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What's Inside ...

Our Feature Article	page 2
Editorial	page 8
Article: <i>Eldercare Mediation</i>	page 9
President's Message	page 10
Professional Development Supplement	page 11
New Initiatives And Conference Update	page 19

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Immovable Object and Irresistible Force:

The Collision of the Status Quo Principle with Children's Needs

By Shelagh Macdonald and John Goodwin

Introduction

The inspiration for this article has its origins in those situations where lawyers, mediators, and parents - and hence children - come up against the seemingly impenetrable barrier of the legal principle of the "status quo". This is the formal term for the everyday concepts of stability and continuity. The status quo principle is designed to serve the best interests of children, but it does not always fulfill its intention. There is an essential place for the status quo principle in making decisions about children's lives, but it also has a dark side. Its application or influence can heighten the anxiety, fear, distrust, and anger experienced at the time of separation and divorce, and into the future. It has serious limitations that can interfere with children's well-being, and with that of their parents as well.

Specifically, the status quo principle can:

- Fail to recognize that children's developmental needs and capacities evolve.
- Impede parents' efforts to collaborate effectively and make it more difficult for them to stay true to what they believe is best for their children, and

Unnecessarily support a situation where children are witnesses to marital hostility.

In this article, we first discuss the meaning of the legal principle of "status quo" in child custody cases. Secondly, we describe three case examples where issues arising from this principle emerge. Most family mediators and family law lawyers will have encountered these relatively common situations. We then discuss these cases as they relate to the status quo. To conclude, we make several suggestions for addressing the problems identified.

We are not considering cases where there are issues of child neglect or abuse, spousal abuse, other forms of severe family dysfunction, substance abuse, and mental illness. We also note that we are examining the law and practice, as we have experienced it, in Ontario, and realize that these may differ in some respects from other jurisdictions.

The Status Quo Principle

Family law lawyers will recognize that one of the most important factors in any custody dispute is the "status quo." The "status quo" refers to the stability and continuity of the important factors in a child's life at the relevant time, whether it be at a trial, a court motion pending trial or a settlement discussion. These key factors which a court might consider include one or more of the following: the child's residence; the child's relationships with parents, siblings, extended family, school, teachers, friends, other caregivers (nanny, daycare, babysitters); activities, neighbourhood facilities and amenities, and so on.

The principle of "status quo" is reflected in Section 24(2) of the *Children's Law Reform Act* of Ontario where the definition of the...

continued on page 3

“best interests of the child” requires the court to consider a number of factors including: “the length of time the child has lived in a stable home environment”; and, “the permanence and stability of the family unit with which it is proposed that the child will live”.

How do the courts reflect this principle in their decisions?

If the case is being decided at a trial, while judges certainly have the power to change the existing arrangements, they generally do not change the status quo in their decisions. For example, unless the parent who is not residing with the children can clearly establish that the arrangements are not in the child’s best interests, the judge is very likely to continue those residential arrangements.

If a custody issue is being decided before trial, at an interim motion or hearing, the courts are also likely to perpetuate the status quo on the (often implicit) basis that they do not have enough information to justify a significant change. It may also be out of the concern that if the judge makes a change at that stage, the trial judge may order a further change later on.

There may be many sound reasons why a judge would be reluctant to change the status quo in a given case, among them the following:

- There is a widely held appreciation of the value of stability and continuity for children.
- There is a risk in trying something new. If the existing arrangements appear to be generally satisfactory, a judge may not accept alternative arrangements which might possibly be better. Therefore, a conservative approach is often taken following the principle, “If

it is not broken, don’t try to fix it.”

A further reason favouring a conservative approach is that many judges are of the view that these types of issues are best dealt with outside the court system and so are naturally cautious in their interventions.

It is the clear responsibility of family law lawyers to warn clients about the weight given to the status quo principle by the courts in deciding what to do in their particular case so that the client can make decisions accordingly during the progress of their separation. Even if clients are prepared to try a new parenting arrangement in an effort to find a good solution, the lawyer must warn the client that the “trial” arrangement might, with the passage of time, become the new status quo. Many lawyers recognize that giving this information to their clients may create practical difficulties in the resolution of these disputes (for example - in parenting mediation) but it must be done. The key thing at this point is the advice the lawyer gives the client as to how to handle the difficulties. This is where creativity, sensitivity and experience on the part of the family law lawyer can help to mitigate what may be seen as the harshness of the status quo principle.

For example: We can advise clients to focus on the best interests of the children - do what is best for them and not focus unduly on the dispute with their spouse. To remind them that very few of these cases are ever litigated. To focus on strategies to de-emphasize the status quo in the short term.

While we are mainly focusing on the impact of the legal principle of the status quo, we recognize that there are a number of other significant factors which reinforce the status quo in the short and long term. These include:

- A concern about the impact on the child support to be paid or received pursuant to the federal *Child Support Guidelines* if a parent has the children more or less than 40% of the time. This may make it difficult to implement necessary changes in children’s lives over time.
- An understandable reluctance to re-open negotiations and resume contact with former spouse.
- The expense of involving professionals in these issues.

These and other factors can work against the search for creative and flexible arrangements to meet children’s changing needs.

Case Examples

Below we set out three examples which illustrate some of the various ways in which this problem presents itself, with some discussion.

Example 1:

Safia and Jacques, the parents of children ages four and two, were separating. In spite of angry feelings and a low level of trust, they were determined to place their children’s needs as the priority and to try to cooperate as parents. After heated exchanges and extensive discussion, they had finally reached an agreement on the living arrangements for the children. A majority of their time would be spent in the care of their mother, who had been working part-time since the birth of the first child. Both parents agreed that the children needed to spend time with their father regularly and often, with occasional overnights. As they matured, they would spend an increasing amount of time with their father, and eventually they would likely live equal time with each of the parents. Both parents were of the view that a gradual evolution of the living arrangements would likely be best for their children. They wanted to create a...

continued on page 5

plan in mediation that reflected this.

Before the first mediation session, Jacques met with his lawyer who informed him that if he and his wife should disagree in the future about the children's living arrangements, and be unable to resolve their differences through a mediation process, then chances were high that change would not be possible due to the weight given to the status quo. His lawyer suggested that he consider seeking an equal-time sharing arrangement from the beginning of the separation.

Jacques was caught in a dilemma. He was torn between wanting to do what he believed would be best for the children at this time in their lives and, on the other hand, minimizing the risk his lawyer was informing him of and fearful that future changes might not be possible. In the meantime, the parenting relationship was deteriorating as Safia was furious with his vacillation, seeing it as undermining their collaborative efforts and hard work, and as a sign of his distrust of her.

The lawyer is in an interesting position. On the one hand, she wanted to support Jacques in making decisions based on what he and the mother determined to be the best for their children at this time. On the other hand, she needed to inform him of the implications of his decision, and possible difficulties in the future. The lawyer may be seen as giving her client conflicting signals but she was being professionally responsible.

Discussion:

Jacques and Safia were aware that as their children mature, their needs will change. There has been much research done in the field of child development, and this knowledge can be invaluable in making decisions about children when their parents separate, and at later times in the children's lives. Yet the undue

emphasis on the status quo principle fails to take into account the evolving needs of children. For example, there should be no presumption that a toddler who is living the majority of the time with his mother at the beginning of the separation should continue to do so into the years ahead.

Determining a better balance in the weight given to the status quo principle and children's changing developmental needs and capacities is all the more compelling as children are experiencing their parents' separation at an increasingly younger age. According to the most recent report, "National Longitudinal Survey of Children and Youth: Changes in the Family Environment" (Statistics Canada, 1998), one in five children born between 1961 and 1963 had to cope with their parents' separation by the time they were 16. One in five children born between 1971 and 1973 dealt with their parents' separation by age 11. And the same proportion of children born in 1987 and 1988 were just under five years old when their parents' separated.

These changing demographics have significant implications for the application of the status quo principle. As noted above, many children have a longer period from the time of their parents' separation until the age of majority (18) during which their developmental capacities will evolve, their personalities will take shape, and their needs will change dramatically. Referring to the ages cited in the previous paragraph, children's needs may change between ages 16 and 18, and more so between ages 11 and 18. But they will change far more between ages five (and under) and 18. The kinds of living arrangements that the parents (or other decision-makers) determine these children need when they separate may be very different than what their children need at various points in the future.

We are not suggesting here that arrangements must necessarily change over time, or that there is a textbook version for living arrangements based on developmental needs, or that developmental needs are the only factor to consider - but there must be an openness to the possibility of change. An undue emphasis on the status quo principle may be an impediment to children's ongoing well-being. As much recognition must be given to the evolutionary nature of children's development and personality in determining their best interests as is given to the status quo, in addition to other factors not discussed here.

Do living arrangements in fact evolve, either formally or informally? We were unable to find any Canadian information to answer this question. In a retrospective study completed in the USA with 800 college students whose parents divorced when they were children (Fabricius and Hall, 2000), the living arrangements were notable for their stability over time. Most participants reported that the living arrangements they had when their parents separated (residing primarily with the mother) were the same up to 8 years later, though this was contrary to the wishes of the vast majority of the students who expressed the desire to have spent more time with their fathers as they were growing up.

Example 2:

Georgie and Susan, the parents of a five year old daughter and seven year old son, were trying to reach a decision in mediation on living arrangements for their children once they separated. Georgie believed that an equal time sharing arrangement might work well but Susan had doubts about this. Despite Susan's uncertainties, she was willing to experiment with Georgie's proposed arrangement for several months, and review their children's adjustment

continued from page 5

then. However, Susan had been correctly informed by her lawyer that the status quo principle might make further change difficult. She was very anxious about trying an arrangement which she might regret and get stuck with later on. The parents came to an impasse as a result.

Discussion:

This is a situation with parents wanting to be both thoughtful and flexible in deciding the living arrangements for their children. The lawyer is doing her job well, giving legal advice regarding the risk that the initial arrangement will be difficult to change if the parents are in disagreement in the future. However, this creates a problem.

No parent, or other decision-maker, can know for sure what is the best living arrangement for children whose parents are separating. There must be the opportunity for trial arrangements without parents (and sometimes children) feeling they will be trapped in arrangements which they feel are not satisfactory. Yet, there is not enough room within the present system for the kind of experimentation and flexibility which many families need if they have to move beyond the mediation process to resolving differences in the context of the law.

Example 3:

Gabrielle and David live in the matrimonial home with their two children, Kristi age twelve and Donald age seven. There is frequent open conflict in the home between Gabrielle and David and neither is able to restrain their hostility. Both children are suffering from this. Kristi is failing at school, complaining that she cannot concentrate on her studies. She is also getting into fights with some of her fellow students and the school has contacted both parents about this. Donald is experiencing stomach pains

and headaches which his family doctor attributes to the marital conflict. Both parents have loudly invited the other to leave the home "for the sake of the children". Both have been told by their lawyers not to leave the home for fear of prejudicing their claim to custody if the matter was litigated because of a concern about the "status quo."

Discussion:

There is a large body of research on the impact of marital conflict on children. We know from research by Cummings and Davies ("Children and Marital Conflict: The Impact of Family Dispute and Resolution", 1994) and others that marital conflict can cause distress among children (including toddlers and infants - though they may not understand the substance of the argument, they are sensitive to the parents' emotions). Conflict in itself is not destructive to children, but how parents fight greatly affects children's responses and adjustment. Children are more distressed by conflict that is hostile or physical. Children's responses are greatly influenced by whether or not the fight is actually resolved, experiencing less distress when the conflict is resolved.

The fear of the implications of the status quo principle paralyzes Gabrielle and David from taking the step to physically separate. When parents separate, one of their greatest fears, rational or not, is that they will lose their children, whether by the loss of decision-making power or time with the children or both. The status quo principle can exacerbate this fear. The anger and tension in the home continues, and the children may be harmed by the ongoing hostilities.

A parent may sometimes leave the home against the lawyer's advice because that parent does not want to further subject the children to marital hostilities or tension. That parent may well be acting in the children's best

interests by leaving. However, with the current emphasis on the status quo, that parent risks being penalized, and ultimately so do the children.

This situation is potentially harmful to the child's well-being. This is not the intent of the law, nor of parents, mediators, lawyers, judges, and others involved in the lives of children whose parents separate.

There is a need to find a better way to deal with this dilemma so that children are not forced to endure continuing exposure to their parents' conflicts.

Comments and Conclusions

While the elements of stability and continuity are often valuable, focusing on the status quo in dealing with parenting issues may not always be in the best interests of the child. Children's needs change over time and parenting arrangements need to reflect this. There may also be a need to be flexible and to experiment in order to find the best outcome for the children at a given point in time.

A number of suggestions for addressing the difficulties with the status quo principle have been referred to in this article. In this section, we draw together our recommendations:

Section 16 of the current *Divorce Act* (Canada) refers to the "best interests of the child" without further elaboration. Bill C-22, the proposed amendments to the *Divorce Act*, further defines the meaning of "best interests of the child" in Section 16.2(2). It includes an interesting and promising addition to the law which requires the court to consider:

- (a) "the child's physical, emotional and psychological needs, including the child's needs for stability, taking into account the child's age and stage of development" (underlining added).

continued on page 7

This new provision addresses some of the concerns set out in this article by requiring the court to consider the ages and stages of child development. It is a step in the right direction because implicit in it is a recognition that children's needs are, in part, age and stage specific and change over time. It requires the courts to include in their deliberations a necessary and dynamic new element - a recognition of these changing needs. If the amendments and this particular provision are passed, it is our hope that lawyers and judges take up the challenge and opportunity this amendment provides.

All professionals in the field of separation and divorce need to be aware of the inherently dynamic nature of children's needs. Education on the ages and stages of child development could be useful for those who do not have that expertise.

Parents could also be educated about child development. Mediators and parenting education programs encourage parents to know about, and be attentive to, their children's evolving developmental needs, capacities, and personalities. They can be informed that parenting plans are not written in stone. As an effort (that may not be legally enforceable should the parents litigate in the future) to try to counterbalance the emphasis given to the status quo principle, a specific clause is often included in the Parenting Plans for young children which states that their changing needs may be reflected in a gradual evolution of their living arrangements, with regular times for review.

We need to expand the recognition of the dynamic nature of children's needs by providing for periodic reviews and linking up the family with professional resources for the parents to consult as challenges arise. Parenting mediators often have an ongoing relationship with families to

help them evolve in order to stay abreast of their children's changing needs (and those of the parents as well).

Parenting mediation and family counselling can provide flexible and creative responses to children's changing needs

In cases of chronic conflict, the innovative process called "parenting co-ordination" can provide for necessary changes as the need arises.

Children's voices need to be heard on an ongoing basis. Much has been written about the increasing importance of listening to children's voices regarding their experience of their parents' separation and the impact on them.


"Children's voices need to be heard on an ongoing basis."

Children themselves need to be informed from the time of their parents' separation that the arrangements in place do not have to be forever - and to have a non-threatening process and place to be able to freely express their views (but not to make the decisions). Processes like parenting mediation and family counselling can facilitate this.

The *Child Support Guidelines* need to be amended to eliminate the troublesome inflexibility created by the 40% rule. Proposals for change in this regard are beyond the scope of this article.

Trial living arrangements should be supported and encouraged by law - on a without prejudice basis so that one party is not penalized for trying to do what is best for the children.

A parent who does move out of the family home without the children should not be automatically penalized

if the parents are in disagreement regarding the children, and end up in litigation. It should be recognized in law that this may be an act of parental concern, and not necessarily abandonment or irresponsibility. 

In summary, anything that locks children into an immovable pattern may be a problem. Our challenge is to allow the needs of the children to prevail over the sometimes immovable object - the status quo.

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