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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Yevgen Mokhov, Applicant**

AND:

Nataliya Ratayeva, Respondent

BEFORE: M. Kraft, J.

COUNSEL: Christina Doris and Carolina Paterson, for the Applicant

Matthew Armstrong, agent for the Respondent

HEARD: December 20, 2022

REASONS FOR JUDGMENT

Nature of the Motion

[1] The applicant, Yevgen Mokhov ("the father"), brings a motion, among other things, seeking to vary the current equal-time sharing parenting schedule as set out in the order of Nakonechny, J., dated May 29, 2019 ("Nakonechny order"), so that he has primary care of the parties' 7-year-old daughter, K. Currently, K resides equally with both parents on a week-on/week-off basis pursuant to the Nakonechny order. The father also seeks to have parenting time with K for the first half of the Christmas Break as per the holiday access schedule set out in the order of Backhouse, J., dated September 21, 2018 ("Backhouse order").

[2] The respondent, Nataliya Ratayeva ("the mother"), brings a cross-motion seeking the involvement of the Office of the Children's Lawyer ("OCL") and to obtain the release of the Children's Aid Society records.

[3] This matter is extremely high conflict with a protracted history of litigation. The father initiated the litigation in 2016 when K was 7 months old. The father alleges that the mother has a history of breaching court orders and regularly overholding K denying him parenting time with him, against her best interests. The father seeks his relief pursuant to Rule 1(8) of the *Family Law Rules*, O. Reg. 11/99 *("FLRs")* under the court's contempt powers on account of the mother's breach of the Nakonechny order and the Backhouse order.

[4] The mother deposes that she is not opposed to the following relief set out in the father's notice of motion, dated November 29, 2022:

(i) An order that the father have parenting time with K during the first half of the Christmas Break, from December 23, 2022 at 3:00 p.m. to December 21, 2022 at noon, as per the "holiday access" schedule set out in the order of Backhouse, J,

dated September 21, 2018 and the mother shall have parenting time with K during the second half of the Christmas break as per the Backhouse order, from December 31, 2022 at 12:00 p.m. to January 9, 2023 when school recommences.;

(ii) An order that neither party be permitted to remove K from school for more than one week each year for the purposes of vacation;

(iii) An order for the non-removal of K from the province of Ontario absent a court order or written consent;

(iv) An order that the mother immediately surrender K's original birth certificate and passport to the father's lawyer's office and that the father's lawyers shall retain the birth certificate and passport for safekeeping until further agreement or court order;

(v) An order directing the Toronto Police, the Peel Regional Police, York Regional Police, the Ontario Provincial Police, the RCMP and other police division in Ontario to assist in the enforcement of this court order; and/or

(vi) An order that the police enforcement clause expire on May 30, 2023.

[5] This matter first came before me on December 1, 2022, when the father brought an urgent motion for the return of K because the mother had taken K on a week-long vacation to the Dominican Republic on November 3, 2022, in the face of the father's opposition and contrary to the Backhouse order and Nakonechny order. After returning from the unauthorized trip to the Dominican Republic, the mother then overheld K and the father had missed another one week of his parenting time over a four-week period because she claims K disclosed to her on the trip that the father had hit her on the face and the mother reported the incident to the Children's Aid Society ("CAS"). The mother was given short notice of the father's urgent motion and sought an adjournment to prepare responding material.

[6] On December 1, 2022, I ordered a) the parents to immediately resume the week-on/week-off schedule; b) the mother to surrender K's passport to the father's lawyer for safekeeping; c) police enforcement of the order; d) the motion to be returned today, to enable the mother to prepare responding material, pre-emptory to the mother; and e) costs of the December 1, 2022 motion to be reserved to the judge hearing this motion.

Issues to be Determined

[7] The two issues to be determined on this motion are:

(i) Should K's primary residence be changed from an equal time-sharing parenting schedule so that she resides primarily with the father and has parenting time with the mother on alternate weekends?

(ii) Should the court request the involvement of the OCL?

Background

[8] By way of brief history, the parties were married on March 7, 2015. K was born on August 21, 2015. Three months later, the parties separated on November 22, 2015.

[9] At the time of separation, the parties were residing with the maternal grandmother in her home in Toronto. After separation, the father moved out to reside with his parents in Kitchener and the mother and K continued to reside with the maternal grandmother.

[10] The father initiated these proceedings in February 2016.

[11] In May 2018, the mother and K moved in with the maternal grandfather in Richmond Hill. In 2019, the father moved to Mississauga. In, 2020, the mother and K moved to North York.

[12] On September 21, 2018, Backhouse, J. made an order granting the parties joint custody of K ("Backhouse order"). The Backhouse order provides that if there is a disagreement between the parties on a decision, after consultation, the mother has final decision-making responsibility for K's education up to grade 8 and the father has final decision-making responsibility for K's religion. The Backhouse order also contains a holiday parenting schedule.

[13] According to the father, for 2.5 years prior to the Nakonechny order, the mother made co-parenting extremely difficult; breached various court orders; overheld K; and undermined his parenting role with the child. The father deposes that the mother has been ordered to pay approximately $24,000 to him in costs from three different judges from the beginning of these proceedings.

[14] On May 29, 2019, the Nakonechny Order set out an equal-time-sharing parenting schedule for K on a week on/week off schedule, with the transfers to take place on Friday after school. In her reasons, Nakonechny, J. made the following findings of fact:

> (i) The parties attended court 8 times since February 2016 to deal with the father's allegations of the mother's interference and withholding of his access to the child;
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> (ii) I find that [the mother] failed to abide by the schedules she agreed to. I do not find [the mother's] explanations regarding the missed access time and failure to communicate with [the father] as required to be credible;
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> (iii) Her explanations are not truthful based upon the evidence. They are excuses for her failure to comply by blaming [the father];
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> (iv) By invoking costs sanctions, Del Frate J. sent a message to [the mother] that her failure to facilitate access was unreasonable and not in the child's best interests. [The mother] has not heeded his honour's caution;
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> (v) I accept [the father's] evidence that [the mother] has breached the terms of the order by withholding and/or interfering with his access to K., refusing to provide make up time and failing to give him the right of first refusal. The evidence shows

> a history of this behaviour by [the mother] prior to the Order. She also refused and/or failed to comply with the terms of the father's access in the Orders of Del Fate J. and Croll, J.; and
>
> (vi) I find that [the mother] has consistently sought to undermine and marginalize the father's relationship with the child…she does not support the father as a parent. This is not in the child's best interests.

[15] In 2020, the father brought a motion to determine K's placement in Senior Kindergarten. At that time, the mother was residing in Richmond Hill and the father was residing in Mississauga. The parties settled the issue and agreed that K would be enrolled in a Montessori school in North York, the midpoint between the parties' two residences. The mother then moved to North York to be closer to K's school.

[16] In July 2021, the father brought another motion seeking to change K's school again to a school in his catchment area and he sought to impose an automatic review of the parenting terms if K missed more than two consecutive days of school without a doctor's note. At this point in time, the father was concerned about significant school absences of K when she was with her mother. On October 10, 2021, Himel, J. dismissed the father's motion and ordered K to be enrolled in Yorkview Public School in North York, the school of the mother's choice. Himel, J. ordered the mother to ensure that K attend school on a regular basis each day and that if she was absent for more than two consecutive dates, the mother was required to advise the father in writing of the absence and the reason therefor ("the Himel order"). If no notice or explanation was provided, the Himel order stated that the matter may be brought back to court to determine what consequences, if any, should result. The father was ordered to pay the mother costs of this motion in the sum of $8,000.

The Father's Position on this Motion

[17] The father brings this motion under r.1(8) of the *FLRs* seeking a change in K.'s parenting schedule because the wife had beached prior court orders and/or under the court's contempt power. He relies on the decision of *Cirinna v.Cirinna*, 2018 ONSC 4831, in which Kristjanson, J. ordered a reversal of primary care on a temporary motion as a result of the mother's ongoing breach of access orders using r.1(8) and r.14(23) of the *FLRs*.

[18] The father argues that the mother breached the Backhouse order when she made plans to travel with K to the Dominican Republic in November without his consent; she breached the Himel order in her failure to provide an explanation for K's many absences from school; and her conduct with respect to the Dominican Republic vacation with K is indicative of the mother's total disregard for court orders and/or the father's parenting role since the Nakonechny order because the mother's decision to travel with K was made with her full awareness that the father did not consent to the trip; she had been stopped from boarding one international flight with K because of the father's presence at the airport; and she then surreptitiously boarded another flight to the Dominican Republic representing a material change in circumstances justifying a dramatic change in the temporary parenting schedule.

[19] The father alleges that the mother is in breach of the Himel order because she K has missed a great deal of school this past 2022 fall term, when she was in the mother's care and the mother did not provide him with any written explanation as to reason for the absences. In paragraph 32 of the father's affidavit, sworn on November 28, 2022 he states "Nataliya has **not once** provided me with notice or of justification for K having been late for or missing school" [his Emphasis added]. In support of his concerns about K's absences from school, the father attaches K's attendance record for the fall of 2022 showing that she missed 12 days from school between September 21 and November 10th, 2022, as an Exhibit to his affidavit.

Mother's Position on the Motion

[20] The mother argues that she is not in breach of the Himel Order. She submits that of the 12 days K missed from school this fall, there was never more than 2 consecutive days missed and therefore, she never had to notify the father of the absence of the reason for the absence, except when she K missed November 8, 9 and 10, when she was on the trip with the mother in the Dominican Republic, about which the father knew. Further, the mother claims that K's absences from school this fall have been legitimate because she has been suffering from colds and respiratory symptoms and the mother kept K home from school in accordance with Public Health recommendations.

[21] The mother does acknowledge in paragraph 62 of her affidavit, sworn on December 12, 2022, that she should not have left with K on the trip to the Dominican Republic without the father's consent or court order. As an excuse, the mother deposes that she booked the trip after she learned that K's school would be closed for the CUPE strike knowing K would not be missing an entire week of school and she deposes that she believed the trip was in K's best interests because K had persistent respiratory symptoms leading the mother to conclude that K lacked exposure to vitamin D which may have been the cause of K's persistent sickness.

[22] The mother takes the position that in order to ask for a parenting schedule change to the Nakonechny order, the father has to establish first whether there has been a material change in circumstances since the order was made. The mother argues there is no such material change in circumstances. While she acknowledges that it was wrong for her to have travelled with K in the absence of the father's consent and/or to overhold K for a further week in November, she claims that her history of overholding K was before Nakonechny, J. when the week on/week off parenting schedule was made and that in four years since the order was made these are only two weeks when this overholding occurred. Further, the mother argues that a change in K's primary residence as proposed by the father is a dramatic departure from the status quo that has been in place since the Nakonechny order and is not in the child's best interests.

[23] The mother explained the withholding of K after she returned from the Dominican Republic vacation occurred because during the trip K disclosed to her that the father had hit her in the face on a camping trip. As a result, the mother reported the matter to the CAS. The mother alleges that the father has a history of violence, including against her. According to the mother, the CAS interviewed K at her home on Monday, November 28, 2022. During the motion, counsel for the father advised that the CAS has since telephoned him and advised him that they were closing the matter. The court has no evidence on the record as to whether the CAS has closed the case.

Issue one: Should K's primary residence be changed from an equal time-sharing parenting schedule so that she resides primarily with the father and has parenting time with the mother on alternate weekends?

Is the remedy sought by the father available under s.1(8) of the FLRs or must a Material Change in Circumstances be Found?

[24] In order to answer this question, the jurisdiction under which this order can be made has to be addressed first. The father seeks to dramatically change K's equal-time-sharing parenting schedule and to place her in his primary care pursuant to r.1(8) of the *FLRs*. Rule 1(8) provides as follows:

> (8) If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, including,
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> (a) an order for costs;
> (b) an order dismissing a claim;
> (c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;
> (d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;
> (e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;
> (f) an order postponing the trial or any other step in the case; and
> (g) on motion, a contempt order. O. Reg. 322/13, s. 1.

[25] The father's argument is that the court may deal with the mother's failure to obey the Backhouse order and/or the Nakonechny order and/or the Himel order by making any order that is considers necessary for a just determination of the matter. While the father put forward a case where a reversal of primary care was made under s.1(8) of the *FLRs*, the breach by the mother in that case was clear. The father's argument is that as long as a judge is satisfied that there has been a failure to obey an order in a case, r.1(8) is triggered and the relief provided for in that rule can be ordered.

[26] The list of potential relief set out in r.1(8) is inclusive and not exclusive: *Mullin v. Sherlock*, 2018 ONCA 1063, at para. 46. The father, therefore, submits that the broad language in r.1(8) which provides that "the court may deal with the failure by making any order that it considers necessary for a just determination of the matter" allows me to vary the Nakonechny order and place K in his primary care.

[27] The father alleges that the mother is in breach of the Himel order which required the mother to provide the father with a written explanation if K misses more than two consecutive days from school. However, as pointed out by the mother's counsel, the attendance records from 2022 demonstrates that other than on the unauthorized trip to the Dominican Republic, K has not missed more than two consecutive days of school and, therefore, the mother has not been

required to provide the father with a written explanation. I do not find that the mother has breached the Himel order.

[28] The father claims that when he has the child in his care, he does not find that she has been sick warranting her absence from school. However, the mother submits that the father's judgement of whether or not K should be kept home from school is not necessarily accurate and that the release of K's medical records from her doctor would demonstrate that K has only been kept home from school when necessary. The father indicated that he would provide his consent to enable the mother to obtain these records from K's doctor. If it turns out that the father is correct in this regard, then this particular issue, K's absences from school will become a matter for the trial judge to assess and determine.

[29] In *Bouchard v. Sgovio*, 2021 ONCA 709 (CanLII), a father appealed an enforcement order granting a mother a temporary parenting order to facilitate the enrollment of their two children in Family Bridges: an intensive therapeutic workshop for alienated parent-child relationships on the basis that the motion judge lacked jurisdiction to make the order pursuant to r.1(8) of the *FLRs*. The appeal was dismissed and Paciocco, J.A. held at paragraph 51, "Stated simply, if the remedy ordered addresses or "[deals] with the failure" to comply with the substantive order and the remedy ordered is found to be necessary to achieve the enforcement of the order being breached, that remedy is *prima facie* authorized by r.1(8). In paragraph 52, the court went on to say that the term *prima facie* was used because "I do not mean to suggest that there are no limits to the kinds of enforcement orders that can be made under r.1(8). For example, it may well be that the remedies that are provided for in r. 31(5), cannot be imposed pursuant to r.1(8) absent a successful contempt motion as contemplated by r.1(8)(g): see *Mantella v. Mantella*, 2009 ONCA 194." In the case at bar, the father asks the court to change the parenting schedule set out in the Nakonechny order and use its contempt powers, but he did not bring a contempt motion pursuant to rule 31 of the *FLRs.*

[30] In the *Bouchard* case, the father argued that r.1(8) cannot be used to make parenting orders and that by ordering the children to attend the Family Bridges Program, the motion judge erred because such parenting orders may only be made or varied under ss.16 and 17 of the *Divorce Act* or ss.20-29 of the *Children's Law Reform Act*. In *Bouchard* the court held that the order made by the motion judge did not vary or replace the initial parenting order, instead it was made to facilitate the parenting order and therefore the court was satisfied that the motion judge's order fell within the motion judge's remedial authority under r.1(8). In the case at bar, however, the father is not asking the court to make an enforcement order to facilitate the Nakonechny order. Instead, he seeks a variation of the temporary parenting schedule set out in the Nakonechny order. As such, I am not persuaded that my jurisdiction to vary the Nakonechny order can be made because the mother took the child on a vacation without the father's consent in breach of the Backhouse order. Rather, I find that my jurisdiction to vary the parenting schedule set out in the Nakonechny order exists only if a material change in circumstances can be found. As set out in *Gordon v. Goertz* 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27 (SCC), to determine a request to change custody, access or parenting order, the court must embark upon a two-stage inquiry.

[31] In paragraph 15 of *A.B. v. I.S.G.*, 2021 ONSC 7001 (CanLII), Pazaratz, J. states:

a. The majority of cases conclude that a material change in circumstances must be established as a prerequisite to changing either a temporary or final order. *Miranda v. Miranda*, 2013 ONSC 4707 (SCJ); *Radojevic v. Radojevic*, 2020 ONSC 5868 (SCJ); *Sullivan v. Boucher*, 2020 ONSC 8062 (SCJ). Since interim orders are intended to provide a reasonably acceptable solution on an expeditious basis for a problem that will get full airing at trial, requests to change interim orders should be rare. *Lusted v. Bogobowicz* 2021 ONSC 269 (SCJ); *Thom v. Thom*, [2014] O.J. No. 2115, 2014 CarswellOnt 5708. This approach is consistent with the language of the legislation.

b. Other cases have suggested that a temporary order may be subject to change if there is a "compelling reason." But even with this less stringent test, those cases agree that courts must proceed cautiously before changing even a temporary parenting order. *Calabrese v. Calabrese*, 2016 ONSC 3077(SCJ); *M.D. v N.J.*, 2016 ONSC 6058 (SCJ).

c. Both approaches emphasize that the overriding principle is always the best interests of the child, and the status quo should not be lightly disturbed on an interim basis. *Chyher v. Al Jaboury* 2021 ONSC 4358 (SCJ).

[32] In *F.K. v. A.K.*, 2020 ONSC 3726 (CanLII), the court explained that the first step of the analysis when a party is asking for a change to an existing parenting order is that there must be a material change in circumstances since the last order was made.

(i) There must be a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet those needs.

(ii) The change must materially affect the child.

(iii) It must be a change which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. The change must be substantial, continuing and "if known at the time, would likely have resulted in a different order." *L.M.L.P. v. L.S.* [2011] SCC 64.

(iv) The finding of a material change in circumstances is a prerequisite to an examination of the merits of an application to vary an existing custody or access order.

(v) If there is no material change in circumstances, the inquiry ends. The court would be without jurisdiction to vary the order. *Litman v. Sherman*, 2008 ONCA 485(Ont. C.A.).

(vi) If there is a material change, the court must move to the second stage and consider the best interests of the child and whether to vary the original order.

[33] The second step in the analysis is as follows:

(i) If a material change in circumstances has been established the court then embarks on a fresh inquiry into the best interests of the child.

(ii) In this fresh inquiry, both parties bear the evidentiary burden of demonstrating where the best interests of the child lie. There is no legal presumption in favour of the custodial parent, or in favour of maintaining the existing timesharing arrangements. *Bubis v. Jones*, 2000 CanLII 22571 (ON SC); *Persaud v. Garcia-Persaud* 2009 ONCA 782; *Deslauriers v. Russell*, 2016 ONSC 5285; *Roloson v. Clyde*, 2017 ONSC 3642.

(iii) The court must ascertain the child's best interests from the perspective of the child rather than that of the parents. Parental preferences and rights do not play a role in the analysis, except to the extent that they are necessary to ensure the best interests of the child. *Gordon v. Goertz*; *Young v. Young* 2003 CanLII 3320 (Ont. CA).

(iv) The child should have maximum contact with both parents if it is consistent with the child's best interests. *Gordon v. Goertz; Rigillio v Rigillio* 2019 ONCA 548 (Ont. CA).

(v) Any assessment of the best interests of a child must take into account all of the relevant circumstances pertaining to the child's needs and the ability of each parent to meet those needs. *Gordon v. Goertz*.

[34] The father proposes that K's parenting time with the mother change from 7 nights out of 14 nights to 2 nights out of 14 days, such that K will reside primarily with him and see the mother on alternate weekends from Friday, after school to Sunday evenings. The Nakonechny order which establishes this parenting schedule is a temporary order.

[35] Embarking on the two-stage inquiry, I find as follows:

(i) I do not find that there has been a change in the condition or needs of K. There is no evidence on the record that K is experiencing any difficulties with the equal-time-sharing schedule or that she is suffering in any way by changing residences on a week on/week off basis. Further, there is no evidence to suggest that K is experiencing any emotional or developmental issues which have deteriorated since the Nakonechny order was made. The father argues that the mother's ability to meet K's needs has changed because her conduct with respect to the Dominican Republic trip demonstrates that she does not consider K's needs or best interests before her own. He also argues that K's many absences from school in the Fall term are indicative that the mother is not able to meet K's needs. The father argues that the mother is not requiring K to attend school regularly and that K is suffering as a result. However, the mother argues that K has suffered a number of cold and respiratory illnesses this Fall and given the guidance from public health, she has kept K home from school as a result. Further, K's report card and the letters the mother attached to her affidavit from Kumon demonstrate

that K is progressing and doing well in her academic progress and in the Kumon program in which the mother has enrolled K to supplement her language and math skills on an extra-curricular basis. The mother has an explanation as to why K has missed school this past Fall. The public health guidelines have been to keep children home from school when they have cold and respiratory illnesses this past Fall. On a written record, which has not been tested, I cannot conclude that the mother is purposefully keeping K home from school and that her absences equate to her not being able to meet K's needs. Further, the mother asked the father to consent to the release of K's doctor's records and having the complete records, which would show K's visits to the doctor and the doctors notes would be instructive to the court to further understand K's absences. In terms of the unauthorized trip to the Dominican Republic, I find that the mother exercised extremely poor judgment and that her conduct in this regard is highly relevant to what may be ordered in terms of decision-making authorities and/or a final parenting schedule when a trial of this matter can be determined. I do not find, however, that this trip amounts to a material change in circumstances.

(ii) I do not find that the unauthorized trip materially affected K in the way a material change in circumstances would. I do find, however, that the mother's excuse for the trip to be completely disingenuous. There is no reasonable explanation for her taking K on the trip when she was aware that the father did not consent to the trip. There is no evidence on the record that K has been diagnosed with a vitamin D deficiency. The mother's conduct with respect to the trip was disrespectful, interfered with the father's parenting time and entirely undermined the father's parenting role, demonstrating that the mother considered her own needs ahead of K's best interests. Furthermore, the mother completely disregarded the court order requiring her to obtain the father's consent before travelling with the child. The consequences for the mother's breach and her bad faith behaviour will be address in costs associated with the father's urgent December 1, 2022 motion to discourage and sanction her inappropriate behaviour.

(iii) Even if I am wrong and the mother's judgment in terms of the unauthorized trip is a material change in circumstances, it must be found to be a change which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. The change must be substantial, continuing and "if known at the time, would likely have resulted in a different order." *L.M.L.P. v. L.S.* [2011] SCC 64. The mother's past history of overholding K and interfering with the father's time with K was in evidence before Nakonechny, J. when she made the equal-time-sharing parenting schedule. In fact, it was for these reasons that Nakonechny, J. ordered a week on/week off parenting schedule for K when she was only three years old. It cannot be said that if Nakonechny, J. knew that the mother had taken K on an unauthorized trip in 2019 that she would not have made the equal-time sharing parenting schedule order.

[36] Since the finding of a material change in circumstances is a prerequisite to an examination of the merits of an application to vary an existing custody or access order, it is not necessary for me to embark on the second stage of the inquiry.

[37] The change the father seeks to the parenting schedule is drastic. In all instances, courts must exercise caution before changing an existing arrangement which children have become used to; *F.K. v. A.K.* This is especially the case where the existing parenting arrangement has been determined by way of court order. The starting point is that court orders are presumed to be correct. *Montgomery v. Montgomery* 1992 CanLII 8642 (ON CA); *Gordon v. Gordon* 2015 ONSC 4468 (SCJ); *Oickle v. Beland* 2012 ONCJ 778 (OCJ).

[38] The general rule is that the courts are reluctant to change *temporary* orders pending trial. The evidentiary basis to grant such a temporary variation must be compelling. But for a temporary variation, the court must also assess whether the changed circumstances have created a situation of actual or potential harm, danger, or prejudice for the child; of such nature or magnitude that immediate rectification or correction are required to safeguard the child's best interests.

[39] The onus on the party seeking a temporary variation is onerous. They must establish that in the current circumstances the existing order results in an untenable or intolerable situation, jeopardizing the child's physical and/or emotional well-being. They must establish that the situation is so serious and potentially harmful that any delay in addressing the problem is likely to continue or exacerbate actual or potential physical and/or emotional harm for the child; *F.K. v. A.K.*. In *F.K. v. A.K.*, the court held

(i) The court must be satisfied that the child's best interests *require* an immediate change – to reduce the detrimental impact of unacceptable negative dynamics or behaviours.

(ii) The court must be satisfied that the existing order has come to be demonstrably *contrary* to the best interests of the child – and that the proposed temporary variation is urgently needed to shield the child from likely future harm.

(iii) Implicitly, the court must have a level of confidence that the temporary variation would not only remove the child from a negative situation, but that the proposed new arrangement is so necessary and beneficial that it would be unfair to the child to delay implementation.

(iv) And given the qualitative difference between untested affidavit materials on a motion compared with a more thorough evidentiary analysis at a trial or oral hearing, the court must be satisfied – on a balance of probabilities – that a clear and compelling need to make an immediate change has been established.

(v) On a temporary motion, the status quo will have a strong gravitational pull – until the moment when the court determines that a child is in peril. After that, priority switches to rescuing and protecting the child. And the pace of correction is directly related to the magnitude of the child's current exposure to harm.

[40] Even if the mother's conduct does not amount to a material change in circumstances, the father argues that it makes a compelling case for the equal-time sharing parenting schedule to be varied as he proposes.

[41] If I am wrong and the mother's conduct in terms of the unauthorized trip with K amounts to a material change, I am not persuaded that it is in the best interests of K to have her parenting time change from having equal parenting time with both parents to residing primarily with the father and seeing her mother on only 2 nights out of 14 nights, for the following reasons:

(i) Since the Nakonechny order in 2019, K has become accustomed to spending equal parenting time with both her parents, on a week on/week off basis. K began this equal time sharing parenting arrangement when she was just 3 years old and she is now 7 years of age. The mother clearly takes K to all of her extra-curricular activities and if she becomes a weekend only parent, K's routine in terms of these additional activities and lessons will have to change;

(ii) The equal-time sharing parenting schedule was arrived at by court order after a long motion was heard by the court with a detailed history of high conflict between the parents. The starting point, therefore, is that the Nakonechny order is presumed to be correct in terms of what it is in K's best interests;

(iii) The court should be very reluctant to change a temporary parenting order prior to trial. The general rule is that such parenting orders ought not to be changed until the court has the opportunity to hear from both parties on a full record with the benefit of viva voce testimony when the evidence can be properly tested;

(iv) The evidence on which a change to a temporary parenting order ought to be granted must be compelling. While the mother's conduct with respect to trip to the Dominican Republic was highly improper in my view, K is protected from this conduct repeating itself because K's passport and birth certificate will continue to be held by the father's counsel; and I will be making orders to disallow the mother from travelling with K until a trial of this matter is heard without a court order;

(v) I am not persuaded that the mother's conduct with respect to the Dominican Republic trip amounts to a material change in circumstances. The mother was engaging in similarly inappropriate conduct and overholding the child and disrespecting the father's role in K's life at the time the Nakonechny order was made. It was for this reason that Nakonechny made an equal time sharing schedule for such a young child. Given that I will making the Nakonechny order subject to police enforcement, the risk that the mother may overhold K will be eliminated between the date of this order and when a trial of this matter is heard;

(vi) Even if the mother's conduct with respect to the Dominican Republic trip amounts to a material change in circumstances and I am wrong in this regard, the court must assess whether the change circumstances have created a situation of actual or potential harm, danger or prejudice for the child of such a magnitude that changes need to be paid to safeguard K's best interests. I believe that the drastic change the father seeks to K's parenting time with the mother is not in her best interests. Further, I do not believe that further danger or harm to K can occur

at the hands of the mother, given the restrictions I will be putting in place in terms of K's passports and the travel restrictions;

(vii) I do find that the father has met the onerous requirement needed to seek the temporary variation to the Nakonechny order. Reducing K's parenting time with her mother from 7 nights out of 14 nights to 2 nights out of 14 nights could well be intolerable to K and/or jeopardize her emotional or physical well-being.

(viii) I do not find that the immediate change to the parenting schedule proposed by the father is necessary to reduce the detrimental impact of the mother's conduct;

(ix) I am not satisfied that the existing Nakonechny order is demonstrably contrary to K's best interests and/or that the temporary changes the father seeks to the parenting schedule are urgently needed to shield K from likely future harm;

(x) Finally, I am simply not satisfied that on a balance of probabilities there is a clear and compelling need to make an immediate change to K's parenting schedule particularly since the request for the parenting schedule change is being made on an untested affidavit materials on a motion as compared with a more thorough evidentiary analysis at a trial.

[42] The father began this application in 2016. It is incumbent on him to move the matter forward to a trial. At the time of this motion, the father had taken no steps to schedule a Trial Management Conference. This now has to be done to bring this matter to a conclusion. For the duration of K.'s life, her parents have been in litigation and it is in her best interests that this litigation come to an end.

Should the court ask the OCL to become involved in this matter?

[43] In 2017, the OCL completed a s.112 parenting investigation. The OCL did not recommend joint decision-making responsibility because of the parties' inability to communicate and made decisions together. It was recommended, therefore, that the mother have sole decision-making responsibility for K. after consulting first with the father. However, the OCL also recommended that sole decision-making be reviewed if the mother is not working cooperatively with the father and is not supporting his relationship with K. The parenting schedule recommended by the OCL is no longer relevant since the report was completed with K was 20 months old and it predated the Nakonechny order. The OCL report from 2017 is entirely outdated at this point.

[44] The father argues that there is no need for the OCL to become involved in this matter and there is a rich record before the court and, as such, involving the OCL is not necessary. Further, he argues that involving the OCL will only delay this matter further. I do not agree with the father's position. The OCL investigation was completed in 2017 when K. was only 20 months old. She is now 7 years of age. The court could benefit from objective third party evidence in terms of recommendations in terms of decision-making responsibility and the ability of each parent to meet K's best interests. Furthermore, the next available TMC dates are at the end of March, beginning of April. If the court requests the involvement of the OCL and the decide to become involved, it will likely taken them about 4 months to complete and investigation. If there

is a delay until May, that will not cause a delay in the scheduling of a trial, since the TMC can proceed and, at that point in time, the court will know if the OCL is involved and schedule the trial accordingly. I find that this is a case where the court shall make the request for the OCL to become involved as it sees fit.

Order

[45] This court makes the following order:

a) The father's motion seeking primary residence of K. and for the mother to have parenting time on alternate weekends from Friday, at 3:30 p.m. to Sunday, at 6:00 p.m. is hereby dismissed.

b) An order that the father have parenting time with K during the first half of the Christmas Break, from December 23, 2022 at 3:00 p.m. to December 21, 2022 at noon, as per the "holiday access" schedule set out in the order of Backhouse, J, dated September 21, 2018 and the mother shall have parenting time with K during the second half of the Christmas break as per the Backhouse order, from December 31, 2022 at 12:00 p.m. to January 9, 2023 when school recommences;

c) Pursuant to s.16.1(4) and s.16.1(5) of the *Divorce Act*, the equal-time-sharing week on/week off parenting schedule set out in the Nakonechny order shall remain in full force and force, subject to the following conditions;

(i) Neither party shall be permitted to remove the child from school for more than one week each a year for the purposes of vacation;

(ii) The mother shall not be permitted to remove the child K from the province of Ontario without a court order;

(iii) The father shall not be permitted to remove the child K from the province of Ontario without prior consent or a court order;

(iv) The mother shall deposit K's original birth certificates and any and all passports of K with the father's counsel who shall retain the birth certificate nd passport for safekeeping until further court order;

(v) The respondent shall not be entitled to apply for a passport of K for any country including Canada until further order of the Court;

(vi) Pursuant to s.36 of the *Children's' Law Reform Act*, the Toronto police, the Peel Regional Police, the York Regional Police, the OPP, the RCMP and any other police division in Ontario shall enforce the Order, specifically including but not limited to the non-removal order, the parenting order as well as the order requiring deposit is the passports with the father's counsel.

(vii) The police enforcement clause set out in (vi) above shall be in place until May 30, 2023 or the trial of this matter, whichever event is later.

d) The parties shall attend a Trial Management Conference at the first possible date available by the Toronto family law trial office;

e) Neither party shall bring any further motion before the court without leave of the court.

f) The court shall refer this matter to the Office of the Children's Lawyer to provide such services under s.89(3.1) and s.112 of the *Courts of Justice Act*, as she deems appropriate for K. A separate endorsement shall follow in this regard.

g) The parties shall sign the necessary authorizations and directions to allow the release of the unredacted records from the Children's Aid Societies of Toronto and Peel;

h) The parties shall sign the necessary authorizations and directions to allow K's doctor/treating physician to release K's medical records, including notes, to the parties.

i) The parties shall make written costs submissions of no more than 3 pages, not including a Bill of Costs and/or Offers to Settle. The father shall serve and file his costs submissions on the mother within 15 days of the release of this Endorsement. The father shall separate his costs from the December 1st, 2022 motion from the December 20, 2022 motion, as he is entitled to costs of the December 1st, 2022 motion. The mother shall serve and file her responding costs submissions of no more than 3 pages within 7 days of being served with the father's costs submissions. The father shall serve and file his reply costs submissions of no more than 1 page, if any, within five days of being served with the mother's responding costs submissions.

M. Kraft, J.

Date Released: December 21, 2022