CITATION: Churchill v. Elliot and Ward, 2024 ONSC 1907
COURT FILE NO.: 365/21
DATE: 2024-04-02

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Katherine Churchill, Applicant

Christopher David Elliot, Respondent

Sandra Ward, Respondent, Noted in Default

BEFORE: The Honourable Mr. Justice A. Pazaratz

COUNSEL: Brent Balmer, Counsel for the Applicant

Jonathan Krashinsky, Counsel for the Respondent Elliot

HEARD: March 27, 2024

ENDORSEMENT

1 "Without prejudice". In parenting orders you can only say it so many times – and for so many months (years?) – before it starts to lose its impact.

2 A quick count confirms the parties filed more than 500 pages of motion materials on the issue of whether we should dramatically change long-standing interim parenting arrangements for a young boy -- where the same issue is now scheduled for a 10-day-trial three months from now.

3 As may be evident from the page count, there are a lot of disputed allegations and professional recommendations here – and none of them have been tested.

4 The people involved:

a. The Applicant mother is 33. The Respondent father is 45. They are the parents of eight-year-old Nathan who is the subject of this motion.
b. The mother has an 11-year-old son of a former relationship, living with her.
c. The father has two older children ages 18 and 17. The 17-year-old daughter has some special needs and is living with him.
d. The added Respondent Sandra Ward is the mother of the 17-year-old. She was noted in default on February 10, 2023, and did not participate in this motion.

5 Nathan is currently living with the father, and sees the mother three out of four weekends. The mother seeks to immediately change that placement – and Nathan's school – so that the child would live with her and see the father alternate weekends.

6 I will briefly summarize the chronology:

7 The unmarried parties lived together between 2015 and June 2020. The mother says she was the primary caregiver for Nathan. The father disputes this.

8 Between June 2020 and March 2022 the child resided primarily with the mother, and the father had parenting time.

9 From approximately October 2021 to March 2022 the mother and her older son were each experiencing mental health issues. The older son became aggressive within the household and also engaged in destructive and self-harming behaviours, all of this while Nathan was residing in the household. Police and CAS were repeatedly involved. It became evident that Nathan needed to be removed from the upheaval and instability of that household.

10 On March 8, 2022 the mother asked the father to care for Nathan because she was preoccupied dealing with her older son who had been hospitalized. The father took Nathan in.

11 The mother says two days later she advised the father that her home situation had stabilized, and she asked that Nathan be returned to her care. The father refused, expressing concern that the long-standing mental health issues relating to the mother and her older son were serious and unresolved. He said Nathan should not be returned to that physically and psychologically dangerous environment.

12 The mother accused the father of unfairly exploiting what she characterized as a brief period of crisis in her household. She immediately commenced this application seeking Nathan's return to her care. The issues have been vigorously litigated since then.

13 On June 15, 2022 Justice Bingham made an interim, without prejudice consent order at a case conference which included:

a. Nathan's primary residence with the father
b. Mother to have parenting time on a gradually increasing schedule, leading to alternate weekends from Friday at 5:00 p.m. to Sunday at 5:00 p.m.
c. Exchanges through third parties. Parents to have no direct contact with one another.
d. Mother's older son not to be present during any of mother's time with Nathan.

14 On July 22, 2022 the father was ordered to pay $1,000.00 per month interim spousal support, and the OCL was asked to become involved.

15 On March 8, 2023 there was a further interim, without prejudice consent order which included:

a. Mother's time with Nathan was expanded to include PD days and holiday Mondays.
b. The mother's older son could be present for two hours at the end of Nathan's parenting time, provided that another person was present.
c. Additional provisions regarding locations and exchanges.

16 On June 23, 2023 the parties consented to another interim, without prejudice order which included:

a. Primary residence with the father was continued.
b. There was further incremental expansion of the mother's time, and her older son was permitted to be present for up to three hours of Nathan's parenting time. Mother to advise father if there were any incidents involving her older son while Nathan was present, and to advise what steps she had taken to protect Nathan.
c. Parties to communicate through AppClose.
d. Provision for further modification of parenting time as agreed.
e. No child support payable by either party.
f. Father to continue to pay $1,000.00 per month spousal support.

17 On August 28, 2023 the OCL issued its s.112 report prepared by clinician Sarah Martyn. The 33-page narrative (49 pages including appendices) provides a very detailed analysis relating not only to the parents and Nathan, but also relating to the father's daughter and the mother's older son.

18 The OCL's recommendations relating to Nathan include:

a. Mother to have decision-making responsibility for Nathan. She should consult with the father through AppClose prior to making any major decisions. She is to consider the father's input and then advise him of the decisions made.
b. Nathan will be enrolled at the Brainery school on Monday and Tuesday of each week, and continue enrolment at his current Sandhills Public School on Wednesday, Thursday and Friday of each week. Parents to participate in facilitating and supporting this hybrid arrangement.
c. Provisions re continuity of medical and dental care.
d. Mother to be responsible for day-to-day health care for Nathan. Each parent to be responsible for emergency medical care when Nathan is in their care.
e. Additional provisions for security in relation to the mother's older son's mental health issues.
f. Nathan to have a shared parenting schedule between his two homes, including Sunday and Monday nights with the mother; Tuesday, Wednesday and Thursday nights with the father; weekends alternating between the parents; and additional holiday provisions.
g. If the mother's older son experiences "periods of dysregulation", the mother should openly speak to the father about this and make an alternative care plan for Nathan if required.
h. Provision for sibling contact.

19 On September 27, 2023 the father filed a Dispute to the OCL Report.

20 On October 23, 2023 the OCL filed a Dispute Response.

21 Also on October 23, 2023, at a settlement conference the parties consented to yet another interim, without prejudice order which included:

a. Nathan would have parenting time with the mother three weekends out of four. Specification of Christmas time-sharing.
b. Exchange provisions.
c. Mother's older son could now be present during Nathan's parenting time, without restriction.

22 On January 18, 2024 Justice Madsen conducted a Trial Management Conference.

a. A 10-day trial was scheduled for the sittings of June 10, 2024.
b. A detailed Trial Scheduling Endorsement Form was completed, setting out that both parents and the OCL clinical investigator would be testifying. In addition the mother would be calling 14 supporting witnesses and the father would be calling 29 supporting witnesses.
c. The mother was authorized to proceed with this long motion, and timelines for materials were set.

23 On March 27, 2024 the motion was heard, requiring one-half day.

24 The mother's requests included the following:

a. Transfer Nathan's primary care to the mother immediately.
b. Transfer Nathan's school to Beechwood Brainery in Cambridge (where the mother works) or in the alternative, Nathan to attend school in the mother's catchment area.
c. Father to have Nathan on alternate weekends Friday at 6:00 p.m. until Sunday at 6:00 p.m. Other times as arranged between the parties.
d. Mother to be entitled to enroll Nathan in counselling without the father's consent.
e. Father to pay child support.
f. Costs.

25 The father asks that the mother's motion be dismissed in its entirety, without costs.

26 The mother's narrative on this motion includes:

a. She recognizes that the court may be reluctant to make interim changes with a trial being about three months away. She also recognizes that the court may be reluctant to change Nathan's school this late in the school year.
b. But the OCL report was quite thorough and specifically recommended that Nathan would prefer to reside primarily with the mother, and he would prefer to attend school at the Brainery.

c. While the mother admits she asked the father to care for Nathan briefly in March 2022, it was only while she dealt with some immediate mental health crises involving herself and her older son. Her home situation settled down very quickly thereafter, and the father's refusal to return Nathan to the mother constitutes "self-help" which should not be rewarded. The court should not respect or perpetuate a status quo which was created unilaterally and strategically.
d. In any event, while the father may be able to argue that Nathan has been with him for these past two years, prior to March 2022 Nathan was with the mother for an equivalent two years. And if you factor in that the mother was the primary caregiver while the parties were living together, the mother actually has a much more comprehensive history of caring for Nathan.
e. Three weekends out of four isn't nearly enough time given the strong bond Nathan has with the mother and her older son. Nathan has clearly expressed a desire to spend the majority of time with the mother.
f. While the father's parenting skills are adequate or largely equivalent to the mother's, there is one big difference which needs to be addressed right away. The father refuses to recognize the importance of the mother in Nathan's life, and he refuses to promote or facilitate the mother's role or relationship with the child. The mother says this is evident in the father's relentless efforts to restrict her contact with Nathan, without justification. She feels Nathan is being harmed continuing to reside with one parent who conveys unwarranted negativity toward the other parent. In contrast, she has always respected and promoted the father-child relationship and will continue to do so.
g. The mental health issues relating to the mother and her older son have been resolved. This is evident from the father's willingness to consent to the previous interim orders which have gradually expanded the mother's time and removed restrictions with respect to her older son. If those mental health concerns no longer exist, it is unfair for the father to keep using them as an excuse to interfere with the mother's relationship with Nathan.

27 The father's narrative on this motion includes:

a. The father disputes much of the mother's evidence. He disputes the OCL's factual findings and recommendations. He feels his own evidence is supported by the records of CAS workers, many of whom are now scheduled to testify at trial.
b. He emphasizes that none of the evidence has been tested. Questioning has not taken place. He seeks the opportunity of a trial, so that he and his witnesses can present their evidence, and where all witnesses will be subject to cross-examination.
c. He says even the mother's evidence confirms many aspects of *his* case.

d. The mother admits the father's care of Nathan is appropriate, and that the child is doing well.
e. The mother admits that when Nathan was in her care, she and her older son had terrible mental health and behavioural challenges which jeopardized the young child's well-being. Those mental health challenges have been profound and enduring. It is superficial and self-serving for the mother to simply declare that things are better now, and expect everyone to take her word for it. The father says those long-standing problems are more severe than the mother is admitting. He urges the court to be cautious. He warns against experimenting with Nathan by thrusting him into a new situation before each party's parenting proposal has been thoroughly analyzed and tested.
f. The father absolutely denies the suggestion that he is not supportive of the mother's relationship with Nathan. This appears to be her strongest argument in favour of an immediate change of everything in Nathan's life. But the father's materials include CAS notes which confirm the magnitude of the jeopardy Nathan was facing before being removed from the mother's household in March 2022. The father did not orchestrate the transfer of Nathan to his care. He stepped up when asked. And he has not exploited or prolonged the current situation. He has simply been trying to protect his son from serious risk of harm. It is not fair to characterize his response to the mother's crises as "self-help".
g. The mother has not established that there has been any material change in circumstances since any of the previous interim orders she consented to.
h. In any event, the reality is that Nathan has been in a stable, loving environment with the father for the past two years. He is doing well in his current school where he has many connections and supports. He is doing better than he was when he was in the mother's care. There is no compelling evidence – even if believed – to suggest that Nathan would be better off suddenly having everything change in his life.
i. The mother offers no actual plan. She seems to acknowledge changing schools at this stage is a bad idea. At the hearing of the motion the mother suggested a compromise proposal of Nathan attending her preferred school a couple of days a week and then continuing at his current school the remainder of the week. This "hybrid" proposal suggested by the OCL is extremely unusual, and the father seeks an opportunity to adduce and challenge evidence on the topic. More to the point, the mother has provided no specific details as to how either her original or compromise proposal would work. She doesn't have a car. During submissions, her lawyer suggested she might be able to arrange some transportation for the child on certain school days, but the court has received no evidence about this.
j. Nathan's sibling relationships are important, and must be carefully considered before any changes are imposed. The father still has serious concerns about Nathan having additional contact with the mother's older son who continues to reside with her. As well, Nathan has a close

relationship with the father's 17-year-old daughter. All of these dynamics can be considered at trial. We are not doing Nathan any favour if we start experimenting with his life, without knowing all of the facts.

k. While the mother proposes counselling for Nathan on the basis that "it couldn't hurt", the father's input from the child's school reinforces his own perception that Nathan is doing well and doesn't need counselling. This is another topic where the father proposes that any decisions be made after careful analysis, and not through hasty guesswork.

28 Counsel agree on the applicable statutory analysis, and the best interests test which the court must apply. They narrowly disagree on the evidentiary burden on the mother, and more generally, on the weight to be applied to certain factors when a party seeks an interim change to an interim order with a trial imminent.

29 Sections 24 and 33.1(1) of the *Children's Law Reform Act* govern this situation.

> 24(1) Best interests of the child
> In making a parenting order or contact order with respect to a child, the court shall only take into account the best interests of the child in accordance with this section.
>
> 24(2) Primary consideration
> In determining the best interests of a child, the court shall consider all factors related to the circumstances of the child, and, in doing so, shall give primary consideration to the child's
> physical, emotional and psychological safety, security and well-being.
>
> 24(3) Factors
> Factors related to the circumstances of a child include,
>
> (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
> (b) the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's
> life;
> (c) each parent's willingness to support the development and maintenance of the child's relationship with the other parent;
> (d) the history of care of the child;
> (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
> (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
> (g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
(i) the ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, in particular with one another, on matters affecting the
child;
(j) any family violence and its impact on, among other things,
(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
(k) any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child.

24(4) Factors relating to family violence
In considering the impact of any family violence under clause (3)(j), the court shall take into account,

(a) the nature, seriousness and frequency of the family violence and when it occurred;
(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
(d) the physical, emotional and psychological harm or risk of harm to the child;
(e) any compromise to the safety of the child or other family member;
(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve the person's ability to care for and meet the needs
of the child; and
(h) any other relevant factor.

24(5) Past conduct
In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person, unless the conduct is relevant to the exercise of the
person's decision-making responsibility, parenting time or contact with respect to the child.

24(6) Allocation of parenting time

> In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child.
>
> 24(7) Application to related orders
> This section applies with respect to interim parenting orders and contact orders, and to variations of parenting orders and contact orders or interim parenting orders and contact orders.
>
> 33.1(1) Best interests of the child
> A person to whom decision-making responsibility, parenting time or contact has been granted with respect to a child under a parenting order or contact order shall exercise the decision
> making responsibility, parenting time or contact in a manner that is consistent with the best interests of the child within the meaning of section 24.

30 Section 24(1) of the *CLRA* provides that the court shall take into consideration only the best interests of a child when making a parenting order or a contact order.

a. The 'best interests' test is a flexible and fact-driven exercise, tailored to the needs and circumstances of the child's whose well-being is under consideration. *De Souza v. De Souza*, 2023 ONSC 2457 (SCJ).
b. Case by case consideration of the unique circumstances of each child is the hallmark of the process. *Van de Perre v. Edwards*, 2001 SCC 60 (SCC); O'Connor v. Duguay, 2023 ONSC 2374 (SCJ)
c. The analysis must remain centered on the rights of the child, from a child-centred perspective. The 'rights' of a parent are not a criterion. *Young v. Young*, 1993 CanLII 34 (SCC)
d. The focus is on the child, not the parent. *S.S.L. v. M.A.B.*, 2022 ONSC 6326 (SCJ).

31 Section 24(2) says when considering best interest factors, primary consideration is to be given to the child's physical, emotional and psychological safety, security and well-being. *Pierre v. Pierre*, 2021 ONSC 5650 (SCJ).

32 Section 24(3) sets out a list of factors for the court to address when considering the circumstances of a child and determining best interests.

33 The court is required to undertake a broad analysis of each child's specific situation.

a. The list of best interests factors in the Act is not exhaustive. *White v. Kozun*, 2021 ONSC 41 (SCJ); *Pereira v. Ramos*, 2021 ONSC 1736 (SCJ);

Seyyad v. Pathan, 2022 ONCJ 501 (OCJ); *J.T. v. E.J*., 2022 ONSC 4596 (SCJ).

b. None of the listed factors are given priority, except the primary consideration in 24(2) is overarching. O'Connor v. Duguay, 2023 ONSC 2374 (SCJ).
c. No single criterion is determinative. The weight to be given to each factor depends on the circumstances of the particular child. *Dayboll v. Binag*, 2022 ONSC 6510 (SCJ)
d. The listed factors are not a checklist to be tabulated with the highest score winning. Rather, the court must take a holistic look at the child, his or her needs and the people in the child's life. *Phillips v. Phillips,* 2021 ONSC 2480. *W.H.C. v. W.C.M.C.* 2021 ONCJ 308 (OCJ); *Harry v. Moore* 2021 ONCJ 341 (OCJ); *McIntosh v Baker*, 2022 ONSC 4235 (SCJ); *Brownson v. Brownson*, 2022 ONSC 5882 (SCJ).
e. An assessment of the best interests of the child must take into account all of the relevant circumstances with respect to the needs of the child and the ability of each parent to meet those needs. *Mokhov v. Ratayeva*, 2021 ONSC 5454 (SCJ).
f. The child's best interests are not merely "paramount" – they are the only consideration in this analysis. *Gordon v. Goertz,* 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27 at para. 28; *Mattina v. Mattina*, 2018 ONCA 641 (ON CA); *E.M. v. C.V.* 2022 ONSC 7037 (SCJ).
g. The court must ascertain a child's best interests from the perspective of the child rather than that of the parents. *Gordon v. Goertz*, [1996] 2 S.C.R. 27.(SCC). Adult preferences or "rights" do not form part of the analysis except insofar as they are relevant to the determination of the best interests of the child. *Young v. Young* 1993 CanLII 34 (SCC); *E.M.B. v. M.F.B.* 2021 ONSC 4264 (SCJ).
h. The court's unrelenting focus on the best interests of each particular child means that there can be no presumption in favour of any one type of parenting order. All things being equal, each child deserves to have a meaningful and consistent relationship with both parents. *E.M.B. v. M.F.B.* 2021 ONSC 4264 (SCJ).

34 Section 29 of the *CLRA* sets out the Court's authority to change a parenting order.

> 29(1) Variation of orders
> A court shall not make an order under this Part that varies a parenting order or contact order unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child who is the subject of the order.

35 Typically, on an interim motion the court is presented with conflicting affidavits which are incomplete and untested. The facts are often still evolving. As a result, a temporary order is meant to provide a reasonably

acceptable solution on an expeditious basis for a problem that will be fully canvassed at subsequent conferences or resolved at a trial. *Coe v. Tope*, 2014 ONSC 4002 (SCJ); *Munroe v. Graham*, 2021 ONCJ 253 (SCJ); *Nicholson v. Nicholson*, 2021 ONSC 7045 (SCJ); *Shokoufimogiman v. Bozorgi*, 2022 ONSC 5057 (SCJ); *Sadiq v Musa*, 2023 ONSC 1811 (SCJ); *Grover v Grover*, 2023 ONSC 3607 (SCJ).

36 Although the "status quo" is frequently mentioned as an important consideration in determining *or continuing* parenting arrangements – particularly at the interim stage -- the term "status quo" is not specifically mentioned in the legislation. However, section 24(3)(d) of the *CLRA* lists "the history of care of the child" as a factor in determining best interests. That factor appears to be another way of describing "status quo". *Brownson v. Brownson*, 2022 ONSC 5882 (SCJ).

a. It is a long-standing legal principle that absent evidence of a material change and that an immediate change is required, the status quo is ordinarily to be maintained until trial: *Niel v. Niel*, 1976 CanLII 1925 (ON CA), 28 R.F.L. 257 (Ont. C.A.), *Grant v. Turgeon*, 2000 CanLII 22565 (ON SC), 5 R.F.L. (5th) 326 (Ont. S.C.J.); *Wang v. Tang*, 2023 ONSC 3609 (SCJ); *Easton v. McAvoy*, 2005 CarswellOnt 7379 (OCJ); *Levesque v. Bond*, 2023 ONSC 1895 (SCJ)
b. The status quo – and avoiding reckless creation of a new status quo - are important considerations at the interim stage. *Cosentino v. Cosentino*, 2016 ONSC 5621 (SCJ); *Cabral v. Parker* 2021 ONSC 4574 (SCJ); *Viveash v. Viveash* 2021 ONSC 7456 (SCJ); *N.D. v. R.K .*, 2020 ONCJ 266 (OCJ). The longer the status quo has existed, the greater the presumption that it should be maintained pending trial, unless there is material evidence that the child's best interests require an immediate change. *W.H.C. v. W.C.M.C.* 2021 ONCJ 308 (OCJ); *Ceho v. Ceho*, 2015 ONSC 5285 (SCJ); *Batsinda v. Batsinda* 2013 ONSC 7869 (SCJ); *Green v. Cairns*, 2004 CanLII 9301 (SCJ); *Papp v. Papp*, 1969 CanLII 219 (ON CA); *MacDonald v. Cannell*, 2021 ONSC 7769 (SCJ).
c. Temporary orders are "band-aid" solutions pending a full hearing. The status quo is ordinarily maintained pending trial unless the evidence demonstrates that the best interests of the child require some modification. *Sullivan v. Senechal*, 2022 ONSC 557 (SCJ)
d. To disturb the status quo, there must be compelling evidence to show the welfare of the child would be in danger if the status quo is maintained. The evidence must clearly and unequivocally establish that the status quo is not in the child's best interests. *Miranda v. Miranda*, 2013 ONSC 4704 (SCJ); *Dayboll v. Binag*, 2022 ONSC 6510 (SCJ); *A.L. v. C.M.*, 2023 ONCJ 412 (OCJ); *Tomkinson* v. *Baszak* 2023 ONSC 4092 (SCJ).
e. The status quo is particularly important on an interim motion because the court is often not in a position to make factual findings based on incomplete and untested evidence. *R.C. v. L.C.*, 2021 ONSC 1963 (SCJ);

C.C. v. I.C., 2021 ONSC 6471 (SCJ); *Dayboll v. Binag*, 2022 ONSC 6510 (SCJ); *Chaput v. Chaput*, 2021 ONSC 2809 (SCJ);

37 The court must be mindful that an interim order can often have long-term implications for the child and the outcome of the litigation. *F.B. v. C.H.* 2021 ONCJ 275 (OCJ); *Coe v. Tope*, 2014 ONSC 4002 (SCJ). As a result, the existence of a status quo – and its manner of creation – are often the subject of significant controversy at the motion stage.

a. The *status quo* may be established by reference to the parents' practice or the child's routine prior to separation; by any consensual arrangement made after separation; or by court order. *Brady v. Fitzpatrick* 2022 ONSC 2380 (SCJ); *Gray v. Canonico*, 2020 ONSC 5885 (SCJ); *Falarz v. Gullusci* 2023 ONSC 2644 (SCJ)
b. If a motion is brought immediately after separation, the court will need to determine parenting roles and the child's routine while the parties were together, with emphasis on more recent patterns. If a time-sharing arrangement has emerged on a consensual basis since the date of separation – and if it is meeting the child's needs – the court will be reluctant to change an arrangement which the child has become used to. But if only a short amount of time has elapsed between the creation of a new status quo and the hearing of the motion, the court will be more inclined to presume that restoration of a previous successful status quo is appropriate. *Kennedy v. Hull* 2005 ONCJ 275 (OCJ); *M.H.S. v. M.R.* 2021 ONCJ 665 (OCJ).

38 Because of the obvious importance of the status quo as a best interests consideration, courts must be mindful of - and actively discourage - efforts by parents to unilaterally create a new status quo through manipulation, exaggeration or deception. *Izyuk v. Bilousov*, *2011 ONSC 6451* (SCJ); *Coe v. Tope*, 2014 ONSC 4002 (SCJ).

a. The status quo does not refer to a situation unreasonably created by one party after separation to obtain a tactical advantage in the litigation. *Cabral v. Parker* 2021 ONSC 4574 (SCJ); *Theriault v. Ford*, 2022 ONSC 3619 (SCJ) Neither parent has the right to suddenly impose major changes in a child's life, or to unilaterally interfere with or impede the other parent's contact or role in the child's life. A parent cannot be permitted to gain a litigation advantage through manipulation of events, or by creating a new arrangement which they may later characterize as the "status quo." *Rifai v. Green* 2014 ONSC 1377 (SCJ); *Ivory v. Ivory* 2021 ONSC 5475 (SCJ); *J.F.R. v. K.L.L.* 2022 ONSC 5067 (SCJ); *Wang v. Tang*, 2023 ONSC 3609 (SCJ).
b. Parents cannot resort to self-help remedies; ignore obligations under agreements or orders; present a *fait accompli* to the court on an interim

basis; and expect the court to approve. That is a recipe for chaos, and disaster, and is unfair to children caught in the middle. *Sain v Shahbazi*, 2023 ONSC 5187 (SCJ)

c. Self-help is to be discouraged, and certainly not rewarded. A parent who engages in self-help tactics for strategic purposes -- despite the best interests of the child -- will generally raise serious questions about their own parenting skills and judgment. *Southorn v. Ree*, 2019 ONSC 1298 (SCJ); *McPhail v. McPhail*, 2018 ONSC 735 (SCJ); *C.C. v. I.C.*, 2021 ONSC 6471 (SCJ); *Rifai v. Green*, 2014 ONSC 1377 (SCJ); *M.H.S. v. M.R.* 2021 ONCJ 665 (OCJ).
d. Neither parent has the right to create a unilateral parenting status quo, even if there is an alleged safety issue. *Gray v. Canonico*, 2020 ONSC 5885 (SCJ); *Ivory v. Ivory* 2021 ONSC 5475 (SCJ); *Ibitoye v. Ibitoye* 2023 ONSC 2008 (SCJ)
e. It is inappropriate for a parent to make secret plans which will have significant impact on children and parenting arrangements, and then announce those plans after decisions have been implemented. *Canning v. Davis-Hall*, 2019 ONCJ 971 (OCJ); *Doan v. Tran*, 2022 ONCJ 419 (OCJ)
f. Parents take unilateral action at their own peril. The court will not sanction self-help in circumstances where the best interests of children may potentially be jeopardized. Corrective action by the court may be swift and firm – with long-term consequences quite the opposite of what the offending parent hoped to achieve. *Fallis v. Decker*, 2013 ONSC 5206 (SCJ).

39 In this case, the mother accuses the father of having engaged in self-help to create – *or at least unreasonably perpetuate* -- a favourable status quo. This is one of many allegations which can be explored at trial. But for purposes of this interim motion, there is insufficient evidence to satisfy me that the father has engaged in unilateral or "self-help" behaviour.

40 Counsel for the parents disagreed on the extent to which the mother must establish a material change in circumstances as a threshold consideration on this motion. Both counsel referred to *Ceho v. Ceho*, 2015 ONSC 5285 (SCJ). The father also referred to *Leggo v. Hulme*, 2019 ONSC 2306 (SCJ).

41 As a general rule, no material change in circumstances is required on a motion to change a temporary *without prejudice* order, or in relation to a time-limited temporary order. *Kirichenko v. Kirichenko* 2021 ONSC 2833 (SCJ).

42 While the father's counsel relies on *Cehio* to suggest that in this case the mother must establish a material change in circumstances, I agree with Justice Price's analysis in that case which included the following:

> [85] To require a party to establish that a "material change of circumstances" has occurred since a "temporary temporary and without prejudice order" was made would not promote the primary objective of resolving disputes fairly in the most timely and least expensive manner. Rather, it would discourage the temporary settlement of disputes

> pending counselling, or questioning, or a clinical investigation by the OCL. Parties would be more likely to argue the issues prematurely in order to avoid a presumption arising from the *status quo* in the future. They would be less willing to adjourn a motion in the interest of counselling, or questioning, or OCL investigation, if they thought that the court, upon the return of the motion, would require proof of a material change of circumstances before it would consider the results of those steps.
> [86] The very expression "without prejudice" is intended to preserve the position of each party. It would be rendered meaningless if the temporary temporary order, in fact, prejudiced the party who consented to it, by imposing on that party a higher threshold of proof in the future, and requiring him or her to prove a material change of circumstances.

43 In *Courville v. Courville*, 2015 ONCJ 535 (OCJ), a case cited by the mother, Justice Starr stated:

> [15] The words "without prejudice" contained in the consent order of March 25, 2015 and in the order this court made on July 10, 2015, are not empty words. The court, the administration of justice, and the parents who come before this court depend on this. If family law disputes are to be settled or moved towards final resolution and in a speedy, efficient, and cost effective way, parties must have the ability to agree to "test drive" new arrangements. To do this, they must have some assurance that the temporary without prejudice orders they agree to (particularly when those orders deal with trying out changes that they are worried may negatively affect their children), can be reviewed following the agreed upon timeframe. In this case, the insertion of the words "without prejudice" was meant, in part, to give each party confidence that when the motion was finally heard, the court would start from the presumption that unless there was a compelling reason to do so, the status quo that they agreed to suspend, would be maintained.

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

45 However, the court must be mindful that a protracted succession of temporary-temporary or without prejudice orders may perpetuate – and perhaps even *invite* – even more motions, as parents jockey to obtain an advantageous status quo. That's largely what's happened in this case.

a. The mother keeps pursuing the same motion -- repeatedly – for the *temporary* return of Nathan to her care.
b. The "without prejudice" characterization has allowed her to keep coming back, each time making a bit more headway.

c. While each preceding consent order is characterized as being "without prejudice", the cumulative effect and duration of these successive orders eventually erodes the practical significance of the "without prejudice" designation.

46 Allowing parents an unfettered right to keep trying to change parenting arrangements without requiring a material change in circumstances is inconsistent with children's need for stability and predictability. At a certain point, the "without prejudice" characterization becomes counter-productive. *Rafla v Fawaz,* 2022 ONSC 4512 (SCJ).

47 In parenting cases, the words "without prejudice" have an important but often time-limited significance. There is a difference between an interim without prejudice order of short duration and an interim without prejudice order which has persisted for an extended period of time. From the parent's perspective the "without prejudice" designation preserves options and avoids admissions. But from the child's perspective – *which is the one that really counts* -- the words "without prejudice" cannot magically obscure the reality of the child's accumulating experiences, routines and relationships.

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

49 On this motion the mother relies, in part, on *some* of the contents of the OCL's lengthy s.112 report. She does not seek to rely on the clinical investigator's recommendations, but she asks the court to accept some of the clinician's factual findings (such as the child's views and preferences). The father submits the report should have no relevance at this interim stage. He disputes the findings and recommendations, and his lawyer will be cross-examining the author at trial.

50 The law with respect to interim use of professional reports:

a. The case law overwhelmingly urges courts to be cautious before relying upon an assessment report or OCL report at an interim stage of the proceedings. *Batsinda v. Batsinda*, 2013 ONSC 7869 (SCJ): *Zantinge v. Abdulrahman* 2022 ONSC 1159 (SCJ); *Denomme v. Denomme*, 2022 ONSC 5205 (SCJ); *B. v. D.* 2022 ONSC 1352 (SCJ); *Slaght v. Taylor*, 2016 ONSC 1904 (SCJ).
b. In general, interim implementation of OCL reports and assessments should be discouraged, as such motions require the court to make profound and often disruptive decisions based on incomplete and untested information. Any interim change to a status quo creates a risk of further changes – or complete reversal – at trial, once the evidence has been more fully presented and tested. *Batsinda v. Batsinda* 2013 ONSC 7869 (SCJ); *Sayeau v Buttle*, 2022 ONSC 7246 (SCJ).
c. An assessment or section 112 report is only one piece of evidence in a proceeding, intended for use *at trial*. At the motion stage the report

untested. It should generally not be adopted without a trial where the judge will have the opportunity to

i. Observe cross-examination of the author;
ii. Undertake a thorough analysis and evaluation of all aspects of the assessor's report, including the assessor's credentials, methods, observations, findings, theories, and recommendations;
iii. Observe the testimony and cross-examination of the parties and their witnesses;
iv. Consider all the other relevant evidence in the case.

Zantinge v. Abdulrahman 2022 ONSC 1159 (SCJ); *Batsinda v. Batsinda* 2013 ONSC 7869 (SCJ); Marcy v. Belmore, 2012 ONSC 4696 (SCJ); *B. v. D.* 2022 ONSC 1352 (SCJ); *Mayer v. Mayer*, [2002] O.J. No. 5303 (S.C.J.); *Kirkham v. Kirkham*, 2008 CarswellOnt 3644 (SCJ);

d. It is usually preferable for the *status quo* to continue until trial. *Denomme v. Denomme*, 2022 ONSC 5205 (SCJ). This, of course, may depend on how long the parties will have to wait for their trial, and whether anything can be done to expedite the trial in appropriate circumstances.
e. Nonetheless, the best interests of the child must be the paramount consideration at every stage. And if the arrival of an assessment or OCL report presents additional – and reliable – information affecting the immediate best interests of the child, then in some circumstances it may be appropriate *and necessary* for the court to utilize the report in making (or changing) an interim order. *Bos v. Bos*, 2012 ONSC 3425 (SCJ)
f. Historically, many cases have set out a fairly stringent requirement that there must be "compelling" or "exceptional" circumstances to change the *status quo* pending trial. *Benko v. Torok*, 2012 ONCJ 401 (OCJ); *Grant v. Turgeon*, 2000 CanLII 22565 (SCJ); *Daniel v. Henlon*, 2018 ONCJ 122 (OCJ); *Genovesi v. Genovesi*, [1992] O.J. No. 1261 (Gen. Div.). This could include cases in which a parent has been found to be engaging in potentially alienating behaviours which need to be addressed immediately. *WDC v. JLM*, 2012 ONCJ 700 (OCJ).
g. More recently, a number of cases have warned against an "inflexible blanket prohibition" with respect to consideration of assessment reports an interim motion, especially when that is the only independent evidence before the court. *Taylor v Clarke*, 2017 ONSC 1270 (SCJ).
h. The magnitude of the proposed interim change – and the strength of the new information – will likely be important factors.
i. In both *Bos v. Bos*, 2012 ONSC 3425 (SCJ) and *Jonczyk v. Tilsley* 2021 ONSC 2546 (SCJ) the court set out four factors to consider when a court is asked to change temporary parenting arrangements, based on an assessment report, *without a finding of "exceptional circumstances":*

i. How significant is the change that is being proposed as compared to the interim *status quo*?
ii. What other evidence is before the court to support the change?
iii. Is the court being asked to consider the entire report and recommendations, or only some parts, including statements made by children, or observations made by the assessor?
iv. Are the portions of the report sought to be relied on contentious and if so has either party requested the opportunity to cross-examine the assessor?

j. At the motion stage the court should not presume that an assessor's recommendations would or should inevitably prevail at trial. *Batsinda v. Batsinda*, 2013 ONSC 7869 (SCJ); *Marcy v. Belmore*, 2012 ONSC 4696 (SCJ). As a result, some cases have held that little or no weight should be given to the assessor's *conclusions or recommendations* at the interim stage.
k. However, the *evidence and observations* set out in the report may justify immediate court action, particularly if the evidence suggests an immediate change is required to protect children from physical or emotional harm, or otherwise promote their best interests. *M. v. S. et al.* 2022 ONSC 1687 (SCJ).
l. Information such as statements made by a child to the assessor; the assessor's observations of the parents and the child (individually or together); or undisputed facts contained in the report – those portions of an assessment *may* be of considerable value to a motions judge in determining whether interim changes to the parenting regime are required to promote the best interests of the children. *Jonczyk v. Tilsley* 2021 ONSC 2546 (SCJ).
m. Parties should not perceive the arrival of an assessment report as creating an automatic strategic opportunity to secure a more favourable status quo, heading into trial. *Marcy v. Belmore*, 2012 ONSC 4696 (SCJ). Clearly, the facts of each case will be critical and will guide the exercise of the court's discretion. *Jonczyk v. Tilsley* 2021 ONSC 2546 (SCJ); *Lamacchia v. Carullo*, 2022 ONSC 687 (SCJ).

51 While the mother only seeks to make limited use of the section 112 report at this stage, I do not find that any of the contents suggest that an immediate and dramatic change to Nathan's situation is in the child's best interests – particularly given the fact that the report will soon be tested at trial.

52 My considerations in deciding the mother's motion include the following:

a. The history here is complex, and Nathan is still a young, vulnerable child.
b. There are many disputed facts and allegations.
c. It is impossible to make necessary credibility and factual determinations based on the lengthy, conflictual and untested affidavit materials.

d. It is not disputed that this eight-year-old boy has been primarily resident with the father for the past two years. He attends school in the father's catchment area.
e. It is not disputed that the child's current placement arose as a result of serious problems in the mother's household when Nathan was living with her.
f. The mother has quite candidly acknowledged that in most respects the father's care of Nathan has been adequate, and comparable to the care that she would provide.
g. She expresses a narrow rationale for seeking an immediate and dramatic change in parenting arrangements for the child. She has voiced specific concerns about the father refusing to promote her relationship with her son. But taken at their strongest, her allegations do not constitute a level of parental alienation which, in some extreme cases, has led to a dramatic change in interim parenting arrangements. The mother provides no compelling evidence that immediate intervention is required to either rescue the child from a bad situation, or advance the child to a significantly better situation.
h. The mother also relies on her characterization of the child's views and preferences. Here too, the father presents a competing narrative. To the extent that the mother seeks to rely on an untested OCL report which the father disputes, it is premature for the court to determine what weight if any should be given to that individual piece of evidence. In any event, views and preferences are only one of the relevant considerations in determining the best interests of the child. And views and preferences may end up being given less weight where the more dominant issue relates to adult lifestyle, behaviour and mental health issues relating to a parent and members of their household.
i. At every stage, the court must focus on the best interests of the child. And the evidence on this case does not displace the presumption that once a stable and beneficial parenting arrangement has been created, it is in the best interests of the child to maintain continuity and successful routines pending trial.
j. The magnitude of the issues and the extent of the factual dispute herein is reflected by the length of the pending trial (10 days) and the number of anticipated witnesses (approximately 46).
k. That trial – only three months away – will create an opportunity for a much more detailed and comprehensive analysis of all the evidence (including vitally important testing of evidence through cross-examination).
l. For purposes of this motion, the mother's emphasis that all previous orders were "without prejudice" has little impact on the best interests analysis. Even without imposing the elevated threshold requirement of establishing a material change in circumstances, the court still requires compelling reasons to disrupt a successful two-year status quo on the eve of trial. No

matter what test is applied, the mother has not established that her requested changes are necessary for the benefit of the child.

m. To the contrary, the mother's plan is filled with uncertainties which need to be fully canvassed at trial. And the mother's request to change Nathan's school this late in the school year only compounds the court's overall concern about the magnitude of her proposed disruption of the child. With the scheduling of the trial roughly coinciding with the end of the current school year, that would be a more appropriate time to consider any change in school registration.
n. The court simply cannot impose a dramatic change on this young child, based upon incomplete information. Very soon, all of these important issues will be thoroughly and properly considered. In the meantime, we must not make hasty decisions which might be subject to further change *or even reversal* at trial.

53 The mother's motion is dismissed.

54 If the parties cannot resolve the issue of costs, they are to serve and file written submissions (no longer than two pages including case law links, plus a bill of costs and any offers) on the following timelines.

a. Father's materials by April 19, 2024.
b. Mother's materials by May 3, 2024.
c. Any reply by father by May 13, 2024.

Justice Alex Pazaratz

Date: April 2, 2024