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Family

SCC's fluid treatment of 'best interests of the child' test: Recent Supreme Court authority

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(February 19, 2021, 1:39 PM EST) -- Perhaps the guidance offered by the Supreme Court of Canada on the "best interests" test in its seminal jurisprudence is answered in the Alberta decision of *A.N.M. v. D.R.H.* [2019] A.J. No. 1062. In an application to assess parenting, Justice Todd LaRochelle went back to pre-*Young v. Young* [1993] S.C.R. 3 authority, and quoted Justice Rosalie Silberman Abella, in *MacGyver v. Richards* [1995] O.J. No. 770 at para. 27:

Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention.

Because there are stages to childhood, what is in a child's best interests may vary from child to child, from year to year, and possibly from month to month. This unavoidable fluidity makes it important to attempt to minimize the prospects for stress and instability.

In another of her more recent Supreme Court of Canada decisions discussing the "best interests" test, *Kanthasamy v. Canada (Citizenship and Immigration)* [2015] 3 S.C.R. 99, and writing for the majority, Justice Abella reached back to her opinion in *MacGyver v. Richards* and stated that the "best interests of the child" principle means "deciding what appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention" (para. 36).

By circling back to her earlier definition of the "best interests" test, perhaps Justice Abella has underscored its most tangible meaning: what is in the "best interests of the child" is fluid and dependent on the circumstances at any given time.

More recently, the Supreme Court of Canada has added some further texture to the best interests test. *Michel v. Graydon* 2020 SCC 24 is a case in which historical child support claims were allowed notwithstanding that the child was 23 years of age and no longer a child of the marriage.

The common law spouses had entered into a consent order for child support, but the father had underreported his income during the years in which the order was in effect. While the court analysis of child support is of certain interest, the concurring judgment of Justice Sheilah Martin introduces compelling considerations to the analysis, expanding on the policy reasons why allowing claims for historical child support is in the best interests of the children.

In exploring the policy framework, Justice Martin underscores that the nature of child support is animated by the best interests of the child (para. 53) and that it is consistent with the primacy of the child's best interests that they be sheltered from the economic consequences of divorce (para. 37).

Further articulated by Justice Martin was that the *Federal Child Support Guidelines* helped shift the focus from a " 'need-based' regime … to one that determines a child's entitlement to support" (para. 50). Too, Canadian jurisprudence and Canada's international obligations recognize that parents and custodians are primarily responsible for securing the conditions of living necessary for the child's development and the state has the responsibility to take all appropriate measures to secure financial support for the child (para. 103).

A procedural bar to historical child support runs counter to the best interests of many children. Moreover, the best interests of the child are intrinsically tied to those of their caregiver.

While the Supreme Court of Canada has endeavoured over the years to articulate the nuances of the best interests test, it is evident that the test has remained fluid, and continues to remain dependent on the circumstances and the facts before the court. There is, however, no doubt that the "best interests of the child" is foundational to any argument before the court on matters involving children, and "the best interests of the child are at the heart of any interpretative exercise" (para. 102 of *Michel v. Graydon*).

As also observed by Justice Martin in *Michel v. Graydon*, this aligns with Canada's obligations under the United Nations Convention on the Rights of the Child which, in Article 3(1), makes a child's best interests a primary consideration in all actions. The amendments to the *Divorce Act*, effective March 1, 2021, will now prescribe, in detail, the factors to consider in deciding what is in the best interests of the child, and with this prescription, together with the historical guidance of the court, it is anticipated that there will be more clarity when advancing best interests arguments.

This is part two of a two-part series. Part one: SCC's fluid treatment of 'best interests of the child' test: Seminal jurisprudence.

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