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— Franks & Zalev - This Week in Family Law

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Question: What Can a Trial Judge Do to Assist Two Parties in a High-Conflict Family Dispute Avoid Ongoing Litigation? Answer: Not Much!

SSG v. SKG (2022), 78 R.F.L. (8th) 401 (Alta. C.A.) — Schutz, Khullar and Kirker JJ.A.

This was a high-conflict separation.

Following a 26-day trial, the trial judge ordered shared parenting of the parties' two children and directed a detailed parenting plan. He also determined the retroactive and ongoing child support payable by the father to the mother under s. 9 of the *Federal Child Support Guidelines*, SOR/97-175 (the "*Guidelines*").

The trial judge required the parties to retain a Parenting Coordinator with arbitral powers to resolve regular conflict and conflicts over joint decisions. The trial judge also limited the circumstances in which either party could bring a Variation Application to change child support. The mother appealed, arguing that the trial judge had exceeded his jurisdiction by imposing binding arbitration on the parties without their consent and by improperly restricting the court's jurisdiction to deal with child support in the future under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp).

The parties married in July 2009, and separated in September 2016. There were two children of the marriage, then nine and ten years old.

They could not resolve their issues with respect to parenting and child support, so they had a trial. The trial was heard for 26 days over the course of 23 months. The reasons were 333 paragraphs long. We're sure it seemed like a good idea at the time.

In their submissions, both parties suggested they were willing to have *some* issues arbitrated.

The ultimate Order of the trial judge, however, went further than that. Ultimately, the trial judge ordered that, "the parents shall retain a parenting coordinator within 30 days" and then proceeded to name the parenting coordinator should the parents not agree otherwise. The Order then went on to direct that the parties retain a parenting coordinator with arbitration powers to resolve day-to-day disputes over the parenting plan or joint decisions:

> The Parenting Coordinator shall resolve day to day conflict that may arise related to the detailed parenting plan or in relation to any conflict over joint decisions. The Parenting Coordinator shall not have the authority to re-instate joint decision-making, no[r] is the Parenting Coordinator permitted to make changes to the parenting schedule outlined herein, unless the parties provide express written consent to provide them with the ability to do so.

> Where the Mother thinks that a decision made by the Father pursuant to his sole decision making authority was inappropriate and not in the children's best interests she may apply for a review of the decision to the Parenting Coordinator. The Parenting Coordinator's review shall not be a *de novo* review of the decision related to the children. The Parenting Coordinator shall consider the facts and decision made, to determine whether the decision made by the Father was reasonable and in the best interests of the children at the time it was made. The Parenting Coordinator shall award enhanced costs related to such an application.

Then, after setting out his decision for ongoing child support payable by the father to the mother pursuant to s. 9 of the *Guidelines*, the trial judge also directed that:

> The parties shall not bring any application to vary this amount unless the Father's line 150 income deviates upwards or downwards by more than 20%, or if the Mother's income increases by more than 50% from its 2020 level of $184,348.00.
>
> The Mother shall not be permitted to bring an application for variation of this amount based on a decrease in her income.

The mother appealed.

First, she argued that the trial judge could not force the parties to retain a parenting coordinator with arbitration powers.

Second, she argued that the trial judge exceeded his jurisdiction by limiting the circumstances in which the parties could bring a Variation Application to vary child support ordered under s. 9 of the *Guidelines*.

Despite the best of intentions, absent consent of the parties, a judge cannot order parties to submit their disputes to arbitration. That constitutes the improper delegation of authority.

As stated by the Alberta Court of Appeal in *Durocher v. Klementovich*, 2013 CarswellAlta 848 (C.A.):

> [15] . . . it is a principle of access to justice that the parties can bring any dispute they may have to the Court. The Court has the jurisdiction to resolve those disputes, and it would be extraordinary to decline to decide, much less to compel the parties to submit to a private adjudicator: *Zacks v. Zacks*, [1973] SCR 891 (S.C.C.) at pp. 906-7; *Mainfroid v. Mainfroid*, [1926] 3 W.W.R. 617 (Alta. C.A.) at p. 618, [1926] 4 D.L.R. 1060 (Alta. C.A.). The power to grant corollary relief given by the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.) to a "court of competent jurisdiction", does not permit the delegation of that power to private arbitrators. An obligation to submit to arbitration must be founded in a statute or an agreement: *Sport Maska Inc. v. Zittrer*, [1988] 1 SCR 564 (S.C.C.) at p. 588.

See also *Stuve v. Stuve* (2020), 49 R.F.L. (8th) 13 (Alta. C.A.) at paras. 37-41; *Imineo v. Price* (2011), 14 R.F.L. (7th) 193 (Ont. C.J.); *C. (M.A.) v. K. (M.)* (2008), 53 R.F.L. (6th) 219 (Ont. C.J.); *Hunter v. Hunter* (2008), 52 R.F.L. (6th) 109 (B.C. S.C.); *M. (C.A.) v. M. (D.)* (2003), 43 R.F.L. (5th) 149 (Ont. C.A.); *Hsiung v. Tsioutsioulas* (2011), 9 R.F.L. (7th) 482 (Ont. C.J.); *N.S. v. R.M.*, 2019 CarswellOnt 11800 (S.C.J.); *Steels v. Butrimas*, 2012 CarswellOnt 12128 (S.C.J.); *Sue-A-Quan v. Duarte*, 2022 CarswellOnt 4195 (S.C.J.). In fact, in *Michelon v. Ryder*, 2016 CarswellOnt 8764 (C.J.), the court suggested that the court cannot include a provision appointing a parenting coordinator even in a Consent Order.

While one can find decisions where parenting coordinators are appointed by the court, generally those decisions do not consider the jurisdiction for that to actually happen.

Here, the parties did not agree to have day-to-day parenting issues determined by a parenting coordinator by way of binding arbitration. Therefore, that requirement was set aside by the Court of Appeal.

There was also a problem with the trial judge — again with the best of intentions — limiting the ability of the parties to vary child support in the future.

A judge tasked with determining any Variation Application in the future under s. 17(1)(a) of the *Divorce Act* would have to consider the incomes of the parties (and the other factors in s. 9 of the *Guidelines*) to assess whether there has been a change of circumstances as required by s. 17(4) of the *Divorce Act*.

Also, pursuant to s. 14 of the *Guidelines*, a change in circumstances for the purposes of s. 17(4) includes "any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support."

As noted by the Court of Appeal:

> [17] As well intentioned as the trial judge may have been in trying to discourage ongoing litigation, nothing in the *Divorce Act* or *Guidelines* authorized him to limit the circumstances in which any variation application could be made. Section 15.1(4) of the *Divorce Act* empowers courts to include "terms, conditions or restrictions" in child support orders, including time limits specifying when a review shall take place. But even a timeline for review "does not preclude an earlier application to vary that order pursuant to section 17 of the *Divorce Act* and section 14 of the *Child Support Guidelines*": see Julien D Payne & Marilyn A Payne, Child Support Guidelines in Canada, 2022 (Toronto: Irwin Law Inc, 2022) at 461.

And this was true notwithstanding the attempt of the trial judge to signal to the parties — and a future court — that he had considered a *range* of possible income changes when making his decision about child support. The trial judge just went "too far in binding the discretion of a future court." Trying to restrict future variation applications based on possible changes in income alone were not helpful because, under s. 17(4) of the *Divorce Act*, a change in income is not the only reason for a possible variation.

In fact, parties can't even agree to oust the jurisdiction of the court to vary support: *Bemrose v. Fetter* (2007), 42 R.F.L. (6th) 13 (Ont. C.A.); *Patton-Casse v. Casse* (2011), 8 R.F.L. (7th) 343 (Ont. S.C.J.), aff'd, (2012), 29 R.F.L. (7th) 210 (Ont. C.A.); *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.).

So What is A "Compelling Change" Anyway?

E.K. v. R.K. (2022), 79 R.F.L. (8th) 253 (N.L. C.A.) — Boone, O'Brien and Knickle JJ.A.

This was EK's appeal of a motion to vary an interim parenting order, giving the Court of Appeal for Newfoundland and Labrador the chance to comment on the appropriate legal test to do so.

EK and RK were the parents of a five-year-old girl. A court case started. While EK applied to the Family Division for a decision on parenting, during a Case Management hearing, the parties agreed to an Interim Consent Order regarding parenting. Pursuant to the Consent Order, their daughter would primarily reside with RK (the father), and EK (the mother) would see her during set time periods, which time was to be supervised.

EK's time was to be supervised — not because of any parenting concerns regarding EK (in fact, EK had been the child's primary caregiver during the relationship) but because she was in a relationship with a man who had been convicted of killing a prior intimate partner. This person had also threatened EK, suggesting he would kill her if she was ever unfaithful. A social worker from the Department of Children, Seniors and Social Development ("CSSD") was of the view that it was not safe for EK to be the primary parent or to have unsupervised access while part of that relationship.

Six months after consenting to the Order, EK sought to vary it.

In Newfoundland, Rule F19.02 of the *Supreme Court Family Rules* provides that leave of the court is required before a person can look to vary an interim order. Therefore, EK had to ask the Family Division for leave to vary the interim Order. The *Supreme Court Family Rules* further provide that a party cannot even ask the court to consider varying an interim order without first showing the presence of certain factors:

> F19.02 (1) A party must request a judge's permission to proceed with an application to vary an existing interim order.

(2) To request a judge's permission to proceed with an application to vary an interim order, a party must file an Application to Vary an Interim Order in Form F19.02A.

(3) A judge may grant permission to proceed with an application to vary an interim order where

(a) there has been a **compelling change of circumstances** since the date the interim order was made;

(b) there is an **urgent or immediate need** to hear the application as irreparable harm will likely occur before the matter can proceed to a final hearing; and

(c) either

(i) the party has taken steps to advance the matter to a hearing or otherwise resolve the issues in dispute, or

(ii) there is a valid reason why the matter has not advanced to a hearing or final resolution. [**emphasis** added]

While some cases suggest there is no jurisdiction under the *Divorce Act*, R.S.C. 1985, c. 3 (2d. Supp.), to vary an interim order [see, for example, *Brooks v. Brooks* (1998), 39 R.F.L. (4th) 187 (Ont. C.A.); *Gebert v. Wilson* (2015), 69 R.F.L. (7th) 17 (Sask. C.A.)], most provinces accept the "compelling circumstances" or "compelling change" standard to vary an interim order: *Shwaykosky v. Pattison*, 2015 CarswellAlta 2027 (C.A.); *Chambers v. Nyhus*, 2022 CarswellAlta 2364 (C.A.); *P. (D.) v. B. (R.)*, 2007 CarswellPEI 69 (C.A.); *Coe v. Tope*, 2014 CarswellOnt 9158 (S.C.J.); *Miranda v. Miranda*, 2013 CarswellOnt 9752 (S.C.J.); *M. (S.R.) v. M. (J.K.)* (1996), 24 R.F.L. (4th) 286 (Man. C.A.); *F. (H.) v. G. (D.)* (2006), 29 R.F.L. (6th) 47 (N.B. C.A.).

This certainly makes sense. Once a schedule is in place, it should generally be in place until trial, unless a sufficiently compelling change makes the current schedule unsuitable. Temporary orders are intended to be . . . well . . . *temporary*, meant to only last for a short period of time. To vary a temporary order is to substitute new temporary arrangements for arrangements that are already meant to be temporary. However, this rational assumes parties can get to trial in a reasonable time. If that is not possible, then the rationale behind not varying a temporary order starts to wither.

Here, EK relied on two changes in circumstances: She had changed jobs and both parents now lived in St. John's. Supervision was no longer necessary because she had demonstrated over the preceding six months that she could be trusted not to see her daughter with her partner present.

A judge of the Family Division denied EK leave to ask to vary the Consent Order, finding that neither EK's change in employment nor RK's change in residence amounted to a "compelling change of circumstances." The judge also decided that EK had not shown any urgent or immediate need to vary the Consent Order and that she had not taken any steps to advance the matter through the court.

EK suggested that the trial judge erred in refusing leave and in applying the Rule F19.02 criteria.

The Court of Appeal noted that the term "compelling change in circumstances", first appearing in the Rules in 2017, had yet to be judicially defined. Furthermore, whether an interim order affecting children is made under provincial family legislation or the *Divorce Act*, a party seeking to vary the order is required to demonstrate that there has been a "material change in circumstances" — a change which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order: *Gordon v. Goertz*, 1996 CarswellSask 199 (S.C.C.).

What is the interplay between "material change in circumstances" and "compelling change in circumstances"?

Of course, "compelling change" must mean something different than "material change." And if a family court judge is satisfied that under Rule F19.02(3) there has been a "compelling change in circumstances," then the result will be a variation application at which the applicant will have to show a material change in circumstances (having already established a compelling change in circumstances).

The difference between these two standards cannot be defined in purely relative terms, that is that one — "compelling" — is higher than the other — "material" — or once leave was granted to bring a variation application based on a "compelling" change, that would automatically prove the material change needed on a variation application. Therefore, determined the Court of Appeal, the best approach to interpret a rule of procedure is to consider the underlying functional considerations of the terms.

As determined by the Court of Appeal:

> [19] In the context of a request for permission under rule F19.02(3), a *compelling* change of circumstances should be one that is powerful enough to demand the attention of the parties and judge. If it is, then the application to vary can proceed, and the judge can decide whether the change is a *material* one that justifies variation in the Interim Order. [*emphasis* in original]

To be candid, this seems a bit tortured. This means that a change could be found to be so compelling that leave is granted to bring a variation application — where it might then not pass the material change threshold? Because the change was either not foreseen or could not have been reasonably contemplated? It's hard to think of a "compelling change in circumstances" that would not also be a "material change in circumstances."

In any case, here the Family Division judge decided that there was no compelling change of circumstance; no urgent or immediate need to hear the application; and that EK had not taken steps to advance the matter to a hearing or otherwise resolve the dispute. EK argued that each of those decisions was made in error.

At the Court of Appeal, EK conceded that neither her job change nor the residence change, alone, would constitute a compelling change. However, argued EK, the change in her job and in RK's residence, together with her compliance with the supervisory terms of the Consent Order for a period of six months, cumulatively constituted a compelling change of circumstances that justified proceeding with an application to vary the terms of the Order.

The Court of Appeal did not agree that compliance with the current order amounted to a compelling change. The requirement for supervision arose solely because EK was in a relationship with a person of some concern. And the CSSD social worker testified that CSSD would not support any parenting arrangement that involved EK having unsupervised access because of their continuing relationship. The mere fact of EK's relationship with her current partner who presented a threat to her and her daughter led to the supervision requirement, and that circumstance had not changed. And however one defines "compelling" or "material" — something that did not change was neither "compelling" nor "material."

Therefore, the Court of Appeal did not accept that it was an error for the Family Division judge to have rejected EK's position that her record of compliance, taken by itself or in combination with her job change and RK's address change, was compelling enough to require a variation hearing.

Absent a compelling change, leave to vary an interim order had to be denied. And it was. Properly so.

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