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"Extraordinarily Difficult": Parenting Time and the Rights of Children in Cases Involving Family Violence

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Case Commented On: *DAF v SRG*, 2020 ABCA 25 (CanLII)

Family law cases can raise issues that are very challenging for the legal system to address, especially where there has been domestic violence. As the Alberta Court of Appeal recently noted in *DAF v SRG*, these cases can entail "extraordinarily difficult decisions" with "potentially profound consequences for the parties and the children involved" (at para 19). Yet these cases are "made challenging by limited time and often conflicting affidavits" and may involve "disparate proceedings in multiple courts" (at para 19). Alberta was moving toward a Unified Family Court that would have consolidated family proceedings in one court presided over by judges experienced in family law. However, in late February the government put this initiative on hold, apparently because of costs.

The decision of Justices Patricia Rowbotham, Sheila Greckol and Dawn Pentelechuk in *DAF v SRG* underlines the need for a Unified Family Court in Alberta, raising issues about what level of parental contact with children is appropriate where there has been domestic violence and how the voices of children can be brought forward in such cases. The decision also provides an opportunity to discuss recent amendments to the *Divorce Act*, RSC 1985, c 3 (2nd Supp) and what impact those amendments should have on family law in Alberta.

Background

The appellant, DAF, appealed the decision of a chambers judge, who dismissed his application for supervised parenting time with his biological child (a five year old boy). The respondent, SRG, was the child's half-sister and DAF's former partner's adult daughter from a previous relationship.

DAF and the child's mother were in a ten-year relationship and separated in November 2018. The mother obtained an Emergency Protection Order (EPO) at that time, prohibiting DAF from contacting her or their child. In July 2019, DAF pleaded guilty to a criminal charge of assault on the mother and three breaches of the EPO and was sentenced to 24 months' probation. Under the probation order, DAF is only permitted contact with the child as approved by his probation officer or through court order. On August 5, 2019, the child's mother was killed in a car accident.

Shortly after her mother's death, SRG applied for guardianship orders under the *Family Law Act*, SA 2003, c F-4.5 (*FLA*) for the child and the child's two other half-siblings from the mother's

previous relationship, both minors at the time. SRG also obtained a without notice restraining order against DAF on behalf of herself, the child, and the other siblings.

On August 14, 2019, SRG obtained an order for substitutional service of the guardianship application upon DAF. She only served the order for substitutional service and not the guardianship application itself, and DAF denied receiving notice of the application. In September 2019, a Provincial Court judge granted a final guardianship order in favour of SRG in the absence of DAF. Once this order was served on DAF, he took steps to appeal the guardianship order in Provincial Court and sought to stay the order in the Court of Queen's Bench.

The Chambers Application and Appeal Decision

On October 31, 2019, DAF made an application for a stay of the guardianship order pending his appeal and for interim supervised parenting time ("DAF's Applications"). The Justice in Morning Chambers ("Chambers Judge") dismissed both applications.

DAF appealed only the application for supervised parenting time to the Court of Appeal. The Court noted that the Chambers Judge did not have before him the evidence filed in the mother's EPO application, DAF's position on the EPO, the evidence filed by SRG to support a restraining order, or the facts related to DAF's assault conviction. The Court of Appeal found that it was "indisputable" that there had been "domestic violence between DAF and the child's mother" (at para 9) – presumably meaning violence by DAF towards the mother. However, DAF denied that he had ever been abusive or violent toward his child, and the Court of Appeal noted that the level of exposure the child had to DAF's violence against the mother was unknown (at para 9).

SRG's materials opposing DAF's Applications were, according to the Court of Appeal, "replete with hearsay" (at para 10). During the Chambers application, SRG's counsel referred to two typewritten and unsigned letters purportedly written by SRG's siblings (then aged 14 and 17), alleging "that DAF had been violent towards them and DAF's child" (at paras 10, 13). Also included were letters from the CUPS Calgary Society, the contents of which were not described by the Court (at para 14). The Court held that since these letters were not properly before the Chambers Judge, they should be expunged from SRG's affidavit (at para 15).

The Court noted that neither parties' lawyer had raised concerns that this type of evidence was prohibited pursuant to Family Practice Note 2, nor did DAF's lawyer object to this evidence being considered in Morning Chambers. The Court stated:

> Family Practice Note 2, paragraph 36 bars appending letters or unsworn statements from third parties to affidavits filed by the parties:
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> > The court may not consider hearsay evidence contained in letters or unsworn statements authored by third parties that are appended to affidavits. (emphasis added)
>
> There are sound policy reasons for this, particularly in matters of child custody and parenting time. Such decisions should be made on credible and reliable evidence and on as fulsome a record as possible. The practice of obtaining letters from minor children on

such issues is highly problematic and potentially damaging to the children participating (at paras 11-12).

The Court of Appeal noted that it was not certain whether the Chambers Judge had relied on the inadmissible third party letters, which were "highly prejudicial" and "completely untested" (at para 13), nor was the basis for his refusal of supervised parenting time explained. The Court acknowledged that cases with domestic violence are especially challenging due to the intersections of court systems, and the potential impact on the families involved, emphasizing that, for those reasons, "judges have an obligation to determine the admissibility and validity of the evidence before them and do their best to ascertain the truth" (at para 19).

The Court held that the Chambers Judge was obliged to consider all relevant factors to determine the child's best interests, including that children should have maximum contact with each parent (at paras 20-21). Ultimately, the Court was not satisfied that the Chambers Judge considered and weighed the potential benefits of supervised parenting time "against admissible evidence that the child would be at physical or emotional risk" (at para 22). The Court granted the appeal on an interim, without prejudice basis pending a full hearing, allowing DAF to have four hours of professionally supervised parenting time per week at his own cost. The Court recommended that SRG consult with the child's counsellor and play therapist to facilitate the parenting time, considering that DAF had not spent any time with the child for over a year.

Analysis

Voice of the Child

The *Convention on the Rights of the Child* (CRC) addresses every child's right to provision, protection and participation, and was ratified by Canada on May 28, 1990. Under Article 12 of the CRC, children have a right to be heard and considered in all matters affecting them. The *FLA* addresses this right by stating that the child's "views and preferences, to the extent that it is appropriate to ascertain them" is a factor in the best interests of the child analysis (s18(2)(b)(iv)).

In spite of this provision, it is often the case that when litigation is heated, the child's voice gets lost in the midst of the parents' (or guardians') conflict. Parties may respond by appending letters or notes written by the children to their affidavits to demonstrate the children's views, as SRG did in this case. The Court of Appeal's concerns that the evidentiary procedures set out in Family Practice Note 2 ("PN2") were not being followed provides an opportunity to consider the issues raised by PN2 and other Family Practice Notes.

Under the current system, there are limited ways to present a child's views properly to the court in light of the directive not to consider hearsay in PN2. An Intervention under Family Practice Note 7 (PN7) may be undertaken, a lawyer may be appointed for the child, or, rarely, a judicial interview could be conducted (see also Joanne J Paetsch, Lorne D Bertrand, & John-Paul E Boyd, Children's Participation in Justice Processes: Survey of Justices of Alberta's Court of Queen's Bench (June 2018)).

Interventions under PN7 require a court order, through the consent of both parties or an application by one party. Under PN7, a Parenting Expert is appointed as a friend of the Court,

and "must provide an independent report to the Court" (at para 7). The Parenting Expert is typically privately retained by the parties to perform their role under PN7, and the parties must bear those costs. PN7 even specifically notes that:

> The Court shall order an Intervention only if the parties are able to pay the cost of the Intervention, after considering any available subsidies or private health care coverage, or if the party seeking the Intervention is able to pay the entire cost of the Intervention at first instance, subject to their right to seek a contribution from the other party at the conclusion of the Intervention (at para 11, emphasis added).

The costs associated with a PN7 Intervention may be unaffordable for many parents and guardians. A Voice of the Child Report, one form of Intervention, is used "to canvass the views and needs of the child(ren), including from parents and collaterals" (PN7 at para 41(ii)). These reports typically cost thousands of dollars, depending on the scope of the report and the number of children involved. Concerns have also been expressed that many custody evaluators lack understanding of domestic violence issues and their impacts on children's best interests (see Linda C Neilson and Susan B Boyd, Interpreting the New Divorce Act, Rules of Statutory Interpretation & Senate Observations, at 7).

Parents can also apply for a lawyer to be appointed for their children under s 95(3) of the *FLA* or s 112 of the *Child, Youth, and Family Enhancement Act*, RSA 2000, c C-12 (see *BLS (Re)*, 2013 ABPC 132 at paras 226-290, for details regarding the role of children's counsel). Usually, children's lawyers are appointed through organizations like Legal Aid or Legal Representation for Children and Youth, so the financial burden on the parent or guardian can be lighter than going through a PN7 Intervention.

There are, however, a multitude of factors that are taken into consideration when a court hears an application to appoint a lawyer for the children (see *Chalmers v Lannan*, 2015 ABPC 262). Even if a lawyer is appointed, they are not required to screen for family violence and may not have sufficient training on family violence, as noted in a previous post by Deanne Sowter.

If parents or guardians are unsuccessful in their applications for counsel, or cannot afford to gather the necessary evidence in a way that can be properly provided to the court, the voices of the children are virtually silent in the same proceedings that determine their everyday living conditions and relationships with their parents.

Since many lawyers and parties are aware that the "practice of obtaining letters from minor children on such issues is highly problematic and potentially damaging to the children participating" (*DAF v SRG* at paras 11-12), another way to gather evidence regarding the children indirectly is through third parties. Most people peripheral to parenting issues, such as schoolteachers or family doctors, do not volunteer to become involved in the parties' legal proceedings, but do sometimes try to provide written materials to give insight into a child's circumstances. Usually, these types of written materials are not sworn, but appended to the affidavits of one of the parties. If the authors of these types of materials were required to provide their own affidavits, much of their information may never come to light, as the authors would likely to be reluctant to provide formal statements and become directly involved in court

proceedings and subject to questioning as a result. These types of letters are also specifically disallowed under PN2 when they are appended to affidavits.

Even if the third parties were willing to file their own affidavits, it is not certain whether their statements could be included as part of the legal proceedings. Under PN2, there is a preapproved list of "third parties who are properly before the Court making submissions or providing relevant evidence", which includes but is "not limited to Child and Family Services, the Director of Maintenance Enforcement, or counsel for a child" (at para 28). Otherwise, for third party affidavits that are not preapproved, leave of the court is required (PN2 at para 35).

The importance of obtaining proper evidence in a case involving parenting time cannot be understated. However, the rules placed on the evidence considered in deciding family matters must attempt to find a balance between procedural fairness and the ability of the courts to hear children's voices in a practical and affordable way that is sensitive to family violence issues. The current restrictions imposed by PN2 and PN7, coupled with the expenses and other limitations of the existing options, do not achieve that balance for many parties in parenting disputes.

Parental Contact

As noted above, DAF sought supervised parenting time under the *FLA*, under which the best interests of the child is the sole factor in making decisions regarding parenting time (s 18(1)). Unlike some jurisdictions, the *FLA* does not contain an explicit presumption that maximum contact with each parent or guardian is in the child's best interests. However, Alberta courts have read this principle into the *FLA*, with the Court of Appeal stating in this case that "Presumptively, children are entitled to a relationship with both of their parents, and that relationship is limited only to the extent it is in the child's best interests to do so" (at para 18; see also paras 20-21). Earlier cases have read in this presumption as well: see e.g. *Thember v King*, 2019 ABQB 697 at para 137 (cited in *DAF v SRG* at para 21); *ADM v SWL*, 2015 ABQB 630 at paras 132-7; *Omar v Ali*, 2013 ABQB 703 at para 10).

Family violence is an explicit factor relevant to the best interests of the child under s 18(2)(b)(vi) of the *FLA*, including its impact on the child's safety, the child's general well-being, and the ability of the parent who engaged in the family violence to meet the needs of the child. Family violence is defined to include not just direct violence towards a child, but violence against other family members as well (s 18(3)). Curiously, these provisions were not cited by the Court of Appeal even though the family violence against the child's deceased mother was "indisputable". In the Court's view, the Chambers Judge should have weighed the benefits to the child of having "limited, professionally supervised visitation with his biological father" on the one hand and "admissible evidence that the child would be at physical or emotional risk" on the other (at para 22). They found that four hours of contact per week, supervised by a professional, would not "risk either physical or emotional harm to the child" based on the admissible evidence (at para 22) – and, as noted above, this did not include the letters SRG tried to submit that raised concerns about DAF's violence.

As the Court of Appeal noted in this case (at para 20), the federal *Divorce Act* currently contains a maximum contact provision: "In making an order [for custody or access], the court shall give

effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact" (s 16(10)).

However, a number of amendments were made to the *Divorce Act* in 2019 by Bill C-78, which will take effect later this year. Significantly, family violence will be added to the Act as a mandatory consideration relevant to the best interests of the child (new ss 16(3)(j) and 16(4)), with the stipulation that courts shall "give primary consideration to the child's physical, emotional and psychological safety, security and well-being" (new s 16(2), emphasis added). Also significant is the new s 16(6), which provides that "In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child." Some advocacy groups and Parliamentary witnesses raised concerns about "maximum contact" provisions, particularly as applied in cases involving family violence. As a result, the Minister of Justice committed to replacing the marginal note "Maximum parenting time" for the new s 16(6) with "Parenting time consistent with best interests of child" when the amended Act is proclaimed (Neilson and Boyd at 9-10).

In its brief on Bill C-78, Luke's Place – a centre for abused women and their children – and the National Association of Women and the Law (NAWL) argued that there "is no credible evidence" to support the presumption that it is in a child's best interests have maximum time with each parent, and in fact "there is a growing evidence base that this is not the case in family violence situations" (at 6). These arguments were endorsed by the Women's Legal Education and Action Fund (LEAF) in its brief to the government on Bill C-78. LEAF's brief notes the concern that a provision on maximum parenting time would "trump" the provision that the child's physical, emotional and psychological safety, security and well-being are to be the primary considerations in allocating parenting time (at 5). LEAF also cites research supporting the view that "women targeted by family violence and related abusive behaviour confront major hurdles when they try to protect themselves and their children in the face of statutes and/or case law that include maximum contact or time, even when statutory provisions emphasize the best interests of the child" (at 2). All of these organizations, and many others who endorsed the brief by Luke's Place and NAWL, argued that the provision on maximum parenting time should be removed from the *Divorce Act*, or if retained, renamed "Best Interests and Parenting Time."

In addition to changing the marginal note, the Department of Justice had this to say about the new s 16(6) of the *Divorce Act*:

> the optimal amount of [parenting] time depends on an individual child's circumstances and must be based on what is in the child's best interests. Therefore, courts must take into account all factors relating to the best interests of the child in determining what division of time would be best…. As part of the best interests of the child analysis, the allocation of parenting time is subject to the overarching primary consideration of the child's safety, security and well-being (see Neilson and Boyd at 10, citing Department of Justice, The Divorce Act Changes Explained).

These observations and those of the organizations noted above should inform decisions on parenting time heard by the courts. The proper interpretation of provisions concerning parenting time in cases involving family violence also has gendered implications, given the "well documented social reality that women and children are those most harmed and affected by family violence" (Neilson and Boyd at 5). These gendered impacts were recognized by the Senate Standing Committee on Legal and Constitutional Affairs in its Observations on Bill C-87 and by the Department of Justice in its Gender-Based Analysis of the amendments, and are appropriate for courts to consider as part of their contextual analysis of the relevant legislation.

In a jurisdiction like Alberta, where maximum contact is not explicitly referenced in the *FLA* but family violence is included in the determination of best interests, family violence should trump considerations of maximum contact when allocating parenting time. This is in effect what the amendments to the *Divorce Act*, read together and in context, require, which should cause courts in this province to reconsider their approach of reading a presumption of maximum contact into the *FLA*, especially since that approach appears to be based at least in part on the pre-amendment version of the *Divorce Act* and cases decided under that version.

If maximum contact continues to be read in to the *FLA* as a factor, the *Convention on the Rights of the Child* supports the view that a child's actual best interests should be paramount over parental rights to contact, even if the latter is sometimes framed within the language of best interests (see LEAF brief at 5 and *DAF v SRG* at para 21). In cases involving family violence, article 19 is especially pertinent:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Family violence-related deaths in Canada also underscore the need to take family violence and the safety interests of women and children more seriously than parental contact "rights". Luke's Place is named after a child who was killed by his father during an unsupervised access visit after his mother had sought supervised access in the courts. In Ontario, the recent deaths of Keira Kagan and her father (under investigation as a murder-suicide) has led to renewed concerns about the strained family law system. Concerns have also been raised that women who try to protect their children from family violence are labelled as "alienating" parents or are otherwise penalized for their attempts at protection (see here and here and Neilson and Boyd at 7-8). Alienation allegations were not at play in *DAF v SRG*, but there are many cases where the maximum contact principle collides with women's legitimate efforts to protect their children, with adverse consequences for parenting outcomes.

Conclusion

DAF v SRG illustrates how two key issues in cases involving parenting time where there has been domestic violence – the admissibility of evidence regarding the children's interests and legal presumptions concerning maximum contact – can come together in ways that may negatively affect the outcome. Although DAF's interim parenting time will be supervised, the emotional impact of that time on the child was overridden by the restrictions created by PN2 and the presumption that maximum contact is in a child's best interests. In our view, it would have been preferable for the Court to maintain the status quo of no contact until the evidence could be properly presented and fully considered – there was sufficient evidence of domestic violence for the Chambers Judge to have decided as he did, even if his reasons were lacking.

This case points to the need for specialized family court judges who are trained on domestic violence and the relevance of such violence to decisions on parenting time. The need for judicial training on family violence was raised by the organizations making submissions on Bill C-78 as well as by the Senate Standing Committee (see here at 6). Specialized family courts would also require adequate time to deal with complex family cases and appropriate rules for the admission of evidence in these cases that take account of access to justice issues, family violence, and the rights of children.

In light of the COVID-19 pandemic, the handling of family law cases by courts and the government has become uncertain. When current circumstances subside, we call on the government to reconsider its decision to suspend the implementation of Unified Family Courts in Alberta given legitimate concerns about how well our existing system can handle these sorts of cases. We also urge courts in Alberta to reconsider their approach to including a presumption of maximum contact under the *FLA* as well as the admissibility of evidence related to the best interests of children, especially in family violence cases. In our view, family violence should trump considerations of maximum contact when allocating parenting time.

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