FAMLNWS 2023-46
Family Law Newsletters
December 04, 2023

— Franks & Zalev - This Week in Family Law

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The Interim Alienation Switch-Er-Oo — Part Deux — This Time with Feeling!

In the September 27, 2021 (2021-37) edition of *TWFL*, we discussed *JLZ v. CMZ* (2021), 58 R.F.L. (8th) 313 (Alta. C.A.), where the Alberta Court of Appeal upheld a full reversal of custody that was granted on an interim motion as a remedy for parental alienation. Although we indicated that "it is almost unheard of for this type of relief to be granted on an interim basis," it appears we spoke too soon, because in both *Y.H.P.* and *G.R.G.*, two experienced family law jurists — Justice Kraft and Justice Finlayson — also boldly granted this type of extraordinary interim relief.

While we will have to wait and see whether these cases are the start of a trend or merely a blip, both cases are worth a careful read, particularly since the jurisdictional basis for granting the relief was different in each case — *G.R.G.* dealt with an interim variation of an **interim** order, and *Y.H.P.* dealt with an interim variation of a **final** order. While there are similarities between the two tests, it is more difficult to vary a final order on an interim basis than it is to vary an interim order on an interim basis (as it generally should be).

Finally, as we discuss below, these cases offer the opportunity to reflect on the bigger question of why child protection agencies generally do not seem to think that the type of harmful conduct that is prevalent in so many alienation cases — including both *Y.H.P.* and *G.R.G.* — raises child protection concerns. While the children in *Y.H.P.* and *G.R.G.* were clearly in distress and in need of immediate assistance, the relevant children's aid societies both inexplicably declined to intervene, and left it up to the parents and the family court to deal with the situation entirely on their own, despite some decisions likening alienating conduct to child abuse; see *Izyuk v. Bilousov*, 2011 CarswellOnt 12097 (S.C.J.); *Tremblay v. Tremblay* (1987), 10 R.F.L. (3d) 166 (Alta. Q.B.); and *Reeves v. Reeves*, 2001 CarswellOnt 277 (S.C.J.) as examples. More on this below.

***Y.H.P. v. J.N.*, 2023 CarswellOnt 16173 (S.C.J.) — Kraft J.**

The parties in *Y.H.P.* were married from 2008 to 2014. They had one child together, a daughter, who was 12 years old by the time of the motion before Justice Kraft.

After the parties separated in 2014, the mother alleged that the father had sexually abused the daughter. These serious allegations were investigated by the police, the Children's Aid Society of Toronto, the Suspected Child Abuse and Neglect Program at the Hospital for Sick Children in Toronto (otherwise known as the "SCAN" team), the Office of the Children's Lawyer ("OCL"), and various other medical professionals, but were not verified. Nevertheless, the mother refused to let the father have unsupervised parenting time until he brought a motion for access and successfully opposed the mother's request for supervision.

In 2016, the OCL prepared a report confirming that the child was happy and comfortable with the father. It also expressed concerns about the mother's behaviour.

Fortunately, in 2017, the mother apparently realized that she needed to change her behaviour, and agreed to resolve the family law case pursuant to a consent order that provided, among other things, that the parties would share joint custody (now decision-making authority), and that the child would live with the father for 5 out of every 14 nights.

Over the next several years, things went reasonably well, and the parties essentially followed the schedule set out in the 2017 order. So even though the matter initially bore many of the hallmarks of a serious alienation case, there was reason to hope for a reasonably happy ending. But sadly, that did not happen.

In March 2020, the COVID-19 pandemic began. As the father was a dentist and was still seeing patients, he agreed to **temporarily** suspend his in-person parenting time with the child to minimize the risk of exposing her to COVID-19. However, he still maintained regular contact with the child over FaceTime and by text message.

The father eventually asked to resume in-person parenting time with the child. The mother initially asked him to wait until the child was fully vaccinated in mid-2022. However, in mid-2022, she told the father she had decided not to vaccinate the child, and started claiming that the child was happy with the current arrangements, and did not want to see the father in person. And, when the mother found out that the child's therapist for the last six years supported the resumption of in-person parenting time, the mother — of course — responded by terminating the therapy.

You can see where this is going. So much for fairy tale endings . . .

Upon realizing that the mother was not going to let him see the child in person, the father commenced litigation, and arranged an urgent Case Conference. At the Case Conference, which took place in November 2022, the mother consented to a temporary order whereby the father would have in-person parenting for the next four Saturdays for three to five hours, and that his parenting time would then increase further. But despite the court Order, the father did not get to see the child. Instead, the mother claimed the child was refusing to see him, and either kept her home entirely, or drove her to the exchange but didn't take steps to get her out of the car.

The parties also agreed to retain a reintegration therapist by February 7, 2023. However, the mother managed to delay that process until March, and then sabotaged it entirely by, among other things, "barging in [during a visit between the child and father] after agreeing to not be in the building and repeating in front of [the child] that her father is dangerous." If this is what the mother did *in front* of the therapist while litigation was ongoing, we can't imagine what she was saying to the child about the father in private; well, maybe we can.

The father brought a motion to have the mother held in contempt of the November 2022 order. The contempt motion was granted by Justice Akazaki in February 2023, but the mother appealed, and the Court of Appeal's decision is currently under reserve.

In addition to moving for contempt, the father brought a motion to have the child placed in his primary care, and to prohibit the mother from seeing the child for 120 days while they attended the Building Family Bridges Program, which "is a 4-day intensive workshop to re-establish the damaged father-daughter relationship", and has been ordered in a number of alienation cases that Justice Kraft discussed in her decision (see, for example, *M.M.B. (V.) v. C.M.V.*, 2017 CarswellOnt 10747 (S.C.J.); *B. (S.G.) v. L. (S.J.)*, 2010 CarswellOnt 4782 (S.C.J.); *Bouchard v. Sgovio*, 2021 CarswellOnt 20740 (S.C.J.); and *X v. Y*, 2016 CarswellOnt 3301 (S.C.J.)). It is that motion that is of interest for our purposes.

Justice Kraft started her analysis by reviewing the leading authorities from Ontario about varying a final parenting order on a motion for temporary relief, including Justice Pazaratz's excellent decision on the subject in *F.K. v. A.K.* (2020), 43 R.F.L. (8th) 411 (Ont. S.C.J.), and the Divisional Court's decision in *S.H. v. D.K.*, 2022 CarswellOnt 2219 (Div. Ct.), which we discussed in the March 28, 2022 (2022-11) edition of *TWFL*, and where the Divisional Court cited *F.K.* with approval. She also reviewed many of the leading cases from Ontario about parental alienation, including the detailed list of indicators of alienation set out by Justice Nicholson in *Malhotra v. Henhoeffer*, 2018 CarswellOnt 18560 (S.C.J.), aff'd (2019), 32 R.F.L. (8th) 1 (Ont. C.A.) (another "must-read").

After a careful review of the evidence, Justice Kraft was satisfied that the mother was trying to alienate the child from the father:

> [28] I find that the facts of this case demonstrate circumstances that are so compelling that I am satisfied that [the child's] best interests require an immediate change to her primary residence to her father, **without contact with the mother** to reduce the detrimental impact of the mother's unacceptable alienating behaviour. . . . [**emphasis** added]

Given the mother's egregious behaviour, which included multiple breaches of court orders, fabricating false allegations (that the father had physically and sexually abused the child), and preventing the child from being able to obtain the therapeutic help she needed, Justice Kraft's findings are bold but not particularly surprising. The far more difficult issue, however, was what to do about the situation, bearing in mind that the child was 12 years old and vehemently opposed to having any further contact with her father.

According to Justice MacPherson in *C. (W.) v. E. (C.)* (2010), 93 R.F.L. (6th) 279 (Ont. S.C.J.) (which was recently cited with approval by the Alberta Court of Appeal in *JLZ v. CMZ* (2021), 58 R.F.L. (8th) 313 (Alta. C.A.)) (see also our discussion of *JLZ* in the September 27, 2021 (2021-37) edition of *TWFL*), there are essentially four options for dealing with cases involving parental alienation:

> a. Do nothing and leave the child with the alienating parent;
>
> b. Reverse custody and place the child with the rejected parent;
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> c. Leave the child with the favoured parent and provide therapy; or
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> d. Provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.

As therapy alone had already failed, and as neither party had suggested placing the child with a third party, that only left options (a) and (b).

The mother, of course, argued that the child should remain with her, and that perhaps the OCL should be appointed to investigate and/or prepare a voice of the child report. Or, to put it in slightly more cynical terms — that the court should sanction further delays while the parent-child contact problem became even more entrenched.

The father, on the other hand, asked the court to reverse custody immediately, and place the child with him. He also proposed a 120-day "blackout period", during which the mother would have no contact with the child, and enrolling in the Building Family Bridges program.

After reviewing the best interests factors set out in s. 16 of the *Divorce Act*, Justice Kraft decided to grant the extraordinary interim relief sought by the father:

> [88] Based on the above, [the child's] primary residence will be reversed. **I do not find that simply returning to the status quo, leaving [the child] with the mother, without further and timely intervention is an appropriate option.** [The child] would likely never voluntarily see her father again, continuing to justify her rejection with a narrative of alleged paternal abuse. **That leaves me with one option: a temporary parenting time reversal and a blackout period. While this kind of order is a last resort, this may well be that last resort. It cannot wait until the father's Motion to Change is heard.**
>
> [89] **The only way to guard against any ongoing negative influence from the mother and to ensure the best possible success of re-establishing the relationship with the father is to suspend contact between [the child] and the mother temporarily.** On the assumption that [the child] will desire to re-establish a connection with her mother, I will order that [the child] participate in therapy as a condition to the court considering re-establishing contact with the mother upon review of this matter. In order to ensure compliance with this order, police enforcement will be necessary.

> [90] **I agree with the father that the blackout period should be for 120 days, but it should be subject to regular reviews to see how it is progressing and whether it should be expanded or contracted.** Those reviews must look to the extent that each party follows the therapeutic advice of the Aftercare therapist. Each parent must play their role. The mother must be open to altering her perspective of the father to allow [the child] to fully accept him as a safe and loving father. For the sake of [the child], the mother must work closing with Family Bridges and the Aftercare therapists and follow their directions. [emphasis added]

Again; a rather bold (and appropriate) decision. Justice Kraft also made a very detailed order setting out exactly what was going to happen going forward, and how the process was going to work that is worth a careful review when dealing with these types of cases. However, there is one particular part of the order that warrants specific mention: Justice Kraft appointed a Case Management Judge who would have regular meetings with the parties to ensure that the order was being implemented, and who would receive regular updates from the therapists. The Case Management Judge was also given authority to decide whether and when the blackout period should be extended or ended.

This type of ongoing judicial oversight is critical when granting a full custody reversal, and should ***always*** be included as a term whenever this type of order is made. We say this for two reasons:

> 1. First, the court needs to ensure that the order is still serving the child's best interests, as it is impossible to predict how a particular child will react to such a drastic change in their life, and adjustments may have to be made.
>
> 2. Second, one of the most common criticisms about programs like Building Family Bridges is that there is still a serious debate amongst psychologists about whether and to what extent they are an appropriate and/or effective form of treatment. Some jurisdictions, including Colorado, have even gone so far as to enact specific legislation to limit or restrict their use. [For more information, see "Colorado Becomes the First State to Limit Court Use of Family Reunification Camps" by Propublica as part of a series of articles it published about parental alienation issue that can be found on its website at https://www.propublica.org/series/parental-alienation.]

Without clear evidence about the utility and safety of programs like Our Family Bridges, it is important to include appropriate terms in the court's order — as Justice Kraft did in *Y.H.P.* — so that the court has the ability ensure that the process is not doing more harm than good for the child/children in each particular case.

We have all seen "those" final orders that start with: "This is a high conflict parenting situation. The case is seven years old and fills 52 bankers boxes, including 32 different court orders and 45 court attendances . . . " Want to avoid those situation? This is the way to do it — early, decisive court intervention with continued case management. The court simply ***must*** act early to prevent alienation: *Ene v. Ene* (2015), 56 R.F.L. (7th) 332 (Ont. S.C.J.); *Williamson v. Williamson* (2016), 74 R.F.L. (7th) 18 (B.C. C.A.); *A. (A.) v. A. (S.N.)* (2009), 66 R.F.L. (6th) 294 (B.C. S.C.); *Kwan v. Lai* (2016), 98 R.F.L. (7th) 437 (B.C. S.C.); *Hazelton v. Forchuk* (2017), 93 R.F.L. (7th) 254 (Ont. S.C.J.); *MacLeod v. MacLeod*, 2019 CarswellOnt 5172 (S.C.J.) (can make finding of alienation at interim stage); *Hajji v. Al-Jammou* (2020), 48 R.F.L. (8th) 401 (Ont. S.C.J.). And for those that say "the court does not have the resources for continued management of cases" — we point to the benefit of avoiding cases that fill 52 bankers boxes, etc . . .

***G.R.G. v. S.G.*, 2023 CarswellOnt 16929 (S.C.J.) — Finlayson J.**

The parties in *G.R.G.* were married in 2018 and had a child together. When they separated in 2019, the child was only eight months old.

Litigation ensued almost immediately after separation. The mother alleged that the father was abusive. The father denied the allegations.

Between 2020 and 2022, the mother breached multiple court orders, including **consent** orders for the father to have **supervised** parenting time with the child.

In 2022, Justice Lack, an experienced family law judge, heard a contested motion by the father to allow him to start having unsupervised parenting time with the child. On April 1, 2022, her Honour found that there was no reason for supervision to continue, and granted the father's motion, and ordered a graduated schedule whereby the father would start seeing the child during the day on Wednesdays and Saturdays, and that overnight parenting time would start in late June 2022.

After Justice Lack made this order, the mother started contacting the police and the Durham Children's Aid Society to allege that the father had anger issues and had locked the child in a bathroom. And, shortly before the overnights were supposed to start, she contacted the police and alleged that the father had sexually abused the child. The police investigated, and the child was seen by the SCAN team and other professionals, but the allegations were not verified.

Unfortunately, this was merely the first of many times that the mother would respond to a court order she didn't like by raising serious new allegations of abuse and/or violence against the father. For example, in response to a subsequent order requiring the mother to comply with Justice Lack's order (yes — an order that someone comply with an order), the mother contacted the police and alleged that the father had drugged the child, and had assaulted the mother's mother. And, upon learning that her request to change Justice Lack's order had been dismissed, the mother responded by contacting the police to allege that the father had assaulted the child.

Although the parties had numerous further court attendances in 2022 and 2023, they were not able to resolve matters, and the mother continued breaching court orders and raising serious allegations against the father with both the court and various third parties, including the police and Society.

Ultimately, in 2023 the father brought a motion to have the child removed from the mother's care, and placed in his sole care. By the time this motion was argued before Justice Finlayson in September 2023, some **20 orders or endorsements** had already been made by **five other judges**. (Sound familiar?)

In order to decide the father's motion, Justice Finlayson first summarized the principles that apply when dealing with a request to vary an interim parenting order prior to trial, including the following:

> 1. "Just because the Court can vary a temporary order on a temporary basis prior to trial, or just because the Court can make an initial order for temporary decision-making that would disturb a status quo, does not necessarily mean that it should do so."
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> 2. "The maintenance of the status quo is a heavy factor on a motion of this kind."
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> 3. "The preferable approach is usually to get the matter on for trial."
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> 4. "Generally it is not in a child's best interests to be subjected to a change in her residential arrangements if the possibility of yet another change is right around the corner because of an impending trial."
>
> 5. "Nevertheless, the Court is not powerless to act, where a child is in danger, or where there is some other compelling reasons to do so in a child's best interests[.]"
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> 6. " . . . additional considerations when deciding to intervene or not, are about the calibre of the evidence before the Court, and how quickly the case is likely to go to trial[.]"

Justice Finlayson also reviewed Justice Mackinnon's decision in *J.D. v. N.D.* (2020), 50 R.F.L. (8th) 62 (Ont. S.C.J.), which we discussed in the July 12, 2021 (2021-26) edition of *TWFL*, and where her Honour explained that there was good reason to consider lowering the threshold for varying an interim parenting order prior to trial:

> [23] In my view the law has evolved to the point where the approach of deferring parenting changes to trial in highly conflicted cases characterized by family violence and/or child parent contact issues should be re-examined, along with the related approach of routinely deferring implementation of family assessments to trial. **A reconsidered process of active**

> **judicial case management and timely single judge decision making** may provide children more hope for better outcomes and at the same time provide procedural fairness to their parents. [**emphasis** added]

Given the enormous backlogs in our courts, the need to consider lowering the threshold for varying interim orders is even more important now than it was in 2020. But no matter what standard applied, Justice Finlayson was satisfied that the facts of this case desperately cried out for **immediate** judicial intervention since, among other things: (a) the mother was clearly not supporting the child's relationship with the father; (b) the mother had refused to comply with multiple court orders; (c) the record before the court contained objective evidence from multiple third parties; (d) the case was not ready to be tried during the November trial sittings; and (e) the next available trial date was not until May 2024 at the earliest.

Given the mother's conduct, Justice Finlayson found that it would be in the child's best interests to be placed in the father's sole care, and to limit the mother to weekly supervised access for a few hours through either the local supervised access program, or a private supervision service. (At the risk of repetition — another bold decision.)

Like Justice Kraft in *Y.H.P.*, Justice Finlayson also made a number of orders to ensure that the court would be able to monitor the situation. In particular: (a) he asked the OCL to conduct an investigation to help the court understand how the child was doing in the father's care, whether the mother was able to gain any insight into her behaviour, and what a final parenting plan might look like; and (b) he ordered the parties to re-attend before him in approximately 30 days to see if the OCL had accepted the court's referral, and to obtain an update about how the child was adjusting to the new arrangements.

Finally, and of particular interest to us, Justice Finlayson directed that a copy of his reasons be sent to the Durham Children's Aid Society as, in his view, "[a] number of aspects of this case have approached if not crossed the line into matters of child protection, yet the parents were left to litigate these issues in private parenting litigation. A father-child relationship has been significantly disrupted in the process[.]" He also ordered the Society to have its representative attend the next court attendance to explain how the Society was going to support the family going forward. Love it.

A Final Thought

As we said at the beginning, we've been giving a lot of thought to the role children's aid societies ought to be playing in cases involving allegations of serious parental alienation. Both *Y.H.P.* and *G.R.G.* involved a parent who repeatedly made unverified allegations of serious physical and sexual abuse, ignored multiple court orders, and engaged in conduct that must have placed the child at risk of serious emotional and psychological harm. And yet, although children's aid societies were involved in each case, and although it seems obvious from the conduct described by Justice Kraft and Justice Finlayson that the children in *Y.H.P.* and *G.R.G.* were in need of protection, neither society saw fit to start a protection proceeding (or take other less intrusive steps to protect these vulnerable children). Instead, they both essentially left it up to the targeted parent to try and deal with the situation — and protect their child — on their own.

We understand that children's aid societies have limited resources, but they need to start taking active positions in these cases. It will save time and cost for the system and the agencies as a whole. Simply leaving a child with a parent who behaves in the way that the alienating parents in *Y.H.P.* and *G.R.G.* acted, and hoping for the best, just isn't good enough.