Court of Queen's Bench of Alberta

Citation: CMZ v JLZ, 2021 ABQB 700

Date: 20210902
Docket: 4801 182850
Registry: Calgary

Between:

CMZ

Plaintiff

- and -

JLZ

Defendant

Restriction on Publication

Identification Ban – See the *Child, Youth and Family Enhancement Act*, section 126.2.

No person shall publish the name or photograph of a child or of the child's parent or guardian in a manner that reveals that the child is receiving, or has received, intervention services.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Corrected judgment: A corrigendum was issued on September 10, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Mr. Justice D.A. Labrenz

Introduction

[1] These applications arise from a high conflict and heavily litigated dispute between the Plaintiff father and the Defendant mother over parenting of the two children of the marriage. The parties were married in 2014 and separated in July 2019. A Statement of Claim for Divorce and Division of Matrimonial Property was filed by the Plaintiff in August of 2019. This fractious parenting dispute involves two daughters, the eldest is currently 6 years of age and the youngest 3 years of age, born July 31, 2015 and June 7, 2018 respectively. I will refer to the eldest daughter as LZ and the youngest daughter as WZ consequent upon the publication ban I ordered under s.126.2 of the *Child, Youth and Family Enhancement Act,* c. C-12.

[2] In my capacity as the second judge to case manage this matter, following closely upon the case management provided by Justice Price of this Court, I granted leave to the parties to bring forward the three Applications that these written reasons address.

[3] An Application was filed by the Defendant ["JLZ"] on July 7, 2021 seeking an order that JLZ be given the primary parenting responsibilities in relation to LZ and WZ. Practically speaking, JLZ seeks that I order a return to the parenting regime that existed before the Order last made by Justice Price on March 12, 2021. Justice Price's March 12 Order followed immediately upon Justice Price finding that JLZ was, once again, in contempt of an order made by this Court. The March 12 Order replaced Justice Price's February 8 Order, and the latest order effectively transferred primary parenting to the Plaintiff ["CMZ"].

[4] Concurrently, JLZ also applies for an order that would require a Family Law Practice Note 8 Child Custody/Parenting Evaluation ["PN8"] to be completed for the purposes of securing the assistance of a parenting expert to make recommendations concerning the best interests of the children of the marriage and a concomitant recommendation as to parenting time and decision making.

[5] JLZ argues that the best interests of the children are with her as the primary parent, citing what she refers to as the "status quo", and accompanied by a voluminous and continuing litany of allegations, directed towards questioning the suitability of CMZ as a parent. This includes allegations suggesting that CMZ has sexually abused his children. It is worth noting, at this stage, that Justice Price did not find support in the evidence for any credible or reliable conclusion that CMZ was not willing and able to properly parent the two young children of the

marriage; nor, did Justice Price find evidential support for the allegation that CMZ had sexually abused the children.

[6] CMZ, as he has throughout the acrimonious litigation, denies what he calls JLZ's "false narrative", and argues that if JLZ is permitted parenting time with the children that she will continue to harm them. CMZ says the continuing focus upon the allegations that JLZ had previously made about his suitability as a parent should cause me to conclude that JLZ will continue with behaviours that Justice Price previously described as contemptuous and alienating. CMZ further argues that the children are at a delicate time in their recovery and further exposure to JLZ would cause the children further harm.

[7] JLZ argues that the PN8 is necessary for a proper investigation to be completed and that the resulting parenting recommendation will be of invaluable assistance to the judge ultimately assigned to hear the trial.

[8] CMZ, for his part, argues that the PN8 is an unnecessary expense and submits that the trial judge will have all the evidence that will reasonably required to properly decide the parenting issue.

[9] For his part, CMZ filed an Application on July 7, 2021 seeking child support in relation to both children of the marriage from the time that the children were supposed to be transferred to his full-time care on March 1, 2021.

[10] JLZ responds that there are outstanding child support arrears, incomplete disclosure, and substantial shared debt owed by CMZ to JLZ, and that this ought to be considered in relation to CMZ's application for retroactive and ongoing child support.

Background

[11] As already alluded to, this high conflict and ongoing acrimonious parenting dispute has spawned prolific litigation on an interim basis, unaccompanied by the imperfect degree of finality that a trial would provide. I say imperfect because neither parenting nor the best interests of the children could ever reasonably be viewed as being in stasis over any significant period of time; rather, both adults and children, frequently and constantly change. So, too, does their respective life circumstances and experiences. Parenting is by nature a dynamic and human experience.

[12] JLZ suggests that CMZ is an unfit, if not dangerous, parent to the children. It bears mentioning that for the most part the allegations made by JLZ are denied by CMZ, and this Court has not previously found any merit in the submission that CMZ is an unfit or dangerous parent by reason of the continuing allegations.

[13] The parties have been and are encouraged to proceed to trial. Beyond the adjudicative fairness of a trial, where the trier of fact has greater latitude to make factual determinations in the face of contested issues of credibility or reliability, a trial judge managing the evidence at trial can more easily ensure that only admissible evidence is brought before the Court. It also bears observing that repetitious interim litigation is not in the best interests of children, except as is clearly necessitous as, for example, in those circumstances where the children credibly require the immediate intervention of the court to protect their physical, psychological or emotional safety.

[14] I have had the opportunity to consider the history of this matter, previous evidential filings, and the past decisions of this Court and the Court of Appeal of Alberta. I do not propose to review every factual detail, narrative event, filing or ruling; however, I have considered the entire history of this matter for the purpose of this decision and the absence of a specific reference should not be taken to mean that the court has either ignored or discounted individual pieces of evidence.

[15] JLZ addresses in her Concise Letter a number of concerns with respect to the adequacy of the investigations or decision-making processes employed by the Court, the Royal Canadian Mounted Police ["RCMP"], Alberta's Children Services, and a number of court appointed psychologists: including, Dr. Wendy Froberg and Paloma Scott, as well as Glenda Lux who conducted a risk assessment in relation to the Plaintiff under a court ordered Practice Note 7 ["PN 7"].

[16] To give JLZ's present Parenting Application and PN8 Applications the necessary context, I will briefly review the history of this litigation, including past Court rulings concerning the parenting issues. This will hopefully impart not only a sense of historical context but it will also bring clarity to the best interests of the children moving forward.

[17] Although there is a dispute between the parties as to the amount of parental engagement that CMZ had with the children before separation, I accept that JLZ was the primary caregiver and that for protracted periods following the birth of the children was the stay-at-home parent. At the time of separation, the children of the marriage were very young: LZ was 4 years of age and WZ was 1.

[18] I also accept, respecting the earlier factual findings made by Justice Price, that CMZ has, and has had, an addiction to alcohol. Justice Price reasonably concluded that CMZ struggled to maintain sobriety prior to the separation of the parties; however, she also accepted that CMZ has made significant efforts to address his alcohol addiction and that he has been successfully managing his alcohol addiction by maintaining his sobriety, with the added support of Alcoholics Anonymous. Justice Price said the following in her oral reasons delivered August 13, 2020 as reported on May 7, 2021 at 2021 ABQB 229 at paras 11-12 as follows:

> In or about June 2019, about a month before the parties separated, they retained a nanny to help care for the children. In [CMZ's] August 7th, 2019 affidavit, he admitted to alcohol abuse which escalated during their marital breakdown which began October 2018. There is no dispute that [JLZ] left the home with the children for a period of three weeks to stay with her parents beginning mid-April 2019 following a "particularly bad bout of depression and period of alcohol use" by [CMZ].
>
> It is uncontroverted that [CMZ] took a 60-day leave of absence commencing April 29th, 2019 with the support of his family physician to recover from alcoholism. He returned to work on July 2nd, 2019 without incident and resumed his role at his place of employment. By August 5th, 2019, [CMZ] claimed to be 100 days sober. [CMZ] has since been cross-examined on his affidavit evidence, and as at July 17th, 2020, the date he was cross-examined, he gave evidence that he continued to maintain his sobriety. There is no evidence before me that [CMZ] has not maintained his sobriety since April 28th, 2019. [CMZ] has been sober for over one year and three months.

> Since the commencement of legal proceedings, [CMZ] has been forthright in admitting his alcoholism and has set out what steps he has taken towards his recovery. He has also admitted to suffering from depression and anxiety and gave evidence of what prescription medication he has been taking. I find that [CMZ] should be commended for his admissions about his alcoholism, depression and anxiety and the efforts he has made towards his recovery.

[19] In the present proceedings, JLZ disputes the claims made by CMZ as to continuous sobriety. JLZ attaches as an exhibit to her reply affidavit dated July 21, 2021, a photograph from July 3, 2020, said to be a copy of a BACtrac positive test for alcohol. The requirement for CMZ to provide breath samples into what is described as the BACtrack device arises from an Order of this Court granted by Justice Jones on February 27, 2020 which provided, *inter alia*, unsupervised parenting time to CMZ.

[20] The difficulty I have with the suggestion that CMZ provided a breath sample that tested positive for alcohol is that I do not have any information as to the accuracy of the testing results or how they are derived. Significantly, the exhibited test result baldly proclaims that the breath sample registers as "0.007". Assuming, without knowing, that this reflects a reading of .007 grams of alcohol per 100 millilitres of blood, where the legal limit for operating a motor vehicle in Canada would be significantly higher at .08 grams per 100 millilitres of blood, the result of .007 is so low as to not be suggestive of direct consumption. I cannot conclude on the basis of this untested and challenged evidence that CMZ had consumed alcohol contrary to his claims of continuous sobriety.

[21] It is also notable that this evidence said to suggest a positive testing for alcohol was not advanced before Justice Price nor was it advanced before the Court of Appeal by way of a fresh evidence application on appeal. It is only now that JLZ suggests that this exhibit demonstrates that CMZ's claim as to being continuously sober since April 28, 2019 is deliberately deceptive.

[22] Justice Price also found that CMZ admitted also to be suffering from depression and anxiety and gave evidence of what prescription medication he was taking.

[23] In Justice Price's August 13, 2020 oral decision, which followed a hearing of July 29, 2020, Justice Price reviewed the history of the matter in the context of an application and cross-application for issues concerning parenting.

[24] Justice Price held that JLZ initially agreed only to CMZ's supervised access to the children until such time as a formal risk assessment and medication review had been completed. JLZ, in this regard, rejected an initial assessment that had already been completed by a psychologist as being inadequate.

[25] Before CMZ made his initial Application for unsupervised access, it is uncontroverted that the only parental time that CMZ had with his children was in the matrimonial home, supervised by JLZ's mother, her grandmother, or their nanny.

[26] CMZ's first Application for unsupervised access was on August 14, 2019. He was unrepresented and he consented with JLZ's legal counsel to supervised parenting.

[27] Under the terms of Justice Ashcroft's Consent Order of August 14, 2019, CMZ agreed to be assessed under the terms of a Practice Note 7 ["PN7"] risk assessment and to enter into a Consent Order as to terms, including the proposed supervised parenting time. To this end, a

Consent Order was granted by Justice Anderson on October 9, 2019. Justice Price noted that the PN7 covered a number of issues including the following: CMZ's psychological functioning; CMZ's mental health, CMZ's addictions; substance abuse history and risk; CMZ's knowledge and beliefs, CMZ's knowledge of and involvement with the children; and risk factors that suggest that CMZ cannot adequately meet the children's needs along with emotional risks to the children if CMZ were to exercise unsupervised parenting time.

[28] Justice Price at paras 28-29 found that the supervision provided by JLZ or JLZ's sisters was extreme, such that the supervision would be traumatic for anyone including the children or any parent. Justice Price at para 19 said as follows:

> I find that [JLZ] and her family members exhibited extreme behaviour that was intended to get the negative reaction from [CMZ] that had a resulting traumatic and negative effect on the children. They have restricted [CMZ] from having any quality time with the children and have interfered with the development of his relationship with the children and vice versa, their relationship with their father.

[29] Following a dispute, which was precipitated by a FaceTime call with CMZ's parents in December of 2019, JLZ without further explanation terminated CMZ's parenting time.

[30] With the assistance of legal counsel, CMZ then applied for shared parenting. The parenting expert, Glenda Lux, had by then completed the PN7 risk assessment and concluded that CMZ was currently in control of his alcohol problem. Ms. Lux also concluded that CMZ, when sober, could parent as well or better than the general population. Ms. Lux was also of the view that CMZ could adequately meet the children's needs. Ms. Lux found that there were no physical or emotional risk to the children beyond those that exist in the general parenting population.

[31] At para 41 of Justice Price's oral reasons, Justice Price reiterated JLZ's objections to CMZ's requests for shared parenting as follows:

> Para 3:
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> "The applicant has a history of substance abuse and mental health issues. The applicant does not appear to grasp the severity of his substance abuse or the effect that the same has had on his ability to parent our children. He appears to think that the PN 7 report that has taken place somehow negates the years he has failed to be an involved parent and/or be a part of the children's lives."
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> Para 4:
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> "The applicant fails to put the children's needs first. Our daughters have lived a very sheltered life which revolves around our family home where they are cared for by me and our nanny. The children have never spent a night away from me. The applicant is seeking overnight parenting time without allowing the children time to adjust and, most alarmingly, without following the recommendations set by Ms. Lux."
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> Para 5:

> "The applicant has not undertaken any substance abuse testing as recommended by Ms. Lux. Until the applicant has undergone substance abuse testing that confirms both his past sobriety and has ongoing sobriety tests, it is not in the children's best interests that the current supervision requirement be lifted."
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> Para 15:
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> "As Ms. Lux explains in her report, a person suffering from substance abuse issues is more likely to relapse in his first year of recovery."
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> Para 46:
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> "The applicant's parenting time needs to be supervised until he has undertaken random substance abuse testing for a period of at least six months. Ms. Lux makes it clear that a substance abuse evaluation is incomplete without recent drug or alcohol testing. The applicant has undertaken none of these tests to date."
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> Para 49:
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> "The applicant's proposed overnight parenting time fails to take into consideration our children's age and their upbringing. They have been raised in our home and have had little contact with anyone other than my family, the nanny and myself. If they were forced to sleep away from the only home they know without the benefit of a transitional period and their having reached the appropriate developmental age, they will be adversely affected."

[32] On February 27, 2020, Justice Jones granted CMZ's application and varied Justice Ashcroft's Order to provide CMZ with specified unsupervised parenting time, some of which was to occur outside the matrimonial home. CMZ was also ordered to undertake certain testing for alcohol and drugs.

[33] As Justice Price described, on the first Saturday that CMZ would have been permitted unsupervised parenting outside of the matrimonial home, JLZ told CMZ that she had put WZ down for a nap. As a consequence, CMZ decided to exercise his parenting time in the matrimonial home so as not to disturb WZ. On March 21, 2020 the parenting time exercised by CMZ was, once again, in the matrimonial home at JLZ's request due to the COVID-19 novel coronavirus pandemic. The very next Saturday, March 28, CMZ was denied entry and access by JLZ because of the pandemic. Justice Price noted that JLZ did not deny that she contacted the RCMP before the scheduled visit to advise that she would not be permitting CMZ his parenting time.

[34] At para 55 of Justice Price's decision, Justice Price notes that the children started making comments to CMZ that CMZ attributed to parental alienation.

[35] On May 30, 2020, at a time when CMZ started living with his fiancé and her 12-year-old daughter, CMZ went to pick up his children to exercise his unsupervised parenting time pursuant to Justice Jones' Order. LZ grabbed a whistle outside the residence, that had been left for her in a flower pot, in the belief that CMZ was not permitted to take her from the home. Justice Price describes the involvement of JLZ and the police.

[36] On June 2, 2020, when CMZ arrived to pick up the children, JLZ and her sister were waiting in the driveway, and LZ started crying and re-entered the home and parenting time with the children did not occur. Justice Price stated the following regarding the use of whistles:

> The evidence that [JLZ] has put whistles in the house readily available for [LZ] and has encouraged [LZ] to use them is not in dispute. The evidence is also clear that at no time has [JLZ] encouraged interaction between [CMZ] and the children. It is evident by her own evidence that it has, in fact, been discouraged. [JLZ] says that some of the recent behaviours of the children are (1) disrupted sleep patterns, (2) fear of being put in the vehicle, (3) an increased need for emotional reassurance.

[37] Justice Sullivan on June 26, 2020 ordered, *inter alia*, an Order appointing Poloma Scott as a therapeutic counsellor for the children and made a further Order for interim child support.

[38] By way of a cross application, opposing CMZ's application for shared or primary parenting of the children, JLZ sought to restrict CMZ's parenting time during which a mutually agreeable parenting coach or in-home support worker would be present to assist CMZ with his parenting ability.

[39] Justice Price summarized the grounds cited by JLZ as follows:

(a) he is in recovery from alcoholism and has a history of mental health issues including suicidal ideation, depression, anxiety and emotional dysregulation;
(b) he has failed to follow provincial guidelines regarding COVID-19;
(c) he has exposed the children to inappropriate behaviour and conflict by arguing with visit supervisors, having a physical altercation with the defendant and swearing at the defendant and her family members in the presence of the children; and
(d) he has introduced the children to a new romantic partner without consulting the defendant prior in the middle of COVID-19.

[40] At para 70 of her decision, Justice Price enumerated the issues that she must decide as involving the question of whether or not the defendant breached the orders of Justices Ashcroft and Jones, engaged in alienating behaviour, and to determine what was in the children's best interests.

[41] At para 80, Justice Price found that the unilateral decision to deny access to the children or limit access to the children to the matrimonial home on Saturdays was in contravention of Justice Jones's Order. Similarly, at paras 84-89, Justice Price found that JLZ's barring of access by CMZ to the children between January 1 and March 3, 2020 constituted a contravention of Justice Ashcroft's Order.

[42] Justice Price also found that JLZ engaged in the following alienating behaviours at paras 91-94:

> A. Coaching [LZ] to blow a whistle if her father is taking her away from her home. [LZ] who was only 4 at the time and now only 5 could have only been

taught by JLZ to fear her father and to use the whistle if she was afraid he was doing something he should not;

B. Taking supervision to the extreme to the point of intimidation and interference with [CMZ]'s limited parenting time under the Ashcroft order;

C. Limiting [CMZ] to access only inside the matrimonial home, not a shred of evidence to support that [JLZ] has been encouraging at any time since separation that the children have a relationship with their father;

D. Believing, notwithstanding the evidence to suggest otherwise, that [CMZ] is still abusing alcohol;

E. Not accepting the parenting expert report of Glenda Lux and at times misconstruing the parenting expert report of Glenda Lux;

F. Affidavit evidence from the outset sets a tone of a lack of trust and that she will persist in her efforts to interfere with the relationship between the children and their father;

G. In [JLZ]'s most recent affidavit sworn August 11th, 2020, she outlines how on the Saturday, August 8th, unsupervised access date, she arranged to have a third party presumably unknown to [CMZ] or the children as she says "be present during the transition." She did not tell [CMZ] of her intentions until the morning of, and he was told by text. This is his unsupervised access date away from the home.

Meanwhile she reports in her affidavit that when he arrived, the third party sat at the dining room table while she and her sister left the building. What was the purpose of having the unknown third party there at all but to agitate and interfere with the situation? Why not discuss with the girls and their father together to reassure them that they were going to spend time with their father elsewhere and that he was just there to pick them up?

Rather, no, [JLZ] reports in her affidavit that she listened while things escalated with the unknown third party to the point that she advised the unknown third party to continue to knock on the door until the police and she arrived back at the house. This is not normal behaviour. This is alienating, obstructive, intrusive, deeply concerning behaviour of the mother's ability to even let go. She demonstrates in her own affidavit her inability to detach herself to allow [CMZ] to have any parenting time with the Children without her interference. How scary, uncomfortable and traumatic this must have been yet again for the children. [JLZ's] behaviour is not acceptable.

H. Furthermore, although [CMZ] provided a list of alienating speech reported by [LW], even in [JLZ]'s most recent affidavit sworn August 11th, 2020, she says:

[LZ] has asked me why the police believe CMZ when "he lies" and why they did not believe her.

What lies? Incredible that a 5-year-old would believe that her daddy lies. That is not normal. It is not a lie that [CMZ] has unsupervised access and at his discretion

> can take the children where he wants on Saturdays during his access time. It could only have been [JLZ] to have put the fear in her daughter and to have impressed upon her that her daddy is not allowed to take her outside of the matrimonial home. This is disturbing. [JLZ's] evidence that her children have been sheltered and only know their home, their mother and their nanny and her family is also disturbing.
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> Furthermore, in her most recent affidavit evidence, she trusted in a stranger to help with the transition, undoubtedly a stranger to her children as well as their father; and she says it was the RCMP that calmed [LW] down. How terrifying that must have been to have an RCMP called there at all. This is not acceptable behaviour. I find what [JLZ] did to interfere and obstruct the most recent August 8th, 2020 visit disturbing.
>
> In summary, I find there is more than sufficient evidence to establish that [JLZ] has engaged in alienating behaviour.

[43] When determining the best interests of the children, Justice Price said, in part, as follows at paras 102-105:

> Recognizing that the children are only 2 and 5, they are at an early developmental stage. I do not want to traumatize them any further by making enormous changes such as giving [CMZ] primary residential care of the children. However, [JLZ's] attitude and her negative influence has got to change. As I earlier stated, she has negatively impacted the circumstances of the children and both her and [CMZ's] ability to meet their needs.
>
> I remain extremely concerned about [JLZ's] controlling nature and the significant steps she has taken to unreasonably withhold parenting time and to interfere with what parenting time and access [CMZ] has had. This behaviour cannot continue. As I have expressed already, my deep concern and primary focus is on what is in the best interests of [LZ] and [WZ].
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> To ensure the greatest possible protection of the children's physical, psychological, and emotional safety, and considering their needs and circumstances, they need to be reunified with their father, and their mother needs to stop her obstructive, intrusive, poisonous behaviour.
>
> Accordingly, I order a Practice Note 7 therapeutic intervention for both parents and the children to participate in to help with parenting their children and help the children reunify with their father.

[44] At para 112, Justice Price cautioned the defendant:

> Given the recent events, I find that giving [CMZ] shared parenting at this time and immediate overnight access is not in the children's best interest. However, I caution you, [JLZ], if you carry on with these coaching antics and deliberate acts to thwart [CMZ's] access and interfere and poison his relationship with the children, I will reconsider my decision to move to a regime to minimize contact and your ability to thwart [CMZ's] access.

[45] At the conclusion of the July 29, 2020, hearing, Justice Price directed the parties in the interim to follow the Parenting Order of Justice Jones.

[46] The Jones Order was not followed and CMZ sought permission to bring an Application for Contempt before Justice Price.

[47] In the oral reasons delivered by Justice Price on August 13, 2020, Justice Price found JLZ in contempt of both the Orders of Justice Jones and Justice Ashcroft. At paras 79-80, Justice Price stated regarding the Jones Order:

> [JLZ's] unilateral decision to deny [CMZ] access to the children or limit access to the children leaving him only to have access in the matrimonial home on Saturdays was contrary to the order of Justice Jones. There is no evidence before me sufficiently supporting that [CMZ's] access pursuant to the order of Justice Jones should have been varied or be varied due to COVID-19 or otherwise.
>
> Accordingly, I find that [JLZ] breached the Justice Jones order.

[48] Justice Price's concluded that JLZ was in breach of the Justice Ashcroft Order of August 2019 at para 86:

> The evidence is clear in the text messages and the exchanged between counsel that occurred thereafter. I believe [CMZ]'s evidence. I also believe that [JLZ] did not take any steps at all to contact [CMZ] to give him access. I do not believe that [JLZ] was waiting at home to supervise or had another supervisor in place on any of [CMZ's] parenting dates. [JLZ] was being obstructive and was not following the court order.

[49] Justice Price further ordered a PN7 for the purpose of reunification therapy.

[50] JLZ appealed Justice Price's decisions and the resulting Parenting Order dated August 24, 2020. The Court of Appeal's reasons for dismissing JLZ's appeal were reported at 2020 ABCA 431. The Court of Appeal described the nature of the appeal at para 1 as follows:

> This appeal concerns a dispute in a high conflict situation between the appellant mother and the respondent father over parenting of two children of the marriage. A special chambers judge, who is case managing the litigation, granted two interim orders. The first order found the appellant in contempt for breaching two previous parenting orders; dismissed the appellant's application for an adjournment of the special chambers hearing to allow for viva voce evidence; dismissed the appellant's application for an adjournment of a contempt application to allow the appellant to cross-examine the respondent on his affidavit; granted primary care of the children to the appellant with joint decision-making between the parties; suspended a previous parenting order; required the parties to provide proposed interim parenting plans for the case management judge's consideration; required the parties to retain Families First to assist with facilitating the respondent's parenting time; and required the parties to retain a therapist to provide a therapeutic intervention under Practice Note 7 for the purpose of reunification between the children and the respondent.

[51] In dismissing the appeal, the panel hearing the appeal remarked at para 9 as follows:

> As an appellate court, we are not in a position to resolve the parties' competing positions nor to fashion a new parenting plan. The determination of a new parenting plan that is in the best interests of the children should be considered afresh by the case management judge. We question the utility of Practice Note 7 in the circumstances, given the expert's inability to make recommendations to the court regarding the children's best interests. It may be that an Evaluative Triage under Practice Note 7 or a more comprehensive and objective assessment under Practice Note 8 would be better suited to the high conflict nature of these proceedings and the parties' tendency for protracted disputes. However, we leave to the case management judge the determination of the best way to resolve the disputes and move this litigation forward in the best interests of the children, bearing in mind that the orders issued to date are only interim in nature and that at some point there will have to be either a settlement or a trial to finally resolve the parenting situation.

[52] Before the appeal of the August 13 and August 24 Parenting Orders was heard by the Court of Appeal, Paperny JA considered an Application to Stay the Order. Paperny JA granted an Interim "Without Prejudice" Stay of the August 24, 2020 Parenting Order with a further Application to be heard on September 15, 2020 before Rowbotham JA. The Stay was conditional on CMZ having professionally supervised parenting time. The supervised parenting did not occur. Rowbotham JA observed on September 8, 2020 that Dr. Wendy Froberg had been retained for the purpose of reunification therapy but continued the Stay noting that the appeal was fast tracked and Rowbotham JA concluded that Dr. Froberg was in a better place to determine where and when parenting time for CMZ should occur: ***JLZ v CMZ,*** 2021 ABCA 131 at paras 3-7.

[53] Following this appeal dealing with both of the Parenting Orders and Justice Price's conclusion that JLZ breached two court orders and had engaged in alienating behaviours, Justice Price asked the psychologist conducting the PN7 reunification therapy to attend Chambers on December 15, 2020. The request was issued because the psychologist conducting the reunification therapy, Dr. Froberg, had expressed some concerns that JLZ was not cooperating with the reunification process.

[54] Justice Price ordered the parties to continue with the reunification process.

[55] JLZ then brought an application for Justice Price to recuse herself on January 18, 2021, suggesting that there was a reasonable apprehension of bias. Justice Price denied the application on February 1, 2021 and scheduled a further case management meeting for February 8, 2021. Justice Price's decision is reported at 2021 ABQB 80.

[56] On February 8, 2021, Justice Price granted unsupervised parenting time to CMZ with the younger child, WZ, commencing February 11, 2021. The matter of parenting was otherwise ordered to proceed to trial with March and April dates being offered to counsel. Justice Price's Order continued to Stay CMZ's parenting time in relation to the older child unless recommended by Dr. Froberg in the context of the reunification therapy.

[57] On February 11, 2021, JLZ contacted the RCMP alleging that the youngest child (then two years of age) had been sexually abused by CMZ. JLZ did not deliver WZ to the February 11th scheduled parenting time for CMZ. CMZ then brought a further Application for JLZ to be found in contempt for non-compliance with February 8, 2021 Order of Justice Price.

[58] Ultimately, after appearances on February 18 and 25, 2021, the Contempt Application was heard on March 12, 2021. Justice Price held that JLZ was in contempt of the February 8, 2021 order. Of note, JLZ advised the Court on February 18, 2021 that the younger daughter made a disclosure of sexual abuse committed upon her by CMZ. JLZ said the disclosure was made on February 6, 2021, and JLZ further advised that a similar disclosure was made to the maternal grandmother on February 7, 2021. Notably, JLZ did not inform Justice Price of these serious allegations at the February 8, 2021 court appearance; notwithstanding, JLZ was specifically asked about abuse allegations.

[59] A letter from the RCMP responding to a notification filed by JLZ in Form 1, and in accordance with Practice Note 5, concluded that no information was provided by either child to indicate any forms of abuse: “With no additional corroborative information, we do not have any concerns at this time for the childrens [sic] safety with the father”.

[60] On March 12, 2021, Justice Price found JLZ in contempt of the February 8, 2021 Order by failing to facilitate CMZ’s parenting time with WZ. Justice Price then granted an Order which, *inter alia,* granted CMZ interim sole care of the children. The Order also gave CMZ the discretion to permit JLZ parenting time “pending the oral hearing of this matter on April 27-30, 2021”. JLZ was not permitted to have parenting with the children before the hearing unless CMZ agreed.

[61] JLZ appealed Justice Price’s decision and JLZ sought a Stay pending her appeal. The Stay Application was refused by Schutz JA and is reported at 2021 ABCA 131.

[62] Schutz JA in refusing the application for a stay paras 14 -17 summarized Justice Price’s reasons for decision as follows:

> In brief, after hearing extensive submissions from counsel for the parties, and having reviewed the history of the proceedings and the applicable law, the case management judge found that the evidence did not support JLZ’s contention she had a good reason to disobey the February 8, 2021 order. Noting this was not the first finding of contempt against JLZ, the case management judge held that since the contempt was “continuing and persisting”, relief beyond a costs award was in the best interests of the children. She therefore ordered JLZ to undergo a psychological assessment, and granted CMZ interim sole care of the children, with no parenting access by JLZ pending the oral hearing scheduled to commence April 27, 2021.
>
> The case management judge found JLZ had not protected the children from the conflict arising from the divorce proceedings, contrary to s 7.2 of the Divorce Act, RSC 1985, c 3 (2nd Supp) [Act]. She also pointed out that under section 7.5 of the Act, parties must comply with orders, which JLZ had failed to do.

> As a result, the case management judge indicated that under the best interests of the child test and the new s.16(2) of the Act, JLZ's actions gave her concerns for the children's physical, emotional, and psychological safety, security, and well-being. In reaching the decision to change parenting, the case management judge stated she had considered all the best interest factors under section 16(3), and specifically noted the new requirement to consider family violence under sections 16(3)(j) and 16(4) of the Act.
>
> The case management judge found JLZ's past conduct in relation to the children, and which is to be considered under s 16(5), was harmful to the children:
>
> In this case, I deem that the past contact of JLZ in relation to the children -- and most recently, in the unsubstantiated allegations that were made, following a direct order that I made, without having raised any of those concerns to the Court or to counsel, and waiting until the day that access was to occur, is past conduct which I deem to be harmful to the children. And all of the subsequent conduct that occurred thereafter in relation to attempting to substantiate those unsubstantiated allegations.

[63] Justice Schutz also noted at para 18 that the preamble to the March 12, 2021 Order noted "the previous findings of contempt against JLZ and her actions since the breach which occurred on February 11, 2021", "the Court finding it is in the best interest of the children to be immediately removed from the care of JLZ as a result of her continued family violence affecting them"; and "the Court noting that there is no evidence before the Court substantiating any allegations against CMZ and the Court finding that CMZ poses no risk whatsoever to the children of the marriage."

[64] Before JLZ's appeal of the March 12, 2021 Order was heard by the Court of Appeal, Justice Price once again heard an Application brought by JLZ seeking her recusal premised upon an argued reasonable apprehension of bias. Justice Price dismissed that application and her reasons can be found reported at 2021 ABQB 360.

[65] In her recusal decision at para 2, Justice Price confirmed her earlier decision that the children should be immediately removed from JLZ's care, and that the removal was necessary because of JLZ's continued family violence. Justice Price indicated that she was aware that immediately following the March 12 Interim Order changing parenting, the children were allegedly abducted by the maternal grandmother and the maternal aunt. Justice Price was also aware that both the grandmother and the aunt were charged with forcible confinement and abduction after the children were located on April 14, 2021 – some 33 days after their abduction. While, I will not repeat the full chronology here, Justice Price extensively detailed the history of the proceedings in her decision on the recusal application.

[66] The Appeal of the Order made by Justice Price on March 12, 2021 was heard by the Court of Appeal on May 4, 2021 and the memorandum of the court's judgment dismissing the appeal was released on May 28, 2021.

[67] The Court of Appeal did not find merit in JLZ's argument that the PN7 authored by Glenda Lux, or the reports of the reunification expert Dr. Froberg, could not be relied upon by

Justice Price as constituting hearsay of a type that could not be acted upon. A similar conclusion was reached in relation to the hearsay PN5 report as authored by the RCMP Constable Stacey. At para 17, the Court noted that "this information is contemplated by the practice notes and central to the case management judge's task of determining the best interests of the child".

[68] At paras 36-42, the Court considered JLZ's argument that she had a reasonable excuse to deny access to CMZ based upon WZ's alleged disclosure suggesting that CMZ had inappropriately tickled her genitals and CMZ's denial of any such occurrence. In response, CMZ raised questions as to timing of the allegations given the silence of CMZ at court on February 8, 2021. The Court of Appeal stated at para 42 as follows:

> We owe deference to the case management judge's interpretation of the evidence and her conclusions, absent palpable and overriding error. Her conclusion that the mother had no reasonable excuse for failing to comply with the order is supported by the record. We are not persuaded of any reviewable error in the case management judge's conclusion that the mother was in contempt of the February 8, 2021 Order.

[69] At paras 69-72, the Court of Appeal extensively reviewed the statutory provisions, including the amendments to the *Divorce Act* that came into force on March 1, 2021 as those provisions direct the court's primary consideration to be given to the best interests of the children when making decisions as to the allocation of parenting responsibilities. At para 75 the Court of Appeal observed that Justice Price found that the unsubstantiated allegations of sexual assault constitute conduct that is in and of itself harmful to the children.

[70] The Court of Appeal at para 76, did not accept an argument that Justice Price discounted or did not consider that CMZ in August and September of 2020 was angry to an extent that the agency tasked with facilitating his visits was concerned.

[71] In the end result, the appeal was dismissed as the Court of Appeal was satisfied that the case management judge considered the best interests of the child, appropriate to the evidence and the *Divorce Act.*

Should the Court order a Parenting Time/Parental Responsibilities Assessment under PN8?

The Arguments advanced by Counsel

[72] Consistent with the history of these proceedings there is no agreement between the parties regarding the need for a PN8 assessment for the purpose of securing the assistance of a parenting expert to make recommendations as to the best interests of the children of the marriage; including, *inter alia*, recommendations as to parenting time and decision-making. Legal Counsel for JLZ argues that given the history of this matter, the age of the children, and the acrimonious dispute between the parties that a PN8 evaluation is absolutely necessary to assist the Court at trial to determine both parental capacity and the best interests of the children.

[73] JLZ, consistent with the position that she has taken throughout the history of this litigation, advances many of the same allegations against CMZ that she has made previously,

both before the previous case management justice and the Court of Appeal. In short, JLZ continues to take the position that CMZ has a history of mental health and substance abuse issues; that he has engaged in domestic violence; that he is dishonest; that he struggles with spiritual crises; that he suffers from anxiety; that he has emotionally manipulated the children and restrained the younger child (which JLZ argues may have conditioned her into submission); and continues with the suggestion that both children have been sexually abused by their father. JLZ alleges that CMZ had inflicted domestic violence. JLZ's affidavit evidence contains more examples of, if substantiated, concerning erratic and abusive behaviours that would call into question CMZ's ability to parent in the best interests of the children.

[74] CMZ denies these allegations and the alleged behaviours that would cause me concern are not objectively corroborated.

[75] JLZ further argues that the three experts appointed by the Court to date have not properly addressed parental capacity or the best interests of the children. Paloma Scott, JLZ argues, was engaged briefly to provide counselling to the children; Glenda Lux's report, providing a risk assessment of CMZ, JLZ argues is stale-dated and fails to explicitly address parental capacity and the best interests of the children; and, finally, Dr. Froberg's engagement as a reunification therapist did not engage the the best interests of the children and/or making decisions as to how to approach suggested changes in parenting.

[76] JLZ also questions the strength of the expert opinion evidence to date, questioning the methodology used by the experts; arguing that the opinions received to date are incomplete; and, questioning the qualifications of the experts.

[77] JLZ has made recent inquiries of Dr. Jennifer Malcolm, a psychologist who conducts both PN7 assessments and the more intensive inquiry mandated by a PN8. Similar to the assessment of CMZ conducted by Glenda Lux, Dr. Malcolm indicated that a PN7 assessment (as Justice Price ordered should be now be conducted of JLZ) will cover the mental health of the parent, as well as parenting strengths and challenges; however, the PN7 will not address the best interests of the children or parenting or parenting responsibilities. Dr. Malcolm said that typically a PN8 can be completed within 2 months assuming the reasonable availability of the parents.

[78] Dr. Malcolm described the PN8 assessment as being focused on the best interests of the children, and as being a more comprehensive assessment that includes assessment of both parent's mental health, their parenting, as well as the functioning of the children within the family. This is done, Dr. Malcolm states, in an effort to provide some guidance to the court as to what would be in the best interests of the children with respect to parenting time and responsibilities. Dr. Malcolm estimated a cost of $12500 to $14500 to complete (dependant upon the hours) the PN8, and estimated that the assessment typically takes 4 months to complete.

[79] CMZ opposes the PN8 application, noting the cost (he is currently unemployed), and the lack of evidence from JLZ as to how the PN8 will be funded. CMZ says that he does not have resources, has not received child support, and has used his remaining funds to provide the children with needed counselling.

[80] CMZ also questions the need for a PN8 and brought to my attention the statement made by Schutz JA in ***Bourgeois v Caldwell,*** 2017 ABCA 328 at para 21 that PN8's should be reserved for the small minority of separated and divorced families where the families are at an impasse, an assessment is required, and the Court requires assistance from an expert.

[81] CMZ argues that an assessment is not required because the three court appointed experts were selected by the defendant, and have been able to provide information to the Court about his mental health and parenting. The experts have also provided counselling to the children. CMZ points out that JLZ has reported at least two of the experts to their professional associations, has has made complaints against the RCMP, and also complained about the prior case management justice. CMZ argues that these complaints are merely an attempt to discredit the experts' opinions "so the defendant can continue with her false and harmful narrative".

[82] CMZ argues that the only expert opinion missing is the PN7 assessment of JLZ as ordered by Price J on March 12, 2021. CMZ also points out that the determination of the best interests of the child is not for an expert; but, instead, a decision that must be made by the judge hearing the trial. Finally, CMZ suggests that the pursuit of the PN8 order by the defendant is a further attempt by the defendant to relitigate issues that she has raised before but that have not been decided in her favour.

Should I Order a Practice Note 8 Assessment be completed?

[83] The purpose of a Practice Note 8 Child Custody/Parenting Evaluation is to provide a comprehensive and objective assessment of a family in cases where the family is experiencing an impasse, and an intervention under Practice Note 7 is inappropriate or has not resulted in resolution of the parenting issues. The ordering of a PN8 evaluation permits the parenting expert to report back to the court in an attempt to assist the court in making a final determination through trial or summary trial as to the parenting and decision-making arrangements that are in the best interests of the children. The parenting expert is also brought under the jurisdiction and protection of the Court.

[84] In my view, notwithstanding the time and the cost, given the extensive history and the nature of the high conflict dispute between the parties, I am of the view that a PN8 should be ordered. This conclusion is reinforced by the young and vulnerable ages of the children; the trauma the children have undoubtedly suffered by reason of the acrimonious litigation; the recent abduction of the children; and, the sudden change in primary parenting brought about by the Order of March 12. In my view these are the precise set of circumstances that a PN8 evaluation was designed to address.

[85] While I agree that the trial justice will be tasked with deciding the best interests of the children and that the best interests of the children will be decided by the Court, not an expert, it is likely that the assistance of a parenting expert opinion as to parental capacity and the best interests of the children will be of great assistance at trial. I am of the view that the proposed PN8 evaluation will assist by providing an objective explorative evaluation of both parents in the context of their ability to relate to and parent their children. The PN8 evaluation, which is typically very thorough, will provide the added benefit of fully exploring the risks posed to the

children by either parent and will provide necessary insight into the personality issues that are in conflict.

[86] The children will of necessity be included and interviewed.

[87] In my view, looking at the best interests of the children and given the lack of contact between the children and their mother since the last order of the Court, it is critical that a parenting expert be retained under the auspices of PN8 for the purpose of providing guidance, counselling, and the necessary recommendations as to parenting moving forward. This, I repeat, is a situation of high conflict and the parties have already demonstrated a proclivity for protracted disputes.

[88] Finally, I fully appreciate CMZ's evidence that he is presently unemployed and is relatively impecunious. For that reason, and because it is JLZ who seeks the PN8 evaluation, I will order that JLZ is responsible for the full costs of the PN8 evaluation, subject however, to the trial judge's discretion to reapportion the cost of the PN8 evaluation at trial.

The Defendant's Parenting Application

The Arguments of Counsel

The position of JLZ

[89] JLZ seeks a return to the parenting regime that immediately preceded the March 12 Order removing her as primary parent and placing the children in the sole care of the CMZ.

[90] JLZ argues that she has been the primary caregiver of the children and that it is in their best interests to have active and consistent parenting time with the mother. JLZ further argues that CMZ does not have the requisite parenting skills and references the distress that the children have exhibited in the past concurrent with their spending time with CMZ. JLZ, once again, references disclosures she says have been made by the children as to alleged sexual abuse. JLZ also suggests that CMZ has engaged in family violence. This, without more, supports a return JLZ argues to what she refers to as "the status quo".

[91] JLZ also submits that the discretion vested in CMZ by the March 12 Order has permitted CMZ to weaponize the order of Justice Price, by permitting CMZ to prevent any contact with the children. JLZ further argues that the absences of any status updates as to the welfare of the children, coupled with the absence of parenting time, reasonably means that JLZ has effectively been alienated from their lives.

[92] JLZ argues that this is not in the best interests of the children as the absence of parental contact with their mother is causing emotional/psychological harm. The harm to the children would also result from separation from family and friends.

[93] JLZ also questions the rapid introduction to CMZ's home, his new life partner and child, along with CMZ's family.

[94] JLZ reminds me that I should be careful not to conflate the actions of her mother and sister in removing the children to B.C. against her by pointing out that there is no evidence before the court that JLZ had any involvement.

[95] JLZ, as well, questions the efficacy and qualifications of the court-appointed experts, the RCMP, and Children's Services, suggesting collectively that they have not taken the appropriate steps to screen for family violence, to gather and evaluate the children's disclosures, and to identify and address what she argues are CMZ's ongoing and escalating patterns of abuse.

[96] As I have earlier detailed, to some extent, JLZ makes a number of other allegations against CMZ while arguing that CMZ is unsuitable as a parent and that the Order of March 12 is completely contrary to the best interests of the children; notwithstanding, her awareness that the Order of March 12 was unsuccessfully appealed.

The position of CMZ

[97] CMZ argues that JLZ has not demonstrated any material change in circumstances since the March 12 Order and the subsequent consideration of that order by the Court of Appeal. CMZ submits that JLZ's entire application seeks to reargue what was already argued on numerous occasions before this Court and before the Court of Appeal.

[98] CMZ reminds me that JLZ's application does not seem to appreciate that the Court has previously found that JLZ has alienated the children and has found that JLZ has engaged in family violence against the children.

[99] CMZ also identifies those portions of JLZ's affidavit evidence that CMZ suggests makes it abundantly clear that there is no hope of any amicable resolution of the parenting dispute before the Court, as it continues with the various allegations that she makes against CMZ that have been found to unsubstantiated, and against the various agencies and expert professionals. CMZ references in this regard, paras 5 and 6 of JLZ's affidavit sworn July 7, 2021 in support of her Parenting Application:

> Since the plaintiff initiated this action, it has been identified as domestic violence matter. To the ongoing detriment of the children and these proceedings, no court-appointed expert, nor the RCMP, nor Children's Services, has taken the appropriate steps (and informed as to the status of the same) to competently and objectively complete. I am informed and verily believe that these steps include, but are not limited to: (a) family violence screening, (b) gathering and evaluation of the Children's disclosures and evidence of the Plaintiff's abuse of them, (c) gathering and evaluation of the evidence of myself, our family members, our neighbours, and third parties who have been subject to and/or witnesses [sic] Plaintiff's ongoing and escalating behaviours, and (d) delineation and analysis of plaintiff's pattern of abusive behaviours to identify and address the root cause of plaintiff's ongoing and escalating behaviour patterns and actions, which I verily believe constitute abuse of the children, myself, my family, and others.
>
> Additionally, to date, no expert with the necessary and requisite experience in domestic violence, child abuse, parental alienation, maternal separation, and psychiatry to competently evaluate this matter has been engaged to assess our

> family and assist the Court in determining (a) the plaintiff's capacity to parent the children on his own, without the support of another adult, and (b) the best interest of the children.

[100] CMZ asks me to further consider that at no time does JLZ acknowledge that she has harmed the children.

[101] CMZ further submits that JLZ is simply repeating the allegations that she has previously made, that were known to the case management justice, when Justice Price made the Order of March 12 transferring primary parenting to CMZ.

[102] In response to the suggestion that CMZ had "weaponized" the March 12 Order, CMZ points out that all times he has obeyed the orders of the Court and that he has tried to work with JLZ, which he states has sometimes been to his own detriment.

[103] CMZ says the March 12 Order is not unreasonable and explains that he has not provided access to JLZ's or her family because of the alleged abduction of the children by family members, and to respect advice given to him by the RCMP.

[104] CMZ points out that his compliance with Justice Price's Order is, at least in part, ironically being used by JLZ to argue for a change in parenting.

[105] CMZ asks me to consider that there is the absence of any suggestion by JLZ that she accepts the findings of the Court, and further no suggestion that she promises to behave differently in the future. In short, CMZ submits that there is no evidence that any effective change will occur.

Analysis of the Parenting Issue

[106] The previous orders of this Court, including the March 12 Order of Price J, are interim orders and not final orders. The interim decisions made to this point in time with respect to parenting are not final and are capable of being reversed on trial or proceedings with *viva voce* evidence: ***Krause v Krause***, 2018 ABCA 293 at para 18; ***Linder v Botterill***, 2018 ABCA 126 at para 24.

[107] The nature of an interim order, as Justice Kraus addresses in ***Thember v King,*** 2019 ABQB 697 at para 13, aff'd at 2020 ABCA 97 (but not addressing this specific point), is such that the order is most often granted without the procedural safeguards of trial such as by the hearing of *viva voce* evidence with accompanying cross examination and the exchange of records. As Justice Kraus observes, citing ***MacMinn v MacMinn,*** (1995), 174 AR 261, when a subsisting interim order proceeds to trial - a material change in circumstances is not required because an interim order can be adjusted at trial. See also, ***FDM v EGM,*** 2021 ABQB 420 at para 145; ***Davies v Davies,*** 2015 ABCA 17 at para 5; ***Hartley v Del Perro,*** 2010 ABCA 182 at para 9; ***Durocher v Klementovich,*** 2013 ABCA 115 at para 20

[108] In situations where one party asks to modify, vary, or reverse a previous interim order, it seems to me that different considerations arise by reasons of judicial economy and comity. First, although a material change might not be strictly required in the same way that it would be

required to vary a final order, an interim order nonetheless ought not to be interfered with unless there has been some material change. Second, an application to modify or replace an interim order should not be regarded as an opportunity for either party to relitigate previous interim orders not decided in their favour in the hope of obtaining a more favourable result; or, as a standing invitation to adduce new evidence that was reasonably available to the parties at the time of the previous interim order.

[109] The Court of Appeal of Alberta has consistently sought to discourage the appeal of interim orders, including parenting orders, because interim orders are entitled to deference and should only be interfered with if they reflect "an error in principle, a significant misapprehension of evidence, or unless the award is clearly wrong": ***McClelland v Harrison,*** 2021 ABCA 89 at para 17. As the Court of Appeal explains, the remedy for an objection taken to an interim order is "usually to expedite the trial, not to appeal the interim order".

[110] The Court of Appeal's comments are particularly apposite here because the Court heard an appeal from Justice Price's Order of March 12 and declined to interfere with the Order as the Court found no reviewable error, either on the basis of an error of law, or based upon a misapprehension of the evidence. Significantly, the Court of Appeal did not find any palpable and overriding error in Justice Price's fact-finding.

[111] As a judge of coordinate jurisdiction, hearing a successive interim parenting application, I cannot act as another layer of appellate review; particularly when the parenting application constitutes an attempt to revisit, and then to interfere with, the previous interim parenting or contempt orders made by this Court. Indeed, the contempt finding itself is a final order.

[112] I accept that it is generally appropriate, when considering an application to vary an interim order, to require some material change before making yet another interim order. The material change must also be urgent in the sense that the best interests of the children necessitate an immediate change; or put another way, a change that is of sufficient urgency that it must be addressed immediately as opposed to awaiting trial. Successive chambers applications seeking the revisiting of interim orders are not to be encouraged in the absence of some material change; otherwise, to permit the same, would be to encourage the practice of judge shopping.

[113] Considered in this way, the general rule is that an applicant seeking to vary the parenting regime established by the court must demonstrate a material change of circumstances following the making of the order. Once a significant change in circumstances has been demonstrated, the best interests of the children must be considered in light of that change. In ***Gordon v Goertz,*** [1996] 2 SCR 27 at paras 10-13, the Supreme Court stated as follows:

> Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther…
>
> The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the

> original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued. . . .
>
> What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way...The question is whether the previous order might have been different had the circumstances now existing prevailed earlier...Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place"
>
> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[114] The proper recognition of these principles is of no small consequence. I will summarize the principles: first, the requirement to demonstrate a material change in circumstances cannot be an indirect route to appeal (especially where as here JLZ did appeal and the Court of Appeal found no palpable and overriding error in the case management justice's fact-finding); second, if a material change in circumstances is demonstrated I must assume the correctness of the previous decision and consider only the change in circumstances since the order was issued; third, a material change means the change has in some way fundamentally altered the child's needs or the ability of the parents to meet those needs; fourth, the material change must distinctly represent a change from what the court could have reasonable foreseen; and fifth, the question then becomes, assuming a material change, how would the order have been different if the existing circumstances had been known to the judge making the earlier order?

[115] I agree with counsel for CMZ that JLZ's attempts to relitigate past issues, including this Court's prior findings that JLZ inflicted family violence upon the children of the marriage and engaged in parental alienation, is not permitted short of at trial.

[116] Similarly, JLZ's attempts to revisit previous findings made by this court concerning, for example, the finding that JLZ's claims that the allegations of sexual assault are unsubstantiated cannot be revisited in the absence of new credible and reliable evidence demonstrating some urgency in the context of the best interests of the children.

[117] I will not at this stage, once again, reiterate the factual findings made by this Court previously, and not interfered with by the Alberta Court of Appeal. I would add, however, there is no concrete evidence supporting the suggestion made by JLZ that the police and/or Children's Services continue to investigate CMZ for sexual assaulting his children or for other forms of neglect, including physical violence. I say this because it is not reasonable to suggest that either the RCMP or Children's Services would leave the children in the care of CMZ if there were reasonable grounds to believe that the children are presently in need of protection. I come to this

conclusion, in part, because to do so would be a complete abrogation of the statutory duties imposed each agency relative to child protection under the *Child, Youth and Family Enhancement Act*, RSA 200 c C-12,

[118] In reaching this conclusion, I have not relied upon the copy of the letter sent to the Court, over the objection of JLZ, dated July 19, 2021. This correspondence, purportedly jointly signed by an assessor and a team leader at Children's Services, as addressed to CMZ and states as follows:

> Children's Services became involved with your family due to concerns reported under the *Child, Youth & Family Enhancement Act.*
>
> During the course of this assessment it was determined that the children are safe in your care, as per the Court of Queen's Bench order. Children's Services is confident that there is no need for further involvement at this time. Should you have any child protection concerns in the future please call our intake line [phone number provided].

[119] I have decided not to rely upon the letter, in least in part, because the letter was not receivable as evidence. CMZ did not tender this letter by way of affidavit and made no effort to authenticate its contents.

[120] Within the legal framework that I have just outlined, I conclude that there has been a material change in circumstances since Justice Price's Order of March 12, 2021.

[121] I come to this conclusion because Justice Price's March Order was made at time when the trial of the parenting issues was scheduled to occur within a month's time. The trial did not proceed and has not been rescheduled. The children have not had contact with JLZ for a number of consecutive months. CMZ has had the full responsibility of parenting since somewhere near the middle of April, 2021. Even before that, the children had been reported as missing for some 33 days.

[122] The question that I must now ask is one that seeks to determine the path to successfully, and without further harm to the children, working towards a successful reunification of the children with their mother and on what terms? I also mindful of the fact that the RCMP have advised CMZ to not disclose to JLZ, or her family, the present location of the children given ongoing concerns arising from the alleged abduction. CMZ advises of a history of being followed by a private investigator, and believes he is still being followed. Whether or not CMZ is presently being followed, CMZ's fear of being followed serves as an apt reminder of the concerns raised.

[123] As I consider the best interests of the children, referenced by the factors found in s.16 of the *Divorce Act*, I am directed to give primary consideration to the physical, emotional and psychological safety, security and well-being of the children. I must consider not only the physical danger to the children, but I must also consider Justice Price's findings that JLZ has been harmfully alienating the children and inflicting family violence upon them.

The Children's Present Circumstances

[124] CMZ describes the children being returned to him after spending time in a remote B.C. cabin that his children refer to as the "Mountain House". The children told CMZ that they spent time with a man named "TJ", and CMZ said that as of July 15, 2021 he had not yet determined the full impact upon the children of their ordeal.

[125] CMZ also said that when the children were returned to him that they had just two or three pairs of clothing each, and that some of the children's clothing was located in bags and were covered in vomit. CMZ said that WZ jumped into his arms but that LZ was fearful of him and his family. CMZ believes that LZ's fear was instilled in her because of JLZ's efforts at alienation.

[126] Since that time, and over the next three months, CMZ states that LZ eventually warmed up to him and now seems happy and appropriately affectionate. LZ, to CMZ's mind, is in the process of building a relationship with her father.

[127] CMZ also advises that LZ has acquired a large social circle of other children, and more importantly, that LZ is no longer fearful of CMZ or his family.

[128] WZ, CMZ states, immediately upon her return from B.C., required constant reassurance. Happily, WZ is now eager to play with other adults and is starting to play with other children. WZ is described by CMZ as affectionate, observant, and as someone who loves to play. WZ is also described as having a tremendous sense of humour. WZ is now able to venture out with other family members of friends without crying in panic and clinging to her father.

[129] Still, CMZ says, that both girls will not go to sleep without him being in the room.

[130] CMZ reports that he has been receiving assistance from Dr. Wendy Froberg, both for advice, and to provide updates on the children's progress.

[131] CMZ assures the Court that he has been speaking positively to the children about their mother, but does not wish JLZ to have contact with the children, citing the criminal investigation related to the alleged abduction, and the concerns he has over JLZ's past behaviour and his worry that a repetition of those past behaviours would further traumatize the children.

The Parenting Decision

[132] JLZ's Parenting Application, for the most part, ignores the previous findings of this Court and improperly attempts to relitigate the previous orders, despite her unsuccessful appeals to the Court of Appeal.

[133] JLZ continues with an established pattern of advancing serious allegations against CMZ's parental ability; allegations that he denies, and allegations that this Court has not previously decided in JLZ's favour. To the extent that JLZ wishes to further advance these allegations, she must do so at trial.

[134] The attempts by JLZ to revisit matters that were not decided in her favour does not constitute a material change in circumstances. It is evident, however, that JLZ does not accept

the prior Court decisions and does not accept the decision of the Court that placed primary parenting responsibility with CMZ. The material change, instead, is occasioned by the prolonged period the children have had without any maternal contact.

[135] I have exhaustively reviewed the previous decisions of this Court. Justice Price made a number of findings based upon roughly the equivalent of the evidence that has been put before me. In particular, Justice Price found JLZ in contempt of the Justice Jones and Justice Ashcroft Orders, and in contempt of her own Order of February 8, 2021. The defiance that JLZ demonstrated in failing to abide by the previous court orders importantly involved the intentional decision JLZ made to obstruct CMZ's court ordered parenting time with his children. Not only has JLZ been found to be in contempt of three of the four court orders made by this Court as to parenting, it is important to note that for the most part this Court has determined that granting CMZ greater parenting time was in the children's best interests.

[136] In addition, leading up to the March 12 Order, Justice Price concluded that JLZ had engaged in a number of negative and harmful behaviours towards the children. I have already detailed the list of alienating behaviours detailed by Justice Price in her oral decision from August of 2020. It was that list that preceded Justice Price's warning to JLZ that if she continued coaching the children and interfering with CMZ's relationship with them, Justice Price would further consider limiting JLZ's contact with the children. Justice Price would later describe JLZ's behaviour as "family violence", and further describe the continued unsubstantiated allegations of sexual assault against CMZ as conduct that his harmful to the children.

[137] As I consider JLZ's application to restore primary parenting to herself, I do so with the full recognition that any proposed change to the parenting regime must be considered with the primary imperative that any proposed change must be measured by the best interests of the children. Section 16 of the *Divorce Act*, contains a number of useful considerations, and s.16(4) in particular directs that I must consider family violence. When considering family violence, I must, *inter alia,* consider the nature, seriousness and frequency of the violence, along with the physical, emotional and psychological harm to the child. I must also consider the willingness of JLZ to comply with orders of this Court that are designed to minimize what this Court has found to be prior family violence; including, coaching and alienating behaviours. I must also consider that JLZ has not in the past demonstrated, as is evident by the 3 contempt findings, a history for non-compliance for court orders.

[138] Section 16(6) of the *Divorce Act*, mandatorily directs that I give effect to the principle of maximum contact with each spouse, but only to the extent that it is consistent with the interests with the best interests of each child. As McLachlin J, as then the was stated, "This means that parental preferences and rights play no role": ***Young v Young,*** [1993] 4 SCR 3 at p.117.

[139] Although JLZ was at one time the primary caregiver, her reliance upon the "status quo" I find in the present circumstances to be misplaced. The children have relatively recently endured not only a change in primary parenting, but that change in parenting was followed by an alleged abduction that resulted in criminal charges against JLZ's family members. The Order changing primary parenting to CMZ occurred because this Court had determined the change to be in the children's best interests, despite JLZ's historical role as the "status quo" primary parent.

[140] While JLZ argues that CMZ has weaponized the current Order, I can come to no such conclusion. Instead of weaponizing the order, I agree with CMZ that the history of this matter, including the previous findings that JLZ has engaged in alienating behaviours, renders realistic CMZ's fear that JLZ will continue to coach and alienate the children should she be afforded unsupervised access to the children. In my view, CMZ has properly considered the delicate state of the children's present recovery, along with the probability that further unsupervised contact with JLZ will cause the children further psychological and emotional harm. Nor, on the evidence before me, am I able to share JLZ's concerns concerning the efficacy and qualifications of the court-ordered experts, the RCMP, and Children's Services. These agencies have not found any objective support for the allegations made by JLZ against CMZ.

[141] CMZ has not demonstrated a material change that would warrant reversing the March 12 Order that would oblige me to restore the former parenting regime, and I would reiterate that it is not my function to make substantial changes to this Order without a material change demonstrating some urgency as measured by the best interests of the children.

[142] As I have varied the March 12 Order to require a PN8 evaluation as opposed to the PN7 evaluation that had been previously ordered, and because a trial date not presently scheduled, it is not in my view in the best interests of the children to prohibit JLZ from any parental access to the children pending a yet to be determined trial date. Instead, I conclude that it is in the best interests of the children that JLZ's parenting time, at least for the near future, be supervised with a view to preventing any further family violence, including any coaching or other alienating behaviours. Supervision is also required to ensure that JLZ does not ask questions of the children that might advertently or inadvertently seek to discover their present location, at least pending some advice from the RCMP that it is safe to do so.

[143] Accordingly, it is in the best interests of the children to further vary the March 12 Parenting Order to the extent that JLZ will have supervised parenting time with both children of the marriage on a weekly basis for 4 consecutive hours every Saturday. This four-hour time period will be as directed by the supervisor. The supervisor must be a psychologist registered with the College of Alberta Psychologists, and must have current expertise in matters involving children and parenting disputes. The psychologist, once retained, is directed to ensure that the JLZ does not engage in any coaching or alienating behaviours with respect to the children, or other similar negative behaviour that is of concern to the psychologist. JLZ will willingly accept any directions that are given by the psychologist, including the regulation of her conversations with the children. The failure to abide with directions given by the supervising psychologist will result in the termination of JLZ's parenting time pending further order of the Court. The supervising psychologist is not to permit any conversation with the children that would directly/indirectly reveal the location of where the children presently reside. All costs associated with supervised parenting will be the sole responsibility of JLZ. The parties should make efforts to jointly agree on the identity of the supervising psychologist, failing which, the parties may come back before me for further direction.

[144] After each parenting session, the supervising psychologist will provide both counsel and myself with a summary report detailing the circumstances of the session, along with any recommendations that might be made by the psychologist, including the duration and number of

parenting sessions. The supervising psychologist should also advise as to the necessity of continued supervision.

[145] The parties may, if necessary, address the terms of this Order if required. The terms of the March 12 Order are to remain in effect except as varied by this decision.

CMZ's Child Support Application

[146] CMZ's Child Support Application relies upon JLZ's financial disclosure from last year which suggests that her employment income is $200,000 per annum. This amount of employment income has not been disputed by JLZ.

[147] Both parties, at least to some degree, seek to adjust their respective child support obligations based upon arguments arising from the pending division of matrimonial property. I find these arguments to be inappropriate because it is trite law that child support is the right of child, and this right cannot be interfered with on the basis of a dispute between the parties as to what is owed one to the other consequent upon the division of matrimonial property.

[148] I am also of the view that it is inappropriate for me at this stage for me to make any determinations as to the parties' respective responsibility for future s.7 expenses as the present evidentiary record does not permit me to come to a proper determination. I say this because there are outstanding disclosure issues, and because I do not have a sufficient evidentiary record before me that explains, for example, why CMZ voluntary left his last period of employment and is not presently employed.

[149] Similarly, although CMZ has argued that he incurred child support arrears for s.7 child care costs that JLZ did not incur, the present record contains little to no information for me to properly determine if and how that occurred and at what dollar amount. I am also aware that JLZ has an outstanding Application for an award of retroactive child support that has not yet been considered.

[150] I conclude, based on the $200,000 per annum guideline income of JLZ, that I am in a position to to order the table amount of s.3 child support in the amount of $2793 per month commencing from the date that the children started residing with CMZ in April of 2021. Based upon CMZ's concession that he has properly accrued at least $8,000.00 in child support arrears, JLZ will have a credit for that amount, and the same $8,000 amount will be ordered to be credited to CMZ's maintenance enforcement account as payor.

[151] The balance of the child support issues should be determined at trial.

[152] The parties may speak to costs if necessary; however, I would note that it seems in the circumstances that success on these applications has been rather mixed.

Heard on the 4th day of August, 2021.
Dated at the City of Calgary, Alberta this 2nd day of September, 2021.

D.A. Labrenz
J.C.Q.B.A.

Appearances:

Penny L. Pritchett
Knight & Pritchett
Barristers & Solicitors
for the Plaintiff

Diann P. Castle (did not appear) & Tanya J. Kelm
Castle & Associates
Barristers & Solicitors
for the Defendant

Corrigendum of the Reasons for Decision
of
The Honourable Mr. Justice D.A. Labrenz

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[1] Correction to paragraph [2] above to now read "... that these written reasons".

[2] Correction to paragraph [116] above now read "... the finding that JLZ's claims".