Court of Queen's Bench of Alberta

Citation: Zak v Zak, 2021 ABQB 360

Date: 20210507
Docket: 4801 182850
Registry: Calgary

Between:

Colin Matthew Zak

Plaintiff (Respondent)

- and -

Jacqueline Louise O'Driscoll Zak

Defendant (Applicant)

Reasons for Decision
of the
Honourable Madam Justice J.C. Price

I. Introduction

[1] The Defendant mother, Jacqueline Louise O'Driscoll Zak, seeks for a second time in four months to have me removed as case management justice on this file. The first application was heard on January 18, 2021 and my decision dismissing the application was published on February 1, 2021: ***Zak v Zak***, 2021 ABQB 80.

[2] This second recusal application arose after I found on March 12, 2021 that Jacqueline was in contempt of my February 8, 2021 order and that it was in the best interest of the children to be immediately removed from her care as a result of her continued family violence affecting them. The two children of the marriage are 2 and 5 years old. I made an interim order that included

among other things that the Plaintiff father, Colin Matthew Zak, have interim sole care of the children of the marriage with the transition of the children from the care of Jacqueline to occur immediately with the assistance of any peace officer called upon to assist (the "Interim Order Changing Parenting").

[3] Immediately following the March 12, 2021 Interim Order Changing Parenting, the children, who were understood to be in the care of Jacqueline's mother that day, were allegedly abducted by their maternal grandmother, Therese O'Driscoll, and maternal aunt, Alison O'Driscoll. The children were located on April 14, 2021, 33 days after their abduction. The RCMP have since laid charges against the maternal grandmother and maternal aunt for forcible confinement and abduction of the children.

[4] On March 14, 2021, after learning that the children were missing, "last seen at approximately 9:30 a.m. on March 12 at the children's home" and "believed to be in the company of adult relatives", I sent an email to Jacqueline's counsel, copied to Colin's counsel, which stated:

> Dear Ms. Castle and Ms. Kelm,
>
> I've learned through a recent CBC news media report that the children are not where they are supposed to be. I am writing this email to encourage you to contact Ms. O'Driscoll to encourage her to take immediate active steps to have the children returned and placed in the care of their father, Colin Zak.
>
> Justice Price
>
> Here is the media report that I am aware of:
>
> https://www.cbc.ca/news/canada/calgary/cochrane-rcmp-abduction-police-request-public-1.5949645

[5] On March 16, 2021, Colin filed an application for an order to hold Jacqueline in contempt for not complying with the Interim Order Changing Parenting and for an order that she be incarcerated for her contempt and that she remain incarcerated until she purged her contempt and until the children had been delivered to his custody. That application for contempt has been adjourned pending the outcome of the appeal of the Interim Order Changing Parenting.

[6] On March 17, 2021, Jacqueline filed an appeal with the Court of Appeal and an application to stay the Interim Order Changing Parenting pending that appeal. The application for the stay was denied by the Court of Appeal on April 7, 2021: ***Zak v Zak***, 2021 ABCA 131. The substantive appeal was heard on May 4, 2021.

[7] On March 24, 2021, Jacqueline filed the within application for my recusal (the "recusal application"). As earlier mentioned, this is her second recusal application since January 2021. The grounds cited by Jacqueline in this recusal application are:

> "Based on email communication sent from Justice J.C. Price to Counsel on March 14, 2021. This implies that Justice J.C. Price has attributed guilt to Ms. O'Driscoll Zak and implies impropriety on Counsel's part.
>
> Based on counsel request, on four separate occasions (February 8, 2021, February 18, 2021, February 25, 2021, March 12, 2021) to schedule a hearing and/or trial to test and examine evidence and follow due process."

[8] The question that must be answered to determine whether I should recuse myself is: What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would she/he/they think that it is more likely than not that I, Justice Price, whether consciously or unconsciously, would not decide fairly?

[9] Given the allegations raised in this recusal application, a full review of the history of this file since my involvement is necessary, as Jacqueline has alleged biased conduct on my part "throughout the entire case management process" dating back to August 6, 2020.

II. History of the Legal Proceedings

[10] These parties first appeared before me at a domestic special on July 29, 2020. I gave my decision orally on August 13, 2020. I made a number of findings that are recorded in my decision including:

> -That there was sufficient evidence not in conflict and uncontroverted such that a fair and just determination could be made based on the record that was before me.
>
> -That Jacqueline and her family members exhibited extreme behaviour that was intended to get a negative reaction from Colin that had a resulting traumatic and negative effect on the children.
>
> -In reviewing one of Jacqueline's affidavits that was before me (there were several affidavits from both parties and a cross-examination transcript of Colin's questioning conducted by Jacqueline's counsel), I held at paragraphs 42 and 43 of my decision:
>
> > Jacqueline vehemently opposed Colin's application. Jacqueline's affidavit was before Justice Jones. In every instance along the way since their separation, Colin has been compliant with the demands and requests of Jacqueline when it has come to parenting. He has consented to supervised visits in the matrimonial home. He consented to and submitted to a PN7 parent psychological evaluation. He consented to access in the matrimonial home even though he was permitted by court order to take the children elsewhere. He submitted willingly to random alcohol tests and drug tests and has indicated he was agreeable to a court-ordered clause prohibiting any consumption of alcohol, and there is no evidence to suggest that he has not abided by staying away from alcohol. Yet, this does not suffice for Jacqueline.
> >
> > Her evidence indicates that she is controlling. She has attachment and separation issues with the children. She does not trust Colin, no matter what he does to try to earn her trust. Every effort made by Colin has been ignored, downplayed, exaggerated, or misconstrued, all of which has impeded the relationship between the children and their father and has made their parenting relationship worse.
>
> -That Jacqueline was in contempt of Justice Ashcroft's parenting order by her unilateral decision to terminate Colin's parenting time between January 1, 2020 to

March 3, 2020, which was contrary to the parenting order pronounced on August 14, 2019 (the "2019 Ashcroft Order").

-That Jacqueline was in contempt of Justice Jones' parenting order by unilaterally denying Colin access to the children or limiting his access to the children contrary to the order dated February 27, 2020 (the "2020 Jones Order").

-That Jacqueline engaged in alienating behaviour which has gravely negatively impacted the circumstances of the children and both her and Colin's ability to meet their needs. I found that there was more than sufficient evidence that Jacqueline had engaged in alienating behaviour, some of which included:

- Coaching Leonine to blow a whistle if her father was taking her away from her home. I found Jacqueline was the only person who could have taught then 4-year-old Leonine to fear her father and to use the whistle if she was afraid he was doing something he should not;
- Taking supervision to the extreme to the point of intimidation and interference with Colin's limited parenting time under the 2019 Ashcroft Order;
- Limiting Colin to access only inside the matrimonial home;
- Believing, notwithstanding the evidence to suggest otherwise, that Colin is still abusing alcohol;
- Not accepting the parenting expert report of Glenda Lux (the "Parent Psychological Report of Colin") and at times misconstruing the information in that report;
- The absence of evidence suggesting that Jacqueline has tried in any way since separation to encourage the children to have a relationship with their father;
- Affidavit evidence from the outset sets a tone of a lack of trust and suggests that Jacqueline will persist in her efforts to interfere with the relationship between the children and their father;
- In Jacqueline's most recent affidavit sworn August 11, 2020, she outlines how she arranged for a third party, presumably unknown to Colin or the children, to "be present during the transition" for the Saturday August 8, 2020, unsupervised access visit. She did not tell Colin of her intentions until the morning of, and he was told by text, yet this was meant to be his unsupervised access time with the children away from the home.
- Meanwhile Jacqueline reports in her affidavit that when Colin arrived, the third party sat at the dining room table while she and her sister left the building. In my oral

> decision, I questioned what was the purpose of having an unknown third party there at all but to agitate and interfere with the situation? Would it not have been better to have a discussion 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?
>
> - Instead Jacqueline 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. I found that this was not normal behaviour, but rather, alienating, obstructive, intrusive, and deeply concerning behaviour reflecting the mother's inability to let go. She demonstrates in her own affidavit her inability to detach herself to allow Colin to have any parenting time with the children without her interference. I opined that this must have been scary, uncomfortable and traumatic for the children and concluded that Jacqueline's behaviour was not acceptable.
>
> -That Jacqueline significantly contributed to the trauma experienced by the children.
>
> -I further found that: "[t]o 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."

[11] In these same reasons for decision, I said the following in my concluding remarks at paragraphs 112 and 113:

> Given the recent events, I find that giving Colin shared parenting at this time and immediate overnight access is not in the children's best interest. However, I caution you, Jacqueline, if you carry on with these coaching antics and deliberate acts to thwart Colin'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 Colin's access.
>
> As a result of the foregoing, as I am most familiar with the evidence filed by the parties and what I have ordered, I will remain seized of the parenting issues in this matter to ensure that the parents remain accountable. Effectively, as a result of ordering the PN7, I believe I am *de facto* case manager.

[12] The Practice Note 7 ("PN7") that I ordered was for therapeutic intervention for the parents and children to help the children reunify with their father and to help with parenting the children more generally.

[13] My oral reasons from August 13, 2020 were recently published to complete the record: ***Zak v Zak***, 2021 ABQB 229.

[14] Jacqueline appealed my August 13, 2020 decision. Her appeal was heard on an expedited basis on November 30, 2020 and the Court of Appeal rendered its Memorandum of Judgment on December 4, 2020: ***Zak v Zak***, 2020 ABCA 431. In that decision, the appeal court affirmed my decision, dismissed the appeal, and remitted the matter back to me for further determination. At paragraph 7, the Court of Appeal stated:

> We are not satisfied that the appellant was denied procedural fairness or that the case management judge was not impartial. The parental alienation issue was fully argued and the case management judge's finding of alienation by the appellant is supported on the record. There is no basis for any suggestion of lack of impartiality.

[15] On December 8, 2020, four days after the Court of Appeal's decision was released, counsel for Colin sent me a letter that stated:

> "Further to the above noted matter and your decision of August 13, 2020, Your Ladyship had requested a review of the parenting regime once the Reunification Counselling had commenced.
>
> Reunification Counselling has commenced, and I believe Dr. Froberg has provided a report to the Court regarding the progress.
>
> There is no current parenting Order and we would like to schedule an appearance before Your Ladyship to deal with interim parenting and to review the Reunification Counselling. Given that the matter was originally set to be reviewed in late October 2020, we would be most grateful if we are able to schedule that appearance prior to the Christmas break."

[16] By this time, I had received the Court of Appeal's decision and Dr. Froberg's Interim Report of Parent-Child Reunification Therapy dated November 26, 2020 (the "Interim Report").

[17] The Interim Report set out how the therapy was proceeding. With respect to the assessment of the mother's readiness and willingness to support reunification efforts, Dr. Froberg noted:

> "Based on her comments and actions, Ms. O'Driscoll does not appear to have accepted the validity and appropriateness of the Reunification intervention and is not indicating that she is willing to cooperatively participate in the process."[1]

[18] As set out in my decision on Jacqueline's first recusal application, I found that Colin's request for a case management meeting to address the parenting regime was urgent and I scheduled a case management meeting on December 15, 2020.

[19] On December 14, 2020, however, I was notified by Jacqueline's new counsel, Renee Miller (who was Jacqueline's third new counsel in less than one year), that an application for bias would be made to have me removed as case management justice.

[20] I heard the first recusal application on January 18, 2021. There were four specific instances of bias alleged in that application: i) findings made in my Oral Reasons for Decision given on August 13, 2020; ii) my decision to hold the December 15, 2020 case management

[1] Colin included the above quoted comment from Dr. Froberg's Interim Report in the affidavit he filed in response to Jacqueline's first application to have me removed as case management justice.

meeting; iii) Dr. Froberg's attendance at the December 15, 2020 case management meeting; and iv) my unwillingness to consider the schedule of experienced counsel. As earlier stated, I dismissed that application.

[21] The parties attended another case management meeting on Monday February 8, 2021. As reported in the transcript from those proceedings, which are part of the court record, by this date I had received Dr. Froberg's updates on the ongoing reunification therapy. She noted that Wyatt was not exhibiting any overt reactions towards her father during the reunification therapy, even though Colin had not spent any parenting time with the children for approximately nine months. Given the progress of the reunification therapy, I granted Colin unsupervised parenting time with Wyatt during the regularly scheduled reunification therapy session on Thursday February 11, 2021 (he would start and finish his unsupervised time at Dr. Froberg's office). I also ordered the matter of parenting to a trial with March and April dates being offered to counsel.

[22] Jacqueline opposed any unsupervised parenting time, but when asked for the basis of her opposition, including whether she alleged any abuse and the details of that abuse, she did not provide any information. Later however, she deposed that one of the children had disclosed abuse to her on Saturday February 6, 2021, two days prior to the case management meeting.

[23] The first period of unsupervised parenting time with Wyatt did not occur and Colin sought permission to bring an application for contempt. The contempt application and Colin's supporting affidavit was sworn and filed on February 12, 2021 and returnable February 18, 2021.

[24] In that affidavit, Colin appended an email string that contained an email from Jacqueline to Dr. Froberg in which she states:

> "Hi Wendy,
>
> I was required to attend the RCMP office to follow-up with them after concerning disclosures Wyatt made over the weekend. Unfortunately I have been here for multiple hours and I am still awaiting their direction."

[25] Given the severity of the allegations, I directed that the parties appear before me on February 18, 2021. On that date, Ms. Miller sought to be removed as counsel of record for Jacqueline and a lawyer from Ms. Castle's office appeared to speak to the matter.

[26] At that case management meeting, I directed that the parties return before me on February 25, 2021, our originally scheduled case management meeting that had been set at the February 8, 2021 case management meeting. I also directed that Jacqueline file her reply affidavit to Colin's affidavit in support of his contempt application by February 22, 2021 and that Colin file any reply affidavit no later than by February 24, 2021. Furthermore, I confirmed that my interim order of February 8, 2021 was not varied and that Colin was to get unsupervised parenting time with Wyatt transitioned through Dr. Froberg on February 19, 2021 and February 25, 2021.

[27] Also as reported in the February 18, 2021 transcript of the proceedings, counsel for Colin advised that the relief that was being sought in the application for contempt included a change in custody of the children.

[28] On February 19, 2021, in accordance with my February 8, 2021 interim order, Wyatt was brought for her visit to Dr. Froberg's office for Colin to have unsupervised parenting time for two hours transitioned through Dr. Froberg.

[29] As requested, I received Jacqueline's affidavit in response to Colin's application for contempt on February 22, 2021. She states the following at paragraphs 19, 20 and 21 of that affidavit regarding the February 19, 2021 parenting time that took place:

> "In accordance with an Interim Order issued by the Honourable Justice J.C. Price on February 8, 2021, Wyatt attended a session with Dr. Froberg at 10:00 AM on February 19, 2021. The Plaintiff provided an update, via email, after the visit. Attached hereto and Marked as Exhibit "G" to this my Affidavit is a copy of the correspondence provided by the Plaintiff on February 19, 2021 at 12:00 PM. He indicated that the visit went well, Wyatt was happy, and that he would provide "extensive documentary evidence" of the visit upon request. He further indicated that Wyatt was sleeping in the car. However, I found Wyatt's behaviour to be very unusual. Wyatt did not recognize me and was very unresponsive. Wyatt was in a trancelike state – like what I had witnessed in the Spring of 2020 – after a visit with the Plaintiff. She was acting very disengaged and exhibiting atypical behaviour by not seeking her usual comfort or following her normal routine. In the evening, around 8:15 PM, I observed a blue substance up Wyatt's nose. Wyatt stated that "Dad put a bean up my nose and it hurt". Wyatt made disclosures pertaining to the Plaintiff apologizing for "touching [her] bum". Wyatt was later taken to hospital for assessment, that night, and we are waiting the results of that visit at the Children's Hospital. I am also awaiting an update from Dr. Froberg regarding what transpired during the session on February 19, 2021, as well as the transition.
>
> Considering the recent disclosures made by Wyatt over the weekend of February 6, 2021; the events taking place during and after the visit, in combination with the aforementioned disclosures made in August 2020, I have filed a "Form 1" pertaining to allegations of sexual abuse perpetrated by the Plaintiff on the children. Attached hereto and marked as Exhibit "H" to this my Affidavit is a copy of the Form 1 sent for filing with the Queen's Bench of Alberta on February 22, 2021. I fear for the safety of our children and am trying to do my utmost to protect them. A change in custody and/or unsupervised access would be detrimental to both children for several reasons, including but not limited to, the pending investigation of sexual abuse perpetrated by the Plaintiff, his history of substance abuse, the Plaintiff's high-risk patterns of behaviour, as well as admitted and documented substance abuse issues. Furthermore, the Plaintiff has not been granted uninterrupted unsupervised visits since May 2020 and the obvious distress the children are in would only further traumatize them.
>
> Given the gravity of the situation and the pending investigation – allegation of sexual abuse – and open police investigation, it would cause further trauma, potential physical and emotional harm, as well as distress to the children should custody be changed to the Plaintiff. Furthermore, Dr. Froberg has not seen the outcome of the PN5 investigation or been apprised of the magnitude of the matter."

[30] On February 24, 2021, I received Colin's reply affidavit, in which he states at paragraphs 7 through 10:

> "The defendant's Feb. 22, 2021 affidavit falsely alleges that I have sexually abused my daughters. All descriptions of said abuse are false and are fabrications of the defendant. I believe the defendant is suggesting to my young daughters that they have been abused.
>
> The defendant's affidavit states that she somehow believed our daughter Wyatt did not recognize her own mother after spending two hours with me.
>
> In point 19, the defendant states that during my Feb. 19, 2021 parenting time, the first time I saw my two-year-old daughter in 9 months, the defendant alleges that I shoved a bean up Wyatt's nose until it hurt. If a bean was lodged in my daughter's nose by an adult on purpose, this would constitute a serious case of child abuse.
>
> Wyatt was never near any bean of any sort during her time at my home. For the approximately 1.5 hours we had with Wyatt outside Dr. Froberg's office, there was at least one adult with her. I didn't shove a bean up my daughter's nose and no bean was in Wyatt's nose when I returned her to Dr. Froberg at the end of my parenting time."

[31] By the February 25, 2021 case management meeting date, Jacqueline had filed a Form 1 and the Practice Note 5 process was implemented. Also, on February 24, 2021, Jacqueline's new counsel forwarded to me an email from Constable Lori Stacey advising Jacqueline that my February 8, 2021 order for unsupervised visits between Colin and Wyatt should not be followed. Constable Stacey's email, which Jacqueline appended to her affidavit in support of this recusal application, states:

> "I will be sending an email to the therapist along with calling dad to advise all visits are stopped until the statements are taken and then it will be reassessed at that time. I am still waiting to hear from Child and Family Services.
>
> Can you please send me the email address of the therapist who assist with the exchange?
>
> Thank you for your time,
>
> Lori"

[32] In the circumstances, I directed that Constable Stacey appear via WebEx at the case management hearing scheduled for February 25, 2021 to speak to her email advising that visits should be suspended, the RCMP's investigation, and when the investigation report would be ready.

[33] As set out in the transcript from the February 25, 2021 case management meeting, Constable Stacey advised that the investigation would be completed and that her report would be provided to me by no later than Wednesday March 10, 2021. In the urgent circumstances, I ordered that it would be in the best interests of the children to have the contempt application heard on March 12, 2021, after the RCMP's investigation and report. I also ordered that Colin's parenting time with Wyatt should continue, but that it would be supervised in the interim by Dr. Froberg.

[34] Furthermore, given the allegations raised by both Jacqueline and Colin in their respective affidavits, I raised with counsel the question as to whether the children should be in the care of a third-party caregiver. I raised this concern again with counsel via email sent through my judicial

assistant to come prepared at the March 12, 2021 contempt hearing with a recommendation for third party custody of the children (i.e. alternatives to foster care). A copy of this email was appended to Jacqueline's written submissions at Tab 9 of her "Supporting Documents & Authorities."

[35] On March 11, 2021, the investigator submitted her report. The report, which was attached as Exhibit "E" to Jacqueline's affidavit sworn on March 24, 2021, states in full:

> On Feb 20, 2021, Jacqueline O'Driscoll made a report of a disclosed event of child abuse with one of her children being the victim. At this time the RCMP opened an investigation. The Children's Services at the Child Advocacy Centre (CAC) were consulted of the allegations. The CAC enables children a safe environment to tell their story using the most trauma aware approach which is in their best interests. Given the totality of the information at hand, a Child Forensic Interview (CFI) was utilized to interview both children. Subsequently, and based upon the testimony of the children an assessment was made respecting next steps. In this case 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 children's safety with the father.

[36] On March 12, 2021, just prior to the contempt hearing, I received a report from Dr. Froberg describing the supervised visits between Colin and Wyatt on March 8 and 11, and I received an unfiled affidavit sworn on March 11, 2021 by Therese O'Driscoll, the maternal grandmother; and an unfiled affidavit sworn on March 11, 2021 by Michael MacNeil, who says in paragraph 1 of his affidavit that he is a licensed private investigator hired by Jacqueline to transport and protect Wyatt and Theresa O'Driscoll. These affidavits were in relation to the supervised visits between Colin and Wyatt that occurred on March 8 and 11, 2021.

[37] On March 12, 2021, I heard the contempt application. As earlier set out, I found Jacqueline in contempt of my February 8, 2021 order on the basis that she failed to bring Wyatt for the scheduled unsupervised access visit with Colin on February 11, 2021. I ordered that Jacqueline undergo a psychiatric assessment and I ordered an interim change of parenting to Colin until the parenting trial. As at March 12, 2021, and by my earlier order, the parenting trial was scheduled to proceed on April 27-30, 2021. I invited Dr. Froberg to attend the contempt hearing. She attended via WebEx after counsel had completed their submissions and just as I was delivering my decision. I invited Dr. Froberg to attend so that she could give advice on how best to transition the children from Jacqueline's care into Colin's care in the event I decided, based on all the evidence, that a change of parenting was in the best interests of the children.

[38] As earlier noted, my March 12, 2021 decision is under appeal and that appeal was heard on May 4, 2021.

[39] Since the March 12, 2021 contempt hearing, the following case management meetings have occurred:

> -On March 19, 2021, a one-hour case management meeting was held to discuss the next steps and procedure on the further contempt application filed by Colin on March 16, 2021; the parenting trial that was scheduled for April 27-30, 2021; and,

Jacqueline's pending recusal application to be filed. The next case management meeting was then scheduled for March 25, 2021;

-On March 25, 2021, a one-hour case management meeting was held. Counsel advised at that time that they would not be ready to proceed with the parenting trial on the pre-scheduled dates set for April 27-30, 2021. Counsel agreed that the recusal application would be scheduled that week in lieu of the parenting trial. Accordingly, the recusal hearing was scheduled for a full day on April 30, 2021. The next case management meeting was scheduled for April 14, 2021 for counsel to provide me with an update on the application for a stay of the Interim Order Changing Parenting that was pending before the Court of Appeal. Also, the meeting was to discuss the next steps for hearing the new contempt application and the next steps and procedure for this recusal application.

-On April 14, 2021, a one-hour case management meeting was held, at which I adjourned Colin's March 16, 2021 contempt application *sine die* pending the decision of the Court of Appeal. I also made directions regarding the filing of materials for this recusal application.

[40] At the hearing of this recusal application on April 30, 2021, Ms. Castle raised a further allegation of bias on the grounds that I had failed to respond to correspondence she had sent to my judicial assistant the previous week in which she proposed another application. Although she acknowledged that I was in a jury trial when she sent her correspondence, Ms. Castle nonetheless alleged that my failure to respond indicated that I was biased or that I was purposefully ignoring her correspondence. Notwithstanding the fact that she did not have a hard copy of her said letter or the proposed application at the recusal hearing, I addressed her complaint and her proposed new application. Before I could fully address it, however, Ms. Castle then argued that my consideration of the proposed application would be pre-empting my decision on the recusal application.

[41] I found Ms. Castle's submissions on this matter to be disingenuous. She alleged that I was biased, complained that my failure to respond to her letter and proposed application was an example of bias, but when I suggested that we could address the matter right there and then, she did not want me to address it because it would be pre-determining the recusal. In any event, after some coaxing, I was advised that the application was for an order for production of materials held by Child and Family Services. Counsel for both parties agreed that the application could be addressed in Queen's Bench morning chambers. Accordingly, I ordered that it proceed in morning chambers on an open date available to counsel, including counsel for Child and Family Services.

[42] Subsequent to her oral submissions on this recusal application, Ms. Castle said her client wanted to know the whereabouts of Colin and the children, as they were unknown. This was raised without application and in the face of Colin's affidavit evidence indicating that the RCMP had recommended that he and the children go into hiding for their safety. Eventually, Ms. Castle indicated that she would try to obtain this information through the disclosure from Child and Family Services.

III. Analysis

A. Legal Test for Recusal

[43] Justice Slatter in ***Alberta Health Services v Wang***, 2018 ABCA 104 succinctly stated the test for recusal at paragraph 4 as follows:

> ... A recusal should occur if a reasonable person, properly informed, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the judge, whether consciously or unconsciously, would not decide fairly. In other words, if there is an objectively reasonable apprehension of bias the judge should recuse him or herself.

[44] The legal test for recusal is the same as the test for reasonable apprehension of bias. I set out the test at paragraphs 10-12 of my decision in the first recusal application, and for ease of reference, I repeat it here:

> The test for a reasonable apprehension of bias is well settled and undisputed. As was noted by the Supreme Court in ***Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General),*** 2015 SCC 25 at para 20, [2015] 2 SCR 282, the established test for reasonable apprehension of bias is:
>
> > "...what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly... [citation omitted]"
>
> In ***Feeney v Simon***, 2020 ABQB 641, Rooke ACJ succinctly summarized the legal principles with respect to bias at paras 15 to 21, the key aspects of which are as follows:
>
> > A simple allegation of bias or misconduct is not a basis for judges to remove themselves from a matter.
> >
> > The strong presumption of judicial impartiality is not easily displaced.
> >
> > Appeal courts do not impute bias lightly; judges are presumed to act impartially.
> >
> > An unfavourable result or conclusion by a judge in relation to a party is not in itself a basis to conclude there has been bias or prejudice.
> >
> > Repeated unfavourable results also are not evidence of bias, particularly in the context of case management.
>
> Associate Chief Justice Rooke then quoted a useful summary of the relevant legal principles that guide how a court evaluates allegations of judicial bias taken from the New Brunswick Court of Appeal's decision in ***Bossé c LaVigne***, 2015 NBCA 54 at para 7, at para 21 of his own reasons:

> The elements of this objective test are that (1) the person considering the alleged bias must be a reasonable person, not one who is very sensitive or scrupulous, but rather one who is right-minded; (2) the person be a well informed person, with knowledge of all the relevant circumstances; (3) the apprehension of bias itself must be reasonable in the circumstances of the case; (4) the situation must be fully examined, not just the face of it; and, the examination must be one that is both realistic and practical; (5) the inquiry begins with a strong presumption of judicial impartiality and looks to determine whether it has been displaced such that there is a real likelihood or probability of apprehension that the judge would not decide the case fairly on the merits; ... [Underlining emphasis in original.]

[45] In her application, Jacqueline relies on Rule 13.1(c) of the Alberta *Rules of Court* and says that it is improper and inappropriate for me to continue acting as the presiding Justice over this matter. Rule 13.1 states that a "judge may act in place of or replace another judge if...it is inconvenient, improper, inappropriate or impossible for that other judge to act." Rule 13.1 typically is used in situations where a judge is ill or passes away before rendering a decision and permits another judge to step in. Jacqueline submits in her written argument that her application to have me recused "is not specifically based on reasonable apprehension of bias towards her and/or her counsel, there is certainly merit to an argument of bias." She then later says, "[w]e respectfully submit that there is a reasonable apprehension of bias towards the Defendant and/or her counsel, however, that this is not the crux of the application before this Honourable court today".

[46] Whatever the "crux" may be, it is clear that Jacqueline does not want me to hear any further court applications on parenting or otherwise in this matter. In any event, the test for bias and recusal are the same.

B. Application of the Legal Principles to the Facts in this Case

[47] Applying the test and the principles set out above, the question that must be answered is: What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would she/he/they think that it is more likely than not that I, Justice Price, whether consciously or unconsciously, would not decide fairly?

[48] I will now address the specific instances of alleged bias upon which Jacqueline relies to have me recused as the case management justice.

i. Based on Email Communication Sent from Justice J.C. Price to Counsel on March 14, 2021: This Implies That Justice J.C. Price Has Attributed Guilt to Ms. O'Driscoll Zak and Implies Impropriety on Counsel's Part

[49] As set out in the introduction of this decision, I sent an email to Jacqueline's counsel after learning on March 14, 2021 from a CBC news media report, just two days after I had ordered that the children be placed in the care and custody of Colin, that the children were missing and had been missing since March 12, 2021, last seen at 9:30 a.m. on that day.

[50] The CBC news media report stated as follows:

> "RCMP in Cochrane, Alta., say they are seeking tips from the public to locate two missing children.
>
> RCMP said the children were believed to be in the company of adult relatives.
>
> They were last seen at approximately 9:30 a.m. on March 12 at the children's home.
>
> A spokesperson with RCMP said there were custody issues involved."

[51] At the March 12, 2021 hearing, I asked counsel about the location of the children and Ms. Castle advised me that they were in the care of Jacqueline's mother that day. I confirmed this information by asking Jacqueline directly; the transcript reads:

> THE COURT: Ms. O'Driscoll Zak, where are the children?
>
> MS. O'DRISCOLL ZAK: With my parents.
>
> THE COURT: At their house?
>
> MS. O'DRISCOLL ZAK: At their house, my mother, at my parents' home.

[52] After I issued the Interim Order Changing Parenting, Ms. Castle asked for an immediate stay of my order before the children were transitioned into their father's care. I dismissed that stay application, as recorded in the transcript of the proceedings, which also contains my oral reasons for decision:

> THE COURT: Okay. So your application for that stay, Ms. Castle is denied. We want to get this transition occurring. This is a stay, and to put it over is only going to create further trauma. There is all, all the, in terms of everything that I see in trying to get these children to spend time with their father, it has only been resistance.

[53] After I denied her stay application, Ms. Castle advised that she would be appealing my decision to the Court of Appeal as early as Monday, March 15, 2021. So when I learned just two days after my March 12, 2021 order that the children were missing, I emailed the parties' counsel. Again, for ease of reference, my email stated:

> I've learned through a recent CBC news media report that the children are not where they are supposed to be. I am writing this email to encourage you to contact Ms. O'Driscoll to encourage her to take immediate active steps to have the children returned and placed in the care of their father, Colin Zak.

[54] While Colin's counsel submitted that my email was "unusual", I did what I thought was necessary in the circumstances of this case. Given the history of these proceedings and my findings that Jacqueline's conduct and behaviour was harming the children, the email I sent on March 14, 2021 was to express my concern for the health and safety of the children. Also, given Jacqueline's earlier representations to the Court that the children have only ever known her, their nanny and her own family and that on the day of the contempt hearing they were in her mother's care at her mother's home, it was plausible that she knew of their whereabouts. Finally, given the history of this matter, including findings made and upheld by the Court of Appeal that Jacqueline was in contempt of the 2019 Justice Ashcroft Order and the 2020 Justice Jones Order, and in consideration of my most recent finding that she was in contempt of my February 8, 2021 Order,

I sent the email directed to Jacqueline through her counsel encouraging her to follow my March 12, 2021 Order.

[55] I find that a reasonable person properly informed and viewing the matter realistically and practically would not conclude that based on the circumstances of this case, all of which have been summarized herein, that my email sent to counsel for Jacqueline on March 14, 2021, implies that I have attributed guilt to Jacqueline or that it implies impropriety on Ms. Castle's part. I find that a reasonable person properly informed and viewing the matter realistically in these circumstances would not be of the view that I consciously or unconsciously would not decide the matter fairly.

[56] However, as there is an outstanding application for contempt, having heard and found Jacqueline to be in contempt of the 2019 Justice Ashcroft Order, the 2020 Justice Jones Order, and my order of February 8, 2021, I will decline to hear Colin's latest application for contempt and will recommend that it be heard by a different Justice of the Court of Queen's Bench.

ii. Based on Counsel Request on Four Separate Occasions (February 8, 2021, February 18, 2021, February 25, 2021, March 12, 2021) to Schedule a Hearing and/or Trial to Test and Examine Evidence and Follow Due Process

[57] As illustrated in the history of the proceedings of this matter, including the history since February 8, 2021, all of which is reported herein, due process was followed in reaching my decision on March 12, 2021. If I am wrong in this conclusion, I am confident the Court of Appeal will address any such failure in its appeal decision.

[58] There have been multiple case management meetings to address the next steps in the litigation, and numerous opportunities for the parties to be heard. I have given Jacqueline every opportunity to help with the children's reunification with their father, and for her to be a good parent to her children. Every decision I have made, including the procedural ones, have been made in the best interests of these children.

[59] Given the urgency of the matter, the evidence of the parties that was before me, and the updates and reports from Dr. Froberg and Constable Stacey that were before me as a result of the Practice Notes 7 and 5 processes, I find that it was reasonable to proceed with the contempt application based on the materials and record available on March 12, 2021.

[60] In my view, a reasonable person properly informed and viewing the matter realistically and practically would not think that due process and procedural fairness were not followed.

[61] In summary, I find that a reasonable person properly informed and viewing the matter realistically and practically would not conclude based on the historical proceedings in this case and all of the findings that have been made by me and by the Court of Appeal that I am biased and/or that I would not, consciously or unconsciously, case manage this matter fairly.

iii. Other Allegations of Bias Referenced in the Oral and Written Submissions of Counsel for Jacqueline

[62] Although not raised in the recusal application itself, counsel for Jacqueline raised in her written submissions and oral argument that:

"...the following conduct of the Honourable Justice J.C. Price offers context and further demonstrates ongoing bias prevalent throughout the entire case management process:

a. August 6, 2020 - Hearing the contempt application of the Plaintiff, while the Honourable Justice J.C. Price was reserving judgement on an interim parenting matter;

b. August 13, 2020 – Making a finding of alienation and contempt on the part of the Defendant – sans proper trial and testing of evidence, as well as request to provide expert evidence to refute the accusations of parental alienation;

c. August 24, 2020 – Granting increased parenting time to the Plaintiff, despite evidence of distress on the part of the children and history/pattern of coercion on the part of the Plaintiff;

d. December 15, 2020 – Accommodating urgent request of the Plaintiff for case management and compelling the Defendant to appear without counsel;

e. December 15, 2020 – Requiring prior legal counsel to attend and act as agent, in lieu of new counsel, despite breakdown of relationship and no consent to same;

f. December 15, 2020 – Unilaterally inviting Dr. Froberg to attend the case management appearance;

g. February 8, 2021 – Granting an interim order giving Plaintiff unsupervised access to the younger child, despite Reunification Therapy dictating an alternative protocol;

h. February 8, 2021 – Attempting to limit and dictate procedural parameters of trial on parenting, despite acknowledging another Justice will hear the same;

i. December 15, 2021; February 18, 2021; February 25, 2021; March 12, 2021 – Accommodating Plaintiff legal counsel's request for scheduling and rescheduling of hearing, despite knowledge of Defendant counsel's schedule being in conflict and requiring accelerated response;

j. February 25, 2021 – Compelling visits to take place, despite ongoing investigation into allegations of sexual misconduct perpetrated by the Plaintiff;

k. February 25, 2021 – Contacting counsel and advising of third party care alternatives, despite no substantiated evidence of parental alienation and/or safety concerns for the children on the part of Defendant;

l. March 12, 2021 –Inviting Dr. Froberg to attend without formal notice and/or context;

m. March 12, 2021 – Relying on unsworn, untested evidence provided directly to the court – the letter of Constable Lori Stacey;

n. March 12, 2021 – Making an extreme, unprecedented decision for change of primary care during an application for contempt – the equivalent of morning chambers;

> o. March 12, 2021 – Granting an order that the Defendant shall have no parenting time with the children, pending trial;
>
> p. March 12, 2021 – Recommending the Defendant have no contact whatsoever with the children – leaving it at the discretion of the Plaintiff;
>
> q. March 12, 2021 – Granting an order to stay MEP enforcement, despite not being seized to support matters and/or recognizing substantial arrears and/or related facts;
>
> and
>
> r. March 14, 2021 – Advising and directing legal counsel of the Defendant on how to engage with their client, based on news media report and impugning guilt.
>
> The above-mentioned decisions of the Honourable Justice J.C. Price attest to failure to follow rules of evidence and principles of procedural fairness – to the detriment of the Defendant.
>
> Points (a) – (f) have previously been raised in the application of bias of January 4, 2021 [TAB19] and subsequently lead to the circumstance at bar. It is respectfully submitted that the decisions prior to February 8, 2021 have only compounded the evidence of impartiality and respectfully supplement the current application for the recusal of the Honourable Justice J.C. Price."

[63] I appreciate counsel's acknowledgment that "[p]oints (a) – (f) have previously been raised in the application of bias of January 4, 2021." I addressed those allegations in my first recusal decision, which I note was not appealed. I further note that the Court of Appeal commented on some of these same issues in its decision, wherein it said that there was no basis for any suggestion of lack of impartiality: ***Zak v Zak***, 2020 ABCA 431 at para 7.

[64] With respect to points g. through r. above, many of those matters relate to Jacqueline's allegations of abuse against Colin and to the March 12, 2021 hearing and resulting Interim Order Changing Parenting. I reiterate the point I made in the first recusal application at paragraph 20 of my decision that "[i]t is trite law that the fact that a judge has found against a party does not constitute evidence of bias." It is clear that Jacqueline and her counsel are very unhappy with the decisions I have rendered in this matter, but that does not mean that I am biased. As already stated, the March 12, 2021 decision is under appeal and if due process was not followed in reaching that decision the Court of Appeal will make that finding.

[65] In my view, in considering the numerous hearings and orders given in this high conflict family matter, and the totality of the evidence and the findings of fact made, including the findings of parental alienation made in my August 2020 oral reasons for decision that were upheld by the Court of Appeal, I find that a reasonable person properly informed and viewing the matter realistically and practically would not think that the case management proceedings and the findings that I have made as the case management justice in this matter have been biased and/or that I could not consciously or unconsciously case manage this matter fairly.

IV. Conclusion

[66] In conclusion, I find that Jacqueline has failed to meet the high burden to provide cogent evidence in support of her allegations of bias or reasonable apprehension of bias to have me

recused as the case management justice in this matter. In the result, this recusal application is dismissed.

[67] This said, I feel that it would be in the best interests of the children that I nonetheless step down as case management justice. The children need the love, care and support of their parents. The ongoing dispute as to whether or not I should hear matters and Jacqueline's persistence in not following court orders and/or appealing them is a waste of valuable time and the parties' and the court's resources. I would much prefer that the parties focus and direct their attention on the needs and best interests of their children and come to a final resolution for their parenting arrangement.

[68] Every decision I have made in this matter has been guided by what the evidence led me to conclude was in the best interests of the children. Yet I fear that as long as I remain the case management justice, it will be difficult for Jacqueline to focus her energies on anything but my involvement. Accordingly, in these highly contentious circumstances, I will recommend to The Honourable Associate Chief Justice J.D. Rooke that a new case management justice be appointed to see this family and these precious children through to a resolution as soon as possible.

V. Costs

[69] As the successful party in this recusal application, Colin is entitled to costs. If counsel cannot resolve the issue of costs, counsel for Colin shall provide written costs submissions not to exceed 3 pages within 30 days. Counsel for Jacqueline shall submit her written response not to exceed 3 pages within 30 days of receipt of the Colin's costs submissions. All submissions to be filed and copies provided to me through my judicial assistant.

Heard on the 30th day of April, 2021.
Dated at the City of Calgary, Alberta this 7th day of May, 2021.

J.C. Price
J.C.Q.B.A.

Appearances:

Penny Pritchett
for the Plaintiff/Respondent

Diann P. Castle and Tanya J. Kelm
for the Defendant/Applicant