WARNING

This is a case under the *Child, Youth and Family Services Act, 2017* and subject to subsection 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Family Services Act, 2017,* which deals with the consequences of failure to comply, read as follows:

87(8) Prohibition re identifying child — 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.

(9) Prohibition re identifying person charged — 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(3) Offences re publication — 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.

CITATION: CAS of Ottawa v. D.M. and J.K.
COURT FILE NO.: FC-19-CP8-1
DATE: 2020/12/11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Children's Aid Society of Ottawa, Applicant

AND:

D.M. and J. K, Respondents

BEFORE: Justice Mary A. Fraser

COUNSEL: Deborah Souder, for the Applicant

Wade Smith, for the Respondent, J.K.

D.M., self-represented

Deborah Scholey for Office of the Children's Lawyer

HEARD: November 10, 2020

ENDORSEMENT

[1] As a result of COVID-19 which has caused the suspension of regular court operations at this time, as set out in the Notice to the Profession dated March 15, 2020 (available at https://www.ontariocourts.ca/scj/covid-19-suspension-fam/) this matter was heard by Zoom video conference.

[2] The Applicant (the "Society") has brought a Motion for Summary Judgment on this Status Review Application pursuant to Rule 16 of the *Family Law Rules*. It asks for an order that there is no genuine issue for trial in this matter and that I grant summary judgment by finding that the children, S.K. born May 2006 and C. K. born November 2007 (the "children") who were found to be in need of protection pursuant to sections 74(2)(b)(i), 74(2)(b)(ii) and 74(2)(h) of the *Child, Youth and Family Services Act* (the "Act") by MacLeod J. on April 8, 2019, continue to be children in need of protection under the Act.

[3] The Society asks for an order placing the children in the custody of the Respondent, J.K. (the "father") with access to the Respondent, D. M. (the "mother") at the discretion the father.

[4] The father consents to the Order sought by the Society. He also brings a Motion asking for an Order pursuant to section 137 of the Act restraining the mother from, among other things, attending within 500 m of his residence.

[5] Ms. Deborah Scholey is counsel for the children. She supports both the Society and the father in their respective motions.

[6] The mother asks for the return of the children to her sole custody.

[7] The mother also presently brings a cross motion seeking, among other things, a restraining Order against the father.

Background Facts:

[8] The mother and the father were married on July 22, 2000. They separated for the last time on November 27, 2016. A domestic proceeding was commenced and on December 13, 2016, the parents entered into an Interim Parenting Agreement by which the parents agreed to a 2-2-3 shared parenting arrangement.

[9] The domestic proceeding continued was ongoing when the protection proceeding was started.

[10] There is a long history of involvement by the Society as a result of the mother's mental health concerns. She was diagnosed with bipolar affective disorder in 2013. The Society maintains that the mother has been "formed" on a number of occasions. The mother does not dispute her history of mental health issues and hospitalizations. She does dispute the specific diagnosis of bipolar affective disorder.

[11] The Society's most recent involvement began in January 2019.

[12] The children have resided with the father since being brought to a place of safety on February 1, 2019.

[13] On April 8, 2019, MacLeod J. made statutory findings on the children and found them to be in need of protection. He made a Final Order placing the children in the care of their father subject to the supervision of the Society for a period of four months on terms and conditions, with access to the mother at the discretion of the Society and in accordance with the children's wishes.

[14] MacLeod J. also made a final restraining order against the mother, pursuant to section 137 of the Act specifying that : 1) the mother shall not attend within 500m of the father's residence; 2) the mother shall not attend within 500m of the children's schools, unless with the written pre-approval of the Society; 3) the mother shall not communicate with the children by any means without the father's supervision; and 4) the mother shall not have any physical contact or access with the children, except fully supervised access at the discretion of the Society.

[15] Mohammed Said, the Society worker, in his Affidavit sworn October 19, 2020, outlines that D.M. has and continues to present as paranoid, with a pervasive belief that there is a conspiracy between the father, the Society, the police and judiciary to deprive her of her children and that her children are being physically and emotionally abused by the father, aided and abetted by the Society.

[16] The mother has sent numerous emails directed to numerous community members, politicians, police officers and health professionals throughout this proceeding. These communications relate her belief that she is being targeted, "gang stalked," and terrorized by the father. The mother, in these communications, threatens to take civil action and pursue criminal prosecution against the various professionals who have had had involvement with the family in this and related proceedings.

[17] On January 31, 2019, the Society received emails from the mother, copied to the Ottawa Police Service, the children's school, a city counsellor and a mental health care provider. These emails warned that if anything happened to the mother or the children, they were to know that it was likely that the father was not solely responsible. She stated that she would attempt to distribute as many photos of the people who have been following her as possible. Due to this as well as concerns respecting the mother's mental health during the resulting in-person visit with her, led to the Society's decision to bring the children to a place of safety.

[18] The Society reached out to the mother's previously identified medical and psychiatric supports to learn that the mother was not in contact nor receiving treatment and that she was likely not taking her medication.

[19] On February 6, 2019, a temporary Without Prejudice Order was made placing the children in the care and custody of the father with the mother's access being at the discretion of the Society and in accordance with the children's wishes. On February 17, 2019 this Order became a "With Prejudice Order" on the same terms.

[20] The mother has not cooperated with the Society since this file was opened.

[21] Following the children being brought to a place of safety, the mother did not acknowledge or comply with the terms restricting her access to the children. She contacted the father and the school persistently and the mother would also simply show up demanding to see the children during this time.

[22] In the spring of 2019, the mother traveled to Montreal. She was arrested and incarcerated for fleeing from a Peace Officer. She was detained in jail in Quebec for over a month.

[23] On July 27, 2019, the mother was arrested. She had broken into the father's house. She was charged with criminal harassment, break and enter/unlawfully in a dwelling (the father's home). In total she was facing five charges: two criminal harassment charges, two mischief charges and one charge of breaching a court order.

[24] She was then "in custody" again from July 29, 2019 to some point in the late summer of 2019. It is noted that these charges were due to proceed to a trial in early December 2019.

However, they were delayed as the criminal court ordered the completion of an assessment to determine if the mother was criminally responsible for her acts.

[25] Upon the mother's release from custody, she remained in Ottawa for a short period of time but then she left the country for the United States. She also travelled to other countries. It appears she remained out of the country for the most part until August 2020.

[26] The mother has refused to cooperate with the Society to address its protection concerns. Since February 2019, there has been little if any engagement by her. The Society has also provided an extensive history of communications from the mother which it submits support the conclusion that the mother suffers paranoid and irrational thinking.

[27] The mother has been unwilling to meet with workers even when she is in Ottawa and meetings have been unproductive. She has denied receiving emails and phone calls from them and at one point suggested that Bell was hacking her email and phones. When invited to meet to discuss access with the children, the mother declined because she was busy working on "criminal charges" against the worker and the Society stating that there was a possibility of collusion. Attempts to contact the mother by attending at her home have been met with accusations that the worker has been stalking her.

[28] In December 2019, the mother met with the worker and was provided a list of parenting programs which, at the time, she was prepared to take in an effort to work cooperatively with the Society. The mother did not follow through and when contacted by the worker in March 2020, she accused him of being a terrorist and denied ever receiving a list of parenting courses from anyone.

[29] The mother has accused the Society of "illegally apprehending" her two children. She states that the worker illegally committed "criminal defamation, perjury and multiple crimes related to the fabrication of evidence and false affidavits."

[30] The mother has claimed that she has alerted the American authorities and has additionally reached out to authorities in Ireland, the United Kingdom, as well as the Canadian Embassy about what she termed the "group's wicked practices."

[31] In April 2020, there was contact between the worker and the mother who advised she was in Mexico. The worker advised the mother that the children were doing well. The worker inquired whether the mother was seeing a psychiatrist or other mental health professional and expressed an interest in knowing what her status was so that discussions could take place with respect to contact with the children. In response, the mother told the worker that he was "more like a sociopath than a human being" and provided several reasons why he has not been arrested yet.

[32] The mother is maintaining a website under an assumed name which is in aid of supporting others who find themselves married to a "narcissist." On this website she has been publishing photos of the children and documents relating to the child protection proceedings. The Society has expressed its concern to the mother that the publication of these materials is harmful and upsetting to the children, given they are aware of the materials and so are their peers. The mother refuses to remove this material.

[33] The Society is likewise concerned that the mother persists in forwarding email communications to its workers respecting matters unrelated to the child protection matter and she is disseminating to numerous individuals unrelated to this proceeding, information concerning the child protection issues.

Attempts to Arrange Access:

[34] The Society reached out to the mother in order to arrange and facilitate access with the children shortly following the children being brought to a place of safety. It was initially arranged that the mother would have access on Wednesday evenings for an hour, supervised by the Society. However, the mother advised that she wanted nothing to do with the Society. Attempts by the Society to engage the mother and address the issue of access were usually met with no response.

[35] On May 16, 2019, the mother contacted the Society and asked for an access visit to be arranged. The Society suggested a meeting in order to get access started. The mother did not attend at the designated meeting time.

[36] On May 31, 2019, the mother contacted the Society and advised she was not in Ottawa until the following week. She asked for a meeting on June 6, 2019 so that she could have access with the children on June 7, 2019. In her communication, she asked that the children have their passports with them when they came in for a visit in case the police are ready to arrest J.K then.

[37] On June 11, 2019 the mother left the worker a message stating "It's…Tuesday morning, June 11, 9:01 a.m. Let's see. I could be in Ottawa tonight if I chose to but I will probably hang back because I am working on a couple of lawsuits. Your name is all over one of them."

[38] The worker sent an e-mail message offering to schedule a visit once the mother returned to Ottawa. Eventually, after much back and forth, a meeting was scheduled for June 26, 2019.

[39] On June 26, 2019, the mother arrived at the Society. She presented herself to security and then went to the parking lot and video recorded the staff's licence plates.

[40] The mother indicated she was going to record the meeting despite a request that she not do so. The rules respecting the visit were reviewed with her. The mother was then asked, prior to seeing the children, to turn off both of the phones she had with her and to leave them with security. She was told that if she would not leave her phones with security, her visit would not happen. The mother continued to video record and refused to accede to this request. The visit was therefore cancelled. The mother would not then leave the lobby and security called the police. The mother ultimately left the building before the police arrived.

[41] The mother has not exercised any access with the children since February 2019.

Status of the Mother's Mental Health:

[42] The mother continues to maintain that this proceeding has been brought about through the father's fabrications and the Society's willingness to accept his evidence.

[43] She does not dispute that she has been challenged with mental health issues. She maintains, however, that her mental illness has been situational. It began, she claims, when she had her first psychotic breakdown in March 2013 "in response to the father's severe emotional and psychological abuse of her."

[44] The mother, for reasons she blames on the father, advises that she is presently homeless and in a "state of poverty."

[45] In 2014, the mother states that a psychiatrist, Dr. Gilles Fleury of the Montfort Hospital provided a diagnosis of "Acute Adjustment Disorder" which the mother states is a situational mental disorder caused by acute stress.

[46] In 2015, the mother relates that a psychiatrist, Dr. Gary Kay of the Ottawa Hospital acknowledged that her previous diagnosis of bi-polar disorder was incorrect and that he changed her diagnosis to Psychosis NOS.

[47] In 2017, the mother asserts that a psychiatrist, Dr. Iris Jackson, fine-tuned Dr. Kay's 2015 Psychosis NOS diagnosis to Brief Psychotic Disorder with marked stressors.

[48] In 2018, the mother states that a psychiatrist, Dr. Deanna Mercer, of the Ottawa Hospital stated that "she has brief psychotic episodes related to the stress she has experienced."

[49] According to the mother, her correct diagnosis is psychosis NOS (not otherwise specified). She does not dispute that she has had multiple hospitalizations in the past for psychotic episodes.

[50] The mother has not produced any evidence to suggest that she is presently receiving support or treatment from mental health professionals.

The Children's Lawyer:

[51] The Children's Lawyer advises that the children do not wish to return to their mother's care at this time. While the children are hopeful that some day they will be able to resume a relationship with her, they have been impacted by her mental health issues and they are to some extent fearful of her given their awareness of her past irrational behaviour. Sadly, they have been impacted and traumatized by the some of the mother's actions. At present, the children wish to remain with their father. They support the father's request for a restraining order.

The Law:

[52] Summary judgment motions are brought under Rule 16 of the Family Law Rules. Subsections (6) and (6.1) of that Rule provides as follows:

(*6) NO ISSUE FOR TRIAL – If there is no genuine issue requiring a trial of a claim or defence, the court shall make a final order accordingly.*

(6.1) POWERS – In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties, and the court may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence,

2. Evaluating the credibility of the deponent.

3. Drawing any reasonable inference from the evidence.

[53] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada set out a two-step process for determining whether summary judgment should be granted. The judge must first determine if there is a genuine issue requiring a trial based on the evidence without using the fact-finding powers set out in subsection 6.1. If, after this initial determination, there still appears to be a genuine issue for trial, the judge may resort to the fact-finding powers to decide if a trial is required.

[54] The Court in *Hryniak* (at para. 49) held that in the context of a child protection case, there will be no genuine issue requiring a trial when the judge concludes that a fair and just determination can be reached on the merits on a motion for summary. This will be the case when the process (1) allows the judge to make the necessary finding of fact, (2) allows the judge to apply the law to the fact, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[55] In *Kawartha Haliburton Children's Aid Society v. M.W.*, 2019 ONC 316 (at para. 63), the Ontario Court of Appeal held that the standard for fairness is not whether the procedure is as exhaustive as a trial but whether it gives the judge confidence that he/she can find the necessary facts and apply the relevant legal principles to resolve the dispute.

[56] In a child protection proceeding, a fair and just determination on the merits must acknowledge that such proceedings engage *Charter* rights for a vulnerable segment of our society. As a consequence, a judge must take a cautious approach to motions of this nature in the context of a child protection proceeding.

[57] That said, the genuineness of an issue must arise from something more than a parent's heartfelt expression of his desire to resume care of the children. The parent's evidence must support that the parent faces better prospects than what existed at the time the society removed the children from his/her care.

[58] On a Status Review Application pursuant to subsections 113 to 116 of the Act, the Court must first determine whether the children continue to be in need of protection. The Court must consider the degree to which the risk concerns that formed the basis for the original order still exist. The need for continued protection may arise from the existence or absence of circumstances that triggered the original order for protection; or from circumstances

which have arisen since then. (See: *Children's Aid Society of Hamilton v. S (B.L.)* 2014 CarswellOnt 12921 (Ont. S.C.J.).

[59] Under s. 114 of the Act, the Court, on a Status Review Application, must then determine what order is in the best interests of the children.

Analysis:

[60] The evidence in this matter clearly shows that the mother has, and continues to be, unable to meet the needs of the children. She has been completely focussed on her perception that the father and the Society have conspired against her.

[61] While the mother admits to mental health issues, she sadly demonstrates little, if any, insight into how these issues impact her ability to assume the care of the children.

[62] Her unwillingness to address her mental health issues has resulted in one and one-half years passing with her taking little apparent action to improve her ability to resume the care of her children. She continues, it seems, to live a chaotic, unstable lifestyle. She does not have a home for the children. She has had multiple brushes with the law. Some of the criminal charges appear to remain outstanding.

[63] The mother has chosen to wage her dispute with the father in a public forum by sharing her issues on her website and she has shared information which invades the children and the father's right to privacy. This is harmful for the children. The mother remains unwilling to remove this material from public view.

[64] The children have not seen their mother since February 2019. The mother has spent large portions of her time in custody, in hospital or out of the county. She has not made any real effort whatsoever to see the children over the past year and she does not demonstrate any awareness of the impact her absence has had on her children.

[65] The mother has not engaged with the Society workers to work toward a return of the children to her care. She has remained resistant and combative to the Society's involvement.

[66] The mother has not sought out psychiatric treatment when it would otherwise seem appropriate for her to do so. She appears to have made no significant progress, if any at all, during this proceeding in managing her mental health issues. If, as the mother claims, her mental health does not presently impact her ability to provide for the proper care of the children, she has not provided any evidence to support her position, when it would be appropriate and indeed incumbent on her to do so.

[67] Unfortunately, the mother's plan is at best an "idea." The mother has not put forward any real plan. She asks that the children be returned to her when she has no home or services set up for the children. She does not appear to have the financial ability to support her children.

[68] Based upon the evidence before me, I conclude that a return to the mother's care would expose the children to a significant risk of serious emotional or physical harm. The children continue to be children in need of protection under the Act.

[69] The children are clearly stable and content in the care and custody of the father. They wish to remain with him.

[70] The granting of a custody order would terminate the Society's legal involvement. However, the mother's parental rights would not terminate with such a disposition. The custody/access issues will continue to be governed by what is in the best interests of the children and it does not foreclose the mother from pursuing such issues in the future.

[71] I find that it is in the best interests of the children that they be placed in the custody of the father at this time pursuant to section 102 of the Act. Access to the mother should be in the discretion of the father.

[72] There is no genuine issue requiring trial in this matter in this Status Review Application for me to come to that conclusion. The evidence before me makes it clear that the children cannot be safely returned to their mother's care, not even under a Supervision Order. The children should not have to wait any longer to have the issues in this proceeding determined. There is no realistic possibility that the mother's plan of care will be successful. It is clear that it is in their best interests to be placed in the custody of their father at this time.

[73] I conclude, based upon the evidence before me, that an Order should issue granting the father's request for a restraining order.

[74] Finally, based upon the evidence before, I do not find that the mother is entitled to the relief sought in her notice of motion and I decline to grant such relief.

[75] For the above reasons, an Order shall go as follows:

a. Summary judgment is granted pursuant to Rule 16 of the *Family Law Rules* as follows:

i. The children continue to be in need of protection under s. 74(2)(b)(i), 74(2)(b)(ii) and 74(2)(h) of the Act;

ii. The children shall be placed in the custody of the father with access to the mother at the father's discretion;

iii. The mother shall be restrained, pursuant to s. 137 of the Act, as follows:

A. The mother shall not attend within 500m of the residence of the father;

B. The mother shall not attend within 500m of the children's schools, unless prior approval is obtained in writing from the father;

C. The mother shall not communicate with the children by any means (electronic, telephone etc.) without the supervision of the father;

D. This restraining order shall be enforceable by the Ottawa Police Service (OPS), the Ontario Provincial Police (OPP), the Royal Canadian Mounted Police (RCMP), or any other police service within its jurisdiction;

E. This restraining order shall remain in force unless it is varied, extended or terminated by the court.

iv. The dates scheduled for the trial of this matter in January 2021 shall be vacated.

M. Fraser J.

Date: December 11, 2020