Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 7220764 v Bundi, 2020 ABQB 757

Date: 20201204
Docket:2003 13386
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 772 0764
o/a Essex House

Applicant

- and -

Shem Bundi

Respondent

Endorsement
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] The father of a four-year-old girl fights a condominium board's bid to evict the child (and effectively him too) for breach of the condominium's "no minors in residence" bylaw.

[2] The father does not dispute the bylaw. He instead points to an exception for a condominium occupant who, after his or her occupancy begins, and owing to "unforeseen circumstances", becomes the primary parent of a minor.

[3] The board argues that the exception does not apply.

[4] I find that the exception applies, sheltering the father and child here.

B. Background

Previous and current "age" bylaw

[5] From May 5, 1999 until March 2, 2020, the condominium's bylaws barred residence by a minor (per ss 43(c)):

> **No unit shall be occupied as a residence by any person under the age of Eighteen (18) years of age** provided that this resolution may be amended by ordinary resolution. Any resident who has not reached the age of eighteen at the date this [bylaw] is approved [May 5, 1999] shall have the right to remain in residency. [emphasis added]

[6] The change in March 2020 had its genesis in summer-2019 bylaw amendments[1], sparked in turn by recent changes to the ***Alberta Human Rights Act*** addressing age-restricted residences. Congruent with the ***AHRA*** changes, a new "age" provision was added to the bylaws (s. 90):

> (a) To be consistent with the age restriction which was in the Corporation bylaws prior to January 1, 2018, an eighteen (18) year age restriction is brought forward into this draft of bylaws.
>
> (b) **A Unit may not be occupied by a person who has not attained their eighteenth (18th) birthday.**
>
> (c) **Notwithstanding Bylaw 90(a), a Unit may be occupied by a person who has not attained their eighteenth (18th) birthday if that person**:
>
> (i) is a surviving spouse or adult interdependent partner of a deceased former occupant of the Unit who, at the time of death, was cohabiting with the deceased former occupant.
>
> (ii) is providing home-based personal or health care services to an occupant of the Unit
>
> (iii) **is or are minors, related by blood**, adoption, marriage or by virtue of an adult interdependent partnership, to an occupant of the Unit, **of whom the occupant has, since commencing occupancy of the Unit, become the primary caregiver due to an unforeseen event.[2]**
>
> (d) On December 31, 2032, the references within this age restriction Bylaw to the words or numbers of "eighteenth" or "18th" are amended and replaced by "fifty fifth" and "55th".
>
> (e) Any person who resides in a Unit as of December 31, 2032, who ahs not attained their fifty fifth (55th) birthday is grandfathered and permitted to remain. [emphasis added]

[7] Subsection 32(4) of the *Condominium Property Act* defines when original or new bylaws take effect:

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[1] In his capacity as a unit owner, the father voted in favour of the new bylaws.

[2] These exceptions are patterned on the minimum-age-occupancy-restriction exceptions in section 1 of the *Human Rights (Minimum Age for Occupancy) Regulation*, Alta Reg 252/2017, under the *Alberta Human Rights Act* (ss. 4.2 and 5(4)).

> An amendment, repeal or replacement of a bylaw does not take effect until
>
> (a) the corporation files a copy of it with the Registrar [of Land Titles], and
>
> (b) the Registrar has made a memorandum of the filing on the condominium plan.

[8] The Registrar made the required memorandum on March 2, 2020, making the new bylaws effective that date.

[9] No one argued that the new bylaws had any operation before that date.

Family and residence history

[10] The father bought his unit in the condominium building in 2013 (the Unit). He has alternated between living in the Unit and renting it to various tenants while living elsewhere in Edmonton.

[11] In 2014, he married a woman from Arizona, who initially continued to live there, and in 2016 they had a child (the girl in question), who first lived with the mother in Arizona.

[12] In fall 2016, in light of health difficulties experienced by the mother, the father took over parenting of the daughter, returning with her to Canada and moving with her into the Unit for about three months, before they moved to another condominium building in Edmonton. (The Board had reminded the father of the "no minors" rule during their stint in the Unit.)

[13] In March 2017, the mother joined the father and daughter in Edmonton and began living with them at the other building.

[14] In July 2017 the couple's son was born, but, sadly, he died a few days later.

[15] The family moved into the Unit in February 2018. The Board again reminded the father of the "no minors" rule and had taken initial steps (lawyers' letters) to obtain an order to enforce that rule, before the family moved out in July 2018.

[16] In August 2018, the couple decided to separate. The mother moved elsewhere in Edmonton, and the father eventually moved with the child back into the Unit, at the end of May 2019.

[17] The parties' post-separation parenting evolved from initially mother as primary parent, to informal back-and-forth parenting depending on the parents' respective work schedules and availability, and eventually to a formal shared-parenting arrangement (per a Provincial Court order in June 2019) on a 4-3-3-4 rhythm.

[18] The record is not clear as to the timing of those evolutions. The Board's understanding (per its February 26, 2020) letter to the father was that "a minor child has been living in the Unit on a full-time basis [with the father] since approximately October 2019."

[19] The father's email in response (March 9, 2020) did not expressly contest the Board's assertion of full-time residence by the child over that period but neither did he concede that.

[20] The father did give evidence of a material family change around that time:

> In March 2020, after the outbreak of coronavirus disease …, [my] wife decided to return to Phoenix, Arizona. I became the sole caregiver for [our daughter] since then."

[21] The father also gave evidence that "I don't know my wife's current address [in Arizona], but she has called me from a [certain phone number apparently in the] Phoenix metropolitan area."

[22] The Board provided evidence of protesting the child's post-May-31-2019 residence in the Unit via June 2019, August 2019, February 2020, and May 2020 letters, part of an ultimately unproductive (from the Board's perspective) back-and-forth with the father about the child's ongoing residence in the Unit.

[23] The Board also provided evidence of many complaints by owners of other units in the building, mostly child-noise-related, at various points including the stretch from June 2019 to the present.

[24] The Board eventually applied to terminate the child's residence in the Unit, leading to the application I heard on November 25, 2020.

C. Issues

[25] The issues are:

(1) which bylaws apply (as between the "circa 1999" and "circa 2020" versions);

(2) under the applicable bylaws, whether the child's current residence in the Unit is barred;

(3) if her current residence is barred, whether the Board is entitled to the injunctive relief it seeks; and

(4) if not, what relief, if any, should be granted.

D. Analysis

1. Which bylaws apply (as between the "circa 1999" and "circa 2020" versions)?

[26] No debate exists here about when the new bylaws kicked in. Everyone agrees they took effect as of March 2, 2020.

[27] The Board did not argue that the old bylaws continued to have some, or any, effect after March 1, 2020.

[28] If the Board had brought its application and had it heard before March 2, 2020, the old (i.e. then-existing) bylaw would have been operative. Under that regime, the answer to "can she reside in the Unit?" would have been obvious: no, since she was under eighteen and since the rule was strict (no exceptions).

[29] As it is, the Board did not bring its application until after March 2020. Accordingly, the state of affairs that governs is that existing now, to which the new bylaws apply. Whatever effect the old rule had, and whatever outcome the Board might have achieved if it had applied when the old rule applied, are immaterial here.

[30] This is the unquestionable effect of ss. 32(4) *CPA*: the new "age" rule, inconsistent with the old one, took effect in early March 2020, ousting the old rule completely.

2. Under the new "age" rule, is the child's current residence in the Unit barred?

[31] The father acknowledges the existence and effect of the new rule: no minors can reside in the building. He puts his eggs in one basket, namely, the exception for "occupant becoming a primary caregiver due to an unforeseen event."

[32] The father's evidence is that "in March 2020", when his separated spouse relocated to Arizona, he became the child's primary (and sole) caregiver.

When did Mr. Bundi become the child's primary caregiver?

[33] One might ask: did he only acquire that status on her relocation, or did he have that status before that? For the "minor child caregiver" exception to apply, he had to **become** the primary caregiver after taking occupancy.

[34] On that aspect, I note the following:

- the Provincial Court shared parenting order (June 2019) was not varied or replaced at any point;
- the father deposed that he "became" the sole parent in March 2020;
- per the father, the mother continued to reside in Edmonton until then;
- the father was not cross-examined on those (or any) points;
- the Board's "understanding" (per its February 26, 2020 letter) that the child had been in full-time residence at the Unit "since approximately October 2019" was indeed merely an understanding: it presented no evidence of the child's full-time residence through that period;
- apparently taking the noise complaints here as a rough proxy for when the child was residence at the unit, the Board's representative deposed that "between October 2019 and February 2020, the Corporation received **numerous written complaints** from other [condominium] residents regarding the presence of and noise caused by a young child in the Unit." However, it did not put **any** written complaint arising in that period into evidence. In the only complaint from that period for which **any** details are provided (the December 28, 2019 complaint summarized at para 29(a) of the Board's affidavit), the complainant refers to noise "on a daily basis for approximately the past 4 weeks now" i.e. roughly back to the start of December 2019;
- a downstream complaint (made March 28, 2020) provides no timing details other than noise on March 22, 2020;
- another downstream complaint (made May 26, 2020) provides a log of noise complaints covering April 29, 2020 to May 24, 2020;
- the only other complaint for which details are provided (made June 3, 2020) refers to seeing and hearing the child "many times over the past 6 months [i.e. back to early December]" and to hearing "screaming … virtually every day." Given the long span of this complaint, the absence of specifics, and the long "reporting delay", I discount the "virtually every day" aspect of this complaint. If the frequency had actually been as reported, the complaint would presumably have

been made much earlier, and it would have been echoed in other owners' complaints i.e. with similar noise-level, timing, and frequency details; and

- tellingly, the made-March-28-2020 complaint states that "the child is at home 24/7 except when **the parents** take her out some place" i.e. this owner confirmed some degree of participation by the mother in the child's life.

[35] From all this evidence, I conclude that the mother was not completely out of the picture before March 2020. Even colouring in all the "noise-filled" days and weeks reflected in these complaints (and, again, discounting the "virtually every day" one for the reasons provided), the evidence shows large gaps e.g. no actual mention of noise complaints at all between early June 2019 and late September 2019 and no actual details provided of complaints in October and November 2019, and same for January and February 2020.

[36] From this, I infer that the child was not in residence during at least some of the "no apparent noise" periods and, by extension, that she was in the care of her mother for those periods or at least some of them.

[37] The Board asserted (at least implicitly) that Mr. Bundi had already become the "primary parent" before his wife's relocation to the US. I find that it had the onus to prove that assertion.

[38] However, given:

1. Mr. Bundi's evidence (on which he was not cross-examined) that he "became" the primary caregiver in March 2020, bolstered by his evidence that he does not even know where his wife is currently living (other than apparently in Arizona);
2. the legal status quo through to that point (i.e. shared parenting), per the Provincial Court order);
3. the mother's apparent continuing involvement through to that point; and
4. as reviewed above, no evidence that the child was actually in full-time residence with the father in the lead-up to March 2020 or reflecting any particular division of "on the ground" parenting as between Mr. Bundi and his wife;

the Board has not discharged its onus i.e. proved that Mr. Bundi was already functioning as the "primary caregiver", within the meaning of subsection 90(c), before his wife moved away.

[39] Accordingly, I find that Mr. Bundi became the child's primary caregiver only on his wife's departure from Canada. After that point, any uncertainty about the "on the ground" division of parenting evaporated: he was the full-time parent (i.e. primary caregiver) after that.

When did Mr. Bundi's wife leave Edmonton?

[40] The only evidence on this is point is from Mr. Bundi. He deposed that his wife left "after the outbreak of coronavirus disease (COVID-19)."

[41] I infer that means after the outbreak in Alberta.

[42] In ***Servus Credit Union v Proform Management Inc***[1], I noted the outbreak's timing in Alberta:

> Covid-19's now-massive impact was only beginning to emerge in the week of March 9-13. I take judicial notice that no provincially ordered "restrictions on gatherings" were in place by that week. ... The Alberta Government's Covid-19 case statistics [www.alberta.ca/stats/covid-19-alberta-statistics-htm] only start as of March 8, 2020. The bar-graphs are not calibrated to allow perfect counts, but, [there was] a baseline of zero confirmed cases as of March 8, 2020 ....

[43] With the Board not cross-examining Mr. Bundi on his evidence that his wife left after the outbreak began in Alberta, and in light of no confirmed Covid-19 cases in Alberta at least through March 8th, I find that Mr. Bundi's wife left at some point after March 8th.

What is the significance of Mr. Bundi's wife leaving after March 2nd?

[44] The significance is that the new "age" rule, which took effect March 2nd, was in place when Mr. Bundi's wife relocated, leaving him as the child's primary caregiver. Accordingly, Mr. Bundi fits within the opening words of the exception i.e. an occupant who "has, **since commencing occupancy of the Unit, become** the primary caregiver [of a minor] …."

[45] The question becomes whether, given the exception's closing words, that change in parenting was "due to an unforeseen event."

Was this parenting change due to such an event?

[46] The Board's counsel noted that the condominium bylaws do not define "unforeseen event." Both she and the father's counsel provided extracts from Canadian cases interpreting the phrase and equivalents ("unforeseen circumstance", "unexpected [event]", "accident" (as in "unexpected, unforeseen, and unintended happening")) in various contexts. The central theme was the same: something that was not, nor should have been, expected.

[47] I also note:

- "unforeseen event" is not defined by or otherwise mentioned in the *Condominium Property Act*
- same for the *Human Rights (Minimum Age for Occupancy) Regulation* under the *Alberta Human Rights Act* (mentioned earlier), which created the three-pronged exception on which the bylaw here was modelled;
- the *Canadian Oxford Dictionary* (2nd edition –2004) defines "unforeseen" as "not foreseen." It defines "foresee" as "see or be aware of beforehand." Converting the tense, "foreseen" means "seen or been aware of beforehand." Similarly, the *New Shorter Oxford English Dictionary* (1993) defines "unforeseen" (first definition) as "[t]hat has not been foreseen" and "foresee" as "[b]e aware of beforehand; predict (a thing, *that*)";
- no evidence here shows or signals that Mr. Bundi asked or somehow compelled his wife to leave Canada or otherwise precipitated her departure or that he facilitated it in any way;
- no evidence shows that the mother's departure is temporary. (As noted, the father's evidence is that he does not even know where his wife is currently living, other than in Arizona);

- nothing signals that the mother sought to take the child with her to Arizona or that she has taken or is taking any steps to regain any parenting of the child;
- no evidence showed any longstanding or even pre-existing-at-all intention of the mother to return to the US; and
- the Board did not point to anything in evidence as the basis (or bases) for the father having foreseen (on any standard) the mother's departure.

[48] It is not unknown for a parent to relocate at a distance, leaving the other parent as the primary caregiver i.e. effectively abandoning the remaining family members. But nothing in the evidence here showed that the father or anyone else should, or even could, have foreseen that happening here.

[49] As for any argument that "anything can happen" and, by extension, "anything can be foreseen", that would effectively deprive this exception of any meaning.[3]

[50] Instead, "unforeseen event" must be interpreted here as not reasonably foreseeable i.e. as something that could not have been predicted on the basis of the available evidence.

[51] For example, a condominium occupant who decides to adopt a child could not be said to have "become … the primary caregiver … due to an unforeseen event." Same for an occupant who acquires that status after arranging (somehow) for the other parent to exit as a parent.

Impact of the current pandemic

[52] The father argued that the current pandemic cements his "have become primary caregiver" position, with the mother in Arizona and the Canada-US border largely closed.

[53] I find that, with no evidence of any intention by the mother to return to Canada or, in any case, to regain parenting (or some subset of it) anywhere, the pandemic does not affect the analysis here.

E. Conclusion

[54] For these reasons, I find that the father indeed "became … the primary caregiver [of a minor child] due to an unforeseen event" i.e. the mother's unexplained-on-the-evidence decision to relocate, apparently permanently, to the US.

[55] As a result, the Board's "no minors in residence" rule does not apply here.

[3] ***Toronto District School Board v CUPE Local 4400 (Unit B)***, 2016 CanLII 32987 (ONLA) at para 42

[56] If the parties are unable to agree on costs, I invite them to seek directions (via one-page letters, respectively, sent to my assistant and copied to each other) by December 15th.

Heard on the 25th day of November, 2020.
Dated at the City of Edmonton, Alberta this 4th day of December, 2020.

M. J. Lema
J.C.Q.B.A.

Appearances:

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