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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Note: We'll be taking next week off. We'll be back with the next edition of *TWFL* the week of October 23, 2023.

One Small Step for Public School Education

R. v. S., 2023 CarswellOnt 12802 (S.C.J.) — Price J.

The end of summer is upon us. We notice that small, almost imperceptible change in early morning and early evening temperatures. We suddenly become acutely aware that the days have been getting shorter. Local stores start to sell boxes of packaged candy — of the sort people hand out on Halloween. And courts are overrun with choice of school litigation.

Here, the battlefield was kindergarten, and where the child, E, should attend.

Roberts wanted E to attend Kettle Creek, the public school serving the area where he lived with E's paternal grandparents, on a farm. Symons wanted E to attend King's Academy, a private faith-based school — the same school attended by his older half-brother.

Having done his research, Roberts advocated for Kettle Creek for the following reasons:

a. As a public school, it was subject to government oversight and receives public funding to operate, which would ensure that E received adequate and necessary resources, equipment and supports;

b. Kettle Creek would keep E in close contact with neighbourhood friends who are also students there, and with whom he would share a bus ride to and from the school each day;

c. E would have greater opportunities to participate in sports and extracurricular activities at Kettle Creek than would be the case at King's Academy;

d. E would be exposed to a greater diversity of students than was likely to be the case at King's Academy;

e. There would likely be more consistency to E's daily and weekly routines if he were to attend Kettle Creek, particularly in continuing to receive the free childcare from his paternal grandmother;

f. There was a before and after-school program at Kettle Creek;

g. As a public school, there was no cost for E to attend Kettle Creek, and the parties did not earn sufficient incomes to pay both the tuition and the attendant childcare costs which would be required should E attend King's Academy;

h. The physical amenities and plant at Kettle Creek far exceed those of King's Academy, which was housed in a church with limited outdoor space for children's activities;

i. The teaching staff at Kettle Creek are accredited by the province and are members of the Ontario College of Teachers, subject to oversight, whereas the teaching staff at King's Academy were not required to hold accreditation as teachers; and

j. Kettle Creek followed the Ontario provincial curriculum. King's Academy was under no obligation to do so.

And having done her research (and using more of the alphabet), Symons was equally sure it was in E's best interests to attend King's Academy:

a. E's spiritual development is essential. At King's Academy, he would receive the same education as in the public system, "if not better," while experiencing "spiritual growth and education";

b. The first year of attendance at King's Academy, E would have the benefit of his older half-brother at the school in Grade 7;

c. The teachers at King's Academy are "kind, fair and patient," setting positive examples for their students, taking seriously and doing their best to resolve any concerns expressed to them;

d. The teachers at King's Academy have at least a bachelor's degree;

e. King's Academy follows provincial guidelines for curriculum and is recognized as a private school;

f. While the subjects taught to students at King's Academy are the same as those taught in the public school, they also integrate a "Biblical worldview;"

g. It is important that E "grow up seeing that God is not just for Sundays at church," but in the "everyday";

h. King's Academy had smaller class sizes;

i. There was little likelihood of bullying at King's Academy, based on the experience of E's older brother;

j. The student body at King's Academy would grow over time grow, and until then, E would be able to participate in extracurricular activities in community-based programs;

k. There was a public park near the school for outdoor recreation;

l. King's Academy was prepared to limit monthly tuition to $300.00;

m. King's Academy was equidistant from the parties' residences so that both parties could participate in driving;

n. To attend Kettle Creek, E, a shy four-year-old, would be placed on the bus with children he did not know, driven to a school he did not know, and taught by teachers he did not know; whereas E was already familiar with King's Academy, having visited it on a few occasions.

While there are some general principles set out in the case law, Justice Price was clearly, and correctly, of the view that E's best interests were to govern his decision.

In *Thomas v. Osika* (2018), 13 R.F.L. (8th) 191 (Ont. S.C.J.), Justice Audet helpfully set out a number of general principles taken from the case law when considering the choice of school issue:

[37] They can be summarized as follows:

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a. Sub-section 28(1)(b) of the *Children's Law Reform Act* specifically empowers the court to determine any matter incidental to custody rights. The issue of a child's enrollment in a school program must be considered as being **incidental to or ancillary to the rights of custody** (*Deschenes v. Medwayosh*, 2016 ONCJ 567);

b. It is implicit that a parent's plan for the child's education, and his or her capacity and commitment to carry out the plan are important elements affecting a child's best interests. In developing a child's educational plan, **the unique needs, circumstances, aptitudes and attributes of the child, must be taken into account** (*Bandas v. Demirdache*, 2013 ONCJ 679 (Ont. C.J.));

c. When considering school placement, one factor to be considered is the ability of the parent to assist the child with homework and the degree to which the parent can participate in the child's educational program (*Deschenes v. Medwayosh*, 2016 ONCJ 567);

d. The **emphasis must be placed on the interests of the child, and not on the interests or rights of the parents** (*Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] S.C.J. No. 52 (S.C.C.));

e. The importance of a school placement or educational program will promote and maintain a child's cultural and linguistic heritage (*Perron v. Perron*, 2012 ONCA 811 (Ont. C.A.));

f. Factors which may be taken into account by the court in determining the best interests of the child include assessing any impact on the stability of the child. This may include examining whether there is any prospect of one of the parties moving in the near future; where the child was born and raised; whether a move will mean new child care providers or other unsettling features (*Askalan v. Taleb*, 2012 ONSC 4746 (Ont. S.C.J.));

g. The court will also look to any decisions that were made by the parents prior to the separation or at the time of separation with respect to schooling (*Askalan v. Taleb*, 2012 ONSC 4746 (Ont. S.C.J.));

h. Any problems with the proposed schools will be considered (*Askalan v. Taleb*, 2012 ONSC 4746 (Ont. S.C.J.));

i. A decision as to the choice of school should be made on its own merits and based, in part, on the resources that each school offered in relation to a child's needs, rather than on their proximity to the residence of one parent or the other, or the convenience that his attendance at the nearest school would entail (*Wilson v. Wilson*, 2015 ONSC 479);

j. **Third party ranking systems, such as the Fraser Institute's, should not factor into a court's decision.** These systems of ranking do not take into consideration the best interest of the particular child in a family law context (*Wilson v. Wilson*, 2015 ONSC 479);

k. If an aspect of a child's life, such as school placement, is to be disrupted by an order of the court, **there must be good reason for the court to do so**. Thus, before a court will order a child to transfer schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron v. Perron*, 2012 ONCA 811 (Ont. C.A.));

l. Custodial parents should be entrusted with making the decision as to which school children should attend. When a sole custodial parent has always acted in the best interest of a child, there should be no reason to doubt that this parent will act in the best interest of the child when deciding on a school (*Adams v. Adams*, 2016 ONCJ 431);

m. Those cases are very fact-driven. **The courts are not pronouncing on what is best for all children in a general sense but rather deciding what is in the best interests of this child before the court** (*Deschenes v. Medwayosh*, 2016 ONCJ 567). [**emphasis** added]

As we said; a very helpful list.

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Much to the chagrin of the Court, the evidence did not reveal much about E, and the parties seemed unable to agree on anything — even whether E was an "active, outgoing, rough and tumble" child who enjoyed participating in agricultural work at his grandparents' farm, as Roberts asserted, or a shy four-year-old, as asserted by Symons.

Each parent seemed to frame the major benefit, as they saw it, to E of attending their preferred school by connecting it to the lifestyle that they would want for him. Roberts focused on the prospect to E making friends at Kettle Creek with other children coming from the agricultural community. Symons focused on E making friends with other children who were more likely to have been exposed to a faith-based lifestyle.

Justice Price accepted that, if Roberts' assertion about the agricultural roots of many of the students at Kettle Creek proved to be true, then E would be more likely there to be able to develop a connection with other children who shared that background with him.

Neither parent had a further move on the horizon, so that did not impact the decision.

Justice Price recognized that the educational experience for any child of this age would primarily be driven by the friendships he is able to form at school and the teachers to whom he is exposed. Save for the significantly smaller student body at King's Academy, both schools would otherwise likely present E with positive experiences.

However, it was of concern to the Court that King's Academy was regularly forced to fundraise for basic student necessities, even though this is a reality at many private schools.

Of interest was the determination that the decision about where a child attends school should not turn on what extracurricular sporting or other activities might be available when children can participate in community extracurricular activities throughout the year. We're not sure we agree with his Honour on this specific point. Extracurricular activities, be those sports or other activities, are important social activities for children - and kids often want to be on teams with their school friends. But we do agree this should be a secondary or tertiary consideration at best.

While Kettle Creek, as a public school, certainly had more resources for students that need extra assistance or that struggle, there was no evidence that E had any such issues that might require such resources. However, it must surely be a significant consideration that those resources are available should they be needed in the future.

It is noteworthy that Justice Price was not overly concerned that, while all teachers at King's Academy had at least a Bachelor degree — none actually held degrees in education. While there was no doubt that the teachers in the public system held higher qualifications, to Justice Price, teaching is a "calling." He had little doubt that teachers at both schools did so because they are dedicated to their students.

In fact, as noted by Justice Price, the Ontario *Education Act*, R.S.O. 1990, c. E.2, allows for people who are not members of the Ontario College of Teachers to teach for a period of up to one year under a letter of permission. Accordingly, being a member of the Ontario College of Teachers seems not to confer any superior status on a person's ability to teach. It merely grants them permission to teach in the public system and makes them subject to the requirements of the College with respect to such matters as competence and discipline. Interesting point.

Ultimately, based on an analysis of these factors, his Honour determined that Kettle Creek was a potentially more stable and, for students with learning difficulties, better resourced school, where E was more likely to encounter a greater number of students who shared his cultural heritage. King's Academy seemed better positioned to focus on E as an individual and to attend to matters beyond academics.

For those of you that are still reading — here is where your tenacity pays off. After reviewing some decisions regarding private school as a section 7 expense (as opposed to a "choice of school issue"), Justice Price came to the conclusion that, absent evidence that private school is *necessary*, or that a child has any particular needs which could only be met at private school, or any other such "compelling reason" — *public school is the default*. Bold statement. We like it. It essentially suggests a rebuttable

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presumption of public school. Recently, Justice Kristjanson came to an almost similar conclusion in *Cibuku v. Cibuku*, 2023 CarswellOnt 12614 (S.C.J.): there must be evidence that private school satisfies some specific and identified need that cannot otherwise be addressed appropriately in public school.

Putting all of this together, his Honour was not convinced that Symons had put forward a sufficiently compelling case for him to order that E attend private school over public school. Symons' desire for a faith-based education was not sufficient.

E will be attending Kettle Creek. Symons gets to pay some modest costs. And it would appear the rest of us get the benefit of a new presumption in favour of public school.

Denying Parenting Time — What Does It Take?

A.V.P. v. C.G.H. (2023), 86 R.F.L. (8th) 363 (B.C. Prov. Ct.) — Doerksen Prov. J.

"Forbidding a parent any access whatsoever is rare, but in certain circumstances this is what the best interests of the children demands." — Doncaster v. Field, 2014 CarswellNS 269 (C.A.)

As a general rule, courts rarely find that it is in a child's best interests to completely terminate all contact with a parent. But general rules always have exceptions, and *A.V.P. v. C.G.H.* is such an exception. This case shows just how terrible a parent's conduct must be to persuade a judge to grant this type of extraordinary relief. It also shows the importance of ensuring that judges receive adequate training about intimate partner violence and coercive control in intimate partner and family relationships, which hopefully will now start happening with the recent enactment of Bill C-233 — *An Act to amend the Criminal Code and the Judges Act (violence against an intimate partner)*.

The parties had an 8-year-old daughter together. After a prolonged absence from the child's life, in 2020 the father applied for parenting time. The mother objected for several reasons, including that the father had a history of physically abusing the mother and his lengthy absence from the child's life. However, the Court granted the father's request for parenting time, over the mother's objections. Initially, his parenting time was supervised, but he eventually progressed to unsupervised parenting time.

In March 2021, the mother withheld the child from the father because of COVID restrictions, and because the father was behind on his support payments. The Court admonished the mother for acting unilaterally, and made a conduct order under Division 5 of B.C.'s *Family Law Act*, S.B.C. 2011, c. 25, that directed the parties to put the child's best interests first, to maintain polite and respectful communications, and refrain from any negative or hostile criticism, communication, or argument in front of the child. The Court also ordered an investigation under s. 211 of the *Family Law Act* into the child's needs, views, and preferences, and the ability of both parents to meet her needs.

Shortly after the conduct Order was granted and the s. 211 report ordered, the mother brought an application to suspend the father's parenting time. In response, the father sent some truly horrific text messages to the mother; we will not repeat them here (but they are set out in the decision).

Despite the father's abusive messages to the mother, which were especially concerning given his history of physically abusing the mother, in August 2021, the Court yet again chastised the mother for denying parenting time, and granted the father a police enforcement clause.

For reasons that are not discussed in the decision, it took until August 2022 (a year and a half after it was ordered) for the court appointed assessor to complete the s. 211 report. According to the report, the child told the assessor that she did not want to spend more time with the father, and that he had been denigrating the mother and her parents to the child. The assessor recommended against expanding the father's parenting time, and urged the father to seek counselling to deal with his anger and communications with the child.

Again, for reasons that are not explained in the decision, in the face of the s. 211 report, and although the father *continued* sending horribly abusive messages to the mother, in November 2022 the Court ***expanded*** the father's parenting time to include overnight visits.

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In early 2023, the application the mother had started in early 2021 finally came on for a hearing. ***Two days before the hearing***, the father left the mother a threatening voicemail message stating that "Karma is a bitch", and that he hoped she was "ready for the hearing".

After reviewing the history of the matter, the hearing judge, Judge Doerksen, determined that it was not in the child's best interests to allow the current situation to continue, and that the father should not have any further contact with her unless and until he made serious changes to his behaviour. As a result, and in addition to suspending the father's parenting time, Judge Doerksen made an Order prohibiting the father from seeking further relief from the court unless the application was filed by a lawyer, and he paid $2,500 into court, filed a current financial statement, and completed a family violence prevention course or program that was at least 40 hours. She also made a protection Order under s. 183 of the *Family Law Act* prohibiting the father from having any further contact with the mother or child except through a lawyer, or going anywhere where the mother works, lives, attends school, worships, or happens to be.

This was clearly the right result, but our concern is that it took so long for the court to take steps to try and ensure that the child and mother in this case were adequately protected. The fact that the Court ordered a police enforcement clause ***against the mother*** and expanded the father's parenting time in the face of incontrovertible evidence that the father was unable to put the child's needs ahead of his own and posed a serious risk to the mother and child (e.g. his history of violence against the mother and his horrific messages to her) clearly shows that legislation like Bill C-233 should have been enacted long ago. It also shows the importance of having specialized family courts that have the necessary resources to deal with cases in a timely manner. A year and a half to produce a court ordered parenting assessment, and even longer to have an application to suspend the father's parenting time heard on the merits was obviously far too long.

We need to do better. Much much better.

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