Court of King's Bench of Alberta

Citation: JC v KC, 2022 ABKB 707

Date:
Docket: FL01 36960
Registry: Calgary

Between:

JC and VL

Appellants

- and -

KC

Respondent

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.

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

By Court Order, no person shall publish or broadcast information that may identify the children or guardians involved in this proceeding.

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

Reasons for Decision
of the
Honourable Justice M.A. Marion

Appeal from the Order by
The Honourable Judge J.R. Shaw

Dated the 25th day of February, 2022

(Docket: FF901013902)

I. INTRODUCTION

[1] This is an appeal (**Appeal**) of a February 25, 2022 Order (**Order**) of the Honourable Judge J.R. Shaw (**Judge**) of the Provincial Court of Alberta, pursuant to *Alberta Rules of Court* Rule 12.61 and section 89 of the *Family Law Act*, SA 2003, c F-4.5 (*FLA*).

[2] The Order changed parenting in respect of a child, KC (**Child**). The appellants, JC (**Grandfather**) and VL (**Grandmother**) (together, **Appellants**), are the maternal grandfather and step-grandmother of the Child. The Child is 8 years old. The respondent, KC (**Mother**), is the mother of the Child. Both the Appellants and the Mother are joint guardians of the Child.

[3] Since 2020 the Child has resisted being alone with the Mother. Following several interim orders, in November 2021 the parties agreed to an Interim Consent Parenting Order (**Consent Order**), pursuant to which the Mother had parenting time for 2 hours on alternating weekends, to be increased in certain circumstances. The Order increased the Mother's parenting time to alternating full weekends with overnights, and directed the Mother and Child to together attend a type of therapy known as Theraplay.

[4] The Appellants opposed the increased parenting time and filed the Appeal. The Appeal is opposed by the Mother and court-appointed counsel for the Child (**Counsel**). For the reasons set out below, the Appeal is dismissed.

II. BACKGROUND

A. The Child's Father's Guardianship is Terminated

[5] The Child has been the subject of litigation for most of his short life. In his early years, the litigation was between the Mother and the Child's father. On August 11, 2016, those parties agreed to the terms of a Consent Final Varied Parenting Order, which provided that the Child would

ordinarily reside with the Mother. On December 19, 2017, the father agreed to a Consent Guardianship Termination Order terminating his guardianship rights.

B. The Appellants Become Joint Guardians with the Mother

[6] By 2018, the Mother and the Child lived in Calgary with the Mother's boyfriend, who had been with them for almost 3 years. In April 2018, they moved to Carstairs to be closer to family, including the Appellants. In May 2018, the Mother and her boyfriend separated, and in June 2018 the Mother and the Child moved into the Appellants' home.

[7] In spring 2019, the Mother moved to Calgary where she worked, and the Child continued to reside with the Appellants.

[8] In October 2019, the Appellants and the Mother consented to an order giving the Appellants guardianship rights, together with the Mother. At the same time, the Appellants and the Mother agreed to the terms of an Ex Parte Consent Final Varied Parenting Order (**2019 Final Order**), which provided that the Child would ordinarily reside with the Appellants, that the Appellants would have parenting time and responsibility at all times except when the Mother had parenting time, and that the Mother's parenting time would be as mutually agreed.

C. Mother's Application to Terminate Appellants' Guardianship and Interim Orders

[9] In May 2020, the Mother applied to terminate the Appellants' guardianship and vary parenting. She filed sworn statements describing the difficulty she was having getting parenting time with the Child and asserting a breakdown in the co-parenting relationship. She had been told by the Appellants that she disrupts the Child's emotions and he fears her. The Appellants filed affidavits in response detailing interactions between the Appellants, the Mother and the Child. The Mother only had one overnight visit with the Child since spring 2019 (in March 2020).

[10] On May 21, 2020, Judge O'Gorman ordered an Interim Without Prejudice Varied Parenting Order, which gave the Mother parenting time from 3pm to 6pm every Sunday. The parenting time was to be exercised in Carstairs at the Appellants' home unless the guardians all agreed the Child was comfortable leaving the Appellants' residence with the Mother. The parties then filed more sworn evidence of the Mother's parenting time and her interactions with the Child. There were difficulties for the Child before, during and after the Mother's parenting time.

[11] On September 14, 2020, Judge O'Gorman ordered a Consent Without Prejudice Varied Parenting Order, which confirmed that his earlier order remained in effect, but directed the parties to attend family counselling to work on the Mother-Child relationship.

[12] On November 27, 2020, Judge O'Gorman ordered a Consent Without Prejudice Varied Parenting Order, which again confirmed the May 21, 2020 order. This order provided that so long as the Mother was exercising her parenting time in the Appellants' residence, they shall not interrupt the parenting time and, barring exceptional circumstances, shall treat the Mother's parenting time as if she were exercising it in her own residence.

D. *Viva Voce* Hearing Before Judge Airth and New Interim Parenting Order

[13] On February 5, 2021, the parties attended a one-day *viva voce* parenting hearing before Judge Airth. She found the Appellants and the Mother to be credible. In her reasons (**Airth Reasons**), Judge Airth noted the relationship between the Child and Mother had deteriorated tremendously over the past year, that there was an unhealthy cycle of psychological and physical upheaval before, during and after visits, that the Mother struggles with her reactions around the Child, that the Child preferred the parenting style of the Appellants, that the Mother's parenting style did not bring out the loving and caring part of the Child, and that it was not in the best interests of the Child to transition him to the Mother's part-time or full-time care. Judge Airth held that the door must remain open for the Mother and Child to have a relationship, but only with the guidance of a mental health professional who puts the Child's best interests first.

[14] Accordingly, on March 15, 2021, Judge Airth granted an Interim Parenting Order (**Airth Order**), which reduced the Mother's parenting time but provided for it to increase over time based on input and guidance from a mental health professional (the Child's counsellor). The Child was ordered to continue individual counselling as advised by his counsellor to help determine the Mother's parenting time. Judge Airth directed that the parties return to court on September 8, 2021 to review the issue of parenting and decision-making.

E. Post Hearing Counselling Order and Appointment of Counsel for the Child

[15] On July 7, 2021, Judge O'Gorman granted an order (**Consent Counselling Order**), which directed the parties to commence counselling with a specific counsellor (**Counsellor**) as soon as possible. The counselling was to include the Child and the guardians were to be included separately and subsequently in a combination as recommended by the Counsellor.

[16] On September 5, 2021, the Appellants filed an affidavit detailing the Mother's exercise of parenting time and the Child's counselling. A letter from the Counsellor indicated that she was in the rapport-building and treatment planning phase, and that further information would help her forge a more positive connection between the Child and the Mother. Her treatment plan noted that the Child has had a "tumultuous relationship" with his Mother, that the Child was struggling to enjoy time with his Mother, that the Child had verbalized his lack of interest in connecting with his Mother, and that the Child was negative and at times aggressive towards his Mother. The Counsellor did not provide any insight as to the cause of the difficulties in the relationship between the Mother and Child.

[17] On September 8, 2021, Judge Mah raised the idea of appointing counsel for the Child. Both the Appellants and the Mother were agreeable. Judge Mah granted an Order Appointing Lawyer (**Counsel Order**), which was in a form generated by the Provincial Court using a usual form known to the Judge: see for example ***JS v MW***, 2021 ABPC 152. The Counsel Order brought the matter back to be spoken to on November 29, 2021.

F. November 29, 2021 Interim Consent Parenting Order

[18] On November 29, 2021, Judge D'Souza granted the Consent Order. The Consent Order reduced the Mother's parenting time to 2 hours on alternating Sundays, which could be increased to 4 hours if the Child was comfortable and wanted more time with his Mother. The Consent Order

also provided that the Mother's parenting time would be in the Appellants' home unless otherwise agreed, but that the parties were to encourage visits out of the home and the Appellants were not to interrupt it. The Consent Order directed that the Child would continue to attend individual counselling as directed by the Counsellor. The parties were to return to court on January 20, 2022 to review the issue of parenting and decision-making.

[19] At the time of the Consent Order, the parties had not yet appointed Child's counsel. Judge D'Souza reconfirmed that the parties needed to get counsel for the Child appointed in accordance with the Counsel Order.[1]

G. Appointment of Counsel

[20] Counsel was appointed in December 2021. Shortly following this, the dynamics of the court proceedings changed, as did the relationship between the Appellants and the Mother. The evidence of the dealings between Counsel, the Appellants, and the Mother leading up to February 25, 2022 were before the Judge in a detailed affidavit filed by the Appellants (**Appellants' Affidavit**). Some of these dealings are summarized below.

[21] Early in January 2022, Counsel began gathering information and met with the Child on Zoom. According to the Appellants, they set the Child up in a room with headphones and the door closed, did not interfere, and were in a separate room. There is evidence of emails and submissions to the Judge that Counsel believed there was interference of the Grandmother through coaching.

[22] On January 7, 2022, Counsel asked the Appellants and the Mother to provide, among other things, their proposed parenting schedules. In response, the Mother's counsel confirmed her understanding that the Counsellor "has been seeing the [Child] and will integrate the guardians' participation as she deems appropriate". Mother's counsel stated that her "ideal" parenting schedule would be to have overnights every second weekend, and her "realistic" schedule was to have the current 2-hour visits at her house and increasing as recommended by the Counsellor. Mother's counsel confirmed that the Child refused to go anywhere with the Mother.

[23] On January 17, 2022, Counsel asked for the parties' counsel's opinion on Theraplay for the Mother and Child to commence immediately, and their opinions on a Child Custody/Parenting Evaluation pursuant to Family Law Practice Note 8 (**PN8 Evaluation**). Counsel confirmed she was not seeking to change the Counsellor, but to provide additional therapy for Mother and Child. She also advised the parties that "the current arrangement is not in the best interests of the child." The Appellants' counsel sought clarification why Counsel believed that the existing Consent Order was not in the best interests of the Child, to which Counsel responded that the Consent Order was not serving to foster a Mother-Child relationship. Counsel agreed with Mother's proposed parenting plan. Appellants' counsel then sought disclosure of Counsel's discussions with the Child.

[24] On January 18, 2022, Counsel asked the Mother to bring the Child to a meeting with Counsel, and proposed that there be a few hours of parenting time both before and after the visit.

---

[1] It is not clear whether the transcript of the November 29, 2021 attendance was on the Court file or was before the Judge when he granted the Order. It was provided to me during oral argument, by Counsel, and there was no objection to it being reviewed and referred to by the Court as part of the record on this Appeal.

The Appellants' counsel advised that this would not work because of the Child's refusal to leave home with the Mother without one of the Appellants with him. Appellants' counsel again requested information from Counsel and her feedback and assistance.

[25] Following these emails, the Grandmother emailed the Counsellor directly, seeking information about the Counsellor's communications with Counsel, reinforcing the Appellants' concerns that the Child was resistant to the Mother, and providing the Grandmother's view of the resulting trauma if the proposed changes were implemented. The email asked whether the Counsellor had heard from Counsel "or whether you would be able to write a letter stating how this big of a change would affect [the Child]".

[26] On January 20, 2022, Counsel had a Zoom meeting with the parties' counsel. The exact contents of that discussion were not before the Judge, but some aspects of it are discernable from other evidence. For example, the Appellants' evidence, from their lawyer, was that Counsel alleged the Child was being coached, that there was interference during her call with the Child, and that she had decided this was a case of the Appellants alienating the Child.

[27] There was also a flurry of emails amongst counsel leading up to the court appearance that day. In those emails, among other things, the Appellants advised: (a) they consented to the beginning of Theraplay as soon as possible, but that they would need to bring the Child due to his resistance to his Mother; (b) they could not agree to a change to parenting without first having Theraplay sessions; (c) they wanted to protect the Child from emotional harm, and they understood drastic changes only served to undercut the Child's progress; (d) the Grandmother had contacted the Counsellor on the advice of legal counsel to get feedback from the Counsellor on what she believes are in the Child's best interests, as they relied on the Counsellor's recommendations; (e) they strongly denied certain allegations being levied against them; and (f) they could not afford a PN8 Evaluation.

[28] In those emails, Counsel advised that it was her opinion that if the Appellants contested the proposed plan, they should seek a PN8 Evaluation, that the Child "thinks things are his fault", that blame should not be directed to the Child, that the Grandmother's contacting the Counsellor caused issues, that the Appellants are to encourage a relationship with the Mother and not delay parenting time, and that for Theraplay to be successful there needs to be adequate parenting time.

[29] Counsel for the Mother advised that her agreement to reduce her parenting time in the Consent Order was because of the Appellants advising that the Child was having extreme difficulties regulating his behaviour before and after the visits, and that this was also occurring at school. With the new information the Mother had from Counsel, "with the support of" the Counsellor, it was now the Mother's position that the current arrangements are not in the Child's best interest. The Mother was open to Counsel's proposed changes and committed to Theraplay.

H. January 20, 2022 Court Appearance

[30] The parties attended before the Judge in the afternoon of January 20, 2022. In the course of that appearance, Counsel advised that the matter was an emergency, that the Consent Order was not serving the Child, that she would like significant changes to the Consent Order, that the Counsellor did not want the parties to contact her directly, that the Counsellor recommended

Theraplay, that Theraplay required that the Child and Mother be in the Mother's home, that without a variation to the Consent Order "this matter is going to drag on, and it's not for the benefit of the Child", and that the Child is "not thriving in his current situation".

[31] The Appellants' counsel advised the Judge about the Airth Order, that Judge Airth had refused the Mother's application to increase her parenting time, that the Child is extremely resistant, that the Appellants agreed with Theraplay happening and with him continuing with the Counsellor. The Appellants opposed changing the Mother's parenting time to a full weekend.

[32] The Judge noted that an order mandating Theraplay was not required if the parties agreed to it. He adjourned the matter to February 25, 2022 and asked that the Consent Order (which had not yet been filed) be finalized before then. At the end of this attendance, Mother's counsel withdrew from the file because she was moving her practice. The Mother became a self-represented litigant.

I. Further Dealings Prior to February 25, 2022 Court Appearance

[33] Following the January 20, 2022 appearance, there were further dealings amongst the parties, including related to potential meetings of Counsel with the Child, discussions surrounding a possible form of order for Theraplay, and Counsel's attempts to get Theraplay started. Counsel advised the parties that she was concerned about interference, coaching and alienation, and that she intended to seek to vary the parenting order at the next court appearance to include more parenting time at the Mother's home. The Appellants' counsel continued to reiterate concerns over the Child's resistance to the Mother, and Counsel continued to reiterate her position that if the Appellants had a concern with her proposed changes, they should get a professional parenting assessment completed.

[34] On February 22, 2022, the Appellants filed the Appellants' Affidavit. It was voluminous and provided detailed evidence of the Mother's visits with the Child since September 2021, as well as the dealings between the parties and Counsel. The Appellants' Affidavit indicated that the Child continued to resist time with the Mother and refused to be alone with her. It stated that the Child's behaviour at school and in sports was getting worse, raised concerns that Counsel had not disclosed her communications with the Child and that the Counsellor now refused to speak with them.

[35] No questioning was conducted on the Appellants' Affidavit. Nobody filed any affidavits between the January 20, 2022 and February 25, 2022 appearances.

J. February 25, 2022 Appearance

[36] On February 25, 2022, the parties appeared before the Judge again. He requested submissions from Counsel. Counsel made statements, which are discussed in more detail later in these Reasons, and recommended the proposed change to the parenting plan to include alternating weekends with overnights and Theraplay.

[37] The Judge did not allow the Appellants' counsel to get far into her submissions, before he stated that he found Counsel's submissions "compelling", and then said, "I am granting her submissions, counsel". Appellants' counsel challenged the Judge, but he stated that he had the Appellants' Affidavit before him, and he had independent counsel for the Child. He also stated

that he accepted Counsel's submissions "as accurate and based on my experience with her as a lawyer appearing in my court". He cut off Appellants' counsel. The Mother was not asked for her position. The Judge directed the parties to leave the courtroom and work out the specific terms of the Order, which they did.

[38] The final form of the Order included parenting provisions, including the alternating overnight weekend parenting, as well as directions related to Theraplay. The parties were ordered to return for another appearance on May 6, 2022.

[39] On March 4, 2022, the Appellants filed their appeal of the Order. On March 18, 2022, Justice Johnston granted a stay of the Order pending this Appeal (**Stay Order**). The Stay Order did not stay the direction for the Mother and Child to attend Theraplay.

III. GROUNDS OF APPEAL

[40] The Appellants assert that:

(a) the Judge breached the principles of natural justice or procedural fairness, and therefore committed an error of law, by failing to provide adequate reasons, by refusing to allow their counsel to make submissions, and by refusing to consider their evidence in the Appellants' Affidavit;

(b) the Judge erred in mixed law and fact and made a serious misapprehension of the evidence in determining it would be in the best interests of the Child to increase parenting time; and

(c) the Judge erred in law by making a material change to parenting time in docket court.

IV. RECORD ON APPEAL

[41] An appeal of a Provincial Court decision pursuant to section 89 of the *FLA* is normally an appeal on the record, not a hearing *de novo*: ***Wandler v Crandall***, 2017 ABCA 391 at para 33; Rule 12.68.

[42] Rule 12.68 provides that "the documents provided by the clerk of the Provincial Court pursuant to rule 12.62(2) and the transcript of the hearing before the Provincial Court form the record for the hearing of the appeal, and no other evidence may be considered by the Court unless otherwise ordered by the Court". Rule 12.62(2) provides that the clerk of the Provincial Court is to "forward the order, together with filed documents relating to the order, including exhibits, to the Court of Queen's Bench court clerk".

[43] In this case, all parties agreed to, or did not object to, me considering any documents on the Provincial Court file up to the date of the Order. That portion of the file reflects what was before the Judge and is consistent with the Appeal being on the record. File history is important context to facilitate meaningful appellate review in family matters: ***JM v EM***, 2022 ABCA 49 at para 2.

[44] Counsel and the Mother also relied on significant evidence from the Provincial Court file relating to the conduct of the matter in Provincial Court after the Order. The parties agreed, or did not object to, me referring to this information but only after I have decided the Appeal on its merits. In my view, that information is not a relevant part of the record for appellate review, but it may be relevant to the exercise of discretion under Rule 12.70.

V. STANDARD OF REVIEW

[45] The Order was the latest of several interim parenting orders, including the Airth Order, and the Consent Order, all in the context of the Mother's application to terminate guardianship and vary the 2019 Final Order.

[46] Whether discretionary interim parenting orders are made in special chambers, case management, or regular chambers, the Court of Appeal has consistently confirmed that, in the absence of an extricable error of law or palpable and overriding error, they are owed a high degree of deference; that is, an appeal court will only interfere if the judge erred in law or made a material error in the appreciation of the facts: ***Chambers v Nyhus***, 2022 ABCA 287 at para 19 (chambers or special chambers); ***JM v EM*** at para 26 (chambers); ***AF v DS***, 2022 ABCA 20 at para 25 (special chambers); ***Werry v Kish***, 2021 ABCA 121 at para 12 (chambers); ***ALB v CVL***, 2019 ABCA 94 at para 16 (chambers); ***Zack v Popp***, 2019 ABCA 50 at para 14 (chambers); ***Linder v Botterill***, 2018 ABCA 126 at para 17 (special chambers); ***Krause v Krause***, 2018 ABCA 293 at para 8 (chambers); ***HG v RG***, 2017 ABCA 89 at para 7 (chambers) citing ***Rensonnet v Uttl***, 2014 ABCA 304 at para 7 (special chambers); ***TNR v WPR***, 2016 ABCA 322 at para 8, leave to appeal to SCC refused, 37341 (13 April 2017) (case management); ***Letourneau v Letourneau***, 2014 ABCA 156 at para 6 (case management); ***Konashuk v Wayland***, 2015 ABCA 196 at para 9 (chambers); and ***LWE v GLE***, 2004 ABCA 179 at para 12 (chambers).

[47] The deferential standard of review is amplified where the order being reviewed includes built-in reviews: ***McClelland v Harrison***, 2021 ABCA 89 at paras 17-18. The practical remedy for a questionable interim support order is usually to expedite the trial, not appeal the interim order: ***McClelland*** at para 17, citing ***Garnett v Garnett***, 2019 ABCA 282 at para 5. In my view, another practical remedy is to take advantage of built-in reviews of the order, or an application to vary the order where permissible. Appeals in the context of high-conflict parenting matters, where the underlying circumstances are constantly changing or evolving, will often not be practical.

[48] Issues of procedural fairness are reviewed for correctness: ***Chambers*** at para 20; ***AR v JU***, 2021 ABCA 337 at para 14; ***AF v DS*** at para 26; ***FJN v JK***, 2019 ABCA 305 at para 46, leave to appeal to SCC refused, 38859 (6 February 2020). The question is whether the standard of fairness required by law has been met: ***AR v JU*** at para 14; ***JM v EM*** at para 29.

VI. ISSUES

[49] This Appeal raises these issues:

(a) What was Counsel's role before the Judge?

(b) Was Counsel entitled to provide information to the Judge and could the Judge rely on that information?

(c) Did the Judge breach principles of natural justice or procedural fairness by cutting off the Appellants' oral submissions, or refusing to consider their evidence?

(d) Did the Judge fail to provide adequate reasons?

(e) Did the Judge err in mixed law and fact or make a serious misapprehension of the evidence in determining the best interests of the Child?

(f) Did the Judge err in law by varying parenting time without a *viva voce* hearing?

(g) What is an appropriate order on this Appeal?

VII. ANALYSIS

[50] Counsel's appointment significantly changed the dynamics of this matter. Further, in granting the Order, the Judge accepted and adopted Counsel's submissions. It is important on appeal to characterize the role of Counsel, the nature of her submissions before the Judge, and the purpose for which they could be used.

A. The Role of Counsel in Respect of Children

[51] The role of counsel in respect of children in child custody or parenting matters has been the subject of significant debate and evolution over the last several decades. Different provinces have different jurisdictional bases and practices respecting appointing counsel: Donna J Martinson & Catherine E Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation" (2018) 31 Can J Fam L 151 at 153. Care must be taken in considering the articulations of the role of counsel respecting children, given these differences, the evolution of the roles over time, and the different ways the roles are described or labelled in judicial decisions or articles.

[52] At least three broad types of sometimes overlapping roles for counsel involving children have been contemplated by academia and courts: (1) *amicus curiae*, or friend of the court; (2) an instructional role, where counsel takes instructions from the child (sometimes referred to as child's advocate role, instructional advocacy role, or a direct advocate role); or (3) a non-instructional role, where counsel acts for the child but does not take instruction from the child (sometimes referred to as a "best interests" role, a "best interests guardian", guardian *ad litem* or, as some would modify it, an "interests and entitlements" role or a "rights and interests" role): see ***Puszczak v Puszczak,*** 2005 ABCA 426 at para 9; ***SK v DG*****,** 2022 ABQB 425 at paras 327-343; ***DCE v DE***, 2021 ABQB 909 at para 30; ***BLS (Re)***, 2013 ABPC 132 at paras 264-286; ***Alberta (Child, Youth and Family Enhancement Act, Director) v RM***, 2011 ABPC 244 at paras 113-121; ***M B-W v RQ***, 2015 NLCA 28 at para 44; Macy Mirsane, "The Roles of *Amicus Curiae* (Friend of the Court) in Judicial Systems with Emphasis on Canada and Alberta" (2022) 59:3 Alta L Rev 669 at 690-693, 2022 CanLIIDocs 1110; Nicholas Bala & Rachel Birnbaum, "Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases" (2018) 59:4 C de D 787

at 813-819, CanLIIDocs 10690; Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43:4 Alta L Rev 845 at 848-851, 2006 CanLIIDocs 177; Dale Hensley, "Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner's Perspective and a Response to Professor Bala" (2006) 43:4 Alta L Rev 871, 2006 CanLIIDocs 178; Lorne D Bertrand, Nicholas Bala, Rachel Birnbaum & Joanne J Paetsch, "Hearing the Voice of Children in Alberta Family Proceedings: The Role of Children's Lawyers and Judicial Interviews" (2012) at 2-3, 7, online (pdf): *Canadian Research Institute for Law and the Family* <https://canlii.ca/t/2869>, 2012 CanLIIDocs 76.

[53] The latter two roles accord with the practices in many jurisdictions and respect the UN Convention on the Rights of the Child, 20 November 1990, Can TS 1992 No 3 (entered into force 2 September 1990): ***SK*** at paras 158, 334; Bala & Birnbaum at 822-823; Martinson & Tempesta at 157.

[54] The determination of counsel's role is important so that all counsel, the child (if mature enough) and the parents understand the role and its limits, and to provide a basis upon which the court may assess submissions of the child's counsel in the matter: ***M B-W*** at paras 45, 51.

1. *Amicus Curiae*

[55] In the 1960s, Alberta courts began a practice of appointing *amicus curiae* for children in custody disputes. The amicus' primary role was as a friend of the court, to assist the court by (1) arranging for investigation of the facts, usually by a professional; (2) laying before the court the relevant evidence about the facts; (3) laying before the court the relevant expert opinions on custody options; (4) providing his or her own recommendation; and (5) attending hearings to cross-examine witnesses: "Protection of Children's Interests in Custody Disputes" (1984) at 15, online (pdf): *Alberta Law Reform Institute* <www.alri.ualberta.ca/1984/10/protection-of-childrens-interests-in-custody-disputes/>;1984 CanLIIDocs 1. More recently, the amicus role has been defined as being neutral and the amicus does not typically provide a recommendation to the court or take a position on the best interests of the child: ***Puszczak*** at para 9; ***SK*** at paras 340-341; Bala at 848-849; Bala & Birnbaum at 814.

[56] The amicus is an independent, impartial and neutral adviser; while effectively focussing on the child's interests, and ensuring the child understands the process, the amicus does not have a lawyer-client relationship with the child and, therefore, is expected to ensure "all relevant evidence" is before the Court, potentially including the child's confidential information and wishes: ***SK*** at paras 340-341; Bala & Birnbaum at 814. Only a court can appoint someone into an amicus role – legal counsel cannot self assign this role: ***SK*** at para 352.

[57] Given that an *amicus curiae* is a friend of the court, not the lawyer *for* the child, and that the amicus may be obligated to disclose the child's confidential information (which is inconsistent with the trend toward more child empowerment in court processes), courts should be cautious in appointing child's counsel in an amicus role and should set out the precise role: ***SK*** at para 342; ***BLS (Re)*** at para 286; ***JESD v YEP***, 2018 BCCA 286 at paras 71-73; Martinson & Tempesta at 186-187. Appointing counsel *for* the child, who can then adopt an instructional or a non-instructional role, will usually be sufficient and more appropriate.

2. Instructional Role

[58] When counsel *for* the child is appointed, the order will not usually state whether the lawyer should adopt an instructional or non-instructional role. This will make sense in cases where the child's characteristics and ability to instruct counsel is unclear, or there are concerns of alienation or abuse. It is up to the lawyer, in accordance with the Law Society of Alberta *Code of Conduct*, to assess whether the child is capable of expressing a wish, preference or viewpoint and has capacity to instruct counsel: ***RM v JS***, 2013 ABCA 441 at para 24; ***SK*** at paras 319-326; Bala at 859-860; ***BLS (Re)*** at paras 244-256, 279. A list of some factors for counsel to consider in determining whether an instructional relationship can exist are set out in ***BLS (Re)*** at para 279. The capacity assessment is critical and must be carefully conducted by appointed counsel in all cases. Child's counsel should have "the requisite skill and competency to represent children, including the skill necessary to properly assess a child's psychological, developmental, and cognitive profile in context and determine whether they can instruct counsel": ***SK*** at para 325. Further, although the lawyer's assessment of the child's capacity is not binding on courts, courts will often rely on, or take comfort in, counsel's assessment of the child's capacity when considering the child's views, if counsel has concluded that they can take on an instructional advocacy role: ***SZ v JZ***, 2022 ABQB 493 at para 181; ***AAG v JLG***, 2022 ABQB 119 at para 104.

[59] If the lawyer is satisfied that the child has the capacity to provide instructions, counsel is expected to adopt a traditional lawyer-client role whereby the lawyer advocates for the child's stated position (which may include taking no position): ***SK*** at para 334; Bala at 859-860; ***AAG v JLG*** at para 104.

[60] If the lawyer adopts an instructional role, then they are bound by solicitor-client confidentiality and privilege unless they receive information about the child being harmed or in danger: ***SK*** at para 354. In a custody or parenting dispute, counsel in an instructional advocacy role is in many ways like any other counsel representing a client and party – they can adduce evidence and make legal argument or submissions: ***SH v Minister of Social Development and CH***, 2021 NBCA 56 at paras 37-38.

[61] Given the difference between instructional and non-instructional roles of child's counsel, to avoid confusion it is important that child's counsel expeditiously advise the parties and the court of counsel's role.

3. Non-Instructional Role

[62] If the child cannot articulate a wish, preference or viewpoint, or does not have capacity to instruct counsel, then child's counsel may adopt a non-instructional role: ***SK*** at para 334; ***HKH v JDH***, 2019 ABQB 163 at para 11; ***BLS (Re)*** at para 279.

[63] As noted above, historically this role has been referenced as a best interests role, a best interests guardian role, or a guardian *ad litem* role. It has been the subject of some controversy and debate. At one time, it was considered a modification of the *amicus curiae* role, whereby the child's counsel "advocat[es] a position based on counsel's assessment of the child's best interests": Bala at 849. The lawyer was not considered to be technically acting on behalf of the child (or their views), but in their best interests: Bala at 849. Such a role has been recognized as problematic

because lawyers are not qualified to take a position on the best interests of the child or because it usurps the court's role in determining best interests: ***AR v JU*** at para 14; ***SK*** at para 330; Hensley at 879; Bala at 850; Martinson & Tempesta at 187.

[64] More recently, academics and courts have started to move away from describing non-instructional roles as a best interests role to one in which counsel considers and advocates for the "interests and entitlements" or the "rights and interests" of the child: ***SK*** at paras 332, 338; Bala & Birnbaum at 826; ***SH*** at para 54; ***DB (Re)***, 2021 ABPC 195 at para 3; ***(Re) NB***, 2019 ABPC 163 at para 18; ***DS and AC v The Minister of Social Development***, 2021 NBCA 25 at paras 34-36, leave to appeal to SCC refused, 39783 (9 December 2021). Under this description of the role, the interests and entitlements of the child are considered by the counsel, including but not limited to physical security and safety, emotional well-being, education, health, religion, family connections, and social involvement: ***SK*** at para 336. The role is based on an objective assessment of what is important in a child's life, not a lawyer advocating for an outcome that aligns with their subjective interpretation of what is best for the child: ***SK*** at para 338. This description of the non-instructional role is also arguably more consistent with the wording of section 95(3) of the *FLA*, which provides that the court "may appoint an individual to represent the interests of a child in a proceeding under this Act" (emphasis added): see also Hensley at 883-885.

[65] If the lawyer adopts a non-instructional role, they are nonetheless bound by solicitor-client confidentiality and privilege unless they receive information about the child being harmed or in danger: ***SK*** at para 354; *contra* Bala at 866. For example, counsel can only share the child's privileged communications if counsel concludes that the child has the capacity to consent to the waiver of privilege and have that information shared, and if it is in the best interests of the child. There may be circumstances where the child does not have capacity to instruct counsel on all matters affecting the child, and counsel must adopt a non-instructional advocacy role, but the child has capacity to consent to counsel sharing the child's views.

4. Counsel's Role in this Case

[66] While historical nomenclature and role definition is helpful, ultimately counsel's role will be defined by the specific order appointing counsel and, where not in an *amicus curiae* role, the counsel's assessment of the capacity of the child and adoption of an instructional or non-instructional role.

[67] In Alberta, the Provincial Court's jurisdiction is statutory and is from section 95(3) of the *FLA*, which provides that "the court may at any time appoint an individual to represent the interests of a child in a proceeding under this Act".

[68] In this case, both Counsel and Appellants' counsel took the position that Counsel's role was as *amicus curiae*. This is consistent with the approach of counsel in some other Provincial Court cases involving children: ***AF (Re)***, 2019 ABPC 105 at para 6. However, I disagree that Counsel in this case was *amicus curiae*.

[69] The Counsel Order was granted pursuant to section 95(3) of the *FLA*. Its preamble stated that "the Court has determined that the child requires legal counsel in order to represent the best interests of the child." The body of the Counsel Order provided that "a lawyer is appointed to

represent the interests of the child" and that "the child shall be represented by Counsel". The lawyer is referred to throughout as "counsel for the child", and that the parties are responsible for applying for and "obtaining a lawyer for the child". *Amicus curiae* is not expressly referenced anywhere in the Counsel Order. Further, the Counsel advocated for a specific result before the Judge and treated her meeting with the Child as confidential, none of which is consistent with an amicus role. In these circumstances, the Counsel was not acting as *amicus curiae*, or a friend of the court, but as counsel for the Child.

[70] I find that Counsel was acting in a non-instructional role when she appeared before the Judge and on this Appeal. The Child is 8 years old, and Counsel never identified that the Child had capacity to instruct her, or that she was taking an instructional advocacy role. Given the specific wording of the Counsel Order, including appointing Counsel to represent the "interests" of the Child, I find that Counsel was acting in an "interests and entitlements" non-instructional role.

B. Provision and Use of Information from Child's Counsel

1. The Framework

[71] Concerns have long existed with the role of child's counsel in a non-instructional role, including concerns that: (1) counsel's views, evidence or information put counsel in the impossible situation of being both advocate and witness; (2) the process would be procedurally unfair because counsel cannot usually be cross-examined; (3) child's counsel might provide inadmissible hearsay information; (4) child's counsel may not have the qualifications to give opinion evidence; and (5) counsel's views or information on best interests may be given undue weight or unduly influence judicial decision-making: ***RM v JS*** at paras 26, 28; ***SK*** at 330; Bala at 850; Bala & Birnbaum at 815-816.

[72] Accordingly, in both private custody and child protection matters, courts have restricted child's counsel's role to ensure appropriate and fair evidentiary processes are followed. Child's counsel cannot be both advocate and give factual evidence, for example of the views of the child—factual evidence should be put before the court by appropriate evidentiary means (including potentially appropriate professionals): ***RM v JS*** at paras 28-29; ***Catholic Children's Aid Society of Toronto v SRM***, [2006] OJ No 1741(Ont Ct J) at para 111; ***Strobridge v Strobridge***, [1994] OJ No 1247 (ONCA) at para 36; ***SK*** at para 171; ***SL (Re)***, 2020 ABPC 194 at para 46; ***KC v JC***, 2022 ABPC 94 at para 25; ***Cairns v Cairns***, 1931 CanLII 471 (ABCA) at paras 39-40; ***BLS (Re)*** at paras 287-291.

[73] Child's counsel cannot give their personal subjective views or opinions of the best interests of the child as evidence given through their submissions: ***RM v JS*** at para 26; ***Strobridge*** at para 36; ***SK*** at para 338; ***Ojeikere v Ojeikere,*** 2018 ONCA 372 at para 50; ***CR, Re***, 2004 CanLII 34368 (ONSC) at paras 28-29; ***Y v Y,*** 1985 CanLII 1265 (ABQB) at para 15. Defaulting to an opinion of child's counsel concerning best interests may constitute a reversible error, as it is the court's role to assess the evidence and best interests: ***SH*** at para 53.

[74] Ultimately, counsel's role, as advocate, is normally to ensure appropriate admissible evidence is before the court, and to make submissions in the nature of argument based on that evidence.

[75] However, there are also countervailing practical concerns associated with being too restrictive on child's counsel. Courts have referenced child's counsel as often being the "only voice of reason above the din of parental discord and brinkmanship": ***Chalmers v Lannan***, 2015 ABPC 262 at para 47. Other judges have noted the practical difficulties with a strict evidentiary approach that may be inconsistent with a long-standing practice of the Provincial Court, which has been to rely on information from child's counsel: ***JPR v YMS***, 2015 ABPC 283 at paras 14, 17. Both Counsel and the Appellants' counsel in this case are experienced in family law matters and each confirmed their experience that child's counsel do not normally file affidavits.

[76] The concern is that the benefits of child's counsel, including (1) facilitating resolution; (2) ensuring the child understands the proceedings, has an independent person to speak to and represent their interests and voice where appropriate; and (3) facilitating the efficient functioning of the courts, may all be undermined by additional delay and cost associated with marshalling evidence in traditional ways. Family custody and parenting matters are often dealt with in emergent situations in chambers, by courts with limited resources and time. Decisions often must be made quickly in real-time, failing which circumstances can be overtaken, issues can become moot, and the best interests of the child may be put at risk. Further, parties are often unable to afford their own counsel, let alone share the cost of child's counsel. The more rigidly the evidentiary role for child's counsel is applied, the more likely it and its benefits will become unavailable to parties, the court, and children.

[77] Over 30 years ago, in ***Romaniuk v Alberta***, 1988 CanLII 3451 (ABQB), this court articulated some of the benefits and shortcomings of the use of counsel respecting children (in the context of an *amicus curiae* but equally applicable to a non-instructional counsel role) at paras 39-40:

> As can be gleaned from this brief review, there are some problems which have surfaced in connection with our Court initiated practice of using an amicus to assist the Court in arriving at what are, usually, very difficult decisions to make. However, in defense of the practice, I think it is fair to say that the work of an amicus, properly handled, has led to reasonable out of Court settlements of many custody and access disputes which would otherwise have had no alternative but to proceed to trials. In our experience these trials are frequently lengthy, full of acrimony and bitterness, costly to all concerned both financially and emotionally and probably destroy any possible hope that the parents could ever communicate again on any reasonable level for the benefit of their children. From the point of view of this trial judge, while realizing that the final decision still rested with the Court, I have often found that the information and background supplied by the amicus or his consultants was valuable in helping me sift through the evidence and to make the difficult decisions involving custody and access. We regularly hear the comment that the straight adversarial system used in our Court dispute resolution system does not serve well in matrimonial and family disputes. In the typical custody dispute, the adversarial system seems to dictate that each side must bring before the Court evidence to show

> that the other side is an unfit and improper person to have custody of or access to a young child. This invariably leads to a dredging up of each side's version of a plethora of large and small, real or imagined complaints against the other which often must lead the trial judge to wonder, if half of the allegations are true, whether either parent should be allowed to go anywhere near the children.
>
> For my part, in spite of its warts and shortcomings, the additional information and insights provided through the intervention of an amicus is, in the vast majority of the cases, far better than the system of deciding these distressing and sometimes tragic cases purely on an adversarial basis as we tried to do before the concept was instituted in our Court. [...]

[78] Many judges would echo these comments today. Courts have strived to find the balance needed between appropriate and fair processes versus the undue impairment or loss of the benefit of child's counsel. In my view, the framework, as it has developed, balances these competing considerations. An adherence to appropriate and fair evidentiary principles does not necessarily undermine the role of child's counsel.

[79] As a threshold matter, not all submissions are an attempt to provide evidence. Courts must carefully construe and characterize counsel's submissions to determine if they are in the nature of argument based on the evidence before the court, which is permissible, or are in substance attempting to provide fact or opinion evidence that is not otherwise in evidence, which is not permissible: see for example ***Ludwig v Ludwig***, 2019 ONCA 680 at para 71-77. This may not always be an easy distinction to make, and it is incumbent on child's counsel to be clear in their own minds, and with courts and other interested parties, as to intended nature of their submissions.

[80] Further, the framework allows relaxation of, or an exception to, the strict evidentiary requirements where there is express agreement or consent of the other parties. This is important. All parents and guardians are obliged to act in the best interests of the children: *FLA*, ss 21(1), 21(2)(c). This obligation may require guardians to consent to, or the court to order, child's counsel putting information before the court.

[81] In ***Strobridge*** at para 38, in the context of child's counsel providing evidence of the child's preferences, the Ontario Court of Appeal noted that consent will avoid the problem in many cases. In some cases, it appears counsel's submissions or information is entered into evidence or relied on by the court without objection, pursuant to a court order or without explanation: see for example: ***Beson v Director of Child Welfare***, [1982] 2 SCR 716; ***Hunt v Hunt***, 2018 ABQB 444; ***ST v KT***, 2021 ABPC 167; ***CF v DF***, 2018 ABCA 187. However, in ***RM v JS***, at para 29, the Court of Appeal noted that a lack of objection is insufficient – the issue must be drawn to the attention of the court and other parties.

[82] In ***TNR v WPR*** at para 7, the Court of Appeal held it was not an error for the court to refer to submissions of child's counsel where it was expressly contemplated in a consent order appointing counsel that child's counsel could provide summaries of the information acquired in the course of her role. Other recent cases apply a similar approach in finding consent such that counsel submissions could be considered: see ***AAG v JLG*** at para 103; ***CS v KB***, 2018 ABPC 306 at para 4.

[83] However, there are limits to what submissions can be accepted as information or evidence and relied on by courts, even where there is agreement or consent, particularly where the agreement or consent was given before knowing what the submissions will be or on what they will be based.

[84] For example, even where there is agreement or consent, counsel submissions should not be accepted as evidence where they create a conflict with, or are in conflict with, other material fact or opinion evidence: ***BLS (Re)*** at paras 287-291. In those circumstances, as a matter of fairness and to avoid the child's counsel becoming a necessary witness to resolve the conflict, child's counsel should adduce other evidence failing which the counsel's conflicting information should be disregarded. Another example is that child's counsel could not provide privileged information to the court, including solicitor-client communications or settlement discussions, without appropriate consents in place: ***Williams v Williams***, 2020 ABCA 15 at para 22, citing ***Flock Estate v Flock***, 2019 ABCA 194 at para 34. Further, even where there is no conflict, the lack of an independent evidentiary foundation for the child's counsel's submissions, may affect the weight the court gives the information in the exercise of its discretion: ***KC v JC*** at para 25. Other factors, including whether the information includes hearsay, may also affect the weight given.

[85] In summary, and subject to the specific provisions of any appropriate court order appointing counsel made within the court's jurisdiction, in private parenting and custody matters:

(a) child's counsel are entitled to make submissions in the nature of argument, based on the evidence before the court. Child's counsel's recommendations will often simply be treated as a form of argument;

(b) absent a court order, or agreement or consent to child's counsel providing information or evidence to the court, child's counsel are not entitled to give fact or opinion evidence, or their views, and courts should not treat any such submissions as evidence. Counsel's submissions in these instances would be limited to argument based upon the evidentiary record;

(c) where an order provides for it, or there is agreement or consent of the parties, child's counsel may be permitted to provide factual information to the court. Factual information is still subject to ordinary evidentiary principles, including hearsay and its exceptions. Some flexibility may be warranted where the matter is not a final decision and, by analogy to Rule 13.18, the identity of the source of the information is provided by child's counsel. The court may also need to take a flexible approach where the hearsay information is information from the child—courts have noted that there are several ways to get children's information or views before the court: ***SK*** at paras 168-173. Further, the Court of Appeal has stated that a flexible approach to hearsay may be appropriate, even in potentially final decisions, where an interested party or person may not otherwise have a voice before the court, such as estates and corporations: ***Saito v Lester Estate***, 2021 ABCA 179 at para 12; ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365 at para 33, leave to appeal to SCC refused, 37899 (5 July 2018). A similar flexible approach may also be appropriate for hearsay information of a child when there is no direct evidence from the child or when it would not be in the best interests of the child to give direct evidence in the proceedings;

(d) even where they are consented to or permitted, counsel submissions must not disclose privileged communications without appropriate consents in place. For example, child's counsel cannot disclose settlement communications without the consent of all parties to those discussions and cannot disclose the privileged information of the child client without the consent of the child or leave of the court;

(e) where an order provides for it, or there is agreement or consent of the parties, child's counsel may be permitted to provide their opinion or their views, provided that the information does not conflict with, or create a conflict with, other material evidence. However, any offered opinion is still subject to ordinary evidentiary principles relating to lay opinion evidence (***R v Graat***, [1982] 2 SCR 819 at 835-837; ***R v Sanaee***, 2016 ABCA 289 at para 15) or expert opinion evidence (***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23). For example, opinions or views of child's counsel must not be bare assertions—they must reflect the basis for counsel's opinions or views, and they must be based on facts otherwise in evidence: ***RM v JS*** at para 29; ***KC v JC*** at para 25. And even in these circumstances, courts must be cautious in giving any or undue weight to counsel's views where counsel does not demonstrate expertise: ***RM v JS*** at para 26. From a practical perspective, in many cases counsel's opinions or views, will be treated much the same as argument based on the evidence before the court, even if they are allowed; and

(f) the weight given to children counsel's submissions is within the court's discretion.

[86] This case illustrates how relying on counsel submissions in a high-conflict matter can create an additional layer of conflict, procedure, delay, and costs. In high-conflict matters, even where child's counsel is permitted to provide information directly to the court, this should only be done where the exigencies or other context of the matter make it reasonably necessary. It should not be the default approach. Where feasible, other evidence should be adduced to avoid aggravating the conflict.

2. Counsel's Provision of Information in this Case

[87] In this case, Judge Mah raised the idea of appointing counsel for the Child. Both the Appellants and the Mother were agreeable. The Court then prepared and issued the form of Counsel Order, without the specific terms being the subject of express review or approval by the parties. However, the Counsel Order was not appealed or challenged by any party. After being reminded by Judge D'Souza to get counsel appointed, the parties cooperated in the appointment of counsel in accordance with its terms.

[88] The Counsel Order authorized Counsel to (1) appear and participate in the proceedings as would any other party, with full right to question, examine, cross-examine, call evidence and make submissions to the court; (2) communicate with the parties and third parties involved with the Child; (3) speak to the Child and other parties; (4) receive other information about the Child and in respect of the proceedings; and (5) apply to the court for direction or further authorization. The Counsel Order also provided:

> All third parties involved with the child and/or the parents..., and any other individuals having contact with or information about the child, are hereby authorized to release any and all information about the child and/or the parents, including documentary information, to Counsel for the child, **who shall receive or use such information for the purpose of attempting** to resolve or **to have adjudicated the issues before the Honourable Court**.
>
> **Counsel for the child is authorized, in his or her sole discretion, to provide a summary to this Honourable Court, orally or in Writing, of the information he or she acquires in the course of performing his or her duties** and by doing so he or she shall not be deemed to be a witness in these proceedings. [Emphasis added]

[89] These provisions have similarities with the order in ***AAG v JLG*** and other cases. "Information" has been defined to include (1) knowledge obtained from investigation, study, or instruction; (2) intelligence, news; (3) facts, data: "information" online: *Merriam-Webster* <Merriam-webster.com/dictionary/information>. Broadly speaking, information can include representations or submissions of legal counsel: see, for example: *Criminal Code*, RSC 1985, c C-46, s 726.1.

[90] In my view, "information" in the Counsel Order is broad enough to include both factual information, as well as information in the form of Counsel's views, recommendations or opinions. Further, the Appellants were aware of Counsel's position and intentions before the Judge, and there was no objection before the Judge respecting Counsel's submissions or provision of information. Therefore, subject to the limitations summarized above, I find the parties consented to Counsel providing information to the Court.

[91] In this case, the Appellants also filed the Appellants' Affidavit prior to the February 25, 2022 appearance. This affidavit included significant evidence of the Mother's visits with the Child since September 2021, as well as the significant dealings between the parties and Counsel. Embedded in the Appellants' Affidavit is other evidence of Counsel's information, positions and views. Since the Appellants adduced this evidence to be relied on in support of their position, the Appellants must be taken to have consented to the Judge reviewing and relying on it.

[92] Within this legal framework and factual context, I consider the Appellants' grounds of appeal.

C. Did the Judge Breach the Appellants' Right to be Heard or Refuse to Consider their Evidence?

[93] The Appellants assert that the Judge erred by "refusing to allow counsel for the Appellants to make arguments" based on the Appellants' Affidavit. The Appellants did not rely on any authorities in support of their position.

[94] The right to be heard is one of the tenets of our legal system and requires that the courts provide an opportunity to be heard to those who will be affected by the decisions: ***DL Pollock Professional Corporation v Blicharz***, 2018 ABCA 252 at para 12, citing ***A (LL) v B (A)***, 1995

CanLII 52 (SCC) at para 27, [1995] 4 SCR 536. As noted above, the question is whether the standard of fairness required by the law has been met: ***AR v JU*** at para 14; ***JM v EM*** at para 29.

[95] I am satisfied that the Appellants' right to be heard was exercised and that they were heard. February 25, 2022 was not the first appearance before the Court or before the Judge. The Appellants were aware of Counsel's positions, and in the January 2022 appearance, the Appellants' counsel made submissions and advised the Judge of the Appellants' position that they objected to weekend overnights. This is partly why the Judge adjourned to another date.

[96] The court file included several orders and substantial evidence, which reflected the Appellants' evidence and position. The Appellants' Affidavit contained both evidence and the Appellants' opinion and views, some of which is in the nature of argument. It is obvious from that affidavit what the Appellants' position was in respect of increased parenting time. While it would have been preferable for the Judge to allow Appellants' counsel to complete her oral submissions, the Judge's approach did not constitute a reviewable error. Whether a court requires further oral argument on parenting matters is a matter of discretion: ***JLZ v CMZ***, 2020 ABCA 431 at para 5.

[97] I am also not persuaded by the Appellants' argument that the Judge did not review the Appellants' Affidavit. It is up to the Appellants to establish that there is reasoned belief that the Judge must have ignored the affidavit in a way that affected his conclusion: ***Van de Perre v Edwards***, 2001 SCC 60 at para 15; ***Mercer v Mercer***, 2018 ABCA 21 at para 10, citing ***MMG v JAS***, 2017 ABCA 209 at para 15. The Judge confirmed more than once that he had the Appellants' Affidavit in front of him. It is common for judges to review filed affidavits or other file material in advance of hearing high conflict parenting matters. The Appellants have not established that the Judge ignored the affidavit.

[98] While the Judge's treatment of Appellants' counsel on February 25, 2022 was abrupt, in all of the circumstances this did not rise to the level of erroneously offending the Appellants' right to be heard.

D. Did the Judge Fail to Provide Adequate Reasons?

[99] Failing to provide reasons that are sufficiently intelligible to permit appellate review is an error of law: ***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2020 ABCA 333 at para 32.The standard of review for the sufficiency of reasons requires the reviewing court to consider whether the reasons are reasonably intelligible to the parties and whether they, taken together with the trial record and the submissions of counsel, permit meaningful review: ***Prominence Resources Inc v Zargon Oil & Gas Ltd***, 2020 ABCA 191 at para 26; ***University of Alberta v Chang***, 2012 ABCA 324 at paras 14, 23.

[100] Adequacy of reasons also involves a contextual inquiry, having regard to the particular circumstances of the case, including whether the basis of the judge's conclusions is apparent from the balance of the record even without articulation, whether the trial judge was called on to address troublesome principles of law, unsettled, confused or contradictory evidence on a key issue, and the time constraints and general press of business in the courts: ***Custom Metal Installations*** at para 32; ***R v Sheppard***, 2002 SCC 26 at paras 28-29, 50, 55; ***R v Walker***, 2008 SCC 34 at paras 19-20; ***R v Lim***, 2019 ABCA 473 at para 22; ***Bott v Schneider***, 2022 ABQB 307 at para 87.

[101] In the context of parental access or parenting, the failure of the court to specifically reference the best interests test is a material error only if it gives rise to the reasoned belief that it affected the conclusion: ***Letourneau*** at para 7; ***Van de Perre*** at para 15.

[102] In this case, the Judge gave very short oral reasons. He stated that he found Counsel's submissions compelling, that he was "granting her submissions", and that he accepted Counsel's "submissions as accurate and based on my experience with her as a lawyer appearing in my court". Effectively, he adopted and accepted Counsel's submissions. Her submissions were before the Judge from both the January 20, 2022 and February 25, 2022 appearances.

[103] There is nothing inherently defective or unfair about a judge adopting and incorporating by reference a counsel's submissions into their reasons, as long as the parties and the appellate court can discern why the decision was made and there is no prejudice to a right of appeal: ***R v Greenhow***, 2004 ABCA 22 at para 10; ***Sheppard*** at para 46; ***Prominence Resources*** at para 25. This is particularly so in interim family parenting applications heard in docket court, chambers, case management, or the like, where reasons are often necessarily brief: see for example: ***JLZ v CMZ*** at paras 2-8; ***Werry*** at para 10; ***Konashuk*** at paras 7, 13.

[104] It would have been preferable for the Judge to give more robust reasons. However, a careful review of the context, including Counsel's submissions which he adopted, is instructive. Counsel's accepted submissions expressly or by implication included, among other things, these key points:

(a) the Child was struggling in his current placement with the Appellants;

(b) the Counsellor made recommendations, based upon which Counsel made a recommended parenting plan proposal to the parties, which was consistent with what she was recommending to the Court;

(c) the Counsellor recommended Theraplay, which required the Child and the Mother to attend therapy together, including at the Mother's home;

(d) the Appellants had consented to Theraplay but Theraplay had not commenced;

(e) Counsel had only had one video conference with the Child;

(f) the Appellants were interfering or being uncooperative, including (1) the Grandmother had interfered in her meeting with the Child and the Child was evidently heavily coached; (2) the Appellants provided requested information late or not at all; (3) the Appellants had consented to Theraplay but then withdrew their consent; and (4) the Grandmother made inappropriate comments to the Counsellor after Counsel had spoken with the Counsellor and presented proposed parenting plan changes;

(g) the matter was an emergency;

(h) the Consent Order was not serving the best interests of the Child, including failing to promote the Child's relationship with his Mother; and

(i) Counsel was recommending an increase in the Mother's very limited parenting time, not a change of primary custody.

[105] It is plain from the Judge's adoption of Counsel's submissions that he concluded it was in the best interests of the Child to amend the parenting order to allow the Child to spend more time alone with his Mother, including to attend Theraplay recommended by the Counsellor and agreed to by the parties, for the reasons given by Counsel. This means, by implication, that the Judge was not persuaded by the Appellants' assertions of resistance to the Mother or harm to the Child. In these circumstances, the adoption of the Counsel's submissions adequately and reasonably supports the Judge's Order. On balance, the Judge's reasons were adequate because they were adequately intelligible, reviewable and accountable: ***Prediger v Santoro***, 2016 ABCA 11 at para 17; ***Sheppard*** at para 55; ***Prominence Resources*** at para 26.

[106] The core of the Appellants' argument is that the Judge erred in adopting the Counsel's submissions in the circumstances, which is addressed next.

E. Did the Judge Err in Respect of his Consideration of the Evidence in Determining the Best Interests of the Child?

[107] To assess this appeal ground, I assess (1) whether the Judge erred in law by accepting Counsel's submissions and (2) whether the Judge erred in mixed fact and law or made a serious misapprehension of the evidence in determining it would be in the best interests of the Child to vary parenting as recommended by Counsel.

1. Did the Judge Err in Accepting Counsel's Submissions?

[108] I have found that the parties consented to Counsel providing information to the Court. However, I must consider whether the adoption of any of the Counsel's submissions was in error because it conflicted with other material evidence, was a bare assertion which did not have a factual foundation, or was an erroneous default to Counsel's opinion.

a. Submission that the Child was Struggling in his Current Placement with the Appellants

[109] This submission was consistent with or supported by other evidence, including the Appellants' Affidavit which indicated that the Child was having aggression issues, was extremely moody, easily set off, screaming in his sleep, and that he was doing well in school and sports "until recently". There was also consistent and significant evidence of the Child's resistance to his Mother, which was worsening. Appellants' counsel confirmed that "there's a lot of concerns here and a lot of issues". There was no error made in accepting these submissions.

b. Submission that the Counsellor Made Recommendations, Upon which Counsel Recommended a Parenting Plan

[110] Counsel submitted to the Judge that the Consent Order provided that the recommendations of the Counsellor should be implemented, that the Counsellor had "addressed them with me", that she had "been in contact with" the Counsellor, that the Counsellor was willing to continue with the Child, and that "immediately after receiving recommendations from the [Counsellor]" she

advised the parties and made a detailed parenting proposal. The detailed parenting proposal was clearly based on or consistent with the Counsellor's recommendations and was consistent with the one proposed to the Judge. This is not in conflict with any other evidence—while the Appellants would like more information about why the Counsellor made her recommendations, there was no evidence that the Counsellor recommended something different. There was no error made in accepting these submissions.

c. Submission that the Counsellor Recommended Theraplay, which required the Child and the Mother to attend Therapy together, including at the Mother's Home

[111] Counsel advised that the Counsellor "has recommended a very specific type of counselling", namely Theraplay. And, further, that it was critical to Theraplay that the Child and Mother do this therapy together, including in the Mother's home. This does not conflict with other evidence, and in fact after hearing this description of Theraplay, the Appellants' counsel confirmed that the Appellants were "absolutely on board with Theraplay happening" and that they had "consented immediately to Theraplay". The Appellants did not adduce any evidence that Theraplay did not require the Child and Mother to be alone or did not require therapy to be conducted in the Mother's home. There was no error in accepting these submissions.

d. Submission that the Appellants had consented to Theraplay but Theraplay had not commenced

[112] The Appellants advised the Judge on January 20, 2022 that they were "absolutely on board" with Theraplay. It was also true that Theraplay had not commenced by the time they were before the Judge on February 25, 2022. There was no error in accepting these submissions.

e. Submission that Counsel had one Meeting with the Child

[113] This was not disputed and there was no conflicting evidence. There was no error in accepting this submission.

f. The Submission that the Appellants were interfering or being uncooperative

[114] Counsel made submissions which, taken together, suggested that the Appellants were being uncooperative and were interfering with the Child, his Counsel, and the Counsellor. I address these below.

(1) The Submission that there was Coaching and Interference in Meeting with the Child

[115] Counsel stated:

> I was able to contact the child only once via video conference. The grandmother assisted. I can advise the Court there was extreme interference by the grandmother in receiving instructions. The child was very evidently heavily, heavily coached.

[116] The Appellants swore that they set the Child up in a room with headphones and had the door closed, that they remained in a separate room during the call, and that they had no interaction with the Child during the meeting. They also state that they were shocked to learn that Counsel was alleging coaching, interference or alienation, relying on Judge Airth's reasons and their assertion that they never interfered with or spoke badly about the Mother with the Child. In my view, the Appellants' evidence is not necessarily in conflict with Counsel's statements that the Child was evidently coached and that there was interference in receiving instructions from the Child. By suggesting that coaching interfered with Counsel's meeting with the Child, Counsel was not necessarily saying there was active interference during the call.

[117] There were other allegations that were directly denied by the Appellants, including an allegation that the Grandmother told the Child to call her mom or that she was his real mother, and that the Appellants were showing the Child affidavits in the court proceedings. Counsel did not include those allegations in her submissions to the Judge, so there is no conflict.

[118] As there was no direct conflict in the evidence, there was no error in accepting Counsel's submissions for the purposes of the interim application.

(2) The Submission that Appellants were Providing Requested Information to Counsel Late or Not at All

[119] Counsel told the Judge that "the majority of the information I required and requested from the grandparents was either received very late or was not received at all".

[120] There were significant communications between the Appellants' counsel and Counsel in January and February 2022. Counsel requested a lot of information, including the parties' positions on Theraplay. Based on the evidence before the Judge, there was evidence that at least some of what was requested was not provided or quickly provided, including: the final signed or filed version of the Consent Order, the Child's official dance and spring hockey schedules, a copy of the transcript of proceedings before Judge O'Gorman on July 7, 2021 when a counselling order was granted (even though Appellants' counsel confirmed she would send it)[2], a complete version of the email from the Grandmother to the Counsellor (only a redacted version was provided), and a proposed form of order in respect of Theraplay. Whether other requested information was provided "late" is unclear, and whether the items I have listed constitute the "majority" of the information requested, that is subjective and unclear on the record before me. Counsel's submissions were not necessarily inaccurate and, in any event, did not create a conflict with material evidence before the Judge. The detailed communications amongst the parties were in the Appellants' Affidavit for the Judge to review and characterize whether he agreed with Counsel's submissions. There was no error in accepting Counsel's submissions.

(3) Submission that Appellants Withdrew Consent to Theraplay

[121] Counsel's statement to the Judge that the Appellants withdrew their consent to Theraplay was sufficiently accurate. The Appellants' unconditional agreement to Theraplay was made very clearly in representations to the Judge on January 20, 2022. It was on this basis that the Judge

[2] The Transcript of this appearance before Judge O'Gorman was not before me, either.

decided not to grant a specific order for Theraplay: "the guardians can enter that now without any court order".

[122] After the January 20, 2022 appearance, Appellants' counsel refused to prepare a form of consent order (correctly noting that there was no order granted). Then, the Appellants raised issues with the proposed Theraplay counsellor, communications with her, and whether she would provide reports. On January 28, 2022, Appellants' counsel advised that they would not proceed with Theraplay if Counsel was not willing to provide details of her discussions with the proposed Theraplay counsellors. In her words: they would have to "wait for court". As a result, without the Appellants' consent, no Theraplay had started by February 25, 2022. While it likely would have been helpful to do so, Counsel was not obligated to provide the Appellants with her discussions with the proposed Theraplay counsellors which she made on behalf of the Child. The Appellants' refusal to proceed was inconsistent with their unconditional agreement to Theraplay. There was no error in the Judge accepting the Counsel's submissions.

(4) Submission of Inappropriate Comments to Counsellor

[123] On January 20, 2022, Counsel advised the Judge that the Counsellor had requested an amendment to the order that the guardians are not to contact her; that she will contact them if she has recommendations. On February 25, 2022, she advised the Judge that the Grandmother had written the Counsellor and made a number of "very inappropriate comments".

[124] The redacted version of the email that was the subject of these comments was included in the Appellants' Affidavit. In the email, the Grandmother wanted to communicate with the Counsellor, but asked whether the information could "stay between us". She expressed frustration with the Mother's proposed parenting schedule, expressed her opinion that the Child will experience trauma if the Mother's proposed parenting schedule is implemented, detailed the Child's resistance to the Mother, asked if the Counsellor had heard from Counsel, and asked if the Counsellor would be able to write a letter stating how "this big of a change would affect" the Child.

[125] This email could be interpreted in different ways. It could be an inappropriate attempt to secretly influence the Counsellor's views of the situation and seeking to support the Appellants' position and views on parenting. It could also be interpreted as an honest attempt by the Appellants or their counsel to try to understand the Mother's position on parenting and its potential effect on the Child, to avoid further conflict with the Mother, all in the context of the new arrival of Counsel on the scene. The Appellants attached only a portion of the email, redacting embedded portions of the email on the basis only that they "contain some personal information about us we do not wish to share".

[126] The fact that an incomplete email could be interpreted different ways does not create a conflict in the evidence. It was open to the Judge to interpret the email in the context of all the evidence and there was no error in accepting the Counsel's submissions about it.

g. Submission that the Matter was an Emergency

[127] Counsel advised the Court on January 20, 2022 that the matter was an emergency, and the Judge indicated he was treating it that way. The Appellants did not object to this characterization or state there was no emergency. There was evidence that the Child's relationship with his Mother

was deteriorating, that the Child was experiencing struggles, that the Counsellor was recommending an immediate change in parenting and new therapy with the Mother, that the Mother supported this position based on new information she had received as supported by the Counsellor, and that the Appellants agreed to "immediately" commence Theraplay. In my view, there was no conflict between the Counsel's submissions and other material evidence, and it was not an error for the Judge to accept Counsel's submissions.

h. Submission that the Consent Order was not serving the best interests of the Child, including failing to promote the Child's relationship with his Mother;

[128] These submissions either constituted the Counsel's position, recommendation, views or opinion, that the Consent Order was not in the best interests of the Child, and that the proposed changes to parenting were in the best interests of the Child, or they were submission in the nature of argument based on the evidence, as to the best interests of the Child. The question is whether there was a factual foundation for the submissions.

[129] Counsel's reasons why the Consent Order was not working and a change of parenting was required were simple and clear—the Consent Order was not fostering the Mother's relationship with the Child, the current strategy was not working, and the Child needed to be spending more time with his Mother alone, in specialized therapy and in the Mother's home.

[130] Counsel's recommendations and views had a factual foundation supported by the information I reviewed above. In particular, the Airth Order, the Consent Counselling Order, and the Consent Order all contemplated and provided for the increase in Mother's parenting time in consultation with and based on the recommendation of the Counsellor or other professionals. None of the parties provided, or attempted to provide, direct evidence from the Counsellor or any other professional. While it would have been preferable for Counsel to provide evidence directly from the Counsellor, the Judge was left with Counsel's submissions and information that the Counsellor recommended Counsel's proposed changes to parenting.

[131] Counsel's submissions that the proposed changes to the Consent Order were in the best interests of the Child were not contradicted by any other admissible opinion evidence. It was not an error for the Judge to accept Counsel's submissions about the interests of the Child.

i. Conclusion re Accepting Counsel's Submissions

[132] In the unique circumstances of this case, the Judge did not err in accepting the Counsel's submissions.

2. Did the Judge Err in Mixed Fact and Law or Misapprehend the Evidence?

[133] The Appellants further assert the Judge erred in mixed fact and law and misapprehended the evidence by determining that the proposed changes to parenting were in the best interests of the Child.

[134] The appellate court's role is not to re-weigh factors relevant to determining a child's best interests, unless the lower court neglected to consider a relevant factor or misunderstood the evidence: ***Letourneau*** at para 9; ***Van de Perre*** at paras 13, 15, 35. An omission is only a material error if it gives rise to a reasoned belief that the judge must have forgotten, ignored or misconceived evidence in a way that affected his conclusion: ***Van de Perre*** at para 15; ***Mercer*** at para 10.

[135] The Appellants argue that the Judge ignored that (1) Counsel failed to adduce evidence; (2) Counsel made material misrepresentations to the Judge; and (3) there was significant history of the matter and the resistance of the Child to the Mother. The first two arguments are addressed above: the Judge was entitled to rely on the Counsel's submissions made orally and as contained in the Appellants' Affidavit, and I am not satisfied that Counsel made the alleged material misrepresentations or intentionally misled the Judge.

[136] The evidence of the Child's resistance to the Mother is clear and consistent, but there was no professional opinion evidence, and no previous clear judicial finding, as to its cause. Further, the Appellants did not adduce any expert opinion evidence that the Child would suffer the harm that they believe the Child would suffer if the Mother's parenting time was increased as per the Order. While I do not endorse Counsel's positioning that it was incumbent on the Appellants to pay for a PN8 Evaluation before they could assert their concerns with the changes, the reality is the Appellants did not adduce professional evidence to rebut the evidence of the Counsellor's recommendation or to show that the Child would likely suffer harm. The Judge did not commit a material misapprehension of the evidence.

[137] This ground of appeal is dismissed.

F. Did the Judge Err in Law by Varying Parenting Time without a *Viva Voce* Hearing?

[138] The Court of Appeal has consistently provided guidance that, absent urgency or some other satisfactory reason, and clarity on the child's best interests, a chambers judge should not make substantial changes to a parenting regime without oral evidence; and when this is not possible, the orders made should focus on maintaining the *status quo* pending a proper hearing: ***JM v EM*** at para 48; ***AF v DS*** at para 33; ***LDM v WFT***, 2017 ABCA 106 at para 7; ***Shwaykosky v Pattison***, 2015 ABCA 337 at para 6; ***Huitt v Huitt***, 2021 ABCA 235 at para 6; ***HG v RG*** at paras 9-10.

[139] The Court of Appeal's guidance has been focussed on matters of high conflict involving conflicting evidence on material issues: ***Chambers*** at para 21; ***AF v DS*** at paras 30-31; ***JM v EM*** at para 33; ***Shwaykosky*** at para 7; ***Konashuk*** at para 7; ***Rensonnet*** at para 9; ***JLZ v CMZ***, at para 5. However, where there is sufficient uncontradicted evidence before the court which allows the judge to make an interim determination regarding the best interests of the child without embarking on a credibility assessment of the contradictory evidence, it is not an error for the judge to make an interim order—in fact, it is encouraged: ***Konashuk*** at paras 13-14; ***Krauss v Krauss***, 2018 ABCA 367 at para 4; ***JLZ v CMZ*** at paras 14, 76, 78.

1. Did the Order Effect a Substantial Change to the Parenting Regime?

[140] A chambers judge is in the preferred position of deciding whether a proposed change is substantial, is in the best interests of the children, and can appropriately be dealt with in chambers:

Huitt at para 8. This is a discretionary decision that should be given great deference: ***Crawford v Crawford***, 2015 ABCA 376 at paras 14-15.

[141] Whether a proposed change to the parenting regime is substantial will depend on the context and facts of the matter. However, it is helpful to contextualize the analysis by considering parenting regime changes that have been considered substantial by the Court of Appeal, for example: reversing primary care (***Zack*** at paras 20, 22), suspending parenting (***JM v EM*** at para 19; ***Crawford*** at para 8), implementing a new shared parenting regime (***LDM v WFT*** at para 6), changing a shared parenting arranging to one where one parent has primary care (***Shwaykosky*** at paras 1, 6), granting a final parenting order (***Chambers*** at para 21) or increasing parenting to effectively 50/50 shared parenting (***AF v DS*** at paras 1, 33).

[142] The Order increased the Mother's parenting time from 2 hours every second weekend at the Appellants' home, to alternating full weekends with overnight stays. The Appellants argue that it was a massive change given the history of the Child's resistance to being alone with the Mother, and the fact that the Child had not had an overnight stay with the Mother for well over a year.

[143] However, the change must also be considered in the context of the various interim orders. Part of the existing parenting regime, as reflected in the most recent interim orders, the O'Gorman Order, the Airth Order, and even the Consent Order, included increasing the Mother's parenting time based on the guidance and recommendation of professionals, in particular the Counsellor. Here, there was some evidence that the proposed changes were recommended by the Counsellor. They were also contemplated to be very short term, with a built-in further court review within 5-6 weeks. In these circumstances, I am not satisfied that the change was substantial, but rather was the implementation of what was already contemplated in the existing regime on a short-term basis. It would always have been available for the parties to seek to vary the Order further if circumstances warranted it.

[144] Even if I am wrong and the change was substantial, it would not affect my decision on this ground of appeal. As noted earlier, there was evidence that the matter was urgent, and that Counsel's information did not create a conflict with other material evidence. In those circumstances, the Judge was entitled to consider the non-conflicting evidence and to exercise his discretion to grant the Order. His decision to proceed on an interim basis is owed deference.

G. What is an Appropriate Order on this Appeal?

[145] For the reasons above, the Appeal is dismissed. The Stay Order is no longer in force as of the date of these reasons. If the parties cannot agree on costs of this Appeal within 30 days of this decision, they may make submissions to me in writing of no longer that 5 pages.

VIII. CONCLUSION AND FINAL COMMENTS

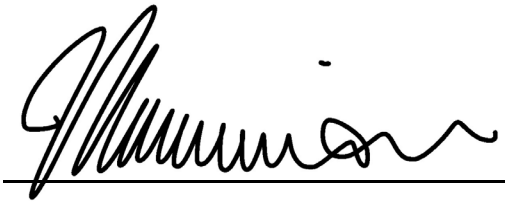
[146] Where does the dismissal of this Appeal leave parties and the Child? The parties made submissions in oral argument that the matter is being case managed by Assistant Chief Judge Cornfield (**CM Judge**) and that the issue of parenting is in the process of being scheduled for trial. They made submissions on how and whether the Appeal affected the Provincial Court proceedings.

[147] On its terms, the Order was to be reviewed at the next court appearance in May 2022. Given the Appeal and Stay Order, this likely did not happen, and it may very well be that the Order has been overtaken by subsequent events as often happens in family matters where circumstances are not static. The Order may need to be varied or updated to reflect current realities, but I make no findings in that regard. I agree with Counsel that the next steps are best managed by the CM Judge who has had carriage of this file in case management for the past several months. Subject to any directions the CM Judge may have made or may make, any party may bring an application to vary the Order to the CM Judge if they are of the view the Child's current reality warrants it. While repeated appearances before the Court to alter interim parenting arrangements are discouraged, a practical approach fitting the circumstances is encouraged: ***McClelland*** at paras 17-18.

[148] I did not consider any post-Order materials on the Court file or provided by the parties until after I made my decision on the Appeal. The file is thick and appears to be growing rapidly. Given that I have dismissed the Appeal, I have only given the post-Order materials a cursory review. The conflict between the Appellants and Counsel has escalated and is being actively managed by the CM Judge.

[149] Counsel has also been providing written materials to the CM Judge directly, on a confidential basis. The CM Judge commented on this practice in ***KC v JC*** at paras 23-25. The appropriateness of Counsel relying on the Counsel Order to make *ex parte* communications to the CM Judge, which are not shared with the Appellants, is not before me. However, my decision should not be taken as an endorsement of that practice or that interpretation of the Counsel Order. I also remind Counsel of the framework's parameters for appropriately providing information to the Court pursuant to the terms of the Counsel Order.

Heard on the 15th day of September 2022.
Dated at Calgary, Alberta this 24th day of October 2022.



M.A. Marion
J.C.K.B.A.

Appearances:

Brynn Doctor, Doctor Law
for the Appellants

K.C., self-represented

Cori Lynne T. Mercier, Castle & Associates
for the Child