

RECENT AND INTERESTING FAMILY LAW CASES

2022-2023

PRESENTED TO THE CBA ALBERTA NORTH
FAMILY LAW SECTION

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***ANDERSON V.
ANDERSON, 2023
SCC 13***

Property division , domestic
contracts

ISSUE:

Whether to enforce separation
agreement that did not conform
to statutory requirements for
agreements deviating from
default rules governing property
division

- Short marriage (3 years)
- Parties signed settlement agreement with two friends as witnesses; no financial disclosure, no legal advice
- Agreement that each would retain property in his/her name and give up rights to other spouse's property, except family home and its contents
- Saskatchewan FPA contains provisions similar to sections 37 and 38 of Alberta FPA stipulating formal requirements for validity of agreements

DECISION

- Agreement binding, enforced according to its terms
- Agreement was entitled to serious consideration given that it reflected the parties' understanding of what division of property was fair in the context of their relationship at the time of separation
- Lack of independent legal advice and disclosure did not undermine integrity of bargaining process or fairness of the agreement
- Outcome is in keeping with Alberta decisions (*Corbeil v Bebris*; *Kuehn v Kuehn*), giving significant weight to agreement despite non-conformity with ss 37-38 FPA
- Financial disclosure remains important, but absence may not require judicial intervention if fairness of the negotiation process is not undermined

***AHLUWALIA V
AHLUWALIA, 2022
ONSC 1303,
REVERSED 2023
ONCA 476***

Intimate partner violence

ISSUE:

Recognition of new tort of
family violence

- 2022 trial decision awarded wife \$150,000 for compensatory, aggravated, and punitive damages based on new tort of family violence
- 16-year pattern of coercion, control and abuse – marriage was “not just “unhappy” or “dysfunctional”; it was violent”
- Mandhane J finding existing torts directed at discrete instances of wrongdoing; inadequate to address harm resulting from patterns of behaviour associated with family violence

DECISION

- Recognition of new tort of family violence overturned
- Requirements of the torts of assault, battery, and intentional infliction of emotional distress were met in the instant case and provided remedies to the wife
- Existing torts were capable of capturing harms caused by patterns of conduct inherent in intimate partner violence
- CA agreed with trial award of \$50,000 each for compensatory and aggravated damages, but reversed order for punitive damages

MORAD V IANNONE, ***2023 ABCA 293***

Notice requirements for
relocation

ISSUE:

Whether chambers judge erred
in finding mother complied with
notice requirements before
relocating with children

- Mother travelled to Florida with children with consent of father
- Father subsequently applying for their return when the mother expressed intention to remain in Florida permanently
- “Insufficient clarity” in evidence about whether father may have initially agreed to relocation
- Chambers judge finding wife’s conduct in relation to notice requirement was a “technical breach”

DECISION

- Father's appeal of decision allowing relocation dismissed
- While chambers judge's use of "technical breach" was not ideal, decision to allow relocation was made after considering all the circumstances, including the mother's non-compliance, in context of entire "best interests" determination
- However, court emphasized:

“To be clear, we do not condone parents undertaking a unilateral relocation or a “move first, ask second” type of approach.”

***KUZUCHAR V.
KUZUCHAR, 2023
ABKB 135***

Occupation rent

ISSUE:

Whether mother entitled to adjustment to property division where father occupied matrimonial home post-separation

- Husband lived in matrimonial home for eight years after separation; wife required to rent accommodations
- Parties shared parenting of children on a week on/week off basis; roughly equivalent levels of income
- Husband did not formally request contribution but raised it in response to wife's claim for occupation rent
- Husband had resisted wife's attempts to sell the house

DECISION

- Straight-forward occupation rent calculation was not appropriate, but adjustment of some sort was warranted
- Best approach was to treat housing of the family unit, albeit fractured, as a joint expense until trial
- Marion J assessed all expenses incurred by both parties for accommodations during post-separation period, and gave a credit to the wife as her expenses were higher
- Not just and equitable for husband to have equal share of the property without an adjusting payment to reflect the benefit he enjoyed

KANTOR V

KANTOR, 2023

ABCA 237

Retroactive variation, spousal support, interpretation of court orders

ISSUE:

Whether father entitled to variation of spousal support despite non-compliance with disclosure requirements in prior order

- Consent order suspended husband's obligation to pay spousal support because he lost his job; required him to notify wife within 10 days of finding new employment, and restart paying spousal support within two months
- Husband had periods of employment over next 3-4 years but never notified wife
- Wife discovered husband's employment, sought order requiring him to make all support payments he had missed; husband cross-applied to reduce support

DECISION

- Husband ordered to pay retroactive support for all periods except initial period of unemployment; reduction of support refused
- Right to seek review of support was implicitly conditional on compliance with other terms of consent order
- Court order must be interpreted as a “holistic document”
- Husband could not “cherry-pick” or treat the consent order “as a buffet, where he can pick and choose which paragraphs he might adhere to”

SR v MR, 2023

ABKB 464

Guardianship, contact, alleged sexual assault, changing child's surname

ISSUE:

Whether guardianship, parenting, contact with father or change in surname was in child's best interests

- 3-year-old child; mother alleged child conceived when father sexually assaulted her
- Since birth, child resided exclusively with the mother and her partner, whom child believed was her father; child had never met the biological father
- Father claimed sexual relations were consensual
- Father sought guardianship and parenting or contact time, and to change child's surname

DECISION

- Father's application dismissed
- Not possible on the evidence to conclude that the child was born as a result of sexual assault; s 20(4) FLA did not apply to disqualify the father from guardianship
- Father made no meaningful offer to provide support; refused information about his education, employment, marital status, how he would support the child, or criminal background check
- No evidence that appointing the father as guardian, making an order for contact, or changing her name was in child's best interests

SCHAFER V SCHAFER,
2023 ABCA 117

Appeal of arbitral awards

ISSUE:

Interpretation of arbitration
agreement clause designating
right of appeal

- Parties' arbitration agreement provided for rights of appeal "in accordance with subsection 44 and/or 45 of the Arbitration Act"
- Father appealed a costs award
- Dismissed on grounds that leave was required, which he had not sought, and time to do so had expired
- Father argued arbitration agreement should be interpreted as allowing "full spectrum of appeal rights" on fact, law and mixed fact and law, without requiring leave

DECISION

- Appeal dismissed
- Principle of statutory interpretation that “where parties have deliberately removed words from their agreement, those words are completely discarded” applied
- Provision providing for a right of appeal “in accordance with subsection 44 and/or 45 of the Arbitration Act”, without further detail, had to be interpreted as a broad reference to section 44, and not section 44(1) alone
- Right of appeal was limited to appeal with leave of the court on a question of law only, pursuant to s. 44(2)

***MOHAMUD V
ABDULLAHI, 2023
ABKB 371***

Imputation of income

ISSUE:

Whether to impute income to
father wishing to retire

- 68-year-old father was laid off, decided to retire
- Parties had five children, four residing with mother
- Father alleged health issues, applied for a downward variation of his support obligations

DECISION

- Income imputed to father for minimum-wage, part-time work
- Court reviewed evidentiary requirements related to imputation of income in post-*Peters v Atchooay* case law
- Father's evidence was bare assertions about his medical condition and inability to find new employment in his field at his age; not backed up by medical records or other concrete evidence
- “Without children, the Father would have every right to retire. [...] The fact is, he does have children and he is obligated to support them in a way that is consistent with his capacity to do so.”

MOG v COG, 2023

ABCA 19

Hague Convention

ISSUE:

Whether return of child to father in Sweden likely to cause “grave risk” or place child to in “intolerable situation”

- Application for stay of order for requiring return of child to father in Sweden pursuant to the Hague Convention
- Mother had brought child to Canada initially with the father’s consent, but consent revoked when mother then decided to stay in Canada
- Trial judge found child would not be placed in “intolerable situation” if returned to Sweden; intolerableness to mother was not the relevant consideration

DECISION

- Stay refused; child must be returned to Sweden
- Trial judge's assessment of "intolerable situation" was correct; emphasis is on best interests of the child, not the parent
- Fact that there was an outstanding arrest warrant for the mother in Sweden, which could make her unable to return to Sweden to attend legal proceedings seeking to get her daughter back to Canada, did not create irreparable harm
- Court had to trust that the Swedish authorities would handle the situation appropriately and find a method for the mother to be able to participate in proceedings in Sweden

KELLEY (RE), 2022

ABKB 726;

FESER (RE), 2023

ABKB 509

Family law and bankruptcy

ISSUE:

Impact of bankruptcy
proceedings on property
division and support obligations

- In ***Kelley***, husband claimed 50% ownership of matrimonial home held solely in wife's name
- Parties were separated at time of the wife's bankruptcy; no action for distribution of matrimonial
- Trustee rejected husband's claim as a fraudulent preference or unenforceable agreement since there was no consideration
- In ***Feser***, wife applied to annul the husband's bankruptcy, arguing he was using it to avoid support obligations and enforcement of a damage award the wife had obtained against him for cyberbullying

DECISION

- **Kelley:** trustee's decision affirmed; husband's claim disallowed
- In competing proceedings under the BIA and the MPA, timing is critical; if there is no MPA order in place at the time of bankruptcy, property passes unencumbered to the Trustee, leaving it unavailable for division under the MPA
- **Feser:** annulment of bankruptcy refused; husband genuinely insolvent at time of assignment into bankruptcy
- Under the BIA, support obligations are claims provable; an order of discharge does not release the bankrupt from debt or liability arising under a judicial decision or an agreement respecting support of a spouse or child

***MANJUNATH V.
KUPPA, 2023 ONSC
6057***

Egregious conduct, punitive damages

ISSUE:

Determining property division, corollary relief and other sanctions for "high-handed, malicious, arbitrary and highly reprehensible conduct"

- Husband carried out long-term plan to deprive wife of the benefits of the family assets, including executing documents that were extremely prejudicial to wife without disclosure or legal advice and under duress
- Husband controlling and abusive throughout the marriage
- Conspired with 2 others to sell assets, hide proceeds
- Husband's pleadings struck for failing to provide financial disclosure; deliberate breaches of court orders

DECISION

- Documents signed by wife prejudicing her rights were shams and set aside
- Substantial orders made against the husband for property equalization, lump sum spousal support and outstanding costs
- Two other defendants who participation in husband's scheme were jointly and severally liable for portions of the awards against the husband
- Punitive damages awarded against all three defendants (\$1 million against the husband, \$700,000 and \$500,000 against the other two defendants) - in light of "high-handed, malicious, arbitrary and highly reprehensible conduct".

QUESTIONS?

