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Expert Reports: Are They Inherently Material Evidence?

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Case Commented On: *E.G. v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2014 ABCA 396

This summer I posted a comment on a successful application to stay the Queen's Bench decision of the Honorable Mr. Justice G.C. Hawco, which reversed a Permanent Guardianship Order ("PGO") made by the Provincial Court at trial. On the hearing of the appeal of the Director of Child and Family Services ("the Director") of Justice Hawco's decision, there were several issues raised surrounding the expert reports that were entered as evidence at trial and relied upon in Justice Hawco's decision, but not relied upon in the trial decision of the Honorable Judge L.T.L. Cook-Stanhope. This post will comment upon the Court of Appeal (Justices Côté, Rowbotham and Jeffrey) decision on those issues.

Facts

The background to the appeal is outlined in greater detail in the decision and my earlier post, but it is important to highlight several important developments within the case which began at trial. There were two reports entered as evidence by counsel for the parents, the reports of Ms. Debra Harland and Dr. Sonya Vellet, which were then withdrawn during trial. The authors of these reports were not called as witnesses, therefore not available for cross-examination, and counsel for the parents confirmed to Judge Cook-Stanhope that the parents were not intending to rely on them.

However, the reports were admissible, remained on the record, and were referred to in questioning of the only expert witness called, Dr. Rosalyn Mendelson. The first issue that arose on appeal with respect to these reports was whether Justice Hawco erroneously relied on them on appeal. The Court of Appeal concluded that Justice Hawco did rely on the reports, and should not have (at para 31). Secondly, the Court of Appeal discussed whether such reports would constitute material evidence which, if disregarded at trial, would be a reviewable error. Ultimately, the Court clarified that these reports were not material evidence, and that Judge Cook-Stanhope was correct to not address them in her reasons (at para 35).

Discussion

These reports, and the way in which they should be dealt with, bring up several issues related to the weight of expert evidence and the level of deference to a trial judge on appeal. Without a jury, the judge assumes the role of the trier of fact. If the reports had been withdrawn from a jury trial, the jury would not be able to rely on them. The expert witness role, and the reason for a higher standard of qualification of these experts as opposed to lay witnesses, is that their evidence is not entered for the truth of its contents (at para 21); there is probative value in expert opinions that can assist the trier of fact in making inferences. The trier of fact still has the discretion, absent an overriding and palpable error, to choose which evidence he or she prefers, including which opinions and inferences are preferable (at para 37).
Counsel for the children suggested that Justice Hawco was entitled to reweigh the evidence presented at trial, but the Court of Appeal confirmed that the standard of review for an appellate court does not allow that court to substitute its own view by re-weighing the evidence absent an error in principle or a correct finding that the trial judge had disregarded material evidence. Since the reports were not material, and there was no error in principle (at para 45), the decision of Judge Cook-Stanhope to grant a PGO was restored.

This decision confirms that the level of deference in weighing expert opinions remains very high. If Ms. Harland and Dr. Vellet had been called, Judge Cook-Stanhope would have needed to address their testimony in her decision if she was disagreeing with their opinions, but would not have been required to place any greater weight on those opinions. Without the opportunity for cross-examination and, further, without counsel for the parents specifically relying on the reports, they were not material evidence (at para 45). This is despite the fact that they were expert reports.

However, the Court also indicated (at para 44) that in this case, the issue is not even whether the trial judge preferred the evidence of one expert over another. Essentially, there was only the expert evidence of Dr. Mendelson available at trial. While the reports were completed by experts and remained on the record as admissible evidence, the Court of Appeal reveals in this decision that it is not only the qualification of an expert that has a higher threshold, it is also the presentation of that expert's evidence that has a high threshold in order to be material evidence. Without an opportunity to cross-examine an expert on their report, it seems that evidence contained within the reports should have no probative value.