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— Franks & Zalev - This Week in Family Law

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Contents

How to Encourage Parties to Settle Interim Parenting? Don't Punish Them for Doing So!

Seidel v. Seidel, 2021 CarswellSask 372 (Sask. C.A.) — Leurer, Barrington-Foote and Kalmakoff JJ.A.

Courts are loath to interfere with interim orders in family law proceedings. Generally, appellate courts prefer that, rather than spend time and money appealing interim orders, parties push on to trial. The same rationale underpins a second principle, namely that courts should generally not vary parenting arrangements on an interim basis without compelling reason to do so. In *Seidel*, the Saskatchewan Court of Appeal found it necessary to interfere with an interim parenting order because the court below overlooked the second principle.

The appellant mother and the respondent father married in 2009. They had two children born in 2012 and 2014. They separated on November 12, 2018, and the father moved out of the home shortly after separation.

In April 2019, the parties entered into a domestic contract (an interspousal agreement in Saskatchewan). The Agreement dealt with all matters arising out of the parties' marriage and separation.

With respect to parenting, the Agreement provided for joint custody of the children and for the children to have their primary residence with the mother. The father was to have parenting time with the children three out of four weekends each month. The Agreement also fixed the father's support obligations in accordance with the *Federal Child Support Guidelines*, SOR/97-175.

Less than one year after the Agreement was signed, the father issued a petition claiming a divorce and assorted corollary relief. Simultaneously, he served a Notice of Application claiming an interim equal parenting schedule (alternating weeks) and an adjustment to his child support obligations.

The father's evidence was that he wanted more parenting time but that the mother refused. He alleged that the parenting arrangements in the Agreement were for the specific purpose of meeting the parties' work schedules because, at the time, the mother had the ability to rearrange her schedule to care for the children while the father was at work. At the time, the children were in grade two and pre-kindergarten, and the parties intended to minimize/avoid the need to pay for childcare. However, swore the father, the Agreement was no longer relevant to the children's childcare needs because the youngest child was then entering grade one, and both children would be at a school with before-and-after school care programs.

The mother's evidence was that she had been primarily responsible for the children while the father worked. She provided details as to the household arrangements, and gave evidence as to how the children were used to the parenting arrangements in place. She also set out some concerns with the father's parenting.

While recognizing the arrangements as set out in the Agreement, the Chambers judge also set out that the "presumption" is that it is in the best interests of the children to maximize time with each parent, and that there was no reason that could not be achieved in this case. He found that some transition would be appropriate, and that "a gradual transition to a more shared parenting arrangement would also be better for the children than an abrupt change." The Chambers judge then made an order providing for gradually staged increasing parenting time for the father. By July of 2021, the parties would be in a full week-about rotation.

To start, the Chambers judge also ordered the father to pay child support of $1,582 a month based on the *Guidelines*, without set-off. And then, as the parties approach shared parenting, the set-off would apply such that the father would pay child support in the net amount of $785 per month.

The mother appealed arguing that the Chambers judge erred in ignoring the agreed-upon parenting arrangement that had been in place since the parties' separation and in the Agreement — without any evidence that the children were at risk or of any other compelling circumstances.

The Court of Appeal started with the well-accepted proposition that a court should not vary interim legal or *de facto* custody arrangements absent evidence that the child or children are in some way at risk, or for other compelling reasons: *Guenther v. Guenther* (1999), 1999 CarswellSask 117 (Sask. Q.B.). [See also: *McEachern v. McEachern* (1994), 5 R.F.L. (4th) 115 (Ont. Gen. Div.); *Shwaykosky v. Pattison*, 2015 CarswellAlta 2027 (Alta. C.A.); *Greve v. Brighton*, 2011 CarswellOnt 8814 (Ont. S.C.J.); *P. (D.) v. B. (R.)* (2007), 44 R.F.L. (6th) 9 (P.E.I. C.A.).]

In Saskatchewan, *Guenther* is the seminal case with respect to changes in interim custody and primary residence (as opposed to changes in interim access), as subsequently expressed by Justice Ryan-Froslie in *Gebert v. Wilson* (2015), 69 R.F.L. (7th) 17 (Sask. C.A.):

> [11] First, the principle expressed in *Guenther* does not displace the legislative requirement enunciated in both the *Divorce Act*, R.S.C. 1985, c. 3 and *The Children's Law Act*, 1997, S.S. 1997, c. C-8.2 that in making decisions with respect to parenting arrangements, the paramount consideration is the best interests of the child. In our view, the principle itself is rooted in that paramount consideration. It recognizes that changes in custody and primary residence have a profound effect on children — altering their day to day home environment, their routine, their contact with important people in their lives including caregivers, siblings, extended family and friends and may result in a change of school and activities — and thus, generally should not occur on an interim or temporary basis as a final resolution may result in such a change being reversed with all of the same attendant disruptions to the child.
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> [12] Second, the principle applies generally to changes in custody and primary residence, **as opposed to changes in access**. In *Guenther*, while Laing J. refused to change the child's custody on an interim basis in the face of the parent's written agreement, he did increase the mother's parenting time with the child. Usually, changes in access will not have the same profound effect on a child as changes in custody or primary residence.
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> [13] Third, the principle recognizes that the *status quo* may be changed on an interim basis if there is a compelling reason to do so, or if the child is at risk. That is how this Court interpreted *Guenther* in the recent case of *Napper-Whiting v. Whiting*, 2014 SKCA 33, 433 Sask R 235 . . . [emphasis added]

The Court of Appeal then helpfully explained what is meant by "status quo" for the purpose of applying the principle. A *status quo* is neither one of short duration nor the situation which arises in the immediate aftermath of separation. Nor would it apply to a recently "engineered" *status quo*. Rather, in applying this principle, the court should focus on the *status quo* that existed during the parents' relationship — before separation — and not what was created in the immediate aftermath of separation. Only once parents understand that the relationship is over and that separation will be long-term, do parents turn their minds to questions of decision-making and parenting schedules. Continuing to quote from *Gebert*, Court of Appeal opined:

> [14] . . . It is important that parents are able to pursue the goals of reconciliation and parenting agreements without fear that their failure to immediately commence a court application to determine parenting issues will prejudice their position

> because a new *status quo* is created. We recognize that the effluxion of time may eventually result in the establishment of a new *status quo*. That, however, is a question of fact for determination of the Chambers judge, taking into account among other things, the length of time that has passed since the separation, the reasons for the delay in bringing the application, and how the parenting regime was established (*e.g.* by agreement, unilateral action of one party, necessity, etc.). All of this must be considered against the backdrop of what is in the best interest of the child, including the relationship that the child enjoyed *with both parents prior to the separation*. [emphasis in original]

Similar sentiments have been expressed in other provincial courts as well: *Johal v. Johal* (2009), 72 R.F.L. (6th) 17 (B.C. C.A.); *Marshall v. Marshall* (1998), 42 R.F.L. (4th) 180 (N.S. C.A.); *Hewitt v. McGrath*, 2010 CarswellNS 423 (S.C.); *Button v. Konieczny*, 2012 CarswellOnt 12353 (S.C.J.); *Batsinda v. Batsinda*, 2013 CarswellOnt 18635 (S.C.J.); *A.L.M. v. V.L.S.* (2020), 47 R.F.L. (8th) 476 (Ont. C.J.).

In this case, the interim order made by the Chambers judge was a fundamental change to the *status quo*. The *status quo* had clearly been that the children had their primary residence with their mother, and at the time of the interim order, this situation had been in place for over 1- $^{1}/_{2}$ years. In making a change to the children's primary residence, the Chambers judge was not just "adjusting" the parenting arrangements. And the Chambers judge could only make such significant interim parenting changes if the children were at risk ***or*** there was another compelling reason to do so.

Unfortunately, the reasons of the Chambers judge did not suggest that his interim order was made with these principles in mind, and the interim decision did not evince any substantive (or compelling) reasons for making it.

While the Chambers judge was motivated by the "maximum contact" principle in s. 16(10) of the *Divorce Act*, that section does not, in fact, call for equal shared parenting. It merely directs courts (as it then read) to "give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child."

Section 16(6) of the amended *Divorce Act* now expresses the same principle in slightly different language: "In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child." However, no matter what the wording, s. 16(10) did not (and s. 16(6) does not) create a presumption in favour of shared parenting: *Ackerman v. Ackerman* (2014), 48 R.F.L. (7th) 1 (Sask. C.A.) at para. 40. Rather, what the "maximum contact" should be in any particular case depends on the best interests of the child.

So, ultimately, the Chambers judge did not give effect to the principle that the *status quo* should not be changed on an interim motion short of potential harm to the children or another compelling reason and also over-emphasized s. 16(10).

The fact was that, 1- $^{1}/_{2}$ years earlier, the parents had agreed that the children's best interests were served by an arrangement that involved a significantly different parenting arrangement than shared parenting. This was a problem for the father. But an even bigger problem for the father was the fact that the Agreement actually contemplated the circumstance the father said justified a change: that is, that the children would be attending school. And although that situation was contemplated, the Agreement did not contemplate a change in or review of parenting arrangements in those circumstances.

While the father expressed a strong desire for more parenting time and argued that him having more parenting time was actually in the children's best interests, he also had to acknowledge that the children were doing well under the parenting arrangements in the Agreement. And while he might very well succeed in getting more time — or even a more equal parenting schedule at trial, that was not the test. There was nothing in the record to establish any compelling reason to change the interim *status quo*.

Here, the proper course would have been to confirm the parenting arrangements in the Agreement and to move the matter along to a pretrial conference, and to trial. That is what the Court of Appeal did in allowing the appeal.

While we cannot dispute the import of the legal principles at play in *Seidel*, the continued application of these principles absolutely require counsel to ensure their clients understand that an interim arrangement — whether by agreement, order, or

even just *de facto* arrangements — may persist until trial. And, in the aftermath of COVID-19, that trial may be sometime in late 2035. This, of course, will have a cooling effect on parties settling their interim parenting disputes short of a motion.

This may be why some courts have been suggesting that it is the usual "material change" test and not the "compelling reasons" test that applies on a motion to change an interim parenting order: *Kirichenko v. Kirichenko* (2021), 55 R.F.L. (8th) 93 (Ont. S.C.J.); *Miranda v. Miranda*, 2013 CarswellOnt 9752 (S.C.J.); *Radojevic v. Radojevic*, 2020 CarswellOnt 14013 (S.C.J.); and *Sullivan v. Boucher* (2020), 52 R.F.L. (8th) 468 (Ont. S.C.J.).

Allow us to be so bold as to propose two possible solutions.

The problem: courts should be encouraging parties to settle the issue of interim parenting. But if parties know that any agreed-upon arrangement will likely last until a distant trial, in most cases, at least one of the parties will be reluctant to settle.

Solution 1: A "without prejudice" order does not create a *status quo*: *Button v. Konieczny*, 2012 CarswellOnt 12353 (S.C.J.); *Shaw v. Shaw* (2008), 62 R.F.L. (6th) 100 (Ont. C.J.); *Musheyev v. Gilkarov* (2016), 89 R.F.L. (7th) 444 (Ont. S.C.J.); *De Silva v. De Silva* (2016), 78 R.F.L. (7th) 130 (Ont. S.C.J.); *Rigillo v. Rigillo* (2019), 31 R.F.L. (8th) 356 (Ont. C.A.); *Hamilton v. Hamilton*, 2021 CarswellOnt 161 (S.C.J.). And if an order stated to be "without prejudice" does not create a *status quo*, surely parties can agree that the parenting provisions of an agreement will be "without prejudice." Therefore, perhaps parties can agree to "without prejudice" consent orders and agreements without having to worry that the provisions cannot be changed absent a material change (at best) or the need for "compelling" circumstances (at worst). This would *encourage*, rather than *discourage*, interim settlements.

Solution 2: When parties have agreed on interim parenting measures to avoid an interim motion, if the parties later disagree on changing parenting arrangements, perhaps the test for varying an interim *status quo* (where there has not yet been a parenting order) might be relaxed, so that the interim arrangements are a *factor*, but not essentially an insurmountable *bar*. That would encourage interim agreements and many of the settled parenting motions will, in fact, never re-appear in court.

Just a thought. Or two thoughts.

Not All Non-Disclosure Should a Mistrial Make

Smith v. Smith, 2021 CarswellOnt 15173 (S.C.J.) — Breithaupt Smith J.

Non-disclosure is such a serious problem in family law that numerous courts across Canada, including the Supreme Court of Canada in both *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.) at para. 9 and *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.) at para. 33, now regularly refer to it as "the cancer of family law litigation[.]" In *Leitch v. Novac* (2020), 38 R.F.L. (8th) 1 (Ont. C.A.), the Ontario Court of Appeal takes the analogy even further suggesting that "nondisclosure metastasizes and impacts all participants in the family law process."

But sometimes, allegations of non-disclosure can actually be misused to, as Justice Rogers put it more than 15 years ago in *Chernyakhovsky v. Chernyakhovsky*, 2005 CarswellOnt 942 (S.C.J.), "cause delay or to reap tactical advantage." Unfortunately, the Court's recent decision in *Smith v. Smith* may have allowed the wife in that case to do just that.

The wife commenced an Application against the husband in 2017. The husband retained an expert, and produced a valuation of his business. For reasons that are not discussed in the decision, the wife chose to proceed to trial without an expert report of her own.

In January 2020, the parties attended a Trial Management Conference and set the case down for trial. The Trial Management Conference judge noted in his Endorsement that there was still a "possible need for motions re: outstanding disclosure."

In September 2020, the wife brought a motion for further disclosure. She also sought to strike the husband's pleadings. However, the motion was adjourned several times, and was ultimately never argued.

The trial of the financial issues between the husband and wife started in October 2021. Both parties were represented by counsel.

The husband's theory of the case was that the parties "had long been in desperate financial straits and that the worst was avoided only by reliance upon the charity of many now-unpaid creditors[.]" The wife, on the other hand, took the position that "the family enjoyed a luxurious lifestyle and that [the husband] continuously moved funds between numerous prosperous corporations to cloud the true financial picture[.]"

As the wife was Applicant, she called her case first. She closed her case after six days of evidence.

After the wife closed her case, the husband started giving his evidence in chief. During the husband's evidence, on the morning of the 7 th day of the trial, he mentioned the name of a third party with whom he did business. The wife's counsel ran a corporate search over the lunch break, and apparently discovered that the husband was a Director of a company that had been incorporated prior to separation called "Great Lakes Crane & Rigging Co. Ltd." (the "Company") that he had not previously disclosed.

As a result of this discovery, and although the corporate search did not show whether the husband actually owned an interest in the Company, that afternoon the wife brought an emergency motion for an order that the trial "be suspended" so that she could conduct a "forensic analysis" of the husband's assets. She also asked for an order requiring the husband to "pay for the required forensic accounting to complete the analysis and that he comply with any requests for the disclosure of documents required for the professional to complete the forensic analysis[.]"

In the alternative, the wife argued that the trial should continue, but the Court should draw a negative inference against the husband.

The trial judge quickly dismissed the wife's alternative request for an adverse inference as "the making of such an Order mid-trial and before [the husband's] evidence has even concluded would be prejudicial and unnecessary," and was the type of thing that should be "left for closing argument[.]"

With respect to the wife's motion to adjourn the trial to allow her to conduct a "forensic analysis", the trial judge started her analysis by noting that the wife had not provided "a satisfactory explanation as to why [she] did not pursue her motion for disclosure and for the striking of [the husband's] pleadings in the Fall of 2020", and that "the situation as a whole seems suggestive of an inattentiveness to trial preparation."

Nevertheless, the trial judge granted the wife's request to adjourn the trial to allow her to further investigate the husband's finances. The trial judge was concerned that "this matter was not actually ready to proceed to trial, despite the hearing of six days of evidence." Furthermore, while the wife would obviously cross-examine the husband about the Company "to impugn [his] credibility in cross-examination," the trial judge was worried that this might put the court in a position of having to determine "his Net Family Property founded on shaky and/or non-existent valuation evidence."

But the trial judge didn't stop there. Instead of just granting the wife's request for an adjournment, the trial judge ordered a new trial because she did "not see how *this* trial could continue on the basis of the [wife's] *now completed* case." She also recused herself from hearing the new trial because she was concerned that "an informed person, viewing the matter realistically and practically — and having thought the matter through would conclude that [her] having already seen the entirety of [the wife's] testimony could impact upon any attempt at a fresh assessment of her credibility in the second trial."

In other words, after six days of evidence, the trial judge declared a mistrial. She also declined to order the wife to pay the husband's costs thrown away and reserved the issue of costs to the new trial judge because she was concerned that if the husband "has actively misled the Court by failing to make full and frank disclosure, it would be disingenuous for costs incurred by him for these last six days of trial to be paid to him by the [wife]."

Very respectfully, we think that the trial judge got this one wrong.

The wife decided to proceed to trial without arguing her outstanding disclosure motion or taking any of the other steps available to her under the *Family Law Rules* to obtain further information about the husband's finances. She voluntarily closed her case after calling six days of evidence. Litigants are — and should be — bound by their strategic choices: *Griffi v. Lee*, 2005 CarswellOnt 7550 (S.C.J.); *Warren v. Gilbert Estate*, 2008 CarswellOnt 5933 (C.A.); *Travelers Transportation Services Inc. v. 1415557 Ontario Inc.*, 2010 CarswellOnt 9745 (S.C.J.); *Killam v. Killam*, 2018 CarswellBC 512 (C.A.).

As Justice Bale recently noted in *CAS v. J.J., C.M. and Six Nations of the Grand River* (2021), 52 R.F.L. (8th) 306 (Ont. S.C.J.), a mistrial requires the court to be satisfied that "there has been a 'fatal wounding' of the trial process", and that "no other curative measure could salvage a just and fair trial[.]" Here, in our view, the mere fact that the wife had learned that the husband was a Director of a company without *any* evidence to suggest that he had an interest in it and/or that it had any value, was not the type of "fatal wounding of the trial process" that left the Court with no option but to declare a mistrial that neither party requested. The fact that the husband was a director of this company may have led to other important evidence. Or it could have amounted to absolutely nothing.

[For further discussion about mistrials in family law cases, see our comment on *CAS v. J.J., C.M. and Six Nations of the Grand River* in the August 16, 2021 (2021-31) edition of *TWFL*, and Philip Epstein's discussion of *Forsythe v. Tone*, 2018 CarswellOnt 9340 (S.C.J.) in the July 2, 2018 (2018-26) edition of *TWFL*.]

In our view, instead of declaring a mistrial, the trial judge ought to have dismissed the wife's request for an adjournment and ordered the trial to continue. The wife could then have tried to adduce evidence about the Company (or any other additional issues she wanted to raise) by cross-examining the husband and his witnesses. If necessary, she could have also sought leave to reopen her case to allow her to subpoena a representative of the Company and obtain information about whether the husband had an interest in it, and whether that interest, if any, had any value.

If the wife was able to establish that the husband had undisclosed assets, the trial judge could then have drawn any necessary inferences (adverse or otherwise), or provided directions for how any additional information she needed in order to decide the case was going to be produced. Alternatively, if the evidence did not establish that the husband had any additional assets, the trial judge could have proceeded to decide the case based on the record before her.

Instead, seven full days of trial are now lost in the abyss, and the parties must now start over from the beginning. Of course, should it turn out that the husband had undisclosed material assets, he should have to pay the costs of this dalliance. But either way, the system pays, and everyone loses.

Expert Expenses Expected and not Exceptional

MDS Inc. v. Factory Mutual Insurance Company, 2021 CarswellOnt 17074 (C.A.) — Feldman, Harvison Young and Thorburn JJ.A.

In the September 20, 2021 (2021-36) edition of *TWFL*, we discussed *Charlesfort Developments Limited v. Ottawa (City)*, 2021 CarswellOnt 10606 (C.A.), where the Ontario Court of Appeal clarified that a party can claim costs for an expert even where the expert is not called to give evidence at trial.

In *MDS Inc.*, the Ontario Court of Appeal made it clear they were not kidding. A party can recover (reasonable) expert fees for expert reports that were (reasonably) necessary for the proceeding, even where the expert was not actually called to give evidence.

MDS Inc. was an insurance case — but there is no good reason why the same principles ought not apply in family law. Here, the dispute was about the interpretation of an insurance policy and whether the policy covered business losses of the respondents. It all came down to the definition of "corrosion." Fascinating. The insurer lost at trial but was successful on appeal.

The parties could not agree on the quantum of trial costs. The trial judge had awarded the respondents costs of $1.2 million. The appellant sought its partial indemnity trial costs of $561,103.95 and disbursements (at trial), including fees of $241,284

and disbursements of $255,268.17. As the insurer was entirely successful on the appeal, it was entitled to its reasonable costs of the trial.

Costs jurisdiction emanates from section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 — the same source of jurisdiction for family law costs considerations.

The issues in the case were complex and important — over $50 million was in issue, and each side had retained several experts to assist with the case. The experts had been retained to quantify the losses.

The Court of Appeal agreed that the appellant should be allowed to recover the disbursements for expert advice regardless of whether the expert reports were introduced at trial or relied on by the trial judge. Each of the parties engaged multiple experts, and the Court itself appointed an expert. All expert fees were found to be incidental to the litigation. Although the insurer's expert report was not introduced at trial, it was determined that the amounts had been reasonably incurred to respond to the issues raised by the respondents.

The Court then set down the rule clearly: reasonable expert fees for expert reports reasonably necessary for the conduct of the proceeding are recoverable whether or not the expert is called to give evidence. The fact that the expert was not called to give evidence is a factor to consider — but the fact the expert was not called does not bar recovery.

Furthermore — and this is important for family cases — the reasonableness of retaining the expert is to be considered *at the time the expense is incurred not in hindsight*. This is a common occurrence in family law as parties are often in the position of having to retain experts to provide or critique expert reports early in the litigation.

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