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Family Law Newsletters

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

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***H.S. v. D.N.* (2025), 18 R.F.L. (9th) 339 (Ont. S.C.J.) — Finlayson J.**

Just how much chaos does a family have to endure before a court will intervene on an interim motion?

In *H.S. v. D.N.*, we get an answer: overholding that resulted in a father being jailed; repeated Society and police involvement; a 172-page section 30 custody/access assessment recommending supervised parenting time; a father who refused psychological testing; and two children at the center of it all experiencing untold emotional harm.

Even then, the father argued that the assessment report should not be relied upon until trial. Justice Finlayson "disagreed."

This decision is an example of a court exercising its discretion to act on an interim basis to protect children, while still preserving the father's right to challenge an assessment at trial. But it is also a case that raises challenging questions about a system that allowed these two children to fester in chaos for *three years* before anyone could hear evidence and make findings of fact.

Background

The parties were married from 2012 to 2022. They had two children: D., age 12, and C., age 10. Post-separation, a *status quo* emerged where the children lived primarily with the mother. The litigation that followed was described by several judges as "high conflict" which, when loosely translated from judge-speak, is "ugh."

The father overheld D. for almost 2 ¹/₂ months in the fall of 2023. Justice Bird had ordered D.'s return by December 22, 2023, setting a schedule of alternate weekends and mid-week time for the father. She authorized the mother to enroll the children in counselling without the father's consent and directed the parties to communicate only through AppClose or OurFamilyWizard. She noted that "the impact of the parties' separation and inability to coparent on the children is concerning." An understatement. And some foreshadowing.

The father did not comply.

At an urgent Case Conference on January 11, 2024, Justice Jarvis found the father to be "at least presumptively in contempt" and sent him to the big-house temporarily until D. was returned. His Honour described the Children's Aid Society reports about the family as "shocking," noted the children were being emotionally harmed, and made a referral to the Society. When counselling was suggested, the father said he did not need it — a response His Honour found demonstrated a considerable lack of insight.

In May 2024, Justice MacPherson dismissed the father's motion to vary Justice Bird's Order. He found the father lacked insight into the consequences of his actions and that the children were already being influenced to express views rather than being

shielded from litigation. His Honour concluded: "This high conflict case does not bode well for [D.] and [C.]." He directed that the case be prioritized for trial in November 2024.

The parents did not listen. Instead of proceeding to trial, they consented to a section 30 assessment in October 2024 — but without naming an assessor. They subsequently agreed to an assessor, who the mother said was proposed by the father's counsel because of his "strong, professional reputation and experience."

The father obstructed the assessment process. He interfered with counselling. He refused psychological testing. He blocked the release of information. He limited collateral contacts. He did everything but put Baby in a corner (older readers will get the reference). And then, when the report proved unfavourable, he alleged bias.

The overholding continued into 2025, prompting escalating fines that began at \$500 and doubled with each infraction.

Meanwhile, the children were suffering. The Children's Aid Society verified concerns of emotional harm on multiple occasions. The children's doctor reported that D. was exhibiting "anxiety and neck twitching due to stress." D. was observed with facial twitching and stuttering during the assessment. Both children had been exposed to repeated police involvement. Both parents alleged the other was alienating the children. D. was aligned with his father; C. was aligned with her mother.

The 172-page assessment report was released on May 1, 2025, of course making the May trial impossible, and necessitating an adjournment to the Fall, peremptory to the parties.

But that was still five months away when the matter ended up before Justice Finlayson — and as His Honour observed, five months was a long time for the children to live in chaos.

When Can a Court Act on a Custody/Access Assessment Before Trial?

The mother brought a motion to implement the section 30 assessment report pending trial. The father argued that the report could not be relied upon until it was trial-tested.

Justice Finlayson acknowledged the tension in the case law and worked through it carefully. As is trite, temporary orders are imperfect solutions based on limited evidence, meant to "hold the line" until trial: *Chaitas v. Christopoulos* (2004), 12 R.F.L. (6th) 43 (Ont. S.C.J.). And because stability is important for children, it is usually preferable to just get to trial rather than change residential arrangements when, "the possibility of yet another change is right around the corner because of an impending trial": *K.A.C. v. P.P.*, 2007 CarswellOnt 3043 (C.J.).

But the court is not powerless to act, and will act, where a child is in danger and/or where there are compelling circumstances: *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.J.); *Kimpton v. Kimpton*, 2002 CarswellOnt 5030 (S.C.J.).

The "traditional" rule required "compelling circumstances" before a court could rely on an untested assessment report: *Batsinda v. Batsinda* (2013), 2013 CarswellOnt 18635 (S.C.J.). But that standard has somewhat relaxed over time, and courts may now give "some consideration" to an assessment report without finding exceptional circumstances, weighing all relevant factors in context: *Bos v. Bos*, 2012 CarswellOnt 7442 (S.C.J.); *Closner v. Closner*, 2019 CarswellOnt 1130 (Div. Ct.). The key insight from *Batsinda* is that cautionary traditional rule should primarily apply to an assessor's conclusions and recommendations, not to the underlying evidence, facts and observations. Statements made by the children, the assessor's observations of the parties, and impressions of their interactions can be valuable and probative at an interim motion. See also *Glover v. Glover* (2013), 34 R.F.L. (7th) 229 (Ont. S.C.J.) where some of the assessor's recommendations were implemented on an interim motion.

The law has now perhaps evolved to recognize that rigidly deferring implementation of assessments in high-conflict cases may itself harm children. Justice Finlayson's approach reflects this (we suggest welcome) evolution.

Even though it may not have been necessary for the court to find exceptional circumstances, Justice Finlayson applied the more stringent test anyway, for three reasons. **First**, the changes proposed by the mother were significant: supervised parenting time would result in a major reduction of the father's time, and the father would no longer be able to act as the children's soccer

coach. **Second**, the mother was essentially asking the court to implement all of the assessor's recommendations pending trial — which called for caution. **Third**, the father wanted to challenge the assessment at trial on a number of grounds, which obviously could not happen in full until trial.

But having applied the more stringent test, Justice Finlayson still found it was met . . . and then some. He identified six considerations that, individually and collectively, required court intervention:

1. **The conflict was entrenched.** Multiple judges described the matter as high-conflict, and the Society had been engaged twice.
2. **The children were being harmed.** There was medical evidence of anxiety and stress-related physical symptoms, and the Society had verified concerns of emotional harm on multiple occasions.
3. **Court orders had not been followed — primarily by the father.** There was overholding, interference with counselling, and non-cooperation with the assessment.
4. **Prior remedial efforts had failed.** Costs, fines, and even brief incarceration had not changed the behaviour.
5. **Mental health concerns remained unexplored.** The father refused psychological testing despite agreeing to the assessor's retainer. His financial objection was, as the court put it, "devoid of merit."
6. **The evidentiary gaps were self-created.** The father blocked information releases, limited collateral contacts, refused testing — and then argued the court lacked sufficient evidence to act. (For those of you looking for a definition of chutzpah . . .)

The Society's Conflicting Letter

In an unusual twist, the evening before the motion, the Society delivered a summary letter that appeared to conflict with the assessment report. The Society recommended leaving the schedule in place, having both children engage in therapy, and having the parents attend a co-parenting program.

Justice Finlayson was critical of this letter, and for good reason. He noted that it stated what was obvious — that the children needed calm and stable home environments — but without providing any realistic solution for how to achieve that laudable goal. The Society did not appear to have addressed the father's repeated overholding or non-compliance. In fact, Justice Finlayson questioned whether the author of the letter had even read the assessment before writing it.

More fundamentally, if the court could not rely on the assessor's opinions because they were untested, why should it rely on the opinions of a child protection worker on the very same issues? As Justice Finlayson put it, that "would be internally inconsistent" and "an absurd result".

The Remedy: Will This Actually Work?

Justice Finlayson did not simply rubber-stamp the mother's motion claiming 29 heads of relief. He was clear that he did not intend to implement the entire report as the mother asked. Some of the mother's proposals were "inappropriate and not in the children's best interests" — particularly those requiring consultation with the father, "in a case where parental communication is inflammatory and conflict generating." The parties, Justice Finlayson concluded, "need to stay away and not otherwise engage with each other, for the sake of their children."

But Justice Finlayson was also candid about the difficulties inherent in what he was ordering. He acknowledged that D. "may very well be upset with the outcome of this motion. He may very well act out." The mother would have to deal with this, and she could not do so by sending him back to the father. But that did not mean that the assessor had not recognized this problem before making his recommendations, or that the court was "oblivious to this potential."

The critical passage is this (at para. 239):

There are difficult dynamics in this case. A difficult solution is at this point all that remains in terms of remedial options.

In short, the court was running out of options. Costs, fines, and even incarceration had not worked. Police enforcement might help crisis manage, but it was "not a complete and longer term solution". There had already been enough police and Society involvement, "which in itself is not good for these children. The children do not need to see and experience their parents calling the police on each other."

We suspect his Honour wanted to act before this situation became so entrenched that it was too late to fix: See *Ippolito v. Palmer* (2026), 24 R.F.L. (9th) 88 (Ont. S.C.J.) and *Ginese v. Fadel* (2024), 4 R.F.L. (9th) 114 (Ont. S.C.J.) — two heartbreaking cases.

In making the order he made, Justice Finlayson relied on two things. First, the mother's account that D. had settled down after coming back into her care in the past, when distanced from the father. Second, the fact that the children's therapist was now available to support D. and the mother. That therapeutic support was not in place when the matter first came before Justice Bird in December 2023.

Justice Finlayson also considered whether to split the children, placing each with his or her preferred parent. But he declined, noting that separating the siblings would be stressful and anxiety-inducing for C., and that Justice Bird had already ordered that the siblings should not be separated. He found no sufficient reason to change that finding.

The final order provided that the father would have supervised parenting time pending trial, either one or two three-hour visits per week, through a professional supervision service. The father was responsible for the cost. The mother was given sole decision-making authority for health and education—she would inform the father of decisions, but she need not consult in advance. The parties were ordered to communicate only by AppClose or OurFamilyWizard, briefly and cordially, about the children only. And critically: "The parties are cautioned that the trial judge will be shown their communications following the release of these Reasons for Decision. They will be under the scrutiny of the court."

Both parents were also ordered to undergo psychological testing. The father was required to sign all necessary consents and release information. Any failure to cooperate could justify an adverse inference under s. 30(6) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12:

Refusal to attend

(6) Where a person ordered under this section to attend for assessment refuses to attend or to undergo the assessment, the court may draw such inferences in respect of the ability and willingness of any person to satisfy the needs of the child as the court considers appropriate.

And, critically, neither party was permitted to share the contents of the decision with the children. The mother could tell them what the new schedule was, and that "the judge made the decision and they have to follow it" — but nothing else.

The trial was confirmed as peremptory and no further motions were permitted without leave.

This is a careful, thorough, and well-written decision that balances the competing considerations in a high-conflict parenting case. We offer several observations:

First, courts can and will act on interim motions when children are being harmed — even if an assessment report has not been tested at trial. The evidence and observations in the report are fair game, even if the ultimate conclusions are not. That reflects the modern approach.

Second, parties who obstruct the assessment process-by refusing psychological testing, withholding consents, or blocking the release of information-cannot then rely on the resulting evidentiary gaps to argue that the court lacks sufficient evidence to act. That is not sound legal strategy.

Third, this case is a reminder that overholding has consequences. The father overheld D. for months. He was jailed. He was fined. And ultimately, his parenting time was ordered to be supervised. Self-help remedies are not available in family law. As Justice Quinn memorably put it in *Gordon v. Starr* (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.): "An order is an order, not a suggestion. Non-compliance must have consequences. One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders." We cannot repeat those words often enough.

Justice Finlayson's decision is a well-reasoned application of these principles. It recognizes that sometimes "wait until trial" is just not good enough — not when children are being harmed, not when orders are being breached, and not when the party seeking to defer the issue is the one who created the mess in the first place. This is consistent with his Honour's approach in *G.R.G. v. S.G.*, 2023 CarswellOnt 16929 (S.C.J.), another alienation case on which we commented in the December 4, 2023 (2023-46) edition of *TWFL* in "The Interim Alienation Switch-Er-Oo — Part Deux — This Time with Feeling!", where he also granted extraordinary interim relief in circumstances where the evidence of harm was equally compelling.

The Bigger Problem

The parties separated in 2022. The Trial was scheduled for late 2025. That is at least three years of interim management without fact-finding — motions, fines, incarceration, and a 172-page assessment — while children lived in ongoing conflict. Multiple judges managed successive crises, but none could hear *viva voce* evidence and make credibility findings. That's a systemic problem.

The judges involved did what they could with the tools available to them. But the system itself is the problem. As we said in "Some Issues Never Go Away: Alienation vs. Estrangement" in our comment on *C.C. v. C.H.C.* (2025), 9 R.F.L. (9th) 272 (B.C. Prov. Ct.), in the May 5, 2025 (2025-16) edition of *TWFL*, the excessive time it takes to complete many high-conflict parenting trials, "is simply untenable. The delay in reaching a resolution not only exacerbates and entrenches the emotional and psychological toll on the children involved but also prolongs the suffering of parents trapped in these protracted disputes."

High-conflict cases that do not get better need to get to trial — quickly — so that the court can fulfil its fact-finding role. That means having the parties prove their case with proper evidence, not affidavits drafted by lawyers that are never tested by cross-examination. It means one judge hearing *viva voce* testimony and making credibility findings, not a rotating (though well-meaning) cast of judges making interim orders based on competing paper records. It really serves as an advertisement for single judge case management.

Requiring litigants to either settle or proceed to trial is not punitive. It is efficient. Trial dates promote resolution

D. and C. did not choose this. They should not have had to wait three years for someone to actually hear evidence and make a decision. Nothing helps focus litigants on settlement more than a fixed trial date. And if the case cannot be settled, any outstanding issues can then be resolved one way or another based on a complete evidentiary record. The alternative of having these cases linger in the system without end will almost invariably just make things worse.

D. and C. are living proof.