

**CITATION:** Reif v. Reif, 2021 ONSC 3976  
**SARNIA COURT FILE NO.:** 19-8290  
**DATE:** 20210601

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Stacey Eva-Mae Reif	)	Aaron B.R. Drury, Counsel for the Applicant
	)	Applicant
<b>- and -</b>	)	
Andre-Oliver Helmuth Reif	)	
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	)	<b>HEARD:</b> By Zoom on January 15, 2021
	)	and February 12, 2021

**RULING ON MOTION**

**CARROCCIA J.:**

**INTRODUCTION**

- [1] The parties in this case each filed motions seeking various forms of relief. The court heard argument by Zoom on a special appointment on January 15, 2021 and February 12, 2021.
- [2] The applicant, Stacey Eva-Mae Reif, filed a motion dated October 15, 2020 seeking the following relief:
  - An order that the respondent, Andre-Oliver Helmuth Reif, pay spousal support to the applicant on an interim interim basis in the amount of \$2,413 per month;
  - An order imputing income to the respondent in the amount of \$170,000 per annum on an interim interim basis for the purpose of spousal support;
  - An order that the respondent provide the applicant with details of his income from all sources including his income generating rental properties; and

- An order that the respondent pay costs on a full recovery basis including disbursements and HST.

[3] The respondent filed a motion on November 11, 2020 seeking the following relief:

- An order seeking the dismissal of the applicant's motion for spousal support with costs;
- Or, alternatively, an order for the imputation of employment income to the applicant in the amount of \$80,000 per annum on an interim and without prejudice basis;
- An order that the respondent shall pay to the applicant \$767 per month in spousal support based on his income of \$170,000 and the applicant's imputed income of \$80,000;
- An order that the applicant shall be responsible for all carrying and maintenance costs on the matrimonial home from the date of commencement of spousal support payments until the closing date of the sale of the matrimonial home;
- An order that the applicant shall produce evidence of job search efforts from October 2019 to date and on a go forward basis, including but not limited to: job applications submitted, job searches, current resume, list of interviews offered and attended, and any and all job offer letters etc.;
- An order that the applicant shall pay the respondent occupational rent from October 31, 2019 to date and on a go forward basis until the matrimonial home is sold, in the amount of \$4,000 per month;
- An order that the applicant shall undergo, and pay for, a vocational assessment report and produce a copy of the report to the respondent;
- An order for the immediate listing and sale of the matrimonial home located at 1956 Huron Ave., Sarnia, Ontario (although this was not pursued on this motion);
- An order that the respondent shall have unrestricted access to the matrimonial home, including for a moving service for the purpose of removing his contents;
- An order for shared decision-making authority (formerly custody) of the children, with parenting time on a two-week rotating schedule, including particulars for holiday and summer vacation schedules;
- Or alternatively, an order for increased parenting time with the children for the respondent father;

- An order that the applicant not denigrate the respondent to or in front of the children, and not discuss adult issues with them, and encourage the respondent's relationship with them; and
  - Costs.
- [4] The applicant mother filed a further motion dated November 26, 2020 seeking the following relief:
- An order striking the respondent's motion dated November 11, 2020 for non-compliance with the court order dated October 31, 2019;
  - An order that the respondent shall have each of his rental properties valued and provide such valuation to the applicant within 30 days;
  - An order that the respondent shall provide to the applicant the values of his bank accounts which are detailed in the Notice of Motion; and
  - An order adopting the recommendations of the OCL clinician, Jacqueline Bobyk-Krumins, on an interim basis pending the outcome of this matter.
- [5] In support of her motions, the applicant relies on her affidavits dated September 28, 2020 and November 26, 2020. In support of his motions, the respondent relies on his affidavits dated November 8, 2019, December 9, 2019, December 13, 2019, November 11, 2020, and January 8, 2021, as well as the affidavit of Angela Cobbett, the respondent's partner, dated January 4, 2021.
- [6] In addition, I have reviewed the Form 13.1 Financial Statements filed by each of the parties.

## **BACKGROUND**

- [7] The applicant, Stacey Eva-Mae Reif, is 51 years of age. The respondent, Andre-Oliver Reif, is 50 years old. The parties were married on October 6, 2005 and separated on October 23, 2019, although the date of separation is in dispute as the respondent claims they separated in 2016. There was a prior court proceeding in 2017 and according to the respondent, they lived separately under the same roof from that date until the date of final separation in 2019. This conflicts with his affidavit of November 8, 2019, where the respondent indicates that the parties separated for three months at the end of 2016 and reconciled in March of 2017.
- [8] They are the parents of two children: Amelia Linda Rose Reif, born March 3, 2008, now 13 years old, and Alivia Alexandra Eva-Mae Reif, born January 9, 2012, who is now nine years old.
- [9] The parties are both engineers. According to her affidavit, however, the applicant became a stay-at-home mother in 2007 and has not been employed as a chemical

engineer since that time. After the birth of their first child, she stopped working and the respondent became the sole financial support for the family. Recently, the applicant has been working as a tutor and at various businesses on both a part-time and full-time basis.

- [10] The applicant indicates in her affidavit of September 28, 2020 that due to the ongoing COVID-19 pandemic and cutbacks in local plants, she has had difficulty finding employment. She has attempted to find employment through employment counsellors.
- [11] The respondent is employed as a planning specialist chemical engineer with Enbridge Inc. and additionally owns 15 income properties.
- [12] On October 31, 2019, Desotti J. made an order, on an urgent motion brought by the applicant without notice to the respondent. That interim interim order grants sole custody of the children to the applicant, supervised access to the respondent, a lump sum payment of \$8,000 by the respondent to the applicant to be credited against future child support and/or spousal support obligations, and exclusive possession of the matrimonial home to the applicant.
- [13] That order was subsequently varied by Desotti J. on December 20, 2019, as was an order made by Bondy J. on November 24, 2019. The order currently in effect grants the parties interim joint custody (now decision-making authority) of the children, provides for parenting time by the respondent with the children unsupervised. It also deals with other issues related to travelling with the children, holiday access etc., and provides for the appointment of the Office of the Children's Lawyer.
- [14] The order for payment of a lump sum amount towards future child support and/or spousal support obligations was not varied.
- [15] I note that the applicant is seeking an order striking the respondent's motion for failure to comply with the order of Desotti J. of October 31, 2019. I decline to do so and will deal with all of the issues raised by the parties.

## THE ISSUES

- [16] Many of the issues raised by the parties are related and, accordingly, I will deal with the issues as follows:

### **1. Spousal Support and Imputation of Income**

- [17] The applicant seeks spousal support on a temporary basis in the amount of \$2,413 per month which represents the midrange “with child support” amount based on imputed income to the respondent of \$170,000 and income of the applicant at \$30,000.
- [18] The respondent takes the position that no order ought to be made for spousal support because the applicant’s needs are being adequately met since she has employment income, the applicant receives child support payments in the amount of \$2,158 per month, and she is living in the matrimonial home “rent free”.

- [19] In the alternative, the respondent takes the position that, on a temporary basis, he pay spousal support in the amount of \$767 per month based on his income of \$170,000 and asks that the applicant's income be imputed at \$80,000.
- [20] Raikes J. made an interim interim without prejudice order on October 29, 2020, requiring the respondent to pay spousal support to the applicant in the amount of \$1,800 per month.

**The Law**

- [21] Section 15.2(2) of the *Divorce Act*, R.S.C 1985, c. 3, permits a court, on application by either spouse, to make an interim order for spousal support. In determining whether to make such an order, the court shall take into account the condition, means, needs and other circumstances of each spouse including:
  - (4)(a) the length of time the spouses cohabited;
  - (b) the functions performed by each spouse during cohabitation; and
  - (c) any order, agreement or arrangement relation to support of either spouse.
- [22] Furthermore, subsection (6) mandates that a court that makes an order for spousal support should recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown, including economic hardship of the spouses arising from the breakdown of the marriage.
- [23] In determining whether to make an order for support, whether it is an interim order or a final order, the court must balance those enumerated factors in light of the objectives of spousal support.
- [24] In *Samis (Guardian of) v. Samis*, 2011 ONCJ 273, [2011] O.J. No. 2381, Sherr J. at paras. 43 and 44, outlined the following principles for a court to consider in determining whether to make an interim order for spousal support:
  - i) Interim support is to provide income for dependent spouses from the time the proceedings are instituted until trial.
  - ii) The Court need not conduct a complete inquiry into all aspects and details to determine what extent either party suffered economic advantage or disadvantage.
  - iii) Interim support is a holding order to maintain the accustomed lifestyle if possible pending final disposition as long as the claimant is able to present a triable case for economic disadvantage.
  - iv) On interim support motions, need and ability to pay take on a greater significance. The need to achieve self-sufficiency is of less importance.
  - v) Interim support should be ordered within the range of the SSAG, unless exceptional circumstances dictate otherwise.

- vi) While the merits of the case in its entirety must await a final hearing, interim support should only be ordered where a *prima facie* case for entitlement has been made out.
- [25] Section 19(1) of the *Child Support Guidelines*, SOR/97-175, sets out the factors to be taken into account in imputing income to a spouse including the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [26] In *Drygala v. Pauli*, [2002] O.J. No. 3731, the Ontario Court of Appeal says the following regarding s. 19(1) of the *Child Support Guidelines*, at para. 23:

In my view, in applying this provision, the trial judge was required to consider the following three questions.

1. Is the spouse intentionally under-employed or unemployed?
  2. If so, is the intentional under-employment or unemployment required by virtue of his reasonable educational needs?
  3. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?
- [27] This reference does not take into account the other factor outlined above, namely where the under-employment or unemployment is required by the needs of a child of the marriage.
- [28] The burden of proof that income ought to be imputed to a spouse based on intentional under-employment is on the party seeking to establish it. Once it is established, however, the burden shifts to the other party to establish that the reason for the under-employment is reasonable.<sup>1</sup>

### Analysis

#### *The Parties' Financial Circumstances*

- [29] According to the applicant's financial statement, dated December 5, 2019, and supported by Notices of Assessment from the Canada Revenue Agency, her income was as follows:

2016: \$ 1,320.00

2017: \$26,560.00

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<sup>1</sup> *Drygala v. Pauli*, *supra*, at para. 38.

2018: \$16,001.00

2019: \$38,564.00

- [30] According to the respondent's financial statement, dated March 10, 2020, and supported by Notices of Assessment from the Canada Revenue Agency, his income was as follows:

2016: \$124,391.00

2017: \$159,495.00

2018: \$169,419.00

2019: \$151,683.68

- [31] In addition, according to the factum of the respondent, his net rental income in 2019 was \$39,683.68, in addition to his employment income, for a total income of \$191,216.48, much more than the applicant is seeking to impute to the respondent.

- [32] The applicant and respondent were married for approximately 14 years from October 2005 until they separated in October 2019. (It is not necessary for me to determine at this time whether the actual date of separation is in 2016). For the majority of that time, the applicant was home with the children full-time and was the primary care giver to the children although, as the children got older, she did have some part-time and full-time employment.

- [33] The respondent urges the court to consider that the applicant "could easily" find an entry to a mid-level position in her field of expertise, namely as a chemical engineer, despite the fact that she has not worked in that field in almost 14 years and that we are still dealing with the economic impacts of a global pandemic. In support of that, the respondent provides several job postings in the engineering field. There is no evidence before the court as to whether the applicant would be qualified for those jobs.

- [34] The applicant points out in her affidavit that when the respondent was unemployed in 2015, it took him almost seven months to find a new job.

- [35] The respondent devotes a good deal of space in his multiple affidavits to explaining how the applicant spends money recklessly and is capable of finding work in her field, but simply chooses not to.

- [36] Interim orders for spousal support are intended to provide income for a defendant spouse until the matter goes to trial or is otherwise resolved. The income disparity in this case is obvious. At this stage in the proceedings, given the principles outlined in *Samis (Guardian of)* referred to above, self-sufficiency is less important and need and ability to pay takes on greater importance.

- [37] In my view, an assessment of the needs of the applicant, the means of the respondent to pay support, the length of the marriage as well as the fact that the applicant has a triable case for compensatory support based on economic disadvantage, the applicant has established entitlement to an interim order for spousal support.
- [38] The issue is the quantum of the support and whether income should be imputed to the applicant for the purpose of that calculation. I note that the applicant is also seeking to impute income to the respondent as a result of his income from his rental properties.
- [39] In his alternative position, (should the court order the payment of spousal support), the respondent suggests that the court make an order based on his income of \$170,000 and income imputed to the applicant of \$80,000.<sup>2</sup> This position is reiterated in his factum. Given that the amount referred to as his income exceeds his employment income for 2019 but is less than the total income he earned including his rental income, it appears that he is effectively in agreement that income ought to be imputed to him.
- [40] As to whether to impute income to the applicant in these circumstances, there is conflicting affidavit evidence on the issue of whether the applicant voluntarily chose to leave her employment as a chemical engineer or whether a decision was made together that she stay home to care for their children.
- [41] I note that the Office of the Children's Lawyer ("OCL") was appointed pursuant to the order of Desotti J., dated December 20, 2019. Ms. Jacqueline Bobyk-Krumins, a clinician, prepared a report after conducting meetings with the parties and the children as well as receiving information from other sources. At p. 5 of that report, she states the following:

*In 2005 Ms. Reif and Mr. Reif married and within a couple of years, started their family. There were discussions and a decision according to Mr. Reif whereby Ms. Reif would remain at home to care for the children while he concentrated on career growth.*

*For a period of time, things went well however in 2015, Ms. Reif states that things started to change for she and Mr. Reif. Mr. Reif, she reports lost his job as a Plant Manager and by that time, his grandmother had been residing in their home for five years and it was becoming more difficult given that they also had two young children to care for in the home.*

*Mr. Reif recalls differently stating that it was after they started their family that things began to change. He recalls that Ms. Reif was prepared to give up her career however did not recognize his role as the provider for the home. She was to pay the bills and instead, she was spending out of control and was looking for a life beyond their means.*

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<sup>2</sup> Respondent's Notice of Motion, dated November 11, 2020.

- [42] This seems to suggest that at the time of his meeting with the clinician who was preparing the report on behalf of the OCL, the respondent advised her that the decision for the applicant mother to stay home with the children and give up her career was made after discussions between them.
- [43] In determining whether to impute income to the applicant, I take into account the following factors. The applicant has not been employed as a chemical engineer since 2007. There is no evidence that she could secure employment in that field currently given her long absence from that type of employment particularly in light of the global pandemic.
- [44] It appears that the decision to “give up her career” was a mutual decision made by the parties following the birth of their first child in order for the applicant to stay home and take care of the children. In any event, I am not satisfied that the decision must be mutual for the applicant to establish entitlement. Whether the decision was mutual or not, the roles adopted by the parties during the marriage are clear; the respondent was the breadwinner and the applicant was the homemaker. The applicant must be given more time to establish a career. Accordingly, I decline to make an order to impute income to the applicant at this time.
- [45] I accept the *Spousal Support Advisory Guidelines* calculation provided by Mr. Drury attached as Schedule A. I use the midpoint as Mr. Drury requested that figure. In any event, the trial judge will be in a better position to adjust the quantum on a fulsome record.
- [46] The respondent shall pay support to the applicant, commencing January 1, 2021, in the amount of \$2,413 per month which represents the midrange “with child support” amount based on imputed income to the respondent of \$170,000 and income of the applicant at \$30,000.<sup>3</sup> This is without prejudice to the respondent to seek an adjustment of the spousal support payable following a trial of the issue.
- [47] As for the lump sum support ordered, I note that despite his position, that he has “more than satisfied the \$8,000 requirement laid out in the October 31, 2019 order”<sup>4</sup> of Desotti J. by virtue of the child support payments in the amount of \$2,158 which he has been making since March 2020, there is no indication that the respondent made any child support payments prior to that date.
- [48] The order of Desotti J., dated October 31, 2019, states as follows:
  - 3(h) Pending any order obliging the Respondent, Andre-Oliver Helmuth Reif to pay child support and/or spousal support to the Applicant, Stacey Eva-Mae Reif, he shall pay to her a lump sum amount of \$8,000 to be credited against his support obligations.

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<sup>3</sup> *The DivorceMate calculation referred to is attached as Appendix A.*

<sup>4</sup> *Affidavit of the Respondent*, dated January 8, 2021, at para. 8.

- [49] In my view, the respondent has not paid a lump sum payment of \$8,000 to the applicant after the order was made.

## **2. Order for Financial Disclosure Including Income-generating Properties**

- [50] The applicant is seeking details of the respondent's income from all sources including his income-generating rental properties. Although the respondent filed a financial statement and included income tax Notice of Assessments, he did not provide documentation relating to the bank accounts referred to or documentation relating to the value of the income-generating rental properties.
- [51] In total, it appears that the respondent owns 15 properties. The applicant is also seeking disclosure related to the values of certain bank accounts which have not been disclosed.
- [52] The respondent states the value of each of the 15 rental income properties he owns in his affidavit of January 8, 2021. He indicates that these are values taken from their "current MPAC statements". He provides mortgage statements for five of the properties.
- [53] He also states in his affidavit the balances of six personal bank accounts at various financial institutions, as well as the balances of four bank accounts related to the rental properties. He does not provide any documentation in support of the stated values of the rental properties or current bank account balances.

### **The Law**

- [54] It is trite to say that the *Family Law Rules*, O. Reg 114/99, require ongoing financial disclosure, from all parties. In particular r. 13(11) states:

#### **INSUFFICIENT FINANCIAL INFORMATION**

- (11) If a party believes that the financial disclosure provided by another party under this rule, whether in a financial statement or otherwise, does not provide enough information for a full understanding of the other party's financial circumstances,
- (a) the party shall ask the other party to give the necessary additional information; and
  - (b) if the other party does not give it within seven days, the court may, on motion, order the other party to give the information or to serve and file a new financial statement.

- [55] Recently in *Seifi v. Haiji*, 2021 ONSC 3419, Sutherland J. says the following at para. 34:

Needless to say, financial disclosure is critical. As in any family law case, financial disclosure is the underpinning of family law litigation and failure to provide financial disclosure will infect all aspects of a family law proceeding. The failure of a party to provide any financial disclosure

or timely financial disclosure is a factor the court may take into consideration in ascertaining a parties' income for support. The court may make a negative inference against the party who fails to provide any or timely financial disclosure.

**Analysis**

- [56] In my view, it is clear that the financial disclosure requested must be provided by the respondent despite his position that the rental properties referred to do not form part of the net family property. That issue will be determined in due course. But, as Sutherland J. states, "financial disclosure is critical."
- [57] Furthermore, it is not sufficient for the respondent to simply provide the values of each of the properties according to the MPAC statements. I take judicial notice that the current housing market in Ontario has been such that property values are increasing exponentially. Accordingly, it is necessary for him to provide a true value of each of those properties.
- [58] It is reasonable to require that the respondent have his rental properties valued as of the date of separation and as of present date and provide to the applicant a report in writing prepared by a real estate appraiser as it relates to each of the rental properties referred to in paragraph 1 of his affidavit dated January 8, 2021.
- [59] Furthermore, the respondent will provide to the applicant bank statements from the date of separation to present which disclose the values of all of his bank accounts from the following financial institutions:
  1. CIBC, including U.S. chequing account, and any and all other chequing or savings accounts or Tax-Free Savings accounts.
  2. Scotiabank, including any and all accounts.

**3. The Matrimonial Home located at 1956 Huron Ave., Sarnia, Ontario**

- [60] Initially, the respondent was seeking an order for the immediate listing and sale of the matrimonial home. That issue was not pursued in argument and, accordingly, it is not necessary for me to decide that issue.
- [61] There are, however, other issues relating to the matrimonial home. The respondent is seeking an order that the applicant shall be responsible for all carrying and maintenance costs on the matrimonial home from the date of commencement of spousal support payments.
- [62] The applicant takes the position that she would be prepared to pay all carrying costs in relation to the matrimonial home if the respondent is ordered to pay spousal support on an interim basis. Since I have made the order for spousal support on an interim interim

basis, I will accordingly make an order that the applicant shall be responsible for all carrying costs in relation to the matrimonial home commencing January 1, 2021.

#### **4. Should the Respondent have Unrestricted Access to the Matrimonial Home?**

- [63] The respondent is seeking unrestricted access to the matrimonial home including for a moving service for the purpose of removing “his contents”.
- [64] Desotti J. made an order on October 31, 2019, granting the applicant exclusive possession of the matrimonial home. Various conditions of that order were varied by the order Desotti J. made on December 20, 2019, but that condition remains in effect.
- [65] Furthermore, the order of December 20, 2019 permits the respondent, by virtue of para. 12, to return to the home to retrieve “Reif family objects, personal papers or other personal possessions” with a third party on a date to be agreed by the parties or arranged through counsel if the parties cannot agree.
- [66] The court also ordered that the applicant shall not permanently or temporarily otherwise remove, sell, trade, or dispose of any items from the matrimonial home, including Reif family objects.

#### **The Law**

- [67] Section 24(1)(b) of the *Family Law Act*, R.S.O. 1990, c. F.3, permits the court to make an order for exclusive possession of a matrimonial home. Section 25 allows such an order to be varied if the court is satisfied that there has been a material change in circumstance.

#### **Analysis**

- [68] The order of Desotti J. permits the respondent to make arrangements with the applicant, or through counsel, to attend at the home to retrieve his personal property or Reif family objects. The onus is on the party seeking to vary such an order to establish that there has been a material change in circumstance to justify a variation.
- [69] The respondent is seeking “unrestricted access” to the home. Such an order would run contrary to an order for exclusive possession. The respondent has not satisfied the court that there has been a material change in circumstance to justify a variation in the order to permit him unrestricted access to the home. In fact, it appears on the affidavit evidence that he has violated that order by attending at the home and entering when the applicant was not home and without her agreement.
- [70] The applicant indicated through counsel that she would accommodate, as far as she is able to, any request by the respondent to attend at the family home to retrieve his property.
- [71] Accordingly, the motion for unrestricted access to the matrimonial home is dismissed.

## **5. Should the Applicant be Ordered to Pay Occupation Rent?**

- [72] The respondent is seeking an order that the applicant pay him occupation rent in the amount of \$4,000 per month commencing from October 2019, the date of the order for exclusive possession in favour of the applicant issued by Desotti J. No such order was made when the issue of exclusive possession of the home was dealt with. The applicant continues to live in the home with the children.
- [73] The respondent claims in his affidavit of November 11, 2020, at para. 26, that he has continued to pay towards the line of credit, insurance, various utilities and the alarm system on the home. He claims that the current expenses for the matrimonial home are approximately \$530 per month.
- [74] In his affidavit of January 8, 2021, the respondent says, at para. 7, that he has “most generously and faithfully paid many thousands of dollars in bills/payments on the applicant’s behalf.”
- [75] The respondent indicates further that he would not consider renting the home for less than \$6,000 per month. He indicates that he has offered to purchase the applicant’s interest in the home since November 2019 to no avail. It is interesting to note that he did not start making payments towards child support until March 2020.
- [76] The respondent provided ads from “Kijiji” for homes listed for rent which he claims are comparable to the matrimonial home, ranging in cost from \$2,900 to \$4,700 per month, along with his own calculations of amounts paid by him and owed to him by the applicant without any expert valuation or supporting documentation.
- [77] The applicant claims in her affidavit of November 26, 2020, that she has been paying the carrying costs of the matrimonial home since the order for exclusive possession was made except for the water heater and discretionary costs.

### **The Law**

- [78] The court has jurisdiction to order a party to pay occupation rent if it is reasonable and equitable to do so.<sup>5</sup> There is conflicting jurisprudence as to whether occupation rent should only be awarded in exceptional circumstances. In *Klassen v. Klassen*, 2020 ONSC 4835, at para. 11, H.J. Williams J. says:

Occupation rent is not automatic and should only be awarded when it is reasonable and equitable to do so. It is a tool to achieve justice in the circumstances of the case. (*Khan*, at para. 11.) It is an equitable remedy to be awarded only in “exceptional cases.” (*Malik v Malik*, 2015 ONSC 2218, at para. 155.)

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<sup>5</sup> *Griffiths v. Zambosco*, 2001 CanLII 24097 (ONCA), at para. 49.

- [79] Ultimately, in that case, Williams J. concluded that a trial judge would be in a better position to assess whether it would be reasonable to make such an order and declined to do so.
- [80] In *Rezel v. Rezel*, [2007] CanLII 12716 (ONSC), a decision after a trial, Young J. reviewed the law and set out, at para. 24, the following factors in considering whether to make an order for occupation rent:

In the case of *Higgins v. Higgins*, 2001 CanLII 28223 (ON SC), [2001] O.J. No. 3011 (S.C.J.), J.W. Quinn J. articulated the following as relevant considerations when determining the appropriateness of an order for occupation rent:

- (a) the conduct of the non-occupying spouse, including the failure to pay support;
- (b) the conduct of the occupying spouse, including the failure to pay support;
- (c) delay in making the claim;
- (d) the extent to which the non-occupying spouse has been prevented from having access to his or her equity in the home;
- (e) whether the non-occupying spouse moved for the sale of the home and, if not, why not;
- (f) whether the occupying spouse paid the mortgage and other carrying charges of the home;
- (g) whether children resided with the occupying spouse and, if so, whether the non-occupying spouse paid, or was able to pay, child support;
- (h) whether the occupying spouse has increased the selling value of the property;
- (i) ouster is not required, as once was thought in some early decisions.

- [81] Ultimately, the court declined to make the order.

### Analysis

- [82] In determining whether to order the payment of occupation rent, the court has considered the factors outlined above. I am also mindful of the fact that this is an interim motion and not a trial and there is conflicting affidavit evidence before the court. The court was not provided with any expert evidence as to the fair market rental value of the property nor any documentary evidence regarding actual payments made towards monthly bills, property taxes or mortgage. It is unclear how much has been paid by either of the parties.

- [83] The court has considered that the respondent, although paying child support since March 2020, has opposed the claim for spousal support and that the children reside primarily with the applicant at the matrimonial home.
- [84] It is unclear whether the applicant, the occupying spouse, has increased the selling value of the home.
- [85] The respondent also repeats his claim several times that he did not leave the matrimonial home of his own volition but was forced out by the applicant. Ouster is not required for the claim to be made. The circumstances under which the non-occupying spouse left the home may be one of the relevant circumstances, but this consideration ought to be left to the trial judge who will have a complete record.
- [86] Keeping in mind that an order for occupation rent should only be made where it is reasonable and equitable to do so, I decline to make the order given the lack of evidence outlined above along with the conflicting affidavit evidence on a without prejudice basis.
- [87] In my view, a trial judge would be in a better position to deal with this issue on a proper evidentiary record.

## **6. Vocational Assessment**

- [88] The respondent is seeking an order that would require the applicant to undergo a “Vocational Assessment” to determine her suitability to return to the workforce as an engineer. The court was not provided with any details as to who would conduct such an assessment.
- [89] Additionally, the respondent is seeking an order that the applicant shall produce evidence of job search efforts from October 2019 to date and on a go forward basis, including but not limited to: job applications submitted, job searches, current resume, list of interviews offered and attended, and any and all job offer letters, etcetera. This was not argued before me and I do not propose to address this.
- [90] The parties made further submissions to the court on the issue of a vocational assessment on February 12, 2021 and provided case law.
- [91] The applicant is opposed to the order and asks that the request for the assessment be dismissed on a without prejudice basis.

### **The Law**

- [92] The court was provided with the decision of the Ontario Court of Appeal in *Ziebenhaus v. Bahlieda*, 2015 ONCA 471. The facts of that case are very different from this case in that it involves personal injury litigation, however, in *Ziebenhaus* the court was asked to consider whether the Superior Court of Justice has inherent jurisdiction to order a party to undergo an assessment by someone who is not a “health practitioner”. At issue in that case was the applicability of s. 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In

that case, the decision of a motions judge to order a vocational assessment to determine the appellant's vocational potential and ability to pursue competitive work after suffering a brain injury in a skiing accident was upheld by the Divisional Court. The Ontario Court of Appeal upheld that decision and said, at para. 15:

While recourse to inherent jurisdiction should be had only sparingly, the motion judge in this case concluded that involving it was necessary "in the interest of fairness", as it was required for the defendants to meet the plaintiffs' case. The Divisional Court quite properly concluded there was no basis to interfere with the motion judge's exercise of discretion in this case.

- [93] In *Korkola v. Korkola*, [2009] CanLII 2487, at para. 12, a vocational assessment had been ordered, but there it was ordered by another judge and there was no discussion in the reported decision as to why the order was made.

#### Analysis

- [94] I accept the respondent's submission that a vocational assessment may be of assistance to a court in a determination of issues relating to the applicant's suitability to return to the workforce, support, and/or imputation of income. I also accept that the court has the jurisdiction to make such an order. However, it is difficult to order such an assessment without any information as to who would conduct it, the cost and the time required to complete it.
- [95] There were some discussions in submissions as well that counsel would be permitted to return before me with the details necessary to make such an order once they become known.
- [96] Accordingly, the court will adjourn that part of the respondent's motion *sine die* and permit the respondent to return the matter before me once a determination has been made as to how and when and by whom the assessment will be conducted and at what cost. This will avoid the necessity of having to argue the issue again before another judge.

#### **7. Variation of Order for Decision-Making Authority and Parenting time**

- [97] At this time, the order of December 20, 2019 of Desotti J. provides for interim joint custody of the children with "liberal and generous care and control of the children" to the respondent father including on alternate weekends from Friday after school until Sunday at 8:00 p.m. and from Wednesday evenings after school overnight until Thursday morning.
- [98] The order provides that the parties shall remain flexible regarding the parenting schedule.
- [99] The order also provided for the appointment of the Office of the Children's Lawyer. The OCL report is attached as an exhibit to the affidavit of the applicant. The clinician,

Jacqueline Bobyk-Krumins, recommended in her report that the applicant have sole custody, primary residence, and decision-making authority for the children.

- [100] The respondent's motion seeks a variation in that interim order to shared custody (now decision-making authority) on a two-week rotating schedule effectively a 2-2-3 schedule including a specific schedule for holidays and birthdays, etcetera.
- [101] Alternatively, the respondent seeks increased parenting time with the children on a schedule to be determined.
- [102] The applicant seeks to implement the recommendations of the OCL on an interim basis pending the outcome of this matter by changing the custody or decision-making authority to sole decision-making authority to the mother because of the inability of the parties to communicate with each other and make decisions together.
- [103] The OCL recommends that the current parenting time schedule be varied from an overnight visit on Wednesdays to 8:00 p.m. Furthermore, she recommends that if the children, who are currently 13 years old and nine years old, determine that they do not wish to remain at their father's home overnight, they will spend at least four hours on Saturday and four hours on Sunday with their father.
- [104] Apparently, Amelia, who is 13 years old, chooses not to stay overnight at the respondent's home.
- [105] The respondent takes issue with that report and disputes many of the findings. The report has not been tested on cross-examination.

### The Law

- [106] This court must primarily be concerned with the best interests of the children in making a determination as to parenting time and decision-making responsibility in accordance with the principles of s. 16 of the *Divorce Act*:

16(1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

#### Primary consideration

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

#### Factors to be considered

(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including....

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

...

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

...

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

...

Parenting time consistent with best interests of child

(6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

Parenting order and contact order

(7) In this section, a parenting order includes an interim parenting order and a variation order in respect of a parenting order, and a contact order includes an interim contact order and a variation order in respect of a contact order.

...

16.3 Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.

[107] Before changing an interim interim order for decision-making responsibility and parenting time, the court must carefully consider the request. In *Lonsdale v. Smart*, 2018 ONSC 3991, a case considered under the *Children's Law Reform Act* R.S.O. 1990, c. C.12 as am. (although the principles are equally applicable here) in relation to a variation of a temporary order, McDermot J. says the following at paras. 10-12:

Secondly, because this is an interim motion based upon affidavit evidence and input from the Office of the Children's Lawyer, the court must exercise extreme care in making a decision which would substantially change the status quo. Although there is no presumption that a status quo governs, the case law is clear that there must be compelling circumstances warranting a change in the status quo: see *Ceho v. Ceho*, 2015 ONSC 5285 and the cases cited therein, including *Batsinda v. Batsinda*, 2013 ONSC 7869, *Green v. Cairns*, 2004 CanLII 9301(Ont. S.C.J.) and *Papp v. Papp*, 1969 CanLII 219 (ON CA), [1970] 1 O.R. 331(C.A.). The test has been discussed as being compelling reasons (*Batsinda* and *Papp*) or a

“high threshold” (*Green*). In *Grant v. Turgeon*, 2000 CanLII 22565 (Ont. S.C.J.), MacKinnon J. notes the required circumstances for an interim variation of custody as being “exceptional circumstances where immediate action is mandated.”

The reasons for requiring a high threshold are clear; to change custody of a child when trial is pending runs the risk that the child will then have to go through two changes rather than one, especially if he or she is moved to another household after trial. Also, evidence on a motion is not particularly credible as the court must rely upon conflicting affidavits. The status quo is a powerful indicator of a child’s best interests and it is, if possible, best to push a change in custody to trial if possible as this is where a child’s best interests can be best addressed.

Accordingly, if a change is to be made at an interim motion, the court should rely upon evidence that is largely uncontested; the court cannot rely upon conflicting affidavits or evidence requiring a finding of credibility.

- [108] As to whether it is appropriate to implement the recommendations of an assessor, at this stage in the proceedings, that is, on a motion for interim relief where there is no consensus between the parties, I refer to the decision of *Bos v. Bos*, 2012 ONSC 3425, where Mitrow J. says the following at paras. 23 and 24:

I respectfully agree and adopt the principles in relation to considering an assessment report on a motion as set out in *Forte and Kerr*. In my view, the jurisprudence has evolved to the point that although the general principle enunciated in *Genovesi* continues to be well founded, it is not so rigid and inflexible as to prevent a court on a motion to give some consideration to the content of an assessment report where that assessment report provides some additional probative evidence to assist the court, particularly where the court is making an order which is not a substantive departure from an existing order or status quo. In such circumstances, the court may consider some of the evidence contained in an assessment report without having to conclude that there are “exceptional circumstances” as set out in *Genovesi*. In fact, “exceptional circumstances” findings were not made in either *Forte* or *Kerr*.

The court has a duty to make orders in a child’s best interests and it would be counter intuitive to this principle to impose on the court an inflexible blanket prohibition against considering any aspect of an assessment report (absent exceptional circumstances) on an interim motion, especially when the only independent objective evidence before the court is from an expert assessor.

- [109] I must consider how significant the change is that is being requested and whether there is any probative evidence before the court to support the request.
- [110] The variation requested deals with the issue of decision-making responsibility as far as both parties are concerned. The applicant seeking sole decision-making responsibility and the respondent seeking shared decision-making responsibility with increased parenting time.
- [111] It is obvious that there is poor communication between the parties in this matter and that they are unable to agree on many issues. It is equally obvious that they both love their children and wish to spend as much time with them as possible.
- [112] The OCL clinician says the following at page 32-33 of her report:

*At present, Ms. Reif and Mr. Reif do not agree when it comes to the needs of the children as they vary in their parenting strategies and in their view of what is in their best interests going forward.*

*Ms. Reif has also identified controlling aspects in her communication with Mr. Reif and Mr. Reif does make disparaging comments about [Ms.] Reif to this clinician regarding the need for her to change her behaviour. As well, Amelia states that her father refers to their mother as “she” or the “other person” and both children state that her father speaks about their mother in her presence.*

*Such examples reinforce that at present Mr. Reif is struggling to support Ms. Reif as a person and parent and it reinforce the difficulties he experiences with being flexible and open to other perspectives. As such, sharing parenting and decision making is not recommended in this matter as doing so is most likely to perpetuate existing challenges and further impact the wellbeing of Amelia and Alivia.*

- [113] Given the inability of the parties to agree, and for the sake of avoiding further conflict between the parties, I believe it is in the best interests of the children to vary the order of Desotti J., of December 20, 2019, to provide for the primary residence and primary decision-making responsibility to the applicant mother.
- [114] In respect of the respondent father’s request for more time with the children, I see no reason why he should not have an evening with the children during the seven-day period when he currently does not see them. That is from Wednesday to Wednesday over the weekend of the applicant mother’s parenting time. I am prepared to increase the respondent’s parenting time to include another weekday evening of parenting time from after school until 8:00 p.m. every other week. I wish to be respectful of the children’s schedules, the details of which I do not know. Accordingly, this can be arranged by the parties. If they cannot agree on this, the matter can be brought back before me.

- [115] As it relates to specific parenting time during the summer and for holidays, I did hear brief submissions regarding the scheduling of that parenting time, but I decline to make that order at this time. I would encourage the parties to come to an agreement on a parenting schedule as it relates to holidays and summer vacation. If they cannot reach an agreement on summer holidays, the issue may be returned to me.
- [116] Lastly, as it relates to the children, it was agreed that an order would go on consent that the children may attend for counselling and that both parents will cooperate and participate as far as the parents are required to do so by the counsellor. The counselling is to be arranged through the respondent's Employee Assistance Programme.

## ORDERS

- [117] In conclusion, I make the following orders:

1. The order of Raikes J., of October 29, 2020, requiring the respondent to pay spousal support to the applicant in the amount of \$1,800 per month is varied as follows: the respondent, Andre-Oliver Helmuth Reif, is ordered to pay spousal support to the applicant, Stacey Eva-Mae Reif, commencing on January 1, 2021, in the amount of \$2,413 per month based on the applicant's income of \$30,000 and the respondent's imputed income of \$170,000.
2. The respondent shall make further financial disclosure to the applicant by having the following properties valued by a qualified real estate appraiser and provide a report in writing to the applicant of the value of those properties as of the date of separation and as of the present date, namely:

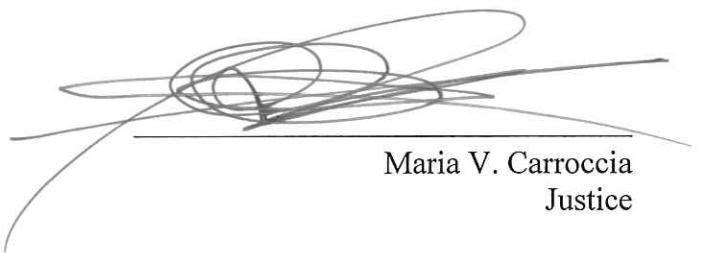
523 Devon Street, Stratford, ON  
652 Devon Street, Stratford, ON  
654 Devon Street, Stratford, ON  
658 Devon Street, Stratford, ON  
436 Glastonbury Dr., Stratford, ON  
26 Nethercott Dr., Stratford, ON  
22 Dickens Place, Stratford, ON  
34 Dickens Place, Stratford, ON  
90 Woods Street, Stratford, ON  
56 Graham Cres., Stratford, ON  
83 Maple Ave., Stratford, ON  
628 Devon Street, Stratford, ON  
631 Devon Street, Stratford, ON  
71 Crehan Cres., Stratford, ON  
73 Crehan Cres., Stratford, ON

3. The respondent shall provide to the applicant bank statements which show the value of any and all bank accounts in his name including bank accounts relating to his income-generating rental properties from the date of separation to present.

4. Paragraph 2 of the order of Desotti J., dated December 20, 2019, is varied to grant primary residence of, and primary decision-making responsibility for the children to the applicant mother.
5. Parenting time for the respondent will be increased to include a further weekday evening with the children from after school until 8:00 p.m. to be arranged by the parties. If the parties are unable to agree, they can bring the matter back before me.
6. An order will go on consent that the children may attend for counselling, and that both parents will cooperate and participate as far as the parents are required to do so by the counsellor. The counselling is to be arranged through the respondent's Employee Assistance Programme.

## COSTS

- [118] The parties are each seeking costs, but no submissions were made on costs. Accordingly, if the parties cannot agree, they may provide brief written submissions on the issue, not to exceed five pages in length, exclusive of any bill of costs, within 30 days of today's date.



Maria V. Carroccia  
Justice

**Released:** June 1, 2021



**CITATION: Reif v. Reif, 2021 ONSC 3976**  
**SARNIA COURT FILE NO.: 19-8290**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**BETWEEN:**

Stacey Eva-Marie Reif

Applicant

**– and –**

Andre-Oliver Helmuth Reif

Respondent

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**RULING ON MOTION**

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Carroccia J.

**Released:** June 1, 2021