: ***Witherly v Witherly***[45];
- one parent's possible serious alcohol dependency – increased (but not shared) parenting for her – to be reviewed in nine months for independent evidence of her condition: ***Cech v Fisher***[46];
- no shared parenting until mother demonstrating healthy and safe home environment for the children (series of unstable post-separation relationships): ***Babich v Babich***[47];
- shared-parenting issue deferred to special chambers with *viva voce* evidence in light of insufficient evidence on impact of proposed "sibling break-up" (only some children proposed for shared parenting), the impact on the children of witnessing an altercation between the parents, and one child's subpar school performance: ***RNK v JLL***[48];
- no shared parenting until (at minimum) "the children's wishes can be ascertained with the assistance of an expert" (children 15 and 13): ***Oosterhuis v Oosterhuis***[49]; and
- resumption of interrupted shared parenting deferred until re-introduction-of-absent-parent process completed: ***SLT v AKT***[50].

[11] I realize that this is not a box-checking exercise:

Determining a child's best interests is not simply a matter of scoring each parent on a generic list of factors. Each case must be decided on the evidence

presented. The listed factors [in one case] merely serve as indicia of the best interests of the child. By their very nature, custody and access applications are fact-specific. The listed factors may, therefore, expand, contract, or vary, depending on the circumstances of the particular case as manifested by the totality of the evidence. Courts must approach each decision with great care and caution.

Lema J also concluded that **the young ages of the children – 4.5 and 2.25 years – did not precluded shared parenting**.

He further underscored that a **transition to shared parenting should be gradual**.

4. ***SAS v. LMS***, 2020 ABQB 287

This April 24, 2020 decision of Robert A. Graesser J was the first comprehensive Alberta decision to lay out the ground rules for dealing with Covid. In this emergency application the father applied to enforce his parenting rights to his children. The mother, a nurse, had taken the self-help remedy of denying him parenting time as she was concerned he was not following Covid health protocols. Graesser J relied on the seminal Ontario decision of ***Ribeiro v. Wright***, 2020 ONSC 1829 and stated the following general principles:

1. Parents are expected to address COVID-19 issues and concerns with each other before taking any action (including applying for variations or relief from the Court) to resolve these issues and concerns in good faith and to act reasonably in exploring strategies that will first and foremost ensure the health and safety of their children.
2. Where face to face access or parenting time presents different risks in the different households, the parties should consider strategies that have the children in the less risky environment but in a manner that maximizes virtual contact between the children and the other parent.
3. **Court orders are meant to be followed. There should be no unilateral withholding of access or parenting time except in true emergency situations as described above where there is imminent risk to a child's health or safety**;
4. Whether under the Divorce Act or the Family Law Act, varying existing court orders requires a change in circumstances and will be determined on the basis of the best interests of the child or children. COVID-19 is not an automatic change in circumstances; the party seeking a variation must

establish that their family circumstances have been impacted in a way that warrants a temporary change in the order;

5. The burden or onus of proof is on the parent seeking a change in the status quo or the existing court-ordered parenting. It is not satisfied by suspicion or speculation, but as with any matter involving circumstantial evidence, it may be satisfied by logical and reasonable inferences from conduct;
6. If an application cannot be made because of the urgency of the situation, an application by the defaulting party must be made as soon as possible after learning of the emergency;
7. Applications based on speculation, mistrust, or fear without credible evidence of material non-compliance posing unacceptable risks to the children are unlikely to get permission to proceed as an emergency application, let alone be successful; and
8. Respondents must be prepared to unequivocally commit that he or she will meticulously comply with all COVID-19 safety measures; and
9. Non-compliant parents can expect no second chances.

A more detailed overview of the case is in this The Lawyer's Daily article.

5. ***SER v. JS***, 2020 ABQB 267

This April 16, 2020 decision is interesting in that C.M. Jones J explores the scope of disclosure obligations as set out in the 2017 Alberta Court of Appeal decision of ***Cunningham v. Seveny***, 2017 ABCA 4. **In *Cunningham* the appellate court rejected the argument of the payor that it is up to the payee to obtain an expert's opinion about the payor's corporate expenses if she thought they were unreasonable, or alternatively, the court should appoint an assessor. The appellate court made clear that it is the payor's duty to provide** a statement of all payments or benefits, but also a **sufficient explanation to facilitate the payee's assessment of the reasonableness of these payments or benefits**, in the context of determining income available for discharge of child support obligations.

In ***SER v. JS*** the mother, seeking child support, alleged the father was hiding income in his corporate entities. Her arguments were dismissed, with Jones J stating:

[38] In ***Cunningham v Seveny***, 2017 ABCA 4 at para 27, the Alberta Court of Appeal summarized these disclosure obligations:

"**The content of required disclosure must be sufficient to allow meaningful review by the recipient parent, and must be sufficiently complete and comprehensible that, if called upon, a court can readily discharge its duty to decide what amount of the disclosing parent's annual income fairly reflects income for child support purposes**."

[39] This passage does not suggest an unlimited ability by the recipient parent to request further and more disclosure once there is enough information about the corporation to assess the impact on the payor's line 150 income. . . .

. . .

[42] In the absence of third-party notice, the court was limited to ordering disclosure of documents that were within Mr. S's control. To have "control" over a record there must be "a corresponding ability to enforce compliance with the request": ***McAllister v Calgary (City),*** 2012 ABCA 346, at para 7. Furthermore, "the right to access the record must be specific to the party from whom disclosure is sought" and it is not enough "that the party may be able to request the record from the non-party because of an existing relationship between them": ***McAllister*** at para 7. By serving the Notice to Disclose on Mr. S alone, without any further notice to Mr. RS or to the corporation, means that Ms. ER and her counsel could only expect the disclosure that Mr. S was capable of obtaining in his personal capacity.

. . .

[55] In ***Cunningham***, the Court of Appeal seems to suggest that there may be limits to the reasonableness of efforts to secure pre-trial disclosure. Balance is needed. At paragraph 35 the Court notes:

Simply put, parties ought not to be put to time-wasting, money-draining line-by-line justifications for every dollar that has been spent. In keeping with the foundational rules, pre-trial disclosure must not become a process that wholly consumes the very parental resources that otherwise would be available for child support. And, parties must bear in mind that supervising courts will continue to take a very dim view of litigation antics or abuses that detract from, or thwart, the overarching objectives of child support legislation, the foundational rules and disclosure obligations.

6. ***Aubin v. Petrone***, 2020 ABCA 13

In this January 14, 2020 decision the majority of the Alberta Court of Appeal per Antonio JA discusses piercing the corporate veil in a family law context. (Leave to appeal to the Supreme Court of Canada was dismissed.) The corporate veil was pierced to allow a former spouse to register a judgment against the building owned by a corporation of which the other spouse was the controlling shareholder. The wife was also granted a charge on the shares of the corporation by the trial judge, and there was an order that the husband and the corporation could not declare bankruptcy until the security agreements to protect the wife were in place.

The piercing was held to be necessary because the husband had engaged in a concerted effort to frustrate the matrimonial property judgment against him. "Mr. Petrone committed, attempted or threatened various wrongs against Ms. Aubin, using Quantum as his weapon."

The issue is framed as follows:

[28] Assets held by a company belong to the company and generally remain behind the corporate veil. But the courts have seen numerous cases where a company was built on the direct and indirect contributions of two spouses while being legally controlled by one. This arrangement can work for everyone while the relationship is healthy, but is open to abuse when the marriage breaks down.

And the court concludes:

[34**] The proper focus on marital breakdown should be on "the parties' *real* assets post-separation and a fair distribution of those assets**" (emphasis added): *Wildman* at para 41. Piercing the veil of a company owned and controlled by one party may, in some circumstances, be entirely appropriate—indeed, it may be "an essential mechanism for ensuring" that children and ex-spouses receive their financial entitlements. "[T]he law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law": *Wildman* at paras 41 and 49.

In the recent October 2020 decision of *WHG Investments Ltd. v. Unterschultz*, 2020 ABQB 621 it was argued that the principles of *Aubin* would not apply to a minority shareholder situation. This argument was dismissed, with the judge agreeing that, while the presence of other shareholders, even majority shareholders, should give the Court pause, the existence of such shareholders does not act as a bar to the piercing where the ends of justice so justify. Mah J found it justified that the wife register a certificate of lis pendens under section 35 of the *Matrimonial Property Act* against lands owned by a company connected to the husband through a series of holding companies in which he had a complete or partial interest.

7. ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65

This December 19, 2019 Supreme Court of Canada decision may have real significance to the family mediation/arbitration process in that **it will change the standard of review on appeal from the arbitrator from the lower standard of reasonableness to a higher appellate standard**. As discussed in a two part The Lawyer's Daily article co-authored with Christine Silverberg, with part one here and part two here, **the Supreme Court has decreed that the standard of review on appeal from an administrative body with a statutory right of appeal will be an appellate standard. The *Arbitration Act* of Alberta which governs family law mediation/arbitration has a statutory right of appeal. Thus for questions of law an appeal from an arbitrator will be a "correctness review"; for questions of fact of mixed fact and law the appellate standard is palpable and overriding error. This is distinguished from the pre-*Vavilov* standard of reasonableness.**

It has been argued in the aftermath of ***Vavilov*** that the legal principles of ***Vavilov*** would not apply to consensual arbitrators such as family law mediators/arbitrators. This argument has gained some traction in the case law, but on balance the case law has been applying the ***Vavilov*** principles to

consensual arbitrators, although it may remain a live issue. J.M. Ross J applied ***Vavilov*** and the standard of review of correctness to an appeal from a family law mediator/arbitrator in the May 26, 2020 decision of ***Clark v. Unterschultz***, 2020 ABQB 223. The British Columbia Court of Appeal has declined to decide the issue in the context of family law mediation/arbitration in the October 7, 2020 decision of ***Nolin v. Ramirez***, 2020 BCCA 274.

8. ***BM v. JM***, 2019 ABCA 503

In this December 16, 2019 decision the appellate court takes a firm stand in favour of grandparent's rights. The grandparents applied for a contact order pursuant to s. 35 of the Family Law Act of Alberta on the basis that the father of the 11 year old child was unreasonably denying contact. The grandparents had had significant contact with the child for 9 of his 11 years of life. The best interests of the child test governed, including whether the child's physical, psychological or emotional health may be jeopardized if contact is denied and whether the guardian's denial of contact was unreasonable (s.35(5)). The *per curiam* court stated:

[19] **The appellant further argues, incorrectly, that there must be a finding that the parent is unable or unwilling to act in the best interests of the child before a contact order can be made** pursuant to section 35 of the *Family Law Act*. In our view, the appellant is labouring under a misapprehension of the law in making this argument. The making of a contact order is not a comment on the willingness or the ability of the parent to act in the child's best interests. It is simply an order designed to promote the child's best interests by preserving contact he or she had with a significant other (in this case, the grandparents) in circumstances where the person seeking contact obviously loves and enhances the quality of the child's life and where the child reciprocates that love and enjoys the enhancements.

9. ***Alanen v. Elliot***, 2019 ABCA 485

In this December 10, 2019 decision **the appellate court upholds a $10,000 sanction for civil contempt for attempting to intimidate the lawyer representing his wife in a high conflict divorce.** In May 2017 after the husband had contacted two lawyers representing the wife and her business valuator, the parties entered into a consent order whereby the husband agreed to have no direct or indirect contact with her lawyer's or other experts. In April 2019 the **husband emailed the wife's lawyer attaching a draft complaint to the Law Society about the conduct of the lawyer**. The wife deposed this was an attempt to intimidate her lawyer. The Chambers judge found him to be in contempt and imposed a penalty of a $10,000 payment of solicitor/client costs. This was upheld by Rowbotham J for the court on appeal.

10. ***Boland v. Carew***, 2019 ABCA 202

In this May 23, 2019 decision **the appellate court discusses the interplay of the long delay rules and family law.** The statement of claim for divorce and matrimonial property division was filed in 2010. Per the appellate court per Bielby J:

[T]here is no limitation period within which separated parties must commence an action for divorce under the *Divorce Act*, RSC 1995, c 3; there is no limitation period on an action for ongoing child support; see ***S v (DB) v G (SR)***, 2006 SCC 37 (CanLII), [2006] 2 SCR 231. The two-year limitation period for the matrimonial property claims has not yet started to run; it does not start to run until the date of a "decree nisi, declaration, or judgment": see *Matrimonial Property Act* RSA 2000, c. M-8, s. 6.

Bielby J upheld the Chamber Judge's dismissal of the application to dismiss for long delay, stating:

[11] **We conclude that Mr. Carew's negotiating, entering into and honouring the settlement agreement "significantly advanced" this action**. Settling both matrimonial property and child support issues can only be seen as significantly advancing this action toward resolution notwithstanding that some issues, in particular the divorce itself, remain outstanding.

. . .

16] The practical result of granting Mr. Carew's application [to dismiss for long delay] would be to require Ms. Boland to commence a new action and bring a new application in order to pursue her claims for a divorce and child support, possibly including an action on their earlier settlement agreement. Such support is the right of the child and the obligation of the child's parents. Mr. Carew has not demonstrated that granting the application would be of any benefit to him (beyond perhaps inconveniencing Ms. Boland). This is not a circumstance where Mr. Carew can benefit from the lapse of any statutory limitation period. Had the chambers judge granted the application to dismiss, there would be no bar to Ms. Boland recommencing an action for identical relief.

[17] We observe that to endorse a payor's unilateral decision to stop making the agreed-upon child support payments and to then apply to strike the payee's underlying action for same, arguing that no proceedings had been taken for more than 3 years, would be to permit the payor parent to **set a trap** to force the payee to go to the expense of recommencing and prosecuting child support; if she could not afford or was otherwise unable to take that step, the payor could practically be absolved from further payment and his child deprived of the benefits of that support. Without suggesting that was Mr. Carew's motivation in applying to strike this action, to endorse his interpretation would effect such a result.

END

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