

Family

Court implicitly upholds finding of parental alienation that amounts to 'family violence'

By **Barb Cotton and Christine Silverberg**



Barb Cotton



Christine Silverberg

(June 22, 2021, 10:51 AM EDT) -- In part one, we summarized the seminal case in Alberta, *JLZ v. CMZ* 2021 ABCA 200, in which 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.

The appellate decision arose after findings by the case management judge, Justice Johanna C. Price, that the mother was in contempt of several court orders to provide the father access, and moreover had engaged in parental alienation by coaching and deliberate acts to thwart, poison and interfere with the father's relationship with the children (*Zak v. Zak* 2021 ABQB 229 at para 112).

We earlier reviewed the appellate court's conclusion that contempt of a parenting order can lead to a variation of parenting. In this part two, we review the factors leading to a finding by the case management judge of parental alienation which amounted to "family violence" within the meaning of the new amendments to the *Divorce Act*.

The facts of the case can be briefly recapped as follows: 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 father, 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. The father's access to the children was subsequently denied by the mother, for months.

On August 13, 2020, in an oral judgment issued as *Zak v. Zak* 2021 ABQB 229, 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, which included:

- placing whistles around the home and yard and coaching the 5-year-old child to blow a whistle if she was in fear of her father;
- imposing "extreme supervision" to the point of intimidation of the father and interference with his access;
- limiting the father's access to the matrimonial home;
- believing that the father was still abusing alcohol, despite evidence to the contrary;
- refusing to accept and at the time misconstruing the expert psychologist's report;
- showing a tone of distrust in the mother's affidavits, to the point of "alienating, obstructive, intrusive, and deeply concerning behaviour," and that she would persist in her efforts to interfere in the children's relationship with their father;

- arranging to have a third-party present during access transition (in a subsequent decision, *Zak v. Zak* 2021 ABQB 360, identified as a private investigator), who impeded the father's access; and
- coaching the 5-year-old to think of her father as a liar (*Zak v. Zak* 2021 ABQB 229 at para. 91).

The mother was found to have ignited trauma in the children, "and now it is aflame" (para. 101). In order to ensure the "greatest possible protection of the children's physical, psychological and emotional safety," the children needed to be "reunited with the father" and the mother was admonished to stop her "obstructive, intrusive, poisonous behaviour" (para. 104).

Features of the "extreme supervision" of the mother are remarkable and illustrate what behaviour is clearly not acceptable. Initially the father acquiesced to the mother's demands for supervised access in the matrimonial home by the mother, the nanny or members of the mother's family. Counsel for the mother had been initially charged with suggesting guidelines for supervised access to the then unrepresented father, but instead imposed mandatory requirements for the visits.

The supervisors were to see and hear all contact and conversations between the children and their father, and to take notes. The visits could be interrupted or ended by the supervisor at any time. The father had no moment alone with his children. He was not permitted to sit alone at the dining table with his children; he was prevented from leaving gifts or food for his children; he was prevented from picking up his youngest child to say goodbye; and was not allowed to Facetime with the children and his parents. When he complained about the restrictions, he was denied access for weeks or months.

With respect to this extreme supervision, Justice Price stated (*Zak v. Zak* 2021 ABQB 229):

[29] All of this behaviour would be traumatic for anyone including the children or any parent. I find that Jacqueline and her family members exhibited extreme behaviour that was intended to get the negative reaction from Colin that had a resulting traumatic and negative effect on the children. They have restricted Colin from having any quality time with the children and have interfered with the development of his relationship with the children and vice versa, their relationship with their father.

This untenable situation continued into 2021. Alleged breach of COVID protocols were asserted by the mother. The mother also alleged sexual abuse of the children, which allegations were readily dismissed by the authorities.

Matters were brought to a head in a case conference on March 12, 2021. The mother was found to be in contempt of an access order of Justice Price of Feb. 8, 2021, and as a result of the contempt regarding access, the primary care of the children was changed from the mother to the father. Justice Price noted the "best interests" test and the recent amendments to the *Divorce Act* requiring the court to consider family violence (ss. 16(3)(j) and 16(4)).

Justice Price 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.

The decisions in both *JLZ v. CMZ* and *Zak v. Zak* illustrate the boundaries of parental behaviour, the lines that are crossed where behaviour by a parent amounts to parental alienation, and when supervised access devolves into the impermissible extreme.

Parental alienation can have serious, long term effects, and these decisions confirm the importance of considering the best interests of the children in the larger framework of the newer provisions in Canada's *Divorce Act*, redefining domestic violence by incorporating psychological abuse. Weighing the best interests of the child must include the impact of family violence, including coercive and controlling behaviour, and parental alienation must be seen for what it is — another form of domestic violence.

This is part two of a two-part series. Part one: Alberta Court of Appeal upholds variation of parenting as consequence of contempt.

Barb Cotton is the principal of Bottom Line Research and assists solo, small and specialized lawyers with their research and writing needs. She can be reached at (403) 240-3142, cell (403) 852-3462 or e-mail barbc@bottomlineresearch.ca. Christine Silverberg is a Calgary-based lawyer with a diverse advocacy, regulatory and litigation practice. She can be reached at (403) 648-3011, christine@silverberglegal.com or through www.christinesilverberg.com.

Photo credit / Ilya Burdun ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.

© 2021, The Lawyer's Daily. All rights reserved.