Court of King's Bench of Alberta

Citation: AMF v GHP, 2022 ABKB 758

Date: 20221116
Docket: FL08 01591
Registry: Medicine Hat

Between:

AMF

Appellant

- and -

GHP

Respondent

Reasons for Decision
of the
Honourable Justice EJ Sidnell

Appeal from the decision of the
Honourable Judge MC Christopher
issued in Medicine Hat on April 5, 2022
in Provincial Court Action FF027-000257

[1] The appellant, AMF, who I will refer to as the "Mother", and the respondent, GHP, who I will refer to as the "Father", have three children together:

(a) the oldest, who I will refer to as "Child M", age 13; and

(b) two younger children, age 8 and 11, who I will collectively refer to as the "Younger Children".

[2] The Mother appeals the order of Judge Christopher, granted April 5, 2022.

[3] The Mother sought to introduce new evidence, but given the test set out in ***Palmer v The Queen***, [1980] 1 SCR 759, which is applicable in appeals such as this one, withdrew that application during the hearing of this appeal: see ***McClelland v Harrison***, 2021 ABCA 89, at para 13 and ***Barendregt v Grebliunas***, 2022 SCC 22, at para 3.

Standard of review

[4] In ***Alberta (Director, Child, Youth and Family Enhancement) v HF***, 2022 ABKB 681, Mandziuk J undertook a helpful analysis of the standard of review on an appeal from the Provincial Court to the Court of King's Bench. In that case, the Director appealed a decision of a Provincial Court Judge granted after the hearing of a trial and, at para 48, Mandziuk J said:

> The standard of review applicable to appeals from Provincial Court to the Court of King's Bench is correctness in relation to questions of law, and palpable and overriding error with respect to fact finding. Questions of mixed fact and law attract the standard of review of palpable and overriding error "unless there is an extricable question of law in which case the standard is correctness" ... "matters of mixed law and fact fall along a spectrum of particularity."

[5] Mandziuk J noted that an appeal from the Provincial Court is not a hearing *de novo*: para 51. Mandziuk J also discussed deference to the Provincial Court decision, at paras 52 and 53:

> Deference is a key consideration in the Court of King's Bench's determination of Provincial Court appeals, particularly when they involve parenting orders. Our Court of Appeal in ***Letourneau v Letourneau***, 2014 ABCA 156 noted (at para 6) the "highly fact-specific and discretionary" nature of parenting orders and directed that "[t]he standard of review of a parenting order allows for appellate intervention only where the judge below erred in law or made a material error in his or her appreciation of the facts" (citing ***Van de Perre v Edwards***, 2001 SCC 60 at para 13).
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> This question of deference was canvassed by Watson J (as he then was) in ***Alberta (Child, Youth and Family Enhancement Act, Director) v AS***, 2006 ABQB 354 (at para 84):
>
> > The standard of review of decisions as to child custody, notably as to what is in the best interests of a child, appears to be quite deferential having regard to the broad language provided for as to this Court's appellate jurisdiction. I mean – by that – that the broad language does not seem to be quite so deferential but the case law seems to be.

[6] In ***McClelland v Harrison***, 2021 ABCA 89, at para 17, the majority observed that support and parenting orders are entitled to deference. A support order should only be disturbed if it reflects an error in principle, a significant misapprehension of the evidence, or is clearly wrong. This is especially true for an interim without prejudice order, as the usual practical remedy for a questionable interim support order is to expedite the trial and not appeal the interim order. In relation to parenting, repeated appearances before a court to alter interim parenting arrangements are to be discouraged.

[7] In this case, the subject matter of the appeal is parenting. The appeal relates to a hearing which resulted in an order made by Judge Christopher who was the *de facto* Case Management Judge. I must respect the deference owed to a judge, and particularly one who is knowledgeable about the parenting matters as a result of being a case management judge. The standard of review of a parenting order allows for appellate intervention only where the judge below erred in law or made a material error in the determination of the facts. However, I am also mindful that while support obligations may be made up with payments made later, time with a child is more nuanced and may not be so easily reconciled.

Applicable rules

[8] The *Alberta Rules of Court*, AR 124/2010, contain specific provisions relating to appeals from the Provincial Court to the Court of King's Bench in family matters. A Notice of Appeal must be filed in Form FL-33 within the deadlines set out in Rule 12.61. The appellant must order and pay for a transcript of the hearing before the Provincial Court and file it with the deadline set out in Rule 12.63(1). No issue was raised regarding the Mother's compliance with these requirements.

[9] Rule 12.62(2) requires the Provincial Court Clerk to take certain steps:

> Immediately on receipt of the notice of appeal filed under rule 12.61, the clerk of the Provincial Court must forward the order, together with the filed documents relating to the order, including exhibits, to the Court of [King's] Bench court clerk.

[10] Establishing the "documents relating to the order" under Rule 12.62(2) is important because Rule 12.68 determines what constitutes the appeal record:

> The documents provided by the clerk of the Provincial Court pursuant to rule 12.62(2) and the transcript of the hearing before the Provincial Court form the record for the hearing of the appeal, and no other evidence may be considered by the Court unless otherwise ordered by the Court.

Litigation Context

[11] This matter is governed by the *Family Law Act*, SA 2003, c F-4 (*FLA*). The April 5, 2022 Order was one order of many in a series and was granted in the context of highly contested parenting litigation, which has continued even after a parenting trial was heard in Provincial Court, in 2019. Counsel for the children described the April 5, 2022 Order as a sliver of the many orders addressing the multitude of issues raised in the litigation. I would elaborate and characterize the April 5, 2022 Order as a tiny sliver of an enormous cake, with multiple layers, frosting and decorations on top. The April 5, 2022 Order is one small element in the context of complex, multi-issue, ongoing litigation.

[12] Although not under appeal, in her reasons given May 24, 2022, Judge Christopher provided a historical summary of the litigation. In this appeal, the Mother has contended that Judge Christopher has made inaccurate and unfair inferences against her. I have only included what I understand to be uncontested facts in the quoted portion of Judge Christopher's historical summary:

> ... This matter has a long conflicted history dating back to 2015 when [the Father] was granted primary day-to-day care and control of the three children ...
>
> At the time [the Mother] had moved ... and was granted parenting time one weekend per month. A series of applications and much litigation followed, culminating in a three-day trial held in 2019 on April 12th, 15th and May 10th ...
>
> [The Father] remained the primary day-to-day caregiver of the children, and a detailed schedule was set out whereby [the Mother's] time with the children was outlined. The parties shared decision-making. ...
>
> There followed a series of applications in at least three jurisdictions ...
>
> . . .
>
> ... Then on June 10th, 2021 there was an order following the JDR ... detailing that dad would continue to have day-to-day control and primary responsibility for the children and then the order set out reasonable generous parenting time for the mother on alternate weekends and set out that the children should attend counselling.
>
> It set out that counselling was recommended. It set out that decision-making was to continue to be shared, and then there were numerous terms about communication between the parties and communication with the children and also with respect to police enforcement. And this was a final order consented to by then counsel ...
>
> Then there was in September of 2021 an application regarding the refusal of the [Mother] to return the child to the [Father], and there was a police assistance clause there. Then there ... was a further order on October 5th of 2021 re-appointing counsel for the child[ren]. And there was an application that was heard ... on October 15th, 2021 which stated that the parenting order granted by [Judge Christopher] on June [10th], 2021 was to remain in effect and directing both parties to follow the terms of the order.
>
> There was a further term of that order stating that neither party should make any further applications between now and the review of that order without prior approval of the Court and directing [the Father] to provide a response. ...
>
> When the matter came before [Judge Christopher], [she] seized [herself] in the role of case management judge and directed the status quo at the time be maintained in order that further information could be provided as to the child who remained with her mother. The two younger children remain with their father ...

[13] In addition, on September 23, 2021, the Mother filed an Application, in form FL-10, in accordance with s 2(1) of the *Provincial Court Procedures (Family Law) Regulation*, AR 149/2005 (the "*Procedures Regulation*"), seeking a variation of the June 10, 2021 Order, which was granted after the Judicial Dispute Resolution session (also referred to as a JDR), and with the consent of both parents. The June 10, 2021 Order set out that the Father was to have primary parenting of the children and provided for parenting time with the Mother.

[14] As noted in Judge Christopher's historical summary, the Father filed a "come-back application" on September 27, 2021, which consisted of a letter addressed to the Clerk of the

Court. The letter did not state the nature of the application, the grounds or remedy sought, but requested an application on an emergency basis and that an affidavit of the Father be filed. The letter does not indicate whether the other parties were sent a copy.

[15] Based on submissions of counsel at the appeal hearing, it appears that these two applications were extant when Judge Christopher, on her own motion, suspended, on an interim without prejudice basis, the Mother's in-person parenting time with the Younger Children, on January 25, 2022. The Mother takes great umbrage at the issuance of the January 25, 2022 Interim Without Prejudice Parenting Order and the suspension of her in-person parenting time with the Younger Children. However, the January 25, 2022 Interim Without Prejudice Parenting Order was not appealed.

The April 5, 2022 oral application

[16] In the fall of 2021, as evidenced by the applications described at paragraphs [13] and [14], issues arose which primarily related to Child M. Hearings, scheduled every few weeks, appeared to be directed towards resolving that issue. In addition to the January 25, 2022 Interim Without Prejudice Parenting Order, in early 2022, access between the Mother and the Younger Children via video and telephone was also addressed.

[17] Counsel for the Mother asserts that, on April 5, 2022, he made an oral application to lift the suspension of the Mother's in-person parenting of the Younger Children. The transcript discloses the following exchange:

> MR. ROSENKE: Well, Your Honour, just one more thing, so -- and Mr. Tieman spoke to it a few minutes ago, the younger children. And so at this point, it's 3 months since [the Mother] has seen them -- that they've seen [their Mother] and spent time with her. I'm just wondering what the position is, what your position is, Your Honour, because if this persists for a while and keeps going (INDISCERNIBLE) [Child M] stays with her, I mean, I'm not sure if that (INDISCERNIBLE) but, I mean, the children (INDISCERNIBLE) --
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> THE COURT: Let's do this, Mr. Rosenke.
>
> MR. ROSENKE: -- (INDISCERNIBLE) --
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> THE COURT: I'm alive to the concern, but let's do this. Let's not upset the apple cart, but let's get some movement on the 26th. Okay? I've had a long history with these parties and I am aware that the children need both parents, as in most cases, but they don't need upset and they we don't need to build into the structure of this dispute an opportunity for further upset and alienation. This is really looking at the children and keeping things stable for them.
>
> So I think that Mr. Tieman does need a chance to talk to the counsellors who are involved on a preliminary basis and they can provide an air of reality that we need going forward. Okay? So for now we're going to keep it as is and then, on April 26th, we can have a more fulsome discussion around, you know, is it appropriate at that point to resume in person anything?
>
> These children have been through the ringer since well before the trial ... which your client has consistently tried to overturn by appeal and by repeat court

> proceedings, so I'm just going to proceed cautiously. Okay? And I understand that your client is anxious to see the children. I'm more anxious that the children are not further upset by the dispute between the parents and I don't think those things have been resolved, I think they're parked and they haven't dealt with those issues.
> ...
>
> So we need to focus only on the children at this point and I know the parents are anxious and disappointed, but this is the best we can do. I'm not going to expose those children to upset. ...

[18] Except for this exchange on the April 5, 2022, the record does not show that any application was ever made or dismissed.

[19] Counsel for the Mother submits that after Judge Christopher issued the January 25, 2022 Interim Without Prejudice Parenting Order suspending the Mother's parenting time with the Younger Children, he raised lifting the suspension at each of the hearings after that date, including the April 5, 2022 hearing. Accordingly, counsel for the Mother contents that the Father, counsel for the children and Judge Christopher could not have been surprised by his reprise of his oral submission on April 5, 2022. However, at no time after the January 25, 2022 Interim Without Prejudice Parenting Order did the Mother file any type of documentation to commence, or support, any type of application. Further, there was no appeal of the January 25, 2022 Interim Without Prejudice Parenting Order. This situation created multiple difficulties for this appeal.

The April 5, 2022 Order

[20] The April 5, 2022 Order was approved as to the order granted by counsel for the children, counsel for the Mother and counsel for the Father and signed by Judge Christopher.

[21] The preamble of the April 5, 2022 Order states that it was granted upon hearing an application of the Father and refers to "consent from counsel for the Applicant, counsel for the Respondent and counsel for the children". The signatures of counsel appear under the statement: "Approved as to the order granted". Counsel's endorsement does not indicate consent to the substance of the Order.

[22] Consent indicates that a party agrees to the substance of an order. On the other hand, an order agreed as to the order granted, or as to form and content, only signifies that the signatory agrees that the wording of the order reflects the order granted; it conveys no inference that the signatory agrees to the order in substance.

[23] As result, it is not clear on the face of the April 5, 2022 Order whether there was consent to the substance or just agreement as to what order was granted by Judge Christopher. The April 5, 2002 Order was called an "Order" and not a "Consent Order" as one would expect if there was consent regarding the substance of it. In some cases, establishing consent is crucial, especially on appeal.

[24] Most critically, the April 5, 2022 Order itself does not mention any application made by the Mother to lift the suspension of her in-person parenting time with the Younger Children, or any dismissal of such an application. The entire April 5, 2022 Order addresses matters relating to the Child M. On the face of the Order granted, and approved by all counsel, there was no

application by the Mother to lift the suspension of her in-person parenting time with the Younger Children on April 5, 2022.

Is a written application required?

[25] Without a written application, it was not clear what documents the applicant referred to, and it makes establishing the appeal record more difficult. At the appeal hearing, counsel for the Mother referred to previously filed Affidavits, but there is no record to show that these were before the Provincial Court on April 5, 2022.

[26] The Clerk of the Provincial Court forwarded to this Court the following documents which, pursuant to Rule 12.68, become the appeal record:

(a) Provincial Court Clerk notes from the April 5, 2022 hearing, which confirm the contents of the filed Order;

(b) April 5, 2022 Order;

(c) March 1, 2022 Order;

(d) letter from counsel for the Father, dated February 28, 2022, relating to resources accessed for Child M;

(e) January 25, 2022 Interim Without Prejudice Parenting Order;

(f) letter from counsel for the children, dated February 4, 2022 sent in preparation of the hearing on February 8, 2022;

(g) affidavit of the Father, sworn February 3, 2022;

(h) affidavit of the Mother, sworn January 24, 2022; and

(i) letter from counsel for the Father, dated January 13, 2022 regarding matters relating to the Child M.

[27] Unless otherwise ordered by the Court, the records provided by the Clerk of the Provincial Court constitute the appeal record. There was no application to add records to the appeal record in this appeal.

[28] Establishing the appeal record is particularly important when a party seeks, on appeal, to assert that the court below misconstrued the facts.

[29] The Mother submits that Judge Christopher inferred that she would not return the Younger Children to the care of the Father if she was given unsupervised parenting time. Further, the Mother submits that she was being blamed for the conflict that occurred, and the police involvement, over the holiday period. The Mother's January 24, 2022 affidavit addresses the holiday conflict issues but does not contain any evidence to support her position that she returned the Younger Children on three or four occasions before the January 25, 2022 Interim Without Prejudice Parenting Order. That is not to say that the Mother did not return the children as she says, only that such evidence is not part of the appeal record.

[30] Without a written application, there was no legal principle, caselaw or legislation brought to the attention of the Provincial Court and the other parties to alert them to what the Mother considered important. On appeal, the Mother submits that s 34 of the *FLA*, which sets out the circumstances under which a parenting order can be varied, and s 18 of the *FLA*, which sets out

the factors to be taken into account when determining the best interests of the children, should have been considered at the April 5, 2022 hearing. However, there was no application, written or oral, that raised these sections of the *FLA*, or even the *FLA* itself.

[31] At the hearing of this appeal, there was a consensus among counsel that the practice of the family bar in matters heard in Provincial Court, Family Division, in Medicine Hat, was to not file a FL-10 application, notwithstanding that appears to be required by s 2(1) of the *Procedures Regulation*.

[32] Indeed, there was a consensus among counsel that if a party attempted to file a FL-10 application when there were applications outstanding, that it would be rejected by the Clerk of the Provincial Court. Counsel said they typically file a "come-back motion" or "come-back application" where a FL-10 application is extant. Counsel also agreed that, while it might not be correct, it was not uncommon for counsel to raise applications orally in Provincial Court, Family Division, hearings in Medicine Hat. I am not in a position to know, or comment on, those accepted procedures or practices, except to the extent that they impact an appeal to this Court.

[33] In the Court of King's Bench, an application must be brought in accordance with Rule 6.3(2): see ***Matta v Matta***, 2021 ABQB 826, at para 16. In that case, at para 17, Harris J noted the "purpose of giving notice and compliance with Rule 6.3 is to ensure that a respondent knows of the arguments to be addressed and to allow the Court to properly prepare for the hearing". Further to this general principle, there are other reasons, including:

(a) making the parties and Court aware of the:

  (i) applicant's grounds for the application;

  (ii) the law and rules to be relied upon;

  (iii) the evidence which will serve as the foundation for the application;

(b) setting out the evidence to be relied upon provides some parameters for opposing parties to conduct cross-examinations and assists them preparing competing evidence; and

(c) creating a record for the Court, and the parties, of the type of application, and date and time set for the application, the relief sought by the applicant, the grounds, the law and evidence relied upon.

[34] Regardless of whether the practice of the family bar in Provincial Court, Family Division, in Medicine Hat, does not require an application to be in writing, if a party wishes to appeal an order, then that party must be able to persuade the Court hearing the appeal that: (a) an application was made; (b) an order was granted in relation to such application; and (c) it can identify the appeal record.

Did counsel's April 5, 2022 submissions amount to an oral application?

[35] As quoted above, at the April 5, 2022 hearing, counsel for the Mother said "I'm just wondering what the position is, what your position is, Your Honour" in relation to the Mother's in-person parenting of the Younger Children.

[36] On appeal, there was considerable emphasis placed on the factors for considering the best interests of the Younger Children under s 18, and also on s 34, of the *FLA.* Yet, the *FLA* was never even mentioned at the April 5, 2022 hearing, let alone any of the specific factors.

[37] Even if a written application was not required, I find that the question posed by counsel for the Mother to Judge Christopher did not amount to an oral application. The question had none of the hallmarks of an application: there was no articulation of the relief being sought, the grounds and legislative basis for the relief sought or the evidence being relied upon. The other counsel who appeared were not given an opportunity to make any submissions. Judge Christopher responded to the question but was not asked to make a ruling and I find that she did not make one. All of this is reflected in the April 5, 2022 Order that was approved as to the order granted by all counsel present and signed by Judge Christopher. That Order did not mention any application by the Mother or that it was dismissed. Certainly, and not least, there is no clear appeal record.

Conclusion and costs

[38] The Mother's appeal is dismissed because there was no application to lift the suspension of her in-person parenting time and no ruling on that point. As a result, there is no order for her to appeal with regard to her in-person parenting time with the Younger Children.

[39] The Mother submits that she had no other recourse but to appeal the April 5, 2022. I respectfully disagree. There were many other avenues, including bringing an application pursuant to the *Procedures Regulation* before the Provincial Court for the relief that she sought, or bringing an application in another manner which created a record of the relief sought, the grounds for the application, and the law and facts relied upon.

[40] In the event that the Father, or counsel for the children, wishes to seek costs of this appeal, they must contact me, in writing, no later than 30 days after the issuance of this decision, concurrently providing a copy of that letter to the other two counsel. If contacted, I will provide directions for resolving the issue of costs.

Heard on the 2nd day of November, 2022.
Dated at the City of Calgary, Alberta this 16th day of November, 2022.

E.J. Sidnell
J.C.K.B.A.

Appearances:

Adam Rosenke
for the Appellant

Marc F Crarer
for the Respondent

Jonathan P Tieman
for the children