ONTARIO

Superior Court of Justice
(Name of Court)

Court File Number
FS-20-16365

at **393 University Ave., 10th Floor, Toronto, Ontario, M5G 1E6**
(Court office address)

Applicant(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Children's Aid Society of Toronto **30 Isabella Street** **Toronto, ON M4Y 1N1**	**Alex De Melo** **Children's Aid Society of Toronto** **30 Isabella Street** **Toronto, ON M4Y 1N1** **Tel: 416-924-4640 x2584** **Fax: 416-324-2550** **ademelo@torontocas.ca**

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
[redacted] **[redacted]**	**Mira Pilch** **Gottlieb Law Firm** **40 Sheppard Avenue West, Suite 200** **Toronto, ON M2N 6K9** **Tel: 416-227-1653** **Fax: 416-227-1678** **mpilch@gottlieblawfirm.com** **Tammy Law** **Tammy Law Professional Corporation** **151 Bloor Street West, Suite 604** **Toronto, ON M5S 1S4** **Tel: 416-410-4808** **Fax: 416-691-7368** **wingyun@tammylaw.ca**

FACTUM OF THE APPELLANT
[redacted]

Mira Pilch LSO#: 34837I
Gottlieb Law Firm
40 Sheppard Avenue West, Suite 200
Toronto, Ontario
M2N 6K9
Tel: (416) 227-1653
Fax: (416) 227-1678
mpilch@gottlieblawfirm.com
Counsel for the Appellant [redacted]

TO: Tammy Law
Tammy Law Professional Corporation
151 Bloor Street West, Suite 604
Toronto, ON M5S 1S4
Tel: 416-410-4808
Fax: 416-691-7368
wingyun@tammylaw.ca
Counsel for the Appellant, [redacted]

AND TO: Alex De Melo/Justine Sherman
Children's Aid Society of Toronto
30 Isabella Street
Toronto, Ontario
M4Y 1N1
Tel: 416-924-4640 ex.2584/ex
Fax: 416-324-2550
ademelo@torontocas.ca/jsherman@torontocas.ca
Counsel for the Respondent on Appeal, Children's Aid Society of Toronto

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I – OVERVIEW AND ISSUES

1. This appeal arises from a motion to determine the appropriate temporary access order governing the contact between a child and his parents during COVID-19, where the child had been residing in a kin placement, and the parents had been exercising positive, in person access, with the child, three times a week in that home.

2. The decision of Justice Zisman, dated April 9, 2020 suspended face to face access between the parents and child, despite the parents following COVID-19 guidelines, there being an existing order for access, there being months of positive parent-child access, and the consent of the kin caregivers to the access. The Appellant mother appeals from that decision.

3. The Appellant mother submits that the motion judge made the following errors, either of which would justify an overturning of the decision:

   a. The motion judge failed to apply the correct legal test for the admission of a medical opinion;

   b. The motion judge failed to consider the least intrusive access order possible, consistent with the best interests of the child, when concluding no in person access could occur.

4. The Appellant mother also relies on the Appellant father's factum to discuss the other grounds of appeal raised in her Notice of Appeal.

II – STATEMENT OF FACTS

5. On December 23, 2019, the child, [redacted] (born [redacted]) ("[redacted]"), was brought to the North York General Hospital by the parents because of concerns about his physical presentation. The initial medical work up indicated [redacted] had bleeding in his brain, bruising on the elbow, and tiny red dots on his neck. He was transported to the Hospital for Sick Children and was in critical condition.

   Reasons for Judgment of Justice R. Zisman, dated April 9, 2020, page 2, at para. 12, tab 5, Appellant Father's Appeal Record

6. The SCAN team at the Hospital for Sick Children opined that the child's injuries were most likely caused by inflicted trauma. The parents did not know how the injuries occurred. They cooperated with the investigation, including agreeing to be interviewed by the police. In addition to the parents, the paternal

grandmother, paternal stepfather, and paternal aunt all had opportunities to harm the child and were part of the police investigation.

Reasons for Judgment of Justice R. Zisman, dated April 9, 2020, page 3, at para. 15, tab 5, Appellant Father's Appeal Record

Affidavit of Jordana Levman, dated January 9, 2020 at para. 8, 9, 10 and 12, tab 11, Appellant Father's Appeal Record

Affidavit [redacted], dated March 29, 2020 at para. 12, tab 16, Appellant Father's Appeal Record

7. On January 10, 2020, the Society commenced a child protection application and obtained a temporary without prejudice order placing the child in the care of the maternal grandmother, [redacted], subject to the supervision of the Society. The Society sought access at its discretion, which was granted, with the requirement that such access be supervised by the Society. The court further permitted the parents' access to be supervised by a person approved of by the Society while the child was in the hospital. The maternal grandmother ([redacted]) and step-grandfather ([redacted]) were approved supervisors of the access.

Reasons for Judgment of Justice R. Zisman, dated April 9, 2020, page 3, at para. 18, tab 5, Appellant Father's Appeal Record

8. The child was discharged from the hospital into the maternal grandmother's care on January 16, 2020.

Reasons for Judgment of Justice R. Zisman, dated April 9, 2020, page 3, at para. 18, tab 5, Appellant Father's Appeal Record

Endorsement of Justice Zisman, dated January 10, 2020, tab 8, Appellant Father's Appeal Record

9. The parents had access as follows:

a. Between December 10, 2020 and January 16, 2020, the parents exercised regular access with[redacted], supervised by the maternal grandmother, the step grandfather or other person approved by the Society at the hospital.

b. Between January 16, 2020 and February 4, 2020, the parents exercised access three times per week, for two hours on each occasion, at the Society's office, supervised by a Society worker.
c. Between February 4, 2020 and March 17, 2020, the parents exercised access three times per week for a total of 8 hours at the maternal grandmother's home, supervised by a Society worker.

Affidavit of [redacted], dated March 27, 2020 at paras. 4-8, tab 15, Appellant Father's Appeal Record,

10. The access visits have all been noted to be positive. The uncontradicted evidence is that the parents were cooperative with the conditions imposed on access and were advised that their interactions with the child was appropriate. Further, the evidence showed that they were able to feed, change, soothe, and provide medical care the baby without the need for any intervention.

Affidavit of [redacted], dated March 27, 2020 at para. 5, tab 15, Appellant Father's Appeal Record

11. The only area identified during access was that the Respondent mother sometimes presented as being overwhelmed when the baby was crying, fussing, or unwilling to feed. The Society acknowledged that the Respondent father was able to soothe the child when the Respondent mother was overwhelmed. The Society provided no evidence that they ever intervened because the child was unsafe during access.

Affidavit of [redacted], dated March 29, 2020 at para. 19, tab 16, Appellant Father's Appeal Record

Affidavit of [redacted], dated April 6, 2020, at para. 21, tab 18, Appellant Father's Appeal Record

12. It is also uncontradicted that both of the parents have attended at the child's doctors' appointments, have asked questions about the child's health, and were appropriate during those appointments. Further, it was noted by the Society workers that, during access, the parents implemented exercises recommended to them by the child's occupational therapist and other medical professionals.

Affidavit of [redacted], dated March 29, 2020 at paras. 9 and 17, tab 16, Appellant Father's Appeal Record

13. As a result of the noted positives in the parents' access with their child, on March 17, 2020, the parties had a meeting to discuss expanding access. The Society suggested the agreed to following access plan, effective <u>immediately</u>:

a. For one week, the existing access would increase by an hour each time (before or after the regularly scheduled time), to be supervised by the maternal grandmother and/or step-grandfather.

b. In addition, there would be access on other weekdays where it is not already occurring (specifically Tuesdays and Fridays) for three hour visits each, supervised by the maternal grandmother and paternal step-grandfather, with possible drop in visits by the Society.

c. The parents would be permitted to attend any medical appointment with the child or in-home services.

According to the Society's access plan, the parents were allowed to have up to 9 hours of access, supervised by the grandparents, effective immediately: 1 hour each on Mondays, Wednesdays and Thursdays, and 3 hours each on Tuesdays and Fridays.

Affidavit of [redacted], dated March 27, 2020 at Exhibit "A", tab 15, Appellant Father's Appeal Record

14. The parties were clearly aware of COVID-19 during the March 17, 2020 meeting. In fact, the Respondent father raised with the Society the possibility of access disruption and asked for additional time with the child. At no time did the Society state that the parents' conduct or the maternal grandparents' conduct put the child at more risk due to COVID-19 or that their access would be suspended as a result.

Affidavit of [redacted], dated March 29, 2020 at para. 21, tab 16, Appellant Father's Appeal Record

15. The following day, on March 18, 2020, the family service worker, Alannah Sheridan, informed the Respondent mother that the Society would no longer be making visits to kin homes due to COVID-19. However, she said that the parents were able to have their regular access, supervised by the Society via video call.

Affidavit of [redacted], dated March 27, 2020, at para. 14, tab 15, Appellant Father's Appeal Record

16. That same day, the parents had expanded access for 4 hours at the maternal grandmother's home as originally planned. This access was supervised remotely by the Society worker for 3 hours and 1 hour by the maternal grandmother. The uncontradicted evidence is that the access visit was positive and the parents cooperated with ensuring that the worker was able to see the child at all times. The worker indicated she would be supervising the next day's scheduled visit again, via Skype.

Affidavit of [redacted], dated March 27, 2020 at paras. 15-17, tab 15, Appellant Father's Appeal Record

17. On March 19, 2020, just before the parents were to have a visit with their child, they were told that their access was suspended as a result of the Society's "directive" to suspend all face to face access. There was no suggestion that access was being suspended because of any concerns about the conduct of the parents or maternal grandparents.

Affidavit of Alannah Sheridan, dated April 6, 2020 at para. 9, tab 18, Appellant Father's Appeal Record

18. The motions judge noted that "there is no concern" with the ability of the grandparents "to provide adequate care for their grandchild or comply with any expectations or directions of the society." Prior to [redacted]'s placement in their care, the grandparents were both assessed and approved by the Society's kinship department. During this process, they both demonstrated to the Society that their focus was on [redacted]'s safety and that they were aware of the protection concerns that led to [redacted] coming into care. It is undisputed that the grandparents took [redacted] to all of his medical appointments and have followed through with all medical recommendations. It is further undisputed that [redacted] has been well cared for by the grandparents. There is no evidence to suggest that the grandparents have ever put [redacted] at risk either from themselves, his parents, or anyone else.

Reasons for Judgment of Justice R. Zisman, dated April 9, 2020, page 4, at para. 21, tab 5, Appellant Father's Appeal Record

Affidavit of Jordana Levman, dated January 8, 2020 at para. 24, tab 11, Appellant Father's Appeal Record

Affidavit of [redacted], dated March 29, 2020 at paras. 8-9, tab 16, Appellant Father's Appeal Record

Affidavit of [redacted], dated April 6, 2020 at para. 15, tab 18, Appellant Father's Appeal Record

19. The uncontradicted evidence is that the maternal grandmother is comfortable asserting her opinion in relation to the parents' care of the child during access visits, that she is comfortable with her supervisory role, that she is not conflicted about having to intervene in access, and that her commitment to [redacted] outweighs any reservations she may have in intervening in the parents' access to ensure [redacted]'s well-being. The uncontradicted evidence is also that the parents receive the maternal grandmother's opinion openly and accept her interventions without issue.

Affidavit of [redacted], dated March 30, 2020, at paras. 42-51, tab 17, Appellant Father's Appeal Record

Affidavit of [redacted], dated March 29, 2020 at para. 9, tab 16, Appellant Father's Appeal Record

20. The parents and maternal grandmother described taking significant COVID-19 precautions including: restricting trips out of the home, engaging in social distancing practices, avoiding public transit, changing cloths and washing hands prior to access visits, frequent handwashing, and wearing masks and gloves when outside the home. The Society produced no evidence to suggest that the parents were not taking COVID-19 precautions, although it claimed it could not monitor their compliance.

Affidavit of [redacted], dated March 29, 2020 at paras. 27-34, tab 16, Appellant Father's Appeal Record

Affidavit of [redacted], dated March 27, 2020 at paras. 23-33, tab 15, Appellant Father's Appeal Record

Affidavit of [redacted], dated March 30, 2020, at paras. 75-86, tab 17, Appellant Father's Appeal Record

Affidavit of Alannah Sheridan, dated April 6, 2020, at para. 22(d), tab 18, Appellant Father's Appeal Record

The Motion

21. As a result of the Society's decision to suspend access without seeking a variation of the current access Order, the Respondent Mother served and filed a 14B Motion on March 24, 2020, seeking that an urgent motion be heard on the issue of access between the parents and the child during COVID-19.

14B Motion, on behalf of the Respondent mother, dated March 24, 2020, tab 7, Appellant Father's Appeal Record

22. The Society took the position that the motion was not urgent, but the Court set a date for the Motion of April 7, 2020, endorsing that the parents, the maternal grandmother and the Society could each file an affidavit not to exceed ten pages, including attachments, in 12 point font.

Endorsement of Justice Zisman, dated March 24, 2020, tab 6, Appellant Father's Appeal Record

23. The parents' and the maternal grandmother's affidavits were to be served and filed by email by March 30, 2020. The Society's affidavit was to be served and filed by April 6, 2020. The endorsement did not allow for any right of reply.

Endorsement of Justice Zisman, dated March 24, 2020, tab 6, Appellant Father's Appeal Record

24. The Notice of Motion served by the Respondent mother sought the following relief:

    a. An order providing that access between the parents, [redacted] and [redacted], and the child, [redacted], born October 3, 2019, be supervised by the Society, either of the maternal grandparents, [redacted] or [redacted], or other person(s) approved by the Society;

    b. The in person access shall take place each day, for a period of five hours, or as otherwise agreed between the parents and the maternal grandparents.

c. While Covid-19 infection continues to be an issue, all access shall take place in the home of the maternal grandparents, where the child resides; and

d. Should the Society wish to supervise the access, its staff may observe visits via video, using Skype or other electronic means;

Notice of Motion of the Respondent mother of [redacted], dated March 27, 2020, tab 14, Appellant Father's Appeal Record

25. Each parent served his or her affidavit in advance of the March 30, 2020 deadline. The Society's responding affidavit was served on April 6, 2020 at 4:56 pm, in a password protected format. The password was provided at 4:59 pm on April 6, 2020.

Transcript of the April 7, 2020 motion, dated April 7, 2020, at page 8, lines 1-12, tab19, Appellant Father's Appeal Record

26. Justice R. Zisman released her Reasons for Judgment on April 9, 2020, dismissing the Respondent mother's motion, declining to order any in-person face to face visits between the parents and the child.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, at page 12, para. 99, tab 5, Appellant Father's Appeal Record

27. Justice Zisman made the following temporary order:

a. The parents will have virtual access to the child as arranged between the grandparents, and the parents. Such access to include telephone, text, Skype, WhatsApp, Zoom, and other Facetime messenger or other services that allow for video/audio conferencing.

b. The participation of the society *(sic)* is not necessary but if desired, shall be arranged. The grandparents should advise the worker of the day and time of the proposed social media contact and the society worker can join, if desired.

c. The parents are to be advised of and permitted to participate in any remote telephone or video conferences between the grandparents and any professional involved in the care of the child.

d. Due to the ongoing COVID-19 pandemic, face to face visits in the grandparents' home will resume upon being deemed safe by the society. Such access to be supervised by the society or such other person as approved of in advance by the society.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, at page 12, para 100, tab 5, Appellant Father's Appeal Record

III – LAW AND ANALYSIS

Issue: Did the motion judge err in admitting the evidence of Dr. K. Aref?

28. The Society tendered the evidence of the child's community paediatrician, Dr. Karim Aref, in the form of a short letter, dated March 30, 2020, appended to Ms. Sheridan's affidavit.

Affidavit of Alannah Sheridan, dated April 6, 2020, at Exhibit "A", tab 18, Appellant Father's Appeal Record

29. Opinion evidence is presumptively inadmissible. It can be admitted if it meets the test for expert evidence, which has four elements:
    a. The evidence must be relevant;
    b. The evidence must be necessary in assisting the trier of fact;
    c. No other evidentiary rule should apply to exclude it; and
    d. The expert must be properly qualified.

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, CanLII at para 19

30. There is no exception to the rule against opinion evidence that would allow for an opinion by a doctor as to the risk of illness to a child except as an expert either as litigation or participant expert.

31. The Society did not provide the court or the parents with Dr. Aref's curriculum vitae or any information with respect to Dr. Aref's particular experience with children who had experienced brain injuries. Dr. Aref writes in his letter that the child "is definitely at a higher risk of getting more sick compared to other children if he gets exposed to illnesses including COVID-19." He does not explain the medical basis for this conclusion, does not quantify the increase in risk, nor does he state whether this increased risk of potential illness should affect access arrangements for [redacted].

Affidavit of Alannah Sheridan, sworn April 6, 2020, at Exhibit "A, tab 18, Appellant Father's Appeal Record

32. It is unclear on what basis the motions judge accepted Dr. Aref's letter. At the motion, counsel for the Respondent mother noted that the evidence of Dr. Aref does not set out his expertise. The motion judge responded by stating "He doesn't need to be an expert. He's speaking simply as the child's doctor".

Transcript of the April 7, 2020 motion, page 14, lines 28-32, tab 19, Appellant Father's Appeal Record

Transcript of the April 7, 2020 motion, page 15, lines 2-3, tab 19, Appellant Father's Appeal Record

33. When counsel for the maternal grandmother was making her submissions, the motion judge noted, in respect to the information Dr. Aref had, that "So I don't know what he has, that's true. But I don't know what the other doctors have, so I've just got to assume the doctor has an overall idea of this child's vulnerabilities and certainly would have received the hospital records early on and so forth."

Transcript of the April 7, 2020 motion, page 37, lines 22-27, tab 19, Appellant Father's Appeal Record

34. Counsel for the maternal grandmother raised the issue of expert evidence in regard to Dr. Aref, and the motion judge states, "Just to be-I'm going to interrupt you again 'cause this reference to expert evidence is completely out of, it doesn't make any sense. He's not being presented as an expert. He is simply the child's treating physician. So I'm just taking it as based on his knowledge of this child, this is what he sees".

Transcript of the April 7, 2020 motion, page 38 lines 5-16, tab 19, Appellant Father's Appeal Record

35. When a court is asked to suspend in-person access, an assessment must be made of the medical vulnerability of the child and parents, the willingness and ability of the parents to follow COVID-19 health protocols, and the risks to the child in restricting their relationship with one parent. While this determination occurred in the context of a domestic case, between two parents, it is equally valid when a Court is being asked by a Children's Aid Society, a state agent, to eliminate the parents' contact with a child, who has been removed from their care.

Robinson v. Darrah, 2020 ONSC 2840, at para. 23

36. When medical evidence is provided in support of a suspension of in-person access, it is expected to include details of the child's medical condition, the basis for any increased vulnerability to COVID-19, and specific recommendations about any required additional precautions.

Robinson v Darrah, 2020, ONSC 2840, at para. 24

37. The motions judge did not undertake any analysis of the admissibility, reliability or relevance of Dr. Aref's evidence. His evidence did not meet the standards for admission under the rules pertaining to either litigation or participation expert evidence, and therefore, should not have been admitted.

a. Dr. Aref's letter should have been scrutinized as litigation expert opinion evidence

38. The Family Law Rules distinguish between litigation and participant experts. A litigation expert is a person "engaged for the purposes of litigation to provide expert opinion evidence."

Family Law Rules, O. Reg 114/99, Rule 20.2(1)

39. Dr. Aref's letter was clearly an attempt to provide a medical opinion with respect to the risk to [redacted] of COVID-19. The Society requested this letter for the purposes of litigation, after the Society had instituted its blanket policy suspending access and in response to [redacted]'s motion to have access reinstated. No information was provided to nor sought by the Court about Dr. Aref's perspective on what could mitigate risk to [redacted] from COVID-19 transmission.

40. Dr. Aref therefore qualifies as a "litigation expert" under Rule 20.2(1). The fact that he was also the child's pediatrician does not change the nature of the expertise he was providing. It is the purpose of the evidence, not the expert's familiarity with the child, which determines whether the expert is a litigation expert or participant expert.

41. A litigation expert must meet the requirements of Rule 20.2(2) of *The Family Law Rules*, including providing a report to the parties in advance of the court hearing, a document setting out his or her expertise, in what area his or her expertise relates to and the rationale for the opinion expressed in the report. None of this information was provided to the Court hearing the motion.

Family Law Rules, O. Reg. 114/99 Rule 20.2(2)

b. Dr. Aref's evidence did not meet the standard for participant expert opinion evidence

In the alternative, if Dr. Aref was a participant expert, defined as "a witness with special skill, knowledge,

training, or experience who has not been engaged by or on behalf of a party to the litigation" he may give opinion evidence, without meeting the requirements for the admission of expert evidence, as long as 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.

Family Law Rules, O. Reg. 114/99. Rule 20(2)(1)
Westerhof v. Gee Estate 2015 ONCA 206, para. 60

42. Dr. Aref does not indicate in his letter if he had seen any patients with a COVID-19 infection. Ms. Sheridan's affidavit states that Dr. Aref told her that he has not seen an increase in paediatric patients with regard to the COVID-19 virus. Therefore, it is not the case that Dr. Aref can opine on the course of COVID-19 in general, or as it pertains to [redacted], given that he has had no personal experience with this novel and emerging illness.

Affidavit of Alannah Sheridan, sworn April 6, 2020, at page 7, para. 24, tab 18, Appellant Father's Appeal Record

43. There was no information before the court as to how long Dr. Aref had been the child's treating physician, what role Dr. Aref has in the child's care as he is being followed by multiple specialists, what information Dr. Aref relied on from these other physicians when providing his opinion about the risk to the child of COVID-19 during access with his parents, or what information the Society provided Dr. Aref about its policy of no access between the child and his parents.

44. If participant experts or non-party experts also proffer opinion evidence extending beyond the limits described above, they must comply with the requirements in Rule 20.2(2), which include, *inter alia,*

a. The expert's name, address and area of expertise.

b. The expert's qualifications, including his or her employment and educational experiences in his or her area of expertise.

c. The nature of the opinion being sought and each issue in the case to which the opinion relates.

d. The instructions provided to the expert in relation to the case.

e. The expert's opinion on each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

f. The expert's reasons for his or her opinion, including, a description of the factual assumptions on which the opinion is based,

Family Law Rules, O. Reg. 114/99. Rule 20.2(2)
Westerhof v. Gee Estate 2015 ONCA 206, at paragraph 60

45. As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. As Justice Cromwell stated in the *White Burgess* case, "The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role".

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, CanLII at paragraph 20

46. The Court did not conduct any inquiry into the admissibility of Dr. Aref's opinion letter, and as such, did not perform the gatekeeping function so essential to this type of evidence. Justice Cromwell notes the importance of the careful analysis of expert evidence, stating, "Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice".

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, CanLII, at paragraph 12

c. Failure of the Society to Include the Entirety of Dr. Aref's Opinion

47. The full context of Dr. Aref's opinion was not properly disclosed to the court. In her case note of a conversation Ms. Sheridan had with Dr. Aref on March 30, 2020, she states that she advised Dr. Aref of the precautions the parents are taking to limit the likelihood of the transmission of a COVID-19 infection, and that he said that "there are all the recommended things." Her case note also states that "Dr. Aref explained that he does not want to take a direct position on access". Neither of these statements were included in Ms. Sheridan's affidavit.

Affidavit of Alannah Sheridan, sworn April 6, 2020, at page 7, para. 24, tab 18, Appellant Father's Appeal Record

48. In *Robinson v. Darrah,* Justice Tobin finds that the medical evidence provided by the doctor merely supported the mother's view that access should not continue. The Court notes:

> However, the doctor did not go any further. There was no consideration of what mitigation efforts would minimize the risk to both of them so that in-person access in some form, from which the child derives benefit, could continue.
>
> Neither the Court nor the Society turned their minds to what could be done to minimize risk to the child of COVID-19; the inquiry was halted when Dr. Aref indicated to the worker that stopping access was "the best thing to do right now".

Robinson v. Darrah, 2020 ONSC 2840, at para. 33

Transcript of the April 7, 2020 motion, page 28, lines 16-18, tab 19, Appellant Father's Appeal Record

Issue: Did the Motion Judge err in her determination of the least restrictive access order?

49. During the motion, counsel for each of the Respondent parents clarified that their clients were seeking any in person access, under any appropriate conditions.

Transcript of the April 7, 2020 motion, page 8, lines 31-32, tab 19, Appellant Father's Appeal Record

Transcript of the April 7, 2020 motion, page 20, lines 21-28, tab 19, Appellant Father's Appeal Record

50. The *Child, Youth and Family Services Act* provides that a Court can make, vary or terminate an access order in the child's best interests.

Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1, s. 104

51. The Court is obligated to take the specific considerations outlined in the non-exhaustive list of best interest factors in s. 74(3) into account in setting access terms.

Children's Aid Society of Algoma v. T.W. 2018 ONCJ 451, at para.41

52. The other relevant factors in this case are: s. 74(3)(v) the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family; s. 74(3)(vi) the child's relationships and emotional ties to a parent, sibling, relative, other member of a child's extended family, or

member of a child's community; and s. 74(3)(vii) the importance of continuity in the child's care and possible effect on the child of disruption in that continuity.

Transcript of the April 7, 2020 motion, page 19, lines 14-25, tab 19, Appellant Father's Appeal Record

Child, Youth and Family Services Act, 2017, SO. 2017, c. 14, Sched. 1, s. 74(3)

53. The Court did not do an analysis of the various best interests it considered when determining that it would not grant any of the relief sought by the Respondent mother. The conclusion that "the Court is simply not prepared to risk any further chance that he could be exposed to COVID-19" is not consistent with the weighing of all of the relevant best interests criteria required by the legislation.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, at page 12, para. 97, tab 5, Appellant Father's Appeal Record

54. It is well-recognized that significant access, particularly to an infant, is of crucial importance in child protection proceedings where the final disposition is pending. The motion judge likened the suspension of in person access to a foster parent's vacation, or the experience of a parent undergoing treatment, indicating the low import to the Court of continuing to foster a parent child relationship through in person contact.

Children's Aid Society of Algoma v. T.W. 2018 ONCJ 451, at para.43

Reasons for Judgment of Justice Zisman, dated April 9, 2020, at page 12, para. 97, tab 5, Appellant Father's Appeal Record

55. Access is the right of the child. The motion judge did not consider the significance of the impact on a 5 ½ month old baby of no in person contact with his parents and the loss to the child of the emotional bond and attachment which occurs only through face to face contact between an infant and his parents.

Children's Aid Society of Algoma v. T.W. 2018 ONCJ 451, at para.45

56. While COVID-19 poses a challenge to existing access regimes, "a complete suspension of timesharing is not the starting point, it is a last resort, and is to be considered only after every other option has been considered". The motion judge did not turn her mind to a consideration of the other options proposed by the Respondent mother, which were to allow for less frequent in person visits than what was pled initially in the Notice of Motion, or to assess whether allowing the Society to continue to supervise the visits via Skype, which had already been done, would mitigate the risk.

Brazeau v. Lejambe, 2020 ONSC 2843 (CanLII), at para. 15(b)

57. The Court is also obliged to consider the purposes of the *Child, Youth and Family Services Act*; one of the purposes is to assist families in caring for their children and recognizing the least disruptive action consistent with the best interests of the children.

Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1, s. 1(2)

58. The motion judge did not turn her mind to a consideration of the other options proposed by the Respondent mother, which were to allow for less frequent in person visits than what was pled initially in the Notice of Motion, or to assess whether allowing the Society to continue to supervise the visits via Skype, which had already been done, would mitigate the risk.

IV – ORDER REQUESTED

59. As a result of the foregoing, the Appellant mother requests the following relief:

1. An Order that the Appellants, [redacted] and [redacted], have face to face access with their child, [redacted] (d.o.b. October 3, 2019) in accordance with the plan proposed by the Society on March 17, 2020, and specifically:

    a. Commencing immediately, 1 hour on Mondays, Wednesday, and Thursday, supervised by [redacted] or [redacted] in addition to the regularly scheduled access of 2 hours on Mondays, 3 hours on Wednesdays, and 3 hours on Fridays, supervised by the Society.
    b. After one week, additional access time on Tuesdays and Fridays for three hours each, supervised by [redacted] or [redacted], with possible drop-in video visits by the Society.
    c. If the child has additional in home services, the Appellants shall be permitted to attend for the duration of those appointments. The Society will be given advance notice of these appointments and may have the discretion to attend those appointments.

2. In the alternative, an Order that the Appellants, [redacted] and [redacted], have face to face access with their child, [redacted] (d.o.b. [redacted]), three times per week for 2 hours on Mondays, three hours on Wednesdays, and three hours on Thursdays, supervised by [redacted] or [redacted], or supervised by video through the Society;

3. In the further alternative, a temporary without prejudice suspension of face to face access, with a new hearing to be held, which may include a voir dire, in front of a different judge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF MAY 2020

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Mira Pilch
Counsel for the Appellant Mother
[redacted]

SCHEDULE "A"

LIST OF AUTHORITIES

1. *White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, CanLII*
2. *Robinson v Darrah, 2020, ONSC 2840*
3. *Westerhof v. Gee Estate 2015 ONCA 206*,
4. *Children's Aid Society of Algoma v. T.W. 2018 ONCJ 451*,
5. *Brazeau v. Lejambe, 2020 ONSC 2843 (CanLII),*

SCHEDULE "B"

LIST OF LEGISLATION

Family Law Rules O. Reg 114/99

EXPERT OPINION EVIDENCE

DEFINITIONS

20.2 (1) In this rule,

"joint litigation expert" means a litigation expert engaged to provide expert opinion evidence for two or more parties; ("expert commun du litige")

"litigation expert" means a person engaged for the purposes of litigation to provide expert opinion evidence; ("expert du litige")

"participant expert" means a person who is not engaged to provide expert opinion evidence for the purposes of litigation, but who provides expert opinion evidence based on the exercise of his or her skills, knowledge, training or experience while observing or participating in the events at issue. ("expert participant") O. Reg. 250/19, s. 8.

EXPERT WITNESS REPORTS

(2) A party who wishes to call a litigation expert as a witness at trial shall, at least six days before the settlement conference, serve on all other parties and file a report signed by the expert and containing, at a minimum, the following:

1. The expert's name, address and area of expertise.
2. The expert's qualifications, including his or her employment and educational experiences in his or her area of expertise.
3. The nature of the opinion being sought and each issue in the case to which the opinion relates.
4. The instructions provided to the expert in relation to the case.
5. The expert's opinion on each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research or test conducted by or for the expert, or of any independent observations made by the expert, that led him or her to form the opinion, and, for each test,

A. an explanation of the scientific principles underlying the test and of the meaning of the test results, and

B. a description of any substantial influence a person's gender, socio-economic status, culture or race had or may have had on the test results or on the expert's assessment of the test results, and

iii. a description and explanation of every document or other source of information directly relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 20.2) signed by the expert. O. Reg. 250/19, s. 8.

SAME, MORE THAN ONE PARTY

(3) If two or more parties wish to call a joint litigation expert as a witness at trial, subrule (2) applies with necessary modifications. O. Reg. 250/19, s. 8.

SUPPLEMENTARY REPORT

(4) Any supplementary report by a litigation expert must be signed by the expert, and shall be served on all other parties and filed,

(a) at least 30 days before the start of the trial; or

(b) in a child protection case, at least 14 days before the start of the trial. O. Reg. 250/19, s. 8.

DOCUMENTS TO ACCOMPANY REPORT

(5) The following documents shall accompany a report when it is served on a party under subrule (2), (3) or (4), unless the documents have already been served on the party:

1. A copy of any written statement of facts on which the litigation expert's opinion is based.
2. A copy of any document relied on by the litigation expert in forming his or her opinion. O. Reg. 250/19, s. 8.

RESTRICTION ON TESTIMONY

(6) Unless a judge orders otherwise, a litigation expert may not testify about an issue at trial unless the substance of the testimony is set out in a report that meets the requirements of this rule. O. Reg. 250/19, s. 8.

CROSS-EXAMINATION

(7) A joint litigation expert may be cross-examined at trial by any party. O. Reg. 250/19, s. 8.

WHEN JOINT LITIGATION EXPERT REQUIRED

(8) Litigation expert opinion evidence concerning the following matters may only be presented by a joint litigation expert:

1. A claim for custody of or access to a child under the *Divorce Act* (Canada) or the *Children's Law Reform Act*, unless the court orders otherwise.
2. Any other matter specified by the court. O. Reg. 250/19, s. 8.

MOTION FOR DIRECTIONS

(9) If parties who wish or are required to engage a joint litigation expert do not agree on a matter relating to the engagement, any one of them may make a motion for directions. O. Reg. 250/19, s. 8.

ORDER RE JOINT LITIGATION EXPERT

(10) The court may, on motion under subrule (9) or otherwise, make an order engaging a joint litigation expert for two or more parties. O. Reg. 250/19, s. 8.

SAME

(11) In making an order under subrule (10), the court shall ensure that the matters listed in subrule 20.3 (2) are either set out in the order or are otherwise addressed by the order. O. Reg. 250/19, s. 8.

COOPERATION

(12) Parties who engage a joint litigation expert, or for whom a joint litigation expert is engaged, shall cooperate fully with the expert and make full and timely disclosure of all relevant information and documents to the expert, and the court may draw any inference it considers reasonable from a party's failure to do so. O. Reg. 250/19, s. 8.

RESTRICTION ON EXPERTS ON SAME ISSUE

(13) If a joint litigation expert provides opinion evidence on an issue for a party, no other litigation expert may present opinion evidence on that issue for that party, unless the court orders otherwise. O. Reg. 250/19, s. 8.

PARTICIPANT EXPERT

(14) A party who wishes to call a participant expert as a witness at trial shall,

(a) at least six days before the settlement conference,

(i) serve notice of the fact on all other parties, and

(ii) if the party wishes to submit any written opinion prepared by the expert as evidence in the trial, serve the written opinion on all other parties and file it; and

(b) serve on any other party, at that party's request, a copy of any documents supporting the opinion evidence the participant expert plans to provide. O. Reg. 250/19, s. 8.

APPLICATION TO MOTIONS FOR TEMPORARY ORDERS OR FOR SUMMARY JUDGMENT

(15) Unless the court orders otherwise, this rule applies, with the following modifications, to the use of expert opinion evidence on a motion for a temporary order under rule 14 or a motion for summary judgment under rule 16:

1. Expert witness reports and any supplementary reports shall be served and filed as evidence on the motion in accordance with the requirements of subrules 14 (11), (11.3), (13) and (20), as applicable.

2. Any other necessary modifications. O. Reg. 250/19, s. 8.

Child Youth and Family Services Act, 2017 SO 2017, C14, Sched.1

ACCESS

Access order

104 (1) The court may, in the child's best interests,

(a) when making an order under this Part; or

(b) upon an application under subsection (2),

make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate.

PURPOSES

Paramount purpose and other purposes

Paramount purpose

1 (1) The paramount purpose of this Act is to promote the best interests, protection and well-being of children.

Other purposes

(2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well-being of children, are to recognize the following:

1. While parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.

2. The least disruptive course of action that is available and is appropriate in a particular case to help a child, including the provision of prevention services, early intervention services and community support services, should be considered.

3. Services to children and young persons should be provided in a manner that,

i. respects a child's or young person's need for continuity of care and for stable relationships within a family and cultural environment,

ii. takes into account physical, emotional, spiritual, mental and developmental needs and differences among children and young persons,

iii. takes into account a child's or young person's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,

iv. takes into account a child's or young person's cultural and linguistic needs,

v. provides early assessment, planning and decision-making to achieve permanent plans for children and young persons in accordance with their best interests, and

vi. includes the participation of a child or young person, the child's or young person's parents and relatives and the members of the child's or young person's extended family and community, where appropriate.

4. Services to children and young persons and their families should be provided in a manner that respects regional differences, wherever possible.

5. Services to children and young persons and their families should be provided in a manner that builds on the strengths of the families, wherever possible.

6. First Nations, Inuit and Métis peoples should be entitled to provide, wherever possible, their own child and family services, and all services to First Nations, Inuit and Métis children and young persons and their families should be provided in a manner that recognizes their cultures, heritages, traditions, connection to their communities, and the concept of the extended family.

7. Appropriate sharing of information, including personal information, in order to plan for and provide services is essential for creating successful outcomes for children and families.

Best interests of child

(3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,

(a) consider the child's views and wishes, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained;

(b) in the case of a First Nations, Inuk or Métis child, consider the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community, in addition to the considerations under clauses (a) and (c); and

(c) consider any other circumstance of the case that the person considers relevant, including,

(i) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs,

(ii) the child's physical, mental and emotional level of development,

(iii) the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,

(iv) the child's cultural and linguistic heritage,

(v) the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family,

(vi) the child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community,

(vii) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity,

(viii) the merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent,

(ix) the effects on the child of delay in the disposition of the case,

(x) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent, and

(xi) the degree of risk, if any, that justified the finding that the child is in need of protection.