

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Children’s Aid Society of Toronto)
) *Alex De Melo and Justine Sherman, for the*
Applicant (Respondent in Appeal)) Respondent in Appeal
- and -)
)
O.O.) *Mira Pilch, for the Appellant*
)
Respondent (Appellant))
-and-)
)
G-L., J.) *Tammy Law, for the Appellant*
)
Respondent (Appellant))
)
Ontario Association of Child Protection)
Lawyers) *David Miller and Lainie Basman, for the*
Intervenor) Intervenor
)
Canadian Civil Liberties Association)
Intervenor) *Kate Kehoe, for the Intervenor*
)
) **HEARD:** July 27, 2020

WARNING

The court hearing this matter directs that the following notice be attached to the file:
This is a case under Part V of the *Child, Youth and Family Services Act, 2017*, (being Schedule 1 to the *Supporting Children, Youth and Families Act, 2017*, S.O. 2017, c. 14), and is subject to subsections 87(7), 87(8) and 87(9) of the Act. These subsections and subsection 142(3) of the Act, which deals with the consequences of failure to comply, read as follows:

87 ...

Order excluding media representatives or prohibiting publication

(7) Where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm

to a child who is a witness at or a participant in the hearing or is the subject of the proceeding, the court may make an order,

...
(c) prohibiting the publication of a report of the hearing or a specified part of the hearing.

Prohibition re identifying child

(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

Prohibition re identifying person charged

(9) The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

...
142 ...

Offences re publication

(3) A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(c) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

E.L. NAKONECHNY, J.

- [1] This is an appeal pursuant to s. 121(1) of the *Child, Youth and Family Services Act*, S.O. 2017, c. 14, from the Interim Order of Zisman, J. made April 9, 2020.
- [2] The appellant, O.O., is the mother and the appellant, J.G-L. is the father of the child, D. who is now 12 months old.
- [3] In December, 2019, when D. was three months old, his parents brought him to North York General Hospital because he was lethargic and not feeding properly. An initial examination showed serious injuries including bleeding in his brain and retinal lining, bruising on his arms and thighs and broken blood vessels. D. was transferred to the Hospital for Sick Children in critical condition and placed in the Paediatric Intensive Care Unit.
- [4] At Sick Kid's Hospital, D. suffered repeated seizures. He was examined by doctors in the Suspected Child Abuse and Neglect Unit who advised that D. had suffered brain damage, retinal hemorrhages and bruising. The SCAN doctors did not find an underlying medical condition to explain these injuries. The parents had no explanation for the injuries. The doctors concluded that the likely cause of the injuries was trauma by force inflicted to the child's head, eyes and/or neck.
- [5] On January 10, 2020, a temporary without prejudice order was made under the *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1, placing D. in the care and custody of his maternal grandmother supervised by the Children's Aid Society of Toronto. The parents had supervised access to the child while he was in hospital.

- [6] D. was released from hospital on January 16, 2020. The parents initially exercised access three times per week at CAST's offices supervised by a CAST worker. Commencing February 4, 2020, the parents began exercising access at the maternal grandmother's home three times per week for two to three hours. The visits were supervised by a CAST worker.
- [7] On March 17, 2020 the parents, the grandmother and the CAST worker met to discuss a plan for gradually increased access and a transition from CAST supervision to supervision by the grandmother and her spouse with CAST checking in on the visits as required. The transition access schedule proposed by CAST and agreed to by the parents was:
- a. Commencing immediately, 1 hour on Monday, Wednesday and Thursday, supervised by the grandmother or her spouse in addition to the regular access of 2 hours on Monday, 3 hours on Wednesday and 3 hours on Friday supervised by CAST;
 - b. After one week, additional access for three hours on both Tuesday and Friday supervised by the grandmother or her spouse with possible drop in video visits by CAST; and
 - c. If the child has additional home medical services, the parents are permitted to attend for the appointments. CAST would be given advanced notice of the appointments and the worker may attend at their discretion.
- [8] The parents attended at the grandmother's home for the child's first occupational therapy appointment on March 18. The CAST worker attended by Skype.
- [9] On March 19, CAST advised the parents' counsel that the agreement for the transition access schedule was no longer in effect. CAST was suspending all in person access due to COVID-19. CAST proposed virtual access as an alternative to maintain continuity of contact.
- [10] On March 24, the mother sought leave to bring an urgent motion to reinstate the parents' in person access to D. Zisman, J. granted leave for the motion to be heard by teleconference and set a timetable for service and filing of materials by all parties.
- [11] The motion was heard on April 7. In a decision dated April 9, Zisman, J. dismissed the mother's motion for in person access. On a temporary basis, Zisman, J. ordered that the parents have virtual access to D. due to COVID-19, including participation in any conferences and appointments between the grandparents and any professionals caring for the child and that in person access resume when deemed safe by CAST. The access was to be supervised by CAST or a person approved by it in advance.

Grounds of Appeal

- [12] The parents appeal the temporary Order of Zisman, J. on the following grounds:

- a. The Judge erred when she failed to apply the correct legal test applicable to a variation in access.
 - b. The Judge erred in failing to exercise the appropriate gatekeeping function and applied the wrong legal test in accepting the expert opinion of the child's paediatrician, Dr. Aref.
 - c. The Judge erred in failing to consider the *Charter* rights at stake and the importance of pre-trial access in child protection cases.
 - d. The Judge erred in failing to consider the least intrusive option possible to maintain face to face access.
 - e. The Judge erred when she drew improper inferences from the evidence and relied on irrelevant evidence and speculation to reach her decision.
 - f. The Judge erred by denying the parents the right to due process and substantive fairness, contrary to the principles of fundamental justice.
- [13] In the Amended Notice of Appeal dated May 25, 2020, the parents seek an order for in person access to the child in accordance with the transition access schedule, or in person access three times per week for two hours on Monday, three hours on Wednesday and three hours on Thursdays supervised by the grandmother or by video by CAST or that a new hearing be held, which may include a *voir dire*, in front of a different judge at the Ontario Court of Justice.
- [14] At the time of the hearing of the appeal, the parents were exercising in person access to the child for five hours two days per week: three hours supervised by CAST and two hours supervised by the grandparents. The parents sought an order for access to the child every day for eight hours per day supervised by the grandparents or by CAST.
- [15] By Order dated June 18, 2020 Faieta, J. granted leave to the Ontario Association of Child Protection Lawyers and the Canadian Civil Liberties Association to intervene in this appeal as a friend of the court. The OACPL and the CCLA made written and oral submissions in this appeal.

Standard of Review

- [16] The standard of review on an appeal from a judge's order is set out in *Housen v. Nikolaisen*, 2002 SCC 33. On questions of law, the standard of review is correctness. For findings of fact, the standard of review is a palpable and overriding error.
- [17] On questions of mixed fact and law, there is a spectrum. Where there is an extricable legal principle, the standard of review is correctness. With respect to the application of the correct legal principles to the evidence, the standard is palpable and overriding error.

- [18] With respect to findings of fact, an appellate court "may substitute its own view of the evidence and draw its own inferences of fact where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, at para. 4). The Supreme Court of Canada went on to say (at para. 55) that the language of "palpable and overriding error" and "clearly wrong" found in the case law "encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result. "
- [19] In *Children's Aid Society of Toronto v. V. L.*, 2012 ONCA 890; leave to appeal refused [2013] S.C.C.A. No. 1112 the Court of Appeal held at para. 15: "the court owes a special duty to ensure that the safety and well-being of children are protected. As a result of this special duty, the best interests of the child are always the paramount consideration in child protection proceedings."

The Judge's Review of the Evidence and Findings of Fact

- [20] Zisman, J. held that the mother's access motion met the test for urgency as described in the Chief Justice's Notices to the Profession dated March 15, 2020 and amended April 2, 2020, and in the case law, *Thomas v. Wohleber* 2020 ONSC 1965 (S.C.J.). The Judge held that the court should generally consider requests by a parent for access in child protection cases to be an urgent issue because it impacts the safety, health and well-being of a child: at para. 61.
- [21] The Judge then considered whether the parents' request for in person access was appropriate in light of COVID-19. The Judge acknowledged that CAST could not suspend the parents' in person access based solely on a blanket policy. The Judge also found that CAST had a statutory duty and mandate to protect the health of all children in its care and in the care of kin caregivers. This duty required CAST to comply with all COVID-19 protocols and precautions. These protocols were evolving and subject to change as more information about the virus became known.
- [22] The Judge reviewed the evidence regarding this child's particular vulnerability to COVID-19. The grandmother's affidavit stated that she had spoken to the paediatrician's office and was assured that D.'s injuries did not put him at increased risk of contracting or fighting off the Corona virus. CAST produced a note from the child's paediatrician, Dr. Aref, which contradicted this. Dr. Aref confirmed that the child's traumatic brain injuries would likely result in long term neurological consequences. The Judge accepted Dr. Aref's opinion that D. was at a higher risk of being more ill compared to other children if he was exposed to any illness, including COVID-19.
- [23] Zisman, J. found that the court had an oversight duty to ensure that orders made in protection proceedings did not jeopardize the health and safety of children or the viability of the kin home.

- [24] The Judge was concerned that the grandmother sought information about the child's particular health issues from the doctor's office staff and not directly from the paediatrician. Zisman, J. also expressed concern that the parents and the grandmother appeared not to recognize D.'s fragile and vulnerable condition and the possible significant health risks to him of in person access. The Judge found that the parents sought in person access for their own benefit rather than agreeing to an access schedule where the child was at no risk of exposure to COVID-19, which was more beneficial to him.
- [25] The Judge accepted that the parents and the grandparents were doing everything they could to comply with all COVID-19 precautions. But in light of the child's traumatic injuries and neurological vulnerabilities, Zisman, J. held that the parents' request for daily in person access raised concerns about their understanding of the spread of the virus and D.'s particular vulnerabilities to it. This did not accord with the primary public health recommendation at the time that people stay home as much as possible. The access requested by the parents created too great a risk of the child being exposed to COVID-19.
- [26] The Judge accepted that CAST would act in good faith and balance its obligation to ensure the safety of the child with its duty to ensure that the parents have a meaningful relationship with the child through face to face access. The Judge was not prepared to reinstate in person access at the time of the motion and ordered CAST to reinstate face to face access when it deemed it safe.

Fresh Evidence

- [27] Section 121(6) of the *CYFSA* provides that a court may receive further evidence relating to events after the appealed decision. Section 134(4)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C 43 as am. allows the court to receive this further evidence by affidavit.
- [28] The father and CAST both brought motions to file fresh evidence on this appeal. While both the father and CAST filed affidavits in response to the other's motion, neither party strenuously objected to the filing of fresh evidence by the other. Both parties agreed that the fresh evidence tendered by the other met the test for admission in *R. v. Palmer*, [1980] 1 S.C.R. 759.
- [29] I agree that the fresh evidence tendered by both the father and CAST meets the criteria set out in *Palmer, supra*: the evidence could not have been adduced on the motion (due diligence), the evidence is relevant, the evidence is credible, and the evidence bears upon a decisive or potentially decisive issue. The fresh evidence tendered updates the court on the current circumstances of the child and the parties and is necessary to deal fairly with the issues on appeal. In my view, the fresh evidence of the father and CAST should be admitted.
- [30] The father filed three affidavits: one in support of his motion for fresh evidence, one in response to CAST's motion for fresh evidence and one in reply to the affidavit of the

CAST worker, Alannah Sheridan, filed in response to his motion. Ms. Sheridan is the child protection caseworker for the family since January 23, 2020.

- [31] The father's affidavit in support of his motion for fresh evidence is essentially a reply to the affidavit filed by Ms. Sheridan, on the urgent motion before Zisman, J. In accordance with Zisman, J.'s timetable, Ms. Sheridan's affidavit was served and filed the day before the motion was argued. The timetable in Zisman, J.'s March 24 Endorsement did not permit the parents a right of reply.
- [32] The father argues that Ms. Sheridan's evidence on the urgent motion was inconsistent with CAST's disclosure and the reasons CAST gave the parents for suspending in person access. They were told their access was suspended due to a blanket protocol relating to all in person access. They say they were not told their access was suspended due to specific concerns about the parents' judgment, minimization by the parents and grandmother of the child's injuries and complex medical needs or their failure to adhere to COVID-19 protocols.
- [33] Ms. Sheridan's affidavit refers to a video of the parents' interaction with the child in hospital. The video was not before Zisman, J. In argument on the urgent motion CAST counsel argued that the parents' behaviour and language in the video suggested they failed to take the child's injuries seriously.
- [34] The father says the description of the video given by Ms. Sheridan was misleading, inaccurate and showed bias. The parents were portrayed by CAST as insensitive and lacking in judgment. In the father's view, the video shows an affectionate and gentle interaction between the parents and D. which Ms. Sheridan misrepresented to the court.
- [35] The father states that CAST had knowledge of the video for some months prior to the motion but never raised it as an issue of concern with the parents. The transitional access schedule proposed by CAST was based on observations by the worker of the loving and positive interactions between the parents and D.
- [36] The father's affidavit states that CAST also showed bias by failing to fully and accurately provide all of Dr. Aref's statements to the court. Dr. Aref agreed the parents were taking all recommended precautions (regarding COVID-19) and were correct in their hygiene and handling of breastmilk. Dr. Aref said he did not want to take a position on access. CAST did not put these positive statements before Zisman, J. on the motion.
- [37] When the parents received Ms. Sheridan's affidavit, they could have asked to adjourn the urgent motion to seek leave to obtain more disclosure from CAST and file reply affidavits. They did not. The father's evidence is that he did not want to delay the hearing because it would have delayed the resumption of in person access.
- [38] The father's affidavit in response to CAST's motion for fresh evidence attaches a report obtained by the parents from Dr. Jane W. Turner, a forensic pathologist. In her report, Dr. Turner concludes that there is medical evidence linking D.'s injuries to natural disease and medical interventions, not abusive head trauma. The father argues that Dr. Turner's

report raises a serious triable issue and that the SCAN findings that D.'s injuries are a result of inflicted trauma are not conclusive.

- [39] The father's affidavits express the parents' concerns that CAST has prejudged them as child abusers and now cannot or will not fairly assess their parenting and behaviour. The parents no longer have trust in CAST or its workers.
- [40] The father's affidavits set out the parents' view that they are being wrongly punished and humiliated by CAST. The parents have done everything they can to comply with CAST's requirements for access, including following all COVID-19 protocols. CAST's actions have interfered with their relationship with D. to the point that reunification may be impossible. Ms. Sheridan did not reference the extensive evidence in the case notes that the parents are loving and caring, take the child's injuries seriously, are concerned about D.'s development and progress and are seeking out resources to support his recovery. Instead, Ms. Sheridan gave evidence which the father says is inaccurate, incomplete and "categorically untrue".
- [41] CAST filed two affidavits sworn by Alannah Sheridan in support of CAST's motion for fresh evidence and in reply to the father's motion and affidavits. Ms. Sheridan's affidavit describes the parents' access to the child following the April 9 Order and how this access has progressed.
- [42] Ms. Sheridan spoke with the parents on May 7 to discuss a safety plan to resume in person access. Ms. Sheridan then discussed the plan with Dr. Aref, her supervisor and other relevant persons at CAST to ensure that it met all of the new and evolving COVID-19 protocols CAST was implementing.
- [43] During these discussions, Ms. Sheridan continued to communicate with the parents and ask for their input on the safety plan. There was a particular exchange about the mother's request to breastfeed. CAST sought specific input from Dr. Aref on that issue.
- [44] The parents had the first in person visit with D. on May 27 for two hours supervised by Ms. Sheridan. The next visit was on June 3 for three hours supervised by Skype.
- [45] On June 4, Ms., Sheridan received Dr. Aref's recommendations regarding breastfeeding and increasing in person access time.
- [46] Beginning June 10, the access visits were extended to five hours two days per week: three hours supervised by CAST and two hours supervised by the grandparents. This access has continued to the hearing of this appeal.
- [47] On June 23 CAST proposed a joint call including CAST and the parents when the grandmother took D. for his appointment with Dr. Aref. This would ensure that all parties could receive information, ask questions and get answers from the doctor at the same time. This joint call did not take place because the grandmother felt it would be too challenging for her to facilitate the call during the appointment while caring for the child.

- [48] Ms. Sheridan had a telephone consultation herself with Dr. Aref on June 24 to discuss the parents' request for increased access, to attend outings with the kin caregivers and to utilize other areas of the kin home during the access visits. She confirmed that the access visits (twice per week for five hours) were going well.
- [49] Dr. Aref advised Ms. Sheridan that his focus was to provide recommendations strictly pertaining to the health and safety of the child. He recommended that the access not increase in frequency and that it remain in a controlled environment in the kin home. Ms. Sheridan relayed these recommendations to the parents and the grandmother and invited them to contact Dr. Aref directly.
- [50] Ms. Sheridan's affidavit also provided an update on D.'s health and the numerous medical services he is receiving including occupational and physiotherapy and visual and ophthalmology treatment. The parents have attended all of D.'s virtual physiotherapy sessions, first by observation and now by hands on participation.
- [51] As of June 24, the police investigation relating to D.'s injuries is ongoing, and the Crown was reviewing evidence.
- [52] Ms. Sheridan's affidavits also respond to the father's criticism of CAST's characterization and use of the video evidence on the motion. Ms. Sheridan confirms that at the March 17 meeting CAST discussed with the parents its three primary worries based on observations at the access visits and involvement with the family:
- a. the parents' awareness and appreciation of the severity of the child's injuries, particularly the parents' behaviour and comments in the video;
 - b. the complexity of the child's medical and developmental needs and the parents' ability to meet those needs and implement recommendations made by the child's treating physicians and specialists; and,
 - c. the mother's parenting skills when the child is distressed.
- [53] Ms. Sheridan states that the parents did not comment on the video at the meeting or respond to CAST's concerns.
- [54] Ms. Sheridan's affidavit also sets out CAST's protocols for the state of emergency declared by the Province of Ontario on March 17 relating to the COVID-19 pandemic. It outlines CAST's understanding of the public health crisis and the steps taken to balance its obligations to protect vulnerable children in its care against the health risks posed by transmission and spread of the virus through community contact. CAST maintained continued consultation with families to deal with individual access situations.
- [55] Ms. Sheridan states that CAST conducted case by case reviews of access plans for all children and consulted with all affected families and caregivers. In March, CAST could not confirm to the parents how long in person access would be suspended. In early May Ms. Sheridan advised these parents that CAST was assessing their ability to address the

risks and keep the child safe in accordance with public health directives and protocols so their in person access could be resumed.

Analysis – The Grounds of Appeal

a – Did the Judge fail to apply the correct legal test applicable to a variation in access?

[56] The parents argue that the Judge erred in law because she failed to apply the two part test to vary an access order set out in *Catholic Children’s Aid Society v. R.M.*, 2017 ONCJ 784 at para. 85:

- a. The party seeking the change in the order has the onus to establish that a sufficient change in circumstances has taken place since the making of the last order; and
- b. The court should conduct a contextual analysis when determining if it is in a child’s best interests to change an access order and, if so, what terms and conditions are appropriate. The objectives of s. 1 of the *CYFSA* should be at the forefront of the analysis.

[57] The parents argue that the Judge did not consider the two part test, or the list of contextual factors set out in *R.M.* at paragraph 83 in her Reasons. The Judge provided no principled reason why the test should be departed from during the pandemic.

[58] The father argues that the Judge should first have applied the two part test without consideration of COVID-19 to determine whether a change to access was in the best interest of the child. Once that was determined, he says CAST had the onus of proving that access should be varied due to COVID-19 considerations based on specific admissible evidence.

[59] The father relies on the case of *Ribeiro v. Wright*, 2020 ONSC 1829, where Pazaratz, J., held that existing parenting arrangements and schedules which were determined based on the best interests of the child should be adhered to subject to whatever modifications were necessary to comply with COVID-19 precautions. *Ribeiro* is a domestic dispute between separated parents of children with no particular health issues.

[60] This ground of appeal fails.

[61] In making her decision regarding access, the Judge considered the the best interests of the child as set out in s.74(3) of the *CYFSA* and the oversight duty of the court to ensure that “orders are made that do not jeopardize the safety and health of children that are before the court.” at para. 85.

[62] The Judge reviewed and considered the protection concerns raised by CAST including the child’s multiple, serious and unexplained injuries that were most likely caused by trauma from an inflicted severe force injury; the comments made by the parents in the video regarding the child’s appearance which were a direct result of his brain injury; the

failure of the grandmother to speak to the child's paediatrician directly about the child's risk from COVID-19; and the grandmother's evidence that there was a relatively narrow gap between the child's developmental abilities and other 5-month-old babies despite evidence that the child was missing developmental milestones.

- [63] The Judge found that the evidence of the parents and the grandmother appeared to minimize child's fragile and vulnerable condition. Rather than acknowledge the extent of the child's injuries and the possible long term future impact, the evidence of the parents and grandmother focussed on bolstering the parent's wish for in person contact.
- [64] The Judge preferred the evidence of CAST over the grandmother's evidence of the child's risk of exposure to COVID-19. CAST obtained a medical note from the child's paediatrician. The grandmother relied on information that was not directly from the doctor and was not correct.
- [65] The Judge considered the change to the access schedule requested by the mother and the evidence before her of the change in circumstances since the making of the last court order. Based on the evidence before her and her findings of fact relating to the child's needs, she found that the access proposed was not in the child's best interests and could place him at risk of harm. There was evidentiary support for these findings and the findings were not clearly wrong.

b – Did the Judge apply the wrong legal test in admitting the evidence of the child's paediatrician, Dr. Aref?

- [66] The evidence of Dr. Aref was a short letter dated March 30, 2020 attached as an Exhibit to the Affidavit of Ms. Sheridan. The mother argues that the letter is an opinion which is inadmissible because it does not meet the test for admissibility of expert evidence set out in *White Burgess Langille Inman v. Abbott and Halibuton Co.*, 2015 SCC 23 at para.19:
- a. The evidence must be relevant;
 - b. The evidence must be necessary to the trier of fact;
 - c. No other evidentiary rule should apply to exclude it; and
 - d. The expert must be properly qualified.

- [67] The mother also argues that Dr. Aref's letter did not meet the test for admissibility as a participant expert witness set out in *Westerhof v. Gee Estate*, 2015 ONCA 206 at para.60:

...a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 (of the *Rules of Civil Procedure*) where:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[68] The mother argues that the Judge failed to analyze the admissibility, reliability or relevance of Dr. Aref's letter. By not doing so, the Judge failed to exercise her gatekeeping function and made findings based on inadmissible evidence.

[69] I do not agree. It is clear from the transcript of the hearing that the Judge turned her mind specifically to Dr. Aref's letter as participant expert evidence: "He doesn't need to be an expert. He's speaking simply as the child's doctor." and "He's not being presented as an expert. He is simply the child's treating physician. So, I'm just taking it based on his knowledge of this child, this is what he sees." pages 14, 15, 37 and 38.

[70] The Judge weighs Dr. Aref's evidence against the evidence of the grandmother in her consideration of whether face to face access by the parents is appropriate due to the specific risks to this child from COVID-19. The Judge found that Dr. Aref's evidence was more credible than the evidence of the grandmother.

[71] As the child's treating physician, Dr. Aref was aware of the child's specific traumatic injuries and the resulting impact on his immune system. His opinion of the child's particular susceptibility to illnesses including COVID-19 was formed from his participation in the events of observing and treating the child and as part of his ordinary exercise of his expertise as a doctor. The Judge properly identified Dr. Aref as a participant expert. The Judge did not err or fail in her gatekeeper function by admitting Dr. Aref's evidence: *Westerhof*, paras. 68-70.

[72] This ground of appeal fails.

c – Did the Judge fail to consider the parents' Charter rights and the importance of pre-trial access in child protection cases?

[73] The father argues that the denial by the State of a parent's right to access to their child constitutes serious interference with their psychological integrity which is protected by s.7 of the *Charter: J.T. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55.

[74] The father states that the Judge presumed that CAST's allegations had been proven and, in doing so, devalued the importance of the parents' pre-trial access to the child. By not preserving the parents' in person access to the child pending the determination of the merits of the child protection case, the Judge breached the parents' *Charter* rights. This was contrary to the principles of fundamental justice.

- [75] The Judge specifically states in her Reasons that the protection concerns alleged by CAST have not been fully presented or scrutinized and are included only for context: para. 11. She also acknowledges the importance of an infant child maintaining meaningful contact with a parent to form attachments and the importance of the parents' involvement in the child's rehabilitation: para. 68.
- [76] This motion was heard pursuant to the Ontario Court of Justice March 28, 2020 Notice to the Profession and Public which limited hearings by the court to matters which met the test for urgency. The Judge determined that the matter was urgent in a summary endorsement without reasons and granted leave for the motion to be heard on its merits.
- [77] In her Reasons on the motion, the Judge confirms that cases which involve a society attempting to significantly reduce a parent's contact with a child or a parent requesting access to a child in care will almost always be urgent because the requests are serious and can impact on family relationships in the future. She states that the court should consider these matters on an urgent basis because they impact the safety, health and well being of the child.
- [78] The Judge made findings of fact based on the circumstances of the parties and the evidence before her at the time. On April 7, 2020, only three weeks after the Ontario government "locked down" the province due to the COVID-19 pandemic, information about the spread of the virus and protocols for protection of the public were evolving rapidly. The primary recommendation of the government at the time was that people should stay home and strictly limit community contact. The government consulted with medical and public health experts and made this recommendation to limit transmission of the infection.
- [79] The Judge held that the access requested by the mother was not consistent with this recommendation and not in the best interests of the health and safety of the child. She noted that the various medical professionals involved in the child's care had temporarily discontinued their own in person involvement with the child. The Judge's finding was not based on a presumption that CAST had proved its allegations, but in compliance with the government's recommendations. The Judge balanced the importance of the parents' continued in person contact with the child against the heightened risk to the child of contracting COVID-19. This was not a palpable and overriding error.
- [80] This ground of appeal fails.

d – Did the Judge err in failing to consider the least intrusive option to maintain face to face access?

- [81] The mother argues that in considering the motion for access, the Judge was obligated to take into account the specific factors s. 74(3) of the *CYFSA* to determine what was in the child's best interest. These factors include: (v) the importance of the child's development of the positive relationship with a parent and a secure place as a member of a family; (vi) the child's relationship and emotional ties to a parent, relative and other member of the

extended family and (vii) the importance of continuity of the child's care and possible effect on the child of disruption to that continuity.

- [82] The mother states that the Judge erred by not applying these factors and not considering other options proposed by the parents which were less intrusive than the termination of in person access, including less frequent visits. The mother states that the Judge's failure to consider a reduced schedule of in person contact shows she gave low importance to fostering the parent child relationship.
- [83] The Judge has specific powers under s104(1) and 105 of the *CYFSA* to make, vary or terminate an order respecting a person's access to a child in the child's best interests.
- [84] As set out above, I have found that the Judge recognized the importance of the child's continued contact with the parents and the impact that temporary termination of in person access would have. This child suffered traumatic injuries and is in a fragile physical state. The Judge found that the paramount consideration to determine his best interests was his physical, mental and emotional needs and the appropriate care or treatment to meet those needs: *CYFSA* s. 74(3)(c)(i). The Judge had sufficient evidence before her to make this finding.
- [85] Although the parents argued that less frequent visits and continued CAST supervision by Skype would mitigate the risk to the child, the Judge found it was not in this child's best interests to risk **any** chance that he could be exposed to COVID-19. Such exposure could jeopardize his health and possibly the viability of the kin home and the continuity of his care. This was not a palpable and overriding error. This ground of appeal fails.

e – Did the Judge draw improper inferences from the evidence and rely on irrelevant evidence and speculation to reach her decision?

- [86] The father argues that the Judge made findings of fact that were unreasonable or not reasonably supported by the evidence; failed to consider relevant evidence and made findings that had no basis in evidence. He argues that the Judge ignored relevant undisputed evidence which directly contradicted her conclusions and drew inferences that were speculative and not factually proven.
- [87] As examples, the father submits that the Judge ignored the undisputed evidence that the parents and the grandmother had been compliant with all CAST's rules, had demonstrated a commitment to caring for the child and followed through with all medical recommendations. This contradicts the Judge's findings that the parents and the grandmother minimized the child's injuries and did not understand his developmental needs.
- [88] The father also submits that the Judge considered evidence including the parents' statements in the video, contradictions in the mother's affidavits about breastfeeding and CAST's allegations about the cause of the child's traumatic injuries which are not relevant to the narrow issue of access during the COVID-19 pandemic: *Children's Aid*

Society of the Region of Waterloo v. J.N., 2020 ONSC 2999. He argues that the Judge relied on protection concerns which were not relevant to the suspension of access.

- [89] The father also submits that the Judge made findings that had no basis in evidence: that if the grandmother's health was compromised, the child could be removed and placed in foster care; that the parents' request for greater access showed they did not understand the transmission of COVID-19; that the parents' meeting with their counsel remotely contradicted their request for additional in person access.
- [90] This is a question of mixed fact and law. The standard of review is palpable and overriding error.
- [91] In applying the best interests test, the Judge made findings based on undisputed evidence regarding the child's traumatic physical injuries and his risk of being more severely affected if he was exposed to any illness including COVID-19. The Judge adopted the reasoning of other judges in child protection cases and applied the principle that CAST has a statutory duty and a mandate to protect children in their care and act in their best interests. She was concerned that the parents and grandparents did not acknowledge the child's vulnerable condition in their own evidence.
- [92] The parents have not demonstrated that the Judge made a palpable and overriding error in her treatment of the evidence before her. The Judge's finding that it was in the best interests of the child to temporarily terminate the parents in person access was not clearly wrong nor was it based on irrelevant evidence or speculation. There was sufficient admissible evidence available to the Judge to make this finding. I dismiss this ground of appeal

f – Did the Judge deny the parents the right to due process and substantive fairness contrary to the principles of fundamental justice?

- [93] The father argues that the Judge denied the parents their right to due process and substantial fairness because she failed to set a fair process for the hearing of the motion and privileged CAST as a special litigant. He states that the Judge imposed significant restrictions on the ability of the parents to fully present their case by setting the deadline for CAST's material so close to the motion date, failing to provide the parents a right of reply and setting a limit of 10 pages on the affidavits.
- [94] The father argues that CAST failed to comply with its duty towards the parents by failing to provide balanced evidence to the court and by tendering exaggerated and misleading evidence. In particular, the parents submit that CAST misled the court by failing to enter the full video into evidence, failing to provide context for the video and misleading the court about the video's importance. CAST also failed to provide the complete statement from Dr. Aref that he did not want to take a position on access and that the parents were taking appropriate precautions regarding breastmilk.
- [95] The mother brought a 14B motion on March 24, 2020 seeking a date for an urgent motion to reinstate the parents' in person access with the child. The Notice of Motion states that

the parents wish to file one affidavit from each of them and one affidavit from the grandmother. CAST did not object to the mother bringing the motion.

- [96] By Endorsement dated the same day, the Judge granted the mother leave to bring her motion and set an urgent hearing date for April 7. The Judge set the timetable for the filing of materials by the parties based on the request by the mother for an urgent hearing date. The mother, father and grandmother were given seven days to serve and file their material (March 30) and CAST was given seven days thereafter to file responding materials (April 6). All affidavits were limited to 10 pages, including attachments with 12 point font.
- [97] They parents chose not to deal with the issue of the video in their own affidavit material. The video was raised by CAST in the March 17 meeting with the parents as an issue of concern going to their awareness and appreciation of the extent and severity of the child's injuries. The parents had access to the video as it had been distributed to their friends and family through social media.
- [98] The parents chose not to ask for an adjournment of the motion to seek a right of reply or to obtain further disclosure from CAST. The parents did not want to delay the hearing and their access to the child. However, if the parents believed that the evidence from CAST was exaggerated and misleading, it was incumbent upon them to correct the record before the Judge on the motion, not before this court in fresh evidence on appeal.
- [99] The evidence in the father's Affidavit in this appeal responding to CAST's evidence filed on the motion below could have been put before the Judge at the motion in a reply affidavit. The parents chose not to do so. The Judge made her findings on the evidence before her. The Judge cannot be said to have erred in failing to make findings on evidence not before her.
- [100] The motion was brought in the very early stages of the suspension of the regular operations of the Ontario Courts. The procedure for bringing urgent motions was governed by the Notices to the Profession, the Public and the Media, released by the Chief Justice on March 15 and April 2. Those Notices provide that parties were only to submit brief materials to allow for a fair, timely and summary disposition of urgent motions. Emailed filings could not exceed certain limits. The Judge was within her discretion and the direction of the Notices to set a timetable for filing of materials, limit the number of affidavits and number of pages of the filings.
- [101] The father argues that CAST did not present the evidence in a fair and unbalanced manner and used highly prejudicial statements in its submissions.
- [102] Mother's counsel objected during CAST's submissions on the motion relating to the severity of the child's traumatic injuries (Transcript p. 208). The Judge agreed with the objection and directed CAST counsel to limit his submissions to the known facts.
- [103] In reply submissions on the motion, mother's counsel argued that CAST's position on the motion was inconsistent with the transitional access schedule. Counsel did not argue that

Ms. Sheridan's evidence and the video were exaggerated, misleading or out of context. Counsel did not object to this evidence. Mother's counsel did argue that CAST made submissions regarding the child's health that were not in evidence.

- [104] The Judge managed the process and conducted the hearing of the motion in accordance with the *Family Law Rules* and the Notices. The parents chose to proceed with the motion on April 7 rather than seek an adjournment to file reply material and ask for more disclosure. They chose not to object to or ask to strike the evidence submitted by CAST that they now take issue with. The Judge did not commit a palpable or overriding error. This ground of appeal fails.

Additional Submissions on the issue of delegation

- [105] During the course of the hearing counsel for the intervenors, the Ontario Association of Child Protection Lawyers and the Canadian Civil Liberties Association, made submissions in support of the parents' arguments. In particular, the OACPL and the CCLA submit that decisions regarding a parent's *Charter*-protected right to a relationship with their child must be made by the Court, not delegated to a children's aid society, to ensure fairness to parents involved in child protection proceedings.
- [106] The parents do not raise the issue of delegation as a ground of appeal in their Amended Notice of Appeal. However, they argued, with the support of the intervenors, that orders for access at the discretion of a children's aid society do not permit the society to unilaterally and indefinitely suspend access. The parents state that the suspension of in person access for an indefinite period seriously impacts their fundamental rights and could irreparably damage their relationship with the child. They argue that these decisions should not be left to CAST but must be subject to judicial oversight.
- [107] There are two lines of cases dealing with the issue of whether the Court may delegate access decisions to a children's aid society. Many of these cases were decided before the COVID-19 pandemic.
- [108] The first line of cases follows *H.(C.) v. Durham Children's Aid Society*, [2003] O.J. No. 879. In that case the Divisional Court held that the predecessor *Child and Family Services Act*, R.S.O. 1990, C 11, gave the Court authority to make an access order in the discretion of a children's aid society:

The parent-child relationship is dynamic, always changing. Where an application for protection has been commenced, the relationship may also be difficult. Maximum flexibility is required to respond to the family's ongoing needs on a day to day basis. The parties should not have to return to court for every day-to-day access issue. That would not be in the children's best interest. (at para. 19).

- [109] Other cases have confirmed that where a child has specific vulnerabilities or extraordinary treatment requirements, an order for access in the discretion of the society will best meet the child's special needs. Such an order permits maximum flexibility for access arrangements which will accommodate the child's variable treatment

requirements: *Kawartha-Haliburton Children's Aid Society v. V.C.*, [2003] O.J. No. 140 and *Children's Aid Society of Algoma v. B.(C.)*, (2003) 49 R.F.L. (5th) 304.

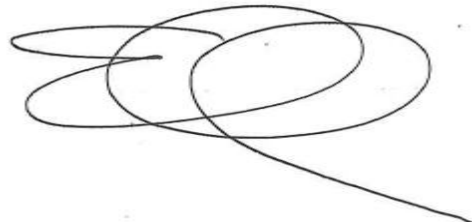
- [110] In *L.R. v. Children's Aid Society of Toronto*, 2020 ONSC 4341, Horkins, J. adopted the reasoning of the Divisional Court in *H.(C.)*, *supra*, and held that an access order in the discretion of the society does not infringe upon the rights of either the parent or the child. The parent has a clear statutory pathway to have the court review the discretionary authority granted to the society: at para. 88.
- [111] In *L.R.*, Horkins, J. found that the situation surrounding the mother's access was fluid and unpredictable and subject to changing circumstances, particularly the progress of the parents and the child in counselling. The best interests of the child required the society and the therapists to have the flexibility to tailor the schedule and terms of access based on the actions of the parties.
- [112] The second line of cases concludes that the court has no authority to delegate access decisions to a non-party or a party. The court is required to balance and evaluate the evidence considering the factors set out in the statute and make orders setting out the terms and conditions of access based on those factors. The benefit of expediency proposed in *H.(C.)* can not outweigh the rights of children and parents to have decisions made by the court through a neutral and objective process: *C.A.S. v. K.D.D.*, 2020 ONSC 511, *Durham Children's Aid Society v. S.C.* 2002 CanLII 62888 and *Children's Aid Society of Toronto v. D.P.* 2005 CanLII 5878.
- [113] The parents rely on both domestic cases, (*Ribeiro*, *supra*) and child protection cases (*Children's Aid Society of Toronto v. T.F.*, 2020 ONCJ 169 and *C.A.S. v. J.N.* 2020 ONSC 2999) to argue that the existence of the COVID-19 pandemic does not permit a "blanket" suspension of in person access by either a parent (in domestic cases) or children's aid societies (in child protection cases).
- [114] The Judge recognized that the issue of whether to suspend in person access must be viewed in the unique circumstances of the child and the caregivers. She considered the reasoning in the domestic and child protection cases dealing with COVID-19 access issues, the rapid evolution of the public health knowledge of the COVID-19 pandemic and the increased risk to this child of exposure to the virus.
- [115] The Judge determined that, to address D.'s unique health vulnerabilities, the changing protocols of COVID-19, and what was known about community transmission of COVID-19 at the time the motion was heard, it was in the best interests of this child to make an access order in the discretion of CAST. The Judge had the authority under the *CYFSA* and the case law to do so (*L.R.*, *supra*).
- [116] The Judge was satisfied that CAST would act in good faith and balance its duty to protect the safety and well being of the child with its duty to ensure that the parents have a meaningful relationship with the child. The fresh evidence before me shows the Judge's conclusion was warranted.

Costs

- [117] This interim Order was made at an early stage of the pandemic. The material before the Judge was mandated by the Notices for a summary disposition of the urgent motion.
- [118] Modern family costs rules are designed to foster four fundamental purposes: to indemnify successful litigants for the cost of litigation, to encourage settlements, to discourage and sanction inappropriate behaviour by litigants, and to ensure that cases are dealt with justly: *Mattina v. Mattina*, 2018 ONCA 867 at para. 10. The touchstone considerations of costs awards are proportionality and reasonableness: *Beaver v. Hill*, 2018 ONCA 840 at para. 12. In *Boucher v. Public Accountants Council (Ontario)*, 2004 Can LII 14579 at paras. 28, 29 and 37, the court held that costs must be fair and reasonable, and consistent with the reasonable expectations of the parties.
- [119] Subject to the provisions of an Act or the rules of court, costs are in the discretion of the court: s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Pursuant to Rule 24 of the *Family Law Rules*, O.Reg. 114/99, the successful party is presumptively entitled to costs.
- [120] In my view, this is an appropriate case to order no costs. The issue of suspension of access during the COVID-19 pandemic was, at the time of the motion, novel and very important to the parties. While there is growing domestic and child protection jurisprudence on this issue, there was not much case law to guide the parties at that time.
- [121] None of the parties acted in bad faith or took unreasonable positions. All parties advanced views that are reasonable in the context of this family and the current pandemic.
- [122] In my view, it was not unreasonable for the appeal to proceed. Given the reasonable behaviour of all parties and the importance of the issues, it is not appropriate for costs to be awarded in these circumstances

Order

- [123] For the reasons set out above, the appeal is dismissed.
- [124] There shall be no costs of this appeal.

A handwritten signature in black ink, consisting of several overlapping loops and a long tail extending to the right.

E.L. Nakonechny, J.

C.A.S.T. v. O.O. and G.-L. J.
COURT FILE NO.: FS-20-16365

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Children's Aid Society of Toronto Applicant
(Respondent in Appeal)

and

O.O. and G.-L. J. Respondents (Appellants)

and

Ontario Association of Child Protection Lawyers
and
Canadian Civil Liberties Association

(Intervenors)

REASONS FOR JUDGMENT

E.L. Nakonechny, J.

Released: November 4, 2020