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**Family Law Newsletters**

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

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**Stay Pending Appeal? Stay Focussed on the Best Interest of the Child**

***Kalmbach v. Kalmbach*, 2024 CarswellAlta 2186 (C.A.) — Ho J.A.**

**Issues:** Alberta — Stay Pending Appeal

This was the applicant/support recipient's application for a stay pending appeal pursuant to Rule 14.48 of the *Alberta Rules of Court*, Alta. Reg. 124/2010. The court below found the applicant to be in contempt and stayed payment of child support, spousal support, arrears of support and mortgage payments until she purged her contempt. The applicant also asked, during the stay, that the previous child and spousal support orders be reinstated.

The parties separated in 2017, and there was one child of the marriage, currently 16-years-old. The child was living primarily with the applicant and had not seen the respondent in a number of years.

Although the applicant was in court in June 2023 when the contempt application was scheduled for August 17, 2023, and although the scheduling deadlines were clear, she did not file any materials in response to the contempt application.

The afternoon before the scheduled hearing, the applicant requested an adjournment by emailing the Case Management Judge's assistant, stating that she could not attend the following day for medical reasons.

The hearing proceeded in the applicant's absence, and the Case Management Judge found the applicant in contempt for failing to comply with an earlier order that required her to provide certain information and answers to undertakings. As a result, child and spousal support were suspended until the applicant purged her contempt. The applicant appealed.

The applicant argued that the Case Management Judge erred by proceeding on August 17, 2023, in her absence. She argued there was a breach of procedural fairness and that the Case Management Judge erred by suspending both child and spousal support payments until she purged her contempt. She also argued that it was an error to suspend child support because child support is — the right of the child.

The Case Management Judge reinstated child support on October 4, 2023, such that child support had been suspended for less than two months.

As of August 2024, the appeal had still not been set down for a hearing, and the Appeal Record had not yet been filed.

The test for a stay pending appeal is well known. It is the 3-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F (S.C.C.) ("*RJR-MacDonald Inc. v. Canada (Attorney General)*"):

1. Does the appeal raise a serious issue (as opposed to a frivolous one)?
2. Would the applicant suffer irreparable harm (harm that cannot be compensated for in costs or damages) if the stay is refused?
3. Where does the balance of convenience lie? If the stay is refused, will the applicant suffer greater harm than the respondent would suffer if the stay were granted?

Ultimately, the question requires a consideration of the justice of the case and the ultimate question is whether the granting of a stay is just and equitable in all the circumstances: *Google Inc. v. Equustek Solutions Inc.*, 2017 CarswellBC 1727 (S.C.C.) at para. 25.

In the family law context, the test is somewhat modified to reflect the paramount importance of the best interests of the child(ren) involved: *CLS v. BRS* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.) at para. 10; *Lloyd-Martinez v. Martinez*, 2021 CarswellAlta 75 (C.A.) at para. 10; *K.O. v. T.O.* (2015), 67 R.F.L. (7th) 1 (Sask. C.A.); *Lefebvre v. Lefebvre*, 2002 CarswellOnt 4325 (C.A. [In Chambers]); *Mudry v. Danisch* (2014), 48 R.F.L. (7th) 176 (Ont. Div. Ct.); *Berry v. Berry* (2010), 7 R.F.L. (7th) 29 (Ont. C.A. [In Chambers]); *K.K. v. M.M.*, 2021 CarswellOnt 8220 (Ont. C.A.); *C.D. v. A.B.*, 2004 CarswellNB 435 (N.B. C.A.); *P. (D.H.) v. P. (P.L.)* (2012), 29 R.F.L. (7th) 89 (N.B. C.A.); *Grant v. Grant* (2008), 53 R.F.L. (6th) 286 (N.S. C.A. [In Chambers]); *Reeves v. Reeves* (2010), 79 R.F.L. (6th) 255 (N.S. C.A. [In Chambers]); *Godin v. Godin*, 2011 CarswellNS 88 (C.A. [In Chambers]); *N.S. v. R.S.* (2016), 89 R.F.L. (7th) 137 (N.S. C.A.); *Alleyn-Dornn v. Dornn*, 2011 CarswellMan 247 (Q.B.).

The threshold for whether the appeal raises a "serious issue" is low. Essentially, the applicant need only show that the appeal is neither frivolous nor vexatious: *RJR-MacDonald Inc. v. Canada (Attorney General)* at paras. 337-338. A detailed or in-depth examination of the merits of the appeal is not required at this stage. See also *Denis v. Sauvageau*, 2022 CarswellAlta 1158 (C.A.) at para. 18.

However, although the threshold is low, the mere fact that children are involved, thereby invoking their best interests, without more, will not generally suffice to meet the "genuine issue" test. The applicant must still have an argument that the court below erred. The standard has not been lowered to "any argument will do": *Baker v. Hunter*, 2015 CarswellAlta 1803 (C.A.); *DA v. HK*, 2014 CarswellAlta 1983 (C.A.).

Notably, there *are* cases from the Alberta Court of Appeal that suggest that there is a serious issue to be tried *whenever* courts are called upon to consider the best interests of a child: *Sopczak v. Gye-Sik* (2011), 95 R.F.L. (6th) 338 (Alta. Q.B.); *C.L.S. v. B.R.S.* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.). However, that would render the first part of the test for stay pending appeal obsolete in every child-related appeal. That cannot be right, especially given the very high deference afforded to courts of first instance with respect to parenting issues. Respectfully, an appellate court cannot delve into a parenting case in the name of the best interests of the child where there is no material error: *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.); *P. (D.) v. B. (R.)* (2007), 44 R.F.L. (6th) 9 (P.E.I. C.A.); *Wedsworth v. Wedsworth* (2001), 19 R.F.L. (5th) 455 (N.S. C.A.).

Here, the applicant argued that there was a breach of procedural fairness and that the court should not have proceeded in her absence. She argued that the Case Management Judge should have granted a short adjournment and made the subsequent hearing peremptory on her. That was enough for Justice Ho to find that the appeal involved a genuine issue and was not frivolous, especially given the nature of the contempt remedy.

Often in a case like this, the second and third branches of the test are collapsed and considered together — or in the words of Justice Ho, considered "holistically", because "irreparable harm" is closely connected with the "balance of convenience" when children are involved: *Baker v. Hunter*, 2015 CarswellAlta 1803 (Alta. C.A.) at para. 11; *AG v. JB*, 2008 CarswellAlta 191 (C.A.) at para. 12. The overarching consideration is whether the child will suffer irreparable harm resulting from granting or denying the stay: *CLS v. BRS* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.) at para. 10.

Similar to the "genuine issue" inquiry, there must be something material to the alleged irreparable harm — there is no automatic irreparable harm simply because the matter involves a child. More than "mere disruption" to the child's life is required. There must be evidence of circumstances that demonstrate potential harm to the child, or some harm that is "real and significant" and is more than a transitory disturbance: *Lloyd-Martinez v. Martinez*, 2021 CarswellAlta 75 (C.A.) at para 15; *Millington v. Millington*, 2021 CarswellAlta 1654 (C.A.) at para 14; *Fossey v. Fossey*, 2021 CarswellAlta 1921 (C.A.) at para 15; *YM v. DT* (2021), 61 R.F.L. (8th) 260 (Alta. C.A.).

Here, the applicant referred to hardship that had allegedly resulted to her and to the child as a result of the finding of contempt and suspension of support. Justice Ho was satisfied that the suspension of *spousal* support had an adverse impact on the child and that a stay pending appeal would mitigate those adverse effects and better serve the best interests of the child.

Therefore, on a balance of probabilities, her Honour was convinced that the second and third criteria also weighed in support of a stay, giving paramount consideration to the best interests of the child.

However, Justice Ho was also mindful of the fact that the matter had been ongoing since 2017 and that the appeal was still not ready to be listed.

Therefore, her Honour was only prepared to grant the applicant a partial stay (with respect to spousal support), and she imposed filing deadlines — and a hearing date — for the appeal.

And that was that.

### **The Office of the Children's Lawyer Giveth . . . and the Ontario Superior Court Taketh Away**

*Moniz v. Amyot*, 2024 CarswellOnt 16209 (S.C.J.) — Price J.

**Issues:** Ontario — Parenting — Reversal of Primary Care

The main issue on this motion was whether the child's primary residence should be switched, on an *interim* basis, from the Respondent/mother to the Applicant/father.

The parties had an on-again-off-again relationship and never married. Their child, R, was born in Strathroy, where the father continued to live with his fiancée, their nine-month-old child and his parents. Where is Strathroy? Southeast of Mullifarry and dead south of The Wrightmans Corners. Still don't know? Think London Ontario-ish.

The relationship ended before R was two-years-old. In 2021, following separation, the mother relocated to London with R.

The father wanted R to live with him and the rest of his family in his parents' home, where, in the father's absence, his parents and his fiancée would be available to care for her. Under the father's suggested plan, the mother would have parenting time with R on alternate weekends and Wednesday evenings in Strathroy. The father would be responsible for transporting the child to London for the mother's parenting time on the weekends, while the mother would be responsible for her transportation to and from Strathroy for her Wednesday parenting time. The mother would pay child support to the father.

In 2023, Justice Moore ordered that the Office of the Children's Lawyer (the "OCL") provide a Report to assist the parties and court in determining the child's best interests. Justice Price noted that the OCL Report (circulated in May 2024) — which strongly favoured the father — was likely the impetus for the father bringing the motion.

The OCL investigator recommended that R live primarily with the father and that he be granted sole decision-making authority. The mother would have parenting time on alternate weekends, extended to Mondays during the summer, and weekly 2 1/2 hour dinner visits on Wednesdays.

The OCL investigator noted several areas of concern about the mother, citing at length excerpts from reports and records from her physician, the police, and the Children's Aid Society (the "Society") dating back to December 2020. The investigator questioned the mother's mental health and ability to care for R.

The OCL also noted that the mother had over a dozen interactions with police from 2021-2023, which included reports of domestic disputes and disturbances at the mother's residence and incidents of domestic abuse by the mother's ex-boyfriend. By November 2023, the police had "flagged" the mother's apartment as a "domestic hazard" — not a good flag as far as flags go.

The Society interacted with the mother on a few occasions, and asked the father about his concerns regarding the mother's residence. The father told the Society about the mother's potential alcohol abuse issues and supposed lack of consistency in R's day-to-day schedule. The Society took no formal action despite confirming in 2022 — twice — that R was at risk in the mother's care, according to the OCL investigator.

In response to the OCL report, the mother filed a Notice of Dispute and claimed that the investigator was biased in favour of the father. For this, she cited several reasons, including that the investigator failed to examine the father's history of mental health issues or substance abuse with comparable depth, and that she failed to follow-up and investigate information about the father provided by the mother.

The father's counsel argued that the OCL report was "unrelentingly indicative of the mother's chaotic, unstable lifestyle", which translated directly into a lack of stability for R. Accordingly, R's best interests mandated that he be placed with the father prior to trial, despite the fact that R had been residing with the mother since 2021. The father's counsel focused on the fact that R's eligibility to attend Junior Kindergarten in September 2024 lent urgency to the court addressing the issues of where R was to reside and what school he should attend.

The father's case was essentially that the mother makes bad decisions and that, along with her behaviour, put R at risk, and that the OCL report provides independent evidence and corroboration to support his position. Hence, these factors, according to the father, and a consideration of R's best interests, combined to require that R be removed from the care of the mother and be placed in the care of the father.

The mother's counsel, on the other hand, focused on the *status quo* — the "facts on the ground" — the fact that the mother had been R's primary parent since birth. She argued that, according to the case law, there is a "heavy onus" on a parent looking to change a parenting *status quo* and claimed that there was no compelling evidence of exceptional circumstances to mandate such a change at this time.

The mother's counsel noted that, but for the OCL report, there was no other evidence before the court to compel the outcome sought by the father. She pointed to the absence of evidence that R has not been meeting his milestones or of any medical concerns, plus evidence that R presented as a happy child to the staff at daycare, and that he is vaccinated. She noted the frequency at which the Society took no steps to intervene in the mother's care of R despite the many (usually anonymous) reports it received.

In considering the matter, Justice Price noted that the father had failed to consider the history of the care of the child. Section 20(4) of the *Children's Law Reform Act*, R.S.O., 1990, c C.12 (the "*CLRA*") is clear that if, following the separation of a child's parents, the child "lives with one of them with the consent, implied consent or acquiescence of the other, the right of the other to exercise the entitlement to decision-making responsibility with respect to the child, but not the entitlement to parenting time, is suspended until a separation agreement or order provides otherwise."

R had been in the primary care of the mother for almost *two years* before the father commenced proceedings in December 2022. This created a *de facto status quo* by the time the motion was argued. After the mother had relocated to London in 2021, following the parties' separation, she was placed in a hotel for two weeks and asked the father to care for R until she got into a shelter. He did so, returning R to her when she went into the shelter. The father either impliedly consented, or acquiesced, to the

mother having primary care and decision-making responsibility for R. That history could not just be ignored when considering R's best interests.

Then there was the question of the propriety, and test, for varying an existing interim order, which Justice Price held should equally apply where a *de facto status quo* parenting arrangement is being challenged.

In *Daniel v. Henlon*, 2018 CarswellOnt 2901 (C.J.) at paras. 26-27, the court stated:

[26] It is well established in the case law that in custody and access cases, **it is generally not in the best interests of children to disturb the status quo on a temporary motion pending a trial without compelling reasons**. The moving party must demonstrate that there is **material and compelling evidence** that the child's best interests **demand an immediate change** to the status quo or the existing parenting arrangement pending a trial, particularly if the status quo has been in place for a significant period of time . . .

[27] Compelling reasons to change the status quo on a temporary basis pending a trial could include serious mental health issues in connection with one of the parents, drug or alcohol addictions on the part of one of the parents, the child being at risk of physical or emotional harm in parent's care, or demonstrable evidence that the child is doing very poorly under the temporary parenting order. **[emphasis added]**

In *Miranda v. Miranda*, 2013 CarswellOnt 9752 (S.C.J.) at para. 26, Justice Mitrow similarly held that, "[a] party wishing to disturb an interim status quo or vary an interim order faces a strong onus to produce cogent and compelling evidence to show that the physical, mental and moral welfare of a child would be in danger in maintaining the status quo . . . "

So what of the somewhat damning OCL report?

Historically, absent very "exceptional circumstances," courts were very slow to rely on such reports for the purposes of interim motions. See, for example: *Robinson v. Robinson* (1985), 49 R.F.L. (2d) 43 (Ont. C.A.); *Mayer v. Mayer* (2002), 34 R.F.L. (5th) 69 (Ont. S.C.J.); *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.J.); *Genovesi v. Genovesi* (1992), 41 R.F.L. (3d) 27 (Ont. Gen. Div.); *Kirkham v. Kirkham* (2008), 57 R.F.L. (6th) 120 (Ont. S.C.J.); *Stuyt v. Stuyt*, 2006 CarswellOnt 7783 (S.C.J.).

That view has changed significantly in the past decade or so. In *Bos v. Bos* (2012), 2012 CarswellOnt 7442 (S.C.J.), Justice Mitrow suggested that, where the best interests of a child are at stake, a court should not demand "exceptional circumstances" before a change is made:

[23] . . . the jurisprudence . . . is not so rigid and inflexible as to prevent a court on a motion to give some consideration to the content of an assessment report where that assessment report provides some additional probative evidence to assist the court, particularly where the court is making an order which is not a substantive departure from an existing order or status quo."

Then, at paragraph 26 of *Bos*, Justice Mitrow listed four factors for the court to consider when faced with a motion for interim relief in relation to parenting issues; where an assessment has been prepared; and when the court is being asked to consider the assessment without making a finding that "exceptional circumstances" exist:

1. How significant is the proposed change as compared to the interim *de jure* or *de facto* status quo?
2. What other evidence is before the court to support the change requested?
3. Is the court being asked to consider the entire report and recommendations, or is it necessary for the purpose of the motion only to consider some aspects of the report, including statements made by the children, observations made by the assessor or any analysis contained in the report which may be of assistance to the motions judge?
4. Are the portions of the recommendations which are sought to be relied on contentious and, if so, has either party requested an opportunity to cross — examine the assessor?

Justice Chappel similarly interpreted *Bos* in *Batsinda v. Batsinda*, 2013 CarswellOnt 18635 (S.C.J.):

[32] The caution that applies with respect to the weight to be given to assessment reports at the interim stage of proceedings applies primarily to the conclusions and recommendations of the assessor, rather than the evidence and observations set out in that report. Information such as . . . the assessor's observations respecting the parties, and their impressions regarding the parties' interactions with the children may be of considerable value to the motions judge in their attempt to reach a decision respecting the best interests of the children, provided that the evidence appears to be probative.

This is all consistent with the "general rule" that a court should treat an assessment report with caution at a motion for a temporary order — see *Southorn v. Ree*, 2019 CarswellOnt 2570 (S.C.J.) at para. 20.

We are also somewhat partial to the test expressed in *Marcy v. Belmore* (2012), 27 R.F.L. (7th) 412 (Ont. S.C.J.): the court should consider if there is a problem requiring immediate attention — and even then — the courts should act with caution, implementing only as much as absolutely required.

Considering the OCL report, Justice Price observed that it was largely based on information taken from third party reports generated by the police, the Society and the mother's medical providers. The investigator had no personal knowledge of the information in those reports, and the mother's counsel had raised a number of compelling questions about the reliability of some of the information on which the investigator relied in formulating her recommendations.

In Justice Price's view, the information contained in those reports (and let's call it . . . oh, we don't know . . . hearsay) did not fall within the exceptions allowed for by Justice Mitrow in *Bos* and Justice Chappel in *Batsinda* because they were hearsay. The specific information was neither within the personal knowledge of the investigator, nor were the facts observed by the investigator personally at the time of the events described in the report. And, of course, the author of the report had not been cross-examined — which *could* result in a very different story than the one set out in the reports on which the investigator based her conclusions. As noted by the British Columbia Court of Appeal, the right to cross-examine a court-appointed assessor is an important safeguard integral to parenting determinations: *W. (K.M.) v. W. (L.J.)* (2010), 94 R.F.L. (6th) 90 (B.C. C.A.).

Moreover, much of the information from reports cited by the OCL investigator was dated. There was no evidence of more recent imminent risk to R. The argument that the "longitudinal series" of police and Society reports suggested a pattern of behaviour by the mother that could pose a risk to R was something best left to determine at trial.

Justice Price also addressed several aspects of the OCL report that the father's counsel relied on:

1. The daycare notes summarized by the OCL investigator indicated that R was a happy, well-adjusted child who has speech delays, which was not suggestive of instability.
2. Prior to the release of the OCL report, the parties had already agreed to the father having periods of weekly parenting time with R during the summer of 2024. This supported the conclusion that the mother supported R's relationship with the father. Conversely, the father advanced little evidence to demonstrate his ability to cooperate with the mother on matters affecting R. He ran a negative campaign.
3. The father advanced little evidence to demonstrate his own ability to meet R's needs. His entire plan was built around the support he would receive from his fiancée and his parents.
4. Family violence and its role and impact, if any, in R's life were matters best left to be explored at trial. R was present less than 50% of the time when police attended at the mother's home in the past (not that this is any ringing endorsement). Moreover, there was no evidence that the mother's *current* boyfriend has been violent toward her.

Based on the materials filed for the motion, including the mother's Notice of Dispute, Justice Price drew the following conclusions having regard to the four factors listed in *Bos v. Bos*:

1. The changes proposed by the father were significantly different from the interim *de facto status quo*;
2. There was little other uncontested evidence properly before the court to support the changes requested;
3. The court was being asked to consider the investigator's analysis, which was based on third party reports, arguably contained suggestions of bias in favour of the father and may inexplicably lack certain information that would place the mother in a better light as a caregiver; and
4. Most of the recommendations were contentious and were disputed by the mother.

Accordingly, Justice Price placed little weight on the investigator's report for the purposes of the motion. And without the report, there was basically no basis to change the *status quo*.

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