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Family

An exhausting and ruinous parenting case: J.M. v. E.M.

By **Georgialee A. Lang**

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(June 21, 2022, 3:06 PM EDT) -- It is sad, but true, that despite the best intentions of lawyers, judges and parenting experts, family law cases can go off the rails and careen into unexpected and destructive outcomes. *J.M. v. E.M.* 2022 ABCA 49 is such a case.

The case

In 2012 a German woman, J.M., came to Alberta with her 6-month-old daughter, M. In 2015 J.M. met and later married a Canadian man and had two children, born in 2016 and 2017. Unfortunately, the marriage ended in April 2019 with a physical altercation between J.M. and her mother-in-law and J.M.'s allegations that her husband was abusing M., leading to the involvement of the Child and Family Services Ministry and J.M. moving with the three children to a women's shelter.

Later in 2019 a primary parenting order was made in favour of J.M. and the children's father was awarded specified parenting time. By that time, M. was 8 years old and suffering from bullying and expressing suicidal ideation.

A trial was set to address parenting and child and spousal support, but the parties, each represented by counsel, agreed to a binding judicial settlement conference wherein a final order dated Feb. 5, 2020 was made, providing shared parenting and shared decision-making of all three children, with a week on/week off parenting schedule.

M. was estranged from her stepfather and a unification plan was put in place with the expectation that M. would eventually spend half-time with him. Although J.M. had no income the order provided that she would receive spousal support for only six months. The reunification therapy never commenced, and the father last saw M. in October 2019.

Regrettably, the order of February 2020 was not the end of the litigation. The parties continued to quarrel, and further allegations of child abuse were levelled by J.M. against her husband, as M. made disclosures to several mental health professionals. These allegations resulted in criminal charges against the father for sexual interference and a preliminary inquiry was held in September 2021, during which M testified. A trial date was set for March 2022.

The father was faced with additional allegations in 2020 when J.M. swore that her two younger children had been sexually and physically abused by their father and paternal grandmother. A family judge ordered an investigation of the allegations pursuant to Practice Note 5 and the father was then subject to supervised access.

Upon the completion of the investigation in December 2020 the chambers judge determined that the sexual and physical abuse allegations were "unsubstantiated in regards to parenting and supervision concerns" and ordered J.M. to pay costs to her husband. The Appeal Court noted that the chambers judge failed to specify which allegations against which children were unsubstantiated, despite the pending criminal trial.

The court then ordered a Practice Note 7 Triage Intervention, a procedure used in high-conflict cases

where an expert opinion as to the children's best interests is conducted by a parenting expert who acts as a friend of the court.

Further abuse allegations were made by J.M. on Jan. 6, 2021, this time to the RCMP who referred the matter to the Caribou Child and Youth Centre, where the two younger children, now ages 4 and 3½ years old, were interviewed. However, the allegations could not be substantiated as the children were too afraid to speak.

On Jan. 21, 2021, J.M. obtained an emergency protection order against her husband, which was vacated the following day upon the husband's application. Later that same day, with J.M. appearing, the court suspended J.M.'s parenting time with the two youngest children.

Suspecting that this order would cause J.M. to flee, the father filed an *ex parte* application seeking orders that J.M. deliver her passport to the court and a non-removal order. However, it was too late. J.M. left Canada and flew to Germany with M. three days after the order suspending her parenting was handed down.

On Jan. 26, 2021, J.M. was found to be in contempt of the Feb. 5, 2020, parenting order which precluded travel outside of Canada without a court order and a warrant for her arrest was issued. The father was granted sole parenting and decision-making of the two youngest children and the paternal grandmother was given guardianship and decision-making with respect to M. The father's child support obligations were rescinded and service of the father's application and affidavits in support of J.M. were dispensed with and the documents were sealed.

The following day the father brought a Hague Convention application for the return of M., which resulted in her return to Canada into her paternal grandmother's custody in May 2021 after a hearing and an appeal in Germany.

On May 18, 2021, the court ordered that the father have no contact with M. and that his parenting time with the two younger children be supervised. The three children were united and were living with their paternal grandparents on their farm. J.M. was allowed to have two supervised one-hour Zoom calls with the children each week, at her expense. A warrant for J.M.'s arrest for child abduction remained in place, as did the warrant for contempt.

The appeal

J.M. appealed the decision of the chambers judge from her home in Germany. She identified three grounds of appeal:

1. The chambers judge erred by dispensing with notice and service upon her of the father's application;
2. The chambers judge erred by appointing the grandmother as the guardian for M.;
3. The chambers judge erred by granting sole parenting and decision-making to the father in respect of the two younger children.

The Appeal Court began its analysis with the off-cited observation that "self-help" in family law is not permitted unless there is immediate danger and no opportunity to apply to the court for a variation order, for the simple reason that the court has an obligation to safeguard the dignity of the courts and the forces of its orders and the obligation to safeguard the best interests of a child. However, they also noted that the mother's actions must be viewed through a holistic consideration of the circumstances that confronted her.

The Appeal Court allowed the appeal, reaching "three inescapable conclusions" after reviewing the evidentiary record:

> a) That a significant power imbalance existed and continues to exist between the mother, her husband and her husband's family;
> b) That the mother's abuse allegations had yet to be adjudicated by the court; and

> c) That the mother had been deprived of procedural fairness at various times during the litigation, leading to an untenable status quo.

These findings led them to suggest that the mother's departure from Canada was borne out of her desperation. The power imbalance included the mother's lack of legal status in Canada and her poverty after separation, living in shelters and later in a tent.

The lower court's Feb. 5, 2020, order included a term that the father would sponsor J.M. and M. for permanent residence in Canada, but he failed to do so. At about the time she left Canada with M. she wrote to the German embassy pleading for assistance, painting a harrowing picture of a marriage characterized by mental, emotional and physical abuse. The court noted that the recent amendments to the *Divorce Act* in respect of family violence underscore society's increased understanding of and condemnation of domestic violence and its deleterious effects on spouses and children.

The Appeal Court then queried whether the Practice Note 5 investigation was conducted by an experienced child assessor, given the expert's inability to obtain any information from the children, who apparently broke down in hysterics and shook in fear when in the presence of RCMP officers. This, despite medical evidence that one of the children showed physical signs of sexual assault with a ruptured hymen, a fact that was brought to the attention of the chambers judge. The Appeal Court stated that the lower court's finding that no abuse could be substantiated was a determination made in an "evidentiary vacuum."

With respect to procedural unfairness, the Appeal Court found that the chambers judge apparently accepted the father's submissions that J.M.'s application for a protection order, after she made additional allegations of abuse, was made in bad faith, as the abuse had already been found by the court to be unsubstantiated.

It was then that the mother's parenting time was suspended, an order that was considered inexplicable and extraordinary by the Appeal Court, particularly because no such order was sought by the father. They stated:

> A fundamental tenet of our adversarial system is that parties are entitled to know the case they must meet and be provided with an opportunity to address evidence prejudicial to their case and marshal evidence to prove their position. *Charkaoui, Re*, 2007 SCC 9 at para. 53; *Ruby v. Canada* 2002 SCC 75 at para. 40 …

They also referred to *Van de Perre v. Edwards* 2001 SCC 60 at para. 47 where the court held that, "[p]arens patriae jurisdiction does not justify the avoidance of the rules of civil procedure."

Further, the Appeal Court criticized the lower court's decision to entrench upon the open court principle by ordering that the father's court materials not be provided to J.M. and that they be sealed.

Finally, the Appeal Court remarked that all of these unusual remedies were granted to a parent who had no contact with M. for 15 months, was facing a criminal charge for sexual interference, and whose parenting time with his two younger daughters was supervised.

The decision

The Appeal Court admitted there were no easy answers and no quick solutions, but the priority was to arrange for J.M. to be reunited with her children in Canada. The court facilitated this by ordering the husband to pay $5,000 to an immigration lawyer to assist J.M. to obtain a Temporary Residence Permit.

They also vacated the order for supervised Zoom parenting time which was costing J.M. $750 a month, money better spent on her travel expenses to Canada. The orders suspending J.M.'s parenting time were vacated, the father's sole parenting and decision-making was vacated; the warrant for J.M.'s arrest was vacated and her contempt declared to be purged; the child support order against her was vacated; and the chambers judge was no longer seized of the case. An expedited trial was to be arranged.

A report by the children's amicus revealed that M. had achieved a measure of stability after her return to Canada and the parties agreed that in the interim her grandmother would retain guardianship on a without prejudice basis, subject to variation following the father's criminal trial.

Conclusion

This exhausting and ruinous journey for these parents and children leads inexorably to the realization that there has to be a better way to deal with those high-conflict, trauma-inducing cases that are far too prevalent in our family justice system.

This case unfolded in a more remote northern community in Alberta where accessible family law services desperately need improvement. Delays in adjudicating allegations of family violence and child abuse stand in the way of resolution and healing that exacerbates clashes between parents. The health of our families is the cornerstone on which society rests. There is an urgent need for a new vision to ensure that policies and programs to support families are our highest priority.

Georgialee A. Lang is a lawyer and arbitrator in Vancouver and Kelowna, B.C. Lang has practised family law for 31 years, recently focusing primarily on arbitration and appellate litigation. Lang is a writer, speaker and media commentator whose publications range from the Huffington Post *to the* National Post *and* The Lawyer's Daily. *For fun she pens a blog (*lawdiva.wordpress.com*). Connect with her at* georgialeelang.com *or on* Twitter*.*

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