

# In the Provincial Court of Alberta

Citation: DS v PA, 2018 ABPC 157

Date: 20180711  
Docket: FF029000846  
Registry: Red Deer

Between:

**J.A.**

Applicant

- and -

**P.A. and A.A.**

Respondents

- and -

**D.S. and B.S.**

Respondents/Applicants

## Restriction on Publication

**Identification Ban** – See the *Family Law Act*, section 100.

By Court Order, there is a ban on publishing information that may identify the children or guardians in this matter.

**NOTE:** This judgment is intended to comply with the ban so that it may be published.

## Reasons for Decision of the Honourable Judge G.G. Yake

### I. Introduction

[1] The Court must determine the ongoing primary care and guardianship of K.A., a two year old boy, born in February 2016.

[2] In these Reasons reference to section numbers shall mean sections of the *Family Law Act*, RSA 2003, c F-4.5 (the “Act”) unless otherwise indicated.

## II. Facts and Evidence

[3] J.A. is 26 years old. He is the biological father of K.A. He is currently incarcerated in Alberta. He is scheduled to have a parole hearing soon and may be released on parole sometime in November of 2018.

[4] J.A. has a *Youth Criminal Justice Act* record showing 18 convictions between December 6, 2007 and December 14, 2009 for property-related offences, assault causing bodily harm, trafficking in a controlled substance and failing to comply with different types of court orders relating to bail.

[5] J.A. has an adult *Criminal Code* record showing 36 convictions between June 17, 2016 and November 9, 2017 for property offences, weapons offences, dangerous driving, breach of various court orders, and possession of an illicit substance.

[6] R.S. is the deceased mother of K.A. She was 25 years old when she was shot and killed while riding as a passenger in a motor vehicle on February 1, 2017 in Red Deer, Alberta. J.A. was incarcerated at the time of R.S.’s death. He was not responsible for her death. The man who killed R.S. has been convicted of criminal negligence causing death contrary to section 220(a) of the *Criminal Code* of Canada.

[7] P.A. (paternal grandmother – age 47) and A.A. (paternal grandfather – age 52) are the parents of J.A. They are currently the guardians of K.A. They have had the day to day care of K.A. for approximately 17 months.

[8] D.S. (maternal grandfather-age 57) and B.S. (maternal grandmother- age 54) are the parents of R.S. They are the court-appointed guardians of R.S.’s six year old daughter A.M., born June 2012. A.M. and K.A. have different biological fathers.

[9] In the fall of 2014 R.S. and J.A. began a romantic relationship. In mid-January 2015 J.A. moved into the home that R.S. and her daughter A.M. shared. That home was owned by D.S.

[10] Initially their relationship blossomed and on May 21, 2015 they learned that R.S. was pregnant. K.A. was born out of that pregnancy.

[11] Shortly after R.S. became pregnant her relationship with J.A. soured. J.A. stayed out late and some days and nights he did not come home at all. When he did come home he slept much of the time and they often argued, sometimes in front of A.M. During these arguments J.A. sometimes yelled at and verbally abused R.S. and threw household items. Although it has not been proven that he assaulted R.S. or threatened to assault her, his behavior certainly caused R.S. to reasonably fear for her safety, and therefore constituted “family violence” as defined under section 18(3).

[12] On December 31, 2015 J.A. was arrested for various *Criminal Code* offences and was remanded in custody until January 13, 2016. When he was released he returned to live with R.S. and A.M.

[13] J.A. was living with R.S. and A.M. when K.A. was born in February 2016. He attended at the Red Deer Hospital on the day K.A. was born and he assisted R.S. to fill out K.A.'s Birth Certificate and helped R.S. choose K.A.'s name.

[14] On March 4, 2016 a Canada-wide Warrant for the arrest of J.A. was issued for a number of very serious *Criminal Code* offences. J.A. fled with R.S., A.M. and K.A. He was arrested on March 8, 2016 after a police chase, during which he rammed a police vehicle with the vehicle he was driving. R.S., A.M. and K.A. were not in the vehicle driven by J.A. at that time.

[15] Upon J.A.'s arrest R.S., A.M. and K.A. went to live with the maternal grandparents until April 20, 2016 when J.A. was released from custody. This move was necessary because her house had been rendered uninhabitable by renovations to her house that J.A. and two other men had attempted.

[16] After being released from custody on April 20, 2016 J.A. began committing more crimes, including theft of ATM machines. He was arrested for those crimes on June 12, 2016 and he has remained in custody since that date. Ultimately he was sentenced to a total of 30 months in gaol. He has been denied day parole and is scheduled to be released on his statutory release date, sometime in November 2018.

[17] While J.A. was in custody and before R.S. died on February 1, 2017 she corresponded with him, exchanged text messages with various people and wrote in her diary. From the correspondence, text messages and diary entered as exhibits at trial it is very difficult to discern whether R.S. intended to continue or end her relationship with J.A. upon his release from gaol. It is clear that shortly before her death she began living with another man in her house.

[18] From the evidence at trial, including the testimony given by J.A., it is clear that he was addicted to methamphetamines and gambling from the fall of 2015 until he last went to gaol.

[19] J.A. claims to have overcome his drug and gambling addictions while in gaol. While it is true that he has taken some steps in that regard, the evidence presented at trial does not show that he has been rehabilitated and has overcome these addictions.

[20] When the maternal grandparents learned of their daughter's death on February 1, 2017 they contacted the paternal grandparents and asked them to pick up and care for A.M. and K.A. The maternal grandparents did not want to expose A.M. and K.A. to the turmoil and personal pain that they had to deal with, resulting from the death of their daughter.

[21] On February 13 the maternal grandparents attended at the home of the paternal grandparents and retrieved A.M. On February 15, 2017, the paternal grandparents were granted an *ex parte* order (without notice to the maternal grandparents) granting them interim custody of K.A. The maternal grandparents re-attended on February 16 to pick up K.A. and at that time A.A. told the maternal grandparents that he had obtained a court order that gave him custody of K.A. and that he was "in control". As might be expected, the maternal grandparents were surprised and shocked by this news.

[22] In any event, the maternal grandparents left with K.A. on February 16 on the understanding that they would keep him until February 23 and then return him to the care of the paternal grandparents. However, shortly after February 16 the paternal grandparents insisted that they get K.A. back on February 20 to take him to a medical appointment.

[23] The maternal grandparents were prepared to accommodate this change of plan, so the paternal grandparents came to the home of the maternal grandparents to get K.A. on February 20.

[24] Immediately upon his attendance at the home of the maternal grandparents on February 20, A.A. noticed that K.A. was not present, and he flew into a rage. He accused the maternal grandparents of kidnapping. He told D.S. that he (A.A.) “was a better man” than he (D.S.) was. D.S. told the paternal grandparents to leave and they exited the house.

[25] After A.A. left the house he drove quickly up the driveway and parked nearby. Both sets of grandparents called the RCMP. Two RCMP officers in different patrol cars attended. Ultimately A.A. provided the RCMP with a copy of the February 15 *ex parte* order and that was presented to D.S., who was able to take a photograph of it. He then turned K.A. over to the paternal grandparents, with the assistance of an RCMP officer.

[26] The Procedural History section of these Reasons describes the evolution of this litigation from February 15, 2017 forward.

[27] There is very little trust remaining between the maternal grandparents and the paternal grandparents.

[28] The maternal grandparents were married in 1987. In addition to R.S., they have one adult son who lives nearby. Both have a long history of steady employment and are financially secure. They have a very stable lifestyle, having lived in the same large home on an active farm for decades. They have a very supportive network of friends and family in the area. They have a significant history of caring for K.A. and A.M. before their daughter died. Both A.M. and K.A. have their own bedrooms in the maternal grandparents’ home.

[29] The paternal grandparents have been married for 21 years. In addition to J.A. they have an adult son. They have a very good relationship with that son.

[30] They live in a comfortable and clean rented house. It has a large backyard with a large park across the street. K.A. has his own bedroom in that house.

[31] A.A. has a history of steady employment in construction and as a truck driver. That employment was recently interrupted when A.A. was diagnosed with cancer. He has undergone treatment for that disease and says that he is now cancer-free. He testified that he has returned to work and expects to be able to earn \$9,000.00 per month net of taxes and deductions.

[32] P.A. works part-time and alternate weekends at a senior care facility. When she and A.A. have been unable to care for K.A. they have utilized the services of a day-home. Very little information about that facility is before this Court.

[33] The paternal grandparents also have a history of care of K.A. and A.M. before R.S. was killed.

### **Credibility**

[34] Each of the parties testified and called witnesses at trial. Numerous exhibits were entered, including transcripts, court orders, applications, affidavits, text messages, photographs, letters and a diary written by R.S.

[35] The most important witnesses called by the parties were J.A., the paternal grandparents and the maternal grandparents, as they have personal knowledge of their dealings with each other and their history with K.A. and A.M.

[36] J.A. was a credible witness insofar as he testified about his desire to become a responsible father for K.A. However, he displayed a lack of insight into the problems he faces and the hard work he will have to do to achieve that goal. At times during his testimony, particularly on cross-examination, he was argumentative, evasive and vague.

[37] I accept the testimony of the paternal grandparents that they love K.A. and genuinely believe that they can properly provide safety and security for him as he grows up. However, for a number of reasons I do not find them to be credible or reliable reporters of their history of interaction with the maternal grandparents.

[38] In the first instance, as will be discussed later in these Reasons, they have a history of dishonest dealing with the maternal grandparents and the Court.

[39] Further, they were often unable to recall dates and events clearly when challenged on cross-examination. Their evidence was often disorganized and somewhat scattered.

[40] A.A. in particular became argumentative and evasive when cross examined. For example, in the face of a copy of the transcript of their court appearance before Judge Deck on March 24, 2017 (entered as an exhibit at trial) A.A. claimed that the transcript did not accurately record that court application, and at one point said he might have been hallucinating when he was in court on March 24, 2017.

[41] Also, the transcript of his Questioning on October 16, 2017 (enter as an exhibit at trial) shows that during that examination he claimed that he could not remember many events, and when challenged the following exchange occurred:

Q. You have a very convenient memory, don't you?

A. Yes, I do.

[42] From A.A.'s testimony at trial I conclude that he has both a poor memory and a "convenient" or selective memory.

[43] In contrast, the maternal grandparents were very good witnesses. They each gave their testimony calmly and answered all questions put to them clearly. They were consistent through examination in chief and cross examination. Some of their evidence was corroborated by other witnesses and exhibits. I find that both maternal grandparents were credible and reliable witnesses.

[44] Where there is any conflict between the testimony of either of the maternal grandparents and either of the paternal grandparents or J.A., I accept the testimony of the maternal grandparents.

[45] Evelyn Wotherspoon testified as a Parenting Expert appointed by the Court pursuant to Practice Note 7. She was qualified to give expert opinion evidence in the area of child development and children's mental health and provided a comprehensive report that was entered as Exhibit 27. I find her to be a credible and reliable witness. I will review her evidence later in these Reasons.

### **Procedural History**

[46] This trial started on April 3, 2018. It was originally scheduled for five days but took thirteen and one half days in April, May and June to complete.

[47] Before the trial started numerous court applications were made. All of the parties reside in Central Alberta, within the proper jurisdiction of this Court. The documents filed in support of and in opposition to those applications show significant conflict between the maternal and paternal grandparents. That history is summarized, as briefly as possible, as follows:

- (i) On February 15, 2017 the paternal grandparents applied *ex parte* for and were granted guardianship of K.A. by Judge D'Souza sitting in Calgary Provincial Court. This application was made without notice to the maternal grandparents, who were not named in the style of cause. The Court was not advised that K.A. has a sibling and maternal grandparents. At the same hearing the Court ordered that K.A. was to reside with the paternal grandparents and that they had responsibility for him at all times except when J.A. had parenting time. J.A.'s parenting time was to be as mutually agreed.
- (ii) On February 23, 2017 the paternal grandparents appeared before Judge Mah in Calgary Provincial Court. An *ex parte* Final Parenting Order replacing the February 15, 2017 Parenting Order was made. Pursuant to this Order, K.A. was to reside with the paternal grandparents, contact time between K.A. and extended family members was to be at the sole discretion of the paternal grandparents, and a "police enforcement" clause was added.
- (iii) On March 17, 2017 in Red Deer Provincial Court Judge Holmes granted the maternal grandparents a Consent Interim Guardianship Order and a Consent Interim Parenting Order regarding A.M. (K.A.'s sibling). Pursuant to that Consent Interim Parenting Order the maternal grandparents provide the primary residence and day to day care of A.M. On the same date Judge Holmes granted the maternal grandparents leave to make an application in Red Deer Provincial Court for a Guardianship Order and a Variation of Parenting Order regarding K.A.
- (iv) On March 24, 2017 Judge Deck sitting in Red Deer Provincial Court granted the maternal grandparents' application to transfer the paternal grandparents' applications for Guardianship, Parenting and Variation of Parenting from Calgary Provincial Court to Red Deer Provincial Court. On the same date Judge Deck granted the maternal grandparents' application to be appointed as guardians of K.A., terminated the *ex parte* Final Varied Parenting Order made in Calgary Provincial Court on February 23, 2017, ordered that the maternal grandparents have parenting time with K.A. from 5:00 p.m. on March 28, 2017 until 5:00 p.m. on April 2, 2017 and ordered that the parties meet at the McDonalds Restaurant on the west side of Gasoline Alley for pick up and drop off of K.A. The paternal grandparents were present in Court when that Order was made.
- (v) On March 29, 2017 Judge Mitchell sitting in Red Deer Provincial Court found the paternal grandparents to be in breach of the Interim Parenting Order made by Judge Deck on March 24, 2017. Judge Mitchell ordered that the paternal grandparents transfer K.A. into the care of the maternal grandparents at the McDonald's Restaurant on the west side of Gasoline Alley by 2:00 p.m. on March 29, 2017, failing which a peace officer was to enforce the Order "with immediate

effect”. Judge Mitchell also ordered that K.A. ordinarily reside with the maternal grandparents until further order of the Court.

- (vi) On March 29, 2017 counsel for the paternal grandparents (not their counsel at trial) filed a Notice of Appeal of Judge Deck’s March 24, 2017 Order and Judge Mitchell’s March 29, 2017 Order. At the same time counsel filed an Application for a Stay of the Orders made by Judge Deck and Judge Mitchell on March 24 and March 29, 2017. The Notice of Appeal and Application were filed in Calgary Court of Queen’s Bench notwithstanding that the Orders under appeal were made in Red Deer Provincial Court. The Application for a Stay included as “Grounds” the statement that K.A. “...has never spent more than a couple days (sic) in the care of the Respondents since birth” and the statement that J.A. is a guardian of K.A. Both of these statements are false.
- (vii) On March 30, 2017 Justice Erb sitting in Calgary Court of Queen’s Bench stayed the Orders made by Judge Deck and Judge Mitchell until April 6, 2017.
- (viii) On April 5, 2017 Judge D’Souza sitting in Calgary Provincial Court granted a Consent Order appointing the paternal grandparents interim guardians of K.A. with primary care of K.A. The maternal grandparents were granted contact with K.A. “as mutually agreed in writing in advance” by the paternal grandparents.
- (ix) On April 7, 2017 Judge Glass sitting in Red Deer Provincial Court set the trial dates April 3, 4, 10, 11, and 12, 2018 and prohibited any of the parties from bringing any Application or Claim in any Judicial Centre without leave of a Judge of the Provincial Court in Red Deer.
- (x) On May 9, 2017 a full day JDR was scheduled. That JDR was not completed because counsel for the paternal grandparents (not their trial counsel) advised presiding Provincial Court Judge Andreassen that she needed to leave immediately after she returned from her lunch break.
- (xi) On June 23, 2017 Judge Holmes sitting in Red Deer Provincial Court ordered counsel for the maternal and paternal grandparents to contact Dr. Lorri Yassenik to schedule a telephone interview to arrange for K.A. to attend one or more joint sessions with A.M. at Dr. Yassenik’s office in Calgary.
- (xii) On August 2, 2017 Judge Deck sitting in Red Deer Provincial Court granted a Consent Order directing that Dr. Lorri Yassenik see K.A. individually or with A.M. and directing the paternal and maternal grandparents to cooperate with Dr. Yassenik, with a direction as to payment of Dr. Yassenik’s costs.
- (xiii) On November 29, 2017 Judge Glass sitting in Red Deer Provincial Court granted an Interim Variation of Parenting Order that gave the paternal grandparents primary residence and day to day care of K.A., with the maternal grandparents

having specified parenting time plus additional parenting time as agreed between the parties.

- (xiv) On March 19, 2018 Judge Glass sitting in Red Deer Provincial Court ordered that the Calgary Provincial Court Action was consolidated into the Red Deer Provincial Court Action. On the same date Judge Glass granted an Intervention Order regarding J.A.'s application for sole guardianship of K.A. Pursuant to that Intervention Order Evelyn Wotherspoon was appointed as a Parenting Expert under Practice Note 7 to carry out a short term intervention to provide assistance to the Court to craft a developmentally appropriate parenting plan for K.A.

### **Applications Before the Court**

[48] J.A. has applied for sole guardianship of K.A., termination of his parents' guardianship of K.A., and for variation the Parenting Order currently in effect so that he has primary residential care of K.A. upon his release from gaol.

[49] On March 12, 2018 P.A. (the paternal grandmother) swore and filed an affidavit supporting J.A.'s application to be appointed sole guardian of K.A., provided that K.A. remain in the care of P.A. and A.A. until J.A. is released from prison.

[50] However, at the conclusion of the trial the paternal grandparents changed their position. They now want J.A. to share guardianship of K.A. with them, with K.A. remaining in their primary care. Their plan is to allow J.A. to move into their home sometime after he is released from prison so that he can share custody of and decision making authority in relation to K.A. They ultimately plan to transfer primary care of K.A. to J.A. if and when he proves that he has overcome his addictions, has employment, has his own residence and is capable of parenting K.A.

[51] They propose that the maternal grandparents have contact time with K.A. every other weekend from Thursday to Sunday.

[52] During the trial J.A. also changed his position with regard to terminating his parents' guardianship. He now concedes that he is not currently able to provide sole guardianship or full time parenting to K.A. He says that if he is declared to be a guardian he wants to share guardianship with the paternal and/or the maternal grandparents, with specified parenting time for himself. If he is not declared to be a guardian, he wants his parents to be the sole guardians of K.A., with specified contact time for himself, including visits with K.A. at the correctional institution where he is incarcerated.

[53] The maternal grandparents oppose J.A.'s application for guardianship and have applied to become guardians of K.A. and to have primary care of K.A. They have applied to terminate the guardianship of the paternal grandparents. In the event that J.A. is found to be a guardian, they say that his guardianship should be devoid of any decision-making responsibility. They say that any contact that J.A. has with K.A. should be supervised and subject to random drug screening.

### **III Issues**

[54] The following are issues for this application:

- 1) Does J.A. meet the requirements under section 20 for statutory guardianship?

- 2) If J.A. does not meet the requirements of a statutory guardian, should he be declared a guardian pursuant to section 23?
- 3) Should the maternal grandparents be declared guardians pursuant to section 23?
- 4) Should the guardianship of the paternal grandparents be terminated pursuant to section 25(1)?
- 5) Should the Interim Variation of Parenting Order made by Judge Glass on November 29, 2017 be varied pursuant to section 34?
- 6) Which parties should have the powers responsibilities and entitlements of guardians described under sections 21(5) and 21(6)?

#### **IV Law and Analysis**

##### **1) Application for Guardianship - J.A.**

[55] There are two “gateways to guardianship” under the Act, the first through section 20 (“statutory guardianship”) and the second through section 23: *MAB v HJLM*, 2017 ABCA 174, para 4; *FR v VT*, 2017 ABCA 109.

[56] If J.A. meets the criteria set out in in section 20 then the Court cannot deny him guardianship. Those criteria are described in section 20(2), pursuant to which it must be proven on a balance of probabilities that J.A.:

- (a) has acknowledged that he is a parent of K.A., and
- (b) has demonstrated an intention to assume the responsibility of a guardian in respect of K.A.

within one year from either becoming aware of the pregnancy or becoming aware of the birth of K.A., whichever is earlier.

[57] J.A. testified that he began cohabiting with R.S. at her house in mid-January 2015 and that on May 21, 2015 he learned of the pregnancy that resulted in K.A.’s birth. I accept that evidence.

[58] The relevant time period under section 20(2) is therefore from May 21, 2015 to May 20, 2016. It must be proven that J.A. acknowledged his paternity of K.A. and demonstrated an intention to assume the responsibility of a guardian of K.A. over this time period.

##### **Section 20(2)(a)**

[59] The evidence establishes that J.A. acknowledged his paternity of K.A. within one year from learning of that pregnancy. He did so publicly to his friends and family and by attending at the hospital when K.A. was born, and by assisting R.S. to complete K.A.’s birth certificate, which identifies J.A. as K.A.’s father. He has satisfied the requirement under section 20(2)(a).

**Sections 20(2)(b), 20(3)(e) and 20(3)(j)**

[60] The more difficult question is whether, within one year of learning of the pregnancy, J.A. demonstrated an intention to assume the responsibility of a guardian in respect of K.A. as described in section 20(2)(b).

[61] Pursuant to section 20(3)(e), a parent has demonstrated an intention to assume the responsibility of a guardian in respect of a child by cohabiting with the other parent for at least 12 consecutive months during which time the child was born.

[62] As noted above, J.A. and R.S. began living together at her house in mid-January 2015. On December 31, 2015 J.A. was arrested and held in custody for at least 10 days. When he was released in January 2016 he returned to live with R.S. He was living there when K.A. was born in February 2016.

[63] On March 4, 2016 a Canada-wide Warrant was issued for the arrest of J.A. At that time he attended at the home of the maternal grandparents, picked up R.S., A.M. and K.A. and fled with them to an undisclosed location. There is no evidence suggesting that R.S. was forced to accompany J.A.

[64] J.A. was arrested on the Canada-wide Warrant on March 8, 2016 and held in custody from that date until April 20, 2016, when he was again released. While he was in custody from March 8 to April 20 R.S. and K.A. lived with the maternal grandparents. Upon J.A.'s release from custody on April 20, 2016 he returned to live with R.S. and K.A. at her house until he was re-arrested in June 2016. He has remained in custody since then.

[65] As a result of his periodic incarceration J.A. did not live with R.S. for at least 12 consecutive months from May 21, 2015 forward.

**Analysis – Statutory Guardianship Under Section 20(3)(e)**

[66] The issue at this point is whether, despite his periods of physical separation from R.S., J.A. continued to cohabit with R.S. from May 21, 2015 to May 20, 2016.

[67] The Act does not define “cohabit” or “cohabiting”. However, the requirements of cohabitation have been judicially considered.

[68] In *Wright v Lemoine*, 2017 ABQB 395 cohabitation was considered in the context of an application for partner support pursuant to sections 57 and 58 of the Act. Justice Nixon reviewed a number of cases, starting at para 28 with the statement at para 42 of *Hodge v Canada*, 2004 SCC 65 (CanLii), [2004] 3 SCR 357:

“Cohabitation” in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof, and conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue.

[69] Alberta decisions consistent with this proposition and cited in *Wright v Lemoine* include *Rocky v Hartwell*, 2016 ABQB 438 (CanLii), 86 RFL (7<sup>th</sup>) 395; *Racz Estate (Re)*, 2013 ABQB 668 (CanLii), 574 AR 272 (*sub nom Tait v Westphal*); *Riley Estate (Re)*, 2014 ABQB 725 (CanLii), 603 AR 1.

[70] As noted by Justice Nixon in *Wright v Lemoine* at para 37, in one case, even where the parties were in a turbulent relationship “characterized with regular physical violence and verbal attacks,” brief periods of separation did not bring cohabitation to an end: *Charles v Young*, 2013 ABQB 632 (CanLii), 573 AR 144.

[71] At paras 45 and 46 in *Wright v Lemoine* Justice Nixon states:

45 As noted earlier in these Reasons, the Supreme Court of Canada in *Hodge* made clear cohabitation is a necessary requirement for a common law relationship, but cohabitation is not the same as co-residence. As seen in the cases referred to earlier in these Reasons, physical separation of parties and maintenance of separate residences does not necessarily interrupt the period of cohabitation.

46. Given the many ways parties may structure their living arrangements, it is important to take a flexible approach and to consider the intentions of the parties in determining whether they have cohabited for the requisite period of time in order that the purpose of the [legislation] is met. Section 10 of the *Interpretation Act*, RSA 2000 c I-8 requires that “[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.”

### **Adjudication**

[72] The facts in this case disclose that R.S. and J.A. intended to and did resume living together after he was released from custody in January 2016 and again after he was released from custody in April 2016. Construing section 20(3)(e) in accordance with section 10 of the *Interpretation Act*, I find that, notwithstanding J.A.’s periodic absences due to his incarceration, he cohabited with R.S. for 12 consecutive months from the date that he learned of the pregnancy, and that K.A. was born during that 12 month period.

[73] I find that pursuant to section 20(3)(e) J.A. has demonstrated an intention to assume the responsibility of a guardian in relation to K.A., and that he has met the requirements of section 20(2)(a) and section 20(2)(b).

[74] J.A. is therefore a statutory guardian of K.A.

[75] Given this finding, it is not necessary for me to adjudicate J.A.’s claim that he is a parent who has demonstrated an intention to assume the responsibility of a guardian in respect of a child by voluntarily providing or offering to provide reasonable direct or indirect financial or other support for the child, other than pursuant to a court order, as described in section 20(3)(j).

[76] However, I will do so for the sake of providing complete Reasons.

### **Analysis – Statutory Guardianship Under Section 20(3)(j)**

[77] J.A. contends that he provided direct and indirect support for R.S. and K.A. during and after the pregnancy in the absence of any court order. He claims to have remodeled a room in the house he shared with R.S. so that it could be used as a nursery. He also says that he hired contractors to do renovations to that home, that he paid the mortgage and other household bills and that he gave R.S. money to buy food and supplies.

[78] His testimony on examination in chief with regard to the financial and non-financial support he provided was:

Q. ...And what type of financial support did you provide for [R.S.] and [K.A.], if any?

A. Like I said, I would buy and sell some cars, or some, you know, quads or bikes, and boats, and, I mean, sometimes I would have to ask my family for money, sometimes, you know [R.S.'s] parents would help us out, but it was-you know, I would do odd jobs here and there, and then like I also said, I would-sometimes from crime I would pay.

Q. Okay. And did you provide any type of non-financial support to [R.S.] and [K.A.]?

A. Well like as in like was I there with them, was I passionate?

Q. Like in terms of-you know, in terms of supporting them, not emotionally, but financially-like aside from money did you provide any type of services, or-

A. Well I was their-I was his father, you know, I was there, I-I helped take care of him for the little time I was there.

Q. So tell me a little bit about that, how did you-how did you two divide the responsibilities of the household?"

A. I don't know, there wasn't like a schedule, you what I mean (sic), if-we just did normal parenting, man, we just took care of our kids. I don't know like really how to explain that.

Q. So in terms of paying the bills, who paid the bills?

A. Toward the end [R.S.] was, through her parents.

Q. M-hm.

A. But-

Q. And sorry, go ahead.

A. But you know what I mean, like [R.S.] wasn't working after when she got pregnant until- until after I went to gaol, then she started working again so-like I said, you know what I mean, odd jobs here and there, and you know what I mean-

Q. M-hm.

A. Just my family, and friends and-

Q. And who-who kept up the house?

A. Well we both did, but, I mean, we kind of had a messy lifestyle, but we all took care of the house I guess, took care of the children. I don't know, I think everything was just so crazy with a newborn and two kids, that we weren't too worried about taking care of the house I guess.

Q. And can you describe the house for me, what type of a house was it?

A. It's a, I don't know, two story, four bedroom, two bathroom house, with a nice backyard and detached garage.

Q. And did you own that or rent it?

A. No, [R.S.] owned the house.

Q. [R.S.] owned it, okay. Was there a mortgage?

A. I believe so, yeah.

Q. Who paid the mortgage?

A. Between me, [R.S.] and her parents sometimes.

Q. Okay. At any point were there any improvements done to the home?

A. Yeah, if that's what you want to call them, yeah, sure.

Q. Tell me about that.

A. Hired some people to do some renovations on the house, I did the nursery and then the bathroom upstairs, and then I hired some guys from Rimbey to do some stuff on the house, yeah, like-

Q. So what work did you do in the nursery exactly?

A. I just, you know, repainted the walls, and filled a couple holes in, and just cleaned it out, built some shelves and stuff. Just got it fresh and ready for baby.

Q. Okay. And these gentlemen from Rimbey, what were they responsible for?

A. Remodeling the kitchen, and the entry, and then putting doors and trim on all the walls-I mean all the doors in the hallway.

Q. And how did that go?

A. Not very good at all actually.

Q. How so?

A. They just-I don't know, they were only there for a day or two, and they just didn't do anything properly, so we just cut it off.

(Transcript April 3, 2013, page 38, lines 11-41, page 40, lines 1-41, page 40, lines 1-9)

[79] J.A. did not provide any documentation to support his testimony that he financially supported R.S. or that he had any legitimate source of income. He did not provide any other evidence supporting his testimony that he made any mortgage payments.

[80] On cross examination he acknowledged that he was unemployed for much of the time that he lived with R.S., and that he had a gambling addiction and a crystal methamphetamine addiction.

[81] It is clear from his testimony that J.A. does not have any specific memory of the amount of money he gave to R.S., the dates he gave her money, or the how she used the money he gave her.

[82] There is no evidence that J.A. provided any financial support to R.S. or K.A. while he has been incarcerated.

[83] I accept the evidence given by the maternal grandparents to the effect that the house was bought for R.S. by D.S. (maternal grandfather) and that they often had to pay ongoing household expenses, including the mortgage on that house, groceries and household supplies, both before and after K.A. was born.

[84] I also accept the evidence given by P.A. (paternal grandmother) that she and A.A. (paternal grandfather) contributed to the support of K.A. and R.S. by occasionally purchasing groceries and household supplies for them.

[85] With regard to J.A.'s claim that he paid for renovations to the house, I note that he has not provided any documentary or other evidence supporting that claim or describing the amount paid, the work done, the persons who did that work or the date that work was done.

[86] It is clear on the evidence that house was rendered uninhabitable and was unsafe to live in as a result of the efforts made to renovate it. As a result, after K.A. was born R.S. and K.A. lived with the maternal grandparents for about 6 weeks while the house was being repaired. There is no evidence that J.A. contributed in any way to the cost of repairing the damage done to the house by the attempted renovation.

#### **Adjudication – Statutory Guardianship Under Section 20(3)(j)**

[87] I find that J.A. has not proven that he made or paid for any beneficial renovations to the house.

[88] I find that J.A. has failed to prove that he voluntarily provided or offered to provide reasonable direct or indirect financial or other support for K.A., and he has not demonstrated an intention to assume the responsibility of a guardian as contemplated by section 20(3)(j).

#### **2) The Maternal Grandparents' Applications for Guardianship, Variation of Parenting and Termination of the Guardianship of the Paternal Grandparents**

[89] Pursuant to section 23(1) the maternal grandparents apply to be appointed guardians of K.A. and pursuant to section 23(5)(b) they are asking the Court to waive the 6 month care and control requirement prescribed by section 23(1)(b).

[90] The maternal grandparents also apply under section 34 to vary the Interim Variation of Parenting Order made by Judge Glass in Red Deer Provincial Court on November 29, 2017, and to terminate the paternal grandparents' guardianship of K.A. The maternal grandparents want to provide the primary residence and day-to-day care for K.A.

[91] The paternal grandparents oppose these applications. With regard to the application to vary parenting, they say that there has not been a change in the needs or circumstances of K.A. since Judge Glass granted them primary residence and day to day care of K.A., that K.A. is thriving and upon consideration of section 18 factors, variation of parenting is not in his best interests.

[92] J.A. initially applied for sole guardianship but now says that he is prepared to share guardianship with either or both sets of grandparents. He opposes the application to terminate his parents' guardianship and he opposes the application to vary parenting. He says that there are no

extreme circumstances present to justify termination, and to the extent that there are concerns, they are speculative and do not form the basis for a disruption in K.A.'s primary attachment.

### **The Best Interest Test**

[93] The Court must determine what parenting arrangement is in the best interest of K.A. As enunciated in section 18(2)(a), the task of the Court is to ensure the greatest possible protection of his physical, psychological and emotional safety.

[94] With regard to the application to vary the Interim Variation of Parenting Order made by Judge Glass on November 29, 2017 brought by the maternal grandparents pursuant to section 34, the paternal grandparents say that this Court must be satisfied that a change in the needs or circumstances of K.A. has occurred since that Order.

[95] However, because the Order made by Judge Glass was an interim order and not a final order, a change in the needs or circumstances of circumstances of K.A. is not required: *Wandler v Crandall*, 2017 ABCA 391 at para 30. This Court shall consider only the best interest of K.A. as required by section 18.

### **A. The Evidence of Evelyn Wotherspoon**

[96] The *viva voce* evidence of Evelyn Wotherspoon and her report entered as Exhibit 27 have been of great assistance in determining this issue. She interviewed all the parties and observed them interacting with K.A.

[97] Ms. Wotherspoon has been conducting family assessments for more than 35 years, and she has been assessing the mental health of infants and young children for more than 17 years. In this trial she was qualified to give expert opinion evidence in the area of child development and the mental health of children. She has been qualified to give expert opinion evidence in that area on many occasions in the Alberta Court of Queen's Bench and the Provincial Court of Alberta. I accept all of the *viva voce* evidence given by her and the evidence found in her report. I attribute great weight to that evidence.

[98] Ms. Wotherspoon's testimony and her report contain evidence relevant to the protection of K.A.'s physical, psychological and emotional safety and his need for stability, considering his age and stage of development. She reviews K.A.'s history of care and provides her opinion about the nature, strength and stability of the relationships between K.A., his sibling A.M. and the parties to these Applications.

[99] Her evidence also addresses the ability and willingness of the parties to care for and meet the needs of K.A., and their ability and willingness to communicate and co-operate on issues affecting him.

[100] When assessing the mental health of infants Ms. Wotherspoon looks at four categories:

- (i) pre-natal exposure, temperament, and health – how are they developing?
- (ii) what characteristics the caregivers have, including mindset, attitude, beliefs, understanding and empathy for the child;
- (iii) the network of supportive relationships because children can tolerate stress if they have an adequate network of supportive relationships undergirding them; and

(iv) risk and protective factors in the family and community environments, with the analogy that the child carries a knapsack and every risk factor is a rock in that knapsack (a “burden of risk”) and every protective factor makes that knapsack easier to carry – so that if that if that knapsack has too many rocks in it and the child experiences adversity, that child will be less nimble and less capable and less adaptable in the face of that adversity.

(Transcript May 28, 2018 pg 16 lines 7-41, pg 17 lines 1-7)

[101] Ms. Wotherspoon testified that K.A. is currently thriving and has developed a primary attachment with his paternal grandmother and a strong secondary attachment to the paternal grandfather and the maternal grandparents, and a secondary attachment to J.A. Both sets of grandparents and J.A. are emotionally invested caregivers.

[102] Both set of grandparents maintain homes that are clean and safe, and both sets of grandparents have established regular and appropriate daily routines for K.A. His physical safety is currently not at risk in either home.

[103] Based on her observations, Ms. Wotherspoon says that K.A. presents similarly in each caregiving environment and he transitions well between the two households. She did not observe the level of distress in K.A. at the transitions/exchanges that has been described by the paternal grandparents.

[104] K.A. has a close and affectionate relationship with his sibling A.M.

[105] He is a healthy, well-adjusted and sturdy youngster with an easy, charming temperament. He is meeting his social/emotional and developmental expectations.

[106] Ms. Wotherspoon testified that K.A. has risk factors including the loss of his mother at a critical stage of his brain development, his placement change and the disruption of his sibling relationship with A.M. He has had a lot of adversities linked with mental health issues over the long run. Her opinion is that K.A. has a significant risk burden, the effects of which may not appear until adolescence or young adulthood, or until another stressful event occurs.

[107] Ms. Wotherspoon identified his protective factors as his adaptability, his ability to engage socially with adults and his primary and secondary attachments to his caregivers

[108] It is Ms. Wotherspoon’s opinion that most important priority for K.A. is stability of caregiving going forward.

[109] The essential qualities of the parties as caregivers must be assessed in order to ensure the greatest stability of the future care of K.A.

[110] Ms. Wotherspoon identified the qualities of caregivers that are important as:

- (i) the capacity to self-reflect on their own parenting strengths and challenges;
- (ii) the capacity for flexible thinking, which includes the capacity to look at situations from different points of view and to be able to separate their own feelings and preferences from other’s, and especially from the child’s; and
- (iii) the ability to regulate and manage difficult feelings under pressure.

[111] At pages 44 and 45 of her report Ms. Wotherspoon states:

[138] For [K.A.] to have good mental health and achieve his full potential, he must have sensitive, responsive and nurturing care from caregivers who are reasonably capable of regulating their emotions and who can engage in self-reflection when problems arise. Given his vulnerabilities, [K.A.] must have a stable and predictable household with a minimum of changes or disruption going forward. As the description of each relationship is evaluated, emphasis should be given to:

1. The history of providing a stable and predictable home.
2. The capacity of each caregiver to empathize and separate [K.A.'s] feelings from their own.
3. The capacity of each caregiver to recognize their strengths and deficits and adjust accordingly.
4. The caregiver's history of dealing with problems and conflicts.

#### **The Interview of the Paternal Grandparents**

[112] Ms. Wotherspoon found the paternal grandparents challenging to interview. She describes them as anxious and emotional and unable to remember dates and events. She says they interrupted and contradicted each other and were also self-contradictory, giving inconsistent answers to questions. The paternal grandfather presented as agitated, guarded and defensive.

[113] Notwithstanding these difficulties, Ms. Wotherspoon is of the opinion that the paternal grandparents are loving and affectionate caregivers to K.A., and that they are motivated to provide a good home for him until J.A. is released from prison.

[114] However, she is concerned that A.A. has difficulty with emotional self-regulation and she says that he appears to lack the self-reflective capacity to express regrets, acknowledge personal flaws or admit to personal challenges of any kind.

[115] She is also concerned that they have adopted an inflexible "all-or-nothing" mindset with respect to the current dispute (either they prevail, or they will never see K.A. again) and that they have expressed extremely negative and unsubstantiated views of the maternal grandparents, including the belief that the maternal grandparents do not love K.A. and their applications are "100% motivated by money" and by "money, ego and image."

[116] Ms. Wotherspoon is also very concerned that the paternal grandparents have a longstanding pattern of overlooking serious mental health symptoms and criminal behavior that J.A. has displayed from an early age, including aggression toward people, deceitfulness, theft, serious violations of rules and disturbance of behavior sufficient to cause impairment to social and academic functioning. In her words, they have "spent most of their lives making excuses for this young man and protecting him from consequences". She is concerned that they might be unwitting enablers of J.A.'s dysfunctional behavior.

[117] She is of the opinion that their narrative suggests that J.A. has significant difficulty with emotional regulation and impulse control, and that J.A. likely meets the criteria for Substance Use Disorder and requires further assessment for ongoing mental health issues.

[118] Ms. Wotherspoon testified that although she is very cautious about disrupting K.A.'s primary attachment to P.A. and the thought of doing so makes her "sick to her stomach", in this case there are compelling reasons to consider doing so:

A. I don't like doing it. I am very cautious about that. There are a number of reasons why that might be considered, but it is not a happy-it's not something I would like to do. The thing is the compelling reasons. There have to be compelling reasons.

Q. Is it correct that the compelling reasons up to this point do not exist in this matter?

A. Oh, no, I think there are many compelling reasons why you should consider disrupting that attachment, even though it will be painful. I think there are, particularly around [J.A.], yes, there are compelling reasons to consider it. I guess the question is to look at the compelling reasons on both sides, but certainly it is not my preferred alternative to disrupt attachments.

(Transcript May 28, 2018 p. 120 lines 1-13)

Q. Is it correct that the primary attachment relationship is of - I want to say one of the highest importance in the consideration of weighing all of these factors?

A. It certainly is my first question, is the primary - who is the primary attachment for this child is the thing I want to know first. But we have a situation where this child's primary attachment is someone who is unable to recognize that it may not be the best plan for her son to take over care of this child. I think that is the issue for me is it a -she is doing a great job and the child is thriving in her care, but her plan is for this individual who has a strong history of symptomology that would be considered quite serious and severe in any mental health program, and when I'm screening and referring people for mental health services, someone like [J.A.], that pattern of symptoms is straight out of the diagnostic and statistical manual. They are very concerning, and the idea that they would be contemplating him as the sole guardian for this child is a compelling concern, yes.

(Transcript May 28, 2018 p.120 lines 15-27)

[119] Ms. Wotherspoon is convinced that J.A.'s effort to become the primary caregiver of K.A. will be ongoing, and she is concerned that the paternal grandparents do not have the ability to withstand pressure from him, and will not be able to withstand that pressure over time.

[120] In summary Ms. Wotherspoon is concerned that:

- (i) the paternal grandparents are unwitting enablers for their son's addictions, they fail to recognize a pattern of instability and symptoms of underlying mental health concerns, they deflected responsibility and over-simplified his problems and do not fully grasp the task that J.A. faces if he is to rehabilitate and assume the role of a parent;
- (ii) A.A. has difficulty with self-regulation and both paternal grandparents lack sufficient self-reflective capacity; and

- (iii) the paternal grandparents appear to lack the capacity to protect K.A. by setting firm limits with J.A. or holding him accountable if he does not follow through on his plans and commitments post-incarceration.

[121] It is Ms. Wotherspoon's opinion that the plan of the paternal grandparents to have J.A. move into their home while K.A. is residing with them as primary caregivers, and their proposal that J.A. shall ultimately become the sole guardian of K.A. constitutes a compelling reason to consider disrupting the primary attachment that K.A. has with his maternal grandmother.

[122] I accept and agree with that opinion. I add that execution of the paternal grandparents' plan to ultimately turn primary care of K.A. over to J.A. would result in disruption of the primary attachment that K.A. has with P.A.

#### **The Interview of J.A.**

[123] J.A. is reported by Ms. Wotherspoon to fluctuate between expressing deep regret and remorse for the impact that his actions have had on R.S., K.A. and A.M. to becoming agitated, irritated, impatient and defensive when pressed on parts of his narrative. While he took responsibility for his poor choices and decisions, he also minimized the length and extent of his criminal behavior.

[124] He was mistrustful of the assessment and expressed doubts about the motives of the maternal grandparents.

[125] While acknowledging that drugs and gambling have had a significant negative impact on his life, he had difficulty saying he was an addict.

[126] Ms. Wotherspoon observed J.A. interact with K.A. at the correctional institution at which J.A. is housed. She notes that J.A. is at ease with and observant of K.A. during those visits, expresses empathy for K.A. and plays well with K.A.

[127] Ms. Wotherspoon is convinced that J.A. loves K.A. and wants to be a good father but it is her opinion that he has not shown a history of being able to provide the necessary stability and predictable care that K.A. will need. She says that while he shows some awareness of the inappropriateness of his criminal behavior, he did not acknowledge or address long-standing, serious mental health symptoms that have a high potential to interfere with his ability to meet K.A.'s needs. I accept and agree with that opinion.

#### **The Interview of the Maternal Grandparents**

[128] The maternal grandparents are described by Ms. Wotherspoon as calm, composed and organized in their interviews, despite the emotional toll on them resulting from the sudden death of their daughter R.S., the ensuing dispute over the care of K.A. and their unexpected role as full time caregivers of A.M.

[129] They are described by Ms. Wotherspoon as loving and empathetic, self-reflective and very stable, and she says that although they are still struggling with the death of the daughter R.S., they are able to regulate their emotions and display flexible thinking. I accept and agree with that opinion.

#### **Summary of Findings by Evelyn Wotherspoon**

[130] At para 136 of her report, under the title "Summary of Findings", Ms. Wotherspoon states that both sets of grandparents and J.A. are emotionally invested caregivers. However, she

goes on to state “Unfortunately, the proposals of all parties to this dispute necessitate another change in primary caregiving. The most important priority for [K.A.] is stability of care giving going forward.”

[131] In Ms. Wotherspoon’s opinion the maternal grandparents have the ability to protect and cultivate K.A.’s other affectionate ties and significant relationships despite the difficult relationships that have developed between the parties. They are able to do this because they have demonstrated abilities to consider the views of others, to self-critique and to separate their preferences, views and needs from K.A.’s. Further, they have showed a willingness to engage with and accept advice from therapists and other professionals regarding the best ways to minimize the pain and stress on K.A. and A.M. I accept and agree with that opinion.

[132] I also accept and agree with Ms. Wotherspoon’s opinion that it is in K.A.’s best interest that shared decision-making is not workable, and that it is in K.A.’s best interest to have one set of care givers who have the power to make decisions.

### **B. Prior Court Orders in the Context of Section 18(2)(b)(viii)**

[133] The steps taken by the paternal grandparents to obtain Court Orders, and their failure to comply with Judge Deck’s Order made on March 24, 2017, raise concerns about their ability and willingness to communicate with the maternal grandparents on issues affecting K.A.

[134] The paternal grandparents were appointed interim guardians and primary caregivers of K.A. on February 15, 2017 by Judge D’Souza sitting in Calgary Provincial Court upon *ex parte* application. Even though the maternal grandparents had met with the paternal grandparents on February 13, 2017 they were not notified of this application and were not named in the style of cause. Judge D’Souza was not advised that the maternal grandparents existed and had a history of contact with K.A.

[135] The paternal grandparents testified that they did not mention the maternal grandparents during their application because they were inexperienced with Court procedures, and because they had received instructions from the person who helped them complete the Application form at the Calgary courthouse to only answer questions put to them by the Judge. This explanation might be true, and I do not reject it.

[136] I do not accept their explanation for not providing prior notice of this application to the maternal grandparents. They testified that they believed that J.A. had told the maternal grandmother about this application shortly before it was made, and therefore they did not think they had to notify the maternal grandparents.

[137] Logic and common sense dictate that, if the paternal grandparents were acting honestly and transparently, and if they were primarily concerned with the welfare of K.A., they would have wanted to know what expectations and plans the maternal grandparents had for the future care of K.A. If they had been acting in good faith, they would have inquired whether J.A. had in fact spoken with either of the maternal grandparents about K.A.’s future care, and whether they were aware of the planned application for a Guardianship Order.

[138] I find that the paternal grandparents intentionally failed to disclose to the maternal grandparents their intention to apply for a Guardianship Order, and that intentional non-disclosure is the root cause of the distrust that the maternal grandparents have for the paternal grandparents.

[139] On February 23, 2017 Judge Mah sitting in Calgary Provincial Court granted an *ex parte* Final Varied Parenting Order that replaced the Parenting Order made by Judge D’Souza on February 15, 2017. Judge Mah ordered that the paternal grandparents were to provide the primary residence for K.A. and that contact with extended family members shall be at their sole discretion. As well, a “police enforcement” clause was included in this Order.

[140] The maternal grandparents were not given notice of this application despite the fact that they had met with the paternal grandparents on February 16 and 20, 2017 for the purpose of picking up and exchanging K.A., and despite the fact that on February 20, 2017 they asked the paternal grandparents for a copy of the Order made by Judge D’Souza on February 15, 2017 (which request was refused). Further, the maternal grandparents were not named in the style of cause and no information describing their history of contact with K.A. was provided to Judge Mah.

[141] It is apparent that the paternal grandparents knew by February 20, 2017 that the maternal grandparents were very interested in being involved in the future care of K.A. Any reasonable person in the position of the paternal grandparents would have realized that the maternal grandparents were entitled to participate in any court application related to K.A.’s future care. Any reasonable person in the position of the paternal grandparents would have given the maternal grandparents a copy of the Order made by Judge D’Souza on February 15 and would have given them prior notice of the February 23 application made before Judge Mah.

[142] The paternal grandparents have not provided any reasonable explanation for failure to do those things and their failure to advise Judge Mah of the names of the maternal grandparents and their interest in being involved in the future care of K.A.

[143] I find that the paternal grandparents intentionally failed to notify the maternal grandparents of the application that resulted in the February 23, 2017 Order.

[144] I also find that they intentionally omitted from that application, and the materials filed in support of that application, the names of the maternal grandparents, and other information describing the history of care of K.A. that the maternal grandparents had. I find that that they thereby intentionally mislead the Court.

[145] The maternal grandparents were appointed interim guardians of K.A. on March 24, 2017, and the paternal grandparents’ interim guardianship of K.A. was terminated by Judge Deck sitting in Red Deer Provincial Court. On the same date Judge Deck made an Interim Variation of Parenting Order granting the maternal grandparents parenting time with K.A. from March 28, 2017 at 5:00 p.m. until April 2, 2017 at 5:00 p.m.

[146] On March 29, 2017 Judge Mitchell sitting in Red Deer Provincial Court made a Varied Parenting Order that declared the paternal grandparents to be in breach of Judge Deck’s Interim Parenting Order. This Order was made because the paternal grandparents failed to deliver K.A. to the maternal grandparents on March 28, 2017.

[147] A.A. was questioned under oath on October 16, 2017 about breaching Judge Deck’s Order and gave the following evidence:

Q. So you didn’t show up because you didn’t-you choose to. You said you were busy. Do you think the rules don’t apply to you?

A. Rules apply when rules are made properly.

(Exhibit 1, Tab 19 - transcript of Questioning held October 16, 2017 at p. 92, lines 14-17)

[148] From this testimony it appears that A.A. took a very cavalier approach to Judge Deck's Order made March 24, 2017. It appears that A.A. believes that his obligation to comply with that Order, and perhaps other Court Orders, is contingent upon whether he believes they are "made properly".

[149] On March 30, 2017 Judge Deck's Orders and Judge Mitchell's Order were stayed until April 6, 2017 by Justice Erb sitting in Calgary Court of Queen's Bench. It is important to note that the Application for that stay contained two statements that were false, namely:

(i) K.A. has never spent more than a couple days (sic) in the care of the maternal grandparents; and

(ii) J.A. was, at that time, a guardian of K.A.

[150] The paternal grandparents have not provided any explanation for providing this false information to the Court.

[151] It is apparent that from an early stage in these proceedings, and continuing until March 30, 2017, the paternal grandparents engaged in a pattern of dishonest behavior that interfered with the maternal grandparents' attempts to be involved in the care of K.A. It is also apparent that their dishonest behavior resulted in different Courts being deprived of important information relating to K.A.'s history of care.

[152] This history is strong evidence that the paternal grandparents have not been able and willing to honestly communicate and cooperate with the maternal grandparents and with the Court on issues affecting K.A.

### **Adjudication**

[153] I find that it is in the best interests of K.A. that the maternal grandparents be appointed as his guardians. They are each suitable as guardians and have the ability and are willing to exercise the powers, responsibilities and entitlements of guardianship in respect of K.A. Given their history of care of K.A., there are good and sufficient reasons to waive the requirement for 6 months care of K.A. found in section 23(1)(a), and I do so pursuant to section 23(5)(b). Their application to be appointed as guardians of K.A. is granted.

[154] Even though this Court is not required to consider whether there has been a change in the needs or circumstances of K.A. as described in section 34(3), for the sake of clarity I say that I am satisfied that the plan of the paternal grandparents to bring J.A. into their home to live with them and K.A., and their plan to eventually turn over primary care of K.A. to J.A. constitutes a change in the needs or circumstances of this child within the meaning of section 34(3).

[155] I find that the variation of the Interim Variation of Parenting Order made by Judge Glass on November 29, 2017 is necessary to ensure the greatest possible protection of K.A.'s physical, psychological and emotional safety, and is in the best interests of K.A. I order that the maternal grandparents shall provide the primary residence and day to day care of K.A.

[156] I recognize that there will be a disruption of the primary attachment that K.A. has with his paternal grandmother, and I make this decision only after serious consideration of the effect that removing this child from P.A. will have upon him. I have carefully weighed the impact that

disruption of the primary care relationship will have upon him as required by the Alberta Court of Appeal in *McPhail v Karasek*, 2006 ABCA 238 and *Milton v. Letch*, 2013 ABCA 248.

[157] J.A. has a history of family violence and addiction and there is no specific plan to deal with those problems. The paternal grandparents' plan to allow J.A. to move into their residence and eventually provide the primary residence and day to day care of K.A. therefore presents a clear danger to the stability of K.A., is not in his best interest and is a compelling reason to vary the current care regime of K.A. that outweighs the risk that might result from disruption of his primary attachment with P.A.

[158] Further, the paternal grandparents' plan necessarily entails disruption of that primary attachment sometime in the future, when they transfer day to day care and primary residence of K.A. to J.A.

[159] With regard to the application to terminate the guardianship of the paternal grandparents pursuant to section 25(1), it is important to recognize that they obviously love K.A. and K.A. loves them, and that they have taken good day to day care of K.A. While their failure to deal honestly with the maternal grandparents and the Courts is of great concern and was not in K.A.'s best interest, it not sufficient reason to terminate their guardianship. As stated in *MRC v EL*, 2017 ABPC 156, termination of guardianship under the Act appears to be justified only in extreme circumstances, including where a guardian has had little contact with the child, or has committed a criminal offense (especially against a child), or where there are parenting deficiencies which the guardian is unable or unwilling to address. The application to terminate the guardianship of the paternal grandparents is denied.

[160] J.A. is a statutory guardian of K.A. He concedes he is currently unable able to provide sole guardianship or full time parenting for K.A. I am convinced that he must take significant steps to address his mental health and addictions issues before he will be able to fulfill the responsibilities of a father and a guardian. Until he does that it is not in K.A.'s best interest that J.A. have the powers, responsibilities and entitlements of a guardian described under section 21(5) and section 21(6). Therefore his guardianship shall be devoid of any of those powers, responsibilities and entitlements.

[161] I invite counsel to make submissions with regard to the conditions that might attach to contact between J.A. and K.A.

[162] It is in K.A.'s best interest to have only one set of decision-makers. The lack of trust between the paternal and maternal grandparents has interfered with their ability to communicate. As I indicated earlier in these Reasons, that distrust is rooted in the dishonest behavior of the paternal grandparents. There is little reason to expect that communication between paternal and maternal grandparents will improve to the extent required to serve the best interests of K.A. Shared decision-making between the paternal and maternal grandparents would most likely result in further conflict between them.

[163] As the maternal grandparents will provide the primary residence and day to day care of K.A. it is in his best interest that they alone have the powers, responsibilities and entitlements of guardians described under sections 21(5) and 21(6). Although they alone shall have those powers, responsibilities and entitlements, they shall be required to inform J.A. and the paternal grandparents of all the significant decisions they make regarding K.A.

[164] I accept Ms. Wotherspoon's recommendation that the change in primary care occur promptly. Therefore I order that K.A. be delivered by the paternal grandparents to the maternal grandparents at 2:00 p.m. on July 11, 2018. The exchange shall take place at the McDonald's Restaurant located at Gasoline Alley on the west side of Highway 2 near Red Deer, Alberta. The formal Order shall include a police enforcement clause to ensure compliance.

[165] I accept Ms. Wotherspoon's recommendation that there should be a period during which the paternal grandparents and J.A. shall have no contact with K.A. to allow him to settle and form a new primary attachment with the maternal grandparents. I expect the expert opinion of a psychologist may be required to determine the appropriate period of time, and I invite further written submissions from counsel in this regard, and with regard to contact thereafter between K.A. and the paternal grandparents.

## **V. Conclusion**

[166] In the result, the following Final Orders are made, which replace all prior Orders:

- 1) J.A. is a statutory guardian of K.A., but his guardianship is devoid of the powers, responsibilities and entitlements of guardianship described under sections 21(5) and 21(6).
- 2) The paternal grandparents are guardians of K.A. but their guardianship is devoid of the powers, responsibilities and entitlements of guardianship described under sections 21(5) and 21(6).
- 3) The maternal grandparents are guardians of K.A. with all the powers, responsibilities and entitlements of guardianship described under sections 21(5) and 21(6). They shall inform J.A. and the paternal grandparents of all significant decisions they make regarding K.A.
- 4) The maternal grandparents shall provide the primary residence for K.A. and shall have day to day care of K.A.
- 5) Neither the paternal grandparents nor J.A. shall have contact with K.A. pending the preparation of a written opinion of a Psychologist or Parenting Expert.
- 6) The paternal grandparents shall deliver K.A. to the maternal grandparents at 2:00 p.m. on July 11, 2018 at the McDonalds Restaurant located at Gasoline Alley on the west side of Highway 2 near Red Deer, Alberta.
- 7) If a party or any person on their behalf breaches a term of this Order, a Peace Officer shall forthwith provide assistance to ensure compliance with this Order. Before enforcing this Order the Peace Officer must first ensure that the party has been served with a copy of this Order. If not served, that party shall be shown a copy of this Order by the Peace Officer and will be given a reasonable time to comply with this Order. If the party then does not obey this Order the Peace Officer shall do such lawful acts as may be necessary to give effect to this Order, including, if necessary, arresting,

detaining and bringing the party at the earliest possible time before a Judge of the Provincial Court.

[167] If counsel cannot agree on costs then written submissions may be filed within 30 days.

Heard on the 3<sup>rd</sup>, 4<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> days of April, 4<sup>th</sup>, 15<sup>th</sup> and 28<sup>th</sup> days of May and 1<sup>st</sup>, 8<sup>th</sup> and 11<sup>th</sup> days of June, 2018.

Dated at the City of Red Deer, Alberta this 10<sup>th</sup> day of July, 2018.

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G.G. Yake  
A Judge of the Provincial Court of Alberta

**Appearances:**

I. Jetha  
for the Applicant J.A.

A. Wilson  
for the Respondents P.A. and A.A.

S. Crooks and C. Donkin (Student-At-Law)  
for the Respondents/Applicants D.S. and B.S.