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

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The Only Case You'll Ever Need About Interim Parenting

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Who doesn't love a good list?

If you ever need to write a Factum for an interim parenting motion, Justice Pazaratz's decision in *Churchill* is now the only case you'll need to rely on. It reviews and summarizes literally ***all*** of the legal principles and issues that arise on these motions.

The parties in *Churchill* lived together for five years. They had a child together, who was eight years old by the time of the motion before Justice Pazaratz in 2024.

When the parties separated in 2020, the child lived primarily with the mother and her older son from a previous relationship. However, in March 2022, the mother asked the father to care for the child temporarily while she tried to help her older son deal with some significant mental health issues (as well as her own).

Almost immediately after the child moved in with the father, the mother claimed that the situation with her older son had stabilized, and asked the father to return the child. When the father refused to do so, the mother commenced an Application.

Between June 2022 and June 2023, the mother and father consented to a series of "without prejudice orders" that provided, among other things, that the child would continue living with the father but would spend increasing amounts of time with the mother. The court also asked the Office of the Children's Lawyer (the "OCL") to conduct an investigation, and it agreed to do so.

In August 2023, the OCL released a detailed report, and recommended, among other things, a schedule whereby the child spent approximately equal time with both parents. The mother accepted the OCL's recommendations. The father rejected them.

In January 2024, the court scheduled a 10-day trial for June 2024. However, it also granted the mother leave to bring a 1/2-day motion in March 2024 for a temporary Order to have the child placed in her primary care pending trial.

Given that the child had already been in the father's primary care for two years at the time the motion was heard, that nothing in the more than 500 pages of materials filed suggested any urgency, and that the trial was only three months away, it should come as no surprise that Justice Pazaratz dismissed the motion, and awarded costs to the father.

But that is not the interesting part of the decision, or the reason we wanted to bring this case to your attention. We did that because Justice Pazaratz, as he often does, took the opportunity to review and summarize almost all of the leading cases dealing with interim parenting, and organized them into a comprehensive framework of principles to use in future cases. The following is a summary of the general framework that Justice Pazaratz put together for future use, although we have left out the numerous citations to other cases that he relied on when assembling this framework (you'll no longer need them anyways because you can now just cite *Churchill*):

General principles for assessing a child's best interests on an interim motion:

1. The list of best interests factors in the [applicable legislation] is not exhaustive.

2. None of the listed factors are given priority[.]

3. No single criterion is determinative. The weight to be given to each factor depends on the circumstances of the particular child.

4. The listed factors are not a checklist to be tabulated with the highest score winning. Rather, the court must take a holistic look at the child, his or her needs and the people in the child's life.

5. An assessment of the best interests of the child must take into account all of the relevant circumstances with respect to the needs of the child and the ability of each parent to meet those needs.

6. The child's best interests are not merely "paramount" — they are the *only* consideration in this analysis.

7. The court must ascertain a child's best interests from the perspective of the child rather than that of the parents.

8. Adult preferences or rights do not form part of the analysis except insofar as they are relevant to the determination of the best interests of the child.

9. The court's unrelenting focus on the best interests of each particular child means that there can be no presumption in favour of any one type of parenting order. All things being equal, each child deserves to have a meaningful and consistent relationship with both parents.

The limitations of interim parenting motions:

10. Typically, on an interim motion the court is presented with conflicting affidavits which are incomplete and untested. The facts are often still evolving. As a result, a temporary order is meant to provide a reasonably acceptable solution on an expeditious basis for a problem that will be fully canvassed at subsequent conferences or resolved at a trial.

The importance of the "status quo" on interim parenting motions:

11. It is a long-standing legal principle that absent evidence of a material change and that an immediate change is required, the *status quo* is ordinarily to be maintained until trial[.]

12. The status quo — and avoiding reckless creation of a new status quo — are important considerations at the interim stage.

13. The longer the status quo has existed, the greater the presumption that it should be maintained pending trial, unless there is material evidence that the child's best interests require an immediate change.

14. Temporary orders are "band-aid" solutions pending a full hearing. The *status quo* is ordinarily maintained pending trial unless the evidence demonstrates that the best interests of the child require some modification.

15. To disturb the *status quo*, there must be compelling evidence to show the welfare of the child would be in danger if the *status quo* is maintained. The evidence must clearly and unequivocally establish that the *status quo* is not in the child's best interests.

16. The *status quo* is particularly important on an interim motion because the court is often not in a position to make factual findings based on incomplete and untested evidence.

Determining the "status quo":

17. The *status quo* may be established by reference to the parents' practice or the child's routine prior to separation; by any consensual arrangement made after separation; or by court order.

18. If a motion is brought immediately after separation, the court will need to determine parenting roles and the child's routine while the parties were together, with emphasis on more recent patterns.

19. If a time-sharing arrangement has emerged on a consensual basis since the date of separation — and if it is meeting the child's needs — the court will be reluctant to change an arrangement which the child has become used to.

20. But if only a short amount of time has elapsed between the creation of a new *status quo* and the hearing of the motion, the court will be more inclined to presume that restoration of a previous successful *status quo* is appropriate.

21. Because of the obvious importance of the *status quo* as a best interests consideration, courts must be mindful of — and actively discourage — efforts by parents to unilaterally create a new *status quo* through manipulation, exaggeration or deception.

22. The *status quo* does not refer to a situation unreasonably created by one party after separation to obtain a tactical advantage in the litigation.

23. Neither parent has the right to suddenly impose major changes in a child's life, or to unilaterally interfere with or impede the other parent's contact or role in the child's life. A parent cannot be permitted to gain a litigation advantage through manipulation of events, or by creating a new arrangement which they may later characterize as the *status quo*.

24. Parents cannot resort to self-help remedies; ignore obligations under agreements or orders; present a *fait d'accompli* to the court on an interim basis; and expect the court to approve. That is a recipe for chaos, and disaster, and is unfair to children caught in the middle.

25. Self-help is to be discouraged, and certainly not rewarded. A parent who engages in self-help tactics for strategic purposes — despite the best interests of the child — will generally raise serious questions about their own parenting skills and judgment.

26. Neither parent has the right to create a unilateral parenting *status quo*, even if there is an alleged safety issue.

27. It is inappropriate for a parent to make secret plans which will have significant impact on children and parenting arrangements, and then announce those plans after decisions have been implemented.

28. Parents take unilateral action at their own peril. The court will not sanction self-help in circumstances where the best interests of children may potentially be jeopardized. Corrective action by the court may be swift and firm — with long-term consequences quite the opposite of what the offending parent hoped to achieve.

Interim Without Prejudice Orders:

29. As a general rule, *no material change in circumstances is required* on a motion to change a temporary without prejudice order, or in relation to a time-limited temporary order.

30. At the earliest stages of litigation — particularly on the first return of a motion where there has been insufficient time for a response — a "without prejudice" order may have the advantage of stabilizing the situation, without requiring a material change in circumstances before arrangements can be further considered.

31. However, the court must be mindful that a protracted succession of temporary-temporary or without prejudice orders may perpetuate — and perhaps even invite — even more motions, as parents jockey to obtain an advantageous *status quo*.

32. Allowing parents an unfettered right to keep trying to change parenting arrangements without requiring a material change in circumstances is inconsistent with children's need for stability and predictability. At a certain point, the "without prejudice" characterization becomes counter-productive.

33. From the parent's perspective the "without prejudice" designation preserves options and avoids admissions. But from the child's perspective — *which is the one that really counts* — the words "without prejudice" cannot magically obscure the reality of the child's accumulating experiences, routines and relationships.

34. You can call the interim arrangement whatever you want. But after a child's placement has continued uneventfully for months — or in this case years — the "material change in circumstances" test becomes indistinguishable from the "why should we disrupt the status quo?" test.

Assessments And OCL Reports On Interim Parenting Motions:

35. The case law overwhelmingly urges courts to be cautious before relying upon an assessment report or OCL report at an interim stage of the proceedings.

36. In general, interim implementation of OCL reports and assessments should be discouraged, as such motions require the court to make profound and often disruptive decisions based on incomplete and untested information.

37. An assessment or [OCL] report is only one piece of evidence in a proceeding, intended for use *at trial*. At the motion stage the report untested. It should generally not be adopted without a trial.

38. It is usually preferable for the *status quo* to continue until trial.

39. Nonetheless, the best interests of the child must be the paramount consideration at every stage. And if the arrival of an assessment or OCL report presents additional — and reliable — information affecting the immediate best interests of the child, then in some circumstances it may be appropriate *and necessary* for the court to utilize the report in making (or changing) an interim order.

40. Historically, many cases have set out a fairly stringent requirement that there must be "compelling" or "exceptional" circumstances to change the *status quo* pending trial.

41. More recently, a number of cases have warned against an inflexible blanket prohibition with respect to consideration of assessment reports an interim motion, especially when that is the only independent evidence before the court.

42. At the motion stage the court *should not presume* that an assessor's recommendations would or should inevitably prevail at trial.

43. However, the *evidence and observations* set out in the report may justify immediate court action, particularly if the evidence suggests an immediate change is required to protect children from physical or emotional harm, or otherwise promote their best interests.

44. Information such as statements made by a child to the assessor; the assessor's observations of the parents and the child (individually or together); or undisputed facts contained in the report — those portions of an assessment *may* be

> of considerable value to a motions judge in determining whether interim changes to the parenting regime are required to promote the best interests of the children.
>
> 45. Parties should not perceive the arrival of an assessment report as creating an automatic strategic opportunity to secure a more favourable status quo, heading into trial.

It's a Santa Claus decision — there is literally something for everyone. There is enough balance built into these **45** principles to help counsel advise and advocate, and to help courts determine, interim parenting motions. If you cannot find principles in this case that help your case, you need to seriously reconsider your approach.

Finally, as you have probably noticed by now, we have a particular view about the length of time it takes our system to decide family law cases on a final basis, particularly in cases involving young children. So, we would be remiss if we didn't point out that even though *Churchill* involved the best interest of a young child, and even though the litigation began in March of 2022, the trial was not going to be heard and decided until June 2024 *at the earliest* — even though the case was scheduled for trial during the June 2024 sittings, that is no guarantee that the trial would actually be heard during those sittings. It is not uncommon for trial lists to be so long that some cases are not reached, or for the trial to start but not finish, and then have to wait months for the next trial sittings. And then there is the time it takes busy judges to write reasons.

Not All Results are Appealing

Joseph Lebovic Charitable Foundation v. Jewish Foundation of Greater Toronto, 2024 CarswellOnt 19879 (C.A.) — Favreau, Monahan and Gomery JJ.A.

Issues: Ontario - Reviewing an Arbitrator's Decision on Jurisdiction Parties and counsel sometimes forget that not all awards issued in the context of arbitration are subject to appeal. This is not a family law case, but it is important for family lawyers to remember the rules of the arbitration game.

In *Lebovic*, the moving parties were looking to quash the responding parties' motion for leave to appeal on the basis that the Court of Appeal was without jurisdiction to hear the proposed appeal.

To make uninteresting facts short, in 2015, the parties started an arbitration about the proposed sale of land. This led to a consent order. In 2021, the moving parties started an arbitration raising various issues arising from the consent order. The responding parties brought a counterclaim in the arbitration.

After the 2021 arbitral proceeding started, the responding parties retained new counsel and raised concerns over the arbitrator's jurisdiction. Before hearing the substantive issues on the arbitration, the arbitrator heard arguments on whether he had jurisdiction over the issues raised in the arbitration. The arbitrator reserved his decision on jurisdiction. After the parties presented their evidence on the arbitration, but before they made their closing submissions, the arbitrator released a decision dated March 15, 2023, in which he concluded that he did have jurisdiction over the issues raised in the arbitration. The arbitrator then decided the substantive issues in a separate award in July 2023.

The responding parties then initiated two separate proceedings in Superior Court. The first — and of primary interest to us — was an application to review the arbitrator's jurisdiction decision. The second was an appeal from the July 2023 arbitration award.

Justice Akbarali, the application judge, dismissed the application to review the issue of jurisdiction. She found that the responding parties had waived their right to object to the arbitrator's jurisdiction.

Not content to pick up their marbles and go home, the responding parties brought a motion for leave to appeal to the Ontario Court of Appeal. This was the moving parties' motion to quash the motion for leave to appeal on the basis that the Court of Appeal did not have jurisdiction to hear an appeal from the application judge's order.

What's that you say? No right of appeal to the Court of Appeal? Correct.

Let's have a look at the governing sections of s. 17 of the Ontario *Arbitration Act*, *1991*, S.O. 1991 (the "*Arbitration Act*") which is similar to arbitration statutes across the country:

> **Rulings and objections re jurisdiction**
>
> **Arbitral tribunal may rule on own jurisdiction**
>
> 17 (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.
>
> . . . . .
>
> **Time for objections to jurisdiction**
>
> (3) A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal.
>
> **Time for objections, exceeding authority**
>
> (5) A party who has an objection that the arbitral tribunal is exceeding its authority shall make the objection as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration.
>
> **Later objections**
>
> (6) Despite section 4, if the arbitral tribunal considers the delay justified, a party may make an objection after the time limit referred to in subsection (3) or (5), as the case may be, has expired.
>
> **Ruling**
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> (7) **The arbitral tribunal may rule on an objection as a preliminary question or may deal with it in an award**.
>
> **Review by court**
>
> (8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.
>
> **No appeal**
>
> (9) **There is no appeal from the court's decision**. [emphasis added]

Section 17(9) of the *Arbitration Act* is clear that there was no ability to appeal from the application judge's decision regarding jurisdiction. Mic-drop.

The responding parties tried to argue that the arbitrator's jurisdiction decision was not a ruling "on an objection as a preliminary question" and that it was, therefore, not made under s. 17(8). But it was clear that is precisely what had happened; the issue of jurisdiction was argued as a preliminary question before the arbitrator. It did not matter that the jurisdiction award was delivered after the substantive arbitration had started: *Iris Technologies Inc. v. Rogers Communications Canada Inc.*, 2022 CarswellOnt 12468 (C.A.), at paras. 7-8. This was also a difficult argument for the responding parties given they brought a stand-alone application to review the arbitrator's jurisdiction decision, and a separate application in respect of the July 2023 award.

No jurisdiction to hear the appeal . . . no jurisdiction to hear a motion for leave to appeal . . . motion quashed.

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