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Family

Alberta courts stake out position on pandemic and parenting issues

By **Barb Cotton**

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(May 7, 2020, 2:32 PM EDT) -- In a recent judgment a senior jurist of the Alberta Court of Queen's Bench, Justice Robert A. Graesser, has staked out the Alberta position regarding parenting issues arising in view of the current pandemic.

In *SAS v. LMS* 2020 ABQB 287, Justice Graesser frames the issues before him as the extent to which one parent should be able to expose the children and the other parent to risks the other parent finds unacceptable regarding steps to be taken to be shielded from the virus, such as physical distancing and the "stay at home" government sanctioned mandate.

In this case the father, an accountant, was stated by the mother, a nurse, to be somewhat cavalier in his approach to isolation, continuing to attend his workplace personally, taking his two young children to his workplace, having a friend/employee continue to regularly visit in his home and continuing to take the children horseback riding. The mother's concerns were accentuated as her 86-year-old mother was living with her in her home and was at greater risk of harm from COVID-19.

The parties had been separated since 2013 and had a history of being able to work matters out between them, without resorting to the courts. In this case, however, the husband felt that the mother's concerns were "hypervigilant." In view of her concerns the mother had denied the father access to the children notwithstanding a shared parenting order in the Divorce Judgment and the father applied to the court to enforce his shared parenting rights on an emergency basis, while holding the mother to be in civil contempt.

It is notable that at the outset Justice Graesser found that neither party was acting to take an advantage over the other, to alienate the children, nor to create mischief, but rather both parties were acting in what they thought was a responsible way to protect their children, themselves and other family members in view of COVID-19.

Further issues in the case included the scope of the definition of "cohort" — family members or close friends becoming a single unit for the purposes of contact, as allowed by the Alberta chief medical officer of health, Dr. Deena Hinshaw. The court also considered how the parenting issues in the pandemic should be addressed in the face of existing court orders.

Justice Graesser reviewed Ontario authority and then concluded:

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.

The regular visitations by the friend/employee of the husband was not found to be a valid cohort as articulated by Hinshaw and could not give rise to a "loophole" in the recommended pandemic isolating measures.

Justice Graesser stated: "Looking for 'loopholes' or exceptions is too frequently an attempt to justify an unwillingness to comply, or an attitude of dismissiveness towards the risks acknowledged by medical professionals. Courts should be slow to permit anything that puts a person or the community in an unreasonable risk."

In the result the application was adjourned and the relatively non-litigious family was encouraged to work the matter out themselves in view of the direction of the court. Justice Graesser stated that in their steps towards resolution, a guiding principle should be that it is in the best interests of the children to continue with the shared parenting rotation established by previous court orders and it was in the best interests of the children to be able to spend time with their father. However, the ball was in the father's court to make sure that could happen in a way that kept the children safe.

Further, the mother was admonished for taking the self-help remedy of denying shared parenting to the father rather than seeking leave for an emergency application to the court to vary the existing court order.

Justice Graesser postulated three circumstances in which a self-help remedy could be forgiven: 1) where a parent is diagnosed with COVID-19 and insists on still exercising face to face access with the child; 2) where a parent is displaying symptoms of COVID-19 but refuses to do anything about it; and 3) where a parent has or is about to do something involving the children that poses an immediate threat to their health or safety. In such cases, if there is no time to apply for permission to make an emergency application, unilateral action could be forgiven if an application is made at the earliest opportunity.

In this decision, Justice Graesser has provided a helpful blueprint for Albertans struggling to deal with parenting issues in this pandemic.

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