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— Franks & Zalev - This Week in Family Law

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Contents

COVID-19 Update

We have four COVID-19 cases to tell you about this week. In the first case, *J.T.K. v. A.E.M.*, 2020 CarswellOnt 6682 (C.J.), Justice Baker refused the Respondent's request to adjourn a motion until it could be heard in person, not being satisfied that there was any reason that the matter could not properly be dealt with in writing. In the second, *C.A.S. v. J.N., A.F. and M.S.*, 2020 CarswellOnt 6741 (S.C.J.), Justice Piccoli provided an excellent summary of the principles that apply when dealing with child protection cases during the COVID-19 pandemic. Finally, in *Wallegham v. Spigelski*, 2020 CarswellOnt 6298 (S.C.J.), and *Snively v. Gaudette*, 2020 CarswellOnt 6839 (S.C.J.), Justice Bondy both dealt with contempt motions that arose out of one parent's refusal to follow a court ordered schedule as a result of COVID-19.

Before we discuss these cases, however, we have noticed that the vast majority of the reported COVID-19-related cases come from Ontario. We do not know why that is, but if there are any non-Ontario COVID-19 related family law cases that you think might be of interest but that we have not already discussed, please feel free to forward them to us.

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J.T.K. v. A.E.M., 2020 CarswellOnt 6682 (C.J.) **- Baker J.**

We are starting to see decisions where judges are openly expressing concerns about the enormous backlog that our courts are going to be faced with once they are able to fully reopen, and are actively taking steps to try to deal with this problem. For example, in *J.T.K. v. A.E.M.*, the parties were able to resolve the main parenting issues without having to argue the motion, but they were unable to resolve the less pressing issues of the Applicant's request for makeup time and costs.

The Applicant wanted to have the Court deal with the remaining issues in writing, while the Respondent argued that they were not urgent and, accordingly, should be adjourned until the courts fully reopened.

Justice Baker refused to adjourn the matter, recognizing that the remaining issues were straightforward and could easily be dealt with in writing now (instead of adjourning them for oral submissions at some unknown date in the future). She also recognized that it is critical for the court system, which was already struggling to keep up with its ever-increasing caseload and the time limits for dealing with criminal cases that the Supreme Court of Canada established in *R. v. Jordan*, 2016 CarswellBC 1864 (S.C.C.), to start managing the growing backlog by dealing with matters that can be dealt with in writing now instead of putting them off until later:

> [8] An oral hearing would increase costs to the parties and require the allocation of judicial resources to relatively straightforward issues. It is difficult to see what the benefit would be of oral hearing on these kinds of issues.
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> [9] Moreover, the Respondent's proposal to adjourn the matter to the presumptive date would leave this case, like many others, in limbo, for future resolution at some unknown time. The court can take judicial notice of the fact that the restrictions on hearing arising from the COVID 19 emergency will lead to a substantial backlog of cases. When the emergency abates, the court will face unprecedented workload demands in dealing with that backlog.
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> [10] There is then, a substantial systemic benefit to resolving those matters that can be dealt with under the new expansion of workload, now.

We absolutely agree with Justice Baker's decision to force the Respondent to deal with the remaining issues in writing. We hope to see more courts make it clear to litigants that they cannot just put matters off to an unknown future date if they can be reasonably addressed now, and that they do not have an automatic right to make oral submissions. Notably, while not a family case, the Ontario Court of Appeal just made the same point in *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 CarswellOnt 6920 (C.A.), where it ordered that an appeal be heard in writing over the objection of one of the parties, finding there was nothing in the Ontario *Courts of Justice Act* or the *Rules of Civil Procedure* that prevented the Court from doing, especially in these times:

> [5] The exercise of the court's jurisdiction to manage its own process by directing that some appeals proceed on the written record is not inconsistent with any provision of the Courts of Justice Act or the Rules of Civil Procedure, which, in any event, do not mandate the absolute right to an oral hearing of an appeal. The Courts of Justice Act prescribes the composition of the Court of Appeal, but not the mode of hearings. And, while oral hearings are contemplated, the Rules of Civil Procedure do not explicitly direct that appeals to the Court of Appeal require an oral hearing. Rather, r. 1.04(1) expresses the governing principle that the Rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
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> [6] It is also beyond controversy that the COVID-19 pandemic has created extraordinary circumstances to which we must all adapt as best we can. Since March 17, 2020, there have been no in person appeals heard at the Court of Appeal. More than 100 scheduled appeals had to be adjourned. Through a series of Practice Directions, this court has endeavoured to address the tremendous disruption caused by the pandemic. As a result, appeals are being heard in writing or remotely until in person appeals can resume. Case management conferences are being held to manage and schedule them.
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> [7] Accordingly, it is well within this Court's jurisdiction to order that a civil appeal be heard in writing when the due administration of justice requires it. During these extraordinary times, judicial resources are strained. The ability to hear appeals remotely is not unlimited. Where appropriate, some appeals must be heard in writing in order to ensure that appeals continue to be heard in a timely and an orderly fashion.

We know that oral advocacy is important and that it *can* have an impact on the outcome in some cases. However, if the system is going to overcome the backlog that is building up, it is going to have to put restrictions on the types of matters that are argued orally, and impose strict time limits that the parties will be required to comply with. Notably, the Supreme Court of the United States typically only gives each side a total of 30 minutes for oral arguments in even the most complicated cases (and, at the Supreme Court of Canada, intervenors get only five minutes). Surely everything counsel and/or parties believe to be a "long motion" is not a "long motion."

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C.A.S. v. J.N., A.F. and M.S., 2020 CarswellOnt 6741 (S.C.J.) **- Piccoli J.**

Justice Piccoli's decision in *C.A.S. v. J.N.* is now one of the leading cases about access in child protection cases during the COVID-19 pandemic.

The children were in the care of their respective fathers, and the mother had access at the discretion of the Children's Aid Society of the Region of Waterloo (the "CAS").

The mother's access was suspended on March 15, 2020, when the CAS put a blanket policy in place where it temporarily suspended in-person access in all of its cases. On May 8, 2020, however, the CAS advised the parties that its blanket policy was being lifted, and that the mother's in-person access should resume. Both of the fathers, however, opposed the mother having in-person access because they were concerned that she had a history of not following court orders, and they did not trust her to follow COVID-19 protocols.

In ordering that the mother's in-person access would resume, Justice Piccoli provided a helpful summary of the key principles that apply when dealing with COVID-19-related child protection cases. In particular:

- "It is clear that since COVID-19 the court has found that there is no presumptive authority extended to the Society to suspend all in-person access to parents without formulating some alternative measures. See: *DCAS v. Quinn*, 2020 ONSC 1761; and *Children's Aid Society of Toronto v. T.F.*, 2020 ONCJ 169, at para. 10."

- Although Justice Pazaratz's decision in *Ribeiro v. Wright*, 2020 CarswellOnt 4090 (S.C.J.) "is not a child protection matter, the guidelines are applicable. See: *Simcoe Muskoka Child and Youth Family Services v. JH*, 2020 ONSC 1941, at para. 6."

- "In the current exceptional circumstances, the benefit of ongoing in-person contact must be weighed against any risk to the child and to his or her caregivers. See: *Children's Aid Society of Toronto and O.O and J.G-L*, 2020 ONCJ 179, at para. 69."

- "The onus is on the party seeking to restrict access to provide specific evidence or examples of behaviour or plans by the other party that are inconsistent with COVID 19 protocols and expose the child to risk. See: *Tessier v. Rick*, 2020 ONSC 1886, at para. 12."

- "A parent is not permitted to simply engage in self-help, or to interpret public health directives as a license to terminate parenting time. If the parent fears that the current routine may compromise their child's well being, or the health of a person in the home, then the parent must provide specifics and bring a motion to change the order. See: *Ahmadi v. Kalashi*, 2020 ONSC 2047, at para. 8."

- "As Justice Sherr states in *C.L.B. v A.J.N.*, 2020 ONCJ 213, at para. 31: 'Medical evidence is important on these COVID-19 motions. If someone is seeking to suspend a person's face-to-face contact with a child due to the child's medical vulnerability, a medical report should be provided setting out the child's medical condition, any increased vulnerability the child has with respect to the COVID-19 virus and specific recommendations about additional precautions that are required to protect the child from the virus.'"

- "Good parents will be expected to comply with the guidelines and to reasonably and transparently demonstrate to the other parent, regardless of their personal interests or the position taken in their parenting dispute, that they are guideline-compliant. See: *Balbontin v. Luwawa*, 2020 ONSC 1996, at para. 11."

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Wallegham v. Spigelski, 2020 CarswellOnt 6298 (S.C.J.) **- McLaren J. (see also** 2020 CarswellOnt 5710 (S.C.J.) **for the triage judge's decision to allow the motion to proceed)**

In *Wallegham v. Spigelski*, the parties had joint custody of their 5-year-old son pursuant to a court order. In mid-March 2020, however, the mother started withholding the son from the father because she had various concerns about COVID-19. While the father undoubtedly did some things in the early days of the pandemic, including taking the child to a store and then telling the mother "to piss up a rope" (whatever that means) when she asked him not to do this again, the evidence that the father filed in support of his motion to reinstate his access ultimately satisfied Justice McLaren that he was, in fact, taking the pandemic seriously, and that it was in the child's best interests to be able to resume seeing the father immediately.

That being said, Justice McLaren was not prepared to grant the father's request to find the mother in contempt of court because, among other things, the record before her did not establish that "the Mother was trying to deliberately and wilfully disobey a court order."

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Snively v. Gaudette, 2020 CarswellOnt 6838 (S.C.J.) 2020 CarswellOnt 6839 (S.C.J.)**-Bondy J.**

In contrast to *Wallegham*, in *Snively v. Gaudette* Justice Bondy was satisfied that the mother had, in fact, established that the father had willfully breached a court order. While contempt motions, which Justice Bondy recognized are "the big stick of civil litigation" and "should be used sparingly and only in the clearest cut of cases", should not be brought lightly, in *Snively*, the father's conduct did not really leave the mother or the court with much choice.

The parties' 12-year-old and 11-year-old lived primarily with the mother pursuant to a court order.

The mother worked at the Southwest Detention Centre in Windsor. At the beginning of the COVID-19 pandemic, the mother asked the father to temporarily keep the children with him until questions about a possible outbreak of COVID-19 at the jail had been resolved.

Once the jail had implemented strict protocols to deal with COVID-19 and had confirmed that none of the prisoners or staff had been infected, the mother asked the father to return the children to her. When he refused to do so, the mother brought a motion to have him held in contempt of court.

In granting the mother's motion, Justice Bondy was satisfied that the mother had established the elements of contempt beyond a reasonable doubt in that: (a) the order clearly and unequivocally stated what should and should not be done; (b) the father had actual knowledge of the order; and (c) the father had wilfully and deliberately breached the order. His Honour was also clearly not impressed by the way that the father had handled the situation:

> [62] In summary, the applicant father resorted to self-help rather than coming to court to seek relief. Although his stated purpose was to protect the children, the record before me supports the conclusion that his motives are most likely related to taking advantage of the COVID-19 crisis to change the status quo.
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> [63] The applicant father has on more than one occasion put his own needs ahead of those of the children. For example, he engages the 11 and 12-year-old children in this court process. In doing so, he likely exposed the children to unnecessary fear and trauma with respect to the COVID-19 crisis. He also failed in his duty as a father to protect them from parental conflict. In addition, he put the 11 and 12-year-old children in danger by electing to leave them alone in the vehicle while that vehicle was parked in a public parking lot. Finally, he has a history of physical abuse with the children which required the intervention of the CAS.
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> [64] On the other hand, the respondent mother has demonstrated a willingness to put the children's safety ahead of her own needs in the past. I have no reason to believe that she will not continue to do so in the future. In other words, I find that she is likely to again request the applicant's assistance in ensuring the safety of the children should there be a change in circumstances at her place of employment. If she does so, I would expect that the applicant would not again attempt to take advantage of the situation.
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> [65] Said another way, I am far more comfortable trusting the children's safety to the mother than I am to the father in the circumstances.
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> [66] In conclusion, I find the best interests of the children favour maintaining the terms of the order of Hebner J. It follows that I find the father did not have any reasonable excuse for his contempt.

When the matter came back before Justice Bondy to deal with sentencing, however, the father had purged his contempt by returning the children, which his Honour found "weighed significantly in his favour." The mother requested a penalty of $252, which was the amount of income that she had lost as a result of having to deal with the motion, and Justice Bondy agreed that this would be an appropriate penalty in the circumstances. He also ordered the father to pay the mother her costs on a full recovery basis because "he had no reasonable excuse for the conduct that gave rise to the litigation, and because the respondent mother's ability to provide for the children will be directly and negatively impacted by this unnecessary litigation."

It's the Timeless Romantic Tale of Boy Meets Girl; Boy Marries Girl; Boy and Girl Separate; Boy and Girl Divide Property; Boy and Girl Reconcile; Boy and Girl Separate Again; Boy and Girl Divorce . . . And Girl Wants to Divide Property Again

Miaskowski v. MacIntyre (2020), 35 R.F.L. (8th) 253 (Ont. C.A.) **- Feldman, Brown, and Zarnett JJ.A.**

This important case from the Ontario Court of Appeal considered the impact of a reconciliation on a prior Separation Agreement and property division.

The parties married on October 16, 1997, separated on July 22, 1999, and entered into a Separation Agreement on January 18, 2002. The Separation Agreement included property releases. The wife used the equalization payment to set-off part of the cost of buying out the husband's interest in the matrimonial home. In the Separation Agreement, the wife specifically waived the right to share in the husband's pension:

> 19.3 The wife specifically releases any rights or claims she may have to a share of the husband's Canada Post pension.

Keep that wording in mind, and note the "specific" release.

The Separation Agreement also included the somewhat standard clause that, should the parties reconcile and cohabit for 90 days, the provisions of the Separation Agreement would become **void**, but the reconciliation would not "affect or invalidate any payment, conveyance or act made or done pursuant to the provisions of [the] agreement."

The parties reconciled on March 1, 2006, only to separate again nine years later (on December 7, 2014). At trial, the main issue was how to value the increase in value of the husband's pension. The husband argued that his pension should be valued from the date of reconciliation to the date of the *second* separation. On the other hand, the wife argued that the pension should be valued from the date of marriage to the date of the second separation. Therefore, the ultimate issue was the extent of the wife's entitlement to share in the value of the husband's pension, given the reconciliation provision and the two above-noted clauses in the Separation Agreement (the waiver by the wife of her rights to share in the husband's pension, and the payment exception to the clause that makes the separation agreement void on reconciliation for more than 90 days).

At trial, the wife argued that once the parties had reconciled and cohabited for 90 days, the terms of the Separation Agreement, including the release/waiver with respect to the husband's pension, were void. She argued that the Separation Agreement implied that its terms - including the pension waiver - would be null and void if the parties reconciled and cohabited for 90 days. She also argued that the parties had specifically intended this result. The wife had placed the husband back on title to the matrimonial home after they reconciled. If the husband wanted to protect his pension at that point in time, argued the wife, he should have requested a new Agreement. The wife also relied on a letter from the husband's lawyer, in which the lawyer responded to the husband's revelation that the parties had reconciled by reminding him of the potential impact of the 90-day clause.

The trial judge considered *Sydor v. Sydor* (2003), 44 R.F.L. (5th) 445 (Ont. C.A.), a 2003 Ontario Court of Appeal decision, and one of the leading cases on the impact of reconciliation on Separation Agreements. The common law rule, as correctly noted by the Court of Appeal, is that a Separation Agreement is void upon reconciliation, "subject to a specific clause in the agreement that would override the common law." The Court of Appeal in *Sydor* further stated that, "a specific release of all rights to a particular property can be viewed as evidence that the parties considered the disposition of that property final and binding, regardless of what may occur in the future."

The trial judge determined that the releases in the Separation Agreement were in the nature of a "specific release" as referenced in *Sydor*. The parties had made specific transfers and acted on the basis of those transfers. Pursuant to the terms of the Separation Agreement, the wife had already "received" her share of the pension, or at least an amount with which she was satisfied. The trial judge did not explicitly deal with the fact that the parties had not valued the husband's pension, as the husband had not been contributing to it for long before the first separation. This would turn out to be an important fact on appeal.

The trial judge found that the parties' post-separation conduct also corroborated his conclusion that the Separation Agreement contained the type of "specific release" that was not voided by their reconciliation. There was no indication that the husband acted contrary to the belief that the portion of the pension from before the parties' first separation was protected by the Separation Agreement. The fact that, after reconciliation, the husband was put on title to the matrimonial home did not represent a benefit to him, as he also assumed responsibility for an equivalent amount of debt. There was nothing in the parties' behaviour that set aside the clear terms of the Separation Agreement and, as a result, the terms were a complete answer to the wife's claim to share in the pre-reconciliation value of the husband's pension.

The wife appealed.

The wife's initial argument on appeal, that the trial judge failed to consider the *Pension Benefits Act*, was dismissed because she did not advance that argument at trial. However, the Court of Appeal still found that there were two mistakes in the trial judge's decision that were significant enough to warrant granting the appeal and overturning his decision.

The Court of Appeal found that the trial judge had erred in his interpretation of the Separation Agreement by failing to give effect to the reconciliation clause. The reconciliation clause voided the agreement upon a reconciliation that lasted more than 90 days. Since the parties had reconciled for more than 90 days, their Separation Agreement was void, but "any payment, conveyance or act made or done pursuant to the provisions of the agreement" was not.

The first error the trial judge made, according to the Court of Appeal, was that he misapprehended the evidence. He did not consider the wife's uncontradicted evidence that the parties had not assigned a value to the husband's pension in the Separation Agreement. No specific amount of money was paid by the husband to the wife in exchange for a release of any claim she would have against his pension. Consequently, this fell outside the definition of a "specific release." Therefore, voiding the pension release did not invalidate any conveyance, payment, or act that was made or done under the Separation Agreement. Since there was no money paid to the wife in exchange for the release, the pension release was covered by the voiding provision in the reconciliation clause.

There are two issues with this view:

1. The Court of Appeal in *Sydor* stated that, "a ***specific release of all rights to a particular property*** can be viewed as evidence that the parties considered the disposition of that property final and binding, regardless of what may occur in the future" [emphasis added]. But the Court of Appeal in *Sydor* did not refer to a requirement for a specific payment for the release. All that was required was a "specific release." And, pursuant to the Separation Agreement in this case, "the wife specifically releases any rights or claims she may have to a share of the husband's Canada Post pension." It is hard to be more specific than that.

2. Again, in *Sydor* the Court of Appeal found that, "a specific release of all rights to a particular property ***can be viewed*** as evidence that the parties considered the disposition of that property final and binding, regardless of what may occur in the future" [emphasis added]. But the corollary is not necessarily true. It is not a given that a non-specific release cannot be viewed as evidence that the parties considered the disposition as final and binding. Such might be the case in a global Separation Agreement that resolves all property and support issues for one lump sum, along with extensive, though general, releases.

What was likely driving the Court of Appeal here was a desire to not see the wife lose out on the subsequent nine years of growth in the husband's pension.

In any case, this should be of significant importance to practitioners. The effect of this result may very well be that general releases that are part of a "global deal" will often fall outside the definition of a "specific release." Much clearer wording is now necessary when drafting releases and reconciliation clauses.

The second error that the trial judge made was in his interpretation of the Separation Agreement's reconciliation clause. When interpreting an agreement, a court is attempting to discern the intention of the parties from the language they used. According to the Court of Appeal, the language of the voiding clause in the Separation Agreement clearly demonstrated that the parties' intention if they reconciled was to return themselves to the position they were in prior to separation. The bargain they made on separation, where they released one another from future rights and obligations, would be set aside and become void, and they would regain all of the rights as spouses they had bargained away in the Separation Agreement.

However, the reconciliation clause also provided that it was not necessary, in order to give effect to the parties' intent, to unwind and undo conveyances or transfers that had already been completed. The Court of Appeal set out that there could be situations where the spouses could not undo a conveyance, such as after the sale of property to a third party.

At trial, and on appeal, the parties focused on potential unfairness. The husband argued that it would be unfair to leave intra-spousal transfers in place when the consideration for the transfer was not a payment, but a release of future rights. The spouse who received the payment may be ultimately overcompensated if he or she does not release the other spouse from the corresponding obligation. Essentially, the husband argued that he had paid the wife for the pension release, he could not get his money back, so it was unfair that he be deprived of that for which he bargained.

The Court of Appeal determined that the husband's concern would only arise in exceptional cases. Under the equalization regime in the *Family Law Act*, there would be no unfairness in normal cases. That is because the value of the spouses' net family property is equalized upon separation. Therefore, it will not ordinarily matter in whose name a particular asset is held. If the wife received a $10,000 payment from the husband, she would have $10,000 more in her net family property that she would need to share with him as a result of the equalization regime. In this case, if the wife had been paid money for the pension release, that money would form part of her net family property and the husband's pension would form part of his net family property.

The Court of Appeal set out that unfairness would need to be considered on a case-by-case basis, and the court would need to use one of its many tools to deal with these situations, such as order an unequal division of net family property under s. 5(6)(h) of the *Family Law Act*.

The Court of Appeal noted that while the specific reconciliation clause in the Separation Agreement had been part of the general Ontario Separation Agreement precedent for more than 30 years, in the future, counsel may need to be more specific. To put it simply, if the parties had intended the pension release to continue after a reconciliation, they should have said so:

> [44] I note that the reconciliation clause used in the separation agreement in this case has been a precedent for over 30 years: see e.g., James C. MacDonald et al., "Precedents and Principles: A Comprehensive Review of Domestic Contracts", Canadian Bar Association - Ontario, Continuing Legal Education Program, Family Law for the Specialist, February 7, 1986. In order to clarify the intent of the parties, it may be helpful in future for such reconciliation clauses to address what the parties intend will occur upon reconciliation with respect to specifically contemplated transfers. For example, if the parties intend any transferred property to be treated as property that is to be excluded from the net family property under s. 4(2)6 of the FLA, that should be explicitly provided.

Therefore, to be safe, going forward reconciliation clauses should specifically address what the parties intend upon a reconciliation with respect to specific transfers and release. Say what you mean, and mean what you say. If not, ready thine deductible.

Test on a Motion to Change a Temporary Care Order Made on a Status Review: The "Sufficiently Material" Test?

Children's Aid Society of Brant v. A.H. (2020), 35 R.F.L. (8th) 474 (Ont. C.J.) **- Hilliard, J.**

The mother brought a motion for the return of the child to the joint care of her and her mother, the maternal grandmother (or, in the alternative, for an order providing for expanded access for the mother with the child, including alternate weekends and two mid-week visits after school).

At the start of oral argument, the question arose about the correct legal test for an interim motion to change a temporary care order on a Status Review application (curiously, there is no test set out in the legislation).

The basic facts of the case were as follows:

• On July 8, 2019, a final order was made in the protection proceeding. It placed the child in the care of the mother and the maternal grandmother, subject to terms of supervision. The child's return was to be implemented on a gradual basis, and it was anticipated that the child would be fully integrated back into the care of his mother and grandmother by August 19, 2019.

• On August 15, 2019, the child was taken back into the care of the Society due to concerns that the mother was breaching the terms of the supervision order. An early Status Review was commenced as a result of the child being taken back into care.

• The first court date on the Status Review was August 20, 2019, and the Court placed the child in the care of the Society on a temporary and without prejudice basis.

• At the request of the mother and grandmother, a temporary care and custody hearing was scheduled for October 8, 2019. However, on the return date for the hearing, both the mother and grandmother requested an adjournment in order to retain counsel. Neither one of them filed an Answer and Plan of Care or an affidavit. The Society opposed the adjournment request on the basis that the mother and grandmother had already been given two previous extensions of time to serve and file materials, and asked the court to make the temporary and without prejudice temporary care order into a temporary care order. The Court accepted the Society's position.

The mother (with the assistance of counsel) then filed a motion in early November 2019 to vary the October 8, 2019 order and, in order to decide the motion, the Court first had to determine the proper legal test to be applied by the Court on a motion to change a temporary care order at a Status Review.

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What is the legal test on a motion to change a temporary care order made at a Status Review?

Subsection 113(8) of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c 14, Schedule 1 (the "*CYFSA*") provides the authority for the Court to make an order regarding the interim care and custody of a child at a status review proceeding:

> (8) **INTERIM CARE AND CUSTODY** - If an application is made under this section, the child shall remain in the care and custody of the person or society having charge of the child until the application is disposed of, unless the court is satisfied that the child's best interests requires a change in the child's care and custody.

The mother submitted that she only needed to show that *a* change in circumstances had occurred since the last temporary care and custody order. The Society, on the other hand, argued that the mother had to show *a material change* in circumstances before the Court could change the interim care and custody arrangements that were put in place at the Status Review. Whatever the test, it was accepted that the onus was on the mother to meet it and to show a change or material change.

The Society submitted that a motion requesting a change to a temporary care order made on a Status Review is analogous to the same type of motion in a child protection application. Although it is settled that a court must find that there has been a material change in circumstances before changing a temporary care order on a protection application, there was no binding precedent on the issue on a Status Review.

While the test in a protection application has been stated as a "material change", courts have found that a flexible approach must be taken in determining what constitutes a material change: *Catholic Children's Aid Society of Toronto v. R.M.* (2017), 1 R.F.L. (8th) 472 (Ont. C.J.) at para. 57. The reason for the threshold of a material change in circumstances in protection applications was to recognize that the statutory scheme emphasizes stability and continuity for children.

According to Justice Hilliard, on a Status Review application, just as in a protection application, the Court must balance and consider the need to maintain the *status quo* to provide stability and predictability of the child(ren), while not creating an insurmountable barrier for a parent to overcome before being able to request a review of a temporary order that placed a child in the care of the Society.

Her Honour also noted that child protection proceedings are fluid by nature, and courts must recognize and contemplate the potential for parents to make positive changes in order to remediate the protection concerns that resulted in their children being removed from their care.

Temporary orders are by definition transitory. Throughout an ongoing child protection proceeding, whether protection application or status review application, the Court may consider changes in the circumstances of the parent(s) that merit a review of a temporary order made for the placement of children.

Justice Hilliard found, correctly in our view, that:

> . . . to impose a threshold of a material change in circumstances akin to what is required to be demonstrated in a motion to change a final order in a proceeding under the *Children's Law Reform Act* is not the appropriate test in my view. **To require parents to demonstrate a change that was not reasonably foreseeable or contemplated prior to the making of the temporary order is to set the bar impossibly high**. There is an expectation that parents will strive to improve throughout the course of child protection litigation and demonstrate that they have made progress in completing the goals set out for them, either by the Society's Plan of Care or by the Court, by way of terms of a supervision order. [emphasis added]

That said, her Honour also cautioned that not just *any* change will justify a review of a child's placement. For example, a parent having simply demonstrated that he/she has attended supervised access consistently and met with the worker at all scheduled times, while having not taken any positive steps to remediate the protection concerns that brought thee child(ren) into care will not be sufficient.

Ultimately, Justice Hilliard set out the test (the "sufficiently material" test) as follows:

> I therefore find that **the appropriate test to by applied by the Court on the review of a temporary care order on a status review is a change in circumstances that is sufficiently material to warrant a review of the placement of the child by the Court**. The onus is on the party requesting a review of the placement of the child to demonstrate that this threshold requirement has been met. [emphasis added]

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Is there a different legal test if the request is a change in the child's placement versus a change to a parent's access regime?

The Society conceded that the threshold test on a motion to change the provisions of a temporary access order is lower than what is required for a change to a child's placement. Justice Hilliard agreed. Her Honour determined that a court may, at any time, review temporary access provisions when presented with evidence that a change to the access regime is in the child(ren)'s best interests. To follow the previous example, even evidence of consistent and timely attendance for access visits that are objectively described as a positive experience for the children may suffice to justify a court's review of the access regime.

The Result?

Applying these tests to the facts before her, Justice Hilliard found as follows:

> [42] The totality of the [mother's] evidence about what changes she has made since the temporary care order can be summed up as statements of her intention to comply with court orders, while completely lacking in examples of positive steps that she has taken to remediate ongoing protection concerns.
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> [43] On the totality of the evidence before me, I am not satisfied that the [mother] has demonstrated that there has been a sufficiently material change in her circumstances to justify a review of [the child's] placement at this time.
>
> [44] I am, however, satisfied that there is sufficient evidence before me to warrant a review of the [mother's] access with [the child].

And Her Honour ordered accordingly. While the child would continue in the temporary care of the Society, access was meaningfully expanded.