Citation: JDB v DKM, 2019 MBCA 68 Date: 20190607
Dockets: AF18-30-09130;
AF18-30-09132

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

	)	***A. L. Bennet***
J. D. B.	)	*for the Appellant*
	)	
(Petitioner) Appellant	)	***D. L. Takeuchi***
	)	*for the Respondent*
- and -	)	
	)	*Appeals heard:*
D. K. M.	)	***March 6, 2019***
	)	
(Respondent) Respondent	)	*Judgment delivered:*
	)	***June 7, 2019***

STEEL JA

[1] These appeals are a good example of the limitations of the court system in the resolution of family disputes, especially those involving the care and control of children. This case also highlights the effects of delay on children who are the subject of high-conflict litigation.

[2] The petitioner (the mother) is appealing a final order pronounced after trial in February 2018 (the final order) and an interim review of that order which was pronounced in July 2018 (the review order). Both appeals were heard together. An extension of time to appeal the final order and a stay of the review order were granted in chambers by this Court in September 2018.

FACTS

[3] The parties are the parents of two children, a son born March 8, 2003 and a daughter born June 8, 2005. In 2009, the parties, who never married, separated after seven and one-half years of cohabitation. When the parties separated, the children remained in the primary care of their mother and the three of them lived with the mother's parents in the St. James area of Winnipeg.

[4] The parties entered into a separation agreement in 2012 agreeing, among other matters, that they would have joint custody of the children, that the children were to remain in the primary care and control of the mother and that the respondent (the father) would have care and control on alternate weekends from Saturday afternoon until Sunday evening. Shortly thereafter, the father sold the former family home and moved to Lorette, Manitoba with a new spouse and two young children.

[5] Disputes arose between the parties as to the difficulty in reconciling the children's activities, the distance between Lorette and Winnipeg and the father's desire to see the children more often and, especially, to have them in his home in Lorette. Finally, as a result of ongoing disputes, in 2013 the mother filed a petition seeking a court order for either sole custody or, alternatively, primary care and control with specified periods of care and control to the father.

[6] An assessment report was completed by Verna Sullivan (Sullivan) in 2015 recommending an increase in the father's periods of care and control. In February 2016, on an interim motion, the Court extended the father's weekends to include Monday morning and ordered a gradual transition to

include weekday overnights and equal time over the summer. The children objected to the increased access and by August 2016, the son was refusing to participate in overnight visits with his father.

[7] The trial began in November 2016. After two days of evidence, the Court ordered a brief consultation report from Family Conciliation and adjourned the trial to June 2017. Due to a family emergency of counsel, the trial did not continue in June 2017, except to address summer access. The trial judge ordered that the parties share summer access with the daughter travelling between them each week. Access did not go smoothly that summer to put it mildly and, in August 2017, the father brought a motion asking that the mother be held in contempt for failing to comply with the summer access order.

[8] The parties filed many pages of emails dealing with the difficulties involved in the father exercising his access to the children. Both parties claimed that the other breached the order. The mother claimed that visitation with the father made the children anxious to the extent that the son did not want to stay alone with his father. A major source of conflict was the children's extracurricular activities. The mother complained that if the daughter had a game or practice during the father's access time, he would not bring her to this activity. The father complained that the mother enrolled the daughter in extracurricular activities without consulting him and that the mother was not flexible in increasing his access.

[9] The trial recommenced a year later in November 2017, and continued for five days. An oral decision was given two months later in February 2018.

[10] The trial judge received evidence from four professionals during the course of the trial. The brief consultation report was completed in February 2017 by Joshua Krongold (Krongold). Krongold identified various concerns of the children, including the travel to Lorette, being tired on school days due to travel and dislike of sharing time equally in their parents' homes over the summer. Krongold identified the father's choice to continue to live in Lorette as a factor which could further deteriorate his relationship with his children. He wrote that, "Neither child enjoys the current parenting schedule, but both feel pressured to follow it."

[11] The final order of the trial judge in February 2018 indicated that the mother was to retain primary care and control of both children, but that the father would have expanded access to the daughter. The father would have care and control of the son "as the parties and [the son] agree".

[12] In particular, and one of the main issues on appeal, the trial judge ordered that the issue of custody would be reviewable in three months if the daughter did not attend the father's periods of care and control. In fact, while the daughter initially participated in the access as ordered, eventually, she refused to attend to or sleep at the father's home. Short visits did proceed in Winnipeg.

[13] After some delay, due to the retirement of the children's previous counsellor, a clinical psychologist, Dr. Robyn Legge (Dr. Legge), began to see the daughter to provide her with therapy. The daughter continued to refuse overnights with her father.

[14] In May 2018, the father filed a notice of motion requesting that: the mother be found in contempt for failure to comply with the final order of the

trial judge; his answer be amended to include orders of sole custody or, alternatively, primary care and control, and final decision-making authority; the mother have no access to both children for a minimum of three months; and costs be awarded on a solicitor and client basis.

[15] To support his motion, the father filed his own affidavit and the affidavit of Theresa Barker (Barker), a marriage and family therapist. Barker recommended a reversal of primary care and control and suspension of contact with the mother. Barker's report relies almost entirely on interviews and information provided to her by the father.

[16] The mother filed her own motion requesting, among other things, a review of the final order regarding the father's care and control of the daughter. Both motions were heard together in July 2018.

[17] The trial judge ordered a reversal of primary care and control of the daughter from the mother to the father, resulting in the relocation of the daughter, on an interim basis, from the St. James area to Lorette. He also ordered that there be a period of 30 days of no contact between the mother and daughter, followed by reasonable care and control as agreed upon with the father. Most importantly, he made the reversal order reviewable without proof of a material change in circumstances and ordered that the final determination of the review order be adjourned to "the fall".

[18] The mother filed an appeal of that review order and applied for a stay pending appeal, which was granted. The daughter has refused to reside with the father pursuant to the review order and has not attended any physical care and control with him beyond some short visits. In fact, until the stay was granted, the daughter had been residing with a third party since, as a

consequence of the review order, she could not return to her mother's care and she refused to be with her father. After the stay was granted, she returned to live with her mother.

DECISION OF THE JUDGE AT TRIAL

[19] The trial judge made several findings of fact with respect to the sharing of care and control of the children. He found that there was little co-operation or flexibility in the parties dealing with each other, and that the mother rejected every request that the father made for additional periods of care and control. Specifically, he found that the mother registered the children for a wide variety of time-intensive extracurricular activities during the father's periods of care and control without consultation with the father.

[20] Relying on evidence from the professionals who testified at trial, the trial judge concluded that the mother "has worked to at least minimize the father from the children's lives in the past". The trial judge understood that his options were limited given the ages of the children, the passage of time and the fact that the father had not asked for custody or primary care and control in his answer. Accordingly, he ordered that the parties have joint custody of the children; that the mother have primary care and control of the children; and that the father have periods of care and control of the son as the parties and the son agree.

[21] With respect to the daughter, the trial judge ordered that the father have expanded access. In particular, he ordered as follows:

> I further order that the issue of custody of both children is reviewable in three months without the need for a material change in circumstances if [the daughter] does not attend her periods of

> care and control with her father. In such case the father may wish to amend his pleadings to include a claim for custody. If such an application is brought I will hear that motion to vary without a case conference and with the expectation that the hearing would occur on affidavit evidence within five weeks of the filing of the motion.

[22] The mother raises six grounds of appeal as follows:

1. the trial judge erred in ordering that the issue of custody be reviewable;
2. the trial judge erred in failing to perform his gatekeeper function relevant to expert evidence;
3. the trial judge misapprehended the evidence;
4. the trial judge erred in failing to consider all matters relevant to the best interests of the children. In particular, in prioritising the desire to foster a relationship with one parent over all other considerations;
5. the trial judge erred in failing to conduct the proceedings in a procedurally fair manner; and
6. the trial judge erred in the exercise of his discretion on costs.

DECISION OF THE TRIAL JUDGE ON THE REVIEW MOTION

[23] In his final order, the trial judge had ordered that the daughter attend counselling. In his review order, he found that:

> [The daughter] has mostly refused physical periods of care and control and has even been taken to the hospital for an anxiety attack around the possibility of a visit with the [father].
>
> . . .

> [The daughter] now presents with serious anxiety at the thought of seeing her father, despite there being no reason for that anxiety in the [father's] conduct.

[24] He then proceeded to order a reversal of primary care and control of the daughter from her mother to her father, coupled with a period of 30 days' no contact between the daughter and her mother.

[25] The mother appeals arguing that the trial judge erred by granting the review order in the absence of a material change in circumstances, in particular, as the review order interrupted the status quo of the daughter and required her relocation on an interim basis.

[26] The mother also argues it was an error for the trial judge to accept the evidence of Barker.

MOTION FOR FURTHER EVIDENCE

[27] The mother made a motion for the introduction of further evidence at the hearing of the appeals. She wished to introduce two further pieces of evidence: an affidavit of the mother; and an affidavit from Dr. Legge.

[28] The affidavit from Dr. Legge details the impact on the daughter of the orders pronounced, her current mental health status and her statements during counselling as to the relationship with her father, the reasons for same, and factors relevant to that. Her report is not intended to comment on either parties' capacity to parent, but rather, on what she recommends as the best situation for the daughter.

[29] This Court set out the factors to be considered in the acceptance of further evidence in *R v Basaraba; Basaraba v Rutley*, 2006 MBCA 27 at para 37 as follows:

1. whether the proposed new evidence could, with due diligence, have been introduced at trial;
2. whether the evidence is relevant in the sense that it bears upon a decisive or potentially decisive issue;
3. whether the proposed new evidence is credible in the sense that it is reasonably capable of belief; and
4. whether the evidence could reasonably have affected the outcome of the hearing below.

See also *Palmer v The Queen*, [1980] 1 SCR 759.

[30] These criteria are often applied with more flexibility in family law cases involving the best interests of the children. In *Friesen v Cascisa*, 2007 MBCA 12, this Court stated (at para 3):

> We accept the argument of father's counsel that when applied to a case where the best interests of a child is at stake, "the strict application of the Palmer criteria must be relaxed." Courts have always treated the best interests of children with the greatest of importance. See *Child and Family Services of Winnipeg v. J.M.F. et al.*, 2000 MBCA 145, 153 Man.R. (2d) 90 at para. 22, *per* Helper J.A., adopting the comments of the Supreme Court in *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165.

[31] More recently, in *Child and Family Services of Western Manitoba v PH and TB*, 2017 MBCA 41, this Court stated (at para 5):

> Admission of fresh evidence on an appeal is a discretionary matter (see section 26(3) of *The Court of Appeal Act*, CCSM c C240). Receipt of such evidence is governed by the criteria set out in *Palmer et al v The Queen*, [1980] 1 SCR 759, but with some flexibility to ensure that important evidence as to what is in the best interests of the child is considered (see *Winnipeg Child and Family Services v F (JM)*, 2000 MBCA 145 at paras 20-25).

See also *G (JD) v G (SL)*, 2017 MBCA 117 at para 34.

[32] We allowed the affidavit from Dr. Legge to be admitted.

[33] One of the primary issues to be addressed on these appeals is whether the trial judge erred in reversing primary care and control from the mother to the father in July 2018, contrary to the best interests of the daughter.

[34] Dr. Legge was not involved with the children at the time of the trial. There was evidence that the children were not comfortable with the family therapist, Vicki Frankel (Frankel). Dr. Legge was involved by the time of the July review hearing, but she started her participation only in mid-May and was not reasonably in a position to prepare a report as to her opinion in accordance with the filing timelines for the review hearing. Since that time, she has had 19 sessions with the daughter.

[35] The evidence of Dr. Legge is relevant and credible as it bears upon the topic of the best interests of the daughter in relation to her emotional and psychological health, and the relationship between her and her parents. Had it been available at the time of the hearings, it could reasonably have affected their outcome.

[36] We did not allow the further affidavit of the mother to be filed. It contained further commentary as to the conflict between the parties regarding the care and control of the children. The evidence as to the daughter's reluctance to spend time with her father and her visit to Health Sciences Centre emergency were before the trial judge.

[37] Insofar as the mother's affidavit set out what child support had been paid since the review order, that was not the subject of these appeals. Should the issue of child support need to be determined by this Court in a future appeal, the mother may seek to have the affidavit admitted at that time.

STANDARD OF REVIEW

[38] A decision of a trial judge with respect to care and control of children is discretionary and appellate courts should give trial judges considerable deference when such decisions are reviewed. An appellate court should not disturb that decision in the absence of a material error, serious misapprehension of the evidence, or an error of law (see *Hickey v Hickey*, [1999] 2 SCR 518; *Van de Perre v Edwards*, [2001] 2 SCR 1014; and *Delichte v Rogers*, 2011 MBCA 50 at para 18).

ANALYSIS

Trial Decision

Treatment of Expert Evidence

[39] The mother argues that the trial judge misapprehended the evidence and erred in the treatment of the expert evidence. In particular, the mother suggests that the trial judge erred in concluding that the main cause of the

children's refusal to attend care and control with their father was caused by separation anxiety from their mother flowing from an insecure attachment to their mother and/or a need to take care of her.

[40] The mother argues that the trial judge drew this conclusion from the evidence of Sullivan and Frankel. She submits that Sullivan was not an expert on the issue of anxiety and, in any case, this was an incorrect inference from her evidence. Evidence that the children might have difficulty separating from their mother does not equate to a finding of concern that the children were expressing separation anxiety or suffered from anxiety disorders.

[41] With respect to Frankel, the mother argues that the trial judge treated her as an expert notwithstanding the trial judge's contrary statement in his decision. This is contrary to *Morrill v Morrill*, 2016 MBCA 66 and a material error.

[42] I do not accept the mother's arguments with regard to the use of the expert evidence by the trial judge. The trial judge had evidence from which he was entitled to infer that the mother's actions, whether intentional or unintentional, had the impact of making her children disinclined to visit with their father.

[43] While Sullivan may not be a psychologist specialising in anxiety disorders, she is capable of expressing an opinion as to whether a person she is interviewing expresses anxiety. For the purpose of the trial, she was qualified as an expert in the area of "preparing social work custody and access family assessments." The questions asked of Sullivan were not improper and not beyond her area of expertise.

[44] Sullivan's assessment report speaks directly about the issue of anxiety. In particular, she states:

> There has been a great deal of discussion in this matter regarding the vulnerability of the children and their anxiety about spending time with their father. In conducting this assessment, I made virtually no observations of either child that would suggest that they are struggling with anxiety in general or in the presence of their father. Contact with collateral professionals supported my observations.
>
> . . .
>
> It is my opinion that [the mother] is anxious about the children having more contact with their father than is currently the case. She spoke extensively about this anxiety even after we spoke about collateral professionals providing no evidence of this. The children have not had professional counselling to assist them in addressing this supposed anxiety. They do not see school guidance counsellors and when [the son] had the opportunity to see a therapist, he expressed no interest in doing so.

[45] Sullivan concluded that it was in the children's best interests to have additional time with their father and that although the parties had different lifestyles, the children could benefit from exposure to this.

[46] The trial judge did not seek evidence from Frankel as an expert witness, as she was not qualified as such. She was called as a witness by the father and her evidence was based upon her meetings with the children and the parties. The trial judge was alive to her role as he stated expressly that Frankel "was not qualified as an expert . . .. Accordingly, she did not express any expert opinion but rather testified only as to her direct observations and the statements of the children."

[47] The trial judge gave no weight to the affidavit of Barker. He realised that the report did not have a proper factual underpinning and that it was based, for the most part, on the father's self-reports. As he states:

> The court must act as a gatekeeper when it comes to expert opinion evidence. To not strictly adhere to this role, the court invites delay, uncertainty, and unnecessary litigation. I find the opinion unreliable and potentially biased in that it did mostly rely on the [father's] self-reports and possibly hearsay expert opinions, who may or may not have had a full understanding of the issues at play in this litigation. I accordingly place no weight on the affidavit of Ms. Barker sworn May 14, 2018.

Reviewable Orders

[48] Although there are many grounds of appeal, there are really only two main issues. First, did the trial judge err in making his final order reviewable? Second, did he err in changing the status quo five months later and substituting another reviewable order? As I will explain, the answer to the first question is no and the answer to the second question is yes.

[49] The mother appeals arguing that section 45 of *The Family Maintenance Act*, CCSM c F20 (the *FMA*) is linked to section 46 of the *FMA*. She contends that the trial judge erred when he ordered that a review take place without the necessity of proving a material change in circumstances. Courts should resolve the controversies before them and make an order which is permanent, subject only to change upon proof of a change in circumstances.

[50] The father argues that sections 45 and 46 stand independently of each other and that a section 45 order does not necessitate proof of a material change.

[51] The relevant provisions of the *FMA* are as follows:

> **Review of order**
> **45** An order may require the parties to return after a specified interval to the court making the order for a review of the provisions thereof, and upon the review the court may vary or discharge the order.
>
> **Application to vary or discharge order**
> **46(1)** This section applies to an application to the court to vary or discharge
>
> (a) an order made under
>
> (i) this Act, other than a child support order governed by section 37.2, or
>
> (ii) *The Wives' and Children's Maintenance Act* (now repealed); or
>
> (b) an order made under *The Child Welfare Act* (now repealed) granting custody of, access to or maintenance for a child.
>
> **Order to vary or discharge**
> **46(2)** The court that made an order referred to in subsection (1) may, on application, vary or discharge that order if the court thinks it is fit and just to do so, having regard to any material change in circumstances that has occurred since the order was made or last varied.
>
> **Effective date of order**
> **46(3)** An order made under subsection (2) is not effective before the filing date of the application to the court to vary or discharge the order.

[52] Jurisprudence on this issue in Manitoba is limited to a small number of Court of Queen's Bench decisions which seem to support both sides of the argument and one Court of Appeal decision which does not address the issue directly.

[53] For example, in *Wissman v Wissman*, 2017 MBQB 13, the judge considered sections 45 and 46 of the *FMA* and asserted that "the court must find there has been a material change in circumstances to warrant the varying of an interim [review] order" (at para 23; see also at para 24). However, she failed to explain why the "material change" provision contained in section 46(2), which specifically applies when there is an application to vary under section 46, would apply to a court's order for review under section 45. See also *Payjack v Striowski*, 2010 MBQB 192; and *KB v CA*, 2014 MBQB 152, where a somewhat similar conclusion was reached.

[54] However, in *Hamelin v Carlisle*, 2013 MBQB 270, the Court came to the opposite conclusion stating, "Review orders permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances" (at para 13). In an earlier case of *Shearer v Hood*, 2008 MBQB 283, Yard J indicated that a variation as a result of a review hearing simply had to have a "sound basis" (at para 19).

[55] The only appellate case, *Perfanick v Panciera*, 2001 MBCA 200, relates to a review order, but does not consider whether a material change in circumstances is required. However, it did establish that a variation under section 46 is independent of a review under section 45, since it held that an application for review under section 45 did not have the same restriction on retroactivity that was present under section 46 of the *FMA*.

[56] Given the paucity of jurisprudence, it is useful to look to the legislative history behind these provisions. Both the history behind a legislative provision as well as its evolution may be relied upon by a court to assist in its interpretation (see Ruth Sullivan, *Sullivan on the Construction of*

Statutes, 6th ed (Markham: LexisNexis, 2014) at 661-62, 679-81 (R. Sullivan)). The history of an enactment includes everything related to "its conception, preparation and passage, from the earliest proposals for legislative change to royal assent" and can include law reform commission reports, committee hearings and legislative debates (*ibid* at section 23.53). Legislative evolution consists of the successive enacted versions of the provision and can assist a court by throwing some light on the Legislature's intentions in amending or adding to a statute (*ibid* at sections 23.18, 23.21).

[57] *The Family Maintenance Act*, SM 1977, c 47 (the *FMA 1977*), was proclaimed in force on November 14, 1977, and replaced *The Wives' and Children's Maintenance Act*, RSM 1970, c W170. It was section 22 of the *FMA 1977* which first introduced review orders into the fold, in much the same language as the present provision. This review provision was retained as section 20 in *The Family Maintenance Act*, SM 1978, c 25 (the *FMA 1978*), with slightly different wording which did not affect its meaning, and was again retained in the re-enacted *The Family Maintenance Act*, RSM 1987, c F20 (the *FMA 1987*) and renumbered as section 45. Since then, the wording of section 45 has remained as indicated in the current *FMA*. As an aside, it should be noted that, according to section 45 of the *FMA*, a review of an order takes place only if a judge has included a review provision in a previous order. A party cannot simply "apply" for a review of a previous order upon their own initiative.

[58] The section with respect to variation orders followed a different history and has changed significantly from its initial enactment to its present form. It was section 23(1) of the *FMA 1977* which permitted a judge, upon application and subject to considering the factors listed in section 5, to vary

or discharge a previous order. Section 5 of the *FMA 1977* primarily listed factors related to the financial circumstances of the parties. Under the *FMA 1978*, however, the language was changed to provide that the court could, upon application, make an order to vary or discharge if it was "fit and just to do so" (section 21). In 2010, section 46 of the *FMA 1987* was amended significantly, to its present form (see *The Strengthened Enforcement of Family Support Payments and Miscellaneous Amendments Act*, SM 2010, c 28, section 7). Not only did this amendment add the requirement, in section 46(2), that the court must regard "any material change in circumstances that has occurred since the order was made or last varied" when determining whether it was fit and just to vary or discharge an order, but the amendment also specified, in section 46(1) that, "This section applies to an application to the court to vary or discharge".

[59] It is a presumption in law that legislative change is purposeful (see R. Sullivan at section 23.22). By rewording section 46(1) to state that, "This section applies to an application to the court to vary or discharge", the Legislature has used specific language to limit the new "material change in circumstances" requirement contained in section 46(2) to that section, as well as an application to the court to vary or discharge. As noted above, section 45 reviews are not based upon an application to the court to vary or discharge, but rather, are founded upon a judge's order requiring the parties to return for a review. Thus, it appears that the purpose of this part of the amendment was to clarify that only section 46 applications to vary or discharge would be subject to the material change in circumstances amendment.

[60] Indeed, the legislative history regarding reviews under the *FMA* suggests that the purpose of section 45 was to authorise judges to permit

parties to return to court for a review of a support order specifically without the need to establish a material change in circumstances.

[61] The Legislature was guided in its reform of Manitoba's maintenance laws in the 1970's by the work of the Manitoba Law Reform Commission. In its report on family law, the majority considered the gap between the ideal of complete financial independence of separated spouses and the reality that dependent spouses (usually women) faced extreme difficulties in achieving that independence. They recommended that, in determining the amount and period of maintenance, new legislation should require a judge to consider a number of equally weighted factors (see Manitoba Law Reform Commission, *Reports on Family Law*, Report 23 (27 February 1976), online (pdf): <www.manitobalawreform.ca/pubs/pdf/archives/23-24-full_report.pdf>).

[62] The minority, however, recommended that any new legislation emphasise self-sufficiency. Among its specific recommendations, the minority endorsed a provision which would permit an unskilled spouse to receive transitional maintenance for the purpose of retraining or education, which would be reviewable or renewable by the court for up to a one-year aggregate duration. Maintenance would then be cut off. This recommendation of transitional maintenance of limited, but reviewable duration, appears to have been the genesis of the *FMA 1977*'s review order.

[63] Hansard records suggest that the review order provision was originally enacted in the *FMA 1977* for the purpose of assisting in enforcing section 4 of the *FMA 1977* (now section 6 of the *FMA*), which imposed upon a supported spouse the obligation to take reasonable steps to become financially independent. It appears that the Legislature supported the goal of

financial independence of separated spouses, but did not wish to place specific limits on the time period in which that could be achieved. Instead, the Legislature enacted the review order to provide judges with the power to order a variation of maintenance in situations where there was no change in the supported spouse's financial circumstances because the supported spouse had not taken reasonable steps towards financial independence.

[64] While the review provision was first introduced to deal with spousal support orders, the plain language of the provision in its context—using the words "an order" as opposed to "[a]n order for support or maintenance" (section 29 of the *FMA 1977*), or "maintenance order" (section 59(1) of the *FMA*)—indicates that all orders of any type could be made subject to a review.

[65] No other jurisdiction in Canada has a review provision exactly similar to section 45 of the *FMA*. However, legislation in most Canadian jurisdictions seems to permit reviews with respect to support orders, and under some statutes, it appears that custody orders may also be made subject to a review. Where reviews as opposed to variations are ordered pursuant to legislation in other Canadian jurisdictions, the case law indicates that no material change in circumstances is required.

[66] In *Leskun v Leskun*, 2006 SCC 25, Binnie J, for the Court, accepted that section 15.2(3) (regarding spousal support) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) (the *DA*) permitted the Court to make review orders relating to spousal support, and explained that such orders permitted parties "to bring a motion to alter support awards without having to demonstrate a material change in circumstances" (at para 37). With respect to custody/access orders made subject to review by the judge's *DA* order, or pursuant to a consent

divorce order, see *M (KAA) v M (JM)*, 2005 NLCA 64 at paras 18-36; *Sather v McCallum*, 2006 ABCA 290 at para 7; and *Campbell v Campbell*, 2016 SKCA 39 at paras 27-28.

[67] There are also several provincial jurisdictions which utilise essentially the same wording as that in the *DA* to permit judges to order reviews with respect to support orders. See, for example, *Family Services Act*, SNB 1980, c F-2.2, section 116(1); *Family Law Act*, RSPEI 1988, c F-2.1, section 34(1); *Parenting and Support Act*, RSNS 1989, c 160, sections 3(3) (spousal support), 10(2) (child support); and *Family Law Act*, RSO 1990, c F.3, section 34(1).

[68] All of these provisions allow the judge to make a support order until the happening of a "specified event", and some also indicate that the court can impose terms, conditions and restrictions respecting the support order as the court thinks "fit and just", or "appropriate". Section 168(1) of British Columbia's *Family Law Act*, SBC 2011, c 25 specifically provides that a judge's order "may provide for a review of spousal support", and section 168(3) specifies that the court is not required to consider the "material change" requirement under section 167(2) before making an order on an application for review. See also section 47(1)(b) of Newfoundland's *Family Law Act*, RSNL 1990, c F-2.

[69] With respect to reviews relating to child custody/access orders in provincial legislation, only section 33(1) of Alberta's *Family Law Act*, SA 2003, c F-4.5 reflects similar wording to section 16(6) of the *DA*. In other provinces, the power to order a review relating to child custody or access is not as clearly set out, but appears to rest mainly upon general provisions

permitting the court to make additional orders that the court considers necessary and proper in the circumstances, or upon provisions giving the court the power to order such "terms and conditions" as the court determines. See, for example, section 129(2) of the *Family Services Act* (New Brunswick); *Children's Law Reform Act*, RSO 1990, c C.12, section 28(1)(c); and *The Children's Law Act, 1997*, SS 1997, c C-8.2, section 6(1)(c).

[70] Regardless of the wording of the specific provision in provincial legislation authorising review orders, courts have consistently confirmed that reviews are different from variations, and that the court need not find a material change in circumstances when reviewing a previous order. It is my view that the same is true of the *FMA* and that a material change in circumstances is not required when varying an order on a review pursuant to section 45 of the *FMA*.

[71] But, the next question is, when should such an order be made? Even if a review order does not require proof of a material change in circumstances, there must be some factors which a court should consider in determining whether to make a review order and what the terms of that review order should be. Finality is an important consideration in the legal system and litigants are entitled, where possible, to a final solution to their issues. When unforeseen circumstances arise, as they often do, it is left to the litigants to bring a variation motion when a "material change in circumstances arises" and a different solution must be found.

[72] However, in some family law situations, matters are so uncertain that review orders, rather than variation orders, provide useful flexibility. In *Leskun*, although Binnie J agreed that courts should attempt whenever

possible to resolve the controversies before them by making permanent orders subject only to variation upon a material change in circumstances, he also indicated that review orders did have a useful role and will be justified "by genuine and material uncertainty at the time of the original trial" (at para 37). Still, when the court does order a future review of an issue, it should be tightly delineated so as to avoid a relitigation of all issues (see para 39).

[73] There have been a number of academic commentaries on the role of review orders in family law. These articles suggest that while *Leskun* took a cautionary approach to review orders, the case endorsed the use of skilfully drafted review orders in appropriate circumstances. See, for example, Justice David R Aston, "Review Orders: Let's Have Another Look" (2007) 26 CFLQ 253, where Aston J notes, referring to *Leskun*, that (at p 11):

> The court expressly recognized the "useful role" of review orders but emphasized the need to ensure that it is the right tool for the job and that the persons employing the tool do so skilfully by recognizing the need to spell out the purpose of the review and its focus in careful detail and, if possible, to ensure that trial judges do not simply pass the buck to another judge or create more protracted litigation than is necessary.

See also Rollie Thompson, "To Vary, To Review, Perchance To Change: Changing Spousal Support" (2012) 31 CFLQ 355; and Jane M Reid & Scott L Booth, "The Use of Spousal Support Review Orders in Canada" (2018) 38 CFLQ 25.

[74] Binnie J specified that common examples of situations that could properly lead a judge to order a review of spousal support are situations where one of the parties, at trial, still needs "to establish a new residence, start a

program of education, train or upgrade skills, or obtain employment" (*Leskun* at para 36). In financial matters, review orders are commonly made when there is a chance that the financial circumstances of one or the other spouse may change, but there is insufficient evidence of probable change to justify an order terminating support at a future date or an automatic future reduction.

[75] But, custody/access orders are different than support orders. The Court of Appeal in New Brunswick made this point in *Sappier v Francis*, 2004 CarswellNB 577. The judge made a custody/access order in which the primary residence of the eldest child was to be with the mother and the primary residence of the two younger children was to be with the father. The judge ordered the matter be reviewable in six months to ensure that the best interests of the children were being promoted. At the scheduled review hearing, which was held before a different judge, the mother sought custody of the two younger children as well. The reviewing judge refused to vary the original order, however, determining that the mother had failed to show that there had been a material change in circumstances.

[76] On appeal, Larlee JA, for the Court of Appeal, stated that, "The purpose of a review of spousal support is quite different from a review of the terms of a custody order" (at para 11), pointing out that in a spousal support review hearing, the focus is upon a change in the financial situation of the parties (*ibid*), whereas a custody order review is "usually held to see if the order the judge has made is working well or needs to be fine-tuned in order to adhere to the principle of the best interests of the child" (at para 12). She stated that "the original order provided for an automatic review hearing" and that consequently, there "was no onus on either party to prove a change in circumstances as a threshold to having the decision reviewed" (at para 9).

Sappier was applied in *Prevost v Prevost*, 2017 ONSC 5825 with respect to the *Family Law Act* (Ontario). In a similar view, see *Zakarian v Guthrie*, 2018 BCSC 2061 at paras 11-15.

[77] In a case annotation to *Sappier*, James G McLeod made the point that (at p 3):

> It is more difficult to understand the purpose of review orders in custody cases if it is not to address how the order is working out. Rideout J. realized that, as a general rule, it is in the best interests of children that their future living arrangements be settled insofar as practicable. However, if there is a real prospect that what appeared to be the appropriate arrangements at the time might not turn out to be in the children's best interests because of foreseeable problems, a court could order an automatic review to maintain control over the process.

[78] As McLeod noted, this may be the major difference between custody reviews and support reviews—"While a court may refuse to 'tinker' with a support order to respond to minor changes in the parties' financial circumstances, sometimes even a minor adjustment may be important to ensure a workable child-care regime" (*ibid*).

[79] In *Lust v Lust*, 2007 ABCA 202, the judge granted interim custody of the children to the father, with a direction that each party seek and follow a regime of counselling so that the best interests of the children could be determined after a one-year interval. The mother appealed, arguing that the judge erred by imposing an interim order after trial rather than a final order. The Court of Appeal dismissed the appeal, stating that, although the procedure is not generally encouraged, in proper situations, a custody order with a review clause can be properly imposed on an interim basis after trial. Such situations

will include those in which the judge retains serious misgivings about the conduct of the parent(s) or the care they will provide to the children. Ultimately, the Court emphasised that, in making custody orders, many factors have to be weighed when determining the best interests of the children, and that interim orders with a review clause may be required in certain cases so as to uphold the paramountcy of the best interests of the children (see para 9).

[80] In *Children and Family Services v GS*, 2011 ONSC 1732, Gray J, for the Divisional Court, noted that, "Different considerations may arise where, as here, the issue relates to the custody of and access to children. The overriding concern in such a case is the best interests of the children" (at para 74). The Court referred to Marie L Gordon's article "The Review Provision in Custody and Access Orders" (2008) 27 CFLQ 319, where she compares and contrasts spousal support review orders and custody review orders. In this regard, she states as follows (at pp 6-7):

> There are key differences between reviews which relate to spousal support, and custody and access provisions. These differences were clearly articulated by the late Jay McLeod in his annotation to *Sappier v. Francis* at page 460:
>
> > Review orders in support cases operate as a form of compromise order where a court is aware that something will or should happen in the foreseeable future but cannot predict the outcome sufficiently to factor the potential future circumstances into the order at the time. The focus of a review hearing is on the extent of the anticipated changed circumstances and/or whether what should happen in fact happened, as well as the reasons for both.
>
> By comparison, custody and access reviews are usually driven by some or all of the following:

> (a) a court's concern that problematic parental behaviour will continue unabated,
>
> (b) a concern that hoped-for improvements in the circumstances or behaviour of parents may not occur,
>
> (c) the Court's need to create a streamlined "fast-track" return to court to deal with problems that may require judicial intervention, and the desire to avoid an applicant having to prove the unforeseeability of a change of circumstances (when in fact there was nothing unforeseeable about the change at all), and
>
> (d) a desire to be able to fine-tune or "tweak" an order to ensure it meets the needs of a family after a "test drive."

[81] In summary, when dealing with either spousal support or custody orders, a final order is to be preferred. Review orders can be ordered in either situation where appropriate, but the circumstances will differ. Courts have been directed to avoid spousal support reviews that would allow "tinkering" upon minor changes in the parties' financial circumstances.

[82] On the other hand, a review order without the need to show a material change in circumstances may be ordered in situations where the court has genuine concerns about what will be in the best interests of the children, having regard to the behaviour of the parent(s) or the care provided to the children, or where it is justified by genuine and material uncertainty at the time of the original order. Reviews may also be ordered in the best interests of the children where the parent(s) need time and access to resources in order to adjust behaviour and where the judge needs more information in order to assess what arrangements will be in the children's best interests.

[83] Review orders in custody matters predicated upon a triggering event or date specified by the court ordering the review are also an effective way of giving the parties quick access to the courts, as problems in custody and access cases can quickly cause damage to children that cannot easily be rectified. Obviously, having the review done by the judge who originally ordered the review adds to the efficacy of the review since he or she will be familiar with the case. Clarity in the language of the order is necessary and the issue to be reviewed should be clearly identified and tightly delimited.

[84] At all times, the ultimate focus of the reviewing judge is to be on the best interests of the children. Events or behaviour supporting or thwarting the original order cannot be the only focus. Rather, the reviewing judge must broadly assess the needs of the children in a contextually sensitive and individualised manner, based upon all the evidence before the judge. This includes consideration of all relevant factors set out in governing legislation relating to the best interests of the children in custody and access matters. Under Manitoba's *FMA*, this means that the reviewing judge should consider all relevant factors contained in section 39(2.1).

Application of the Law to These Review Orders

[85] Applying the above to the final order, the mother argues that there was no material uncertainty at the time of the original trial with regard to the issue of whether the daughter would follow the Court's orders with respect to access with the father. It is submitted that there was plenty of evidence that the daughter was not willing to visit with her father and this was a continuing situation since July 2017. Despite this, the trial judge ordered full alternate weekends.

[86] With respect to the review order, the mother argues that there existed no change in circumstances since the final order which warranted a change of custody, so as to grant the father decision-making authority or which warranted a change to primary care and control.

[87] Sadly, the result of years of litigation, interim orders, a final order and no doubt thousands of dollars in legal fees, is two children who do not have much contact with their father. The trial judge found that the mother did not do as much as she should have to facilitate the relationship between the children and their father. Given the evidence at trial and his findings, the trial judge had the discretion to try and improve the relationship by expanding the periods of care and control of the father with the daughter. He acknowledged the limitations of the court process when dealing with older children by the way in which he dealt with the son.

[88] Given the situation of uncertainty present when he made his final order, it was within the trial judge's discretion to make that order reviewable. The children began refusing to visit with their father in his home since August 2016, and by the summer of 2017, the daughter was having only short visits with her father and not in his home. It was anticipated that the daughter would receive counselling to facilitate the relationship with her father and that the mother would heed the order of the Court and reduce the daughter's extracurricular activities in favour of time with her father. The brief consultation report from Krongold confirmed that the daughter enjoyed spending time with her father, but disliked certain aspects of the current care and control regime.

[89] The final order that the trial judge made in February 2018 was clear and indicated a specific time period of three months. It allowed the parties an opportunity to come back before the Court to determine if the final order that had been made was not working. In his oral reasons, the trial judge stated that the issue of custody of both children was "reviewable in three months without the need for a material change in circumstances if [the daughter] does not attend her periods of care and control with her father." The final order, with its provision for a review after three months if visitation was not taking place, was appropriate in the circumstances of this family and was within the discretion of the trial judge.

[90] However, that is not the case with the trial judge's review order of July 2018. When the expanded care and control in the final order did not improve the relationship, he adopted a remedy of last resort—a change in the status quo. He suspended certain provisions of his final order of February 12, 2018, and replaced them on an interim basis "pending the final variation hearing". He ordered that, "[The daughter] is to be placed into and remain in the day-to-day care of the [father] pending review in the fall of 2018." The review order stated, "5.2 The final variation of the Final Order pronounced February 12, 2018 . . . as it pertains to [the daughter] is hereby adjourned to the fall, 2018."

[91] While facilitating a relationship with the non-custodial parent is an important goal for the court in these disputes, the question must be asked, is it in the best interests of this child in this case?

[92] The review order was vague and raised much trepidation in the daughter. When in the fall was the review to take place? Where would she

be living? School started at the end of August. If she was living in Lorette, was she to move schools? Was she to sign up for her sports teams at the end of August? The 13-year-old teenager had the answers to none of these questions.

[93] The trial judge varied a long-standing status quo arrangement of primary care and control to the mother on an interim basis of indeterminate length, when that interim variation involved not only a change in homes without the companionship of her older brother, but a change in cities with all that involved for a young-teenage girl who had already undergone years of conflict between her parents.

[94] In my view, while such a remedy may be effective for a young child in an appropriate case, its use in this case in relation to the daughter was not clearly defined, did not take into account all the relevant factors and, as history has shown, according to Dr. Legge's evidence, it has had a significantly detrimental impact on the daughter.

[95] Although the review order was supposed to be reconsidered in the "fall", when the school year started, the father refused to allow the daughter to attend school in Winnipeg and registered her in a school in Lorette despite not having the daughter in his home or under his care, and despite his daughter continuously refusing to live with him and stating that she would not want to change schools or relocate. When the daughter refused to accompany the father to his home in Lorette, the police were called.

[96] The reports of Dr. Legge are very clear. Her first report is dated September 4, 2018, and the second dated February 14, 2019. She was concerned about the effect on the daughter of the ongoing conflict regarding

the time which she would spend with her father and of being forced to participate in a relationship with her father that was contrary to her wishes. Dr. Legge observed that the continuing pressure increased the daughter's fear, anxiety and opposition to achieving a reconciliation with her father.

[97] The first report describes the daughter's difficult, stressful and anxiety-ridden relationship with her father, affected not only by her fears of having to go and live with him on a permanent basis, but by her own experiences of staying with her father and his new family. Dr. Legge reports that the daughter "feels her father does not care about how she feels or what she wants, and that he is going to try to make her live with him." Although her mother tried to get her to attend scheduled visits with her father, the daughter was afraid that if she went, he would not let her come back, so she started refusing to go at all.

[98] It was Dr. Legge's conclusion that:

> [I]t was probable that forcing [the daughter] to live with [her father], or removing her from the school where she attends in Winnipeg, and her activities in Winnipeg would cause significant harm to her relationship with her parents, and to [the daughter] herself.
>
> . . .
>
> I worry greatly for her overall mental health if she is forced to uproot from her home, school, and community environment.

[99] She also concluded that:

> [The daughter] has been living in a constant state of limbo in terms of where she will attend school, who she will live with and what her day-to-day life will be like. This level of anxiety, lack of

> security, and fear of the future is not a good thing for a young adolescent's overall mental health and well-being. My recommendations to [the daughter's] parents, as well as the courts, would be to allow [the daughter] to have a say in where she lives. At age 13, I do believe that [the daughter's] thoughts, feelings, and preferences should be taken into consideration. [The daughter] should be encouraged to have a relationship with each of her parents, however, some work will need to be done in therapy to allow her to heal from this experience and move forward with an openness to those relationships. She should continue with individual therapy without the threat of being forced to move against her will hanging over her so that we can do the psychological work of healing from this experience and rebuilding and repairing her relationships with each of her parents.

[100] I find it ironic that in February 2018, when dealing with the then 14-year-old son, the trial judge held that:

> I'm fully aware of the problems associated of allowing a 14-year-old child to drive the issue of care and control but I have little choice due to his age and the history. This has been the case for years now and it would be unrealistic to push [the son] faster than he can realistically change his relationship with his father.

Yet, he ordered exactly that same situation to occur with the soon to be 14-year-old daughter.

[101] In summary, the trial judge erred in law when making the review order for failing to consider the best interests of the child as a whole and focussing primarily on the remediation of the relationship between the father and the daughter.

Other Issues

[102] The mother argues that the status of the pleadings at the time the final order was pronounced was that the father asked for joint custody with neither party having final decision-making authority. It was the trial judge that invited the father to amend his pleadings to include a claim for custody, after the trial judge made custody reviewable. The mother argues that this was an error.

[103] Given my decision with regard to the July 2018 review order, it is unnecessary for me to deal with the mother's argument as to the father's amendment of his pleadings and the trial judge's encouragement on that path.

[104] At the appeal hearing, other issues relating to support and costs were raised. The payment and quantum of support had been affected by the stay. Given the fact that the issue of custody would affect the decision on support and costs, the Court decided to hear and decide the appeal on that point first.

[105] Having now given our decision on that issue, if the parties are unable to reach an agreement on the outstanding issues, they may set this matter down for further hearing.

CONCLUSION

[106] There is no doubt that both parents love their children and are good parents. All the expert reports confirm this. However, their very different parenting styles have left them in continual conflict and the children have obviously felt torn between the two of them. The father always felt that the mother was too soft whereas the mother always felt that the father was too

severe. While an equal and shared relationship with both parents is ideal, that is not always possible. This is especially true when the parties live in two different communities and the children are teenagers with a variety of interests, friends and activities.

[107] The parties separated in 2009. The litigation began in 2013. The Sullivan parental assessment was done in 2015, and subsequent events, particularly the report of Dr. Legge, have intervened. It is now 2019 and the children have lived under the cloud of this conflict for most of their lives. They were four and six when their parents separated and they are now almost 14 and 16 years of age. It has affected them both deeply, especially the daughter. These orders have acted only to deepen her distress. Her therapist suggests that the father be patient and begin to rebuild the relationship with some shared activities. I understand that this is frustrating to him, but the uncertainty regarding the daughter's custody has to stop. The fear and uncertainty regarding her future has affected her mental health deeply, as the reports from Dr. Legge make clear. This is not in her best interests and it is her best interests that must predominate.

[108] I would allow the appeal with respect to the review order of July 2018.

[109] I would vary the final order of February 2018 by deleting the provision that allows it to be reviewed without a material change in circumstances. I would confirm joint custody of the children with primary care and control to the mother and with care and control to the father one evening per week in Winnipeg for a period of four hours, and upon such other occasions and such times as agreed upon jointly by the daughter and her

father. The parties will consult on all major decisions with respect to the daughter, and in the event of disagreement, the mother has the ability to make the final decision.

[110] I am hopeful that beginning to rebuild this fractured relationship with a dinner or a movie once a week will lead to a joint desire for more. With the permanence and stability this order provides to the daughter, I am also hopeful that she will gradually come to the realisation that her father loves her and is an important part of her life.

[111] As I indicated earlier with respect to the outstanding issues, if the parties cannot agree as to costs, they may submit written argument for a decision from this Court.

Steel JA

I agree: Cameron JA

I agree: Mainella JA