# Top Family Law Cases of 2021

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Emergency Protection Orders

This recent Alberta Court of Appeal decision, ***DCM v. TM***, 2021 ABCA 127, issued April 9, 2021, reviews this recent *per curiam* Alberta Court of Appeal decision setting out governing legal principles re emergence protection orders, ***Schaerer v. Schaerer***, 2021 ABCA 104, issued March 18, 2021. An EPO is issued under the authority of the *Protection Against Family Violence Act*, RSA 2000, c P27. In ***DCM v. TM*** the *per curiam* appellate court states:

[15] The test on a review of an EPO is whether (1) family violence has occurred; (2) there is reason to believe that the respondent will continue or resume carrying out family violence; and (3) by reason of seriousness or urgency, an order should be granted. A reviewing judge must make the requisite findings of fact on each element of the test and be careful and clear in their conclusions in order to confirm the EPO.

. . .

[17] On the record before us, the reviewing judge accepted that both parties were telling the truth, but she did not determine whether family violence actually occurred in March 2020 or at any other time. Similarly, she did not decide whether there was a risk of family violence continuing into the future. It appears that she was persuaded to confirm the EPO because the mother was afraid "for some reason", things were going well with the child, everyone seemed happy, and the EPO should continue "out of an abundance of caution". These are not appropriate justifications to confirm an EPO. As set out in ***Schaerer***: [20] ... These events call for an inquiry, but absent a finding of what actually happened, it is not appropriate to issue a restraining order "out of an abundance of caution" or as a matter of routine.

In the result the appellate court set aside a 6 month renewal of an EPO.

Adult Interdependent Partner Claim

In a remarkable recent Alberta Court of Queen's Bench decision, ***Mitchell v. Reykdal*** 2021 ABQB 301, issued April 19, 2021, Justice Anna Loparco wrestles with a true Gordian knot in an adult interdependent partner claim. The plaintiff was in a 17-year relationship with the defendant, who she believed was in the process of divorcing his wife, and with whom she believed she was in an exclusive relationship. In fact, as it turned out, the defendant was leading a double life. The plaintiff did not know this — she believed the defendant left to take

care of his three sons every second weekend as part of a parenting arrangement with his ex-wife. After finding and then wearing an engagement ring she found in the house, and which the court later found the defendant intended to give to her, the plaintiff held herself out to their community as his fiancée. A wedding date was set. The defendant did not go to great lengths to keep their relationship a secret, taking the plaintiff to company parties and even introducing her to members of his family, including one of his sons. The plaintiff was not regularly employed outside of the home after the first few years of the parties' relationship and, although she made some contributions to the businesses of the defendant, she largely devoted her energies as a homemaker and to the needs and welfare of the defendant and her child, thus functioning in a dependent, traditional role. The plaintiff's child called the defendant "Dad," and he became integrated with her extended family, serving as a pallbearer at her father's funeral. The plaintiff and her daughter, and sometimes members of the plaintiff's extended family, lived with the defendant in a series of high-end homes, rent free, over the years. When the plaintiff's daughter herself had children, they called the defendant "Grandpa." As it turned out, the defendant was married for nearly 30 years to a woman he had met in high school and who was raising his three sons, all of whom were heavily involved in hockey and lacrosse. The defendant's wife also acted within a traditional role. The wife accepted the defendant's fiction that he was so busy working that he could come home only every second weekend. The defendant was an independent service provider to the oil and gas industry. While away, the defendant would speak to his wife by telephone every three days, and he was never away for more than three weeks at a time. When he did go home to his wife, the defendant attended 55 per cent to 60 per cent of the games of his three sons, and he and his wife shared a bedroom and had intimate relations. Justice Loparco found that the wife was "blindsided" when she found out about her husband's long-term relationship with the plaintiff. To make a complicated fact history even more complicated, the defendant apparently had affairs with many other women, despite having what appeared to be committed relationships with both the plaintiff and his wife. The defendant ended his relationship with the plaintiff after 17 years of living together, offering her a car and $200,000. She consulted a lawyer and was shocked to learn that the defendant was still married. The plaintiff brought a court action for support as an adult interdependent partner (AIP) and for damages in relation to property and businesses acquired during their relationship. In a series of court applications, the plaintiff was granted AIP support on an interim without prejudice basis.

The first issue before Justice Loparco was to assess whether the plaintiff had standing as an adult interdependent partner. She decided that, in view of the fact the defendant and plaintiff shared each other's lives, their emotional commitment to each other and because they functioned as an economic and domestic unit, the plaintiff had standing as an AIP. Further, Justice Loparco found that the defendant had actually been separated from his wife for the entirety of the 17-year relationship with the plaintiff. The Alberta *Adult Interdependent*

*Relationships Act*, SA 2002, c. A-4.5 (AIRA) bars an AIP claim for support in certain circumstances, and states that a defendant cannot become an adult interdependent partner if he or she was a married person *living with* his or her spouse. The defendant relied on this bar, and the issue before Justice Loparco therefore became whether the defendant was "living with" his wife over this period of time, so as to bar the claim, or whether he was in fact living with the plaintiff.

In the result, and notwithstanding the defendant's legal marriage to his wife, Justice Loparco found that the defendant was *de facto* living with the plaintiff AIP, and her claim was not barred. In the course of her analysis, Justice Loparco first noted that while the factual scenario might be repugnant to many, the court has no business in passing judgment on the defendant's lifestyle choices. The narrow question was whether the plaintiff was an adult interdependent partner notwithstanding that the defendant periodically returned to the matrimonial home where his wife and children lived. Justice Loparco discounted case law from other jurisdictions given that it was a "novel case with little precedential guidance," noting that the "legislators appear not to have contemplated that certain married people might enter into a legitimate relationship of interdependence with another person without being truthful about the extent of their relationship with their spouse" (see para. 9). Justice Loparco turned to Hansard for a statutory interpretation of the AIRA s. 5 bar and the general purpose of the Act. In the result, she held that the stipulation in the bar that the party must not be "living with" their spouse should be construed narrowly and as part of a comparative analysis. Justice Loparco underscored that the legislature in enacting the AIRA intended that marriage-like relationships produce certain responsibilities. The purpose of the AIRA is to ensure those who create relationships of dependency remain responsible for taking care of the dependent individuals when the relationship breaks down. Further, the AIRA must be construed as remedial and be given a "fair, large and liberal construction and interpretation."

## Polyamory

In the recent British Columbia Supreme Court case, ***British Columbia Birth Registration*** No. 2018-XX-XX5815, 2021 BCSC 767, issued April 23, 2021, Justice Wilkinson has exercised the Court's *parens patriae* jurisdiction to issue a declaration of parentage to the third female adult, "Olivia", in a 3-person polyamorous relationship. A child, conceived through sexual intercourse, was born to a married couple, "Eliza" and "Bill". Pursuant to the *Family Law Act*, SBC 2011, c. 25, the biological parents were the only legal parents named on the child's birth certificate. In exercising the court's inherent power and authority to "fill gaps that have arisen from changing social conditions" (para 40) and in considering whether a declaration of parentage was in the child's best interests, Wilkinson J ordered that the birth certificate be amended accordingly.

The *Family Law Act* of British Columbia provides that, in addition to a child being born to biological parents or adopted, parentage may also be determined if the child is conceived by artificial insemination. The Court is empowered to make a declaration of parentage if there is a "dispute" or "uncertainty" regarding a person's parentage (FLA s. 31). Despite extensive attention to the matter of determining parentage in the FLA (Division 2), the facts in the case of Olivia, Eliza and Bill did not enjoin any of the forgoing – biology, adoption or artificial insemination, and there was no "dispute" or "uncertainty" found by the judge. Justice Wilkinson was tasked with deciding whether she would grant Olivia, the third adult in the polyamorous triad, a declaration of parentage, thereby entitling Olivia to all the legal rights of a parent.

It is important to note that all three adults were found by the judge to be "loving, caring, and extremely capable individuals" (para 17). It is also important to note that all three adults were in support of the application for the declaration of parentage of Olivia. The Attorney General of British Columbia opposed the application, and the Registrar General of the Vital Statistics Agency took no position and made no submissions.

To better understand the decision a brief explanation of polyamory is required. John-Paul E. Boyd, QC provides an excellent overview in "Polyamorous Relationships and Family Law in Canada", Canadian Research Institute for Law and the Family, 2017 CanLIIDocs 193 https://canlii.ca/t/7d3. People who are polyamorists are involved in a wide range of intimate partner arrangements that vary as to the number of people involved, the level of commitment of those involved, and the nature of the relationships pursued – the term itself is gender neutral and the relationship may include partners of any gender in a wide range of arrangements. What is consistent, however, is that polyamory is characterized by having relationships with more than one person at the same time (and is to be distinguished from bigamy and polygamy, which involve marriages). There are, however, various themes regarding polyamory, including adaptability, choice, transcendence of traditional gender and parenting roles and transparency and honesty. Thus, "a polygamous cohabiting ménage is formed by freely consenting, informed adults, whose personal values emphasize equality and honesty . . . " (Boyd at p. 15). As Justice Wilkinson explained: "[t]o [the petitioners] this means that they each have a relationship with one another and each of their relationships with each other are considered equal" (para 8).

In this case, the "best interests of the child" were at the heart of the decision regarding a declaration of parentage. Justice Wilkinson reviewed why it would both be important for the third adult in the triad to gain legal parentage and be in the best interest of the child:

- the declaration of parentage is a lifelong immutable declaration of status;
- it allows the parent to fully participate in the child's life;
- the declared parent has to consent to any future adoption;

- the declaration determines lineage;
- the declaration ensures that the child will inherit on intestacy;
- the declared parent may obtain a health care card, a social insurance number, airline tickets and passports for the child;
- the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada;
- the declared parent may register the child in school; and
- the declared parent may assert his or her rights under various laws governing, for example, health care (para 42).

Further, a declaration of legal parentage would secure that parent's legal financial obligations to the child, which require parents to provide support for their children (para 80). Finally, and perhaps, as stated by Justice Wilkinson to be the most important, "parentage is immutable – the relationship between a parent and their child cannot be broken" (para 46).

In the result, Justice Wilkinson found that there was a gap in the *Family Law Act* with regard to children conceived through sexual intercourse who have more than two parents:

> [68] . . . that there is a gap in the FLA with regard to children conceived through sexual intercourse who have more than two parents. The evidence indicates that the legislature did not forsee the possibility a child might be conceived through sexual intercourse and have more than two parents. Put bluntly, the legislature did not contemplate polyamorous families. This oversight is perhaps a reflection of changing social conditions and attitudes . . . or perhaps is simply a misstep by the legislature. Regardless, the FLA does not adequately provide for polyamorous families in the context of parentage. (Emphasis in original)

Wilkinson J invoked her *parens patriae* jurisdiction to fill the legislative gap, declaring Olivia to be a parent alongside the child's other two parents, Eliza and Bill.

The most notable feature of this case is that all three putative parents of the child agreed to the declaration of parentage. The case is a significant step forward in advancing the rights of polyamorous families. What would have been the result if Eliza and Bill had objected to the application of Olivia for a declaration of parentage, after a falling out of the parties and a dissolution of the ménage? Would the declaration of parentage of Olivia nonetheless been found to be in the best interests of the child? Perhaps ***British Columbia Birth Registration*** No. 2018-XX-XX5815, 2021 BCSC 767 is best seen as an important first step in what will be developing case law.

Parental Alienation

In a seminal case for Alberta, ***JLZ v. CMZ,*** 2021 ABCA 200, issued May 28, 2021, 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:

•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.

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 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.

Retroactive Child Support

In ***Colucci v. Colucci***, 2021 SCC 24, issued June 4, 2021, Madam Justice Sheilah Martin, writing for the Supreme Court of Canada, laid out a principled approach to issues of "retroactive" child support, both with respect to applications for retroactive increases in support that should have been paid given revealed increases in the payor's income, and with respect to retroactive decreases in child support paid given the reduction in income of the payor.

The major takeaway from this decision, building on the previous decision of ***Michel v. Graydon***, ["Failure to disclose material information is the cancer of family law litigation" (per Brown J in ***Michel*** at para 33)] is that: "[T]he linchpin holding the child support regime together is financial disclosure" (per Martin J in ***Colucci*** at 32). And further: "[T]he payor's duty to disclose income information is a corollary of the legal obligation to pay support commensurate with income" (para 52).

Another significant development of ***Colucci***, however, is that Martin J has retrenched and refined the principles of ***DBS v. SRG***, 2006 SCC 37, [2006] 2 SCR 231 ("***DBS***") so as to give a road map of a "presumption based approach" to retroactive child support applications.

Martin J summarizes the principles governing where the payor applies under s. 17 of the *Divorce Act* to retroactively decrease child support as:

•The payor must meet the threshold of establishing a past material change in circumstances, and this material change must have some degree of continuity that is real, and not one of choice.

•Once a material change in circumstances is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary (the "presumptive date of retroactivity"). In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the

situation. This is to be distinguished from an application for a retroactive increase of child support, which, because of informational asymmetry, merely requires a "broaching" of the subject to establish a date of effective notice.

•Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.

•The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The ***DBS*** factors (adapted to the decrease context) guide this exercise of discretion. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support is decreased). The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.

• Once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified in accordance with the *Guidelines*.

Martin J summarizes the new principles which apply to cases in which the recipient applies under s. 17 to retroactively increase child support, which in many respects mirror the above set out principles. Of significance is that if there is blameworthy conduct of the payor, the three year rule will not apply to limit the date of retroactivity and the retroactive child support may be payable from the date of increase in income of the payor.

Notwithstanding the welcome clarity Martin J has brought to this area, it is on balance a conservative judgment, and she has to some extent resiled from the promise of her concurring judgment in ***Michel***. Further, her views in ***Colucci*** regarding the efficacy of ***DBS*** and the relative importance of the ***DBS*** contextual factor of delay stand in stark contrast to the opinions of her former colleagues on the Alberta Court of Appeal on these points, as expressed recently in ***Henderson v. Micetich***, 2021 ABCA 103.

In her concurring judgment in ***Michel***, Martin J spoke of delay as having to be appreciated in a broader social context (para 113), which she had characterized earlier as involving issues of family violence and access to justice. There may be many reasons for delay, including information asymmetry regarding the payor's income, lack of financial resources of the recipient to pursue a legal remedy for retroactive child support, or potential behavior by the payor to intimidate the recipient from taking legal action. Martin J concludes in ***Michel*** that delay itself is not always "inherently unreasonable" (para 113). Martin J appears to have resiled to some extent from this view when she subsequently uncritically adopts delay as a ***DBS*** contextual factor in ***Colucci***.

Martin J expresses some concerns about the efficacy of ***DBS*** in ***Colucci***, and alludes to a potential revisitation of the issue in the future. She suggests that it may be preferable to have

retroactive increases payable presumptively as of the date of increase in income, and the issue may need to be revisited:

> [45] In light of the existing approach to blameworthy conduct and the pervasiveness of non-disclosure, it may be necessary in a future case to revisit the presumptive date of retroactivity in cases where the recipient seeks a retroactive variation to reflect increases in the payor's income. A presumption in favour of varying support to the date of the increase would better reflect the recipient's informational disadvantage and remove any incentive for payors to withhold disclosure or underpay support in the hopes that the *status quo* will be maintained. Such a presumption would accord with other core principles of child support and reinforce that payors share the burden of ensuring the child receives the appropriate amount of support.

Oppression Remedy

In this ABQB decision, ***Berman v. 905952***, 2021 ABQB 434, issued June 2, 2021, the wife was granted an equitable interest in two real estate development companies owned by her husband as part of the matrimonial property division and the child and spousal support judgment, which totalled $1,379.432. The companies basically owned "holding properties" for future development near the Stampede grounds in Calgary. The husband had an active business partner in both companies who he had run the businesses with for many years. The husband claimed that he was unemployed and impecunious and had little assets in addition to the two companies, but his credibility was found to be poor.

The wife was granted a trust, or equitable, interest in the shares of the two companies equal to the amount of her judgment.

To realize on her judgment, the wife applied for oppression remedies against the two companies and asked that the court liquidate and dissolve the companies so that she could receive payment of the monies owed to her. The wife had been denied the right to vote her interest at the Annual General Meeting of the shareholders of the company through machinations of the husband. The wife also alleged other acts of oppression. The business partner indicated to the court that he was willing to sell the holding properties simply as a means of extricating himself from his partner's messy divorce, upon certain conditions.

Justice D.A. Labrenz stated:

[35] The question before me asks how corporate law and family law obligations should be resolved in context of the corporate oppression remedy. Added to this question, as was the

case in ***Aubin*** [***Aubin v. Petrone***, 2020 ABCA 13], is the added complication of a third-party shareholder.

[36] This appears to be a novel case.

In the result oppression was found, but the remedy of liquidation was found not to be equitable in the circumstances. The parties were invited to come back to argue what other remedies would be appropriate.

The decision is therefore helpful in wrestling with the difficulty in accessing corporate resources to satisfy a family law judgment.

## Varying Parenting in Morning Chambers

Here is an appellate decision that decides a matter long in issue. In the decision of ***Huitt v. Huitt***, 2021 ABCA 235, issued June 23, 2021, the appellant challenged a variation of interim parenting in morning chambers notwithstanding the direction in Practice Note 2:

[4] The sole ground of appeal is that the chambers judge committed an error of law by making a material change to parenting in morning chambers. The appellant refers to Alberta Family Law Practice Note No. 2:

Restrictions on Morning Family Law Chambers
9. Applications for a change of custody or substantial changes to a parenting arrangement will not be heard in Morning Family Law Chambers; rather, these applications must go to Special Chambers.

The appellant's access of every second weekend and on every other Wednesday was limited to one overnight visit per month. The Amicus Counsel advised the court as to her concerns about the mental health and emotional stability of the child.

The appellate court *per curiam* acknowledged the importance of the Practice Note directive, but upheld the decision nonetheless as a valid exercise of discretion of the Chambers judge:

[8] Item 9 of Practice Note No. 2, however, is not jurisdictional in nature. While it signals that substantive changes to parenting should not generally be made in morning chambers, it does not limit the mandate of a chambers judge to make such changes in that forum in appropriate circumstances. Whether a proposed change is "substantial" in nature, and whether the chambers judge should depart from the general guidance in Practice Note No. 2, [is] within the

discretion of that judge. He or she is in the preferred positioned of deciding if such a change is in the best interests of the children and can appropriately be dealt with in morning chambers. Interim parenting orders are afforded deference on appeal. A reviewing court will only intervene if the judge erred in law or made a material error in his appreciation of the facts: Van de Perre v Edwards, 2001 SCC 60, [2001] 2 SCR 1014.

Mobility under the new amendments to the *Divorce Act*

In this ABQB decision, ***KDH v. BTH***, 2021 ABQB 548, issued July 15, 2021, M.J. Lema J decides a mobility application under the recently amended *Divorce Act*, and discusses, among other things:

-the burden of proof
-the "vast majority of care" provision
-the new statutory "best interests of the child" criteria
-family violence.

I understand from a lecture given by the Department of Justice that one of the aims of the new amendments was to expressly overturn the principles of ***Gordon v. Goertz***. This decision is therefore useful for its comprehensive analysis of the new mobility provisions.

Pre-disclosure Support Orders

In this ABQB decision, ***Heuft v. Bramwell***, 2021 ABQB 642, issued August 13, 2021, M. J. Lema J was faced with the issue of imputing income where the father had not made income disclosure. The original 2004 child support order of $200 per month was made 17 years prior, when the child was 6 months old., based on an imputed income of the father. The child was now 17. The father had been ordered three times over the years to make disclosure, and failed to.

After noting that imputation of income could not be made on pure guesswork, Lema J ordered a time limited "pre-disclosure support order".

[64] While I am not in a position to impute income to Mr. Bramwell on the basis of evidence on the record (given his disclosure failures and Ms. Heuft having no particular window into his income-generating activities), I can vary support on a pre-disclosure basis i.e. set support on a temporary basis, with Mr. Bramwell having an opportunity (albeit time-limited) to provide his

long-outstanding disclosure and, as applicable, to argue that the temporary support exceeds his ability to pay support.

In the result the father was provisionally ordered to pay $800 per month, and was given one more opportunity to make full disclosure of his income. The mother's application for retroactive child support was deferred pending the disclosure of the father.

The matter was before Lema J again in ***Heuft v. Bramwell***, 2021 ABQB 830 in October 2021. The father still had not made disclosure. Lema J declined to grant retroactive child support until the mother applied for a further disclosure order which attached consequences for a failure to comply.

## Procedure on Appeal from an Arbitrator

In the recent Alberta Court of Appeal decision of ***Esfahani v. Samimi***, 2021 ABCA 290, issued August 31, 2021, the respondent sought to appeal an arbitration award, and the Family Docket Court in effect waved him on without imposing the statutory requirement of gaining permission to appeal.

[5] When the respondent's application for permission to appeal came up in Family Docket Court, the presiding judge stated:

THE COURT: So with respect to arbitration appeals, usually we hear the leave together with the substantive. Because otherwise the Judge has to look at all of the substantive issues to see if leave will be granted on the question of law. So a Judge usually hears both of them, or if leave is not granted, then it does not go on.

The Docket Court Endorsement was appealed, with the applicant arguing:

[16] In particular, the applicant argues that parties to family law disputes who agree to arbitration should have some assurance that the resulting awards will not be challenged unnecessarily by appeals. The gatekeeping function required by s. 44(2) [of the *Arbitration Act]* is important, and it should not be undermined by adjourning the permission to appeal application over to be heard with the appeal itself. The applicant therefore argues that her proposed appeal raises an issue of general importance to the family law bar and other parties who submit their disputes to arbitration.

Frans Slatter J agreed with the applicant, and granted leave to appeal this point.

Revenge Porn

In ***ES v. Shillington***, 2021 ABQB 739, issued September 16, 2021, Justice Avril B. Inglis confirmed that the tort of public disclosure of private facts was a viable tort in Alberta. The plaintiff was a battered woman, and sued for assault, sexual assault and battery, in addition to her claims for intentional infliction of mental distress, breach of confidence and public disclosure of private facts. The plaintiff sought general damages of $80,000, aggravated damages of $25,000 and punitive damages of $50,000 for the invasion of privacy and infliction of mental distress torts. The defendant did not defend the claims and was noted in default.

The parties were in a romantic relationship from 2005 to 2016 and had two children together. The defendant was a member of the Canadian Armed Forces. After the defendant physically and sexually assaulted the plaintiff in 2016 she moved with the children to a shelter for women, and then to Alberta.

The testimony of the plaintiff was that prior to the relationship she was a happy person who appreciated her sexuality. She shared various photographs with the defendant during their relationship in which she was in varied states of undress and engaging in sexual activity, which was appropriate in her view as he was frequently away on deployment. She thought it was understood between them that the photographs would not be shared in any way. When deployed to a high-risk situation, the defendant confessed to the plaintiff that he had posted her images online to pornography sites, and when she investigated she found the images were posted as early as 2006 and as late as 2018. The plaintiff experienced significant mental distress and embarrassment as a result of the postings, including nervous shock, psychological and emotional suffering, depression, anxiety, sleep disturbance and humiliation. She was unable to emotionally engage in another romantic relationship and was unable to enjoy a social life. She suffered from shame and guilt, and remained insecure and reactive. The plaintiff's psychologist provided evidence as to her psychotherapy treatment schedule and the injuries she suffered.

The plaintiff was awarded general damages of $80,000, aggravated damages of $25,000 and punitive damages of $50,000 for the invasion of privacy torts. The court found that the defendant had been acting with malice and the publication of the images was another form of domestic abuse. In addition, the plaintiff was awarded general damages of $175,000, aggravated damages of $50,000 and punitive damages of $50,000 for "the violence perpetrated against her." Special damages in the amount of $30,000 for medical expenses and the expenses of having to suddenly relocate to Alberta were also awarded.

The Justice concluded:

[115] The conduct of this Defendant through the course of his bonded, committed familiar relationship with the Plaintiff is appalling and warrants a significant response from the court. His physical and sexual abuse of the Plaintiff destroyed his family unit and significantly damaged the mother of his children. Those actions were traumatizing, humiliating and frightening to the Plaintiff. Also significantly traumatizing were the breaches to her privacy. The Defendant's actions are inexplicable and inexcusable. His actions were meant to control, degrade and humiliate the Plaintiff. While she has shown significant strength by leaving the relationship, seeking extensive treatment, carrying on with her life including single-handedly raising her children and successfully pursuing an education, the impact the Defendant has had remains present. It is most certain this his conduct will continue to affect the Plaintiff and her children for the foreseeable future.

The recognition in *ES v. Shillington* of the new tort of public disclosure of private facts was explicitly endorsed in the recent Alberta case of *LDS v. SCA*, 2021 ABQB 818, issued October 18, 2021, a decision of Justice R. Paul Belzil. The parties were in an intimate relationship from 2011 to 2014 and had one child. The plaintiff alleged it was an abusive relationship, with the defendant insisting on "sex on demand." When the plaintiff left the relationship, she commenced proceedings for child and partner support. The plaintiff had given the defendant intimate "boudoir" photographs as a gift and had provided other sexually explicit photographs of herself in the course of the relationship. Some of these included images of sexual activity with the defendant.

After the end of their relationship, the defendant hacked into her Facebook account and posted one of the boudoir photos online. He then hacked her e-mail account and sent the photo to her current boyfriend, along with a sexually suggestive e-mail. As a result, the defendant was charged with the criminal offence of mischief and pled guilty. Later, when the plaintiff applied for employment, she discovered her name was linked with a pornographic website and her photographs had been posted online.

The plaintiff sued the defendant for breach of confidence, invasion of privacy and intentional infliction of mental distress, which Justice Belzil characterized as a revenge porn claim. The plaintiff claimed general damages of $250,000, loss of income of $250,000, aggravated damages of $100,000,punitive damages of $100,000 and special damages of $25,000. The claim for intentional infliction of mental distress was held not to be made out as the plaintiff did not lead evidence to show she had sustained a visible and provable illness. An Anton Pillar order was issued allowing the search of the defendant's iPhone for incriminating evidence. Justice

Belzil found the defendant summarily liable for breach of confidence and public disclosure of private facts on the basis of circumstantial evidence.

In the result, Justice Belzil awarded general damages in the same amount as that awarded in ***ES v. Shillington***, $80,000. The defendant was found to have been motivated by malice, and aggravated damages of $25,000 were awarded. The trial judge characterized the actions of the defendant as outrageous, planned and deliberate. He attempted to conceal his conduct. The plaintiff was vulnerable, and the defendant's conduct was properly viewed as an attempt to control her after she had terminated the relationship. In view of the need to deter such conduct, punitive damages in the amount of $25,000 were also awarded.

In summary, it appears that damages for revenge porn will be awarded in a significant amount across Canada, with general damages approximating $80,000 and aggravated damages approximating $25,000, if malice is found. The amount awarded for punitive damages may still be a wild card, depending on the egregiousness of the conduct of the defendant. Clearly the courts have characterized revenge porn as a form of domestic abuse, and they seem eager to send a message of deterrence. For this reason punitive damages may be substantial.

PN7 Reports after amendments to the *Divorce Act*

In this Alberta Court of Appeal decision re PN7 reports, ***McCauley v. McCauley***, 2021 ABCA 311, issued September 17, 2021, the mother had requested a PN7 report be prepared, but the parties were of low financial means, the child was 11, and the child did not have behavioral or psychological problems. The mother appealed the Chamber judge's refusal to order a PN7, arguing, among other things:

[10] Second, the appellant argues that the chambers judge failed to consider the "human-rights-based approach" of the recently amended Divorce Act that recognizes children's rights to have their views considered and the new section 16(3)(e) that requires a court to consider "the child's views and preferences". She argues the effect of the amendments is to narrow the discretion afforded to judges to refuse expert evidence in order to ensure those views are before the court..

The *per curiam* appellate court dismissed the appeal, stating:

[19] We do not agree the Divorce Act amendments narrow the discretion afforded to judges to refuse to order expert reports to ensure the child's views and preferences are before the court.

The amendments simply codify a list of factors that a court must consider when deciding the best interests of the child. How to do that is within the judge's discretion and the exercise of that discretion is entitled to deference. Appellate intervention is not warranted in the result.

Dower Rights

The *Dower Act* of Alberta has long been criticized as an archaic device as, for example, it only secures dower rights, which are in the nature of property rights, for married spouses, and does not protect adult interdependent partners. As a result, the Alberta Law Reform Institute is undergoing an extensive project to lead to the modernization of the Act and I believe they have just issued their report.

In ***Graham v. Graham****,* 2021 ABCA 340, issued October 12, 2021, the Alberta Court of Appeal, *per curiam*, provides an overview of the *Dower Act*, its purpose and history, and has done much to bring the *Dower Act* into modern times. In doing so, the court has underscored its efficacy as another tool for a family law practitioner seeking to safeguard the property rights of their client.

In ***Graham***, the husband and wife were married in 1995, had three children and separated in 1997. They did not divorce, however, although divorce proceedings had been instigated by the husband in 2014 and were still in motion at the time of trial, some 24 years later. The wife and children lived a financially difficult life after the separation of the spouses, and with the wife working in only low-paying service positions, they were evicted from their residence, had their utility services cut off and relied on food banks for support. Life was much different for the husband, who had a successful business as a welder, as well as other successful businesses, and in some years earned over $1 million. He paid only minimal child support, however, and in some years paid no child support at all.

The husband bought the "Duchess Home" in 2006 and mortgaged the property twice before ultimately selling it. This would have required dower consent by the wife on three occasions. The husband swore false affidavits to declare he was not married, however, and her dower consent was not procured. The wife sued for damages under the *Dower Act*.

This action was heard at the same time as the issue of property division under the then governing *Matrimonial Property Act*, as well as the issues of child support and retroactive child support. The trial judge awarded the wife retroactive child support in the amount of $152,649.32 but denied her any claim to a share in the property the husband had acquired, referencing the long separation of the parties and the lack of contribution of the wife to the property acquisition. The wife's argument that she made an indirect contribution to the property acquisition by being denied what would have been her proper entitlement to child support over the years was rejected by the trial judge. The trial judge awarded the wife a penalty of $3,000 for the husband's three-time breach of the *Dower Act*, which he characterized as a "matrimonial property/dower offset". The wife appealed on the basis that the trial judge had failed to award her the proper measure of damages under the *Dower Act*. The Alberta Court of Appeal noted the mandatory provisions in the *Dower Act* stipulating the proper measure of damages, and awarded her one-half of the proceeds of the sale of the Duchess Home, $162,500.

The Alberta Court of Appeal characterized her award of damages under the *Dower Act* as divisible matrimonial property and embarked on a s 8 analysis of what the division of these damages should appropriately be. The appellate court found the "abject failure" of the husband to contribute to the welfare of his family to be highly relevant. The wife's income and earning potential was minimal, whereas the husband made a good living and his resources had increased substantially over the two decades of separation. There was no justification for the husband having breached the *Dower Act* on three occasions.

In the result the wife was awarded 75 per cent of the damages and the husband 25 per cent, for an award to the wife of $121,875. It is the discussion of the interplay between the *Dower Act* and the *Matrimonial Property Act* (now the *Family Property Act*) that is of interest, and that buttresses an action for damages for breach of the *Dower Act* as an efficacious tool for the family law practitioner. On the error in conflating the two remedies, the appellate court states:

[21] In our view, the trial judge improperly conflated the analysis of damages under the *Dower Act* with the distribution of matrimonial property under the *MPA*. The *MPA* and the *Dower Act* serve different purposes: *Joncas* at para 30. Therefore, the determination of claims for damages brought under the *Dower Act* and the division of any such damages awarded as matrimonial property under the *MPA*, require two separate analyses. After flagging that the *Dower Act* is protective in nature, the appellate court underscores the mandatory measure of damages set out in the *Dower Act*:

. . .

[29] The *Dower Act* also provides a remedy to the non-owner spouse in s. 11, under which the owner spouse is liable to the non-owner spouse in an action for damages. Once a disposition is found to be wrongful pursuant to s. 11(1), damages are owed under s. 11(2). Section 11(2) provides that the amount of damages the owner spouse will be liable for is the *larger* of either one half the consideration for the disposition or one half the value of the property at the date of disposition. There is no discretion under the *Dower Act* for calculating damages or valuing the dower rights; therefore, the damages awarded must be as directed by s. 11: *Phan* at para13, *Joncas* at para 25.

Thus in ***Graham v. Graham*** the appellate court has cautioned against conflating the protective *Dower Act* with the Alberta statues governing matrimonial property division and has provided family law practitioners with a strengthened remedy of an action for damages for breach of the *Dower Act*. It is notable that the appellate court also stated it was not in agreement with the trial judge's denial of a division of the husband's property in favour of the wife, but as this was not under appeal the court did not order redress.

<u>Independent Children's Counsel</u>

In this comprehensive ABQB decision, ***DCE v. DE***, 2021 ABQB 909, issued November 15, 2021, K.S. Feth J considers an application to appoint independent children's counsel, and canvasses:

-the factors to consider re whether a child's age and maturity are such that the child's views should be considered
-the circumstances that normally indicate that child's counsel should be appointed
-the factors governing the customization of the role of counsel
-the framework applicable in considering a request to appoint children's counsel
-the factors governing whether in the alternative a PN7 report should be ordered.

The father brought the application for the appointment of counsel for the children, stating that they wished to spend more time with him. The mother resisted the application on the basis that the father was a vexatious litigant engaged in a fishing expedition. The children had not asked for their own counsel. In the result Feth J denied the application, and declined to order a PN& Voice of the Child report, stating:

[77] The high conflict history of the litigation, the weak justification for appointing counsel for the children and the absence of an actual application before the Court seeking to vary the existing Parenting Orders raise substantial concerns about the Father using this application for an improper purpose or a fishing expedition. While I make no finding of actual litigation harassment or misconduct in bringing this application, heightened caution is appropriate.

The value of this decision is in the rigorous analysis as to whether appointment of independent children's counsel is appropriate.

## *In Loco Parentis* and Child Support Obligations

In this recent ABQB decision, ***Thierman v. Tymchuk***, 2021 ABQB 902, issued November 12, 2021, G.R. Fraser J found a common law spouse, following a tumultuous 5 year relationship, to be *in loco parentis* to two older children and responsible for the full measure of *Guideline* child support, notwithstanding the existence of a deadbeat biological father, and notwithstanding the severance of the relationship with the children after separation. The court noted that whether or not the step-parent stands *in loco parentis* is to be determined on the basis of the relationship at the time the parties were together. In this case their relationship was severed after the separation of the parties and the older boy sent the step-parent threatening messages. Child support was ordered nonetheless. The *in loco parentis* father was given leave by the court to pursue the biological father to pay his appropriate share of child support.

## Child Support in Shared Parenting

In the very recent case of ***Spiess v. Spiess***, 2021 ABQB 961 the father made $87,800. The mother had re-partnered and had no income herself, but her partner made over $175,000 per year. They had a new baby. The father argued that the set-off amount of child support established by s. 9(a) of the *Guidelines* should be modified by taking into account the lifestyle of the parties pursuant to s .9(c) of the *Guidelines*, which was a matter of discretion for the trial judge, and he should not have to pay child support.

Lema J framed the issue as:

The narrow question becomes **whether the father can effectively piggyback on the mother's new partner's income i.e. to carry the full weight of child-care expenses in the mother's household i.e. with no contribution from him**.

He noted the principle in the case law that: **new spouses do not take on financial responsibilities for step-children, other than in *loco parentis* situations.**

In the result Lema J found that the evidence did not establish a significant difference between the lifestyles of the parties, and did not modify the set-off amount of child support payable by the father.

END