

CITATION: Kumurdjieva v. Cerasuolo, 2023 ONSC 6687
COURT FILE NO.: FS-18-05351-0002
DATE: 20231127

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Milena Kumurdjieva*, Applicant
AND:
Giuseppe Cerasuolo, Respondent
BEFORE: M. Kraft, J.
COUNSEL: Karen Ballantyne, for the Applicant
Sean Cowan, for the Respondent
HEARD: November 21, 2023

ENDORSEMENT

Overview

[1] This case involves a 10-year child, M. The parties were married for 4 years and separated on May 3, 2018. In 2019, after a s.30 parenting assessment had been conducted by Howard Hurwitz and updated again in 2021, the parties reached a Consent, the terms of which were incorporated into a final order of Shore, J., dated October 29, 2021 (“Shore Final Order”).

[2] The Shore Final Order provides that the parties have joint decision-making responsibility and that M. reside with applicant mother 9 overnights out of 14 days and with the respondent father 5 overnights out of 14 days. The parties also retained a parenting coordinator. On September 26, 2023, the parenting coordinator wrote a report recommending changes to the decision-making responsibility and the regular parenting schedule. As a result, on January 23, 2023, the mother brought a Motion to Change the Shore Final Order, seeking, among other things, to cancel the parenting coordination, reduce the father’s parenting time with M. on weekdays to change his overnight parenting time to dinner visits, and to have sole decision-making responsibility over major decisions that impact the child. The changes to the parenting schedule sought by the mother mirror the changes recommended by parenting coordinator.

[3] Within this Motion to Change proceeding, the mother now brings a temporary motion to change the child’s regular parenting schedule and decision-making responsibility. Essentially, the relief sought by the mother on this temporary motion is equivalent to her being successful on a summary judgment of her Motion to Change. The father brought a cross-motion seeking an updated s.30 parenting assessment. There is a Trial Management Conference scheduled for December 8, 2023.

Issues I need to Decide on this Motion

[4] The issues for me to decide on this motion are:

- a. In what circumstances can a Court make a temporary variation of a final parenting order?
- b. Are the facts of this case so exceptional and compelling and/or is M.'s physical and/or emotional well-being in jeopardy and/or is the proposed new parenting schedule so necessary and beneficial that it would be unfair to M. to delay implementation?
- c. If the answer to b. is no, should an updated s.30 parenting assessment by Howard Hurwitz be ordered?
- d. If the answer to b. is yes, it is in M.'s best interest to have her parenting time with the father varied such that her 3 mid-week overnights over 14 days, become 3 mid-week dinner visits, resulting in her overnight time with her father being reduced from 5 overnights out of 14 days to 2 overnights out of 14 days?

Brief Conclusion

[5] I have not found that the facts of this case are so compelling or of such an exceptional nature, that not making the temporary changes to the Shore Final Order as requested by the mother would cause M. serious emotional harm. I am not persuaded, on the conflicted written record before me, that a conclusion can be reached that if the current parenting schedule continues (with the child having 5 overnights out of 14 days with the father), a situation of actual harm or danger exists for M., of such nature or magnitude that the immediate rectification or correction, by eliminating her overnight parenting time with her father during the mid-week is required to safeguard her best interests. Rather, I find that it would be in the child's best interests for the Court to expedite the hearing of the mother's Motion to Change so a judge can have the benefit of a complete record before him or her, where the report written by the parenting coordinator, dated September 26, 2023, can be tested by cross-examination, and where *viva voce* testimony can be heard. I dismiss the father's cross-motion for an updated parenting assessment by Howard Hurwitz as this will cause far too long a delay which is not in the child's best interests. Accordingly, I have ordered a two-day trial to commence on April 2, 2024, so the mother's Motion to Change can be properly heard. I find that this is a child-focused way to address this situation without significant delay.

Issue One: In what circumstances can a Court make a temporary variation of a final parenting order?

[6] The cases of *F.K. v. A.K.*, 2020 ONSC 3726 (CanLII), and *S.H. v. D.K.*, 2022 ONSC 1203 (Ont. Div. Ct.) set out and clarified the legal threshold for when a final order can be varied on a temporary motion. To summarize the legal considerations reviewed by Pazaratz, J., starting at paragraph 48:

48. To determine a request to change custody, access or parenting order, the court must embark upon a two-stage inquiry. *Gordon v. Goertz* 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27 (SCC).

49. The first step: There must be a material change in circumstances since the last order was made.

- a. There must be a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet those needs.
- b. The change must materially affect the child.
- c. It must be a change which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. The change must be substantial, continuing and "if known at the time, would likely have resulted in a different order." *L.M.L.P. v. L.S.* [2011] SCC 64.
- d. The finding of a material change in circumstances is a prerequisite to an examination of the merits of an application to vary an existing custody or access order.
- e. If there is no material change in circumstances, the inquiry ends. The court would be without jurisdiction to vary the order. *Litman v. Sherman*, 2008 ONCA 485(Ont. C.A.).
- f. If there is a material change, the court must move to the second stage and consider the best interests of the child and whether to vary the original order.

50. The second step:

- a. If a material change in circumstances has been established the court, then embarks on a fresh inquiry into the best interests of the child.
- b. In this fresh inquiry, both parties bear the evidentiary burden of demonstrating where the best interests of the child lie. There is no legal presumption in favour of the custodial parent, or in favour of maintaining the existing timesharing arrangements. *Bubis v. Jones*, 2000 CanLII 22571 (ON SC); *Persaud v. Garcia-Persaud* 2009 ONCA 782; *Deslauriers v. Russell*, 2016 ONSC 5285; *Roloson v. Clyde*, 2017 ONSC 3642.
- c. The court must ascertain the child's best interests from the perspective of the child rather than that of the parents. Parental preferences and rights do not play a role in the analysis, except to the extent that they are necessary to ensure the best interests of the child. *Gordon v. Goertz; Young v. Young* 2003 CanLII 3320 (Ont. CA).

- d. The child should have maximum contact with both parents if it is consistent with the child's best interests. *Gordon v. Goertz*; *Rigillio v Rigillio* 2019 ONCA 548 (Ont. CA).
- e. Any assessment of the best interests of a child must take into account all of the relevant circumstances pertaining to the child's needs and the ability of each parent to meet those needs. *Gordon v. Goertz*.
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52. The added complication: the father seeks a *temporary* variation of a *final* parenting order. This requires that the court conduct an even more stringent analysis:
- a. In all instances, courts must exercise caution before changing an existing arrangement which children have become used to.
 - b. This is especially the case where the existing parenting arrangement has been determined by way of court order. The starting point is that court orders are presumed to be correct. *Montgomery v. Montgomery* 1992 CanLII 8642 (ON CA); *Gordon v. Gordon* 2015 ONSC 4468 (SCJ); *Oickle v. Beland* 2012 ONCJ 778 (OCJ).
 - c. And the level of required caution is further heightened if the court is being asked to change a final parenting order on a temporary basis. If the general rule is that we are reluctant to change *temporary* orders pending trial, then it goes without saying that we should be even more reluctant to change *final* orders pending determination of the issue.
 - d. Although counsel did not raise jurisdiction as an issue, I am satisfied the court has the authority to grant a temporary variation of a final order in the appropriate circumstances. *Stokes v. Stokes* 2014 ONSC 1311 (SCJ); *Huliyappa v Menon* 2012 ONSC 5668 (SCJ); *Clements v Merriam* 2012 ONCJ 700 (OCJ).
 - e. But the evidentiary basis to grant such a temporary variation must be compelling.
 - f. The court must start with the aforementioned two-part material change in circumstances analysis.
 - g. But for a temporary variation, the court must also assess whether the changed circumstances have created a situation of actual or potential harm, danger, or prejudice for the child; of such nature or magnitude that immediate rectification or correction are required to safeguard the child's best interests.
 - h. The onus on the party seeking a temporary variation is onerous. They must establish that in the current circumstances the existing order results in an

untenable or intolerable situation, jeopardizing the child’s physical and/or emotional well-being. They must establish that the situation is so serious and potentially harmful that any delay in addressing the problem is likely to continue or exacerbate actual or potential physical and/or emotional harm for the child.

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

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

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

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

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

[7] Dambrot, J. sitting in Divisional Court in *S.H. v. D.K.*, 2022 ONSC 1203 (Ont. Div. Ct.) as a modification of the threshold described by Pazaratz, J., at paragraph 40 concurred that the court must be satisfied “that circumstances exist of so compelling and exceptional nature that they require an immediate change”. However, he continued:

40 ... I would only caution that there may be exceptional circumstances that justify a temporary variation of a final order other than those described in *F.K. v. A.K.* It will be recalled that Pazaratz J. insisted that *a temporary variation of a final parenting order could only be made where the child’s physical and/or emotional well-being is in jeopardy and the proposed new arrangement is so necessary and beneficial that it would be unfair to the child to delay implementation.* That is certainly an indication of how exceptional the circumstances must be to make an interim variation of a final parenting order, but I would not foreclose the possibility that other, equally compelling circumstances might meet the test. (Emphasis added).

[8] Dambrot, J. in *S.H. v. D.K. supra*, sent a cautionary note when the court is asked to overturn longstanding *status quo* on a temporary motion. Analytical rigor must be maintained. In overturning a decision that changed a final order on a temporary basis, Dambrot, J. wrote at paragraph 61:

I noted earlier the motion judge's caveat on the stringent legal test in *F.K.* that cautioned against placing too much emphasis on maintaining the status quo may have led him into error. I am satisfied that it did. Having reviewed his reasons in detail, I am driven to the conclusion that he watered down the importance of maintaining the status quo on an interim motion, and that his approach runs directly contrary to what Benotto J. said in *Davis v. Nusca*, that "there is the basic principle of maintaining the status quo until trial which is extraordinarily important in family law cases." The motion judge lost sight of the importance of maintaining the status quo until trial and conflated the requirement that there be compelling reasons to make an order on an interim basis with a determination of the best interests of the child. He gave the requirement of compelling reasons no real meaning and disturbed a long-standing parenting arrangement on an interim basis in the complete absence of urgent, exceptional or in any other sense compelling reasons. In effect, he gave final relief on an interim motion.

Application of the Law

[9] In terms of step one, the mother argues in her Motion to Change that there has been a material change in circumstances since the Shore Final Order was made because of the continued high level of conflict and lack of communication between the parties; the father's refusal to cooperate with the PC process; the father abdicating his parental responsibilities of M. during his scheduled time; M.'s expressed clear and consistent wishes to change the mid-week overnight parenting time she has with the father; and the father's failure to follow the PC's recommendation.

[10] The father does not agree that there has been a material change in circumstances in his Response to the mother's Motion to Change, however, that position was not taken by him on this motion or set out in his motion materials before me. Accordingly, I move on to step two, which is to assess whether a temporary variation of the Shore Final Order should be made on a motion before her Motion to Change is heard.

[11] It is clear that the court has jurisdiction to make a temporary variation to the Shore Final Order on a motion but it may only do so if the mother meets the onerous onus of demonstrating that the changed circumstances have created a situation of actual or potential harm, danger or prejudice for M. of such a nature that immediate rectification is required to safeguard her best interests. If the mother can establish that M.'s changed circumstances are so serious and are potentially harmful such that any delay by the court in addressing the problem is likely to continue or exacerbate the harm for M., then the court may be satisfied that M.'s best interests require an immediate change to the parenting schedule and decision-making regime to reduce the detrimental impact of what the mother submits are her overnight weeknights with the father, which amount to 2 overnights over a 14-day period of time.

[12] The next step is to determine whether the mother has met the onus necessary for the court to make a temporary variation of the Shore Final Order.

Issue Two: Are the facts of this case so exceptional and compelling and/or is M.'s physical and/or emotional well-being in jeopardy and/or is the proposed new parenting schedule so necessary and beneficial that it would be unfair to M. to delay implementation?

[13] Before this question can be answered, it is helpful to provide a brief factual background identifying what the current parenting schedule is for M., how the parenting coordinator ("PC") came to write a report, and why the mother is seeking a change on a temporary basis. This background is as follows:

- a. The parties were married on September 7, 2012. They separated on May 30, 2018. They have one 10-year-old daughter, M., born on October 15, 2013.
- b. The parties were able to reach a consent agreement with respect to their parenting issues, the terms of which were incorporated into the Shore Final Order. Prior to reaching their agreement, Howard Hurwitz conducted a s.30 parenting assessment which was completed on May 14, 2019, and provided updated recommendations on June 30, 2021.
- c. The Shore Final Order was reached on October 29, 2021, and provides for joint decision-making responsibility and sets out a two-week regular residence schedule for M., as follows:
 - i. In Week one, M. resides with the mother on Mondays, after school to Tuesday morning; with the father from Tuesday, after school to Thursday morning; and with the mother from Thursday, after school to Monday morning.
 - ii. In Week two, M. resides with the father on Mondays, after school to Tuesday morning; with the mother from Tuesday, after school to Friday morning; with the father from Friday, after school to Sunday at 7:00 p.m.; and with the mother from Sunday at 7:00 p.m. to Monday morning.
 - iii. M. spends all PA days with the father during the school year and shares her summer and holiday time with the parents equally.
- d. The Shore Final Order sets out that there is a right of first refusal if a parent cannot care for M. for more than 8 hours during that parent's scheduled parenting time. It also provides that the parties were to hire a PC as recommended by Howard Hurwitz. The parties retained Carolyn Cahen as their PC.
- e. The parties entered into a PC agreement with Carolyn Cahen on August 27, 2021, prior to the Shore Final Order. Ms. Cahen was appointed for a term of 18 months. Under this agreement, Ms. Cahen was, among other things, empowered to (a) arbitrate any parenting disputes if the parties could not reach agreement; (b) meet or consult with M., with or without the parent(s) being present as she deemed

appropriate; (c) coach the parties about communication with the goal of them acquiring the skills necessary to resolve disputes without the need for third party involvement or the court; (d) consult with third parties who had relevant information, including school officials; (d) settle any difficulties related to M's transitions between the parties; (e) monitor M.'s adjustment to the parenting plan; and (f) facilitate M.'s relationship with each parent. The PC was not authorized to make permanent or substantial changes to the schedule, deal with a request to move M.'s residence or make a change in final decision-making authority. Ms. Cahen's PC services started in January 2022.

- f. Since the Shore Final Order was entered into *after* the parties had retained Ms. Cahen on October 29, 2021, paragraph 6 of the Shore Final Order confirmed that Ms. Cahen would provide PC services to the parties and that she would have the final authority to resolve parenting disputes.
- g. The parties could not reach agreement about M.'s summer schedule in 2022. As a result, on June 9, 2022, Ms. Cahen made an arbitration award that addressed M.'s summer schedule for 2022. The award allowed the mother to travel to Bulgaria with M. for three weeks to visit family, ensured that M. was enrolled in summer camp and gave both parents equal parenting time. The father brought a motion to stay the June 2022 PC Arbitration Award but he was unsuccessful. On June 30, 2022, the terms of the PC Arbitration Award dated June 9, 2022 were incorporated into an order of Pinto, J. Pinto J. ordered the father to pay costs of the appeal of \$6,750. This was in addition to the costs Ms. Cahen ordered the father to pay of \$6,500 by July 26, 2022. The father paid the costs ordered by Pinto, J. in November 2022 and the costs ordered by Ms. Cahen in January 2023, after the mother brought a motion to incorporate the terms of the costs award into a court order for enforcement purposes. According to the father, he felt that when he brought this appeal, his relationship with Ms. Cahen was ruptured.
- h. In the Fall of 2022, the mother asked the PC to address the fact that the father was not complying with the right of first refusal clause in the Shore Final Order because he was regularly leaving M. with his mother or other family members overnight when it was his scheduled time. When Ms. Cahen attempted to look into this issue, she spoke with the parties and M. Ms. Cahen wanted to meet with M.'s teachers at her school but the father notified the school advising that he did not consent to Ms. Cahen speaking with M.'s school.
- i. On November 30, 2022, Ms. Cahen wrote to both parents and confirmed that M. had been spending her overnight time during the father's scheduled time at the paternal grandmother's home, contrary to the right of first refusal. Ms. Cahen advised the parents that she was concerned that M. was not getting a good night's sleep, which could affect her health, mood and ability to learn at school. Ms. Cahen noted that M. was a mature and articulate 9-year-old who felt she was not being heard. Finally, Ms. Cahen expressed concern that M.'s relationship with both parents could be irreparably damaged if her wishes were not acknowledged and

acted upon in some way. Ms. Cahen recommended that the father's mid-week overnights be changed to "dinner visits".

- j. After Ms. Cahen made these recommendations, the father's counsel wrote to the mother advising that he wanted to appoint a new PC. The mother would not agree. The PC agreement does not allow one parent to terminate the PC's services unilaterally. Despite this letter, it is agreed that after this, both parties continued to reach out to the PC for assistance on various issues.
- k. Ms. Cahen acknowledges that the father began to ensure that M. slept at his home during his mid-week overnights. In addition, he changed his usual practice of leaving the home at 5:00 a.m. for a work meeting and returning home at 7:00 a.m. on the weekdays when M. slept at his home by conduct his morning work meetings on the telephone or on Zoom so he could remain home with M.
- l. On September 1, 2023, the mother contacted Ms. Cahen because she was having difficulty getting M. to go to the father's home as scheduled. M. had just returned from a week away at overnight camp and was very tired. Ms. Cahen spoke with M. and M. refused to go to the father's home. Ms. Cahen emailed the father in an attempt to get his input and to resolve the issue. The father did not respond to Ms. Cahen's communication. Ms. Cahen refers to this incident as a "parenting crisis" in her report.
- m. On September 4, 2023, Carolyn Cahen notified the parties that she was resigning as their PC effective October 4, 2023. She advised that she was no longer willing to work as the PC because the father was not responding to her emails or otherwise cooperating with the PC process. At the mother's request, Ms. Cahen wrote a PC Report, as per paragraph 6.3.2 of the PC agreement. Paragraph 6.3.2 empowers Ms. Cahen to write a report which "summarizes the process, the parents' perspectives, and the PC's observations. The report is also permitted to include a summary of information obtained from children or third parties. Opinions or recommendations may be included to the extent the PC has obtained sufficient information to provide these."

The Mother's Position

[14] The mother's position is that the father has completely abdicated his parenting responsibilities on the 5 overnights out of 14 days on his scheduled parenting time with M. Specifically, she submits that the father leaves M. with his mother or other family members overnight when he has scheduled mid-week parenting time and during the summer holidays. Further, the mother argues that the father refuses to take M. to medical appointments and activities during his parenting time. The mother claims that M. is exhausted; she clearly and consistently advises her therapist, Dr. Joyce Li, both parents and the PC that she wishes to have fewer overnights with the father, but he will not accept her wishes.

[15] According to the mother, even though the father is technically now in compliance with the right of first refusal clause such that M. is now spending overnights during the school week

at his home and no longer sleeping at the paternal grandmother's home, M. still spends the majority of her mid-week parenting time at the paternal grandmother's home and the father picks her up late to drive her to his house in Woodbridge. The mother swears that when M. is with her father she regularly calls her, crying and begging to come home.

[16] The mother submits that she has met the stringent test required for this court to make a temporary order changing the Shore Final Order which sets out M.'s parenting time with the father because it is clear that M. would suffer harm if this was not done. The mother argues that the father has had the opportunity to spend more meaningful time with M. since the Shore Final Order was made and he has simply not taken advantage of this scheduled time. The mother submits that the father would not cooperate in the PC process, he was rude to Ms. Cahen, the parties now have no PC in place because Ms. Cahen resigned as a result of the father's non-responsiveness; M. calls the mother whenever she is with the father during the school overnight crying and begs to return to her home; and the father refuses to acknowledge or consider M.'s clear and consistent wishes to have no mid-week overnights with him. Furthermore, the mother relies on concerns raised by Ms. Cahen in the PC Report as follows:

“I am very concerned that M.'s relationships with both of her parents, especially her father, will be irreparably damaged if her wishes are not acknowledged and acted upon, at least to some extent.”

The Father's Position

[17] The father argues that the mother's temporary proposed changes to the parenting schedule set out in the Shore Final Order (and those recommended in the PC Report) should not be made without the benefit of an update to Howard Hurwitz's s.30 parenting assessment or a complete record before the court. The father acknowledges that he was not following the right of first refusal set out in the Shore Final Order and submits that when these concerns were raised by the PC about his work schedule and how it was impacting M.'s sleep arrangements, he changed his schedule. The father ensured that M. stopped sleeping at his mother's home during the mid-week once Ms. Cahen told him of her concerns about this arrangement. Further, the father explains that he used to go to work at approximately 5 a.m. to have an early morning team meeting and on the days that M. was in his care, the father would return to his home by 7:00 a.m. so he was present when she work up to help her get ready for school. Once the PC told the father of M.'s concerns, the father changed his work schedule such that he now calls or meets with his Team on Zoom in the early morning and does not start working until after he has dropped off M. at school.

[18] Further, the father disagrees that he is an absentee father or that he delegates his parenting responsibilities to his mother or anyone else. Rather, he maintains that he is M.'s primary caregiver during his parenting time with her. While M. does spend time with the paternal grandmother and her step-sisters when she has parenting time with the father, the father argues that that does not equate to him abdicating his parenting role with M. The father argues that a temporary change in his parenting time with M. should not be made in reliance on recommendations in the PC Report, because he disagrees with the facts laid out in this report. The father questions the process engaged in by Ms. Cahen and about the the PC Report based on the PC, having a one-sided view of the facts and her expressed views that the conflict emanates from him and not the mother. The father does not believe that a PC Report is the equivalent of a

proper assessment. The father argues that the PC did not consult with or meet with the father before writing her Report, and that while Ms. Cahen indicates that she spoke with Howard Hurwitz, her Report does not consider the dynamics or concerns Mr. Hurwitz raised about the mother in anyway. Given the conflicted record, he does not believe that changes to the parenting schedule set out in the Shore Final Order should be made without a further parenting assessment and a full record.

The PC Report

[19] The PC Report provides an overview of Ms. Cahen’s two-year involvement with the family and “*M.’s difficulties adjusting to the parenting schedule and her consistent wish to spend less time with [the father] on weeknights.*” In terms of the PC’s involvement with the family, the PC Report confirms that,

- a. Ms. Cahen met with M. on 9 occasions, either in person, by phone or video conference, 7 times when she was at the mother’s home and 2 times when she was at the father’s house.
- b. Some of Ms. Cahen’s meetings with M. were initiated by her but M. also initiated some of the conversations.
- c. She tried to speak with M. on more occasions when M. was at the father’s home but he did not respond or make himself available.
- d. She tried to speak with M. at school because she felt it would be a more neutral location, but the father would not consent to Ms. Cahen attending at the school or communicating with M.’s educators, despite the terms of the PC agreement entitling her to do so.
- e. She spoke with M.’s therapist, Dr. Joyce Li on 2 occasions. M. has been seeing Dr. Li as her therapist since late 2020.
- f. She reviewed Howard Hurwitz’s s.30 assessment, as well as his updated recommendations.
- g. She spoke with Mr. Hurwitz twice to get clarifications on his recommendations and expectations.

[20] Ms. Cahen described the many issues she needed to address with the parents on a regular basis, which include, communication issues; issues about M.’s extra-curricular activities; issues with the interpretation and application of the holiday schedule; concerns by both parties about derogatory statement to and improper influence of M. by the other party; M.’s difficulties adjusting to the parenting schedule and her consistent wish to spend less time with the father on weeknights; the mother’s concerns regarding the father’s failure to comply with the parties’ right of first refusal clause; and the mother’s concerns regarding the father’s failure to comply with basic parenting duties such as taking M. to scheduled appointments and activities, doing homework, encouraging her to practice her violin, etc.

- [21] The PC Report identified M.'s views as expressed to Ms. Cahen as being:
- a. She does not like to be left in her grandmother's care so much;
 - b. She loves her father, but she does not wish to spend overnights with him in Woodbridge during the week;
 - c. Her father becomes angry and screams at her when she shares her feelings;
 - d. Her father makes her feel guilty or yells at her for speaking about the mother or wanting to call the mother;
 - e. Her father gets angry if she speaks in Bulgarian to the mother;
 - f. Her father doesn't give her any attention;
 - g. Her father is always on the phone;
 - h. She says her stomach hurts and she has nightmares when she sleeps at her father's house;
 - i. She says her father doesn't take care of her;
 - j. She is bored at her father's home;
 - k. She is uncomfortable with her paternal grandmother;
 - l. Her father and his family members say bad things about the mother at family gatherings and this is very hurtful for her;
 - m. Her grandmother makes her eat too much food and she throws up sometimes because her grandmother threatens to spank her if she doesn't eat;
 - n. Sometimes her step-sister takes care of her when her father is at work and she sleeps in late, and M. has nothing to do;
 - o. M. says she wakes up very early when she is at her father's home;
 - p. She said she is often late for school and feels very tired during the day.

[22] Ms. Cahen's report states that M.'s wishes were confirmed by her therapist, Dr. Li. I note, however, there is, however, nothing on the record before me confirming this.

[23] Ms. Cahen asked M. to write her a letter with Dr. Li and the letter said,

"Dear Carolyn, this is what I want to tell you for the schedule. [I] don't want to stay at my dad's because [I] wake up a lot at 5:00 a.m. in the morning. I'm normally late for school. I still want to spend time with my dad but [I] don't want to stay overnight on school nights but [I] am OK to stay there on the weekends. From M."

- [24] Ms. Cahen's report provides, among other things, that
- a. M. feels she is not being heard;
 - b. M. says she told the CCAS worker, Dr. Li, Mr. Hurwitz and her that she does not want to spend so much time with her father;
 - c. M. is sad and angry because nobody is helping her;
 - d. M. is worried about talking to her father about it;
 - e. M. is angry at her mother for making her go to her father's house when she doesn't want to;
 - f. M. is very clear that she wants to continue seeing her father on a regular basis; however, she simply prefers to spend more time with the mother.
 - g. The father increased his efforts to spend more time with M. and organized activities for her to do at his home.

[25] The PC Report makes the following recommendations to the regular parenting schedule set out in the Shore Final Order:

- a. In Week One, M. should spend Tuesday, from after school to 8:00 p.m. and Wednesday, from after school to 8:00 p.m. with the father.
- b. In Week Two, M. spend Tuesday, from after school to 8:00 p.m. with the father and Fridays, after school to Sunday, at 6:00 p.m.
- c. The father should be responsible to drop M. off at the mother's home on Sundays and the mother should be responsible to pick M. up from the father's home during his parenting time during the school week.

[26] The PC also made recommendations to (a) change the summer schedule so that each parent have up to three weeks of consecutive or non-consecutive holiday time with M, and the remainder of the summer be as per the regular schedule; (b) change the holiday schedule; (c) change the joint decision-making responsibility so that the mother has final decision-making responsibility if the parties cannot agree on a decision or if the father does not respond to email communication within a reasonable time frame; and (d) if there is any doubt about M.'s wishes and preferences despite the PC Report, a Voice of the Child report be conducted, with the caveat that involving a further professional may exacerbate M.'s frustrated feelings about not being heard.

Analysis

[27] Based on the conflicting written record before me, I cannot find that there is a certainty M. will suffer irreparable harm if she is made to continue to have mid-week overnights with the father between now and when the Motion to Change will be heard. The father has raised

legitimate concerns about the PC Report, and the facts underlying the PC Report. Specifically, he has raised issues with the facts on which Ms. Cahen relies in her PC Report, claiming they are exaggerated and/or incorrect; and that the PC Report depicts the family's circumstances and the parental conflict in a one-way manner. The father argues that the PC did not have input from him when she wrote the PC Report; M. was influenced by the mother and/or has been placed in a loyalty bind when she was asked by the PC to write her a letter; and the PC did not consider the context of the parental dynamic clearly outlined in the Hurwitz assessment report and updated recommendations.

[28] I am reluctant to make a temporary change to the Shore Final Order pending the hearing of the mother's Motion to Change. I do not find that the mother has met the stringent onus required of her, namely, that the current parenting schedule results in an intolerable situation for M., jeopardizing her emotional-well-being. In other words, I am not satisfied that M.'s best interests *require* an immediate change or that the temporary change of reducing her mid-week overnights with the father by 3 nights out of 14 days is urgently needed to shield M. from likely future harm. The untested affidavit materials before me on this motion where there is conflicting evidence from both parents makes it impossible on this temporary motion for me to be satisfied that the existing parenting schedule is *contrary* to M.'s best interests. When the mother's Motion to Change takes place at an oral hearing, a more thorough evidentiary analysis will provide the court with what is needed to determine, on a balance of probabilities, whether there is a clear and compelling need to make the changes requested by the mother.

[29] Since I have not found that the mother has met the onus entitling her to a temporary change of the Shore Final Order, I now turn to the father's cross-motion to determine whether an updated s.30 parenting assessment should be ordered.

Issue Three: Should an updated s.30 parenting assessment be ordered pending the hearing of the Motion to Change?

[30] In a recent Court of Appeal decision, *ACVP v. AMP*, 2022 ONCA 283, the court confirms that there are no hard and fast rules in determining whether to order an assessment under s.30 of the *Children's Law Reform Act*; rather, the inquiry is fact-driven and flexible: *Glick v. Cale*, 2013 ONSC 893; *A.A. v. D.S.*, 2022 ONSC 1389.

[31] This family has already had one parenting assessment by Howard Hurwitz and an updated assessment in 2021. The father has known that the mother was bringing a Motion to Change since January 2023 and did not raise the issue of an updated parenting assessment until the mother brought her motion for a temporary change within her Motion to Change. He has had 9 months to consider whether an updated assessment would be necessary. Had the father sought such an updated assessment when he was served with the mother's Motion to Change, that assessment could have been underway and completed by now. He did not do so.

[32] I do not believe an updated parenting assessment is necessary in this matter. I also do not find that it would be in M.'s best interests to have this matter delayed a further 6-9 months while such an updated assessment is completed.

[33] The court can determine the issues on this Motion to Change by hearing *viva voce* testimony from both parents, by hearing from M.'s therapist, if she is willing to testify, and by hearing from the PC. In a short trial, the father will have the opportunity to test the evidence of the PC on her report written. It is in M.'s best interests for this matter to be determined as quickly as possible but for the court to make a determination not on a conflicted written record, but with the benefit of having a complete record before it, including *viva voce* testimony and cross-examination.

[34] It is not necessary for me to address issue four given that I have found the mother has not met the stringent onus required for me to make a temporary change to the Shore Final Order on a motion.

ORDER

[35] This court makes the following order:

- a. The applicant's Motion to Change the regular residency schedule and decision-making responsibility as set out in the Order of Shore, J., dated October 29, 2021, is hereby dismissed.
- b. The respondent's motion for an updated s.30 parenting assessment is hereby dismissed.
- c. The mother's Motion to Change shall be heard as a two-day trial scheduled to commence on April 2, 2024. If the parties are not available to participate in this trial on April 2nd and 3rd, 2024, they shall make immediate arrangements to contact the trial coordinator, Joanne Benedetto, at Joanne.Benedetto@ontario.ca, to arrange for the next available short trial date, which is April 22nd, 2024. These arrangements shall be done prior to the Trial Management Conference scheduled on December 8, 2023.
- d. If the parties cannot agree on costs, they shall exchange costs submissions of no more than 3 pages in writing within 14 days of the release of this Endorsement, not including Bills or Costs or Offers to Settle. The parties shall exchange responding costs submissions of no more than 1 page within 7 days of being served with the other's party's costs submissions.

November 27, 2023

M. Kraft, J.