

Family

Alberta Court of Appeal upholds variation of parenting as consequence of contempt

By Barb Cotton and Christine Silverberg



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(June 8, 2021, 3:04 PM EDT) -- In a seminal case for Alberta, *JLZ v. CMZ* 2021 ABCA 200, the *per curiam* Alberta Court of Appeal has 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. The appellate decision arose after findings by the case management judge, Justice Johanna C. Price, that the mother had engaged in parental alienation and was in contempt of several court orders providing the father access.

In the words of Justice Price, the mother had engaged in "coaching antics and deliberate acts to thwart [the father's] access and interfere and poison his relationship with the children" (*Zak v. Zak* 2021 ABQB 229 at para 112).

The appellate decision, and the series of lower court decisions leading up to it, are instructive in that:



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- the appellate court confirms that a variation of parenting can be a consequence of contempt;
- the egregious factors that will lead to a finding of parental alienation are laid out; and
- indicia of "extreme" supervision which will exceed permissible boundaries of supervised access are reviewed.

In this first part of our series, we review the appellate court's conclusion that a variation of parenting can be a consequence of contempt. In part two we will review the factors leading to a finding of parental alienation and extreme supervision of access.

The parties began living together in 2011, married in 2014 and separated in July 2019. Leading up to the separation, the father had experienced depression and alcohol abuse, but quickly addressed the problem and maintained sobriety, as was evidenced by a series of random drug and alcohol tests.

The mother continued to be mistrustful of the husband, however, and insisted that he only see his children under her supervision, or the supervision of her nanny or family members, with such access to be exercised only in the matrimonial home. The father applied to the court for unsupervised access and was granted this, but nonetheless the wife insisted that the access continue to be supervised and take place only in the matrimonial home.

A "Practice Note 7" assessment by a psychologist was agreed to, and this report found the father to be in control of his use of alcohol and "that he could as well or better than most other parents in the general population adequately meet the children's needs," with no physical or emotional risks to the children (*Zak v. Zak* 2021 ABQB 229 at para. 38).

Subsequent to the court's grant of unsupervised access by the father, access was completely denied by the mother for months; a private investigator was hired by the mother to impede transition during

access and the mother called the police during access transition on many occasions. The mother planted whistles throughout the house and yard and encouraged the 5-year-old to whistle her distress with her father's access.

Alleged breach of COVID protocols were asserted by the mother. Finally, the mother alleged sexual abuse of the children, which allegations were readily dismissed by the authorities. On Aug. 13, 2020, the mother was found by Justice Price to be in contempt of two access orders. Most significantly, the mother was found to have engaged in alienating behaviour.

This desultory situation continued until matters were brought to a head in a case conference on March 12, 2021. The mother was found to be in contempt of the access order of Justice Price of Feb. 8, 2021, and as a result of the contempt, the primary care of the children was changed from the mother to the father.

Justice Price noted the recent amendments to the *Divorce Act* dealing with family violence and found that the mother had subjected the children to "continued family violence affecting them" (*Zak v. Zak* 2021 ABCA 131 at paras. 16-18 and appended Interim Order of Justice Price), and thus it was in the best interests of the children that they be removed from her care. The father was granted interim sole care of the children; the mother was denied parenting time except at the discretion of the father.

Later that afternoon, the maternal grandmother and aunt allegedly absconded with the children. The RCMP located them 33 days later in British Columbia. The children were returned to the father, and the grandmother and aunt were criminally charged with forcible confinement and abduction.

The mother appealed the order of Justice Price of March 12, 2021, on various grounds but primarily on the basis that Justice Price had erred in issuing a parenting order which changed the sole care of the children from mother to father as a consequence of contempt. The appellate court canvassed the conflicting law across Canada on the point, taking note of the Ontario Court of Appeal decision *Chan v. Town* 2013 ONCA 478 at para. 6 that a change in parenting should not be used as punishment for contempt.

Notwithstanding, the Alberta Court of Appeal upheld the case management judge, and stated:

[62] In summary, a change in parenting is available following a finding of contempt. It should be used with restraint. It must be proportionate to the gravity of the conduct and the personal culpability of the contemnor and the court must consider other, less drastic measures. The overriding principle is whether the order is in the best interests of the child. Two of the courts' fundamental obligations form the foundation of this case: the obligation to safeguard the dignity of the courts and the force of their orders, and the obligation to safeguard the best interests of children. The primary mechanism by which the courts protect children is the making of orders. A parent's wilful and repeated contempt of court orders may force the court to consider whether it can effectively maintain its *parens patriae* role while the children are in that parent's care. In rare circumstances, a change of parenting might be necessary in service of the children's best interests and the courts' ongoing obligation to protect them.

Clearly, the Alberta Court of Appeal came to the right conclusion. In addition to the seminal stance taken for Alberta in the face of conflicting law concerning the consequences of contempt of a parenting order, what is noteworthy about this decision is the affirmation of the application of the newly introduced "family violence" provisions of the *Divorce Act* in the context of parental alienation, the recognition of the superior court's *parens patriae* jurisdiction and the priority of a child's best interests.

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