

# THE VOGEL INSIDER

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SUMMARY OF  
JUDICIAL DECISION:  
IN THE CHILD'S BEST  
INTEREST

CHEERS TO CHARITY



FALL 2013 ISSUE

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## Welcome from Vogel LLP

We are pleased to share the Fall 2013 Edition of "The Vogel Insider" with you. In this edition, you can find information about our recent successful cases, Vogel LLP lawyer spotlights, interesting articles related to our industry and highlights of our work in the community.

We also enjoy incorporating our clients into "The Vogel Insider" by sharing the positive feedback you pass along to us. If you have any ideas for articles for our next edition, we greatly appreciate your input.

## In the Child's Best Interest: M.(K.) v. D.(N.)

by Brett Coleman

This case is a good example of the potential legal consequences of custodial parent resistance to facilitating an access parent's time with a child, bordering on parental alienation. In this case, the established unwillingness of the custodial parent to promote a meaningful relationship between the child and the access parent, was thought to be a strong indicator of future actions, and was a significant factor in the Judge's decision to change primary care to the access parent.

### *Facts*

The parties in this case had carried on a relatively short common-law relationship, which had resulted in one child who was 7 years old at the time of the decision. The parties resided in Calgary and separated when the child was approximately 5 months old. After the parties' separation, our client ("the Mother") had primary residential care of the child. Thereafter, the Mother relocated to Fort St. John and next, Grande Prairie, with the child. The Mother was cooperative in facilitating the Father's access to the child, when

she resided in Calgary as well as upon her relocation. The Mother would often bring the child to the Father in Calgary, via greyhound bus, and facilitated web-camera visits between the Child and the Father.

When the Mother relocated to Grande Prairie, she contacted the Father to inquire as to whether he wished to have the then 5-year-old child in his care for a couple of consecutive weeks, in Calgary, while she got settled in Grande Prairie. The Father agreed. When the Mother attempted to have the child returned to commence her school year in Grande Prairie, the Father advised he had registered the child for school in Calgary and had no intention of returning her to the Mother's care in Grande Prairie. Due to finances and other factors, the Mother took no immediate action to have the child returned to Grande Prairie. Thereafter, the Father obtained a Variation Order giving him primary care of the child and sole decision-making authority. The Mother did not respond to the Father's Application or appear in Court on the date of the Application.

From the time of the Variation Order up until the Binding JDR, the Father made it very difficult for the Mother to spend any time with the child. As a result, the Mother was forced to return to Court on several occasions for specified parenting time. Despite the fact that all Orders provided the Mother with "any other time with the child as may be agreed between the parties", the Father refused to cooperate in maximizing the Mother's time with the child and repeatedly made excuses as to why the child was busy or unavailable at all times other than the Mother's specified (Court-ordered) visits with the child. The Mother alleged the Father would not allow her private telephone conversations with the child, and would utilize the speaker-phone function of his cell phone for all conversations the child had with the Mother. The Father admitted to doing this on some occasions. The Father refused to share information regarding the child with the Mother, including important medical information and significant travel plans. Up until just prior to the Binding JDR, the Mother had never seen a report card for the child. The Father repeatedly stated he had no problem sharing





this information with the Mother, nor with the Mother spending time with the child, yet he continued to be uncooperative and resistant in his actions.

The Mother brought an Application to have the child returned to reside primarily with her, in Grande Prairie.

Following a Binding JDR held on March 11, 2013, it was ordered that the child would complete her school year with the Father in Calgary and then return to reside with the Mother in Grande Prairie thereafter.

The Court's decision and oral reasons for the decision were given on April 9, 2013 are summarized as follows:

With respect to the preliminary threshold issue of whether there had been a material change in circumstances warranting a change to parenting, the Judge stated that the fact that the Mother was forced to return to Court on multiple occasions to obtain specified parenting orders constituted a material change in circumstances allowing for variation.

Having found the circumstances of the case met the preliminary test for variation, the Court went on to analyze the case with reference to all of the factors speaking to the best interests of the child set out in Section 18 of *The Family Law Act*. The Court noted that all of the factors are to be considered and the analysis must be a comprehensive one, with no single factor carrying more weight than any others.

The court noted that the child had a strong bond with both the Mother and the Father and that it was clear that both parties care a great deal for the child and are able to meet her basic needs. The Judge accepted that the Father had provided the child with a stable home and ensured she participated in extracurricular activities. However, the Court noted some concern with respect to the Father's ability to recognize all of the child's needs and prioritize accordingly. The Court referenced the Father's tendency to cite the child's extracurricular activities as the reason why the child was unable to see the Mother and stated there did not seem to be an understanding on the Father's part that it is in the child's best interests to have both parents involved in her life. Simply put, the Father appeared to value the child's attendance at extracurricular activities higher than time spent with the Mother. The Father's general inflexibility regarding the Mother's parenting time was attributed to his own skewed priorities for the child by which he sought to fit the Mother into the life the Father had created for the child. In distinction, the Court noted that the child was in the Mother's primary care for the first 5 years of the child's life and, throughout that time, the Mother made efforts to ensure the child was able to spend time with the Father, despite the geographical

distance between them. In addition, the Father had consistently demonstrated an unwillingness to communicate and co-operate on issues affecting the child. The Court made particular reference to the Father's failure to communicate with the Mother regarding a serious health incident concerning the child as well as regarding significant travel with the child out of the country. The Court was not satisfied with the Father's low level of communication with the Mother regarding the child.

The Judge considered the fact that the Father had not encouraged or promoted the child's maternal cultural heritage, but rather promoted the development of his own cultural heritage in the child, exclusively. The Judge noted this was particularly concerning given that the parties' original Mediation Agreement had been very specific regarding the development of both the child's maternal and paternal heritage. The court expressed concern regarding the resistance of the Father to a relationship between the child and the child's maternal grandmother noting that, absent some valid concern, the Father should instead be encouraging the child's relationships.

#### *Conclusion*

Ultimately, the Court determined that the past was, in the circumstances, a good predictor for the future and that the child was more likely to benefit from a meaningful relationship with both of her parents if she were returned to the Mother's primary care. The Court returned the child to the Mother's care in Grande Prairie, having considered all of the factors set out in Section 18 of *The Family Law Act*, and determined that doing so was in the child's best interest.

## Lawyer Profile

### Brett Coleman

The newest member of the Vogel team, Brett was admitted to the bar in late 2012. She practices mostly in Family Law and Personal Injury. She obtained her Law degree from the University of British Columbia after attending the University of Lethbridge where she received a degree in Sociology. Brett, who grew up in Lethbridge, loves the human aspect of law and helping people through difficult times. When she's not working, she likes to be outside and often heads to the mountains to snowboard.



# Cheers to Charity

by Andy Hayher

You cannot fully understand how life is for those who are different from you until you lived a day in their lives. Recently I was able to better understand how life is for Calgarians who suffer from conditions that require them to be in a wheelchair.



The Canadian Paraplegic Association and the Calgary Health Trust team up annually for the Chair Leaders fundraising event. The event allows volunteers to spend a day in a wheelchair and understand how daily life is for Calgarians who are in a wheelchair. Vogel LLP is a sponsor of the event and this year I volunteered to spend one day in the shoes of a fellow Calgarian who navigates in a wheelchair.

Immediately I knew that I had bit off more than I could chew. A simple obstacle course to “familiarize” myself with the wheelchair left me wondering if I would even be able to get onto the HandiBus to be transported to work. I often see Handibuses on the road when I am driving, never really thinking twice about how important a role that they play in the lives of those with wheelchairs. After spending a day in a wheelchair, I now appreciate the vital role they play in the lives of Calgarians who use the HandiBus service on a daily basis.

Opening doors, catching elevators and simply getting into my office became arduous tasks. Immediately it became clear that even the simplest things that we take for granted can be a struggle for those who are in a wheelchair. Our office did not pose much in the way of accessibility issues; however, given my novice ability, even navigating the wheelchair was problematic for me.

The goal of the Chair Leaders event is to bring to the forefront the accessibility issues faced by Calgarians in wheelchairs. They have certainly succeeded in that goal. Looking back, it was an incredibly rewarding experience and one that I will not soon forget. The Canadian Paraplegic Association (Alberta) is to be commended for organizing this event and we at Vogel LLP are thankful for the opportunity to be involved.

In April 2013, following a settlement in favour of one of our Personal Injury clients, Vogel LLP donated \$10,000 to the Department of Clinical Neurosciences at Foothills Medical Centre. The money will be put towards iPads, a TV and DVD player, and other items for patient and family comfort and rehabilitation.



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