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— Franks & Zalev - This Week in Family Law

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Some Much Needed Clarity on the Test for Interim Variation of a Final Parenting Order . . . Or Was it the Test for a Variation of an Interim Parenting Order? We can Never Keep That Straight . . .

S.H. v. D.K., 2022 CarswellOnt 2219 (Div. Ct.) — Dambrot J., Swinton J., Copeland J.

In this case, a unanimous Divisional Court panel addressed the test for an interim variation of a final parenting order.

The mother and father were married in 2006 and separated in 2013. There was one child, a daughter, "O". In 2014, the parties entered into a Separation Agreement that was converted into a final order. Of particular relevance was a paragraph in the final order that read "The parties may review [O.'s] residence schedule on or after April 1, 2019, without having to prove a material change in circumstance."

The schedule that was in place for seven years (including the period before the final order) saw O. having time with her father on Tuesdays and on alternating weekends from Friday to Monday morning. There was one small change in 2017 when O. began spending overnight time with her father on Tuesdays.

On January 30, 2020, the mother brought an Application to obtain updated financial disclosure from the father, to review his child support obligations in light of his increased income, and to make some minor adjustments to the schedule relating to school breaks and religious holidays.

The father served his Answer on March 6, 2020 (as amended on August 19, 2020), wherein he made a claim for joint decision-making authority and an order "varying" the final order such that the parties would have equal and shared parenting of O. The fact that the father used the term "vary" was of particular importance in this case.

The father brought a motion on April 27, 2021, seeking a temporary order "varying" the final order and increasing the father's parenting time with O. to an equal and shared schedule by "varying" two paragraphs in the final order. The motion was heard on June 10, 2021, and was characterized as a "motion to vary a final consent order on an interim basis" and where the father sought a "temporary variation of a final parenting order."

O. was 12 at the time of the motion.

Releasing his reasons on June 25, 2021, the motion judge found in favour of the father granting him an interim equal parenting schedule with O. He also awarded costs to the father in the amount of $25,000.

The mother sought leave to appeal to the Divisional Court, which was granted on October 8, 2021. The Divisional Court panel also stayed the motion judge's decision pending the appeal and ordered the appeal expedited.

The Divisional Court then set out the proper test for an interim variation of a final order, which has vexed the family law bar (at least in Ontario) for quite some time.

Section 16.1(1) of the *Divorce Act* states that the court may, upon the application of either or both spouses, make a parenting order with respect of a child of the marriage. Section 16.1(2) allows a judge to make an interim parenting order pending the determination of an application made under s. 16.1(1).

Section 17(1) of the *Divorce Act* allows a judge to vary, rescind or suspend a parenting order (or a support order for that matter). However, s. 17(5) provides that an order under s. 17(1) can only be made if the court first satisfies itself that there has been a change in circumstances. In the case of a parenting order, there must be a change in the circumstances of the child since the making of the order sought to be varied.

While there is no explicit power under s. 17 permitting judges to make interim variation orders, courts have interpreted the *Divorce Act* to permit them to do so. The question, however, is: what is the appropriate test to grant a temporary (that is, interim) variation of a parenting order?

The Divisional Court took great pains to set out the fundamental difference between a "review" and a "variation." A review has been interpreted to allow for parties to alter an order or agreement *without* having to demonstrate a material change in circumstances. It is a fundamentally different beast than a variation. The Court made it clear that if a party is seeking to bring an application for a review — they ought to label it exactly that.

In this case, the Divisional Court determined that while the father's Answer was, ultimately, for a review of parenting, the motion itself was for an interim *variation* and as such it was subject to the material change requirement under s. 17 of the *Divorce Act*.

The Divisional Court set out that the test for an interim variation was a stringent one. The onus is on the party seeking an interim variation to establish that in the current circumstances the existing order results in an untenable or intolerable situation, jeopardizing the child's physical and/or emotional well-being, and that the new proposed arrangement is so necessary and beneficial that it would be unfair *to the child* to delay implementation. See *F.K. v. A.K.* (2020), 43 R.F.L. (8th) 411 (Ont. S.C.J.) at para. 52; *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.J.) at para. 15; and *Crawford v. Dixon* (2001), 14 R.F.L. (5th) 267 (Ont. S.C.J.) at para. 14.

While the motion judge cited the correct cases, and the correct test, he set out a caveat that led to an error in law. Specifically, the motion judge stated that the stringent test should not be read in a manner that places too much emphasis on maintaining the status quo.

In his reasons, the motion judge made a series of findings about the child's best interests *before* undertaking any analysis as to whether the father had met the stringent test for an interim variation of a final order. The motion judge then engaged in an analysis of the facts of which exercise the Divisional Court was highly critical, and found it was in O.'s best interests to alter the final order. The motion judged weighed two contradictory Voice of the Child reports, one from December 2020 (wherein O. reported that she wanted an equal schedule) and the other from March 2021 (wherein O. reported that she wanted to maintain the current schedule). In weighing the evidence, the motion judge determined that the mother had influenced O. into changing her mind. This was despite the significant evidence (including bullying text messages sent to O. the day after the second Voice of the Child Report) that the father was placing the child in a loyalty bind.

The motion judge determined that it would be in O.'s best interests to have an equal time-sharing arrangement. After making that finding the motion judge stated, "I could end the analysis there, but I am obliged to demonstrate why the change from the status quo is compelling." The motion judge cited the stress that O. was experiencing from the litigation and O.'s "true wishes" as compelling reasons to put the equal time-sharing arrangement in place immediately.

This was the error of law according to the Divisional Court: the motion judge reached his conclusion and then reasoned backwards, labelling as compelling the considerations that informed his determination that a change was in the best interest of the child.

The Divisional Court determined that there was nothing in this case that met the stringent test. This was not a case where there was evidence of "exceptional" circumstances that would justify the interim variation of a final order. While the motion judge attempted to avoid putting too much emphasis on the status quo, he conflated that with the requirement that there be compelling reasons to make an interim variation of a final order.

Who Will Speak for the Children?

DCE v. DE, 2021 CarswellAlta 2866 (Q.B.) — Feth J.

The guidelines for determining when and whether to appoint independent counsel for children are underdeveloped. In *DCE*, Justice Feth helpfully sets out some governing principles.

The parents were in a high-conflict parenting dispute with respect to their three children (ages 9, 10 and 11) for almost 2- $^{1}/_{2}$ years.

The children were in the primary day-to-day care of the mother (pursuant to a parenting order granted in January 2019), and the father had parenting time three weekends each month. Summers were shared equally.

The father had concerns about the mother's parenting and believed the children wanted to spend more time with him. He applied for the appointment of independent counsel for the children or for a "Voice of the Children Evaluative Intervention" (as known in Alberta). The mother argued that the father's concerns were unfounded and that he was simply fishing for some information to assist him.

None of the children had requested legal counsel to represent their interests or for an independent means to express their views to the Court — not surprising given their ages.

Section 16 of the *Divorce Act* prescribes that, in making a parenting order, the court "shall" take into consideration only the best interests of the child. Section 16(3)(e) then directs that, in determining the child's best interests, the court "shall" consider "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained."

Section 16(3)(e) does not *require* the appointment of counsel for the child or a Voice of the Child report — the court retains discretion: *McCauley v. McCauley*, 2021 CarswellAlta 2241 (C.A.). However, as a very general rule, children who are *capable* of forming their own views about matters affecting them are entitled to have those views given consideration in accordance with their age and maturity: *Hartley v. Del Pero*, 2017 CarswellAlta 2 (Q.B.); *G. (B.J.) v. G. (D.L.)* (2010), 89 R.F.L. (6th) 103 (Y.T. S.C.). This aligns with Canada's obligation in Article 12 of the *United Nations Convention of the Rights of the Child*.

As noted in numerous cases, there are many ways to get the views of children of appropriate age and maturity before the court aside from the appointment of independent counsel or a Voice of the Child report. Other alternatives include (necessary and reliable) judicial interview; hearsay through a parent, guardian or neutral third party like a psychologist, psychiatrist or social worker; *amicus*; or a letter from the child. See for example: *Stefureak v. Chambers* (2004), 6 R.F.L. (6th) 212 (Ont. S.C.J.); *G. (L.E.) v. G. (A.)*, (sub nom. *L.E.G. v. A.G.)* 2002 CarswellBC 2643 (S.C.); *Lafontaine v. Lafontaine*, 2011 CarswellOnt 2728 (S.C.J.); *Ward v. Swan* (2009), 71 R.F.L. (6th) 378 (Ont. S.C.J.); *Morrison v. Tremain*, 2013 CarswellOnt 4536 (S.C.J.); *Puszczak v. Puszczak* (2005), 22 R.F.L. (6th) 147 (Alta. C.A.); *B. (M.) v. Q. (R.)* (2015), (sub nom. *R.Q. v. M.B.W.)* 60 R.F.L. (7th) 59 (N.L. C.A.); *M. (L.K.) v. F. (J.)*, 2004 CarswellAlta 1578 (Q.B.); *Strobridge v. Strobridge* (1994), 4 R.F.L. (4th) 169 (Ont. C.A.); *M. (K.A.A.) v. M. (J.M.)*, 2008 CarswellNfld 243 (U.F.C.); *K. (N.) v. H. (A.)* (2016), 79 R.F.L. (7th) 384 (B.C. S.C.); *Dormer v. Thomas*, 1999 CarswellBC 1410 (S.C. [In Chambers]); *D. (J.E.S.) v. P. (Y.E.)*, 2017 CarswellBC 794 (S.C.), rev'd (2018), 12 R.F.L. (8th) 154 (B.C. C.A.); *K. (K.L.) v. K. (E.J.G.)*, 2011 CarswellBC 1427 (C.A.).

The court must also be very wary of parents trying to use a child as a pawn in the litigation or of trying to use any of these process to fish for information — as the mother stated her concern to be here: *Gordon v. Towell*, 2010 CarswellAlta 1074 (Q.B.) at para. 62.

Appointing Counsel:

Pursuant to the Alberta Court of Appeal's decision in *Puszczak*, the court must consider whether appointing counsel for a child is "necessary or desirable in the circumstances." However, as noted by Justice Feth, there is no unified set of principles setting out how the court should apply its discretion to appoint counsel for children. The possible objectives have been set out, including: ensuring that all relevant evidence is available to the court; supporting the emotional well-being of the child; allowing age-appropriate children to be heard; and preserving the integrity of the legal process. But the parameters for the exercise of discretion are, to use Justice Feth's word, opaque.

Therefore, Justice Feth very helpfully set out some principles for consideration. While we generally do not like to simply set out "lists" — the list of considerations provided by Justice Feth are so helpful that we decided to break our own rule:

> 1. The Court must be satisfied that the child has attained an "age and degree of maturity" such that the child's views should be considered: *S. (J.) v. M. (R.)* (2013), (sub nom. *R.M. v. J.S.)* 40 R.F.L. (7th) 38 (Alta. C.A.) at para. 24. If that threshold is not satisfied, concerns arise about the child's capacity to form and convey views, to instruct counsel and make reasonable choices, and to be free from undue influence. There is no magic age. The inquiry is individualized and contextual.
>
> 2. As a child becomes a teenager, assumptions about their maturity can be applied with greater comfort.
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> 3. As the child's views are not generally determinative, their capacity to make decisions or offer a perspective need not be perfect.
>
> 4. A child is asked to express views or preferences — not to make choices.
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> 5. When assessing whether a child's age and maturity are such that their views should be considered, relevant considerations include:
>
> > • The nature and complexity of the issue for which the child's input is sought;
> >
> > • Whether the child has expressed an interest in offering a viewpoint;
> >
> > • Whether the child is primarily being asked to provide facts rather than engage in higher reasoning such as drawing conclusions or formulating opinions;
> >
> > • Whether the child's decision-making might be compromised by the child's relationship with a party, including emotional attachment, dependency, estrangement or undue influence;
> >
> > • Whether the child has the ability to gather relevant information and to weigh competing benefits and disadvantages when developing a viewpoint;
> >
> > • Whether the child reasonably appreciates the consequences of expressing a viewpoint;
> >
> > • Whether the child has made good decisions of a substantial nature in other situations;
> >
> > • The child's performance and behaviour in school;
> >
> > • Assessments of the child's behaviour and decision-making capacity provided by professionals such as psychologists, counsellors, physicians and teachers; and

- Parental observations about the child's behaviour and decision-making ability.

Some circumstances will normally favour the appointment of counsel:

1. cases involving allegations of child abuse;

2. cases where an apparently intractable conflict exists between the parents;

3. cases where the child is seemingly alienated from one or both parents;

4. where real issues arise about cultural or religious differences affecting the child;

5. where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge on the child's welfare;

6. where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that the child's welfare is seriously impinged;

7. where issues arise about significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child;

8. any case in which, on the material filed by the parents, neither seems a suitable guardian;

9. any case in which a child of mature years is expressing strong views, which if given effect would involve changing a longstanding custodial arrangement or a complete denial of access to one parent;

10. where one of the parties proposes that the child will either be permanently removed from the jurisdiction, or permanently moved to a place within the jurisdiction that would greatly restrict or for all practical purposes exclude the other party from access to the child;

11. cases proposing to separate siblings;

12. custody cases where none of the parties is legally represented; and

13. applications to the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not properly represented by one of the parties.

The ability to fund independent counsel is obviously a further consideration.

Next, the court must consider the intended role of counsel, and there are generally three possible modes of child representation: *amicus*, best interests guardian, and direct advocate. [See: N. Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43:4 Alberta Law Review 845; D. Hensley, "Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner's Perspective and a Response to Professor Bala" (2006) 43:4 Alberta Law Review 871.]

Amicus takes instruction from the court and may assist by investigating — or arranging for the investigation — of facts, often with the assistance of a psychologist or social worker, and may question witnesses at a hearing and make submissions. The lawyer maintains neutrality, need not inform the court of the child's views, and is not expected to make submissions about the outcome or resolution that best serves the child's interests. Information provided by the child to legal counsel is not confidential and may be shared with the court. Such an appointment may be appropriate where the child lacks full capacity. [In *D. (J.E.S.) v. P. (Y.E.)*, 2017 CarswellBC 794 (S.C.), rev'd (2018), 12 R.F.L. (8th) 154 (B.C. C.A.), the B.C. Court of Appeal expressly disapproved of the appointment of counsel to act as *amicus*, save for exceptional and specific circumstances.]

A best interests guardian may advocate a position based on *their assessment* of the child's best interests. The lawyer acts much like a litigation guardian, assessing the best interests of the child and making recommendations to the court. The lawyer's assessment governs. The lawyer is not bound by the child's views, but usually informs the court of what they are. Notably, the ability of counsel in these circumstances to advocate for something *other than* the child's view is not without controversy.

Finally, a direct advocate role contemplates a conventional lawyer-client relationship where counsel communicates the child's views to the court and seeks to advance the child's interests and objectives. The lawyer advises the child about choices, maintains confidentiality, and advances the child's instructions.

In choosing between roles, the court should consider the following issues:

1. whether legal counsel will take instructions from the child;

2. whether legal counsel may advocate for a position based on their assessment of the child's best interests;

3. whether counsel may advocate for a position contrary to the child's express wishes;

4. whether counsel is responsible for collecting evidence and ensuring that all relevant evidence is before the court, even if the parties decline to introduce that evidence;

5. whether counsel may have record disclosure and discovery, examine or cross-examine any witness at a hearing or trial, and call witnesses;

6. whether counsel may retain another professional, such as a psychologist or social worker, to assist in collecting information from the child;

7. whether communications between counsel and the child remain confidential or privileged, and any exceptions to confidentiality, such as disclosure of child abuse;

8. whether counsel may communicate directly with the parents, collect information directly from third parties such as healthcare providers, counsellors and schools, and meet with the child in the absence of the parents;

9. whether counsel takes further direction from the court and if so, how and when direction is provided;

10. the manner of reporting to the court, including whether the child's information is evidence;

11. whether counsel may initiate appeals, take other steps authorized by the court, and seek costs;

12. whether counsel's role will change over the course of a proceeding; and

13. whether the lawyer is sufficiently trained and experienced for the assigned function (does the lawyer have the necessary skills to interview children.

In terms of setting out counsel's function, as a "preferred practice," counsel should clearly set out the proposed role for counsel for the children when the appointment is sought, and detail counsel's ability to satisfactorily perform the function.

Finally, Justice Feth commented on the historic reluctance of the Court to appoint counsel for children:

> [42] In *LMH v. SRH*, 2010 ABQB 769, at para 12, my colleague Germain J stated in *obiter dicta* that the appointment of legal counsel for children is an "unusual procedure" arising in "exceptional circumstances" and that the "presumption should be against this type of appointment." However, the practice has evolved since then. The emotional and legal benefits to children in having an opportunity to express their opinions and fears to an impartial person are increasingly recognized . . .

> In my view, the contextual analysis is better served by a review of the various principles rather than relying on such a presumption.

Evaluative Intervention and Voice of the Child Reports:

A Voice of the Child Report is meant to detail the candid wishes of a child without any outside pressures. A Voice of the Child Report in no way assesses the parents and offers no opinions.

In deciding whether such a Report is warranted, the court should consider the following:

1. the nature and complexity of the dispute between the parties;
2. whether the child is old enough to voice an opinion;
3. whether the child has any behavioural or psychological issues;
4. whether the child has any special needs or developmental issues;
5. whether a legitimate concern exists that the child is being harmed;
6. whether one parent may be alienating the child from the other parent;
7. whether the child is under the control of a parent in terms of formulating their views and preferences;
8. whether an inexplicable rift has arisen between parent and child;
9. whether any complex inter-personal dynamics between the parents are concerning; and
10. whether the parents have the financial means to pay the cost of the Intervention.

And, of course, the reasons for ordering the Report must more than offset any harm that might be occasioned by ordering the Report: *M. (D.M.) v. L. (D.P.)* (1999), 44 R.F.L. (4th) 433 (Alta. Q.B.) at para. 25.

Justice Feth then applied these considerations to the case before him, and turned his mind to the father's request to appoint counsel for all three children to address multiple issues, failing which a Voice of the Child Report should be obtained.

Here, Justice Feth was concerned that the father was asking for an "ill-defined" investigation into his concerns about the children's welfare, essentially using the appointment of counsel as a "wellness check" on the children. To his Honour, this was more in the nature of "fishing", and the father had not offered any compelling evidence that the children's welfare was at material risk.

However, the father's stated concerns here did not seem to be "*de minimis*." The father complained that the mother was not taking proper care of the children. They had experienced some rashes and eczema. A teacher at the children's school told the father that one of the children wore dirty clothes to school and smelled in class. The children reportedly had untidy hair and dandruff. No other details were offered. While no medical evidence was put forward to show that these observations were the result of poor hygiene or that the children's health was suffering — was medical evidence here really required? Did these allegations, if believed, not raise some concern as to the children's health or welfare?

Then there was the fact that, according to the father, the children had reported that the mother allowed her male friends to sleep in the children's room, an allegation the mother denied.

The father also alleged that the mother sometimes left the children alone at home and that on one such occasion, the youngest child hurt her mouth and was bleeding. The mother explained that the incident was simply the natural loss of a tooth.

Justice Feth was concerned about the general lack of detail provided by the father, especially since the father had previously accused the mother of physically abusing the children, which claim was dismissed by the Court.

On the whole, Justice Feth was not persuaded that the children's welfare was at material risk. He also noted that many of the father's allegations were not substantiated by school records.

Finally, the father argued that an appointment was necessary because the children wanted to spend more time with him. But, noted Justice Feth, the father provided no evidence of any child expressing that wish.

Here, the children were all young — the eldest being 11 years old. Justice Feth was not able to confirm they were mature enough to form views on all the presenting issues or to instruct a lawyer. The nature and complexity of the issues for which the children's input might be sought was also poorly delineated. The children had not asked to provide information to the Court, and there was little, if any, evidence as to the ability of any of the children to make decisions of a substantial nature.

While the parenting relationship was certainly high conflict (which possibly favoured the appointment of counsel), the overall evidence did not demonstrate that the dysfunction was such that counsel for the children was needed to protect their interests. Nor was his Honour satisfied that the children were of the ages and degrees of maturity to form views about parenting time or to instruct counsel

Ultimately, high conflict was not, in and of itself, justification for appointing counsel for the children, and there was little here beyond that.

We offer a further consideration — none of the father's allegations here, in our view, supported the appointment of independent counsel or a Voice of the Child Report. The father's allegations here (save perhaps for the suggestion that the children wanted to spend more time with him) were more suited to a parenting assessment or focussed assessment.

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