In the Provincial Court of Alberta

Citation: J.P.R. v. Y.M.S., 2015 ABPC 283

Date: 20151221
Docket: 150999225F101001
Registry: Calgary

Between:

J.P.R.

Applicant

- and -

Y.M.S.
(a.k.a. Y.M.R.)

Respondent

Restriction on Publication

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

By Court Order, there is a ban on publishing information that may identify the children or guardians in this matter.

NOTE: This judgment is intended to comply with the ban so that it may be published.

Decision of the Honourable Judge K.J. Jordan

INTRODUCTION

[1] This is an application by the father, JPR., pursuant to the *Family Law Act*, S.A. 2000, c. F 4.5, s. 32 for a Parenting Order regarding his children, JP, age 14, and GR, age 12. The children's mother, YMS, (JPR's wife) asked the Court to decline to exercise jurisdiction in this matter and for child and spousal support, presumably on a temporary basis, until this matter is resolved.

[2] JPR is a Canadian citizen. The children were born here and have Canadian passports. YMS, JPR's wife and the mother of the children, is a citizen of Guatemala. The family has lived for most of the children's lives in Guatemala.

[3] According to JPR, he came to Canada with the children on June 8, 2015, because of long-standing marital discord, YMS's emotional volatility, her infidelity over a period of years, a present-day alleged affair with a former lover and a vicious attack on him by YMS two days earlier.

[4] JPR's intentions were to keep the children in Canada, although it is not clear when he decided to do that. It may have been before he purchased the airline tickets on May 21 or perhaps it was after the (alleged) assault. There may have been some discussions about moving to Canada in 2016, but there was no discussion of doing that before JPR left with the children on June 8.

[5] Whatever his intentions on June 8, YMS believed the children would be home in Guatemala to start school in September.

[6] JPR returned to Guatemala on July 3, but left the children in Canada. He had been in touch with a school in Halifax, N.S. about registering the children in school for the upcoming year but, again, YMS did not know that.

[7] On July 15, JPR and YMS were involved in another altercation, which JPR states was not physically violent, but which resulted in him being removed from the family home by several police officers in the middle of the night. He was subsequently charged with "verbal aggressions and disturbance", "rape, child abduction and economic violence". He was charged again, eleven days later, with "sexual violence and economic violence", but those charges appear to replicate the original charges. He was not detained on any of the charges.

[8] YMS came to Canada after she was served with JPR's parenting claim and was present in court when the matter was first heard on September 25, 2015. There was no *viva voce* evidence that day and an order was granted based on the filed materials and submissions. The children were to reside with their father and JPR agreed without hesitation that YMS should have liberal and generous parenting time. He was required to deposit the children's passports with the Court.

[9] Since that time, there have been three days of evidence.

[10] YMS denied JPR's allegations from the beginning, in particular, that she assaulted him, that she has a substance abuse problem and that she is or has recently been in a romantic relationship with a former lover who has a significant criminal record. She alleges instead that JPR assaulted her, both physically and sexually, and that he is the one who has been having an extra-marital affair. She acknowledged that she drove JPR and the children on June 6 for their flight to Canada, but claimed that as far as she knew, the children would be back for the start of the school year in September.

[11] Both parties testified at length about JPR's business affairs and financial misfortunes. Theirs has been a wealthy family, but their fortunes have declined dramatically over the past few years. JPR spends a lot of time, perhaps the majority of it, trying to wrest his companies from the jaws of bankruptcy. There are significant assets, both corporate and personal, but there has been a cash flow problem for some time. There is evidence that there has been more cash available recently, but it is not possible to determine from the limited information available how much of

that is available for the needs of the family because JPR has testified that most of it has been used to assuage various creditors.

[12] The financial information provided was incomplete and, at best, inadequate. I am satisfied that JPR's evidence about his financial affairs involved a lot of cherry picking.

[13] YMS only has limited information about JPR's financial dealings.

[14] The information about the children was limited because of the restrictions faced by children's counsel following the Alberta Court of Appeal decision in *RM v JS*, [2013] ABCA 441. There has been a long-standing practice in this Court, at least in Calgary, whereby children's counsel provides information to the Courts about their young clients. This information typically exceeds what could be considered the child's "wishes and preferences" as referred to in s. 95 (c) of the *Family Law Act*.

[15] In *RM*, supra, the Court stated that children's counsel would not present their findings about a threshold question regarding the child who was the subject of the application because their role as counsel did not extend to giving evidence about their client. At para. 26, they cited the work of two academics writing on "Children's Evidence" in *Evidence in Family Law*, ed. Harold Niman and Anita Volikis, 2010, Canada law Book:

> Evidence about the child's wishes and views should be put before the court by a social worker or other child care professional, who has interviewed the child. The professional person can testify about exactly what was said by the child, describe the circumstances in which this information was communicated, explain its context, and offer an opinion about the relationship of the child's views to the child's interests. The clinician giving such evidence can then be cross-examined by all of the parties, ensuring that this evidence is fully explored and fairly tested. (citing *Catholic Children's Aid Society of Toronto v S.R.M.*, [2006] OJ No 1741 at para 111).

[16] At par. 28, the Court continued,

> The second difficulty with counsels' evidence on maturity was that it was presented through submission. Ordinarily, counsel cannot give evidence without forsaking his or her position as counsel because the inability to cross-examine on the evidence is a source of considerable prejudice to the other side. In *Strobridge v Strobridge* (1994), 115 DLR (4th) 489, 18 OR (3d) 753 (ONCA), Osborne J.A. concluded that counsel for the children could not state the children's views and preferences, nor express an opinion on any issue, without the express consent of the other side. He commented at paras 35-36:
>
> > It seems to me that, absent consent, counsel cannot be both an advocate and a witness on an important issue. That proposition was clearly stated in *Cairns v. Cairns*, [1931] 3 WWR 335 (Alta. C.A.), at p. 345, in this way:
> >
> > > It is to be borne in mind that the function of counsel in any Court is that of an advocate; he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness.

> Counsel retained by the Official Guardian is entitled to file or call evidence and make submissions on all of the evidence. In my view, counsel is not entitled to express his or her personal opinion on any issue, including the children's best interests. Nor is counsel entitled to become a witness and advise the court what the children's access-related preference are. If those preferences should be before the court, resort must be had to the appropriate evidentiary means. See Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children" (1992) 8 C.F.L.Q. 95. The Official Guardian, through counsel, will see that evidence going to the issue of the children's best interests is before the courts.

[17] I recognize the practical difficulties this practice gives rise to. Who will interview the children? Will it be social workers or child welfare workers? Who will pay for this? If parents cannot pay for this (and most of them cannot), will already over-extended Legal Aid budgets have to find a way to provide this service? Or should there be a service within Alberta Justice which will provide qualified individuals to interview the children and then give evidence to the Court about the children and what their wishes and preferences may be? Is the interviewer an assessor or is his or her role limited to ascertaining the children's wishes and preferences as stated in s. 95, *Family Law Act*?

[18] Will there be one interview or more? Children, like adults, change their minds. They think and say different things at different times. Good children's counsel meet with their clients as the need arises; it may be once, it may be several times as a case progress through the Courts.

[19] Is this an issue that needs to be addressed by the Legislature?

[20] As a result, all we know about the children is what their parents have said as this matter proceeded and what their counsel described as their "wishes and preferences". They were born in Canada; the family moved to Guatemala in 2004. The children have spent time in Canada visiting family since that time. They have lived in Guatemala since their move in 2004; it is where they have always gone to school until their father enrolled them in a Calgary school in September 2015; it is where their friends are. Their maternal grandparents live close by and they have a lot of contact with them.

[21] Both children are bright and high functioning. They are presently very upset with what is happening. The most obvious sign of that is GR's withdrawal from her father. JP is very angry with his father. Neither child wants to be in Canada; they both want to go home. This is a position they have taken since their mother arrived in Calgary. The parents have been sufficiently concerned with the children's mental health issues that JPR arranged for them to meet with a counsellor, but they have only seen her once. According to JPR, he cannot afford to pay the private counsellor's fees and he is trying to obtain state-funded counselling with one of the major social service agencies for the children.

[22] JPR proposes that he and the children's mother, YMS (his wife), shall share parenting equally, but that the children shall reside permanently in Canada rather than in Guatemala. He did not explain how that was going to work since YMS does not have Permanent Resident status in Canada and is here on the usual visitor's visa. He did not explain how she would support herself if she stayed here.

[23] The first appearance was on September 25, 2015, and YMS appeared in person. She asked at that time, and continues to ask, for the Court to decline to exercise jurisdiction because the habitual residence of the children is Guatemala, not Alberta.

LAW

[24] There are many cases that describe the law in Alberta regarding custody and access proceedings when a child is removed from the jurisdiction in which he has been ordinarily or habitually resident and taken to a different jurisdiction where the "removing" parent commences a "custody and access application". They require the Court to apply a two-part test in arriving at a final decision about jurisdiction.

Real and Substantial Connection

[25] The first part of the test is to determine if the child or children have a real and substantial connection in the jurisdiction where the application is being heard. If the real and substantial connection is established, the Court must then determine if it should continue to exercise jurisdiction. That requires an examination of the *forum conveniens*.

[26] That law is stated clearly in the matter of *O.E.K. v. K.M.*, [2008] A.J. No. 1062, Provincial Court of Alberta by Kvill, J, who stated at par. 34:

> At common law, courts have jurisdiction to entertain custody and access proceedings if a child was present, resident or domiciled in the jurisdiction at the time the proceedings were commenced. *McKee v. McKee* [1951] A.C. 352

[27] Counsel for YMS acknowledges that there these children have a real and substantial connection with this jurisdiction. The children were born in Alberta and are present in Alberta. They lived here before moving to Guatemala shortly after the birth of the younger child. They have extended family here and they have spent summers here visiting the family. They are attending school here and have Alberta Health coverage.

[28] I accept that the children have a real and substantial connection with Alberta.

Forum Conveniens

[29] The remaining question is whether the Court should continue to exercise jurisdiction. That requires the Court to determine the *forum conveniens*.

[30] The Court is required to examine the following factors in order to determine the *forum conveniens*:

1. What is the habitual or ordinary residence of the children?
2. Where has the family lived?
3. Where are the witnesses located; where is the evidence to be found?
4. Is the child presently located in Alberta? If so, how long has that been the case?
5. What is the strength of the children's bonds to the persons and circumstances in the competing jurisdictions?

6. Was the removal of the child from the habitual/ordinary residence wrongful? If so, was it justifiable?

7. Where can the litigation be most quickly resolved? Where can it be resolved at the least cost?

8. Would moving the child to another jurisdiction cause the child harm?

[31] The list of factors does not include the best interests of the children as set out in s. 18 of the *Family Law Act* or similar legislation elsewhere. It requires that, "In all proceedings under this Part except proceedings under section 20 [which deals with Guardianship applications], the court shall take into consideration only the best interests of the child", and subsection 2 is an extensive list of factors which the Court must consider when determining the best interests.

[32] This has led to considerable discussion in this matter as to whether s. 18 is applicable in these proceedings.

[33] JPR's counsel submits that the best interests test is applicable to the determination of the *forum conveniens* and relies on the decision of McMahon, J. in *L.C.M. v. J.N.S.*, 2008 ABQB 459, in which he stated at para. 22:

> The overarching principle in determining whether jurisdiction should be surrendered by a Court with a *parens patriae* jurisdiction to the courts of a non-Hague Convention signatory state is simply the best interests of the child.

[34] And at para. 31:

> ... the best interests if the child require that issues of child custody and access be determined on the fullest and accurate understanding of Canadian legal principles ...

[35] Her client takes the position that sending these children back to Guatemala would not be in their best interest. Alberta is the more stable and safer home for the children where their best interest can be properly assessed and advanced by both parents. Furthermore, the father has a better economic opportunity to provide for the care of the children in Alberta.

[36] Counsel for YMS also adopts the *LCM*, supra, decision, but relies on a different interpretation of the language used by McMahon, J. He submits that the best interests of the children is best served by having that issue [best interests] decided in the place of the ordinary residence of the children – in this case Guatemala, as that is where the bulk of the evidence can be found.

[37] In *Hilborn v. Hilborn*, (1997) A.R. 62, Justice T. Miller stated that having determined that the Court has jurisdiction, it is necessary to then decide whether to exercise or decline jurisdiction and that in doing so, there are two major considerations which must be kept in mind. The first is the welfare of the child and the second is the fair and proper administration of justice.

[38] He went on to say, "The welfare of the child is usually best served if the custody dispute is heard in the Province where the best evidence is available" and approved the statement of Guy, J.A. of the Manitoba Court of Appeal in *Leatherdale v. Ferguson*, (1964), 50 W.W.R. (N.S.) 700 at p. 703:

"But the most important aspect of this case, to my mind, is that a consideration of what is in the best interest of the children themselves must be gleaned from evidence in Alberta [the other jurisdiction] where the children grew up from birth. That is where their little friends are, their teachers are, their neighbours, and the family doctor and Minister would be living. Winnipeg is a strange new city to them. The production of an affidavit from a prominent child's (sic) psychiatrist in Winnipeg, who took his affidavit stating his view after one interview with these children, is hardly the proper way to determine the well-being, the peace of mind, the feeling of security, the physical comfort, and the long term emotional stability of these children. It is a poor substitute for the viva voce evidence of the people who are growing up with and having daily contact with the children.

The consideration of fair and proper administration goes to the point of discouraging the surreptitious removal of children from the Province or ordinary residence by one of the parents whether to evade a hearing in that Province or to frustrate an existing or permanent order and leads inevitably to forum shopping and the possibility of conflicting orders from different jurisdictions. Generally speaking I think it is fair to say the Divorce Act attempts to try to regulate some order in this area under ss. 10 and 11 *and that a court in a province to which a child has recently been brought should be extremely reluctant to assume jurisdiction, except in the most unusual circumstances and should direct the parties to go back to the court where the best and most complete evidence is available, namely the court in the Province of the ordinary residence of the child involved."* (Emphasis mine)

[39] Counsel for YMS also referred to other factors which have been considered when determining the *forum conveniens*: the location of matrimonial property (*Nicholas v. Nicholas*, [1995] OJ No 3543, juridical advantages or disadvantages to either party, (*Camco International (Canada) Ltd. V. Porodo* (1997), 211 A.R. 71), the cost of conducting the litigation in either jurisdiction (*Camco*), applicable substantive law (*Camco*), and the difficulty in proving foreign law (*Camco*).

[40] Having examined the extensive list of factors in s. 18 of the *Family Law Act*, I conclude that they are not applicable in the determination of the *forum conveniens*. The contrast between the usual factors and some less common ones and the s. 18 factors is striking. Habitual residence, the location of the witnesses, the present location of the child, the length of the child's residence in the jurisdiction, was the removal of the child wrongful, and if so, was it justifiable, where can the litigation be resolved most quickly and at the least cost - these are not related to the s. 18 factors.

[41] The strength of the children's bonds to the persons and circumstances in competing jurisdictions and the possibility of harm if the child is returned to his habitual residence are important considerations within and outside the context of s. 18, but the inclusions of those factors in two different legal tests does not lead inexorably to the conclusion that s. 18 is applicable to the issue of *forum conveniens.*

[42] *LCM*, supra, does not stand for the proposition that s. 18 factors must be considered by the Court in determining the *forum conveniens*. McMahon, J did not find it necessary to examine the usual s. 18 factors. He referred instead to the location of evidence regarding the child's best interest, the location of mother and child, and the mother's tenuous status in the child's habitual

residence. He dismissed the "attachments to school, church or playmates" as insignificant. He did not examine the *forum conveniens* factors, which are akin to the s. 18 factors – the strength of the children's bonds to the persons, the child's circumstances in competing jurisdictions or the possibility of harm if the child was returned to this habitual residence.

[43] McMahon J.'s focus was on the question of the law in Canada and the requirement that it be applied if the matter was to be heard in United Arab Emirates (UAE). He concluded that if the matter were to be heard in the UAE rather than Canada, Canadian law would be applied and stated at par. 31:

> ... The best interest of the child require that issues of child custody and access be determined on the fullest and accurate understanding of Canadian legal principles and case authorities ... all this greatly outweighs any inconvenience arising from the need for evidence from persons resident outside Canada ... In the result I conclude that Alberta is the appropriate jurisdiction to resolve the issues raised.

[44] The same is true in the *Hilborne*, supra, decision. Mr. Justice Miller stated that there are two major considerations that must be kept in mind. The first is the welfare of the child and the second is the fair and proper administration of justice. The welfare of the child is usually best served if the custody dispute is heard in the Province where the best evidence is available.

[45] He did not consider the factors in s. 18 (not least of all because the legislation did not come into effect until 2003) or any similar factors. Instead, he adopted the reasoning of Guy, J.A. in the *Leatherdale*, supra, case:

> "But the most important aspect of this case, to my mind, is that a consideration of what is in the best interest of the children themselves must be gleaned from evidence in Alberta where the children grew up from birth."

[46] He continued, describing the importance of hearing evidence from people in the jurisdiction where the child had his habitual residence. He [Guy, J.A.] did not embark upon an examination of what we would consider best interests as set out in s. 18. or the analogous *forum conveniens* factors.

[47] Nash, J. used a similar approach in *Alexiou v. Alexiou* [1996] AJ No 696 (Alta QB) in which she relied on the decision in *United Oilseed Products v. Royal Bank of Canada*, [1988] 5 W.W.R. 181 (Alta CA). Stevenson, J.A. stated in that case:

1. The test to be applied in all cases where there is an issue of determining the appropriate forum, is that of *forum conveniens*, the forum which is more suitable for the ends of justice.

2. Where a forum possesses jurisdiction over a defendant, as of right, the defendant must show that there is another available forum which is clearly or distinctly more suitable.

3. Where the jurisdiction does not exist as of right, the same burden rests on the party seeking to establish jurisdiction, for example, where a party has been served ex juris.

4. While the overall burden is as set out, the party alleging an advantage or disadvantage must establish it.

[48] Nash J., in *Alexiou*, supra, relied on the same factors used by McMahon, J. in *LCM*, supra, and flesh them out, describing them more fully than has been done in some other cases. For example, "The location of witnesses, such as relatives and friends and family doctor, and where applicable teachers who have grown up with the children and have daily contact with the children and are capable of giving viva voce evidence on the issue of what is in the best interest of the children".

Burden of Proof

[49] There is no dispute as to the burden of proof. It rests on the party who is seeking to have the court assert and maintain jurisdiction over a child whose habitual residence is elsewhere.

[50] Kvill, J. explained it in *O.E.K.*, supra, at para. 38:

> There is a heavy onus on a party seeking to convince a court to take custody jurisdiction if the child is not ordinarily/habitually resident in the province (and) to explain why the child's welfare necessitates the court overriding its basic ordinary/habitual residence jurisdictional principle." *2007 Annual Review of Family Law* at p. 31.
>
> There are good public policy reasons for this general rule.
>
> Firstly, self-help methods of determining jurisdiction would result in chaos for children and families, and would reward a partner who flees to a jurisdiction in order to obtain custody of a child. The parent with the greatest financial resources would be able to leave with the child - excluding the parent with fewer resources.
>
> Secondly, from a procedural perspective, it is likely that the best evidence to support any custody decision would be in the jurisdiction where the child has its "habitual residence" or "ordinary residence".

[51] Her view is consistent with that of Guy, J.A. in the *Leatherdale*, supra, where he stated:

> "A court in a province to which a child has recently been brought should be extremely reluctant to assume jurisdiction, except in the most unusual circumstances and should direct the parties to go back to the court where the best and most complete evidence is available, namely the court in the Province of the ordinary residence of the child involved."

ANALYSIS

[52] The *forum conveniens* for these children is Guatemala. They have lived there since they were very young. They have spent significant periods of their lives in Canada, but with the exception of the period preceding the move to Guatemala in 2004, the time they have spent in Canada has been vacation time. They have grown up in Guatemala with their mother and father. Their maternal grandparents, with whom they have a significant relationship, live close to them. They went to school there until September of this year when their father enrolled them in school here. That is where their friends live.

[53] The witnesses who will testify in the parenting claim (custody and access) are located in Guatemala. That is where the evidence is to be found. The children have been in Alberta only four months. That is in contrast to eleven years in Guatemala.

[54] There is no reliable way to determine where this litigation can be more quickly resolved or at the least cost. JPR was engaged in matrimonial litigation with his first wife for almost two decades. In the end, he paid her $250,000, but there is no evidence as how that may be apportioned between child and/or spousal support, division of matrimonial property or cost. That was Canadian litigation. There is no question, however, that legal fees and related expenses are cheaper in Guatemala than they are here. He will still have to pay Canadian legal and accounting fees in order to provide the financial information required to settle the support and property issues, but a proceeding in Guatemala will still be cheaper than one in Canada.

[55] The removal of the children from Guatemala was wrongful and cannot be justified.

[56] There is no evidence that allows me to conclude that the children would be at risk if they return to Guatemala with their mother. The evidence from the parties about YMS's so-called failings is contradictory and inconclusive. JPR makes serious allegations about her and she denies them. Both parents describe the children as bright and high functioning. That is borne out by school documentation.

[57] The difficulties described with the children have only developed since JPR brought them to Canada. I do not agree with JPR that YMS should be held responsible for any recent mental health issues the children may have because they did not arise until after she came to Calgary. The temporal link is the only connection between their deteriorating mental health and their mother. JPR has not established any other link between the children's deteriorating functioning and their mother. In all likelihood, the children have suffered because of the circumstances they find themselves in while their parents are at war with each other. They feel trapped. If they were at home in their usual environment during this unhappy time in their lives, they would at least have familiar supports to draw upon – their grandparents, teachers and friends. They would be in a better position to handle the pressures they are feeling.

[58] JPR's allegations that YMS is too unstable to entrust with the care of the children are at odds with his actions. When the matter was first in court and the issue of YMS's parenting time arose, he agreed without hesitating that she should have liberal and generous parenting time. During his evidence, JPR testified that a shared parenting arrangement with a 50/50 time split would be appropriate. He has left the children in her care since they have been in Calgary while he is out of town on business trips to India. These trips are not just overnight – they last several days.

[59] I expressed concerns throughout the proceeding that the actions taken by YMS in Guatemala resulting in serious criminal charges against JPR would make it difficult, if not impossible, for JPR to prosecute or defend any legal actions regarding the children because he might be imprisoned. That no longer concerns me. JPR returned to Guatemala after the last day of evidence knowing that he might be arrested. He is not in Canada at this time. His reasons for that are not in evidence. If he is not worried about the consequences of returning to Guatemala, I see no reason for the Court to consider the ramifications of the criminal charges.

[60] The situation of these children is much like the one in the *Leatherdale*, supra, case, which resulted in the Manitoba Court of Appeal directing that the matter be heard in the jurisdiction where the children had their habitual or ordinary residence.

CONCLUSIONS

[61] I find that the while the Court has jurisdiction over this matter, it should decline to exercise that jurisdiction. JPR's application for a Parenting Order is dismissed.

[62] The children's passports will be returned by the Clerk of the Provincial Court of Alberta, Calgary, to the mother forthwith.

Dated at the City of Calgary, Alberta this 21st day of December, 2015.

K.J. Jordan
A Judge of the Provincial Court of Alberta

Appearances:

M. Blitt
for the Mother

No Counsel
for the Father

S. Maxwell
for the Children

Appendix "A"

Family Law Act, S.A. 2003

Best interests of the child

18(1) In all proceedings under this Part except proceedings under section 20, the court shall take into consideration only the best interests of the child.

(2) In determining what is in the best interests of a child, the court shall

(a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and

(b) consider all the child's needs and circumstances, including

(i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,

(ii) the history of care for the child,

(iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,

(iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,

(v) any plans proposed for the child's care and upbringing,

(vi) any family violence, including its impact on

(A) the safety of the child and other family and household members,

(B) the child's general well-being,

(C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

(D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,

(vii) the nature, strength and stability of the relationship

(A) between the child and each person residing in the child's household and any other significant person in the child's life, and

(B) between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

(A) to care for and meet the needs of the child, and

(B) to communicate and co-operate on issues affecting the child,

(ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,

(x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and

(xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.

(3) In this section, "family violence" includes behaviour by a family or household member causing or attempting to cause physical harm to the child or another family or household member, including forced confinement or sexual abuse, or causing the child or another family or household member to reasonably fear for his or her safety or that of another person, but does not include

(a) the use of force against a child as a means of correction by a guardian or person who has the care and control of the child if the force does not exceed what is reasonable under the circumstances, or

(b) acts of self-protection or protection of another person.

(4) For the purpose of subsection (2)(b)(vi), the presence of family violence is to be established on a balance of probabilities.