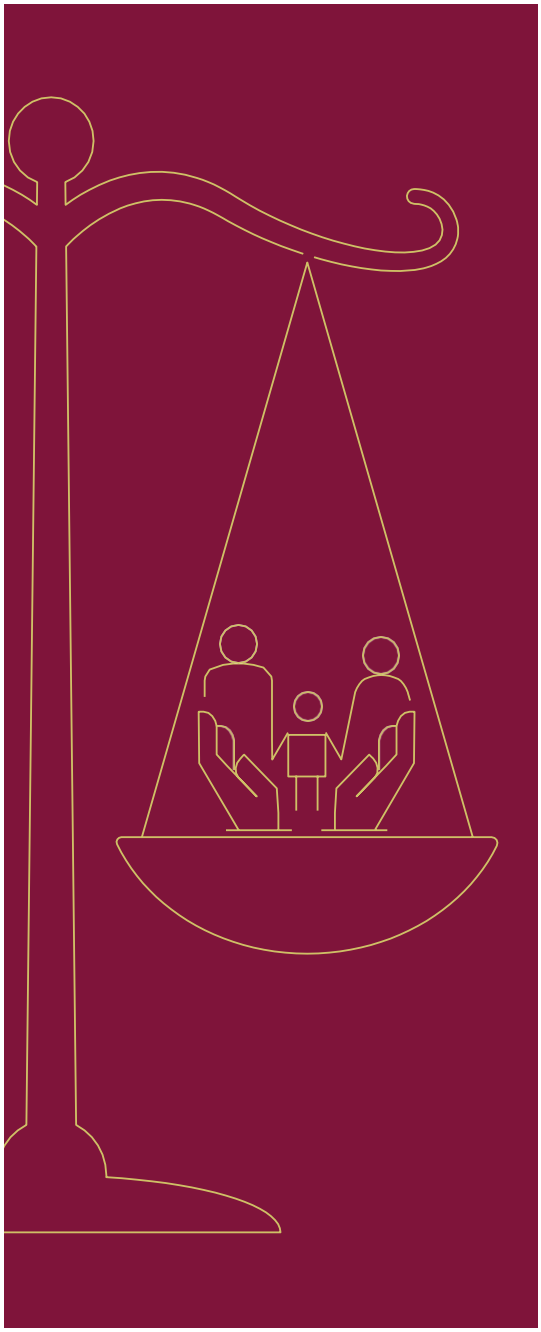
LEGAL BULLETIN

Relocation in the Context of Family Violence: A.J.K. v. J.P.B., 2022 MBQB 43



Introduction

This 2022 Manitoba decision is notable as it considers family violence in the context of a parental request for relocation. The amendments to the ***Divorce Act***, which came into effect on March 1, 2021, created more stringent notice requirements for a party wishing to change their residence or relocate with children. This case was decided after these amendments, and therefore the decision considered the new relocation requirements alongside the expanded definition of family violence in the new ***Divorce Act***.[1]

The judge also explored several other important legal tests in determining the appropriate course of action for this mother and children. For instance, **the test of discretionary limits to the open court principle is considered**. Also, **the best interest of the child in the context of relocation is explored**. The **expanded definition of family violence in the new *Divorce Act* is also considered and discussed**. Finally, the judge gives **commentary on exceptional circumstances required to dispense with the service requirement of a court order**.

This case stands out as it illustrates the discretionary power of a judge when faced with situations of family violence and provides tools for legal professionals seeking to present an argument of this nature in the future.

Background

The parents separated when their children were both under five years old and had been living apart for close to six years. Although the mother said there was no violence by the father during the relationship, the violence began following the relationship breakdown.[2]

The father had engaged in an affair during the relationship, giving rise to a default Divorce Judgment (on the basis of adultery) on August 22, 2016, as well as an order of sole custody to the

[1] A.J.K. v. J.P.B., 2022 MBQB 43 at para 1.
[2] *Ibid* at para 1-5.

mother, with reasonable access to the father.[3]

Following the divorce, the father spent time with the children when it could be arranged. However, the situation between the parties broke down when the mother refused to reconcile with the father. The mother applied for, and received, a Protection Order in October 2018.[4] The evidence given by the mother was that she refused to reconcile after being intimate on one occasion after the divorce, as she did not trust the father. This led to the father becoming violent and aggressive toward the mother and children. This included name-calling in front of the children, stalking, barging his way into her house, following her and her boyfriend, and threatening to hurt himself or someone else. The situation came to a head at a children's sports event, where the father began yelling at the mother to the point where she had to hide in the office of a sports attendant until the police came. At this point, the mother only applied for the Protection Order for herself and not the children.[5]

The father applied to have the Protection Order set aside and was successful in having the three-year order reduced to a period of 18 months. The Judge did not provide reasons for this reduction, other than that he was of the view that a "three-year Protection Order is excessive."[6]

On December 17, 2019, the mother was granted a Protection Order on behalf of the children. The evidence given was that the father was not complying with the neutral exchange locations for his time with the children, had uttered threats such as stating to one of his children that he would murder the mother, sending inappropriate messages, driving past the mother's house, attending the mother's place of employment, and attending the children's school. It was also noted that during this period a third party had also obtained a Protection Order against the father.[7]

The mother was granted a further Protection Order for herself on April 17, 2020, as the previous Protection Order was about to expire. The mother gave evidence that the father had breached the previous Order on numerous occasions, continued to stalk and harass her, and had even spent periods in jail for the breaches.[8]

The father contested this Order, and a set aside trial was held on October 13, 2020. However, at the trial the father appeared unrepresented and agreed to withdraw his application to set aside the Protection Order.[9]

Motion for Relocation

The mother filed a without notice of motion on August 5, 2021, pursuant to sections 16.8 and 16.9 of the new ***Divorce Act***, seeking an order that she be permitted to relocate with the children without giving notice to the father.[10]

Justice Dunlop placed an immediate sealing order on the court file until the motion could be heard on August 27, 2021. Along with a review of the past orders on file, and the fresh evidence that was presented, Justice Dunlop was satisfied that this step was necessary.[11]

The further evidence given showed that the father continued to stalk the mother, her new partner, and children, posted derogatory comments about the mother's father on Facebook, made a number of online posts about "toxic femininity", including uttering a threat that "ALL FEMINISIT(S) I KNOW ARE GONNA DIE SOON", as well as uttering threats against the Premier of Manitoba and Chief Medical Officer.[12]

[3] *Ibid* at para 3.
[4] *Ibid* at para 4-5.
[5] *Ibid* at para 5-6.
[6] *Ibid* at para 9.
[7] *Ibid* at para 11.
[8] *Ibid* at para 13.
[9] *Ibid* at para 15.
[10] *Ibid* at para 16.
[11] *Ibid* at para 17.
[12] *Ibid* at para 18.

Issues before the Judge

The issues before Justice Dunlop were:

1. Is a sealing order and without notice appropriate in the case, as well as should the style of cause be initialized?
2. Do the facts outlined represent an exceptional case, where without notice relocation should be granted against a former spouse who has an order allowing access?
3. What kind of notice should the father be given of the order?[13]

Analysis of the Issues

On the first issue, Justice Dunlop decided that a without notice motion was applicable in this case, citing the test from *Sherman Estate***,** which requires that the person wanting a without notice motion must show that court openness poses a serious risk to public interest, the order sought is necessary to prevent the risk and alternative measures will not prevent the risk, and that the benefits of the order outweigh the risk.[14]

In analyzing the test, Justice Dunlop makes the distinction that the risk in this case is not that there would be an affront to the mother's dignity, as most family cases expose the intimate nature of disputes, but rather the risk is for the safety of the children and mother. In this case, the risk of harm outweighed the public interest in an open court.[15]

Justice Dunlop also found that a sealing order was necessary (to be in effect for 30 days after the date of the judgment), as allowing the father access to the court file, which would allow him to see updates on the proceedings, left a risk that further family violence would ensue.[16]

The decision to initialize (i.e., not use the names of the parties in her decision) also stemmed from the need to protect the mother from further trauma, which outweighed public interest.[17]

When presented with the second issue, whether to allow the relocation without notice to the father, the judge relied on the section of the new ***Divorce Act*** that allows a without notice move or relocation where "there is a risk of family violence."[18] Otherwise, there are new prescribed forms that an individual must use to notify the other parent (if there is an order in place allowing parenting or access to the children).[19] The judge also gave regard to the *Court of Queen's Bench Rules,* which allows for without notice motions in exceptional circumstances.[20] Within the ***Divorce Act,*** the burden of proof is on the parent wishing to move to prove the risk of family violence requiring a without notice motion. Once family violence is found, the burden remains on the parent wishing to move to show that the move is in the best interests of the children.[21]

Given the escalating family violence in these circumstances, the judge found that the future risk of violence was high.[22] In determining whether the move was in the best interests of the children, the judge relied on the best interest factors found in section 16(1)(2) and (3) of the ***Divorce Act***, as well as the factors relating to family violence at section 16(4).[23] Additionally, there are further factors, as outlined in section 16.92(1), to consider when one party wishes to relocate.[24]

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[13] *Ibid* at para 19.
[14] *Ibid* at para 29.
[15] *Ibid* at para 29-32.
[16] *Ibid* at para 33.
[17] *Ibid* at para 34.
[18] Divorce Act, RSC 1985, c 3 (2nd Supp) at 16.8 (3) and 16.9(4).
[19] A.J.K. v. J.P.B., *supra* note 1 at para 36-38.
[20] *Ibid* at para 43-47.
[21] *Ibid* at para 39-40.
[22] *Ibid* at para 50.
[23] *Divorce Act, supra* note 18.
[24] *Ibid.*

In coming to her decision, and considering these factors above, Justice Dunlop states that the father's behaviour meets all the factors set out in 16(1)(4).[25] She also notes that no order has changed his behaviour yet, which is why the mother was left to seek help from the court to go into hiding as a measure to prevent a tragic ending for her and the children.[26] The judge also notes the common occurrence of escalating family violence after a relationship breakdown. The judge emphasizes that the new expansive definition of family violence in the ***Divorce Act*** is one tool to combat the severity of the issue.[27]

On the final issue before the judge, whether to provide notice of the Order to the father, the judge decides that in this case the Order will not be required to be served on the father.[28] The judge states that, although the *Court of Queen's Bench Rules* require the service of an Order, a judge has the ability to dispense with the need for service in exceptional circumstances, which they find in this case.[29] The judge states that in this case the violence is too fresh and that if aware of the Order the father could do something irrevocable. The judge also notes that there is nothing stopping the father from accessing the court record himself once the sealing order for the record is lifted.[30]

Implications

This case demonstrates the power of a judge's discretion to employ exceptions to rules in exceptional circumstances, such as family violence. Justice Dunlop uses the new tools within the new ***Divorce Act*** to craft an excellent decision which aims to protect a family where there has been a history of pervasive and extreme violence. With the emphasis on family violence within the ***Divorce Act,*** the judge has the basis for tackling the other issues as well, related to court rules, and requirements, such as the open court principle.

Justice Dunlop also provides excellent commentary on the new mandate within the ***Divorce Act,*** at section 16(3)(j), for judges to consider family violence and its impact on the determination of the best interests of the children involved.[31] As well, pursuant to section 7.8(2) there is now a mandatory requirement for judges to consider any civil protection orders, proceedings, undertakings, or recognizances in relationship to criminal proceedings impacting the parties.[32] The previous version of the ***Act*** was silent on family violence.[33] These expanded requirements provided the judge with necessary considerations when deciding this case, as she could rely on these sections in determining the best interests of the children. Quoting a 2021 case from Ontario, *McBennett v. Danis,* 2021 ONSC 3610, Justice Dunlop acknowledges that this new broad definition recognizes "the profound effects that all forms of family violence can have on children", which can be both direct and indirect as a result of the child's exposure to the emotional and psychological impact on the victimized parent.[34]

Justice Dunlop also notes that prior to this new definition within the *Divorce Act* there were "long-standing gaps in legislation", which created a situation for victims where they felt they were not protected by the law and had to take drastic measures to protect themselves.[35] With these new tools at the disposal of the mother, she had the ability to seek an order to keep herself safe. Justice Dunlop recognizes that "while the court cannot stop a bullet, a knife, or a fist, it can give them other and children a chance to make a safety plan to avoid the father's violence and keep them safe."[36]

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[25] A.J.K. v. J.P.B, *supra* note 1 at para 59.
[26] *Ibid* at para 60-63.
[27] *Ibid* at para 57.
[28] *Ibid* at para 70.
[29] *Ibid* at para 67.
[30] *Ibid* at para 67-69.
[31] *Ibid* at para 21.
[32] *Ibid.*
[33] *Ibid* at para 22.
[34] *McBennett v. Danis,* 2021 ONSC 3610 at para 86.
[35] A.J.K. v. J.P.B, *supra* note 1 at para 24.
[36] *Ibid* at para 24.

Reception

This case has been widely received and commented on amongst legal professionals in Manitoba, including being summarized in the May 2022 issue of *Headnotes and Footnotes* (A Manitoba publication for legal professionals), as well as being a topic case for the 2023 Annual Midwinter conference in Manitoba.

There is also evidence that this case has reached the attention of organizations in other provinces. For instance, Luke's Place in Ontario commented on the case, stating that while not binding in Ontario, "it is an extensive exploration of a mother's request to move with the children without providing notice to the father."[37]

This case provides useful insights and tools for legal professionals that will serve to strengthen legal arguments surrounding family violence in the future.

Takeaways

The new expanded definition of family violence within the ***Divorce Act*** provides tools that can be used when arguing cases involving family violence.

The discretionary ability of a judge is key in cases such as this. In this case, Justice Dunlop made use of this discretionary tool on several issues within the case. This also highlights the necessity of exceptions within the rules, and an example of a case where following the exception is the appropriate course of action.

This case also demonstrates the limits on certain legal processes. For example, the mother had taken out several Protection Orders and was still experiencing violence and an immediate threat to her safety. The Protection Orders had not been able to stop the father's behaviour.

The new requirement for judges to consider family violence and past proceedings can help victims have their history of violence considered. Although Justice Dunlop notes, at paragraph 21 of her decision, that it is still up to the parties to bring this evidence before the court. Justice Dunlop is hopeful that there will be a future where the court can access past proceedings on its own.[38] However, before this is in place, there is still a real concern that crucial information will fall through the cracks, especially for those not familiar with the court process and disclosure rules, etc.

The mother was represented by counsel in this case. However, for self-represented litigants, this type of case would be quite difficult to argue on their own, given the legal rules and evidence that needed to be presented in order to be successful.

This case dealt with family violence occurring over a lengthy period, and the evidence of this history of abuse aided in demonstrating the exceptional circumstances. There were numerous pieces of corroborating evidence, such as police involvement, third party witnesses, and past orders, which helped the judge in reaching her decision.

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[37] Pamela Cross, "Recent case: Relocation in the context of family violence" (February 14, 2023), online: *Luke's Place* <https://lukesplace.ca/recent-case-relocation-in-the-context-of-family-violence/>
[38] A.J.K. v. J.P.B, *supra* note 1 at para 21.